

In the Supreme Court of the United States

No. 08-1175

STATE OF FLORIDA, PETITIONER

*v.*

KEVIN DEWAYNE POWELL, RESPONDENT

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ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

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BRIEF FOR THE FLORIDA PUBLIC DEFENDER  
ASSOCIATION, INC.  
AS AMICUS CURIAE SUPPORTING  
RESPONDENT

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Florida Public Defender Association, Inc., is a state-wide organization of Florida's elected public defenders, and other public defender staff, who are charged by Florida's constitution and general laws with representing indigent criminal defendants, including the counseling of recent arrestees.

The Association has an interest in this case because it directly involves the advice that the police must give before custodial interrogation of suspects, many of them unable to afford counsel, regarding access to appointed counsel, including public defenders.

## SUMMARY OF ARGUMENT

The decision below rests on adequate state law grounds independent of *Miranda*.

Florida has an exclusionary rule regarding custodial statements dating back to an 1853 case ruling inadmissible the confessions of Simon, a slave, in part because there had been no "[e]xplicit warning of the accused by the magistrate." By 1909 the state supreme court wrote that the state may not use a custodial statement to a magistrate unless the suspect was advised of his rights, and in 1992 it held in *Traylor v. State* that this rule applied to all custodial statements, writing that article I, section 9 of the state constitution has safeguards "similar to," but broader than, those set

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<sup>1</sup> Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk of this Court.

out in *Miranda*.

At bar, the state supreme court relied on *Traylor* and its state constitutional law basis in holding Powell's statement inadmissible because the police did not adequately advise him of his right to the presence of a lawyer during his interrogation.

Florida has significant reasons for having its own broad safeguards regarding custodial interrogations, and its state law exclusionary rule provides an adequate and independent state law ground for the decision at bar.

Regardless whether Powell's statement was admissible under *Miranda*, it was inadmissible under the broader safeguards of Florida's exclusionary rule as set out in *Traylor*. The petitioner seeks a paradoxical ruling from the Court: that the states must be uniformly unable to devise their own uniform rules as to the manner that suspects are advised of their rights before questioning. However sensible such a result might be in the abstract, it cannot affect Florida's sovereign right to require, as a matter of state law, that the police advise suspects with unmistakable clarity as to their right to have counsel present during custodial interrogation.

## ARGUMENT

THE STATE SUPREME COURT RESTED ITS DECISION INDEPENDENTLY ON A STATE LAW EXCLUSIONARY RULE THAT DATES BACK TO BEFORE *MIRANDA* AND BEFORE THE RATIFICATION OF THE FOURTEENTH AMENDMENT ITSELF.

The Court has before it for review *State v. Powell*, 998 So. 2d 531 (2008), which stated that “[b]oth *Miranda*<sup>2</sup> 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,” and determined that Powell was not adequately informed of his right to have counsel present during his custodial interrogation. *Id.* at 542.

With regard to article I, section 9,<sup>3</sup> the court relied on *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992), a state constitutional law decision writing: “Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to [a] lawyer’s help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.” *State v. Powell*, 998 So. 2d at 540.

This reliance on the separate ground of article I, section 9 of the state constitution under *Traylor* was not a passing reference to undeveloped state law, but a conclusion resulting from a rich history of state consti-

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> “No person shall ... be compelled in any criminal matter to be a witness against oneself.”

tutional law litigation regarding the Declaration of Rights in the Florida Constitution. In particular, it reflects Florida's long-standing state law exclusionary rule arising under article I, section 9.

### I. Florida's Declaration of Rights.

Quoting *State ex rel. Davis v. City of Stuart*, 120 So. 335, 347 (Fla. 1929), *Traylor* said of Florida's Declaration of Rights: "No other broad formulation of legal principles, whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this 'stalwart set of basic principles.'" *Traylor*, 596 So. 2d at 963. This statement shows the court's commitment to a broad reading of individual rights under the state constitution.

Florida's first constitution was drafted in 1838, and contained the Declaration of Rights as article I. Among other things, it provided for trial by jury (section 6), protection against unreasonable searches (section 7), due process (section 8), the rights to counsel, notice of the nature and cause of an accusation, confrontation of witnesses, compulsory process, and a speedy and public trial by an impartial jury, and the right not to be compelled to give evidence against oneself (section 10). The Declaration of Rights has been in every subsequent Florida constitution, including the present one, which was adopted in 1968.<sup>4</sup>

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<sup>4</sup> The enumeration of the rights has changed over the years. The right against self-incrimination was in section 8 of the Declaration of Rights of the 1868 Constitution, and it was in section 12 of the Declaration in the 1885 Constitution. It is now in article I, section 9 of the 1968 Constitution.

