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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,

Supreme Court
Docket No. 156542

-vs-

LARICCA SEMINTA MATHEWS,

Defendant-Appellee.
_______________________________________/

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

Defendant-Appellee's Response to
Plaintiff-Appellant's Application for Leave to Appeal

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JURISDICTIONAL STATEMENT

The Defendant accepts the People's statement of jurisdiction and agrees that this Honorable Court may consider the People's application for leave to appeal.

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QUESTION PRESENTED

1. To comply with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d (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 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 the issue?

   The People answered "Yes"

   Defendant answers "No"

   The circuit court did not answer this question.

   The Court of Appeals did not answer this question.

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COUNTER-STATEMENT OF FACTS[1]

Following her arrest, the Defendant was brought to the Wixom Police Department. Once there she was interviewed by Detective Brian Stowinsky and later by Sergeant Michael DesRosiers.[2] The purported advice of rights prior to Stowinsky's interview is accurately stated in the People's Application for Leave to Appeal (hereinafter "People's Application"), along with the purported written advice of rights.[3]

Defendant moved the trial court to suppress the statements because both the verbal and written advice of rights were deficient and the resulting statements were inadmissible at trial. Specifically, the officers did not advise Defendant of her rights to have a lawyer present, or to remain with her throughout questioning or to terminate questioning at any point. Defendant argued that the warnings in this case were insufficient on their face. She also argued that any of the so-called *Miranda*[4] exceptions relied upon by the People, which were crafted when the Supreme Court stated that *Miranda* was non-constitutional or merely prophylactic,

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[1] Defendant largely accepts the People's statement of facts. However the within recitation is provided to supplement those areas where additional information is relevant.

[2] Stowinsky conducted the first interview at approximately 2:43 p.m., which lasted for 61 minutes. DesRosiers' interview began the same day at 6:00 p.m., for 22 minutes.

[3] *See* Appendix E to People's Application. This document, a very non-standard waiver form to say the least, which is included in the People's Statement of Facts, was described by the trial court as "the cheesiest advice – *Miranda* advice – that I have ever seen," to which the Assistant Prosecutor replied "Judge, I'd have to agree. . . . I'm not disputing that by any means." *Id* at 6.

[4] *Miranda v Arizona*, 384 US 436, 439; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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were no longer valid in light of the holding in *Dickerson v United States*[5] that *Miranda* did indeed announce a constitutional standard.

The trial court granted the motion to suppress, holding that the warnings given did not adequately convey to Defendant her right to have a lawyer present throughout questioning. The trial court did not rule on the issue of the officers' failure to advise Defendant of her rights to terminate questioning at any point.

The People filed an interlocutory application for leave to appeal in the Court of Appeals that was denied for lack of merit. The People then filed an interlocutory application for leave to appeal with this Honorable Court, which in lieu of granting the application remanded the case to the Court of Appeals as on leave granted.

The Court of Appeals, by a 2-1 majority, affirmed the trial court's suppression of the Defendant's statements based on the failure to properly advise her of her *Miranda* rights.[6] The majority carefully considered the competing schools of thought as to the scope of the warning related to the presence of counsel, and held the more explicit warning of the right to have counsel present before and during interrogation was required.[7] Specifically, the court stated that "we hold that a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the 'right to an attorney' that does not, when the warning

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[5] 530 US 428, 435; 120 S Ct 2326; 147 L Ed 2d 405 (2000).

[6] *People v Mathews*, ___ Mich App ___ ; ___ NW2d ___ (2018). *See* People's Application at Appendix A. Judge O'Connell dissented because he believed that the advice of rights given here satisfied *Miranda*.

[7] *See eg id* at 11 n 8 ("for *Miranda* warnings to be meaningful, there needs to be an overt expression of the immediacy of the right to counsel—that it 'exists before and during interrogation.'" (quoting 2 LaFave et al., Criminal Procedure (4th ed), § 6.8(a), pp 886-887))

is read in its entirety, reasonably convey the suspect's right to consult with a lawyer and to have an attorney present during interrogation."[8] The court continued, holding that the right to the presence of counsel during interrogation "must be overtly conveyed to a suspect under *Miranda*."[9]

Additional facts may be discussed as relevant to the issues presented herein.

[8] *Id* at 11.
[9] *Id*.

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ARGUMENT

I. THE SO-CALLED WARNINGS IN THIS CASE OMITTED CRITICAL ADVICE OF RIGHTS TO DEFENDANT AND DID NOT MEET THE REQUIREMENTS NECESSARY TO SATISFY *MIRANDA* AND SECURE A VALID WAIVER OF HER STATE AND FEDERAL PRIVILEGES AGAINST SELF-INCRIMINATON.

Issue preservation

The Defendant properly moved the trial court for an order suppressing the statements in this case, which was granted over the People's opposition. This issue was properly preserved for appeal.

Standard of Review

This Court reviews questions of law de novo.[10] The Court also reviews de novo a trial court's conclusions of law on a motion to suppress evidence.[11]

Analysis

The constitutional right to remain silent is a well established liberty interest[12] that is guarded under both federal[13] and state constitutional law.[14]

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[10] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[11] *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993).

[12] *See eg Chavez* v *Martinez*, 538 US 760, 788; 123 S Ct 1994; 155 L Ed 2d 984 (2003) (Stevens, J., dissenting); *Malloy* v *Hogan*, 378 US 1, 8; 84 S Ct 1489; 12 L Ed 2d 653 (1964) ("the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence").

[13] US CONST AMEND V.

[14] MICH CONST 1963 ART I, § 17. *See also* US CONST AMEND XIV; *Malloy* v *Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

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Perhaps chief among these protections is the recognition 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.'"[15] It is well established that a defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity.[16] This is true even if there is ample evidence aside from the confession to support the conviction.[17]

The People concede that the warnings in this case failed to "explicitly advise defendant that she had the right to the presence of a lawyer during the interrogation."[18] The People instead try to spin the little advice that was given as sufficient to reasonably convey the required rights, and ask this Honorable Court to instead focus its attention on questionable precedents, or holdings in other jurisdictions, and to determine that the deficient warnings in this case were 'close enough' to warrant admissibility of statements despite their violation of *Miranda* and *Dickerson*.

The two key issues in this case are whether the insufficient *Miranda* warnings can be ignored and the statements admitted anyway; and whether the

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[15] *Dickerson* v *United* States, 530 US 428, 435; 120 S Ct 2326; 147 L Ed 2d 405 (2000) (quoting *Miranda* v *Arizona*, 384 US 436, 439; 86 S Ct 1602; 16 L Ed 2d 694 (1966)).

[16] *Rogers v Richmond*, 356 US 534, 544; 81 S Ct 735; 5 L Ed 2d 769 (1961); *Wan v United States* 266 US 1; 45 S Ct 1; 69 L Ed 131 (1924).

[17] *Malinski v New York*, 324 US 401, 404; 65 S Ct 781; 89 L Ed 1029 (1945); *Bram v United States*, 168 US 532, 540-42; 18 S Ct 183; 42 L Ed 568 (1897).

[18] People's Application at p 10.

cases that would purportedly support that outcome remain good law. Although the People invite this Honorable Court to establish landmark jurisprudence in reconciling the tea leaves of various other state and federal court decisions, it need not (and should not[19]) do so in order to resolve the issue presented because, among other things, the warnings in this case fail to satisfy *Miranda* itself.

A. THE WARNINGS REQUIRED BY *MIRANDA v ARIZONA*.

Although somewhat passé in the present day due to the proliferation of the perceived requirements of *Miranda* throughout popular culture,[20] the decision itself bears repeating. *Miranda* requires that a suspect in custody

> must be warned prior to any questioning that he 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

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[19] *See Federated Publs, Inc v Michigan State Univ Bd of Trustees*, 460 Mich 75, 93; 594 NW2d 491 (1999) ("this longstanding rule requires us to consider constitutional questions only as a last resort, and to avoid such questions where a nonconstitutional basis exists for resolving the matter."); *Lisee v Secretary of State*, 388 Mich 32, 40-41; 199 NW2d 188 (1972) ("constitutional questions will not be passed upon when other decisive questions are raised by the record which dispose of the case." (internal quotation omitted)); *In re MS*, 291 Mich App 439, 442; 805 NW2d 460 (2011) ("we will not address constitutional issues when, as here, we can resolve an appeal on alternative grounds."). *See also Burton v United States*, 196 US 283, 295; 25 S Ct 243; 49 L Ed 482 (1905) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."); *Liverpool, NY & PSS Co v Emigration Commr's*, 113 US 33, 39; 5 S Ct 352; 28 L Ed 899 (1885) (the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."). *Accord*, *Ashwander v TVA*, 297 US 288, 347; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring); *Bowman v Tennessee Valley Authority*, 744 F2d 1207, 1211 (CA 6, 1984).

