Case No. ____

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,
Petitioner,

v.

THOMAS WILLIAM RIGTERINK,
Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Petitioner asks this Court to grant review of the following issues:

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.

WHETHER THE FLORIDA SUPREME COURT'S OPINION FINDING THE DEFENDANT WAS IN CUSTODY CONFLICTS WITH MIRANDA AND ITS PROGENY DEFINING CUSTODIAL INTERROGATIONS 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

Statutes

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).

Petitioner's Appendix (A1-A95) contains the opinion of the Florida Supreme Court below, Case No. SC05-2162, (A1-A88). The Appendix further contains the trial court's order denying the motion to suppress (A89-A94) and the Miranda Waiver Form (A95). The parties will be referred to as they appear before this Court or as they stood in the court(s) below. [1]

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[1] The symbol; "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution.[2]

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[2] Article I, section 9 of the Florida Constitution provides in pertinent part: "No person shall . . . be compelled in any criminal matter to be a witness against oneself."

STATEMENT OF THE CASE

A. TRIAL

On November 4, 2003, Rigterink was indicted for the first degree stabbing murders of Jeremy Jarvis and Allison Sousa, which occurred in a dual-use warehouse complex in Polk County, Florida, on September 24, 2003.

Alex Bove was driving east on Highway 542 in Polk County near Winter Haven, Florida, when he witnessed part of the attack upon victim Jarvis. (T 1827-28, 1829, 1849). His attention was caught by two men in front of an office-warehouse building. One man was down on the ground and appeared to be covered in red. The second man was standing over him and appeared to be trying to drag him into the building. (T 1828, 1831, 1843). The man on the ground struggled to try to get away. (T 1828, 1830).

Mr. Bove could see that a lot of blood was flowing from a wound on the victim's chest. (T 1828). He observed the second man run into the building and return with a large knife. (T 1828, 1832). Bove described the attacker as a Caucasian man in his late twenties to early thirties about 6ft. 3in. tall and about 200 pounds, with dark brown hair, wearing a white short-sleeved T-shirt and dark shorts. (T 1833-34).

Amanda Short and Allison Sousa, who worked in an office suite, heard screaming outside of the office building. (T 2362, 2366, 2419). As they opened

the front door to look out, a dirty, shirtless, bloody man entered, frantically asking for help. (T 2369-71, 2421).

As the man sat down in a chair by the door, Ms. Short went to the back to get some paper towels, and Mrs. Sousa called 911 to get medical attention. (T 2374, 2421-22). The sound of the front door slamming made Ms. Short turn to look back. (T 2376, 2422-23). She saw a man going toward Ms. Sousa. (T 2377). The man was Caucasian, in his late 20s to early 30s, with thick dark hair to the middle of his neck, wearing a long white t-shirt and dark shorts, about 6'3" tall, 170 pounds, olive or tan complexion, and no facial hair. (T 2378, 2390, 2411, 2437-38).

As the man quickly moved toward Mrs. Sousa, she screamed: "Don't hurt me. Don't hurt me." (T 2384, 2423). Ms. Short turned back down the hallway, entered an office and dead bolted the door. (T 2384-85). She called 911 for help. (T 2385, 2398). Ms. Short heard banging, scuffling, and things hitting the walls. (T 2386, 2390). Ms. Short stayed in the locked office until deputies arrived. (T 2467).

The Polk County Sheriff's communication office received simultaneous 911 calls at 3:07:37 and 3:07:46 p.m. from telephones located in the office building. (T 2455–2458). In the 4-minute recording of the first call, a female voice can be heard saying "Oh, my God. Don't -—- don't hurt me. No. No." The speaking stops, and the 911 operator tells her coworkers all she can hear is "people just throwing

something around," then, total silence. (T 2460, 2461).

When Dep. Angela Mackie arrived at the scene, she found two bodies covered in blood, later identified as Jeremy Jarvis and Allison Sousa. (T 1855, 1926, 1929).

There was a large pool of blood in the entrance, as if someone had stood there while bleeding heavily. (T 2742). Heavy blood stains on the walls and doors indicated someone who was bleeding heavily had been pushed against the walls and doors with force. (T 2752, 2787-88). Arcs of blood spatters were consistent with a bloody knife being used to stab many times. (T 2744, 2748). From the entrance door a smeared blood trail continued down the hallway into the kitchen area, where large amounts of blood on the walls along with spatter from a bloody weapon. (T 2759-63). A palm print in smeared blood was found on the door jamb. (T 2764). The bodies of Jeremy Jarvis and Allison Sousa were found in the warehouse area at the end of the hallway. (T 2769-2770). The two victims had bled to death from multiple stab wounds with a knife, approximately 10-15 inches long. (T 2824-2875).