Florida has a long history of enforcing the rights of criminal defendants before analogous rights were applied to the states by the Fourteenth Amendment as construed by this Court. In fact, such state law rights were enforced well before ratification of the Fourteenth Amendment itself.

*Holten v. State*, 2 Fla. 476 (1849), found a violation of the state constitutional rights to a public jury trial, to be heard by counsel, and to be present at all material stages of the trial when the judge sent written instructions to the jury out of the presence of the accused and his counsel. In *Simon v. State*, 5 Fla. 285 (1853), the court held that involuntary and unwarned statements of the accused could not be used against him. *Groner v. State*, 6 Fla. 39 (1855) established that a charging document must allege all facts necessary for conviction. The court wrote that the reasonable doubt standard applies to criminal prosecutions in *Joe v. State*, 6 Fla. 591 (Fla.1856), and wrote that the jury must “give the defendant the benefit of every reasonable doubt” in *Atzroth v. State*, 10 Fla. 207 (Fla.1860). The court recognized the right to a unanimous verdict in *Motion to Call Circuit Judge to Bench*, 8 Fla. 459 (1859). The requirement that the jury be accurately instructed on the elements of the offense was established in *Cato v. State*, 9 Fla. 163 (1860).

In addition to these antebellum cases, which of course preceded the Fourteenth Amendment, subsequent cases laid out the basic principles governing criminal trials under the state constitution well before similar rights were applied to the states under the theory of incorporation.

Long before *Benton v. Maryland*, 395 U.S. 784 (1969), the court held in *Potter v. State*, 109 So. 91, 92

(Fla.1926) that “under the Constitution and laws of this state, when a person has once been indicted for an offense, tried and acquitted, he cannot afterwards lawfully be indicted a second time for the same offense.” See also *Johnson v. State*, 9 So. 208 (Fla.1891) (where defendant was charged with first degree murder and convicted of second degree murder, and second degree murder conviction was overturned on appeal, he could not be retried for first degree murder under Double Jeopardy Clause of Declaration of Rights).

Before *Faretta v. California*, 422 U.S. 806 (1975), the court determined in *State v. Capetta*, 216 So. 2d 749 (Fla.1968), that the Declaration of Rights confers on a criminal defendant the right to self-representation.

Long before *Washington v. Texas*, 388 U.S. 14 (1967), the court ruled that the accused has the state constitutional right to compulsory process of witnesses without prepayment of costs in *Buckman v. Alexander*, 3 So. 817, 818 (Fla.1888). See also *Pittman v. State*, 41 So. 385, 388-89 (Fla.1906) (noting that right arises from state constitution and not from federal constitution).

The court ruled that evidence obtained in an illegal search must be suppressed in *Gildrie v. State*, 113 So. 704 (1927) and *Hart v. State*, 103 So. 633 (1925), well before *Mapp v. Ohio*, 367 U.S. 643 (1961).

These pre-incorporation cases may contain extensive discussions of foreign case law, including federal case law,<sup>5</sup> but they all inarguably rest on state law. In-

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<sup>5</sup> *Potter* cited *Ball v. United States*, 163 U.S. 662 (1896); *Johnson* cited numerous cases from other states. *State v. Capetta* cited federal circuit court of appeal cases. *Pittman* cited numerous decisions of other state courts. *Gildrie* cited the Fourth and Fifth

corporation has not washed away the state court's continuing power to give the Declaration of Rights a broader reading than the federal constitution.

In fact, the state court continues to read the state constitution as conferring broader rights than the federal constitution. Thus, the court wrote in *State v. Kelly*, 999 So. 2d 1029, 1041 (Fla.2008): "Florida provides a broader right to counsel under article I, section 16 of our state Constitution than that provided by the federal courts under the Sixth Amendment." *See also In re T.W.*, 551 So. 2d 1186 (Fla.1989) (right to privacy under Declaration of Rights "is much broader in scope than that of the Federal Constitution"); *Allen v. State*, 636 So. 2d 494 (Fla.1994) (imposition of death penalty on defendant under the age of 16 at time of crime violates article I, section 17 of Florida Constitution); *Brennan v. State*, 754 So. 2d 1 (Fla.1999) (imposition of death penalty on defendant under the age of 17 violates article I, section 17); *Griffis v. State*, 759 So. 2d 668, 672 (Fla.2000) ("the Florida Constitution, unlike its federal counterpart, contains an express right of appeal").