[20] *See eg Mitchell v United States*, 526 US 314, 331-32; 119 S Ct 1307; 143 L Ed 2d 424 (1999) (Scalia, J., concurring) (discussing *Miranda* being embedded in routine police practice to the point where the warnings have become part of our national culture).

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> afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. . . . [U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[21]

The failure to adequately provide such warnings renders any resulting statement per se involuntary and inadmissible,[22] even if the court "might not find the defendant's statements to have been involuntary in traditional terms."[23]

Although the Supreme Court has not required absolute rigidity in the specific words used, the "warnings *Miranda* requires are invariable" and must be given in full.[24] There is no room for selectivity when it comes to advising of these critical rights. Indeed the Court has held that these particular "safeguards *must be observed*"[25] and that the warnings are "*an absolute prerequisite* in overcoming the inherent pressures of the interrogation atmosphere."[26]

1. Right to counsel at all times during interrogation.

The *Miranda* Court was explicit: "we hold that an individual held for interrogation must be *clearly informed* that he has the right to consult with a

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[21] *Miranda*, 384 US at 479 (emphasis added).

[22] *Id* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

[23] *Id* at 457.

[24] *Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). *See also California v Prysock*, 453 US 335, 359; 101 S Ct 2806; 69 L Ed 2d 696 (1981). Although the People are quick to cite Defendant's preceding statement of the law about absolute rigidity in their Application, People's Application at p 23 n 13, they conveniently skip over the further statement that the warnings are "invariable" and must be given in full.

[25] *Miranda*, 384 US at 467 (emphasis added)

[26] *Id* at 468 (emphasis added).

lawyer *and to have the lawyer with him* during interrogation."[27] The Wixom officers did not satisfy this requirement. They did say Defendant had a right to a lawyer, but did not advise her that she had the right to have a lawyer with her before or during interrogation. *Miranda* requires that she be advised of both. She was not and the inquiry really ought to end there.

2. The failure to give adequate warnings precludes the admissibility of any subsequent statement.

"The requirement of warnings and waiver of rights is . . . fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[28] "[T]he accused *must be adequately and effectively appraised of his rights* and the exercise of those rights must be fully honored."[29] "Without the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'"[30]

"It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the

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[27] *Id* at 470-71 (emphasis added).

[28] *Dickerson* 530 US at 441 (quoting *Miranda v Arizona*, 384 US at 479) (ellipsis in original).

[29] *Id* at 440 (quoting *Miranda v Arizona*, 384 US at 467) (emphasis added).

[30] *Miranda*, 384 US at 466 (quoting *Mapp v Ohio*, 367 US 643, 685; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (Harlan, J., dissenting) and citing *Pointer v Texas*, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965)).

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interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury."[31] "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, *we will not pause to inquire in individual cases whether the defendant was aware of his rights* ***without a warning being given***. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; ***a warning is a clear cut fact.***"[32] "[W]hatever the background of the person interrogated, a *warning at the time of the interrogation is* ***indispensible*** to overcome its pressures and to insure that the individual knows he is free to exercise the privilege *at that point in time*."[33]

In this case the Defendant was not advised of her right to have counsel present and available for consultation before or during questioning. She also was not advised that she had the right to cut off the interrogation at any point if she wished to. The warnings not only fail to fully convey what her rights were, but they ignored the directive of "affording a continuous opportunity to exercise" them.[34] The omission of these required warnings renders Defendant's subsequent statements inadmissible against her at trial and the Court of Appeals' opinion

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[31] *Id* at 468.
[32] *Id* at 468-69 (footnote omitted) (emphasis added).
[33] *Id* at 469 (emphasis added). *Accord*, *Dickerson*, 530 US at 440.
[34] *Miranda*, 384 US at 490.

affirming their suppression should be upheld by either explicitly affirming that ruling, or by denying the People's Application.

B. EVEN IF ALL THE CASES UPON WHICH THE PEOPLE RELY REMAIN GOOD LAW, THE WARNINGS IN THIS CASE WERE CONSTITUTIONALLY INSUFFICIENT.

Rather than arguing that the warnings in this case were accurately given in full, the People instead urge this court to give them a pass because the warnings got some of Defendant's rights correct, even if they were deficient in other key respects.[35] Deferring for the time being that most of the cases upon which the People rely are no longer good law after *Dickerson*,[36] even if they were valid they are factually distinguishable. In support of the proposition that less than the required warnings may still suffice for admissibility, each of the cases cited discusses a suspect's right to have an attorney "present" or "with you," which advice was lacking in the present case.

The People cite *Duckworth v Egan*[37] and *California v Prysock*[38] for the principles that *Miranda* should not be examined as if construing a will or easement and therefore warnings need not be given in the exact form described in *Miranda*,[39] and that "no talismanic incantation was required" to satisfy *Miranda*.[40] But each

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[35] *But see Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010); *Dickerson v United States*; *California v Prysock*, 453 US 335, 359; 101 S Ct 2806; 69 L Ed 2d 696 (1981); *Miranda v Arizona*.

[36] *See infra* Section I.C.

[37] 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989).

[38] 453 US 355; 101 S Ct 2806; 69 L Ed 2d 696 (1981).

[39] *See Duckworth*, 492 US at 202-03.

[40] *Prysock*, 453 US at 359.

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case is distinguishable—particularly in the context of the issue at bar—because each case had advice about the presence of counsel during questioning. In *Duckworth* the defendant was advised "[y]ou have a right to talk to a lawyer for advice before we ask you any questions, and to *have him with you during questioning*."[41] In *Prysock* the defendant was warned that he had "the right to talk to a lawyer *before you are questioned*, have him *present with you while you are being questioned, and all during the questioning*."[42] The Wixom officers' advice to Defendant does not even reach the level of what *Duckworth* and *Prysock* liberally allowed, regardless of the verbiage used.

C. AFTER *DICKERSON*, THERE IS NO LONGER ANY BASIS TO ADMIT A STATEMENT TAKEN IN THE ABSENCE OF A REQUIRED *MIRANDA* WARNING, AND ANY SUCH STATEMENT IS PER SE INVOLUNTARY.

If this Honorable Court were to accept the People's invitation to apply the preceding holdings in their favor, it would first need to determine whether those cases cited by the People, which were decided after *Miranda* but before *Dickerson*, remain valid for the propositions alleged. The entire crux of the People's argument is that various post-*Miranda* decisions held that strict compliance with *Miranda* was not required.[43] This would be understandable had it not been for the decision in *Dickerson v United States*.[44]

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[41] *Duckworth*, 492 US at 198 (emphasis added).

[42] 453 US at 356 (emphasis added).

[43] *See eg* People's Application at 9-10 (citing *Duckworth v Egan* (1989); *California v Prysock* (1981); *Rhode Island v Innis* (1980)), 14 (citing *People v*

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The genesis of the People's reliance on the pre-*Dickerson* cases, and in fact the confusion throughout many subsequent decisions across the country, can be found in the *Miranda* decision itself. For example, the Court stated:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.[45]

The Court continued, apparently inviting the states and federal legislatures to act in its place:

> Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.[46]

In the years following *Miranda* the Court continued to water down the basis for its holding, characterizing the warnings as less than constitutionally required. The Court diminished the warnings as merely "recommended procedural safeguards,"[47] "only . . . prophylactic,"[48] and stated that "*Miranda*'s safeguards are

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Johnson (1979); *People v Bynum* (1970); *People v McClure* (1971)) and 15 (citing *Duckworth* again; *People v Watkins* (1975) and *People v Gilleylem* (1971)).

