IN THE SUPREME COURT OF FLORIDA

THOMAS WILLIAM RIGTERINK,

Appellant,

v. **CASE NO. SC05-2162**
L.T. No. CF03-006982-XX

STATE OF FLORIDA,

Appellee.
_____/

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Since it has been more than one year since this case was decided on direct appeal, and new Justices will be deciding this case on remand, the following facts are provided for this Court's review.

A. Trial Facts

On November 4, 2003, Rigterink was indicted for the first degree stabbing murders of Jeremy Jarvis and Allison Sousa, which occurred in a dual-use warehouse complex in Polk County, Florida, on September 24, 2003. Alex Bove was driving east on Highway 542 in Polk County near Winter Haven, Florida, when he witnessed part of the attack upon victim Jarvis. (T 1827-28, 1829, 1849). His attention was caught by two men in front of a combination office-warehouse building. One man was down on the ground and appeared to be covered in red. The second man was standing over him and appeared to be trying to drag him back into the building. (T 1828, 1831, 1843). The man on the ground struggled to try to get away. As he struggled to get up and run, the attacker grabbed him and his shirt came off. (T 1828, 1830).

When the injured man ran towards the door of the first unit of the building, Mr. Bove could see that a lot of blood was flowing from a wound on his chest. (T 1828). At that point, the

second man ran back into the building and came out with a large knife. (T 1828, 1832). Bove described the attacker as a Caucasian man in his late twenties to early thirties about 6 ft. 3 in. tall and about 200 pounds, with dark brown hair, wearing a white short-sleeved T-shirt and dark shorts. (T 1833-34).

Amanda Short and Allison Sousa worked in an office suite made up of units 1 and 2 of the building on the corner of State Road 542 and Jimmy Lee Road. (T 2361, 2363-64). The afternoon of September 23, 2003, the two women heard screaming outside of the office building. (T 2362, 2366, 2419). As they opened the front door to unit 1 and looked out, a dirty, shirtless, bloody man entered, frantically asking for help. (T 2369-71, 2421). A substantial amount of blood was running down his chest from a wound in the upper right side. (T 2372-73).

As the man sat down in a chair by the door, Ms. Short started down a hallway to the back of unit 1 to get some paper towels. Mrs. Sousa went to call 911 to get medical attention for the injured man. (T 2374, 2421-22). The sound of the front door slamming made Ms. Short turn to look back. (T 2376, 2422-23). She saw Mrs. Sousa on the telephone and a man going toward her. (T 2377). The man was Caucasian, in his late 20s to early 30s, with thick dark hair to the middle of his neck, wearing a long white t-shirt and dark shorts, about 6’3” tall, 170 pounds,

olive or tan complexion, and no facial hair. (T 2378, 2390, 2411, 2437-38).

As the man quickly and menacingly moved toward Mrs. Sousa, she screamed: “Don’t hurt me. Don’t hurt me.” (T 2384, 2423). Ms. Short turned back down the hallway, entered an office and dead bolted the door. (T 2384-85). She used one telephone to call 911 and another to reach the business owners. (T 2385, 2398). Outside the locked door Short heard banging, scuffling, and things hitting the walls. (T 2386, 2390). Ms. Short followed the directions of the 911 operator and stayed in the locked office until deputies arrived. (T 2467).

The Polk County Sheriff’s communication office received simultaneous 911 calls at 3:07:37 and 3:07:46 p.m. from telephones located in the office building. (T 2455–2458). In the 4-minute recording of the first call, a female voice can be heard saying “Oh, my God. Don’t —- don’t hurt me. No. No.” The speaking stops, and the 911 operator tells her coworkers all she can hear is “people just throwing something around,” then, total silence. (T 2460, 2461).

Dep. Angela Mackie is one of the first officers to arrive at the scene. She stopped at unit 1 where the door was open. (T 1854-55, 1864). The large garage-type door to the warehouse in the back of the unit was open. (T 1926). Inside she found two

bodies covered in blood, later identified as Jeremy Jarvis and Allison Sousa. (T 1855, 1926, 1929).

In unit 1, crime scene technicians found a bloody scene evidencing a violent attack. (T 2797-99). There was a large pool of blood in the entrance, as if someone had stood there while bleeding heavily. (T 2742). Heavy blood stains on the walls and doors indicated someone who was bleeding heavily had been pushed against the walls and doors with force. (T 2752, 2787-88). Arcs of blood spatters were consistent with a bloody knife being used to stab many times. (T 2744, 2748). The inside and outside of the entrance door was smeared with blood. (T 2732-33, 2776). The smeared blood trail continued down the hallway into the kitchen area, where large amounts of blood were smeared on the walls along with spatter from a bloody weapon. (T 2759-63). One last door had a bloody palm print in the smeared blood and had been pushed through the door jamb. (T 2764). After that, the trail ended with the bodies of Jeremy Jarvis and Allison Sousa in the warehouse area at the end of the hallway. (T 2769-2770). The two victims had bled to death from multiple stab wounds with a knife, approximately 10-15 inches long. (T 2824-2875).