In addition to Rigterink's partial confession at issue in this case, the State presented considerable physical and circumstantial evidence linking him to the murders. Just 30 minutes before the murders, Rigterink called victim Jarvis to confirm that he had just acquired a new supply of marijuana for sale. (T 2547-48, 2550, 3328, 3353, 3385). Rigterink was out

of work and had no money to support his acknowledged drug habit. (T 2712, 3049, 4185-86, 4257). Two witnesses driving near the storage area described Jarvis's attacker in a way that matched the Defendant. (T 1833-34, 2378, 2390, 2411, 2437-38). The victim's blood was found in the truck that Defendant was driving the day of the murders.[3] (T 3128, 3133, 3194). DNA consistent with Rigterink's was found under the fingernails of victim Jarvis who suffered the brunt of the attack. (T 3140-41, 3194). Rigterink's bloody finger/palm prints were found at the scene. (R249, T 2985, 3362-65). Rigterink owned a knife which was similar to the one which caused the fatal injuries. (T 3050-51). Defendant made changes to his appearance shortly after the crime. (T 3372-73). He avoided giving fingerprint samples to detectives and hid from questioning. (T 3335-36, 3338, 3343). When ultimately questioned by detectives, Defendant gave inconsistent explanations of his behavior on the day of and on the days after the crime. (T 3353-62).

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[3] The DNA from blood found in Rigterink's truck [owned by his father] was consistent with victim Jarvis.

B. PRETRIAL SUPPRESSION HEARING

Rigterink filed a written motion to suppress all statements he made to law enforcement officers, stating that evidence had been seized in violation of Defendant's rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, and that statements had been obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 9 and 12 of the Florida Constitution. However, the only specific claim in the motion was that the Miranda[4] warning as given by the detectives was defective because it only told Defendant he had a right to counsel before questioning, without specifically advising him of the right to counsel during questioning. (R 191-93).

At the November 24, 2004 hearing on the motion, Rigterink amended the motion both verbally and by written interlineations to be limited to only the audio and video statements of Defendant recorded after the Miranda warning was administered. (R 223, 226). Rigterink told the trial court that "our argument is very narrow," relying only on cases from the Fourth District holding that Miranda requires a warning "that the defendant or suspect has the right to have an attorney present during any interrogation." (R 221). Defendant conceded that the interview prior to the warning was not custodial, so no Miranda warning was required. (R 223-24).

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

The only witness called to testify during the suppression hearing was Det. Connolly, who had met with Defendant in an interview room across from the fingerprint station. (R 241). The Florida Supreme Court provided a detailed recitation of facts:

> • PCSO detectives previously interviewed Rigterink at his home on September 25, 2003, and October 9, 2003. At those interviews, Rigterink admitted that he had set up a marijuana buy over the phone with victim Jarvis on Wednesday, September 24, 2003 (the day of the murders), but claimed that the buy was scheduled for a different day (Friday, September 26, 2003);
>
> • Rigterink agreed to visit the PCSO on October 10, 2003, to provide "elimination prints," but failed to show up for the appointment;
>
> • Rigterink eventually called and rescheduled for October 13, 2003, but he also failed to show up for that appointment;
>
> • Plainclothes PCSO detectives, including Detective Connolly, were finally able to reestablish contact with Rigterink at his parents' home on the morning of October 16, 2003;
>
> • Rigterink voluntarily agreed to provide "elimination prints," and as he was getting dressed, he spontaneously stated that two methamphetamine dealers from Lake Wales may have murdered the victims;

• Rigterink was never restrained, and his parents voluntarily drove him to the PCSO's BCI office for fingerprinting;

• Detective Connolly requested that Rigterink's parents remain in the lobby during the interview process, but it is unclear whether Rigterink was aware of this arrangement;

• PCSO latent-fingerprint analyst Patricia Newton and her supervisor, Bill Thomas, were present and fingerprinted Rigterink before his interview. The detectives prearranged for the analysts to compare Rigterink's fingerprints with the bloody crime-scene latents during their interview of Rigterink;

• Rigterink's interview began at 11:00 a.m. on October 16. The detectives questioned him in a six-by-eight foot polygraph-examination room, which was sound-insulated with protective foam. The room contained three chairs and a small desk;

