IN THE SUPREME COURT OF FLORIDA

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

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent, Kevin Dewayne Powell, was charged by information with felon in possession of a firearm, in violation of section 790.23(1), Florida Statutes (2004), for events occurring on August 10, 2004, in Hillsborough County, Florida. (R7-10). A jury trial was held on January 24-25, 2005. (V1/T1-79; V2/T80-208).

Tampa Police Department Officer Salvatore Augeri testified that Powell was arrested and taken to the police department, where he was advised of his *Miranda*[1] warnings. (V2/T97). The following warnings given to Powell are contained on the Tampa Police Department Consent and Release Form, which was received into evidence as State's Exhibit #2:

> You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning.
>
> You have the right to use any of these rights at any time you want during this interview.

(Supp. R60). Powell signed the waiver form. (Supp. R60).

Officer Augeri testified Powell willingly agreed to talk with them. (V2/T98). However, when the prosecutor asked Augeri

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

if Powell made any statements, the defense attorney objected to the validity of the *Miranda* warnings on the basis the standard form states that the defendant has the right to have an attorney present before the questioning, but not during. (V2/T99). The trial court overruled the objection, stating, "I think it's already been said that they have the right to question, have an attorney present right before any questioning and you can have one appointed for you so I'm going to overrule the objection." (V2/T102).

Officer Augeri went on to testify that Powell confessed that he owned the firearm and carried it for protection. (V2/T103). The officer also testified they did not threaten Powell or coerce him in any way to give his statement. (V2/T103). Officer Augeri stated Powell was not threatened or coerced in any way to give his statement. (V2/T103). At trial Powell testified he had been convicted of ten prior felonies, as well as one crime involving dishonesty. (V2/T157). Powell acknowledged he signed the waiver of his rights and consented to be interviewed. (V2/T150). The defense attorney specifically asked Powell:

> **DEFENSE ATTORNEY**: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?
>
> **RESPONDENT:** Yes.

(V2/T150).

Powell was found guilty by the jury of felon in possession of a firearm, but he was found to be in actual possession of the firearm. (R30). Powell was sentenced to ten years in prison, (R41-46), and appealed his judgment and sentence to the Second District Court of Appeal.

In *Powell v. State*, 969 So. 2d 1060 (Fla. 2d DCA 2007), two judges of a three-judge panel of the Second District Court of Appeal held the warnings given to Powell were deficient and certified the following question of great public importance:

> 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?

Powell, 969 So. 2d at 1067-68. On September 29, 2008, this Court affirmed the Second District's decision and decided in a 5-1 opinion that the warnings given to Respondent were insufficient. *State v. Powell*, 998 So. 2d 531 (Fla. 2008).

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

On May 18, 2010, this Court entered an order granting Respondent's motion for briefing schedule on the limited issue of whether the warnings Respondent received violated article I, section 9 of this state's constitution.

SUMMARY OF THE ARGUMENT

Under 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. To hold to the contrary unjustifiably expands article I, section 9, as well as *Miranda*, and erroneously finds that the omission of any express advisement to the right to counsel during questioning fails to satisfy constitutional standards. This Court has always followed the United States Supreme Court's interpretation when addressing *Miranda* issues, and this Court should continue to uphold its commitment to *stare decisis*.

ARGUMENT

ISSUE

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

The warnings Respondent received in this case do not violate article I, Section 9 of the Florida Constitution, which provides, in pertinent part, that, "[n]o person shall be … compelled in any criminal matter to be a witness against oneself." On the contrary, the *Miranda* warnings at issue are in conformance with this Court's prior precedent in interpreting the Fifth Amendment and Florida's Constitutional protection against self-incrimination.

While this Court noted in R*igertink v. State*, 2 So. 3d 221 (Fla. 2009), that the "federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart," this Court also acknowledged it generally follows Fifth Amendment precedent when interpreting this fundamental right that mirrors the United States Constitution. *Id*. at 241.

Historically, this Court has relied on both the federal and State Constitutions when interpreting the admissibility of confessions and the adequacy of *Miranda* warnings. In *State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997), this Court acknowledged:

> Though our analysis in *Traylor* was grounded in the Florida Constitution, our conclusions were no different than those set forth in prior holdings of the United States Supreme Court.

Again in relying on both the state and federal constitutions in addressing the admissibility of confessions, this Court in *Traylor v. State*, 596 So. 2d 957, 965 (Fla. 1992), determined that:

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

Traylor, at 965-966. (emphasis added).

