IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA.

CRIMINAL DIVISION: "U"

CASE NO: 03-5866CF A02

STATE OF FLORIDA,

vs.

**********,
Defendant.
_____/

DEFENDANT'S MOTION TO SUPPRESS A CONFESSION OR ADMISSION ILLEGALLY OBTAINED

Pursuant to Fla. R. Crim. P. 3.190(i), article I, sections 9 and 12 of the Florida Constitution, and the fourth, fifth and fourteenth amendments to the United States Constitution, Mr. *****, through undersigned counsel, requests that this Court grant this motion and in support thereof states the following:

1. Mr. ***** is charged by information with one count of sexual battery on a person less than 12 years of age.

2. He is requesting that the following evidence be suppressed:

a. All statements made by Mr. ***** when he was interrogated by Detective Gary Chapin and Detective Joseph Recarey on May 20, 2003.

3. Mr. ***** alleges that the search and seizure that occurred in this case were done without either an arrest warrant or a search warrant.

4. Pursuant to Florida statutes §§ 90.202(6) and 90.203, Mr. *****, through undersigned counsel, requests that this Court take judicial notice of the court file in the present case as well as the fact that there is no arrest warrant or search warrant contained in said file. *See State v. Hinton,* 305 So. 2d 804, 807 (Fla. 4th DCA 1975) ("[t]he burden

is upon the defendant (the moving party) to prove that the search was invalid; that burden can initially be met by a motion asserting the absence of a warrant and the court judicially noticing that its own file in the cause contains no such warrant. When the defendant's initial burden is met, it then shifts to the state to sustain the validity of the search").

FACTS OF CASE

On May 17, 2003, M.M., a ten-year-old girl, alleged that her stepfather, Mr. Carlos *****, sexually battered her. On May 20, 2003, Detective Gary Chapin of the Palm Beach County Sheriff's Office and Detective Joseph Recarey of the Palm Beach Police Department arrested Mr. ***** and transported him to the Palm Beach Police Department where he was interrogated. The entire interrogation was videotaped.[1]

At the beginning of the interrogation, Detective Chapin told Mr. ***** that he was under arrest and that he was not free to leave the building in which he was being interrogated.[2] Thereafter, Mr. ***** was given *Miranda* warnings.[3] From page ten of the translation to page twenty-eight, Mr. ***** has a discussion with Detective Chapin regarding his need to have a lawyer present during his interrogation. Mr. ***** made the following statements during their extended discussion:

1. "Yes but I don't have an attorney now? Then, what do I do?"[4]
2. *"Ok . . . well . . . I do not have the means but I would like an attorney" (italics added).*[5]

[1] Because Mr. *****'s native language is Spanish, much of the interrogation is in Spanish. Said interrogation has been translated from Spanish into English by Palm Beach County Official Court Interpreter Lucy Bidart. The first twenty-eight pages of this translation are attached to this motion because of their relevance to this motion.
[2] *See* page 2 of the attached translation.
[3] *See* page 9 of the attached translation.

3. "But it would be better . . . the attorney could defend me."[6]
4. In response to Detective Recarey's statement that "[i]t was your . . . selection you already wanted an attorney," Mr. ***** answered "[y]eah . . . yes . . . ."[7]
5. "And . . . and are there attorneys there too [at the jail] . . . or attorneys that can help me like you are telling me?"[8]
6. "But . . . but in the jail I can also have . . . have an attorney because I have no money, I'm telling you the truth, I have no money."[9]
7. "So . . . that over there [at the jail] I also have the opportunity to have an attorney?"[10]
8. "It's not that . . . It's that I was undecided, you understand, I wanted to see . . . that . . . that option, but since I am seeing that, an attorney is going to be there in the . . . ."[11]
9. Ok, then . . . then I don't have . . . I don't have any way out . . . I better talk with [Detective Chapin]."[12]
10. "Yes, I want to talk with [Detective Chapin], I'll talk with him."[13]
11. "[B]ecause I didn't understand the options which I was given about the attorney, he understand me, . . . which is the best . . . with the lawyer . . . that

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[4] *See* page 10 of the attached translation.
[5] *See* page 10 of the attached translation.
[6] *See* page 10 of the attached translation.
[7] *See* page 12 of the attached translation.
[8] *See* page 15 of the attached translation.
[9] *See* page 18 of the attached translation.
[10] *See* page 19 of the attached translation.
[11] *See* page 19 of the attached translation.
[12] *See* page 21 of the attached translation.
[13] *See* page22 of the attached translation.

is, which is the best option with the attorney or without the attorney, that is what I want to know."[14]