## II. The exclusionary rule of article 1, section 9 of the Florida Constitution.

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Amendments and contained an extended quotation from, and discussion of, *Agnello v. United States*, 269 U.S. 20 (1925), and held that evidence found in an illegal search had to be excluded because "to admit it is not only to violate the Fifth Amendment of the federal Constitution, but also violates section 12 of the Bill of Rights of the Constitution of Florida. *See, also, Hart v. State*, 89 Fla. 202, 103 So. 633." 113 So. 2d at 142. *Hart* also cited decisions of this Court and of other states in reaching its state law decision.

In keeping with the foregoing, the supreme court has read the state constitutional right against self-incrimination broadly. A state law exclusionary rule developed for more than a century leading up to the decision in *Traylor*. In relying on *Traylor* below, the state supreme court rested its decision on this separate body of state law in finding Powell's statement inadmissible.

A. The development of Florida's exclusionary rule before *Traylor*.

As already noted, the state supreme court prohibited the use of involuntary confessions in its 1853 decision in *Simon*. In that case, the court established the beginnings of Florida's rules about advising suspects as to the right to remain silent.

A slave, Simon was arrested on suspicion of arson and brought before the mayor of Pensacola. A large and excited crowd called for hanging him. The mayor prevented a lynching, but told Simon that he would be tried and hanged, and advised him that he could turn state's evidence by identifying his accomplices. The mayor later repeated these statements and Simon confessed. The next morning, he confessed again and accused an accomplice, but later was unable to identify the man. Simon was then convicted and sentenced to be hanged.

The supreme court held that the first confession was inadmissible because it arose from a fear of personal violence. It further held that the second confession was to be suppressed on the same ground, especially as there had been no "[e]xplicit warning of the accused by the magistrate."

Similarly, in *Coffee v. State*, 6 So. 493 (Fla.1889), Coffee was induced to confess under threat of being hanged. He later confessed to justices of the peace without being warned of his rights. The supreme court held all of these confessions inadmissible and noted that, before taking a confession, it is “the duty of the justice of the peace holding the same to caution the prisoner, to put him on his guard, and to inform him as to his rights in the premises.” *Id.* at 496.

In *Green v. State*, 24 So. 537, 538 (Fla.1898), the court held that, under *Simon*, confessions should be acted upon by courts and juries with great caution, and that, under *Coffee*, when an arrestee “is brought before a justice of the peace or other officer for preliminary examination, it is the duty of the officer to caution the accused that any statement or confession he may make may be used against him, and to inform him of his rights in the premises.” The court further cited to English cases holding admissible confessions to arresting officers who had first advised the arrestees of the right against self-incrimination. *Id.*

In *Ex parte Senior*, 19 So. 652 (Fla.1896), the court wrote that the state constitutional right against self-incrimination “should be broadly and liberally construed.” *Id.* at 654.

In *Daniels v. State*, 48 So. 747, 748 (Fla.1909), which involved a judicial confession, the court set out the state-law exclusionary rule that “testimony as to confessions of guilt made to officers or when under arrest is not admissible in evidence at the trial, unless it is clearly shown that the confession was voluntarily made after the party is fully advised of his rights under the law.”

Thus, through the early Twentieth Century, Flor-

ida had a growing body of case law requiring that the suspect be advised of the right against self-incrimination. Again, these cases cited and discussed federal law and the law of other states,<sup>6</sup> but they are based on Florida law.

B. Florida's exclusionary rule under *Traylor*.

The foregoing body of case law led to *Traylor*, the main state law decision relied on by state supreme court in the case now before this Court.

The court said in *Traylor* that *Miranda* "established procedural safeguards similar to" those required by the state constitution, 596 So. 2d at 965, n.12, and made clear that Florida's safeguards arise from the Declaration of Rights.

With respect to the privilege against self-incrimination of article I, section 9, the court traced the history of Florida's exclusionary rule arising from *Simon*, and extended by the rule of *Coffee* and *Green* regarding the requirement that prisoners be informed of their rights before being questioned by an officer at a preliminary hearing. *Id.* at 964-65. It further noted that, under *Daniels*, "[c]onfessions obtained in violation of these rules were inadmissible at trial." *Traylor*, 596 So. 2d at 964.

