IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KEVIN DEWAYNE POWELL,

Respondent.

Case No. SC07-2295

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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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).

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

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

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).

Augeri went on to testify that Powell confessed that he owned the firearm and carried it for protection. (V2:T103). Augeri also testified they did not threaten Powell or coerce him in any way to give his statement. (V2:T103).

Powell testified at trial and admitted he has 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).

The jury found Powell guilty of the charge of felon in possession of a firearm, but did not find him to be in actual possession of the firearm. (R30). The trial court adjudicated him guilty and sentenced him to ten years in prison. (R41-46).

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 under the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida,

and reversed his conviction and remanded the case for further proceedings. The Second District 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.

Petitioner's Motion for Rehearing was denied on November 28, 2007. Petitioner filed its notice to invoke the discretionary jurisdiction of this Court on December 4, 2007, along with a motion to stay the mandate. The Second District granted the motion to stay mandate on December 5, 2007, and this Court accepted jurisdiction of the case on January 16, 2008.

SUMMARY OF THE ARGUMENT

Before questioning commenced, Respondent was advised of his right to remain silent, his right to talk to a lawyer before answering any questions and he was told he could have a lawyer appointed to him if he could not afford one. In the final warning Respondent was advised, "You have the right to use any of these rights at any time you want during this interview."

The language used by the officer in giving Miranda warnings to Respondent did not suggest any restrictions on Respondent's right to the presence of an attorney prior to or during questioning. Pursuant to Miranda the exact words used by law enforcement to advise suspects of their rights is not as important as whether the admonitions reasonably convey the required rights. Considering the totality of the warnings given to Respondent, the warnings reasonably conveyed to Respondent his continuing right of access to counsel.

ARGUMENT

CERTIFIED QUESTION

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?

Petitioner contends the totality of the Miranda warnings read to Respondent touched the bases required by Miranda and did not deprive him of any information essential to his ability to knowingly waive his privilege against self-incrimination. Since 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, contrary to the Second District's conclusion, Respondent was properly informed of his ongoing right of access to counsel, as required under Miranda.

Standard of Review

A trial courts ruling on a motion to suppress is clothed with a presumption of correctness regarding the trial court's determination of historical facts. However, appellate courts, independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendments, and, by extension, article I, section 9 of the Florida Constitution. Anderson v. State, 863 So. 2d 169, 182 (Fla. 2003); Connor v. State, 803 So. 2d 598, 608 (Fla. 2001). On questions of historical fact, the trial court can be reversed only where those findings are not supported by the record,

and a *de novo* review of the application of the legal standards to the historical facts, as found by the trial court, is permitted. Connor, 803 So. 2d at 605-08.

The Certified Question Should Be Answered In The Negative

The failure to provide express advice of the right to the presence of counsel during questioning does not 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. Advising an individual that they have the right to talk to an attorney before questioning, and they have right to use the right to consult a lawyer at any time during questioning, reasonably conveys they have the right to a lawyer during questioning pursuant to Miranda.

Interpreting Miranda

The Fifth Amendment to the United States Constitution guarantees all individuals the protection of the right against self-incrimination, as it states "[n]o person ... shall be compelled in any criminal case to be a witness against himself." In Miranda v Arizona, 384 U.S. 436 (1966), in considering the privilege against self-incrimination, the United States Supreme Court established certain procedural safeguards to protect **individual's** rights under the Constitution's Fifth and Fourteenth Amendments before commencing custodial interrogation. The Court stated, "[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." Miranda, 384 U.S. at 444. The prophylactic Miranda warnings are not themselves rights protected by the Constitution, but are measures set out to insure that the right against compulsory self-incrimination is protected. Therefore, reviewing courts need not examine Miranda warnings as if construing a will or defining the terms of an easement. In the years since the Miranda decision, the Court has held Miranda did not require of, nor impose upon, law enforcement a rigid and precise formulation of the warnings given a criminal defendant. California v. Prysock, 453 U.S. 355 (1981); Duckworth v. Eagan, 492 U.S. 195, 203 (1989)(courts should consider if the language is adequate to safeguard the right not to incriminate oneself). The inquiry is whether the warnings reasonably convey to a suspect his or her rights as required by Miranda.

