

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**

—◆—
BRIEF FOR RESPONDENT
—◆—

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QUESTIONS PRESENTED

1. Whether a decision by this Court addressing federal *Miranda* warning standards would be advisory since the Florida Supreme Court clearly and explicitly based the decision below on the independent and adequate alternative ground that the warnings at issue here violated the Florida Constitution.

2. Alternatively, whether the Florida Supreme Court correctly held – in accordance with every federal court of appeals considering the issue on direct review – that advising of “the right to *talk to* a lawyer *before* answering any of our questions” fails clearly to convey a suspect’s right to the *presence* of counsel *during* questioning because it misleadingly suggests a limit on the suspect’s unfettered right to have counsel present both before and during a custodial interrogation.

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INTRODUCTION

This case presents a narrow question concerning the sufficiency of a printed *Miranda* warning form developed and used by the Tampa Police Department and read verbatim to Respondent Powell in an interrogation room at the stationhouse after his arrest.

Over forty years ago, this Court in *Miranda v. Arizona* concluded 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. . . .” 384 U.S. 436, 471 (1966). As the Court has reiterated on numerous occasions since, “[t]he rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning . . . of his right to have counsel, retained or appointed, present during interrogation.” *Fare v. Michael C.*, 442 U.S. 707, 717 (1979). Just last Term, this Court emphasized that *Miranda* rights read to suspects “include the right to have counsel present during interrogation.” *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009). The Florida Constitution independently “requires that prior to custodial interrogation in Florida suspects must be told” of certain rights, including their “right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.” *Traylor v. State*, 596 So. 2d 957, 966 & n.13 (Fla. 1992).

The Tampa police who interrogated Powell, however, did not advise him of his right to have counsel present “during” the interrogation. Nor did they advise Powell more generally of his “right to counsel” without qualification, as some jurisdictions allow. Rather, the form Tampa police read to Powell advised that he had “the right to talk to a lawyer *before* answering any of our questions.” JA 3 (emphasis added).

The Florida Supreme Court did not err in finding that “the warning was misleading. . . . The ‘before questioning’ warning suggests to a reasonable person in the suspect’s shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.” JA 171. To the contrary, the decision reflects a straightforward application of Florida law. *See Traylor*, 596 So. 2d at 966 n.13. Furthermore, every federal court of appeals considering the issue on direct review has found comparable warnings defective under *Miranda*. It also appears that the *Miranda* forms used by virtually every federal, state, and local law enforcement agency in the country satisfy the standards applied in the decision below.

Petitioner would have the Court undo settled law in this area, inviting law enforcement agencies to depart from the valid warning forms currently used in most jurisdictions. The attendant costs would include potential confusion on the part of law enforcement officers, renewed litigation, and dilution of *Miranda*

protections. The Florida Supreme Court was right to conclude that the form here was at odds with *Miranda*. And it was right to hold that the form independently violated Article I, Section 9 of the Florida Constitution.



CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9 of the Florida Constitution provides:

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

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 THE CASE

1. *Factual Background.* On August 10, 2004, detectives and uniformed officers of the Tampa Police Department entered the housing project apartment of Shazeena West, Respondent Powell's girlfriend. JA 19-20, 30-33. At the time, at least four adults were present in the apartment, including Powell. JA 34-36. The police searched the apartment and discovered a gun underneath the bed in a bedroom that Powell appeared to have been coming out of. JA 20-21. Powell did not live in Ms. West's apartment, JA 30-31, 70, and nothing in the apartment linked him to the gun. JA 49-50, 59-61. The police arrested Powell and took him to a cramped interrogation room at the stationhouse. JA 48-49. There, he was questioned by the police. JA 49-50.

The officers read Powell the following warnings from the April 2001 version of the Tampa Police Department's Consent and Release Form 310, JA 3, 24-27, 62-63:

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.

JA 3.

The warning form did not state that Powell had the right to have counsel present with him during the interrogation. JA 3. Rather, it stated that Powell could “talk to” an attorney “before answering any of our questions.” JA 3.

Powell signed the Form 310. JA 62-63, 79-80. He then stated that the gun found under the bed was his. JA 28-29, 64.

At the January 2005 trial, the government used Powell’s self-incriminating statements against him. JA 28-29, 64. Before his statements tying him to the gun were introduced, Powell’s attorney objected that they were inadmissible because the police had advised Powell only of his right to counsel before questioning, and not during the interrogation. JA 3, 24-28; *see also* JA 63-65 (renewing objection). The judge overruled the objections. JA 28, 63-64.

Both interrogating officers then testified that Powell confessed to owning the gun. JA 28-29, 64. The government presented no fingerprint or other forensic evidence. JA 45-46. Powell’s statements were the only evidence at trial connecting him to the firearm.

Powell took the stand and testified that the statements he had made about owning the gun were not true. JA 80-81. He did not own the gun and did not know that it was under the bed in the apartment. JA 78-79, 94. He testified that before the interrogation, the police showed him the gun and told him that if he did not confess to owning it, his girlfriend would be charged: “The detectives told me

that my, my girlfriend would be charged with the possession of a firearm and that they would call the DCF to get her children take[n] away.” JA 55; *accord* JA 59, 78, 80-86, 94-95. In addition, he said the police told him that because the gun was found in her apartment, his girlfriend and her three young children would be thrown out of public housing. JA 84-86. Likewise, he stated that he signed the form read to him and purportedly “waived” his rights because of those threats. JA 80.¹ On rebuttal, the police denied making any of these statements. JA 97.

¹ During the trial, Powell’s lawyer asked him whether he “waived the right to have an attorney present during your questioning by detectives.” JA 80. Petitioner wrenches this testimony out of context to suggest that, notwithstanding the form read to him, Powell had actual knowledge of his rights. Br. 4 (quoting JA 80). Considered in context, however, Powell’s lawyer, who before asking the question had made explicit objections that the warnings given Powell failed to convey the right to counsel during interrogation, was not asking whether Powell had validly waived a known right. Rather, the portion of the transcript quoted by Petitioner was merely the foundation for questions by Powell’s lawyer concerning *why* Powell signed the form and spoke with the police:

Q. Please explain why to this jury you would sign this consent form admitting that this is and make statements to these detectives that this is your gun if in fact that statement was not true?

A. Because of the threat they proceeded after my friend, girlfriend that they were going to try to charge her with the charge of possession of a firearm and take away her kids. . . .

JA 81.

The jury found Powell guilty of possessing a firearm as a convicted felon and he was sentenced to ten years in prison. JA 127-29, 131.

2. *The Warning Form at Issue.* The use of forms like the April 2001 version of Form 310 read to Powell, which contain language limiting the right to counsel to the period before interrogation, appears to be very much the exception rather than the rule. Recent studies found that nearly 96% of a sample of over 900 *Miranda* forms collected nationwide included language informing suspects of the right to have counsel present either during questioning or before and during questioning. See Richard Rogers et al., *The Language of Miranda Warnings In American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124, 133 table 7 (2008) [hereinafter Rogers et al.];² see also SG Br. 1, 13 n.4. This virtual consensus nationwide appears to be consistent with the trend in Florida as well. See *Rigterink v. State*, 2 So. 3d 221, 254 (Fla. 2009) (per curiam) (noting that “the vast majority of Florida’s law enforcement agencies already possess and provide adequate warnings . . . that fully inform a person of his or her right to an attorney prior to and

² Professor Rogers published a code book that summarizes the content of the forms analyzed in the studies. See Richard Rogers & Daniel Shuman, *National Survey of Miranda Warnings, 2005-2006, Code Book*, Study 23100, Inter-university Consortium for Political and Social Research [hereinafter Rogers & Shuman], available at www.icpsr.umich.edu.

during questioning”), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229); *Roberts v. State*, 874 So. 2d 1225, 1227 (Fla. 4th Dist. Ct. App. 2004) (taking notice that 89 of 90 *Miranda* forms used in Florida “contained the warning that the accused is entitled to an attorney during questioning, or words to that effect”).

