IN THE SUPREME COURT OF FLORIDA

THOMAS WILLIAM RIGTERINK	:	
		CASE NO. SC05-2162
Appellant,	:	
vs.	:	
STATE OF FLORIDA,	:	
Appellee.	:	

ON REMAND FROM THE SUPREME
COURT OF THE UNITED STATES

INITIAL BRIEF OF APPELLANT

Submitted by,

David R. Parry, Esquire
Bauer, Crider, Pellegrino & Parry
Attorneys for Appellant
1550 South Highland Avenue, #C
Clearwater, FL 33756
Florida Bar #0458491
(727)446-4800

TABLE OF CONTENTS

Table of Citations

Federal Cases

State Cases

STATEMENT OF THE CASE AND FACTS

On November 4, 2003, Thomas Rigterink was indicted for the first degree stabbing murder of Jeremy Jarvis and Allison Sousa, which occurred in a warehouse complex in Polk County, Florida, on September 24, 2003.

On September 9, 2005, a jury found Rigterink guilty as to each count of first degree murder. Following the penalty phase, the jury recommended a death sentence for each murder.

On August 20, 2004, before Rigterink's eventual trial, he moved to suppress all statements that he had made during the video- taped portion of his October 16, 2003, confession: Rigterink contended that these statements should be suppressed because the written and verbal *Miranda* Warnings provided by the Polk County Sheriff's Office Detectives were materially defective. Specifically, Rigterink challenged the verbal and written right-to-counsel warning he received because each advised him that he only had "the right to have an attorney present prior to questioning." The initial trial judge and a successor trial judge each denied the Motion to Suppress on the ground that Rigterink was not in custody and, therefore, was not entitled to any Miranda Warnings. Rigterink also objected to the admission and publication of the video-taped confession at

trial, which the Court overruled. Rigterink raised on Appeal that he was presented with a defective right-to-counsel warning provided by the interrogating detectives. This Court determined that Rigterink was in custody for purposes of Miranda. That the right-to-counsel warning he received was constitutionally deficient and that the admission and publication of his video-taped confession was harmful error.

This Court determined that, under its decision in *State v. Powell*, 998 So.2d 531 (Fla. 2008), the confession had to be suppressed. This Court determined that Article I, Section 9, of the Florida Constitution, as well as the Federal Constitution, required this Court to reverse the case.

On Petition for Writ of Certiorari, the United States Supreme Court held that the Warnings in this case did satisfy Miranda. *Florida v. Rigterink*, 130 S. Ct. 1235 (2010), relying on *Florida v. Powell*, 130 S. Ct. 1195 (2010). In coming to that conclusion, the Supreme Court assumed that the Warning that *Powell* had the right "to talk to a lawyer before answering any of the officer's questions," conveyed that "Powell could consult with a lawyer before answering any particular question" *Id*. at 1205. Having settled upon that interpretation of the Warnings, the Supreme Court also found that the statement that *Powell*

could exercise that right while the interrogation was underway, reasonably conveyed the right to have an attorney present at all times during the interrogation. *Id*. at 1205.

Upon Remand to this Court, this Court granted Respondent's Motion for a Briefing Schedule to address the limited question of "whether the Warnings given in this case violated Article I, Section 9, of the Florida Constitution."

SUMMARY OF THE ARGUMENT

This Court has already decided that the Warnings in this case do not pass muster under the Florida Constitution. Because Article I, Section 9, of the Florida Constitution requires that a suspect be "clearly informed" of his right to have a lawyer present during questioning, this Court held that a Warning informing a suspect 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 under the State Constitution and Traylor. See *Powell*, 998 So.2d at 542. The decision of the United States Supreme Court in this case does nothing to change the fact that this Court has decided the issue under State law. Therefore, pursuant to both Federal Law and this Court's own precedent, this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution and more broadly than that afforded by the Federal Courts.