• At least two detectives were in the room at all times, and other detectives--which included Detective Raczynski, Detective Scott Rench, and Major Martin--entered and exited the room during the questioning process;

• The door was closed, but not locked, while the interview or interrogation took place (*however*, it is unclear how this detail holds any significance because there was no testimony that Rigterink was aware whether the door was locked or unlocked);

• The detectives and Rigterink discussed his previous descriptions of his whereabouts and actions on September 24, 2003 (i.e., the day of the murders). They began by discussing Rigterink's use of his father's Toyota pickup. Once they established this fact, the detectives moved to discussing Rigterink's relationship with Jarvis beginning with September 21 or 22, 2003, which were the dates on which Rigterink believed that he first borrowed his father's pickup;

• Rigterink readily admitted that on September 22, 2003 (two days before the murders), he purchased marijuana at Jarvis's home;

• Rigterink provided his first story, which was that he was never at Jarvis' residence on the day of the murders;

• The detectives stated that they did not believe this story, and Rigterink presented his second story, which was (1) that he went to Jarvis's home on the day of the murders to purchase marijuana, and (2) that Jarvis was unharmed when he left at approximately 2:30 or 3 p.m.;

• Sometime during the questioning process, Detective Connolly received a message from the fingerprint analysts, which stated that Rigterink's prints matched the bloody latents recovered from the crime scene;

• After Rigterink completed his second story, the detectives confronted him with the fact that his prints matched the bloody latents discovered at the crime scene;

• Rigterink then presented his third story, which was that he visited Jarvis' home on the day of the murders but arrived after the deaths occurred and left before the police arrived;

• After Rigterink completed his third story, the detectives again accused him of dissembling, and he then responded that he would tell them "the whole truth";

• The detectives then advised Rigterink of his *Miranda* rights, and Detective Connolly briefly stepped out of the room to request that a technician turn on the interrogation room's hidden video-recording equipment;

• The initial, untaped portion of the interrogation lasted three hours and twenty-four minutes (i.e., from 11:00 a.m. until 2:24 p.m.) before Detective Connolly decided to *Mirandize* Rigterink and videotape his statements;

• Detective Connolly testified that he *Mirandized* Rigterink to ensure the admissibility of his confession, and that Rigterink and Connolly signed the rights-waiver form in each other's presence after Connolly read Rigterink his rights. Connolly had no idea that the rights-waiver form was

deficient with regard to its description of the right to counsel;

• Rigterink then "confessed," but couched his confession in terms of a series of "Polaroid snapshots," and claimed that he could not actually remember stabbing either of the victims (although he did admit that he physically struggled with Jarvis);

• Rigterink never asserted his right to remain silent, his right to terminate questioning, or his right to speak with an attorney "prior to questioning";

• During the "confession," Rigterink physically demonstrated his movements and actions vis-a-vis the victims and drew an accompanying diagram (State's exhibit 466);

• After Rigterink "confessed," Detective Connolly called an assistant state attorney to ensure that he had probable cause to arrest Rigterink. The ASA agreed that Detective Connolly had probable cause, and the detectives arrested Rigterink in the office and officially placed him in PCSO custody. The arrest occurred at approximately 5:30 p.m. (6.5 hours after the interrogation began);

• Rigterink was 32 years old at the time of questioning, had completed college course work, and was "alert and awake and very energetic" during the taped portion of the interrogation;

- Until his arrest, Rigterink was not placed in handcuffs or otherwise restrained, but the detectives never told him that he was free to leave;

- By the time of his October 16 interrogation, Rigterink was the primary suspect in the Jarvis-Sousa murders, but Detective Connolly did not provide any indication that PCSO personnel informed Rigterink of this status.

(A50-A54).

The trial court entered a written ruling January 19, 2005, finding that Defendant was not in custody when he made his statement. (A89-A94). The order did not reach the adequacy of the Miranda warnings because its finding on custody made it unnecessary. (T 210-12).