The court then held that the state constitution requires that a suspect be advised of the right to a lawyer's help, including the right to have the lawyer present during interrogation:

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<sup>6</sup> *Simon* cited to a New Jersey case, *Coffee* cited numerous out-of-state decisions, and *Ex parte Senior* cited *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and many decisions from other states.

Based on the foregoing analysis of our Florida law and the experience under *Miranda* and its progeny,<sup>FN12</sup> we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help,<sup>FN13</sup> and that if they cannot pay for a lawyer one will be appointed to help them.

<sup>FN12.</sup> In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the federal Court established procedural safeguards similar to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation. In subsequent decisions, the Court expanded *Miranda's* scope. [Citations omitted].

In other areas, the Court limited *Miranda's* scope. [Citations omitted.]

<sup>FN13.</sup> This means that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.

*Id.* at 965-66. Thus, *Traylor* made clear that separate state law rules govern custodial interrogation, includ-

ing that the suspect must be informed of the right to the presence of counsel during interrogation. The court so ruled because of its view that *Miranda* is subject to modification by this Court, and also because of the long line of state law cases arising from *Simon*.

*Traylor* also established another state law requirement as to the waiver of rights. It wrote that “where reasonably practical, prudence suggests it should be in writing,” saying that this rule remedied “a major criticism of *Miranda*,” namely that, as *Miranda* does not require a written waiver of rights, it creates the risk of a swearing contest between the police and the defendant. *Id.* at 966.

The court wrote that these rules serve a state law goal and are required by the state constitution: “A prime purpose of the above safeguards is to maintain a 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.” *Id.* at 966.

Thus, *Traylor* set out rules that: (1) arise from more than a century of state law; (2) are “similar to,” but broader than, the requirements of the Fourteenth Amendment as interpreted in *Miranda*; and (3) establish a bright-line standard for police interrogation in Florida under the state constitution.

The state supreme court has continued to build on the state law foundation of *Traylor*.

In *Thompson v. State*, 595 So. 2d 16, 18 (Fla.1992), the court wrote:

As we said in *Traylor*, to insure that confessions are freely given, article I, section 9 of the Florida Constitution, requires that, prior to

questioning, the indigent accused be advised of and given the opportunity to consult with a court-appointed lawyer. The record is clear that Thompson did not understand this right, and it is mere speculation whether he would have waived it had he understood.

In *Allred v. State*, 622 So. 2d 984 (Fla.1993), the court found a violation of the state constitutional right to silence under *Traylor* and article I, section 9, when an officer had a suspected drunk driver recite the alphabet from “c to w.” The lower court had found a federal constitutional violation under *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), but the supreme court based its ruling solely on state law grounds.

*Peoples v. State*, 612 So. 2d 555, 556 (Fla.1992) held that, under *Traylor*, the state constitutional right to counsel attaches “as soon as feasible after custodial restraint.”

In *State v. Guess*, 613 So. 2d 406 (Fla.1992), an officer testified to a statement made by Guess. Guess sought to testify out of the jury’s presence that his statement was not voluntary. The trial court refused his request, and ruled his statement voluntary without hearing his testimony. The state argued that the harmless error standard of *Arizona v. Fulminante*, 499 U.S. 279 (1991) applied to the judge’s erroneous voluntariness determination, but the state supreme court ruled that the federal standard did not apply, and held that reversal was required as a matter of state law under article I, section 9 and *Traylor*.

In *State v. Owen*, 696 So. 2d 715 (Fla.1997), the court receded from its 1990 decision holding Owen’s confession inadmissible because he had made an am-

biguous invocation of the right to remain silent during his interrogation, and held Owen’s statement was admissible under the reasoning of *Davis v. United States*, 512 U.S. 452 (1994). In this regard, the court wrote that *Traylor* “added nothing to federal law” with regard to the suspect’s right to terminate interrogation by “indicat[ing] in any manner” a desire to remain silent. *Id.* at 719. It reiterated the state law basis of *Traylor*, but said that it found *Davis* “persuasive” on the issue before it: “[*Traylor*] does, however, remind us that we have the authority to reaffirm *Owen* regardless of federal law. Upon consideration, we choose not to do so. We find the reasoning of *Davis* persuasive”. *Id.*

