IN THE SUPREME COURT OF FLORIDA

THOMAS W. RIGTERINK,

Appellant, Case No. SC05-2162

vs. Lower Ct. NO. CF03-006982-XX

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Mr. Rigterink, will respond to Issues I and II of the Answer Brief. He will also continue to rely upon the arguments and citations in the Initial Brief for these two and the remaining Issues. Citations to the record on appeal will remain consistent with the Initial Brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT BY INCORRECTLY RULING THAT MIRANDA WAS NOT REQUIRED BECAUSE THE INTERROGATION WAS NOT CUSTODIAL AND THAT TO ERROR OCCURRED DUE TO THE USE OF A DEFECTIVE MIRANDA WARNING.

Mr. Rigterink's position in this appeal mirrors his arguments to the lower court: that the recorded portion of his statement to police, the only statement made after the administration of a defective Miranda warning, is subject to suppression for two reasons. First, it was and continues to be Mr. Rigterink's position that he was in custody at the time the Miranda warning was issued. Second, his custodial status mandated that a constitutionally sound Miranda warning be given that advised him of his right to

have an attorney present during questioning. That was not done because the warning used in this case failed to advise him of his right to have an attorney present during questioning or the functional equivalent of that right.

Initially, it should be noted that the inappropriate and unprofessional comments directed at undersigned counsel and which imply that undersigned counsel has misled or otherwise acted without candor to this Court contained throughout the State's Answer Brief should be excised from consideration by this Court as to the merits of the Appellant's arguments. False statements which impugn the integrity of counsel are not appropriate and should be disregarded.

The State's assertion that the Initial Brief sought to expand review beyond the suppression of the recorded statement to include Mr. Rigterink's verbal statements is without merit. The Initial Brief clearly identified the fact that the Motion to Suppress addressed only the recorded statement.(Initial Brief, p.49-51) At no point did the Initial Brief seek to expand the motion of trial counsel. A suggestion otherwise is disingenuous. Any reliance by the State on such a construction of the Initial Brief is misplaced. This assertion may have occurred due

to the State misunderstanding the need for this Court to consider the totality of the circumstances surrounding the interrogation in this case in order to make a determination of custody status. Thus, the Initial Brief correctly outlined the factual circumstances present in the record which were relevant under case law to a determination of custodial status.

In order to determine whether or not a person is in custody, a reviewing court must evaluate the totality of the facts and circumstances that are unique to each interrogation to determine at what point a defendant is in custody, thus triggering the need for Miranda. The reviewing court does not look only to the moment in time that immediately precedes custody, but is required to evaluate the whole context of the interrogation. Thus, this Court must examine the entire factual context the of interactions between Mr. Rigterink and law enforcement in this case to determine whether or not a reasonable person would have believed themselves to be in custody at the time of the recorded statement. This Court was properly directed to State v. Pitts, 936 So.2d 1111 (Fla. 2nd DCA 2006) and Ramirez v. State, 739 So.2d 568, 574 (Fla. 1999) by the Appellant to support this assertion. Further, the trial

court did not limit its review of the factual testimony to the time period immediately preceding the administration of the defective Miranda form. The court's written order reproduced in the State's Answer Brief demonstrates that the trial court recognized that factors which preceded the unchallenged verbal statements of Mr. Rigterink were applicable in the determination of custodial status. This Court must also consider the totality of the circumstances, which includes all of the facts relied upon in the Initial Brief.

The State next asserts that the specific facts of this case as related to the four factors of Ramirez and the summaries of those facts contained in the Initial Brief are either contrary to the evidence or support the trial court's ruling. The Initial Brief is not misleading as the State claims and correctly cites to the facts as contained in the record as demonstrated below.

A. FACTUAL CIRCUMSTANCES OF THIS CASE APPLICABLE TO RAMIREZ.

1. Manner in which suspect is summoned for questioning

The first factor of Ramirez according to this Court,

not from the Appellant as the State implies, that is relevant to the issue of custodial status is the manner in which the suspect is summoned for questioning. After a first contact with police on September 25, Detective Connolly and Det. Raczynski went to Mr. Rigterinnk's home on October 9th and told that it would be necessary for him to give his prints the next day for suspect elimination purposes.(II,R234) Det. Connolly and Det. Raczynski also wanted follow up on a previous interview conducted by Det. Navarro. Det. Connolly testified that it was he who asked Mr. Rigterink to come in the next day and Mr. Rigterink agreed to come. The record does not support the State's assertion that Mr. Rigterink was contacted out of the blue and asked to come in and give his prints at his convenience, at any time he wanted.[Answer Brief,p.58] The State is also incorrect in stating that Mr. Rigterink failed to come in three times, but yet the detectives were still only seeking "voluntary" prints.[Answer Brief, p. 58] Mr. Rigterink missed two, not three scheduled times. Neither did law enforcement just wait around for him to show up as the State suggests.