C. THE FLORIDA SUPREME COURT OPINION

In a 4-2, decision, the Florida Supreme Court held the Miranda warnings informing a defendant he had the right to talk with a lawyer prior to questioning, and that if he could not afford one, one would be appointed for him by the court were insufficient to inform him of his right to have counsel present during questioning as required by the principals espoused in this Court's decision in Miranda and the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

Federal courts of appeal and state courts of last resort are divided on the issue of whether this Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966) requires a defendant to be expressly advised of his right to counsel during questioning. This Court in Miranda, 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, this 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, such as the following recited in this case,

> Do you hereby understand that one, I have the right to remain silent. Two, anything I can say, can and will be used against me in court. Three, I have the right to have an attorney present prior to questioning. Four, if I cannot afford an attorney, one will be appointed to represent me by the court. Do you understand that? [R 256],

reasonably convey to a suspect his or her rights as required by Miranda. This Court's resolution of this recurring conflict among state and federal courts is crucial. The warnings administered in this case satisfy Miranda.

In addition, should any deficiency be discerned here, the State respectfully requests review of this case to determine whether the exclusionary rule is appropriately applied where, as here, 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. Since the recurring question of the sufficiency of Miranda and the specific warnings at issue in this case may very well impact a large number of criminal cases across this country, it is important for this Court to determine the appropriate remedy for a technically defective warning; that is, whether suppression is an

appropriate and necessary remedy for an otherwise voluntary statement in the absence of police misconduct.

Finally, the Florida Supreme Court's opinion in this case conflicts with this Court's precedent on custodial interrogations, finding Rigterink was in custody without any degree of restraint associated with a formal arrest. Consequently, Miranda warnings were not required in this case.

I.

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.

The Florida Supreme Court reversed Rigterink's two first degree murder convictions and resulting death sentence because the jury was allowed to consider a videotape of Rigterink's partial confession in violation of Miranda. The Florida Supreme Court held that the standard rights advisement form administered both orally and in writing to Rigterink by the detectives was defective. While the rights form did advise Rigterink of his right to consult counsel prior to questioning and his right to counsel appointed at no charge to him, the form was found deficient, according to the court, because it did not also specifically advise Rigterink of his right to have counsel present during questioning.

The court stated the federal Constitution "sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart." (A36). However, there is no Miranda

clause in Florida's constitution.[5] Nor, for that matter, is there state jurisprudence apart from Miranda which sets forth the required warnings for custodial interrogations. In Traylor v. State, 596 So. 2d 957, 963-67 (Fla. 1992), the court promulgated the required content for a rights warning in Florida, stating it was guided by "Miranda and its progeny." The court essentially replicated the rights warning language under Miranda: "[W]e 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.

The Florida Supreme Court in this case was not addressing state law, but, construing this Court's precedent in Miranda and its progeny.[6] The court

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[5] 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."

[6] The Rigterink court applied its recent decision in State v. Powell, 998 So. 2d 531, 542 (Fla. 2008), cert. pending, which addressed a conflict among the district courts of appeal. The court's conclusion in Powell left no doubt that it was based squarely upon Miranda: "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

clearly decided an issue of constitutional law, guided and governed by Miranda precedent from this Court. See Oregon v. Hass, 420 U.S. 714, 719 (1975) ("But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them."); California v. Beheler, 463 U.S. 1121, 1123 n.1 (U.S. 1983) (although Beheler suggested that decision below rested upon independent state "custody" grounds, "it is clear from the face of the opinion, however, that the opinion below rested exclusively on the court's 'decision on the Miranda issue.'") (quoting the lower court). Thus, certiorari review is clearly appropriate in this case.

Federal courts of appeal and state courts of last resort are divided on the issue of whether this Court's holding in Miranda requires a defendant to be expressly advised of his right to counsel during questioning. Consequently, this case satisfies Rule 10(b) and (c) of this Court's Rules relating to the propriety of certiorari review. There is clearly a need for a resolution from this Court to the existing division among courts across the country.

The Conflict Among State and Federal Courts Interpreting Miranda and its Progeny

There is a split among the different federal circuits with respect to whether informing a suspect that he has a right to an attorney prior to questioning effectively conveys that counsel may

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narrower and less functional warning than that required by Miranda." 998 So.2d at 542.

remain during questioning. The Fifth, Sixth, Ninth and Tenth Circuits have held that a suspect is required to be expressly informed of the right to have an attorney present during questioning. 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).

However, in the context of an ADEPA petition, the Fifth Circuit, in 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), held that warnings which informed a defendant he had the right to presence of counsel prior to questioning but was not explicitly told of his right to counsel during questioning, were adequate and not an unreasonable application of federal law requiring federal habeas relief. Although, the court did recognize its prior decision in Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968), in which it held a suspect must be expressly warned of the right to presence of counsel during interrogation, was binding precedent for cases on direct appeal. Thus, Bridgers appears to have engendered some degree of intra circuit conflict in the Fifth.