3. *The Proceedings Below.* The Florida Second District Court of Appeal reversed Powell’s conviction on the ground that the warnings read to him violated Article I, Section 9 of the Florida Constitution and *Miranda*:

Because the *Miranda* warnings given to Mr. Powell contain limiting language as to “before questioning” and the right to consult with a lawyer, we hold such warnings failed to comply with state and federal constitutional requirements to adequately inform the accused of his or her right to have an attorney present throughout interrogation.

JA 138 (*Powell v. State*, 969 So. 2d 1060, 1063 (Fla. 2d Dist. Ct. App. 2007)). The court reasoned that “the language used by the police department in this case d[id] not rise to a functional equivalent of the required *Miranda* warning.” JA 146. The court also found that the last sentence of the warning, stating that Powell had the “right to use any of these rights at any time you want during this interview,” did not remedy the defect. JA 145. Petitioner sought review in the Florida Supreme Court, which accepted jurisdiction.

The Florida Supreme Court concluded that the warnings were defective because “[b]oth *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning.” JA 174 (*State v. Powell*, 998 So. 2d 531, 542 (Fla. 2008)). The court recognized that the Florida Constitution and *Miranda* give a suspect a right to the presence of counsel not just before interrogation, but also during. It determined that, under the Florida Constitution, police must convey to suspects the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. JA 157-58. The court also recognized that “there is no talismanic fashion in which [warnings] must be read or a prescribed formula that they must follow, *as long as the warnings are not misleading.*” JA 171 (quotation source omitted) (emphasis in original).

Based on the above, the court held that advising a suspect of only the right to talk to an attorney before questioning was “misleading.” JA 171. Telling suspects they have the right to talk with a lawyer before answering any questions “is not the functional equivalent of having the lawyer present with you during questioning.” JA 170-71. The court further found that, when read as a whole, nothing in the form eliminated the misleading limitation. Specifically, the court rejected Petitioner’s argument that the final sentence in Form 310, stating “[y]ou have the right to use any of these rights at any time you want during this interview,” remedied the misleading nature of

the warning. JA 171-72. The court stated that this sentence did “not effectively convey to Powell his right to the presence of counsel before and during police questioning,” because it “could not effectively convey a right the defendant was never told he had.” JA 171.

Finally, the court rejected Petitioner’s argument that a failure sufficiently to warn suspects of their rights could be cured where the suspect purportedly had “actual knowledge” of those rights. JA 172-73. The court concluded that delving into the subjective knowledge of defendants would be unduly speculative and defy the bright-line virtues of *Miranda*. JA 172-73.

Justice Wells dissented. JA 177-80. In his view, informing a suspect of the right to an attorney “before answering any of our questions” “reasonably conveyed” that the suspect could invoke his right to an attorney during the interrogation. JA 179. Justice Wells asserted that the statement in the warning allowing the defendant to use “any of these rights at any time” further “conveyed to Powell his continuing right of access to counsel.” JA 179-80. Finally, he concluded that requiring police to use a different warning form would burden law enforcement. JA 180.



SUMMARY OF ARGUMENT

I. This Court should dismiss the writ of certiorari as improvidently granted because the decision below clearly and explicitly rests on independent and adequate state law grounds. The Florida Supreme Court held that Powell's statements to police were inadmissible because the warnings read to him were deficient under "article I, section 9 of the Florida Constitution." JA 174; *accord* JA 157-58, 164, 170. That holding is independent of the court's separate analysis finding the warnings invalid under *Miranda*. JA 174. As required by *Michigan v. Long*, the independence and adequacy of the state law ground here is "clear from the face of the opinion" and the Florida Supreme Court repeatedly made a "plain statement" that its decision rested on state law grounds. 463 U.S. 1032, 1040-41 (1983).

II. If the Court reaches the merits, it should affirm the decision below. The parties and amicus curiae all agree that suspects possess the right to have an attorney present *during* police interrogation. Br. 12; SG Br. 7-8. We all agree that *Miranda* requires police to convey this right to suspects. Br. 10-11; SG Br. 12. And we all agree that in determining whether a warning adequately conveyed this right, a reviewing court should focus on the substance of the warning and not demand the use of specific words. Br. 12, 16-17; SG Br. 18. Our disagreement concerns whether a warning that advises of a right to *talk to* a lawyer *before* questioning suffices to warn the suspect that he has the right to have the lawyer *present* with him *during* the interrogation.

The Tampa police who interrogated Powell did not explicitly advise him of his right to have a lawyer present “during” the interrogation. Nor did they advise Powell more generally of his “right to counsel,” which several courts have found can sufficiently convey the right to counsel both before and during interrogation. Rather, the police – using a practice that has been rejected by virtually every court that has considered it – advised Powell only that he had “the right to talk to a lawyer *before answering any of our questions.*” JA 3 (emphasis added).

The Florida Supreme Court correctly determined that the warning form was “misleading”:

The “before questioning” warning suggests to a reasonable person in the suspect’s shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.

JA 171. Indeed, since 1968, federal courts of appeals uniformly have found that warnings advising only of the right to counsel “prior to” or “before” questioning convey an impermissible “restriction,” “false limitation,” or “qualification” on the suspect’s access to counsel during interrogation. *See, e.g., Windsor v. United States*, 389 F.2d 530, 533 (5th Cir. 1968). It appears that *every* federal court of appeals considering the issue on direct review has held that warnings like those here are deficient under *Miranda*.

In line with this longstanding jurisprudence, it also appears that the *Miranda* forms used by virtually every law enforcement agency in the country satisfy the standards applied in the decision below. See Rogers & Shuman, *supra*, at 42-63. Of the more than 900 warning forms collected from 49 states and various federal law enforcement agencies, only *five* advise of a right to talk to a lawyer or to have the lawyer present “before questioning” without also articulating the right to counsel *during* interrogation. *Id.* at 42, 43, 48, 52. Of those five, all but one mention the right to have a lawyer “present.” *Id.* at 48.

Contrary to Petitioner’s view, the issue in this case is not one of form, but of substance. The Tampa Police Department could have conveyed the right to counsel using any number of formulations, provided that the warning included the required substance. Indeed, Florida courts have since held that generalized warnings such as “you have the right to the presence of an attorney” are sufficient to convey a suspect’s right to counsel before and during interrogation because – unlike the warning given Powell – they do not misleadingly suggest any temporal limitation. See, e.g., *State v. Smith*, 6 So. 3d 652, 653 (Fla. 2d Dist. Ct. App. 2009), *review denied*, 2009 WL 2989781 (Fla. Sept. 17, 2009).

In the face of all this, Petitioner argues that the last sentence of the form read to Powell cured any defect by providing, “[y]ou have the right to use any of these rights at any time you want during this

interview.” The Florida Supreme Court correctly concluded that “[t]his last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed?” JA 172. Put simply, “a right that has never been expressed cannot be reiterated.” *Id.*

Finally, affirming the decision below will not “unduly burden” law enforcement. Br. 12; *accord id.* 22, 27. Given the settled lower court jurisprudence and law enforcement practice, affirming the decision below will do little more than confirm the status quo. Reversing, by contrast, could impose substantial burdens on the criminal justice system. Under Petitioner’s approach, law enforcement agencies would, in the “often competitive enterprise of ferreting out crime,” *Johnson v. United States*, 333 U.S. 10, 14 (1948), have incentives to modify their forms. That, in turn, would reignite litigation in this area and dilute the protections intended by the *Miranda* decision. Petitioner would risk all of this to defend a standardized form that the Tampa Police Department no longer uses, Br. 21 n.5, that Petitioner concedes is “arguably incomplete,” Br. 25, and that the Solicitor General views as contrary to “sound law enforcement practice.” SG Br. 9.