[44] 530 US 428; 120 S Ct 2326; 147 L Ed 2d 405 (2000).

[45] *Miranda*, 384 US at 467.

[46] *Id.*

[47] *Davis* v *United States*, 512 US 452, 457-58; 114 S Ct 2350; 129 L Ed 2d 362 (1994). *Accord, Duckworth v Egan*, 492 US 195, 201; 109 S Ct 2875; 106 L Ed 2d 166 (1989).

[48] *Michigan* v *Harvey*, 494 US 344, 350; 110 S Ct 1176; 108 L Ed 2d 293 (1990).

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not constitutional in character."[49] Subsequent decisions went so far as to explicitly state that it was "now well established" that *Miranda* warnings are "not themselves rights protected by the Constitution"[50] and that a violation of *Miranda* does not involve "actual infringement of the suspect's constitutional rights."[51]

However, in 2000, the United States Supreme Court "clarified" this line of jurisprudence handed down in the 34 years following its landmark decision in *Miranda* that had seemed to indicate that *Miranda* perhaps did not really mean what it said. The Court, despite prior holdings and statements to the contrary,[52]

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[49] *Withrow* v *Williams*, 507 US 680, 690-91; 113 S Ct 1745; 123 L Ed 2d 407 (1993).

[50] *Moran* v *Burbine*, 475 US 412, 424-25; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

[51] *Oregon* v *Elstad*, 470 US 298, 307-08; 105 S Ct 1285; 84 L Ed 2d 222 (1985). *Accord*, *Michigan* v *Tucker*, 417 US 433, 443-44; 94 S Ct 2357; 41 L Ed 2d 182 (1974).

[52] *See Davis* v *United States*, 512 US 452, 457-58; 114 S Ct 2350; 129 L Ed 2d 362 (1994) (referring to *Miranda* warnings as "a series of recommended procedural safeguards"); *Withrow* v *Williams*, 507 US 680, 690-91; 113 S Ct 1745; 123 L Ed 2d 407 (1993) ("*Miranda*'s safeguards are not constitutional in character."); *McNeil* v *Wisconsin*, 501 US 171, 176; 111 S Ct 2204; 115 L Ed 2d 158 (1991); *Michigan* v *Harvey*, 494 US 344, 350; 110 S Ct 1176; 108 L Ed 2d 293 (1990) ("We have already decided that although statements taken in violation of only the prophylactic *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant."); *Duckworth* v *Eagan*, 492 US 195, 203; 109 S Ct 2875; 106 L Ed 2d 166 (1989) (stating that *Miranda* warnings are not required by the constitution); *Arizona* v *Roberson*, 486 US 675, 681; 108 S Ct 2093; 100 L Ed 2d 704 (1988); *Connecticut* v *Barrett*, 479 US 523, 528; 107 S Ct 828; 93 L Ed 2d 920 (1987) (characterizing the *Miranda* rules as "designed to insulate the exercise of Fifth Amendment rights."); *Moran* v *Burbine*, 475 US 412, 424-25; 106 S Ct 1135; 89 L Ed 2d 410 (1986) (ironically stating that "*As is now well established*, '[the] . . . *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected."' Their objective is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly

held that "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts."[53]

In this about-face, which surprised many scholars,[54] the Court abandoned and expressly repudiated its prior statements and holdings regarding the non-

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unconnected to any federal right or privilege.") (emphasis added; ellipsis and brackets in original); *Oregon* v *Elstad*, 470 US 298, 307-08; 105 S Ct 1285; 84 L Ed 2d 222 (1985) (stating that the violation of *Miranda* does not involve "actual infringement of the suspect's constitutional rights" and that "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered *no identifiable constitutional harm*." (emphasis added)); *New York* v *Quarles*, 467 US 649, 654; 104 S Ct 2626; 81 L Ed 2d 550 (1984) (holding that "the prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the constitution.'"); *Edwards* v *Arizona*, 451 US 477, 492; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (Powell, J., concurring) (noting that the *Miranda* Court "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution."); *United States* v *Henry*, 447 US 264, 274; 100 S Ct 2183; 65 L Ed 2d 115 (1980); *North Carolina* v *Butler*, 441 US 369, 374; 99 S Ct 1755; 60 L Ed 2d 286 (1979); *Michigan* v *Tucker*, 417 US 433, 443-44; 94 S Ct 2357; 41 L Ed 2d 182 (1974) (holding that whether the "police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination" was a "separate question" from "whether it instead violated only the prophylactic *rules* developed to protect that right" and that the "procedural safeguards" adopted in *Miranda* "were not themselves rights protected by the constitution."); *Michigan* v *Payne*, 412 US 47, 53; 93 S Ct 1966; 36 L Ed 2d 736 (1973). *See also Oregon* v *Haas*, 420 US 714; 95 S Ct 1215; 43 L Ed 2d 570 (1975) (holding that a defendant's statement taken in violation of *Miranda* that was nonetheless "voluntary" could be used at trial for impeachment purposes); *New Jersey* v *Portash*, 440 US 450, 459; 99 S Ct 1292; 59 L Ed 2d 501 (1979); *Mincey* v *Arizona*, 437 US 385, 397-98; 98 S Ct 2408; 57 L Ed 2d 290 (1978) (holding that while statements obtained in violation of *Miranda* may be used for impeachment if otherwise trustworthy, the constitution prohibits only "any criminal trial use against a defendant of his *involuntary* statement." (emphasis added)); *Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977) (holding that a *Miranda* violation had diminished status in federal habeas corpus appeals); *Harris* v *New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971) (holding that a statement taken in violation of *Miranda* is still admissible for impeachment in rebuttal). *Cf also Berkemer* v *McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984) (stating that *Miranda* requires strict enforcement "only in 'those types of situations in which the concerns that powered the decision are implicated.'").

[53] *Dickerson*, 530 US at 431.

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constitutional nature of the *Miranda* decision itself—opinions that ironically a majority of the justices subscribing to the lead opinion in *Dickerson* had at one time or another authored. Instead, the Court now pontificated, *Miranda* was indeed a constitutionally based decision and its holding had the full force and effect of the Constitution.[55] By more than mere implication then, the *Dickerson* Court confirmed that any statement taken in violation of the *Miranda* warnings, which it now classified as "constitutionally required"[56] *shall be held to have been compelled*.[57]

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[54] *See eg* Kenneth W. Starr, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 191-208 (2003); Paul G. Cassell & William G. Otis, *Fixing Miranda*, THE PROSECUTOR, Jan/Feb 2000 at 37-38; Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L REV 175 (1999); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN L REV 1055 (1998); Paul G. Cassell, *Miranda's Negligible Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV JL & PUB POL'Y 327 (1997); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW U L REV 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW U L REV 387 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L REV 839 (1996); Harold J. Rothwax, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE, 86-87 (1996); Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA L REV 859 (1979). *See also Dickerson v United States*, 530 US 428, 445; 120 S Ct 2326; 147 L Ed 2d 405 (Scalia, J., dissenting).

[55] *See Dickerson*, 530 US at 431. *Accord, McGraw* v *Holland*, 257 F3d 513, 518 (CA 6, 2001); *Marsack* v *Howes*, 300 F Supp 2d 483, 494-95 (ED Mich, 2004); *David* v *Lavinge*, 190 F Supp 2d 974, 979 (ED Mich, 2002). *Cf United States* v *Guerra*, 237 F Supp 2d 795, 802 (ED Mich, 2003).

[56] *Dickerson*, 530 US at 440.

[57] *Id* at 435 (citing *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)) (emphasis added). *See also United States* v *Patane*, 542 US 630; 124 S Ct 2620, 2632; 159 L Ed 2d 667 (2004) (Souter, J., dissenting).