Notably, this Court denied Bridgers' petition for certioriari review. In doing so, Justices Breyer, Stevens, and Souter issued the following statement: "Although this Court has declined to demand 'rigidity in the form of the required warnings,' California v. Prysock, 453 U.S. 355, 359, 101 S. Ct. 2806, 69

L.Ed.2d 696 (1981) (per curiam), 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 v. Texas, 532 U.S. 1034 (2001). Justice Breyer further commented in Bridgers that, "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 the eight years since this Court denied Bridgers' petition for certiorari review, the purported problem continues to be a recurring one, and there is a need for a resolution from this Court to the existing division among courts across the country.

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 interrogation. 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 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 Second Circuit found sufficient the Miranda warnings that did not specifically inform a suspect of his right to counsel during questioning, but did inform 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 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.

The Fourth Circuit affirmed the district 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), which 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 court 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 this Court's approval in Miranda itself of the FBI warnings that omitted these rubric words. Young, 383 F. Supp. 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 district court in Young 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 Second Circuit 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. Young, 383 F. Supp. 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 Second Circuit 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 Fourth Circuit 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. See also United States v. Caldwell, 954 F.2d 496, 504 (8th Cir. 1992) (noting that the general warning would not have "misled Caldwell into believing that an attorney could not be present during questioning."); United States v. Adams, 484 F.2d 357, 361 (7th Cir. 1973) (Miranda warnings were adequate even though the warnings did not inform defendant specifically of his right to have an attorney present during questioning).

The conflict is also found in state courts construing Miranda's warning on the right to counsel. For example, the Florida Supreme Court's opinion in this case is in direct conflict with the California Supreme Court. In People v. Wash, 6 Cal. 4th 215, 24 Cal. Rptr. 2d 421, 861 P.2d 1107, 1118 (Cal. 1993), the defendant challenged the sufficiency of warnings which contained the statement that "you have the right to have an attorney present before any questioning." The defendant argued that this language was insufficient because it "failed to inform him that he was entitled to counsel during questioning." Id. The court concluded, however, that the reference to access to counsel before questioning could not reasonably be understood as implying that

access to counsel would be terminated once questioning began: "[W]e are not persuaded as defendant's argument implies that the language [of the warnings] was so ambiguous or confusing as to lead defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began." Id. at 1118-19.

Similarly, in State v. Arnold, 496 P.2d 919, 922-23 (Or. Ct. App. 1972), the court found a warning which did not include the right to the presence of an attorney during questioning was not defective. The court stated:

> Here, defendant was advised of his right to have an attorney present before he answered any questions. He did not request an attorney on that advice. It is reasonable to assume, on these facts, that he would not have requested the presence of an attorney while he answered the police officer's questions, had he been so advised. The advice was adequate.

Id. at 922-23.

In sum, there is a clear conflict of authority among state and federal courts regarding whether Miranda requires a defendant to be specifically advised of his right to have counsel present during questioning when he is otherwise accurately advised of his rights. This case presents a clear opportunity for this Court to resolve the conflict. Consequently, the writ of certiorari should be granted.

The Florida Supreme Court's Opinion Conflicts With Miranda And Its Progeny By Requiring A Talismanic Or Formulistic Incantation Of The Right To Counsel

This Court has never explicitly held that to protect a defendant's Fifth Amendment rights, he must be expressly advised that he has the right to the presence of counsel during custodial questioning. In fact, in Miranda, this Court stated:

> . . . 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 444-445.

Again, 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 inadequate 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.

This Court has never insisted Miranda warnings be given in the exact form described in that decision. In California v. Prysock, this 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. at 359. Therefore, the inquiry is simply whether the warnings reasonably "conveyed [to a suspect] his rights as required by Miranda." A waiver is effective where the "'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension." Moran v. Burbine, 475 U.S. 412 (1986) (quoting, Fare v. Michael C., 442 U.S.707, 725 (1979)).

Under this Court's precedent, the Miranda rights warnings given in this case, advising Rigterink both verbally and in writing that he had the right to an attorney prior to questioning and that if he could not afford one, an attorney would be appointed for him by the court, was sufficient. The sharply divided Florida Supreme Court nonetheless held that since Rigterink was not specifically advised that he had the right to an attorney's presence during questioning, his otherwise voluntary statement must be suppressed.

