IN THE SUPREME COURT OF FLORIDA

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

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent adds the following to the Petitioner's Statement of the Case and facts:

Mr. Powell was at the Woodlawn apartment on August 10, 2004, when he heard people yelling that they were entering the apartment. (Vol. 2/T141) He was upstairs. (Vol. 2/T141) The apartment was rented to his girlfriend, Shazeena West, and on that day, two of Ms. West's relatives were upstairs with him. (Vol. 2/T143) When the officers came up the stairs, they pulled the man and the woman out of the first room as if they were trying to get them out of the way. (Vol. 2/T146) When the officers reached Mr. Powell at the top of the stairs, they arrested him. (Vol. 2/T147)

According to Mr. Powell, the police showed him the firearm after he arrived at the police station. (Vol. 2/T149) Before the police told him about the gun, he did not know that it was underneath Ms. West's bed in the apartment. (Vol. 2/T149) Mr. Powell admitted that he told the police he owned the gun and told them he bought it off the street for $150, and he used it for protection. He explained that the police threatened to charge his girlfriend and take away her children. (Vol. 2/T151-52) The police also threatened to get her evicted from the housing project. (Vol. 2/T152, 153) Ms. West has three children ages 3, 11 and 12. (Vol. 2/T155)

With reference to his statement, the following was presented:

> MS. CHERRY: Um, I want you to take a look at this form, Mr. Powell. This is the form that detective EstEvez read to you, correct?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: And the way the language is on there I want you to take a look at it. Does that look like the form that you signed?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: To be interviewed and look at the bottom is that your signature, sir?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: so, you're telling the jury that you did in fact sign this waiver of your rights?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: You waived your right to remain silent and not make any statements that could be used against you in a court of law like they're being used against you today, right, that's what this form is, right?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: And when you signed this form you did in fact make some statements?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: And in fact you made the statements that Detective Augeri and Detective Estevez said that you made, didn't you?

MR. POWELL: Yes.

(Vol. 2/T150-151)

Detective Estevez then denied the police threatened Mr. Powell. (Vol. 2/T165-66)

SUMMARY OF THE ARGUMENT

Tampa Police Department Form 310 Miranda warnings read to the Respondent while he was in custody are constitutionally infirm simply for the reason that the warnings place a limit on an unlimited right to consult counsel before, during, and after interrogation. More importantly, the warning implies that a suspect does not have the right to have counsel present in the interrogation room during questioning. The Miranda warnings in this case did not inform the Respondent he was entitled to have a lawyer ***present*** before or during questioning, or that he could consult with a lawyer during questioning, because the warnings clearly stated that the Respondent had only the right to "talk to" a lawyer "before answering ***any***" of the officers' questions. Since the warning qualified the right to counsel, the warnings were legally inadequate. Furthermore, the catch-all phrase, "You have the right to use any of these rights at any time you want during this interview," did not supply the missing warning, because a right that has never been articulated cannot be reiterated.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE RESPONDENT'S MOTIONS TO SUPPRESS HIS STATEMENTS TO LAW ENFORCEMENT WHEN HE WAS MISINFORMED REGARDING HIS MIRANDA RIGHT TO HAVE COUNSEL PRESENT BEFORE, DURING AND AFTER INTERROGATION.

In this case, the Tampa Police read Respondent his Miranda rights from their standard Miranda card which is referred to as Form 310. It is the same form read to the Petitioner in M.A.B v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007), which is also before this court as Case No. SC07-1381.[1] The Miranda warnings were read to the Respondent on August 10, 2004, and those warnings seem to be unique to Form 310. For that reason, this issue is relatively narrow and case-specific.

The Form 310 Miranda warnings read to the Respondent while he was in custody are constitutionally infirm for the simple reason that they place a limit on an unlimited right to consult counsel before, during, and after interrogation. In addition, the warnings clearly imply that the Respondent did

[1] Form 310 is also involved in Bailey v. State, 2D05-1697, 2008 WL 268912 (Fla. 2d DCA February 1, 2008), and Mitchell v. State, 2007 WL 4355200, 32 Fla. L. Weekly D2958 (Fla. 2d DCA 2007). In Bailey, the defendant was read her rights from the form on August 31, 2003, and in Mitchell the defendant was arrested in July of 2003. In Seward v. State, 2008 WL 53623, 33 Fla. L. Weekly D150 (Fla. 2d DCA January 4, 2008), the language of the warnings is identical to that in this case, but Form 310 is not mentioned, and no date of arrest is given in the opinion. Mitchell and Seward are pending before this Court (SC07-2429 and SC08-129).

no have the right to have counsel present in the interrogation room during questioning. The Miranda warnings in this case cannot be construed as apprising the Respondent that he was entitled to have a lawyer ***present*** during questioning, or even that he had the right to have a lawyer physically present at any time at the police station, either before, during or after questioning. The instant warnings clearly stated that the Respondent had only the right to "talk to" a lawyer "before answering ***any***" of the officers' questions. This language indicated that the Respondent could talk to a lawyer only before he started answering questions and that his right to "talk to" a lawyer terminated once he started answering questions. Consequently, if the right to consult an attorney is limited to a time before questioning, the Respondent was also misled about his right to terminate questioning to request a lawyer.

