Case No. 08-1175

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA
Petitioner,
v.
KEVIN DEWAYNE POWELL
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

WHETHER THE LACK OF ANY EXPRESS ADVICE CONCERNING THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATES *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING. (RESTATED).

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as *State v. Powell*, 998 So. 2d 531 (Fla. 2008). (JA 150-181).

The opinion of the Florida District Court of Appeal, Second District, is reported as *Powell v. State*, 969 So. 2d 1060 (Fla. Dist. Ct. App. 2007). (JA 133-149).

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion on September 29, 2008, and issued a revised opinion on December 23, 2008. On June 22, 2009, the State of Florida's petition for writ of certiorari was granted by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

Respondent, Kevin Dewayne Powell, was charged by information and convicted of felon in possession of a firearm (a loaded nine millimeter

handgun hidden under a bed), on August 10, 2004, in Hillsborough County, Florida. (JA 134, 151-152).

Tampa Police Officer Augeri testified at trial that Powell was arrested and taken to the police department, where he was advised of his *Miranda*[1] warnings. (JA 152). The following warnings given to Powell were contained on the Tampa Police Department Consent and Release Form, which was signed by Powell and received into evidence:

> You have the right to remain silent. If you give up this 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.

(JA 3).

Officer Augeri testified Powell willingly agreed to talk with them, and Powell admitted the firearm was his. Defense counsel objected at trial to the validity of the *Miranda* warnings on the basis that the standard form provides that the

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

defendant has the right to have an attorney present before questioning, but not *during*. (JA 24). The trial court overruled the objection, stating, "I think it's already been said that they have the right to question, have an attorney present right before any questioning and you can have one appointed for you so I'm going to overrule the objection." (JA 28).

Officer Augeri testified that Powell confessed that he owned the firearm and carried it for protection. Powell knew that as a convicted felon he was not permitted to carry a firearm. Powell was neither threatened nor coerced in any way to give his statement. (JA 24, 29). Powell testified at trial and admitted he had been convicted of ten prior felonies, as well as one crime involving dishonesty. (JA 86-87). Powell acknowledged he signed the waiver of his rights form and consented to be interviewed. Defense counsel specifically inquired as follows:

> DEFENSE ATTORNEY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?
> RESPONDENT: Yes.

(JA 80).

The jury found Respondent guilty of the charge of felon in possession of a firearm. (JA 134).

STATEMENT OF CASE

Respondent appealed his convictions and sentences to the Florida District Court of Appeal, Second District, arguing the *Miranda* warnings he was given were deficient pursuant to the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.

In *Powell v. State*, 969 So. 2d 1060 (Fla. Dist. Ct. App. 2007), two judges of a three-judge panel of the Second District Court of Appeal agreed and reversed Powell's conviction and remanded the case for further proceedings. (JA 148). Judge Kelly, concurring in part and dissenting in part, observed:

> Properly framed, the test for reviewing the adequacy of the warnings provided by law enforcement to an individual taken into custody "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981)). In my view, Mr. Powell was not deprived of any information essential to his ability to knowingly waive his Fifth Amendment privilege against self-incrimination, and in particular, his

> right to have counsel present during questioning. Because the warnings, in their totality, "touched all of the bases required by *Miranda*," I respectfully dissent from the majority opinion to the extent that it holds otherwise. *See id.* at 203, 205. (JA 148).

In *State v. Powell*, 998 So. 2d 531 (Fla. 2008), the Supreme Court of Florida affirmed, holding the *Miranda* warnings informing a defendant he had the right to talk with a lawyer before questioning, and that he could use that right at any time during the interview, were insufficient to inform him of his right to have counsel present during questioning as required by the principles espoused in the Court's decision in *Miranda* and the protections given by the Fifth Amendment. (JA 174). Justice Wells' dissent in *Powell* articulates the problem: "I believe that the majority stretches the plain language of the warning given in this case and ignores the simple, straight-forward requirements for a warning set out in *Miranda*. The majority needlessly complicates the *Miranda* warning requirements to reach its conclusion that the warning read to Powell was inadequate." *Id.* at 544.

Justice Wells further concluded:

> The warning in this case stated that a suspect has a right to talk to an

attorney before answering any question. I would find that the use of the phrase "any of our questions" was sufficient to "reasonably convey" to a person of ordinary intelligence that he or she had a right to talk to an attorney at any point during the interrogation. It is unreasonable to conclude that the broad, unqualified language read to Powell would lead a person of ordinary intelligence to believe that he or she had a limited right to consult with an attorney that could only be exercised before answering the first question posed by law enforcement.