In addition to Rigterink's partial confession at issue in this case, the State presented considerable physical and

circumstantial evidence linking him to the murders. Just 30 minutes before the murders, Rigterink called victim Jarvis to confirm that he had acquired a new supply of marijuana for sale. (T 2547-48, 2550, 3328, 3353, 3385). Rigterink was out of work and had no money to support his acknowledged drug habit. (T 2712, 3049, 4185-86, 4257). Two witnesses driving near the storage area described Jarvis's attacker in a way that matched the physical description of Rigterink. (T 1833-34, 2378, 2390, 2411, 2437-38). The victim's blood was found in the truck that Defendant was driving the day of the murders. (T 3128, 3133, 3194). DNA consistent with Rigterink's was found under the fingernails of victim Jarvis who suffered the brunt of the attack. (T 3140-41, 3194). Rigterink's bloody finger/palm prints were found at the scene. (R 249, T 2985, 3362-65). Rigterink owned a knife which was similar to the one which caused the fatal injuries. (T 3050-51). Defendant made changes to his appearance shortly after the crime. (T 3372-73). He avoided giving fingerprint samples to detectives and evaded questioning. (T 3335-36, 3338, 3343). When ultimately questioned by detectives, Rigterink gave inconsistent explanations of his behavior on the day of and on the days after the crime. (T 3353-62).

B. Suppression Hearing

Rigterink filed a written motion to suppress all statements he made to law enforcement officers, stating that evidence had been seized in violation of Defendant's rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, and that statements had been obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 9 and 12 of the Florida Constitution. However, the only specific claim in the motion was that the Miranda warning as given by the detectives was defective because it only told Defendant he had a right to counsel before questioning, without specifically advising him of the right to counsel during questioning. (R 191-93).

At the November 24, 2004 hearing on the motion, Rigterink amended the motion both verbally and by written interlineations to be limited to only the audio and video statements of Defendant recorded after the Miranda warning was administered. (R 223, 226). Rigterink told the trial court that "our argument is very narrow," relying only on cases in the Fourth District Court of Appeals that Miranda warnings "must include a warning that the defendant or suspect has the right to have an attorney present during any interrogation." (R 221). Defendant conceded

that the interview prior to the warning was not custodial, so no Miranda warning was required. (R 223-24).

The only witness called to testify during the suppression hearing was Det. Connolly, who had met with Defendant in an interview room across from the fingerprint station. (R 241). At no time did Defendant ask if he needed to have an attorney, seek to invoke any of the rights about which he had been informed, or hesitate to answer any questions. (R 256, 292). The Miranda warning on the waiver form read: "I do hereby understand that (1) I have the right to remain silent (2) Anything I say can and will be used against me in court (3) I have the right to have an attorney present prior to questioning (4) If I cannot afford an attorney one will be appointed to represent me by the court." The Defendant signed and dated the waiver acknowledgement and Det. Connolly signed as a witness. (SVII 195, R 256). The same warnings were given verbally by Det. Connolly at the beginning of Defendant's recorded statement. (R 257).

> Connolly: And ah . . .go ahead and sign those forms to let it. . . everybody know that, you know, this is your story.
>
> [Defendant]: Um um
>
> Connolly: And ah. . . I don't want it to be misconstrued or anything like that...
>
> [Defendant]: Sure.

> Connolly: . . .at a later date, you know what I'm saying. I want everybody to know what's coming out of your mouth and not what's coming out of my mouth and my mind, you know what I'm saying. (Pause) Okay (Inaudible) I, [Defendant's name]
>
> [Defendant]: Okay.
>
> Connolly: Do you hereby understand that one, I have the right to remain silent. Two, anything I can say, can and will be used against me in court. Three, I have the right to have an attorney present prior to questioning. Four, if I cannot afford an attorney, one will be appointed to represent me by the court. Do you understand that?
>
> [Defendant]: Sure.

(R 196).

The trial court entered a written ruling January 19, 2005, finding that Defendant was not in custody when he made his statement. (R 340-342). The court did not reach the adequacy of the Miranda warnings because his finding on custody made it unnecessary. (T 210-12).

C. Course of Appellate Proceedings

In a 4-2, decision, this Court held the Miranda warnings informing a defendant he had the right to talk with a lawyer prior to questioning, and that if he could not afford one, one would be appointed for him by the court were insufficient to inform him of his right to have counsel present during questioning as required by the principals espoused in Miranda and our state constitution. This Court in Rigterink v. State, 2

So. 3d 221 (Fla. 2009) applied its recent decision in State v. Powell, 998 So. 2d 531, 542 (Fla. 2008), to find the Miranda warning inadequate. In Powell this Court, in a 5-1 opinion, concluded: "Thus, we also agree with the Second District that to advise a suspect that he has the right 'to talk to a lawyer before answering any of our questions' constitutes a narrower and less functional warning than that required by Miranda." State v. Powell, 998 So. 2d 531, 542 (Fla. 2008).

The United States Supreme Court granted review of Powell and reversed this Court in a 7–2 decision, holding that the Miranda warnings Respondent received adequately conveyed his rights. Florida v. Powell, 130 S. Ct. 1195 (2010). The U.S. Supreme Court remanded the case back to this Court for reconsideration in light of its decision in Powell.

The Supreme Court had earlier granted the State's motion to stay and recall this Court's mandate on March 25, 2009. Florida v. Rigterink, 129 S. Ct. 1667 (2009). On March 1, 2010, the Court vacated this Court's decision, and, remanded this case for "for further consideration in light of Florida v. Powell, 559 U.S. ----, 130 S. Ct. 1195, --- L.Ed.2d ----, 2010 WL 605603 (2010).

This brief follows Rigterink's initial brief on remand from the Supreme Court after vacating this Court's earlier opinion.

SUMMARY OF THE ARGUMENT

Rigterink concedes that the Miranda warning in this case was adequate in light of Powell to protect his Fifth Amendment privilege against self incrimination. However, he contends the state constitution imposes more rigorous requirements under Miranda than its federal counterpart. Rigterink's argument lacks any merit.

