

No. 08-1175
In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,

v.

KEVIN DEWAYNE POWELL,
Respondent.

**On a Writ of Certiorari
to the Supreme Court of Florida**

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

In its opening brief, Florida explained why the pre-interrogation warnings at issue, which advise a suspect of his right “to talk to a lawyer before answering any of our questions” and to use that right “at any time you want during this interview,” JA 3, satisfy the requirements of *Miranda*. For the reasons Florida articulated, the decision below rested on an unduly technical and inflexible approach to reviewing the sufficiency of *Miranda* warnings and cannot be squared with the precedents of this Court. The Florida Supreme Court therefore erred in suppressing a fully voluntary confession and vacating Powell’s felony conviction — his eleventh — for possessing a loaded handgun.

In response, Powell contends that this Court lacks jurisdiction because the decision below rests on independent grounds under the Florida Constitution. The Florida Supreme Court’s decision discusses both state and federal law, however, and fails to include the requisite “plain statement” that federal law was used simply as a guide. Under *Michigan v. Long*, 463 U.S. 1032 (1983), the decision below is presumed to rest on federal grounds thereby establishing jurisdiction in this Court. Indeed, a fair reading of the decision simply confirms the conclusion required by *Long*. Most notably, the question certified for the Florida Supreme Court’s consideration, and the issue that court resolved in its decision, was whether the challenged warning complied with this Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Throughout its opinion, moreover, the Florida Supreme Court framed its analysis and reasoning in terms of federal constitutional requirements. To the

extent it discussed Florida law, the Florida Supreme Court never suggested that the content of that law differed in any respect from the Fifth Amendment as interpreted in *Miranda* and its progeny. The Florida Supreme Court's opinion is thus the paradigmatic case of a state-court ruling in which federal and state law are interwoven. This Court therefore has jurisdiction.

On the merits, the Florida Supreme Court's erroneous decision is problematic for reasons that extend well beyond the specific warning at issue. Although the court purported to acknowledge and apply this Court's instruction to approach *Miranda* warnings in a non-technical and common-sense manner, its actual analysis — like that urged by Powell in his brief — would render a wide range of permissible warnings subject to challenge. Similarly, the decision below would frustrate the search for truth in criminal proceedings, but would not further the purposes of *Miranda*. It therefore should be reversed.

I. The Decision Below Does Not Rest On Independent and Adequate State Grounds, and This Court Therefore Has Jurisdiction.

A. There is no “plain statement” in the decision below indicating that it rests independently on state law.

Michigan v. Long instructs that when, as here, a state court interweaves federal and state law, this Court will presume that the decision rests on federal grounds unless the state court “make[s] clear by a

plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.” 463 U.S. at 1041. To insulate such a decision from this Court’s review, the state court must “indicat[e] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds.” *Id.*

The decision below contains no such “plain statement.” “Since *Long*, [this Court has] repeatedly [] followed this ‘plain statement’ requirement.” *Harris v. Reed*, 489 U.S. 255, 261 n. 7 (1989). In a case such as this, where the state court decision primarily relies on federal law, the absence of a plain statement is dispositive. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996); *New York v. Class*, 475 U.S. 106, 109-110 (1986). This Court therefore has jurisdiction to review this matter.

Powell attempts to satisfy *Long* by pointing to the Florida Supreme Court’s conclusion that the challenged warnings violated “[b]oth *Miranda* and article I, section 9 of the Florida Constitution.” Resp. Br. 17 (quoting JA 174). But this Court has rejected arguments that state-court decisions with similar language rested on independent and adequate state grounds. *See, e.g., Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) (rejecting independent and adequate state ground argument where the Florida Supreme Court, *inter alia*, “conclud[ed] that the search violated the Fourth Amendment and the State Constitution.”); *Long*, 463 U.S. at 1037 n.3 (noting that the decision below concluded: “We hold therefore, that the search was proscribed by the Fourth Amendment to United States Constitution and art 1, §11 of the Michigan Constitution.”).

In addition, Powell contends that the structure of the decision below indicates that it rests on state law.¹ But *Michigan v. Long* requires a “plain statement” that “clearly and expressly” indicates the state-law basis for the decision. By requiring such a statement, this Court is relieved from the obligation to evaluate the “structure” of an opinion to determine what law it rests upon. Contrary to Powell’s characterization, the Florida Supreme Court did not “include[] sections separately addressing federal case law requirements under *Miranda*, and Florida case law requirements independently imposed by the Florida Constitution.” Resp. Br. 16 (citing JA 161-163, 164-169). The sections Powell references separately discussed federal and Florida *cases*, but all of those cases treated federal and Florida law as interchangeable and interwoven. Indeed, the Florida court introduced its discussion of those sections by stating that, with regard to both “state and federal courts,” “[t]he principles espoused in the *Miranda* decision formed the basis of how these courts have treated the warnings.” JA 155. The structure of the opinion below therefore simply shows that the