The Florida Supreme Court and other courts requiring that a suspect be explicitly informed of not just his right to an attorney but that he or she must

also be told they have the right to an attorney both prior to, and during questioning, are demanding more from law enforcement than this Court ever envisioned or deemed necessary in Miranda to protect individuals' Fifth Amendment rights. As a result, voluntary confessions have been unnecessarily excluded from criminal trials across this country.

Only a strained, literalistic reading of the warnings given to Rigterink could be interpreted as implying that he could talk to a lawyer before questioning but could not have a lawyer present during questioning. Indeed, when a defendant is told he has the right to remain silent, nothing requires that defendant be told that he has the right to remain silent during questioning, or, after each question. Logically, the right to an attorney, like the right to remain silent, continues forward in time, unless and until limited.

There is no evidence in this record to suggest that the 31 one year old college educated defendant was in any way confused or misled about his right to counsel or in this case that he had a right to remain silent at every juncture. The language in this case certainly meets the reasonable clarity test. The Florida Supreme Court's decision therefore conflicts with this Court's decision in Miranda and its progeny.

II.

USE OF AN ARGUABLY DEFECTIVE MIRANDA WARNING DOES NOT REQUIRE SUPPRESSION OF AN OTHERWISE VOLUNTARY STATEMENT WHEN LAW ENFORCEMENT OFFICERS REASONABLY RELIED UPON A STANDARD WARNING INFORMING THE DEFENDANT OF HIS RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING AND THERE IS NO EVIDENCE THAT THE DEFENDANT WAS CONFUSED OR MISLED BY THE WARNING.

Assuming that the Miranda warning in this case was deficient for not informing Rigterink specifically of his right to counsel during questioning, suppression is an inappropriate and harsh remedy. This Court should grant review of this case to consider whether law enforcement officers' good faith reliance upon a technically defective rights warning requires suppression of an otherwise voluntary statement.

Miranda and its progeny were issued to effectively implement and provide guidelines on the right to remain silent and to deter police misconduct. In this case, it is clear that the detectives did not arrest Rigterink, nor did they believe he was in custody until after Rigterink had issued his final, partial confession. Indeed, even the defense conceded below it was a non-custodial interrogation until just prior to the warned statement [a point after

detectives received notice during the interview that Rigterink's fingerprints matched those bloody prints left at the scene]. The detectives used a printed, Pasco County Sheriff's Office form which they read to Rigterink and that he read and initialed. (A95). Suppression of the defendant's confession exacts a harsh and unwarranted penalty in this case, one not justified in furtherance of Miranda or the exclusionary rule. See Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 2614, 159 L. Ed. 2d 643 (2004) (Kennedy, J., concurring) ("Evidence [obtained in violation of Miranda] is admissible when the central concerns of Miranda are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction.")

In the years since Miranda was decided, this Court has utilized a common sense approach, limiting suppression to those cases involving police misconduct and where the purposes of the exclusionary rule can be furthered. Oregon v. Elstad, 470 U.S. 298 (1985), reflects such a pragmatic approach.

In Elstad, a suspect made an initial incriminating statement at his home. The suspect had not received a Miranda warning before making the statement, apparently because it was not clear whether the suspect was in custody at the time. The suspect was taken to the police station, where he received a Miranda warning, waived his rights, and made a second statement. He later argued that the postwarning statement should be suppressed because it was related to the unwarned first statement, and

likely induced or caused it. This Court held that although a Miranda violation made the first statement inadmissible, the postwarning statements could be introduced against the accused because "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression." Elstad, supra, at 308 (citing Michigan v. Tucker, 417 U.S. 433, 445, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974)). "Errors [that] are made by law enforcement officers in administering the prophylactic Miranda procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." 470 U.S. at 308-309. See also Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (if not actually coerced, a statement obtained in violation of Miranda can be used for impeachment, so that the truth finding function of the trial is not distorted); New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (exception to Miranda based upon concerns of public safety); United States v. Patane, 542 U.S. 630, 124 S. Ct. 2620, 2626, 159 L. Ed. 2d 667 (2004) (plurality opinion) (physical evidence obtained in reliance on statements taken in violation of Miranda is admissible).

