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 Florida Supreme Court

BRIEF FOR THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

The Florida Association of Criminal Defense Lawyers ("FACDL"), an independent affiliate of the National Association of Criminal Defense Lawyers, is a non-profit corporation with a membership of over 1,500 attorneys and 23 chapters throughout the state of Florida. FACDL's members are all practicing criminal defense attorneys committed to preserving fairness within Florida's criminal justice system and ensuring due process for suspects and defendants accused and convicted of committing crimes.

The questions presented in this case have important implications for all Florida criminal defendants.

SUMMARY OF ARGUMENT

The Florida Supreme Court held that the *Miranda* warning in this case was insufficient because a "reasonable person in the suspect's shoes" would have understood it to mean that he had a right to counsel solely *before*, and not *during*, interrogation. *State v. Powell*, 998 So. 2d 531, 541 (Fla. 2008). Thus, in

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[1]No counsel for a party authored this brief in whole or in part. No person or entity other than FACDL and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief and, pursuant to Rule 37.3(a), FACDL has filed the letters of consent with the Clerk of the Court.

addition to the plain language of the warning itself, the "reasonable person in the suspect's shoes" becomes a term of paramount importance.

FACDL maintains that despite the Petitioner's and the Solicitor General's interpretations, Brief of Petitioner at 17-9 ["Pet. Br."]; Brief of Solicitor General at 21-4 ["SG Br."], the plain language of the warning excludes any possible inference that the right to counsel extended throughout questioning. However, even assuming such interpretation were possible, the literacy skills of the United States prison population suggest that very few suspects encountering Mr. Powell's warning would have the capacity to make the complex inference required. That is, a small minority of prisoners would have the tools to infer that contrary to the warning's provision limiting the right to counsel to *before* questioning, the catchall provision could be applied to negate that limiting language and expand the right to counsel to apply "at any time . . . during questioning."

Second, the "inherently compelling pressures" present in stationhouse interrogations and relied on by this Court, in part, to justify the warnings requirement, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), are no less significant today than they were when the Court decided *Miranda.* Furthermore, compelling, albeit limited, research demonstrates that those pressures not only make it less likely that a reasonable person in the suspect's shoes will invoke his rights without a warning, *id.,* they make it more difficult for that person to *comprehend* complex warnings. Thus, in order to ensure that the procedural protections guaranteed by *Miranda* have any force at all, warnings must be given in such a way that

complex inferences of the sort urged by Petitioner are not required to give *Miranda* warnings their full effect.

Finally, the overrepresentation of racial and ethnic minorities in the criminal justice system has increased exponentially in recent decades, leading to a well-documented distrust of law enforcement by these communities. This perspective is likely to shade how a reasonable person in the suspect's shoes (now increasingly minority) views a *Miranda* warning like the one at issue here – that is, he is more likely to take the "before" questioning language at face value, rather than to infer a more expansive right suggested by the catchall language at the end of the warning.

FACDL argues that when literacy rates, the conditions of interrogation and the distrust that marks a growing minority suspect population are considered, the warning in this case was not adequately unambiguous to convey the full effect of the right to counsel to a "reasonable person in the suspect's shoes." Accordingly, the Florida Supreme Court's decision below should be affirmed.

ARGUMENT
"Clarity Can Only Be A Virtue."[2]

In *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966), the Court held that a suspect subject to custodial interrogation must be informed in "clear and unequivocal terms" that he has the right to remain silent and the right to the presence of counsel. In the

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[2]WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 79 (3d ed. 1979).

instant case, the "clear and unequivocal terms" used by law enforcement officials informed Mr. Powell that he had a right to counsel *before* the interrogation ("You have the right to talk to a lawyer before answering any of our questions"). As explained by the Florida Supreme Court, "[t]he '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." *State v. Powell*, 998 So. 2d 531, 541 (Fla. 2008).

