State of Michigan
In the Supreme Court

Appeal from the Michigan Court of Appeals
O'Connell, P.J., and Hoekstra and K.F. Kelly, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court Docket No.

LARICCA SEMINTA MATHEWS,

Defendant-Appellee.

_____/

Court of Appeals No. 339079
Oakland Circuit Court No. 2016-260482-FC
_____/

Plaintiff-Appellant's

Application for Leave to Appeal

JESSICA R. COOPER
Prosecuting Attorney
Oakland County

THOMAS R. GRDEN
Chief, Appellate Division

MATTHEW A. FILLMORE (P59025)
Attorney for Plaintiff-Appellant
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 452-9178

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JURISDICTIONAL STATEMENT

On June 13, 2017, Oakland Circuit Court Judge Phyllis C. McMillen entered an order granting defendant's motion to suppress statements she made during two police interviews (Opinion and Order [Appendix B]). The people appealed this ruling by filing an interlocutory application for leave to appeal in the Court of Appeals. In a 2-1 decision, the Court of Appeals denied the people's application for leave to appeal for lack of merit in the grounds presented. *People v Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079). The people appealed, and this Court remanded to the Court of Appeals for consideration as on leave granted. *People v Mathews*, 501 Mich 950; 904 NW2d 865 (2018). On remand, the Court of Appeals, in a split published opinion, affirmed the trial court's order suppressing the evidence. *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079) (Appendix A). The people now apply for leave to appeal this decision. This Court has jurisdiction over the application under MCR 7.303(B)(1). This application is timely filed within 56 days after the date the Court of Appeals order was entered. MCR 7.305(C)(2)(a).

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On June 13, 2017, Oakland Circuit Court Judge Phyllis C. McMillen entered an order granting defendant's motion to suppress statements she made during two police interviews (Opinion and Order [Appendix B]). The trial court held that although the interviewing officers advised defendant that she had the right to an attorney, the statements defendant made during the interview must be suppressed because the officers did not explicitly advise defendant that she had the right to have an attorney present before and during the interview (Opinion and Order [Appendix B]). The people appealed this ruling by filing an interlocutory application for leave to appeal in the Court of Appeals. In a 2-1 decision, the Court of Appeals majority (Cavanagh, J., and Gleicher, J.) denied the people's application for leave to appeal for lack of merit in the grounds presented. *People v Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079). Judge O'Brien would have granted the application for leave to appeal. *Id.* The people appealed this Court of Appeals order. This Court remanded to the Court of Appeals for consideration as on leave granted. *People v Mathews*, 501 Mich 950; 904 NW2d 865 (2018). On remand, the Court of Appeals, in a split published opinion authored by Judge Hoekstra, affirmed the trial court's order suppressing the evidence. *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079) (Appendix A). The Court of Appeals majority (Hoekstra, J., and K.F. Kelly, J.) summarized its holding as follows:

> On remand, we find no merit to defendant's assertion that the police were required to inform her that she could cut off questioning at any time during the interrogation. However, because generally advising defendant that she had "a right to a lawyer" did not sufficiently convey her right to consult with an attorney and to have an attorney present during the interrogation, we conclude that the *Miranda*[1] warnings in this case were defective and we affirm the trial court's

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)

> suppression of defendant's statement. [*People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079), slip op at 1 (Appendix A).]

Judge O'Connell dissented from the part of the majority's ruling that the "right to counsel" portion of the *Miranda* warnings were defective. *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079) (O'Connell, P.J., concurring in part and dissenting in part) (Appendix A). In contrast to the majority, he agreed with "those cases cited in the majority opinion holding that a generalized warning that the suspect has the right to counsel, without specifying when, satisfies the *Miranda* requirements." *Id.*, slip op at 2 (O'Connell, P.J., concurring in part and dissenting in part). Judge O'Connell concurred with the balance of the majority opinion. *Id.*, slip op at 3 (O'Connell, P.J., concurring in part and dissenting in part). The people now apply for leave to appeal Part (B) of the Court of Appeals majority opinion, which held that the "right to counsel" warning was deficient.

Because this case involves a published Court of Appeals opinion with a dissent and presents an issue of first impression in this Court that has divided appellate courts throughout the nation, the people request that this Court grant leave to appeal or a mini oral argument on the application to determine whether the warning "you have a right to a lawyer" can satisfy *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

STATEMENT OF QUESTION PRESENTED

I. To comply with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the police must give the suspect warnings that reasonably convey that he or she has the right to the presence of an attorney before and during interrogation. Here, at the beginning of defendant's interrogation, the police warned her that "[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer . . . ." This Court has never decided—and other jurisdictions are split on this issue—whether such a general "right to an attorney" warning, without any attached temporal limitations, reasonably conveys to the suspect his or her rights as required by *Miranda*. Should this Court grant leave to appeal to decide this issue?

The people contend the answer is: "Yes."

Defendant has not yet answered this question.

The circuit court did not answer this question.

The Court of Appeals did not answer this question.

STATEMENT OF FACTS

The facts of this case appear to be undisputed. The Court of Appeals accurately summarized the facts as follows:

> This case arises from the shooting death of defendant's boyfriend, Gabriel Dumas, who was killed in defendant's apartment on August 12, 2016. After the shooting, defendant called 911 and told the dispatcher that she had shot Dumas. Police responded to the scene, and defendant was taken into custody and transported to the Wixom Police Department. At the police station, defendant was interviewed twice. Detective Brian Stowinsky conducted the first interview. During the first interview, Stowinsky presented defendant with a written advice of rights form which stated:
>
> > Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.
> >
> > I understand what my rights are and am willing to talk.
>
> Stowinsky also orally reviewed the statements on the advice of rights form with defendant. Specifically, the following exchange took place:
>
> > Detective Stowinsky: OK, um, I'm going to review these, ok?
> >
> > Defendant: Uh hmm.
> >
> > Detective Stowinsky: I'm going to read these to you.
> >
> > Defendant: Uh hmm.
> >
> > Detective Stowinsky: Um, before I question, start asking you, you should know that you have a right to remain silent.
> >
> > Defendant: Uh hmm.
> >
> > Detective Stowinsky: Anything you say maybe [sic] used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?
> >
> > Defendant: Yes.
>
> Defendant agreed to talk with Stowinsky and she signed the advice of rights form. During the questioning that followed, defendant told Stowinsky that she quarreled with Dumas, that Dumas attacked her, and that she shot him.

