STATE OF MICHIGAN

IN THE SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
Docket No. 158102

-vs-

LARICCA SEMINTA MATHEWS,

Defendant-Appellee.
_____/

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

Defendant-Appellee's Supplemental Brief

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JURISDICTIONAL STATEMENT

The Defendant accepts the People's statement of jurisdiction. On 24 October 2018 this Honorable Court ordered the matter to be scheduled for oral argument on the People's Application for Leave to Appeal ("People's Application") and directed the parties to file supplemental briefs limited to "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)."[1] The Court also ordered that "[t]he parties should not submit mere restatements of their application papers."[2]

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[1] *People v Mathews*, ___ Mich ___; 918 NW2d 530 (2018) (brackets in original); Appendix at 150a. *But see eg* Plaintiff-Appellant's Supplemental Brief (hereinafter "People's Brief") at sections I.E (a completely new argument regarding the timing of *Miranda* warnings in multiple statement situations, even though the People expressly acknowledge that "the sufficiency of the second set of warnings given [in this case] . . . is not at issue in this appeal." People's Brief at 9 n 7.) and I.I (stating a rebuttal to arguments made in the Defendant's Response to the People's Application for Leave to Appeal regarding federal habeas issues).

[2] *Id*. *But see eg* People's Brief at Sections I.A, I.B, I.F, I.H, etc.

QUESTION PRESENTED

1. To comply with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d (1966), the police must give the suspect 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 answered "No."

STATEMENTS OF FACTS

Consistent with this Honorable Court's directive to the parties to not merely restate their application papers,[3] the Defendant relies on the original Statement and Counter-Statement of Facts. Additional facts may be discussed as relevant to the issues presented herein.

[3] *People v Mathews*, ___ Mich ___; 918 NW2d 530 (2018); Appendix at 150a.

ARGUMENT

This Honorable Court has directed the parties to address "whether the warnings provided to defendant prior to custodial interrogation 'reasonably conveyed' to her the 'right to consult with a lawyer and to have the lawyer with her during interrogation,' as required by *Miranda v Arizona*."[4] In fact the warnings did not satisfy these requirements. At their most basic level, the warnings completely omitted any advice about consulting with a lawyer, or having the lawyer with her at any time including "during interrogation."

It is "'an absolute prerequisite to interrogation,' that an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'"[5] "Because of the constitutional basis of the right [ ] the standard for waiver is necessarily high."[6] The Defendant in this case was never told she could have a lawyer present or that the lawyer could be with her during interrogation. This fact alone should compel this Honorable Court to deny the People's Application and affirm the Court of

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[4] *Id* (brackets and internal citations omitted).

[5] *Florida v Powell*, 559 US 50, 51; 130 S Ct 1195; 175 L Ed 2d 1009 (2010) (quoting *Miranda v Arizona*, 384 US 436, 471; 86 S Ct 1602; 16 L Ed 2d 694 (1966)).

[6] *Miranda*, 384 US 436, 486 n 55; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Accord*, *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013) ("If the custodial interrogation is not preceded by an adequate warning, statements made during the custodial interrogation may not be introduced into evidence at the accused's criminal trial.").

Appeals because the complete absence of required advice can never "reasonably convey"[7] rights to a suspect.

The People go to great lengths to try to dismiss the temporal issue while ignoring the requirement of advising the Defendant she had a right to have a lawyer present. Then in other areas of their argument they do the opposite: focus on whether the words "present" or "presence" need to be included while ignoring the temporal deficiencies. None of the cases cited by the People in support of admissibility suffer from *both* of the deficiencies like the warnings in the case at bar. The People attempt good lawyering by focusing on what they see as the good (but not the bad) in each instance, but taken as a whole[8] the lack of both of these elements demonstrates that the warnings in this case did not reasonably convey to the Defendant the required scope of her *Miranda* rights.

I. THE DEFENDANT WAS NEVER ADVISED SHE HAD THE RIGHT TO CONSULT WITH AN ATTORNEY BEFORE, DURING OR AFTER QUESTIONING, OR THAT SHE HAD THE RIGHT TO HAVE THE LAWYER PRESENT DURING QUESTIONING.

As an "absolute prerequisite to interrogation,"[9] a custodial suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[10] The Defendant in this case was advised

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[7] *Powell*, 559 US at 62.

[8] *See Duckworth v Eagan*, 492 US 195, 205; 109 S Ct 2875; 106 L Ed 2d 166 (1989) (*Miranda* warnings are to be read "in their totality.").