Although a catchall provision was administered at the end of the warning stating, "You have the right to use any of these rights at any time you want during this interview[,]" the Florida Supreme Court correctly found that this sentence did "not effectively convey to Respondent 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." *Id.*

Petitioner urges this Court to overturn the Florida Supreme Court's well-reasoned and straightforward conclusion, calling it a "hypertechnical approach" that "mires the common sense reasoning of this Court by engaging unnecessarily in semantics." Pet. Br. at 17. The Florida Supreme Court's approach is far from hypertechnical. It merely analyzes the plain language of the warning, concluding that it misleadingly suggests a limitation on Mr. Powell's right to counsel during interrogation. The decision recognizes, consistent with social scientists who study *Miranda* comprehension, that warnings should be simple and clear. When crafted in this way, as the Solicitor General points out, the warning becomes a very effective law enforcement tool because it

"'produces a virtual free ticket of admissibility.'" SG Br. at 10-11 (*quoting Missouri v. Seibert*, 542 U.S. 600, 601 (2004) (plurality opinion)).

The Tampa Police Department chose not to take advantage of this "free ticket." *See* Brief of Richard A. Leo at Section II. ["Leo Br."] The result is not simply a warning that failed to inform Mr. Powell he had a right to counsel during interrogation, but one that implied he did *not* have such a right, because it informed him specifically that he had a right to counsel *before* questioning.[3] Thus, the irony is that had the warning been *less* restrictive–had it left out the word "before," Petitioner might well have argued convincingly that the right to counsel was included in the catchall and applied at any time during the interview. To assume that Mr. Powell simply ignored the term "before" once he heard the catchall at the end, however, defies not only the plain language of the warning but assumes a level of analysis from Mr. Powell that very few people in the general population possess – even outside of the context of interrogation and all the pressures that it entails. If one looks at the subset of individuals likely to find themselves in an interrogation room and ultimately in prison, combined with the stress that comes with the attendant circumstances of an interrogation, *see* section I(B), *infra*, the likelihood of such a fine-tuned analysis, even assuming its correctness, is virtually non-existent.

Since this Court's "clear and unequivocal"

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[3]FACDL notes the legal maxim *expressio unius est exclusion alterius*, which means "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990).

mandate, numerous studies have examined whether criminal defendants are, in fact, understanding their *Miranda* rights. *See, e.g.,* Richard Rogers et al., *The Language Of* Miranda *Warnings In American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124 (April 2008); Richard Rogers, *A Little Knowledge is a Dangerous Thing: Emerging* Miranda *Research and Professional Roles for Psychologists*, 63 American Psychologist 776 (2008); Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers*, 31 Law & Hum. Behav. 177 (2007). These studies have focused on criminal defendants generally and on particular subcategories of defendants, such as juveniles,[4] "mentally disordered defendants,"[5] and non-English speaking defendants.[6] Though they may focus on different aspects of the warnings used in various jurisdictions, the one conclusion on which all of the studies agree is that the clarity of *Miranda* warnings matters. In addition, then, the literacy skills of the "reasonable person in the suspect's shoes," who will be interpreting those warnings, also matters. *Cf. Halbert v. Michigan*, 545 U.S. 605, 620-21 (2005) (relying in

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[4]Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 Psychol. Pub. Pol'y & L. 63 (2008).

[5]Richard Rogers et al., *Knowing and Intelligent: A Study of* Miranda *Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401 (2007).

[6]Richard Rogers et al., *Spanish Translations of* Miranda *Warnings and the Totality of the Circumstances*, 33 Law & Hum. Behav. 61 (2009).

part on statistics regarding low literacy skills of Michigan prison population to support holding that indigent appellants in that state cannot effectively represent themselves on appeal).