When Mr. Rigterink failed to come in on October 10 [the first agreed upon date] or the rescheduled October 13th

date, Det. Connolly made further attempts to locate Mr. Rigterink.(II,R268) Det. Connolly testified that he "located" Mr. Rigterink on October 16th after he received a call from Nancy Rigterink.(II,R238;260) Det. Connolly acknowledged attempts to locate Mr. Rigterink in the suppression hearing, but did not elaborate.(II,R269) In the interest of completeness and to rebut the State's implied assertion that the police did nothing to locate Mr. Rigterink until Nancy Rigterink's call, it is appropriate to consider Det. Connolly's testimony at trial. Law enforcement did not simply sit around waiting for Mr. Rigterink to appear. Det. Connolly testified that he went to Mr. Rigterink's home on October 14th and knocked on the door repeatedly, but got no answer.(XXIV,T3339) Det. Connolly then contacted both Mr. Rigterink's parents and his girlfriend, Courtney Sheil on October 14th and October 15th. (XXIV,T3342) All were told that they were to immediately contact the police if they had contact with Mr. Rigterink. (XXIV,T3342-43)

After receiving a telephone call from Mrs. Rigterink notifying him that Mr. Rigterink was at her home on October 16th, Det. Connolly and Det. Raczynski immediately went to the Rigterink home. Mr. Rigterink was in the shower when

they arrived.(II,R239) When Mr. Rigterink made contact with both detectives, he told them that he had information that two “Ice” dealers from Lake Wales had involvement in the murder. Det. Connolly testified that “I requested if he could come down and give us his elimination prints that we had discussed in the earlier meeting.”(II,R239) Mr. Rigterink agreed to go. He rode in his parents' car as they followed right behind the deputies. The time that the prints were taken was not left to Mr. Rigterink. Quite clearly, when the police arrived at his parent’s home on October 16, they went to make sure Mr. Rigterink’s prints were obtained immediately.

2. The purpose, place, and manner of the interrogation

The State argues that the police only wanted to obtain Mr. Rigterink’s prints on October 16th and that he was free to go upon giving his prints. The State argues there was no intent to further interview Mr. Rigterink, instead he insisted on remaining at the station to give law enforcement additional information. This assertion is not supported by the testimony of Det. Connolly. Det. Connolly testified that Mr. Rigterink’s prints were taken the first thing after his arrival at the station. In response to the State Attorney’s following question “After that had been

done, were there any arrangements or---made with the fingerprint personnel to handle or process those prints and compare them to any prints that had been found at the scene and notify you while you were taking with Mr. Rigterink?", Connolly responded "That's correct." Det. Connolly testified that after the fingerprints were taken and while law enforcement were awaiting the results of a comparison with the crime scene print, Mr. Rigterink was taken to an interview room. The logical conclusion to be drawn from this testimony is that Mr. Rigterink was being detained- if he was in an interview room, he was not out waiting in the lobby with his parents and he was not in their vehicle leaving the station. Det. Connolly did not testify that Mr. Rigterink asked to be interviewed further after giving his prints. Det. Connolly had already testified that Mr. Rigterink gave the information he had about the "Ice" dealers to them before leaving the home for the police station. Det. Connolly did not testify that Mr. Rigterink asked to wait at the station or asked to talk with them further. Det. Connolly did not correct or other wise modify the State Attorney's query "Now, where did you take Mr. Rigterink to after his fingerprints had been obtained?"(II,R241) Mr. Rigterink was taken- he did not

choose to stay.