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Obviously any such statement may not be admissible against its maker in the prosecution's case-in-chief.[58] Indeed, after *Dickerson*, "the *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect"[59] because *Dickerson* confirmed *Miranda*'s directive that "[t]he requirement of warnings and waiver of rights is . . . fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[60]

This is crucially important because the underlying premise of the cases heavily relied upon by the People in seeking to allow a more permissive reading of *Miranda* has been eviscerated by subsequent jurisprudence. The sentence immediately preceding *Duckworth*'s statement (in 1989, eleven years before *Dickerson*) about wills and easements cites *Michigan v Tucker*[61] for the proposition that "Miranda warnings are 'not themselves rights protected by the Constitution.'"[62] After *Dickerson* this is simply untrue and untenable. The same goes for the previously decided *Prysock* (1981) and *Innis* (1980) decisions. It is irreconcilable that a series of decisions justifying exceptions to, or relaxations of, *Miranda* based on it purportedly being merely "recommended procedural safeguards,"[63] "only . . .

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[58] *Dickerson* at 435; *Miranda* at 458-59; *Malloy* v *Hogan*, 378 US 1, 8; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

[59] *Missouri* v *Siebert*, 542 US 600; 124 S Ct 2601, 2615; 159 L Ed 2d 643 (2004) (Kennedy, J., concurring).

[60] *Dickerson*, 530 US at 441 (quoting *Miranda v Arizona*, 384 US at 479) (ellipsis in original).

[61] 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974).

[62] *Id* at 444.

[63] *Davis* v *United States*, 512 US 452, 457-58; 114 S Ct 2350; 129 L Ed 2d 362 (1994). *Accord, Duckworth v Egan*, 492 US 195, 201; 109 S Ct 2875; 106 L Ed 2d 166 (1989).

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prophylactic,"[64] or "not constitutional in character"[65] could possibly remain viable when *Dickerson* later held that the *Miranda* warnings were in fact "constitutionally required."[66]

The language of the opinion is key: when *Dickerson* declared once and for all that *Miranda* really was a constitutional decision, and did away with the distinction between Fifth Amendment violations that are merely technical and those that truly run afoul of the Constitution,[67] the permissive effect of contrary decisions cannot reasonably be relied upon and they are not even arguably controlling authority.[68]

This is critical to understanding both the holding in *Dickerson* and why the People's argument here must fail. *Dickerson* reaffirmed that *Miranda* really did

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[64] *Michigan* v *Harvey*, 494 US 344, 350; 110 S Ct 1176; 108 L Ed 2d 293 (1990).

[65] *Withrow* v *Williams*, 507 US 680, 690-91; 113 S Ct 1745; 123 L Ed 2d 407 (1993).

[66] *Dickerson*, 530 US at 440. *See also Missouri* v *Siebert*, 542 US 600, 620; 124 S Ct 2601; 159 L Ed 2d 643 (2004) (Kennedy, J., concurring) ("the *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect.").

[67] *See eg Oregon* v *Elstad,* 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

[68] *See eg Singleton* v *United States*, 74 Fed Appx 536, 543 n 4, 2003 US App Lexis 18096, 19 n 4, No 02-3272 (CA 6, 2003) (unpublished decision), *cert denied*, 540 US 1192; 124 S Ct 1442; 158 L Ed 2d 103 (2004) ("In *Dickerson* . . . the Supreme Court held that *Miranda* was a constitutional, rather than merely prophylactic, rule. This would seem to alter the decision in *Elstad*, which was premised on a distinction between technical *Miranda* violations (which would not trigger the application of the fruit-of-the-poisonous-tree doctrine) and actual violations of the Fifth Amendment (which would)—a distinction that no longer appears to exist." (citation omitted)).

The present viability of the "exceptions" to *Miranda* that were handed down prior to *Dickerson* continues to be a subject of debate, though the authorities continue to mount on the side that *Dickerson* effectively overruled these exceptions that flow from the underlying spirit and purpose of the *Miranda* decision itself, namely proper advice of the right to silence and counsel. *Cf United States v Patane*, 542 US 630; 124 S Ct 2620; 159 L Ed 2d 667 (2004); *Missouri v Seibert*, 542 US 600, 612; 124 S Ct 2601; 159 L Ed 2d 643 (2004).

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announce a constitutional decision, and it nullified any basis for the so-called "exceptions," or holdings by any courts that allowed confessions to be admissible on less than the minimum warnings required by *Miranda*. Even *Miranda* itself commands that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given."[69] Those warnings include the "right to *the presence of* an attorney"[70] and that the individual "must be *clearly informed* that he has the right to consult with a lawyer *and have a lawyer with him* during interrogation."[71] And the Supreme Court has opined, post-*Dickerson*, that where a warning is ineffective, the defendant cannot validly waive his rights.[72]

However divergent the *Dickerson* holding appeared to be from then-existing *Miranda* jurisprudence, it was still consistent with the announcement of the rules promulgated by the *Miranda* decision itself. There the Court stated that the warnings were the minimum that must be observed: "unless we are shown other procedures which are *at least as effective* in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [ ] safeguards

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[69] *Miranda*, 384 US at 470. *Accord*, *id* at 467 ("the following safeguards must be observed.")

[70] *Id* at 444 (emphasis added).

[71] *Id* at 471 (emphasis added).

[72] *Missouri v Seibert*, 542 US 600, 612; 124 S Ct 2601; 159 L Ed 2d 643 (2004) (plurality opinion with five justices voting to suppress the statements). *See also id* ("unless the warnings could place a suspect . . . in a position to make [ ] an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*".); *United States v Pacheco-Lopez*, 531 F3d 420, 424 (CA 6, 2008) ("Any statements or testimonial acts made prior to the administration and voluntary waiver of *Miranda* rights are irrefutably presumed involuntary and may not be used in the prosecution's case-in-chief.").

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must be observed."[73] Subsequent cases have concurred, and have made it clear that *Miranda* rights are "a fundamental trial right"[74] and that the remedy for failing to give sufficient warnings is exclusion of the unwarned statements.[75]

Quite simply, any case suggesting that a warning that comprises less than those things *Miranda* required could be a fully effective equivalent to *Miranda* is directly contrary to *Dickerson*'s holding that *Miranda* establishes the "constitutionally required" minimum safeguards.[76] *Miranda* only permits warnings that are "at least as effective"[77] as those it required—not less effective warnings that received a pass in the post-*Miranda*/pre-*Dickerson* era.

In this case the Wixom officers did not accurately state Defendant's rights under *Miranda* and the People admit this. Once *Dickerson* affirmed that *Miranda* was the constitutionally required minimum standard, failing to give the full and complete warnings required by that decision is not acceptable. This Honorable Court would be wise not to accept the People's invitation to look the other way and sweep the Defendant's constitutional protections under the rug like the officers tried to do.[78]

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[73] *Miranda*, 384 US at 467 (emphasis added).

[74] *United States v Patane*, 542 US 630, 641 (2004) (internal citation omitted).

[75] *Eg id* at 641-42.

[76] *Dickerson*, 530 US at 440.

[77] *Miranda*, 384 US at 467.

[78] Likewise, the Defendant does not suggest that reading *Miranda* rights is tantamount to a talismanic incantation. Quite the contrary: the Defendant states that *Miranda* has been around for more than fifty years and police officers need not be witches or wizards to accurately convey to a suspect the warnings it requires. *See generally Mitchell v United States*, 526 US 314, 331-32; 119 S Ct 1307; 143 L Ed 2d 424 (1999) (Scalia, J., concurring) (discussing *Miranda* being embedded in

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D. COMMENTARY ON PRIOR MICHIGAN COURT OF APPEALS JURISPRUDENCE.

The People provide an overview of prior decisions of our Court of Appeals that could have been relevant to the present issue.[79] Although these would have no precedential effect on this Honorable Court (or on the Court of Appeals following its published decision in this case), Defendant will likewise discuss these cases because the differences in them persuasively illustrate the importance of compliance with *Miranda*'s directive about a suspect's rights to "the presence of an attorney"[80] and to be "clearly informed that he has the right to . . . have a lawyer with him during questioning."[81]

In *People v Watkins*[82] the defendant was informed she had the "right to an attorney or lawyer *present* before answering any questions or making any statements" and that she could decide to *exercise these rights at any time.*[83] In *People v Gilleylem*[84] the defendant was advised that "[y]ou may have this attorney

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routine police practice to the point where the warnings have become part of our national culture); *Rhode Island v Innis*, 446 US 291, 304; 100 S Ct 1682; 64 L Ed 2d 297 (1980) (Burger, C.J., concurring) ("the meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures."); *Van Hook v Anderson*, 488 F3d 411, 432 (CA 6, 2007) (Cole, J., dissenting) (*Miranda* warnings are "broadly embedded in society"). Although such fanciful prose may serve to divert this Honorable Court's attention from the pitifully inept verbal warnings and written form used in this case, the Defendant merely seeks to have the officers follow the law, and for the court to exclude statements taken in violation of it. There is certainly no magic in that.