This Court was correct in its interpretation of the Warnings for State law purposes. In *Rigterink*, citing its holding in Powell, this Court afforded the Warnings a natural and obvious interpretation: "The 'before questioning' warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning:

"there is nothing in that statement that suggests the attorney can be present during the actual questioning." *Powell*, 998 So.2d at 541. However, in reaching its conclusion that the Warnings complied with the dictates of Miranda, the United States Supreme Court had to assume that the Warnings meant: "Powell could consult with a lawyer before answering any particular question." *Florida v. Powell*, 130 S. Ct. at 1205. That interpretation was rejected by five members of this Court and two members of the Supreme Court. The very fact that Appellate Courts interpreted the same Warning in two distinctly different ways demonstrates that the Warnings are inherently ambiguous. Consequently, under State Law, Appellant was not clearly warned of his right to the presence of counsel during interrogation. Therefore, this Court was correct in finding the Warnings do not comply with the requirements of the State Constitution.

Reinstating this decision will not afford suspects additional rights vis-à-vis a custodial interrogation because "Miranda"–type Warnings are simply procedural safeguards to insure that a suspect is adequately informed of his rights. In reaffirming its decision in this case, this Court will merely hold that under the Florida Constitution these unique Warnings were not the functional equivalent of those required by State Law.

ARGUMENT

ISSUE

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

This Court has already decided that the Warnings at issue in this case were inadequate under the Florida Constitution and *Traylor*. The Florida Supreme Court has consistently maintained that, although they are similar, the procedural safeguards to assure compliance with the Self-incrimination Clause of the Florida Constitution are separate from those required by *Miranda*. Before the United States Supreme Court accepted review in this case, this Court held that in addition to, and aside from, *Miranda*, "Article I, Section 9 of the Florida Constitution requires that a suspect be clearly informed of the right to have a lawyer present during questioning." *Rigterink v. State*, 2, So.3d, 250, 251. In light of that conclusion, this Court held that the Warnings at issue failed to satisfy the requirements of the Florida Constitution because *Rigterink* was not clearly informed of his right to the presence of counsel during the custodial interrogation. The fact that the United States Supreme Court subsequently ruled that the Warnings are adequate under the

floor," or absolute minimum set by that Court under the Federal Constitution, does nothing to change this Court's decision that the confession was inadmissible under State Law.

It is well settled that this Court has the authority on remand to reinstate its decision under State Law. With regard to the right against self-incrimination under Article I, Section 9, this Court is not obligated to follow federal precedent. See *Rigterink v. State*, 2 So.3d 221, 241 (Fla. 2009) ("[U]nlike Article I, Sections 12 ("Searches and Seizures") and 17 ("Excessive punishments"), Section 9 does not contain a proviso that we must follow federal precedent with regard to the right against self-incrimination."). The United Stated Supreme Court also recognized this Court's authority under Federal Law:

> Powell notes that "'state courts are absolutely free to interpret State Constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" Brief for Respondent 19-20 (quoting *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)). See also, e.g., *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). *Powell* is right in this regard. Nothing in our decision today, we emphasize, trenches on the Florida Supreme Court's authority to impose, based on the State's Constitution, any additional protections against coerced confessions it deems appropriate.

Florida v. Powell, 130 S. Ct. at 1203.

Justice Stevens, in his dissent in *Rigterink* wrote:

> In my view, the judgment below rested upon an adequate and independent State ground and the Court therefore lacks jurisdiction over this case. See *Florida v. Powell*, 559 U.S. _____, _____ (2010) (Slip Op., at 1-8) (Stevens, J., dissenting). Indeed, the independence of the State Law ground in this case is even clearer than in Powell because the Florida Supreme Court expressly acknowledged its obligation "to give independent legal import to every phrase and clause contained" in the State Constitution, 2 So.3d 221, 241 (2009) (quoting *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992)), and stated 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," 2 So.3d at 241. Because the independence of the State Law ground is "clear from the face of the Opinion," *Michigan Long*, 463 U.S. 1032, 1041 (1983), we do not have power to vacate the Judgment of the Florida Supreme Court.

Florida v. Rigterink, 130 S. Ct. 1235 (2010)

Pursuant to State precedent, this Court is obligated to afford primacy to the State Constitution: "when called upon to decide matters of fundamental rights, Florida's State Courts are bound under federalist principles to give primacy to our State Constitution . . . . " *Traylor*, 596 So.2d at 962; Rigterink,

2 So.3d at 241. Recently, in *Miller v. State*, Case No. SC08-287, ____ So.3d ____, 2010 WL 2195709 (Fla. June 3, 2010), this Court reaffirmed its practice of primacy:

> "To be held admissible, the confessions must pass muster under both the State and Federal Constitutions.... [W]e examine the confessions initially under our state Constitution; only if they pass muster here need we re-examine them under Federal Law." *Traylor v. State*, 596 So.2d 957, 961-62 (Fla. 1992) ("In any given state, the Federal Constitution thus represents the floor for basic freedoms; the State Constitution, the ceiling.").