> Later the same day, defendant was interviewed a second time by Sergeant Michael DesRosiers. At the beginning of that second interview the following exchange took place between defendant and DesRosiers:
>
> > Sergeant DesRosiers: Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?
> >
> > Defendant: Uh hmm.
> >
> > Sergeant DesRosiers: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.
> >
> > Defendant: OK.
> >
> > Sergeant DesRosiers: So, um, we're just continuing the interview that you started with him.
>
> DesRosiers then proceeded to question defendant about inconsistencies between her previous statements and the physical evidence, including the location of Dumas's fatal bullet wound. Defendant again admitted shooting Dumas, and she attempted to explain the location of the bullet wound by suggesting that the bullet may have ricocheted. She also suggested that the shooting may have been an accident insofar as her finger may have "slipped" while on the trigger because it was "so hot and muggy." [*People v Mathews*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 339079), slip op at 1-3 (Appendix A).]

Defendant was charged with statutory short-form murder, MCL 750.316, reckless discharge of a firearm in a building, MCL 750.234b, and two counts of possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b (Information). Defendant filed a motion to suppress the statements she made during the police interviews, arguing that the statements were involuntary and therefore inadmissible because the police did not explicitly advise her that (1) she had the right to stop the interrogation at any point and (2) she had a right to a lawyer present during interrogation (Defendant's Motion to Suppress Statements). Defendant attached as Exhibit A to her motion the written advice of rights form that she signed at the beginning of the first interview (Defendant's Brief in Support of Motion to Suppress Statements, Exhibit A). The people responded that the advice of rights was sufficient under

Miranda (People's Response to Defendant's Motion to Suppress Statements). The parties stipulated that the trial court could consider the video recording of the interviews and the transcripts of the interviews in deciding defendant's motion (5/3/17 Motion Hearing Transcript [MT I], 3-5).[2] On May 24, 2017, the parties argued defendant's motion before Oakland Circuit Court Judge Phyllis C. McMillen (5/24/17 Motion Hearing Transcript [MT II] [Appendix E]). The trial court took the matter under advisement.

On June 13, 2017, the trial court issued an opinion and order granting defendant's motion to suppress (Opinion and Order [Appendix B]). The court concluded that the warnings the detective gave defendant did not adequately inform her that she had a right to have a lawyer with her during interrogation:

> Nowhere in the warnings received by Ms. Mathews was she told that she has the right to consult an attorney before her interrogation or to have an attorney present with her during interrogation. Nor is there any language from which it could be inferred that she had that right. In the absence of the explicit indication that she had the right to an attorney present before or during questioning, the inference was that at some point in the future, she would be entitled to have an attorney represent her. [Opinion and Order, 6 (Appendix B).]

The trial court then distinguished the cases cited by the prosecution on the ground that in those cases, the words "present," "presence," or "with you" were included in the warnings that the suspects had the right to a lawyer (Opinion and Order, 7-8 [Appendix B]). The court did not, however, cite any cases holding that a general right to counsel warning ("You have the right to a lawyer") was insufficient under *Miranda*. The court concluded as follows:

> The warnings given by Detective Stowinsky and Sergeant DesRosiers failed to advise the Defendant that she had the right to have an attorney present before and during interrogation. The warnings given were not the fully effective equivalent of advising her that she had the right to the presence of an attorney, and that if she could not afford an attorney one would be appointed for her prior

[2] The transcripts of the interviews are attached as Appendix C.

> to any questioning if she so desired. As set forth in the rulings above, without those warnings, the constitutional standards for the protection of the Fifth Amendment right against self-incrimination have not been met, and the statements Defendant gave to Detective Stowinsky and Sergeant DesRosiers may not be used in a trial against her. [Opinion and Order, 8 (Appendix B).]

The trial court did not rule on whether the officers violated *Miranda* by failing to advise defendant that she could terminate the interview at any point.

The people filed an interlocutory application for leave to appeal the trial court's ruling suppressing defendant's statements. In a 2-1 decision, the Court of Appeals majority (Cavanagh, J., and Gleicher, J.) denied the people's application for leave to appeal for lack of merit in the grounds presented. *People v Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079). Judge O'Brien would have granted the application for leave to appeal. *Id.*

The people filed an application for leave to appeal in this Court. This Court remanded to the Court of Appeals for consideration as on leave granted. *People v Mathews*, 501 Mich 950; 904 NW2d 865 (2018). On remand, the Court of Appeals, in a split published opinion authored by Judge Hoekstra, affirmed the trial court's order suppressing the evidence. *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079) (Appendix A). The Court of Appeals majority (Hoekstra, J., and K.F. Kelly, J.) first summarized its holding as follows:

> On remand, we find no merit to defendant's assertion that the police were required to inform her that she could cut off questioning at any time during the interrogation. However, because generally advising defendant that she had "a right to a lawyer" did not sufficiently convey her right to consult with an attorney and to have an attorney present during the interrogation, we conclude that the *Miranda* warnings in this case were defective and we affirm the trial court's suppression of defendant's statement. [*People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079), slip op at 1 (Appendix A).]

In regard to the first issue, the Court held, "[W]hen a defendant has been advised of his or her right to remain silent as required by *Miranda*, police need not also expressly inform the

defendant that this right to remain silent may be exercised to cut off questioning at any point during the interrogation." *Id.*, slip op at 6. In regard to the second issue, the majority held, "Although there is conflicting authority on this issue, we agree with the trial court and hold that a general warning regarding a 'right to a lawyer' does not comply with the dictates of *Miranda*." *Id.* In reaching this conclusion, the majority acknowledged that it was "not aware of any binding caselaw resolving this issue." *Id.*, slip op at 7. The majority discussed decisions from numerous courts that had reached different conclusions on the issue of whether the general warning of the "right to an attorney" satisfies *Miranda*. *Id.*, slip op at 8-10. It then decided that the cases requiring a temporally-related warning were more persuasive than the cases holding that a general "right to an attorney" was sufficient. *Id.*, slip op at 11. But in reaching this conclusion, the majority conceded, "we fully acknowledge that there is a certain logic in the proposition that an unqualified general warning about a 'right to an attorney' encompasses *all* facets of the right to counsel such that a broad warning before interrogation regarding the 'right to an attorney' impliedly informs a suspect of the right to consult an attorney and to have an attorney present during the interrogation." *Id.* That being said, the majority rejected this logic as "disingenuous," concluded that the warnings in this case were insufficient, and affirmed the trial court's suppression of defendant's statements at trial. *Id.*, slip op at 11-13.