Since the warning qualified the right to counsel, the warning was not a general statement that Respondent had an unlimited, and by implication continuing, "right to an attorney." Furthermore, the catch-all phrase, "You have the right to use any of these rights at any time you want during this interview," could not supply the missing warning, because a right that has never been articulated cannot be reiterated.

This case arrived in this Court pursuant to a certified question from a three-judge panel of the Second District Court

of Appeal which reads:

> 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 v. State, 969 So. 2d 1060, 1067 (Fla. 2d DCA 2007). The question originated from the ***en banc*** opinion in M.A.B, 957 So. 2d at 1220. In M.A.B., the Second District was "evenly divided" in that seven judges voted to affirm and seven voted to reverse; however, the majority opinion upon which all agreed contained the certified question.

The Miranda warnings in this case are identical to those in M.A.B.. Powell at 1063. In both cases, the police read the arrestees the following warnings directly from Form 310:

> You have the right to remain silent. If you give up the 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.

Powell at 1064; M.A.B. at 1220 (Canady J., concurring).

As explained by Judge Casanueva in the opinion below, the certified question in the majority opinion in M.A.B. is less than ideal. Powell at 1065 n. 9. The certified question clearly implies that Respondent was informed he had to the right to consult a lawyer at any time during the questioning

when he was not. The fact that Respondent was never told he had the right to consult with a lawyer ***during*** questioning and to have a lawyer ***present*** before and during questioning is the issue presented here. In this case below, Judge Casanueva proposed another question:

> IS THE *MIRANDA* REQUIREMENT THAT A SUSPECT BE WARNED OF THE RIGHT TO THE PRESENCE OF AN ATTORNEY VIOLATED WHEN A SUSPECT IS WARNED THAT "YOU HAVE THE RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY OF OUR QUESTIONS" AND "YOU HAVE THE RIGHT TO USE ANY OF THESE RIGHTS AT ANY TIME YOU WANT DURING THIS INTERVIEW"?

Id.

In his dissenting opinion in M.A.B., Judge Wallace correctly points out the problem with the certified question:

> I have reservations about whether the question framed fairly presents the issue of the adequacy of the Miranda warning that was administered to M.A.B. The certified question states the issue as involving "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." But the warning under review in this case does not advise the accused of "the 'right to use' the right to consult a lawyer 'at any time' during questioning." Instead, the catch-all phrase at the end of the warning says something quite different: "You have the right to use any of these rights at any time you want during this interview." The prior reference in the warning to "the right to talk to a lawyer" is described as a right that must be exercised "***before*** answering any of our . . . questions" (emphasis added). Thus the warning does not -– as the certified question indicates – inform the accused of "the 'right to use' the right to consult a

> lawyer 'at any time' ***during*** questioning" (emphasis added).

M.A.B. at 1236-1237, Judge Wallace concurring.

Therefore, this Court should first exercise its power to modify the certified question. See, e.g., State v. Hosty, 944 So. 2d 255 (Fla. 2006)(Florida Supreme Court rewrote certified question to make it clear that case involved mentally disabled and not physically disabled adults' non-testimonial hearsay after a trial court determination of reliability). The question proposed by Judge Casanueva in this case below is accurate and concise. However, the word "ONLY" should be inserted before the warning statements to make it clear that the two warnings quoted comprise the only warnings even remotely dealing with the issue of the right to counsel. After rephrasing the question, this Court should rule that the written Miranda warnings read to the Respondent in this case were not sufficient because the warnings affirmatively misled the Respondent regarding his right to the presence of counsel and specifically limited the Respondent's right to consult with counsel to the time before he answered any questions.

Miranda v. Arizona, 384 U.S. 436 (1966), mandates that prior to 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 he so desires." Id. at 479(emphasis added); Dickerson v. United States, 530 U. S. 428, 435 (2000)(reaffirming Miranda).

Miranda was a consolidated case involving four defendants from different jurisdictions.[2] However, the Supreme Court, in dealing with Mr. Miranda's situation, specifically noted that "the officers admitted at trial that Miranda was not advised that he had a right to have an attorney present." 384 U. S. 491-492. The Court reversed Miranda's conviction, saying, "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. Clearly, the fact that Mr. Miranda was not informed of his right to the presence of an attorney was uppermost in the Court's consideration.

Consequently, in Miranda the Supreme Court declared that the right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. See Roberts v. State, 874 So. 2d 1225, 1227 (Fla. 4th DCA 2004), *review denied* 892 So. 2d 1014 (Fla. 2005). In Miranda, the Court stated:

> Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer ***and to have the lawyer with him during interrogation*** under the system for protecting the privilege we delineate

[2] Miranda also included Vignera v. New York, Westover v. United States, and California v. Stewart.

> today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, ***this warning is an absolute prerequisite to interrogation***. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Miranda, 384 U. S. at 471-472 (emphases added). The Miranda Court recognized "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." Miranda, 384 U. S. at 469-70.