Nevertheless, in spite of the fact that Mr. ***** *unequivocally* stated at the outset of the interrogation that he would like to have an attorney present to defend him, Detective Chapin did not stop the interrogation but instead continued speaking to Mr. ***** in order to convince him to make a statement about M.M.'s allegations of child abuse. Some of Detective Chapin's statements include the following:

1. After Mr. ***** stated that he did not have money but that he wanted a lawyer present, Detective Chapin stated "[r]ight, then we cannot continue this. The interview is over."[15]

2. "All right, so . . . All right we're done."[16]

3. "First of all, ah . . . tell him ah . . . I'm not . . . there is no lawyers coming. No lawyers are coming here today."[17]

4. "I want to hear what he has to say."[18]

5. ". . . *but he invoked his right to an attorney so I have to stop dead in my tracks right now. That was his choice*" (italics added).[19]

6. "No matter what he says today . . . no matter what you say or no matter what you don't say, you're going to jail. That's why you are under arrest."[20]

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[14] *See* page 24 of the attached translation.
[15] *See* page 10 of the attached translation.
[16] *See* page 10 of the attached translation.
[17] *See* page 12 of the attached translation.
[18] *See* page 12 of the attached translation.
[19] *See* page 12 of the attached translation.
[20] *See* page 13 of the attached translation.

7. "*I only see this as an opportunity to . . . for him to tell me . . . his side of the story and listen to me to why he's in . . . he's going to jail*" (italics added).[21]

8. "He is not going to work. He's going . . . . When he goes to jail tell him he is going to have no bond, there is no bond for this crime. . . . He is going to jail and he is going to stay in jail. . . . Unless his attorney gets him some kind of bond."[22]

9. "I want to talk to you. . . . *But when you tell me . . . I'm not talking to you unless an attorney is here . . . it's over*" (italics added).[23]

10. "Yeah . . . he can get a lawyer but, you know, you will not, this . . . *this is your only opportunity to talk to me to be honest with you*" (italics added).[24]

11. " . . . *you have the right to a lawyer and you exercised that right. . . . So, I have to stop. . . . I cannot continue . . . because you told me you want a lawyer* " (italics added).[25]

12. "That's why I spent so much time telling you that you don't have to answer questions. I was ready to tell you everything I know, *but when you say I want a lawyer, we have to stop our conversation*" (italics added).[26]

13. "Just tell him this. I'm not trying to talk him out of exercising his rights to an attorney. . . . *But from this point forward I cannot approach him or discuss this matter at all.* . . . The only way I can ever talk to you again . . . if your attorney calls me and says you want to talk to me . . . [o]r unless you personally ask me to

[21] *See* pages 13-14 of the attached translation.
[22] *See* pages 14-15 of the attached translation.
[23] *See* page 17 of the attached translation.
[24] *See* page 18 of the attached translation.
[25] *See* pages 18-19 of the attached translation.
[26] *See* page 19 of the attached translation.

come talk to you because that would mean from you you want to exercise your right to an attorney, now you are not going to exercise that right. You would have to come to me to ask me to talk to you about this matter *because once you say I want an attorney I have to stop"* (italics added).[27]

14. Ok. Ah . . . we have a big problem now. . . . Ah . . . First of all, whether you know this or not what we are doing in here is being taped and recorded. . . . So somebody has already watched . . . say . . . say somebody is going to watch this interview, they are going to put the tape in and *they are going to see you asking for an attorney* . . . they've already seen it. . . . *Now . . . my position at this moment is that I can no longer continue my conversation with you. Ok*. . . . For us to continue . . . you have to convince anybody watching this tape . . . that you want to talk to me now . . . of your own free will . . . . (italics added).[28]

15. Detective Recarey stated to Detective Chapin that Mr. ***** was "asking what's the best choice, with the lawyer or without a lawyer." Chapin responded, "You know what? I cannot make that decision for you. . . . The reason for us to cont . . . to continue is . . . would be because you want to talk to me without an attorney present."[29]

16. ". . . I know what was reported to me. . . . And I know every story has two sides. . . . *But the fact is . . . no attorney is coming*. . . . *The law says I have to stop my conversation with you right now* . . . [u]nless you clearly tell me you want to continue without an attorney (italics added)."[30]

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[27] *See* pages 20-21 of the attached translation.
[28] *See* pages 22-23 of the attached translation.
[29] *See* page 25 of the attached translation.
[30] *See* pages 26-27 of the attached translation.

Following this extensive discussion of Mr. *****'s right to remain silent as well as his right to have a lawyer present during his interrogation, Mr. ***** finally agreed to speak with the detectives about M.M.'s allegations. After the interrogation, Mr. ***** was taken to the Palm Beach County Jail.