Judge O'Connell dissented from the part of the majority's ruling that the "right to counsel" portion of the *Miranda* warnings were defective. *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079) (O'Connell, P.J., concurring in part and dissenting in part) (Appendix A). In contrast to the majority, he agreed with "those cases cited in the majority opinion holding that a generalized warning that the suspect has the right to counsel, without specifying when, satisfies the *Miranda* requirements." *Id.*, slip op at 2. He concluded

that in this case, "It is clear from these warnings that defendant's right to a lawyer related to the forthcoming questioning by both Detective Stowinsky and Sergeant DeRosiers." *Id.* He queried, "When the police warn a suspect before the start of questioning that the suspect has the right to counsel, for what other purpose than questioning—the entire duration of questioning—would a suspect be entitled to a lawyer?" *Id.*, slip op at 2 n 2. Judge O'Connell concurred with the balance of the majority opinion (holding that the police were not required to inform the defendant that she had the right to cut off questioning at any time). *Id.*, slip op at 3.

The people now apply for leave to appeal Part (B) of Court of Appeals majority opinion, which holds that the police warnings were insufficient to satisfy *Miranda*. Additional facts, where pertinent to the issue raised on appeal, may be set forth in the argument section of this brief.

ARGUMENT

I. To comply with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the police must give the suspect warnings that reasonably convey that he or she has the right to the presence of an attorney before and during interrogation. Here, at the beginning of defendant's interrogation, the police warned her that "[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer . . . ." Because this Court has never decided—and other jurisdictions are split on this issue—whether such a general "right to an attorney" warning, without any attached temporal limitations, reasonably conveys to the suspect his or her rights as required by *Miranda*, this Court should grant leave to appeal to decide this issue.

ISSUE PRESERVATION:

Defendant moved to suppress the statements she made during the police interviews, arguing that the police did not adequately advise her of all of her *Miranda* rights (Defendant's Motion to Suppress Statements). The people opposed defendant's motion (People's Response to Defendant's Motion to Suppress Statements). The trial court granted defendant's motion and suppressed her statements (Opinion and Order [Appendix B]). Therefore, this issue was preserved for appeal.

STANDARD OF REVIEW:

This Court reviews de novo a trial court's determination whether a defendant's waiver of his *Miranda* rights was made knowingly, intelligently, and voluntarily. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). This Court also reviews de novo constitutional issues and other issues of law, as well as a trial court's ultimate decision regarding a motion to suppress evidence. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009); *People v Henry (After Remand)*, 305 Mich App 127, 137; 854 NW2d 114 (2014).

DISCUSSION:

This murder case presents an issue that has divided the federal circuit courts of appeal and other appellate courts around the nation: Whether *Miranda* is satisfied when a suspect is advised at the beginning of an interrogation that he or she has the right to an attorney, but is not explicitly advised that he or she is entitled to the attorney's presence before and during interrogation. In this case, defendant was advised that "[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer . . . ." (Advice of Rights Form [Appendix D]; see also First Interview Transcript (IT I) [Appendix C].) The Court of Appeals majority, in a published opinion, sided with the jurisdictions holding that such a general warning is insufficient under *Miranda*. *Mathews*, ___ Mich App at ___, slip op at 1, 6-13. Judge O'Connell dissented, siding with the jurisdictions holding that warnings such as those given in this case reasonably convey to the suspect his or her rights under *Miranda*. *Mathews*, ___ Mich App at ___, slip op at 2 (O'Connell, P.J., concurring in part and dissenting in part). This Court should grant leave to appeal or a mini oral argument on the application to resolve which side of the split of authorities Michigan falls on this issue. The people urge this Court to follow the Second, Third, Fourth, Seventh, and Eighth federal circuits and *Miranda* itself, which have held that warnings such as the ones given in the instant case are sufficient. This Court's resolution of this appeal will determine whether defendant's statements are admissible at her murder trial.

A. The Requirements of *Miranda*

To give force to the United States Constitution's Fifth Amendment protection against compelled self-incrimination, the United States Supreme Court established in *Miranda* "'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Florida v*

Powell, 559 US 50, 59; 130 S Ct 1195; 175 L Ed 2d 1009 (2010), quoting *Duckworth v Eagan*, 492 US 195, 201; 109 S Ct 2875; 106 L Ed 2d 166 (1989). In *Miranda*, the Supreme Court held that when a person is in custody, "[p]rior 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." *Miranda*, 384 US at 444.[3] Particularly relevant to the instant case, the Court held that "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 . . . ." *Id.* at 471. But these warnings need not be given in the exact form described in *Miranda*. *Duckworth*, 492 US at 202. "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *California v Prysock*, 453 US 355, 359; 101 S Ct 2806; 69 L Ed 2d 696 (1981). The Supreme Court "has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." *Prysock*, 453 US at 359 (internal quotation marks omitted). "In determining whether police officers adequately conveyed the four warnings, . . . reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement.'" *Powell*, 559 US at 60, quoting *Duckworth*, 492 US at 203. "In *Miranda* itself, the Court said that 'the warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant.'" *Duckworth*, 492 US at 202, quoting *Miranda*, 384 US at 476 (emphasis added in *Duckworth*); see also *Rhode Island v Innis*, 446 US 291, 297; 100 S Ct 1682; 64 L Ed 2d 297 (1980) (referring to "*Miranda* warnings . . . or their

[3] *Miranda* announced a constitutional rule that governs the admissibility of statements made during custodial interrogation in both state and federal courts. *Dickerson v United States*, 530

equivalent"). Warnings are sufficient if they "'reasonably "convey to a suspect his rights as required by *Miranda*."'" *Powell*, 559 US at 60, quoting *Duckworth*, 492 US at 203, quoting *Prysock*, 453 US at 361. The remedy for a failure to give sufficient *Miranda* warnings is exclusion of the unwarned statements. *United States v Patane*, 542 US 630, 641-642; 124 S Ct 2620; 159 L Ed 2d 667 (2004); *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013).

In the instant case, the detective gave defendant the following warnings at the beginning of the first interview:

> Before I question, start asking you, you should know that you have a right to remain silent. . . . Anything you say may be used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. [IT I (Appendix C).]

Defendant also signed a written form advising her of these rights:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free. [Advice of Rights Form (Appendix D).]

This appeal involves the sufficiency of the third ("right to a lawyer") warning. The warning given here did not explicitly advise defendant that she had the right to the presence of a lawyer during the interrogation, but it did advise defendant before the interrogation that she had the right to a lawyer, without attaching any temporal limitations to that right. The issue is whether the warning satisfied *Miranda* by reasonably conveying to defendant that she had the right to a lawyer during questioning.