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

[10] *Id.*

only of an amorphous "right to a lawyer,"[11] but not to consult with that lawyer, to do so before, during or after questioning, or to have the lawyer with her during interrogation. Likewise, there is no information in the advice given to her from which she could have inferred that she had those rights. As a result, the warnings did not reasonably convey her rights.

In the absence of the explicit advice that she had the right to an attorney present, the inference was only that Defendant would be afforded an attorney at some time in the future. As stated in *Miranda*:

> the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. . . . [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.[12]

The Court placed critical importance on the right to have an attorney present during interrogation,[13] and it left no room for interpretation in its holding:

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[11] Appendix at 11a-12a.

[12] *Miranda*, 384 US at 469-70.

[13] *See also id* at 470 ("The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."); *People v Tanner*, 496 Mich 199, 207; 853 NW2d 653 (2014) (As "a corollary of the right against compelled self-

> Accordingly we hold 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* under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, *this warning is an absolute prerequisite* to interrogation.[14]

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incrimination," the right to the presence of counsel "affords a way to insure that statements made in the government-established atmosphere are not the product of compulsion.") (internal quotation omitted).

[14] *Miranda*, 384 US at 471 (emphasis added). It is worth noting in this context that the People devote substantial effort to encouraging this Court to follow the language of the FBI warnings in existence in 1966 when *Miranda* was decided, and that because the Court referred to those warnings approvingly that any general right to counsel warning must suffice. *See eg* People's Brief at 7-9, 14-19, 25, 32, 35, 44. However, the holding of the *Miranda* opinion is clear and requires not just that one be advised of a general right to an attorney as the FBI practice was at the time, but that he also be advised he has the "right to *consult with* a lawyer and to *have the lawyer with him* during interrogation." *Miranda*, 384 US at 471 (emphasis added). The Court emphasized on the importance of counsel's presence by stating that "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also *to have counsel present during any questioning* if the defendant so desires." *Id* at 470 (emphasis added). This Honorable Court ought to not accept the People's invitation to rest its jurisprudence on the malleable practices of the FBI referred to in dicta in lieu of following the express directive of the opinion issued by the United States Supreme Court. *Cf Abela v GMC*, 463 Mich 603, 606; 677 NW2d 325 (2004). The FBI guidelines themselves did "not warn that counsel may be present during custodial interrogation . . . [and] the FBI practice [ ] is not as broad as" the Court's requirements in *Miranda*. *Id* at 500 n 3 (Clark, J., dissenting).

Moreover, those same FBI guidelines quickly evolved to be consistent with the more specific language of the *Miranda* opinion by requiring that suspects not merely be advised of a general right to counsel, but that they be advised "You have the right to talk to a lawyer for advice *before we ask you any questions* and to *have a lawyer with you* during questioning," and "[i]f you decide to answer questions now without a lawyer present, you will still *have the right to stop answering at any time*. You also have the *right to stop answering at any time until you talk to a lawyer*." *Duckworth*, 492 US at 202 n 4 (emphasis added). Yet ironically the People point to these *updated* warnings—which incorporate the language of the *Miranda* opinion, and are more expansive than the FBI warnings in place at the time *Miranda* was decided—as "sufficient." People's Brief at 17-18. Of course they are sufficient because they incorporate advice about the presence of counsel and the ability to consult with that lawyer, which the *Duckworth* Court relied heavily upon (as well as the further advice that the defendant had the right to exercise his rights at any

In this case the Defendant was not advised that she could "consult with"[15] a lawyer or that she could "have the lawyer with [her] during interrogation."[16] The complete absence of advice of these rights vitiates the legitimacy of any warning she was given. Without being told of these "absolute prerequisite[s]"[17] her rights were not "reasonably convey[ed]"[18] to her and her statements are not admissible.

The trial court and the Court of Appeals majority both performed similar analyses and reached the correct conclusion. One observation by the trial court is particularly prescient here: "It is telling that in every case cited by the prosecutor, the words 'present' or 'presence' of an attorney, or have an attorney 'with you' were used."[19] It would defy logic and applicable law for the Supreme Court to hold that specific pieces of advice are an "absolute prerequisite"[20] for compliance with the constitution, for the warnings in this case to lack that advice, and for the statements to nonetheless be admissible. The Supreme Court has confirmed that *Miranda* was intended to "give concrete constitutional guidelines for law enforcement agencies to follow"[21] and that *Miranda*'s dictates were "constitutionally

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time) in reaching its holding. But none of those factors were part of the advice given to the Defendant in this case which did not reasonably convey her rights to her.