This Court should dismiss the writ of certiorari as improvidently granted or, alternatively, affirm the decision below.



ARGUMENT**I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE THE DECISION BELOW RESTS ON INDEPENDENT AND ADEQUATE STATE CONSTITUTIONAL GROUNDS****A. The Florida Supreme Court Based its Decision on the Florida Constitution as Interpreted in *Traylor***

“This Court will not review a decision of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In *Michigan v. Long*, the Court explained that this jurisdictional bar applies where “the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion” or where the court below relies on federal law but “make[s] clear by a plain statement . . . 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. 1032, 1040-41 (1983).

A straightforward read of the decision below confirms that this standard is satisfied here. *First*, the decision below was, by its own terms, independently based on state grounds. This Court need go no further than the plain language of the decision to confirm this. The decision below unequivocally and repeatedly stated that it was based on *Miranda* and,

independently, on “article I, section 9 of the Florida Constitution” and *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). JA 174; accord JA 157-58 (under “article I, section 9 of the Florida Constitution, this Court in *Traylor* [], outlined the . . . rights Florida suspects must be told of prior to custodial interrogation [including] ‘the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.’”); JA 170 (“Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor* [], a defendant has a right to lawyer’s help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.”); JA 164 (“In [*Ramirez/Sapp*] we noted the requirements of both the Fifth Amendment, as explained in *Miranda*, and the Florida Constitution, as explained in *Traylor*. Our explanation of the federal and the state requirements included the requirement that a suspect be informed of the right to have counsel present during questioning.”).

Reflecting that the Florida Supreme Court meant what it said, the decision below contained discrete sections separately analyzing federal law and Florida law. Before analyzing the warnings given Powell, the Florida Supreme Court first discussed general federal standards, JA 155-57, and then Florida constitutional standards. JA 157-58. It included sections separately addressing federal case law requirements under *Miranda*, JA 161-63, and Florida case law concerning the requirements independently imposed by the Florida Constitution. JA 164-69. The court then

addressed these separate standards as applied to the warnings given Powell. JA 169-73. The court concluded that “[b]oth *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning” and that the warnings here were invalid. JA 174.

Beyond the plain language and analysis of the opinion, Florida’s principle of primacy confirms that the decision below was based on independent state grounds. “When called upon to decide matters of fundamental rights, Florida’s state courts are bound under federalist principles to give primacy to our state Constitution. . . .” *Traylor*, 596 So. 2d at 962. Thus, by design, the decision below accorded primacy to state constitutional grounds even though finding the warnings here deficient on both state and federal grounds. JA 174.

Were all this not enough, earlier this year the Florida Supreme Court confirmed that the decision below is based on state law grounds. The court followed *Powell* and emphasized *Traylor*’s holding that “*the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have . . . the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.*” *Rigterink v. State*, 2 So. 3d 221, 254 (Fla. 2009) (per curiam) (quoting and adding emphasis to *Traylor*, 596 So. 2d at 965-66 & n.13),

petition for cert. filed, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229).

Second, the state law grounds are adequate. Over seventeen years ago in *Traylor*, the Florida Supreme Court held that, based on “Florida law and the experience under *Miranda* and its progeny, . . . to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told” of certain rights. 596 So. 2d at 965-66. One of those rights is “the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.” *Id.* at 966 n.13.

In regard to federal requirements under *Miranda*, *Traylor* noted that this Court “established procedural safeguards similar to those defined above.” *Id.* at 965 n.12; *see also Almeida v. State*, 737 So. 2d 520, 524-25 (Fla. 1999) (stating that *Traylor* guidelines are “similar to those announced in *Miranda*”). “Similar,” however, does not mean the same. As the Florida Supreme Court recently recognized in *Rigterink*:

[S]ection 9 [of Article I of the Florida Constitution] does *not* contain a proviso that we must follow federal precedent with regard to the right against self-incrimination. . . . Thus, in this context, the federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by

the Florida Constitution more broadly than that afforded by its federal counterpart.

2 So. 3d at 241 (emphasis in original);³ *see also Evans v. Arizona*, 514 U.S. 1, 8 (1995) (“[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual

³ The Florida Supreme Court has recognized an independent state constitutional requirement that police advise suspects of the right to have a lawyer present during interrogation. It has not done so with respect to certain other self-incrimination issues. *See State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997) (stating that *Traylor* did not establish an independent state constitutional basis “for requiring police to clarify a suspect’s equivocal request to terminate questioning,” that the *Traylor* defendant “made no request whatsoever that he wished to invoke his *Miranda* rights,” and that “our conclusions [in *Traylor*] were no different than those set forth in prior holdings of the United States Supreme Court”); *Sapp v. State*, 690 So. 2d 581, 585-86 (Fla. 1997) (stating that *Traylor* did not establish an independent state constitutional right “to anticipatorily invoke the right to have counsel present during custodial interrogation” by signing a claim of rights form at first appearance but subsequently waiving those rights in writing immediately before interrogation, and that “we do not interpret article I, section 9 of the Florida Constitution as [affording greater protection than the federal Constitution] here”); *Ramirez v. State*, 739 So. 2d 568, 573 & n.3 (Fla. 1999) (finding that custodial statements elicited without *Miranda* warnings and statements made after an oral waiver after police administered *Miranda* warnings but downplayed their significance must be suppressed and acknowledging that “[t]he protections enunciated in *Miranda* have been part of this State’s jurisprudence for over a century pursuant to the Florida Constitution,” but noting in dicta that “‘our conclusions [in *Traylor*] were no different than those set forth in prior holdings of the United States Supreme Court’” (quoting *Owen*, 696 So. 2d at 719)).

rights than do similar provisions of the United States Constitution.”).

With that in mind, if this Court were to reverse the decision below it would not change the outcome in Florida. As such, the holding in this case is not dependent on federal law. Any decision by this Court, therefore, would be an impermissible advisory opinion because “the same judgment would be rendered by the state court after [it] corrected its views of federal law.” *Long*, 463 U.S. at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)); accord *Coleman*, 501 U.S. at 729 (“Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.”).

“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground.” *Long*, 463 U.S. at 1040. For this reason, the Court should dismiss the writ as improvidently granted.

B. This Case Is Unlike Those in Which the Court Has Exercised Jurisdiction

When this Court dismisses on the basis of independent and adequate state grounds, it often does not issue an opinion, so there are few decisions available reflecting that circumstances like those

here warrant dismissal. What can be demonstrated, however, is that this case is unlike those in which the Court has rejected challenges to its jurisdiction. In *Long*, for instance, “[t]he court below referred twice to the state constitution . . . but otherwise relied exclusively on federal law,” 463 U.S. at 1037, whereas the Florida Supreme Court cited the Florida Constitution no less than five times as the basis for its decision.⁴

Similarly, this case is unlike *Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) (plurality opinion), in which the Court exercised jurisdiction where the Florida Supreme Court had “mentioned the State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution.” There, the court below could not have relied on independent state grounds because of a

⁴ See also *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (exercising jurisdiction where decision below “does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally [and] the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments”); *Ohio v. Robinette*, 519 U.S. 33, 37 (1996) (state court mentioned state constitution in passing and cited only federal cases); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986) (exercising jurisdiction where “the New York Court of Appeals cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution”).

1982 state constitutional amendment requiring courts to construe Article I, Section 12 of the Florida Constitution “*in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court*” and to “provide no greater protection than those interpretations.” *Bernie v. State*, 524 So. 2d 988, 990-91 (Fla. 1988) (quoting and adding emphasis to Fla. Const. art. I, § 12).

