IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

_____

APPEAL NO.: 1D01-3399

_____

ERNEST COLEMAN

Appellant-Petitioner,

v.

STATE OF FLORIDA

Appellee-Respondent.

_____

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA

_____

BRIEF OF APPELLANT
(ORIGINAL)

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STATEMENT OF THE CASE AND OF THE FACTS

On January 11, 2000 Jacksonville Sheriff's Office ("JSO") Detective P. J. Jackson signed an affidavit in support of an arrest warrant for Ernest Coleman. [R1-1] The affidavit alleged:

> On 08-20-1999, at approximately 2230, the victim [not identified in affidavit] was at the Educational Community Credit Union, which is located at 1623 Edgewood Ave. The victim was making a withdrawal from the "ATM" machine when he was approached by two black male suspects. One of the suspects displayed a firearm and demanded the victim's money, "ATM" Card, and the "ATM" pin number. The victim complied with the suspects' demands and the suspects fled from the bank traveling westbound on Edgewood Ave. Suspect Coleman was a suspect in a similar robbery case. Due to suspect Coleman possibly being the suspect in this case a photo spread was made which included Coleman's picture.
>
> 01-10-2000 the photo spread was shown to the victim. The victim identified suspect Coleman as one of the suspects who robbed him.

A warrant was issued for Coleman's arrest based on this affidavit. [R1-2] Coleman was not arrested under this warrant until six months later, on June 9, 2000 at 37 minutes past midnight and booked at 50 minutes past midnight. [R1-2; R1-3]

As the warrant affidavit itself stated, even six months before his ultimate arrest, Coleman was already a suspect in *two* ATM robberies, the one alleged in the warrant and a second ATM robbery, when the arrest warrant was issued in January 2000.

Coleman was taken to first appearance court sometime before noon of the day of his arrest and counsel was appointed. [R2-165] He was part of the "add on" docket for the morning calendar. [R1-3]

Detective Jackson knew that this took place. [R2-165-166] At this first appearance hearing Coleman signed an invocation of rights *Edwards*[1] notice [R2-165; R1-57] in which he put on record that he wished to exercise his Fifth Amendment right to remain silent,[2] and to not be questioned about any crime or criminal activity, *whether presently charged or not* without first providing him with an attorney and having the attorney present.[3] The invocation of rights expressly provided that it could not be waived or revoked except in open court, by a written waiver executed by both Coleman and his counsel, thus additionally and expressly invoking his Fifth Amendment right to counsel as well. [R1-57] This *Edwards* notice was placed in the court file and the Detective was aware of it. [R2-186]

However, just two hours after invoking his rights in open court Detective Jackson had Coleman taken from the jail to the Police Memorial Building for questioning. [R2-190] Coleman was interrogated by Detective Jackson about the second ATM robbery

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[1] *Edwards v. Arizona*, 451 U.S. 477 (1981).

[2] He invoked both his rights under the Fifth Amendment to the United States Constitution and his corollary right under Article I, Section 9 of the Florida Constitution. He also invoked his Fifth and Sixth Amendment right to counsel under the United States Constitution and his right to counsel guaranteed under Article I, Sections 2,9 and 16 of the Florida Constitution and Rule 3.130, Florida Rules of Criminal Procedure.

[3] The *Edwards* notice is included in the Appendix hereto.

Coleman was a suspect in, that also took place on August 20, 1999, the same date as the robbery alleged in the arrest affidavit. He interrogated Coleman about an ATM robbery of Thyroid Smith. [R2-166] The Detective took the position that this was not the same robbery as the robbery he had had Coleman arrested on, although the arrest warrant did not specify who the victim was in the robbery the warrant issued for, the two robberies were apparently both at ATMs either at or about the same time or within 15 minutes of each other, and the Detective himself, in his testimony in the suppression hearing, confused the two robberies.[4]

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[4] He first testified that the victim of the Educational Community Credit Union ATM robbery took place at 10:30 p.m. on August 20, 1999 and the victim was *not* Frank Morene, but was Thyroid Smith. [R2-158] In the suppression hearing this testimony was left uncorrected - neither the prosecutor nor the Detective noticed that the arrest warrant specified a 10:30 p.m. ATM robbery at Educational Community Credit Union - but did not name the victim - and yet the robbery that Detective Jackson questioned Coleman on was the Thyroid Smith robbery. If the Thyroid Smith robbery was the 10:30 p.m. Educational Community Credit Union robbery as Detective Jackson testified then he questioned Coleman on the same charge that he had had him arrested on and as to which he had counsel already appointed. However, later in the suppression hearing, without any acknowledgment that he was changing his testimony, the Detective said that the Thyroid Smith robbery took place at 11:45 p.m. but that the *other* robbery was at 2330 [11:30 p.m.], then again he said it was at 10:30 p.m., and that the victim of that robbery was Frank Morene and it took place at 1623 Edgewood Avenue. [R2-161] Later Detective Jackson testified in the suppression hearing that the warrant and arrest was for the Edgewood Avenue Educational Community Credit Union robbery. [R2-163] Where the Thyroid Smith robbery took place was never identified in the suppression hearing, but at trial it was said to have taken place at an ATM at Jax Navy Federal Credit Union at 4420 Wabash Avenue in Jacksonville. [R5-184, 216] The Thyroid Smith robbery occurred at 11:30 p.m. August 20, 1999 according to the victim himself.

Detective Jackson, despite his own confusion about which robbery was which and which robbery Coleman had been arrested on, took the position that he did not question Coleman about the robbery he had been arrested on and had counsel appointed on, but only questioned him about the other of the two robberies he was already investigating. [R2-165-166] He said he knew he could not question Coleman about the robbery he had had him arrested on because he had had an attorney appointed on that case and there was an *Edwards* notice on file about that case. [R2-166]

No notice was given to Coleman's counsel before Detective Jackson had Coleman taken from the jail to Detective Jackson's office to be interrogated. [R2-180; R2-170; R2-165-166] This interrogation took place the same day as the arrest on the first ATM robbery and only about two hours after Coleman had stood in open court and invoked his rights under the *Edwards* notice to not be questioned about any offense. [R2-190] Coleman testified during his suppression hearing that he asked Detective Jackson for counsel but his request was ignored. [R2-191] Coleman also testified that Detective Jackson said that he had the state attorney on the phone and that he wanted to use Coleman as a witness against Jarvis Smith

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[R5-184] It occurred at 11:45 according to Detective Jackson. [R2-160] The other robbery, of Frank Morene, occurred on the same date at 2330 hours [i.e., 11:30 p.m.]. [R2-161] The Detective mistakenly converted this 24 hour clock time which was written on the general offense report, to *10:30* p.m. in his arrest affidavit and in testimony at the suppresion hearing. [R2-161, 163]

whose trial was upcoming, and if he cooperated he would not be charged. [R2-191-192] Coleman signed an acknowledgment of rights form at Detective Jackson's request. [R2-176] Detective Jackson testified that Coleman did *not* ask for counsel and that no promises were made to him to get him to make a statement. [R2-177-178] Coleman's statement read as follows:

> I Ernest Coleman and Jarvies Smith were rideing on 8-20-99. I had my lil brother's BB gun and Jarvies had a 357 magnum or something. While aproaching the guy Jarvieus jump out the car unexpectallay.
> But things change when he seen the guy at the teller he ran up and I walked up to. Jarvous asked for the money then told me to watch him. While pointing and waving the gun. He went to the car of the victims and went through some things I don't know exaclly what was tooken because I was to scared to move. I didn't know what he was thinking. I had never seen him act like this. So I did what I was told. I'm truly sorry for being with him that night. And I apoligise to the victim. [State's Exhibit 3 to suppression hearing, R2-178, spelling but not capitalization as in original exhibit]

Jarvis Smith, the person named in Coleman's statement to Detective Jackson, was already in custody for the robbery described in Coleman's statement and was set for trial the following week (the arrest of Coleman occurred on June 9, 2001, a Saturday, his deposition took place on June 12, 2001, a Tuesday, and Jarvis Smith's trial was set for the following week). [R2-206]

When Detective Jackson learned that Coleman was arrested he picked up the phone and called the Assistant State Attorney on Jarvis Smith's case, Bram Scharf. [R2-206] Assistant State Attorney

Scharf then subpoenaed Coleman for a deposition.[5] No notice was given to Coleman's counsel nor was any effort made to have counsel appointed for Coleman. [R2-206-208] Coleman was placed under oath and advised by Assistant State Attorney Scharf "you understand that everything that you say about this case today *cannot be used*

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[5] The praecipe for witness subpoena appears in the clerk's file in *State of Florida v. Jarvis Kenard Smith*, Case No. 99-11763-CFB, Division CR-D, in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida. The Praecipe reads:

Praecipe for Witness Subpoena
Deposition

S.A. No.: 99-44520 CCR No.: 252812
Case No.: 99-11763-CFB Division:CR-D
Dkt/Cit No. 99-040296-0

State of Florida
vs.
Jarvis Kenard Smith

To the Clerk:

Ernest Coleman, Duval County Jail, Docket No. 2000-20488-4,
Jacksonville, Florida 2:00 P.M.