Studies in recent years also have confirmed with greater breadth the assumption on which the *Miranda* Court relied several decades ago – that custodial interrogations involve "inherently compelling pressures" that may undermine a suspect's ability to exercise his right to remain silent. Thus, the warnings serve as a critical procedural safeguard. *Miranda*, 384 U.S. at 467. What is new since *Miranda*, however, is evidence that law enforcement officers today are armed with even more refined tactics for eliciting confessions, tactics so effective that a startling percentage of suspects have been proven to confess to crimes they did not commit. Rogers et al., *A Little Knowledge Is A Dangerous Thing, supra* at 782; Fla. S. Comm. on Crim. Justice, Int. Rep. 2004-123, at 2-4 (Jan. 2004); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 986 n.38 (1997).

Additional research demonstrates that the presence of stress that accompanies an interrogation may not only reduce a suspect's ability to invoke his rights, but it will also reduce his ability to *comprehend* them. Thus, not only must warnings be given, they must be administered with absolute clarity and simplicity if they are to serve any purpose at all.

A third factor bears consideration in light of recent demographic changes in the populations most likely to come in contact with the criminal justice system. While racial and ethnic minorities have always been disproportionately represented in the

system to some extent, this overrepresentation has jumped dramatically the past several decades. One result has been a well-documented distrust of law enforcement by minority communities. Studies demonstrating such systemic distrust challenge Petitioner's and the Solicitor General's unsupported contention that a criminal suspect, when subjected to custodial interrogation and all its attendant psychological intimidations and pressures, *see Miranda*, 384 U.S. at 467, will assume he has a right of which he has not explicitly been advised.

When taken together, these factors as applied to the warning in the instant case, yield the inescapable conclusion that Petitioner failed to meet its burden in establishing that Mr. Powell's Fifth Amendment right against self-incrimination was protected in this case.

A. The "Reasonable Person In the Suspect's Shoes" Requires Plain, Straightforward Warnings to Allow for Optimal Understanding.

The *Miranda* Court required not only that a warning be given, but that any waiver be made knowingly and intelligently. We now have far more information than we did in the 1960s about the ways in which various characteristics might affect a likely suspect's understanding of *Miranda* warnings. The findings suggest that only the most straightforward, "clear and unequivocal" warning can properly convey a suspect's Fifth Amendment rights in such a way as to produce a constitutional waiver.

The United States Department of Education

conducted its *National Assessment of Adult Literacy in Prison Survey* in 2003. While in the last ten years, the prison population overall has become more educated, the percentages of undereducated inmates is still very high. "In 2003, some 9 percent of prison inmates dropped out of school before starting high school and 28 percent started high school but did not obtain a diploma or a General Educational Development (GED) credential/high school equivalency certificate[.]" U.S. Dept. of Ed., National Center for Education Statistics, *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey* 11 (May 2007) (NCES 2007-473), available at http://nces.ed.gov/pubs2007/2007473.pdf.

More importantly, the minimal literacy rates of this population generate much concern. The study tested for literacy using three mechanisms: prose literacy, document literacy, and quantitative literacy. *Id.* at 3. For purposes of *Miranda* warnings, which can be conveyed in either oral or written form, but do not involve quantitative analysis, the first two are relevant. Individuals in the study were grouped according to four categories of literacy: Below Basic, Basic, Intermediate, and Proficient. *Id.* at 3-4.

Below Basic prose and document literacy may indicate, at the bottom end, illiteracy in English, and at the top end, "locating easily identifiable information in short, commonplace prose texts" and/or "locating easily identifiable information and following written instructions in simple documents" such as charts or forms. *Id.* at 4, Tbl. 1-3.