Id., 2010 WL 2195709 at 11.[1]

In *Rigterink* this Court explained that, under the primacy doctrine, Florida's right against self-incrimination is broader than that right under the Fifth Amendment:

> Thus, in this context, the Federal Constitution sets the floor, and 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. See, e.g., *In re: T.W.*, 551 So.2d 1186, 1191 (Fla. 1989)("State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of Federal Law . . . [W]ithout [independent state law], the full realization of our liberties cannot be guaranteed." (quoting William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977))). This Court is the ultimate "arbiter[ ] of

[1] *See also Armstrong v. Harris*, 773 So.2d 7, 17 (Fla. 2000)("[O]ur State Constitutional rights thus provide greater freedom from government intrusion into the lives of citizens than do their federal counterparts . . . In short '[T]he Federal Constitution . . . represents the floor for basic freedoms; the State Constitution, the ceiling.'").

> the meaning and extent of the safe-guards provided under Florida's Constitution." *Busby v. State*, 894 So.2d 88, 102 (Fla. 2004).

Rigterink, 2 So.3d at 241.

For a century and a half Florida has provided protections under the State Constitution to ensure voluntariness of confessions. See *Miller*, 2010 WL 2195709 at 12 (citing *Traylor*, 596 So.2d at 963-966). In *Miller*, the Court noted: "To ensure voluntariness, we traditionally have required as a matter of State Law that one charged with a crime be informed of his rights prior to rendering a confession." *Id.* at 12 (citing *Traylor*, 596 So.2d at 964) (emphasis in original).

Traylor imposed its own requirements on law enforcement regarding confessions, declaring that with regard to matters of fundamental rights, Florida's State Courts are bound to give primacy to the State Constitution and to "construe each provision freely in order to achieve the primary goal of individual freedom and autonomy." Id. at 962-63. Before examining the confession at issue in Traylor, the Court defined the "basic contours" of State Law under Article I, Section 9. *Id*. at 961. Under a subsection titled "Federalism," the Court noted that as of 1986 at least eleven states had chosen to interpret the self-incrimination provisions of their own State Constitutions in a manner independent of the Supreme Court's

Fifth Amendment jurisprudence. *Id*. The Court asserted that, pursuant to "federalist principles," Florida was free to "place more vigorous restraints on government intrusion than the federal charter imposes." Id. (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)). Reasoning that the Supreme Court exercises constraint in construing the extent of the Federal Constitution, the Court explained:

> Federal and State Bills of Rights thus serve distinct but complementary purposes. The Federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The State Bills of Rights, on the other hand, express the ultimate breadth of common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their Bills of Rights, State Courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the State, the State's own general history, and finally any external influences that may have shaped State Law.

Id. at 962.

After reviewing Florida jurisprudence since 1889 regarding the necessity of Warnings for custodial interrogations, the *Traylor* Court explained that while Miranda provided

"experience," Miranda procedural safeguards were merely "similar to" those rights Florida law enforcement must recite to suspects before interrogation: "In Miranda . . . the Federal Court established procedural safeguards similar to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation." *Traylor*, 596 So.2d at 965 n.12. See also Almeida v. State, 737 So.2d 520, 524 (Fla. 1999) (stating that *Traylor* guidelines for use in Florida are "similar" to those announced in *Miranda*).

In *Miller*, 2010 WL 2195709 at 12-13, this Court laid out both sets of rights, State and Federal, demonstrating that they are separate.[1] With regard to the rights required by the Florida Constitution as outlined in *Traylor*, this Court wrote: "In delineating these rights, we noted that in Miranda, the Federal Court established procedural safeguards similar to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation." *Id*. at 13 (citation omitted).