You will please issue witness subpoena directed to the above named person(s), commanding them to be and appear before **Bram L. Scharf**, Assistant State Attorney, Office of the State Attorney, **Room 623**, Duval County Courthouse, Jacksonville, Florida, on June 12, 2000, concerning a matter wherein the State of Florida is the Plaintiff and **JARVIS KENARD SMITH** is/are Defendant(s).

Bram L. Scharf Dated: June 12, 2000
Assistant State Attorney

DS/afh

Appellant Coleman has concurrently herewith by separate motion moved to supplement the record of this matter with the above praecipe.

against you." [R1-120; emphasis supplied] Coleman thereupon proceeded to give a detailed confession to the second ATM robbery that spans 18 pages of deposition transcript. [R1-132-149]

Jarvis Smith was acquitted in his trial. [R1-52]

At this point Coleman had not been formally charged with any crime, either robbery one or robbery two. However, following his deposition confession, on July 18, 2000, the state filed a two count information joining in one case both the first and second ATM robberies. [R1-6] July 20, 2000 Coleman was brought to court for arraignment on both robberies while represented by the same public defender who was appointed at the time of his arrest on robbery one on June 9, 2000. The record does not reflect any renewed inquiry regarding appointment of counsel for the new charge with *both the court and state taking it for granted that the public defender's original appointment covered the new charge as well as the original arrest offense*. [R1-clerk's minutes July 20, 2000]

The charging document, an information, charged two counts of robbery, count one alleged:

> Ernest Coleman on the 20th day of August, 1999, in the County of Duval and the State of Florida, did unlawfully by force, violence, assault, or putting in fear, take money or other property, to-wit: money and/or jewelry, the property of Frank Morene, as owner or custodian, from the person or custody or Frank Morene, with the intent to permanently or temporarily deprive Frank Morene of the money or other property, and in the course of committing said robbery, carried a weapon, to-wit: a BB gun . .

Count two alleged in nearly identical language a nearly identical

robbery:

> Ernest Coleman on the 20th day of August, 1999, in the County of Duval and the State of Florida, did unlawfully by force, violence, assault, or putting in fear, take money or other property, to-wit: money and/or personal property, the property of Thyroid Smith, as owner or custodian, from the person or custody or Thyroid Smith, with the intent to permanently or temporarily deprive Thyroid Smith of the money or other property, and in the course of committing said robbery, carried a weapon, to-wit: a BB gun . .

Coleman filed a motion to suppress on September 26, 2000 grounded on two claims: (1) that he suffered from a mental problem, was receiving Social Security disability and did not understand what he was doing when he waived his rights and gave a statement, and (2) that he was told that no charges would be brought against him if he gave a statement. [R1-14] Coleman filed an amended motion to suppress on January 18, 2001 alleging two additional claims: (1) the *Edwards* notice, and (2) that he was made promises of lenient treatment in exchange for making the statement and he gave a sworn statement to the State Attorney's Office because of these promises. [R1-36]

An evidentiary hearing was conducted on the motion to suppress and amended motion to suppress on January 26, 2001. [R2-152] Detective Jackson testified that no promises were made to Coleman - Coleman testified that he was told that Detective Jackson had the state attorney on the phone and they wanted his testimony in the upcoming trial against Jarvis Smith and if he would cooperate he would not be charged. [R1-178; R1-191] Detective Jackson admitted

he knew about the *Edwards* notice but he took the position that it did not prevent him from questioning Coleman about the robbery he had not yet been booked on. [R1-165-166] Coleman testified that he gave the sworn statement to the state attorney on June 12 because Detective Jackson told him he was not going to be charged. [R2-191-193] On cross-examination the state went into detail about the sworn statement to show that Coleman had stated in the sworn statement that he had no promises from the state. [R2-195-201] The state argued that *Sapp v. State*, 690 So.2d 581 (Fla. 1997) allowed the detective to investigate Coleman on two robberies, get a warrant to arrest Coleman on one of the two robberies, have Coleman arrested on that warrant, allow Coleman to go to first appearance, have counsel appointed and an *Edwards* notice signed and filed, then immediately take Coleman from court to the Detective's office and interrogate Coleman on the second robbery. [R2-203-205] The state also argued that Coleman's own testimony in his deposition defeated his claim of promises of immunity. [R2-205]

The trial court was disturbed by the evidence presented by the state concerning the deposition of Coleman. Judge Lance M. Day stated:

> Well, I agree it probably has no bearing on this motion, but it seems to me we're going to be right back here on another motion. It's just kind of curious that the defendant, who has an attorney on the particular case

> that he is asked to testify against the co-defendant, that the attorney on that case is not even notified or is not present, at least, during the deposition. That seems - - candidly, that seems very odd, very strange. [R2-209]
>
> MR. MORAN [Assistant State Attorney]: Judge, it struck me as odd, too, and that's why I asked Mr. Scharf [the Assistant State Attorney who took Coleman's statement] and that's why I recall that he said that the defendant is the one who initiated the contact.
>
> THE COURT: Well, there's a rule that I'm sure that you all are aware of that talks about if the defendant initiates the contact there's a procedure to be followed. In fact, we just went through this procedure yesterday in this courtroom. [R2-209]

Subsequently the state clarified that the sworn statement was not for the arrest that Coleman already had a lawyer on [R2-209-211], but did add the following:

> And apparently Mr. Scharf did make the representation that whatever the defendant said during the deposition, which is what I hold right here, would not be used against him in this case, which we have not done. [R2-211]

Despite the bald assertion that the state had not used Coleman's deposition against him, although no evidence was

presented on that matter one way or the other, the state later listed Coleman's deposition in its Sixth Supplemental Discovery Exhibit. [R1-51]

Earlier in the hearing, the Court asked the state how the deposition of the defendant, Coleman, came about:

> THE COURT: How did the deposition occur?
>
> MR. MORAN [Assistant State Attorney]: There was a co-defendant, sir, and the co-defendant's name was Jarvis Smith. Jim Hernandez was the [defense] attorney on that case and an arrest warrant had been outstanding for the defendant while the co-defendant was being prosecuted and that was the week before the trial of the co-defendant. And when Detective Smith - - I'm sorry - - Detective Jackson learned that the defendant had been arrested on the outstanding warrant and knew that the co-defendant's case was about to go to trial the following week, Detective Jackson picked up the phone and called [Assistant State Attorney] Bram Scharf, who was the prosecutor at the time, and said I just learned that Ernest Coleman had been arrested on the other case and Bram Scharf said that - - and I hate to paraphrase, he's in Tallahassee, I wanted to have him here today, Your Honor, to testify, just in case an issue like this arose, but I know that no assurances were made by Bram Scharf or

the detective, and that's clear in the transcript which I wouldn't mind making a part of the record, Judge. [R2-205-206]

Indeed, the state offered the deposition of Coleman into the record (and it was made a part of the record) to assist the Court in ruling on and in support of the state's argument against Coleman's motion to suppress - a motion to suppress that was directed not at the deposition statement, but at the statement Coleman had given to Detective Jackson prior to the deposition. The Court expressly stated that it was going to consider Coleman's deposition in making its ruling on the motion to suppress the prior statement. [R2-218]

Although the motion to suppress was grounded in part on a claim that Coleman had been promised immunity[6] - a claim based on a promise supposedly made by Assistant State Attorney Scharf that Coleman testified Detective Jackson passed on to him, Scharf was not present for and did not testify at the suppression hearing. Assistant State Attorney Moran, who represented the state at the suppression hearing, had responded to a question from the court why wasn't Coleman's attorney present for the deposition:

MR. MORAN: *To be honest, Judge, I don't know the specifics*, but its my understanding that the defendant

[6] We submit that the immunity claim presented in the motion to suppress was sufficient to preserve the issue for appllate review.

unilaterally on his own either approached the detective or called the detective or called the State.

