



# Legal Advisor

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**Jerry Hill**  
**State Attorney**

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Misdemeanor	534-4926
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## QUESTIONING THE INCARCERATED SUSPECT

by J. Kevin Abdoney

Both U.S. and Florida law require that subjects in formal custody be afforded certain rights. Those rights, such as the right to an attorney, are recognized by the Fifth and Sixth Amendments to the U.S. Constitution, which have been incorporated into the Florida Constitution. With regard to the right to counsel, the Fifth Amendment right derives from the well-known U.S. Supreme Court decision in Miranda vs. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), in which it was held that a person who is "in custody" and subjected to police interrogation shall, among several rights, have the right to the presence of an attorney before and during questioning. The Sixth Amendment right to an attorney arises in the specific situation in which a person has already been charged with a crime and formal prosecution has commenced. This article will give the investigating officer an understanding of an incarcerated person's rights to an attorney and how to deal with them when questioning him or her.

*We adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good. Hess vs. State, 794 So. 2d 1249, 1259-61 (Fla. 2001)*

In any situation in which the officer intends to question a suspect, he or she should first decide whether the questioning will constitute "custodial interrogation" such that the Fifth Amendment applies, requiring the reading of *Miranda* warnings. The two questions the officer must ask himself or herself are: Whether the suspect is "in custody," and: Whether the suspect is going to be subjected to interrogation. The answers to these questions will vary depending upon the circumstances of each case. However, as a

<i>Inside this Issue</i>	<i>Page:</i>
LEO Reminders	2
Questioning the Incarcerated Suspect...continued from page 1...	2
LEO News	3
Questioning the Incarcerated Suspect...continued from page 2...	3
From the Courts	4
TOP COPS	4



# LEO REMINDEES

## AN IMPORTANT REMINDER ABOUT A RECENT DEVELOPMENT REGARDING MIRANDA

On June 16, 2004, the Fourth District Court of Appeal issued an opinion in West vs. State of Florida, 876 So. 2d 614 (2004), in which a suspects confession was suppressed because Miranda warnings contained in the Broward County Sheriff's Department waiver form were inadequate. Specifically, although the form indicated that the accused has a right to an attorney before questioning, it failed to state that the individual has a right to an attorney *during* questioning as required by the Miranda Court. In addition, the form failed to state that the suspect has the right to cease questioning at any time.

Please be reminded to check the forms and cards used by your agency and insert the appropriate language as necessary.

# QUESTIONING THE INCARCERATED SUSPECT

...continued from Page 1...

rule of thumb, questioning is considered "custodial interrogation" when it is "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," Miranda, 384 U.S. 436, 444, 477, 86 S. Ct. 1602, 1612, 1629, 16 L.Ed. 2d 694, 706, 725. While the officer will encounter many circumstances outside the context of the incarcerated suspect, in which the answers to these questions may be subject to interpretation, it is safe to say that any questioning of a suspect about his or her involvement in the commission of a crime, one who is in jail, detention, prison, or a holding cell or police cruiser, will require the reading of Miranda.

Knowing, then, that the officer must read Miranda to the incarcerated suspect, the officer must next ask himself or herself whether the suspect has properly waived his or her Miranda rights and whether the additional Sixth Amendment right to an attorney applies. It is best to start this analysis with the question, "What is this suspect incarcerated for?" If the suspect is incarcerated for the offense about which the officer intends to ask questions, then the suspect's Sixth Amendment right to counsel, a right separate and distinct from his Miranda right to counsel, may apply.

The Sixth Amendment right to counsel applies when a suspect has been formally charged with a crime and formal prosecution has commenced. A suspect's arrest by affidavit or warrant is sufficient to amount to a formal charge. In addition, formal prosecution typically commences at the suspect's first exposure to the judicial tribunal; which may be the first appearance hearing or arraignment if the suspect was released from custody



*Kevin Abdoney is an Assistant State Attorney in the Child Abuse / Sex Abuse Division. In addition to his caseload, Kevin is also the Division Chief over that area. He has been with the State Attorney's Office since November 1999.*

prior to first appearance. This is usually the first time a suspect will be advised of his Sixth Amendment right to have an attorney represent him or her during the prosecution of his or her case. If a suspect does not have an attorney prior to either of these hearings, one will be appointed to him or her at his request at that time.