LAW OF CASE

I. BURDEN OF PROOF

In *Jorgenson v. State,* 714 So. 2d 423, 426 (Fla. 1998), the Florida Supreme Court stated that "the burden of showing that a defendant's statement was voluntarily made is on the State. *Brewer v. State,* 386 So.2d 232, 236 (Fla.1980). The State must establish voluntariness by a preponderance of the evidence. *Id.*" *See also Thompson v. State,* 548 So. 2d 198, 204 (Fla. 1989) ("the burden is on the state to show by a preponderance of the evidence that [a] confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived").

II. MR. *****'S INVOCATION OF HIS RIGHT TO COUNSEL

In *Miranda v. Arizona*, 86 S. Ct. 1602, 1625-26 (1966), the United States Supreme Court held that:

> Prior 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. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If, however, he indicates in any manner and at any stage of the*

> *process that he wishes to consult with an attorney before speaking there can be no questioning.* Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Italics added.[31]

The italicized prohibition stated above was blatantly disregarded by the two detectives in the present case. Mr. ***** clearly stated, "Ok . . . well . . . I do not have the means but I would like an attorney."[32] Immediately after this Mr. ***** stated, "But it would be better . . . the attorney could defend me."[33] And when Detective Recarey told Mr. ***** that "[i]t was your . . . was your selection you already wanted an attorney," Mr. ***** responded by saying "[y]eah . . . yes."[34]

According to the *Miranda* decision, the police were required to immediately cease questioning Mr. ***** when he made these statements. Instead, they continued speaking at length with Mr. ***** in order to get him to change his mind and speak with them without an attorney being present.

The *Miranda* Court reiterated its holding when it stated:

> *Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he

[31] Undersigned counsel has not provided the trial court with a copy of the *Miranda* decision because it is 66 pages long.
[32] *See* page 10 of the attached translation.
[33] *See* page 10 of the attached translation.
[34] *See* page 12 of the attached translation.

> intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.*
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> This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. *If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.*

Miranda, 86 S. Ct. at 1627-28 (italics added).

In the present case, Detective Chapin did, in fact, decide not to provide Mr. ***** with an attorney when he stated, "First of all, ah . . . tell him ah . . . I'm not . . . there is no lawyers coming. No lawyers are coming here today."[35] But having made that decision, Detective Chapin proceeded to question Mr. ***** in spite of the fact that the *Miranda* decision explicitly prohibits such a practice by law enforcement.[36] *See also Shook v.*

[35] *See* page 12 of the attached translation.

[36] What is particularly troubling about this interrogation is that Detective Chapin acknowledges his understanding of the law when he states that "[Mr. *****] invoked his right to an attorney so I have to stop dead in my tracks right now." *See* page 12 of the attached translation. Nevertheless, the detective willfully violated the law when he proceeded to interrogate Mr. *****. Also troubling is the fact that *nowhere in any of Detective Chapin's reports* is it mentioned that Mr. ***** invoked his right to counsel.

State, 770 So. 2d 1261 (Fla. 1st DCA 2000) ("[w]e hold that Appellant's statement, 'Get me an attorney right now' was an unequivocal request for counsel, and interrogation should have ceased immediately, and not resumed until counsel was provided. *Smith v. Illinois,* 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); *Almeida v. State,* 737 So.2d 520 (Fla.1999), *cert. denied* 528 U.S. 1182, 120 S.Ct. 1221, 145 L.Ed.2d 1121 (2000).

In *Edwards v. Arizona,* 101 S. Ct. 1880, 1884-85 (1981), the U.S. Supreme Court again dealt with the issue of a defendant invoking his right to have a lawyer present during interrogation when it stated that:

> [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina v. Butler, supra*, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and *we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [FN8] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*
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> FN8. In *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977), where, as in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod v. Ohio*, 381 U.S. 356, 85 S.Ct. 1556, 14 L.Ed.2d 682 (1965), we summarily reversed a decision that the police

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Instead, the detective's reports state that Mr. ***** waived his right to counsel before speaking with them.

> could elicit information after indictment even though counsel had not yet been appointed.
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> *Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S., at 474, 86 S.Ct., at 1627. Our later cases have not abandoned that view. In *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U.S., at 104, n. 10, 96 S.Ct., at 326, n. 10; see also *id.*, at 109-111, 96 S.Ct., at 329-330 (White, J., concurring). In *Fare v. Michael C., supra*, 442 U.S., at 719, 99 S.Ct., at 2569, the Court referred to *Miranda's* "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *Rhode Island v. Innis*, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980). We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Italics added. *Accord Arizona v. Roberson,* 108 S. Ct. 2093, 2097-98 (1988) ("[t]he *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' 451 U.S., at 484-485, 101 S.Ct., at 1884-1885.").