This Court further explained in *Traylor*, in a footnote, that "a lawyer's help" means "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Id.* At 966. However, just as the Supreme Court in *Miranda* noted that a suspect has the right to the presence of a lawyer during questioning; neither the *Miranda* Court, nor this Court in *Traylor* required that a suspect be *expressly* advised of the right to counsel during interrogation. In fact, *Traylor* indicates that the

language in the warning which advises the suspect he has the "right to a lawyer's help" is sufficient to convey this right, as *Traylor* did not mandate otherwise. This Court in *Traylor* declined the opportunity to find a suspect must be expressly told he has a right to have an attorney present during questioning. On the contrary, this Court held that advising a suspect he has a "right to a lawyer's help" satisfies the requirements set forth in *Miranda* and article I, section 9 of the Florida Constitution. (*See Anderson v. State*, 863 So. 2d 169, 182 (Fla. 2003 there is no talismanic fashion in which *Miranda* warnings must be read or a prescribed formula that they must follow, as long as the warnings are not misleading). Nowhere in article I, section 9 is it required that suspects be *expressly* advised of the right to counsel during questing.

Moreover, in *Cuervo v. State*, 967 So. 2d 155 (Fla. 2007), this Court again, relying on *both federal and state precedent*, reiterated the specific *Miranda* warnings which a suspect must be informed as follows: "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 160, citing *Miranda v. Arizona*, 384 U.S. 436 (1966). This Court continued to follow its long history of precedent in specifically relying on the procedural

safeguards set forth in *Miranda* to protect a suspect's Fifth Amendment right against self-incrimination, which the Court, once again acknowledged is reflected in article I, section 9 of the Florida Constitution. *Cuervo v. State*, 967 So. 2d at 160.

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. In *Fitzpatrick v. State*, 900 So. 2d 495, 510 (Fla. 2005), in determining whether the defendant's statements were constitutionally obtained, this Court stated that it, "ultimately determine[s] constitutional issues arising in the context of the Fourth and Fifth Amendment, *and by extension*, article I, section 9 of the Florida Constitution." (emphasis added). Recently in *Ross v. State*, No. SC07-2368 (May 27, 2010), this Court held:

> In accordance with our precedent and the precedent of the United States Supreme Court, we conclude that under the totality of the circumstances, the waiver of the defendant's rights against self-incrimination was not voluntary, knowing, and intelligent, and the statements were not voluntarily given. Thus, for the reasons addressed below, we conclude that the police interrogation violated both *Miranda* and the defendant's constitutional rights under the Fifth Amendment to the United States Constitution and article I, section 9, of the Florida Constitution.

Id.

Under 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. To hold to the contrary unjustifiably expands article I, section 9 as well as the application of *Miranda* to Florida cases. Additionally, such a holding would erroneously suggest that the omission of any express advisement to the right to counsel during questioning fails to satisfy constitutional standards. Notably, a similar reliance exists in this Court's interpretation of the Fourth Amendment pursuant to article 1, section 12 of this state's Constitution. Although, there is not a comparable conformity clause in the Florida Constitution regarding the United States Supreme Court's interpretation of the Fifth Amendment, this Court has recognized the right against self-incrimination provided in Florida's Constitution is the same as that in the Fifth Amendment. This Court has always followed the United States Supreme Court's interpretation when addressing *Miranda* issues and it should continue to uphold its commitment to *stare decisis*.

The Warnings at Issue Reasonably Convey the Right to Have Counsel Present During Questioning

In *Florida v. Powell*, the United States Supreme Court

reviewed the warnings given to Respondent pursuant to the Fifth Amendment protection against self-incrimination as established in *Miranda*. The Court concluded the warnings reasonably conveyed to Powell his right to have an attorney present, "not only at the outset of interrogation, but at all times." *Powell*, 130 S.Ct. 1195, 1205 (2010).

While this Court believed the warnings given to Respondent to be misleading, such a concern was determined to be unfounded by the United States Supreme Court as it concluded:

> The Florida Supreme Court found the warning misleading because it believed the temporal language-that Powell could "talk to a lawyer before answering any of [the officers'] questions"-suggested Powell could consult with an attorney only before the interrogation started. 998 So.2d, at 541. See also Brief for Respondent 28-29. In context, however, the term "before" merely conveyed when Powell's right to an attorney became effective-namely, before he answered any questions at all. Nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced. Instead, the warning communicated that the right to counsel carried forward to and through the interrogation: Powell could seek his attorney's advice before responding to "*any* of [the officers'] questions" and "*at any time* ... *during* th[e] interview." App. 3 (emphasis added). Although the warnings were not the *clearest possible* formulation of *Miranda*'s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading.

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

Miranda and its progeny have dictated that to be sufficient, warnings must adequately convey rights to a person of ordinary intelligence and common understanding. Not only did the United States Supreme Court find that the warnings in this case met this standard, but even Powell himself testified at trial that he understood the warnings as given to him and he knowingly waived his right to have an attorney present during questioning. The warnings at issue functioned in the field as intended by the *Miranda* Court, and they further met the requirements of this state's Constitution in protecting an individual's rights against self-incrimination.