In describing the initial questioning of Mr. Rigterink, Det. Connolly does not refer to the new information about the “Ice” dealers Mr. Rigterink spoke of at his parent’s home. There is no mention in the record of the “Ice” dealers being discussed further at all. According to the record, Det. Connolly testified that according to his interview notes, he began asking Mr. Rigterink questions about the homicides of Mr. Jarvis and Ms. Sousa “..as far as, once again, following up the details of his previous interviews and leading into the murders of Jarvis and Sousa.”(II,R243) The interview began with a recounting of the timeline relating to Mr. Rigterink and his activities from September 22 and then led up to his activities on the day of the murder.(II,R243-246)

At no time in his recitation of the content of the conversations between Mr. Rigterink and himself or the other detectives that were present during the three and a half hour questioning period did Connolly reference any discussion about the new information that, according to the State, Mr. Rigterink wanted to share. There is simply no mention of the Lake Wales “Ice” dealer link to these

murders during the questioning at the police station.

Ramirez requires that the purpose of the interrogation must be evaluated as a factor relevant to the custodial status determination. The purpose of the interview was to obtain any information that Det. Connolly believed should be on tape before actual taping occurred.(II,R263) At the time of the questioning on October 16th, the investigation was focused on Mr. Rigterink after all other suspects had been eliminated- Mr. Rigterink was termed the primary suspect by Det. Connolly.(II,R269) Det. Connolly spent three hours and twenty-four minutes getting information that he felt should be on tape before he advised Mr. Rigterink of his Miranda rights.(II,R264)

The place where the interrogation takes place must also be considered under Ramirez. The State takes issue with the Appellant's use of the word "secure" to describe the interview room used in this case. Appellant maintains that the room was "secure" under the definition accorded to such spaces in law enforcement agencies in other cases. Det. Connolly differentiated this room from other public spaces in the police station as an interview room used for polygraph exams. The room had been soundproofed with foam

walls to ensure no outside sounds could enter. The room was equipped with video recording capabilities. The room had a door with a lock. It was physically located across from a work station where fingerprints were obtained. The logical conclusion to be made based on Det. Connolly's testimony is that this interview room was not open to the public and was thus "secure" as opposed to a lobby or other areas of the station that are open to the public or to which the public has access without being accompanied by an employee of the law enforcement agency. It is reasonable to conclude that access to this room was limited to law enforcement and not the general public and was thus secure. See, Pollard v. State, 780 So.2d 1015 (Fla. 4th DCA 2001). In addition to being soundproofed, the door was closed while Mr. Rigterink was being questioned.(II,R242) There is no testimony from Det. Connolly to establish whether or not Mr. Rigterink was told the door was unlocked.

The State also disputes the manner in which the questioning occurred and appears to argue that the entire context of the questioning prior to the taped interview should be disregarded. The State offers no case law to support this contention. Again, this Court is required to

examine the totality of the circumstances, including the manner of the interrogation prior to the taped statement. The State's claim that only two officers were present during the actual taping is correct. However, any implication that no other officers were involved in this interrogation is not supported by the record. Det. Connolly admitted under cross-examine that Det. Raczynski, Det. Rench, and Major Martin also were present in differing combinations when Mr. Rigterink was being interrogated. (II,R266) Det. Connolly agreed that Det. Rench, when present, took as active a role in questioning as he did.(II,R266) Det. Connolly referred to the style of questioning Mr. Rigterink as "confronting him with things" that created inconsistencies.(II,R270) According to Det. Connolly, the tenor of the questioning was designed to elicit " …a story that explained the evidence and explained the crime scene and explained his actions as far as his unusual behavior that we encountered and also the evidence. That's the story I was looking for."(II,R271) From the record, it is fair to conclude that the tenor of the questioning was hardly causal conversation. For example, when asked if Major Martin may have referenced lethal

injection or the “needle”, Det. Connolly couldn’t recall whether this was done despite his detailed recollection of Mr. Rigterink’s verbal, non-recorded statements.

3. The extent to which the suspect is confronted with evidence of his or her guilt.

The third factor pursuant to Ramirez, and not fabricated by the Appellant as the State seemingly suggests, analyzes the extent to which the suspect is confronted with evidence of his or her guilt. In the Initial Brief Mr. Rigterink stated that his prints were taken, he was placed in an interview room and immediately confronted with his prior statements. The police accused him of lying. After the print comparison was made, Mr. Rigterink was told that his print matched the bloody print found at the scene. The Initial Brief states that Mr. Rigterink was accused of lying. The State responds that these assertions from the Initial Brief are not supported by the record. The State is incorrect.

