CASE NO. 08-1229

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,
Petitioner,

v.

THOMAS WILLIAM RIGTERINK,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

I

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION CONFLICTS WITH *MIRANDA v. ARIZONA*, AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS?

II

WHETHER USE OF AN ARGUABLY DEFECTIVE *MIRANDA* WARNING REQUIRES SUPPRESSION OF A SUSPECT'S STATEMENT WHEN LAW ENFORCEMENT OFFICERS REASONABLY RELIED UPON A STANDARD WARNING INFORMING A SUSPECT OF HIS RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING AND THERE IS NO EVIDENCE THAT THE DEFENDANT WAS CONFUSED OR MISLED BY THE WARNING AND THE RESULTING STATEMENT WAS OTHERWISE VOLUNTARY?

III

DOES THE FLORIDA SUPREME COURTS OPINION FINDING THE DEFENDANT WAS IN CUSTODY, CONFLICT WITH MIRANDA AND ITS PROGENCY DEFINING CUSTODIAL INTERROGATION WHERE THE DEFENDANT VOLUNTARILY CAME TO THE STATION TO PROVIDE FINGERPRINTS, VOLUNTEERED HIS DESIRE TO MAKE A STATEMENT AND WHERE HE WAS NEVER RESTRAINED OR TOLD HE COULD NOT LEAVE DURING A LENGTHY BUT NON-COERCIVE INTERVIEW?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL STATUTES

FEDERAL RULES

OTHER AUTHORITIES

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OPINION BELOW

The Decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as *Rigterink v. State*, 2009 Fla. LEXIS 151, 34 Fla. L. Weekly S. 132 (Fla. January 30, 2009).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9 of the Florida Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or Naval Forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

There are no additional facts to be presented. The full Opinion of the case to be reviewed is attached in the Petitioner's Appendix.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I.

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION CONFLICTS WITH MIRANDA v. ARIZONA, AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS.

A. The opinion of the Florida Supreme Court in *Rigterink* is founded on independent and adequate State Constitutional Grounds and Florida Case Law interpreting Article I, §9 of the Florida Constitution.

The Opinion in *Rigterink* plainly states that the Florida Supreme Court based its decision on the independent requirements of the Self-Incrimination Clause of Article 1, §9 of the Florida Constitution, separately and apart from precedent from this Court, interpreting the constraints of the Fifth Amendment. The Opinion is also clear that the Court's decision under the Florida Constitution would be adequate to resolve the issue.

In *Ritgerink*, the Court held that, under its decision in *State v. Powell*, 998 So.2d 531 (Fla. 2008) the confession had to be suppressed. The Court asserted that, as the ultimate arbiter of the meaning and extent of the safeguards provided under the Florida Constitution, it had decided to interpret Florida's right against self-incrimination more broadly than that right under the Fifth Amendment:

> ..... [U]nlike Article I, Sections 12 ("Searches and Seizures") and 17 ("Excessive punishments"), Section 9 does *not* contain a proviso that we must follow Federal precedent with regard to the right against self-incrimination. *Cf. Traylor v. State,* 596 So.2d 957, 962 (Fla. 1992) ("When called upon to decide matters of fundamental rights, Florida's State Courts are bound under federalist principles to give primacy to our State Constitution and to give independent legal import to every phrase and clause contained therein.").
>
> Thus, in this context, the Federal Constitution sets the floor, and not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its Federal counterpart. See, e.g., *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989) ("State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of Federal Law . . .

> [W]ithout [independent state law], the full realization of our liberties cannot be guaranteed." (quoting *William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977))). This Court is the ultimate "arbiter of the meaning and extent of the safeguards provided under Florida's Constitution." *Busby v. State, 894 So.2d 88, 102 (Fla. 2004).*

Rigterink, 2 So.3d at 241.

"This Court will not review a question of Federal Law decided by a State Court if the decision of that Court rests on a state law ground that is independent of the Federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185 (1995), the Court recognized that State Courts are "absolutely free to interpret State Constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." In deciding the jurisdictional question, the *Evans* Court wrote:

> In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1202 (1983), we adopted a standard for determining whether a State Court decision rested upon an adequate and independent State ground. When "a State Court decision fairly appears to rest primarily on Federal Law, or to be interwoven with the Federal Law, and when the adequacy and independence of any possible State Law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the State Court decided the case the way it did because it believed that the Federal Law required it to do so." *Id.,* at 1040-1041, 115 S.Ct. at 3476.