In M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007), the Second District considered, *en banc*, the same warnings at issue in the instant case, and the court was evenly split on the question of the adequacy of the warnings. In his opinion supporting affirmance in M.A.B., Judge Canady pointed out that the decision in United States v. Lamia, 429 F.2d 373 (2d Cir. 1970), has been cited by the Supreme Court for this reasoning as follows:

> In rejecting the view that Miranda requires a "talismanic incantation," the Supreme Court in Prysock observed: "This Court has never indicated that the 'rigidity' of Miranda extends to the precise formulation

> of the warnings given a criminal defendant." 453 U.S. at 359, 101 S.Ct. 2806. As support for that proposition, the Supreme Court cited Lamia. The Supreme Court's citation of Lamia strongly suggests the Supreme Court's approval of that decision. In United States v. Burns, 684 F.2d 1066, 1074-1075 (2d Cir. 1982), the court noted the citation to Lamia in Prysock, expressed its continued adherence to Lamia, and upheld warnings which-like the warnings in Lamia-did not expressly state the right to the presence of counsel during questioning.

M.A.B., 957 So. 2d at 1224.

In fact, in Miranda, the Supreme Court stated:

> Over the years the Federal Bureau of Investigation has compiledan exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.

Miranda, 384 U.S. at 483-84.

Although no reference is made to the right to have counsel present during questioning, the Supreme Court stated that "...the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today." Id. at 483-84.

In an unpublished opinion the Eleventh Circuit, in considering Miranda, noted:

> Importantly, the Supreme Court has never insisted Miranda warnings be given in the exact form described in that decision. In California v. Prysock, the Supreme Court stated the rigidity of Miranda does not extend "to the precise formulation of the warnings given a criminal defendant," and "no talismanic incantation [is] required to satisfy its strictures." 453 U.S. 355, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981). Therefore, the inquiry is simply whether the warnings reasonably "conveyed [to a

suspect] his rights as required by Miranda." Id. at 2810. United States v. Harris, 151 Fed. Appx. 882, 885 (11th Cir. 2005).

In Harris the court also reasoned, "[a] waiver is effective where the 'totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension.'" Harris, 151 Fed. Appx. at 885, citing, Moran v. Burbine, 475 U.S. 412 (1986)(quotation omitted).

The Federal Courts

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. Depending on the circumstances, federal courts have reached varying conclusions on the necessity for express warnings of the right to have counsel present during interrogation. The Fifth, Sixth, Ninth and Tenth Circuits have held that a suspect is entitled to be expressly informed of the right to have an attorney present during questioning. See United States v. Windsor, 389 F.2d 530, 533 (5th Cir. 1968); United States v. Tillman, 963 F.2d 127, 140-42 (6th Cir. 1992); United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984); United States v. Anthon, 648 F.2d 669, 672-74 (10th Cir. 1981).

Whereas, the Second, Fourth, Seventh and Eighth Circuits, have found sufficient Miranda warnings that did not specifically advise a suspect of his right to have an attorney present during questioning. See United States v. Burns, 684 F.2d 1066 (2d Cir.

1982); United States v. Frankson, 83 F.3d 79, 81-82 (4th Cir. 1996); United States v. Caldwell, 954 F.2d 496, 500-04 (8th Cir. 1992).

The Seventh Circuit, in United States v. Adams, 484 F.2d 357, 361-62 (7th Cir. 1973), held that a suspect had been Mirandized effectively despite the fact that the warnings he received did not inform him specifically of his right to have an attorney present during questioning. In Adams, the court cited to United States v. Lamia, 429 F.2d 373 (2d Cir. 1970), in which the court found sufficient the Miranda warnings issued at the police station that did not specifically inform a suspect of his right to counsel during questioning, but informed him of his right to remain silent and to refuse to answer questions, that if he did not have an attorney one would be provided without cost, and that anything he said could be used against him in court. Adams, 484 F.2d at 362. As such, it seems the Seventh Circuit has acknowledged that the failure to expressly tell a suspect on the street or at the police station that he has the right to have an attorney present during questioning does not render Miranda warnings constitutionally deficient when, collectively, the warnings made this right clear. Id.

In United States v. Street, 472 F.3d 1298 (11th Cir. 2006), the Eleventh Circuit held that in order to satisfy the required elements of Miranda a suspect must be told the following:

> He must be warned prior to any questioning 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 1311.

