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. 158102

LARICCA SEMINTA MATHEWS,

Defendant-Appellee.

_____/

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

Plaintiff-Appellant's

Supplemental Brief

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 (123a). 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 *People v Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079) (132a). 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) (133a). 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) (134a). The people applied for leave to appeal this decision. The application was timely filed within 56 days after the date the Court of Appeals order was entered. MCR 7.305(C)(2)(a). This Court has jurisdiction over the application under MCR 7.303(B)(1). On October 24, 2018, this Court granted oral argument on the application and ordered the people to file a supplemental brief. *People v Mathews*, ___ Mich ___; ___ NW2d ___ (2018) (150a). This supplemental brief is timely filed within 42 days of this Court's October 24, 2018, order.

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 (123a). 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 sufficiently advise defendant that she had the right to have an attorney present before and during the interview (128a-130a). 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) (132a). Judge O'Brien would have granted the application for leave to appeal. *Id.* (132a). The people appealed the Court of Appeals order to 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) (133a). 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) (134a). 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. [*Mathews*, ___ Mich App at ___, slip op at 1 (134a).]

Judge O'Connell dissented from the part of the majority's ruling that the "right to counsel" portion of the *Miranda* warnings was defective. *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339079) (O'Connell, P.J., concurring in part and dissenting in part) (147a-148a). In contrast to the majority, Judge O'Connell 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) (148a). 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) (149a). The people applied for leave to appeal Part (B) of the Court of Appeals majority opinion, which held that the "right to counsel" warning was deficient. On October 24, 2018, this Court granted oral argument on the application and ordered the people to file a supplemental brief "addressing whether the warnings provided to the defendant prior to custodial interrogation 'reasonably convey[ed],' *Florida v Powell*, 559 US 50, 60 (2010), to her the 'right to consult with a lawyer and to have the lawyer with [her] during interrogation,' as required by *Miranda v Arizona*, 384 US 436, 471 (1966)." *People v Mathews*, ___ Mich ___; ___ NW2d ___ (2018) (150a). The people request that this Court answer this question in the affirmative, reverse the trial court's decision to suppress defendant's statements, and remand for further proceedings.

STATEMENT OF QUESTION PRESENTED

I. To comply with *Miranda v Arizona*, 384 US 436, 471; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the police must give a suspect in custody warnings that reasonably convey that he or she has "the right to consult with a lawyer and to have the lawyer with him 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 . . . ." Did these warnings reasonably convey to defendant her right to the presence of counsel as required by *Miranda*?

The people contend the answer is: "Yes."

Defendant contends the answer is: "No."

The circuit court answered: "No."

The Court of Appeals majority answered: "No."

STATEMENT OF FACTS

The facts relevant to this appeal 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.[2]
>
> 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.[3]

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[2] See page 11a of the Appendix.

[3] See page 12a of the Appendix.

> 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.[4]
>
> 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 (134a-136a).]

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 (42a). 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 (44a-63a). Defendant attached as Exhibit A to her motion the written advice

[4] See page 32a of the Appendix.

of rights form that she signed at the beginning of the first interview (62a-63a). The people responded that the advice of rights was sufficient under *Miranda* (64a-79a). The parties stipulated that the trial court could consider the video recording of the interviews and the transcripts of those interviews in deciding defendant's motion (87a-89a). On May 24, 2017, the parties argued defendant's motion before Oakland Circuit Court Judge Phyllis C. McMillen (102a-119a). The trial court took the matter under advisement (119a).

On June 13, 2017, the trial court issued an opinion and order granting defendant's motion to suppress (123a). 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. [128a.]

The trial court 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 (129a-130a). 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 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. [130a.]

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) (132a). Judge O'Brien would have granted the application for leave to appeal. *Id.* (132a).

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) (133a). 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 ___ (134a). 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. [*Mathews*, ___ Mich App at ___, slip op at 1 (134a).]

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 (139a). In regard to the second issue (the issue now being contested in this Court), 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.* (139a). In reaching this conclusion, the majority acknowledged that it was "not aware of any binding caselaw resolving this issue." *Id.*, slip op at 7 (140a). 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 (141a-143a). 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 (144a). 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.* (144a). 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. *Id.*, slip op at 11-13 (144a-146a).

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) (147a-148a). 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 (148a). 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. (148a). 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 (148a). Judge O'Connell concurred with the portion 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 (149a).

The people applied for leave to appeal the part of Court of Appeals majority opinion (Part (B)) holding that the "right to counsel" warnings were insufficient to satisfy *Miranda*. On October 24, 2018, this Court granted oral argument on the application and ordered the people to file a supplemental brief "addressing whether the warnings provided to the defendant prior to custodial interrogation 'reasonably convey[ed],' *Florida v Powell*, 559 US 50, 60 (2010), to her the 'right to consult with a lawyer and to have the lawyer with [her] during interrogation,' as required by *Miranda v Arizona*, 384 US 436, 471 (1966)." *People v Mathews*, ___ Mich ___; ___ NW2d ___ (2018) (Docket No. 158102) (150a).

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, 471; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the police must give a suspect in custody warnings that reasonably convey that he or she has "the right to consult with a lawyer and to have the lawyer with him during interrogation." Here, the police reasonably conveyed to defendant these rights when, at the beginning of the interrogation, they warned her that "[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer . . . ."

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 (44a). The people opposed defendant's motion (64a). The trial court granted defendant's motion and suppressed her statements (123a). Therefore, this issue was preserved for appeal.

STANDARD OF REVIEW:

"'To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo.'" *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014), quoting *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

DISCUSSION:

Miranda v Arizona requires that before a custodial interrogation, the police must give the suspect warnings that reasonably convey that he or she has the right to the presence of an attorney during the interrogation. *Miranda*, 384 US at 471; *Florida v Powell*, 559 US 50, 60; 103 S Ct 1195; 175 L Ed 2d 1009 (2010). In *Miranda*, 384 US at 486, the Supreme Court stated that the Federal Bureau of Investigation (FBI) warnings in place at the time—which generally advised the suspect that he or she had "the right to an attorney" without expressly stating that the

suspect had the right to the presence of an attorney during interrogation—"*should be emulated*." (Emphasis added.) Accordingly, the *Miranda* Court did not observe any deficiencies in the wording of the FBI's general "right to counsel" warning in *Westover v United States*, a companion case to *Miranda*.[5] The Supreme Court has never retreated from its own endorsement of such general "right to counsel" FBI warnings. See, e.g., *Oregon v Elstad*, 470 US 298, 301; 105 S Ct 1285; 84 L Ed 2d 222 (1985). Instead, the Court has on several occasions held that the warnings must not include any misleading temporal limitations on the right to counsel. See *California v Prysock*, 453 US 355; 101 S Ct 2806; 69 L Ed 2d 696 (1981); *Duckworth v Eagan*, 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989); *Powell*, 559 US 50. Most significantly, in *Powell*, the Court, in upholding the warnings given in that case, found it significant that nothing in the warnings suggested a temporal limitation on the defendant's right to the presence of an attorney. In other cases, the Court has made clear that the timing of the *Miranda* warnings can have an impact on the comprehensibility and efficacy of the warnings. See, e.g., *Missouri v Seibert*, 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004).

