IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. SC07-2295
KEVIN DEWAYNE POWELL,	:	
Respondent.	:	
	:	

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent adds the following to Petitioner's statement of the case and facts:

The Second District Court of Appeal reversed Powell's conviction on the ground that the warning read to him violated both article I, section 9, of the Florida Constitution and *Miranda*:

> Because the *Miranda* warnings given to Mr. Powell contain limiting language as to "before questioning" and the right to consult with a lawyer, we hold such warnings failed to comply with state and federal constitutional requirements to adequately inform the accused of his or her right to have an attorney present throughout interrogation.

Powell v. State, 969 So. 2d 1060, 1063 (Fla. 2d DCA 2007). The court reasoned that "the language used by the police department in this case d[id] not rise to a functional equivalent of the required *Miranda* warning." *Id*. at 1067. The court also found that the last sentence of the warning, stating that Powell had the "right to use any of these rights at any time you want during this interview," did not remedy the defect because Powell was never told he could have a lawyer with him at all times during the custodial interrogation. *See id*. at 1067. The Second District also certified a question to this Court:

> DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

Id. at 1067-68. Petitioner sought review, and this Court accepted jurisdiction.

This Court concluded that the warnings Tampa police read to Powell were invalid under both the Florida Constitution and *Miranda*. *State v. Powell*, 998 So. 2d 531 (Fla. 2008). The Court recognized that the Florida Constitution and *Miranda* give a suspect a right to the presence of counsel not just before interrogation, but also during. It determined that, under article I, section 9 of the Florida Constitution as interpreted in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), police must convey to suspects "the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Powell*, 998 So. 2d at 535 n.2, 540. The Court also recognized that "there is no talismanic fashion in which [warnings] must be read or a prescribed formula that they must follow, *as long as the warnings are not misleading*." *Id*. at 535 (citation omitted) (emphasis in original).

Based on the above, this Court held that advising a suspect only of the right to talk to an attorney before questioning was "misleading" because "[t]he '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." *Id*. at 541. This Court also held that telling suspects they have the right to talk with

a lawyer before answering any questions "is not the functional equivalent of having the lawyer present with you during questioning." *Id*. at 540.

The Court further found that, when read as a whole, nothing in the form eliminated the misleading limitation. Specifically, this Court rejected Petitioner's argument that the final sentence in Form 310, stating "[y]ou have the right to use any of these rights at anytime you want during this interview," remedied the misleading nature of the warning. *Id.* at 541. The Court stated that this sentence did "not effectively convey to Powell his right to the presence of counsel before and during police questioning," because it "could not effectively convey a right the defendant was never told he had." *Id*.

Finally, this Court rejected Petitioner's argument that a failure to sufficiently warn suspects of their rights could be cured where the suspect purportedly had "actual knowledge" of those rights. The Court concluded that delving into the subjective knowledge of defendants would be unduly speculative and defy the bright-line virtues of *Miranda*. *Id*. at 541.

Justice Wells dissented, opining that informing a suspect of the right to an attorney "before answering any of our questions" "reasonably conveyed" that the suspect could invoke his right to an attorney during the interrogation. *Id*. at 544. Justice Wells interpreted the warning to mean that the suspect had the right to talk to a lawyer before answering *any* of law enforcement's questions and Justice Wells asserted that the statement in the

warning allowing the defendant to use “any of these rights at any time” further “conveyed to Powell his continuing right of access to counsel.” *Id*. Finally, he concluded that requiring police to use a different warning form would burden law enforcement. *Powell*, 998 So. 2d at 545.

On petition for writ of certiorari, the United States Supreme Court held that the warnings in this case did satisfy *Miranda*. *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 not only has the ability to afford primacy to its under the state's self-incrimination clause, it has the duty to do so.

This Court was correct in its interpretation of the warnings for state law purposes. 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 noting 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, two members of the Supreme Court, and by thirteen members of the Second District. 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, Respondent 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 require[s] that a suspect be clearly informed of the right to have a lawyer present during questioning." *State v. Powell*, 998 So. 2d at 542. In light of that conclusion, this Court held that the warnings at issue failed to satisfy the requirements of the Florida Constitution because "Powell was not clearly informed of his right to the presence of counsel during the custodial interrogation." *Id*. 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, also noted:

> The Court acknowledges that nothing in today's decision "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." . . . As the Florida Supreme Court has noted on more than one occasion, its interpretation of the Florida Constitution's privilege against self-incrimination need not track our construction of the parallel provision in the Federal

> Constitution. *See Rigterink v. State,* 2 So. 3d 221, 241 (2009) ("[T]he 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"); *Traylor*, 596 So. 2d, at 961-963. In this very case, the Florida Supreme Court may reinstate its judgment upon remand.