¹ However, the Florida Supreme Court stated time and again that the issue before it was “whether *Miranda* requires that an individual be expressly informed of his right to the presence of counsel during custodial interrogation.” J.A. 164; J.A. 162, 163, 166 (same). The court stated up front that it “answered . . . in the affirmative” the question whether the warnings to Powell violated *Miranda* because they “fail[ed] to provide express advice of the right to the presence of counsel during questioning.” J.A. 151. And after further analysis, it reiterated that the warnings violated *Miranda* because they “did not expressly indicate that [Powell] had the right to have an attorney present during questioning.” J.A. 170.

discussion of state law was “interwoven” with federal law. *See Long*, 463 U.S. at 1039 n.4 (recognizing that even though state law issues may be present, the Court may exercise jurisdiction “where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter” (alteration in original) (internal citation omitted)).

Powell observes that, the Florida Supreme Court referenced *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), for the proposition that, in Florida, prior to a custodial interrogation a suspect must be expressly informed of his right to counsel during questioning.² JA 157-158, 170. But that citation and discussion of *Traylor* does not constitute a “plain statement” that the decision below rests independently on Florida law. Powell’s argument that this Court should go outside the four corners of the decision below and undertake an examination of other cases purportedly based on Florida law is precisely the kind of analysis *Michigan v. Long* was designed to avoid. *See Long*, 463 U.S. at 1040-41 (concluding that requiring a “plain statement” in the four corners of the opinion” itself “obviates the need to examine state law in order to decide the nature of the state court decision”). In any event if *Traylor* had the dispositive force that Powell now asserts, the Florida Supreme Court would have

² In *Traylor*, the Florida Supreme Court stated that pursuant to article I, section 9 of the Florida Constitution, prior to custodial interrogation a suspect must be apprised: 1) of his right to remain silent; 2) that anything he says can be used against him in court; 3) that he has the “right to a lawyer’s help”; and 4) that a lawyer will be appointed at no cost if he cannot afford one. 596 So. 2d at 966. The “right to a lawyer’s help” was defined as meaning that “the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.” *Id.* at 966 n.13.

simply cited *Traylor* and had little need to expound upon federal constitutional strictures. *Traylor*, moreover, does not stand as a broad pronouncement that any ruling by the Florida Supreme Court concerning the privilege against self-incrimination necessarily must rest on Florida law *independent* of the federal Constitution. To the contrary, the Florida Supreme Court has recognized repeatedly that “[a]lthough [the] ‘analysis in *Traylor* was grounded in the Florida Constitution, *our conclusions were no different than those set forth in prior holdings of the United States Supreme Court.*” *Ramirez v. State*, 739 So. 2d 568, 573 n.3 (Fla. 1999) (quoting *State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997)) (emphasis added); see also *Sapp v. State*, 690 So. 2d 581, 585-586 (Fla. 1997) (“Although states may afford greater protection to the individual than the federal Constitution does, ... we do not interpret article I, section 9 of the Florida Constitution as doing so here.”).

While it is true that “a state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee,” *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 293 (1982), that is simply not what the Florida Supreme Court did in this case. In its analysis of the adequacy of the challenged warnings, the court never suggested that the Florida and United States constitutions imposed different requirements for custodial interrogations. See *Long*, 463 U.S. at 1043 (“The references to the state constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court’s interpretation of federal law.”). At most, this is a case in which “a state court’s

interpretation of state law has been influenced by an accompanying interpretation of federal law.” *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (citation omitted). Even if the decision is interpreted in that way, this Court has jurisdiction. *See id.*³

Finally, the fact that the decision below lacks any “plain statement” of the kind required by *Michigan v. Long* is particularly telling because the Florida Supreme Court has demonstrated that it knows how to include such a statement. *See, e.g., Burr v. State*, 576 So. 2d 278, 280 (Fla. 1991) (“[In *State v. Perkins*, 349 So. 2d 161 (Fla. 1977), we held] that evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial ... *Perkins* rests entirely on Florida law. Art. I, § 9, Fla. Const.”); *Haliburton v. State*, 514 So. 2d 1088, 1090 (Fla. 1987) (“[W]e hold *as a matter of state law* that the failure to suppress appellant’s statements obtained in violation of due process of law was reversible error.”) (emphasis added). Moreover, in the decision below, the Florida Supreme Court included a paragraph whose only purpose was to clarify the basis and effect of its decision. *See* JA 174 (“Our decision today is not to be applied retroactively to cases that are already final on the date of this opinion. The decision made today is not new law and is not entitled to retroactive application.”). The Court’s omission of a *Michigan v. Long* statement in that paragraph or at any other point in its decision is therefore dispositive.