[79] *See generally* People's Application at 14-16.
[80] *Miranda*, 384 US at 444.
[81] *Id* at 471.
[82] 60 Mich App 124; 230 NW2d 338 (1975).
[83] *Id* at 128 (emphasis added).
[84] 34 Mich App 393; 191 NW2d 96 (1971).

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present here before answering any questions."[85] In *People v Bynum*[86] the defendant was given a written form that stated he had "the right to have an attorney (lawyer) *present* before I answer any questions or make any statement."[87] Finally, in *People v McClure*,[88] the defendant was told he "had a right to have an attorney *present* before he answered any questions"[89] and the defendant in *People v Johnson*[90] was similarly told that he "had the right to have an attorney *present*."[91]

In permitting the admission of the defendants' statements, each of these courts emphasized that the word "present," or the other language used, imparted essential meaning. These courts found a necessary difference between advice that merely suggested a suspect would be paired with an attorney at some point, with communicating in the advice of rights that the suspect could have an attorney with him before or during the interview, and not just at some future time.[92]

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[85] *Id* at 395 (emphasis added).
[86] 21 Mich App 596; 175 NW2d 870 (1970).
[87] *Id* at 599 (emphasis added).
[88] 29 Mich App 361; 185 NW2d 426 (1971).
[89] *Id* at 367 (emphasis added).
[90] 90 Mich App 415; 282 NW2d 340 (1979).
[91] *Id* at 420 (emphasis added).
[92] As much as the People would like to have this Honorable Court pick and choose to which words meaning should be attributed in a *Miranda* warning, *see eg* People's Application at pp 22-23 ("*Miranda* does not require any precise magic words to comply with the law"), individual words are often critical to a proper decision. Here the trial court found the word "present" to be important (as have numerous courts of appeal), and rightfully so. Not only do the cases discuss its importance in terms of setting a temporal reference necessary for a proper advice of *Miranda* rights, but that language is part of the *Miranda* holding itself and this Honorable Court would be wise to not indulge the People's suggestion that this vital provision should be casually ignored.

Det. Stowinsky gave a purely cursory statement that "[y]ou have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free." This did nothing to inform Defendant that the lawyer could be there before, during or after her interrogation, that she could consult with that lawyer before deciding whether to answer questions in the first place, or to continue to do so once the interview commenced. Neither of the officers in this case advised Defendant of these critical options.

Moreover, there are a series of pre-*Dickerson* cases that support the Court of Appeals decision affirming the trial court's suppression of the statements. In *People v Jourdan*[93] the police gave warnings almost identical to Stowinsky's. There the defendant "was advised of his right to remain silent, that anything he said could and would be used against him in court, that he was entitled to an attorney and an attorney would be furnished to him if he could not afford to employ one."[94] Likewise, in *People v Whisenant*[95] the defendant was advised of the right to an attorney but "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."[96] The court held that "[m]erely informing defendant at the time of arrest that he had a right to counsel did not meet the requirements of *Miranda*."[97]

[93] 14 Mich App 743; 165 NW2d 890 (1968).
[94] *Id* at 744.
[95] 11 Mich App 432; 161 NW2d 425 (1968).
[96] *Id* at 437.
[97] *Id*.

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In addition, the court in *People v Ansley*[98] held that *Miranda* was violated where the defendant was advised that "you have a right to counsel, and . . . if [you] didn't have the money to procure counsel, the court would appoint [you] one"[99] because the "defendant was not clearly informed that he had the right to counsel *and to have counsel with him during interrogation*."[100] Although these decisions do not compel a resolution in Defendant's favor,[101] they are examples of the correct application of *Miranda*, are particularly prescient when viewed in the post-*Dickerson* era, and evidence sound reasoning this Honorable Court would be wise to adopt should it grant leave to appeal.

In that regard, the court should not accept the People's argument that the warnings in this case were a "fully effective equivalent" of *Miranda* warnings. There can be no fully effective equivalent when the officers omitted advice of each necessary right, and all of the cases upon which the People rely as to the advice of having counsel present actually note the importance of the word "present"—which the officers' recitations in this case did not include. The very fact that there are nearly a dozen Court of Appeals cases that turn on whether advice about having an

[98] 18 Mich App 659; 171 NW2d 649 (1969).
[99] *Id* at 663.
[100] *Id* (emphasis added).
[101] As stated, these cases have no precedential value for this Honorable Court. However they remain illustrative of the proper suppression of evidence when *Miranda* is not satisfied, and are persuasive on the subject. This is even more true in light of *Dickerson* and its reaffirmation of the constitutional basis of the required *Miranda* warnings upon which *Jourdan*, *Whisenant* and *Ansley* were decided. Regardless, each of the People's cases is distinguishable on its facts apart from the legal principles involved, and those principles are in serious doubt after *Dickerson*.

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attorney "present" or "with you," or not, demonstrates that there cannot be a fully effective equivalent without such language, and that even a single word can have important meaning.

E. THE WARNINGS IN THIS CASE WERE NOT A FULLY EFFECTIVE EQUIVALENT OF THE REQUIRED *MIRANDA* WARNINGS, UNDER *FLORIDA V POWELL*, OR ANY OTHER AUTHORITY.

In their Application, the People lean heavily on the United States Supreme Court decision in *Florida v Powell*[102] that upheld the warnings given in that case, and lower court cases related to it.[103] They fashion their analysis around two premises: one is that the suspect was warned that he could have a lawyer "before answering any of our questions"[104] (although he was not told he could have an attorney "during" questioning[105]); the second is that by allegedly not placing a temporal limitation on the suspect's ability to exercise his rights, the general advice about a right to counsel was sufficient. The warnings given in Powell were 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 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.*[106]

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[102] 559 US 50; 130 S Ct 1195; 175 L Ed 2d 1009 (2010).
[103] *See generally* People's Application at 19-21.
[104] *Id* at 54.
[105] *Id*.
[106] *Id* (emphasis added).

Detective Stowinsky merely said "before I question, start asking you, you should know . . . ." but was never specific that the Defendant could consult with an attorney before the actual questions were posed. Nor did he tell Defendant she could exercise her rights during the interrogation or at any other time. The Supreme Court upheld the warnings in *Powell* only because the "officers did not 'entirely omi[t],' any information *Miranda* required them to impart" and because they "informed Powell that he had . . . 'the right to use any of [his] rights at any time [he] want[ed] during th[e] interview.'"[107] In this case neither of these critical elements of advice was given to the Defendant.

Individual words can have essential meaning. This is no more novel than when courts interpret statutory language, applying the plain language before it and giving meaning to each word.[108] Certainly interpretation of state and federal constitutional law deserves no less. The inclusion of the words "present" or, depending on the grammar being used, "presence," or "with you," is critical to properly define the right to counsel.[109] Likewise, if the advice had not included the

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[107] *Id* at 62 (all brackets in original).

[108] In that context it is hornbook law that "[a]s far as possible, effect should be given to every phrase, clause, *and word* in the statute," *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d (1999) (quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995)), and that the court "must enforce clear and unambiguous statutory provisions as written." *Johnson v Recca*, 492 Mich 169, 175; 821 NW2d 520 (2012); *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

[109] *Miranda*, 384 US at 469 ("a warning at the time of interrogation is indispensible . . . to insure that the individual knows he is free to exercise the privilege *at that point in time*.") (emphasis added); *Id* at 471 ("an individual held for interrogation must be clearly informed that he has the right . . . to have the lawyer with him during interrogation."). *Accord, Dickerson*, 530 US at 440. Prior

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word "silent" when describing the privilege against self-incrimination, that advice would be completely defective. Omitting advice about having an attorney present is just as defective.