Evans, 514 U.S. at 7, 115 S.Ct. at 1189. *State v. Powell*, 998 So.2d 531 (Fla. 2008).

The only other case discussing this issue from the Florida Supreme Court is also pending in this Court on Petition for Writ of Certiorari.

The *Powell* opinion makes repeated references to *Traylor v. State*, 596 So.2d 957 (Fla. 1992). See *Powell,* 998 So.2d at 534, 535, 535 n.2, 537-538, 540. In *Traylor*, the Florida Supreme Court made it clear that, pursuant to "federalist principles," the Court was free to "place more vigorous restraints on government intrusion than the Federal Charter imposes." *Traylor*, 596 So.2d at 961, citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). The Court asserted, "In any given State, the Federal Constitution thus represents the floor for basic freedoms; the State Constitution, the ceiling." *Id.* at 962 (citation omitted). In light of that realization, the *Traylor* Court construed the Self-Incrimination Clause of Article I, §9, of the Florida Constitution to require that certain rights be conveyed to suspects in custodial interrogation, and the Court defined those rights to include the "right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Traylor* at 965-966, 966 n. 13.

In a footnote, the *Traylor* Court observed that in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court "established procedural safeguards **similar** to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation." *Traylor*, 596 So.2d at 965 n.

12 (emphasis added). Therefore, by defining *Miranda* Rights as "similar to" those mandated by its decisions, the Florida Supreme Court established that its mandatory warnings under State Law were independent from those required by *Miranda*. And, unlike this Court, the Florida Supreme Court created a "bright-line" standard for purposes of State Law, writing:

> A prime purpose of the above-safeguards is to maintain bright-line standard for police interrogation; any statement obtained in contravention of these guidelines violates the Florida Constitution and may not be used by the State.

Traylor at 966.

In *Powell*, the Supreme Court's shorthand references to *Traylor* and its references to Article I, §9 of the Florida Declaration of Rights, clearly demonstrate that its holding was grounded in the Self-Incrimination Clause of the Florida Constitution, but that the holding was not inconsistent with *Miranda*. For example, after explaining the rights outlined in *Miranda*, the *Powell* Court wrote:

> Similarly, to ensure the voluntariness of confessions as required by Article I, Section 9 of the Florida Constitution, this Court in *Traylor v. State,* 596 So.2d 957 (Fla. 1992), outlined the following rights Florida suspects must be told of prior to custodial interrogation:
>
> > [1] they have a right to remain silent, [2] that anything they say will be used against then in Court, [3] that they have a right to a lawyer's help, and [4] that if they cannot pay for a lawyer one will be appointed to help him. *Id. at 966* . . . .

Powell, 998 So. 2d at 534-535. The Court went on to explain that *in Traylor,* "we also unequivocally said that the help of an attorney includes both the right to consult with an attorney before questioning and the right to have an attorney present during questioning." *Powell* at 535, quoting *Traylor* at 966 n. 13.

The Court also wrote:

> After our holding in *Traylor,* we reiterated the principles espoused in *Traylor* and the *Miranda* decision in several other decisions from this Court. In both *Ramirez v. State, 739 So.* 2d. 568 (Fla.1999), and *Sapp v State,* 690 So. 2d *581 (Fla. 1997),* neither of which presented the exact issue involved in the case that is presently before us, we noted the requirements of both the Fifth Amendment, as explained in *Miranda*, and the Florida Constitution, as explained in *Traylor.* Our explanation of the Federal and the State requirements included the requirement that a suspect be informed of the right to have counsel present during questioning. *See Ramirez*, 739 So.2d 573 (quoting from *Miranda* that suspects must be informed that they have a right to an attorney during questioning); *Sapp*, 690 So.2d at 583-84 (citing to *Miranda* for the proposition that an individual has the right to have counsel present during custodial interrogation).

Powell, 998 So.2d at 537-38.

In the Opinion, the Court reiterated: "Under Article I, Section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to a lawyers' help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation."

Powell, 998 So.2d at 540.

In its conclusion, the Florida Supreme Court declared:

> Because *Powell* was not clearly informed of his right to the presence of counsel during the custodial Interrogation, we agree with the Second District and answer the

> certified question in the affirmative. Thus, we also agree with the Second District that to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by *Miranda*. Both *Miranda* and Article I, Section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning. . . .