In this case, defendant was advised at the beginning of the interrogation that "[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer . . . ." (11a-12a.) The issue presented is whether these warnings reasonably conveyed to defendant that her right to an attorney applied during the interrogation. Courts around the country are split regarding whether similar "right to counsel" warnings satisfy *Miranda*. The Court of Appeals majority, in a published opinion, sided with the jurisdictions holding that such warnings are insufficient under *Miranda*. *Mathews*, ___ Mich App at ___, slip op at 1, 6-13 (134a, 139a-

[5] Instead, as will be discussed, the Court determined that the *timing* of the warnings in *Westover* was faulty. *Miranda*, 384 Us at 496-497.

146a). 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) (147a-148a). 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. Given the timing of the warning in this case (at the beginning of the interrogation) and the lack of temporal limitations attached to the right to counsel warning, a reasonable person would understand the warning to mean that the right to an attorney applied during the interrogation. In other words, the warning reasonably conveyed to defendant that she had the right to the presence of an attorney during the interrogation.[6] Because the warning was adequate under *Miranda*, defendant's statements during the interrogations are admissible.[7]

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[6] In defendant's response to the people's application for leave to appeal, she claimed, "In this case the Wixom officers did not accurately state Defendant's rights under *Miranda* and the People admit this." (Defendant-Appellee's Response to Supreme Court Application, p 19.) But the people admit no such thing. Instead, the people argue that although the warnings were not a verbatim recitation of the language from the *Miranda* opinion (although they were very similar to the FBI warnings endorsed by the Court), they satisfied *Miranda* because they reasonably conveyed the rights as required by *Miranda*. See *Powell*, 559 US at 60.

[7] The sufficiency of the second set of warnings given by Sergeant DesRosiers before the second interview is not at issue in this appeal. "Police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). "[T]he *Miranda* rights are not a liturgy which must be read each time a defendant is questioned." *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986). The officers were not required to readvise defendant of her *Miranda* rights before the second interview when the circumstances had not materially changed between the initial warnings and the second interview later that day. See *People v Ray*, 431 Mich 260, 276; 430 NW2d 626 (1988), citing *Wyrick v Fields*, 459 US 42, 47; 103 S Ct 394; 74 L Ed 2d 214 (1982) (holding that the police were not required to readvise the defendant of *Miranda* warnings when the intervening circumstances between the initial warning and the post-polygraph examination questioning did not render the defendant's subsequent statements involuntary or unknowing); *Treesh v Bagley*, 612 F3d 424, 432 (CA 6, 2010), citing *Wyrick*, 459 US at 47 ("Under *Fields*, additional warnings

A. *Miranda* and its Requirements

The Fifth Amendment of the United States Constitution guarantees that no person shall be compelled to be a witness against himself. US Const, Am V.[8] To give force to Fifth Amendment's 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.'" *Powell*, 559 US at 59, quoting *Duckworth*, 492 US at 201.[9] The 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. *Miranda* articulated in several different ways what the "right to counsel" portion of the warnings required. At one point, the Court held that "an individual held

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are only required if the circumstances seriously changed between the initial warnings and the interrogation."). When a defendant is not readvised of *Miranda* warnings before a second or subsequent interview, the defendant's voluntary statements made during that interview are nonetheless admissible. *Godboldo*, 158 Mich App at 606-607. The second set of warnings in this case was sufficient to remind defendant that she could still invoke her *Miranda* rights, and there was nothing in these warnings that would have misled her regarding her rights. Therefore, her statements during the second interview were also voluntary and admissible.

[8] The Fifth Amendment protection against self-incrimination applies to the states through the Fourteenth Amendment. *Malloy v Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964); *Tanner*, 496 Mich at 207. Further, the Michigan Constitution includes the same guarantee against compelled self-incrimination. Const 1963, art 1, §17; *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013). "The wording of the Michigan Constitution granting protection from compelled self-incrimination is identical to the Fifth Amendment protection." *People v Cheatham*, 453 Mich 1, 10; 551 NW2d 355 (1996). This Court has never held that the protection provided by Const 1963, art 1, §17, exceeds that of the Self-Incrimination Clause of Fifth Amendment. *Tanner*, 496 Mich at 239, 256.

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

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. At another point, the Court held that "if the police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation." *Id.* at 474. In the Court's summary, it stated that the suspect "must be warned prior to any questioning . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.[10] It is clear from *Miranda*'s varying descriptions of the warnings required that no specific language was required to adequately inform a suspect of his rights. In fact, the Court stated that "a fully effective equivalent" of the warnings was sufficient. *Id.* at 476; see also *id.* at 467 ("the accused must be *adequately* and *effectively* apprised of his rights . . . ." [Emphasis added.]). Since *Miranda*, the Supreme Court has reiterated multiple times that the 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." *Prysock*, 453 US at 359. 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); 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 equivalent"); *Powell*, 559 US at 60 ("The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed."). "In determining

[10] In *Michigan v Mosley*, 423 US 96, 100 n 6; 96 S Ct 321; 46 L Ed 2d 313 (1975), the Supreme Court reiterated *Miranda*'s requirements as follows: "The warnings must inform the person in custody 'that he has a right to remain silent, that any statement he does make may be used as

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.[11] Instead, 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. This is true if the warnings "touched all of the bases required by *Miranda*." *Duckworth*, 492 US at 203.[12] Warnings should be viewed "in their totality" to determine if they satisfy *Miranda*. *Duckworth*, 492 US at 205.

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evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" *Id.*, quoting *Miranda*, 384 US at 444.

[11] As the United States Court of Appeals for the Tenth Circuit eloquently put it, "Surely *Miranda* is not a ritual of words to be recited by rote according to didactic niceties." *Coyote v United States*, 380 F2d 305, 308 (CA 10, 1967).

