HENRY MCMASTER
ATTORNEY GENERAL

June 4, 2009

Jeffrey B. Moore, Executive Director
South Carolina Sheriffs' Association
112 Westpark Boulevard
Columbia, South Carolina 29210-3856

Dear Mr. Moore:

In a letter to this office you indicated that certain magistrates are dismissing driving under the influence cases because they have been convinced by the defendant's attorney that their client's constitutional rights have been violated. You stated that the apparent violation is the alleged failure of the arresting officer to properly Mirandize the defendant-driver at the point of arrest. You stated that

> [i]t has long been accepted that there are essentially four elements to the *Miranda* warning: 1. You have the right to remain silent. 2. Anything you say can and will be used against you. 3. You have the right to an attorney, and 4. If you can't afford an attorney, one will be appointed on your behalf. Apparently, as the result of a 1997 Court of Appeals case, State v. Kennedy, a fifth "right" must be included in the Miranda warning. This "fifth right" is that you have the "right" to initiate the right to remain silent at any time.

Referencing such, you have questioned "does law enforcement have the new responsibility of including this 'new fifth right' when Mirandizing a person being arrested, and should such a case be dismissed in the absence of this...(claimed right)?

Admittedly, in State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998), the Court of Appeals stated the following:

> *Miranda Warnings*
> A suspect in custody may not be subjected to interrogation unless he is informed that: he has the right to remain silent; anything he says can be used against him in a court of law; he has a right to the presence of an attorney; if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires; and he has

> the right to terminate the interrogation at any time and not to answer any further questions....It is sufficient if the warnings reasonably convey to a suspect his rights as required by *Miranda*...A "talismanic incantation" is not required. (emphasis added).

325 S.C. at 303. One of the issues before the Court was whether Kennedy's statement was taken in violation of his right to counsel. While the Court of Appeals determined that under the facts before the Court, Kennedy did not invoke his right to counsel, the State Supreme Court on review held that Kennedy "...invoked his right to counsel and the Court of Appeals erred in concluding otherwise." 333 S.C. at 430.[1]

It appears that highlighted portion of the Court of Appeals decision in Kennedy, supra, is merely dicta stated in light of the factual issue before the Court. I have been unable to find any similar "holding", i.e., the "right to terminate the interrogation at any time and not to answer any further questions", in any other South Carolina case. The State Supreme Court did not specify such a specific warning in its review in Kennedy, supra. Two subsequent decisions of the Court of Appeals also failed to specify such a warning as being included in the recitation of the rights required by *Miranda*. Indeed, in its decision in State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct.App. 2008), the Court of Appeals, citing Kennedy, supra, stated that

> [t]he well-known *Miranda* rights are that the accused must be informed of: the right to remain silent; any statement made may be used as evidence against him or her; and the right to the presence of an attorney. State v. Lynch, 375 S.C. 628, 633 n. 5, 654 S.E.2d 292, 295 n. 5 (Ct.App. 2007) (citing State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct.App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998)).

381 S.C. at 41. Also, the United States Supreme Court in its decision in Dickerson v. United States, 530 U.S. 428 (2000) stated that

> In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. FN1 384 U.S., at 445-458, 86 S.Ct. 1602. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without

---

[1]The Court stated, however, that "...we agree with the Court of Appeals' conclusion that even if this were a proper invocation of the right to counsel, petitioner waived this right when he initiated further discussions." The Court noted further that "[o]nce an accused requests counsel, police interrogation must cease unless the accused himself 'initiates further communication, exchanges, or conversations with the police." 333 S.C. at 430-431.

> employing brutality, the 'third degree' or [other] specific stratagems, ... custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Id., at 455, 86 S.Ct. 1602. We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself." Id., at 439, 86 S.Ct. 1602. Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." Id., at 442, 86 S.Ct. 1602. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as " *Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id., at 479, 86 S.Ct. 1602.

530 U.S. at 434-435.

It appears that "the right to terminate the interrogation at any time and not to answer any further questions" set forth by the Court of Appeals in Kennedy should be read in association with the prescribed warning required to be given of the "right to remain silent." As further explained by the Court of Appeals in Kennedy,

> [a] reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means...to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored...." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."...If an accused requests counsel after receiving *Miranda* warnings, he should not be subjected to further interrogation outside counsel's presence unless the accused initiates further communication with law enforcement officers. 325 S.C. at 308.