"Although there is no mandate that 'magic words' be used, there is a requirement that all elements of Miranda be conveyed." United States v. Tillman, 963 F. 2d 137, 141 (6th Cir. 1992). The law is flexible in the form that Miranda warnings are given, but rigid as to their required content. West v. State, 876 So. 2d 614, 616 (Fla. 4th DCA 2004), Judge Gross concurring. Later cases from the United States Supreme Court and federal courts interpreting Miranda have tolerated a fair amount of paraphrasing of these rights. However, the Supreme Court has specifically stated that Miranda warnings cannot contain language that suggests a limitation on these rights as does the language in the warnings in this case.

For example, in California v. Prysock, 453 U. S. 355 (1981), an officer informed the defendant on tape, "You have

the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning." Id. at 357. Off the tape, the defendant's mother asked if Prysock could still have an attorney at a later time if he gave a statement to the officer without one. The officer told the mother that Prysock would have an attorney when he went to court and that "he could have one at this time if he wished one." Id. In Prysock, the Court did reject the argument that Miranda required a rigidity or "talismanic incantation" in the form of the required warnings. However, the Court did caution that the warnings given must be "fully equivalent" to those prescribed in Miranda. Prysock, 453 U. S. at 359. The Court then found that Miranda warnings containing a statement, "you have the right to have a lawyer appointed to represent you at no cost to yourself," were sufficient to inform the defendant that he had a right to appointed counsel for questioning, specifically because the defendant had also been told that he had the "right to have a lawyer present prior to ***and during interrogation***." Prysock at 361 (emphasis added).

In Prysock, the Court distinguished cases with warnings linking the right to counsel with some future time after police interrogation, reasoning that the warning given to Prysock did not suggest any limitation on the right to the presence of appointed counsel different from the clearly

conveyed rights to a lawyer in general, including the right "to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning." Id. at 360-361.

In Duckworth v. Eagan, 492 U. S. 195 (1989), the accused was specifically informed 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." However, he was also told that the police had no way of giving him a lawyer, but that one would be appointed for him, if and when he went to court. The Court again rejected a rigid form for Miranda warnings, but stated nonetheless: "Miranda does not require that attorneys be producible on call, but only that the suspect be informed . . . that he has a right to an attorney ***before and during questioning***, and that an attorney would be appointed for him if he could not afford one." Id. at 204 (emphasis added). In Duckworth, the Court noted that Prysock disapproved of warnings that did not "apprise the accused of his right to have an attorney present if he chose to answer questions." Duckworth, 492 U. S. at 205.

As Judge Wallace's dissent in M.A.B. points out, many federal cases, including those cases cited by Judge Canady in support of his concurring opinion, have held that Miranda warnings are sufficient if an accused is told of his right to an attorney "in a general manner." M.A.B., 957 So. 2d at 1235.

The reasoning underpinning these decisions is that the warnings implied a continuing and unlimited right to counsel. See, e.g., United States v. Caldwell, 954 F. 2d 496 (8th Cir. 1992)(warning at arrest of "a right for an attorney" was adequate in that it was not misleading); United States v. Lamia, 429 F. 2d 373 (2d Cir. 1970)(warnings that accused had "a right to an attorney" and that if he was not able to afford one, an attorney would be appointed were "unqualified" and sufficient); United States v. Frankerson, 83 F. 3d 79 (4th Cir. 1996)(warning stating "you have a right to an attorney" conveyed a continuing right). In other words, in these cases, it is precisely the fact that the warnings conveyed the right to an attorney in an unqualified manner without any limiting language which prompted these courts to uphold the warnings in question. In the instant case, it is the limiting language "before answering any of our questions" which renders the warnings inadequate.

For example, in Caldwell, the court held that the officer's ambiguous warning "you have a right for an attorney" which was given in the defendant's kitchen was adequate. Nevertheless, in so holding, the court stated that "[i]f there was a deficiency in the warning, it is in the ambiguity of the warning, not that the warning actively misled Caldwell by suggesting a false limitation of his right to counsel." Caldwell, 954 F. 2d at 502. It should also be noted that in Caldwell, the circuit court decided that the error was not

properly preserved in the district court, and for that reason, the court could only correct any alleged error if it were "plain error" that seriously affected the fairness of the proceedings.

In Lamia, the defendant was told at the time of his arrest only that "he had a right to an attorney, [and] if he wasn't able to afford an attorney, an attorney would be appointed by the court." Lamia, 429 F. 2d at 374-75. Lamia made incriminating statements at the time of arrest, and he gave a written statement after he was later warned in writing 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." Id. at 375. The Second Circuit held that the warning of a "right to an attorney" given at arrest was adequate. The court distinguished the case from United States v. Fox, 403 F. 2d 97 (2d Cir. 1968), in which the accused was told only that he "could consult an attorney prior to any question." Id. at 377. The Lamia court stated that the Fox majority thought that the warning was misleading "since it was thought to imply that the attorney could not be present during the questioning." The Lamia court noted, "whether this was correct or not," Lamia, by contrast, was "told nothing that would suggest any restriction on the attorney's functioning." Lamia at 377.