THE COURT: *Is that in the deposition anywhere?*

MR. MORAN: I don't think it is, Judge. I think that's what Bram Scharf communicated to me and I wanted him to be able to shed some more light on that for your Honor.

THE COURT: Doesn't the rule provide that any communication with the defendant, there should be a record made of it by the State?

MR. MORAN: We have the - - what's in the deposition. . . *I mean if there was some - - I don't know - - the appearance of impropriety for why the defendant was there, I would just argue it has no bearing on the count for which we're here for this hearing.* [R2-207-208; emphasis supplied]

Without any further evidentiary development, the motion to suppress was denied on January 30, 2001. [R1-16]

Immediately prior to trial, on June 27, 2001, Coleman asked the court to revisit the motion to suppress and raised the additional argument that the two robberies were not unrelated offenses for purposes of *Sapp*. [R4-124] The court considered the new argument and denied the renewed request on the merits. [R4-134]

Prior to trial Coleman had advised the state that Kenya Washington was a defense witness. [R2-234] The state took

Washington's deposition. [R2-231] Washington had been involved romantically with both Jarvis Smith and Coleman and had circumstantial information to support the defense theory that Jarvis Smith had committed the ATM robberies with another young man whose appearance was somewhat similar to Coleman's. [R2-244-252] The state specifically questioned Washington about Coleman's sworn statement given to the state attorney in an attempt to get Washington to admit that Coleman had also confessed to her. [R2-262-264]

Coleman's trial attorney never expressly argued that Coleman had use and derivative use immunity as a result of the state's subpoenaing Coleman and offering him immunity prior to his sworn statement on June 12, 2000 and the trial court, although suggesting that it anticipated such a motion, in the absence of a clearly articulated defense motion did not initiate a *Kastigar*[7] proceeding on its own.

Coleman filed a motion to sever the trial of the two counts on September 26, 2000 which argued not that the two counts were improperly joined but only that fairness required a severance. The motion was granted by the court. [R1-17-19] The state elected to proceed on the second robbery, that is, count two, the robbery to which Coleman had confessed. [R2-225-226]

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[7] *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)

The Trial

Both the state and the defense presented short opening statements. The state presented two witnesses and seven exhibits and the defense presented three witnesses and two exhibits.

State's Opening

In opening, the state described the case as follows:

On August 20, 1999 Thyroid Smith drove up to the Jax Navy ATM by Roosevelt Mall, late at night, to get some money. He left his car door open and the car running. When he put his card in the ATM two men approached from behind. One came right up to him with a gun and said "Give me the money, I want five hundred dollars." He couldn't get $500 out of the ATM. [R5-173] The other man was in Thyroid Smith's car taking things. Smith was only able to get $10 from the ATM. Smith gave the robber with the gun the $10. The other person took Smith's wife's purse, with her checkbook, Smith's wallet and about 25 CDs. The second robber came up to the one holding the gun on Smith's back and said, "Hurry up, let's go." Smith gave a description of the robber with the gun and of the second man. Smith said the robber with the gun was about six feet tall, slim build, had twists in his hair, like dread locks, a black male, he had two front gold teeth, wearing a white t-shirt and jeans or dark pants. [R5-174] Smith described the second man as shorter, darker and bald.

A couple of weeks later Thyroid Smith, the victim, saw someone

he thought looked like the man who robbed him. Smith told Detective Jackson that he had seen the person who robbed him. The man the victim identified as his robber was Gary Mency.

Detective Jackson took ATM photos from the robbery and he also put together a photo spread of persons including Gary Mency. [R5-175] Detective Jackson showed the photo spread to the victim, Smith, and Smith picked out the photo of Gary Mency as the person who had robbed him.[8] [R5-176]

Having a positive identification from the victim, Detective Jackson went to where Mency lived and found Mency's girlfriend. Detective Jackson showed her the ATM photos of the robbery and she also identified her boyfriend, Mency, as the person in the ATM photo. Detective Jackson then arrested Mency. [R5-176]

Detective Jackson interviewed Mency and Mency denied the robbery. [R5-176]

A couple of months later Detective Jackson started to get suspicious that he had the wrong person for this robbery because he kept hearing the name Ernest Coleman as a possible suspect. [R5-177] Detective Jackson got a photo of Coleman and thought it looked like the description given of the robber by the victim and that Coleman looked like Mency and that Coleman had two front gold teeth. [R5-177]

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[8] According to the state, Gary Mency did not have gold teeth.

Detective Jackson interviewed Coleman and showed Coleman the photos from the ATM [R5-177] and Coleman said it was him - and this is when Detective Jackson noticed that Coleman had two front gold teeth. Coleman identified himself as the person in the ATM photo and wrote his name on the top of the photo. Coleman said it wasn't a real gun but was a BB gun. Coleman wrote on the back of the photo "I used a BB gun when I committed this crime with Jarvis Smith." [R5-178] Detective Jackson had Coleman write a statement in his own words as to what happened that day and Coleman did, confessing to going with Jarvis Smith to do this robbery. [R5-178-179]

The state concluded that the jury would hear from the victim, Thyroid Smith, and Smith would testify that he had seen a person on the street that looked like the guy who robbed him but that at that time he did not have the benefit of a photo of Coleman.

Defense Opening

The defense opening statement mentioned presumption of innocence, burden of proof and reasonable doubt, then suggested that there would be many conflicts in the evidence.

The defense pointed out that earlier another person had been charged with this same crime, and that there was another name that had come up who may have had some involvement in it as well as other suspects who had never come forward. The defense did not question that a robbery had taken place but stated that the defense would show that Coleman did not commit the robbery. [R5-180-181]

State's Case

The state presented just two witnesses, Thyroid Smith, the alleged victim of robbery number two, and Detective Jackson.

Witness - Thyroid Smith

The victim, Thyroid Smith, testified that two black men came up to him when he was at an ATM. One was about six feet tall, slim, with two gold teeth in front and twists in his hair. [R6-185] This person had a "short pistol" in his hands. It was black. He said that he would shoot the victim if he did not withdraw and give him $500. The victim thought he would shoot him. The gun appeared to him to be real. [R5-186] The victim finally succeeded in getting $10 out, the robber asked for it and he gave it to him. [R5-187] The other man was shorter, bald and dark complexioned. [R5-186-187] The shorter man was searching through the victim's car and took his wallet, his wife's purse with her checkbook and some CDs. [R5-187] After giving the robber the $10 he still demanded that he withdraw $500 and threatened to shoot the victim if he did not do so. The victim took the threat seriously but was not able to withdraw any more money. He was thinking that the man was going to shoot him. So he told them to take his car, the keys were in it. The other robber took the keys from the car, and told the victim to not move and not go anywhere or they would come back and shoot him. [R5-188] They dropped his keys on the ground and took off in their own car, a small gray Nissan. [R5-189] The gun was kept on his back or at a

distance from his back the entire time the robbers were there. [R5-189] Afterwards the victim went to a Dunkin' Donuts and found an off-duty police officer and reported the crime. [R5-189] Then two or three weeks after he was robbed he saw someone he thought looked like the man with the gun. He told the detective. About a week after that the detective showed him a photograph of that person and he picked the photo out. The victim identified Gary Mency as the robber. [R5-190] *Neither prior to nor during his testimony at trial did the victim ever identify Coleman as the person who robbed him.*[9]

