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**State of Florida v. Kevin DeWayne Powell**

**SC07-2295**

ALL RISE.

O YEA, O YEA, O YEA.

THE SUPREME COURT IS NOW IN  
SESSION.

ALL THOSE HAVING BUSINESS BEFORE  
THIS COURT, GIVE ATTENTION AND  
YE SHALL BE HEARD.

GOD SAVE THE UNITED STATES, THE  
GREAT STATE OF FLORIDA AND THIS  
COURT.

LADIES AND GENTLEMEN THE FLORIDA  
SUPREME COURT.

PLEASE BE SEATED.

GOOD MORNING FRIENDS, WELCOME TO  
THE FLORIDA SUPREME COURT ON  
WEDNESDAY, MARCH 5.

THE FIRST CASE ON OUR CALENDAR  
IS THE STATE OF FLORIDA VERSUS  
POWELL.

COMMISSIONER SHANAHAN.

WELCOME TO THE COURT.

>> THANK YOU YOUR HONOR.

IF IT PLEASE THE COURT, THIS IS  
THE CERTIFIED QUESTION FROM THE  
SECOND DISTRICT COURT OF  
APPEALS. THE MIRANDA WARNING,  
AND THE WARNINGS GIVEN IN THIS  
CASE WERE ADEQUATE AND THE  
SUSPECT IN THE CASE, MR. POWELL  
HIS WARNING AS PURSUANT TO  
MIRANDA.

>> I WAS JUST WONDERING IF HE  
DID ACCURATELY CONVEY THAT HE  
WOULD LIKE TO HAVE AN ATTORNEY  
PRESENT.

>> PRIOR TO AND DURING  
QUESTIONING.

>> WE ALL AGREE THAT THAT RIGHT  
INCLUDES THE PRESENCE OF AN  
ATTORNEY, BOTH PRIOR TO  
QUESTIONING AND DURING  
QUESTIONING.

>> THAT IS CORRECT.

>> THE ONLY QUESTION HERE IS  
THAT SHOULD THE WARNING THAT WAS  
GIVEN ADEQUATELY CONVEY THE

RIGHT TO HAVE AN ATTORNEY  
PRESENT DURING QUESTIONING.  
>> THAT IS CORRECT.

BASED ON THE CERTIFIED QUESTION.  
>> WERE THESE WARNINGS ACTUALLY  
READ FROM A CARD?

>> YES, THIS IS BASED ON FORM  
310 FROM THE TAMPA POLICE  
DEPARTMENT.

>> WHERE IS 310 IN THE RECORD?  
IS THAT FORM A PART OF THIS  
RECORD?

>> YES, IT WAS SUBMITTED INTO  
EVIDENCE I BELIEVE.

>> HAVE YOU SEEN IT IN THE  
PHYSICAL RECORD THAT WE HAVE?

>> IT SHOULD BE IN THE RECORD  
YOUR HONOR AND IT WAS SUBMITTED  
INTO EVIDENCE.

PARDON ME?

>> IF YOU HAVE IT, JUST KIND OF  
TELL ME WHAT PAGE OF THE RECORD  
IT WAS ON AND I WILL FIND IT.

>> IT IS SUPPLEMENT RECORD ON  
PAGE SIX.

I AM SORRY.

YES, RECORD NUMBER PAGE SIX.

I AM SORRY.

>> REGARDING THE SPECIFIC  
STATEMENTS, THIS FORM, I KNOW  
THAT BOTH PARTIES CITE A LOT OF  
LAWS.

I'VE HAD A LOT OF CASES ON THIS.

IS THERE ANY CASE THAT  
SPECIFICALLY DEALT WITH LANGUAGE  
LIKE THE ONE IN THE LAST  
SENTENCE OF THESE, WHICH IS YOU  
HAVE THE RIGHT TO USE ANY OF  
THESE RIGHTS AT ANY TIME YOU  
WANT DURING THIS INTERVIEW?

>> THE CASE THAT CAME CLOSE TO  
THIS WAS CONNECT, AND IT IS NOT  
DIRECTLY INVOLVED BUT IT IS VERY  
CLOSE, IN WHICH HE SAID HE HAD  
THE RIGHT TO THE PRESENCE OF  
COUNSEL BEFORE AND THEN HE WAS  
TOLD, IF YOU ANSWER ANY OF THESE  
QUESTIONS AT ANY TIME, SO HE  
WASN'T TOLD DURING BUT HE WAS  
TOLD THAT ANY TIME, AND IN THIS  
CASE HE WAS TOLD AT ANY TIME AND  
DURING, SO BOTH WORDS WERE USED  
AND THE FOURTH DISTRICT

CONCLUDED THAT BECAUSE HE WAS TOLD THAT ANY TIME, THAT WAS SUFFICIENT SO HERE WE HAVE ANY TIME AND HE WAS TOLD DURING.

>> WASN'T THERE ALSO A STATEMENT MADE THAT SAID, IF YOU DECIDE TO ANSWER THE QUESTION NOW, WITHOUT AN ATTORNEY PRESENT, AND YOU WILL HAVE -- THE RIGHT TO ANSWER ANY QUESTIONS AND ON AND ON, SO AT CONNECT NOT ONLY WAS HE TOLD THAT YOU HAVE A RIGHT TO SPEAK TO AN ATTORNEY BUT THEY ALSO TALKED IN TERMS OF IF YOU DECIDE TO SPEAK WITHOUT HAVING THE ATTORNEY PRESENT, SO ISN'T THAT REALLY QUITE A DIFFERENCE FROM THE CASE WE HAVE HERE, WHERE THE WARNING NEVER EVEN INTIMATES THAT YOU HAVE A RIGHT TO HAVE THE ATTORNEY PRESENT DURING QUESTIONING?

>> I WOULD RESPECTFULLY DISAGREE WITH THAT.

HERE THE WARNINGS DO CONVEY YOU HAVE THE RIGHT TO HAVE AN ATTORNEY PRESENT.

HE IS TOLD YOU HAVE THE RIGHT TO TALK WITH AN ATTORNEY BEFORE YOU ANSWER ANY OF OUR QUESTIONS, NOT JUST QUESTIONING.

AND CONNECT -- HE WAS TOLD BEFORE YOU ANSWER QUESTIONING BUT FOR ANY OF OUR QUESTIONS, WHICH IS ALL DURING INTERROGATION, IF ANY SINGLE QUESTION, NOT JUST QUESTIONING, AND THEN IMMEDIATELY FOLLOWING, YOU CAN USE THIS RIGHT AT ANY TIME YOU WANT DURING THIS INTERVIEW.

>> IS THERE A STANDARD THAT HAS COME OUT OF THIS WHOLE COLLECTION OF CASES, WHICH WE TRY TO DETERMINE WHETHER THE PRECISE LANGUAGE IS ACCEPTABLE OR NOT?

BY THAT I MEAN, IS IT WHAT A REASONABLE PERSON WOULD UNDERSTAND OR A PERSON OF AVERAGE INTELLIGENCE OR AVERAGE EXPERIENCE?

>> THAT IS THE STANDARD.

A PERSON WITH AVERAGE INTELLIGENCE AND A REASONABLE PERSON UNDERSTANDS. YOU CANNOT TAKE THESE RIGHTS JUST WORD FOR WORD AND ONE AT A TIME.

IT IS THE TOTALITY OF THE WARNING THAT HAS TO BE LOOKED AT IN THIS CASE.