The argument that the comment "before I question . . . you should know" has some constitutional equivalence to "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*"[110] is without merit. Stowinsky's statement "before I question . . ." is more properly read to be a statement of the point in the conversation at which he was giving the warnings, not the time(s) at which the Defendant may exercise the rights about which she was told thereafter. The People imply that because the word "before" appeared as part of the dialogue that it somehow conveyed meaning to the Defendant about the scope of her rights. At best this is wishful thinking. But even if this Honorable Court accepts the People's proposition and ascribes some weight to this use of the word, it still remains insufficient to meet the requirements of *Miranda* that the suspect be "clearly

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jurisprudence from this Honorable Court likewise has recognized the importance of these words. *See eg People v Tanner*, 496 Mich 199, 207 n 3; 853 NW2d 653 (2014) ("Prior to any questioning, the person must be warned that he has the right to the *presence* of an attorney, either retained or appointed.") (emphasis added); *Id* at 207 ("The right to have counsel *present* during custodial interrogation is, in the words of the United States Supreme Court, a corollary of the right against compelled self-incrimination, because the *presence of counsel* at this stage affords a way to 'insure that statements made in the government-established atmosphere are not the product of compulsion.'") (quoting *Miranda*, 384 US at 466 (emphasis added)); *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013) (same quotation); *People v Daoud*, 462 Mich 621, 624 n 1; 614 NW2d 152 (2000) (restating the necessity of warning of the "presence of an attorney").

[110] *Miranda*, 384 US at 471 (emphasis added).

informed"[111] of her rights, and ignores that the subsequent advice given in *Powell* about "the right to use any of these rights at any time you want during this interview"[112] was completely absent in the present case. "[A] defendant's right to have counsel present at custodial interrogations must be zealously guarded."[113] The Wixom officers did not do so.

The temporal limitation argument also fails. The Court read the warnings in *Powell* as a whole and concluded that "[n]othing in the words used indicated counsel's presence would be restricted after the questioning commenced."[114] But this was *explicitly premised* on the fact that Powell was told he had "the right to use any of these rights at any time you want during this interview,"[115] which the officers did not do in this case.[116] This final clause worked to make the overall warning sufficient in the Court's opinion. In discussing the given advice of the right to counsel "before answering any of our questions" and that he could "use any of these rights at any time you want during the interview" the *Powell* Court opined:

> The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. ***In combination***, the *two warnings*

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[111] *Id.*
[112] *Powell*, 559 US at 54.
[113] *Wyrick v Fields*, 682 F2d 154, 158 (CA 8, 1981).
[114] *Powell*, 559 US at 63.
[115] *Id* at 54.
[116] *See also eg* People's Application at 18 ("The People concede that the warnings given in the instant case are distinguishable from the warnings given in Powell. . . . [T]he police in *Powell* informed the defendant that he had the right to use his rights at any time during the interview. The [P]eople do not claim that the police in this case informed defendant that she could use her rights at any time during the interview.").

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> reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times.[117]

Stowinsky's advice to Defendant did not clearly inform her of the scope of her right to counsel and to have counsel present during interrogation. Detective DesRosiers' "advice" was even worse.[118] The People's reliance on *Powell* to validate the advice given in this case fails because taken as a whole it was insufficient to meet the requirements of *Miranda* (or even *Powell* itself).

The Court of Appeals' holding was correct and soundly based on the proper rationale:

> we hold that a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the "right to an attorney" that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with a lawyer and to have an attorney present during interrogation.[119]

The Court of Appeals and the trial court were sensible not to accept the People's invitation to use a partial reading of *Powell* as a justification to dilute the requirements of proper *Miranda* warnings, and this Honorable Court would be wise to (for what should be the third time in this case) reject this argument and affirm the Court of Appeals.[120]

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[117] *Powell*, 559 US at 62 (emphasis added).

[118] People's Appendix A at 2-3 and People's Appendix C ("Alright, so um, Detective Stowinsky, remember he talked about your rights and everything? . . . Same thing applies. Um, you don't, you don't even have to 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.").

[119] *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) at 11. *See* People's Application at Appendix A.

[120] Frankly, the People's argument that this Court should reverse the Court of Appeals merely because Stowinsky did not place any "temporal limit" on when

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F. IF THIS COURT WISHES TO WADE INTO THE CONSTITUTIONAL DEBATE, IT MUST APPLY THE PLAIN LANGUAGE OF *MIRANDA* AND IT SHOULD BE MINDFUL OF ITS SPIRIT AS WELL.

The entire purpose of *Miranda* was to require law enforcement to clearly and directly inform a suspect about his constitutional rights so that the suspect could, in a custodial setting, fairly evaluate whether to answer questions posed to him, to consult with counsel to make that decision, and whether to continue with the presence of counsel. It would be contrary to *Miranda* (and *Dickerson*) to allow the deficient advice given in this case to survive constitutional scrutiny.[121]

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the Defendant could exercise her rights smacks of the kind of wordsmithing or linguistic gymnastics against which the People warn this Honorable Court. At the same time they urge the Court not to read the language too carefully as if construing a will or easement, they also want the Court to parse out one part of the warning given in *Powell* and ignore a. Despite their backpedaling about the applicability of *Powell*, People's Application at 18, the People argue that "the absence of any temporal limitations attached to [the right to have counsel present] 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." People's Application at 19. But this completely ignores the fact that the *Powell* Court only ruled as it did because it took the two warnings in combination–which the People admit was *not* given in this case—and in doing so it felt that collectively they were adequate. It is one thing to read a will, easement, or constitutional precedent too narrowly or mechanically. It is entirely another to impute constitutionally necessary language that does not exist.

[121] This is true whether this Honorable Court analyzes the issue under the Fifth Amendment, or under the Michigan corollary. *See* MICH CONST 1963, ART I, § 17. A similar example occurred in the case just discussed at length *supra*, *Florida v Powell* where the Florida Supreme Court held that the advice given in that instance failed to satisfy the Florida Constitution. *State v Powell*, 998 So 2d 531, 542 (Fla, 2008), *rev'd on federal grounds*, 559 US 50; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). Although Defendant argues that the Fifth Amendment and *Miranda* compel a ruling affirming the Court of Appeals or denying leave to appeal that decision, this Court is of course free to allocate greater rights to a suspect on state constitutional grounds than the federal constitution requires. *See Sitz v Dep't of State Police*, 443 Mich 744; 506 NW2d 209 (1993). *See also New State Ice Co v Liebmann*, 285 US

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Miranda held that in order to properly advise a suspect of the scope of his right to counsel

> 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* under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, *this warning* ***is an absolute prerequisite*** to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. *Only through such a warning* is there ascertainable assurance that the accused was aware of this right.[122]

These are the "constitutionally required" minimum safeguards.[123] This Honorable Court need look no further than the *Miranda* Court's holding on the right to counsel to determine that the warnings given in this case do not measure up to this standard. The advice was not clear and it did not advise the Defendant she had a

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262, 311; 52 S Ct 371; 76 L Ed 747 (1932) (Brandies, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 97; 740 NW2d 444 (2007) (Kelly, J., dissenting) ("And though the United States Supreme Court's interpretation of the federal constitution may be a polestar to help us navigate to the correct interpretation of our constitution, it is no more than that. Ultimately, it is our constitutional duty to independently interpret the Michigan Constitution."); James Madison, THE FEDERALIST NO 51 ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the position allotted to each subdivided among distinct and separate departments. Hence a double security to the rights of the people."). Doing so would also insulate such a holding from further federal review. *Herb v Pitcairn*, 324 US 117, 125-26; 65 S Ct 459; 89 L Ed 789 (1945); *Abie State Bank v Bryan*, 282 US 765, 773; 51 S Ct 252; 75 L Ed 690 (1931). *See also Mu'Min v Virginia*, 500 US 415, 422; 111 S Ct 1899; 114 L Ed 2d 493 (1991); *Smith v Phillips*, 455 US 209, 221; 102 S Ct 940; 71 L Ed 2d 78 (1982).

[122] *Miranda*, 384 US at 471-72 (emphasis added).

[123] *Dickerson*, 530 US at 440. *Accord*, *id* at 438 ("*Miranda* is a constitutional decision.").

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right to have a lawyer with her during interrogation. Without these "absolute prerequisite[s]"[124] the advice of rights in this case does not satisfy *Miranda* or the Fifth Amendment.