Det. Connolly testified that after Mr. Rigterink’s prints were obtained, he was taken to the polygraph interview room.(II,R241) Det. Connolly testified that once in the interview room, the door was closed and he began to “…once again, following up the details of his previous

interviews and leading into the murder of Jarvis and Sousa."(II,R243) According to Det. Connolly, the interview began with Mr. Rigterink's activities on September 22 (food poisoning), focused on his use of his father's vehicle, his relationship with Jarvis, his contacts with Jarvis on September 24, and his activities on the night of the murders.(II,R244-249) Mr. Rigterink was confronted by Det. Connolly who said "… you know, you need to tell the us the truth. We don't think your story is adding up, and you need to tell us the truth." Mr. Rigterink then told which ever detectives were present at that time that he had gone to see Jarvis, a deviation from his original statements. This is referred to as the "second story" by Det. Connolly.(II,R252) At this point, Det. Connolly was notified that the print comparison had been completed and a match was established.(II,R249)

According to Det. Connolly, the bloody print was significant because the mere fact of the print would seem to him that this person was at the crime scene.(II,R250) In response to the State Attorney's query "…Did you confront Mr. Rigterink with that information that you didn't think he was telling you the truth?" Det. Connolly responded "We did".(II,R250) Mr. Rigterink was not just

told that his print was at the scene, as the State suggests in the Answer Brief [p.61], but was specifically told the print was in blood.(II,R253) According to Det. Connolly, "His response when he was confronted, he showed up right after the attack on Jarvis…", which led to what is referred to as the "third story".(II,R253-254)

Det. Connolly testified that at the end of the third story "At that point we, again, told him that this wasn't the total truth of the story."(II,R254) Mr. Rigterink responded that he would tell everything. Det. Connolly thought it best to advise Mr. Rigterink of Miranda because he thought he was going to get the whole story, so the defective Miranda warnings were given.(II,R255)

The period of time that elapsed from the entering of the interview room until the activation of the tape was approximately three hours and twenty-four minutes.(II,R264)

Det. Connolly agreed that the purpose of continually confronting Mr. Rigterink and the statements used by law enforcement in their questioning were designed to get the facts of his story.(II,R270) Det. Connolly explained that he was "true facts"- a "story that explained the evidence and explained the crime scene and explained his actions as far as his unusual behavior that we encountered and also

the evidence. That's the story I was looking for."(II,R271) Det. Connolly admitted to confronting Mr. Rigterink repeatedly with "his lies".(II,R272) Det. Connolly did not dispute the defense lawyers' characterization of the questioning "..as the lie evolved you continued to confront him, demand to tell the truth, tell him his story wasn't adding up, and all the things that we've described."(II,R279) The factual summary contained in the Initial Brief is completely supported by the record.

This factor is particularly important when the police do not accept the suspect's statement. When a suspect is confronted with evidence of his guilt, how the police respond to the suspect's explanation is critical. The likelihood that the suspect will feel that he is free to leave is enhanced if the police express belief in his innocence of do nothing to refute the offered explanation of innocence. A suspect is more apt to believe that he is not free to leave if the police express belief in his guilt or continue to try to refute the suspect's explanation. Meredith v. State, 964 So.2d 247 (Fla. 4th DCA 2007), citing Stansbury v. California, 511 U.S. 318,325, 114 S.Ct. 1526, 128 L.Ed 2d 293 (1994). In this instance, the testimony of

Det. Connolly established that the neither he nor the other officers involved in interrogating Mr. Rigterink ever expressed a belief in his innocence or his explanations. Det. Connolly testified that he continually told Mr. Rigterink that he did not believe him and thought he was lying. Thus, per Meredith and the cases cited therein, this factor must be considered as evidence which establishes custody.

4. Whether or not the suspect is informed that he or she is free to leave the place of questioning

It cannot be disputed that Mr. Rigterink was not informed by law enforcement that he was free to leave.(II,R291) At no point in Det. Connolly's testimony did he indicate that Mr. Rigterink was permitted to leave the interview room. There is also no indication in this record to support the assertion by the State [Answer Brief p.61] that Mr. Rigterink knew that his parents remained in the lobby from 10:30 a.m. arrival time until they were informed of his arrest after the taped statement. The citation to the record accompanying this statement does not support the assertion made by the State that Mr. Rigterink knew where his parents were while he was being interrogated. Det. Connolly testified that Mr. Rigterink's

parents were told they could wait in the lobby while Mr. Rigterink was being questioned and/or processed, but Det. Connolly did not testify that Mr. Rigterink was told they were waiting for him to be released.(II,R240)

B. CASE LAW AND ANALYSIS

Mr. Rigterink argues that his statement was subject to suppression because the facts as contained in the record established that he was in custody at the time he made the video taped statement. Mr. Rigterink correctly advised this Court that the determination of custodial status is to be analyzed by a totality of the circumstances and provided this Court with the governing authority to support his position.