Basic prose and document literacy provide a measure of an individual's capacity to "read[] and understand[] information in short, commonplace prose

texts" or in "simple documents[.]" *Id.* The Intermediate prose and document literacy categories demonstrate skills in "reading and understanding moderately dense, less commonplace prose texts as well as summarizing, making simple inferences, determining cause and effect, and recognizing the author's purpose," among others. *Id.*

Finally, an individual who scores in the Proficient prose and/or document literacy range(s) is "reading lengthy, complex, abstract prose texts as well as synthesizing information and making complex inferences[.]" *Id.* He may also be "integrating, synthesizing, and analyzing multiple pieces of information located in complex documents." *Id.*

In 2003, sixteen percent of the adult prison population (200,000 inmates) had Below Basic prose literacy, and twenty-two percent had Below Basic document literacy. *Id.* at 13, Fig. 2-2. Forty percent had Basic prose literacy and thirty-five percent had Basic document literacy. *Id.* This left less than half the prison population in either the Intermediate or Proficient prose or document literacy categories. *Id.*[7]

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[7]The Department of Education's survey compared literacy levels among adults in prison with literacy levels among the adult household population. "Prison inmates had lower average prose, document, and quantitative literacy than adults living in households." *Id.* at 29, Fig. 3-1. A higher percentage of prison inmates (thirty-nine percent) than adults living in households (twenty-one percent) had Below Basic quantitative literacy. *Id.*, Fig. 3-2. A lower percentage of prison inmates (two-to-three percent) than adults living in households (thirteen-to-fourteen percent) had Proficient prose, document, and quantitative literacy. *Id.*, Fig. 3-2. "A lower percentage of adults in prison than adults living in households had Intermediate document or quantitative

For black inmates, the statistics are even more stark: only thirty-eight percent of black incarcerated adults possess Intermediate or Proficient prose literacy, compared with forty-four percent overall. Forty-one percent of black incarcerated adults have Intermediate or Proficient document literacy, compared with fifty percent of the overall population. *Compare Literacy Behind Bars, supra* at 13, Fig. 2-2 *with id.* at 15, Fig. 2-4.

The study shows that although having a high school diploma increases the likelihood of reaching the Intermediate or Proficient literacy level slightly, it by no means guarantees it. Indeed, only slightly more than half, or fifty-seven percent, of inmates with a GED or high school equivalency diploma possessed these levels of prose literacy in 2003. Inexplicably, the percentage was even lower for inmates who had actually attended and graduated from high school – fifty-two percent. *Id.* at 17, Fig. 2-6. For document literacy, the figures were sixty-two percent for GED recipients and fifty-seven percent for high school graduates. *Id.*; *see also* Daniel P. Greenfield et al., *Retrospective Evaluation of Miranda Reading Levels and Waiver Competency*, 19 Am. J. of Forensic Psychol. 75, 79-80, n.45 (2001) (noting the importance of differences between an individual's highest achieved grade level and his literacy skills).

In addition to below average literacy levels among likely criminal suspects, one must also consider the method by which the warning is given. Already low comprehension levels drop dramatically when

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literacy . . . ." *Id.*, Fig. 3-2.

police read warnings to suspects orally. Richard Rogers, *A Little Knowledge is a Dangerous Thing, supra* at 780 ("As an overall trend, oral advisements failed to be comprehended much more frequently than their written counterparts by recently arrested detainees.").

The notion that popular understanding of *Miranda* fills these gaps is a myth. As Rogers and his co-authors point out, despite our inundation through popular culture with the *Miranda* warnings, exposure does not necessarily yield understanding:

> We can easily imagine open incredulity at any assertion that a particular defendant did not know that the right to silence meant he or she was under no obligation to communicate further with the authorities. Anecdotally, informal surveys suggest that college students do not understand the term "right" as a *protection*. Instead, the large majority of students construed "right" as simply an *option*, but an option for which they will be severely penalized (i.e., their non-cooperation will be used in court as incriminating evidence).