[1] In *Miller*, 2010 WL 2195709 at 12, this Court suggests the continued validity of its decision in *Powell*: "Specifically, the warnings given to Miller satisfy the requirements of *State v. Powell,* 998 So. 2d 531 (Fla.2008), *rev'd on other grounds,* --- U.S. ----, 130 S.Ct. 1195, --- L.Ed.2d ---- (2010), and do not constitute a narrower and less functional warning than that required by *Miranda.*"

In *Powell*, this Court cited *Traylor* throughout the Opinion. *Powell*, 998 So.2d at 534, 535, 535 n. 2, 537-538, 540. Before considering the actual Warnings given to Mr. *Powell*, the Court reaffirmed *Traylor*'s immutable in-custody Warnings:

> [T]o ensure the voluntariness of confessions as required by Article I, Section 9 of the Florida Constitution, this Court in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), outlined the following rights Florida suspects must be told of prior to custodial interrogation:
>
> > [1] they have a right to remain silent, [2] that anything they say will be used against them in court, [3] that they have a right to a lawyer's help, and [4] that if they cannot pay for a lawyer one will be appointed to help him. Id. at 966 . . . .

Powell, 998 So.2d at 534-535 (emphasis added). Quoting *Traylor,* the Court explained that "the help of an attorney includes both the right to consult with an attorney before questioning and the right to have an attorney present during questioning." Id. at 535 n.2 (citing *Traylor*, 596 So.2d at 966 n.13). In explaining its holding that "Mr. Powell was not clearly informed of his right to have counsel present during interrogation," the Court repeated the interrogation rights afforded suspects under Florida Law:

> Under Article I, Section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to a lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.

> Accord *Ramirez [v. State*], 739 So.2d [568, 537 (Fla. 1999)] (finding suspects must be informed that they have a right to an attorney during questioning); *Sapp [v. State]*, 690 So.2d [581, 583-84 (Fla. 1997] 583-84 (same). The standard police department Miranda form used during the interrogation of Powell did not expressly indicate that he had the right to have an attorney present during questioning. Powell was told he had the right to talk with a lawyer before questioning and that he could use that right at any time during the interview. The right he could use during the interview was the right he was told he had to talk with a lawyer before answering any questions. This is not the functional equivalent of having the lawyer present with you during questioning.

Powell, 998 So.2d at 540.

If that were not enough, other language in *Powell* shows that a separate standard under state law provided independent authority for the holding:

> After our holding in *Traylor*, we reiterated the principles espoused in *Traylor* and the *Miranda* decision in several other decisions from this Court. In both *Ramirez v. State*, 739 So.2d 568 (Fla. 1999), and *Sapp v. State*, 690 So.2d 581 (Fla. 1997), neither of which presented the exact issue involved in the case that is presently before us, we noted the requirements of both the Fifth Amendment, as explained in *Miranda*, and the Florida Constitution, as explained in *Traylo*r. Our explanation of the Federal and the State requirements included the requirement that a suspect be informed of the right to have counsel present during questioning. See *Ramirez*, 739 So.2d 573 (quoting from *Miranda* that suspects must be informed that they have a right to an attorney during questioning);

> *Sapp*, 690 So.2d at 583-84 (citing to Miranda for the proposition that an individual has the right to have counsel present during custodial interrogation).

Powell, 998 So.2d at 537-38.

This Court made it clear in *Rigterink* that it was relying on its previous ruling in *Powell*. This Court took great efforts to explain that the decision finding the Warnings were deficient based on an independent State ground. It is clear that the Court relied on two individual sets of criteria when it "noted the requirements of both the Fifth Amendment, as explained in Miranda, and the Florida Constitution, as explained in *Traylor*."[1] Id. (emphasis added). The Court's reference to "the Federal and the State requirements" as opposed to "the Federal and State requirements" also indicates that the Court analyzed the Warnings under the two separate bodies of law.

In *Rigterink*, as previously announced in *Powell*, this Court used Federal precedent merely as guidance, and the Court did not adhere to a strict primacy analysis simply because it did not have to do so. Until the United States Supreme Court decided this case, there was no Supreme Court law on point. In other

[1] *Traylor* rights also reappear in *Rigterink*, 2 So.3d 221. In *Rigterink* the Court held that, in light of *Powell*, the warning given to *Rigterink* was materially deficient. The court repeated the *Traylor* warnings and noted that those warnings had been established nearly seventeen years before under the state constitution. *Id*. at 254.

words, there was nothing in the case law of the Supreme Court interpreting *Miranda* that was in conflict with this Court's conclusion that the Warnings herein were insufficient. For that reason alone, this Court had no reason to make a plain statement that the Warnings were deficient under the requirements of State Law as distinct and separate from Supreme Court decisions. Furthermore, because *Miranda* "set the floor" in determining the constitutionality of the Warnings, when this Court found that the rights administered in this case were defective under Miranda, it implicitly found that the Warnings were defective under the more rigorous standards of the Florida Constitution. Therefore, it is of no particular import that the Court did not use a strict primacy analysis in reaching its decision.

