IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, **PETITIONER,** **v.** **KEVIN DEWAYNE POWELL,** **RESPONDENT.**	**Case No. SC07-2295**

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

In *Powell v. State*, 969 So. 2d 1060 (Fla. 2d DCA 2007), only two judges of a three-judge panel of the Second District Court of Appeal held the warnings given to Powell were deficient with one judge dissenting. In *M.A.B. v. State*, 957 So. 2d 1219 (Fla. 2d DCA 2007)(en banc), the entire Second District Court of Appeal considered the adequacy of the identical warnings given to Powell. In affirming M.A.B.'s conviction the court was evenly divided in a 7 to 7 split. Therefore, 14 judges in the Second District considered the issue of whether the warnings complied with the dictates of *Miranda* and seven of those judges concluded, as did the majority of the United States Supreme Court, that the warnings adequately conveyed to a suspect his rights.

SUMMARY OF THE ARGUMENT

Respondent 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 that the warnings were sufficient and did reasonably convey to Respondent, and anyone of ordinary intelligence, his rights. As such, Respondent 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

ISSUE

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

The Florida Constitution, just like its federal counterpart, safeguards individual's right against self-incrimination through the giving of *Miranda* warnings prior to custodial questioning. In this case, the United States Supreme Court specifically found that the *Miranda* warnings given to Respondent were sufficient as they reasonably conveyed to him his right to have an attorney present, "not only at the outset of interrogation, but at all times." *Florida v. Powell*, 130 S.Ct. 1195, 1205 (2010).

Petitioner submits the warnings given to Respondent adequately conveyed his rights under the Florida Constitution and established precedent. By asserting that the warnings are inadequate, Respondent is asking this Court to abandon its responsibility to interpret the self-incrimination clause of the Florida Constitution as it is written. The language of 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. Where such identical state

and federal constitutional provisions have shared an overlapping history, Florida courts have declined to depart from established United States Supreme Court decisions. For example, in *State, Dept. of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210 (Fla. 2d DCA 1993)(en banc), the court in considering the due process clauses in the state and federal Constitutions stated as follows:

> 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.

Id. at 1217.

More recently in *Mitchell v. State*, 34 Fla. L. Weekly D1794 (Fla. 2d DCA Sept. 2, 2009), Judge Altenbernd contemplating the very issue before this Court, recognized the aforementioned long-standing principle of law when he aptly 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.

Moreover, in *Florida v. Powell*, the United States 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).

Historically, this Court in interpreting article I, Section 9, has not expanded these rights or departed from the requirements of the United States Constitution or the *Miranda* decision. On the contrary, this Court has consistently followed

United States Supreme Court decisions requiring that *Miranda* warnings need only adequately convey one's rights to a person of ordinary intelligence and that no specific language is mandated. However, Respondent is asking this Court to ignore established precedent and require law enforcement to recite to an individual a "talismanic incantation" of his rights - specifically requiring police officers to *expressly* advise an individual of his right to counsel *during* interrogation. Respondent wants this Court to depart from its prior interpretation of this state's Constitution without specifying any unique aspect of Florida's Constitution, established law, or announced public policy to justify such a departure. In interpreting the right against self-incrimination as reflected in Florida's own Constitution the warnings given to Powell adequately convey his right to have counsel present during questioning.

Respondent fails to assert any unique aspect or language of the Florida Constitution which differs from its Federal counterpart that would justify a departure from precedent of the United States Supreme Court or this Court. By parceling the warnings out of context, Respondent makes the same failed arguments rejected by the United States Supreme Court. Respondent contends the warnings are subject to a multitude of interpretations which render them inadequate. However, when read in context the language adequately conveys one's rights

including the right to have counsel present prior to and during questioning. For example, as the Court determined in *Florida v. 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." On the contrary, the Court found the warning communicated that Powell's right to counsel carried forward to and through the interrogation, meaning he could seek counsel's advice before responding to "any of [the officers'] questions" and "at any time ... during th[e] interview." *Florida v. Powell*, 130 S.Ct. at 1205.

As such, "[t]his Court and the United States Supreme Court have stressed that there is no talismanic incantation required to ensure the warnings are sufficiently conveyed." *Rigterink v. State*, 2 So. 3d 221 (Fla. 2009), citing *Anderson v. State*, 863 So. 2d 169, 182 (Fla. 2003). *See also Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)(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). Even Powell himself, presumably a reasonable person, testified that he understood he had the right to have a lawyer present with him during interrogation and he voluntarily chose to waive that right.

It contorts reasoning to suggest the warnings given to Powell do not reasonably convey his right to have an attorney present during questioning. "Only based on a strained, literalistic reading" could the warnings given be interpreted as meaning that he "could talk to a lawyer before questioning and at any time during questioning but could not have a lawyer present during questioning." *M.A.B. v. State*, 957 So. 2d 1219, 1228 (Fla. Dist. Ct. App. 2007) (Canady, J., concurring) (assessing these identical warnings). Importantly, the *Miranda* language in this case, which does not require a suspect be expressly advised of his right to counsel during interrogation, meets the reasonable clarity test because the warnings do not suggest that "the right of access to counsel is limited to a lawyer who is not physically present, nor that the right to counsel is inapplicable during interrogation." *Id.* at 1228.

Because the warnings have already been deemed by this nation's highest court to properly protect an individual's right against self-incrimination, a broader interpretation that departs from established Florida law and United States Supreme Court precedent would not benefit the citizens of this State. The warnings Powell received in this case do not violate article I, Section 9 of the Florida Constitution.

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 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)).

The split among the federal circuits on this very issue was resolved in *Florida v. Powell*, 130 S.Ct. 1195 (2010), in which the Supreme Court again stated that a specific advisement of counsel during questioning is not required to satisfy *Miranda*. Hence, the federal courts cannot implement such a requirement on law enforcement, nor should the officers of this State be so encumbered. Not only is the right against self-incrimination currently protected under this Court's established precedent interpreting *Miranda* and article I, section 9, but to further require officers to expressly advise a suspect of the right to counsel during questioning would unduly burden law enforcement and fail to serve the individuals of this State.

From a practical viewpoint, Respondent is suggesting a rule of law which would unjustifiably suppress otherwise valid,

voluntary confessions and unnecessarily exclude critical evidence. 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).

Granting Respondent’s requested relief would lead to absurd scenarios. For example, a murder suspect who 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 or the law abiding citizens of this State. *Miranda*'s procedural safeguards were not intended to create a "constitutional straightjacket." *Miranda*, 384 U.S. at 467.

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 found the warnings in this case effectively protect the privilege against self-incrimination. Nothing in Florida's constitution mandates a different result.

CONCLUSION

Based upon established Florida law the right against self-incrimination does not differ from its federal counterpart. Under both the Fifth Amendment and article I, section 9 of the Florida Constitution the warnings in this case reasonably convey *Miranda* rights to an average person of ordinary intelligence, and are in compliance with the mandates of this state's Constitution. Petitioner respectfully submits that the warnings Respondent received did not violate article I, section 9 of the Florida Constitution as well as established Florida precedent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Cynthia J. Dodge, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000 this 8th 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).

Respectfully submitted,

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