Rogers, *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, *supra* at 190.[8]

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[8]It is a commonly-held belief that *Miranda* rights are so omnipresent in pop culture today that not only do most Americans recognize them, they can recite them. They hear them night after night on the myriad of police shows such as *Law & Order* and *CSI* and their various off-shoots. This is largely a myth, however. One recent study revealed that almost sixty-four percent of college

FACDL submits that regardless of his literacy or education level, a suspect would not understand the statement that "[y]ou have the right to talk to a lawyer before answering any of our questions" to mean that he has the right to have a lawyer present *during* an interrogation, even when followed by the catchall clause on which Petitioner so heavily relies. *Cf.* Rogers, *An Analysis of Miranda Warnings and Waivers*, *supra* at 190 ("Incomplete though accurate information has a real potential to mislead custodial suspects."); Rogers, *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, *supra* at 65 (criticizing translated warnings where suspect told that "legal counsel can be available *before* the interrogation" rather than "before and during" because "this error essentially nullifies a key feature of the ongoing nature of Constitutional protections"); Rogers, *The Comprehensibility and Content of Juvenile Miranda Warnings*, *supra* at 81-82 ("Warnings that

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undergraduates displayed at least two deficits in *Miranda* understanding. Richard Rogers et al., *Myths, Methods, and Model Solutions*, 23 Crim. Just. 4, 5 (Summer 2008) (*citing* Richard Rogers et al., *Advances in the Assessments of Miranda, symposium presentation*, American Psychology-Law Society (March 6, 2008)). Almost twenty-eight percent did not know that the Constitution guaranteed the right to silence and believed that failing to cooperate would be later viewed and used against them as incriminating evidence. *Id.* at 5. Over thirty-five percent believed that police could continue interrogation after an individual requested counsel. *Id.* at 5. Almost twenty-four percent believed a *Miranda* waiver had to be signed in order to be valid. *Id.* Thus, despite the prevalence of *Miranda* warnings in society today, such saturation does not translate into adequate knowledge and comprehension of such warnings.

misinform the defendant about the right to have an attorney present during questioning do not satisfy the requirements of *Miranda*.").

However, even assuming, *arguendo,* that the plain language of the warning given to Mr. Powell does not irretrievably limit the right to counsel to before questioning, the interpretation urged by Petitioner would require that a suspect have the ability to make complex inferences that are likely far beyond the reach of the average criminal suspect. Under Petitioner's view, suspects could understand the full breadth of their right to counsel during interrogation only by making the inference that the provision providing a right to counsel only *before* interrogation, is meant to be corrected or negated by a subsequent provision, the catchall language that a suspect could exercise his rights "at any time . . . during this interview." This type of inference would require Intermediate prose and document literacy at the very least, since individuals with Below Basic and Basic literacy skills do not have the capacity to form inferences at all based on what they read or hear. *Literacy Behind Bars, supra* at 4, Tbl. 1-3. Even individuals possessing Intermediate Literacy skills can form only "simple" inferences and their understanding is limited to "commonplace" prose and documents. *Id.* Petitioner's suggested inference cannot easily be categorized as "simple." Moreover, social science research makes clear that the vocabulary used in *Miranda* warnings is anything but "commonplace." *See, e.g.,* Rogers, *The Language Of Miranda Warnings In American Jurisdictions: A Replication And Vocabulary Analysis*, *supra* at 130 ("[A]pproximately two-thirds (*i.e.*, 67.2%)

of the *Miranda* warnings exceeded the sentence difficulty of [the Internal Revenue Service] 1040-EZ Instructions."). Thus, Petitioner's strained interpretation of the warning is likely attainable only by those who possess Proficient prose and document literacy skills, which comprises only two to three percent of the adult prison population. *Literacy Behind Bars, supra* at 13, Fig. 2-2.

In light of the foregoing literacy data and studies analyzing individuals' true understanding of *Miranda* warnings, it is FACDL's contention that warnings must leave little to chance in their precision and simplicity if a "reasonable person in the suspect's shoes" is to understand them. In particular, warnings that rely on inference to convey their intended meaning must be avoided. *See* Daniel J. Croxall, *Inferring Uniformity: Towards Deduction and Certainty in the* Miranda *Context*, 39 McGeorge L. R. 1025, 1034 (2008) ("The only way to assure adequate warnings is to move away from allowing inference to suffice and to move towards a deductive strategy to assure full compliance with the *Miranda* directive."). The warning in this case fails to meet that standard.