*State v. Owen* thus aligned Florida law with “persuasive” federal law on the discrete issue of the duties of law enforcement “when a suspect makes an equivocal statement regarding the right to remain silent.” *Id.* at 720. Compare *Ramirez v. State*, 739 So. 2d 568, 573 (Fla.1999)<sup>7</sup> (noting in text and footnote 3 that *State v. Owen*’s analysis of this issue under *Traylor* is identical with federal law) with *Almeida v. State*, 737 So. 2d 520, 524-26 (Fla.1999) (limiting *State v. Owen* to its facts and repeating that *Traylor*’s exclusionary rule derives from *Simon* and the Florida Constitution).

*Almeida* held: “Article I, section 9, Florida Constitution, requires that whenever a suspect’s rights are clearly raised in the interrogation room-whether by police or the suspect-officers must pursue the matter in an open and forthright manner.” *Almeida*, 737 So. 2d at 526. The court noted that *Traylor* was based on

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<sup>7</sup> *Ramirez* held that Florida law does not differ from federal law on the question of whether a suspect is in custody.

state law arising from *Simon* and article I, section 9, and wrote that *Traylor* established “guidelines for use in Florida - similar to those announced in *Miranda* - that were designed to ensure the voluntariness of confessions.” *Id.*, 737 So. 2d at 524-25.

In *State v. Hoggins*, 718 So. 2d 761 (Fla.1998), the court concluded that, even though this Court had found that the prosecution may impeach defendants with their pre-*Miranda* silence, such impeachment violates the state constitutional right to silence under *Traylor*. See also *Cowan v. State*, 3 So. 3d 446, 449-50 (Fla. 4<sup>th</sup> DCA 2009) (following *State v. Hoggins*).

Although *Traylor*, *Thompson*, *Allred*, and *Almeida*, like the case at bar, contain numerous references to *Miranda* and other federal case law, they rest on state law grounds under the Declaration of Rights.

Thus, in *State v. Kelly*, the court stressed the state law nature of *Traylor*, writing that, under *Traylor*, the state courts should look to their own state law traditions in construing the state constitution:

This Court clearly stated in *Traylor v. State*, 596 So. 2d 957, 962 (Fla.1992):

[W]hen called upon to construe their bills of rights, state courts should focus primarily on *factors that inhere in their own unique state experience*, such as the express language of the constitutional provision, its formative history, both *preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state’s own general history*, and finally any external influences that may have shaped

state law.

*State v. Kelly*, 999 So. 2d at 1041 (quoting and adding emphasis to *Traylor*).

C. Florida's exclusionary rule and the decision below.

We see from the foregoing that Florida has a long history of safeguarding against involuntary confessions and the uninformed waiver of the right to remain silent. "[I]n this context, 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." *Rigterink v. State*, 2 So. 3d 221, 241 (Fla.2009), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229) (failure to advise of right to presence of counsel during questioning violated state constitutional right to remain silent).

At bar, the court initially framed the issue before it as one involving *Miranda* because that was how the issue was presented to it. *State v. Powell*, 998 So. 2d at 533-34. After discussing *Miranda*, it turned to the state law rule of *Traylor*, saying it serves "to ensure the voluntariness of confessions as required by article I, section 9 of the Florida Constitution." *Id.* at 534-35. It then looked to federal cases and found them "split." *Id.* at 536-37. It reviewed Florida cases and found that the majority of reviewing courts had found inadequate warnings similar to those at bar. *Id.* at 537-40. It then examined the warnings given to Powell, and noted again that the state argued that they complied with

*Miranda. Id.* at 540.

After discussing the state's *Miranda* argument, the court ruled that the warnings did not comply with the requirements of article I, section 9 and *Traylor*:

Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. *Accord Ramirez*, 739 So. 2d at 573 (finding suspects must be informed that they have a right to an attorney during questioning); *Sapp*, 690 So. 2d at 583-84 (same). The standard police department *Miranda* form used during the interrogation of Powell did not expressly indicate that he had the right to have an attorney present during questioning. Powell was told he had the right to talk with a lawyer before questioning and that he could use that right at any time during the interview. The right he could use during the interview was the right he was told he had to talk with a lawyer before answering questions. This is not the functional equivalent of having the lawyer present with you during questioning. As stated in *Miranda*, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning.