B. *Miranda*'s Instruction that the FBI Warnings Should Be Emulated

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US 428, 432, 444; 120 S Ct 2326; 147 L Ed 2d 405 (2000).

In *Miranda* itself, the Supreme Court approved the warnings given by the Federal Bureau of Investigation (FBI), which do not explicitly advise the suspect that he has the right to a lawyer during interrogation:

> Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, *that the individual may obtain the services of an attorney of his own choice* and, more recently, that he has a right to free counsel if he is unable to pay. A letter received from the Solicitor General in response to a question from the Bench makes it clear that *the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today*. [*Miranda*, 384 US at 483-484 (emphasis added).]

The Court then quoted a letter from the Director of the FBI, which described the warnings FBI agents gave to suspects before an interview: "'"The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F.2d 684 (1965), and *Jackson* v. *U.S.*, 337 F.2d 136 (1964), cert. den. 380 U.S. 935."'" *Miranda*, 384 US at 484.[4] Thus, FBI agents advised suspects of their right to an attorney, but did not explicitly advise them that they had a right to an attorney *during interrogation*. Nonetheless, the *Miranda* Court approved the FBI warnings and stated that they should be emulated: "The practice of the FBI can readily be emulated by state and local enforcement agencies." *Id.* at 486. In Justice Clark's

[4] In *Westover v United States*, 342 F2d 684, 685 (CA 9, 1965), rev'd by *Miranda*, 384 US at 495-496 "[t]he F.B.I. agents advised the appellant that he did not have to make a statement; that any statement that he made could be used against him in a court of law; that he had the right to consult an attorney." In *Jackson v United States*, 119 US App DC 100; 337 F2d 136, 138 (1964), "[t]he F.B.I. agent immediately advised the appellant 'that he did not have to make any statement, that any statement he did make would be used against him in a court of law, and that he was entitled to an attorney.'"

dissenting opinion in *Miranda*, he opined that the FBI warnings did not adequately convey to the suspect the right to counsel during interrogation:

> [T]he requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. 484-486, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States*, 342 F.2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States*, 337 F.2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. [*Miranda*, 384 US at 500 n 3 (Clark, J., dissenting).]

But the *Miranda* majority clearly disagreed, and it is the majority opinion—not Justice Clark's dissent—that should be followed. Since *Miranda*, several courts have pointed to *Miranda*'s endorsement of the FBI warnings in concluding that a general "right to an attorney" warning is sufficient under *Miranda*. See, e.g., *United States v Warren*, 642 F3d 182, 185 (CA 3, 2011); *United States v Lamia*, 429 F2d 373, 376 (CA 2, 1970). The warnings in the instant case were similar to the FBI warnings that the Supreme Court stated in *Miranda* should be emulated by state and local law enforcement agencies. Therefore, this language from *Miranda* alone is enough to support reversal of the trial court's conclusion that the warnings in this case were insufficient.

In a footnote, the Court of Appeals majority in this case attempted to minimize—and ultimately decided to disregard—the Supreme Court's statement that the FBI warnings should be emulated. *People v Mathews*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 339079), slip op at 10 n 7. The Court of Appeals majority listed two justifications for disregarding this aspect of the *Miranda* opinion: (1) because *Miranda*'s endorsement of FBI

practices was followed by a discussion of then-current practices in other countries and a discussion addressing concerns about pre-interrogation warnings adversely affecting law enforcement; and (2) because there currently exists a difference of opinion among various courts regarding the necessity of explicitly warning a suspect about the right to the presence of counsel during interrogation. *Id.* But neither of these reasons justified ignoring *Miranda*'s plain directive. *Miranda*'s discussion of interrogation practices of other countries appears to have been directed toward easing concerns that curbs on interrogation would unduly endanger law enforcement practices. *Miranda*, 384 US at 486-489. Nothing in this discussion undermined *Miranda*'s statement that the FBI warnings were consistent with the requirements set forth elsewhere in the *Miranda* opinion. As for our Court of Appeals' second reason for disregarding *Miranda*'s approval of the FBI warnings, the existence of a disagreement in various other jurisdictions regarding the sufficiency of general "right to an attorney" warnings does not mean that the Court was free to disregard *Miranda*. While the Court of Appeals was not bound by decisions from lower federal courts or decisions from other states, they *were* bound by United States Supreme Court decisions on issues of federal law. See *Abela v GMC*, 469 Mich 603, 606; 677 NW2d 325 (2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." [citations omitted]) and *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005) ("We are not bound by the decisions of the courts of other states . . . ."). The Court of Appeals erred in concluding that a general warning that the suspect has the right to an attorney is inadequate under *Miranda* when *Miranda* itself stated that the FBI's general warning that the suspect has the right to an attorney was consistent with the rule announced in *Miranda*.

C. Michigan Court of Appeals Decisions Relevant to This Issue

The people recognize that despite *Miranda*'s guidance in giving the FBI warnings as an example of warnings to be emulated, subsequent caselaw from lower courts has been inconsistent in regard to whether similar warnings satisfy *Miranda*. Aside from this case, there are several older (at least 38 years old) Michigan Court of Appeals cases that address this issue. Several cases from that Court have upheld the sufficiency of warnings that informed the suspect that he had the right to have an attorney present. In *People v Johnson*, 90 Mich App 415; 282 NW2d 340 (1979), the officer told the defendant that "he had the right to remain silent, that anything he said could and would be used against him in a court of law; *that he had the right to have an attorney present*. If he could not afford an attorney, one would be provided him by the court." *Id.* at 418 (emphasis added). The defendant argued that the officer's statement that the defendant "had the right to have an attorney present" failed to inform him that he had the right to counsel *during interrogation* and therefore did not comply with *Miranda*. *Johnson*, 90 Mich App at 418. But the Court of Appeals disagreed and concluded that the warnings satisfied *Miranda*:

> [P]olice advice to defendant that he "had the right to have an attorney present" cannot reasonably be understood otherwise than as informing defendant of his right to counsel *during interrogation* and not merely at some subsequent trial. So considered, the language was adequate to "fairly apprise an accused that he had the right to counsel during interrogation" and thus conforms to the *Miranda* requirements. [*Johnson*, 90 Mich App at 420.]