B. Custodial Interrogation Produces Psychological Stress that Undermines A Suspect's Understanding of *Miranda* Warnings.

In addition to this Court's assumption in *Miranda* that warnings must be "clear and unequivocal" to be understood by a reasonable person in the suspect's shoes, another of its assumptions has been proven again and again. Indeed, the evidence to

support the "inherently compelling pressures" present in stationhouse interrogations, *Miranda*, 384 U.S. at 467, is far more prevalent now than it was in 1966. The very professional whose techniques the *Miranda* Court referenced in 1966, John E. Reid, later of John E. Reid & Associates, offers a selection of interrogation training courses across the country. The company claims that more than 500,000 professionals in the law enforcement and security fields have attended its interviewing and interrogation training programs since they were first offered in 1974. http://www.reid.com/training_programs/interview_overview.html. In a Florida Senate Criminal Justice Committee Report on electronic recording of suspect interrogations, the committee refers to Reid's book, *Criminal Interrogation and Confessions,* as "[t]he basic textbook of interrogation techniques." Fla. S. Comm. on Crim. Justice, Int. Rep. 2004-123, at 2 (Jan. 2004). The "Reid method" and others teach different approaches for interviews (which concentrate primarily on information gathering and rapport building) and interrogations, which are conducted "'in a controlled environment'" and are generally "'accusatory'" in nature. Charles D. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1521, 1531 (2008) (*quoting* FRED E. INBAU, ET AL., CRIMINAL INTERROGATION AND CONFESSIONS, 7-8 (4th ed. 2001)).

A California law enforcement training organization, Commission on Peace Officer Standards and Training ("POST"), also offers interrogation courses, one of which is entitled the "'Confrontation Interrogation Technique.'" Weisselberg, *supra*, at 1533-534 (*quoting* Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993)). The first step in the technique is "Psychological

Domination," which involves leaving the suspect alone in the interrogation room to "'heighten[] anxiety and stress'" and it goes on from there. Weisselberg, at 1534 (*quoting* CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, INTERVIEW AND INTERROGATION TECHNIQUES TELECOURSE, PARTS I & II, Apr. 8 & 22, 1993 at 20 (1994) (handbook accompanying telecourse) (available at http://libcat.post.ca.gov/dbtw-wpd/documents/POST/55607142.pdf)).

Not only are these interrogation methods available, they are widely used. Isolation, confrontation with guilt and inconsistencies, interrogating in a small room, and implying or pretending to have evidence of guilt all continue to be prevalent tactics for eliciting confessions from suspects, Weisselberg, *supra* at 1535-537, and all contribute to the "inherently compelling pressures" with which this Court was concerned over forty years ago.[9] In short, the custodial anxieties and stressors that dictated the basis for a warning requirement are alive and well and

[9]This Court recognized in *Miranda*, "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. The Court added that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.*

are even more linked to the need for clear and unequivocal warnings now than they were in 1966.[10]

Custodial stress likely carries with it another relevant side effect that gradually is becoming the focus of research and bears relevance to the instant case – namely, the effects of stress on comprehension. Because simulating interrogation carries with it ethical concerns, no published studies examine the effects of interrogation on a suspect's comprehension of *Miranda* warnings. However, Nate Gillard and Richard Rogers recently conducted a "mock-crime" study, which did just that, based on their assessment that "[t]he missing link in *Miranda* research is an evaluation of how situational stresses, often severe, affect *Miranda* comprehension and reasoning." Nate Gillard & Richard Rogers, Presentation at the

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[10]These inherently compelling pressures often have resulted in false confessions. The Innocence Project reports that, "About 25 percent of the over 240 wrongful convictions overturned by DNA evidence in the U.S. have involved some form of a false confession." www.innocenceproject.org/Content/314.php. This is no doubt in part because "[p]olice trainers and interrogation manuals mislead detectives into believing that they can divine whether a suspect is innocent or guilty from simple non-verbal and behavioral responses to their questions." Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 986 n.38 (1997).