In *Traylor v. State,* 596 So. 2d 957, 966 (Fla. 1992), the Florida Supreme Court voiced its agreement with the holdings in *Miranda, Edwards,* and *Roberson* when it stated:

> [Under the Self-Incrimination Clause of Article I, Section 9 of the Florida Constitution], if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, [FN14] although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.
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> FN14. Once the right to counsel has been invoked, any subsequent waiver during a police-initiated encounter in the absence of counsel during the same period of custody is invalid, whether or not the accused has consulted with counsel earlier. *Cf. Minnick; Roberson; Edwards* (comparable rule under federal law).

In the present case, Mr. ***** explicitly invoked his right to have counsel present during his custodial interrogation. That being the case, the State cannot establish a valid waiver of that right by showing merely that he responded to further questioning by Detective Chapin even though Mr. ***** had previously been given *Miranda* warnings. Moreover, because it was Detective Chapin and not Mr. ***** who initiated further conversation, Mr. ***** was not properly subject to further interrogation until he had counsel present with him.

During the interrogation, Detective Chapin made the comment that "I only see this as an opportunity to . . . for him to tell me . . . *his side of the story* and listen to me to

why he's in . . . he's going to jail."[37] Detective Chapin also stated that "I know what was reported to me . . . And *I know every story has two sides*" (italics added).[38] These comments, however, were merely thinly-veiled attempts to obtain incriminating statements from Mr. ***** after he had unequivocally requested that an attorney be present to assist him.

A strikingly-similar situation arose in *Jones v. State,* 346 So. 2d 639, 640 (Fla. 2d DCA 1977) wherein defendant's conviction was reversed when the trial court erroneously admitted certain inculpatory statements made to the police after the defendant invoked his right to remain silent. The *Jones* opinion states:

> Appellant was arrested at 5:00 a. m. in the morning and placed in handcuffs. He was then given Miranda warnings. At the trial, officer Spivey explained what happened next:
>
> Q Did you ask Mr. Jones if he understood those rights?
> A Yes.
> Q And what did he respond?
> A He said that he didn't want to say anything.
> Q Did he eventually say anything?
> A Yes, he did.
> Q Was that pursuant to your questions?
> A Yeah."
>
> The officer later recounted what occurred at the police station:
>
> Q And would you tell the Judge, please, what if any conversation you had with Mr. Jones at the Bradenton Police Department.
> A Yes, sir. *I asked did the defendant, did he want to tell his side* and he said no, he just wanted to talk to his lawyer. We asked him who his lawyer was and he said Mr. Schultz. I asked him if he wanted to call him and he said, yes. All right, I didn't press the issue. I told him what I had through investigation learned. He said,

[37] *See* pages 13-14 of the attached transcript.
[38] *See* page 26 of attached transcript.

'No, that's not correct.' He said, 'Let me remember now to make sure.'
They had been playing pool and he said that Mr. Cadle had pulled his hair and said it made him mad, that he done it two or three times and he told him to quit but Mr. Cadle didn't do that so he said he went out to his car, got his gun, came back in and shot him. He said although I did not when I shot him, I didn't run out of the bar. I walked out of the bar.
Q Now Officer Spivey, he said he wanted to talk to his lawyer. Would you describe to the Court, please, how it is that the questioning continued and how this conversation ensued?
A Yes, sir. I would tell him how I had it for my report. He would say, 'That's not correct. It was this way.'
Q Was he volunteering these things to you?
A If I asked him questions, he would say, 'I don't choose to answer, sir.' but if I would say something or if I would go on to say how I, through investigation what I had learned; then he said, 'No, that's not right. It happened this way.'
Q And so you weren't questioning him?
A Whenever I asked him questions he would say 'I don't choose to answer,' and so I would drop that."

The admission of the inculpatory statements over appellant's objection violated the principles of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Miranda court made it clear that when a suspect in police custody indicates that he wishes to remain silent, further interrogation at that time must cease.

We are compelled to reject the state's contention that the inculpatory statement given at the police station was admissible because it was not the product of direct interrogation. No one can seriously doubt that officer Spivey was attempting to obtain incriminating statements when he continued to converse with appellant about the incident after appellant had told him he did not want to talk. In Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), the U.S. Supreme Court recently quashed some incriminating statements obtained by the police in an equally subtle manner after the suspect's attorney had made it clear that his client did not wish to make a statement.