Similarly in *People v Bynum*, 21 Mich App 596, 599; 175 NW2d 870 (1970), and *People v McClure*, 29 Mich App 361, 367; 185 NW2d 426 (1971), the defendants were given a form that stated: "I have the right to have an attorney (lawyer) present before I answer any questions or make any statement." The Court held that such warnings adequately informed the defendants of their right to counsel during interrogation and complied with *Miranda*. *Bynum*, 21 Mich App at

600; *McClure*, 29 Mich App at 368; see also *People v Watkins*, 60 Mich App 124, 128; 230 NW2d 338 (1975) (upholding a warning that the defendant had the "right to an attorney or lawyer present before answering any questions or making any statements" and that she could exercise these rights at any time); and *People v Gilleylem*, 34 Mich App 393, 395; 191 NW2d 96 (1971) (upholding as adequate under *Miranda* a warning to the defendant that "'[y]ou may have this attorney present here before answering any questions'"). In the instant case, the Court of Appeals and trial court attempted to distinguish the warnings given to defendant from the warnings in the above cases on the ground that the warnings in this case did not include the word "present." While this distinction may be true, the absence of one word from *Miranda* warnings does not necessarily invalidate the entirety of the warnings, as long as they reasonably convey the rights as required by *Miranda*. *Powell*, 559 US at 60. The lower courts' overly rigid examination of the warnings and invalidation of those warnings based on one missing word smacks of examining the words "'as if construing a will or defining the terms of an easement,'" which the Supreme Court has held is improper. *Powell*, 559 US at 60, quoting *Duckworth*, 492 US at 203; see also *Prysock*, 453 US at 359. As will be discussed in more detail later in this brief, when examining the warnings in a common-sense manner, they cannot be reasonably understood as anything but informing defendant of her right to counsel *before and during interrogation*. The warnings in this case, like the warnings in *Johnson* and the cases upon which it relies, were sufficient to satisfy *Miranda*.

In addition to the Court of Appeals opinion in the instant case, several older cases from the Court of Appeals have held that the general warning, "you have the right to a lawyer," does not adequately inform the suspect that he has the right to a lawyer during interrogation. In particular, in *People v Whisenant*, 11 Mich App 432; 161 NW2d 425 (1968), the Court held that

the warnings were inadequate because they did not inform the defendant that he had the right to counsel during interrogation:

> The testimony taken at the *Walker*[5] hearing held in the case at hand, although indicating a voluntary confession under former standards, does not demonstrate compliance with *Miranda, i.e.,* nowhere does it appear that defendant was informed of his right to have counsel, retained or appointed, present during questioning and the giving of his statement. Merely informing defendant at the time of arrest that he had a right to counsel did not meet the requirements of *Miranda*. [*Whisenant*, 11 Mich App at 437.]

The Court reached a similar conclusion in *People v Jourdan*, 14 Mich App 743, 744; 165 NW2d 890 (1968), where the Court held that the warning that the defendant was entitled to an attorney was insufficient under *Miranda* because it did not advise the defendant that he was entitled to counsel during interrogation. Similarly in *People v Ansley*, 18 Mich App 659; 171 NW2d 649 (1969), the Court, relying on *Whisenant*, 11 Mich App 432, and *Windsor v United States*, 389 F2d 530 (CA 5, 1968), held that the warning regarding the right to counsel was insufficient:

> The warnings given the defendant did not comply with the mandatory requirements of *Miranda* and its progeny. The defendant was not clearly informed that he had the right to counsel and to have counsel with him during interrogation, as recently set forth in *People* v. *Whisenant* (1968), 11 Mich App 432. Defendant was not informed that he had a right to appointed counsel during interrogation, if he so desired, as required in *Miranda*. [*Ansley*, 18 Mich App at 667.]

Whisenant and its progeny were all decided before *Prysock*, *Duckworth*, and *Powell*, where the United States Supreme Court established guidelines for examining the sufficiency of *Miranda* warnings. These developments in the United States Supreme Court's *Miranda* jurisprudence have rendered the validity of *Whisenant* and its progeny questionable. The published Court of Appeals opinion in the instant case is the first published Michigan decision to address this issue

[5] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

since the Supreme Court's development of *Miranda* jurisprudence in *Prysock*, *Duckworth*, and, most importantly, *Powell*.

D. *Florida v Powell*, 559 US 50; 130 S Ct 1195; 175 L Ed 2d 1009 (2010)

In *Powell*, 559 US 50 (2010), the United States Supreme Court upheld the validity of warnings that informed the defendant that he had the right to a lawyer *before* questioning, but did not explicitly inform the defendant that he had the right to a lawyer *during* questioning. The officer in *Powell* warned the defendant as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. *You have the right to talk to a lawyer before answering any of our [the officers'] questions*. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview. [*Powell*, 559 US at 54 (emphasis added).]

The Supreme Court held that the "right to counsel" warning given in *Powell* satisfied *Miranda* because it reasonably conveyed to the defendant his right to have an attorney present before and during the interrogation. *Id.* at 62. In so holding, the Court emphasized that attention must be focused on whether the warning contains a temporal limitation on the right to the presence of counsel that excludes the right to counsel during interrogation:

> "[N]othing in the warnings," we observed, "suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the suspect is] questioned, . . . while [he is] being questioned, and all during the questioning." [*Id.* at 61, quoting *Prysock*, 453 US at 360-361 (internal quotation marks in *Prysock* omitted).]

The Court rejected the Florida Supreme Court's conclusion that the temporal language of the warning—that the defendant could talk to a lawyer *before* answering any questions—suggested that the defendant could consult with an attorney only before the interrogation started:

> In context, however, the term "before" merely conveyed when Powell's right to an attorney became effective—namely, before he answered any questions

> at all. Nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced. Instead, the warning communicated that the right to counsel carried forward to and through the interrogation: Powell could seek his attorney's advice before responding to "*any* of [the officers'] questions" and "*at any time* . . . *during* th[e] interview." App. 3 (emphasis added). Although the warnings were not the *clearest possible* formulation of *Miranda*'s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading. [*Powell*, 559 US at 63.]

When the defendant in *Powell* pointed out that "most jurisdictions in Florida and across the Nation expressly advise suspects of the right to have counsel present both before and during interrogation," the Supreme Court held that such explicit warnings were not required to comply with *Miranda*'s requirements as long as they "communicated the same essential message." *Id.* at 64. Justice Stevens, in dissent, asserted that "the warning entirely failed to inform [the defendant] of the separate and distinct right 'to have counsel present during any questioning.'" *Id.* at 75-76 (Stevens, J., dissenting), quoting *Miranda*, 384 US at 470. But the majority responded to the dissent as follows: "We find the warning in this case adequate, however, only because it communicated just what *Miranda* prescribed." *Powell*, 559 US at 62 n 5.