The Florida Senate's Committee on Criminal Justice noted in 2004 that the "Reid method," widely used in Florida, has been criticized by some, including Professor Richard Leo, as prone to producing false confessions if officers conducting Reid interrogations are not properly trained to avoid false positives. Fla. S. Comm. on Crim. Justice, Int. Rep. 2004-123, at 2-4 (Jan. 2004).

American Psychology Law Society Conference: *Situational factors: The missing link in* Miranda *knowledge*, "Summary" 1 (Mar. 2009) (Summary and Powerpoint Presentation available from Richard Rogers at rogersr@unt.edu).

Gillard and Rogers set up a mock theft scenario with a sample of seventy-nine college students who were first tested for their reading and listening comprehension, as well as their anxiety level. They were instructed to try to remove a watch from a display case without setting off an alarm attached to the case. The alarm was activated for each participant, regardless of whether or not they had handled the extraction adeptly. *Id.* at 2. Following the alarm, each participant immediately was given an oral or written administration of *Miranda* in a "cramped, windowless room." *Id.* They were "apprehended" for less than two minutes and then tested for their comprehension of the warning. *Id.* at 3. The control group underwent the same initial procedures, but participants were not "apprehended" as the mock-crime participants were. Instead, the control group participants were read warnings and were then left in a room with neutral reading materials for three minutes. *Id.* 2-3.

The results demonstrated that apprehended participants had states of anxiety that registered three times higher, on average, than the control group's. *Id.* at powerpoint slide 9. This increased anxiety directly correlated with decreased *Miranda* comprehension and reasoning: the high-anxiety apprehended group averaged a score of ten percent lower than the control group. *Id.* at powerpoint slide 10.

Thus, not only are the "inherently compelling pressures" of a stationhouse interrogation as relevant

today as they were in 1966, for the reasons they were relied on by the Court, we are now beginning to see that they may also warrant the need for increased simplicity and clarity in the administration of such warnings for different reasons. The decreased comprehension that comes with the stress of interrogation has implications for a warning of the type administered in this case. Even if one accepts Petitioner's interpretation as conceivable, it is unlikely that a suspect, faced with the decreased comprehension likely to accompany the stress of an interrogation, would be capable of reaching the inference required to disregard the warning's explicit limitation placed on the right to counsel in favor of the more expansive, contradictory catchall.[11]

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[11]Gillard and Rogers point out that due to ethical concerns, the apprehended participants were not handcuffed, nor were they isolated longer than two minutes. In addition, they were free to leave. The participants were also college educated. Nate Gillard & Richard Rogers, Presentation at the American Psychology Law Society Conference: *Situational factors: The missing link in Miranda knowledge* (Mar. 2009) (Powerpoint Presentation, slide 15, available from Richard Rogers at rogersr@unt.edu). Thus, many of the effects found presumably would be heightened in a real interrogation involving a suspect from an educational background more typical of the prison population.

C. A General Distrust of Law Enforcement and the Criminal Justice System Contributes to the Unlikelihood Respondent Would Have Inferred the Presence of a Right of Which He Was Not Informed.

Petitioner and the Solicitor General's suggestion that the "catchall" provision of the warnings here "eliminated any inference that counsel could not be present after the interview commenced, *e.g.* SG Br. at 26, defies not only the plain language of the warnings, but also disregards the real-world backgrounds of suspects in the criminal justice system.