[12] Defendant relies heavily on her argument that *Dickerson*, 530 US 428, overruled all of the prior Supreme Court cases that allowed the "equivalent" of *Miranda* warnings or recognized exceptions to *Miranda* (Defendant-Appellee's Response to Supreme Court Application, pp 12-20). Defendant cites the Supreme Court's decisions in *Prysock*, 453 US 355, *Duckworth*, 492 US 195, and *Innis*, 446 US 291, as examples of cases that are no longer good law under *Dickerson* (Defendant-Appellee's Response to Supreme Court Application, p 16). But *Dickerson*, 530 US at 432, 444, holds only that *Miranda* announced a constitutional rule that governs the admissibility of statements made during custodial interrogation in both state and federal courts and may not be superseded legislatively. The Supreme Court recognized in *Dickerson* that there are established exceptions and modifications to the *Miranda* rule, and that those exceptions and modifications merely illustrate that no constitutional rule is immutable. *Dickerson*, 530 US at 441. For example, *Dickerson* described the "public safety exception" to *Miranda* from *New York v Quarles*, 467 US 649; 104 S Ct 2626; 81 L Ed 2d 550 (1984), as merely being a "modification" of the *Miranda* rule. *Dickerson*, 530 US at 441. Accordingly, as this Court recognized in *Attebury*, 463 Mich at 669, the *Quarles* exception to *Miranda* remains good law after *Dickerson*. Nothing in *Dickerson* says that the Court's prior cases interpreting *Miranda* were overruled. Nor does *Dickerson* hold or imply that the "effective equivalent" rule applying to *Miranda* warnings is no longer valid. *Miranda*, 384 US at 476. In fact, the Supreme Court has held that even under *Dickerson*, "police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda.* Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." *United States v Patane*, 542 US 630,

"[T]he giving of the [*Miranda*] warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused." *Prysock*, 453 US at 359. The remedy for a failure to give sufficient *Miranda* warnings is exclusion of the unwarned statements from the defendant's trial. *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).[13] "Conversely, giving

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641; 124 S Ct 2620; 159 L Ed 2d 667 (2004). Despite defendant's insistence that the "effective equivalent" rule regarding *Miranda* warnings is no longer valid under *Dickerson*, she cites no cases that would support this proposition. Further, the *Miranda* opinion itself refutes defendant's argument. In *Miranda*, the Court held that the warnings listed in the opinion or "a fully effective equivalent" are prerequisites to the admissibility of statements made during custodial interrogation. *Miranda*, 384 US at 476. *Dickerson* only constitutionalized this holding. And since *Dickerson*, the Supreme Court has continued to recognize that the equivalent of *Miranda* warnings is adequate to inform the suspect of his rights. For example, in *Powell*, 559 US at 60, the Supreme Court cited with approval *Prysock*, *Duckworth*, and *Innis* for the proposition that *Miranda* warnings need not adhere to any precise set of words, but need only reasonably convey the rights articulated in *Miranda*. See also *Seibert*, 542 US at 611. Defendant, without citing any law in support, would have an officer giving *Miranda* warnings act as a sorcerer who must recite the precise words of the conjuration lest the spell go awry and release the evil spirit. But *Miranda* does not require any precise magic words to comply with the law. *Miranda* warnings should be reviewed in a commonsense manner, not a rigid one. *Powell*, 559 US at 63. As the Supreme Court has explained, the law requires only that the police "reasonably convey" to the suspect the rights set forth in *Miranda*. *Powell*, 559 US at 60. Even defendant acknowledges that "the Supreme Court has not required absolute rigidity in the specific words used . . . ." (Defendant-Appellee's Response to Supreme Court Application, p 7.) The warnings set forth in *Miranda* are not so rigid and inflexible as to require exact duplication by police officers. The Supreme Court's recognition in *Dickerson* that *Miranda* announced a constitutional rule does not change this.

Defendant concedes that her argument regarding *Dickerson*'s effect on the validity of prior Supreme Court decisions (like *Duckworth*, *Prysock*, and *Innis*) is "critical to . . . why the People's argument here must fail." (Defendant-Appellee's Response to Supreme Court Application, p 17.) But as discussed above, defendant's argument is meritless. Given that this admittedly "critical" foundation of defendant's argument is fatally flawed, the entire structure of her argument must come tumbling down.

[13] However, a defendant's unwarned statements made in violation of *Miranda* may still be admissible for the purposes of attacking the defendant's credibility as a witness. See *Harris v New York*, 401 US 222, 225-226; 91 S Ct 643; 28 L Ed 2d 1 (1971), and *Oregon v Hass*, 420 US 714, 723-724; 95 S Ct 1215; 43 L Ed 2d 570 (1975).

the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver." *Seibert*, 542 US at 608-609; see also *Cheatham*, 453 Mich at 21 ("If the police inform the defendant of his *Miranda* rights, and there is no evidence that the police knew or should have known that the defendant did not comprehend those rights, the rationale of *Miranda* would seem to dictate that any statements voluntarily made after that point should be admissible.").

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

In *Miranda* itself, the Supreme Court approved the warnings given by the FBI at the time, which did 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).]

It was the FBI's practice to give the warnings at the very outset of the interview. *Id.* at 485. The Court 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.[14] 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.[15] In other words, a general right to counsel warning given at the outset of an interrogation was sufficient to satisfy *Miranda*. See *United States v Warren*, 642 F3d 182, 185 (CA 3, 2011) (holding that in light of *Miranda*'s endorsement of the FBI warnings, "it cannot be said that the *Miranda* court regarded an express reference to the temporal durability of this right [to counsel] as elemental to a valid warning.").

When the *Miranda* Court applied its holding to the facts of *Westover v United States*, one of the companion cases to *Miranda*, the Court made clear that the general right to counsel warning given by the FBI might not be sufficient to guarantee an intelligent waiver of constitutional rights when the warnings are given at a time that would not adequately protect the suspect's Fifth Amendment privilege. In that case, local police arrested the defendant and

[14] 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.'"

[15] Forty-three years later during the oral argument in *Powell*, 559 US 50, Justice Ginsburg pointed to *Miranda*'s citation of the FBI warnings in place at the time. *Florida v Powell* Oral Argument at 6:20 <http://www.oyez.org/cases/2000-2009/2009/2009_08_1175> (accessed November 27, 2018). See also *United States v Warren*, 642 F3d 182, 185 (CA 3, 2011) ("[A]s highlighted in questioning by Justice Ginsburg at oral argument, *Miranda* regarded the warning used at that time by the Federal Bureau of Investigation—which did not explicitly state any right to counsel at the time of questioning—as consistent with its holding.").