The people concede that the warnings given in the instant case are distinguishable from the warnings given in *Powell*. In this case, the police warned defendant that "before any questions are asked of you, you should know . . . you have a right to a lawyer," whereas in *Powell*, the police warned the defendant that "[y]ou have the right to talk to a lawyer before answering any of our questions." *Powell*, 559 US at 54. Additionally, the police in *Powell* informed the defendant that he had the right to use his rights at any time during the interview. *Id.* The people do not claim that the police in this case informed defendant that she could use her rights at any time during the interview. But while the facts of *Powell* may be distinguishable in this regard, *Powell* nonetheless provides guidance in this case. *Powell* supports the conclusion that a general "right to an attorney" warning before interrogation conveys that the defendant's

right to an attorney begins immediately (before questioning). *Id.* at 63. And *Powell*'s focus on the absence of any temporal limitations attached to that right supports the conclusion that a general "right to an attorney" warning—without any attached temporal limitations—is sufficient to advise the defendant that his or her right to counsel continues through the interrogation.[6] *Powell* also specifically rejects the notion that it is necessary for police to expressly advise suspects of the right to have an attorney present both before and during interrogation. *Id.* at 64.

E. Post-*Powell* Caselaw

Since *Powell*, numerous appellate courts have held that warnings that inform the suspect of the right to a lawyer, but do not expressly inform the suspect of the right to a lawyer during interrogation, satisfy *Miranda*. For example, in *United States v Warren*, 642 F3d 182, 184 (CA 3, 2011),[7] the officer advised the defendant as follows:

> I told [the defendant] that he had the right to remain silent. Anything you say can and will be used against you in a court of law. *You have the right to an attorney*. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish. Should you decide to talk to me, you can stop the questioning any time. [*Id.* (emphasis added).]

The Third Circuit stated that in light of *Powell*, it needed to address whether the lack of any express reference to the right to counsel during interrogation, coupled with the lack of a "catch all" statement that the defendant could invoke his rights at any time during the interrogation, undermined the validity of the warnings. *Warren*, 642 F3d at 186. The Court held that it did not. *Id.* The Court noted that the warnings were similar to the FBI warnings that were approved

[6] Contrary to the Court of Appeals holding in this case, *Miranda* warnings are not deficient when they lack affirmative and specific temporal information regarding the right to counsel before and during interrogation, but, rather, are deficient when they include a temporal *limitation* on the right to counsel.

[7] Although federal courts of appeals decisions are not binding on state courts, they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

by *Miranda*. *Warren*, 642 F3d at 184-186. The Court also pointed out that *Powell* underscored that attention must be focused upon whether anything in the warning suggested any limitation on the right to the presence of counsel different from the conveyed right to a lawyer in general. *Warren*, 642 F3d at 185. The Court then held that the unmodified statement, "[y]ou have the right to an attorney" was not time-limited and did not indicate that counsel's presence could be restricted after questioning commenced. *Id.* at 186-187. The Court explained its holding as follows:

> [I]t is counterintuitive to conclude from this warning that while the general right to counsel is unrestricted, the right to appointed counsel exists only in the moments prior to questioning and ceases the moment that the interview commences. Again, the officer said: "[i]f you cannot afford to hire an attorney, one will be appointed to represent you without charge *before any questioning if you wish*." Like *Powell* and *Duckworth*, we read the officer's words as indicating merely that Warren's right to pro bono counsel became effective before he answered any questions. *Powell*, 130 S. Ct. at 1205. It does not restrict the right to counsel, but rather addresses when the right to appointed counsel is triggered. *See Duckworth*, 492 U.S. at 204. Taken as a whole, then, the warning reasonably conveys the substance of the rights expressed in *Miranda*. [*Warren*, 642 F3d at 186-187 (emphasis in original).[8]]

[8] Other federal post-*Powell* cases have held that the general warning, "You have the right to a lawyer," without any temporal limitation attached, satisfied *Miranda*. See, e.g., *United States v Massengill*, 2016 US Dist LEXIS 77052 (ED Tenn, 2016), slip op at 5 (upholding a warning that failed to mention that the defendant had the right to have an attorney *present during questioning*, because nothing in the warning insinuated that the right to an attorney was tied to some future event); *United States v Gwathney-Law*, 2016 US Dist LEXIS 185388 (WD Ky, 2016), slip op at 31 (same); *United States v Fields*, 2016 US Dist LEXIS 48756 (ED Pa, 2016), slip op at 10 (holding that the warning that the defendant had the right to an attorney, without any language limiting that right, satisfied *Miranda* because there is no requirement that the warning of a general right to counsel include any express reference to the right to counsel during interrogation); *United States v Nelson*, 2013 US Dist LEXIS 64715 (ND Iowa, 2013), slip op at 12-14 (holding that the warning that "[y]ou have a right to an attorney," following "[y]ou have the right to remain silent," was sufficient under *Miranda* to communicate to the defendant that his right to an attorney began immediately and continued throughout the interview); *United States v Shropshire*, 2011 US Dist LEXIS 52426 (ED Tenn, 2011), slip op at 12 (holding that the warning, "[y]ou have the right to an attorney" was adequate because it did not limit the right to the attorney and it was reasonable to conclude that "when one is advised of the right to have an attorney, immediately following the warning you have a right to remain silent and anything you

The United States Supreme Court denied certiorari. *Warren v United States*, 564 US 1012; 131 S Ct 3012; 180 L Ed 2d 836 (2011).

Similarly in *Carter v People*, 398 P3d 124; 2017 Colo 59M (2017), the Colorado Supreme Court held that advice very similar to the advice given in the instant case passed muster under *Miranda*. The detective in *Carter* advised the defendant as follows:

> Since you're in custody, before I can even talk to you I have to do the formal little rights things, okay? So you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney. If you cannot afford to hire a[n] attorney, one will be appointed to you without cost. [*Carter*, 398 P3d at 125.]

The Colorado Supreme Court, after discussing *Powell*, *Duckworth*, and *Prysock*, observed that the specific advisement of the defendant's right to counsel did not include any temporal limitation and was prefaced with a statement that he had to be advised of his rights before questioning. *Carter*, 398 P3d at 127. The Court held that, as in *Powell*, the warning reasonably conveyed to the defendant that the interrogation would not proceed without an attorney if the defendant requested one:

> Much as the Court held in *Powell*, it would be highly counterintuitive for a reasonable suspect in a custodial setting, who has just been informed that the police cannot not talk to him until after they advise him of his rights to remain silent and to have an attorney, to understand that an interrogation may then proceed without permitting him to exercise either of those rights. [*Carter*, 398 P3d at 128.]