Rigterink fails to assert any unique aspect or language of the Florida Constitution which is different from its Federal counterpart that would justify a departure from precedent of the United States Supreme Court or this Court. The standard set forth in Miranda and routinely followed by this Court has always been that warnings given must adequately convey to a person of ordinary intelligence and common understanding their rights. To find that the warnings in this case violate Florida's Constitution is inconsistent with this Court's own precedent and with the United States Supreme Court's decision in Powell that the warnings were sufficient and did reasonably convey to anyone of ordinary intelligence, his rights. As such, Rigterink has not provided any reason based on Florida's Constitution for a Miranda warning more expansive than the one required by its federal counterpart.

ARGUMENT

WHETHER THE MIRANDA WARNINGS GIVEN IN THIS CASE VIOLATED ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION?

I. The Supreme Court's Decision In Powell Establishes That The Warnings Provided To Rigterink Satisfy The Requirements Of Miranda

In Florida v. Powell, the United States Supreme Court held that Miranda warnings which did not expressly advise the defendant that he had the right to have a lawyer present during questioning were not defective and did not require suppression. The Court concluded the warnings reasonably conveyed to Powell his right to have an attorney present, "not only at the outset of interrogation, but at all times." Powell, 130 S. Ct. 1195, 1205 (2010). While this Court believed the warnings given to Powell to be misleading, such a concern was unfounded as determined by the Supreme Court when it concluded:

> The Florida Supreme Court found the warning misleading because it believed the temporal language-that Powell could "talk to a lawyer before answering any of [the officers'] questions"-suggested Powell could consult with an attorney only before the interrogation started. 998 So.2d, at 541. See also Brief for Respondent 28-29. In context, however, the term "before" merely conveyed when Powell's right to an attorney became effective-namely, before he answered any questions at all. Nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced. Instead, the warning communicated that the right to counsel carried forward to and through the interrogation: Powell could seek his attorney's advice before responding to "*any* of [the officers'] questions" and

> "*at any time ... during* th[e] interview." App. 3 (emphasis added). Although the warnings were not the *clearest possible* formulation of *Miranda's* right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading.

Florida v. Powell, 130 S. Ct. at 1205.

While Powell's warning included the admonition that he could use his general rights "at any time" you want during this interview, this part of the warning was not critical to the Supreme Court's ruling. The warnings in Rigterink do not vary materially from those provided in Powell which have been deemed by this nation's highest court to properly protect an individual's right against self-incrimination. In Powell, the Supreme Court resolved the conflict between those courts which expressly required the Miranda warning to tell a suspect that his right to counsel includes the right to have counsel present during the interrogation and those which held that telling the suspect he has the right to counsel prior to, or before questioning, without limitation, is sufficient.[1] Accordingly, it is clear that under Powell the warnings administered both orally and in writing to Rigterink, advising him that he had the right

[1] See State v. Modeste, 987 So. 2d 787, 792 (Fla. 5th DCA 2008) (Evander, J., concurring) ("[R]ecogniz[ing] that forty-two years after the issuance of the Miranda decision, there remains a split of authority in both the state and federal courts as to whether Miranda requires a suspect to be expressly advised that his right to counsel includes the right to have an attorney present during interrogation.").

to have an attorney present prior to questioning and that if he could not afford an attorney, one would be appointed for him, (R 196), was sufficient to satisfy Miranda.

Rigterink does not contend that the minor variation in wording between Powell and Rigterink was material to the Supreme Court's decision. Indeed, Rigterink concedes that the "warnings in this case" did "satisfy" Miranda as discussed in the Supreme Court's decision in Powell. (Rigterink's Brief on Remand at 2). However, Rigterink argues that that this Court decided his case on state law grounds, and, that the federal Constitution sets the "floor," not the "ceiling" for a defendant's rights in Florida. Accordingly, he asserts that Powell does not and should not control the outcome of his case. Rigterink's argument is unpersuasive.

Rigterink argues that the rights warning in this case was misleading. However, Rigterink's only 'evidence' of such confusion is the split of authority between appellate courts on the issue of whether or not a suspect must be expressly advised of the right to have an attorney present during interrogation. Rigterink misapprehends the nature of the 7-2 ruling in Powell. The Supreme Court held that being advised of the right to consult with a lawyer prior to questioning, without any temporal restriction on that right, is adequate to satisfy Miranda. This

was a decision based upon a common sense interpretation of the language utilized by the police officer in Powell and a repudiation of the 'confusion' engendered only by appellate courts' legal cogitations, which technically parsed the basic phrasing of Miranda. Consequently, the only 'evidence' that Rigterink submits for his assertion that the rights warning was confusing in this case, or, in Powell, has been rejected by the Supreme Court.

Contrary to this Court's decision in Rigterink below, a suspect hearing the warnings concerning his right to counsel would not infer any restriction on his access to a lawyer during the interrogation. Rather, as courts that have applied a less technical approach to similar warnings have concluded, the suspect would understand that he has an unqualified right to counsel that continues throughout his contact with the police.

Courts that have applied the reasonable approach exemplified by California v. Prysock, 453 U.S. 355 (1981) and Duckworth v. Eagan, 492 U.S. 195 (1989) have recognized the implausibility of this Court's reading of the Miranda warning on direct appeal. For example, in People v. Wash, 861 P.2d 1107 (Cal. 1993), cert. denied, 513 U.S. 836 (1994), the California Supreme Court addressed similar warnings that, in an inadvertent departure from the prescribed form, advised the suspect that he

had "the right to have an attorney present before any questioning." Id. at 1118. Like Rigterink, the defendant in that case challenged the warnings as "inadequate because they failed to inform him that he was entitled to counsel during questioning." Id. The court recognized that under Miranda "a suspect must be apprised, inter alia, that he has the right to the presence of an attorney during questioning," but the court concluded that the "warnings given defendant here 'reasonably conveyed'" that right. Id. at 1119. The court explained:

> Although the warning given to defendant here deviated from the standard form in failing to expressly state that defendant had the right to counsel both before and during questioning, we are not persuaded-as defendant's argument implies—that the language was so ambiguous or confusing as to lead defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began. Id. at 1118-1119.