interrogated him at length that night and the next morning, without giving him any warnings regarding his rights to silence and counsel. *Id.* at 494-496. At noon on the day after the arrest, FBI agents took over the interrogation of the defendant at the local police station. *Id.* at 495. But this time, the FBI agents advised the defendant "that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney." *Id.*; see also *Westover v United States*, 342 F2d 684, 685 (CA 9, 1965). There was no evidence that the defendant articulated a waiver of rights. *Miranda*, 384 US at 496. The Supreme Court held that the defendant's subsequent confession must be suppressed because "[d]espite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process," making the FBI agents "the beneficiaries of the pressure applied by the local in-custody interrogation." *Id.* at 496-497. The Court concluded that "[i]n these circumstances an intelligent waiver of constitutional rights cannot be assumed" and that "the giving of warnings alone was not sufficient to protect the [Fifth Amendment] privilege." *Id.* at 496-497. So the Court's holding in *Westover* shows that a general right to counsel warning might not be adequate to ensure an intelligent waiver of rights if the warning is given at the wrong time, such as at the tail-end of an interrogation after the suspect has already been subject to police pressure for a substantial time. But conversely, the conclusion that may be drawn from the Court's ruling is that a general right to counsel warning *is* sufficient to protect a suspect's Fifth Amendment privilege if given at the beginning of an interrogation before the suspect's will has been worn down by the pressure of lengthy interrogations, thus presumably making any waiver voluntary and intelligent. It is important to note that the Supreme Court found nothing wrong with the words of the FBI's

general right to counsel warning in *Westover*—the Court just found improper the timing of the warning, which caused a defective waiver of those rights.

Both Justice Clark and Justice Harlan, in their *Miranda* dissents, disagreed with the majority that the warning used by the FBI was broad enough to satisfy the rule created by the majority. In particular, Justice Clark opined that the FBI's "right to counsel" warning was insufficient because it did not expressly inform the suspect that he or she had the right to have counsel present at the 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. . . . As I view the FBI practice, it is not as broad as the one laid down today by the Court. [*Miranda*, 384 US at 500 n 3 (Clark, J., dissenting).]

Additionally, Justice Harlan, in his dissent, opined that the FBI practice "falls sensibly short of the Court's [majority's] formalistic rules." *Miranda*, 384 US at 521 (Harlan, J., dissenting). While Justices Clark and Harlan may have opined that the FBI's general right to counsel warning was not as broad as required by the *Miranda* majority's opinion, the majority clearly disagreed, as it approved of the general right to counsel warning given by the FBI. And it is the majority opinion—not the dissents—that must be followed.

In *Duckworth*, 492 US at 204 n 7, which was decided twenty-three years after *Miranda*, the Supreme Court pointed to the FBI warnings that were in place at the time of *Miranda* and that were endorsed by *Miranda* to support its conclusion that the warnings given in *Duckworth*

were also sufficient. Further, several federal courts of appeal have also pointed to *Miranda*'s approval of the FBI warnings in concluding that a general "right to an attorney" warning is sufficient under *Miranda*. See, e.g., *Warren*, 642 F3d at 185; *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. *Mathews*, ___ Mich App at ___, slip op at 10 n 7 (143a). 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.* (143a). 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 what the Supreme Court stated in *Miranda*. While the Court of Appeals and this Court are not bound by decisions from lower federal courts or decisions from other states, they *are* 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]); *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. *Oregon v Elstad*'s Approval of a General Right to Counsel Warning

In *Elstad*, 470 US at 301, the defendant made unwarned statements to the police at his home, was taken back to the police station, was advised of his *Miranda* rights, and then made a full statement to the police. The Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Elstad*, 470 US at 318. In reaching this conclusion, the Court held that "[t]hough belated, the reading of respondent's rights was undeniably complete." *Id.* at 314. The Court noted:

> The *Miranda* advice on the card was clear and comprehensive, incorporating the warning that any statements could be used in a court of law; *the rights to* remain silent, *consult an attorney at state expense*, and interrupt the conversation at any time; and the reminder that any statements must be voluntary. [*Id.* at 315 n 4 (emphasis added).]

There is no indication that the warning in *Elstad* expressly informed the defendant that he had the right to the presence of an attorney during the interrogation. Instead, it appears that the warning only generally informed the defendant that he had the right to consult with an attorney. The Supreme Court's description of this warning as "clear and comprehensive" and "undeniably complete," *id.* at 314, 315 n 4, is further indication that the Court considers general "right to counsel" warnings as adequate under *Miranda*.

D. The Significance of Temporal Limitations (or Lack Thereof) in *Miranda* Warnings

The Supreme Court's decisions in *Prysock*, 453 US 355, *Duckworth*, 492 US 195, and *Powell*, 559 US 50, provide guidance for evaluating the sufficiency of warnings given to a suspect. Notable among these guidelines is the principle that the warnings cannot convey a temporal limitation on the rights that would mislead the suspect into believing that the rights *Miranda* requires do not apply during the interrogation. In both *Prysock*, 453 US 355, and *Powell*, 559 US 50, the Court upheld *Miranda* warnings that did not include any temporal limitations on the suspect's right to an attorney, appointed or otherwise. In so holding, the Court made clear that the absence of temporal limitations on the "right to counsel" or "right to appointed counsel" warnings was a significant factor in determining whether the warning complied with *Miranda*. And in *Duckworth*, 492 US 195, the Court upheld *Miranda* warnings, despite a suggested temporal limitation on the right to appointed counsel, because the warnings, "in their totality," satisfied *Miranda*.

1. *California v Prysock*, 453 US 355 (1981)

In *Prysock*, 453 US 355, the Supreme Court discussed the significance of temporal limitations in *Miranda* warnings in determining whether the warnings were adequate. The defendant in *Prysock* was warned, in pertinent part: "You have 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 . . . . [Y]ou have the right to have a lawyer appointed to represent you at no cost to yourself." *Prysock*, 453 US at 356-357. The issue in *Prysock* was whether the warning adequately informed the defendant of his right to the presence of *appointed* counsel prior to and during interrogation. *Id.* at 358-361. In answering this question in the affirmative, the Supreme Court pointed to the decisions of other courts that had addressed the issue:

> Other courts considering the precise question presented by this case—whether a criminal defendant was adequately informed of his right to the presence of appointed counsel prior to and during interrogation—have not required a verbatim recital of the words of the *Miranda* opinion but rather have *examined the warnings given to determine if the reference to the right to appointed counsel was linked with some future point in time after the police interrogation*. [*Prysock*, 453 US at 360 (emphasis added).]