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

[16] *Id.*

[17] *Id.*

[18] *Powell*, 559 US at 62.

[19] Trial court opinion at 7; Appendix at 129a.

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

[21] *Dickerson v United States*, 530 US 428, 439; 120 S Ct 2326; 147 L Ed 2d 405 (2000) (quoting *Miranda*, 384 US at 441-42).

required."[22] The omission of critical information that is a "constitutionally required"[23] "absolute prerequisite"[24] to admission of evidence cannot "reasonably convey"[25] a suspect's rights.[26]

II. THE ADVICE OF RIGHTS DID NOT REASONABLY CONVEY WHEN THE DEFENDANT WAS ENTITLED TO EXERCISE HER RIGHTS.

The People contend that because Detective Stowinsky used the word "before" in advance of stating the Defendant's rights, this somehow equates to convey that she could exercise those rights before the questioning commenced.[27] The linguistic impossibility of this sentence structure aside, the statement does not communicate what the People argue that it does.

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[22] *Id* at 431. *See also id* at 444 ("*Miranda* announced a constitutional rule.").

[23] *Id* at 431.

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

[25] *Powell*, 559 US at 62.

[26] *See also Miranda*, 384 US at 470 ("the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.").

[27] *See eg* People's Brief at 31 ("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."). *See also eg id* at 23 ("in the instant case, defendant was advised that '[b]efore any questions are asked of you, you should know . . . ."); *id at* 27 ("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."); *id* at 44 ("The detective prefaced the advice of rights with the statement, '[b]efore any questions are asked of you, you should know' . . . 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."). The People made the same argument during oral argument at the Court of Appeals, prompting Judge Kelly to ask "you don't really believe that, do you?"

A. Detective Stowinsky's statement identified when he was giving the advice, not when Defendant could exercise her rights.

Stowinsky advised the Defendant of her rights as follows:

> Det. Stowinsky: Ok, um, I'm going to review these, ok?
>
> Defendant: Uh hmm.
>
> Stowinsky: I'm going to read these to you.
>
> Defendant: Uh hmm.
>
> Stowinsky: Um, before I question, start asking you, you should know that you have a right to remain silent.
>
> Defendant: Uh hmm.
>
> 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.[28]

The statement that "*before I question*, start asking you, you should know that you have a right to remain silent . . . you have a right to a lawyer" is just not the same as "you have the right to an attorney *before you answer* questions." And it is certainly not the same as "you have the right to have an attorney ***present*** *with you* before, *during or after* any questioning." Stowinsky's statement is specifically addressing what *he* was going to do ("before *I* question you"). It did not convey any information to the Defendant about when *she* could exercise *her* rights. This is even

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[28] Appendix at 12a; 135a. *See also* Appendix at 11a (written advice of rights form, stating "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 for free.").

more obvious when the statement is read as a whole without the "uh hmm" responses from Defendant as she was following along: "I'm going to review these, ok? . . . I'm going to read these to you. . . . Um, before I question, start asking you, you should know . . .". This language is clearly defining what Stowinsky was doing and when, and had absolutely nothing to do with conveying information about any aspect of the forthcoming advice of rights—nor was it intended to.[29]

Miranda requires 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."[30] The Miranda Court itself used "prior to" twice: once to state *when* the advice needs to be given, and again to instruct the parameters of *what* that advice must contain. Here the Wixom officers only satisfied the first part: advising her "before I question, start asking you,"[31] but they never communicated that Defendant had the right to "the presence of" counsel,[32] or that she could have a lawyer "prior to questioning".[33] Stowinsky's use of the word "before" adds nothing substantive to the advice of rights and does not cure its defects. Therefore the advice given still did not reasonably convey Defendant's rights to her and the Court of Appeals ruled correctly.

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[29] Linguistically, because the word "before" precedes the noun "I" it serves as a preposition antecedent to the introduction of the subject (noun) of the sentence fragment "I question". It conveys no essential meaning modifying or explaining any aspect of the advice of rights and certainly does not support the People's purported claim that it forms the basis of advising Defendant when she could exercise those rights.

[30] *Miranda*, 384 US at 479.

[31] Appendix at 12a.