See, e.g. People v. Lujan, 92 Cal. App. 4th 1389, 1401-1403, 112 Cal. Rptr. 2d 769, 778-779 (Ct. App. 2001) ("It is unreasonable to conclude that if counsel was present before questioning that the attorney would be excluded from the interrogation room once the interview began"); People v. Valdivia, 180 Cal. App. 3d 657, 663-664, 226 Cal. Rptr. 144, 148 (Ct. App. 1986) ("While the warning * * * deviated somewhat from the accepted form, we are unpersuaded that the words were facially ambiguous or would have caused most people to believe counsel would only be provided

before questioning and then whisked away once it began. A far more reasonable interpretation of the disputed language is that [the suspect] had the unfettered right to consult with and have counsel physically present before and at the interrogation.").

Miranda and subsequent cases have dictated that to be sufficient, warnings must adequately convey rights to a person of ordinary intelligence and common understanding. See Duckworth v. Eagan, 492 U.S. at 203 ("The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'") (quoting California v. Prysock, 453 U.S. 355, 361 (1981)).[2] There is no evidence in the record to suggest that the college educated Rigterink was confused or misled about his right to counsel.[3] The warnings at issue functioned in the field as intended by the Miranda Court, and they further met the

[2] Duckworth and Prysock confirm the principle that warnings about the right to counsel need not specifically refer to each aspect of that right. In both of those decisions, the Court rejected the contention that the warnings were inadequate because the suspect "was not explicitly informed" of one feature of the right to counsel-that he was entitled to "have an attorney appointed before questioning." Prysock, 453 U.S. at 359 (emphasis added); see Duckworth, 492 U.S. at 200 (rejecting the court of appeals' conclusion that the challenged formulation "denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation") (citation omitted).

[3] For example, we only tell the suspect he has the right to remain silent, not that he has the right to remain silent during questioning, or, after each question. Logically, the right to an attorney, like the right to remain silent, continues forward in time, unless and until limited.

requirements of Florida's Constitution protecting one's rights against self-incrimination.[4] By parceling the warnings out of context, Rigterink makes the same failed arguments rejected by the United States Supreme Court in Powell. As the Court determined in Powell, "[i]n context, ...the term 'before' merely conveyed when Powell's right to an attorney became effective - namely, before he answered any questions at all. Nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced." Powell, 130 S. Ct. at 1205.

Finally, in reversing this Court's decision and remanding this case for reconsideration in light of Powell rather than simply denying certiorari, the Court has indicated at least as to the sufficiency of the warning under Miranda, the case stands in the same posture as Powell on remand. Indeed, Rigterink, does not contend otherwise. However, Rigterink maintains that this Court has, and, should, as a matter of policy, depart from Miranda and the Supreme Court's interpretation of that decision to hold the warnings inadequate under our state constitution. Rigterink's argument is without merit.

[4] Indeed, the record in this case, and, Powell, is conspicuously devoid of any evidence that the defendants were confused or misapprehended their Miranda rights.

II. Florida Has Followed Miranda And Its Progeny And There Is No Separate Miranda Warning Applicable Only To Florida

There is no separate constitutional or statutory provision requiring a certain formulation of the Miranda warning peculiar to Florida. Nor, is there a separate line of cases from this Court requiring a prophylactic warning separate and apart from Miranda. Indeed, prior to Miranda, this Court did not require a defendant to be advised of his right to a lawyer at all prior to questioning. See State v. Outten, 206 So. 2d 392, 395-396 (Fla. 1968) (noting that the requirement a suspect be advised of his right to an attorney was "**added** by Miranda" and that prior to Miranda, admissibility in Florida was governed by Escobedo) (emphasis added).[5] Consequently, the requirement that an accused be advised of his right to consult with a lawyer prior to questioning in Florida is clearly a product of the Supreme Court's Miranda ruling, not some separate line of cases or rationale emanating from our state constitution.

Where identical state and federal constitutional provisions have shared an overlapping history, Florida courts have declined to depart from established United States Supreme Court

[5] This Court explained that "[a]s we understand Escobedo v. State of Illinois, supra, it does not stand for more than that an accused in custody of the police and under interrogation for a specific crime may not be denied the assistance of counsel if he requests it." (citing Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977).

decisions. In Mitchell v. State, 34 Fla. L. Weekly D1794 (Fla. 2d DCA Sept. 2, 2009), mandamus denied, 295 So. 3d 291 (Fla. 2010), the Second District Court of Appeal, Judge Altenbernd, contemplated the very issue before this Court, and recognized the aforementioned long-standing principle of law. The Second District observed:

> Despite the suggestion by a plurality of the members of the Florida Supreme Court in *Rigterink* that the ruling in *Powell* may be the result of a more liberal interpretation of article I, section 9, of the Florida Constitution than that required by the U.S. Supreme Court under the Fifth Amendment, we are entirely convinced that the language of these two constitutional provisions are identical for all practical purposes and that no reason specific to Florida would justify an outcome under the Florida Constitution at odds with the outcome under the U.S. Constitution. *See State, Dep't. of Health & Rehab. Servs. v. Cox*, 627 So.2d 1210, 1217 (Fla. 2d DCA 1993) (en banc) ("We conclude that it is not appropriate for this court, as a matter of state constitutional law, to depart from a recent United States Supreme Court ruling under a virtually identical federal constitutional clause unless we are convinced that aspects of Florida's constitution, law, or announced public policies clearly justify such a departure."), *rev'd on other grounds*, 656 So.2d 902 (Fla.1995). We cannot conceive of any reason why Florida would have a constitutional justification for a more extensive *Miranda* warning than the warning required by the U.S. Constitution.