The Initial Brief provided this Court with one decision from this Court and two District Court decisions in which the rulings of the trial court regarding custody were overturned in support of his position. In addition to providing cases in which a custody was determined to exist, Mr. Rigterink provided this Court with citations to three decision from this Court and three District Court decisions in which a custodial status was rejected for purposes of comparison with this case.

The Answer Brief actually cites to only one case not

contained in the Initial Brief and that case is Perez v. State, 919 So.2d 347 (Fla. 2005). The State cites to Perez for the proposition that an appellate argument may not be based on grounds which are not argued in the trial court. Since this was not done by the Appellant, Perez is meaningless for that purpose.

However, in Perez, this Court not only addressed the question of the preservation of appellate grounds for reversal, this Court also addressed whether or not the defendant's inculpatory statement to police was admissible or should have been suppressed. Perez was interviewed by the police three times. The first interview, on the day the crime was discovered, occurred when Perez came voluntarily to the police station after the victims were discovered stabbed to death. Two days later Perez gave a second voluntary interview despite knowing that he had been implicated in a prior crime involving the dead victims. Perez knew that his co-defendant had told the police that Perez had earlier stolen jewelry from the victims. Perez also knew that the police had information that he had pawned the victim's jewelry from the prior theft, that he had pawned some coins believed to have been taken at the time of the homicide, and that he routinely carried a

knife. The third interview occurred when Perez voluntarily went to the police station while his wife was being interviewed. Perez gave conflicting statements after he was confronted with his possession of the victim's jewelry. Unlike Mr. Rigterink, Perez was immediately given Miranda and told he was under arrest for jewelry theft. Perez gave multiple statements which increasingly implicated him in the murder. When Perez challenged his custodial status, this Court found that Perez was not in custody because he voluntarily appeared at the police department, he was explicitly made aware of the fact that he was there on a voluntary basis, and was told by the police that he was free to leave. Perez contrasts sharply with this case. Mr. Rigterink did not randomly appear at the police station. He was directed to come in so his prints could be obtained. While his parents were permitted to drive him to the station, there is no suggestion in the record that Mr. Rigterink would have been able to remain at large if he had refused to come at that time. Det. Connolly testified that he was prepared to obtain a warrant "at some point" in time to secure Mr. Rigterink's prints- a safe bet is that the "time" was sooner rather than later.

In determining whether or not Mr. Rigterink was in

custody, two inquiries must be made: (1) the historical facts and circumstances surrounding the interrogation must be examined and (2) a determination must be made whether or not under those circumstances a reasonable person would believe themselves to be in custody. Meredith v. State, supra. at 964 So.2d 247. The facts of this case support Mr. Rigterink's contention that under the totality of the circumstances, a reasonable person would not have felt free to leave.

The State's attempt to distinguish Pollard v. State, 780 So.2d 1015 (Fla. 4th DCA 2001) must fail due to a misunderstanding of the facts by the State. Pollard was not simply a passenger in a car that was pulled over when the driver committed a traffic offense and who then unwittingly confessed to a homicide. At the time of the traffic stop, Pollard was a murder suspect. The police had information from a tip that she had been present when the victim was strangled and beat to death. The police intended to intercept Pollard and question her, just like the police intended to intercept, question, and obtain prints from Mr. Rigterink.

C. DEFECTIVE MIRANDA WARNINGS

In summary, the State's position that the Miranda

warnings given in this case were adequate because Miranda does not require a "talismanic incantation" of the warning and no federal or state case law supports his position is without merit.

Miranda v. Arizona, 384 U.S. 436, 479 (1966) requires that prior to a custodial interrogation, law enforcement officers must inform a suspect "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if his so desires." "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer prior to questioning and to have the lawyer with him during interrogation."Id. 394 U.S. at 471-472. In addressing the particular circumstances of Mr. Miranda, the Court specifically noted that "it is clear that Miranda was not in any way appraised of his right to consult with an attorney and to have one present during the interrogation…" Id. at 384 U.S. 492. Thus, the right to an attorney present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-

incrimination.