Id. at 1210 (Stevens, J., dissenting).

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]

[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.'").

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 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. S*ee 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.[2] 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

[2] 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.*"

during custodial interrogation." *Id*. at 13 (citation omitted).

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 *Traylor*. 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.

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*."[3] *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 *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 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

[3] *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.

decision.

Petitioner claims, “This Court has never relied solely upon its own state constitutional grounds in its analysis of and opinions deciding issues involving an individual’s right against self incrimination.” Pet. Br. at 9. This is not true. In *Traylor*, without resort to the federal constitution, the court decided that Traylor’s confession to a murder in Florida was admissible because he was properly advised of his rights and he did not invoke his right to counsel in the Florida case. Also, in *Thompson v. State*, 595 So. 2d 16 (Fla. 1992), the Florida Supreme Court declared an earlier version of the Tampa Police Department Form 310 invalid because it lacked language informing Thompson that he had a right to free counsel if he could not afford to hire an attorney. The *Thompson* court summarized the rights required by the Florida Constitution as enunciated in *Traylor*. After concluding that neither Florida law nor *Miranda* required a “talismanic incantation” of rights, the court rested its decision solely on the Florida Constitution, writing, “Consequently, because Thompson’s statements were procured absent the proper warnings required by article I, section 9 of the Florida Constitution, we find his confession was improperly admitted in evidence.” *Id.* at 18. In *Powell*, this Court cited *Thompson* in support of its holding that the error was not harmless. *Powell*, 998 So. 2d at 542.

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 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. In his dissent in *Hoggins*, Justice Wells pointed out the same language from *State v. Owen*, 696 So. 2d 715 (Fla. 1997),[4] that Petitioner cites on pages 6-7 of its brief. It can be assumed that, in deciding the issue presented, the *Hoggins* majority rejected Justice Wells' argument that the Court has "traditionally construed the rights of defendants under the federal decision in *Miranda* consistent with the construction given to the United States Constitution by the federal courts." *Hoggins*, 718 So. 2d at 773.

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.).

[4] In *Owen*, the Court applied federal law to the issue of whether equivocal assertions of the right to counsel required police to cease interrogation. *See also Sapp v. Florida*, 690 So. 2d 581 (Fla. 1997) (declining to interpret *Traylor* to allow an anticipatory invocation of right to counsel during interrogation

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.

In *Powell*, five members of this Court agreed, along with two members of the United States Supreme Court and three judges from the Second District, that Powell was told only that he had the right to talk to a lawyer *before questioning*, and that the warning was misleading.[5] In fact, the certified question sent to this Court from the Second District assumed that the warnings advised Powell of "the right to talk to a lawyer 'before questioning'." *Powell*, 969 So. 2d at 1067-68. This Court made the same assumption: "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 questions." *Powell*, 998 So. 2d at 540. This Court explained:

> In this case the warning was misleading.

(..continued)
by signing a form at first appearance).

[5] In *M.A.B. v. State*, 957 So. 2d 1219 (Fla. 2d DCA 2007), thirteen of the fourteen judges participating in the *en banc* decision construed the exact same warnings to convey that the juvenile had the right to talk to a lawyer "before questioning." Only Judge Northcutt believed that the warning could be understood to mean that the suspect could consult counsel before answering a particular question. *Id*. at 1239. Nevertheless, Judge Northcutt found the warnings were not the "fully effective equivalent of a warning that would have clearly informed M.A.B. that he had a right to consult with a lawyer *and* to have the lawyer with him during interrogation." *Id*.

> The warning said " *before* answering any questions." 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.

Id. at 541. Based upon this premise, this Court held that the "catch-all" language did not cure the defect:

> The State further contends that the final warning, "You have the right to use any of these rights at any time you want during this interview," reasonably informed Powell of the right to have an attorney present during the interrogation. The Second District disagreed and found that language could not cure the deficiency because Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation. *See Powell,* 969 So.2d at 1067. We agree with the Second District and hold that Powell should have been clearly informed of his right to the presence of counsel during the custodial interrogation. The catch-all language did not effectively convey to Powell his right to the presence of counsel before and during police questioning. This last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed? The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.