Id. at 1796.

Rigterink's assertion that the state constitution requires a separate prophylactic warning not required under Miranda rests

entirely with this Court's decision in Traylor v. State, 596 So. 2d 957, 965 (Fla. 1992). Rigterink misinterprets Traylor.

This Court's decision in Traylor did not require that the Miranda warning include an explicit statement to advise a suspect that the right to counsel includes the right to have counsel present during the interrogation. Nor, is there any indication in Traylor that this Court was requiring any particular warning separate and apart from Miranda in order to satisfy our state constitution. Rather, in relying on both the state and federal constitutions in addressing the admissibility of confessions, this Court treated the state and federal Miranda requirement as coterminous, stating:

> Based on the foregoing analysis of our Florida law and the experience under *Miranda* and its progeny, we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that **prior to** custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, **that they have a right to a lawyer's help**, [FN13] and that if they cannot pay for a lawyer one will be appointed to help them.

Traylor, at 965-966. (emphasis added). This Court further explained in a footnote, that "a lawyer's help" **means** "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." Id. at 966. However, just as the Supreme Court

in Miranda noted that a suspect has the right to the presence of a lawyer during questioning; neither the Supreme Court, nor this Court in Traylor required that a suspect be *expressly* advised of the right to counsel during interrogation.

This Court in Traylor declined the opportunity to find a suspect must be expressly told he has a right to have an attorney present during questioning. On the contrary, this Court held that advising a suspect he has a "right to a lawyer's help" satisfies the requirements set forth in Miranda and Article I, Section 9 of the Florida Constitution. See Anderson v. State, 863 So. 2d 169, 182 (Fla. 2003) there is no talismanic fashion in which Miranda warnings must be read or a prescribed formula that they must follow, as long as the warnings are not misleading). Consequently, Traylor provides no support for finding a separate Miranda requirement under the Florida Constitution.

While this Court has relied on both the federal and state constitutions when interpreting the admissibility of confessions and the adequacy of Miranda warnings, contrary to Rigterink's argument, this Court has followed Supreme Court precedent. Indeed, in State v. Owen, 696 So. 2d 715, 719 (Fla. 1997), this Court acknowledged:

> Though our analysis in *Traylor* was grounded in the Florida Constitution, our conclusions were no

> different than those set forth in prior holdings of the United States Supreme Court.

See also Cuervo v. State, 967 So. 2d 155 (Fla. 2007) (Where this Court continued to follow its long history of precedent in specifically relying on the procedural safeguards set forth in Miranda to protect a suspect's Fifth Amendment right against self-incrimination, which the Court, once again acknowledged is reflected in Article I, Section 9 of the Florida Constitution.).

This Court has never relied solely upon state constitutional grounds in its analysis of issues involving an individual's right against self-incrimination. While this Court noted in Rigterink, that the "federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart," this Court also acknowledged it generally follows Fifth Amendment precedent when interpreting this fundamental right that mirrors the United States Constitution. Rigterink, 2 So. 3d at 241. Rigterink, however, argues that this Court has departed from Supreme Court precedent on the Fifth Amendment, and, as an example cites State v. Hoggins, 718 So. 2d 761, 772 (Fla. 1998). Rigterink's reliance upon Hoggins is misplaced.

In Hoggins this Court concluded that comments on the defendant's "pre-trial, pre- Miranda silence" were prohibited by Article I, Section 9 of the Florida Constitution, **and** by Florida's evidentiary rules. This Court did not find the admission of, and, comments on the defendant's post-arrest silence solely violative of the state constitution as suggested by Rigterink. Instead, this Court relied upon both federal and state law precedent, including the evidence code to find reversible error. This Court explained:

> Even if Florida's constitution did not preclude the use of Hoggins' post-arrest, pre- *Miranda* silence for impeachment purposes, Florida's rules of evidence would preclude its use because Hoggins' silence was not inconsistent with his trial testimony. *See Webb*, 347 So.2d at 1056 (finding inadmissible silence that is not inconsistent with a defendant's exculpatory statement at trial); *see also Hale*, 422 U.S. at 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (where government fails to establish threshold inconsistency between silence and exculpatory statement at trial, silence lacks any probative value and must be excluded). In Florida, a defendant takes the stand in a criminal case subject to impeachment by prior inconsistent statements to the extent that the probative value of the prior inconsistent statements is not outweighed by the risk of unfair prejudice to the defendant. *See* §§ 90.403, 608, Fla. Stat. (1997). The same rule applies to impeachment by prior silence, which is not precluded by the federal or state constitution. *See Parker*, 641 So.2d at 485; *Rodriguez,* 619 So.2d at 1032-33. Thus, inconsistency is a threshold question when dealing with silence that may be used to impeach. If a defendant's silence is not inconsistent with his or her exculpatory statement at trial then the statement lacks probative value and is inadmissible.

State v. Hoggins, 718 So. 2d 761, 770, 771 (Fla. 1998).

While this Court in Hoggins cited both the state constitution and state evidentiary rules, its decision rested primarily upon the latter consideration, the lack of probative value of such evidence. See § 90.403, Fla. Stat. (evidence is inadmissible where its probative value is outweighed by the danger of unfair prejudice). This Court recognized that "inconsistency between post-arrest silence and an exculpatory statement made by a defendant at trial is difficult to establish," and that "silence is generally deemed ambiguous." Id. at 771 (citing United States v. Hale, 422 U.S. 171, 176, 95 S. Ct. 2133, 45 L.Ed.2d 99 (1975)). Consequently, Hoggins does not support the notion that this Court has declined to apply Fifth Amendment precedent from the Supreme Court.