The Court concluded that "the *Miranda* advisement of the defendant reasonably conveyed that he had a right to consult with counsel, both before and during any interrogation by the police . . . ." *Carter*, 398 P3d at 130-131. The United States Supreme Court denied certiorari. *Carter v Colorado*, ___US___; 138 S Ct 980; 200 L Ed 2d 248 (2018).

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say can and will be used against you in a court of law, means you have the right to that attorney then.").

F. The Pre-*Powell* Circuit Split

Even before *Powell* upheld the validity of warnings that did not expressly state that the suspect had the right to counsel during interrogation, about half of the federal circuits had upheld similar warnings. The Second, Fourth, Seventh, Eighth, and Ninth Circuit courts of appeal had all held that a general warning that the suspect had the right to a lawyer satisfied *Miranda*. See *United States v Lamia*, 429 F2d 373, 375-377 (CA 2, 1970) (holding that a general warning that the defendant had the "right to an attorney" adequately conveyed to the defendant his *Miranda* rights); *United States v Frankson*, 83 F3d 79, 82 (CA 4, 1996) (holding that the warning, "'[y]ou have the right to an attorney' . . . communicated to [the defendant] that his right to an attorney began immediately and continued forward in time without qualification"); *United States v Adams*, 484 F2d 357, 361-362 (CA 7, 1973) (holding that the warning that the defendant had the "right to counsel" satisfied *Miranda*); *United States v Caldwell*, 954 F2d 496, 502-504 (CA 8, 1992) (holding that the general warning that the defendant had the right to an attorney was not a plain error under *Miranda* because it did not link the right to counsel to a future point in time after interrogation)[9]; *Sweeney v United States*, 408 F2d 121, 124 (CA 9, 1969) (holding that the general warning that the defendant was entitled to an attorney was sufficient under *Miranda* because "[t]he reference to the right to counsel, following, as it did, immediately on the warning as to the right to remain silent and the risk in not doing so, would, we think, be taken by most

[9] See also *Evans v Swenson*, 455 F2d 291, 295-296 (CA 8, 1972) (holding that where the officer told the defendant, "I want to tell you something before you say anything at all to me," followed by "you also have a right to an attorney," satisfied *Miranda* because it "clearly advised and informed in substance that [the defendant] had a right to have an attorney at that time, prior to his making any statements or being interrogated by an officer, and during such interrogation . . . .").

persons to refer to the contemplated interrogation, not to some other time . . . .").[10] And as discussed, after *Powell*, the Third Circuit joined the above circuits in holding that a general right to counsel warning is sufficient. *Warren*, 642 F3d 182, 185 (CA 3, 2011) (holding that a general warning of the right to an attorney, without an express warning of the right to the presence of an attorney during interrogation, satisfied *Miranda*).

Conversely, the Fifth, Sixth, Ninth,[11] and Tenth Circuit courts of appeal have held that *Miranda* warnings must explicitly provide that the suspect has a right to counsel during interrogation. See *Windsor*, 389 F2d at 533 (CA 5, 1968) (holding that the warning that the

[10] Other pre-*Powell* cases upheld that validity of warnings advising of the right to an attorney without an express statement concerning the right to the presence of counsel during interrogation. See, e.g., *State v Quinn*, 112 Ore App 608, 614; 831 P2d 48 (1992) (holding that general warning that the defendant had the right to an attorney "could not mislead him into believing that he *would have* the right to counsel at some future time, nor did it suggest that defendant's right to counsel was conditioned upon any event. Instead, the warning effectively informed defendant that his right to counsel attached immediately and unconditionally." [Emphasis in original]); *People v Walton*, 199 Ill App 3d 341, 344-345; 556 NE2d 892 (1990) (holding that the general warning that the defendant "had a right to consult with a lawyer" "was sufficient to *imply* the right to counsel's presence during questioning" because "no restrictions were stated by the police . . . as to *how, when*, or *where* defendant might exercise his right 'to consult with a lawyer.'" [Emphasis in original]); *People v Martinez*, 372 Ill App 3d 750, 754-755; 867 NE2d 24 (2007) (same); *Eubanks v State*, 240 Ga 166, 167-168; 240 SE2d 54 (1977) (holding that the warnings that the defendant had the right to an attorney was sufficient because it was "implicit in this instruction that if the suspect desired an attorney the interrogation would cease until the attorney was present"); *Criswell v State*, 84 Nev 459, 462; 443 P2d 552 (1968) ("While the warnings given in the district attorney's office did not specifically advise the [defendant] that he was entitled to have an attorney present at that moment and during all stages of interrogation, no other reasonable inference could be drawn from the warnings as given."); *Young v Warden, Maryland Penitentiary*, 383 F Supp 986, 1005 (D Md, 1974), aff'd 532 F2d 753 (CA 4, 1976) (holding that "the admonition of right to remain silent, that if [the defendant] talked what he said could be used against him, and his right to counsel, adequately advised [the defendant] of his right to have counsel 'here and now,' before and during any questioning. There was no limitation as to time of appointment; no postponement. He had an unqualified right to an attorney at any time; 'here and now.'").

[11] The Ninth Circuit appears to have conflicting opinions on this issue.

defendant could speak to an attorney before saying anything did not satisfy *Miranda*);[12] *United States v Tillman*, 963 F2d 137, 140-141 (CA 6, 1992) (holding that the warnings did not satisfy *Miranda* where the defendant was not told that any statements he might make could be used against him or that he had the right to an attorney before, during, and after interrogation); *United States v Noti*, 731 F2d 610, 615 (CA 9, 1984) (holding that the warning that the defendant had "the right to the services of an attorney before questioning" did not adequately inform the defendant that he had the right to counsel during interrogation);[13] *United States v Anthon*, 648 F2d 669, 672-674 (CA 10, 1981) (holding that the warning was insufficient where the defendant "was not advised that his right to counsel encompassed the right to appointed counsel in the event he could not afford counsel, that his right to counsel encompassed the right to have counsel present during any questioning, and that he had the right to stop the questioning at any time.").[14]

The instant case is a good vehicle for this Court to expand Michigan's *Miranda* jurisprudence by deciding which federal circuits Michigan will join regarding the requirements of the "right to counsel" portion of *Miranda* warnings.

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[12] See also *Atwell v United States*, 398 F2d 507, 510 (CA 5, 1968) ("The advice that the accused was entitled to consult with an attorney, retained or appointed, 'at anytime' does not comply with *Miranda*'s directive "* * * that 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 * * *.").