AND I GUESS --

>> IT IS A REASONABLE PERSON AND I GUESS -- I JUST WANT TO MAKE SURE IS THERE ANY CASE THAT WAS CLOSE TO THIS, WITH THE CLOSEST -- IN OTHER WORDS THERE IS A WHOLE HOST OF FEDERAL CASES. NONE OF THE FEDERAL CASES HAVE A WARNING LIKE THIS?

>> THERE ARE SEVERAL CASES THAT HAVE WARNINGS.

CONNECT IS THE CLOSEST THAT HAS BOTH, THAT TALKS ABOUT PRESENCE OF AN ATTORNEY AND TALKS ABOUT LANGUAGE DURING OR AT ANY TIME. THERE ARE FEDERAL CASES THAT HAVE LANGUAGE AS TO AN ATTORNEY BEFORE AND THOSE FEDERAL CASES THAT HAVE RIGHT TO AN ATTORNEY DURING, AND THERE ARE SEVERAL CASES IN THE FEDERAL --.

>> WE HAVE MIRANDA 38 YEARS, WHATEVER IT IS, A LONG TIME AGO, AND IT WOULD SEEM THAT BY NOW THE POLICE DEPARTMENT WOULD HAVE GOTTEN TOGETHER.

THIS IS THE FORM, USE IT BECAUSE REALLY WE DON'T WANT YOU SCREWING UP ON THE FORMS, SO TAMPA HAS THIS FORM. DO THEY GET IT FROM THE SACRAMENTO POLICE DEPARTMENT? I GUESS I AM NOT SURE IF THAT IS WHAT -- SO DOES THIS FORM ITSELF, HAS IT BEEN APPROVED BY SEVERAL COURTS IN THE EIGHTH CIRCUIT, NINTH CIRCUIT, ANYTHING LIKE THAT?

>> NOT THAT I'M AWARE OF.

>> YOU DID NOT FIND IN YOUR RESEARCH ANY FORM THAT IS SIMILAR TO THIS FORM?

>> NO, BUT IN ANSWER TO THE QUESTION, THERE IS NO INCANTATION THAT IS REQUIRED.

MIRANDA REQUIRES NO SPECIFIC LANGUAGE AND THEY DON'T WANT A BRIGHT LINE TEST, THEY DON'T WANT A BRIGHT LINE RULE FOR THESE OFFICERS.

THEY DON'T WANT TO STRAITJACKET OUR LAW ENFORCEMENT.

>> AS WE LOOK AT THESE SPECIFIC WARNINGS, BECAUSE THEY HAVE WHAT IS REFERRED TO AS A CATCHALL, YOU HAVE THE RIGHT TO USE ANY OF THESE ANY TIME, THAT THAT WAS A REASONABLE PERSON OF AVERAGE INTELLIGENCE NOTICED THAT MEANT QUESTIONING AT ANY TIME AND WANTING AN ATTORNEY PRESENT.

>> CORRECT.

>> THIS IS -- JUDGE WALLACE -- THIS IS QUITE CONFUSING BECAUSE IT IS NOT REALLY CLEAR THAT TO AN ORDINARY PERSON, AND I GUESS THAT IS WHERE I DON'T WANT TO CONFESS, BUT TO ME IT WOULD BE CONFUSING.

YOU MISCONSTRUED IT AND I THINK THAT FRANKLY, AND I GUESS I THINK IT IS CONFUSING.

I THINK IT WOULD BE CONFUSING TO AN AVERAGE PERSON AS TO WHAT THAT CATCHALL MEANT AND I NOW KNOW HOW -- IF THE COURT SHOULD SAY IT IS CONFUSING, IS THAT HOW WE FIGURE IT OUT?

>> IF ONE LOOKS AT THE TOTALITY OF THE WARNINGS, LOOKING AT THEM IN CONTEXT, LOOKING AT THEM IN CUSTODIAL INTERROGATION, IS A NATURAL PROGRESSION IN THESE WARNINGS.

YOU HAVE THE RIGHT TO REMAIN SILENT.

IMMEDIATELY FOLLOWING THAT IS YOU HAVE THE RIGHT TO THE PRESENCE OR THE RIGHT TO TALK OR SPEAK WITH AN ATTORNEY AT ANY TIME BEFORE ENTERING ANY ONE OF OUR QUESTIONS.

>> THAT IS THE PROBLEM AS I SEE IT HERE, THAT THE WARNING ACTUALLY SAYS YOU HAVE THE RIGHT TO TALK TO AN ATTORNEY BEFORE THE QUESTIONING, SO THE QUESTION BECOMES, IS THE DEFENDANT, IS A REASONABLE DEFENDANT MISLED IN

BELIEVING THAT -- I CAN TALK TO AN ATTORNEY BEFORE QUESTIONING AND THAT IS IT?

>> BUT IT DOESN'T SAY BEFORE QUESTIONING.

>> IT SAYS BEFORE REQUESTING.

>> BEFORE ENTERING ANY OF OUR QUESTIONS.

>> IT SEEMS TO ME LIKE WE ARE TRYING TO MAKE A DISTINCTION WITHOUT A DIFFERENCE HERE. YOU ARE ANSWERING, YOU HAVE THE RIGHT BEFORE.

THE OPERATIVE WORD HERE IS BEFORE.

SO THE QUESTION IS, IF THAT -- IS THAT MISLEADING TO THE DEFENDANT.

THAT IS WHEN YOU HAVE A RIGHT TO AN ATTORNEY.

>> THIS TAKE-- IF TAKEN OUT OF CONTEXT.

IF WHAT MARANDA REQUIRES IS THAT HE HAS THE RIGHT TO AN ATTORNEY BEFORE BEING QUESTIONED --

>> MIRANDA ALSO SAYS BEFORE AND DURING.

>> MIRANDA SAYS HE MUST KNOW HE HAS A RIGHT TO AN ATTORNEY DURING, NOT THAT HE BE TOLD THAT HE MUST KNOW THAT.

>> ISN'T THAT READING A STRETCH?

>> NO.

>> A FOLLOW-UP.

THERE REALLY ARE TWO SENTENCES AND OF COURSE I THINK YOU CAN SEE WHAT OUR CONCERN IS, IS THAT WHETHER YOU HAVE JUST SORT OF A CATCHALL THING THAT SAYS YOU'VE GOT A RIGHT TO A LAWYER AND YOU ALSO HAVE THE RIGHT TO BE SILENT AND YOU END UP WITH A CATCHALL, THAT YOU CAN EXERCISE THESE RIGHTS ANY TIME YOU WANT TO.

THE SENTENCE YOU ARE RELYING ON, YOU HAVE THE RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY OF OUR QUESTIONS, YOU ARE ASKING US TO INTERPRET THAT TO MEAN THAT THE AVERAGE PERSON WOULD TAKE THAT TO MEAN, YOU UNDERSTAND EACH QUESTION WE ASK, YOU HAVE THE RIGHT TO A LAWYER BEFORE YOU ANSWER EACH QUESTION THAT WE

ASK.

BUT THAT QUESTION, THAT STATEMENT IS FOLLOWED UP WITH, IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED FOR YOU WITHOUT COST AND BEFORE ANY QUESTIONING.