While later decisions have permitted a fair amount of paraphrasing of these rights, all the elements of Miranda must be conveyed and the language of the warning given cannot contain language which suggests a limitation on the rights. United States v. Tillman, 963 F. 2d 137, 141(6th Cir. 1992); West v. State, 876 So.2d 614, 616 (Fla. 4th DCA 2004), Judge Gross concurring.

Numerous federal jurisdictions have held that Miranda warnings which qualify, limit, or fail to advise of a key element of Miranda are inadequate. See, United States v. Noti, 731 F. 2d 610 (9th Cir.1984)(warning insufficient because suspect was not told he had the right to counsel during as well as before questioning); United States v. Tillman, Id.,at 963 F. 2d 137(warning which advised suspect he could have the right to the presence of an attorney defective where he was not told he had the right to the presence of an attorney before, during, and after questioning); Windsor v. United States, 389 F. 2d 530 (5th Cir. 1968); United States v. Bland, 908 F. 2d 471 (9th Cir. 1990).

The State further asserts that the Fourth District cases cited in the Initial Brief are contrary to the

precedent of this Court and have been rejected by both this Court and the United States Supreme Court. This is incorrect. In West v. State, Id., 876 So. 2d 614, *review denied,* 892 So.2d 1014 (Fla. 2005), this Court declined to accept jurisdiction, thus affirming the holding of West. West and this case are idenitical- the Miranda warning was defective because it failed to advise of the right to have an attorney present during questioning. The same warning in West and in this case has been rejected in a plethora of cases. In Dendy v. State, 896 So.2d 800 (Fla. 4th DCA 2005), the Fourth District noted that this Court and the U.S. Supreme Court have declined review of any decisions finding the Miranda warning to be inadequate where the warning omitted advising the defendant of his right to counsel during questioning. Dendy, at 803 n. 6. See e.g. Franklin v. State, 876 So.2d 607 (Fla. 4th DCA 2004)*cert. denied*, 543 U.S. 1081(2005); President v. State, 884 So. 2d 126 (Fla. 4th DCA 2004),*review denied*, 892 So.2d 1014 (Fla. 2005). Thus, the State's assertion that the West decision is unsupported by this Court and the United States Supreme Court is false. In addition to the denials of review by this Court, at least one other appellate court has aligned with the Fourth District. The Fifth District

has also aligned with the Fourth. See, Maxwell v. State, 917 So.2d 404 (Fla. 5th DCA 2006).

The State's reliance on Duckworth v. Eagan, 492 U.S. 195(1989) is misplaced. Duckworth was specifically advised, that he had the right "to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning." The issue in Duckworth was the *form* of the Miranda warning, not the *content*. The issue is this case is content, not form. Mr. Rigterink was not advised of one of the key components of Miranda-the right to counsel during questioning.

The State incorrectly argues that Mr. Rigteink's age and level of education are to be weighed in determining whether or not the Miranda warning should be deemed defective.[Answer Brief p. 69] This argument has been rejected by Miranda itself. Miranda v. Arizona, 384 U.S. at 468-69, 471-472.

Since the preparation of the Initial Brief, this Court has accepted for review M.A.B. v. State, 957 So.2d 1219 (Fla. 2nd DCA 2007), *cert. accepted,* Case No. SC07-1381, [which was cited in the Initial Brief and not addressed by the State and in another similar case] and Powell v. State, 32 Fla. Law Weekly D 2418 (Fla. 2nd DCA 2007), *cert.*

accepted, January 16, 2008, Case No. SC07-2295. This issue presented in M.A.B. arose from a certified question addressing whether the "functional equivalent" of Miranda suffices. M.A.B. and Powell are form, not content cases. While directing this Court to these cases which deal with Miranda, it should be noted that in this case there was no functional equivalent of the Miranda right to have the presence of a lawyer during questioning contained in the warning read to Mr. Rigterink.

As Judge Gross pointed out in his concurrence in West, "the law is flexible in the form that Miranda warnings are given, but rigid as to their required content." West, 876 So. 2d at 616. Nothing in any Supreme Court opinion suggests that it has relaxed the rigidity of Miranda regarding the content of the warning. West, Ibid., at 618, *citing*, Bridgers v. Texas, 532 U.S. 1034 (2001). Contrary to the State's assertion, federal and state law support the position of Mr. Rigterink- the warning in this case was defective in content when it failed to advise him of the right to counsel during questioning. Because the Miranda warnings were inadequate as a matter of law, the order of the trial court denying the motion to suppress must be reversed.