In addition, I agree with the plurality from *M.A.B.* that the final sentence of the warnings used in these cases ensures that the *Miranda* warning "avoids the implication - unreasonable as it may be - that advice concerning the right of access to counsel before questioning conveys the message that access to counsel is foreclosed during questioning." *M.A.B.*, 957 So. 2d at 1227. This final sentence informs suspects, "You have the right to use any of these rights at any time you want during this interview." The previously listed

> rights consist of the right to remain silent, the right to talk to a lawyer before answering any questions, and the right to have an attorney appointed without cost before any questioning. Again, I find that it is patently unreasonable to conclude that a person of ordinary intelligence would interpret this invitation to use "any of these rights at any time you want during this interview" (emphasis added) to mean that the right to talk with counsel could only be invoked before answering the first question posed by law enforcement. The totality of the warning reasonably conveyed to Powell his continuing right of access to counsel.

State v. Powell, 998 So. 2d 531, 544-545 (Fla. 2008) (Wells J., dissenting). (JA 179-180).

SUMMARY OF THE ARGUMENT

Miranda requires that an accused be advised of the right to a lawyer before the initiation of custodial interrogation, which was done below. The warnings advised that Powell had the right "to talk to a lawyer before answering any of our questions" and that he would be provided with one "without cost and before any questioning." He was further told that he had the right to "use any of these rights at any time you want during this interview."

A person of ordinary intelligence would understand that he had a continuing right of access to his counsel and would be entitled to consult with his lawyer during questioning, not just immediately prior thereto.

The holding of the Supreme Court of Florida, that a suspect must be *expressly* advised of his right to counsel during questioning, is neither compelled nor required by *Miranda* and the Fifth Amendment of the United States Constitution. The Court has consistently held that no specific recitation of the warnings is necessary to satisfy the strictures of *Miranda*.

The warnings in this case reasonably convey *Miranda* rights as required by the Court. The Florida Supreme Court's holding to the contrary unjustifiably expands *Miranda* and erroneously finds that the omission of any express advisement to the right to counsel during questioning fails to satisfy constitutional standards.

ARGUMENT

WARNINGS THAT ADVISE OF THE RIGHT TO REMAIN SILENT, THE RIGHT TO TALK TO A LAWYER BEFORE QUESTIONING, AND THE RIGHT TO USE ANY OF THESE RIGHTS AT ANY TIME DURING QUESTIONING REASONABLY CONVEY THE PROCEDURAL SAFEGUARDS ENUNCIATED IN *MIRANDA*.

The Supreme Court of Florida has improperly expanded this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), by requiring law enforcement to expressly advise suspects they have the right to have counsel present during custodial interrogation. The impact of this expansive misinterpretation of *Miranda* places an unnecessary and onerous burden on law enforcement officials and continues to have a chilling effect on the admissions of otherwise voluntary confessions.

A. *Miranda* Requires that the Warnings Given be Reasonably Conveyed.

Over 40 years ago the *Miranda* Court established procedural safeguards to protect an individual's rights under the Fifth Amendment before law enforcement could commence custodial interrogation. The Court mandated that law enforcement, prior to questioning, must advise a person that, "he has the right to remain silent, that

any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

The Court recognized that, while an individual's rights exist, society has an interest in the safety of its citizens in the prosecution of criminals and the ability of the prosecution to utilize otherwise voluntary statements in judicial proceedings. To balance these equally important interests the Court did not require that law enforcement recite the warnings verbatim from *Miranda* as long as the rights were "reasonably conveyed" to the person being questioned. *Duckworth v. Eagan*, 492 U.S. 195 (1989).

Prior to *Miranda*, courts employed the due process clauses of the Fifth and Fourteenth Amendments and a totality of the circumstances test to determine if a confession was compelled or voluntarily given. *See e.g., Brown v. Mississippi*, 297 U.S. 278 (1936). In *Miranda*, the Court recognized the difficulty of applying such a test to determine the voluntariness of a statement holding that the Fifth Amendment's privilege against self-incrimination clause was the touchstone for determining the admissibility of a statement obtained through custodial interrogation.