That being said, a look at treatment of State Law in the State Courts Opinions in both *Evans* and *Long* shows that those decisions are unlike the analysis of Florida Law in this case. In *Long*, the Lower Court mentioned the Michigan Constitution only twice in passing. In *Evans*, the Arizona Supreme Court suppressed evidence found after *Evans* was arrested as a result of an inaccurate computer record showing an outstanding warrant. *Evans* argued that this Court lacked jurisdiction under 28 U.S.C. §1257 because the Arizona Supreme Court based its decision on a State "Good-Faith" Statute. This Court rejected that argument, and a reading of the Arizona Supreme Court Opinion clearly shows that the State Court found the Good-Faith Statute of no use in its analysis because the motivation of the police was not at issue. See *State v. Evans*, 866 P.2d 869, 871 (Ariz. 1994).

In the *Powell* Opinion, and later, in the discussion of *Powell* in *Rigterink*, the Florida Supreme Court laid out a detailed analysis of its previous interpretation of the Florida Self-Incrimination Clause in *Traylor*. The Court explained that it had exercised its prerogative to accord broader protection under the Florida Declaration

of Rights than under the United States Constitution. The Court also made it clear that although *Miranda*, and the cases from this Court that followed, were a guide in assessing the prohibition against compelled testimony in Florida, the result was in no way compelled by Federal Law. Since the result would remain valid independent of further input from this Court, the decision is founded on the adequate and independent State ground of the Florida Constitution, and any decision of this Court would be an advisory opinion. See *Coleman v. Thompson*, 501 U.S. at 729 ("Because this Court has no power to review a State Law determination that is sufficient to support the judgment, resolution of any independent Federal Ground for the decision could not affect the judgment and would therefore be advisory.")

B. **The Opinion in *Rigterink* is in harmony with this Court's decisions in *Miranda*, *California v. Prysock,* 453 U.S. 355 (1981), and *Duckworth v. Eagan*, 492 U.S. 195 (1989), because the Florida Supreme Court merely applied this Court's precedent to the unique facts in this case and concluded that the warnings, as a whole, failed to convey an essential element required by *Miranda*.**

Even if the Opinion below were not grounded on independent and adequate State Grounds, the Opinion of the Florida Supreme Court neither conflicts with *Miranda* nor expands *Miranda*. The Court merely determined whether or not specific warnings read to Respondent failed to convey the *Miranda* requirement that a suspect be generally informed of his right to the presence of counsel during

interrogation. The Court concluded that, when read as a whole, the Warnings in this case were misleading and inadequate.

Rule 10 of the Supreme Court Rules provides that a Petition for Writ of Certiorari will be granted only for "compelling reasons." Under this Rule, those reasons include "(c) a State Court or a United States Court of Appeals has decided an important question of Federal Law that has not been, but should be, settled by this Court, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court." This case does not present a new question of Federal Law or a conflict with this Court's decisions.

The "question presented" as laid out by Petitioner, states that the Florida Supreme Court's holding requires that a suspect must be "expressly advised" of his right to counsel during custodial interrogation. This statement is not correct. The Florida Supreme Court, citing its Opinion in *Powell*, ultimately held only that a suspect has to be "clearly informed" of his right to counsel during interrogation. *Powell* 998 So.2d at 540 ("we hold that *Powell* was not clearly informed of his right to have counsel present during questioning."). The *Powell* holding merely requires a Warning which, when read in whole, imparts the essential requirements of *Miranda*, either in the form proscribed by this Court, or, the "functional equivalent" of that form. The Opinion does not require any specific language, and references to the language contained in *Miranda* are used merely as a concise statement of the right to counsel involved.

Thirteen years after *Miranda*, in *Fare v. Michael C.*, 442 U.S. 707, 716, 99 S.Ct. 2560, 2568 (1979), this Court reaffirmed the essential components of *Miranda* Warnings:

> The rule of the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his ***right to have counsel, retained or appointed, present during interrogation.***

Id., citing *Miranda*, 384 U.S. at 473, 86 S.Ct. at 1627. (*Emphasis added*).

In *Miranda,* this Court stated unequivocally:

> 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.