³ *South Dakota v. Neville*, 459 U.S. 553, 558 n.5 (1983) (observing that it was permissible to review federal issues because the state court had relied on federal precedent in its interpretation of South Dakota law).

B. The decision below rests on the Fifth Amendment as interpreted in *Miranda v. Arizona* and its progeny.

A fair reading of the decision below simply confirms the conclusion that the Florida Supreme Court believed that suppression of Powell's inculpatory statement was dictated by the Fifth Amendment's Self Incrimination Clause. At every critical point in the decision, the Florida Supreme Court framed the analysis and result in terms of federal law:

- The "Certified Question" presented to the Florida Supreme Court asked: "Does the failure to provide express advice of the right to counsel during questioning vitiate *Miranda* warnings which advise both (A) the right to talk to a lawyer before questioning and (B) the 'right to use' the right to consult a lawyer 'at any time' during questioning?" JA 151 (omitting footnote that specifically cited *Miranda v. Arizona*).
- In the "Analysis" portion of the opinion the first sentence provides: "The issue before this Court is whether the failure to provide express advice of the right of counsel during custodial interrogation violates the principles espoused in *Miranda v. Arizona*, 384 U.S. 436 (1966)." JA 155.
- The "Florida Courts" portion of the opinion relied on state law precedents

that, in turn, relied on federal law. The Florida Supreme Court stated: “Our explanation of the federal and state requirements included the requirement that a suspect be informed to the right to have counsel present during questioning. *See Ramirez*, 739 So. 2d at 573 (quoting *Miranda* that suspects must be informed that they have the right to an attorney present during questioning); *Sapp*, 690 So. 2d at 583-84 (citing *Miranda* for the proposition that an individual has the right to have counsel present during custodial interrogation.)” JA 164.

Accordingly, there is no merit to Powell’s contention that article I, section 9, of the Florida Constitution independently compelled the Florida Supreme Court’s holding.⁴ Instead, a fair reading of the opinion indicates the contrary: federal precedent provided the basis for that decision. The Florida Supreme Court plainly believed its holding was

⁴ Powell’s arguments add nothing to the identical contentions he unsuccessfully advanced at the certiorari state. Br. in Opp. 6-13. In particular, in opposing certiorari Powell’s brief cited and discussed the Florida Supreme Court’s decision in *Rigterink v. State*, 2 So. 3d 221 (Fla. 2009). Contrary to Powell’s contention, *Rigterink* confirms the federal basis for the decisions below. *Rigterink* stated that, in *Powell*, “[t]he right-to-counsel warning was materially deficient because it did not accurately and clearly convey one of the central components of *Miranda*: The custodial subject enjoys a right to the presence of counsel during, not merely before, a custodial interrogation. *See Prysock*, 453 U.S. at 361; *Miranda*, 384 U.S. at 444, 466.” *See id.* at 241 (“[The Florida Supreme Court] has generally followed federal Fifth Amendment precedent in interpreting article I, section 9 of the Florida Constitution.”).

dictated by *Miranda v. Arizona*. At most, the “[Florida Supreme Court] felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner that it did.” *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). This Court therefore has jurisdiction.

C. This Court’s decision would not be advisory.

Powell predicts that if this Court reverses the judgment of the Florida Supreme Court and remands for further proceedings, the Florida Supreme Court might hold that its decision was based only on article I, section 9 of the Florida Constitution. Accordingly, Powell argues this Court should refrain from deciding this case. That argument is incorrect.

As explained above, when ambiguity exists as to whether a state court’s opinion rested on the state or federal constitution, this Court has jurisdiction. *Long*, 463 U.S. at 1042. This Court has exercised jurisdiction in cases analogous to the circumstances presented here. For example, in *Arizona v. Evans*, 514 U.S. 1 (1995), this Court considered whether the exclusionary rule required the suppression of evidence where a suspect was arrested based on erroneous information contained in a computer report. The Arizona Supreme Court held that the evidence should have been suppressed, but did not clearly indicate whether its holding was based on its understanding of the Arizona Constitution or on the Fourth Amendment’s exclusionary rule.

This Court rejected arguments that it lacked jurisdiction because an adequate and independent state-law basis existed to affirm. The Court in *Evans* acknowledged that state courts were permitted “to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.” *Id.* at 8. But the Court emphasized that when a state court endeavors to interpret the United States Constitution, it may not evade review by the United States Supreme Court. *Id.* at 8-9. The jurisdictional arguments raised in *Evans* are akin to those asserted in this case. In both situations, however, it is evident that this Court has jurisdiction.