In Frankerson, 83 F. 3d 79, also cited in Judge Canady's concurring opinion in M.A.B., the officer told the defendant,

"You have the right to an attorney," and "If you can't afford an attorney, the Government will get one for you." Frankerson at 81. The Frankerson court reasoned that the warning, specifically because of its generality, "communicated to Frankerson that his right to an attorney began immediately and continued forward in time without qualification." Id. at 82.

The Respondent relies on the Miranda Court's apparent sanctioning of the FBI warnings in use at the time the Miranda opinion was issued in support of its argument. See Brief of Petitioner, page 8. However, the flaw in this argument is that the FBI warnings "that the individual may obtain the services of an attorney of his own choice" and "that he has the right to free counsel if he is unable to pay," place absolutely no restrictions on the right to counsel. The FBI warnings do not imply that counsel cannot be present during questioning as do the warnings in this case. Additionally, the Miranda opinion superceded the FBI warnings by specifically enumerating the warnings to be given to future suspects.

On pages 10-11 of its brief, the Petitioner cites U.S. v. Street, 472 F. 3d 1298 (11th Cir. 2006), in support of its position. However, in Street, the defendant was specifically told he had "the right to the presence of an attorney." Id. at 1311. That warning implies an unqualified and unlimited right to the actual physical presence of counsel. In addition, the issue in Street centered around the absence of warnings that

the defendant's statement would be used against him in court and that he had a right to court-appointed counsel if he could not afford a lawyer. Since the instant issue was not before the court, Street is not persuasive on this point; however, the Street court was concerned that the omitted warning caused a problem which was "not one of form or phrasing, but of substance and omission." Street, at 1312. The same can be said of the omitted warning in this case.

The Petitioner asserts on page 9 of its brief, "There is a split among the different circuits with respect to whether informing a suspect that he has a right to an attorney prior to questioning effectively conveys that counsel may remain during questioning." This is not entirely correct. The federal cases which hold that informing a suspect he or she has a right to counsel prior to questioning implies a continuing right to the presence of counsel during questioning are few in number. See, e.g., Coyote v. United States, 380 F. 2d 305 (10th Cir. 1967)(cited in Roberts, 874 So. 2d 1225), which seems to hold without much discussion that warning a defendant "that before making any statement he could consult a lawyer of his own choice and in the event he was without funds to hire a lawyer, the judge would appoint or provide one for him" was sufficient.

Petitioner cites United States v. Vanterpool, 394 F. 2d 697 (2d Cir. 1968), as support for the statement above, and Petitioner adds the parenthetical "validity of Miranda

warnings upheld where defendant was advised he had the right to consult with a lawyer, 'at this time.'" Brief of Petitioner, page 14. However, the Petitioner fails to note that Mr. Vanterpool was told in general terms "***you have a right to an attorney*** and to consult with a lawyer at this time." Id. at 697 (emphasis added). Furthermore, in Vanterpool, the questioning took place before the Miranda opinion was handed down. Also, the language "at this time" can easily be construed to include the time of the questioning itself. "At this time" does not limit the consultation to the time "before answering any of our questions" as in this case.

In Oregon v. Arnold, 9 Or. App. 451, 496 P. 2d 919 (Or. Ct. App. 1972), also cited on page 14 of Petitioner's brief, the defendant was told only that "that he had the right to consult with an attorney prior to any questioning." Arnold at 496 P. 2d 921. However, in making its decision, the court misstated the warning when it concluded, "Here, defendant was advised of his right to have an attorney ***present*** before he answered any questions." Id. at 923 (emphasis added). Given that erroneous conclusion, the opinion is not well-reasoned and should be disregarded. In United States v. Anderson, 394 F. 2d 743 (2d Cir. 1968), the agent told the defendant "he had a right to a lawyer at this time, and if he had one I would be glad to call the lawyer for him, that if he didn't have one that the Court would appoint him one." Id. at 745. However, in

Anderson, the defendant complained only that he was not informed "he had a right to silence or to the appointment of counsel or that anything he said could be used against him." Id. at 746. Therefore, this specific issue was not before the court when it held that the warnings were sufficient.

Although not cited by Petitioner, People v. Wash, 6 Cal. 4th 215, 24 Cal Rptr. 2d 421, 861 P. 2d 1107 (Cal. 1993), was cited by Judge Canady in his concurring opinion on page 1226 of M.A.B.. In Wash, the California Supreme Court declined to find the specific warning "you have the right to have an attorney present before any questioning if you wish one" "was so ambiguous or confusing as to lead defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began." However, Wash is not instructive in that in Wash the defendant was specifically told he had the right to the ***presence*** of counsel, a crucial piece of information lacking in the instant warnings.

On the other side of the spectrum, cases have held that general warnings are insufficient. For example, in Atwell v. United States, 398 F. 2d 507 (5th Cir. 1968), the FBI agent told the defendant that "he had the right to consult with an attorney, or counsel with anyone else, at any time," but he was not told that he had the right to have a lawyer with him during interrogation. The Fifth Circuit held that although the warnings were recited prior to the decision in Miranda, the

warning was not sufficient. The court reasoned:

> The advice that the accused was entitled to consult with an attorney, retained or appointed, 'at anytime' does not comply with Miranda's directive ' . . .that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . Only through such a warning is there ascertainable assurance that the accused was aware of this right.'