This case is also unlike *Evans*, where this Court rejected an argument that the decision below rested on independent and adequate state grounds, in particular a state “good-faith statute.” 514 U.S. at 6-7, 9. The decision below in *Evans* reflected that the good-faith statute was of no import because the case was “not about the motives of the police” and “[t]he fact that the arresting officer acted in good faith [was] irrelevant.” *State v. Evans*, 866 P.2d 869, 871 (Ariz. 1994).

And this case is unlike *Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996), and *New York v. Class*, 475 U.S. 106, 109-10 (1986), because, there, the state high courts did not make clear that the applicable state constitutional protections were independent of federal requirements.⁵ By contrast, the Florida

⁵ This case is also unlike *Kansas v. Marsh*, where the decision below was based on a prior state court decision that, “itself, rested on federal law.” 548 U.S. 163, 169 (2006); *see also Michigan v. Chesternut*, 486 U.S. 567, 571 (1988) (“Like the court below it, the [state high court] rested its ruling on state precedents interpreting the Fourth Amendment.”).

Supreme Court in this case explicitly based its holding on the independent state constitutional proscription against compelled self-incrimination set forth in *Traylor*. While the Florida Supreme Court's plain statement of the Florida constitutional ground here far exceeds the indicia in *Labron* and *Class*, on remand the courts in those cases confirmed that their original decisions were, indeed, premised on state law grounds and did not disturb the outcome of the original decisions for the defendants. *Commonwealth v. Labron*, 690 A.2d 228, 228 (Pa. 1997) (reaffirming original decision and "explicitly not[ing] that it was, in fact, decided upon independent state grounds, i.e., Article I, Section 8 of the Pennsylvania Constitution"); *People v. Class*, 494 N.E.2d 444, 445 (N.Y. 1986) (reaffirming original decision and stating that the court had "initially and expressly relied on the State Constitution").

Even if this Court were to reach the merits and reverse, the Florida Supreme Court on remand could not ignore its holding that the warnings given Powell were insufficient under the Florida Constitution and *Traylor*. In all events, the outcome of this case will be reversal of Powell's conviction, whether under state or federal law (or both). To avoid rendering an impermissible advisory opinion, this Court should dismiss the writ of certiorari as improvidently granted.

II. THE FLORIDA SUPREME COURT'S DECISION IS FULLY CONSISTENT WITH *MIRANDA* AND DECISIONS INTERPRETING *MIRANDA*

In the event that the Court reaches the merits of the case, it should affirm the decision below. The decision is in line with the plain requirements of *Miranda*, with federal court of appeals decisions interpreting comparable warnings, and with the practices of law enforcement agencies across the country.

A. *Miranda* Requires that Police Clearly Inform Suspects of their Right to Have Counsel Present Before and During Custodial Interrogation

One of the core requirements of *Miranda*, as Petitioner and the Solicitor General acknowledge, is that police must inform suspects of their right to have counsel present during a custodial interrogation. *See, e.g.*, Br. 11-12; SG Br. 7-8, 12. In this regard, *Miranda* could not have been more explicit: “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. . . .” 384 U.S. at 471 (emphasis added). Indeed, “this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.” *Id.* at 471-72.

The basis for requiring law enforcement officers to convey the right of suspects to counsel during questioning is that counsel's presence can counter the inherent pressures of the interrogation atmosphere. *Id.* at 468. At the time this Court decided *Miranda*, as today,⁶ “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak.” *Id.* at 461; accord *Dickerson v. United States*, 530 U.S. 428, 435 (2000). The presence of a lawyer is “indispensable to the protection of the Fifth Amendment privilege” because, as this Court explained, “[w]ith 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.” *Miranda*, 384 U.S. at 469-70. Further, “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.” *Id.* at 470. Thus, this Court held “the need for counsel to protect the Fifth Amendment privilege comprehends

⁶ See generally Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ. Press 2008) (providing comprehensive study of police interrogation in America); Charles D. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519, 1538 (2008) (“[T]he *Miranda* Court concluded that custodial interrogations contain inherently compelling pressures. . . . The best evidence today supports the same legal conclusion reached by the *Miranda* Court.”).

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.*

In the four decades since *Miranda*, this Court has reiterated that police must convey to suspects the right to have counsel present during questioning. *See, e.g., Fare*, 442 U.S. at 717 (“The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning . . . of his right to have counsel, retained or appointed, present during interrogation.”).⁷ Just last Term, this Court again recognized that a defendant’s “*Miranda* rights . . .

⁷ *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 89 (2004) (“*Miranda* warnings, we said, effectively convey to a defendant his right to have counsel present during questioning.”); *Davis v. United States*, 512 U.S. 452, 457 (1994) (“[W]e held in *Miranda v. Arizona* [], that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins.”); *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989) (*Miranda* requires “that the suspect be informed, as here, that he has the right to an attorney before and during questioning”); *California v. Prysock*, 453 U.S. 355, 361 (1981) (per curiam) (“It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost. . . .”); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (“*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation.”).

include the right to have counsel present during interrogation. . . .” *Montejo*, 129 S. Ct. at 2085.

Because it is undisputed that *Miranda* requires police to inform suspects of the right to counsel during interrogation, the narrow issue presented in this case is whether the warning form drafted by the Tampa Police Department and later read verbatim to Powell clearly conveyed this right. It did not.

B. The Decision Below Is Consistent With Decisions of the Federal Courts of Appeals, Which Uniformly Have Found “Before Interrogation” Warnings Misleading

The Florida Supreme Court held that the warning read to Powell was “misleading”:

In this case the warning was misleading. The warning said “*before* answering any questions.” The “before questioning” warning suggests to a reasonable person in the suspect’s shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.

JA 171. That holding is in accord with every federal court of appeals decision that has assessed the validity of similar warnings on direct review.

1. The Federal Courts of Appeals Uniformly Have Rejected Warnings Like Those Here

Although law enforcement officers need not administer “a virtual incantation of the precise language contained in the *Miranda* opinion,” *Prysock*, 453 U.S. at 355, the language used by law enforcement must provide a “fully effective equivalent” of the warnings set forth in *Miranda*. *Id.* at 360; accord Br. 17; SG Br. 10; *United States v. Tillman*, 963 F.2d 137, 141 (6th Cir. 1992) (“Although there is no mandate that ‘magic words’ be used, there is a requirement that all elements of *Miranda* be conveyed.”). In short, what matters is the substance of the warnings, not the form.

The federal courts of appeals have differed on what constitutes a “fully effective equivalent” warning that conveys the right to counsel during interrogation. All, however, agree that warnings suggesting a “restriction,” “false limitation,” or “qualification” on a suspect’s access to counsel – like the warnings here – violate *Miranda*.

There are two lines of cases in this regard – both consistent with the Florida Supreme Court’s decision below. On the one hand, the Second, Fourth, Seventh, and Eighth Circuits have held that “general” warnings – such as “you have the right to an attorney” or the “right to have a lawyer present” – can satisfy *Miranda*. See, e.g., *United States v. Lamia*, 429 F.2d 373, 376-77 (2d Cir. 1970); *United States v.*

Frankson, 83 F.3d 79, 82 (4th Cir. 1996); *United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973); *United States v. Caldwell*, 954 F.2d 496, 502-04 (8th Cir. 1992). This is because a warning with no temporal limitation or qualification can be interpreted to include the right to have an attorney present both before and during interrogation. See, e.g., *Frankson*, 83 F.3d at 82.

On the other hand, the Fifth, Sixth, Ninth, and Tenth Circuits have held that such general warnings are insufficient, and police must explicitly advise of the right to counsel during interrogation. See, e.g., *Windsor v. United States*, 389 F.2d 530, 533-34 (5th Cir. 1968); *United States v. Tillman*, 963 F.2d 137, 140-42 (6th Cir. 1992); *United States v. Noti*, 731 F.2d 610, 615-16 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669, 672-74 (10th Cir. 1981).

Although these courts differ on the specificity of the warnings required, they agree on one thing: warnings that misleadingly suggest that an attorney may be consulted only before interrogation do not comport with *Miranda*.