[32] *Miranda*, 384 US at 479.

[33] *Id.*

B. If the People's interpretation of the use of "before" is correct, then it is an impermissibly misleading temporal limitation on the right to counsel.

Should this Honorable Court indulge the People and accept their untenable argument that "before I question you" somehow equates to "you can consult with a lawyer before you answer," then their argument still must fail. *Miranda* warnings must not include any misleading temporal limitations on the right to counsel.[34] If the People's argument about Stowinsky saying "before" is accepted then it could only mean, either explicitly or by implication, she could speak to an attorney before answering questions, but not during or after questioning. This would function to improperly advise Defendant that she had a single opportunity to consult with counsel and not that she could do so continuously, or at any other time she wished besides before the interview.[35]

In *Duckworth* the defendant was advised "[y]ou have a right to talk to a lawyer for advice before we ask you any questions."[36] This was misleading because it limited the time in which defendant was advised counsel would be available to him before questioning. But the statement was still admissible because he—unlike the Defendant in this case—was also advised that, with respect to the lawyer, he

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[34] *Florida v Powell*, 559 US 50; 130 S Ct 1195; 175 L Ed 2d 1009 (2010); *Duckworth v Eagan*, 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989); *California v Prysock*, 453 US 355; 101 S Ct 2806; 69 L Ed 2d 696 (1981).

[35] *See eg Powell*, 559 US at 74-75 (Stevens, J., dissenting) ("An intelligent suspect could reasonably conclude that all he was provided was a one-time right to consult with an attorney, not a right to have an attorney present with him in the interrogation room at all times.").

[36] *Duckworth*, 492 US at 198.

had a right "to have him *with you during* questioning;"[37] "[y]ou have this right to the advice *and presence of* a lawyer even if you cannot afford to hire one;"[38] and finally that "[i]f you wish to answer questions now without a lawyer present, you have the right to stop answering questions *at any time*."[39] There were not any—let alone all—such saving clauses or warnings in the present case.[40]

"No amount of circumstantial evidence that the person may have been aware of [the right to have a lawyer with him during interrogation] will suffice to stand" in the stead of an adequate warning.[41] In this case, Stowinsky's use of the word "before" either described when he was going to ask questions and not when the Defendant had an opportunity to invoke her rights, or if understood in the way the People suggest it should be then it placed an improper and misleading limitation on Defendant's right to counsel. Either way, the advice of rights would be defective, would not reasonably convey her constitutional rights, and her statements would be inadmissible. For these reasons this Honorable Court should deny the People's Application or affirm the Court of Appeals.

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[37] *Id* (emphasis added).

[38] *Id* (emphasis added).

[39] *Id* (emphasis added).

[40] Perhaps the People anticipated this issue in addressing the following argument to the Court: "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." People's Brief at 26. But this effort at spin belies the fatal defect in this case: unlike in *Powell*, Detective Stowinsky never told Defendant she had the right to exercise her rights at any time during the interview. As a result the advice she was given did not reasonably convey her rights to her.

[41] *Miranda*, 384 US at 471-72.

III. REGARDLESS OF THE LANGUAGE USED, THE WARNINGS IN THIS CASE DID NOT PROVIDE THE CONSTITUTIONALLY REQUIRED ADVICE.

The parties agree that there is no singular word-for-word recitation of *Miranda* rights that is required.[42] But where the People and the Defendant diverge in their analysis is this: while the People rely on the fact that the words can vary, they conveniently minimize the constitutional command that the "same essential message"[43] has to be communicated. Regardless of the words chosen, or the order in which they are stated, "the four warnings *Miranda* requires are invariable."[44] Indeed "[t]he requirement of warnings . . . [is] fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[45] Therefore, even though some latitude is afforded in the language used, police are still unquestionably obligated to properly advise a suspect of the substance of each enumerated right before admitting any subsequent statement.

This may be satisfied so long as the words used "in their totality,"[46] "reasonably convey"[47] those rights, but that simply did not occur in this case. To illustrate this point it is instructive to review the warnings given in the three cases upon which the People most heavily rely: *Prysock*, *Duckworth*, and *Powell*.[48]

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[42] *Powell*, 559 US at 60; *Duckworth*, 492 US at 203; *Prysock*, 453 US at 361; *People v Hoffman*, 205 Mich App 1, 14; 518 NW2d 817 (1994).

[43] *Powell*, 559 US at 64.

[44] *Id* at 60.