A similar balancing approach was employed by the Fourth Circuit in United States v. Nichols, 438 F.3d 437, 444 (4th Cir. 2006) to allow use of evidence in sentencing which was excluded from the guilt phase based upon violations of Miranda and Edwards v. Arizona, 451 U.S. 477 (1981). The Fourth Circuit stated:

> In sum, we conclude that in cases such as this one--where there is no evidence that an illegally obtained statement was actually coerced or otherwise involuntary--the substantial burden on the sentencing process resulting from exclusion of that statement outweighs any countervailing concerns about police deterrence or unreliable evidence. As with evidence obtained in violation of the Fourth Amendment, "the disadvantages of applying the [*Miranda*] exclusionary rule at sentencing are large, [and] the benefits small or non-existent." *Lee*, 540 F.2d at 1212. We therefore conclude that in most cases, including this one, a district court may consider at sentencing statements obtained in violation of *Miranda* and *Edwards*.

Absent coercive tactics by police, there is nothing inherently unreliable about otherwise voluntary statements obtained in violation of Miranda. See e.g. Oregon v. Hass, 420 U.S. 714, 722-23 (1975) (in a case where police failed to honor defendant's request for counsel, no indication that defendant's subsequent statements were involuntary or coerced). In this case, there is no question that Rigterink's statement was voluntary; the videotape and the unrebutted testimony from the suppression hearing below establish this fact.[7] The evil

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[7] As dissenting justice Wells noted in this case: "It is my view that this case is an example of why strict adherence to technical readings of Miranda rights forms can bring about an unreasonable and unnecessary result. Here, the tape of the

addressed by Miranda and its progeny is the coercion of involuntary confessions, not the inducement of voluntary confessions. Oregon v. Elstad, 470 U.S. 298 (1985) (far from being prohibited by the Constitution, "admissions of guilt by wrongdoers, if not coerced, are inherently desirable.").

Rigterink was advised of his right to counsel prior to answering questions, a right he declined to exercise. The State is not suggesting that Miranda's exclusionary rule be abandoned in its entirety. Rather, it should not be applied in cases like this where law enforcement officers reasonably rely upon a technically defective form where there is no evidence that the defendant was in fact confused or otherwise misled about his right to counsel. Since the statement is otherwise voluntary there is simply no police misconduct to deter. Michigan v. Tucker, 417 U.S. 433, 447-50 (1974) (finding that neither deterrence nor trustworthiness rationales of Fifth Amendment exclusionary rule supported exclusion of evidence at issue; emphasizing the need to "weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence"). In this case, reversal of Rigterink's convictions for this heinous, atrocious and cruel double homicide exacts a harsh penalty with its

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police interview of Rigterink plainly shows to me that Rigterink was so intent on talking to the police officers in his effort to convince the police of his story that he paid no attention to what the Miranda warning said. Thus, language used in the warning made no difference in this case. Simply the substance of what actually happened should prevail over the form of the Miranda warning." (A83-A84).

attendant financial cost to the State and incalculable emotional toll upon the victims' families.

The State respectfully requests review of this case to determine whether the exclusionary rule was appropriately applied. Since, as noted above, the recurring question of the sufficiency of Miranda and the specific warnings at issue in this case may very well impact a large number of criminal cases across this country, it is important for this Court to determine the appropriate remedy for a technically defective warning; that is, whether suppression is an appropriate and necessary remedy for an otherwise voluntary statement in the absence of police misconduct.

III.

THE FLORIDA SUPREME COURT'S OPINION FINDING THE DEFENDANT WAS IN CUSTODY CONFLICTS WITH MIRANDA AND ITS PROGENY 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's opinion in this case conflicts with this Court's precedent by finding Rigterink was subject to a custodial interrogation. In Thompson v. Keohane, 516 U.S. 99, 112 (1995), this Court noted that determination of whether a suspect is in custody examines two essential issues:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 77

L. Ed. 2d 1275, 103 S. Ct. 3517 (1983)(per curiam) (quoting *Mathiason*, 429 U.S. at 495).

Rigterink was not arrested or subject to a restriction of his freedom associated with a formal arrest. The only evidence offered at the hearing on the motion to suppress was the testimony of Det. Connolly, presented by the State, and two documents presented by Defendant: a copy of the Miranda waiver form, and one page of transcript that included the oral Miranda warning given by Det. Connolly and Defendant's acknowledgement of it. Based on Detective Connolly's testimony, the trial court found that Defendant was not in custody when he made his statement; therefore, no Miranda warning was required. (A89-A94).