While the issue of whether a suspect must be expressly told he has a right to counsel during interrogation was not specifically before the court in Street, it seems the Eleventh Circuit implicitly found no such requirement pursuant to the aforementioned warnings the court held satisfied Miranda.

The Fourth Circuit, in Young v. Warden, Maryland Penitentiary, 383 F. Supp. 986 (D. Md. 1974), aff'd, 532 F.2d 753 (4th Cir. Md. 1976), cert. denied, 425 U.S. 980 (1978), considered the defendant's allegation that he was not informed of his right to have counsel present during interrogation. The officer who gave the Miranda warnings testified that the defendant was advised of his right to remain silent; that the defendant could get a lawyer of his own choosing; and that if the defendant could not afford a lawyer, the police were obliged to obtain one for him. Id. The officer also testified that he warned the defendant on another occasion that the defendant did not have to say anything further and that the police would get an attorney if the defendant had no means to obtain one.

The court, in dismissing the habeas petition of the defendant, found the defendant had been adequately advised of his right to have counsel before and during any questioning. Id. The court reasoned that the defendant was adequately advised of an

unqualified right to an attorney at any time, and the failure to expand the warning to include an express "here and now" was not fatal logically, particularly in view of the Supreme Court's approval in Miranda itself of the FBI warnings that omitted these rubric words. Id. at 1005. In making its determination the court found, "As to what is necessary effectively to convey the substance of the Miranda warnings, several of the courts have taken what appears to this Court to be hypertechnically narrow approaches." Id. at 1001. Specifically, the court found the opinion by the Second Circuit in United States v. Fox, 403 F.2d 97 (2d Cir. 1968), to misconstrue Miranda, in which the court ruled the warnings given to Fox gave no indication that he was entitled to have an attorney present during questioning, although he was told that he could consult an attorney prior to any questioning. Id. at 1001-1002. The Young court found the dissent in Fox to be persuasive and cited the following from that opinion:

> The second deviation found by the majority from their conception of Miranda standards is that Fox was only told that 'he could consult an attorney prior to any question,' whereas he should have been told that he had 'the right to the presence of an attorney.' But if he had the right to consult an attorney 'prior to any question', the attorney could have prevented any interrogation without his being present- or any interrogation at all.

Young, 383 F. Supp. at 1002, citing United States v. Fox, 403 F.2d at 104-105 (Moore, J., dissenting).

Two years after Fox, the Second Circuit addressed the adequacy of Miranda warnings in United States v. Lamia, 429 F.2d 373 (2d Cir. 1970), cert. denied, 400 U.S. 907 (1970), in which the

defendant was told he had the "right to an attorney" and if he was not able to afford an attorney one would be appointed by the court. Lamia argued the warning did not apprize him of his right to the "presence" of an attorney during questioning. Id. However, the court held otherwise and found that Lamia had been told without qualification of his right to an attorney and that one would be appointed if he could not afford one. Id. In viewing the statement in context, in which Lamia was just informed he did not have to make any statement to the agents, the court found Lamia was effectively warned that he need not make any statement until he had the advice of an attorney. Lamia, 429 F.2d at 376-77.

Additionally, in United States v. Frankson, 83 F.3d 79 (4th Cir. 1996), the court found the officer's notification to the defendant that he had a right to an attorney was sufficient, and the officer need not have specified the right to an attorney applied both prior to and during interrogation. The court found the notification informed the defendant of his immediate right to an attorney with no time restrictions, and that the right "continued forward in time without qualification." Id. at 82. The court stated, "Miranda and its progeny simply do not require that police officers provide highly particularized warnings. Such a requirement would pose an onerous burden on police officers to accurately list all possible circumstances in which Miranda rights might apply." Id. at 82. The court concluded that satisfaction of Miranda does not depend on the precise formulation of the warnings,

but on whether the officer reasonably conveyed the general rights enumerated in Miranda to the suspect. Id.

Other courts have also upheld warnings in which the suspect was advised that he had the right to consult with an attorney prior to any questioning. In State v. Arnold, 496 P.2d 919, 922-23 (Or. Ct. App. 1972), the court found such warnings sufficient because it was, "unreasonable to assume ... that [the defendant] would not have requested the [p]resence of an attorney while he answered the police officer's questions." See also United States v. Vanterpool, 394 F.2d 697, 699 (2d Cir. 1968)(validity of Miranda warnings upheld where defendant was advised he had the right to consult with a lawyer, "at this time"); United States v. Anderson, 394 F.2d 743, 746-47 (2d Cir. 1968)(defendant advised he had right to attorney at that time was considered sufficient warning pursuant to Miranda).