384 U.S. at 471-72 (*emphasis added*). The *Powell* holding mirrors that language.

The *Rigterink* Court carefully considered the *Miranda* holding above, along with the rationale provided by this Court, before determining that the warnings read to Respondent were not the functional equivalent of the warnings required by *Miranda*.

The *Rigterink* Court, in reaching its decision, relied on their reasoning in *State v. Powell.*

> Here in comparison to *Powell*, the PCSO Detectives provided *Rigterink* with a similarly defective right-to-counsel warning both verbally and in writing: Specifically, the relevant portion of the warning stated that *Rigterink* had "the right to have an attorney present prior to questioning." (*Emphasis supplied*). Therefore, *Powell* directly controls this issue. The right-to-counsel warning was materially deficient because it did not accurately and clearly convey one of the central components of *Miranda*: The custodial subject enjoys a right to the presence of counsel during, not merely before, a custodial interrogation. *See Prysock*, 453 U.S. at 361; *Miranda*, 384 U.S. at 444, 466, 470, 479; *Powell*, 33 Fla. L. Weekly at S780, S782, 2008 WL 4379596, at *3, *9-*10. As we held nearly seventeen years ago under our State Constitution:
>
> [T]o ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation 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 them.
>
> This means that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.

Traylor v. State, 596 So.2d 957, 965-66 & n. 13 (Fla. 1992) (*emphasis* added).

In its careful analysis in *Powell*, which was relied upon in the holding in *Rigterink*, the Florida Supreme Court fully appreciated that "*Miranda* does not mandate the warnings be a virtual incantation of the precise language contained in the *Miranda* Opinion." *Powell* at 534, citing *California v. Prysock*, 453 U.S. 355,

101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). The *Powell* Court also noted,

> Moreover, in *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), the Supreme Court further said that the "[r]eviewing Courts . . . Need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Id.* at 203, 109 S.Ct. 2875 (quoting *Prysock*, 453 U.S. at 361, 101 S.Ct. 2806).

Powell at 534.

The Florida Supreme Court simply concluded, consistent with both *Prysock* and *Duckworth*, that the warning to *Rigterink* that he had the right to have an attorney present prior to questioning" was not the functional equivalent of having a lawyer with you during questioning. The Court in *Powell* explained that it found "the warning was misleading," writing:

> The State contends that since the *Miranda* decision, the United States Supreme Court has held that Miranda did not require of or impose upon law enforcement a rigid and precise formulation of the warnings to be given to a criminal defendant. In *Anderson vs. State*, 863 So.2d 169 (Fla. 2003)], we also noted that "there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, **as long as the warnings are not misleading.**" 863 So.2d at 182 (*emphasis added*). In this case, the warning was misleading. The warning said "**before** answering any questions." The "before questioning" warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning: there is nothing in that statement that suggests the attorney can be present during the actual questioning.

Powell at 541.

In *Prysock*, this Court observed "ordinarily this Court would not be inclined to review a case involving application of precedent to a particular set of facts." *Prysock*, 453 U.S. at 355, 101 S.Ct. at 2807 (citing *Fare v. Michael C.*, 439 U.S. 1310 1314, 99 S.Ct. 3, 558 L.Ed.2d 19 (1978) (Rehnquist, J., in chambers)). Also, whether or not a Lower Court's decision is correct, Rule 10 of this Court provides: "A Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no doubt that the *Rigterink* and *Powell* Courts properly stated the applicable rules of law.

Nevertheless, the holding in this case conflicts neither with the spirit, nor the actual holding of *Prysock*. In *Prysock*, the State Court held that Warnings were inadequate because the defendant was not specifically told he had the right to the services of a free attorney before and during interrogation. Specifically, *Prysock* was told: "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"; and later, "you have the right to have a lawyer appointed to represent you at no cost to yourself." *Prysock* 453 U.S. at 357. This Court was concerned that the State Court found the Warnings invalid simply because of the order in which they were given. The Court believed the Lower Court "essentially laid down a flat rule requiring that the content of *Miranda* Warnings be a virtual incantation of the precise language contained in the *Miranda* Opinion." *Id.* at 355.

In arriving at its decision, this Court noted that during the interview, 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." This Court found the Warnings were sufficient because "nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed right to have a lawyer before he was questioned, while he was questioned and all during the questioning." *Id. at 360-61.*

In contrast, in *Rigterink*, the Florida Supreme Court found that the Warnings were inadequate because they did not mention the presence of counsel during, not merely before, a custodial interrogation. This defect is distinguishable from that in *Prysock*, because the defect pertains to the substance of the Warning as opposed to its form.