WELL, IF YOU READ THOSE TWO SENTENCES TOGETHER, DON'T THEY READ THE WAY THE JUSTICE IS SUGGESTING TO YOU AND THAT IS BEFORE ANSWERING ANY OF OUR QUESTIONS THAT THE AVERAGE PERSON WOULD TAKE THAT TO MEAN, YES I HAVE A RIGHT TO CONSULT WITH A LAWYER BEFORE I TALK TO YOU?

>> OKAY, BUT I WOULD NOT TAKE IT TO MEAN THAT I HAVE THE RIGHT TO A LAWYER TO BE HERE WHILE YOU ARE ASKING THE QUESTION, TO ADVISE ME OF THAT AS YOU ARE ASKING THE QUESTION.

THESE TWO SENTENCES APPEAR STRAIGHTFORWARD, ONE RIGHT AFTER THE OTHER AND THEY BOTH HAVE THE DEFINITION ABOUT YOU HAVE THE RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY OF OUR QUESTIONS. AND SO IF YOU READ THE ONE NOW THAT SAYS YOU WILL GET A LAWYER APPOINTED FOR YOU IF YOU CAN'T AFFORD IT, AND BEFORE ANY QUESTIONING, THEN I AM HAVING DIFFICULTY WITH YOUR INTERPRETATION, YOUR RATHER BROAD INTERPRETATION OF THAT FIRST SENTENCE, SO HELP ME WITH THAT.

SHOULD WE CONSIDER THOSE TWO SENTENCES TOGETHER?

>> NO, YOU SHOULD CONSIDER ALL FOUR SENTENCES TOGETHER. TAKEN INTO CONTEXT IN THEIR ENTIRETY, NOT ONE WARNING AT A TIME, NOT ONE WARNING BY ITSELF BUT ALL OF THEM TOGETHER.

>> THERE ARE ONLY TWO SENTENCES THAT HAVE ANYTHING TO DO WITH QUESTIONING.

>> I WOULD RESPECTFULLY DISAGREE WITH THAT.

MIRANDA HAS SAID YOU HAVE TO LOOK ALL THE WARNINGS TOGETHER.

ONE FOLLOWS THE OTHER AND IN THE FEDERAL COURTS IT SAYS THE SAME THING.

THEY HAVE THE RIGHT TO REMAIN SILENT AND THEN IMMEDIATELY FOLLOWING THAT THEY HAVE THE RIGHT -- ANYTHING THEY SAY CAN BE TOLD, HELD AGAINST THEM OR HELD AGAINST THEM AND THEN BEING TOLD THEY CANNOT TALK TO A LAWYER BEFORE ANSWERING ANY OTHER QUESTIONS.

>> WAIT A MINUTE, I THINK THAT IS WHERE THE BREAKDOWN IS.

HAVE YOU USED THE WORD, PRESENCE OF A LAWYER?

>> OR TALKED WITH A LAWYER.

>> ARE YOU ADDING LANGUAGE TO WHAT WAS ACTUALLY SAID?

MAYBE IT DOES, MAYBE NOT.

>> DO YOU AGREE OR DISAGREE THAT DETERMINING WHETHER OR NOT YOU WANT TO WAIVE YOUR RIGHT TO REMAIN SILENT, PART OF THAT IS YOU HAVE THE RIGHT TO TALK TO AN ATTORNEY?

THAT CAN BE WAIVED BUT THE RIGHT TO TALK TO AN ATTORNEY IS RELEVANT TO THE RIGHT TO REMAIN SILENT.

CORRECT?

>> YES, THEN THERE'S A SEPARATE COMPONENT THAT MIRANDA TALKS ABOUT, THE IMPORTANCE OF HAVING AN ATTORNEY PRESENT DURING AN INTERROGATION TO MAKE SURE THE INTERROGATION PROCESS DOES NOT BECOME ABUSIVE.

>> YES.

>> WHAT CASE, AND WE WILL FOLLOW-UP WITH JUSTICE CANTERA, WHAT CASE IS THERE, BECAUSE I'VE LOOKED AT GILLIS AND THE MIAMI FORM, I HAVE LOOKED AT THE DUCKWORTH FORM THE CHICAGO POLICE USED BACK IN THE 80'S AND THE FBI FORM THAT IS IN FOOTNOTE FOUR, EVERY ONE OF THOSE CASES FORMS SPECIFICALLY STATE THAT YOU HAVE THE RIGHT TO THE PRESENCE OF THE ATTORNEY DURING THE INTERROGATION.

>> ACTUALLY, THE FBI FORM DOES NOT SAY PRESENCE.

THE FBI SAYS THE RIGHT TO COUNSEL, OR MAINTAIN THE SERVICES OF AN ATTORNEY OF YOUR CHOICE.

>> ARE YOU TALKING ABOUT THE ONE IN DUCKWORTH?

>> I AM TALKING ABOUT THE ONE QUOTED BY MIRANDA ITSELF IN THE MIRANDA OPINION.

>> I WAS TALKING ABOUT THE ONE IN DUCKWORTH THAT CLEARED UP THE CONFUSION.

>> IT IS POSSIBLE THE FBI CHANGED THE FORM BUT IF YOU LOOK AT MIRANDA ITSELF, WHEN THEY ARE TALKING ABOUT THE LETTER FROM I THINK IT WAS HOOVER, EXPLAINING THE -- THAT MIRANDA ENDORSED, IT WAS THEY ARE NOT REQUIRED TO MAKE A STATEMENT.

ANY STATEMENT MAY BE USED AGAINST THEM IN COURT, THEY HAVE THE RIGHT TO COUNSEL AND THE RIGHT TO FREE COUNSEL OF HE IS UNABLE TO PAY, AND AT THAT TIME THOSE WERE THE WARNINGS ENDORSED BY MIRANDA THAT WAS USED BY THE FBI.

>> THE FBI IN DUCKWORTH SAYS YOU HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVISE BEFORE WE ASK ANY QUESTIONS AND YOU HAVE A LAWYER WITH YOU DURING QUESTIONING.

>> OKAY.

>> THAT IS NOT HERE.

THAT IS EXPLICIT TO THE MIAMI BEACH FORM.

IT IS EXPLICIT IN OUR FORM.

IT IS EXPLICIT IN THE CHICAGO CASE THAT WAS PART OF DUCKWORTH, AND CAN YOU NAME A FEDERAL CASE OR ANOTHER SIGNIFICANT CASE WHERE THE TERM PRESENCE OF THE ATTORNEY DURING QUESTIONING IS NOT MORE DIRECTLY IMPLIED OR STATED THAT IT IS IN THIS CASE?

>> FROM THIS CASE THERE IS QUERVO THERE IS TRAILER, THERE'S ANDERSON, ALL FROM THIS COURT. THIS COURT HAS BEEN IN TRAILER YOU HAVE A RIGHT TO --.

>> DOESN'T IT SAY THAT A LAWYER

--

>> IN A FOOTNOTE IT MEANS DURING, BUT IN EXPLAINING WHAT HAS TO BE SAID, A RIGHT TO A LAWYER'S HELP WAS FINE BUT I GUESS THE PROBLEM I HAVE --.