The courts that have upheld “general” warnings indicate that warnings suggesting a limitation on access to counsel are deficient under *Miranda*. In *Lamia*, for instance, the Second Circuit found that a general warning advising of the “right to an attorney” satisfied *Miranda* because the suspect was “told nothing that would suggest any restriction on the attorney’s functioning.” 429 F.2d at 377. The court

highlighted that this general warning was sufficient because it was unlike the warning held invalid in *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968), which advised only of a right to “consult an attorney prior to any question.” *Lamia*, 429 F.2d at 377; *see also Fox*, 403 F.2d at 100.⁸

Similarly, the Eighth Circuit, citing *Fox*, found that “the general warning that Caldwell had the right to an attorney . . . could not have misled Caldwell into believing that an attorney could not be present during questioning.” *Caldwell*, 954 F.2d at 504. Rather, “[i]f there was a deficiency in the warning, it

⁸ *Lamia* retreated from aspects of *Fox*, but not *Fox*’s holding that the warning’s qualification of the right to counsel only “prior to any question” was misleading:

[T]he majority in that case, including a member of this panel, considered the warning that Fox “could consult an attorney prior to any question” to be affirmatively misleading since it was thought to imply that the attorney could not be present during the questioning. Whether this was correct or not, we think that *Fox* must be considered to rest on [this and another basis] and that other observations in the opinion represented too formalistic an approach to *Miranda*. Here *Lamia* was apprised that an attorney would be appointed if he was unable to afford one, and was told nothing that would suggest any restriction on the attorney’s functioning. We find that the substance of the required warnings was given.

Lamia, 429 F.2d at 377; *see also United States v. Dizdar*, 581 F.2d 1031, 1038 (2d Cir. 1978) (upholding a warning providing that the defendant was “entitled to have a lawyer present” in part because it was unlike the warning in *Fox*).

is in the ambiguity of the warning, not that the warning actively misled Caldwell by suggesting a false limitation of his right to counsel.” *Id.* at 502. Likewise, the Seventh Circuit found that a form used by IRS investigators advising that “you may, if you wish, seek the assistance of an attorney before responding” violated *Miranda* in part because the defendant “was not told that he could have counsel present during the questioning.” *United States v. Oliver*, 505 F.2d 301, 303, 306 & nn.5-6 (7th Cir. 1974), *abrogated on other grounds by United States v. Fitzgerald*, 545 F.2d 578 (7th Cir. 1976) (finding interviews like the one in *Oliver* non-custodial).

These cases are consistent with *Prysock*, where this Court upheld a warning that provided, “[y]ou 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” in part because “nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel. . . .” 453 U.S. at 356, 360-61. This Court explained that “[t]his is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning.” *Id.* at 361 (quoting *United States v. Noa*, 443 F.2d 144, 146 (9th Cir. 1971)).

The courts of appeals requiring a more explicit warning of the right to have counsel present *during* questioning also have rejected warnings like the ones read to Powell, not because they affirmatively mislead, but because they omit a material element of

Miranda. The Fifth and Ninth Circuits, for instance, have long held that a warning advising only of the right to counsel “before” interrogation is incomplete:

It is obvious that the full *Miranda* warnings were not given to appellant at any time prior to obtaining either the oral or written confession because Windsor was not informed by the Government agents that he was entitled to the presence of an attorney, retained or appointed, during the interrogations. . . . Merely telling him that he could speak with an attorney or anyone else before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation and that one will be appointed if he cannot afford one.

Windsor, 389 F.2d at 533; *accord Noti*, 731 F.2d at 614-15 (citing *Windsor* and holding that a warning providing “the right to the services of an attorney before questioning” was invalid under *Miranda*); *United States v. Bland*, 908 F.2d 471, 473-74 (9th Cir. 1990) (holding that a warning providing the “right to an attorney prior to questioning” was invalid under *Miranda*).

The reasoning in the decisions requiring a more explicit warning of the right to counsel *during* interrogation is in accord with a statement accompanying the denial of certiorari in *Bridgers v. Texas*, 532 U.S. 1034, 1034 (2001) (statement of Breyer, J., with whom Stevens, J. and Souter, J. joined,

respecting the denial of the petition for writ of certiorari). There, Members of the Court stated that the warnings given the defendant providing only the “right to the presence of an attorney/lawyer prior to any questioning” said “nothing about the lawyer’s presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element.” *Id.*

The Florida Supreme Court’s decision is fully consistent with the reasoning in all of the decisions above. In accord with the reasoning in *Fox, Caldwell, Oliver*, and *Prysock*, the Florida Supreme Court found that the warnings read to Powell placed an affirmatively “misleading” qualification on his access to counsel. JA 171. And as in *Windsor, Noti, Bland*, and the statement accompanying the denial of certiorari in *Bridgers*, the Florida Supreme Court found that, if not affirmatively misleading, the warning misled by omission because there was “nothing in that statement that suggests the attorney can be present during the actual questioning.” JA 171.

In sum, the “split” upon which Petitioner sought review in this Court, *see* Petition at 9-10, and presently attempts to cabin this case, *e.g.*, Br. 21 n.5, has no application here. Federal courts of appeals considering warnings like the ones given Powell uniformly have held them defective.

2. Petitioner and the Solicitor General Ignore the Relevant Decisions

Rather than address the holdings and reasoning of the relevant decisions, Petitioner and the Solicitor General simply ignore them. Instead, they cite a handful of cases that they erroneously assert conflict with the decision below.

Petitioner, for instance, relies on *Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), another case stemming from a Florida warning form. Br. 21-22 n.6. That case, however, does not depart from the uniform holdings of the federal courts of appeals.⁹ In *Bridgers*, Florida law enforcement officers, reading from a card issued by the Fort Lauderdale Police Department, advised the defendant that “[y]ou have the right to the presence of an attorney/lawyer prior to any questioning.” 431 F.3d at 856. Applying the highly deferential standard of review for habeas petitions,

⁹ Petitioner also suggests that *United States v. Vanterpool*, 394 F.2d 697 (2d Cir. 1968), and *United States v. Anderson*, 394 F.2d 743 (2d Cir. 1968), held that warnings like the ones at issue here satisfy *Miranda*. Br. 20 n.4. The warnings in those decisions, however, apprised the defendant of a right to counsel “at this time,” meaning at the time of the interrogations that were then taking place. The Second Circuit later made clear that warnings advising of only the right to counsel before interrogation differed from the warnings at issue in *Vanterpool* and *Anderson*. See *Fox*, 403 F.2d at 100 n.1 (noting that “the warnings upheld in [*Vanterpool* and *Anderson*] went much further toward complying with the substance of *Miranda* than those given *Fox*,” who was told merely that “he could consult an attorney prior to any question”).

the Fifth Circuit concluded that the decision of the Texas Court of Criminal Appeals upholding the warning was not “objectively unreasonable.” *Id.* at 860. The court indicated, however, that the outcome would have been different on direct review. *See id.* at 860 n.6 (highlighting habeas context and noting that a prior decision holding that “a suspect must be explicitly warned that he has the right to counsel during interrogation . . . remains binding precedent for cases on direct appeal in this Circuit”).

Beyond its limited application to the habeas context, *Bridgers* involved a warning that the Texas court found materially different from the form read to Powell. The Texas court determined that the warning sufficiently conveyed the right to counsel during interrogation primarily on the basis that the suspect was told he had a right to the “presence” of counsel before questioning. *Id.* at 857-58. The Texas court distinguished that from warnings, similar to the ones given Powell, that advise only of the right to “consult or speak to an attorney before questioning, which might have created the impression that the attorney could not be present during interrogation.” *Id.*; *accord id.* at 860 n.5.