In *Duckworth*, the accused was specifically informed: "You have a right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning;" and, "you have this right to the advice and presence of a lawyer even if you cannot afford to hire one." *Duckworth*, 492 U.S. at 198. The issue in that case was whether the fact that police told him "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to Court" rendered the Warnings defective. In rejecting a rigid form for *Miranda*

Warnings, this Court stated: "*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." *Duckworth*, 492 U.S. at 204.

In *Duckworth,* the Court noted that the *Prysock* Court's disapproval was restricted to warnings that "would not apprise the accused of his right to have an attorney present if he chose to answer questions." *Id. a*t 205. Therefore, *Prysock* and *Duckworth* seem to answer the question posed in *Rigterink* and *Powell*, and the holding in *Rigterink* is in accordance with these decisions.

Petitioner cites Justice Breyer's statement explaining the decision to deny certiorari in *Bridgers v. Texas*, 532 U.S. 1034, 121 So.Ct. 1995 (2001) (Breyer, J. dissenting with Stevens and Sourter, J. J., joining). The *Miranda* Warnings read to Bridgers stated, "You have the right to the presence of an attorney/lawyer prior to any questioning." *Id.* Justice Breyer expressed his colleagues' concerns, citing *Prysock* and writing, "although this Court has declined to demand 'rigidity in the form of the required warnings,' [ ] the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element." *Bridgers*, 121 S.Ct. at 1996.

Justice Breyer also wrote:

> Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner'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.

Id.

In this case, the Warnings were held to be insufficient precisely because they did not advise the defendant of that same "essential *Miranda* element," the right to the actual presence of an attorney during interrogation. Therefore, since the holding in *Rigterink* remedies the concerns of the Justices in *Bridgers*, there is no need for this Court to intervene.

C. Contrary to Petitioner's assertions, there is no ongoing conflict among the Courts; and this case does not conflict with most cases cited by petitioner because the facts are distinguishable.

Rule 10 of the Supreme Court Rules, provides that a Petition for Writ of Certiorari will be granted only for "compelling reasons." Under the Rule, those reasons include: "(b) a State Court of last resort has decided an important Federal question in a way that conflicts with the decision of another State Court of last resort or of a United States Court of Appeals."

Many of the cases cited by Petitioner as conflicting with *Rigterink* are not in actual conflict because in those cases, the suspects were informed they had a right to counsel without any qualifying or limiting language. For example, in *United States v. Adams*, 484 F.2d 357 (7th Cir. 1973), an officer testified that he recited "the right to remain silent, right to counsel, and if they haven't got funds to have counsel, that the Court will see that they are properly defended." *Id.* at 361.

See also *United States v. Lamia*, 429 F.2d 373, 376-77 (2d Cir. 1970) ("Lamia had been told without qualification that he had the right to an attorney and that one could be appointed if he could not afford one."); *United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996) (warning advising "you have the right to an attorney," because of its generality, communicated an immediate and continuing right without qualification); *United States v. Burns* 684 F.2d 1066, 1074-75 (2d Cir.1982) (warning informing defendant he had a right to an attorney was sufficient, but Court urged law enforcement to make explicit the right to have an attorney present during questioning); *United States v. Caldwell*, 954 F2d 496, 502 (under "plain error" standard for unpreserved error, ambiguous warning "you have a right for an attorney" was not misleading because it did not suggest a false limitation); *People v. Prim*, 289 N.E.2d 601, 603-04 (Ill. 1972) (Miranda Warning that defendant had a right to have counsel present sufficient).

Petitioner's claim that the "purported problem continues to be a recurring one" is belied by the fact that all of the allegedly conflicting cases cited by Petitioner were decided before 1996, and most were decided between 1968 and 1976. Petitioner also cites to the unpublished opinion of the eleventh Circuit in *United States v. Harris*, 151 Fed. Appx. 882, 885 (11th Cir. 2005). *Harris* does not conflict with the holding in *Powell* or *Rigterink*.