In addition, no concrete basis exists to believe that upon remand, the Florida Supreme Court would simply reinstitute its prior holding, this time solely under state law principles. While it is conceivable that such a result could occur, it is no less conceivable that the opposite might occur if this Court holds that the warnings comport with *Miranda*. Even if the Florida Supreme Court did affirm on remand, it would have to do so purely and explicitly on state-law grounds, a step it did not take in the decision below. *See Evans*, 514 U.S. at 8 (acknowledging that, following its reversal as to the Arizona Supreme Court’s interpretation of the Fourth Amendment’s exclusionary rule, upon remand the state court would be free to address still-extant state law issues “because [the Arizona Supreme Court was now] disabused of its erroneous view of what the United States Constitution requires.”). Accordingly, this Court would not be rendering an advisory opinion in this matter.

II. The *Miranda* Warnings Issued to Powell Reasonably Conveyed His Rights Under Federal Law.

A. The Florida Supreme Court did not heed this Court's instruction that warnings must only "reasonably convey" the *Miranda* warnings.

Powell attempts to portray the decision below as consistent with the standards this Court has prescribed for review of *Miranda* warnings, contending that the Florida Supreme Court acknowledged the proper legal framework. That characterization, however, is inaccurate. Although the Florida Supreme Court incorporated certain language from precedent from this Court, it nevertheless held that, on pain of suppression, compliance with the dictates of *Miranda v. Arizona*, 384 U.S. 436 (1968), requires that an individual subject to a custodial interrogation must be explicitly told that he is entitled to the presence of counsel during the interrogation. That holding is inconsistent with decisions of this Court, and the basic approach the Florida Supreme Court applied would encourage unnecessary litigation about the validity of other adequate warnings.

This Court has repeatedly noted that latitude is appropriate in the form of the *Miranda* warnings, and that such warnings are adequate as long as they "reasonably convey" the suspect's rights. *See, e.g., Missouri v. Seibert*, 542 U.S. 600, 611 (2004); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). In *California v. Prysock*, 453 U.S. 355 (1981), this Court made clear that the protections afforded by the *Miranda* warnings were not dependent on the manner

in which they were recited. *Prysock* recognized that reducing the *Miranda* warnings to a simple rote verbal formulation was inappropriate: “*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures.” *Id.* at 359. Similarly, *Duckworth v. Eagan*, 492 U.S. 195 (1989), establishes that *Miranda* warnings issued to a suspect are not dependent upon the form in which they are articulated. In *Duckworth*, a suspect signed a waiver form that stated: “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. This warning was challenged on the grounds that it failed to adequately relate the suspect’s rights under *Miranda* to appointed counsel before questioning.

The *Duckworth* Court found the challenged warning consistent with *Miranda* and instructed that “[r]eviewing courts ... need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*.’” *Id.* at 203 (quoting *Prysock*, 453 U.S. at 361). Powell does not even acknowledge this oft-recited *Duckworth* language.

If the *Duckworth* warnings were subjected to the kind of analysis the Florida Supreme Court conducted, the outcome in *Duckworth* would clearly be different. The Florida Supreme Court’s analysis would lead to the conclusion that the *Duckworth* warnings “misleadingly suggest” that the suspect would have *only* been entitled to counsel once he was arraigned. But this Court recognized that such formalism was inconsistent with the purposes of *Miranda*, embracing the principle that reviewing courts should analyze warnings in their “totality” to determine whether they

complied with *Miranda*. See *id.* at 205. Parsing warnings clause-by-clause is an unnecessary exercise, yet the Florida Supreme Court's constrained interpretation of *Miranda* does just that.

At bottom, *Miranda* was intended to address the inherently coercive nature of custodial interrogations. *Dickerson v. United States*, 530 U.S. 428, 435 (2000). However, *Miranda* warnings that provide “full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process[.]” *Moran v. Burbine*, 475 U.S. 412, 427 (1986). The Tampa Police Department warnings apprised Powell of the adversarial nature of the custodial interrogation, informed him of the fact that any cooperation with law enforcement could subsequently be used against him in a court proceeding, that counsel would be appointed for him, and that he could assert his right to counsel at any time during his interrogation. Cf. *Colorado v. Spring*, 479 U.S. 564, 574 (1987) (“The *Miranda* warnings protect [the privilege against self-incrimination] by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.”). Under both *Prysock* and *Duckworth*, the warnings issued to Powell “reasonably conveyed” the requirements of *Miranda*.⁵

⁵ See *Withrow v. Williams*, 507 U.S. 680, 690 (1993) (“The *Miranda* Court did of course caution that the Constitution requires no ‘particular solution for the inherent compulsions of the interrogation process’”) (quoting *Miranda*, 384 U.S. at 467).