This is not a case in which interrogation has been terminated at a suspect's request and later resumed under circumstances in which it is apparent that the suspect has changed his mind and desires to

> make a statement. Rivera Nunez v. State, 227 So.2d 324 (Fla. 4th DCA 1969); cf. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Here, the appellant clearly indicated that he didn't want to talk, and the state failed to meet the heavy burden of showing that he thereafter made a knowing intelligent waiver of his right to remain silent. See State v. Dixon and Godbolt, --- So.2d ---- (Fla. 2d DCA 1977); Singleton v. State, 344 So.2d 911 (Fla. 3d DCA 1977).

Italics added. *See also Neal v. State,* 451 So. 2d 1058, 1060 (Fla. 5th DCA 1984) ("we also note that it was error to admit the defendant's taped confession. This confession came *after* [defendant] had thrice requested the assistance of counsel after *Miranda* warnings. The interrogation officer continued to discuss the case with her and did not attempt to secure the requested attorney. The confession was not given in direct response to interrogation, but we believe it to have been induced by the continued discussion of the case by the detective and his advice to [defendant] to confess. This violated *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)").

In the present case, Detective Chapin advised Mr. ***** that the reason he was under arrest was because of "unlawful sexual activity with a female under the age of 12."[39] The detective also told Mr. ***** that "he [was] not going to work. He's going . . . . When he goes to jail tell him he is going to have no bond, there is no bond for this crime. He is going to jail and he is going to stay in jail."[40]

[39] *See* page 2 of the attached transcript.
[40] *See* page 14 of the attached transcript.

These facts are particularly relevant in light of *Pirzadeh v. State,* 854 So. 2d 740, 741-43 (Fla. 5th DCA 2003). The facts in *Pirzadeh* are as follows:

> Prior to trial, Pirzadeh moved to suppress a written statement he made to Detective Andrew Burke of the Orange County Sheriff's Office on the basis that the statement was obtained in violation of his right to counsel under the Florida and United States Constitutions. The statement was made as follows:
>
> I told the agent that I want to write the statement, I am writing this in my own free will, the agent promises nothing, I had 220 grams of opium in my store, I paid $6,000 and bought that six days ago, I am not an opium trafficker, I use that for my own, this 220 grams of opium should last me about one year, I buy the opium from the friend I know, when I bought that, the opium comes in candy wrapper, I have back problems and I use it to remedy pain, I own the gas station at 4316 Curryford Road, Orlando, Florida 32806, another agent read my rights and I chose to write the statement anyway.
>
> During the suppression hearing, both sides stipulated that Pirzadeh was placed under arrest, advised of his *Miranda* [FN1] rights, and invoked his right to counsel prior to being transported to the Orange County Jail. While being booked at the jail, Detective Burke approached Pirzadeh and explained to him what crimes he was being charged with and what the sentencing guidelines for those crimes were. Detective Burke also told Pirzadeh that he was not going to give Pirzadeh a bond at that time because he considered Pirzadeh a flight risk. At that time, Detective Burke did not ask Pirzadeh any questions or make any promises to him. Once Pirzadeh was advised of the charges and the no-bond status, Pirzadeh said he wanted to cooperate because he wanted a bond. Burke told Pirzadeh he still was not going to give him a bond and that he should get an attorney and seek a hearing.
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> FN1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
>
> This back and forth dialogue continued between Detective Burke and Pirzadeh with Pirzadeh claiming he would cooperate and wanted a bond, and the detective stating he would not get a bond. During this continuing exchange, the detective testified he told Pirzadeh that Pirzadeh could cooperate, but he was not going to recommend a bond. Pirzadeh told Detective Burke that he still wanted to cooperate and that he wanted a bond. The detective told

Pirzadeh that if Pirzadeh wanted to cooperate, that would be fine, but the detective would not give him any assistance and would continue to recommend no bond. The trial court denied Pirzadeh's motion to suppress and Pirzadeh's written statement was read into evidence and a blown-up copy published to the jury.

The issue in this case is whether the trial court erred in denying Pirzadeh's motion to suppress his written statement. As it was stipulated that Pirzadeh was in custody at the time he spoke with Detective Burke and that Detective Burke initiated the contact, the only issue is whether Detective Burke's actions constituted an improper custodial interrogation.

In the constitutional sense, an interrogation can be either the direct asking of questions or its "functional equivalent." The functional equivalent of interrogation includes any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). In *Larson v. State,* 753 So.2d 733 (Fla. 2d DCA 2000), the Second District Court of Appeal found that an officer who held a conversation with a defendant about the crimes for which he was charged, and told the defendant that he was facing a twenty-five-year sentence, was conducting an interrogation of the defendant because those statements were reasonably likely to elicit an incriminating response from the defendant.