The cases cited by the Supreme Court had found the warnings inadequate because they had linked the defendants' right to an appointed attorney to a time after the police interrogation, such as when the defendant first appeared in court or when (and if) the defendant was charged with a crime. *Id.*, citing *United States v Garcia*, 431 F2d 134 (CA 9, 1970), and *People v Bolinski*, 260 Cal App 2d 705; 67 Cal Rptr 347 (1968). In contrast, the warnings in *Prysock* were sufficient because they did not suggest any temporal limitation on the right to the presence of appointed counsel "different from the clearly conveyed rights to a lawyer in general . . . ." *Prysock*, 453 US at 360-361. *Prysock* instructs that an important factor in determining the adequacy of *Miranda* warnings is whether the warnings link the right to counsel (appointed or otherwise) to a future point in time after the interrogation. The warnings given in the instant case are not like

the improper warnings discussed in *Prysock* that linked the defendant's right to appointed counsel to a time after the interrogation.[16]

2. *Duckworth v Eagan*, 492 US 195 (1989)

In *Duckworth*, 492 US 195, the Supreme Court again discussed the effect of temporal limitations on the validity of *Miranda* warnings. In *Duckworth*, the police advised the defendant, in pertinent part, as follows:

> You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. . . ." [*Id.* at 198.]

The issue in *Duckworth* was whether informing a suspect that an attorney would be appointed for him "if and when you go to court" placed an improper temporal limitation on the suspect's right to appointed counsel during interrogation. *Id.* at 200-201. The Court held that it did not. *Id.* at 201. The Court held that the warning complied with *Miranda* because it "touched all of the bases required by *Miranda*" and, when viewed in its totality, did not mislead the defendant into thinking that he could not have an appointed attorney during interrogation. *Duckworth*, 492 US at 203-205. In reaching this conclusion, the Court held that the type of defective warnings discussed in *Prysock*—warnings that that failed to apprise the suspect of his right to have an appointed attorney present because they linked the right to appointed counsel to a future point in time after interrogation—was not present in *Duckworth*. *Duckworth*, 492 US at 204-205. The Court then explained why the warnings, when viewed in their totality, were sufficient to inform the defendant that he had the right to have an appointed attorney present during interrogation:

[16] The people recognize that the warnings in *Prysock* are distinguishable from the warnings in the instant case, as the defendant in *Prysock* was expressly informed that he had the right to have counsel present during the interrogation.

> Of the eight sentences in the initial warnings, one described respondent's right to counsel "before [the police] ask[ed] [him] questions," while another stated his right to "stop answering at any time until [he] talk[ed] to a lawyer." *Id*., at 1555-1556. We hold that the initial warnings given to respondent, in their totality, satisfied *Miranda*, . . . [*Duckworth*, 492 US at 205.]

It is important to note that the Court found significant that the defendant was advised that he had the right to an attorney before he was asked any questions. Similarly in the instant case, defendant was advised that "[b]efore any questions are asked of you, you should know . . . you have a right to a lawyer . . . ." (11a.) The warning in this case, like the warnings in *Duckworth*, "touched all of the bases required by *Miranda*," *Duckworth*, 492 US at 203, without including any misleading temporal limitations that would induce defendant into thinking that she did not have the right to the presence of counsel during the interrogation.[17]

3. *Florida v Powell*, 559 US 50 (2010)

Later, in *Powell*, 559 US 50, the 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).]

[17] Again, the people recognize that the warnings given in *Duckworth* are distinguishable from the warnings in the instant case, as the defendant in *Duckworth* was expressly informed that he had the right to have a lawyer with him during questioning. *Duckworth*, 492 US at 198. But the warnings in the instant case also did not contain the problematic temporal language in *Duckworth* regarding the right to an appointed attorney "if and when you go to court." *Id.*

The defendant acknowledged that he understood these rights, agreed to talk, and made incriminating statements. *Id*. At trial, the trial court held that the *Miranda* warnings were sufficient and admitted evidence regarding the defendant's statements. *Id.* The Florida Second District Court of Appeals reversed, holding that the warnings did not comply with *Miranda*. *Id*. On appeal, the Florida Supreme Court framed the issue as follows: "The issue before this Court is whether the failure to provide express advice of the right to the presence of counsel during custodial interrogation violates the principles espoused in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)." *Powell v State*, 998 So2d 531, 533 (Fla, 2008); see also *id.* at 540. The Florida Supreme Court answered this question in the affirmative. *Id.* at 542.

The United States Supreme Court reversed in an opinion authored by Justice Ginsburg. *Powell*, 559 US 50, 56, 64. 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. The Court concluded as follows:

> They [the officers] informed Powell that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview." App. 3. 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 reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times. [*Id.*]

In holding that the warnings were adequate, the Court emphasized that attention must be focused on whether the warnings contained a temporal limitation on the right to the presence of counsel that excluded 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 began:

> 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 (emphasis altered).]

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 declined to hold that such explicit warnings were required to comply with *Miranda*'s requirements. *Powell*, 559 US at 63-64. The Court also praised as "exemplary" and "admirably informative" the standard FBI warnings expressly advising the suspect of the right to talk to a lawyer before questioning and have a lawyer present during questioning, but "decline[d] to declare its precise formulation necessary to meet *Miranda*'s requirements" as long as they "communicated the same essential message." *Powell*, 559 US at 64.[18]

[18] At the time of *Powell*, the FBI gave the following warnings regarding the right to counsel: "'You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning.'" *Powell*, 559 US at 64.

The language of the warnings given in the instant case is distinguishable in some respects from the language of the warnings given in *Powell*. In this case, the police warned defendant in pertinent part that "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 . . . ," 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. The "right to counsel" portion of the warning in *Powell*, unlike this portion of the warning in the instant case, was potentially misleading because it could be misunderstood to mean that the right to an attorney applied only before the interrogation and not during it. But to remedy this, the police in *Powell* gave the defendant the additional warning that he had the right to use his rights at any time during the interview. *Id.* Although this additional "catch all" language was not recited in the instant case, it was only necessary in *Powell* to offset the potentially misleading temporal language in the *Powell* "right to counsel" warning. In any event, while the warnings in *Powell* may be distinguishable in these respects, the *Powell* opinion nonetheless provides guidance in this case and supports the conclusion that the warnings given in this case were sufficient.

First, *Powell* held that the warning that the defendant had the right to an attorney before questioning conveyed that the defendant's right to an attorney began 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.[19] *Powell* also specifically rejected the notion that it

[19] 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

is necessary for police to expressly advise suspects of the right to have an attorney present both before and during interrogation. *Id.* at 64. Additionally, *Powell* held that the portion of the warning in that case that informed the defendant that he had the right to talk to a lawyer before answering any of the officers' questions "communicated that [the defendant] could consult with a lawyer before answering any *particular* question . . . ." *Id.* at 62 (emphasis added). Applying this logic, the warning in the instant case also communicated to defendant that she had the right to a lawyer before any *particular* question was asked of her. Having the right to a lawyer before each particular question means having the right to a lawyer during an interrogation that entails multiple questions. Justice Stevens, in his dissent, explained this: "If a suspect is told he has the right to consult with an attorney before answering any particular question, the Court may be correct that he would reasonably conclude he has the right to a lawyer's presence because otherwise he would have to imagine he could consult his attorney in some unlikely fashion (*e.g.*, by leaving the interrogation room between every question." *Powell*, 559 US at 72 n 7 (Stevens, J., dissenting). So as Justice Stevens makes clear, the warnings in this case were just as effective as the "right to counsel" portion of the warnings in *Powell* in conveying to defendant her right to the presence of counsel during interrogation.