[13] See also *Smith v Rhay*, 419 F2d 160, 163 (CA 9, 1969) ("Although Smith was told that he had the right to an attorney, he was not, insofar as the record of the hearing before the trial judge concerning the admissibility of the confessions indicates, told, as required by *Miranda*, that he had the right to the presence of an attorney and that, if he could not afford one, a lawyer could be appointed to represent him *prior to any questioning*.").

[14] The Court of Appeals in this case also cited several out-of-state court cases in support of its holding that general "right to an attorney" warnings do not comply with *Miranda*. See *Mathews*, ___ Mich App at ___, slip op at 8-9.

G. Conclusion

This Court should grant leave to appeal to address whether, under *Miranda* and its progeny (especially *Powell*), the warning in this case sufficiently advised defendant that she had the right to an attorney during interrogation. The people urge the Court to answer this question in the affirmative. *Miranda* itself expressly approved FBI warnings very similar to the warnings given in the instant case. In particular, the Supreme Court stated in *Miranda* that the FBI's general "right to an attorney" warning was "consistent with the procedure which we delineate today" and "can readily be emulated by state and local enforcement agencies." *Miranda*, 384 US at 483-484, 486. The Supreme Court likely made this statement because a general "right to counsel" warning given before interrogation reasonably conveys to the suspect that he or she has the right to an attorney before and during interrogation. This Court should take guidance from *Miranda* and uphold the validity of the warnings in this case.

Further, before the detective in this case advised defendant of her rights, he said, "[b]efore any questions are asked of you, you should know . . . ." (Advice of Rights Form [Appendix D]; IT I [Appendix C]). It was clear from these warnings that defendant's rights (including her right to an attorney) applied immediately and before questioning. Conversely, the warnings could not reasonably be understood to mean that although defendant had to be *advised* of her rights before being questioned, she could not *invoke* those rights before or during questioning. Just as it would be unreasonable for defendant to think that she did not have a right to remain silent until some unspecified point in time after the interrogation, the same would apply to her right to a lawyer. Instead, as the Court of Appeals dissent explained, by the detective telling defendant that he had to advise her of her rights before questioning her, the detective effectively conveyed to her that those rights, including the right to a lawyer, applied

before and during questioning. *Mathews*, ___ Mich App at ___, slip op at 2 (O'Connell, P.J., concurring in part and dissenting in part). And as our Court of Appeals held in *Gilleylem*, "[t]o advise an accused that he may have an attorney present before questioning is sufficient 'to fairly apprise an accused that he had the right to counsel *during* interrogation.'" *Gilleylem*, 34 Mich App at 395 (citations omitted).

The detective's warning that defendant had the right to a lawyer did not include any temporal limitations or make the right to counsel conditional in any way. Nothing in the warnings given to defendant suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general. *Id.* at 360-361; see also *Powell*, 559 US at 61. Thus, the warning could not have misled defendant into believing that her right to counsel was linked to some future point in time after the police interrogation or was conditioned upon some event. *Prysock*, 453 US at 360. Instead, the general warning that defendant had a right to an attorney effectively conveyed that defendant had the right to counsel immediately and unconditionally, which included before and during interrogation. A comparison of the "right to counsel" warning with the "right to silence" warning supports this conclusion. *Miranda* does not require the police to explicitly advise a suspect that he or she has the right to remain silent *at this time* or *during the interview*. *Miranda*, 384 US at 444, 479. This is undoubtedly because the warning that the suspect has the right to remain silent, by itself, adequately conveys that the right to silence is effective immediately and continues forward through the interrogation. The same should apply to the "right to counsel" warning.

The Court of Appeals opinion in this case appears to require the police to explicitly advise suspects that they have the right to the presence of an attorney both before and during interrogation. See *Mathews*, ___ Mich App at ___, slip op at 11-12. But the United States

Supreme Court has rejected this position, stating that while such "advice is admirably informative, . . . we decline to declare its precise formulation necessary to meet *Miranda*'s requirements." *Powell*, 559 US at 64. In *Powell*, the Supreme Court held, "Although the warnings were not the *clearest possible* formulation of *Miranda*'s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading." *Powell*, 559 US at 63 (emphasis in original). This statement applies equally in the instant case. Although it would have been more informative for the detective to explicitly tell defendant that she had the right to an attorney before and during interrogation, the detective's warnings, when examined as a whole and in a practical and common-sense manner, reasonably conveyed to defendant her rights as required by *Miranda*.[15]

This Court should grant leave to appeal to determine whether *Miranda* warnings must include an explicit warning that the defendant has a right to a lawyer present before and during interrogation, or whether a more general warning that the defendant has a right to a lawyer can be sufficient. This is an issue of major significance to this state's jurisprudence. MCR 7.305(B)(3). It does not appear that this Court has ever addressed the issue of whether a general "right to an attorney" warning before an interrogation, without any temporal limitations, satisfies *Miranda*. There also exists a split in the federal circuit courts of appeal and state appellate courts regarding this issue. This Court should grant leave to appeal to clarify where Michigan stands on this issue. For the reasons stated above, the people contend that the warning in this case that

[15] In defendant's Court of Appeals brief, she claimed, "In this case the Wixom officers did not fully or accurately advise Defendant of her *Miranda* rights and the People admit this." (Defendant-Appellee's Court of Appeals Brief, 19.) But the people admit no such thing. In fact, the people argue that although the warnings were not a verbatim recitation of the language from the *Miranda* opinion, they satisfied *Miranda* because they reasonably conveyed the rights as required by *Miranda*. See *Powell*, 559 US at 60.

"[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer" was sufficient under *Miranda* to convey to defendant that she had a right to a lawyer during questioning.

Defendant's statements in this murder case are an integral part of the people's ability to prove that defendant committed a premeditated murder. If the people go to trial without this evidence and defendant is acquitted of murder, double jeopardy will preclude a retrial, and the admissibility of defendant's confession will become moot. Thus, the people will suffer substantial harm if forced to go to trial and await final judgment before taking an appeal of the trial court's suppression of defendant's statements. Therefore, this Court should grant leave to appeal or a mini oral argument on the application to address this jurisprudentially significant issue.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Matthew A. Fillmore, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court grant leave to appeal or a mini oral argument on the application.

Respectfully Submitted,

JESSICA R. COOPER
Prosecuting Attorney
Oakland County

THOMAS R. GRDEN
Chief, Appellate Division

By: /s/ Matthew A. Fillmore
(P59025)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 452-9178

DATED: July 17, 2018