To the contrary, in Rigterink this Court recognized that should the defendant take the stand on retrial, the State would be able to impeach his testimony with his otherwise inadmissible statements in accordance with Supreme Court precedent. Rigterink, 2 So. 3d at 260 (citing Oregon v. Elstad, 470 U.S. 298, 307, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985)). Thus, Rigterink reaffirms the principle that this Court has generally followed Fifth Amendment precedent from the Supreme Court. See also Sapp v. State, 690 So. 2d 581, 586 (Fla. 1997) (rejecting defendant's claim that "regardless of whether federal law

permits an individual to anticipatorily invoke the right to have counsel present during custodial interrogation, Article I, section 9 of the Florida Constitution provides an independent basis for this right")[6]; Fitzpatrick v. State, 900 So. 2d 495, 510 (Fla. 2005) (in determining whether the defendant's statements were constitutionally obtained, this Court stated that it, "ultimately determine[s] constitutional issues arising in the context of the Fourth and Fifth Amendment, *and by extension*, article I, section 9 of the Florida Constitution.") (emphasis added); Ross v. State, 2010 WL 2103971, 30 (Fla. May 27, 2010) (discussing and applying the Supreme Court's plurality opinion in Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L.Ed.2d 643 (2004) which held that a second confession was inadmissible when a police officer intentionally questioned a suspect without administering Miranda in order to elicit an unwarned confession that was then used to elicit a second warned confession [two step]).

This Court's decisions in Powell and Rigterink, if reaffirmed solely on state constitutional grounds, will represent this Court's first material departure from the Supreme

[6] In Sapp this Court stated that "[a]lthough states may afford greater protection to the individual than the federal Constitution does, PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980), we do not interpret article I, section 9 of the Florida Constitution as doing so here." 690 So. 2d at 586.

Court's decisions applying and interpreting Miranda. See Miller v. State, 2010 WL 2195709, 15, 35 Fla. L. Weekly S323 (Fla. June 3, 2010) (where this Court asserted separate federal and state authority for the right against self-incrimination in Florida but ultimately rejected the defendant's claim that his Miranda warning was insufficient to inform him of the right to counsel by "[a]pplying the analysis" of the Supreme Court's decision in "Prysock.").

By asserting that the warnings are inadequate, Rigterink is asking this Court to abandon its responsibility to interpret the self-incrimination clause of the Florida Constitution as it is written. See State v. DiGuilio, 491 So. 2d 1129, 1137 (Fla. 1986) ("'[o]ur responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have an individuals.'") (quoting Gordon v. State, 104 So. 2d 524, 541 (Fla. 1958)). Article I, Section 9 of the Florida Constitution specifically provides that, "[n]o person shall be ... compelled in any criminal matter to be a witness against oneself." As this Court has recognized on numerous occasions, this clause mirrors the Fifth Amendment

right against self-incrimination.[7] While this Court may prefer a more expansive Miranda warning applicable to law enforcement officers in this State, without specific legislative, state constitutional, or, federal constitutional authority mandating such a warning, creating such a requirement would be an unwise and inappropriate exercise of judicial power. See State, Dept. of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1217 (Fla. 2d DCA 1993) (en banc), rev'd on other grounds, 656 So. 2d 902 (Fla. 1995) ("We conclude that it is not appropriate for this court, as a matter of state constitutional law, to depart from a recent United States Supreme Court ruling under a virtually identical federal constitutional clause unless we are convinced that aspects of Florida's constitution, law, or announced public policies clearly justify such a departure.").

A finding that these warnings were insufficient would not grant the citizens of this State any more protection than they currently have under Florida's Constitution. As such, the citizens of Florida cannot be given a privilege they already possess - to be adequately advised of their rights. To hold

[7] In Florida v. Powell, the Supreme Court noted that, "[a]lthough invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in Miranda. See Long, 463 U.S., at 1044, 103 S.Ct. 3469." Florida v. Powell, 130 S. Ct. 1195, 1202 (2010) (emphasis added).

these warnings inadequate is to give only lip service to the Supreme Court's repeated statement that the relevant inquiry is only whether the warnings reasonably "conve[y] to [a suspect] his rights as required by Miranda." State v. Powell, 998 So. 2d at 544 (Wells, J., dissenting), citing Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (quoting California v. Prysock, 453 U.S. 355, 361 (1981)).

Granting Rigterink's requested relief may also lead to absurd scenarios. For example, a murder suspect who was arrested in another State and properly Mirandized pursuant to the dictates of the United States Supreme Court, could have his confession thrown out when extradited to Florida merely because an *express* advisement of the right to counsel *during* questioning was not provided. Such a nonsensical result would not serve the interests of justice. Miranda's procedural safeguards were not intended to create a "constitutional straightjacket." Miranda v. Arizona, 384 U.S. 466, 467 (1966). Simply put, the Federal Constitution "does not require police to administer the particular Miranda warnings," as long as the procedure used effectively protects the privilege against self-incrimination. Dickerson v. United States, 530 U.S. 428, 440 n.6 (2000). The United States Supreme Court in Powell found the warnings effective to protect a suspect's privilege against self-

incrimination. Nothing in Florida's Constitution mandates a different result.