Atwell, 398 F. 2d at 510, citing Miranda at 384 U.S. at 471. In United States v. Tillman, 963 F. 2d 137 (6th Cir. 1992), the police advised Tillman that he had "the right to the presence of an attorney" if he so wished. The Sixth Circuit specifically acknowledged that Miranda warnings need only to reasonably convey the required Miranda rights; however, the court agreed that the warnings "failed to convey the substance of defendant's rights under law" partially because Tillman was never told he had "the right to an attorney both before, during and after questioning." Tillman at 141.

As Judge Wallace's dissent in M.A.B. points out, federal courts generally hold that warnings which qualify or limit the right to counsel are inadequate. M.A.B., 957 So. 2d at 1235. For example, in United States v. Noti, 731 F. 2d 610 (9th Cir. 1984), the police told the defendant he had "the right to the services of an attorney before questioning." The Ninth Circuit held the warning was insufficient because the officers failed to inform the defendant he had the right to counsel during questioning as well as before questioning. In Windsor v.

United States, 389 F. 2d 530 (5th Cir. 1968), an FBI agent told Windsor "he could speak to an attorney or anyone else before he said anything at all." The Windsor court decided that Windsor was not properly advised of his right to the presence of appointed counsel, saying, "Merely telling him that he could speak with an attorney or anyone else before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation and that one will be appointed if he cannot afford one." Id. at 533. In United States v. Bland, 908 F. 2d 471 (9th Cir. 1990), Bland's parole officer advised him that he "had a right to an attorney prior to questioning," but Bland was not told he was entitled to have an attorney present during questioning. Id. at 473-74. Noting that Miranda did not require a "talismanic incantation" of the warning, the court held that the warning was inadequate because it failed to inform Bland of the right to counsel during questioning.

In Brown v. Crosby, 249 F. Supp. 1285 (S.D. Fla. 2002), Brown was a juvenile tried as an adult and convicted in Florida as a principle to the first-degree murder of a deputy. Brown argued in a federal habeas petition that his confession was not voluntary partly because he was never informed of his right to the presence of an attorney during questioning. When the fifteen-year-old Brown was arrested, a detective read him his Miranda rights from a Broward County Sheriff's Office card. Among other rights, Brown was specifically told, "You

have the right to speak to an attorney and have him here with you ***before*** the police ask you any questions." Id. at 1294 (emphasis in original). Brown was also told "If you decide to answer questions now without an attorney present, you will give up the right to stop answering questions until you speak to an attorney." Id. Brown did not give a statement at that time. At the police station, Brown was advised of his rights from a Juvenile Statement of Rights form, which stated in part: "You have the right to talk to an attorney and have him here with you ***before*** we ask you any questions," and "If you decide to answer my questions now without an attorney present, you will still have the right to stop answering my questions at any time until you talk to an attorney." Brown, 249 F. Supp. at 1304. In Brown, the district court held that Brown's right to have an attorney present during questioning was not reasonably conveyed to him. Although Brown was shown to have a low I.Q., the court stated in general,

> In this case, the warnings given to Brown did not clearly advise him of his "core" Miranda right to "talk only with counsel present," e.g., during questioning, or to "discontinue talking at any time." (citations omitted) Thus, the Court finds that advising a suspect such as Brown of the right "to have an attorney here with you before we ask you any questions," is simply not the same as advising him of his undeniable right to have an attorney present during that questioning.

Brown, 249 F. Supp. At 1306.

The Petitioner's reference to Traylor v. State, 596 So.

2d 957 (Fla. 1992), on pages 14-15 is misleading. In Traylor, the defendant was warned, "You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked of you and to have the lawyer with you during any questioning." Id. at 971. Although this Court did "hold" that a suspect needs to be informed that he has a right to "a lawyer's help," the actual warning given to Traylor was much more detailed and included a mention of the right to the presence of a lawyer. Therefore, because Traylor was never told only that he had the right to "a lawyer's help," this Court did not "decline[] the opportunity" to rule on the question of whether advising a suspect he "has a right to a lawyer's help," without more, is sufficient. See Brief of Petitioner, pages 14-15.

After this case was decided below, the Second District decided Graham v. State, 2007 WL 4404945, 33 Fla. L. Weekly D4 (Fla. 2d DCA 2007). In Graham, the court noted the difference between advising a suspect of the right to the presence of an attorney and advising him, as in this case, that he had the right to "talk to" an attorney before questioning, saying, "The warnings given to Graham are distinguishable because they advised that Graham had the right to the presence of an attorney and did not include any timeframe limitation." Id.