Cross-examination of Smith

Smith stated that the gun was in his back and the robber stood on his side. The robbery took about ten to fifteen minutes. [R5-191] The defense had Smith identify a photo spread from which he had picked out Mincy, but withheld introducing it into evidence. [R5-193-200]

Redirect of Smith

The state had Smith identify the ATM photos of the robbery as State's Exhibits 1 and 2. [R5-204]

Recross-examination of Smith

Smith acknowledged identifying Mency as the robber about two weeks after the robbery while it was still fresh in his mind. [R5-206] Then as recently as February 2001 (the trial was June 2001) in

[9] In rebuttal closing argument the State admitted that the victim did not know who robbed him. [R6-388, lines 11-12]

a defense deposition the victim was still positive that Mency was the robber (not Coleman). [R5-207-208] Despite rereading the deposition transcript in which he answered that he was positive about the identification of Mency as the robber, Smith said that he did not remember stating in the deposition that he was positive in his identification of Mency, and he thought that answer could be incorrect. [R5-208-209] Smith testified that at no time prior to trial had he been shown a photograph of Coleman. [R5-209]

Re-redirect Examination of Smith

Q. [Assistant State Attorney Villa]: Okay. In fact, you had never seen a picture of Ernest Coleman ever or ever knew that he was a suspect in your case, is that true?

A. [Victim Smith]: That's true.

Q. Okay. So when - - when you saw the photograph of the robber or of Ernest Coleman and you saw the photograph of the robbery of the - - taken from the ATM machine, did you become to doubt your previous identification?

A. Yes, ma'am. [R5-212]

The record contains no identification by the victim of Coleman as the person who robbed him.

Witness - Detective Jackson

Detective Jackson testified that he investigated the Thyroid Smith robbery and arrested Gary Mency as the robber. [R5-216] The arrest of Mency resulted from the victim calling the detective and

telling him that he had seen one of the suspects who robbed him. The detective then made a photo spread containing Mency, showed it to the victim, and the victim picked Mency out of the photo spread. [R5-216] The detective then located Mency's girlfriend, Tomeka Johnson. The detective showed Tomeka Johnson the ATM photos of the robbery and she identified the robber as her boyfriend, Gary Mency. [R5-217] He then arrested Mency, who did not confess to the crime. State's Exhibit 3, a photo of Mency was introduced into evidence. [R5-219] Mency fit the description the victim gave except for not having gold teeth. [R5-219] Detective Jackson later came to doubt he had the right person. [R5-219] He "[got] the name of another suspect" and the name he "kept getting" was Ernest Coleman.[10] Detective Jackson got a photo of Coleman and compared it to the robbery picture and "it was identical, the same person." [R5-220] Detective Jackson then interviewed Coleman. [R5-220] He took the ATM photos with him to the interview. [R5-221] Detective Jackson said that Coleman did not look the same in court as he had looked in the photograph. [R5-222] Detective Jackson advised Coleman of his rights at 12:10 p.m. on June 9, 2000. [R5-230] He showed Coleman the ATM photographs (State's Exhibits 1 and 2), which Coleman signed on the back saying they were pictures of himself.[11]

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[10] There was no objection to this clearly improper testimony and the State repeated it in closing argument.

[11] To the extent there was any evidence whatsoever other than Coleman's own confession it would have been these ATM

[R5-233, 234, 235] He then had Coleman write out a written confession to the robbery. [R5-238] Coleman's written confession was admitted over defense objection as State's Exhibit 7. [R5-239]

Cross-examination of Detective Jackson

Detective Jackson confirmed that a couple of weeks after the robbery he got a call from the victim saying he had seen the man who had robbed him. [R5-249-249] The Detective did a photo spread that contained a photo of Gary Mency and the victim identified the photo of Mency as the man who had robbed him. [R5-249] The victim never contacted the Detective later to say that he was mistaken in the identification of Mency as the robber. [R5-249] The Detective interviewed Mency's girlfriend, showed her the ATM photos, and she identified the robber in the ATM photo as her boyfriend, Gary Mency. [R5-250] The Detective confirmed that some of the checks that had been stolen from the victim's car during the robbery were later recovered. [R5-251] He recovered one check from Uquana Telfair. [R5-251] Based on his interview of Telfair, Detective Jackson also then interviewed Jarvis Smith and Ronald Holland, Telfair's boyfriend. [R5-251-252] The Detective never put a photo of Holland in a photo spread for identification by the victim. [R5-252]

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photographs, but they were "tainted" by the confession in which the detective had Coleman sign and acknowledge that they were photographs of himself.

Redirect of Detective Jackson

Detective Jackson said Ronald Holland had gold teeth "all over his mouth" and was six feet three inches tall. Detective Jackson never considered Holland a suspect. Telfair said she got the stolen check from Jarvis Smith. Smith was a suspect along with Coleman. [R5-259]

Recross-examination of Detective Jackson

Detective Jackson said that Holland had "kind of like dreads in his hair." He described him as a medium skinned black person. Detective Jackson did not think Holland resembled the description of the robber enough to include him in a photo spread. [R5-260]

Defendant Required to Display his Teeth to Jury

The State requested and the Court instructed the Defendant to stand, face the jury, open his mouth and expose his teeth to the jury. [R5-264] The Court inquired of counsel for Coleman if he agreed that when Coleman opened his mouth he had what appeared to be two gold teeth or gold caps on the front portion of his upper mouth, and counsel agreed. [R5-276] The State then rested. [R5-264] The defense argument for judgement of acquittal was denied.[12]

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[12] There was a *corpus* problem in this case. *Cf. Farley v. City of Tallahassee*, 243 So.2d 161 (Fla. 1st DCA 1971). Trial counsel did not object or move for a judgment of acquittal on this basis, however, accordingly under the authority of *J.B. v. State,* 705 So.2d 1306 (Fla. 1998), the error is not fundamental error and the failure to preserve it at the trial court waives it for purposes of direct appeal. However, counsel notes this error for post-conviction relief purposes under Rule 3.850, Florida Rules of Criminal Procedure, should this appeal be denied.

Defense Case

The defense presented three witnesses, Uquana Telfair, who was the sister of Gary Mency, the man the victim had identified as the robber in this case, Gary Mency himself, and Thyroid Smith again, the alleged victim. The defense introduced two exhibits: (1) a photograph of Ronald Holland, the man suggested by the defense as being the second robber (in addition to Gary Mency, the robber identified by the victim), and (2) a photo of Gary Mency, which had been identified by the victim, Thyroid Smith, as a photo of the man who had robbed him.

Defense Witness Uquana Telfair

Telfair testified that she was the sister of Gary Mency. [R5-292] Detective Jackson had questioned her and she had in her possession certain checks from the victim of this robbery. [R5-293] She got the checks from Jarvis Smith. [R5-293] Smith had Ronald Holland with him when he came to Telfair's house and gave her the checks. [R5-293] She described Jarvis Smith as about six feet tall with a bald head and no gold [teeth]. [R5-294] She described Holland at that time as about six feet three or four, dark skinned, with a mouth full of gold [teeth] and plaits in his hair. [R5-294] The Detective showed her some ATM photos and she told the Detective that that was not her brother, Gary Mency, in the photos. [R5-297][13]

[13] Note that the Detective testified that it was Mency's girlfriend, not his sister, who had identified Mency in the ATM photos. [R5-250]

Redirect of Telfair

On redirect Telfair identified a photo of Holland which was admitted as Defense Exhibit One. [R5-302]

Recross-examination of Telfair

She stated that in 1999 Holland did not look like he looked in the photo that was Defense Exhibit One. His hair was shorter. [R5-304] Holland's mouth was full of gold teeth, top and bottom. [R5-305]

Defense Witness Gary Mency

Mency admitted that he knew Ronald Holland and Jarvis Smith. [R5-311-312]

Defense Witness Thyroid Smith

Smith acknowledged that he had identified a photo of Gary Mency as the man who robbed him. [R5-319] The Detective had shown him the photo and he had signed his name to the back of it. [R5-319-320] This photo was entered as Defendant's Exhibit Two.