As part of the system for protecting this constitutional privilege, the Court established that

individuals are entitled to consultation with an attorney prior to questioning and to the presence of an attorney during interrogation. Along with other procedural safeguards this information must be effectively communicated to the individual. *Miranda*, 384 U.S. at 470.

The Court never intended to unduly burden the police by mandating that particular words be used in conveying the meaning of *Miranda's* protections. In fact, the Court has steadfastly counseled against any requirement for a recitation of "magic words" to satisfy the Court's holding. *Miranda* does not require of, nor impose upon, the courts or law enforcement a rigid and precise formulation of the warnings given a criminal defendant. *California v. Prysock*, 453 U.S. 355 (1981). To avoid tipping the delicate balance struck by *Miranda*, the Court recognized that the "limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." *Miranda*, 384 U.S. at 481.

Miranda and its progeny merely require that the warnings given "adequately convey" the protections enunciated therein. In *Prysock*, the Court accepted review of a case involving application of precedent to a set of facts. There, the lower court's opinion improperly set forth a "flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise

language contained in the *Miranda* opinion." The Court held "such a rigid rule was not mandated by *Miranda* or any other decision of this Court, and is not required to serve the purposes of *Miranda." Prysock*, 453 U.S. at 356. In finding the warnings given adequately conveyed a right to counsel in conjunction with the pending interrogation, the Court held, "… nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning.'" 453 U.S. at 360-61.

As explained by the Court, these "prophylactic" *Miranda* warnings are not themselves rights protected by the Constitution, but are measures set out to insure that the right against compulsory self-incrimination is protected. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

Nor were *Miranda's* procedural safeguards intended to create a "constitutional straightjacket." *Miranda*, 384 U.S. at 467. Simply put, "the Constitution does not require police to administer the particular *Miranda* warnings," as long as the procedure used effectively protects the privilege against self-incrimination. *Dickerson v. United States*, 530 U.S. 428, 440 n.6 (2000).

In *Miranda*, the Court found the warnings used by the FBI were sufficient to provide a reasonable person a meaningful understanding of their rights. In citing these warnings with approval, the Court stated:

> Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.

Miranda, 384 U.S. at 483-84.

Despite the absence of any reference to the right to have counsel present during questioning, the Court stated that, "...the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today." *Id.* at 483-84.

Although the reasons for the protections afforded by *Miranda* warnings have remained, the

language used in advising a suspect of his rights has evolved over time as our society has changed and advanced. Because the warnings are given in various circumstances it is important flexibility exists to accommodate a variety of different scenarios. For instance, considering custodial interrogations are not limited to the station house, "and the officer in the field may not always have access to a printed *Miranda* warning, or he may inadvertently depart from routine practice," reviewing courts need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (courts should consider if the language is adequate to safeguard the right not to incriminate oneself).

Unsurprisingly, given today's daily bombardment of information and spur of the moment media, *Miranda* warnings have become such a routine part of law enforcement procedures that over the past four decades they have become a part of our national culture. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). Any good police officer on the television beat would be remiss if he did not "Mirandize" a suspect before questioning, evidencing that, under the "reasonably convey" analysis, *Miranda* warnings have been assimilated into our society. *See* Merriam-Webster's Online Dictionary, Main Entry: Mi·ran·dize, Pronunciation: \mə-'ran-ˌdīz\, Function: transitive verb, Inflected Form(s): Mi·ran·dized;

Mi·ran·diz·ing, Date: 1984,: to recite the *Miranda* warnings to (a person under arrest).

Thus, the warnings and the reasonably convey standard should only be examined through this more modern day lens. Given a common sense perspective, the inquiry as to whether the warnings given to Respondent[2] *reasonably convey* to a suspect of ordinary intelligence his rights must be answered in the affirmative.

B. The Warnings at Issue Reasonably Convey the Right to Have Counsel During Questioning.

The warnings in this case, when read in context, adequately convey one's rights pursuant to *Miranda* including the right to have counsel present prior to and during questioning. Although not absolutely perfect or the most elegant formulation of the warnings, *Miranda* itself neither demanded nor indicated any "talismanic incantation was required to satisfy its strictures." *Prysock*, 453 U.S. at 359. The requirement to inform a suspect of his rights could be satisfied not

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[2] "You have the right to remain silent. If you give up this 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." (JA 3).

only by the precise warnings delineated in *Miranda* but also by "a fully effective equivalent." *Id.* at 476.