The court in Young v. Warden, Maryland Penitentiary, 383 F. Supp. 986 (D. Md. 1974), aff'd, 532 F.2d 753 (4th Cir. Md. 1976), cert. denied, 425 U.S. 980 (1978), reasoned that:

> ... a strong argument can be made that the ordinary accused might well be confused as to the meaning of the warning that he was entitled to have an attorney with him during questioning and that one could be appointed for him, but not until he went into court; but that he could answer questions in advance of such appointment.

Id. at 1004.

The Florida Courts

In Traylor v. State, 596 So. 2d 957, 965 (Fla. 1992), this Court noted the state's authority to obtain freely given confessions is an unqualified good, citing McNeil v. Wisconsin, 501

U.S. 171 (1991). To ensure such confessions are given freely, this Court held a suspect must be informed of the following rights prior to interrogation:

> 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, and that if they cannot pay for a lawyer one will be appointed to help them.

Traylor, 596 So. 2d at 965-66.

In a footnote this Court explained that lawyer's "help" means that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. In Traylor, this Court declined the opportunity to find a suspect must be expressly told he has a right to have an attorney present during questioning, but held that advising a suspect he has a right to a lawyer's help satisfies the requirements set forth in Miranda and this State's 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).

More recently in Cuervo v. State, 967 So. 2d 155 (Fla. 2007), this Court again reiterated the Miranda warnings of which a suspect must be informed and stated that, "Prior 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 384 U.S. 436 (1966).

The Fourth District Court of Appeal in Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), concluded that Miranda warnings that did not expressly include advisement of the right to have an attorney present during questioning were inadequate to fully inform a defendant of his constitutional rights, even though the warnings included the advisement of the right to have an attorney present prior to questioning.

However, a few years later, in Canete v. State, 921 So. 2d 687, 688 (Fla. 4th DCA 2006), the Fourth District Court of Appeal, in an *en banc* opinion, recognized that a verbatim wording of Miranda is not required as long as the warning adequately fulfills Miranda's substantive requirements. Although Canete was not specifically advised he had a right to have a lawyer present "during" questioning, the court found that based on the totality of the warning given, the warning was sufficient for Canete to readily infer he had a right to have an attorney present "during" interrogation. Id. Because Canete was advised, "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," the court found the warning to be sufficient to convey the right to a person of ordinary intelligence and common understanding. Id. at 689. (emphasis added).

Similarly, in Jackson v. State, 921 So. 2d 772 (Fla. 4th DCA 2006), the court held the defendant was adequately advised of his right to attorney during interrogation, although the waiver form stated that he had right to have attorney with him before interrogation, but did not make clear that he had right to have attorney with him during questioning. The court found the waiver of rights form signed by the defendant contained an explanation of his rights, and the defendant affirmatively indicated he understood that if he decided to answer questions without an attorney present, he would still have right to stop answering questions at any time until he talked to an attorney. Id.

In Maxwell v. State, 917 So. 2d 404 (Fla. 5th DCA 2006), the Fifth District Court of Appeal found an officer's statement to a defendant that he "had a right to an attorney" was insufficient pursuant to Miranda. The court in Maxwell and Octave v. State, 925 So. 2d 1128 (Fla. 5th DCA 2006), held a defendant must be apprized of their right to have an attorney present during questioning.

The Third District Court of Appeal, in Gillis v. State, 930 So. 2d 802 (Fla. 3d DCA 2006), approved a form used by the police department, which advised the accused that he had the right to attorney during questioning and any time thereafter, and which tracked the language of Miranda.

As previously noted, in M.A.B., the Second District Court of Appeal first considered the sufficiency of the same set of Miranda

warnings at issue in the instant case.[2] The facts, as set out by Judge Canady in his opinion supporting affirmance, show M.A.B. argued his statements should have been suppressed because the Miranda warnings he received did not inform him of his right to have an attorney present during questioning. M.A.B., 957 So. 2d at 1219. The trial court determined the warnings were adequate to inform M.A.B. of his rights. When M.A.B. raised the same challenge on appeal, seven judges on the court voted to affirm and seven voted to reverse. Id. Thus, the trial court's ruling was not disturbed and the adjudications of delinquency were affirmed. Id. at 1220.