B. The Florida Supreme Court gave the warnings a technical and unrealistic meaning, and failed to consider them in their totality.

The Florida Supreme Court's highly unrealistic and overly technical reading of the warnings failed to consider them as a whole. Considered in their totality, the warnings are consistent with *Miranda's* dictates. In reaching a contrary conclusion, the decision below erred in several respects.

First, the Florida Supreme Court mischaracterized the meaning of the phrase "before answering any of our questions," reading out of that language the evident message that the suspect can consult with his attorney before each and every answer he is asked to provide. The plain meaning of "the right to talk to a lawyer before answering any of our questions" is that, upon being asked any question, the suspect may turn to his lawyer for help in answering it. That language alone therefore conveys the right to counsel during questioning. There is no basis for questioning whether that language also conveys the attorney's "physical presence" in the interrogation room. It defies common sense to conclude that, upon hearing these warnings, a lay suspect would conjure up a grand jury-like process, in which he would be shuttled in and out of the interrogation room to talk to his lawyer before answering each question. A reasonable listener would instead understand that his lawyer could be present in the interrogation room to serve the attorney's obvious purpose – to provide advice to the suspect in answering questions.

Second, the Florida Supreme Court all but ignored the phrase “at any time during this interview” by relegating it to an empty “catch-all” sentence. This warning confirms that the suspect’s rights are available “at any time” – i.e., without any limit, restriction, or qualification, and specifically “during” the interrogation. Furthermore, understood in context, the phrase “during *this* interview” contemplates that the warning is provided at the time of interrogation. Even more clearly than the “at this time” language, that the courts of appeals have upheld, the warning that the suspect can use the right to counsel “during this interview” reasonably conveys to a suspect the *present* availability during questioning of access to an attorney. A suspect hearing that warning would not believe that the police were telling him about his rights in a *previous* (i.e., “before questioning”) phase of the process; rather, he would understand that the rights of which he was being informed – including the right to consult with a lawyer – applied at that moment, “during this interview.”

Thus, even if one were to read the “before answering any of our questions” portion of the warning as not encompassing the right to counsel during the question-and-answer session, Powell’s argument would still fail. If these warnings had said, “you have the right to talk to an attorney before answering any of our questions and at any time during this interview,” there would be no dispute at all that the warnings would be adequate. Indeed, that is essentially the fix that the concurring opinion below suggested. See JA 175 (“You have the right to talk to a lawyer before answering any of our questions and *at any time during questioning.*”) (Pariente, J., concurring). But such an unquestionably adequate

warning differs from the warnings here only because the Tampa warning separated the advice about the right to talk to an attorney “before answering any of our questions” and “during this interview” by a statement of the right to appointed counsel. The sole difference, in other words, is the order in which the rights were stated. But this Court in *Prysock* correctly concluded that the admissibility of a confession should not turn on the order in which the police state the *Miranda* warnings. 453 U.S. at 361 (“The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given.”).

Third, and in any event, even if one accepted Powell's artificial and constricted reading of “before answering any of our questions” as meaning “before questioning,” and even if one ignored the explicit advice that the suspect could use the right to talk to an attorney “at any time during this interview,” the warnings nevertheless reasonably conveyed to Powell his ability to have counsel present during questioning. That is because, a suspect who understands that his right to counsel attaches prior to interrogation or “before questioning” realistically would not draw the highly counterintuitive inference that the attorney would be made unavailable once the first question is asked. As other courts have concluded, the natural and common-sense reading of these warnings is that an attorney who is provided even before questioning begins will continue to be available while questioning is underway.

Consequently, if the *Miranda* warnings read to Powell are read as a whole, they reasonably conveyed

to him his right to counsel during his custodial interrogation.

C. Federal courts are in sharp and longstanding disagreement about what language a *Miranda* warning must contain.

Powell contends that “every” federal circuit court of appeals to consider the issue has held that *Miranda* warnings similar to those issued to him violate the Fifth Amendment. Resp. Br. at 27; *see also id.* at 33 (“Federal courts of appeals considering warnings like the ones given Powell uniformly have held them defective.”). Powell is manifestly incorrect in his reading of the case law.