Cross-examination of Thyroid Smith

Smith did not have the benefit of a photo of Ernest Coleman when he was shown the photo spread with Gary Mency's photo and picked out the Mency photo as that of the robber. [R5-321] When asked if he had had Coleman's picture whether he would still have picked out Mency, Smith failed to answer. [R5-321-322]

The Defense rested. [R5-324]

Closing Arguments

The State restated the evidence and pointed to the confession for its conclusion that it had met its burden of proof. [R6-358-372] The defense argued that the confession was a false confession that came after one and a half hours of "persuasion" from Detective Jackson. The defense argued that it was stretching coincidence for Gary Mency to be identified as the robber by the victim, then Mency's girlfriend identified him as the person in the ATM photos, and his own sister had checks that were stolen from the robbery, which she claimed came from Jarvis Smith - who was in the company of Ronald Holland, whom Mency admitted knowing. [R6-372-387]

Verdict and Sentence

The jury returned a verdict of guilty on the charge of robbery with a weapon, a BB gun. [R6-426-427] The court ordered and considered a presentence report before adjudicating twenty-one year old[14] Ernest Coleman guilty of robbery, count two of the information, determined that he met the criteria for classification and sentencing as a habitual felony offender under Florida Statutes § 775.084 and sentenced him to ***life in prison*** for the offense of holding up a man with a BB gun. [R2-343-344] This appeal followed in a timely manner. [R1-111]

[14] Coleman was only nineteen years old when he allegedly committed this crime. [R1-3]

STANDARD OF REVIEW

Issue I.

Admission of involuntary statements are subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). In *Fulminante*, the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Florida Supreme Court has explained that this means:

> the [reviewing] court must still be able to conclude beyond a reasonable doubt, after evaluation of the impact of the error in light of the overall strength of the case and the defenses asserted, *that the verdict could not have been affected by the error*. *Goodwin v. State*, 751 So.2d 537, 545 (Fla. 1999) (emphasis supplied).

Issue II.

Immunity claims, if established, are *per se* reversible. *United States v. Hubbell*, 530 U.S. 27 (2000), *but see United States v. Schmidgall*, 25 F.3d 1523 (11th Cir. 1994). *Hubbell* does not expressly state a standard of review, but the Court dismissed Hubbell's indictment merely on a showing that there had been *some derivative use* of Hubbell's immunized production of documents, without any application of a harmless error analysis. From the facts of the case, as outlined in the opinion, it would not appear that Hubbell would have been reversed had a harmless error standard

been applied. The United States Supreme Court has never held that immunity claims were subject to harmless error review and indeed the very concept of immunity would seem to be inconsistent with harmless error analysis. It is true, however, that prior to *Hubbell* the Eleventh Circuit has held that immunity claims are subject to harmless error review.

SUMMARY OF ARGUMENTS

I. UNDER THE HOLDING OF *SAPP V. STATE* THE TRIAL COURT ERRED IN DENYING DEFENDANT COLEMAN'S MOTION TO SUPPRESS HIS CONFESSION, BECAUSE (1) THE OFFENSE ON WHICH HE WAS INTERROGATED AND CONFESSED WAS INTIMATELY RELATED TO THE OFFENSE AS TO WHICH HE HAD INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND FIFTH AMENDMENT RIGHT TO COUNSEL, AND (2) THE INTERROGATION, WHICH OCCURRED WITHIN TWO HOURS OF HIS INVOCATION OF HIS RIGHT TO REMAIN SILENT, WAS IMMINENT AT THE TIME COLEMAN INVOKED HIS RIGHTS, AND EITHER OF THESE TWO CONDITIONS ARE SUFFICIENT TO RENDER THE INVOCATION OF RIGHTS EFFECTIVE UNDER *SAPP*, REQUIRING THE SUPPRESSION OF THE STATEMENTS.

Sapp v. State, 690 So.2d 581 (Fla. 1997) held that an invocation of the Fifth Amendment right to remain silent and the accompanying Fifth Amendment right to counsel could not be anticipatorily invoked after the arrest on one charge to apply to interrogation on a later, *unrelated* offense, unless the interrogation on the unrelated offense had already begun *or was imminent*.

Coleman was a suspect in two ATM robberies committed in the same manner at two ATMs just fifteen minutes apart. A victim of the first robbery had identified a picture of Coleman as the robber

and on that basis a detective got an arrest warrant for Coleman on robbery one. Coleman was already a suspect in the second robbery that had occurred fifteen minutes after the first one.

Coleman was arrested and the same day taken for first appearance, had counsel appointed, and invoked in writing his Fifth Amendment right to remain silent and right to counsel. Within two hours of this written invocation of rights in first appearance court, the detective who had obtained the arrest warrant for Coleman had Coleman taken to the detective's office for interrogation about the second robbery. The detective knew that Coleman had invoked his Fifth Amendment rights but did not honor the assertion of these rights and did not contact Coleman's counsel before the interrogation.

Coleman, who has mental problems, had been on Social Security disability, had completed only the sixth grade, and was held back three times to do that, in an hour and a half session with the detective signed an advice of his rights,[15] and according to the detective waived his rights, then gave an oral and written confession to the second robbery.

Coleman was then charged in a single information with both the first and second ATM robberies. At his arraignment on this information which joined the two robberies, no inquiry regarding

[15] Coleman did not execute a written waiver of rights in conformity with Rule 3.111(d)(4).

counsel was made as to the second robbery. The court and state took it for granted that the public defender already represented Coleman on the second robbery as well as the first robbery.

Coleman filed a timely motion to suppress arguing that the failure of the detective to honor his written invocation of rights required the confession he gave to be suppressed. In reliance on *Sapp* the trial court denied the motion to suppress.

The denial of the motion to suppress was error under the *Sapp* holding, which is that an invocation of rights such as Coleman asserted is ineffective only if both (1) the two offenses are *unrelated*, and (2) questioning has not begun *or is not imminent* on the second offense.

Given the near identity of circumstances of the two ATM robberies, their proximity in time and geographical location (just fifteen minutes apart) as well as similarity in commission (late night ATM holdups, by two men, one carrying what appeared to be a gun, and a getaway by car), the two crimes were related.[16]

Additionally, the State itself took the *de facto* position that the two offenses were related by joining the two offenses in a single information, and in not requiring the trial court to engage in a new inquiry regarding appointment of counsel when Coleman was arraigned on the two offenses - which was his first appearance on

[16] The same detective was investigating both offenses and had the same two suspects for both robberies.

the second offense.

Because the two offenses were related, *Sapp* does not apply to prevent the invocation of rights from being effective as to the questioning on the second offense.

In addition, the detective who had had Coleman arrested on robbery number one already suspected Coleman on robbery two, so he had Coleman brought to his office for interrogation on robbery number two almost as soon as he was out of first appearance court on robbery number one and had finished invoking his right to remain silent and right to counsel. Within two hours of the invocation of rights the detective, who knew Coleman had invoked these rights, was interrogating Coleman on robbery number two. This meets the *Sapp* standard for questioning that is imminent at the time of the invocation of rights, and accordingly, under *Sapp*, the invocation of rights was effective.

There was no evidence tying Coleman to the second robbery other than his confession, therefore the erroneous admission of his confession was not harmless error, because this Court can not be assured beyond a reasonable doubt that Coleman would have been convicted had the confession not been admitted.[17]

[17] The state ultimately dropped the charges in robbery number one and proceeded to trial only on the second offense.

II. COLEMAN'S CONVICTION MUST BE VACATED AND THE CHARGE DISMISSED DUE TO THE STATE'S USE OF HIS IMMUNIZED STATEMENT AND THE VIOLATION OF DISCIPLINARY RULE 7-104 IN OBTAINING THE IMMUNIZED STATEMENT.

The State subpoenaed Coleman for a deposition in robbery number two without notice to his counsel who had been appointed on related robbery number one three days earlier. The State knew Coleman was represented by counsel. Under Section 914.04, Florida Statutes Coleman automatically had use and derivative use immunity for the statement he was compelled to make under authority of the State's subpoena. In addition, the State expressly promised Coleman use immunity before making any statement.