In his opinion supporting reversal, Judge Wallace concluded that the rights given to M.A.B. "did not inform him of the full extent of his right to counsel[,]" and stated "[n]otification of the right to talk to a lawyer before questioning is not the equivalent of notification of the right to have a lawyer present during questioning." M.A.B., So. 2d at 1235 (Wallace, J., dissenting). However, Judge Canady explained in his opinion supporting affirmance that it is the final sentence of these warnings that distinguishes them from those found to be inadequate in other cases:

By specifically referring to the right to consult with

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[2]In M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007)(en banc), the Second District certified the same question of great public importance. This Court granted review of M.A.B.,962 So. 2d 337 (Fla. 2007), and set oral argument for March 5, 2008. The Court subsequently removed M.A.B. from the oral argument calendar and scheduled argument in the instant case in its place.

> 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.

Id. at 1227-28. (emphasis added).

Most recently, in Mitchell v. State, 32 Fla. L. Weekly D2958 (Fla. 2d DCA Dec. 14, 2007), the Second District applied its decision in Powell to reverse a defendant's convictions for attempted first-degree murder and armed burglary of a dwelling with an assault or battery because the defendant had received Miranda warnings identical to those given to Respondent. The Second District certified the same question of great public importance as certified in M.A.B. and Powell. Judge Altenbernd wrote a concurring opinion in Mitchell in which he opined that Powell has, in effect, established "a per se rule that the standard Miranda form used by many police departments is defective as a matter of law and that all statements made during an interview in which the defendant signs this form are inadmissible." Mitchell, 32 Fla. L. Weekly at D2959. Judge Altenbernd aptly observed that "Miranda

warnings are not, as a general rule, read to English majors or philosophers studying theoretical linguistics." Id. He concluded that the form found to be deficient in Powell accomplishes the critical function of Miranda:

> to communicate by both words and actions to a person of average intelligence (1) that the giving of a statement to the police can have serious legal consequences, (2) that the person is not obligated to provide the statement, (3) that the matter is serious enough that the person may need to consult with a lawyer, and (4) that the State will provide a lawyer upon request and without continuing questioning if the person indicates he wants one and cannot afford one.

Id.

The Instant Case

Here, as in M.A.B., Respondent was advised of his rights from a form as follows:

> 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.**

(Supp. R60)(emphasis added). In finding these warnings did not adequately apprise Respondent of his right to have an attorney present with him during questioning, Judge Casanueva, writing for the Powell majority, relied heavily on the Fourth District Court of Appeal's decision in Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2005). Interestingly, the court's reliance on Roberts stems from the reasoning that the person in custody "must be clearly advised" of the right to have counsel present before and during

interrogation. Powell, So. 2d at 1065. The majority ignores the Fourth District Court of Appeal's subsequent opinion in Canete, which does not require a suspect be specifically advised of the right to counsel during interrogation as long as the warning readily infers he had a right to have an attorney present "during" interrogation. As Judge Kelly noted in the dissent, the adequacy of the warnings provided to an individual taken into custody "is simply whether the warnings reasonably "'conve[y] to [a suspect] his rights as required by Miranda.'" Powell, So. 2d at 1068 (Kelly, J., concurring in part and dissenting in part), citing, Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (quoting California v. Prysock, 453 U.S. 355, 361 (1981)).

Judge Kelly further stated:

> In my view, Mr. Powell was not deprived ofany information essential to his ability to knowingly waive his Fifth Amendment privilege against self-incrimination, and in particular, his right to have counsel present during questioning. Because the warnings, in their totality, "touched all of the bases required by Miranda," I respectfully dissent from the majority opinion to the extent that it holds otherwise. See id. at 203, 205. Although the majority's thoughtful analysis of the issue is not without persuasive force, I believe the reasoning detailed in Judge Canady's opinion in M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007), is more in line with the body of precedent the Supreme Court has provided for guidance on this issue, and accordingly, I adopt that reasoning as my own.

Powell, So. 2d at 1068.