The Fourth District Court of Appeal in Florida has also held that Miranda warnings are legally insufficient if the defendant is not specifically advised that he is entitled to

have counsel present during questioning even when the warnings mention the presence of an attorney before questioning. In Roberts, 874 So. 2d 1225, the officer told the defendant, "You have the right to talk with a lawyer and have a lawyer present before any questioning and if you cannot afford a lawyer, one will be appointed to represent you for any questions if you wish." The Fourth District held these warnings were inadequate because the defendant was not advised of his right to have an attorney present during questioning as well as before questioning. The Roberts court specifically declined to infer the right to counsel during questioning from a warning given about the right to counsel before interrogation, writing:

> Here, the [Broward Sheriff's Office] warning does not fail to state altogether when an attorney can be present. Rather, it explicitly states that an attorney can be present ***before*** questioning. This use of the "before questioning" warning alone, however, has suggested to at least one court that the suspect was affirmatively misled into believing that the attorney could ***not*** be present during questioning itself. See Caldwell, 954 F. 2d at 504 (distinguishing United States v. Fox, 403 F. 2d 97 (2d Cir. 1968)). Perhaps for this reason, courts confronting warnings with just the "before questioning" advice have deemed them constitutionally infirm. [Citations omitted]

Roberts at 1228 (emphasis in original).

In Roberts, the waiver of rights form did contain the proviso, "With these rights in mind I am willing to answer questions without a lawyer present"; however, the court found

this fact unpersuasive because the form was not the "'effective and express explanation' of the right to counsel required by Miranda." Id. at 1229. The court also refused to rule that the evidence presented at the suppression hearing was sufficient to support a finding that the defendant understood his right to have an attorney present, reasoning:

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Roberts at 1229, quoting Miranda, 384 U. S. at 471-72.

In subsequent cases involving the same Sheriff's Office form, the Fourth District reiterated its decision in Roberts. See, e.g., West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004), *review denied*, 892 So. 2d 1014 (Fla. 2005)(same BSO card insufficient as a matter of law); Ripley v. State, 898 So. 2d 1078 (Fla. 4th DCA 2005)(same); President v. State, 884 So. 2d 126 (Fla. 4th DCA 2004), *review denied* 892 So. 2d 1014 (Fla. 2005)(same); and Cook v. State, 896 So. 2d 885 (Fla. 4th DCA 2005)(the fact that the waiver form acknowledgement stated, "With these rights in mind I am willing to answer questions without a lawyer present," did not compensate for the omission). 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 decisions finding such Miranda warnings inadequate. 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); West (Florida Supreme Court review denied); President (same); Roberts (same).

In Maxwell v. State, 917 So. 2d 404 (Fla. 5th DCA 2006), the Fifth District held that warning a defendant that he had "a right to an attorney" was inadequate because it did not inform the defendant he had the right to have an attorney present during questioning and that one would be appointed in the event he could not afford one. See also, Octave v. State, 925 So. 2d 1128 (Fla. 5th DCA 2006)(general warning that defendant had "a right to counsel" could not be construed as an appraisal of the right to have a lawyer present during questioning).

In the concurring opinion in West, Judge Gross explains that "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. Judge Gross points out that the denial of certiorari in Bridgers v. Texas, 532 U. S. 1034 (2001), contains language supporting his court's decision:

> Nothing in any Supreme Court opinion suggests that it has relaxed the rigidity of Miranda regarding the *content* of the required warnings. At least three justices have expressed their concern about a Miranda warning identical to the one in this case, also arising from Broward County. In a statement accompanying a denial of a petition for writ of certiorari, Justice Breyer wrote:
>
> > Although this Court has declined to demand "rigidity in the form of the required warnings," California v. Prysock,

> 453 U. S. 355 [ ](1981) (*per curiam*), the warnings given here say nothing about a lawyer's presence during interrogation. For that reason, they apparently leave out an essential Miranda element. 384 U. S. at 470, 86 S. Ct. 1602.
>
> Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of Respondent's claim. And because the police apparently read the warnings from a standard-issue card, I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention. Bridgers v. Texas, 532 U. S. 1034, 121 S. Ct. 1995, 149 L. Ed. 2d 779 (2001).

West, 876 So. 2d at 618, Gross, J., concurring.

In Canete v. State, 921 So. 2d 687 (Fla. 4th DCA 2006), cited by the Petitioner on pages 16 and 21-22, is not in conflict with these decisions. In Canete, the police told the defendant, "You have the right to speak to an attorney, have an attorney ***present*** here before we make any questions, do you understand?" and, "If you decide to answer the questions now, without an attorney ***present***, you still have the right not to answer my questions at any time until you can speak with an attorney, do you understand?" Id. at 687. The defendant was then told, "Knowing and understanding your rights as I have explained [them] to you, are you agreeable to answer my questions without an attorney ***present***?" Id. (Emphasis added). The Canete warnings mention the right to the presence of an attorney three times. In the instant case, there is no mention of the right to the "presence" of an attorney at any time.

Furthermore, the warnings in Canete, taken as a whole, clearly imply the right to the presence of an attorney during questioning. Therefore, Canete is not in conflict with the Respondent's position. Also, in Jackson v. State, 921 So. 2d 772 (Fla. 4th DCA 2006), cited by the Petitioner on page 17, the court stated, "the waiver of rights form signed by Jackson contained the identical explanation of his rights as delineated in Canete." Id. at 773. For that reason, Jackson is equally inapplicable.