Finally, as noted above, in considering a petition for certiorari on direct appeal in *Bridgers*, Members of this Court stated that the warnings “apparently leave out an essential *Miranda* element.” *Bridgers*, 532 U.S. at 1034. The *Bridgers* case thus supports, rather than contradicts, the decision below.

The *only* other case identified by Petitioner as purportedly upholding warnings comparable to the ones given Powell is *State v. Arnold*, 496 P.2d 919, 922-23 (Or. Ct. App. 1972). Br. 20 n.4. The court there reasoned that a “prior to any questioning” warning was adequate on the assumption that – because the defendant had not asked for a lawyer before the interrogation – he would not have asked for one during questioning.¹⁰ That, of course, improperly presupposes that suspects who initially waive their right to counsel before questioning never change their minds after the interrogation begins. Experience demonstrates otherwise.¹¹

¹⁰ See *Arnold*, 496 P.2d at 923 (“Here, defendant was advised of his right to have an attorney present before he answered any questions. He did not request an attorney on that advice. It is reasonable to assume, on these facts, that he would not have requested the presence of any attorney while he answered the police officer’s questions, had he been so advised. The advice was adequate.”). While not expressly rejecting *Arnold*, the Oregon Court of Appeals has since endorsed an approach like the one taken in the federal cases, which distinguishes general warnings from those that suggest a “qualification” on access to counsel. See *State v. Quinn*, 831 P.2d 48, 52-53 (Or. Ct. App. 1992) (where a defendant was told “you have the right to an attorney,” the court held that the warning was sufficient to inform the defendant “that his right to an attorney was unconditional”).

¹¹ Police in fact often structure interviews to “soften up” suspects to encourage them to sign *Miranda* waiver forms. After the form is signed, they become more accusatorial, which may prompt requests for counsel during the interrogation. See Leo, *supra*, at 132 (“Once the interrogator has obtained the suspect’s implicit or explicit waiver (typically memorialized by his initials

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For its part, the Solicitor General’s brief, while completely ignoring the federal court of appeals decisions, relies on California state court opinions it claims conflict with the decision below. SG Br. 25-27.¹² As in *Bridgers*, however, the warnings at issue in the California decisions advised of the right to have a lawyer physically “present” rather than the right just to “talk to” an attorney.

In any event, at best, these Oregon and California decisions are the exceptions that prove the rule.

at the bottom of a *Miranda* advisement form), the tone, content, and force of the interrogation may change dramatically. It is typically after the *Miranda* moment that the interrogation process becomes accusatorial. . . .”). Though police use various tactics to avoid such mid-interrogation requests, they happen. *See id.* at 278-83; *accord, e.g., United States v. Smith*, No. CR09-5088, 2009 WL 1121091, at *3 (W.D. Wash. Apr. 27, 2009) (holding that defendant who initially signed waiver form later properly invoked the right to counsel during interrogation).

¹² *People v. Wash*, 861 P.2d 1107, 1118-19 (Cal. 1993); *see also People v. Lujan*, 112 Cal. Rptr. 2d 769, 778-79 (Cal. Ct. App. 2001); *People v. Valdivia*, 226 Cal. Rptr. 144, 146-47 (Cal. Ct. App. 1986). Although not cited by Petitioner or the Solicitor General, courts in at least one other state appear in accord with *Wash*. *See People v. Gilleyem*, 191 N.W.2d 96, 97 (Mich. Ct. App. 1971) (concluding that a warning providing “[y]ou may have this attorney present here before answering any questions” was sufficient under *Miranda*).

C. The Decision Below Properly Assessed the Substance of the Warnings Given Powell and Did Not Require “Magic Words”

Petitioner and the Solicitor General spend most of their briefs tearing down straw man arguments.

They first suggest that the decision below applied the wrong legal framework by purportedly looking for “magic words” rather than focusing on whether the warnings given Powell “adequately conveyed” the substance of Powell’s right to counsel during interrogation. *E.g.*, Br. 21 (arguing that the decision below “misapplied the Court’s ‘reasonably convey’ and ‘fully equivalent’ standards”); SG Br. 18 (“A reviewing court should focus on the basic substance of the advice and should not demand the use of specific words.”). That is wrong.

The Florida Supreme Court was explicit that no particular language is mandated. The court found that, when read as a whole, the rights conveyed to Powell were not the “functional equivalent” of the right to have a lawyer present during questioning. JA 170-71. After specially acknowledging that “there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, *as long as the warnings are not misleading*,” the Florida Supreme Court concluded, “[i]n this case the warning was misleading.” JA 171 (quotation source omitted) (emphasis in original). The touchstone, the court reasoned, is not particular words, but clarity:

[T]o advise a suspect that he has the right “to talk to a lawyer before answering any of our questions” constitutes a narrower and less functional warning than that required by *Miranda*. Both *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning.

JA 174. So although Petitioner and the Solicitor General characterize the issue here as whether *Miranda* requires “a single script,” “a single standard form,” and “mandat[es] that particular words be used,” Br. 12; SG Br. 6, 15, what is really at stake is whether a suspect would be misled by the substantive content of warnings that suggest a limit on access to counsel to before questioning has begun.¹³ As shown, federal courts of appeals repeatedly and consistently have answered that question in the affirmative.

Next, building on their flawed foundation that the decision below applied the wrong legal framework, Petitioner and the Solicitor General assert that the

¹³ Thus, contrary to Petitioner and the Solicitor General’s suggestion, the decision below would not require suppression of confessions if officers in the field give a warning that “deviates” from the precise language of the *Miranda* decision, so long as the warnings given convey the required substance. Br. 15; SG Br. 13-14, 20. In any event, that is not the situation here. As Petitioner and the Solicitor General acknowledge, the officers here accurately read a printed form developed and used as a matter of policy by the Tampa Police Department. Br. 21 n.5, 24; SG Br. 14 n.5.

Florida Supreme Court's holding is improperly formalistic because, they say, it requires that police explicitly use the word "during" in any warning. *E.g.*, Br. 10 (arguing that the decision below improperly expanded *Miranda* "by requiring law enforcement to expressly advise suspects they have the right to have counsel present during custodial interrogation"); *accord id.* 9, 22; SG Br. 27 ("The decision below appears to presuppose that *Miranda* warnings must include language specifically advising the suspect of the 'presence-during-questioning' aspect of the right to counsel."). That too is incorrect.

As lower courts interpreting the *Powell* decision have recognized, the Florida Supreme Court did not require police explicitly to advise suspects of the right to counsel *during* interrogation. Several decisions from the Florida Second District Court of Appeal have held that generalized warnings such as "[y]ou have the right to the presence of an attorney" sufficiently convey the right to counsel before and during interrogation because – unlike the warnings given *Powell* – they do not suggest any limitation. *E.g.*, *State v. Smith*, 6 So. 3d 652, 653 (Fla. 2d Dist. Ct. App. 2009) ("In this case, however, Smith was told: 'You have the right to the presence of an attorney.' Nothing Smith was told suggested that his right to the presence of an attorney was limited to the period 'before questioning.' Therefore, this case is distinguishable from *Powell*. . . ."), *review denied*, 2009 WL 2989781 (Fla. Sept. 17, 2009); *State v. Fletcher*, 16 So. 3d 1040, 1040 (Fla. 2d Dist. Ct. App. 2009) ("Mr.

Fletcher and Mr. Lee signed ‘Warnings to Suspects’ cards which state, ‘You have the right to the presence of an attorney.’ This unrestricted warning is distinguished from the one given in *Powell* and identical to language recently approved by this court in *State v. Smith*. . . . Accordingly, we reverse the trial court’s [suppression] order.”). The decision below itself discussed without disagreement *Graham v. State*, 974 So. 2d 440, 440 (Fla. 2d Dist. Ct. App. 2007), which likewise upheld generalized warnings. JA 165.