Coleman was questioned about the voluntariness of his confession three days earlied to Detective Jackson. He testified that the confession was voluntary. He later filed a motion to suppress that confession, *inter alia* on voluntariness grounds. The State then asked the trial court to use his immunized statement to decide (and deny) his claim of involuntariness on his confession. The trial court agreed to consider his immunized statement and denied the motion to suppress the confession.

The confession was the only evidence against Coleman in this case. Therefore, the derivative use of his immunized statement to deny his motion to suppress his confession requires that his conviction be vacated. Even if a harmless error standard applied, which we argue it does not, this could not be harmless error.

Additionally, we argue that it was the grossest ethical

violation for the State to compel Coleman to submit to this subpoena and give a sworn statement without giving notice to his counsel on the related case. The conviction should be vacated due to the ethical violation alone, if not for the immunity violation.

ARGUMENTS

I. UNDER THE HOLDING OF *SAPP V. STATE* THE TRIAL COURT ERRED IN DENYING DEFENDANT COLEMAN'S MOTION TO SUPPRESS HIS CONFESSION, BECAUSE (1) THE OFFENSE ON WHICH HE WAS INTERROGATED AND CONFESSED WAS INTIMATELY RELATED TO THE OFFENSE AS TO WHICH HE HAD INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND FIFTH AMENDMENT RIGHT TO COUNSEL, AND (2) THE INTERROGATION, WHICH OCCURRED WITHIN TWO HOURS OF HIS INVOCATION OF HIS RIGHT TO REMAIN SILENT, WAS IMMINENT AT THE TIME COLEMAN INVOKED HIS RIGHTS, AND EITHER OF THESE TWO CONDITIONS ARE SUFFICIENT TO RENDER THE INVOCATION OF RIGHTS EFFECTIVE UNDER *SAPP*, REQUIRING THE SUPPRESSION OF THE STATEMENTS.

Ernest Coleman was a suspect in two ATM robberies that took place fifteen minutes apart. In each robbery, two men approached a person at an ATM teller, with one of the two suspects holding a gun, demanded money from the person at the ATM teller, and then after getting money, the two suspects drove away in a car. The two robberies occurred within fifteen minutes of one another and close enough together geographically that the two robbers could go from one to the other and do the two robberies within just fifteen minutes time. Coleman was suspected to be the gunman in both.

The same detective investigated both robberies. The detective was able to get the victim in robbery one to identify a photograph of Coleman as the man who robbed him, but the victim in robbery two was unable to identify Coleman. Only having probable cause to

arrest Coleman on the first robbery, the detective only sought and obtained an arrest warrant on the first robbery.

As soon as Coleman was arrested on the arrest warrant for robbery number one, he was taken to Court the very same day, had counsel appointed and invoked, in writing, his Fifth Amendment right to remain silent and to refuse to answer any question about the robbery he had been arrested on or any other matters. He expressly invoked his Fifth Amendment right to counsel, and stated that he did not want to waive this invocation of rights without advice of counsel, counsel being present, and the waiver being done in open court.

Although the detective who was investigating these two related robberies knew that Coleman had had counsel appointed, had invoked his right to remain silent and not be questioned about the arrest offense or any other offense without counsel being present, the detective had Coleman taken more or less directly from Court to the detective's office for questioning about robbery number two. Within two hours of being in Court and invoking his rights, Coleman had waived his right to remain silent and right to counsel[18] and

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[18] Florida Rules of Criminal Procedure, Rule 3.111(d)(4) provides:

A waiver of counsel made in court shall be of record; *a waiver made out of court shall be in writing* with not less than 2 attesting witnesses. *The witnesses shall attest the voluntary execution thereof*. [emphasis supplied]

There was no written waiver of counsel in this case - there

signed a written confession to robbery two.[19]

Coleman challenged the admissibility of the confession on the basis of the written invocation of rights. The State responded by

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was only a written advice of rights. [State's Exhibit Number 5] An advice of rights that does not waive those rights is the opposite of a waiver of rights. The written advice of rights contained no language whatsoever regarding any desire on the part of the defendant Coleman to waive the rights he had been advised of. Nor did either witness to the advice of rights form attest to even its voluntary execution. Therefore, under Rule 3.111(d)(4), there was no valid waiver of counsel. The Florida Supreme Court has pointed to compliance with Rule 3.111(d)(4) in upholding a waiver of counsel. *Smith v. State*, 699 So.2d 629 (Fla. 1997). Although this objection was not raised below, the issue involved is the waiver of a fundamental constitutional right. Coleman testified during the suppression hearing that he asked Detective Jackson for counsel but his request was ignored. [R2-191] Coleman also testified that Detective Jackson said that he had the state attorney on the phone and that he wanted to use Coleman as a witness against Jarvis Smith whose trial was upcoming, and if he cooperated he would not be charged. [R2-191-192]. On these facts, we submit that Coleman has shown prejudice that implicates his fundamental rights. But see *Hogan v. State*, 330 So.2d 557 (Fla. 2nd DCA 1976)(lack of written waiver required by Rule 3.111(d)(4) not reversible error if no prejudice to the defendant), *Johnson v. State*, 660 So.2d 637 (Fla. 1995)(lack of two witnesses under Rule 3.111(d)(4) not reversible error unless it resulted in prejudice or harm such that fundamental rights are implicated).

[19] Coleman's trial counsel filed a motion to suppress that alleged that Coleman "has a mental problem and was receiving Social Security disability." [R1-14] At his sentencing, his mother testified that Coleman only completed the Sixth Grade, and even that involved being held back three years in a row. She said that he could stay on a job, "if it's a small job that he can function with, because he always have a slow problem from the age of, I think, six. I think it was the age of six, but he started at the age of 12 and they went back to the time he was six and said he had a mental problem. It's a slightly [?] problem, but . . ." [R2-306]

citing *Sapp v. State*, 690 So.2d 581 (Fla. 1997), and the trial court denied the motion to suppress on the basis of *Sapp*.

Sapp involved a defendant arrested on "a robbery *unrelated to the charges at issue* in [the *Sapp*] case." *Sapp*, 690 So.2d 581, 583 (Fla. 1997) (emphasis supplied). Sapp invoked his rights under *Edwards* and *Miranda* only after he had first waived those rights in a custodial interrogation and given a full confession to the original, unrelated charge. *Sapp*, 690 So.2d 581, 583, 584 , n.2 (Fla. 1997). In *Sapp* it was not until *a week later* after the invocation of rights under *Miranda* and *Edwards* that detectives initiated an interrogation concerning the facts of the *unrelated* case, that Sapp waived his rights without requesting an attorney. *Sapp*, 690 So.2d 581, 583 (Fla. 1997).

The *Sapp* court articulated the issue as whether an individual may effectively invoke his Fifth Amendment right to counsel on an *unrelated offense* when custodial interrogation has not begun *or is not imminent*. *Sapp*, 690 So.2d 581, 584 (Fla. 1997).

The *Sapp* court held that it agreed with the interpretation of *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204 (1991), adopted by several courts of appeal, and our local United States District Court for the Middle District of Florida, that is, that the United States Supreme Court:

> [I]f presented with the issue, would not permit an individual to invoke the Miranda right to counsel before custodial interrogation has begun *or is imminent*." *Sapp*,

690 So.2d 581, 585 (Fla. 1997)(emphasis supplied).

In so holding, the Florida Supreme Court expressly stated that it agreed with the interpretation of this issue made by the United States District Court for the Middle District of Florida in *United States v. Grimes*, 911 F.Supp. 1485 (M.D. Fla. 1996). In that decision, the Court held:

> The record contains no evidence suggesting Mr. Grimes was being questioned or otherwise interrogated on *December 14, 1994, the date he signed the declaration of rights form*. Furthermore, *no possible interrogation was initiated until January 22 or 23, 1995.* Thus, "given that [Grimes] was not being interrogated when he signed the [declaration of rights] form, and that *no interrogation was impending or imminent* . . . [he] was not within the 'context of custodial interrogation' when he signed the . . . form, and therefore . . . the prophylactic rules of *Miranda* and *Edwards* [do] not render inadmissible" his subsequent statements. Id. at 1249. [*Alston v. Redman*, 34 F.3d 1237, 1245-49 (3rd Cir. 1994), cert. denied, 130 L. Ed. 2d 1085, 115 S. Ct. 1122 (1995).] Based upon footnote 3 of *McNeil* and the Third Circuit's opinion in *Alston*, the Defendant's Claim of Rights form was not a valid invocation of the Fifth Amendment right to counsel. *Grimes*, 911 F.Supp 1485, 1496.[20] [emphasis supplied]

Therefore, it is clear under *Sapp* that *Sapp* only applies to (1) unrelated offenses, (2) and even if the offenses are unrelated, only applies if questioning is not impending or imminent. In holding that questioning was not imminent in *Sapp,* the Florida Supreme Court pointed to the fact that the second interrogation occurred *one week* after the invocation of rights under *Edwards* and

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[20] On appeal, *United States v. Grimes*, 142 F.3d 1342 (11th Cir. 1998). Counsel for Coleman was also appellate counsel in the *Grimes* case.