In those situations in which the suspect invokes his Sixth Amendment right to counsel, either by appearing with an attorney or by accepting the appointment of an attorney, the officer may not question him or her about that offense without permission from the attorney and the suspect via proper Miranda waiver. In addition, the officer may be contacted by an attorney prior to either of these court dates indicating that he represents the suspect and not to question his or her client. In this situation, the officer should not attempt to interview the suspect. There may be circumstances in which the officer receives such contact from an attorney, but the suspect does not know he or she is represented

# QUESTIONING THE INCARCERATED SUSPECT

...continued from Page 2...

because, for instance, his family retained the attorney without his knowledge. Under another scenario, the defendant may in fact be represented by an attorney, but initiates contact with law enforcement out of a desire to speak. In these instances, the officer should contact the State Attorney's Office for guidance as to whether or not he or she may attempt to question the suspect. As a general rule, however, an incarcerated suspect who is represented by an attorney may not be questioned about the offense for which he or she is represented without permission from the attorney and suspect.

As is sometimes the case, however, an officer may wish to question an incarcerated person who is a suspect in a crime for which he or she is not currently in custody. Prior law in Florida was confusing as to whether law enforcement was permitted to interrogate a person who is in custody and who had invoked his Sixth Amendment right to an attorney. In State vs. Guthrie, the Second District Court of Appeal stated that a suspect's signing of a claim of rights form at his first appearance hearing on a grand theft charge precluded questioning by law enforcement on an unrelated sexual abuse charge. 666 So. 2d 562 (1995). However, the Second District ruling was in conflict with the Florida Supreme Court's ruling in Sapp vs. State, 690 So. 2d 581 (1997).

In the Sapp case, a suspect was questioned about a robbery-homicide for which he had not been arrested while he was in custody on a separate robbery charge. The defendant had invoked his Fifth (Miranda) and Sixth Amendment rights to an attorney on the robbery charge for which he was in custody and was represented by the public defender. While the defendant

was in jail awaiting trial on the first robbery charge, law enforcement obtained a confession from him after Miranda on the second, unrelated robbery-homicide. The public defender moved to suppress the confession to the unrelated robbery-homicide, claiming that it was obtained in violation of the defendant's Fifth and Sixth Amendment rights to counsel. The Supreme Court of Florida ultimately held that the defendant's invocation of his Fifth and Sixth Amendment rights to counsel on the first robbery charge, while preventing law enforcement from questioning the defendant about that charge, did not preclude questioning him about the second, unrelated robbery. The Court reasoned that the defendant's attempt to invoke his Miranda rights on the claim of rights form signed in the first robbery case was not effective to preclude questioning on the second robbery because *when he signed the form* custodial interrogation on the second robbery had not begun and was not imminent. The Court stated that "requiring the invocation [of the right to counsel] to occur either during custodial interrogation or when it is imminent strikes a healthier balance between the protection of the individual from police coercion on the one hand and the state's need to conduct criminal investigations on the other." Sapp, 690 So. 2d at 586.

The Sapp Court disapproved of the Second District's holding in Guthrie and quashed its decision. Therefore, according to current Florida law, if the officer wishes to question a suspect who is in custody about an unrelated offense, the only concern he or she must have is reading Miranda and obtaining a legally sufficient waiver.



LEO  
NEWS

## LAKELAND P. D.

Officer David Albares retired in October 2004 after having served more than 27 years.

Officer Thomas Brown retired in October 2004 after having served more than 27 years.

Officer Joe Rodman retired in October 2004 after having served more than 10 years.

Officer Louis Hemness retired in October 2004 after having served more than 17 years.

Officer Carlisle Phillips retired in May 2004 after having served more than 25 years.

Congratulations to all of you on your retirement and thank you all for your many years of service to the community and the Tenth Judicial Circuit.



