

IN THE SUPREME COURT OF FLORIDA

JOSEPH MODESTE,

Petitioner,

versus

CASE NO: SC08-1723

STATE OF FLORIDA,

Respondent.

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APPEAL FROM THE CIRCUIT COURT  
IN AND FOR ORANGE COUNTY  
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S AMENDED BRIEF ON JURISDICTION

FRANK J. BANKOWITZ, P.A.  
FRANK J. BANKOWITZ, ESQUIRE  
207 E. Livingston Street  
Orlando, FL 32801  
Florida Bar #: 171977  
407.428.1514  
Facsimile 407.849.0776  
Attorney for Petitioner

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## TABLE OF CITATIONS

1. Duckworth v. Ragan, 492 U.S. 195, 203 (1989)
2. State v. Hobbs, 974 So. 2d 1119, at 1122-1123 (Fla. 5<sup>th</sup> DCA 2008)
3. Maxwell v. State, 917 So. 2d 404 (Fla. 5<sup>th</sup> DCA 2006)
4. Miranda v. Arizona, 384 U.S. 483 (1966)
5. Octave v. State, 925 So. 2d 1128 (Fla. 5<sup>th</sup> DCA 2006)
6. People v. Washington, 6 Cal 4<sup>th</sup> 215 (Cal. 1993)
7. Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007)
8. Roberts v. State, 874 So. 2d 1225 (Fla. 4<sup>th</sup> DCA 2004)
9. Thompson v. State, 595 So. 2d 16 (Fla. 1992)
10. United States v. Noti, 731 F2d 610, 614 (9<sup>th</sup> Cir 1984)
11. West v. State, 876 So. 2d 614 (Fla. 4<sup>th</sup> DCA 2004)
12. Windsor v. United States, 394 F2d 743, 746-47 (2<sup>nd</sup> Cir 1968)

Rule 9.030 (a)(2)(A)(vi), Fla. R. App. P.

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AMENDED JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the circuit Court, ninth judicial Circuit, in and for orange County, Florida. In the Brief the Respondent will be referred to as “the State: and the Petitioner will be referred to both by his name (“Mr. Modeste”) and as he appears before this Honorable Court.

In the Brief the following symbols will be used:

“R” – Record on appeal, volume two of record on appeal

“T” – Transcript of motion hearing, volume one of record on appeal

## STATEMENT OF THE CASE

Petitioner Joseph Modeste was charged by indictment filed in the Circuit Court of Orange County, Florida with two counts of first degree murder. (R 98). The trial court ruled that Petitioner's statements to law enforcement were inadmissible because law enforcement failed to properly advise Mr. Modeste of his right to have counsel present during his interrogation in violation of Miranda v. Arizona, 384 U.S. 483 (1966) and Maxwell v. State, 917 So. 2d 404 (Fla. 5<sup>th</sup> DCA 2006).

The State appealed the trial court's order denying the admission of petitioner's statements and the Fifth District Court of Appeal reversed, ruling that "...an individual is adequately advised on his right to remain silent, anything he says can be used against him. He has the right to an attorney and if he cannot afford an attorney, one will be appointed for him. Miranda does not require that the suspect also be expressly informed he has the right to have counsel present during interrogation and establishing conflict with Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA, 2007), Thompson v. State, 595 So. 2d 16 (Fla. 1992), West v. State, 876 So. 2d 614 (Fla. 4<sup>th</sup> DCA 2004), State v. Hobbs, 974 So. 2d 1119, at 1122-1123 (Fla. 5<sup>th</sup> DCA 2008).

(Appendix). and its own decision in Octave v. State, 925 So. 2d 1128 (Fla. 5<sup>th</sup> DCA 2006) and Maxwell v. State, 917 So. 2d 404 (Fla. 5<sup>th</sup> DCA 2006). Petitioner has not filed for a rehearing as the decision was an en banc decision. On August 26, 2008, Frank J. Bankowitz was designated to represent the Petitioner on appeal and his notice to invoke this Honorable Court's discretionary jurisdiction was filed in the District Court on September 2, 2008. Rule 9.030 (a)(2)(A)(vi), Fla. R. App. P.

## STATEMENT OF THE FACTS

In its decision herein, the District Court wrote:

We hold that when an individual is adequately advised of his right to remain silent, anything he says can be used against him, he has the right to an attorney, and if he cannot afford an attorney, one will be appointed for him, Miranda does not require that the suspect also be informed he has the right to have counsel present during interrogation.