In Canete, that where the defendant was advised, "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," the Fourth District found advising a suspect "at any time" can reasonably be understood as conveying the message that an attorney could be present during questioning. Canete v. State, 921 So. 2d 687 (Fla. 4th DCA 2006). Also, in Lawrence v. Artuz, 91 F. Supp. 2d 528 (E.D.N.Y. 2000), the court found the officer's statement that a defendant had right to have an attorney present "at any time" was adequate, pursuant to Miranda, to convey the notion that he had the right to have counsel present at the time of questioning. The court in People v. Martinez, 867 N.E.2d 24 (Ill. App. Ct. 1st Dist. 2007), held the failure to inform the suspect that he had right to have counsel present during questioning and had the right to consult with counsel prior to questioning did not render Miranda warnings fatally defective; as the suspect was informed that he had right to an attorney, and the warning reasonably conveyed the suspect's rights.

In United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978), the court rejected the defendant's contention that Miranda warnings given prior to the his confession failed to adequately advise him of his right to have a lawyer present during interrogation. The defendant was told he was entitled to "to have a lawyer present," and that if he could not afford a lawyer, "we'll get you a lawyer for free." Id. The court held that the warnings adequately informed the defendant of his right to counsel during the interrogation. Id.

Although the Court in Miranda 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. Telling a suspect they the right to the presence of counsel, may be formal and pedantic to certain individuals, whereas telling another defendant he has the right to talk to a lawyer or the right to a lawyer's help is more meaningful. The test is that the words used "reasonably" convey the right to the suspect. As the court recognized in Canete, the totality of the circumstances must be considered in making such a determination. There is no bright-line test which can be applied in all circumstances. An officer must have the flexibility of language to convey the essence of the rights to the suspect.

In United States v. Potter, 360 F. Supp 68 (E.D. La. 1973), the court, denying the defendant's motion to suppress statements made to the FBI, rejected the contention that an FBI agent's modification of the Miranda warnings tainted the entire interrogation. The agent explained to the defendant that the agent was not in a position to appoint an attorney before custodial interrogation, but that a United States "magistrate" would appoint an attorney for the defendant if the defendant so desired. Id. The court concluded the words of Miranda, which said "the court", do not constitute a ritualistic formula that must be repeated without variation in order to be effective. Id. Words that convey the substance of the warning along with the required information are

sufficient to satisfy Miranda. Id. The court held that the agent's verbal modification of the Miranda warnings did not deceive the defendant, nor did it fail to apprise him fully of his rights, including the right to have counsel present during questioning and the right, if indigent, to appointed counsel during interrogation. Id. The court found the agent's oral version of the warnings, merely constituted a personal, pragmatic assessment of how the Miranda rights would be executed, and that such a technical deviation from the standard warnings did not prevent the defendant from receiving a complete and understandable explanation of his rights. Id.

Similarly, it contorts reasoning to suggest the warnings given to Respondent do not reasonably convey his right to have his attorney present during questioning. Only based on a strained, literalistic reading, inattentive to context, could the warnings given to Respondent be interpreted as implying that he could talk to a lawyer before questioning and at any time during questioning, but could not have a lawyer present during questioning. As noted in M.A.B., "The warnings at issue . . . admittedly are not the most elegant formulation of Miranda rights. But the test is reasonable clarity, not elegance. And the language of the warnings meets the test of reasonable clarity." M.A.B., So. 2d at 1228. Respondent 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.

In the final warning Respondent was reasonably informed of the breadth of the umbrella under which he rests: "You have the right to use any of these rights at any time you want during this interview." It requires a very facile mind, and an almost willful ignorance of common parlance, to conclude the expression "talk to an attorney before answering any questions" limits the defendant's comprehension of his right, while the last warning, that the rights may be exercised "at any time" confuses him. Taken in context, the language used by the officer 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 Respondent his continuing right of access to counsel.

As this Court has stated, "We must keep in mind that the reason for informing individuals of their rights before questioning is to ensure that statements made during custodial interrogation are given voluntarily, not to prevent individuals from ever making these statements without first consulting counsel." Sapp v. State, 690 So. 2d 581 (Fla. 1997), citing, Traylor, 596 So. 2d 957, 964 (Fla. 1992).