This Court's interpretation of the Fourth Amendment pursuant to Article 1, Section 12 of this state's constitution is governed by Supreme Court precedent. Although, there is not a comparable conformity clause in the Florida Constitution regarding the United States Supreme Court's interpretation of the Fifth Amendment, this Court has recognized the right against self-incrimination provided in Florida's Constitution is the same as that in the Fifth Amendment. This Court has always followed the United States Supreme Court's interpretation when addressing Miranda issues and it should continue to uphold its commitment to *stare decisis*.[8] Adopting a more generous view of a defendant's constitutional rights in Florida, without specific legislative or state constitutional authority sanctioning such separate treatment, would ill serve the interests of the

[8] At least two opinions in Florida have already cited the Supreme Court's decision in Powell to reject a challenge to the Miranda warnings. See Joseph v. State, 2010 WL 2675311, 2 (Fla. 4th DCA July 7, 2010) (citing Florida v. Powell, 130 S. Ct. 1195, 1205 (2010)) (Although the Miranda warning was not perfectly clear, it was "sufficiently comprehensive and comprehensible when given a commonsense reading."); Dominique v. State, 2010 WL 2509126, 2, 35 Fla. L. Weekly D1428 (Fla. 4th DCA June 23, 2010) ("However, in determining whether police officers have adequately conveyed Miranda warnings, the inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda. Florida v. Powell, 130 S. Ct. 1195, 1204 (2010))".

citizens of this State by unfairly hindering legitimate law enforcement efforts and producing an unjustified windfall to criminal defendants.[9]

III. As A Matter Of Law And Policy This Court Should Not Expand The Miranda Prophylactic Warnings Beyond What Is Required By The Supreme Court

Since the Supreme Court and Miranda do not require the warnings this Court stated was necessary in Powell and Rigterink, this Court should decline to expand the prophylactic warning in Florida given the heavy societal cost and minimal, if any, benefit to the justice system of such an expansion. While this Court stated that the Constitution sets the "floor" and not the "ceiling" for constitutional rights in Florida, this Court relied upon its recent decision in Powell and was clearly under the impression that Miranda required a suspect be explicitly advised that the right to counsel extends to and through having

[9] This Court's refusal to follow Supreme Court precedent under the Fourth Amendment led to passage of the 1982 revisions to Article I, Section 12. With this amendment, Florida courts became bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment, and provide no greater protection than those interpretations. See State v. Butler, 655 So. 2d 1123, 1125 (Fla. 1995) ("This Court is bound, on search and seizure issues, to follow the opinions of the United States Supreme Court regardless of whether the claim of an illegal arrest or search is predicated upon the provisions of the Florida or United States Constitutions.") (citations omitted). See also Perez v. State, 620 So. 2d 1256, 1258 (Fla. 1993) (the conformity clause not only binds the Florida courts to follow the United States Supreme Court's interpretation of the Fourth Amendment to the United States Constitution but also to "provide no greater protection than those interpretations.").

counsel present during the interrogation.[10] Consequently, this Court, and the parties on direct appeal did not have occasion to consider whether or not creating a separate Miranda prophylactic warning, applicable to Florida, is a wise policy. Since the recurring question of the sufficiency of Miranda and the specific warnings at issue in this case may very well impact a large number of criminal cases in this State, it is important for this Court to assess the perceived benefit versus the cost of such a rule. Moreover, this Court should consider whether suppression is an appropriate and necessary remedy in this, and other cases, for otherwise voluntary statements, administered in compliance with Miranda [in accord with Supreme Court case law], **in the absence of police misconduct**.[11]

The Supreme Court, in enacting a prophylactic rule attempts to assess and balance the attendant costs and benefits of such a rule. As explained by the Court Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (U.S. 2009) (emphasis added):

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[10] This Court's conclusion in Powell left no doubt that it was based squarely upon Miranda: "Thus, we also agree with the Second District that to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by Miranda." 998 So.2d at 542.

[11] Nothing in the record suggests that the police department adopted the particular warnings at issue here for the purpose of undermining the protections of Miranda. Indeed, after Powell, it is clear that the standard form satisfies Miranda.

> When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. "The value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost." *Minnick*, 498 U.S., at 161, 111 S. Ct. 486, 112 L. Ed. 2d 489 (SCALIA, J., dissenting). **We think that the marginal benefits of Jackson (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran, supra*, at 426, 106 S. Ct. 1135, 89 L. Ed. 2d 410).**

See also United States v. Patane, 542 U.S. 630, 640-641 (2004) ("But because these prophylactic rules (including the Miranda rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination")(internal citations omitted)(plurality opinion).

Courts have been increasingly reluctant to exclude or otherwise prohibit juries from hearing non-coerced, and, otherwise reliable confessions from either the guilt or penalty phases of criminal trials. This trend recognizes that the balance between the truth seeking function of criminal trials and the fact that the law has often required suppression of otherwise valid, probative evidence, for a defendant who has suffered no identifiable harm. These cases have relied on the

same rationale as those permitting consideration of illegally seized evidence and seek to balance the deterrent effect expected to be achieved by extending the Miranda exclusionary rule against the harm resulting from excluding otherwise reliable evidence from the truth-finding process.[12] See United States v. Havens, 446 U.S. 620, 627, 100 S. Ct. 1912, 64 L.Ed.2d 559 (1980) (noting that similar policies underlie the exclusionary rules under the Fourth and Fifth Amendments).

[12] See e.g. Harris v. New York, 401 U.S. 222, 224-26, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971) (absent actual coercion, a confession obtained without warning a defendant of his Miranda right to counsel may be used to impeach the defendant's testimony at trial); Oregon v. Hass, 420 U.S. 714, 722-24, 95 S. Ct. 1215, 43 L.Ed.2d 570 (1975) (finding otherwise voluntary statements obtained after a suspect had invoked his Miranda right to counsel but before counsel was provided admissible for impeachment purposes); Michigan v. Tucker, 417 U.S. 433, 446-52, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974) (The Fifth Amendment does not bar admission of the testimony of witnesses discovered through a defendant's unwarned but otherwise voluntary statements, nor does it bar the introduction of physical evidence discovered as a result of such statements); United States v. Patane, 542 U.S. 630, 124 S. Ct. 2620, 2626, 159 L.Ed.2d 667 (2004) (plurality opinion) (the 'fruit of the poisonous tree' doctrine does not extend to physical evidence derived from unwarned but otherwise voluntary statements.); New York v. Quarles, 467 U.S. 649, 657, 104 S. Ct. 2626, 2632 (1984) (concluding "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."). See also, United States v. Nichols, 438 F.3d 437, 443 (4th Cir. 2006) (concluding that "the policies underlying the Miranda exclusionary rule normally will not justify the exclusion of illegally obtained but reliable evidence from a sentencing proceeding.").