Neither was the admission of the video statement harmless error. To suggest that a confession complete with demonstrations is harmless error is ludicrous. Absent the confession, the State's case consisted of circumstantial evidence for which Mr. Rigterink had provided an explanation. Absent the video confession, Mr. Rigterink would have been entitled to have the jury instructed on circumstantial evidence. Obviously the prosecutor below must disagree with the Attorney General's dismissal of the recorded statement as being harmless when admitted, for otherwise the prosecutor could have agreed to its exclusion.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE DEFENSE TO PRESENT EVIDENCE WHICH CORROBORATED THE DEFENDANT'S TESTIMONY ABOUT THE VIOLENT NATURE OF THE DRUG TRADE AND THE REPOTATION FOR VIOLENCE OF THE PERSON THE DEFENSE ARGUED WAS INVOLVED IN THE MURDERS.

In this Issue, Mr. Rigterink argued that it was error for the trial court to prohibit him from presenting the testimony of William Farmer. The State first responds that this Issue is barred from being raised on appeal because it was abandoned by trial counsel. In support of this

position the State has reproduced excerpts from the record in the Answer Brief. [Answer Brief, p.75-76] Upon examination of the complete record, including the numerous portions the State has omitted, it is clear that trial counsel did not abandon the issue, but rather chose not to call Farmer after the trial court ruled that the testimony defense counsel wished to elicit from him would not be admitted. A complete summary of the record on this question is as follows:

After Mr. Rigterink testified, defense counsel requested that the trial court revisit an earlier ruling which had excluded the testimony of Farmer.(XXIX,T4197) Farmer's testimony was "corroborative in that he presented reputation testimony regarding Mr. Mullins' propensity for violence and use of violence in his drug business." (XXIX,T4197-4198) Counsel argued that the trial court, after hearing Mr. Rigterink's testimony, had grounds upon which it would be appropriate for the ruling to be reconsidered.(XXIX,T4198-4199) Defense counsel explained that the argument was not being made that Mr. Mullins actually committed the murders, but rather he "had some involvement in them, made himself a spokesman for whoever did commit the murders, and passed on the threat of several

occasions relating to them."(XXIX,T4203) After hearing the State respond, the trial court stated "Okay. Well, the Court's finding of facts previously found are the same. The Court's application of the law previously applied is the same. The court's ruling remains the same. Okay." (XXIX,T4204)

Because the trial court's ruling on the Motion in Limine had been primarily directed at the admission of testimony from a Richard Hall that implicated Mullins as the actual perpetrator, defense counsel then asked for clarification on the court's adherence to the previous ruling.(XXIX,T4205) Defense counsel advised the court that there was confusion between the two defense lawyers as to whether or not Mr. Farmer could be called to testify under the prior ruling if he did not testify about anything that corroborated Hall.(XXIX,T4205) The State responded that Farmer's testimony was not relevant under the previous proffer of his testimony at the Motion in Limine hearing.(XIX,T4206-07)

Defense counsel notified the court that while they "would be happy to do a proffer", he felt that Mr. Farmer had already testified on general knowledge of the local drug trade and reputation evidence as it related to Mr.

Mullins and was relevant.(XXIX,T4207) The court responded that if they needed an additional proffer, he would hear it, but if no additional evidence from Mr. Farmer was offered "the proffer that I've heard, I've already ruled on. I've made my findings and I've ruled on that." (XXIX,T4208)

Defense counsel told the court that "There's nothing different that I would anticipate Mr. Farmer testifying about that the Court has not already heard."(XXIX,T4208) Defense counsel again outlined what he anticipated Mr. Farmer's testimony would be.(XXIX,T4208-09) The court asked if that "was the evidence presented at the prior proffer?" and defense counsel responded it was. The court replied "Okay. My ruling stands."(XXIX,T4209) Defense counsel again asked the court to respond specifically to the issue of Farmer testifying about the reputation of Mark Mullins and the general information about the drug trade based only on the prior proffer.(XXIX,T4209-4210) The State responded that no additional proffer was necessary, that he would accept the testimony from the proffer.(XXIX,T4210) A confusing interchange occurred as to whether or not the witness would be called to proffer again-as the State suggested (XXIX,T4210,lines 23-25),

defense counsel responded he thought he had, and the court responded "Why don't you call the witness then." The court made no further ruling regarding Mr. Farmer that contradicted the ruled that unless additional evidence was proffered, Mr. Farmer's testimony would be excluded. (XXIX,T4209)