By failing to consider the warnings in their entirety, the Supreme Court of Florida and other like-minded courts, e.g., those cited in fn. 6, *infra.*, have embraced a hypertechnical approach by concentrating on the words used in isolation and not their meaning as a whole. This approach mires the common sense reasoning of this Court by engaging unnecessarily in semantics. Consequently, *Miranda* has been rendered unworkable by various courts' utilization of an overly rigid application of its holding. *Dickerson v. U.S.*, 530 U.S. 428, 463 (2000) (Scalia, J., dissenting).

Warnings, such as those given to Powell, accomplish the critical function of conveying to an individual of average intelligence:

> (1) that the giving of a statement to the police can have serious legal consequences, (2) that the person is not obligated to provide the statement, (3) that the matter is serious enough that the person may need to consult with a lawyer, and (4) that the State will provide a lawyer upon request and without continuing questioning if the person indicates he wants one and cannot afford one.

Mitchell v. State, 2 So. 3d 287 (Fla. Dist. Ct. App. 2007) (Altenbernd, J., concurring).

Powell was first warned of his right to remain silent, right to speak with a lawyer before questioning, right to appointed counsel if he could not afford one, and that he could exercise any of these rights during questioning. Reading these advisements as a whole to a person of ordinary intelligence can only lead to the common sense conclusion that one's rights were adequately conveyed.

In *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996), Frankson contended that the warnings given were deficient because they did not convey a right to have counsel present during interrogation. The Fourth Circuit reasoned that the officer's notification to the defendant that he had a right to an attorney was sufficient, and the officer need not have specified the right to an attorney applied both prior to and during interrogation. In finding the warnings provided to Frankson communicated that his right to an attorney began immediately and continued forward in time without qualification, the court postulated:

> *Miranda* and its progeny simply do not require that police officers provide highly particularized warnings. Such a requirement would pose an onerous burden on police officers to accurately

> list all possible circumstances in which *Miranda* rights might apply. Given the common sense understanding that an unqualified statement lacks qualifications, all that police officers need do is convey the general rights enumerated in *Miranda*.

Frankson, 83 F.3d at 82.[3]

In *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), the Second Circuit found sufficient *Miranda* warnings that did not specifically inform a suspect of his right to counsel during questioning, but did inform him of his right to remain silent and to refuse to answer questions. Lamia was told that if he did not have an attorney one would be

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[3] Other Federal Circuit courts have found *Miranda* warnings that did not specifically advise a suspect of his right to have an attorney present *during* interrogation were sufficient. For example, in *United States v. Caldwell*, 954 F.2d 496, 500-04 (8th Cir. 1992), the Eight Circuit observed that "the general warning that [the defendant] had the right to an attorney, which immediately followed the warning that he had the right to remain silent, could not have misled [the defendant] into believing that an attorney could not be present during questioning." *See also United States v. Cusumano*, 429 F.2d 378 (2d Cir. 1970), and *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982). The Seventh Circuit, in *United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973), held that a suspect had been Mirandized effectively despite the fact that the warnings he received did not inform him of his right to have an attorney present during questioning.

provided without cost, and that anything he said could be used against him in court.

The court in *Lamia* correctly discerned that Lamia had been told without qualification of his right to an attorney and that one would be appointed if he could not afford one. In viewing the statement in context, in which Lamia was just informed he did not have to make any statement to the agents, Lamia was effectively warned that he need not make any statement until he had the advice of an attorney. *Lamia*, 429 F.2d at 376-77.

Lamia has been cited with approval by the Court for the analysis that it never intended to invoke a "rigidity" in the form of the warnings, as the warnings in *Lamia* did not expressly state the right to the presence of counsel during questioning. *Prysock*, 453 U.S. at 359.[4]

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[4] Other state and federal courts have upheld warnings in which the suspect was advised that he had the right to consult with an attorney prior to any questioning. In *State v. Arnold*, 496 P.2d 919, 922-23 (Or. Ct. App. 1972), the court found such warnings reasonably conveyed his rights under *Miranda* because it was, "unreasonable to assume ... that [the defendant] would not have requested the [p]resence of an attorney while he answered the police officer's questions." *See also United States v. Vanterpool*, 394 F.2d 697, 699 (2d Cir. 1968) (validity of *Miranda* warnings upheld where defendant was advised he had the right to consult with a lawyer, "at this time"); *United States v. Anderson*, 394 F.2d 743, 746-47 (2d Cir. 1968) (defendant advised he had right to attorney at that time was considered sufficient warning pursuant to *Miranda*).