Miranda.[21] It was a given in *Sapp* that the two offenses were unrelated.

However, in the instant case, Coleman was taken more or less immediately from appearing in court, where he signed the rights form and invoked his rights, to the detective's office for questioning. The record established that the confession was given about *two hours* after he had invoked his right to remain silent and right to counsel associated with his right to remain silent. Thus, in Coleman's case, *the questioning was both impending and imminent*. Short of coming into the courtroom and interrupting the proceedings, the detective questioned Coleman as soon as he possibly could after he invoked his rights and parted from his attorney.

Coleman's questioning was imminent when he invoked his right against such questioning. Thus under *Sapp*, he was entitled to effectively invoke his right against such questioning, and it violated his right to counsel under the Fifth Amendment for the police officer to initiate such questioning, while Coleman was

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[21] There have been two subsequent Florida Supreme Court decisions relying on *Sapp* that contain any discussion of the facts. In *Thomas v. State*, 748 So.2d 970, 982 (Fla. 1999), the delay between execution of the *Edwards-Miranda* notice and the subsequent questioning was one week, just as in *Sapp*. In *Hess v. State*, 794 So.2d 1249 (Fla. 2001), the form was signed on April 4 and there were three subsequent interviews, on April 10, 11, and 12. However, the detective interviewing Hess did not know of the invocation of rights until the 12th and the Court found that Hess had initiated the contact.

still in continuous custody. Within two hours of this confession, Coleman had expressly invoked his right to remain silent and not waive that right without first consulting with his counsel and having counsel present, and the waiver being effectuated in open court. The officer admitted he knew this when he interrogated Coleman.

In addition, the two offenses in Coleman's case *were related* and this was an argument raised by Coleman's trial counsel. [R4-124] No court has ever held that a Fifth Amendment invocation of rights is not effective as to related offenses. These two offenses were related beyond any possible dispute. Therefore, it was error to refuse to honor the invocation of rights and deny the motion to suppress.

The detective himself stated in the arrest affidavit for the first offense, that Coleman was a suspect in a similar ATM robbery. Indeed, the evidence showed that the two robberies took place within 15 minutes of one another, were committed by the same two individuals in exactly the same manner.[22]

Most telling is that the State itself took the position that the two robberies were related by charging the two offenses in a single information. Florida Rule of Criminal Procedure 3.150,

[22] There is no evidence in the record how close the two ATM locations were to one another, but by inference they were close enough that Coleman could go from a robbery at one to commit a robbery at the second within fifteen minutes. Thus they had to have been close to one another.

reads in pertinent part:

> (a) Joinder of Offenses. Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions.

The two offenses were properly joined because they were part of a related time spree, close in time, close in location, and involving crimes committed in an identical fashion. *Bundy v. State*, 455 So.2d 330, 345 (Fla. 1981) (approving joinder of two murders committed within two hours of one another in similar fashion blocks apart).

Although the defense later moved to sever the two cases and the motion was granted without opposition by the state, it is clear that the State never conceded that the two offenses were nor properly joined in the single information. Nor did the defense argue in support of its severance motion that the two offenses were unrelated. The defense motion for severance set forth only one ground for severance - not that the two offenses were improperly joined - but only that severance was necessary and appropriate to promote a fair determination of the defendant's guilt or innocence for each offense.

Severance for trial may be granted simply to promote a fair determination of the issues, even when two offenses are properly joined. In *Thames v. State*, 454 So.2d 1061 (Fla. 1st DCA 1984),

this Court explained:

> Additionally, rule 3.152 provides that the trial court shall grant a severance of two or more charges included in an information, even if such charges are properly joined, if the defendant proves that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.

No one below - neither the State, the defense, nor the Court - ever argued that the two offenses were improperly joined.

Although the State did not seek to do so, clearly the two offenses were related enough that evidence of the first offense could have been admitted under the *Williams* rule in the trial of the second. Section 90.404(2), Florida Statutes. See *Williams v. State*, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 4 L. Ed. 2d 86, 80 S. Ct. 102 (1959).

In addition, we know the two offenses were related because when Coleman was brought to court, both offenses were arraigned together without any advice from the Court or State that they were unrelated offenses.

Finally, we know that the two offenses were related because neither the Court nor the State thought it necessary to inquire about appointment of counsel on the second robbery. When Coleman was arraigned on the "new" offense, the Court, State and Public Defender all took it for granted that the Public Defender was already counsel on both offenses. There was no new advice of rights by the Court at which Coleman was informed he had the right to counsel on the second robbery, no inquiry into whether he

already had counsel or desired that counsel be appointed. None of this took place. The Court took it as a given that the Public Defender, who had been appointed on June 9, 2000 when Coleman had his initial appearance on robbery number one, was already Coleman's lawyer by virtue of that June 9, 2000 appointment as to robbery two also. There had been no intervening initial appearance on robbery two, there had been no intervening hearing for appointment of counsel for robbery two. The original appointment of counsel was considered by the Court to apply to both offenses. At no time in the proceedings did the State object to the position the Court took concerning Coleman's representation of counsel on offense number two.

Given all of the above, it is clear that the trial court erred in denying Coleman's motion to suppress his confession.

Although admission of involuntary statements are subject to harmless error review, the error in this case was not harmless. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). In *Fulminante*, the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Fulminante,* quoted in *Goodwin v. State*, 751 So.2d 537 (Fla. 1999).

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly,

> confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States*, 391 U.S., at 139-140 (White, J., dissenting). See also *Cruz v. New York*, 481 U.S., at 195 (White, J., dissenting) (citing Bruton). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless. *Fulminante*, 499 U.S. 279, 296.
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> The Florida Supreme Court has explained that this means:
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> > the [reviewing] court must still be able to conclude beyond a reasonable doubt, after evaluation of the impact of the error in light of the overall strength of the case and the defenses asserted, *that the verdict could not have been affected by the error*. *Goodwin v. State*, 751 So.2d 537, 545 (Fla. 1999) (emphasis supplied).

In the Coleman case, there was no other evidence other than the confession. The victim was unable to identify Coleman as his robber, the ATM photos were too poor from which to make an identification, and there were no third party witnesses who implicated Coleman. The case came down to his own confession. This cannot be harmless error. Coleman's fundamental rights were violated. His confession should have been suppressed. Without the confession, he could not have been convicted. The error was not

harmless. Therefore Coleman's conviction must be reversed.[23]

II. COLEMAN'S CONVICTION MUST BE VACATED AND THE CHARGE DISMISSED DUE TO THE STATE'S USE OF HIS IMMUNIZED STATEMENT AND THE VIOLATION OF DISCIPLINARY RULE 7-104 IN OBTAINING THE IMMUNIZED STATEMENT.