Indeed, although in this case Petitioner argues that *Powell* stands for the proposition that the word “during” must be included in *Miranda* warnings, *e.g.*, Br. 10, in previous cases in Florida, Petitioner repeatedly has argued that generalized warnings containing no mention of “during” create no conflict with the holding in *Powell*. *See, e.g.*, Jurisdictional Brief of State of Florida at *4-6, *Smith v. State*, No. SC09-739 (Fla. May 18, 2009), 2009 WL 1635223 (arguing that the warning that a suspect has the “right to the presence of an attorney” does not conflict with *Powell* even though the suspect was not explicitly advised of his right to an attorney during interrogation).

D. The Decision Below Is Consistent With Law Enforcement Practice Across the Country

In the practical day-to-day application of *Miranda*, law enforcement agencies in nearly every jurisdiction in the country have determined that

warnings advising only of the right to counsel “before” interrogation are inconsistent with *Miranda*. Social scientists studying *Miranda* have collected warning forms used by federal, state, and local law enforcement agencies in over 600 jurisdictions (representing 49 states, the District of Columbia, the Virgin Islands, Puerto Rico, as well as forms used by two federal law enforcement agencies and the U.S. Army Criminal Investigation Command). See Rogers et al., *supra*, at 124-26; Rogers & Shuman, *supra*, at 1-24; Weisselberg, *supra*, at 1565 & nn.258-260 (discussing the Rogers et al. studies).

Using hundreds of different verbal formulations, nearly all of these warning forms advise of either the right to counsel during questioning or before and during questioning. See Rogers & Shuman, *supra*, at 42-63; see also SG Br. 13 n.4.

And, as the Solicitor General confirms, “all the forms used by the various federal law enforcement agencies explicitly advise the suspect of the full contours of each right, including the right to the presence of counsel during questioning.” SG Br. 12 & n.3 (quoting warning forms used by the Federal Bureau of Investigation, Internal Revenue Service, and other federal law enforcement agencies). These federal warnings, too, while similar in substance, employ “minor variations” in wording. SG Br. 8 & nn.2-3.

Of the over 900 forms in the studies discussed above and the federal forms cited by the Solicitor General, only *five* advise of a right to talk to a lawyer or to have the lawyer present “before questioning” without also articulating the right to counsel *during* interrogation. Rogers & Shuman, *supra*, at 42, 43, 48, 52; SG Br. 12 n.3. Of those five, only one warning form, like the form read to Powell, neglects even to mention the right to have a lawyer “present.” Rogers & Shuman, *supra*, at 48. As explained above, moreover, the warning given Powell is an outlier even within Florida, where it appears that most law enforcement agencies use *Miranda* warnings that advise suspects of the right to have an attorney present during questioning. *See supra*, at pp. 7-8.

The fact that these law enforcement agencies have administered the core *Miranda* warning of the right to have counsel present during interrogation in hundreds of different ways demonstrates that no “magic words” are required. Some jurisdictions inform suspects of the right to counsel “before and during” interrogation, while others advise of the right to counsel “while you are being questioned”; “before and during any questioning”; “prior to and during any questioning”; “while . . . making a statement”; “during the interview”; “during the entire time you are being questioned”; “at the time of the interview”; “before and while answering any questions”; “prior to and during any interview”; “before, during, and after questioning”; or “while we talk to you.” Rogers &

Shuman, *supra*, at 42-63. Most warnings expressly advise of the right to have counsel “present” or “present with you,” although many inform of the right to have a lawyer “with you.” *Id.*

E. Petitioner and the Solicitor General’s Defense of the Warnings Here Is Without Merit

Petitioner dedicates very little attention to defending the actual content of the warning given Powell. When it does, it appears to make two main arguments: (1) the warning stating that Powell had a right to talk to a lawyer before questioning implied the right to have counsel present during questioning but, if not, (2) the warning’s last sentence – “[y]ou have the right to use any of these rights at any time you want during this interview” – cured any defect. Both arguments are incorrect and employ the very “strained, literalistic,” Br. 23, approach this Court has condemned.

First, Petitioner argues that “common sense” indicates that a person advised of the right to talk to a lawyer before interrogation would presume the right to counsel during the questioning because “it would be incredible to suggest that an attorney would have been squired out the door once questioning began.” Br. 25; *see also* SG Br. 24-25. While Petitioner and the Solicitor General consider their view of Form 310 as the “common sense” interpretation, Br. 16-18; SG Br. 24, they ignore that numerous federal and Florida judges have interpreted warnings advising of

the right to counsel “before” or “prior to” interrogation to be misleading. They also ignore the real world reality that warnings are not given in comfortable surroundings where a suspect can parse the words in the manner employed by Petitioner and the Solicitor General. Rather, “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak.” *Miranda*, 384 U.S. at 461.¹⁴

Second, Petitioner and the Solicitor General argue that – because the last sentence of the form read to Powell stated that “[y]ou have a right to use any of these rights at any time you want during this interview” – “[t]hat warning eliminated any inference that counsel could not be present after the interview commenced.” SG Br. 26; *accord* Br. 8, 18. This was easily answered by the Florida Supreme Court:

¹⁴ Like Petitioner, the Solicitor General argues that it is inappropriate to “[f]ocus[] on the precise wording of the warning at the expense of their substance.” SG Br. 15. Yet the Solicitor General’s brief engages in exactly that sort of formalistic argument. It closely parses the words of the warning and claims that the phrase “before answering any of our questions” clearly conveys that a suspect could request a lawyer before each of the police’s questions during the course of the interrogation. SG Br. 23. The Solicitor General’s argument depends on the formalistic premise that “before answering any of our questions” does not have the same meaning as “before any questioning” or “before questioning.” SG Br. 23, 26. In the rush to analyze the warning word-for-word, the Solicitor General ignores that Petitioner repeatedly characterized that part of the warning as being equivalent to “before questioning.” *See, e.g.*, Br. 6, 10, 18.

This last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed? The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.

JA 172.¹⁵

¹⁵ A federal district court in Florida rejected a similar argument. In *United States v. Taylor*, federal agents reading from a standard form then used by the Department of Homeland Security, advised the defendants that “[y]ou have the right to talk to a lawyer for advice before we ask you any questions.” No. 05-60072, at 5 (S.D. Fla. July 26, 2005) (magistrate judge’s report and recommendation). The magistrate judge found the warning invalid under *Miranda*, concluding that most criminal attorneys, to say nothing of “a suspect unschooled in the law,” would construe the form as impermissibly limiting access to counsel to the period before interrogation. *Id.* at 12. Notably, the government in that case, like here, argued that other clauses in the form – a provision providing that “[i]f you decide to answer questions now without a lawyer present, you have the right to stop answering at any time” and a waiver provision providing “[a]t this time, I am willing to answer questions without a lawyer present” – were sufficient to support a “reasonable inference” of the right to have an attorney present during questioning. *Id.* at 6, 11. The magistrate judge rejected the government’s parsing of the form, concluding that the “waiver portion of the form incorporates the statement of rights portion, which sets forth the right to counsel *before* questioning only. Moreover, there is no indication in the form that the right to terminate questioning implies a right to request counsel or

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Last, Petitioner ultimately retreats from the warning itself and, like the Oregon Court of Appeals case upon which it relies, Br. 20 n.4, suggests that it does not matter whether the warning here was deficient. It argues that “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.” Br. 23 n.7; *see also id.* 25. Petitioner’s demand that Powell should have made an “unequivocal” request for counsel, however, serves only to illustrate the need for a clear warning. When suspects seek to invoke their right to counsel during an interrogation they are required to do so clearly and explicitly:

[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the

consult with counsel during the interrogation process.” *Id.* at 11-12. In adopting the magistrate judge’s recommendation, the district court “note[d] that no objections to the Report & Recommendation have been filed by the United States.” *Taylor*, No. 05-60072 (S.D. Fla. Aug. 9, 2005) (order adopting report and recommendation); *see also* Paula McMahon & Ihosvani Rodriguez, *Feds Make Miranda Blunder*, S. Fla. Sun-Sentinel, Aug. 6, 2005, at 1B (reporting that the Bureau of Immigration and Customs Enforcement determined that the form used in *Taylor* differed from the approved form used nationwide and that after the form was held invalid “[t]he agency took immediate action to ensure that every field office in the country” was using the proper form), *available at* 2005 WLNR 23613777.

circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel.