Here, in holding the warnings given to Powell were inadequate, the Supreme Court of Florida has misapplied the Court's "reasonably convey" and "fully equivalent" standards. The Florida court[5] and others in expanding *Miranda,*[6]

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[5] Indeed, another Florida case is pending in this Court. *Florida v. Rigterink*, 129 S.Ct. 1667 (2009). In both *Rigterink* and the instant case, the warnings were read from a card containing similar verbiage even though the cases arose in different Florida jurisdictions. Law enforcement agencies in both jurisdictions have, subsequent to the Florida *Powell* opinion, conformed the language set forth on their warnings card to the dictates of that opinion. Nevertheless, the issue before this Court remains extant and requires resolution despite the change in language. Officers in the field may not read the card *verbatim* or may not have the card accessible in every scenario. The conflicts in decisional case law identified in the certiorari petition filed in the instant case highlight the need for this Court to resolve the question presented herein.

[6] Notwithstanding this Court's repeated instruction that *Miranda* warnings need only adequately convey one's rights, the Fifth, Sixth, Ninth and Tenth Circuits have taken a hypertechnical approach to *Miranda* by requiring that a suspect be expressly informed of the right to have an attorney present during questioning. *See Windsor v. United States,* 389 F.2d 530, 533 (5th Cir. 1968); *United States v. Tillman*, 963 F.2d 137, 140-42 (6th Cir. 1992); *United States v. Noti,* 731 F.2d 610, 615 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669, 672-74 (10th Cir. 1981); *Atwell v. United States*, 398 F.2d 507 (5th Cir. 1968); *But see Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), *cert denied*, 548 U.S. 909 (2006)(warnings that informed a defendant he had the right to presence of counsel prior to questioning but did not

have gone beyond what the Court intended in holding no specific recitation of the warnings is necessary or mandated.

The failure to expressly advise a suspect that he has the right to have an attorney present during questioning does not render *Miranda* warnings constitutionally deficient when, collectively, the warnings made this right clear. To suggest otherwise actually dilutes the purpose of *Miranda*. The right to an attorney is absolute if a suspect unequivocally requests the assistance of a lawyer. Parsing through a litany of circumstances such as while the police are in or out of the interrogation room, or during questioning, merely describes an event or circumstance and adds a qualifier to an absolute.

C. The Florida Supreme Court's Opinion Improperly Expands Miranda, Burdens Law Enforcement and Unjustifiably Suppresses Otherwise Valid, Voluntary Confessions.

Courts which, contrary to *Miranda's* intent, are requiring law enforcement to expressly advise a defendant they have the right to have counsel present *during* custodial questioning, are demanding more from law enforcement than the

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explicitly advise of right to counsel during questioning were adequate and not an unreasonable application of federal law requiring federal habeas relief).

Court ever envisioned or deemed necessary. From a practical viewpoint, these courts are unjustifiably suppressing otherwise valid, voluntary confessions and unnecessarily excluding critical evidence. The "[a]dmissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (*quoting Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

It contorts reasoning to suggest the warnings given to Powell do not reasonably convey his right to have an attorney[7] present during questioning. "Only based on a strained, literalistic reading" could the warnings given to the defendant be interpreted as implying that he "could talk to a lawyer before questioning and at any time during questioning but could not have a lawyer present during questioning." *M.A.B. v. State*, 957 So. 2d 1219, 1228 (Fla. Dist. Ct. App. 2007) (Canady, J., concurring) (assessing these identical warnings). Importantly the *Miranda* language in this case and others, which do not require a suspect be expressly advised of his right to counsel during interrogation,

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[7] In this case, the Florida court reversed where no error occurred. Powell never unequivocally exercised his right to an attorney; therefore, it begs the question how any failure to specifically inform him that he had a right to an attorney during questioning would have made any difference to Powell's exercise of a known right to an attorney.

meets the reasonable clarity test because the warnings do not suggest that "the right of access to counsel is limited to a lawyer who is not physically present, nor that the right to counsel is inapplicable during interrogation." *Id.* at 1228.

In this case, it is clear that the police did not employ improperly coercive tactics to garner Powell's confession, nor has such an allegation been made. The police officer used a standard printed rights form which was read to Powell and that Powell read and signed. Powell indicated he understood his rights and voluntarily waived them.