This Court has also interpreted Article I, Section 9, more broadly than its Federal Counterpart in another context. In *State v. Hoggins*, 718 So.2d 761 (Fla. 1998), this Court held that the right to remain silent under Article I, Section 9, prohibits the use of a defendant's post-arrest pre-Miranda statements for impeachment purposes even though the same is not prohibited under the Federal Constitution.

This Court has also interpreted other State Constitutional provisions more broadly than their federal counterparts. See, e.g., *State v. Kelly,* 999 So.2d 1029 (Fla. 2008) (holding that

under Article I, Section 16 of the Florida Constitution the right of indigents to appointed counsel in misdemeanor cases differs from its Federal counterpart); *Traylor* (reiterating that the Florida right to counsel under Article I, Section 16 attaches before Sixth Amendment right); *In re: T.W.*, 551 So.2d 1186 (Fla. 1986) (right to privacy under Florida Declaration of Rights is much broader than that of the Federal Constitution). Furthermore, the fact that this Court has interpreted some self-incrimination issues in conformity with the Supreme Court's interpretation of *Miranda* does not mean that, under different factual situations, this Court cannot or should not deviate from Federal Law.

The Warning in this case seems to be the equivalent of a verbal Rubin's vase[1] – its meaning shifts with the reader's perception. And once the reader extracts his first meaning from the warning, there would be no reason to reinterpret the warning. In fact, the reader may be unable to discern the other meaning unless and until it is brought to the reader's attention. The very

[1] An ambiguous drawing made famous by Danish Psychologist Edgar Rubin. A Rubin's vase can be perceived either as two black faces looking at each other, in front of a white background, or as a white vase on a black background. Often, the viewer sees only one of the two valid interpretations, and only realizes the second after some time or prompting. The observer's "perceptual set" and individual interests can also bias the situation. *See* http://www.newworldencyclopedia.org/entry/Rubin_vase

fact that different appellate courts interpret the same warning in two distinctly different ways demonstrates that the warnings are inherently ambiguous. For that reason, this Court was correct that the warning cannot serve as a clear warning of the right to the presence of counsel as required by the Florida Constitution and this Court's case law.

In reaffirming the holding in *Rigterink*, this Court will not be expanding the right against self-incrimination, nor will it be expanding the rights set out to insure that the right against self-incrimination is honored, for example, the right to presence of counsel. In other words, the substantive right against self-incrimination and the right to the presence of counsel during interrogation are conceptually different from the Miranda-type warnings designed as a procedural safeguard to inform a suspect of the substantive rights he possesses under both the federal and state constitutions. In *Rigterink*, this Court recognized the difference, noting that in *Traylor*, the Court "outlined the . . . rights Florida suspects must be told of prior to custodial interrogation" in order to "ensure the voluntariness of confessions as required by Article I, Section 9 of the Florida Constitution." *Id*. at 534. Because this Court will merely be holding that these particular and unique warnings

do not satisfy the requirements of the State Constitution, this Court should reaffirm its decision in this case under State Law.

CONCLUSION

In light of the foregoing arguments and authorities, Respondent respectfully requests that this Court reinstate its decision in this case by holding that the warnings given to respondent were inadequate under Article I, Section 9 of the Florida Constitution.

CERTIFICATE OF FONT COMPLIANCE

I Hereby certify that this document was prepared by using Microsoft Word with Courier New 12 Point Font in compliance with Fla. R. App. P. 9.210 (a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399, with copy to Scott Andrew Browne and Candance M. Sabella, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 this 2nd day of July, 2010.

Respectfully submitted,

BAUER, CRIDER, PELLEGRINO & PARRY

_____
DAVID R. PARRY, ESQ.
Jordan Hills Professional Center
1550 South Highland Avenue, #C
Clearwater, FL 33756
(727) 446-4800
FLA. BAR # 0458491