Other aspects of Justice Stevens's dissent[20] in *Powell* support the conclusion that the warnings in this case were sufficient to comply with *Miranda*. First, Justice Stevens asserted that the warning in *Powell* "entirely omitted an essential element of a suspect's rights" and that "the warning entirely failed to inform [the defendant] of the separate and distinct right 'to have

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before and during interrogation, but, rather, are deficient when they include a temporal *limitation* on the right to counsel.

[20] Justice Breyer joined the merits analysis of Justice Stevens's dissent.

counsel present during any questioning.'" *Id.* at 72, 75-76 (Stevens, J., dissenting), quoting *Miranda*, 384 US at 470. But Justice Ginsburg, writing for the *Powell* majority,[21] 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. Second, Justice Stevens discussed in his dissent the very issue presented in this case—whether *Miranda* warnings must expressly inform a suspect of the right to the presence of counsel during interrogation. *Powell*, 559 US at 73 n 8 (Stevens, J., dissenting). Justice Stevens recognized that there was a split in the federal circuits regarding this issue, but pointed out that "most of the Circuits that have not required express mention of the right to an attorney's presence have approved only general warnings regarding the right to an attorney; that is, warnings which did not specifically mention the right to counsel's presence during interrogation but which also contained no limiting words that might mislead a suspect as to the broad nature of his right to counsel." *Id.* He then opined that while he was "doubtful" that such general warnings would satisfy *Miranda*, they were at least better than the warnings in *Powell* because they were not misleading: "I am doubtful that warning a suspect of his 'right to counsel,' without more, reasonably conveys a suspect's full rights under *Miranda*, but at least such a general warning does not include the same sort of misleading temporal limitation as in Powell's warning." *Powell*, 559 US at 73 n 8. In other words, Justice Stevens opined that general "right to counsel" warnings like the warnings given in the instant case were *more* compliant with *Miranda* than the warnings given in *Powell*—warnings that seven justices of the Supreme Court found to be sufficient to comply with *Miranda*. If a general "right to counsel" warning without any temporal

[21] Justice Ginsburg's majority opinion in *Powell* was joined in full by Justices Roberts, Scalia, Kennedy, Thomas, Alito, and Sotomayor.

limitations is superior to a warning that includes an arguably misleading temporal limitation like the one in *Powell*, then the warning in the instant case was surely adequate.

4. What *Prysock*, *Duckworth*, and *Powell* Teach Us Regarding Temporal Limitations

Under *Prysock*, *Duckworth*, and *Powell*, warnings that affix temporal limitations onto the right to counsel can be defective if they mislead the suspect into thinking that he or she does not have the right to an attorney during the interrogation. But the Supreme Court has never held that *Miranda* requires the police to expressly attach a time-directive to the right to counsel warning; i.e., that the police must expressly inform a suspect exactly when the right to counsel applies. Instead, the Court has held only that the warnings must "reasonably convey" to the suspect his or her right to the presence of counsel during interrogation. *Powell*, 559 US at 60. The warning in this case does not suffer from the inadequacy discussed in *Duckworth*, *Prysock,* and *Powell*, namely, linking the right to appointed counsel to a future point in time after interrogation. These cases—especially *Powell*—teach that *Miranda* warnings are generally not fatally defective when the only claimed deficiency is that of generality. See *United States v Caldwell*, 954 F2d 496, 502 (CA 8, 1992). When a general "right to counsel" warning is given at the beginning of the interrogation and does not include any misleading temporal limitations, it reasonably conveys to the suspect that the right to counsel applies during the interrogation.

E. The Timing of the Warnings is Relevant

As discussed above, the Supreme Court held in *Westover* (a companion case to *Miranda*) that the timing of *Miranda* warnings is relevant to whether the suspect intelligently waived his or her rights. *Miranda* also explained that "a warning *at the time of the interrogation* is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege *at that point in time*." *Miranda*, 384 US at 469 (emphasis added). A "right

to counsel" warning given at the beginning of the interrogation would naturally be more likely to inform the suspect that he or she could exercise the right to counsel *at the time of interrogation* than would a warning given, for example, hours before the interrogation or after the interrogation has already begun.

In *Seibert*, 542 US 600, the Court again discussed how the timing of *Miranda* warnings can affect their validity. The police in *Seibert* used a two-step interrogation strategy by first obtaining an unwarned (and thus inadmissible) confession from the defendant, then giving her *Miranda* warnings and having her repeat her prior confession (believing that the second confession would be admissible). *Id.* at 604-605. In determining whether police warnings given in this manner reasonably conveyed to the defendant her rights as required by *Miranda*, the Court posed the question as follows: "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Siebert*, 542 US at 611-612. The Court held that it would not: "Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Siebert*, 542 US at 613-614, quoting *Moran v Burbine*, 475 US 412, 424; 89 L Ed 2d 410; 106 S Ct 1135 (1986). In other words, "the circumstances in which the *Miranda* warnings were given meant they could not 'function "effectively" as *Miranda* requires,' so that the second confession was itself, in effect, an unwarned confession subject to suppression under *Miranda*." 2 LaFave et al, Criminal Procedure (3rd ed.), §6.8(b), p 803. The *Siebert* Court listed several factors that were relevant to the determination of whether *Miranda* warnings were "effective enough to accomplish their object." *Siebert*, 542 US at 615. One of these factors was "the

timing and setting" of the warnings and statement. *Id.* The Court held that the circumstances in that case affected "the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 617.

Later, in *Bobby v Dixon*, 565 US 23; 132 S Ct 26; 181 L Ed 2d 328 (2011), the Court distinguished *Siebert* and upheld the admissibility of the defendant's statements made in the second part of a two-step interrogation where a "significant break in time and dramatic change in circumstances" existed after the defendant's unwarned statements, ensuring that the defendant's unwarned interrogation "did not undermine the effectiveness of the *Miranda* warnings he received before confessing to [the] murder." *Bobby*, 565 US at 32. Again in *Bobby*, the timing of the warnings and circumstances surrounding them were important factors in determining whether *Miranda* warnings effectively conveyed to the defendant his Fifth Amendment rights.