The current case goes beyond *Larson.* Not only did the detective inform Pirzadeh of the crimes with which he was charged and the possible sentence, but also told Pirzadeh he would not be given a bond. Whether or not Pirzadeh believed that the detective had any control over the bond is immaterial. Once the detective told Pirzadeh about the nature of the charges against him, he should have terminated the confrontation as it became clear that continuing the conversation would lead to an incriminating response.

The State argues that Pirzadeh reinitiated the conversation after invoking the right to counsel. The United States Supreme Court has held that when an accused has invoked his right to counsel, all interrogation must cease immediately until counsel is made available, unless the accused reinitiates further communication with law enforcement. *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The State relies on *Oregon v.*

> *Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); *Francis v. State,* 808 So.2d 110 (Fla.2001), and *Hill v. State,* 772 So.2d 19 (Fla. 2d DCA), *review denied,* 790 So.2d 1104 (Fla.2001), for the proposition that Pirzadeh reinitiated the conversation. The State's reliance is misplaced. In *Bradshaw,* the defendant asked the police officers, "Well, what is going to happen to me now?" In *Francis,* the defendant knocked on the door of the interrogation room and asked what was going on after being inside for three and one-half hours. And, in *Hill,* the defendant requested a meeting with a detective after a visit from his probation officer. There is no question that it was Detective Burke, and not Pirzadeh, who initiated the contact after Pirzadeh invoked his right to counsel. All Pirzadeh did was respond to the renewed contact by continuing to express his interest in cooperating and in getting a bond. The law concerning *Miranda* warnings and the right to counsel establishes a policy whose purpose is to prevent what happened in this case. The trial court should have granted Pirzadeh's motion to suppress the written statement--the result of the improper initiation of conversation after invocation of the right to counsel.

As was the case in *Pirzadeh,* Detective Chapin informed Mr. ***** of the crime that he was charged with as well as the fact that he would not be given a bond. Once the detective did that, he should have immediately terminated the confrontation as it was then obvious that continuing the interrogation would lead to an incriminating response.

In *Pirzadeh*, the State relied upon *Oregon v. Bradshaw,* 103 S. Ct. 2830 (1983), *Francis v. State,* 808 So.2d 110 (Fla.2001), and *Hill v. State,* 772 So.2d 19 (Fla. 2d DCA) in arguing that the defendant reinitiated the conversation after invoking the right to counsel. *Pirzadeh*, 854 So. 2d at 743. The *Pirzadeh* Court rejected this argument, and this court too should reject such an argument (if advanced by opposing counsel) because of the salient fact that in *Bradshaw, Francis,* and *Hill* the interrogating officers ceased their interrogations as soon as the respective defendants invoked their right to counsel. In the present case, however, Detective Chapin did not.

In *Rafferty v. State,* 799 So. 2d 243 (Fla. 2d DCA 2001), defendant argued that his statements to the police should have been suppressed because the police continued to interrogate him after he unequivocally requested an attorney. The facts in *Rafferty* are as follows:

> The taped statement begins with FHP Trooper McPherson advising Rafferty of his rights:
>
> MCPHERSON [reading to Rafferty]: Knowing what my rights are, I hereby, prior to being interviewed, waive my rights to consult with a lawyer or to have him present during this interview. I do hereby affix--affix my signature accordingly.
> Can you sign or do you just want me to go ahead and do you want to go ahead and--
> RAFFERTY: I need a lawyer.
> MCPHERSON: You need to get a lawyer?
> RAFFERTY: I guess, I don't know.
> MCPHERSON: Okay.
> RAFFERTY: I'll answer the questions.
> POWELL: Do you want a lawyer?
> MCPHERSON: Do you want a lawyer?
> RAFFERTY: I'll answer the questions.
> MCPHERSON: You gonna answer--okay. You're gonna answer the questions here?
> RAFFERTY: Yeah.
> MCPHERSON: Okay. Can you sign here?
> POWELL: Just scribble, it doesn't even have to be legible.
> MCPHERSON: Yeah. Can you see that?
> RAFFERTY: Where it says you have a right to an attorney?
> MCPHERSON: Yeah.
> RAFFERTY: I want--I want (inaudible).
> MCPHERSON: You want an attorney?
> RAFFERTY: Yeah.
> MCPHERSON: So you don't want to answer the questions.
> RAFFERTY: I won't be answering the questions then.
> POWELL: Do you want an attorney present now, this is what he's asking?
> RAFFERTY: I don't think so.
> MCPHERSON: Okay.
> POWELL: So you do want to answer questions at this time?
> RAFFERTY: Yeah.
> MCPHERSON: You want to answer questions at this time?

RAFFERTY: Yeah.

Rafferty, 799 So. 2d at 245-46.