In this case, the Respondent was never told he had the right to the presence of an attorney at any time. Respondent was told only, "You have the right ***to talk to*** a lawyer before answering any of our questions." This warning does not covey the meaning that a lawyer could be ***present*** with the Respondent before questioning as opposed to his speaking to a lawyer over the telephone. Contrary to Judge Canady's reasoning that "the essence of the right to counsel is the right to talk with counsel," the right to the presence of a lawyer is much more comprehensive (and much more powerful) than the right to consult with a lawyer who would not be present. In explaining why the warning given in this case was not the functional equivalent of that required by Miranda, Judge Casanueva writes:

> The hallmark of Miranda is the need for effective communication to a suspect of the basic constitutional right against self-incrimination. The right to talk to a lawyer before answering questions, which

> M.A.B. was told was his privilege, is derivative of his and every suspect's greater right to have an attorney present at all times during custodial interrogation. That right was never unequivocally conveyed to M.A.B. Thus, the language used by the police department in this case does not rise to a functional equivalent of the required Miranda warning.

M.A.B. at 1241.

In M.A.B., Judge Canady reasons that the final sentence of the warning that Respondent had "the right to use any of these rights at any time you want during the interview" lifted "any limitations on the circumstances of access to counsel." M.A.B. at 1228. However, having been told specifically that he had a right "to talk to" a lawyer, an accused in custody at a police station would assume that talking to counsel on the telephone was all that was allowed, because it is entirely possible to talk to an attorney without his ever being present. The accused would assume that a telephone conversation, a minimal distraction from the interrogation process, would be permissible. However, the accused would not assume from this warning that he could compel the officers to accept the presence of an attorney to oversee his interrogation — especially if the accused was not in a position to hire an attorney himself. Why would an accused (who may also be a juvenile), assume that he could insert the physical presence of a third party -- a party antagonistic to the interests of the authorities holding him in custody -- into the mix unless he was specifically told that this was his

right?

In Miranda, the Court stressed the importance of counsel's presence, stating:

> If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Miranda at 384 U. S. 470. The Miranda court also declared that, "No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." Id. 384 U. S. at 471-472. In other words, in the absence of a specific warning, the warning may not be inferred from circumstantial evidence. Therefore, this Court cannot infer a warning about the right to have counsel present from the "catch-all" phrase when none was provided.

In their dissenting opinions in this case, both Judge Wallace and Judge Casanueva agree that the fact that the Respondent was informed that he had "the right to use any of these rights at any time you want during the interview," did not inform the Respondent that he could have a lawyer present during questioning. Judge Wallace wrote:

> The State argues that the last sentence of the warning was adequate to inform M.A.B. of his right to have counsel present during interrogation. The last sentence of the

warning reads: “You have the right to use any of these rights at any time you want during this interview.” Granted, some courts have found warnings that include the language “at any time” to be adequate. See Davis, 459 F. 2d at 169(concluding without discussion that “the right to consult a lawyer, at any time” was an adequate warning); Lawrence v. Artuz, 91 F. Supp. 2d 528, 538 (E.D.N.Y. 2000)(holding statement that accused “had a right to have any attorney present ‘at any time’ was adequate to convey the notion that he had a right to have counsel present at the time of questioning”). Nevertheless, these decisions are not persuasive on the adequacy of the particular warning at issue in this case. Here, both the warning about the right to talk to counsel and the warning about the right to the appointment of counsel limit the rights by suggesting that they must be exercised before questioning. Thus the concluding statement in the warning telling M.A.B. that he has the right “to use any of these rights at any time” is confusing and contradictory.

In addition, even if one assumes that the warning’s final sentence expands the scope of the warning as a whole to include the pre-interrogation and interrogation stages, the expanded warning still fails to inform M.A.B. of his right to a lawyer’s ***presence*** during interrogation. Nothing about the statement that “[y]ou have the right to use any of these rights at any time you want during this interview” informed M.A.B. that he had a right not only to consult with an attorney in conjunction with the interrogation process but also had the right to have that attorney present with him during the interrogation. Cf. Atwell, 398 F. 2d at 509 n. 8, 510(finding that warning of “right to consult with an attorney, anyone of his choosing at anytime” does not comply with Miranda directive that defendant be warned of his right to have a lawyer with him during interrogation). For this reason, the warning administered to M.A.B. was not “fully effective equivalent” of the warning required under Miranda.

M.A.B. at 1235-36 (emphasis in original).

In his dissenting opinion, Judge Casanueva writes:

> The safe harbor language – that M.A.B. was informed of his "right to use any of these rights at any time . . . during this interview" – simply cannot cure the deficiency because M.A.B. was never informed that he had the right to have a lawyer with him at all times during his custodial interrogation. Therefore, it was fruitless to tell him that he could exercise the right at any time when he was never informed of the right in the first place.

M.A.B. at 1241.

In Atwell, 398 F. 2d 507, the Fifth Circuit court rejected the argument that the modifying language "at any time" could be interpreted to mean that the defendant was told he was entitled to counsel before interrogation and to have counsel present during interrogation. The court stated:

> "At anytime," in its usually accepted connotation in ordinary everyday affairs, can be said to embrace the full span of any course of events. But dealing with the Constitutional rights of an accused at the preliminary stage of the in-custody interrogation process is not commonplaced. 'Anytime' could be interpreted by an accused, in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or some time or event other than the moment the advice was given and the interrogation following.