[45] *Miranda*, 384 US at 476.

[46] *Duckworth*, 492 US at 205.

[47] *Powell*, 559 US at 62.

[48] In the Defendant's Response to the People's Application she noted the questionable validity of certain pre-*Dickerson*/post-*Miranda* rulings because those

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

In *Prysock*, the defendant was warned in relevant part as follows:

Sgt. Byrd: Your legal rights, Mr. Prysock, is [sic] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?

Randall P.: Yeh.

Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?

Courts' opinions had expressly noted that *Miranda* was, among other things, "not constitutional in character," *Withrow v Williams*, 507 US 680, 690-91; 113 S Ct 1745; 123 L Ed 2d 407 (1993), which the Court later firmly rejected. *Dickerson*, 530 US at 440. The People dispute Defendant's contention. *See* People's Brief at 12-13 n 12. Though this argument is technically outside the scope of the supplemental briefs requested by this Honorable Court, *People v Mathews*, ___ Mich ___; 918 NW2d 530 (2018); Appendix at 150a, it remains important to address in this context because the People are trying to save clearly inferior *Miranda* advice in this case by citing to precedents that while not expressly overruled have had the bases for their decisions eviscerated by subsequent case law. For example, the People's reliance on *Oregon v Elstad*, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), is a prime example of a case whose underpinnings are in serious doubt. *Elstad* bases its holding admitting the defendant's statements on the fact that his statements followed "unwarned yet uncoercive questioning," *id* at 318, thereby holding that such a "statement, though technically *in violation of Miranda*, was *voluntary*." *Id* (emphasis added). But *Dickerson* makes clear that even "statements which may be by no means involuntary . . . may nonetheless be excluded" *Dickerson*, 530 US at 445, in the absence of proper *Miranda* warnings because those *Miranda* warnings are indeed "constitutionally required," *id* at 440, and any statement taken in the absence of those warnings *shall be held to have been compelled*. *See id* at 435 (citing *Miranda*, 384 US 436). Therefore after *Dickerson*, the entire basis for the more permissive ruling in *Elstad* is untenable because it would be impossible for that defendant's "unwarned" statements to be legally "uncoercive" within the meaning of *Miranda*, and without adequate warnings they are per se coercive. Although a more extensive analysis of the several cases between 1996 and 2000 may be appropriate to illustrate the point, Defendant will respectfully, and in deference to this Court's directive, dispense with further analysis in this regard and address her arguments to the three main cases cited by the People: *Prysock*, *Duckworth*, and *Powell*.

> Randall P.: Yes.
>
> Sgt. Byrd: 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. Do you understand this?
>
> Randall P.: Yes.
>
> . . .
>
> Sgt. Byrd: You all, uh, -- if, -- you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
>
> Randall P.: Yes.
>
> Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?
>
> Randall P.: Yes.[49]

These warnings were held to be acceptable, but they exhibit two key differences from the warnings in this case. First, Prysock was explicitly told he could "talk to a lawyer before you are questioned."[50] Unlike the debate addressed in the preceding section of this brief, the advice to Prysock was explicit that the right to consult the attorney was connected to the questioning itself. Second, any limitation of the advice as to the timing of that consultation was cured with the succeeding statement that he had the right to "have him present with you while you are being questioned and all during the questioning."[51] The Court held that this latter advice, when taken in conjunction with the balance of the advice, was sufficient to comply with *Miranda*.[52]

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[49] *Prysock*, 453 US at 356-57.
[50] *Id* at 356.
[51] *Id*.
[52] *Id* at 360-61.

In the present case, Defendant was never told she could have counsel "present" at any point in time. Further, she was never told that she could do so "before you are questioned" or "while you are being questioned and all during the questioning."[53] The aspects of the advice in *Prysock* that the Court found to be an effective equivalent to *Miranda* are sorely lacking in this case.

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

The defendant in *Duckworth* was given the following advice:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. 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. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.[54]

In a separate part of the interview the following form was read to the defendant, after which he also read it aloud and signed it:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

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[53] *Id* at 356.

[54] *Duckworth*, 492 US at 198.

> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I do not hire an attorney, one will be provided for me.[55]

The issue in *Duckworth* was whether the statement that counsel would be provided "if and when you go to court" improperly or misleadingly limited the advice regarding counsel.[56] If taken on its own that may have been the case, but the Court noted the balance of the language and advice given and upheld the warning based on all of the information conveyed to the defendant "in its totality".[57]

The advice given in *Duckworth* that validated the warning, that the present Defendant was not given and that invalidates her warning, included:

- "You have a right to talk to a lawyer for advice *before we ask you any questions*";[58]
- "to *have him with you during* questioning";[59]
- "right to the advice *and presence of* a lawyer";[60]

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[55] *Id* at 198-99.

[56] *Id* at 200-201.

[57] *Id* at 205. The Court also discussed the accuracy of the statement that an attorney would be provided at court as being a true statement in the context of the timing discussed and the local procedure, and that the officers were transparent about the fact that they did not have a lawyer there. However the Court determined that the total advice of rights conveyed that if the defendant did not want to answer questions without a lawyer present that no questions would be asked, and should charges be issued a lawyer would be provided at that time. *Id* at 203-205.

[58] *Id* at 198 (emphasis added).

[59] *Id* (emphasis added).

[60] *Id* (emphasis added).

- "you have the right to stop answering questions *at any time*";[61]
- "You also have *the right to stop answering at any time* until you've talked to a lawyer";[62]
- "an attorney may be present *while I am making any statement or throughout the course of any conversation* with any police officer if I so choose";[63] and
- "I can refuse to answer any further questions and remain silent, thereby *terminating the conversation*."[64]

No aspect of any of the foregoing advice was communicated to the Defendant in this case other than a nebulous "right to a lawyer." Although the *Duckworth* Court found the totality of the advice compliant with *Miranda* because of the breadth of advice given about the lawyer being present, being available before and during questioning, and that the defendant could stop answering questions at any time, the advice in the present case contains none of these features. Contrary to the People's argument, and unlike the defendant in *Duckworth*, the advice given to Defendant did not convey the "same essential message"[65] of *Miranda*'s four "invariable"[66] warnings.

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[61] *Id* (emphasis added).
[62] *Id* (emphasis added).
[63] *Id* at 199 (emphasis added).
[64] *Id* (emphasis added).
[65] *Powell*, 559 US at 64.
[66] *Id* at 60.

C. Florida v Powell, 559 US 50 (2010).

Prior to interviewing defendant Powell, the Tampa Police Department officers advised him as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.[67]

Similar to *Duckworth*, a key question was whether advising the defendant that he could "talk to a lawyer before answering any of our questions" improperly limited the scope of the right to counsel by implying that the right existed before questioning but not thereafter. But the Court held that the rights taken as a whole "reasonably conveyed"[68] Powell's rights to him because they "did not 'entirely omit' any information *Miranda* required them to impart."[69] The Court noted that Powell was informed "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."[70]

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[67] *Id* at 54.

[68] *Id* at 62.

[69] *Id*.

[70] *Id* (brackets in original) (emphasis added). The People discuss Justice Stevens' dissent in *Powell* at length for the proposition that because the advice in that case had an improper temporal limitation that the absence of any limitation must *ipso facto* be superior. But that completely ignores the fact that Powell was told he could "use any of his rights at any time he wanted during the interview," *id* at 54, which eliminated any taint from the improper advice. At best this point supports the proposition that warnings are to be taken "in their totality." *Duckworth*, 492 US at 205. But it does not support the argument that the most

> The Court went on to state that
>
> > [t]he 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.[71]

Here neither of those things occurred. Stowinsky never told the Defendant she could consult with a lawyer before answering any particular question, nor did he tell her she could exercise her rights while the interrogation was being conducted or "at any time [she] want[ed] during th[e] interview."[72]

Of all the cases cited and discussed by both parties this point is probably the most striking: the *Powell* Court held that the advice given "reasonably convey[ed]" what it was required to only because Powell was told he could exercise those rights before the interview *or at any time during the interview*.[73] Defendant in this case

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basic statement that one has "a right to an attorney" without a temporal limitation must always suffice to satisfy *Miranda*. *See also* People's Brief at 17 ("it is the majority opinion—not the dissents—that must be followed.").

[71] *Powell*, 559 US at 62.

[72] *Id*.