In reversing the trial court's denial of defendant's motion to suppress, the *Rafferty* Court stated:

> It is well-settled that when a suspect makes an unequivocal request for an attorney during interrogation after he has waived his rights, all questioning must stop until an attorney is present. *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *State v. Owen,* 696 So.2d 715 (Fla.1997). After he told the FHP trooper "I'll answer the questions," Rafferty made an unequivocal request for an attorney by answering yes when the trooper asked whether he wanted an attorney. Rafferty's subsequent statement "I won't be answering the questions then" clarified his intent to invoke his right to an attorney. There was nothing that needed to be further clarified, and the questioning should have ceased until an attorney was present.

Id. at 246.

In the present case, questioning of Mr. ***** should have ceased until an attorney was present.[41] And although there was no need for further clarification once Mr. ***** unequivocally invoked his right to counsel when he stated that he "would like an attorney,"[42] Detective Recarey inexplicably had Mr. ***** sign a *Miranda* rights card indicating that he had waived his right to counsel.[43]

Although both the United States Supreme Court and our own state supreme court have repeatedly emphasized that a detained criminal suspect has a constitutional right to have counsel present while being interrogated, Detective Recarey and Detective Chapin erroneously told Mr. ***** that "[t]here are no lawyers coming here today. If you want

[41] Of course, this ignores the fact that Detective Chapin told Mr. ***** that "there is no lawyers coming. No lawyers are coming here today." *See* page 12 of the attached transcript.
[42] *See* page 10 of the attached translation.

an attorney [it] would be for the court."[44] In light of this misinformation about his *Miranda* rights, it can hardly be said that Mr. ***** knowingly and voluntarily waived his right to counsel before speaking with the police. That being the case, his statements made while being interrogated should be suppressed.

A similar situation arose in *Dooley v. State,* 743 So. 2d 65 (Fla. 4th DCA 1999) where defendant's conviction was reversed because he made inculpatory statements as a result of being misinformed by the police about his *Miranda* rights. In *Dooley*, defendant was convicted of three counts of sexual battery on a person less than twelve years of age and two counts of lewd acts on a child under sixteen years of age. *Id.* at 66. On appeal, defendant argued that his statements to the police should have been suppressed because he did not knowingly and voluntarily waive his right to have counsel present during his interrogation. *Id.* The *Dooley* Court agreed with defendant and granted him a new trial. *Id.* The facts in *Dooley* are as follows:

> On April 18, 1997, B.D., the minor victim, informed the police that Dooley, her father, sexually abused her over the span of three and one-half years. Later that same day, Dooley was transported to the Boca Raton police station and interrogated by Sanchez. The interrogation was tape recorded. Prior to questioning Dooley, Sanchez advised him of his Miranda rights as follows:
>
> Sanchez: Kelly, I am required to warn you before you make any statements that you have the following constitutional rights. You have the right to remain silent and not to answer any questions. Do you understand that?
> Dooley: Uh-huh. Yes, sorry.
> Sanchez: Any statement you make must be freely and voluntarily given, do you understand that?
> Dooley: Yeah.
> Sanchez: You have the right to the presence and representation of a lawyer of your choice before you make any statement or during

[43] *See* pages 10-11 of the attached transcript.
[44] *See* page 12 of the attached transcript.

any questioning. Do you understand that?
Dooley: Yeah.
Sanchez: If you cannot afford a lawyer, you're entitled to the presence and representation of a court appointed lawyer before you make any statement and during any questioning. Do you understand that?
Dooley: Yeah.
Sanchez: If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent. Understand that?
Dooley: Yeah. Sanchez: I can make no threats or promises to induce you to make a statement. This must be done by your own free will.
Dooley: Yeah.
Sanchez: Any statement can be and will be used against you in a court of law. You understand that?
Dooley: Yeah.
Sanchez: Do you understand these rights as I just read them to you?
Dooley: Uh-huh.
Sanchez: You understand them?
Dooley: Yes, sir.

After detailing Dooley's constitutional rights and after confirming that Dooley understood these rights, Sanchez proceeded with the interview as follows:

Sanchez: Do you wish to waive your rights and speak to me without the presence of an attorney?
Dooley: Um, I don't wish to waive my rights.
Sanchez: By waiving your rights now doesn't mean that you waive them in the future. All you're saying here now is that you're talking to me without the presence of an attorney. If one is required later on, if that's your wish, one can be appointed to you. Do you understand that?
Dooley: Right. Um, I'm going to talk to you.

The interview continued and Dooley confessed. At the hearing on Dooley's motion to suppress the confession, the trial judge listened to the tape recorded portions delineated above. In denying the motion to suppress, the trial judge stated:

And my decision is that "Right, I am going to talk to you, yes" is spontaneous, voluntary and has all of the indicia in what I heard of a citizen who wants to talk to the police.