In *Harris*, the Eleventh Circuit specifically recognized that *Miranda* required that before a person in custody is interrogated "the person must be clearly informed

he has the right to consult with a lawyer and to have a lawyer with him during interrogation." *Id.* at 885. In *Harris*, the defendant did not claim the *Miranda* Warnings read to him at the time of arrest and while he was incarcerated in a holding cell at the jail were insufficient. Instead, *Harris* claimed the Warnings read to him 15 minutes after the last sufficient warning, immediately before his taped interview, failed to advise him of his right to counsel. The *Harris* Court held that the fact that the final Warnings were "somewhat incomplete" did not affect the sufficiency of the Warnings in their totality. Therefore, *Harris*, whether or not it has precedential value as an unpublished Opinion, does not conflict with the holding in *Powell.*

Petitioner also urges this Court to grant Certiorari in this case to correct an "intra-circuit" conflict allegedly created by *Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), *cert. denied,* 548 U.S. 909, 126 S.Ct. 2961, 165 L.Ed. 2d 959 (2006). First, any intra-circuit conflict should be resolved in any future cases by use of *en banc* proceedings. More importantly, however, is the fact that there is no conflict.

Bridgers was told he had "the right to the presence of an attorney/lawyer prior to any questioning." *Id.* at 856. On direct appeal in the State Court, the Court rejected *Bridgers*' argument that the Warnings were insufficient because they did not explicitly state he had the right to consult an attorney during questioning. This Court denied Certiorari; but as related above, the Court issued a statement from three Justices expressing their concern that the warnings omitted "an essential

Miranda element." *Bridgers v. Texas*, 532 U.S. at 1034. *Bridgers* then filed a Federal Habeas Petition, which was denied, and that Appeal went to the Fifth Circuit. (*Bridgers v. Dretke*, 431 F.3d 853).

The Fifth Circuit made it clear that the standard of review for an Appeal of a Habeas Proceeding under the Antiterrorism and Effective Death Penalty Act (AEDPA) requires deference to the Lower Court unless the decision is "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." *Bridgers*, 431 F.3d at 857 (quoting AEDPA, 28 U.S.C. §2254(d)). The Fifth Circuit merely held that *Bridgers* failed to show the State Court's decision (that he was adequately advised of his Fifth Amendment Rights) was "objectively unreasonable" under the AEDPA. The Fifth Circuit found that the State Court considered and "applied controlling Supreme Court precedent and properly recognized that *Miranda* required advising a suspect that he is entitled to have counsel present during interrogation." *Bridgers* at 858. Because the standard of review was significantly different on Habeas Review, there is no inter-circuit conflict with cases that held otherwise on direct review. See, *e.g., Atwell v. United States*, 398 F.2d 507, 510 (5th Cir. 1968).

Therefore, for the reasons above, compelling reasons for Certiorari are not presented in this case.

II

DOES THE USE OF AN ARGUABLY DEFECTIVE *MIRANDA* WARNING REQUIRE SUPPRESSION OF A SUSPECT'S STATEMENT WHEN LAW ENFORCEMENT OFFICERS REASONABLY RELIED UPON A STANDARD WARNING INFORMING A SUSPECT OF HIS RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING AND THERE IS NO EVIDENCE THAT THE DEFENDANT WAS CONFUSED OR MISLED BY THE WARNING AND THE RESULTING STATEMENT WAS OTHERWISE VOLUNTARY?

No "good-faith" exception can be made for defective *Miranda* Warnings contained in pre-printed forms. A violation of a suspect's Fifth Amendment (and Article I, 9) Constitutional Rights does not occur at the time law enforcement officers fail to convey adequate *Miranda* Warnings, it occurs when the statements produced as a result of the faulty warnings are introduced into Court. See *United States v. Patane*, 542 U.S. 630, 641-642, 124 S.Ct. 2620, 2628-29 (2004) (plurality opinion) (failure to give *Miranda* Warnings does not violate a suspect's Constitutional Rights or even the *Miranda* Rule; the violation occurs only upon admission of the unwarned statement at Trial (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990)). The Self-Incrimination Clause contains its own exclusionary rule. See *Patane*, 542 U.S. at 640 (Unlike the Fourth Amendment, the Self-Incrimination Clause contains its own self-executing exclusionary rule by providing "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."). Therefore, it would be incongruous to say that a Court could violate the suspect's Constitutional Right

against self-incrimination (for the first time) by admitting the confession solely because the police relied "in good faith" on a misleading and insufficient pre-printed *Miranda* form.