Id. at 541.

It was only Justice Wells who believed that the warnings conveyed the meaning that Powell had the right to talk to an attorney before answering any individual question. *See Powell*, 998 So. 2d at 544. Furthermore, it was not until Petitioner's

reply brief in the United States Supreme Court that Petitioner claimed that the *Miranda* warning informed Mr. Powell that he had the right to talk to a lawyer before answering any individual question. *See* Brief of Petitioner, 2009 WL 2896308; and Reply Brief of Petitioner, 2009 WL 4099502.

In reaching its conclusion that the warnings complied with the dictates of *Miranda*, the Supreme Court assumed without discussion 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." *See Florida v. Powell*, 130 S.Ct. at 1205 (emphasis added). This interpretation necessarily excludes the equally valid interpretation of the Second District, this Court, and Petitioner.

The warning in this case seems to be the equivalent of a verbal Rubin's vase[6] — 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 fact that different appellate courts interpret the same warning in two distinctly different ways demonstrates that the warnings are

[6] 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*

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.

Finally, Petitioner argues that this Court should find the warnings were adequate based on the fact that Mr. Powell was a convicted felon. Pet. Br. 15-16. First, this argument is outside of the narrow issue presented on remand. Nevertheless, contrary to Petitioner's claim that Mr. Powell had "prior experience with the law and *Miranda* warnings," there is no evidence in this record that Mr. Powell was ever read his *Miranda* rights before this incident, or that he understood that he had the right to have counsel present during interrogation.[7] Indeed, there are many

(..continued)
http://www.newworldencyclopedia.org/entry/Rubin_vase

[7] During the trial, Mr. Powell testified that his custodial statements to detectives concerning the gun were untrue. He testified that he signed the consent form waiving his rights and made the false statements because the detectives threatened to charge his girlfriend with possessing the firearm. On rebuttal the detectives denied threatening Mr. Powell. *See Powell*, 969 So. 2d at 1064 n.8.

Before this testimony, Powell's lawyer asked him whether he "waived the right to have an attorney present during your questioning by detectives." (Vol. 2/T150) Petitioner wrenches this testimony out of context to suggest that, notwithstanding the form read to him, Powell had actual knowledge of his rights. Pet. Br. at 4 (quoting Vol. 2/T150). Considered in context, however, Powell's lawyer, who before asking the question had made explicit objections that the warning given Powell failed to convey the right to counsel during interrogation, was not asking whether Powell had validly waived a known right. Rather, the portion of the transcript quoted by Petitioner was merely the foundation for questions by Powell's lawyer concerning *why* Powell signed the form and spoke with the police:

> Q. Please explain why to this jury you would sign this consent form admitting that this is and make statements

crimes (like sale and possession of contraband) that do not require interrogation because the crime took place in the presence of an officer.

This case is unlike *Miller* because Miller argued that the *Miranda* warnings failed to advise him he had the right to free appointed counsel during questioning. *Miller*, 2010 WL 2195709 at 11. In *Miller*, the warning was clearly adequate and not subject to misinterpretation. Also, this Court emphasized that the evidence presented at the suppression hearing showed that Miller

> expressly stated to law enforcement that he normally would not talk to police and would first talk to an attorney, but was going to "do something that he had never done before." Thus Miller expressed a willingness to talk that was premised on his prior understanding that he had a right to an attorney, which is a right he normally utilized.

Id. at 15.

Furthermore, in *Powell*, this Court rejected the same argument that Petitioner makes here:

> Lastly the State argues that Powell had actual knowledge of his rights based on his prior dealings with law enforcement. However, in *Miranda* the Court disapproved of a case-by-case inquiry into whether or not a suspect was aware of the unarticulated right. The Court said:
>
> > The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate
>
> (..continued)
> to these detectives that this is your gun if in fact that statement was not true?
> A. Because of the threat they proceeded after my friend, girlfriend that they were going to try to charge her with the charge of possession of a firearm and take away her kids . . . .

(Vol. 2/T152).

> warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.
>
> 384 U.S. at 468-69, 86 S.Ct. 1602 (footnote omitted). Powell's prior dealings with law enforcement cannot substitute for adequate *Miranda* warnings.

Powell, 998 So. 2d at 541.

In reaffirming the holding in *Powell*, 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 *Powell*, 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 SERVICE

I certify that a copy has been mailed to Robert J. Krauss and Susan M. Shanahan, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of July, 2010.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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