>> THIS WAS A VERY EDUCATIONAL EXPERIENCE FOR ME TO READ ALL OF THESE CASES, AND I THINK WHAT I AM STRUCK BY IS THE CASES THAT HAVE APPROVED THE WARNING, IT SAYS YOU HAVE THE RIGHT TO A PRESENCE OF AN ATTORNEY, THEY DON'T QUALIFY IT AND I THINK THAT TO ME, THE KEY IS THAT IN MIRANDA WHATEVER, WHATEVER FORM IT MIGHT HAVE BEEN UNDERNEATH ALL OF THOSE WARNINGS, WHAT THEY SAID IS THAT THEIR RIGHT TO COUNSEL IS INDISPENSABLE AND JUSTICE BELL WAS SAYING TO PROTECT THIS AMENDMENT COMPREHENDS NOT MERELY RIGHT TO CONSULT WITH THE COUNSEL FOR QUESTIONING BUT ALSO TO HAVE COUNSEL PRESENT DURING ANY QUESTIONING IF THE DEFENDANT SO DESIRES.

>> THAT IS CORRECT, SO I GUESS TO HAVE TO, IF SOMEONE SAYS BROADLY YOU HAVE A RIGHT TO AN ATTORNEY, THERE ARE MANY COURTS THAT SAY THAT YOU DON'T HAVE TO SAY AN ATTORNEY HAS TO BE PRESENT DURING QUESTIONING. THEY HAVE UPHELD SOME OF THOSE, BUT WHERE IT LIMITS THAT AS AT LEAST SOME OF THESE PEOPLE IN THE SECOND DISTRICT -- THE JUDGES IN THIS CASE -- WHERE THE TIME IS LIMITED, NOW WE ARE GOING INTO IT BEING MISLEADING LIKE THE WARNINGS IN ALL THE BROWARD COUNTY SHERIFF'S FORMS THAT WERE STRUCK DOWN BY THE DISTRICT AND THAT IS I THINK WHAT WE ARE STRUGGLING WITH AND I'M STILL NOT HEARING THAT YOU SAID THERE IS A CASE WHERE THE TIME LIMIT BEFORE QUESTIONING IN A COURT HAS UPHELD THAT FORM.

>> I THINK WE ALL HAVE TO GO BACK TO WHAT MIRANDA SAYS.

>> WE JUST DID.

IT IS IMPORTANT TO HAVE A

COUNSEL PRESENT NOT ONLY PRIOR  
BUT DURING.

I AM SURPRISED TO SEE THAT  
EQUALLY SAYING THE IMPORTANCE  
WAS NOT JUST BEFORE QUESTIONING,  
BUT DURING IT AS WELL.

I AM SURPRISED TO SEE THAT IN  
MIRANDA SO QUICKLY.

>> THAT WAS NOT IN THE ACTUAL  
RIGHT MIRANDA HAD ENDORSED.  
THAT WAS IN THE MEANING AND AS  
LONG AS THAT MEETING IS CONVEYED  
REASONABLY AND ADEQUATELY  
CONVEYED TO THE SUSPECT THAT IS  
WHAT MIRANDA AND ITS PROGENY --  
IF YOU LOOK AT DUCKWORTH, THERE  
IS NO INCANTATION, THERE ARE NO  
MAGIC WORDS THAT HAVE TO BE  
SAID.

THE SUSPECT KNOWS HE HAS A RIGHT  
TO COUNSEL BEFORE QUESTIONING  
AND DURING QUESTIONING, THAT IS  
WHAT MATTERS AND THAT IS WHAT  
THESE WARNINGS CONVEY.

IF THE WARNINGS ARE READ IN  
THEIR ENTIRETY, YOU DON'T HAVE  
TO HAVE THE EXPRESS WORD DURING.

>> YOU HAVE USED ALMOST ALL OF  
YOUR TIME.

IF YOU WOULD LIKE TO SAVE A  
LITTLE FOR YOUR REBUTTAL.

>> THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I AM HERE REPRESENTING KEVIN  
POWELL FOR THE PUBLIC DEFENDER'S  
OFFICE.

WHAT STRUCK ME ABOUT THIS IS  
THAT THIS IS A PRINTED FORM AND  
THERE ARE LOTS AND LOTS OF THESE  
PRINTED FORMS AND THESE PRINTED  
FORMS OFTEN END UP THE SUBJECT  
OF LITIGATION.

YOU WOULD THINK AT SOME POINT  
SOME ATTORNEY WOULD GO BACK TO  
THE LAW ENFORCEMENT AGENCY AND  
SAY, YOU KNOW, MAYBE THE FORM  
WON'T WORK.

>> I UNDERSTAND THAT, BUT HERE  
WE HAVE A FORM THAT IS FIVE  
SENTENCES IN LENGTH, AND WHAT  
MIRANDA SAYS IS YOU ARE SUPPOSED  
TO TELL A PERSON THAT IS GOING  
TO BE INTERROGATED WHO IS

SUSPECTED OF A CRIME, THAT THEY HAVE RIGHTS AND THAT THEY HAVE A RIGHT TO REMAIN SILENT.

THEY HAVE A RIGHT TO TALK TO A LAWYER AND THAT THE LAWYER CAN BE THERE, ANYTIME THEY WANT HIM TO BE THERE.

IF THE STATE IS GOING TO PAY FOR IT.

THAT IS THE SUBTOTAL OF WHAT MIRANDA SAYS ISN'T IT?

>> YES.

>> OKAY, NOW I UNDERSTAND AND THERE ARE CASES OUT OF THE U.S. SUPREME COURT THAT IT MADE IT CLEAR THAT WE ARE NOT CONSTRUING IT WILL HEAR.

WE ARE TRYING TO FIGURE OUT WHETHER THERE IS SOME -- A STATEMENT THAT HAS BEEN MADE TO THIS PERSON THAT THAT PERSON IS GOING TO REASONABLY UNDERSTAND THEIR RIGHTS, NOT THAT THIS IS SOME SPECIFIC DICTATE BY UNITED STATES SUPREME COURT AS TO WHAT THAT LANGUAGE IS GOING TO BE.

>> YES.

>> HERE HE IS TOLD, THIS GUY IS TOLD, YOU HAVE THE RIGHT TO TALK TO A LAWYER BEFORE ANY OF OUR QUESTIONS AND THREE SENTENCES LATER, THREE SENTENCES WITHIN A NANOSECOND, THAT GUY IS TOLD, YOU CAN EXERCISE THOSE RIGHTS AT ANY TIME.

NOW, I SUBMIT WITH -- ONLY A BUNCH OF LAWYERS COULD GET INTO AN ARGUMENT ABOUT WHAT THAT MEANS.

>> YOUR HONOR, HE WAS TOLD THAT HE HAS A RIGHT TO TALK TO THE LAWYER.

>> HE HAS GOT A RIGHT TO EXERCISE ANY OF THESE RIGHTS AT ANY TIME.

>> HE WAS TOLD --

>> DURING THIS INTERVIEW.

>> YES, AND THAT WAS THE RIGHT TO TALK TO A LAWYER.

>> COME ON, THIS FELLOW DID NOT DROP IN HERE FROM OUTER SPACE. HE HAS GOT A RIGHT TO TALK TO A LAWYER AND HE HAS THAT RIGHT AT ANY TIME THAT A LAWYER'S GOING

TO BE THERE IF YOU WANT HIM TO  
BE THERE.

IF THIS COURT SANCTIONS THAT  
LANGUAGE, THEN WHAT HE WOULD BE  
DOING IS SAYING THAT YOU ASSUME  
IN EVERY CASE THAT EVERY SUSPECT  
KNOWS HIS MIRANDA RIGHTS  
VERBATIM.