*Miranda*, 384 U.S. at 469-70, 86 S.Ct. 1602.

*Id.* at 540-41. The discussion of *Miranda* at the end of the foregoing paragraph was secondary to the holding based on article I, section 9 and *Traylor*.

The court then continued to address the state's arguments based on *Miranda*. *Id.* Again, this discussion does not affect the court's state law ruling. Finally, it summarized its agreement with the lower court that the *Miranda* warning card was inadequate because it did not comply with the separate requirements of *Miranda* and article I, section 9:

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. Based on this conclusion, we approve the Second District's decision in *Powell* to the extent the decision is consistent with this opinion.

*Id.* at 542.

In relying on *Traylor* and article I, section 9, the court relied on a solid, long-standing body of state law

growing from *Simon* through *Traylor* as set out above. It would certainly have been simpler for the court to have dispensed with the federal law argument as summarily as it did in *State v. Guess*. Nevertheless, the extensive discussion of *Miranda* is consistent with the court's long-standing practice of consulting foreign law, including federal law, when confronting an issue of state constitutional law and then deciding whether to align state law with such authorities as it finds persuasive.<sup>8</sup>

III. The Florida court has significant reasons for stricter state law rules governing the warnings given to suspects in custody.

As already noted, *Traylor* established bright line rules regarding Florida custodial interrogations based on the principle that the state court should base its decisions on factors inhering in Florida's unique experience, as well as preexisting and developing state law, evolving customs, traditions and attitudes within the state, Florida's general history, and any external influences that may have shaped state law. *State v. Kelly*, 999 So. 2d at 1041 (quoting *Traylor*). We can see several such reasons for Florida's state law rule at bar.

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<sup>8</sup> Needless to say, Florida courts also often consider case law from other jurisdictions in deciding state law issues of less than constitutional magnitude. Sometimes it finds such cases persuasive, sometimes it does not. Compare *Martinez v. State*, 761 So. 2d 1074, 1086-87 (Fla.2000) (following federal case law as to instructions to jurors given transcripts while listening to recordings) with *State v. Pennington*, 534 So. 2d 393, 394-95 (Fla.1988) (considering at length, but declining to follow, federal case as to preservation of issue for appeal).

### A. False confessions.

The state supreme court has long been concerned about the conviction of the innocent based on false confessions: “it is a fact that numbers of persons have confessed that they were guilty of the most heinous crimes, for which they suffered the most horrible punishments, and yet they were innocent.” *Coffee*, 6 So. 493 at 511.

This concern has become more acute as DNA testing has shown that persons have been convicted of “the most heinous crimes” in Florida on the basis of false confessions. See Warren Richey, *DNA Evidence Clear Florida Inmate after 23 Years*, Christian Science Monitor (Sep. 10, 2009) (DNA testing showed innocence of man convicted of rape and murder based on false confession); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. Marshall J. Computer & Info. L. 771, 774 (Summer 2005) (“In late 2003, Broward County, Florida, police agencies buckled under public pressure and voluntarily adopted a video recording requirement after a local newspaper uncovered an astonishing thirty-eight false confession cases.”).

Florida is among the states with the highest number of false confessions leading to convictions. See Steven A. Drizin, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945-46 (Mar. 2004). Former Justice Cantero recently wrote that an “alarming problem with Florida’s death penalty is the number of defendants on Death Row who were later exonerated.” Raoul G. Cantero III and Mark R. Schlakman, *Let’s Talk death penalty in 2010*, Tallahassee Democrat (Sep. 16, 2009).

One way to protect against false confessions is to insist that suspects be advised of their rights with unmistakable clarity.

B. The costs of litigation of variant forms.

Florida has a strong interest in avoiding expensive and time-consuming litigation of the question of whether the suspect was aware of, and knowingly waived, the right to the presence of counsel during interrogation.

As already noted, *Traylor* sought to remedy with its state law rules a perceived problem with *Miranda*, namely that *Miranda* allows officers to warn suspects of their rights orally, which leads to swearing contests between officers and defendants. The ruling at bar would reduce the cost of litigating the question of whether the suspect was aware of, and knowingly waived, the right to the presence of counsel during interrogation.

Florida faces an acute financial crisis, including massive decreases in funding for court personnel. The Florida Bar News recently reported that the state's clerks of court have had to lay off almost twenty percent of their court staff and furloughed many others. *Court clerks bemoan their lack of resources*, Fla. Bar News, Oct. 1, 2009 at 1. Adherence to the bright line standards of *Traylor* and the decision below will lead to simplifying and reducing the time-consuming litigation of motions to suppress.