Contrary to Powell’s assertion, sharp disagreement exists among the courts on the principle at issue in this case. The Florida Supreme Court noted this disagreement. *See* JA 161 (“The federal courts are split regarding the necessity for express warnings of the right to have counsel present during interrogation.”). The federal courts of appeals themselves have long and openly acknowledged a conflict concerning whether *Miranda* requires explicit advice of the right to the “presence of counsel during questioning.” *See, e.g., Bridgers v. Dretke*, 431 F.3d 853, 859 (5th Cir. 2005) (that warnings similar to the ones in this case implicate “a split among the circuits with respect to whether the warning must explicitly provide that a suspect is entitled to the presence of counsel during interrogation”); *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984) (noting that the “Second Circuit has deemed the omission of [presence-during-questioning language] insignificant, holding that *Miranda* is satisfied by the inferences that can be

drawn from” the surrounding advice, that “the Fifth Circuit, however, rejects this approach,” and siding with the Fifth Circuit). And the very commentators on which Powell relies have similarly recognized that the question of what constitutes an adequate right-to-counsel warning is a matter of longstanding and ongoing dispute.⁶

Powell is flatly incorrect that the federal courts have “uniformly” rejected warnings akin to those provided to Powell. Resp. Br. 33. In fact, only the Ninth and Fifth Circuits have invalidated warnings that are “similar” to the one under review in the sense that their only alleged flaw was that they contained language informing the suspect that he could consult with counsel before answering questions, but did not explicitly state that the suspect could have an attorney present during the interrogation. Both of those circuits established that rule, moreover, before this Court’s announcement in *Duckworth*, which set the standard for evaluating the adequacy of *Miranda* warnings. In *Noti*, the Ninth Circuit concluded that, “although the question is a close one,” 731 F.2d at

⁶ See, e.g., Daria K. Boxer, *Miranda with Precision: Why the Current Circuit Split Should be Resolved in Favor of a Uniform Requirement of an Explicit Warning of the Right to Have Counsel Present During Interrogation*, 37 Sw. U. L. Rev. 425, 431 (2008) (“In the absence of unequivocal Supreme Court guidance, circuit courts remain split on the issue of whether the third *Miranda* warning must include an express reference to the right to have counsel present during interrogation.”); Adam S. Bazelon, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning “You Have the Right to an Attorney,”* 90 Marq. L. Rev. 1009, 1019 (2007) (“Although *Miranda* and its progeny indicate that a suspect subjected to a custodial interrogation must be informed of his right to have an attorney, the circuits are split on whether this explicit warning is required.”).

615, *Miranda* requires explicit advice of “the right to counsel during questioning,” *id.* at 614.⁷ The court therefore agreed with the Fifth Circuit’s 1968 decision in *United States v. Windsor*, 389 F.2d 530, which invalidated warnings that advised the defendant of his “right to the services of an attorney before questioning.”⁸

Contrary to Powell’s contention, the decisions in *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968), *United States v. Oliver*, 505 F.2d 301 (7th Cir. 1974), and *United States v. Tillman*, 963 F.2d 137 (6th Cir. 1992), did not resolve the adequacy of so-called “before questioning” warnings. To the contrary, the warnings in each of those cases were invalidated primarily on other grounds. In *Fox*, the challenged warning failed to include any reference to the right to appointed counsel. That omission, the Second Circuit later explained, “tainted the entire warning” and constituted the “most significan[t]” reason for the

⁷ In *United States v. Bland*, 908 F.2d 471 (9th Cir. 1990), decided after *Duckworth*, the Ninth Circuit simply concluded, without substantive discussion or mention of *Duckworth*, that it would “not retreat from *Noti*” and therefore invalidate a warning that “failed to include a statement that [the defendant] had a right to have an attorney present during questioning.” *Id.* at 472-474.

⁸ More recently, in *Bridgers v. Dretke* 431 F.3d 853 (5th Cir. 2005), the Fifth Circuit rejected on collateral review a challenge to warnings that stated: “You have the right to the presence of an attorney/lawyer prior to questioning.” The court “recognize[d]” that its earlier decisions “remain[] binding precedent for cases on direct appeal in this Circuit,” 431 F.3d at 859 n.4, but it noted the reasoning of other courts to the contrary and opined that *Miranda* does not answer the question “whether informing the suspect that he has a right to the presence of an attorney prior to questioning adequately conveys that counsel may remain during questioning.” *Id.* at 859.

result in *Fox*. See *United States v. Lamia*, 429 F.2d 373, 377 (1970) (upholding warnings that informed the defendant that “he had a right to an attorney”). The Second Circuit has cast significant doubt on the aspect of *Fox* on which Powell relies. In *Lamia*, that court refused to endorse *Fox*’s reasoning regarding the presence-during-counsel component of the warnings, expressing no opinion as to “[w]hether this [analysis] was correct or not.” *Id.* at 377. *Lamia* also concluded that, in general, *Fox* “represented too formalistic an approach to *Miranda*.” *Id.*; see *id.* at 376 (rejecting a similar effort to seize on linguistic variations in the “right to remain silent” warning; concluding that the two formulations “mean substantially the same thing to any reasonable person” and that “[w]hile there may be philological distinctions, they surely would not occur to anyone at a time of arrest”). And the Second Circuit has squarely upheld warnings that advised the defendant of his right “to consult with a lawyer at *this* time.” *United States v. Vanterpool*, 394 F.2d 697, 698 (2d Cir. 1968) (emphasis added); *United States v. Anderson*, 394 F.2d 743, 745 (2d Cir. 1968) (suspect told “he had a right to a lawyer at this time”); *cf.* JA 3 (advising the suspect of his ability to use the right to talk to an attorney “during this interview”).

