APPENDIX H

ORLANDO CANETE, Appellant, v. STATE OF FLORIDA, Appellee.
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
921 So. 2d 687; 2006 Fla. App. LEXIS 1152; 31 Fla. L. Weekly D 359
No. 4D03-2915
February 1, 2006, Decided

Editorial Information: Subsequent History

Review denied by Canete v. State, 2006 Fla. LEXIS 2839 (Fla., Nov. 20, 2006)

Editorial Information: Prior History

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Palm Beach County; Susan Lebow, Judge; L.T. Case No. 02-8494 CF10A. Canete v. State, 2005 Fla. App. LEXIS 8156 (Fla. Dist. Ct. App. 4th Dist., June 1, 2005)

Disposition:

Affirmed.

Counsel Carey Haughwout, Public Defender, and John M. Conway, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and David M. Schultz, Assistant Attorney General, West Palm Beach, for appellee.

Judges: STONE, J. WARNER, POLEN, KLEIN, SHAHOOD, GROSS, and MAY, JJ., concur. STEVENSON, C.J., dissents in which GUNTHER, FARMER, TAYLOR and HAZOURI, JJ., concur.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted and sentenced on two counts of third-degree murder and one count of aggravated assault. He appealed the judgment of the Circuit Court for the Seventeenth Judicial Circuit, Palm Beach County (Florida), which denied his motion to suppress incriminating statements.The trial court did not err in denying defendant's motion to suppress incriminating statements because although defendant was not expressly told that he had the right to have an attorney present "during" questioning, the language used by the officer in advising defendant was the functional equivalent of that required in Miranda.

OVERVIEW: On appeal, defendant argued that the Miranda warnings he received were inadequate to fully inform him of his constitutional right to have an attorney present during questioning. Following his arrest, defendant was taken to the police station and advised of his rights in Spanish. Without requesting an attorney or asking any questions, defendant signed a waiver form and the interview continued. Although defendant was not expressly told that he had the right to have an attorney present "during" questioning, the appellate court concluded that the language used by the officer in advising defendant was the functional equivalent of that required in Miranda. The totality of the warning given in the case was sufficient for defendant to readily infer that he had a right to have an attorney present "during" interrogation. The warning given was sufficient to convey this right to a person of ordinary intelligence and common understanding. Therefore, it was adequate.

OUTCOME: The judgment and sentence of the trial court were affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

Miranda makes it clear that suspects must be informed of their right to have an attorney present before and during questioning.

Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning

The "rigidity" of Miranda does not extend to the precise formulation of the warnings given a criminal defendant, and no talismanic incantation is required to satisfy its strictures. A verbatim wording of Miranda is not required, and Miranda warnings need not be given in the exact form described in Miranda. Rather, the question is whether the warning adequately fulfills Miranda's substantive requirements.

Opinion

Opinion by: STONE

Opinion

{921 So. 2d 687}*EN BANC*

STONE, J.

We grant the state's motion for rehearing en banc, withdraw our opinion of June 1, 2005, and substitute the following in its place.

Canete was convicted and sentenced on two counts of third-degree murder and one count of aggravated assault. We affirm. Canete challenges the trial court's denial of his motion to suppress incriminating statements, claiming that the *Miranda* warnings received were inadequate to fully inform him of his constitutional right to have an attorney present during questioning. *See Roberts v. State*, 874 So. 2d 1225 (Fla. 4th DCA2004), *rev. denied sub nom. State v. West*, 892 So. 2d 1014 (Fla. 2005). We resolve this issue en banc as a matter of exceptional importance.

Following his arrest, Canete was taken to the police station and advised of his rights in Spanish, translated as follows:

> Officer: Before I ask you any questions I want to advise you what are your **{921 So. 2d 688}** rights about the law. You understand that I am a police officer.
>
> Canete: Yes.
>
> Officer: You have the right to remain silent. That means that you don't have to speak or answer any of my questions if you don't want to, do you understand?
>
> Canete: Yes.
>
> Officer: You have the right to speak to an attorney, have an attorney present here before we make

any questions, do you understand?

Canete: Yes.

Officer: If you cannot employ an attorney, your own attorney and you are not an attorney, one will be appointed before we can make you - ask you any questions, do you understand?

Canete: Yes.

Officer: If you decide to answer the questions now, without an attorney present, you still have the right not to answer my questions at any time until you can speak with an attorney, do you understand?

Canete: Yes.

Officer: Knowing and understanding your rights as I have explained [them] to you, are you agreeable to answer my questions without an attorney present?

Canete: Yes.

Officer: When you talk to me anything you answer to my questions can be presented as evidence in a court against you, do you understand?

Canete: Yes.