THE LAW REGARDING HIS --

>> DO YOU ACCEPT THE FACT THAT  
WHAT WE ARE TRYING TO FIGURE OUT

IS WHAT A REASONABLE PERSON WITH  
ORDINARY INTELLIGENCE IS GOING  
TO UNDERSTAND?

>> A REASONABLE PERSON WOULD  
UNDERSTAND WHAT HE WAS TOLD BY  
AN AUTHORITY FIGURE WHO WAS  
TELLING HIM HE HAS THE RIGHT TO  
TALK TO AN ATTORNEY.

IT IS ENTIRELY POSSIBLE TO TALK  
TO ONE ATTORNEY WITHOUT EVER  
HAVING THAT ATTORNEY IN THE  
ROOM.

YOU CAN TALK TO AN ATTORNEY OVER  
THE TELEPHONE.

THAT IS NOT WHAT MIRANDA  
REQUIRES.

HAVING AN ATTORNEY PRESENT IS A  
MUCH GREATER AND MUCH MORE --  
RIGHT THAN HAVING THE ABILITY TO  
TALK TO COUNSEL, ESPECIALLY IF  
YOU HAVE THE ABILITY TO TALK TO  
COUNSEL BEFORE QUESTIONING  
BECAUSE WHEN YOU TALK TO A  
CLIENT BEFORE QUESTIONING AND  
THEN YOU SEND HIM OUT INTO THE  
WORLD --.

>> IT DOES NOT SAY BEFORE  
QUESTIONING DOES IT?

>> IT SAYS YOU HAVE THE RIGHT.

>> BEFORE ANY OF OUR  
QUESTIONING.

>> YOU HAVE THE RIGHT TO TALK  
TO A LAWYER BEFORE ANSWERING ANY  
OF OUR QUESTIONS, WHICH CAN VERY  
EASILY BE READ AS TERMINATING  
THAT RIGHT ONCE QUESTIONING  
STARTS.

>> IT IS A REASONABLE  
INTERPRETATION.

IT IS REASONABLE INTERPRETATION  
AND WHAT IT IS SAYING IS THAT  
YOU HAVE A RIGHT TO TALK TO A

LAWYER BEFORE ANY ONE OF OUR  
TIME SPACE.

>> IT DOES NOT IMPLY THAT THAT  
RIGHT TO TALK CONTINUES ONCE YOU  
START ANSWERING.

ONCE YOU START ANSWERING -- YOU  
THINK A DEFENDANT, A PERSON WHO  
IS A TYPICAL DEFENDANT, WITH  
QUESTIONS AND AN AUTHORITY  
FIGURE WHO SAYS YOU HAVE THE  
RIGHT TO TALK TO AN ATTORNEY  
BEFORE YOU ANSWER ANY OF OUR  
QUESTIONS AND THINK HE COULD  
DRAG AN ATTORNEY INTO THAT, INTO  
THAT INTERROGATION ROOM, WHICH  
IS HIS PERFECT RIGHT TO DO, DRAG  
AN ATTORNEY INTO THAT  
INTERROGATION ROOM.

EXCUSE ME?

>> WHAT IS IT THAT WE REALLY ARE  
LOOKING AT HERE?

WHAT IS THE QUESTION WE SHOULD  
BE ASKING OURSELVES?

IT SEEMS TO ME ACCORDING TO THE  
CASE LAW, WHILE THERE ISN'T ANY  
MAGIC WORD THAT YOU HAVE TO  
GIVE, YOU HAVE TO SUFFICIENTLY  
CONVEY TO THE DEFENDANT WHAT IS  
RIGHT, WHAT HIS OR HER RIGHTS  
ARE.

MIRANDA CLEARLY SAYS THAT THE  
RIGHT TO HAVE AN ATTORNEY IS NOT  
ONLY THE RIGHT TO TALK TO AN  
ATTORNEY BEFORE QUESTIONING BUT  
TO HAVE AN ATTORNEY PRESENT  
DURING QUESTIONING, SO MY  
QUESTION TO YOU IS THIS.

HOW DO THESE RIGHTS CONVEY THAT?  
YOUR OPPONENT SAYS THAT BY  
PUTTING THAT FINAL SENTENCE IN  
THERE THAT YOU HAVE THE RIGHT TO  
USE ANY OF THESE RIGHTS AT ANY  
TIME YOU WANT, SATISFIES THE  
REQUIREMENT THAT YOU CAN HAVE AN  
ATTORNEY PRESENT AT ANY TIME.

>> I THINK THE DEFENSE IN M.A.D.  
AND THE POWELL DECISION SAYS  
THAT CATCHALL REALLY MEANS  
NOTHING.

YOU CAN'T REITERATE SOMETHING  
THAT HAS NEVER BEEN ARTICULATED.  
YOU CAN'T REVISIT SOMETHING THAT  
YOU HAVE NEVER VISITED BEFORE  
AND SECOND OF ALL IT IS

CONTRADICTORY, AND WHY SHOULD SOMEBODY, A REASONABLE PERSON WITH REASONABLE INTELLIGENCE HAVE TO SORT OUT CONTRADICTORY LANGUAGE WHEN HE IS TOLD EXPLICITLY INEXPLICIT LANGUAGE, YOU HAVE THE RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY OF OUR QUESTIONS?

>> WHY WOULDN'T A REASONABLE PERSON ASSUME THAT IF I HAVE A RIGHT TO TALK TO AN ATTORNEY BEFORE QUESTIONING AND THEN IT SAYS I CAN EXERCISE ANY OF THESE RIGHTS AT ANY TIME DURING THE INTERVIEW THAT IF THEY COME TO A QUESTION THAT THEY ARE NOT SURE WHETHER THEY WANT TO ANSWER, THEY KNOW FROM THIS FORM THEY HAVE A RIGHT -- I WANT TO TALK TO AN ATTORNEY, WHICH HAPPENS ALL THE TIME.

>> THEY WOULD NOT UNDERSTAND THEY HAVE A RIGHT TO BRING AN ATTORNEY INTO THE ROOM.

>> LET ME MAKE SURE I UNDERSTAND WHERE YOU ARE GOING WITH THIS. THERE'S NO QUESTION THESE ARE SO INTIMATELY RELATED THAT IT MAY BE HARD TO SEPARATE THEM, OR IS THERE A NEED TO SEPARATE THEM? IS THERE A TRUE LEGAL DIFFERENCE, A MEANINGFUL LEGAL DIFFERENCE BETWEEN TALKING WITH AN ATTORNEY AND THE ATTORNEYS PRESENT?

IS THAT YOUR ARGUMENT?

>> YES, THAT IS IT.

>> I THINK THERE ARE TWO DISTINCT LEGAL RIGHTS.

FOR EACH TO BE ADVISED OF BOTH OF THOSE, THAT IS YOUR POSITION.

>> YES, HE HAS TO BE ADVISED. MIRANDA ITSELF SAYS TO HAVE COUNSEL IS AN ABSOLUTE RIGHT BUT ALSO THE NEED FOR COUNSEL TO PROTECT THE SYSTEM AND PRIVILEGE, HAS NOT A RIGHT TO CONSULT COUNSEL PRIOR TO QUESTIONING BUT ALSO HAVE -- PRESENT.

[INAUDIBLE]

>> I'M NOT NECESSARILY DISAGREEING WITH YOU.