Pursuant to the protections provided by *Miranda*, its precedent, and the Federal Constitution, the warnings given to Powell were found to have been sufficient by this nation's highest court. The standard set forth in *Miranda* has always been that warnings given must be sufficient to adequately convey the rights to a person of ordinary intelligence and common understanding. To find the warnings in this case to have violated this state's Constitution would be inconsistent with this Court's own prior precedent and with the United States Supreme Court's decision that the warnings were sufficient and did reasonably convey to Powell, and anyone of ordinary intelligence, his rights.

Furthermore, a finding that these warnings were

insufficient would not benefit the citizens of this State or grant them any more protection than they currently have under Florida's Constitution, as the language in the warnings have been declared adequate by the United States Supreme Court. The citizens of Florida cannot be given something they have already been deemed to possess. As former Justice Wells astutely noted in his dissent in this case:

> To hold this warning inadequate under *Miranda* is to give only lip service to the United State Supreme Court's repeated statement that the relevant "inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981)).

State v. Powell, 998 So. 2d at 544.

The language in *M.A.B. v. State*, 957 So. 2d 1219 (Fla. 2d DCA 2007)(en banc), in which the Second District Court of Appeal considered the adequacy of the identical warnings given to Powell is also instructive. The affirmance in the evenly divided court determined that:

> By specifically referring to the right to consult with counsel both before questioning and at any time during questioning, the advice given to M.A.B. is more detailed than the simple advice of the right to an attorney. And by the reference to the right to consult with counsel at any time, the advice given to M.A.B. avoids the implication - unreasonable as it may be -

> that advice concerning the right of access to counsel *before* questioning conveys the message that access to counsel is foreclosed *during* questioning.
>
> There is nothing confusing or contradictory in the portion of the warnings that advised M.A.B. of the "right to use" any of the rights of which he had been informed "at any time" he wanted during interrogation. This portion of the warnings clearly informed M.A.B. that he could at any time during interrogation avail himself of the right to remain silent, the right to talk to a lawyer, and the right to appointment of counsel. It is not reasonably susceptible to any other interpretation.

M.A.B., 957 So. 2d at 1227-28. (emphasis added).

Respondent was advised of both the right to talk to a lawyer before questioning and the right to use his right to consult a lawyer at any time during the interview. Therefore, Respondent was properly informed of his ongoing right of access to counsel, as required by *Miranda* and article I, section 9 of the Florida Constitution.

Although the *Miranda* Court set forth procedural safeguards for law enforcement to follow in advising individuals of their rights, the Court was abundantly clear that there are no magic words an officer must use as long as the words "reasonably" convey to a suspect his rights. This Court in interpreting *Miranda* issues has always followed that reasoning. Most recently in *Miller v. State*, No. SC08-287 (Fla. June 3, 2010), this Court relied on *California v. Prysock*, 453 U.S. 355, 359 (1981), and *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989), in

recognizing there is no talismanic incantation required to ensure that the warnings are sufficiently conveyed. *Id.* at 13.

Here, Powell was advised of his right to remain silent and then immediately advised of his right to talk to a lawyer before answering any questions. He was then told he could have a lawyer appointed to him if he could not afford one, and that he had the right to use any of his rights at any time he wanted to during the interview. Taken in context, the language used by the officer in this case did not suggest any restrictions on Respondent's right to the presence of an attorney or on having counsel with him during questioning. Considering the totality of the warnings given to Respondent, the warnings reasonably conveyed to him his continuing right of access to counsel.

Miranda's procedural safeguards were not intended to create a "constitutional straightjacket." *Miranda*, 384 U.S. at 467. Simply put, "the 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).

Moreover, in *Miller*, *supra*, this Court concluded that due to Miller's prior experience with the law and exposure to *Miranda* warnings, the crucial test includes consideration of the age, background and intelligence of the individual being

interrogated when determining whether the words conveyed a clear, understandable warning of one's rights. Powell was a ten-time convicted felon and further admitted at trial he understood he was waiving his right to have an attorney present during questioning by the detectives. Powell not only had significant prior experience with the law and *Miranda* warnings, which demonstrated he understood the warnings with regard to his rights, he testified he understood his rights and voluntarily waived them. Under the test set forth in *Miller* by this Court, the warnings Powell received were sufficient and adequate under the Florida and United States Constitutions.

Furthermore, the warnings given to Powell and declared sufficient by the Supreme Court pursuant to the Fifth Amendment and *Miranda,* are likewise in compliance with Florida's Constitutional protection against self-incrimination as mirrored in the Fifth Amendment. As aptly observed by Justice Canady's dissenting opinion in *Miller*, the Florida Constitution does not impose requirements more exacting than those required by *Miranda* regarding warnings a suspect must be advised of when subjected to custodial questioning. *Miller v. State*, No. SC08-287, *23 (Fla. June 3, 2010).

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 7th day of June, 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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