Oliver is even less supportive of Powell’s position. In that case, the government did not even contend that the warnings were adequate under *Miranda*, because they “did not include advice that [the defendant] could remain silent” or the right to appointed counsel, and because the agents made no attempt to ascertain whether the defendant understood the warnings. *Oliver*, 505 F.2d at 304 & n.6, 305, 306. The issue in the case was instead whether the defendant was in *Miranda* custody at the time of the interrogation. The court’s observations

that the “defendant was not told that he could have counsel present during the questioning” therefore were plainly dicta. *Id.* at 304 n.6. The Seventh Circuit has never questioned its holding in *United States v. Adams*, 484 F.2d 362 (7th Cir. 1973), that *Miranda* warnings need *not* contain explicit advice of the “right to have an attorney present during questioning.” *Id.* at 361 (agreeing with the Second Circuit’s decision in *Lamia*, *supra*).

Similarly, the decision in *Tillman* rested on the fact that “the Defendant was never told any statements that he would make could be used against him.” *Tillman*, 963 F.2d at 141. The court concluded that this “troublesome” and “dangerous omission” doomed the warnings: “Of all the elements provided for in *Miranda*,” the court reasoned, advice that statements will be used against the defendant “is perhaps the most critical because it lies at the heart of the need to protect a citizen’s Fifth Amendment rights.” *Id.* The court concluded that, “by omitting this essential element,” the warnings were inadequate because “a person may not realize why the right to remain silent is so critical.” *Id.* At the end of that discussion, the court observed in a single sentence and without discussion that, “[i]n addition, the police failed to convey to defendant that he had the right to an attorney both before, during, and after interrogation.” *Id.* Contrary to Powell’s contention, that observation was hardly the basis for the court’s decision, and it does compel the conclusion that the Sixth Circuit would necessarily reject the warnings at issue here.

The remainder of the decisions Powell cites as “uniformly ... hold[ing]” “similar” warnings defective, in fact *upheld* warnings that were *less* comprehensive

and informative than the ones at issue here. Resp. Br. 33. *See, e.g., United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996) (upholding warning which provided: “You have the right to an attorney. If you can’t afford an attorney, the Government will get one for you.”); *United States v. Caldwell*, 954 F.2d 496 (8th Cir. 1992) (“You have the right to an attorney. If you can’t afford one, one will be appointed for you.”); *see also Evans v. Swenson*, 455 F.2d 291 (8th Cir. 1972) (deeming adequate under *Miranda* the advice that “you have a right to make a phone call and you also have a right to an attorney”).

Powell attempts to portray these decisions as “holdings” in favor of his position by seizing on statements to the effect that different warnings might be invalid if they were “affirmatively misleading.” Resp. Br. 33. But he can make the sweeping assertion that the federal cases “uniformly” support his position only by converting decisions that *approve* of a general warning into decisions that implicitly *reject* other types of warnings that were not at issue. No principled basis exists for that inferential leap.

Finally, Powell’s description of the federal case law requires him to ignore entirely a critical aspect of the warnings under review. Unlike the warnings in the decisions Powell discusses, in this case the warnings specifically advised Powell that the right to talk to a lawyer, like all the other rights of which he was informed, could be exercised “*at any time you want during this interview.*” JA 3 (emphasis added). Powell’s predictions about how the courts of appeals would resolve this case thus rests on a fundamental mischaracterization of the warnings he received.

D. Reversal would not lead to dilution of *Miranda* warnings, but affirmance would encourage wasteful litigation.

Both Powell and *amici* assert that, if this Court were to reverse the Florida Supreme Court, law enforcement agencies would be encouraged to modify their warnings in an effort to hamper suspects' understanding of their Fifth Amendment rights. Resp. Br. at 50-51; Br. for *Amici* NACDL at 9, 20-24. Those predictions of a "race to the bottom" are flatly inconsistent with the available evidence.

The concern that law enforcement would react to this Court's decision by muddling the language contained in the *Miranda* warnings is mistaken. Experience does not bear out, and Powell has not established, the conclusion that upholding these warnings would cause law enforcement agencies to modify their approaches to *Miranda* in a way that compromises constitutional rights. No evidence exists, for example, that after *Duckworth* state and local jurisdictions adopted the "if and when you go to court" formulation, even though one could argue that such language would be more likely to procure a waiver than the standard formulation. Moreover, there is no evidence that in those federal circuits or state courts that currently permit a general "right-to-counsel" warning, law enforcement has stopped specifying in explicit terms that suspects have the right to consult before questioning and to have counsel present during questioning.