C. Suspects' varied comprehension levels.

Florida is particularly vigorous in the prosecution

of juveniles,<sup>9</sup> and it deals with large numbers of the mentally ill and mentally retarded in its criminal justice system.<sup>10</sup> Further, it has a large population of persons from countries with legal systems with little or no regard for the rights of criminal suspects.

Florida can have no interest in making officers try to gauge the level at which individual suspects understand the right to remain silent. The state can avoid problems that arise from varying levels of comprehension by the use of forms that spell out the suspect's rights with clarity. Regardless whether an adult citizen of average intelligence and normal mental health may readily grasp that the right includes the right to have an attorney present during questioning, the universe of suspects includes children, the mentally ill, immigrants, and ill-educated persons who may not be so discerning.<sup>11</sup> The Florida constitution protects these

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<sup>9</sup> See Fla. Dept. of Juv. Justice, Bureau of Data and Research, *A DJJ Success Story: Trends in Transfer Of Juveniles to Adult Criminal Court* 5 (Jan. 8, 2002) (“The Bureau of Justice Statistics reported that Florida held more juveniles in prison in the year 2000 than any other state”).

<sup>10</sup> Susan L. Clayton, *Judge Steven Leifman Advocates for the Mentally Ill*, *Corrections Today* (April 1, 2009) (“When I became a judge I had no idea that I was becoming a gatekeeper to the largest psychiatric facility in the state of Florida--the Miami-Dade Jail,” said Miami-Dade County Judge Steven Leifman, keynote speaker at the H-PIS Special Session and Luncheon.” Leifman said that “Florida needs 10 new prisons over the next five to six years just to house people with mental illnesses.”).

<sup>11</sup> *Cf. T.S.D. v. State*, 741 So. 2d 1142 (Fla. 3<sup>rd</sup> DCA 1999) (interrogation of 12 year old with history of psychological problems, IQ of 62, and third grade reading level); *J.G. v. State*, 883 So. 2d 915 (Fla. 1<sup>st</sup> DCA 2004) (interrogation of 13 year old who was enrolled in courses for emotionally handicapped students, and had history of academic failure); *W.M. v. State*, 585 So. 2d 979 (Fla. 4<sup>th</sup>

people as well as the average person.

D. Simplification of jury determinations of voluntariness.

Florida's prosecutors are burdened not only with proving to the court's satisfaction that a confession is voluntary, they must also persuade the jury. Florida Standard Criminal Jury Instruction 3.9(e) (formerly 2.04(e)), tells jurors that they "must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made," and that "[i]f you conclude the defendant's out-of-court statement was not freely and voluntarily made, you should disregard it." See *Jimenez v. State*, 928 So. 2d 508, 510, n.2 (Fla. 3<sup>rd</sup> DCA 2006). The jury will have an easier job with this determination if it is presented with a written waiver setting out each of the defendant's rights with unmistakable clarity.

\* \* \*

This Court will normally "avoid imposing a single solution on the States from the top down". See, *Smith v. Robbins*, 528 U.S. 259, 275-76 (2000). The states have wide discretion to "experiment with solutions to difficult problems of policy," *id.* at 273, and they have the sovereign right to fashion their own laws in conformity with their own legal history to address the unique problems that each of them faces.

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DCA 1991) (interrogation of 10 year old Haitian boy with IQ of 69 or 70); *Thompson* (interrogation of borderline retarded suspect).

At bar, the petitioner asks the Court to impose on the states a rule that they may not develop their own individual rules regarding the advice given to suspects by state law enforcement officials. Regardless whether such an argument is sensible in the abstract, it cannot lead to a result that will deprive Florida of its power to construe its own Declaration of Rights in the manner that it has done at bar.

Regardless whether the warnings here satisfy *Miranda*, that would not alter the state court's holding that the warnings were insufficient under article I, section 9, and that the statement was inadmissible as a matter of state law, given the vitality of Florida's exclusionary rule and the considerations that support it. If the Court reverses the decision below, the outcome for Powell will be the same since the state supreme court based its decision on an adequate and independent state law ground.

#### CONCLUSION

The Court should not reverse the decision of the state supreme court.

Respectfully submitted,

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