While *Miranda* helps to ensure confessions are given voluntarily, exclusion of non-coerced statements made to police where the suspect is not expressly advised of his right to an attorney's presence *during* interrogation, when he did not seek to exercise his right to an attorney, exceeds what is necessary to safeguard a suspect's Fifth Amendment privilege and incurs unnecessary societal costs. Derek Bottcher, *Bridgers v. Dretke: Not Everything You Say Can and Will be Used Against You*, 18 Geo. Mason U. Civ. Rts. L.J. 359, 383-384 (2008).

For example, consider the untenable result here. To protect against the danger of coercion inherent in custodial interrogation, *Miranda* created a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for

purposes of the prosecution's case in chief. *United States v. Patane*, 542 U.S. 630, 639 (2004). However, an otherwise voluntary confession which follows an arguably incomplete warning should not be treated the same as a complete failure to comply with *Miranda*. Telling Powell he had a right to an attorney during questioning would have done nothing to quell the danger of coercion inherent in a custodial interrogation. Indeed, had Powell exercised his right to an attorney it would be incredible to suggest that an attorney would have been squired out the door once questioning began.

Evidence and unrebutted testimony establishes that Powell's statement was voluntary. The evil addressed by *Miranda* and its progeny is the coercion of involuntary confessions, not the inducement of voluntary confessions. In *Oregon v. Elstad*, 470 U.S. 298, 304 (1985), citing *United States v. Washington*, 431 U.S. 181, 187 (1977), the Court observed that far from being prohibited by the Constitution, "admissions of guilt by wrongdoers, if not coerced, are inherently desirable."

Powell was advised of his right to counsel prior to answering questions, a right he declined to exercise. Powell testified he understood his rights and voluntarily waived them. Powell was clearly and fully advised of his right to remain silent and

the implications of waiving that right.[8] Because the statement is otherwise voluntary, there is simply no police misconduct to deter.[9]

The procedural safeguards articulated in *Miranda* only require an officer "reasonably" convey warnings that inform a suspect of his "right to the presence of counsel," or you have the "right to talk to a lawyer" or the "right to a lawyer's help." The

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[8] The constitutional underpinning of *Miranda* emanates from the Fifth Amendment, which protects a suspect's privilege against compelled self-incrimination. Thus, the right to remain silent and the ramifications of waiving that right [use in a court of law] appear to be the most critical part of the warning. *Cf. Moran v. Burbine*, 475 U.S. 412, 431 (U.S. 1986)(where this Court reiterated that the right to counsel only attaches upon the initiation of adversary proceedings by the State, not initiation of interrogation of a criminal suspect). There is no dispute that this right was clearly communicated to Powell in this case.

[9] In this case, and other cases presenting similar factual circumstances, suppression exacts a harsh penalty upon the prosecution and represents an undeserved windfall for the criminal defendant. Consequently, suppression of an otherwise voluntary statement is not the appropriate remedy for an arguably imperfect *Miranda* warning in the absence of police misconduct. *See generally Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009) ("We think that the marginal benefits of Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering society's compelling interest in finding, convicting, and punishing those who violate the law[.]" (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (U.S. 1986)). **Michigan v. Jackson*, 475 U.S. 625 (1986).

test is whether the words used adequately convey an individual's rights to him. The warnings in context must be considered in making such a determination, because there is no bright-line test which can be applied in all circumstances. An officer must have the flexibility of language and circumstance to convey the essence of the warnings to an individual. *Miranda* requires no more.

As aptly observed by Justice Wells in his dissent in *Powell*:

> Finally, I do not join the majority's decision because it expands upon the *Miranda* warning criteria set by the Supreme Court, resulting in an extreme, unworkable application of the *Miranda* decision. This needless complication is contrary to the spirit of the Supreme Court's decision, in which it stated that the "limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." 384 U.S. at 481, 86 S.Ct. 1602. The majority's decision to require overly detailed *Miranda* warnings will unduly and unnecessarily burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel.

> Additionally, it will result in reversing the convictions of individuals who have confessed to crimes based upon a holding that is at most an extreme technical adherence to language and that has no connection with whether the person who confessed understood his or her rights.

State v. Powell, 998 So. 2d 531, 545 (Fla. 2008) (Wells J., dissenting). (JA 180).

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits the decision of the Supreme Court of Florida should be reversed.

Respectfully Submitted,

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