WE WILL GET THROUGH THIS.  
BUT WHAT YOU ARE SUGGESTING IS  
THAT THERE NEEDS TO BE MENTION  
OF THOSE SEPARATELY, IS THAT THE  
SUBSTANCE OF WHAT YOU ARE  
SAYING?

TO CONVEY THOSE TWO DIFFERENCES?

>> IT DOES NOT MENTION  
SPECIFICALLY WHICH WOULD BE THE  
IDEAL SITUATION.

THE IDEAL SITUATION WOULD BE TO  
LIFT THIS FROM MIRANDA.

VERY SIMPLE.

BUT IF IT IS NOT MENTIONED  
SPECIFICALLY AND THE IDEAL SAYS  
IN AN ARREST OR WHEN SOMEBODY  
DOESN'T HAVE THE THING IN HIS  
WALLET TO GIVE TO HIM, DON'T  
LIMIT THEIR RIGHT, DON'T LIMIT  
HIM.

A LOT OF THE FEDERAL CASES HAVE  
UPHELD THEIR GENERAL LANGUAGE  
BECAUSE IT DID NOT PLACE ANY  
LIMITATION ON THE RIGHT TO THE  
PRESENCE OF COUNSEL.

YOU HAVE A RIGHT TO AN ATTORNEY,  
YOU WOULD SAY THAT IS KIND OF  
BIG BUT IT IS ALL ENCOMPASSING.

IT DOES NOT LOOK AT -- IT DOES  
NOT LIMITED TO AFTER.

IT DOES NOT SAY THERE IS NO  
RIGHT TO JUST TALK, JUST AS YOU  
HAVE A RIGHT TO AN ATTORNEY.

UNLIMITED.

BEFORE, DURING, AFTER.

>> CORRECT ME IF I'M WRONG, BUT  
I THOUGHT YOUR MAIN FOCUS IN  
THIS CASE WAS THE WHOLE BEFORE  
AND DURING DICHOTOMY.

I DID NOT GET THE IMPRESSION  
THAT YOU WERE ARGUING THAT  
TALKING DOES NOT MEAN PRESENCE.

>> YES, IT IS IN MY BRIEF.

WHEN I START ARGUING OF COURSE  
YOU KNOW YOU HAVE TO GO THROUGH  
ALL OF THESE THINGS WHICH IS  
INCREDIBLE.

GOINGTHROUGH ALL THE FEDERAL  
CASES.

>> I WAS NOT FOCUSING ON THIS  
WHOLE TALKING VERSUS PRESENCE, I  
WAS FOCUSING ON BEFORE VERSUS  
DURING.

WHAT CASES CAN YOU CITE THAT

HOLD THAT SAY TALKING WITH --  
BUT NOT PRESENCE IS THE  
POSITION?

>> I AM NOT SURE THAT ANY OF  
THOSE, ANY OF THEM HAVE THAT.  
MOST OF THEM HAVE IN CONJUNCTION  
WITH, YOU -- THEY DON'T SAY TALK  
TO.

YOU HAVE THE RIGHT TO AN  
ATTORNEY AND TO HAVE HIM WITH  
YOU.

>> ARE THERE ANY CASES WHERE  
THEY SAID TALK TO OR CONSULT  
WITH AN ATTORNEY AND DID NOT SAY  
AND TO HAVE HIM WITH YOU?

>> I'M NOT SURE THAT ANY OF THEM  
ARE SPECIFIC.

I AM SURE MS. SHANAHAN WILL BE  
ABLE TO ADDRESS THAT.

>> THAT IS THE CASE SHE SAID, IT  
STARTED OUT, I DON'T KNOW IF IT  
WAS A FORM BECAUSE IT SOUNDS  
LIKE IT IS -- IT WAS NOT  
VERBATIM.

>> IT IS NOT CLEAR WHETHER OR  
NOT IT IS A FORM.

>> YOU HAVE THE RIGHT TO SPEAK  
TO AN ATTORNEY AND IT DOES SAY  
PRESENT HERE BEFORE WE MAKE ANY  
QUESTIONS.

THAT IS THE FIRST PART AND THEN  
IT GOES INTO, ANSWER THE  
QUESTIONS NOW, YOU STILL HAVE  
THE RIGHT NOT TO ANSWER MY  
QUESTIONS UNTIL YOU CAN SPEAK  
WITH AN ATTORNEY.

THEY SAID THAT THAT WAS, UNLIKE  
ROBERTS, WHICH WAS A CASE WHERE  
THE BROWARD FORM WAS FOUND TO BE  
MISLEADING.

THIS WAS NOT MISLED AND THE  
TOTALITY WERE ADEQUATE TO INFORM  
THE DEFENDANT'S RIGHT TO COUNSEL  
DURING INTERROGATION, HAD THE  
RIGHT TO THE PRESENCE OF AN  
ATTORNEY WHICH REFERRED TO IT

THREE TIMES SO IT SEEMS TO ME  
THE COURT -- FOURTH DISTRICT, I  
WAS SURPRISED IN SEEING HOW  
IMPORTANT IT WAS IN MIRANDA,  
THAT THE PRESENCE OF THE  
ATTORNEY DURING THE QUESTIONING  
WAS A CRITICAL PART OF MIRANDA

BUT THAT IT IS A FORM THAT  
SIMPLY SAYS YOU HAVE THE RIGHT  
TO THE PRESENCE OF AN ATTORNEY.  
THAT WOULD NOT BE STRUCK DOWN  
BECAUSE IT WAS NOT LIMITED.

>> RIGHT, IF SOMETHING IS  
UNLIMITED IT IS MORE OPEN-ENDED.

>> THE QUESTION I HAD WANTED TO  
ASK, HAD TO DO WITH SPECIFIC  
ISSUES IN THIS CASE.

I UNDERSTAND WE ARE LOOKING FOR  
A REASONABLE PERSON STANDARD AND  
WE ARE NOT SUPPOSED TO SAY HOW  
DID IT APPLY IN THIS CASE BUT I  
AM TROUBLED BY THE FACT THAT  
DURING THE TRIAL, THAT HIS OWN  
LAWYER ASKED HIM WHETHER HE  
WAIVED THE RIGHT TO HAVE AN  
ATTORNEY PRESENT DURING  
QUESTIONING.

THAT IS WHAT THE QUESTION WAS,  
IT WAS A LEADING QUESTION.

THE ATTORNEY ASKED IT, DID YOU  
WAIVE YOUR RIGHT TO HAVE AN  
ATTORNEY PRESENT DURING YOUR  
QUESTIONING AND HE SAID HE DID.  
NOW WHAT DO WE DO WITH THAT?  
DO WE IGNORE THE FACT THAT IN  
THIS CASE -- LET'S SAY EVEN IN  
PRE-TRIAL HE HAS GOTTEN ON THE  
STAND AND SAID, THEY SHOWED  
EVIDENCE THAT IN PRIOR CASES HE  
HAD AN ATTORNEY WITH HIM DURING  
QUESTIONING AND HE SAID DESPITE  
WHAT THE FORM SAID, I KNEW I HAD  
A RIGHT TO HAVE AN ATTORNEY  
PRESENT DURING QUESTIONING.  
DO WE SIMPLY IGNORE THE REALITY  
FOR THIS DEFENDANT EITHER  
BECAUSE HE IS SO SAVVY IN THE  
WORLD OR BECAUSE OF HIS PRIOR  
EXPERIENCE OR BECAUSE HIS  
ATTORNEY ASKED HIM A QUESTION,

THAT THIS RECORD AFFIRMATIVELY  
SAYS HE UNDERSTOOD THAT IT MEANT  
THAT HE HAD THE RIGHT TO HAVE AN  
ATTORNEY PRESENT DURING  
QUESTIONING?