The entire spirit of *Miranda* was to "clearly inform[ ]" suspects of their rights,[125] and ensure that "careful safeguards [be] erected" to preserve those rights.[126] The *Miranda* opinion itself begins by stating that the Court granted certiorari "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, *and to give concrete constitutional guidelines* for law enforcement agencies and courts to follow."[127] *Dickerson* recognized and synthesized these needs for clear information, appropriate safeguards, and guidelines by stating that the "accused must be adequately and effectively appraised of his rights."[128]

This Court should opt for a rule that is clear and that more adequately enforces both the plain language of the *Miranda* decision and the intent the Court had behind it instead of perpetuating the ambiguity recommended by the People.[129]

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[124] *Miranda*, 384 US at 471.

[125] *Id*.

[126] *Id* at 466.

[127] *Miranda*, 284 US at 441-42 (emphasis added).

[128] *Dickerson*, 530 US at 440. *See also Wyrick v Fields*, 682 F2d 154, 158 (CA 8, 1981) ("a defendant's right to have counsel present at custodial interrogations must be zealously guarded.").

[129] To again analogize to statutory construction, if there is any ambiguity (which the Defendant is not suggesting is present here as the dictates of *Miranda* are plain), a court must look to the language of a statute to interpret it consistent with its legislative intent. *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986); *Longsteth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985). There is no question the *Miranda* Court's intent was to create a framework where law

It would be entirely incongruent with *Miranda* to disregard the minimally required warnings, in favor of a "close enough" approach. The Supreme Court has made it clear post-*Dickerson* that "the *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect."[130] The Wixom police did not advise Defendant that she had a right to have counsel present, that this right existed before, during and after interrogation, or that she could exercise her rights at any time. Instead, they skipped past the "constitutionally required"[131] language and excised critically important information from the advice they were mandated to give her.

This Court need not conclude, as the trial court did, that the advice of rights was "the cheesiest advice – *Miranda* advice – that I have ever seen."[132] But it must hold that it was constitutionally deficient. The Court of Appeals should be affirmed, or leave to appeal should be denied.

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enforcement would clearly, directly and effectively communicate to a suspect his rights under the Fifth and Sixth Amendments. This Honorable Court should not ignore the forest for the trees like the People suggest it should and disregard the fact that the warnings in this case, even when taken as a whole—written and verbal—fail to meet the text or meaning of the *Miranda* decision, or to adequately convey the essential advice they require.

[130] *Missouri* v *Siebert*, 542 US 600; 124 S Ct 2601, 2615; 159 L Ed 2d 643 (2004) (Kennedy, J., concurring).

[131] *Dickerson*, 530 US at 440.

[132] Appendix E to People's Application at 6. The record also reflects that the Assistant Prosecutor replied "Judge, I'd have to agree. . . . I'm not disputing that by any means." *Id*.

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G. ALTHOUGH IT IS NOT BINDING ON THIS COURT, FEDERAL COURT OF APPEALS PRECEDENT MAY LATER CONTROL THE OUTCOME OF THIS CASE.

Beyond the foregoing arguments regarding the propriety of affirming the Court of Appeals, as a practical matter this Honorable Court should align itself with those courts requiring advice of the presence of counsel before, during and after questioning. In *United States v Tillman*[133] the United States Court of Appeals for the Sixth Circuit held this advice to be necessary for a confession to be admissible as a matter of federal constitutional law.[134] Therefore any conviction in this state based on less than this quantum of advice to a suspect would be vacated upon the filing of a petition for a writ of habeas corpus in the federal district court because it would be "*irrefutably* presumed involuntary,"[135] and that court would order a new trial without the admission of the accused's statement. So, even if this Honorable Court agreed with the People and a conviction were obtained and affirmed through the entire state court process, it would surely be nullified once state appellate proceedings concluded and the appropriate petition were filed in federal court.

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[133] 963 F2d 137 (CA 6, 1992).

[134] *Id* at 141 (warnings did not satisfy *Miranda* where "the police failed to convey to defendant that he had the right to an attorney both before, during and after questioning.").

[135] *United States v Pacheco-Lopez*, 531 F3d 420, 424 (CA 6, 2008) (emphasis added) ("Any statements or testimonial acts made prior to the administration and voluntary waiver of *Miranda* rights are irrefutably presumed involuntary and may not be used in the prosecution's case-in-chief.").

The state has a "strong interest in preserving the finality of judgments."[136] Indeed, "[t]he principle of finality [ ] is essential to the operation of our criminal justice system."[137] "Without finality, the criminal law is deprived of much of its deterrent effect."[138] "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice."[139]

Federal circuit court opinions are not binding on this Court.[140] But *Tillman* **is binding** on the federal district courts[141] in Michigan,[142] and unless overruled,

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136 *People v Ingram*, 439 Mich 288, 300 n 7; 484 NW2d 241 (1992) (quoting *Henderson v Kibbe*, 431 US 145, 154 n 13; 97 S Ct 1730; 52 L Ed 2d 203 (1977)). *See also People v Ward*, 459 Mich 602, 611; 594 NW2d 47 (1999) (noting the important concerns "for finality and the efficient administration of justice"); *People v Reed*, 449 Mich 375, 388; 535 NW2d 496 (1995) (discussing "the state's important interest in the finality of criminal judgments.").

137 *Teague v Lane*, 489 US 288, 309; 109 S Ct 1060; 103 L Ed 2d 334 (1989); *People v Maxson*, 482 Mich 385, 398; 759 NW2d 817 (2008) (quoting *Teague*, 489 US at 309) ("The principle of finality 'is essential to the operation of our criminal justice system.'")).

138 *Teague*, 489 US at 309.

139 *United States v Timmreck*, 441 US 780, 784; 99 S Ct 2085; 60 L Ed 2d 634 (1979) (internal quotation omitted). *See also People v Carpentier*, 446 Mich 19, 58; 521 NW2d 195 (1994) (Riley, J., concurring) (quoting *Timmreck* with approval); *People v Ingram*, 439 Mich 288, 297; 484 NW2d 241 (1992); *People v Crawford*, 417 Mich 607, 616; 339 NW2d 630 (1983) (Brickley, J., concurring).

140 *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

141 *Hutto v Davis*, 454 US 370, 375; 102 S Ct 703; 70 L Ed 2d 556 (1982) (per curiam) ("unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); *Brown v Cassens Transport Co*, 492 F3d 640, 646 (CA 6, 2007); *Darrah v City of Oak Park*, 255 F3d 301, 309 (CA 6, 2001) (noting that a belief that a prior case was wrongly decided is insufficient to permit reversal of the decision of a previous panel); *Salmi v Sec'y of Health & Human Serv's*, 774 F2d 685, 689 (CA 6, 1985); *Timmreck v United States*, 577 F2d 372 (CA 6, 1978), *rev'd on other grounds*, 441 US 780; 99 S Ct 2085; 60 L Ed 2d 634 (1979); *Hall v Eichenlaub*, 559 F Supp 2d 777, 781-82 (ED Mich, 2008)

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also on any case before the United States Court of Appeals for the Sixth Circuit.[143] And while "finality of state convictions is a *state* interest . . . that States should be free to evaluate, and weigh the importance of,"[144] the Supreme Court has recognized

("Absent a clear directive from the Supreme Court or a decision of the Court of Appeals sitting en banc, a panel of the Court of Appeals, or for that matter a district court, is not at liberty to reverse the circuit's precedent."). *See also Hasbrouck v Texaco, Inc*, 663 F2d 930, 933 (CA 5, 1981) (if precedent is "still valid and not properly distinguishable at the time of the ruling . . . it should have been applied. District Courts are bound by the law of their own circuit."), *cert denied*, 459 US 828; 103 S Ct 63; 74 L Ed 2d 65 (1982).

[142] 28 USC 41. *See also* 28 Stat 826 (1891).