In fact, as the study Powell cites shows, the evidence is exactly the opposite: even though courts have upheld variant warnings, law enforcement

agencies tend to gravitate toward similar language. Resp. Br. at 42; *see also* Br. for Professor Richard Leo as *Amici Curae* Appendix. That practice makes sense: law enforcement agencies would risk losing convictions if they intentionally and significantly altered the *Miranda* warnings. The only incentive to change the warnings is the possibility of an increase in waivers by suspects. But an overwhelming percentage of suspects waive their rights even when they are provided the standardized and precise warnings.⁹ The effect of changing the warning would simply be to place all of the statements resulting from those waivers at risk of suppression.

Indeed, the broader implications of this case are very different from what Powell emphasizes. A decision reversing the Florida Supreme Court would simply affirm the principle of *Duckworth* and *Prysock* that *Miranda* warnings should be read sensibly and non-technically.

Affirming the Florida Supreme Court's approach would render variants of *Miranda* warnings potentially deficient. To cite just two possible examples, a suspect informed only of his right to counsel "during questioning" would have a cognizable claim, and would certainly contend that he was not reasonably conveyed his right to counsel "before questioning."¹⁰ A suspect told he had the right to

⁹ *See generally* Paul G. Cassell and Brett S. Hayman, *Police Interrogations in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. Rev. 839, 859, tbl. 3 (1996) (describing a waiver rate exceeding eighty percent).

¹⁰ Notably, a compendium of various Florida jurisdictions *Miranda* warnings provided by *amici*, demonstrates that (Continued...)

counsel “at any time he wanted” could argue such a warning lacked clarity or specificity. The consequences of affirming would ultimately require reviewing courts to parse warnings clause-by-clause to determine whether they comported with federal constitutional strictures, a result that is inefficient and clearly disfavored under this Court’s precedent.

E. Powell’s attacks on the motivation for adopting the challenged warnings are unfounded and irrelevant.

Neither a factual nor a legal basis exists for Powell’s accusation that the warning at issue was the result of the Tampa Police Department’s efforts to circumvent *Miranda* or obscure the suspect’s understanding of his rights. As a factual matter, the available evidence suggests exactly the opposite.¹¹

approximately 30 do not contain “before” or “prior to questioning” language concerning the right to counsel. Br. for Professor Richard Leo as *Amici Curae* Appendix.

¹¹ The warnings given to Powell were apparently adopted as a result of litigation ultimately resulting in the Florida Supreme Court’s decision in *Thompson v. State*, 595 So. 2d 16 (Fla. 1992), which invalidated the previous version of Tampa warning on the ground that it did not adequately communicate the suspect’s right to appointed counsel. As revised and administered to Powell, Form 310 is substantially less complex than the previous version (79 words versus 148) and more understandable because it does not contain the arcane and legalistic language of the prior form. *E.g.* (suspect “need not consent to be interviewed” or “required to make any further statement”; if suspect “desire[s] to consult with an attorney,” “interview will terminate”). There is no basis at all for the inference Powell would ask this Court to draw from the change in the form.

This case does not present a circumstance resembling the one this Court confronted in *Missouri v. Seibert*, in which there was clear evidence that the challenged practice was deliberately designed to evade *Miranda* and was gaining in popularity. Because those concerns are not present here, the subjective motivation for adopting these warnings does not bear on whether they are constitutionally adequate. See *Moran*, 475 U.S. at 423 (“[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent’s election to abandon his rights.”)

Requiring the suppression of Powell’s inculpatory statement, notwithstanding fully adequate *Miranda* warnings, does nothing to advance the efficacy of law enforcement or adherence to *Miranda*, and gives short-shrift to countervailing interests “in punishing and incapacitating those who violate criminal laws.” *Duckworth*, 492 U.S. at 207 (O’Connor, J., concurring). The Florida Supreme Court’s express advice standard is untenable when one considers that in this case, law enforcement was placed in an identical position, from a legal standpoint, had Powell’s confession been the product of outright physical coercion or had no warnings been provided at all. This standard misreads the Tampa Police Department warnings by construing them as involving two distinct phases of interrogation (“before” and “during” questioning). Common sense dictates that counsel would not disappear once questioning started.

Simply put, informing a suspect that he has the right to counsel before answering any question, and

that this right can be asserted at any point “during this interview” “reasonably convey[s]” the right to the presence of an attorney during questioning.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Florida Supreme Court.

Respectfully submitted,

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