>> FIRST OF ALL, THAT QUESTION  
HAS MANY FACETS TO IT.

FIRST OF ALL I RESPECTFULLY  
DISAGREE THAT IT SHOWED HE  
UNDERSTOOD HE HAS THE RIGHT TO

HAVE AN ATTORNEY.

>> ON MY PREMISE, IF IT IS IN THE RECORD AFFIRMATIVELY THAT THE MATTER WHAT THE FORM SAYS, THAT THE DEFENDANT KNEW BEFORE ANSWERING QUESTIONS THAT HE HAD A RIGHT TO HAVE AN ATTORNEY PRESENT DURING QUESTIONING THAT THE FORM IS NOT, DOES NOT TRUMP WHAT THIS PERSON ACTUALLY KNEW?

>> USUALLY NOT BECAUSE IT SEEMS LIKE THE FEDERAL CASES AND THE U.S. SUPREME COURT INTENDED OR HINTED THAT THE WARNINGS ARE PREREQUISITE TO A VALID INTERROGATION AND YOU DON'T GO BACK.

>> I'M TALKING ABOUT DIRECT EVIDENCE.

>> FIRST OF ALL THERE IS NO DIRECT EVIDENCE IN THE CASE.

>> YOU AGREE WITH ME THAT AS SOMEBODY SAID I KNEW WHAT IT MEANT, THAT I HAD A RIGHT TO HAVE AN ATTORNEY PRESENT DURING QUESTIONING THAT NO MATTER WHAT THE FORM SAYS, THAT WOULD TRULY LOOK ABSURD, A FORM OF SUBSTANCE TO, IN THAT CASE THE --

>> IT WOULD LOOK ABSURD AND THAT IS THE RELATED QUESTION OF WHETHER OR NOT, WHETHER NOT -- [INAUDIBLE]

>> HOW DO YOU HAVE DIRECT EVIDENCE THAT HE KNEW HE HAD THE RIGHT TO HAVE AN ATTORNEY PRESENT?

>> IN THAT CASE WE DON'T HAVE THAT.

FIRST OF ALL I DON'T KNOW WHAT

THAT EXCHANGE WAS.

THAT HAPPENED AFTER THE SUPPRESSION HEARING SO THE JUDGE HAD RULED THESE STATEMENTS WERE ADMISSIBLE, THE CAT WAS OUT OF THE BAG AND WHAT HE WAS DOING WAS TRYING TO COMMUNICATE THAT NOBODY SAID THIS BECAUSE HIS GIRLFRIEND WAS GOING TO LOSE HER CHILDREN OR LOSE HER APARTMENT OR WHATEVER BUT SHE, I DON'T EVEN KNOW SHE HAS THE FORM IN FRONT OF HER.

SHE IS ASSUMING SOMEHOW THAT THE FORUM SAID THAT AND IT DIDN'T SAY THAT.

HE IS TRYING TO GET TO THE POINT WHERE HE CAN EXPLAIN WHY HE SAID THAT.

[INAUDIBLE]

>> SHE SPECIFICALLY, IT IS ON PAGE 97.

SHE MAKES THE JUDGMENT BEFORE THE STATEMENTS COME IN AND SHE SPECIFICALLY SAYS THAT FORM 310 IS DEFECTIVE AND IT DOES NOT GIVE HIM A RIGHT TO COUNSEL.

BUT THE THING ABOUT THIS IS SHE DOES NOT ADMIT HE UNDERSTOOD IT. HE IS TALKING ABOUT WHETHER NOT HE WAIVED THOSE RIGHTS.

IN EVERY SINGLE MIRANDA CASE OR JUST ABOUT YOU HAVE A WAIVER. YOU ARE TALKING ABOUT WHETHER OR NOT THE MIRANDA RIGHTS WERE READ, WERE GIVEN PROPERLY BUT THE PERSON HAS WAIVED THOSE RIGHTS.

>> DOES THE RECORD REFLECT IN THIS CASE HOW LONG THIS FORM HAS BEEN USED?

>> NO, BUT IF YOU LOOK AT THE OTHER CASES IT WAS AROUND 2003 AND 2004 BECAUSE THAT IS ONE OF CASES THAT POPPED UP EITHER WHEN

--

>> I ALSO NOTICED THAT IN MITCHELL I THINK IT IS THAT JUDGE ALTONBERG SAID THAT MANY POLICE DEPARTMENTS WERE USING

THIS FORM.

>> I THINK THIS WAS JUST SPECIFIC TO HILLSBOROUGH. IT WAS A DIFFERENT FORM AND IT READ DIFFERENTLY.

I AM PRETTY SURE IT WAS A HILLSBOROUGH FORM. IT WAS USED BY TAMPA POLICE OR THE SHERIFF.

>> YOU ARE SAYING IN THE OTHER CASES, IN 2001, 2003?

>> IF YOU LOOK AT THE FOOTNOTES I HAVE, IT SEEMED LIKE THE DATES THEY WERE TALKING ABOUT WERE BETWEEN 2003 AND 2004, SO MAYBE THEY FIXED IT. I HOPE THEY

FIXED IT.

>> TELL US WHETHER OR NOT, WAS THERE A CLAIM OF HARMLESS ERROR AT THE DISTRICT COURT OF APPEAL LEVEL, THAT IS HARMLESS ERROR IN THE SENSE THERE WAS LATER TESTIMONY BY YOUR CLIENT -- OH WELL I HAVE HAD MY MIRANDA RIGHTS READ TO ME A MILLION TIMES.

I UNDERSTOOD THAT PART OF IT WAS THAT I HAD THE RIGHT TO HAVE A LAWYER PRESENT DURING THE QUESTIONING SO WAS THAT ISSUE RAISED AT THE DISTRICT COURT OF APPEALS LEVEL?

>> I'M NOT SURE.

>> YOU READ THE DISTRICT COURT OF APPEALS OPINION.

>> YES I HAVE AND I DON'T KNOW, I DON'T THINK SO BUT YOU'VE GOT ANOTHER THING TOO.

IF YOU LOOK AT THE EXCHANGE, THE COUNCIL WAS ALLOWED TO -- WITH REGARD TO THEIR RIGHTS FORM. IF THE JUDGE MADE HIS DECISION THEN THERE WOULD A BEEN NO NEED FOR THE CLIENT TO TESTIFY, PERIOD.

SO HOW CAN YOU SAY THERE IS HARMLESS ERROR WHEN AT THAT POINT IN TIME IT WOULD HAVE BEEN NO CONFESSION.

THERE WOULD HAVE BEEN NOTHING

AND IF YOU LOOK OF THE OPINION, HOW COULD -- IT IS NOT ILLEGAL FOR STATES TO OWN A GUN. IT IS ONLY ILLEGAL IF YOU ARE A CONVICTED FELON OR HAVE SOME OTHER RESTRICTIONS, SO THE THING IS HOW COULD THEY HAVE TIED HIM TO A GUN THAT WAS IN HIS GIRLFRIEND'S HOUSE UNDERNEATH HER BED IN A VERY MESSY ROOM WHEN HE WAS NOT ARRESTED -- I DON'T THINK HE WAS ARRESTED. HE WAS ARRESTED OUTSIDE OF THE ROOM.