After speaking with Mr. Rigterink, defense counsel told the court that because of "…the limitations that the Court has imposed upon us with regard to some of these witnesses which we've just discussed in our renewal of our arguments from earlier…" that they would rest.(XXIX,T4218)

The statements of defense counsel summarizing Farmer's testimony, the exchange between the trial court who had heard the Motion in Limine, and the prosecutor's acceptance of the prior testimony vitiated the need for any additional proffer. There is sufficient evidence of Farmer's purported testimony in this record. See, Clark v. State, 32 Fla. Law Weekly D2871 (Fla. 1st DCA Dec. 5, 2007)

It is clear from these exchanges that defense counsel's decision to refrain from calling Farmer was based upon the last enunciated ruling from the trial court which held that Farmer would not be permitted to testify about the matters contained in the proffer relating to Mullins

and the drug trade in this area. The proffered Defense counsel did not as the State argues, abandon calling the witness or fail to get a ruling from the court. Defense counsel had nothing further to proffer. Defense counsel's summation of what Farmer would testify to coupled with the State's agreement that the prior transcript or testimony would control satisfies the requirement for any additional proffer. Farmer was not called as a witness because the trial court ruled that his testimony from the prior proffer and defense counsel's summation of it was not going to be admissible.

The cases cited by the State are distinguishable because in each case the trial court reserved ruling on a motion and defense counsel did not ever request a firm ruling. See, Farina v. State, 965 So.2d 246 (Fla. 2006)(defense counsel told to renew objection if he felt it necessary after prosecutor was allowed an opportunity to establish relevance of objected to testimony);Armstrong v. State, 642 So.2d 730 (Fla. 1994); Rose v. State, 787 So. 2d 786 (Fla. 2001).

The State's argument that the proffered testimony of Mr. Farmer did not meet the standard for admissibility is

without merit.[Answer Brief p.79) The cases relied upon by the State address a different standard of admissibility than applies to this case. The cases relied upon by the State dealt with "reverse Williams Rule" evidence. For example, in State v. Savino, 567 So.2d 892 (Fla. 1990), the defendant sought to introduce reverse Williams Rule evidence to establish that his wife was the actual killer of their six year old child by introducing evidence that she had previously abused another infant from a different marriage in a different state seven years previously. The evidence was excluded because it did not meet the heightened degree of "fingerprint" similarity necessary for admittance under relevancy. Evidence of past crimes must have "fingerprint" similarity in order to be relevant when the party seeking admission seeks to identify that individual as the actual perpetrator. Likewise, in Rivera v. State, 561 So.2d 536 (Fla. 1990)[Answer Brief p.81], the evidence under consideration was reverse Williams Rule evidence. The defendant sought to introduce evidence of another rape/murder while he was in jail to establish that he could not have committed the charged offenses and the real perpetrator was still at large. The evidence of the other offense was held inadmissible due to significant

dissimilarities between the two crimes.

In Savino and Rivera the defendants had argued that the standard of admissibility governing Williams Rule evidence should be relaxed when the evidence was being admitted by the defendant. This Court held that the strict admissibility standard for Williams Rule evidence should apply equally to the defense and the State. These cases are inapplicable to this case because the admission of Farmer's testimony was not sought as reverse Williams rule evidence. The defense had conceded that it was not trying to establish through Farmer that Mark Mullins was actually the perpetrator of the crime, thus they did not have to meet the fingerprint similarity standard outlined in Savino and Rivera. Contrary to the State's assertion, the Initial Brief stated the correct standard of review applicable to non-Williams Rule cases. The State has made no effort to distinguish or dispute the standard of admissibility outlined in Alexander v. State, 931 So.2d 946 (Fla. 4th DCA 2006) and Jacobs v. State, 962 So.2d 934 (Fla. 4th DCA 2007) which are relied upon by Mr. Rigterink in support of his argument that the evidence proffered through Farmer was admissible. The trial court erred in prohibiting Farmer

from testifying consistent with his proffer as to the workings of the local drug community and his particular knowledge of Mark Mullin's interaction with that community.

CONCLUSION

Based upon arguments and citations of authority contained in the Initial Brief and this response, the judgment and sentence of the lower court should be reversed and a new trial ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to the Office of the Attorney General, Stormie Stafford, Rivergate Plaza, Suite 650, 444 Brickell Ave., Miami, FL 33131, this ____ day of February, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

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