In this case, the Florida Supreme Court unduly relied upon the perceived impact upon Rigterink during the interview that his fingerprints had been found at the scene. It was this information the court found which turned the non-custodial interview into a custodial interrogation. (A63) ("Other than a murder weapon or DNA evidence tying the killer to the victims, it is difficult to imagine a more incriminating evidentiary item than one's bloody fingerprints being discovered at the scene of the murders. Along with, and in consideration of, all other factors, a reasonable person in Rigterink's position certainly would not have felt free to leave police custody once the detectives disclosed this fingerprint match."). Under similar circumstances, this Court held that a police officer falsely advising a defendant he possessed

evidence linking a defendant to a crime did not transform an interview into a custodial interrogation. Oregon v. Mathiason, 429 U.S. 492, 495-496 (U.S. 1977).

In Mathiason, this Court found that a police officer falsely stating his fingerprint had been found at the scene was of no consequence to the custody inquiry, stating, in part:

> . . . But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.
>
> The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.

> The petition for certiorari is granted, the judgment of the Oregon Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

(emphasis added).

In this case, like Mathiason, Rigterink voluntarily agreed to come to the police station and was not transported to the station by the police. Rigterink agreed to go to the sheriff's station at that time so he could give his fingerprints, which was the only thing detectives requested. (R 238-39). It was Rigterink who volunteered that he had additional pertinent information to provide. (R 239). Rigterink asked his parents to drive him so that they would be able to drive him back from the sheriff's station when the interview was over. Defendant's parents were asked to wait in the lobby while fingerprints were processed.[8] (R 240). Rigterink was never was told he could not leave. (R 257).

Rigterink never indicated he wanted to leave, and seemed intent on explaining things to the satisfaction of detectives. (R 277-78). In this case, nothing changed after officers truthfully told Rigterink that the fingerprints he had just provided to the police were matched to those found at the scene. Prior to that, officers had told Rigterink that they did not believe his various stories. The majority

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[8] Defendant testified at trial that he was 31 years old at the time of the crime. (T 3831). His parents drove him to the sheriff's station because his license was suspended. (T 3638).

opinion of the Florida Supreme Court inappropriately lent overwhelming weight to the fact the officers truthfully told Rigterink that his fingerprints had **just** been matched to the crime scene. This fact did not turn an otherwise non-custodial interview into a situation where Rigterink would believe he was not free to leave or terminate the interview. As this Court noted in Mathiason, "whatever relevance this fact [untruthful statement defendant's prints were matched to the scene] may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the Miranda rule." Mathiason, 429 U.S. at 495-496. See also Stansbury v. Cal., 511 U.S. 318, 325 (U.S. 1994) ("Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.").

In a federal habeas case, this Court reversed a federal court for finding the minor defendant was in custody for purposes of Miranda under circumstances similar to this case. Yarborough v. Alvarado, 541 U.S. 652, 666 (2004). This court found the following factors militated against a custody finding: 1) "[t]he police did not transport Alvarado to the station or require him to appear at a particular time"; 2) "they did not threaten him or suggest he would be placed under arrest"; and 3) "Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. [although the interview in fact lasted two hours]" (citation omitted). Further, this Court noted that the tone or manner of the

interview was not confrontational and at the end of the interview Alvarado went home. Id. "All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." Alvarado, 541 U.S. at 666.

Although this case does not present a federal habeas question to which the deference of the AEDPA applies, the factors considered by this Court in Alvarado are nonetheless instructive. Here, like Alvaredo the officers never threatened Rigterink with arrest or prosecution. The atmosphere was not coercive despite officers telling Rigterink that they did not believe his inconsistent accounts of his activities on the day of the murders. Further, like Alvaredo, Rigterink voluntarily came to the station and, indeed, it can be said he initiated contact [through his parents] and volunteered that he had information he wanted to provide to the officers. He was not arrested, nor restrained, and, indeed, followed officers to the station in his parent's car. His parents waited for him during the approximately four hours or so he was questioned.

While Rigterink may well have felt some internal pressures to answer the investigators questions, he was not subject to a coercive atmosphere nor was his freedom of movement in any way curtailed. "Under the narrower standard appropriate in the Miranda context, it is clear that [defendant] was not "in custody" for purposes of receiving Miranda protection since there was no "'formal arrest or restraint on freedom of movement'

of the degree associated with a formal arrest." Minnesota v. Murphy, 465 U.S. 420, 430-431 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)).

The Florida Supreme Court's decision in this case conflicts with this Court's precedent defining custodial interrogations which trigger the need for Miranda warnings. Consequently, certiorari review should be granted in this case.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner, the State of Florida respectfully requests this Honorable Court GRANT the Petition for Writ of Certiorari.

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