Davis, 512 U.S. at 459. If the suspect’s request is not clear and unambiguous, the police have no obligation to stop the questioning. *Id.* at 461-62.¹⁶

Thus, under Petitioner’s approach a suspect would be required to invoke his right to counsel clearly and unequivocally, but law enforcement officers would not have a corresponding obligation to explain those rights clearly and unequivocally. “If the suspect is not made aware of when he can have an attorney, he will not realize that he is entitled to have an attorney present during interrogation, and any request for an attorney may seem ambiguous. The *Davis* threshold creates a double standard. . . .”¹⁷

¹⁶ *E.g.*, *Davis*, 512 U.S. at 455 (defendant initially waived his right to counsel, but one hour into questioning stated “maybe I should talk to a lawyer,” which was held too ambiguous to require that questioning cease); *United States v. Peters*, 435 F.3d 746, 751-52 (7th Cir. 2006) (citing cases reflecting the types of requests that have not satisfied the “strict” clarity requirement).

¹⁷ Adam S. Bazelon, Comment, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning “You Have the Right to an Attorney,”* 90 Marq. L. Rev. 1009, 1031 (2007); accord Daria K. Boxer, Comment, *Miranda With Precision: Why the Current Circuit Split Should Be Solved in Favor of a Uniform Requirement of an Explicit Miranda Warning of the Right to Have Counsel Present During Interrogation*, 37 Sw. U. L. Rev. 425, 447 (2008) (“[C]onsidering a ‘lawyer-like clarity’ that the
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Beyond that, Petitioner's speculation about what might have transpired if Powell had been adequately warned of his rights or what Powell actually understood is inconsistent with the "bright line" virtues of *Miranda* for police and suspects:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Miranda, 384 U.S. at 468-69 (footnote omitted).

modern case law demands from suspects to invoke their right to counsel, it appears fair to require the same level of precision from the trained law enforcement personnel." (footnotes omitted)).

F. Affirming the Decision Below Will Not Burden Law Enforcement

Finally, affirming the decision below will not “unduly burden” law enforcement. Br. 12; *see also id.* 22, 27. As noted, all federal law enforcement agencies and virtually all state and local agencies appear already to use printed forms that satisfy the standards set forth in the decision below. And Petitioner notes that the Tampa Police Department has since modified its form. Br. 21 n.5. Thus, affirming the decision below will do little more than confirm the status quo.

But if the Court finds the warning here sufficient under *Miranda*, the overwhelming majority of jurisdictions now using forms that comply with the current state of *Miranda* law would be tempted to narrow their warnings to advise only of the right to talk to counsel before interrogation or otherwise modify their forms. As the Solicitor General acknowledges, such changes would “increase . . . the litigation costs of defending any statement.” SG Br. 17 n.7. To be sure, the Solicitor General states that “law enforcement agencies generally have little incentive to replace the conventional warnings with some other phrasing.” *Id.* But that confidence is not shared by those who have studied modern police practices. *See, e.g., Leo, supra*, at 124 (“Perhaps the most fundamental police strategy to successfully negotiate *Miranda* is to do an end run around its requirements by taking advantage of the definitions, exceptions, and ambiguities in *Miranda* doctrine.”); *see also* Brief

for the United States at *37-38, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 141075 (Jan. 28, 2000) (“Although many law enforcement agencies would continue to observe the *Miranda* procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings, *others might significantly modify them...*” (emphasis added)).¹⁸ Thus, while advocating that state and local jurisdictions “model their *Miranda* warnings on the federal formulation,” SG Br. 6; *accord id.* 9, 13, adopting the Solicitor General’s view would have the opposite effect.

¹⁸ Upholding the warnings used here also could impede the ability of courts to determine whether defendants have clearly waived their Sixth Amendment rights. This Court has held that advising a defendant of the right “to have counsel present during the questioning” provides sufficient information to secure a “knowing and intelligent” waiver of the right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 293 (1988). Last Term, this Court recognized that when “a defendant is read his *Miranda* rights (*which include the right to have counsel present during interrogation*) and agrees to waive those rights, that typically does the trick [to waive the Sixth Amendment right to counsel], even though the *Miranda* rights purportedly have their source in the Fifth Amendment.” *Montejo*, 129 S. Ct. at 2085 (emphasis added). Thus, a clear *Miranda* warning provides a bright-line means for courts to assess Sixth Amendment waivers. The warning advocated by Petitioner here, however, does not provide the clarity afforded by the warnings underlying the *Montejo* and *Patterson* decisions. If law enforcement agencies adopt watered down warnings, that could spur litigation over the sufficiency of Sixth Amendment waivers.

That police departments and other law enforcement agencies modify forms to try to increase confessions is supported by the circumstances that led to the present case. In 1984, Tampa Form 310 stated clearly, “I further understand that prior to *or during* this interview that I have the right to have an attorney present.” *Thompson v. State*, 595 So. 2d 16, 17 n.3 (Fla. 1992) (quoting Form 310) (emphasis added). Despite uniform federal court of appeals decisions to the contrary, Tampa changed its form to suggest an inappropriate limitation on the right to counsel. And Tampa continued to use the misleading form read to Powell even after Florida courts had found a comparable form used in another Florida jurisdiction defective.¹⁹ It was only after the *Powell*

¹⁹ In the months immediately preceding Powell’s interrogation, the Fourth District Court of Appeal had held that warnings comparable to the ones at issue here were defective. *See Roberts v. State*, 874 So. 2d 1225, 1228-29 (Fla. 4th Dist. Ct. App. 2004) (holding that a warning providing “[y]ou have the right to talk with a lawyer and have a lawyer present before any questioning” was invalid); *accord West v. State*, 876 So. 2d 614, 615-16 (Fla. 4th Dist. Ct. App. 2004); *Franklin v. State*, 876 So. 2d 607, 608 (Fla. 4th Dist. Ct. App. 2004); *President v. State*, 884 So. 2d 126, 127 (Fla. 4th Dist. Ct. App. 2004) (per curiam). The record does not reflect why the Tampa form was not changed in light of these decisions (or exactly when the form was subsequently changed to conform with *Miranda* and Florida Constitutional requirements). What is apparent is that at the time of Powell’s arrest and interrogation Petitioner was seeking review of the *Roberts*, *West*, and *President* decisions in the Florida Supreme Court. Further, in the months after Powell’s interrogation, Petitioner sought review of the *Franklin* decision in this Court, which was denied. *See Franklin*, 543 U.S. 1081

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decision that Tampa again aligned its form with existing law. *See* Br. 21 n.5.

* * *

In the end, most law enforcement agencies have not had difficulty following the guideposts courts have provided concerning *Miranda* warning forms. That the Tampa Police Department decided that it was willing to risk using a non-compliant warning is no reason to upset longstanding lower court decisions and settled law enforcement practices used across the country. The Florida Supreme Court correctly held that the form here was at odds with both Article I, Section 9 of the Florida Constitution and *Miranda*.



(Jan. 10, 2005); *see also* Petition for Writ of Certiorari, *State v. Franklin*, 543 U.S. 1081 (2005) (No. 04-568), 2004 WL 2418918 (Oct. 20, 2004).

CONCLUSION

For the foregoing reasons, the Court should dismiss the writ of certiorari as improvidently granted or affirm the judgment of the Florida Supreme Court.

Respectfully submitted,

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