**Hardee County**  
124 South 9th Avenue  
Wauchula, FL 33873  
Phone: (863) 773-6613  
Fax: (863) 773-0115

**Highlands County**  
411 South Eucalyptus  
Sebring, FL 33870  
Phone: (863) 402-6549  
Fax: (863) 402-6563

**Polk County**  
P.O. Box 9000, Drawer SA  
Bartow, FL 33831-9000  
Phone: (863) 534-4800  
Fax: (863) 534-4945

**Child Support Enforcement**  
215 N. Floral Avenue  
Bartow, FL 33830  
Phone: (863) 519-4749  
Fax: (863) 519-4759

**Lakeland Branch Office**  
930 E. Parker Street, Suite 238  
Lakeland, FL 33801  
Phone: (863) 499-2596  
Fax: (863) 499-2650

**Winter Haven Branch Office**  
Gill Jones Plaza  
3425 Lake Alfred Rd. 9  
Winter Haven, FL 33881  
Phone: (863) 401-2477  
Fax: (863) 401-2483

#### LEGAL ADVISOR STAFF

JERRY HILL, PUBLISHER

✉ email: [jhill@sao10.com](mailto:jhill@sao10.com)

CHIP THULLBERY, MANAGING EDITOR

✉ email: [cthullbery@sao10.com](mailto:cthullbery@sao10.com)

MICHAEL CUSICK, CONTENT EDITOR

✉ email: [mcusick@sao10.com](mailto:mcusick@sao10.com)

LORENA DIAZ, GRAPHIC DESIGN

✉ email: [ldiaz@sao10.com](mailto:ldiaz@sao10.com)

For comments or suggestions, contact us at the above e-mail addresses.

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## ...FROM THE COURTS...

### DEFENDANTS' DAUGHTERS WERE CITIZEN INFORMANTS.

The defendants were charged with possession of cocaine and paraphernalia and filed a motion to suppress evidence, asserting that there was insufficient probable cause to justify the issuance of the search warrant under which the cocaine and paraphernalia were found. The facts on which the motion was based were that officers obtained a search warrant for the defendants' residence after they met with the defendants' daughters at the daughters' request and learned from them that the

defendants' had a small safe in their bedroom in which there were baggies of white powder with the word cocaine written on them and a weight scale. The trial court granted the motion, but on appeal the Second District reversed, holding that the daughters qualified as citizen informants whose statements provided probable cause for the issuance of the warrant. *State v. Gonzalez*, 29 FLW D2048 (Fla. 2d DCA Sept. 10, 2004).

### ANOTHER CONSTRUCTIVE POSSESSION CASE.

The defendant, a juvenile, was charged with possession of marijuana. At her trial, an officer testified that he witnessed an assistant principal search the defendant's backpack and find marijuana in it. The defendant testified that she did not know the marijuana was there and that she had not looked in the particular pocket where it was found for some time. She said that she had left the backpack unattended on the floor of her classroom while she cooked at a stove during cooking class

and then picked it up when summoned to the assistant principal's office for the search. The trial court found her guilty as charged, but on appeal, the Second District reversed, holding that in light of the defendant's un rebutted testimony the state had failed to sufficiently prove that the defendant had knowledge of the presence of the marijuana in order to establish that she had constructive possession of it. *P.M.M. v. State*, 29 FLW D2203 (Fla. 2d DCA Sept. 29, 2004).

### TAKING MORE THAN THE DOCTOR ORDERED CAN GET YOU IN TROUBLE.

The defendant was charged with attempted murder and aggravated battery. At her trial, she attempted to assert an involuntary intoxication defense by having a doctor testify concerning the effect on her of certain drugs which had been legally prescribed to her but of which she had taken greater than the prescribed doses.

The court refused to allow the doctor to testify, and the defendant was convicted as charged. On appeal, the First District affirmed, holding that since the defendant took larger than prescribed doses her intoxication was voluntary and thus not a legal defense. *Cobb v. State*, 29 FLW D2208 (Fla. 1<sup>st</sup> DCA Oct. 1, 2004).

# TOP COPS

I would like to recognize Officer Jeff Barrett of the Lakeland Police Department. Officer Barrett has had over 700 hours of K-9 training and is a certified instructor for police K-9 teams. In addition to being a certified K-9 instructor, he is also a certified field training officer, or F.T.O. Because he is so knowledgeable in these matters, it is my intent to qualify him as an expert witness on detector K-9's and their training and deployment. Currently, he is assisting me to prepare for a suppression hearing scheduled for Dec. 3<sup>rd</sup> involving a Matheson v. State issue. Officer Barrett personally trained the K-9 team involved in this case and without his assistance, I would not be prepared to address this issue in court.

ASA Torie Avalon, Felony Division 5