> At trial, Dooley renewed his objection to the admission of his confession but the objection was overruled.

Id. at 66-67.

In concluding that defendant did not knowingly and voluntarily waive his *Miranda* rights, the *Dooley* Court stated:

> To be valid, a waiver must be the result of the suspect's free choice, not produced by police intimidation, coercion, or deception. "[T]he evidence must show that the waiver was made with a full awareness of the nature and consequences of the rights given up." *Brookins,* 704 So.2d at 577 (citations omitted).
>
> Detective Sanchez explained to Dooley his Miranda rights and confirmed that Dooley understood those rights. Dooley clearly stated that he did not wish to waive those rights. At that point the interrogation was required to cease. *See Miranda,* 384 U.S. at 473-74, 86 S.Ct. 1602; *Traylor v. State,* 596 So.2d 957, 966 (Fla.1992).
>
> In *Traylor* our supreme court held 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 if they cannot pay for a lawyer one will be appointed to help them.
>
> Under Section 9, if the suspect *indicates in any manner* that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.
>
> *Id.* at 965-66 (emphasis added) (footnote omitted).
>
> Dooley's statement: "Um, I don't wish to waive my rights" certainly qualifies as an indication that he did not want to be interrogated. One of the rights that Sanchez informed Dooley that he had was the right to remain silent and not to answer any questions.
>
> *Traylor* has recently been reaffirmed as the law of this state on whether a suspect has voluntarily waived his Miranda rights. *See*

Almeida, 24 Fla. L. Weekly at S331, 737 So.2d at 523.

In *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the United States Supreme Court held law enforcement officers could continue interrogating a suspect when there has been an equivocal assertion of the suspect's Miranda rights. In *State v. Owen,* 696 So.2d 715 (Fla.), *cert. denied, Owen v. Florida,* 522 U.S. 1002, 118 S.Ct. 574, 139 L.Ed.2d 413 (1997), the Florida Supreme Court adopted the ruling in *Davis.* Based upon *Davis* and *Owen,* the state argues that it was permissible for Sanchez to continue interrogating Dooley because he allegedly made an equivocal assertion of his Miranda rights.

The state is correct that our supreme court adopted the holding in *Davis;* however, the state misconstrues *Owen* and *Davis.* In *Davis,* the defendant had already been informed of his Miranda rights and a knowing and voluntary waiver had been obtained. The same was true in *Owen.* In *Owen* our supreme court held that:

police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation *after having validly waived his or her Miranda rights.*

Id. at 719 (emphasis added). This case differs from *Owen* and *Davis* in that Dooley had not *already* waived his Miranda rights at the time he said "Um, I don't wish to waive my rights."

In footnote 7 in *Almeida,* Justice Shaw speaking on behalf of the court, makes abundantly clear the holding in *Owen* "applies only where the suspect has waived the right earlier during the session." The state cites no case, nor are we able to find any case, which holds that law enforcement officers may continue an in-custody interrogation on the basis of even an equivocal assertion of the suspect's Miranda rights, without first obtaining a valid waiver of those rights.

Deception cannot be used to obtain a waiver of a defendant's Miranda rights. *See Ramirez v. State,* 24 Fla. L. Weekly S353, S356, 739 So.2d 568, 575 (Fla.1999). The waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (citations omitted).

> Sanchez's response to Dooley's assertion of his rights was the statement "[b]y waiving your rights now doesn't mean that you waive them in the future." This indicated that the defendant could speak with the officer without risk, that his later invocation of rights would prevent the statement from being used in court. The police may not use misinformation about *Miranda* rights to nudge a hesitant suspect into initially waiving those rights and speaking with the police.
>
> The trial court listened to the taped interview and did not conclude that Dooley had been equivocal in invoking his Miranda rights, but that his statement, "Right. Um, I'm going to talk to you" was spontaneous and voluntary and had all the indicia of a citizen who wanted to talk to the police. This court has listened to the tape recording. We find that in light of the misinformation given by Sanchez, the trial court erred as a matter of law in concluding that Dooley had a "spontaneous and voluntary" desire to confess. A spontaneous statement connotes a statement occurring without external cause; self-generated or impulsive. Dooley's so-called spontaneous and voluntary statement was in direct response to further interrogation and misinformation that was constitutionally impermissible.

Dooley, 743 So. 2d at 68-69.

WHEREFORE, Mr. *****, through undersigned counsel, requests that this Court grant Defendant's Motion to Suppress a Confession or Admission Illegally Obtained.

_____
Ronald S. Chapman
Counsel for Defendant

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished by delivery to Assistant State Attorney Patrick McKamey this 2d day of January, 2004.

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