Coleman was subpoenaed under a praecipe for subpoena issued by the State Attorney, appeared under the compulsion of that subpoena, and provided a sworn statement to the State Attorney upon the express promise of the State that nothing he said in the sworn statement would be used against him. [R2-209-211]

Florida Statute Section 914.04 provides for use and derivative use immunity for any testimony given in response to a subpoena in

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[23] Because this Court is bound by the Florida Supreme Court's decision in *Sapp* that a person may not anticipatorily invoke his Fifth Amendment right to remain silent and right to counsel as to an unrelated case, unless questioning on the other offense has begun or is imminent, we have not sought to persuade this Court that *Sapp* is fundamentally unsound. It is our position, however, that *Sapp* was wrongly decided. *Sapp* relied upon admitted *dicta* from *McNeil v. Wisconsin,* 501 U.S. 171 (1991), to reach its holding. We submit that the Florida Supreme Court does not have the authority to reverse United States Supreme Court precedent - *Edwards v. Arizona*, 451 U.S. 477 (1981), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Arizona v. Roberson*, 486 U.S. 675 (1988) - and that that precedent was unaffected by the *McNeil dicta.* That precedent dictates, we argue, that a person may anticipatorily invoke a Fifth Amendment right. We are not waiving the argument that under the authority of *Edwards, Miranda* and *Arizona v. Roberson* Coleman had the right, which he effectively exercised, to invoke his Fifth Amendment right to remain silent and Fifth Amendment right to counsel as to the offense on which he was arrested and the second offense that was under investigation. We expressly hereby intend by this argument to preserve the issue for further appellate review should that review be necessary, which, given the facts of this case, we think unlikely. Just as the footnote in *McNeil* has been held to be enough to undo two decades of jurisprudence we submit that this footnote is enough to preserve the issue.

a criminal investigation by the State attorney or in connection with criminal trial proceedings. Such immunity is constitutionally required. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 84 S. Ct. 1594 (1964). The grant of immunity is self-executing and does not require that the person subpoenaed first assert his Fifth Amendment right to remain silent and not incriminate himself. *Jenny v. State*, 447 So.2d 1351 (Fla. 1984).

In Coleman's case, the Assistant State Attorney who subpoenaed Coleman expressly advised Coleman, before Coleman testified, that Coleman would have use immunity if he testified in response to the subpoena. [R1-119-120; R2-211]

However, the record demonstrates that the State in fact used the immunized statement against Coleman in a strategically decisive manner - to rebut his claim of involuntariness that he made in his motion to suppress his confession given to Detective Jackson. Indeed, the state offered the deposition of Coleman into the record (and it was made a part of the record) to assist the Court in ruling on and in support of the state's argument against Coleman's motion to suppress - a motion to suppress that was directed not at the deposition statement, but at the statement Coleman had given to Detective Jackson prior to the deposition. *The trial court expressly stated that it was going to consider Coleman's deposition in making its ruling on the motion to suppress the prior statement.* [R2-218]

The State did not and could not meet the heavy burden of showing that it made no use of the immunized statement when the State itself asked the trial court to use the immunized statement against Coleman to make a finding that his earlier confession had been voluntary. On these facts the conviction in this case must be vacated. *State v. Williams*, 487 So. 2d 1092 (Fla. 1st DCA 1986), *State v. Yatman*, 320 So.2d 401 (Fla. 4th DCA 1975), *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).[24]

Immunity violations are not subject to a harmless error standard. Any use of immunized testimony requires dismissal of the charges against Coleman. *United States v. Hubbell*, 530 U.S. 27 (2000). Because there was indisputable use of the immunized statement, the conviction must be vacated and the charge dismissed.

Even if this Court were to apply a harmless error standard,

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[24] Of course, the immunized statement was used in a number of other ways as well, including the examination of defense witness Kenya Washington. The state specifically questioned Washington about Coleman's sworn statement given to the state attorney in an attempt to get Washington to admit that Coleman had also confessed to her. [R2-262-264]

The State also later listed Coleman's deposition in its Sixth Supplemental Discovery Exhibit. [R1-51] Apparently the State was of the view that the immunized statement could be introduced before the jury at trial to impeach Coleman if he testified at trial inconsistent to the sworn statement. We think that use would have been prohibited. *Cf. State v. Fowler*, 466 So.2d 210 (Fla. 1985). The threat of its use may have kept Coleman from the witness stand.

however, that standard cannot be met by the State - and the burden is on the State once it is established that a defendant testified under a grant of immunity. *Kastigar v. United States*, 406 U.S. at 460, 92 S. Ct. at 1665; *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18, 695, 84 S. Ct. 1594 (1964).

Because the State urged the trial court to consider the immunized statement in ruling on the motion to suppress, and the trial court stated that it would rely upon the immunized statement in making its determination on that motion, which it then denied, there can be no doubt but that the immunized statement was used and used in a way that resulted in the confession being presented to the jury. Without the confession there was no other evidence of guilt, hence the conviction rested indirectly on the use of the immunized statement, and could not be harmless beyond a reasonable doubt.

Additionally, in this case the Assistant State Attorney clearly was on notice that Coleman was represented by counsel on the related first robbery, yet he did not notify Coleman's counsel before subpoenaing Coleman to give his sworn statement and took Coleman's statement without counsel being notified or present. This presents a serious ethical violation that we submit warrants the setting aside of the conviction and dismissal of the case.

In *Yatman*, cited above, the Fourth District Court of Appeal considered a remarkably similar situation, but with the

distinguishing features that the Assistant State Attorney who took a deposition of the ultimate defendant may not have known the person was represented by counsel on a related case when he took the statement, and the witness's lawyer did find out about the deposition shortly before it occurred. Even so, the Fourth District Court of Appeal had this to say about the ethical violation involved and its possible impact on the prosecution:

> This brings us to the ethical considerations involved in a case when the prosecution communicates with an individual charged with an offense but does so without notifying that individual's attorney. We concede that the case in which the deposition was taken was not the criminal case in which the appellee was the defendant. However, the charge against Kozakoff and the charge against appellee either arose out of the same criminal episode or else are so closely connected as to make testimony which is relevant in one case very likely relevant in the other. We concede also that counsel for appellee did receive actual knowledge of the subpoena within the hour before his client was mandated to appear. But the ethical violation had occurred, or at least had been set in motion, by that point.
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> There appears to be some doubt among some prosecutors that DR7-104 Code of Professional Responsibility, 32 F.S.A., applies to their activities. Perhaps this doubt exists because prosecutors do not have an individual client to represent. Be that as it may, there is probably no provision of the Canons of Ethics more sacred between competing lawyers than the prohibition against communicating with another lawyer's client on the subject of the representation. Such knowing communication constitutes the grossest sort of unethical conduct.
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> Disciplinary Rule 7-104 of the Code of Professional Responsibility applies equally to lawyers involved in the prosecution of criminal cases as in civil cases. [citations omitted] If any communication with a person represented by counsel on the subject under litigation is prohibited, then taking the deposition of an individual charged with a criminal offense without notice to his

> counsel regarding matters which are relevant to the criminal charges pending against said represented individual is also clearly prohibited by the foregoing disciplinary rule.
>
> This record is not clear as to whether the assistant state attorney taking the deposition in fact knew appellee was represented by counsel. It may be that he did not. But in a matter involving this degree of ethical delicacy it would behoove one in his position to make some reasonable inquiry to find out.
>
> *While we condemn the procedure employed here, we conclude that it does not automatically require a dismissal* of the information, since the authorities generally hold that *violations of ethical considerations do not require reversal on appeal*. *Yatman v. State*, 320 So.2d 401, 402,403 (Fla. 4th DCA 1975)(emphasis supplied).

In Coleman's case, however, the State clearly knew that Coleman had a lawyer representing him on the related charge and clearly did not notify Coleman's counsel. So, although the *Yatman* court held that taking a statement of a person represented by counsel on a related matter did not *require* dismissal, when it was not clear that the state attorney knew the person was actually so represented and the attorney for the witness did get notice in advance of the statement, it said that had the state attorney known that the witness was represented by counsel and nevertheless communicated directly with the represented person, such conduct would constitute the "grossest sort of unethical conduct." Given the egregious nature of the misconduct here, we argue that Coleman is entitled to have his conviction vacated and the charges dismissed.

CONCLUSION

Appellant Ernest Coleman requests this Honorable Court reverse his conviction and sentence and dismiss the charge in the information, prohibiting any further retrial.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Coleman certifies that the size and style of type used in this brief is 12 point Courier or Courier New.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Attorney General Robert Butterworth, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, by hand delivery via courier, this March _____, 2002.

_____
William Mallory Kent