>> I THINK THE QUESTION WENT MORE TO WHETHER HE ADMITTED HE KNEW HIS RIGHTS WERE NOT TO THE CIRCUMSTANCES OF THE CRIME.

>> IT CAN'T BE, BECAUSE THE

THING IS, THE STATE HAS THE BURDEN AND IN THE TIME THE EVIDENCE IS BEING INTRODUCED TO PROVE THE EVIDENCE IS ADMISSIBLE.

THAT EVIDENCE WAS NOT THERE, SO HOW COULD YOU TAKE SOMETHING THAT HAPPENS IN A DEFENSE CASE AFTER THE CAT IS OUT OF THE BAG?

>> THE WHOLE POINT IS THE DEFENDANT SEEMED TO ADMIT IN THE SUPPRESSION HEARING THAT HE UNDERSTOOD HE HAD THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING.

>> FIRST OF ALL HE DID NOT ADMIT HE UNDERSTOOD HE HAD THE RIGHT. HE SAID HE WAIVED THE RIGHT AND IT WAS A VISITATION OF SOMETHING SHE THOUGHT WAS ON THE FORM. I DON'T KNOW WHERE SHE GOT THAT FROM.

IT WAS THE LEADING QUESTION WHERE THE ANSWER WAS SUPPOSED TO BE -- SHE NEVER SAID, DID YOU UNDERSTAND YOU HAVE THE RIGHT TO THE PRESENCE OF COUNSEL. SHE JUST SAID, DID YOU WAIVE THIS RIGHT, THIS RIGHT, THIS RIGHT.

I DON'T KNOW WHY SHE IS GOING

THROUGH THAT.

IT IS THE DEFENSE'S CASE, IF THE EVIDENCE HAD BEEN SUPPRESSED IT WOULD HAVE BEEN --

>> WHO REPRESENTED HIM AT THE SUPPRESSION -- YOU SAID SHE MAY NOT HAVE KNOWN WHAT THE FORM SAID. WHO REPRESENTED HER?

>> THERE WAS NO SUPPRESSION HEARING.

THIS HAPPENED DURING THE TRIAL.

>> SHE HEARD THE TESTIMONY AS TO WHAT THE FORM SAID?

>> SHE RAISED IT WAS DEFECTIVE IN THAT MANNER AND THEN SHE IS ASKING A LEADING QUESTION IMPLYING THAT SOMEHOW THE FORM SAID THE PRESENCE -- THERE ARE A LOT OF DISTURBING THINGS WITH REGARD TO THIS DEFENSE,.

[INAUDIBLE]

ALSO THERE IS ANOTHER PROBLEM

ABOUT, WE HAD NO IDEA HOW THEY FOUND THIS GUN OR TO WHAT AUTHORITY THEY FOUND THIS GUN. THERE ARE A LOT OF PROBLEMS AND I AM SURE THIS WILL BE REVISITED IF FOR SOME REASON THAT THE COURT DOES NOT UPHOLD IT.

>> SHE WAS AWARE OF WHAT THE FORM SAID ON THE DEFENSE SIDE OF THE CASE?

AND ASKED THE STATEMENT BE SUBMITTED?

>> ABSOLUTELY, AND BY THAT TIME, IT WAS EVIDENCE DURING THE SECOND OFFICER'S TESTIMONY.

>> YOU HAVE EXCEEDED YOUR TIME AND IF YOU COULD BRING YOUR REMARKS TO A CONCLUSION.

>> I WOULD JUST URGE THIS COURT TO READ ALL THE CASES.

I KNOW THEY ARE VERY, VERY TEDIOUS.

I CAN'T EVEN CARRY THEM, BUT WHEN YOU LOOK AT IT YOU REALIZE THAT THESE INSTRUCTIONS DO NOT WARN THE CLIENT THAT HE HAS THE RIGHT TO THE PRESENCE OF AN ATTORNEY AND THAT IS THE

IMPORTANT QUESTION IN THIS CASE. THANK YOU.

>> ANY REBUTTAL?

>> IN SPEAKING TO WHETHER HE UNDERSTOOD HIS RIGHTS, THE FORM AT THE TIME OF QUESTIONING INDICATING THAT -- HE NOT ONLY TESTIFIES.

>> IF THE RIGHTS WERE NOT INCLUDING THE RIGHT TO HAVE THE PRESENCE OF AN ATTORNEY DURING QUESTIONING, THAT IS WHY I THOUGHT IT MIGHT BE SIGNIFICANT THAT HE ANSWER THAT WAY DURING THE TRIAL.

I DON'T THINK HIS SIGNING THE WAIVER MEANT HE UNDERSTOOD HE HAD THE RIGHT TO PRESENCE OF AN ATTORNEY DURING QUESTIONING BECAUSE THAT IS WHAT WE ARE ARGUING ABOUT, THAT THERE IS A REASONABLE BASIS TO CONCLUDE THAT THESE WARNINGS DID NOT CONVEY THAT RIGHT, OR COULD HAVE MISLEAD A REASONABLE PERSON, SO

HOW DOES THAT HELP YOU TO SAY HE SIGNED A WAIVER?

>> I THINK THIS COUPLED WITH THE TESTIMONY GOES TO THE FACT THAT HE UNDERSTOOD HIS RIGHTS AS A REASONABLE PERSON AND THERE'S BEEN NO ARGUMENT THAT HE WAS NOT A REASONABLE PERSON AND DID NOT UNDERSTAND HIS RIGHTS IN THIS CASE.

AS TO THE QUESTION EARLIER, THERE IS A CASE OF YOUNG VERSUS MARYLAND AND THE CASE OF FRANKSON THAT YOU HAD ASKED ABOUT IN WHICH, WAS THERE A QUESTION ABOUT WHETHER THERE IS, AND THAT IS ALSO IN THE STATE BRIEF, ABOUT WHERE THEY WERE DOING THIS INTERVIEW TYPE OF QUESTIONING AND AND BOTH OF THOSE CASES TALK ABOUT THAT ISSUE.

>> DO YOU AGREE WITH THE IMPOSING COUNSEL'S INTERPRETATION THAT THERE IS A

DISTINCTION BETWEEN TALKING BEFORE AND PRESENT DURING WITH REGARD TO A LAWYER?

>> NO.

>> YOU DO NOT, SO THERE'S NO DISTINCTION, NO TWO SEPARATE THINGS WE ARE TALKING ABOUT, THAT IT IS ALL THE CONTINUUM.

>> CORRECT, AND I THINK IN MIRANDA THEY SAY RIGHT TO COUNSEL, THEY ALSO SAY PRESENCE OF COUNSEL. THEY SAY CONSULT WITH COUNSEL.

THEY SAY DIFFERENT WARNINGS FOR THE SAME THING AS LONG AS THE MEANING CONVEYED THE SAME THING AS WHAT IS REQUIRED BY MIRANDA. THE STATE RESPECTFULLY -- AS THESE WARNINGS DO CONVEY TO A REASONABLE PERSON THAT HE HAS A RIGHT TO THE PRESENCE OF AN ATTORNEY DURING QUESTIONING AS WELL AS PRIOR TO QUESTIONING. THANK YOU.

>> THANK YOU VERY MUCH.