We recognize that our conclusion on this issue may be in conflict with the Second District Court of Appeal's decision in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007), jurisdiction accepted 1973 So. 2d 1123 (Fla 2008). Further we continued to adhere to the view that a Miranda warning which fails to advise a defendant of his right to appointed counsel he cannot afford to hire his own attorney, is inadequate. See Thompson v. State, 595 So. 2d 16 (Fla 1992). However, we recede from our suggestion in Maxwell v. State, 917 So. 2d 404 (Fla. 5<sup>th</sup> DCA 2006) that a Miranda warning is inadequate when the suspect is not expressly advised that the right to counsel includes the right to have counsel present during interrogation. In so doing, we recognize that the Fourth District Court of

Appeal has taken a contrary position. See West v. State, 876 So. 2d 614 (Fla. 4<sup>th</sup> DCA 2004); Roberts v. State, 874 So. 2d 1225 (Fla. 4<sup>th</sup> DCA 2004). We conclude that the officers' statements adequately advised Mr. Modeste of his rights as required by Miranda. In so doing we certify conflict with West and Roberts.

## SUMMARY OF ARGUMENT

The Supreme Court has jurisdiction to review the Fifth District Court of Appeals decision in this cause. The District Court's decision expressly and directly conflicts with a decision of the Second District Court of Appeal and the Fourth District Court of Appeal as well as its own decision in Maxwell on the same question of law. The District Court's decision has certified that its holding conflicts with the Fourth District Court of Appeal's decisions in West v. State, 876 So. 2d 614 (Fla. 4<sup>th</sup> DCA 2004) and Roberts v. State, 874 So. 2d 1225 (Fla. 4<sup>th</sup> DCA 2004) and Rule 9030 (a)(2)(A)(vi), Fla. R. App. P.

## ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS AND CERTIFIES THAT IT CONFLICTS, WITH THE FOURTH DISTRICT COURT OF APPEAL'S DECISIONS IN WEST v. STATE, 876 So. 2d 614 (Fla. 4<sup>th</sup> DCA 2004) AND ROBERTS v. STATE, 874 So. 2d 1225 (FLA. 4<sup>TH</sup> DCA 2004)

In its decision the Fifth District Court of Appeals reversed the Orange County Circuit Court's order that Petitioner's statements to law enforcement were inadmissible, the circuit court order stated (at R311-312):

In the instate case, the defendant was specifically informed of his right to remain silent, his right to an attorney before questioning and that he could stop talking at any time. There is no indication from the transcript of his interview that he was informed of his right to an attorney during the interview. The oral Miranda warnings given by the detective did not reasonably convey to the defendant his right to the process of an attorney during the interview. See Duckworth v. Ragan, 492 U.S. 195, 203 (1989). Although the specific phrase "right to counsel during interrogation" is not required to satisfy an adequate Miranda warning, there was no phrase during the interview that could be interpreted as an equivalent. Furthermore, stating specifically that the defendant had a right to counsel before talking, while omitting that he had a right to counsel during the interview, is affirmatively misleading... therefore, the incriminating statements obtained from the interview must be suppressed.

This before rather than during language is inadequate because it affirmatively misadvises the accused by suggesting he would not have the right to counsel during questioning Roberts v. State, 874 So. 2d 1225 (Fla 4<sup>th</sup> DCA), United States v. Noti, 731 F2d 610, 614 (9<sup>th</sup> Cir 1984), Windsor v. United States, 394 F2d 743, 746-47 (2<sup>nd</sup> Cir 1968), People v. Washington, 6 Cal 4<sup>th</sup> 215 (Cal. 1993). Given the facts of this case where two doctors reported to the trial court a history of dyslexia for the defendant and the fact the police did not read from the Miranda card they had is especially disturbing.

The Fifth District Court of Appeals in its en banc opinion, writes... we certify conflict with West and Roberts. Both cases are from the Fourth District Court of Appeals.

This Honorable Court has jurisdiction to accept review of this cause and resolve the express and direct conflict which the decision herein certifies exists between the Fifth and Fourth District Courts of Appeal, as well as the decision in Maxwell of the Fifth District and the Second District Court's decision in Powell v. State, 969 So. 2d 1060 (Fla. 2nd DCA 2007). Rule 9.030 (a)(2)(A)(iv)(vi), Fla. R. App. P.

## CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review or the Fifth District Court of Appeal's decision in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Attorney General's Office, 444 Seabreeze Blvd., #500, Daytona Beach, FL 32118 this 26th day of September, 2008.

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FRANK J. BANKOWITZ, ESQUIRE  
ATTORNEY FOR PETITIONER

## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using Times New Roman, 14 point.

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FRANK J. BANKOWITZ, ESQUIRE  
ATTORNEY FOR PETITIONER

## APPENDIX

- A. Decision of the Fifth District Court of Appeal