Siebert and *Bobby* teach that the timing and setting of *Miranda* warnings are factors that should be considered in determining the validity of the warnings.[22] This is because the timing of the warnings may be used to mislead the suspect to the extent that a reasonable person would not understand his or her rights guaranteed by the Fifth Amendment and *Miranda*. But conversely, the timing of warnings should also be able to *assist* a suspect in understanding the nature of his or her rights. In the instant case, for example, the police gave the warnings at the very beginning of the interrogation and prefaced the warnings with, "Before any questions are asked of you . . . ." (11a.) Given the timing of the warnings, a reasonable person would have understood that the right to an attorney applied to the forthcoming interrogation.

[22] As the Tenth Circuit has held, the crucial test is whether the words considered in context "impart a clear, understandable warning of all of [the suspect's] rights." *Coyote*, 380 F2d at 308.

F. The Pre-*Powell* Circuit Split Regarding General Right to Counsel Warnings

Despite *Miranda*'s guidance in giving the FBI warnings as an example of warnings to be emulated, subsequent caselaw from lower courts was inconsistent in regard to whether similar warnings satisfied *Miranda*. Nonetheless, 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 upheld similar general "right to counsel" warnings.[23] Before *Powell*, the Second, Fourth, Seventh, Eighth, and Ninth Circuits of the United States Court of Appeals all held that a general warning that the suspect had the right to a lawyer satisfied *Miranda*. See *Lamia*, 429 F2d at 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 as he was told "without qualification that he had the right to an attorney"); *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*); *Caldwell*, 954 F2d at 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)[24]; *Sweeney v United States*, 408 F2d 121,

[23] Although federal courts of appeals decisions are not binding on state courts, they may be persuasive. *Abela*, 469 Mich at 607.

[24] 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 . . . .").

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 persons to refer to the contemplated interrogation, not to some other time . . . .").[25] And as will be discussed, after *Powell*, the Third Circuit joined the above circuits in holding that a general right to counsel warning is sufficient. *Warren*, 642 F3d at 185.

Conversely, the Fifth, Sixth, Ninth,[26] and Tenth Circuit courts of appeal all held before *Powell* that *Miranda* warnings must explicitly provide that the suspect has a right to counsel during interrogation. See *Windsor v United States*, 389 F2d 530, 533 (CA 5, 1968) (holding that

[25] 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.'").

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

the warning that the defendant could speak to an attorney before saying anything did not satisfy *Miranda*);[27] *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);[28] *United States v Anthon*, 648 F2d 669, 672-674 (CA 10, 1981) (holding that the warnings were 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.").[29]

G. Post-*Powell* Caselaw Addressing General Right to Counsel Warnings

Since *Powell* clarified *Miranda*'s requirements in 2010, numerous appellate courts have held that warnings that inform the suspect of the right to a lawyer, but do not expressly inform

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[27] 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 * * *.").

[28] 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*." [Emphasis in original.]).

[29] The Court of Appeals in this case also cited several other out-of-state 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 (141a-142a).

the suspect of the right to a lawyer during interrogation, satisfy *Miranda*. For example, in *Warren*, 642 F3d at 184, which was decided in 2011, 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 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 warnings 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).[30]]

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

Another good example is *Carter v People*, 398 P3d 124; 2017 Colo 59M (Colo, 2017), where 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

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

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 warnings 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 Colorado Supreme 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).

H. Michigan Court of Appeals Decisions Relevant to This Issue

Aside from this case, there are several older (at least 38 years old) Michigan Court of Appeals cases that address the issue presented in this case. Although these cases are not binding on this Court, the people will discuss them to help explain how the Court of Appeals in this case was led into making its erroneous ruling. Several cases from the Court of Appeals 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 (emphasis in original). 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 (emphasis in original).]

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 the presence of 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, the warnings in this case, when examined in a common-sense manner, cannot reasonably be 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 (approximately 50-year-old) 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*[31] 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 it 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*, 389 F2d 530, held that the warning regarding the right to counsel was insufficient:

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

> 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.]

But *Whisenant* and its progeny were all decided before *Prysock*, *Duckworth*, and *Powell*, where the United States Supreme Court established more detailed 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. And the Court of Appeals' reliance on these questionable opinions in the instant case led the Court to wrongly determine that the warnings were fatally defective. *Mathews*, ___ Mich App at ___, slip op at 8-9, 11 (141a-142a, 144a).

I. The Significance of Potential Future Federal Habeas Proceedings on This Court's Decision in This Case

This Court should disregard defendant's argument that the Court of Appeals opinion should be affirmed because her conviction would ultimately be overturned under *Tillman*, 963 F2d 137 (CA 6, 1992), in the federal courts on habeas review. In short, the Sixth Circuit's decision in *Tillman* does not control in this case and will not result in defendant ultimately obtaining habeas relief. There are several reasons why defendant's argument on this score is faulty.

First, this Court is not bound by Sixth Circuit decisions, *Abela*, 469 Mich at 606, and should not render its decision based on a fear of what the federal courts *might* do in the *future* in this case.

Second, defendant's argument misapprehends the nature of habeas proceedings and the deference that federal courts must give to state court rulings. The Sixth Circuit case on which

defendant relies, *Tillman*, 963 F2d 137, was not a habeas case, but was rather a direct appeal. The defendant in *Tillman* was indicted in federal court on three counts of federal crimes. *Id.* at 138. He entered a conditional plea of guilty on one count and preserved his right to appeal the district court's denial of his motion to suppress. *Id.* at 139. On appeal, the Sixth Circuit reversed the district court's denial of his motion to suppress, holding that the *Miranda* warnings given to the defendant were defective because he "was never told that any statements he might make could be used against him. . . . In addition, the police failed to convey to defendant that he had the right to an attorney both before, during and after questioning." *Id.* at 141.[32] If this issue were to arise in a different case on direct appeal in the federal courts for the Sixth Circuit, the federal district courts and the Court of Appeals for the Sixth Circuit would be required to follow *Tillman*. See *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."). But if this issue were to arise in the context of a civil habeas proceeding in federal court (as could eventually happen in the instant case if defendant is convicted), the standard would be different. The standard of review in habeas proceedings is much more deferential than the standard of review in a direct appeal. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas relief is authorized only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC 2254(d)(1).

[32] The officer testified that he gave the following warnings to the defendant and another suspect:

> They had the right to remain silent, the right to the presence of an attorney if they so wish, they are not required to answer any questions and if they decide to answer questions they can stop and do so, and if they cannot afford an attorney one will be appointed before they answer any questions. [*Tillman*, 963 F2d at 140.]

The Supreme Court, time and time again, has instructed that AEDPA "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013).

> AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624, 641 (2011). "If this standard is difficult to meet"—and it is—"that is because it was meant to be." *Id.,* at 102. We will not lightly conclude that a State's criminal justice system has experienced the "extreme malfunctio[n]" for which federal habeas relief is the remedy. *Ibid.*, (internal quotation marks omitted). [*Burt*, 571 US at 19-20.]