[143] *United States v McMurray*, 653 F3d 367, 384 (CA 6, 2011) ("Put simply, we are 'bound to follow [a Circuit precedent's] mandate unless and until a contrary rule is developed by this court en banc or by the Supreme Court." (quoting *United States v Merosky*, 135 F Appx 828, 837 n 2 (CA 6, 2005) (noting disagreement with binding precedent but acknowledging the duty to follow it nonetheless)). *See also Geiger v Tower Auto*, 579 F3d 614, 622 (CA 6, 2009) ("we are without authority to overrule prior published decisions of our court absent an inconsistent decision of the Supreme Court or an en banc reversal."); *Bonner v Perry*, 564 F3d 424, 431 (CA 6, 2009); *Schoenberger v Russell*, 230 F3d 831, 842 (CA 6, 2002) (Moore, J., concurring) (acknowledging that questionable precedent controls); *Id* at 841 (Keith, J., concurring) ("one panel of this Court cannot overturn a decision of another panel; only the Court sitting en banc may do so."); *Mendenhall v Cedarapids, Inc*, 5 F3d 1557, 1570 (CA Fed, 1993) ("Stare decisis in essence 'makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decision.'" (internal quotation omitted)); *Gately v Massachusetts*, 2 F3d 1221, 1226 (CA 1, 1993) ("the ruling of law in a case [is] binding in future cases before the same court or other courts owing obedience to its decision."); Bryan A. Garner, et al, The Law of Judicial Precedent § 2 (2016) ("a federal district court must follow the decisions of the federal circuit court in the same jurisdiction, as well as Supreme Court precedent."). *Cf Railey v Webb*, 540 F3d 393, 427-28 (CA 6, 2008) (Moore, J., dissenting).

[144] *People v Maxson*, 482 Mich 385, 398; 759 NW2d 817 (2008) (quoting *Danforth v Minnesota*, 552 US 264, 280; 128 S Ct 1029; 169 L Ed 2d 859 (2008) (emphasis in original)).

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that in the context of federal habeas proceedings, federal courts will apply federal constitutional law without deference to any state court determination.[145]

Therefore, the reality of the question presently before this Honorable Court is that if it grants leave to appeal and ultimately reverses the Court of Appeals, it will effectively be abdicating to the federal courts the finality of convictions obtained under the People's (and Judge O'Connell's) theory of the proper scope of *Miranda*. Years after the original trial, the entire process would start all over at considerable expense to the state, inconvenience to the parties, heartache to the victims' families as well as defendants and their families, and to the considerable prejudice of the defendant who would have remained incarcerated the entire time. "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[146]

Regardless of how this Court feels about the underlying principles of the scope of the warnings in this case, it ought to avoid the result advocated by the People which would only compel a new trial as soon as the matter reached the federal court. Instead, this Court would be wise to heed the advice of Justice John Marshall Harlan when he cautioned that "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man

[145] *Danforth v Minnesota*, 552 US 264, 280; 128 S Ct 1029; 169 L Ed 2d 859 (2008) (discussing the principles of federalism and deference to states only "so long as they do not violate the Federal Constitution.").

[146] *Mackey v United States*, 401 US 667, 693; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

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shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation."[147]

This Court should prioritize its interest in the finality of its and its inferior courts' jurisprudence. "A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process."[148] Should this Court instead rule as the People suggest, the case will be tried, and any appeal would work its way back through the Michigan court system with this Court's decision remaining the law of the case. Once the Defendant reaches the end of the road for her Michigan appeals she will file for a writ of habeas corpus in the federal district court. That court will be obliged to follow *Tillman* and to grant her petition and order a new trial without admission of the statements at issue here. Any subsequent similar cases in Michigan would meet the same result, contrary to the principle of finality, and at great expense to the parties and to judicial economy.[149] Therefore, regardless of how it might lean based

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[147] *Id* at 691. Justice Harlan was addressing collateral attacks on convictions, but his cautionary wisdom is equally applicable and prescient in the present context. *Cf also People v Houlihan*, 474 Mich 958, 967; 706 NW2d 731 (2005) (Markman, J., dissenting) (noting, in a discussion focused on retroactivity of a decision to pending convictions "the important considerations of judicial economy and finality" and stating that "[t]he state has a strong interest in [ ] finality.").

[148] *Mackey*, 401 US at 691 (Harlan, J., concurring in judgments in part and dissenting in part).

[149] *See Franks v Delaware*, 438 US 154, 183; 98 S Ct 2674; 57 L Ed 2d 667 (1978) (Rehnquist, J., dissenting) ("This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant

on the underlying principles involved, this Honorable Court should, for the benefit of the entire court system and all involved, summarily affirm the Court of Appeals, or deny leave to appeal and not disturb the Court of Appeals' opinion.

CONCLUSION

If it chooses to do so, this Honorable Court certainly may wade into the weighty discussion invited by the People.[150] However, the more appropriate and jurisprudentially prudent approach[151] would be to decide the issue simply on the facts of this case, much like the trial court and the Court of Appeals did.

The warnings in this case were facially deficient. They did not warn the Defendant of her right to have counsel present, either before or during the interview. They also did not advise the Defendant of her right to cut off questioning or exercise her right to counsel at any time during the interview. They did not satisfy either a pre- or post-*Dickerson* reading of *Miranda*. A proper warning "*at the time of the interrogation is **indispensible*** to overcome its pressures and to insure

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events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.") (quoting *Mackey v United States*, 401 US 667, 690-91; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

[150] *See eg* People's Application at p 27 ("There also exists a split in the federal circuit courts of appeal and [other] state appellate courts regarding th[e] issue . . . 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 Court should grant leave to appeal to clarify where Michigan stands on this issue.").

[151] *See supra* note 19.

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that the individual knows he is free to exercise the privilege *at that point in time*."[152]

On these bases alone the statements should be suppressed, and the People's Application can be denied, or the Court of Appeals affirmed, without having to consider the decision invited by the People as to having Michigan pick a side on the split among federal circuits and other states' courts as to the specificity of advice of the right to have counsel present, pursuant to *Miranda*, or any other questionable carve-outs of that decision. The court need look no further than the fact that the officers did not meet the requirements of *Miranda*, their warnings were not a fully effective equivalent, and there is no other characterization the People may suggest to ignore the deficiencies in the warnings given to the Defendant. The trial court correctly suppressed the statements, that ruling was appropriately affirmed by the Court of Appeals, and it should likewise be affirmed.

Should this Honorable Court choose to evaluate the continuing validity of the cases allowing less than full compliance with *Miranda*, it should conclude that *Miranda* required minimum standards,[153] the content of which *Dickerson* affirmed are "constitutionally required."[154] Even the People concede that the warnings in

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[152] *Miranda*, 384 US at 469 (emphasis added). *Accord*, *Dickerson*, 530 US at 440.

[153] *Dickerson*, 530 US at 441 (quoting *Miranda v Arizona*, 384 US at 479) ("[t]he requirement of warnings and waiver of rights is . . . fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.") (ellipsis in original); *Miranda*, 384 US at 470 ("No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.").

[154] *Dickerson*, 530 US at 440.

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this case did not comply with the verbiage of *Miranda*, though the parties differ on the effect of those failures.

Florida v Powell provides no relief to the People because the advice in this case lacked critical elements of the warnings that, taken as a whole in that case, were sufficient. Both the plain language of *Miranda* and the spirit of its rule "would be frustrated" if police could "undermine its meaning and effect."[155] Either theory should compel confirmation of the result reached by the Court of Appeals.

Finally, should this Honorable Court grant the People's request and reverse the Court of Appeals, it will do so in the face of contrary, albeit not controlling (at this stage of proceedings), federal constitutional law in the Sixth Circuit. This will ultimately result in the reversal of any conviction that might be obtained in this case, forcing a new trial years later without the statements. Any similar cases in Michigan would be affected in the same manner. The principle of finality, and the interests of the entire court system, would be undermined and this Honorable Court would effectively cede final word on the issue to the federal courts.

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[155] *Missouri* v *Siebert*, 542 US 600; 124 S Ct 2601, 2615; 159 L Ed 2d 643 (2004) (Kennedy, J., concurring).

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REQUESTED RELIEF

Defendant respectfully requests that this Honorable Court either grant the People's Application and summarily affirm the Court of Appeals, or deny the Application because the Court of Appeals was correct in the first place.

Respectfully submitted,

/s/ Joseph A. Lavigne .

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