As to other courts' constructions of *Miranda,* in United States v. Brown, 100 Fed. Appx. 769, 2004 WL 1240897 (10th Cir. 2004), the Tenth Circuit Court of Appeals stated that the defendant's

> ...claim the *Miranda* warning was inadequate for failing to inform Mr. Brown he could discontinue the interview at any time and/or ask for a lawyer at any time... must fail. Here Detective Andrews explicitly informed Mr. Brown of his right to remain silent and his right to the presence of an attorney during any questioning. These advisements adequately advised Mr. Brown of his right to refuse to answer questions and/or refuse to answer questions until represented by an attorney in light of the fact Mr. Brown does not contend he sought to terminate questioning at any point during the interview. There is no requirement a suspect be informed he or she may terminate questioning at any time....and "warnings that convey the substance of the suspect's rights are sufficient. (emphasis added).

100 Fed. Appx. at 772-773.

In its decision in Jomolla v. State, 990 So.2d 1234 at 1240 (D.Ct.App.Fla, 2008), the Florida court referenced the decision in Everette v. State, 893 So.2d 1278 (Fla. 2004) stating that

> ...the Florida Supreme Court found that *Miranda* only requires law enforcement to issue four warnings prior to initiating custodial interrogation: (1) that the individual has the right to remain silent, (2) that anything the person says may be used in court, (3) that the individual has the right to have an attorney present during questioning, and (4) that if the individual cannot afford an attorney, one will be appointed for him before questioning.

See also: Gillis v. State, 930 So.2d 802 at 806 (D.Ct.App.Fla, 2006) ("...we conclude that, because the *Miranda* form used informs the accused that he/she does not have to answer any questions posed by the officer, implicit in this warning is the fact that the accused may invoke his right to remain silent at any time during the interrogation or to terminate further questioning during the interrogation.)

In State v. Blank, 955 So.2d 90 at 110 (La. 2007), the Louisiana Supreme Court stated that

> [a]lthough *Miranda* zealously protects the right of an arrestee to terminate custodial interrogation at any point he chooses,...and the police must scrupulously honor the assertion of that right,...*Miranda* did not expressly require that advice as a subpart of the broader advisement with respect to the right to remain silent....Further, the right to remain silent embodies the right to terminate questioning. It is the tool by which

a suspect can control the time of questioning, the topics discussed, and duration of the session.

In its decision in State v. Foust, 823 N.E.2d 836 at 853-854 (2004), the Ohio Supreme Court indicated that

> [t]he Supreme Court has never insisted that *Miranda* warnings be given in the exact form described in that decision. Instead, the court has stated 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.' " Duckworth v. Eagan (1989), 492 U.S. 195, 202-203, 109 S.Ct. 2875, 106 L.Ed.2d 166, quoting California v. Prysock (1981), 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696. "Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' " Duckworth at 203, 109 S.Ct. 2875, 106 L.Ed.2d 166, quoting Prysock at 361, 101 S.Ct. 2806, 69 L.Ed.2d 696.
>
> Police do not have to provide additional warnings to a suspect beyond what *Miranda* requires. Indeed, in State v. Edwards (1976), 49 Ohio St.2d 31, 39-41, 3 O.O.3d 18, 358 N.E.2d 1051, we found that *Miranda* warnings were adequate even though the defendant was not explicitly asked whether he wanted an attorney. Similarly, in State v. Dailey (1990), 53 Ohio St.3d 88, 90-91, 559 N.E.2d 459, *Miranda* warnings were deemed adequate even though they did not explicitly refer to "appointment of counsel."
>
> Federal courts have also rejected challenges to the adequacy of *Miranda* warnings based on the absence of additional warnings. See, e.g., United States v. Ricks (C.A.6, 1993), 989 F.2d 501, unpublished opinion, 1993 WL 78781 (suspect need not be informed that he has the right to stop answering questions at any time); United States v. Lares-Valdez (C.A.9, 1991), 939 F.2d 688 (suspect need not be advised of the right to have questioning stopped at any time, of the option to answer some questions but not others, or that some questions may call for incriminating responses); United States v. Caldwell (C.A.8, 1992), 954 F.2d 496, 501-504 (suspect need not be explicitly advised of his right to counsel before and during questioning); United States v. DiGiacomo (C.A.10, 1978), 579 F.2d 1211, 1214 (no express requirement under *Miranda* to advise suspects of the right to terminate questioning).

Consistent with the above, in the opinion of this office, there is no "fifth right" imposed on law enforcement to specifically instruct a suspect in custody that the suspect has the "right" to

terminate the interrogation at any time and not to answer any further questions. Such "right" is incorporated by the required instruction that the suspect has the right to remain silent. The failure to specifically provide this "fifth right" would not serve as the basis to have a case dismissed.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General