Without requesting an attorney or asking any questions, Canete signed a waiver form and the interview continued. We reject the argument that the officers failed to advise him of his right to have an attorney present *during* questioning.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), makes it clear that suspects must be informed of their right to have an attorney present before and during questioning. *See Franklin v. State*, 876 So. 2d 607 (Fla. 4th DCA2004), *cert. denied*, 543 U.S. 1081, 125 S. Ct. 890, 160 L. Ed. 2d 825 (2005); *West v. State*, 876 So. 2d 614 (Fla. 4th DCA2004), *rev. denied*, 892 So. 2d 1014 (Fla. 2005); *Roberts*. Although Canete was not expressly told that he had the right to have an attorney present "during" questioning, we conclude that the language used by the officer in advising Canete is the functional equivalent of that required in *Miranda*.

In *California v. Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981), the Supreme Court recognized that "the 'rigidity' of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant," and "that no talismanic incantation [is] required to satisfy its strictures." A verbatim wording of *Miranda* is not required, and *Miranda* warnings need not be given in the exact form described in *Miranda*. *Roberts*, 874 So. 2d at 1227. Rather, the question is whether the warning adequately fulfills *Miranda*'s substantive requirements.

In *Roberts*, we recognized that the warning given in that case, as read by sheriff's deputies, from a *Miranda* rights warning card, was misleading and inadequate to inform Roberts of his right to counsel "during" interrogation. Such is not the case here.

The totality of the warning given in this case was sufficient for Canete to readily infer that he had a right to have an attorney present "during" interrogation. The warning given was sufficient to convey this right to a person of ordinary intelligence and common understanding. It is, therefore, adequate. *See Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989).

{921 So. 2d 689} This case is distinguishable from the circumstances in *West* and *Roberts*, where the defendant was advised only that he had the right to counsel before questioning. Although the officers in this case did not use the word "during" or "while" in warning Canete, they did tell him "if you decide

to answer the questions now without an attorney present you still have the right not to answer my questions at any time until you can speak with an attorney." They told him that he had the right to the presence of an attorney before they could ask him any questions, and they further asked Canete if he was willing to answer questions without an attorney present. In totality, this was sufficient.

As to the other issues raised on appeal, we also find no reversible error or abuse of discretion. Therefore, the judgment and sentence are affirmed.

WARNER, POLEN, KLEIN, SHAHOOD, GROSS, and MAY, JJ., concur.

STEVENSON, C.J., dissents in which GUNTHER, FARMER, TAYLOR and HAZOURI, JJ., concur.

Dissent

Dissent by: STEVENSON

STEVENSON, C.J., dissenting.

Because the *Miranda* 1 warnings Canete received were inadequate to inform him of his constitutional right to have an attorney present during questioning, and the admission at trial of the statements obtained was not harmless, I would reverse and remand for a new trial.

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Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The majority distinguishes the warnings given in this case from those found inadequate in *Roberts v. State*, 874 So. 2d 1225 (Fla. 4th DCA2004), *rev. denied sub nom. State v. West*, 892 So. 2d 1014 (Fla. 2005), and concludes that the *Miranda* warnings here were the "functional equivalent" of expressly telling Canete that he had the right to have an attorney present "during" questioning. I respectfully disagree. In so holding, the majority decision is inconsistent with our prior decision in *Roberts* and violates the rule set forth in *Miranda*.

When closely analyzed with respect to whether the right to have an attorney present during questioning was conveyed, the warnings given in the instant case cannot be distinguished in any meaningful way from those given in *Roberts*. To illustrate, the crucial aspects of these warnings must be examined side by side:

THE RESPONDENTS **Warnings in Roberts**	PALM BEACH COUNTY **Warnings given Canete**
1. You have the right to	**1. You have the right to remain silent.**
remain silent	
2. Anything you say can be	**2. When you talk to me anything you**
used against you in a court	**answer may be presented as evidence in**
of law.	**a court against you.**

3. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.	**3. If you cannot employ an attorney . . . one will be appointed before we . . . ask you any questions.**
4. You have the right to talk with a lawyer and have a lawyer present before any questioning.	**4. You have the right to speak with an attorney, have an attorney present here before we make any questions.**
	5. If you decide to answer the questions now, without an attorney present, you still have the right not to answer my questions at any time until you can speak with an attorney.