Atwell, 398 F. 2d at 510.

What is puzzling in this case is that these rights were read to the Respondent from a waiver form -- they were not

given in the heat of an arrest on the street. By the time these rights were read to Respondent, it had been some 38 years since the Miranda opinion; however, the waiver form in this case was confusing and inadequate. In Noti, the court mused:

> Finally, we note how simple it is for the police to avoid allegations of error in the Miranda warnings. Although the Supreme Court does not require a verbatim reading of the Miranda rights to defendants, see California v. Prysock, 453 U. S. at 359, 101 S. Ct. at 2809, it certainly does not prohibit it. The police can always be certain that Miranda has been satisfied if they simply read the defendant his rights from a prepared card. Although we do not require such a reading, we encourage it. A verbatim reading would, in all instances preclude claims such as Noti's.

Noti, 731 F. 2d at 615. If the police have no intent to deceive a suspect regarding his right to have a lawyer sit with him during interrogation, why would they adopt a written form with awkward and confusing language, when the simpler language of Miranda itself would assure that any statement given would be immune from challenge?

The Petitioner also argues that the Respondent "specifically acknowledged that he had waived his right to have an attorney present during questioning," Brief of Petitioner, page 26. However, the record does not support this assertion. During Mr. Powell's direct examination ***at trial***, the following exchange took place:

> MS. CHERRY: Um, I want you to take a look at this form, Mr. Powell. This is the form

that detective Estevez read to you, correct?

MR. POWELL: Yes.

MS. CHERRY: And the way the language is on there I want you to take a look at it. Does that look like the form that you signed?

MR. POWELL: Yes.

MS. CHERRY: To be interviewed and look at the bottom is that your signature, sir?

MR. POWELL: Yes.

MS. CHERRY: so, you're telling the jury that you did in fact sign this waiver of your rights?

MR. POWELL: Yes.

MS. CHERRY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?

MR. POWELL: Yes.

MS. CHERRY: You waived your right to remain silent and not make any statements that could be used against you in a court of law like they're being used against you today, right, that's what this form is, right?

MR. POWELL: Yes.

MS. CHERRY: And when you signed this form you did in fact make some statements?

MR. POWELL: Yes.

MS. CHERRY: And in fact you made the statements that Detective Augeri and Detective Estevez said that you made, didn't you?

MR. POWELL: Yes.

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First, Mr. Powell never actually testified that he understood that he had a right to have an attorney present during questioning. In this exchange, counsel suggested to Mr. Powell that the waiver form contained the specific warning that he had the right to the presence of counsel. In explaining that he did make incriminating statements (before he denied the truth of the statements), Mr. Powell was mere agreed with counsel's summary of the form. Therefore, taken in context, it is clear that Mr. Powell was not acknowledging that he understood this right. More importantly, however, this exchange took place at trial after the statements had been introduced into evidence. During the motion to suppress, the State had the burden of proving by a preponderance of the evidence that the appellant waived his Miranda rights. See West, 876 so. 2d at 616, citing Ramirez v. State, 739 So. 2d 568 (Fla. 1999). No such evidence was presented by the State during the motion to suppress, and for that reason, the State failed to shoulder its burden.

Nevertheless, "[t]here is authority supporting the view that a Miranda warning which fails to advise of the right to counsel during interrogation makes a confession inadmissible as a matter of law." West at 615-16, citing Bland, 908 F. 2d 471; United States v. Oliver, 505 F. 2d 301 (7th Circuit 1974); and Chambers v. United States, 391 F. 2d 455 (5th Cir. 1968). In Miranda itself the Court argues against a case-by-case inquiry into whether or not a suspect was aware of the

unarticulated right or rights:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate 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.

Miranda, 384 U. S. at 468-49. Although already stated above, it bears repeating that later in the opinion, the Court also opined:

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. ***No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right***.

Miranda, 384 U. S. at 471-72 (emphasis added).

The standard of review in cases such as this is well-

founded. Review of a Florida motion to suppress a confession is a mixed question of law and fact yoked to Federal law. Butler v. State, 706 So. 2d 100 (Fla. 1st DCA 1998), citing Perez v. State, 620 So. 2d 1245 (Fla. 1993). The standard of review for the trial judge's factual findings is whether competent substantial evidence supports the judge's ruling. Butler; Caso v. State, 524 So. 2d 422 (Fla. 1988). The standard of review for the trial judge's application of the law to the factual findings is *de novo*. Ornelas v. U. S., 517 U. S. 690 (1996). The adequacy of Miranda warnings is reviewed *de novo* as a question of law. See Maxwell, 917 So. 2d 407.

In conclusion, there is no excuse, some 38 years after the Miranda opinion was released, for a police force to have a printed Miranda form with defective warnings. Because the Miranda warnings in this case were inadequate as a matter of law, and because the Respondent’s confession is the only evidence linking him to a gun found in his girlfriend’s apartment in her bedroom, the decision of the Second District Court of Appeal should be upheld.

CONCLUSION

In light of the foregoing arguments and authorities, the Respondent respectfully requests that this court affirm the opinion of the Second District Court of Appeal in this case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan Shanahan, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2008.

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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