[73] The Court of Appeals majority recognized this and acknowledged that there are "cases [that] stand for the proposition that no exact, talismanic incantation of the *Miranda* warnings is required. But, none of these cases involved a barebones warning that the suspect had 'a right to an attorney.'" *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (No 339079) (May 22, 2018) slip op at 7; Appendix at 140a. Instead, the Court of Appeals recognized, as the United States Supreme Court has directed, that in considering the totality of the advice given, the defendants in the cases holding that no specific words were required all received more complete advice than the present Defendant. *Id* at 7-8; Appendix at 140a-141a. The Court of Appeals correctly determined that "a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the 'right to an attorney' that does not, when the warning is read in its

was *never* advised of this, and therefore the advice given in this case *cannot* be said to be a "fully effective equivalent,"[74] that "communicated the same essential message,"[75] or to have "reasonably convey[ed]"[76] her rights as "invariabl[y]"[77] required by *Miranda*.[78] The Court of Appeals correctly held that Defendant's statements should not be admissible against her and that decision should be affirmed.[79]

IV. CLARITY IS NOT ONLY PREFERRABLE, IT IS REQUIRED BY *MIRANDA*.

Miranda requires that "an individual held for interrogation must be *clearly informed*" about his rights.[80] This includes that he "must be warned prior to any

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entirety, reasonably convey the suspect's right to consult with a lawyer and to have an attorney present during the interrogation." *Id* at 11; Appendix at 144a.

[74] *Miranda*, 384 US at 476.

[75] *Powell*, 559 US at 64.

[76] *Id* at 62.

[77] *Id* at 60.

[78] This is more striking in light of the discussion in the People's Brief at section I.D, where they emphasize the approval of certain individual warnings in *Prysock*, *Duckworth*, and *Powell* in isolation. But these were held to be acceptable only because "in their totality," *Duckworth*, 492 US at 205, they were sufficient, even though the advice given in each of these cases contained more detailed and complete advice than the Defendant received in the present case. *See also* People's Brief at 19-20 (where they cite *Oregon v Elstad*, 470 US 298 (1985) in support of a general "right to counsel" warning, but they ignore that the opinion itself was based on advice that included the right to "*consult* an attorney [and] *interrupt* the conversation *at any time*." *Id* at 315 n 4 (emphasis added)).

[79] *See also People v Tanner*, 496 Mich 199, 207; 853 NW2d 653 (2014) (As "a corollary of the right against compelled self-incrimination," the right to the presence of counsel "affords a way to insure that statements made in the government-established atmosphere are not the product of compulsion.") (internal quotation omitted).

[80] *Miranda*, 384 US at 472 (emphasis added).

questioning" that "he has the right to the presence of any attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[81] This Honorable Court need go no further than this language in *Miranda* itself to see that the warnings in the present case, which were devoid of advice of about "the presence of an attorney,"[82] did not reasonably convey to the Defendant the rights to which she is entitled under *Miranda*.

There is heavy irony in the present discussion, and the evolving decisions among the several states and federal circuit courts of appeal that have confronted the issues presented in this case.[83] The whole point of giving *Miranda* warnings is to "clearly inform"[84] a suspect of his rights. Yet the People, the Defendant, indeed so many courts across the country, and even our Court of Appeals panel, could not

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[81] *Id* at 479.

[82] *Id*.

[83] *See eg United States v Frankson*, 83 F3d 79, 82 (CA 4, 1996); *United States v Tillman*, 963 F2d 137, 140-41 (CA 6, 1992); *United States v Caldwell*, 954 F 2d, 502-04 (CA 8, 1992); *United States v Noti*, 731 F2d 610, 615 (CA 9, 1984); *United States v Anthon*, 648 F2d 669, 672-74 (CA 10, 1981); *United States v Adams*, 484 F2d 357, 361-62 (CA 7, 1973); *Evans v Swenson*, 455 F2d 291, 295-96 (CA 8, 1972); *United States v Lamia*, 429 F2d , 375-77 (CA 2, 1970); *Sweeney v United States*, 408 F2d 121, 124 (CA 9, 1969); *Atwell v United States*, 398 F2d 507, 510 (CA 5, 1968); *Windsor v United States*, 389 F2d 530, 533 (CA 5, 1968); *People v Mathews*, ___ Mich App ___; ___ NW2d ___ (No 339079) (May 22, 2018); *Carter v People*, 398 P3d 124 (Colo, 2017), *cert denied*, ___ US ___; 130 S Ct 980; 200 L Ed 2d 248 (2018); *State v Quinn*, 831 P2d 48 (Ore App, 1992); *People v Walton*, 556 NE2d 892 (Ill App, 1990); *Eubanks v State*, 240 SE2d 54 (Ga, 1977); *Criswell v State*, 443 P2d 552 (Nev, 1968).