Since this Court's ruling in *Miranda*, minority representation in the criminal justice system has increased exponentially, which many believe is due in large part to an increase in criminalization that has disproportionately affected minorities. *See, e.g.*, Fay Taxman et al., *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring the Consequences for Deterrence*, 16 J. of Health Care for the Poor & Undeserved 57, 63 (2005). The incarceration rate for blacks born in 1971 is one in eight, for Hispanics it is one in twenty-five, and for non-Hispanic, white males it is one in fifty. Estimates for those born in 1991 project that the rate for black males will jump to one in three, for Hispanic males to one in six, and for non-Hispanic males to one in seventeen. Thus, while the percentage of incarcerated black males is expected to jump from 12.5 percent to over 33 percent in twenty years, the percentage of white males incarcerated only will have jumped from 2 percent to under 6 percent. *Id.* at 63. In short,

"[m]inorities are gravely over-represented in every stage of the criminal process[.]" Erik Luna, *Race, Crime and Institutional Design*, 66 L. & Contemp. Probs. 183 (2003) (citations omitted).

Along with these statistics has come an undeniable distrust in the criminal justice system by members of racial and ethnic minority communities. This is yet another factor that Petitioner and the Solicitor General ignore in their strained interpretation of the warning here. This distrust may stem from the belief that law enforcement agencies engage in racial profiling, that particular officers are racist, that the war on drugs is applied disproportionately to drugs that affect the African American community, that immigrant communities are targeted by law enforcement because of increased enforcement of immigration regulations, or from some combination of these factors and others.

Law professor Erik Luna points out that by contrast, one can attach any number of "positive hypotheses" to the overrepresentation of blacks in the criminal justice system, such as the influence of poverty on criminal prevalence, the intensity of policing in open-air drug markets in black neighborhoods, [or] the simple fact that perhaps blacks commit more crimes than whites[.]" Luna, *Race, Crime and Institutional Design*, *supra* at 183-84. He concludes, however, that regardless of these possible hypotheses, "the statistics lead to one dominant view within the black community: African Americans are overrepresented in the system because of racial prejudice by law enforcement." *Id.*

A recent Pew Hispanic Center Study found that only thirty-seven percent of blacks and forty-six

percent of Hispanics believe the police will treat them fairly, compared with nearly three quarters of whites. Mark Hugo Lopez & Gretchen Livingston, *Pew Hispanic Center, Hispanics and the Criminal Justice System: Low Confidence, High Exposure* 1 (Apr. 7, 2009). Similarly, a 2001 study conducted by the Bureau of Justice Statistics found that sixty-three percent of whites surveyed expressed confidence in law enforcement officers compared with only thirty-eight percent of blacks. Bureau of Justice Statistics, *Sourcebook Criminal Justice Statistics Online*, Table 2.12.2009 (2009), available at http://www.albany.edu/sourcebook/pdf/t2122009.pdf. As Fay Taxman and her co-authors put it, "The front end of the criminal justice system is plagued with citizen concerns about the legitimacy of the police and other agents of the criminal justice system[.]" Taxman, *supra* at 69.

Whether or not the most damning perceptions about law enforcement are in fact true, either in whole or in part, is not relevant to the inquiry before the Court. What *is* relevant, however, is the reality that such perceptions exist. A reasonable person in the suspect's shoes is increasingly minority and increasingly distrustful of law enforcement. The likely consequence is that if he is read a *Miranda* warning advising him he has the right to a lawyer *before* questioning, he simply is not likely to infer he is entitled to more. To be sure, someone inclined to distrust police altogether may throw the baby out with the bath water and disregard all warnings, believing them to be a mere formality that officers have no intention of honoring. However, for one who actually decides to test the waters, a clear warning that does not require inferences or other language to "eliminate"

its lack of clarity may make the difference between invocation and waiver.

In conclusion, the Tampa Police Department's warning misled suspects concerning a key constitutional right – the right to counsel during interrogation. The only possible mechanism for reading that right into the warning would be to make a sophisticated inference requiring a literacy level that eludes the vast majority of the public, much less those who come into contact with the criminal justice system. When the stresses of interrogation are factored into the equation, it is pure fallacy to argue that the majority of suspects would make it. Finally, allowing warnings like the one here to suffice overlooks that those most likely to receive warnings may be those who need clarity the most because of their low levels of confidence in law enforcement.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully Submitted,

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