In the almost 40 years since Miranda was decided, the Supreme Court of the United States, and other state and federal courts have recognized Miranda's core purpose is to protect the privilege

against self-incrimination. The exact words used by law enforcement to advise suspects of their rights is not as important as whether the admonitions reasonably convey their rights. The warnings given in this case do adequately convey one's rights.[3]

Respondent Had Actual Knowledge of His Rights

In his trial testimony, Respondent specifically acknowledged that he had waived his right to have an attorney present **during** questioning. Therefore, the alleged deficiency in the warnings found by the Second District in no way affected Respondent, who had actual knowledge of what his waiver meant to him, and who never invoked his right to remain silent, or his right to have an attorney present, before freely and voluntarily answering the detectives' questions.[4] Admission of Respondent's statements at trial did not

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[3]In an abundance of caution, Petitioner would assert that even if this Honorable Court were to affirm the opinion of the Second District in this case, such resolution of this issue would not constitute a fundamental change in constitutional law which would merit retroactive applicationfor cases on collateral review. Pursuant to Teague v. Lane, 489 U.S. 288, 310 (1989), the United States Supreme Court stated that, unless they fall within an exception to the general rule, new constitutional rules of criminal procedure generally will not be applicable to cases which have become final before the new rules are announced. See also, Washington v. McDonough, 2007 WL 4614996(S.D. Fla. Dec. 29, 2007)(finding the decision in Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), does not apply retroactively as the holding of Roberts that the rights waiver form used was deficient and does not fall within either exception to the Teague rule).

[4]With ten prior felony convictions, as well as one prior crime of dishonesty, Respondent has had prior dealings with law enforcement suggesting "more than a passing familiarity with his rights under Miranda." See Mitchell, 32 Fla. L. at Weekly D2960 n.4. (Altenbernd, J., concurring)("the record suggests that these warnings were given to Mr. Mitchell while he was incarcerated for

compromise Miranda's central concern, and the reason for the rule, the protection of the Fifth Amendment right against self-incrimination, was satisfied. Therefore, the rule should not operate in an overly technical way to exclude this otherwise relevant evidence.

Other state courts have considered a defendant's actual knowledge of his rights in determining admissibility of his statements. For example, in People v. Latshaw, 123 A.D.2d 479, 479 (N.Y. App. 1986), the officer asked the defendant "if he understood what his constitutional rights might be." The defendant responded that he knew he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to an attorney, and that an attorney would be provided if he could not afford one. Id. The court held that, while unorthodox, the fact the officer did not initiate Miranda warnings was not fatal. Id. at 480. Moreover, the defendant's recitation of his rights evidenced an adequate understanding of his right not to incriminate himself. Id.

In a similar case out of California, prior to questioning, the officer stated, "I know you've been arrested before, so you know the procedure. First, I have to read you your rights, you understand your rights?" People v. Nitschmann, 41 Cal. Rptr. 2d 325, 327 (Cal.

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another crime and that Mr. Mitchell may have had more than a passing familiarity with his rights under Miranda in light of his prior record.")

App. 1995). Before the officer could read the defendant his rights, the defendant began to explain the events of the evening. The officer stopped the defendant and told him "Okay, hold on. Let me, let me read you this first and then we'll talk about what happened." Id. The defendant then proceeded to state:

> I have the right to remain silent, anything I say, if I say can and will be used against me in a court of law. I have the right to an attorney, if I cannot afford one, one will be appointed to me by the state. I know the whole bit.

Id. On appeal, the defendant argued his statement should have been suppressed because the officer did not tell him he had a right to counsel's presence *during* questioning. The court stated:

> a rule excluding otherwise voluntary statements after the arrestee admonishes himself on the record would do violence to common sense. Here there was direct evidence that appellant was aware of his Miranda rights before talking to the police. This is the goal of Miranda. Where, as here, the reason for the rule is satisfied, the rule should not operate in an overly technical way to exclude relevant evidence.
>
> We decline appellant's invitation to exalt form over substance. . . .

Nitschmann, 41 Cal. Rptr. 2d at 328.

This Court and the United States Supreme Court have repeatedly rejected suggestions that any specific wording is required to adequately convey the substance of a suspect's rights under Miranda. No decision of this Court or the United States Supreme Court has interpreted Miranda to require an explicit warning advising of the right to have an attorney present during questioning. By its

opinion in Powell, the Second District has improperly imposed such a requirement. The Second District's opinion should be reversed because the warnings given to Respondent adequately fulfilled Miranda's substantive requirements.

CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the Second District's opinion and reinstate the trial court's ruling that Respondent's statements were admissible.

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 25th day of January, 2008.

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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