Even if a good faith exception were logically and legally permissible, this case illustrates why exclusion of the confession is the only practical solution. If Courts admitted statements at Trial on the grounds that officers were allowed to rely on these forms, regardless of whether the content of the form conflicted with their own understanding of *Miranda* requirements, law enforcement agencies would be free to draft confusing and misleading forms. In fact, there would be an incentive to do so.

Therefore, for the reasons above, compelling reasons for Certiorari are not presented in this case.

III

DOES THE FLORIDA SUPREME COURTS OPINION FINDING THE DEFENDANT WAS IN CUSTODY, CONFLICT WITH MIRANDA AND ITS PROGENCY DEFINING CUSTODIAL INTERROGATION WHERE THE DEFENDANT VOLUNTARILY CAME TO THE STATION TO PROVIDE FINGERPRINTS, VOLUNTEERED HIS DESIRE TO MAKE A STATEMENT AND WHERE HE WAS NEVER RESTRAINED OR TOLD HE COULD NOT LEAVE DURING A LENGTHY BUT NON-COERCIVE INTERVIEW?

The Florida Supreme Court clearly found that the Defendant was "in custody" for *Miranda* purposes based upon its review of the facts as presented to the Court below and applied both State and Federal authority correctly.

In *Prysock*, this Court observed "ordinarily this Court would not be inclined to review a case involving application of precedent to a particular set of facts." *Prysock*, 453 U.S. at 355, 101 S.Ct. at 2807 (citing *Fare v. Michael C.*, 439 U.S. 1310, 1314, 99 S.Ct. 3, 558 L.Ed.2d 19 (1978) (*Rehnquist, J.*, in Chambers)). Also, whether or not a Lower Court's decision is correct, Rule 10 of this Court provides: "A Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no doubt that the *Rigterink* Court properly stated the applicable rules of law.

In arriving at their decision, the Court noted that the interview lasted a total of six and one-half hours. That the Defendant was placed in a six by eight foot polygraph room with sound-insulated protective foam. There were three chairs and a small desk. There were at least two detectives in the room at all times with Mr. *Rigterink*, with several other detectives coming and going throughout the interview. The Court also noted that the door was closed at all times. After three hours and twenty four minutes of untapped interview, the Defendant was confronted with the discovery of his bloody fingerprints at the scene. The Court also noted that it was at this point that detectives *Mirandized* the Defendant and began taping his statement. The Court noted that the Defendant was never informed throughout the six and one half hours of interrogation that he was free to leave. The Defendant confessed after being given the defective *Miranda* Warnings as discussed above.

The Florida Supreme Court, applying an analysis of the facts of the case and both State and Federal Law, reached the conclusion that the Defendant was "in custody" for purposes of *Miranda.*

The Court stated:

> The facts established during the Suppression Hearing, which the Trial Court adequately summarized in its Order, have thus "set the scene" of inquiry. See *Alvarado*, 541 U.S. at 663. Given these factual circumstances, the second step of the custody analysis is to determine whether "a reasonable person [would] have felt [that] he or she was not at liberty to terminate the interrogation and leave." *Alvarado*, 541 U.S. at 663 (quoting *Thompson*, 516 U.S. at 112). As stated above, *Ramirez* provides the following question-based channeling mechanism to answer this question:
>
> > (1) The manner in which police summon the suspect for questioning;
> > (2) The purpose, place and manner of the interrogation;
> > (3) The extent to which the suspect is confronted with evidence of his or her guilt; [and]
> > (4) Whether the suspect is informed that he or she is free to leave the place of questioning.

739 So.2d at 574 (citing *Countryman*, 572 N.W. 2d at 558) (formatting altered). Similar to many other Fourth and Fifth Amendment inquiries, no individual factor is singularly determinative rather, the "totality of circumstances" controls, and the dispositive inquiry remains whether "a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest."

The Court then applied the four *Ramirez* factors to the competent, substantial evidence contained within the record. Based on the "totality of circumstances", the Court held that *Rigterink* was in custody immediately prior to and during his videotaped interrogation.

There is nothing in the Court's findings or application of the law that warrants a review by this Court. Because the result in this case was a product of carefully and correctly applied precedent, this Court should deny Certiorari.

CONCLUSION

Because the *Rigterink* Court applied the correct rules of law to this unique situation, and because the result rested on adequate and independent State grounds, this Court should deny Certiorari.

Respectfully submitted,

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