[84] *Id* at 472.

unanimously agree on what satisfies the obligation to "clearly inform"[85] or "reasonably convey"[86] one's rights.

The *Miranda* Court itself recognized that the clarity of advice about the right to counsel was necessary because the "accused who does not know his rights and therefore does not make a request may be the person who most needs counsel."[87] The *Powell* Court also cited the value of clarity.[88] Yet with so many judges, justices and legal scholars in disagreement over the importance of certain, often singular, words and phrases (as we are naturally called upon to be in our profession), it only serves to highlight the importance of the clarity that the *Miranda* Court required.

This is not intended to rehash the arguments already presented regarding the specificity of the words chosen by a police officer in advising a suspect of their rights. But it is intended to highlight the fact that there can never be any constitutional infirmity in being more specific—and in this context at least as specific—as *Miranda* requires insofar as one's "right to consult with a lawyer and to have the lawyer with him during interrogation."[89] The Supreme Court has been clear that "the accused *must be adequately and effectively appraised of his rights*

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[85] *Id.*

[86] *Powell*, 559 US at 62.

[87] *Miranda*, 384 US at 470-71. In fact, the *Miranda Court* "granted certiorari . . . 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Dickerson*, 530 US at 439 (citing *Miranda*, 384 US at 441-42).

[88] *Powell*, 559 US at 64 (discussing the United States' amicus brief extolling the virtues of "'desirable police practice' and [ ] 'law enforcement's own interest' to state warnings with maximum clarity.")

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

and the exercise of those rights must be fully honored."[90] The prudent course of action for this Honorable Court is to follow those jurisdictions that have held that a suspect is only "adequately and effectively appraised"[91] of their *Miranda* rights when that advice includes exactly what *Miranda* itself requires: advice of "the right to *consult with* a lawyer and to have the lawyer *with him* during interrogation."[92] That did not happen in this case, there was no other advice given or statement made by the police that would "reasonably convey"[93] these aspects of the right to counsel, and the statements taken are not admissible against the Defendant.

This Honorable Court may edify itself with the weighty discussion of the various competing theories presented by the parties and that may be presented by amici curiae. But at the end of the day it needs to look no further than the *Miranda* opinion itself. This Court would be wise to follow *Miranda*'s plain directive and to hold that a suspect needs to be clearly informed of the right to the presence of counsel and each of the other rights *Miranda* affords. Failure to do so cannot "reasonably convey" the substance of those rights regardless of the words chosen to do so.[94] The trial court and the Court of Appeals both reached the correct result and should be affirmed.

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[90] *Dickerson*, 530 US at 440 (quoting *Miranda*, 384 US at 467) (emphasis added).

[91] *Id.*

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

[93] *Powell*, 559 US at 64.

[94] See eg *Missouri* v *Siebert*, 542 US 600, 621; 124 S Ct 2601, 2615; 159 L Ed 2d 643 (2004) (Kennedy, J., concurring) (Both the plain language of *Miranda* and the spirit of its rule "would be frustrated" if the police were allowed "to undermine its meaning and effect.").

CONCLUSION

The warnings given in this case "in their totality"[95] did not contain the "constitutionally required"[96] "absolute prerequisite"[97] information to "clearly inform"[98] the Defendant of her right to "consult with a lawyer and to have the lawyer with [her] during interrogation."'[99] Likewise, the advice that she had "a right to an attorney" did not "reasonably convey"[100] the nature or extent of her rights. Nor did it "communicate[ ] the same essential message"[101] required by *Miranda*. A proper warning "*at the time of the interrogation* is ***indispensible*** to overcome its pressures and to insure that the individual knows he is free to exercise the privilege *at that point in time*."[102] The Defendant received no such advice and the People's effort to admit her statements in the face of constitutional precedent to the contrary must be rejected. The People's Application should be denied, or the Court of Appeals affirmed.

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95 *Duckworth*, 492 US at 205.
96 *Dickerson*, 530 US at 440.
97 *Miranda*, 384 US at 471.
98 *Id*.
99 *Powell*, 559 US at 51 (quoting *Miranda*, 384 US at 471).
100 *Id* at 62.
101 *Id* at 64.
102 *Miranda*, 384 US at 469 (emphasis added). *Accord*, *Dickerson*, 530 US at 440.

REQUESTED RELIEF

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

Respectfully submitted,

/s/ Joseph A. Lavigne

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