In *Roberts*, this court correctly recognized {921 So. 2d 690} that the warnings given were inadequate to inform Roberts of his right to counsel during questioning. The only difference between the warnings in *Roberts* and the warnings in this case is contained in block 5, where Canete was advised that *if he decided to answer questions without an attorney present, he still had the right not to answer questions at any time until he could speak with an attorney*. With the addition of that single warning, the majority concludes that Canete could now "readily infer" that he had the right to have an attorney present "during" questioning, but they don't explain why that is so. I don't see where the one leads to the other. The additional warning which the officer gave Canete neither spoke to, nor lent any inferences to whether Canete had the right to have an attorney present during interrogation. If the warnings in *Roberts* were insufficient to inform a person of ordinary intelligence and common understanding of the

right to have an attorney present "during" questioning, then the warnings here were equally inadequate. The outcome here should be no different than in *Roberts*.

Although no "talismanic incantation" is required for *Miranda*, *see California v. Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981), the words used must still be carefully chosen to ensure that the person subjected to custodial interrogation is informed of the constitutional right to counsel's presence during the questioning process. As the Court emphasized in *Miranda*, "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer *and to have the lawyer with him during interrogation*. . . ." *Miranda*, 384 U.S. at 471 (emphasis added). A criminal defendant should not have to guess at the substance of his constitutional rights under *Miranda*. Moreover, our decision in *Roberts* specified that "*Miranda* requires a clear, understandable warning from law enforcement officers that conveys all of a defendant's rights. 'Only through such a warning is there ascertainable assurance that the accused was aware of this right.'" *Roberts*, 874 So. 2d at 1229 (quoting *Miranda*, 384 U.S. at 471-72).

I would conclude that, here, as in *Roberts*, the officer failed to advise Canete of his right to have counsel present *during* questioning and that the statements made thereafter should not have been admitted at trial. Since it cannot be concluded that this error was harmless beyond a reasonable doubt, Canete's conviction and sentence should be reversed and this cause remanded for a new trial.

GUNTHER, FARMER, TAYLOR and HAZOURI, JJ., concur.

Footnotes

1
Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

APPENDIX I

[DO NOT PUBLISH]

In the United States Court of Appeals For the Eleventh Circuit

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No. 21-13206

Non-Argument Calendar

WALTER DRUMMOND,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:21-cv-61823-BB

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Walter Drummond, proceeding *pro se*, appeals the district court's dismissal of his habeas corpus petition under 28 U.S.C. § 2554 for lack of jurisdiction because it was successive. On appeal, Drummond argues that the district court erred in dismissing his petition because he is actually innocent and counsel in his underlying criminal case was ineffective. We need not reach these issues because Drummond's current petition is successive to a previous petition, which was denied as untimely, and Drummond did not seek leave from this court under 28 U.S.C. § 2244(b)(3) to file a successive petition.

We review *de novo* whether a habeas corpus petition is successive. *Ponton v. Sec'y, Fla. Dep't of Corr.*, 891 F.3d 950, 952 (11th Cir. 2018). A successive Section 2254 petition requires authorization from this Court. 28 U.S.C. § 2244(b)(3)(A). Accordingly, a district court lacks jurisdiction to consider an unauthorized successive petition. *Williams v. Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007).

When a petitioner seeks to challenge the same judgment that was challenged in a previous § 2254 petition, the petition will be deemed successive. *See Magwood v. Patterson*, 561 U.S. 320, 323–24 (2010). Petitions denied as time-barred are considered to have been dismissed with prejudice, and subsequent petitions

therefore qualify as successive. *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1353 (11th Cir. 2007).

However, we have recognized that "successive" is not "self-defining," and does not necessarily "refer to all habeas applications filed second or successively in time." *Stewart v. United States*, 646 F.3d 856, 859 (11th Cir. 2011). Petitions are not successive when they present new claims that could not have been raised previously. *Id.* at 859–61 (explaining that claims based on a newly discoverable factual predicate are successive, but "[i]f . . . the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive").

Drummond's petition does not fall within the small subset of unavailable claims described in *Stewart* because it did not raise a claim that could not have been raised previously. *Stewart*, 646 F.3d at 863. Drummond's instant petition challenges the same conviction as his previous petition. As nothing prevented Drummond from raising a claim of actual innocence or ineffective assistance of counsel in his original petition, the instant petition is successive.

Thus, the district court did not err in dismissing Drummond's petition as successive because he had previously filed a § 2554 petition; his first petition challenged the same judgment; and he did not seek this Court's permission to file a successive petition. Accordingly, we affirm.

AFFIRMED.

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

Walter Drummond — Petitioner

VS.

Secretary, FDC (FL.)
BROWARD COUNTY, FLa., & — Respondent(s)
State Attorney General (FL.)

Rules 20.1. & 2. Petition for an Extraordinary Writ so authorized by 28 U.S.C. § 1651(a), § 2244(b)(2)(B)(i) & (ii), and § 2254(a).

EXTRAORDINARY TO THIS HONORABLE AND SUPREME COURT (WRIT)

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