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v Richter*, 562 US 86, 101; 131 S Ct 770; 178 L Ed 2d 624 (2011). Habeas corpus is "not a substitute for ordinary error correction through appeal." *Id.* at 102-103. In fact, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. Here, the United States Supreme Court has never directly addressed whether a general "right to counsel" warning can satisfy *Miranda*. Justice Stevens correctly pointed this out in his *Powell* dissent. *Powell*, 559 US at 73 n 8 (Stevens, J., dissenting). Therefore, there is no "clearly established Federal law, as determined by the Supreme Court of the United States," controlling this issue. 28 USC 2254(d)(1). Further, there is no doubt that fairminded jurists could disagree about whether the warnings in this case complied with *Miranda*. *Harrington*, 562 US at 101. This is clearly illustrated by the split in the federal circuits and Judge O'Connell's dissenting opinion in the instant case. Given the current state of the law, the United States Court of Appeals for the Sixth Circuit and its district courts would lack the authority to grant defendant habeas

relief on this issue. Therefore, a decision by this Court that was contrary to *Tillman* would be secure on federal habeas review.

And third, the warnings in *Tillman* can be distinguished from the warnings given in the instant case. In fact, the United States District Court for the Eastern District of Tennessee has distinguished the warnings in *Tillman* from warnings similar to those given in the instant case. *United States v Shropshire*, 2011 US Dist LEXIS 52274 (ED Tenn, 2011), slip op at 8. In *Shropshire*, the defendant was advised, in pertinent part, "You have the right to an attorney. If you cannot afford an attorney, one will be provided." *Id.*, slip op at 4-5. The United States District Court for the Eastern District of Tennessee distinguished *Tillman* and held that these warnings complied with *Miranda*. In particular, the court held that the warnings in *Tillman* were distinguishable because they "implied the defendant only had a right to an attorney *before* questioning began but not in the future." *Shropshire*, 2011 US Dist LEXIS 52274 (ED Tenn, 2011), slip op at 8.

J. Application of the Law to the Facts

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. [12a.]

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. [11a.]

At issue is the third ("right to a lawyer") warning. The officer in this case did not expressly inform defendant that her right to a lawyer included the right to have the lawyer present during

interrogation. But the officer did advise defendant that before any questioning, she needed to know that she had the right to a lawyer, and the officer did not attach any temporal limitations to that right. The issue is whether this warning satisfied *Miranda* by reasonably conveying to defendant that her right to a lawyer included the time during interrogation.

Under *Miranda* and its progeny (especially *Powell*), the warning in this case sufficiently informed defendant that she had the right to an attorney during interrogation. *Miranda* itself expressly approved FBI warnings similar to the warnings given in the instant case. In particular, the United States 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. This Court should take guidance from *Miranda* and uphold the validity of the warnings in this case.

But even setting aside *Miranda*'s instruction to law enforcement to emulate the general "right to counsel" warning used by the FBI, this Court should conclude that the warnings in this case reasonably conveyed to defendant her rights under *Miranda*. The detective prefaced the advice of rights with the statement, "[b]efore any questions are asked of you, you should know . . . ." (11a-12a.) Under *Powell*, 453 US at 62-63, this preface, followed by a general "right to a lawyer" warning, informed defendant that her right to an attorney became effective immediately and gave her the right to consult with a lawyer before answering any particular question. Given the lack of any temporal limitations attached to the warnings, it would only be reasonable for defendant to understand that this unrestricted right to an attorney continued during the interrogation and beyond. As the Court of Appeals held in *Gilleylem*, 34 Mich App at 395, "[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.'" *Id.* (citations omitted;

emphasis in original). And as Judge O'Connell explained in his dissent, "the ordinary layperson understands that the right to an attorney *before* questioning extends to the duration of questioning." *Mathews*, ___ Mich App at ___, slip op at 2 (O'Connell, P.J., concurring in part and dissenting in part) (emphasis in original) (148a). 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. See *Warren*, 642 F2d at 186 ("it 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."). 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 interrogation." *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. Just as it would be counterintuitive for defendant to think that her right to remain silent ended once the interrogation commenced, it would be counterintuitive for her to believe that her right to a lawyer ceased at the time of the interrogation. As the Eighth Circuit has stated, "the general warning that [the defendant] had the right to an attorney, which immediately followed the warning that he had the right to remain silent, could not have misled [the defendant] into believing that an attorney could not be present during questioning." *Caldwell*, 954 F2d at 504.

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 right to a lawyer in general. *Prysock*, 453 US 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 future event. *Prysock*, 453 US at 360; see also *Warren*, 642 F2d at 186 (holding that the defendant "offers no rationale for a reasonable person's belief that the clear, unmodified statement '[y]ou have the right to an attorney' would be regarded as time-limited."). The general warning that defendant had a right to an attorney, given at the beginning of the interrogation and unfettered by any temporal restraints, effectively conveyed that defendant had the right to the presence of counsel immediately and from that point forward. Even the Court of Appeals majority in this case conceded 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." *Mathews*, ___ Mich App at ___, slip op at 11 (emphasis in original) (144a). Nonetheless, the Court of Appeals interpreted *Miranda* as requiring the police to unvaryingly and 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 (144a-145a). 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. Further, requiring police to add a temporal component to the warnings could lead to the undesired consequence of creating uncertainty and inviting litigation regarding whether imprecise temporal

language actually misled the defendant into believing that his or her right to an attorney was time-limited in some way. See *Prysock*, 453 US 355; *Duckworth*, 492 US 195; *Powell*, 559 US 50.

In *Powell*, the Supreme Court held that "[a]lthough 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 can also apply to the instant case. Although it would have been more informative for the detective to expressly advise defendant that she had the right to an attorney both 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*. This Court should put to rest any concerns it may have that upholding the warnings given in this case would encourage law enforcement agencies to try to push the limits of *Miranda* by amending their warnings to give less or ambiguous information to suspects. The Supreme Court dismissed this concern in *Powell* when it explained:

> [A]s the United States explained as *amicus curiae* in support of the State of Florida, "law enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations," Brief for United States 6; instead, it is "desirable police practice" and "in law enforcement's own interest" to state warnings with maximum clarity, *id.*, at 12. See also *id.*, at 11 ("By using a conventional and precise formulation of the warnings, police can significantly reduce the risk that a court will later suppress the suspect's statement on the ground that the advice was inadequate."). [*Powell*, 559 US at 64.]

For all of the reasons discussed above, this Court should hold that the warning that "[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.[33]

[33] 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

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 Court reverse the trial court's opinion and order finding a *Miranda* violation and suppressing defendant's statements to the police. In the alternative, this Court should grant leave to appeal to address this issue.

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

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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.