A consequential expansion of Miranda in this case and its exclusionary rule, would increase the costs of the Miranda framework in Florida without yielding any constitutionally based benefit.[13] The "[a]dmissions of guilt resulting from valid Miranda waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)). And, as this Court has stated, "We must keep in mind that the reason for informing individuals of their rights before questioning is to ensure that statements made during custodial interrogation are given voluntarily, not to prevent individuals from ever making these statements without first consulting counsel." Sapp v. State, 690 So. 2d 581 (Fla. 1997), citing Traylor, 596 So. 2d 957, 964 (Fla. 1992).

Expansion of a broad sweeping exclusionary or prophylactic rule must bear a heavy burden to justify its potentially far reaching and deleterious consequences.[14] "Powell effectively

[13] Of course, the State maintains as it did above, that there is no state legislative or constitutional provision which would authorize a Miranda prophylactic rule which differs from its federal counterpart.

[14] The number of published cases which have already applied this Court's decisions in Rigterink and Powell suggest that these decisions will have a significant impact upon criminal

establishes a per se rule that the standard Miranda form used by many police departments is defective as a matter of law and that all statements made during an interview in which the defendant signs this form are inadmissible." Mitchell v. State, 2 So. 3d 287, 290 (Fla. 2d DCA 2007) (Altenbernd, concurring), mandate stayed, 34 Fla. L. Weekly D1794 (Fla. 2d DCA Sept. 2, 2009). As noted by the Supreme Court, any rule that demonstrably renders truth and society "the loser," McNeil v. Wisconsin, 501 U.S. at 181, "'bear[s] a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness,'" United States v. Leon, 468 U.S. 897, 908, n.6, 82 L.Ed.2d 677, 104 S. Ct. 3405 (1984) (quoting Illinois v. Gates, 462 U.S. 213, 257-258, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983) (WHITE, J., concurring in judgment)). See Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 2614, 159 L.Ed.2d 643 (2004) (Kennedy, J., concurring in

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convictions and prosecutions in this State. Jackson v. State, 4 So. 3d 1287, 1289 (Fla. 2d DCA 2009) (reversing "Jackson's convictions for attempted murder and armed robbery with a firearm"); Mitchell v. State, 2 So. 3d 287, 288 (Fla. 2d DCA 2007) (reversing convictions for attempted first-degree murder and armed burglary of a dwelling with an assault or battery), mandate stayed, 34 Fla. L. Weekly D1794 (Fla. 2d DCA Sept. 2, 2009); State v. Soloman, 6 So. 3d 660, 661 (Fla. 2d DCA 2009) (finding Miranda warning defective under Powell but remanding for determination of whether or not the defendant was in custody); Acevedo v. State, 22 So. 3d 703, 704 (Fla. App. 5 Dist. 2009) (reversing burglary of a dwelling, grand theft and dealing in stolen property convictions).

the judgment) ("Evidence [obtained in violation of Miranda] is admissible when the central concerns of Miranda are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction."). The equities and balance in this case tilt decidedly against expanding Miranda in Florida beyond the reach and requirements of the federal Constitution. See Oregon v. Elstad, 470 U.S. 298, 318 (1985) ("The absence of any coercion or improper tactics undercuts the twin rationales--trustworthiness and deterrence--for a broader rule.").

In this case, it is clear that the detectives did not arrest Rigterink, nor did they believe he was in custody until Rigterink had issued his final, partial confession. Indeed, the defense conceded below it was a non-custodial interrogation until just prior to the warned statement [a point after detectives received notice during the interview that Rigterink's fingerprints matched those bloody prints left at the scene]. The detectives used a printed, Pasco County Sheriff's Office form which they read to Rigterink and that he read and initialed.[15] There is no evidence that the college educated

[15] As explained by the Supreme Court in Michigan v. Tucker, 417 U.S. 433, 447 (1974):

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which

Rigterink was in any way misled about his right to counsel. Indeed, there is no evidence to suggest that this rights warning has engendered any confusion among criminal suspects in this State. There is also no evidence that the detectives acted in bad faith. The detectives relied upon the previously unchallenged pre-printed Miranda form, and there is no evidence they were attempting to circumvent Miranda or otherwise deprive Rigterink of any right under the Florida or federal Constitutions. In other words, there is no evidence the officers engaged in any negligent, much less purposeful, misconduct. Suppression of the defendant's partial confession in this case and reversing his convictions for this brutal double homicide for which there is substantial and unquestioned evidence establishing his guilt, exacts a harsh and unwarranted penalty upon the citizens of this State. A penalty not justified in furtherance of Miranda, the exclusionary rule, or, the Florida Constitution. Accordingly, the State respectfully asks this Court to recede from Rigterink in light of the Supreme

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> has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future acts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Court's decision in Powell and affirm his convictions and resulting sentences.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the convictions and sentences imposed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. mail to David R. Parry, Esquire, Bauer, Crider, Pellegrino & Parry, 1550 South Highland Avenue, #C, Clearwater, Florida 33756, on this 27th day of July, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE