Order

Michigan Supreme Court
Lansing, Michigan

June 12, 2020

158102

Bridget McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellant,

v

LARICCA SEMINTA MATHEWS,
Defendant-Appellee.
/

SC: 158102
COA: 339079
Oakland CC :
2016-260482-FC

On October 3, 2019, the Court heard oral argument on the application for leave to appeal the May 22, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

VIVIANO, J. (*dissenting.*)

I dissent from the majority's decision to deny leave in this case because I believe that the Court of Appeals erred in concluding that the warnings provided to defendant were insufficient under *Miranda v Arizona*, 384 US 436 (1966), and its progeny. I would reverse.

I

Defendant Laricca Mathews was charged with open murder, MCL 750.316, and related firearms charges arising out of the shooting death of her boyfriend, Gabriel Dumas. Defendant called 911 and told the dispatcher that she had shot Dumas. After the police arrived at the scene, she was taken into custody and transported to the Wixom Police Department. Defendant was interviewed twice while at the police station. Both interviews were videotaped, as required by MCL 763.8(2). During the first interview, Detective Brian Stowinsky provided defendant with an advice-of-rights form, which stated:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.
>
> I understand what my rights are and am willing to talk.

Detective Stowinsky orally reviewed the advice-of-rights form with defendant, and the following exchange took place:

> [*Detective Stowinsky*]: Ok, um, I'm going to review these, ok?
>
> [*Defendant*]: Uh hmm.
>
> [*Detective Stowinsky*]: I'm going to read these to you.
>
> [*Defendant*]: Uh hmm.
>
> [*Detective Stowinsky*]: Um, before I question, start asking you, you should know that you have a right to remain silent.
>
> [*Defendant*]: Uh hmm.
>
> [*Detective Stowinsky*]: Anything you say maybe [sic] used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?
>
> [*Defendant*]: Yes.
>
> [*Detective Stowinsky*]: Do you want to talk with me?
>
> [*Defendant*]: Yeah, we can talk.

Defendant signed the form, and Detective Stowinsky proceeded to interview her. During the interview, defendant claimed that she and Dumas had been fighting and that she had shot Dumas in self-defense after Dumas attacked her.

Later that day, Sergeant Michael DesRosiers conducted a second interview with defendant. Before the interview, the following exchange took place:

> [*Sergeant DesRosiers*]: . . . Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?
>
> [*Defendant*]: Uh hmm.
>
> [*Sergeant DesRosiers*]: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.
>
> [*Defendant*]: Ok.
>
> [*Sergeant DesRosiers*]: So, um, we're just continuing the interview that you started with him. I just looked over the statement and have a couple questions about it. Um, so I'm looking at the statement and the problem I have, and you can stop me at any time you want, is, it's from the things in the statement don't necessarily match up with the evidence we found.

During the second interview, defendant claimed that she shot the victim when they were "face to face." When Sergeant DesRosiers told defendant that Dumas had been shot in the back of the head, defendant speculated that the bullet may have ricocheted off the wall. She also suggested the shooting may have been an accident.

Defendant filed a motion to suppress the statements that she made to police arguing, in pertinent part, that the police failed to advise her that she had the right to have an attorney present both before and during questioning.[1] The trial court granted defendant's motion, concluding that the police had failed to inform defendant that she had the right to have an attorney present during the interrogation. The Court of Appeals initially denied the prosecution's interlocutory application for leave to appeal, but on remand from this Court, in a split decision, the Court of Appeals affirmed the trial court's ruling that suppressed defendant's statements. After recognizing the conflicting authority on the issue, the Court of Appeals agreed with the trial court, holding that "a general warning regarding a 'right to a lawyer' does not comply with the dictates of *Miranda*." *People v Mathews*, 324 Mich App 416, 429 (2018). Because there was no binding caselaw addressing this issue, the Court of Appeals undertook a lengthy and thorough review of its own cases, along with cases from the federal circuits and our sister state courts. Ultimately, the Court of Appeals majority decided to follow its own prior decisions, see, e.g., *People v Whisenant*, 11 Mich App

[1] Defendant also contended that the statements should be suppressed because the police failed to advise her that she could terminate the questioning at any point. Although the trial court did not address this argument, the Court of Appeals rejected it and defendant has not appealed that ruling.

432, 434 (1968),[2] and those of the federal circuit courts, holding that a defendant must be specifically advised of the right to the presence of an attorney during questioning. See, e.g., *United States v Noti*, 731 F2d 610, 615 (CA 9, 1984). The Court of Appeals described the decisions of other federal circuits holding that general warnings were sufficient as "disingenuous in light of *Miranda*'s mandate for clear and unambiguous warnings[.]" *Mathews*, 324 Mich App at 438.

II

Miranda has been called a "pathmarking decision." *Florida v Powell*, 559 US 50, 53 (2010). It ruled that "an individual must be 'clearly informed,' prior to custodial questioning, that he has, among other rights, 'the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Id.*, quoting *Miranda*, 384 US at 471. It is beyond dispute, however, that *Miranda* was not intended, and has not been interpreted, as establishing a precise incantation that must be given prior to a custodial interrogation. *Miranda* itself said that either the warnings it laid down or "a fully effective equivalent" were required. *Miranda*, 384 US at 476; see also *Rhode Island v Innis*, 446 US 291, 297 (1980) (noting that the safeguards include the "*Miranda* warnings . . . or their equivalent").

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[2] Other opinions from the Court of Appeals followed the cursory analysis in *Whisenant*. See *People v Jourdan*, 14 Mich App 743 (1968); *People v Hopper*, 21 Mich App 276 (1970).

The Supreme Court's post-*Miranda* pronouncements on the topic similarly make clear that the "Court has not dictated the words in which the essential information must be conveyed." *Powell*, 559 US at 60; see also *California v Prysock*, 453 US 355 (1981) ("This Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. . . . Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."). The question is whether the warning that was given reasonably conveyed the rights specified in *Miranda*, and in making this determination the warning need not be interpreted as though it were a legal document. *Duckworth v Eagan*, 492 US 195, 203 (1989).

With regard to the specific warning at issue here—the notice of the right to an attorney—the Supreme Court has not established that the warning must expressly notify the suspect of the right to consult an attorney before questioning or have one present during it. Some comments in *Miranda* suggest such a requirement. See *Miranda*, 384 US at 471 ("Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ."). But other statements mentioned the right to an attorney's "presence" without specifying when and where the "presence" would occur.[3] And

[3] See *id.* at 444 ("Prior to any questioning, the person must be warned that . . . he has a right to the presence of an attorney. . . ."); *id.* at 479 (An individual in custodial interrogation

when the Court gave an example of satisfactory warning language that complied with the standards it had set forth, it chose (and even lauded as "exemplary") the standard warning that was given by the Federal Bureau of Investigation (FBI). *Miranda*, 384 US at 483. This is important because the FBI's practice was to give only the general warning "that the person has . . . a right to counsel," which included no information regarding when the right applied. *Id.* at 484.[4]

As courts have recognized, *Miranda*'s various statements thus create some ambiguity.[5] And, while it

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"must be warned prior to any questioning that . . . he has the right to the presence of an attorney."); see generally *United States v Clayton*, 937 F3d 630, 639 (CA 6, 2019) (discussing the ambiguity surrounding *Miranda*'s use of "presence"); *Commonwealth v LaJoie*, 95 Mass App 10, 15 (2019) ("But when it came time to summarize what a suspect needed to be told, the *Miranda* opinion did not formulate the warning in terms of a right to counsel 'during questioning'; rather, the Court in *Miranda* used the language, the 'right to the presence of an attorney,' without any temporal component.").

[4] The warning given more recently by the FBI is more specific. See FBI, *Legal Handbook for Special Agents* (2003), p 93 (quoting Form FD-395, which notes the person's right to "talk to a lawyer for advice before" questioning, to "have a lawyer with [him or her] during questioning," and to have a lawyer appointed before questioning if the suspect cannot afford one), available at (accessed May 29, 2020) [https://perma.cc/NK9W-35PF].

[5] This point was not lost on the dissenters, who questioned how the FBI's warnings squared with the other statements in the majority's decision. See, e.g., *id.* at 500 n 3 (Clark, J., concurring in the result of a companion case and dissenting in *Miranda*) (noting that the FBI's warning regarding appointment of counsel was not as broad as the rule expressed by the majority); *id.* at 521 (Harlan, J., dissenting) (stating that while "[h]eaviest reliance is

appears the discussion of the FBI warnings was not necessary to decide the case,[6] the bottom line is that the Court specifically approved a warning that lacked any explicit reference to the time when the right to counsel attached, i.e., that it attached *before* or *during* the interrogation. The Sixth Circuit Court of Appeals explained it well:

> To be sure, *Miranda* clarified that "presence" includes the right to consult with an attorney before and during questioning. But *Miranda* did not require a warning exactly to that effect. Case in point: *Miranda* acknowledged that the warnings employed by the FBI at the time of its decision were "consistent with the procedure which we delineate today." And those warnings, while advising of the right to counsel, conspicuously did not state expressly that counsel may be present during interrogation. [*United States v Clayton*, 937 F3d 630, 639 (CA 6, 2019) (citation omitted).]

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placed on the FBI practice, . . . the FBI falls sensibly short of the Court's formalistic rules.").

[6] See *Miranda*, 384 US at 521 n 19 (Harlan, J., dissenting) (noting that this portion of the opinion was "*obiter dictum*"). To the extent this portion of *Miranda* was dicta, it had plentiful company in the opinion, much of which has been followed as binding nonetheless. See *Faheem-El v Klincar*, 841 F2d 712, 730 (CA 7, 1988) (Easterbrook, J., concurring) ("The details of *Miranda* . . . could be disregarded [as dicta] on the ground that Ernesto Miranda had not been given any warning, so the Court could not pronounce on the consequences of giving three but not four of the warnings on its list."). As I explain below, however, even if dicta, the passages on the FBI warnings are particularly meaningful.

See also *United States v Lamia*, 429 F2d 373, 376-377 (CA 2, 1970) (relying on *Miranda*'s approval of the FBI warnings); cf. *People of Territory of Guam v Snaer*, 758 F2d 1341, 1342 (CA 9, 1985) ("The Supreme Court in *Miranda* . . . , although making clear that one does have the right to consult with counsel before questioning, . . . is ambiguous as to how explicitly the person must be *warned* of that right."). And *Miranda* was not the only time the Supreme Court has endorsed a general advisement of the right to an attorney bereft of any temporal elements. In *Oregon v Elstad*, 470 US 298, 315 n 4 (1985), which addressed other issues, the Court stated that a warning that the suspect had the right to "consult an attorney at state expense" was "clear and comprehensive" and a part of a "careful administering of *Miranda* warnings."

In other cases, the Supreme Court has approved warnings that offered less than was encompassed in *Miranda*'s more expansive passages. These cases instead focus on whether the warnings indicated limitations on the right to counsel. In *California v Prysock*, for example, the Court approved a warning that the defendant had a "right to talk to a lawyer before [being] questioned." *Prysock*, 453 US at 356. *Miranda* was satisfied because "nothing in the warnings . . . suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general[.]" *Id.* at 360-361. Similarly, in *Duckworth v Eagan*, the defendant had been warned, "You have a right to talk to a lawyer for advice before we ask you any questions, and

to have him with you during questioning. . . . We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." *Duckworth*, 492 US at 198 (emphasis and quotation marks omitted). The Court concluded that those warnings, when taken together, satisfied *Miranda* because they informed the defendant of his rights and did not specifically inform defendant that the right to counsel only attached during trial. *Id.* at 204-205. Most recently, in *Florida v Powell*, the Court upheld a warning that informed the defendant of his right to "talk to a lawyer before answering any of our questions" and that he could invoke his rights at any time but did not expressly state that the defendant could have the lawyer present during the interrogation. *Powell*, 559 US at 54 (quotation marks omitted). A commonsense interpretation of the warning, the Court concluded, conveyed the defendant's rights. *Id.* at 62-64.

Among other courts, a split exists over whether the advisement must expressly mention that the right to a lawyer applies before or during the interrogation.[7] Some courts have concluded that the right to have an attorney present at these times is independently

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[7] See generally McMahon, *Necessity That* Miranda *Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 ALR Fed 123 (2020 update) (collecting and commenting on cases discussing presence of attorney during the interrogation); Comment, *Adding (Or Reaffirming) A Temporal Element to the* Miranda *Warning "You Have the Right to an Attorney,"* 90 Marq L Rev 1009, 1019-1024 (2007) (noting the circuit split as well as intracircuit conflict and tracing the source to *Miranda*'s disparate statements).

critical and not adequately conveyed by a notice that mentions neither period or only one but not the other. See, e.g., *United States v Noti*, 731 F2d 610, 615 (CA 9, 1984) ("There are substantial practical reasons for requiring that defendants be advised of their right to counsel during as well as before questioning.").[8]

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[8] See also *United States v Tillman*, 963 F2d 137, 141 (CA 6, 1992) holding that a general warning was inadequate because "the police failed to convey to defendant that he had the right to an attorney both before, during and after questioning"); *United States v Anthon*, 648 F2d 669, 672 (CA 10, 1981) (holding that a warning which failed to, among other things, "advise[ ] that [the defendant's] right to counsel encompassed . . . the right to have counsel present during any questioning" violated *Miranda*); *Windsor v United States*, 389 F2d 530, 533 (CA 5, 1968) ("Merely telling [an individual being questioned] 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. . . ."); *State v Serna*, 2018-NMCA-074, ¶ 21 (NM App, 2018) (concluding "that *Miranda* requires that a person be warned, at least implicitly, that they have a right to counsel prior to questioning" and finding that no such warning was given in the case); cf. *United States v Wysinger*, 683 F3d 784, 798-800 (CA 7, 2012) (concluding that a warning appearing to give the defendant a choice of when he could have a lawyer—that he "had the 'right to talk to a lawyer for advice before we ask any questions or have . . . an attorney with you during questioning' "—violated *Miranda*); *State v McNeely*, 162 Idaho 413, 414, 416-417 (2017) (concluding that an advisement of a "right to an attorney . . . [t]o help you with—stuff" did not satisfy *Miranda*).

Some of these cases warrant additional comment, as the state of the law in these circuits is not entirely clear. Recently, the Sixth Circuit has explained that other errors in *Tillman*—specifically, the failure to advise that the defendant's statements could be used against him—were the thrust of the case, and thus its brief comment on the warning related to the attorney was "not

Other cases, however, find that general warnings—i.e., those that do not expressly describe part or all of the temporal scope of the right to counsel—suffice. These courts have offered compelling reasons that reflect the Supreme Court's commonsense approach and that I find more persuasive. One threshold factor that courts have found significant is whether a suspect was given preinterrogation notice "that the warnings that followed were a prerequisite to any interrogation. . . ." *Carter v People*, 398 P3d 124, 128 (Colo, 2017). At a more fundamental level, these courts embrace the unremarkable proposition that because "an unqualified statement lacks qualifications, all that police officers need do is convey the general rights enumerated in *Miranda*." *United States v Frankson*, 83 F3d 79, 82 (CA 4, 1996). In other words, advising of the "right to counsel," without qualifications, conveys that the right obtains before and during the interrogation.[9]

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persuasive." *Mitchell v MacLaren*, 933 F3d 526, 535 (CA 6, 2019) (habeas proceedings). Additionally, the Ninth Circuit has subsequently held that a defendant "need not have been informed explicitly of his right to consult with counsel prior to questioning" when the warning adequately conveyed that right by stating he could have counsel appointed before the interrogation and present with him during it. *United States v Loucious*, 847 F3d 1146, 1151 (CA 9, 2017); see also *Sweeney v United States*, 408 F2d 121, 124 (CA 9, 1969) (finding sufficient a general warning that the defendant "was entitled to an attorney" because "following, as it did, immediately on the warning as to the right to remain silent and the risk in not doing so, would, we think, be taken by most persons to refer to the contemplated interrogation, not to some other time").

[9] See *United States v Caldwell*, 954 F2d 496, 502 (CA 8, 1992) ("When the only claimed deficiency is that of generality, the

A related factor in these cases is that the warnings did not express "any temporal limitation that might even colorably be misunderstood to restrict the exercise of

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teaching of *Duckworth* that we are not construing a will or defining the terms of an easement convinces us that we cannot hold the warning in this case amounts to plain error."); *Lamia*, 429 F2d at 376-377 ("Lamia had been told *without qualification* that he had the right to an attorney and that one would be appointed if he could not afford one. Viewing this statement in context, Lamia having just been informed that he did not have to make any statement to the agents outside of the bar, Lamia was effectively warned that he need not make any statement until he had the advice of an attorney.") (emphasis added); cf. *State v Figueroa*, 146 A3d 427, 432 (Me, 2016) (noting, where the advisement referenced that the defendant already had an attorney, a general warning of "a right to an attorney" was "communicated an unqualified right to counsel" that could be invoked at any time).

This conclusion—that unqualified statements do not expressly or impliedly convey qualifications—not only comports with common sense, but it also makes sense under a well-known linguistic theory of conversation developed by H. P. Grice. He posited that participants in conversations generally adhere to the maxim of "Quantity," by which they expect that the information contained in statements will "be neither more nor less than is required." Grice, *Logic and Conversation*, in *3 Syntax and Semantics: Speech Acts* (New York: Academic Press, 1975), p 47. This means that contributions to the conversation will not be "overinformative" because "overinformativeness may be confusing in that it is liable to raise side issues; and there may also be an indirect effect, in that the hearers may be misled as a result of thinking that there is some particular POINT in the provision of the excess of information." *Id.* at 46. Thus, for example, the statement "Jane has two children" does not implicate that Jane has more than two children, even though the statement would remain true if she had a third child. Kaplan, *Linguistics and Law* (New York: Routledge, Taylor & Francis Group, 2020), p 7. In the same way, an unconditioned assertion that a suspect has the right to counsel does not implicate a temporal restriction on the right.

[the] right" to counsel in the interrogation. *Carter*, 398 P3d at 127.[10] Even so, the mere possibility of misunderstanding does not disqualify the warning, as the advisement in *Powell* was upheld despite risking confusion as to whether the right pertained to the interrogation itself. *Id.*[11] And, critically, this group of cases also cites *Miranda*'s approval of the FBI warnings. See *Clayton*, 937 F3d at 639.[12] This approach thus trusts that *Miranda* meant what it said regarding the FBI warnings. As I explain below, this is the proper way to interpret *Miranda.* Under these rationales, numerous courts have upheld advisements like that in

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[10] See also *United States v Warren*, 642 F3d 182, 186 (CA 3, 2011) ("[The defendant] offers no rationale for a reasonable person's belief that the clear, unmodified statement '[y]ou have the right to an attorney' would be regarded as time-limited."); *State v King*, ___ So3d ___, ___ (La, 2020) (Case No. 2019-KK-01332), slip op at 6-7 ("The unelaborated upon warning given in the present case, which lacked any temporal aspect at all, implied no limitation on the right to counsel.").

[11] Justice Stevens's dissent in *Powell* recognized this fact, stating that although he was "doubtful that warning a suspect of his 'right to counsel,' without more, reasonably conveys a suspect's full rights under *Miranda*, . . . at least such a general warning does not include the same sort of misleading temporal limitation as in Powell's warning." *Powell*, 559 US at 73 n 8 (Stevens, J., dissenting).

[12] See also *Warren*, 642 F3d at 185 (noting that, in light of *Miranda*'s use of the FBI advisement, "it cannot be said that the *Miranda* court regarded an express reference to the temporal durability of this right as elemental to a valid warning").

the present case, i.e., without any express reference to the temporal scope of the right to counsel.[13]

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[13] See *United States v Nash*, 739 F Appx 762, 765 (CA 4, 2018) ("[T]he phrase 'you have a right to an attorney,' under these circumstances, sufficiently advised Nash of his general right to consult with an attorney before and during the interrogation."); *Frankson*, 83 F3d at 81-82 (upholding advisement of "the right to an attorney"); *United States v Adams*, 484 F2d 357, 361 (CA 7, 1973) (finding sufficient a warning that the suspect had the "right to counsel, and if they haven't got funds to have counsel, . . . the court will see that they are properly defended") (quotation marks omitted); *Lamia*, 429 F2d at 377-378 (upholding warning that defendant had the "right to an attorney"); *King*, ___ So 3d at ___, slip op at 6-7 (holding that similar warning, without temporal elements, sufficed); *State v Nave*, 284 Neb 477, 495 (2012) (citing with approval the court's past cases upholding warnings that made no mention of a "temporal element" or mentioned only the right to have counsel at the interrogation); *Eubanks v State*, 240 Ga 166, 168 (1977) ("It is implicit in this [general] instruction [of the "right to an attorney" along with the other basic rights] that if the suspect desired an attorney the interrogation would cease until an attorney was present."); *People v Walton*, 199 Ill App 3d 341, 344 (1990) (finding that specifically informing the suspect "that he 'had a right to consult with a lawyer' " reasonably conveyed the rights as mandated by *Miranda*); cf. *Figueroa*, 146 A3d at 432 (concluding that a general warning was sufficient under the circumstances and noting that the advisement also indicated that the defendant already had an attorney).

Other courts have upheld similar, but slightly more detailed warnings. See *Warren*, 642 F3d at 184, 186-187 (upholding warning that "You have the right to an attorney. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish") (quotation marks omitted); *Rigterink v State*, 66 So 3d 866, 893 (Fla, 2011) ("Hence, by advising Rigterink that he may have counsel '*present* prior to questioning,' the police reasonably conveyed to Rigterink . . . that counsel, if Rigterink so desired, would have been 'present' with Rigterink both before and during the custodial interrogation.");

My conclusion is also supported by the fact that temporal details are not required to impart the warning concerning the paramount right to remain silent. Even *Miranda*'s most detailed renditions of the warnings never suggested that the police had to specify *when* a suspect could exercise the unqualified "right to remain silent." See, e.g., *Miranda*, 384 US at 444, 467-468, 479. That an unqualified statement reasonably conveys the full breadth of the right to remain silent suggests that the same is enough for the right to an attorney: the former right is at the core of *Miranda*'s protection, whereas the latter is a means of protecting that core right.[14] Thus, it would make little sense, linguistically or logically, to demand additional details about the auxiliary right but not the fundamental right it was designed to protect. Cf. *Carter*, 398 P3d at 128 ("[I]t would be highly counterintuitive for a reasonable suspect in a custodial setting, who has just been informed that the police cannot talk to him until after they advise him of his rights to remain silent and

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LaJoie, 95 Mass App at 11, 16-17 (upholding warning that the defendant had the right to counsel and if he could not afford one, an attorney would be appointed "prior to any questioning") (quotation marks omitted).

[14] See *Miranda*, 384 US at 469 (explaining that the Court's "aim" in requiring a warning about the right to counsel "is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process"); *Adding (Or Reaffirming) A Temporal Element to the* Miranda *Warning*, 90 Marq L Rev at 1027 ("[T]he package of [*Miranda*] warnings is intended to convey to the suspect that he does not have to talk if he does not desire to. The attorney's presence is only a means to an end, not an end in itself" because it "safeguard[s] the suspect's right to remain silent.").

to have an attorney, to understand that an interrogation may then proceed without permitting him to exercise either of those rights."). Indeed, even the Court of Appeals in this case found that the police did not need to specifically inform defendant that she was able at any time to invoke her right to remain silent. See *Mathews*, 324 Mich App at 428, quoting *Miranda*, 384 US at 467-468 ("An individual who has been informed in 'clear and unequivocal terms' at the outset of the interrogation that 'he has the right to remain silent' will understand 'that his interrogators are prepared to recognize his privilege should he choose to exercise it.' "). Consequently, I believe that an unqualified statement, unadorned with temporal components, is sufficient to advise a person of both rights.

III

In the present case, I conclude that the general warning defendant received satisfied *Miranda*. Defendant was given a form at the outset that notified her the warnings were necessary "[b]efore any questions are asked of you." She then received, both on the form and verbally, advisement of an unqualified right to an attorney. Nothing was said that could have misled a reasonable person as to the scope of that right or suggested that it applied only at certain stages of the interrogation or judicial processes. Rather, a commonsense understanding of the warnings would lead one to

believe that the right to an attorney could be invoked at any time.[15]

But even more important, to my mind, is that *Miranda* approved of FBI warnings no more detailed than the ones administered here and the Court has never required more since *Miranda.*[16] Thus, the Court of Appeals' decision below stands for the proposition that warnings like those approved in *Miranda* actually violate *Miranda.* Instead of second-guessing *Miranda*, I would take the Supreme Court at its word on whether this way of phrasing the warning is permissible.[17]

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[15] I concede that the warnings here could have been more explicit. However, it is up to the policy-making branches to adopt or require best practices; courts may only determine which practices pass constitutional muster. See *Walton*, 199 Ill App 3d at 344-345 ("While the better practice would be for the police to make explicit that defendant's right to consult with a lawyer may be both before and during any police interrogation, we hold that the language used in this case [that the defendant had a right to consult with a lawyer] was sufficient to *imply* the right to counsel's presence during questioning" because "no restrictions were stated by the police in the present case as to *how, when*, or *where* defendant might exercise his right 'to consult with a lawyer.' ").

[16] And it has passed on more than one opportunity to reverse courts that have upheld general warnings that contain partial or no express temporal components, including very recently. See *Carter v Colorado*, 583 US ___; 138 S Ct 980 (2018); *Warren v United States*, 564 US 1012 (2011).

[17] The Court of Appeals acknowledged the tension in *Miranda* produced by the discussion of the FBI warnings. *Mathews*, 324 Mich App at 437 n 7. Nonetheless, the Court of Appeals thought the statements concerning the FBI warnings mattered little because they were "immediately followed by a discussion of the then-current practices in" various other countries and military courts and came "in the larger context of

Demanding anything more elaborate, as the Court of Appeals did here, exceeds what *Miranda* required and is therefore not an application but an extension of the case's holding.

In taking the narrower reading of *Miranda*, I am guided by first principles. I am not the first to notice that the rule crafted in *Miranda* lacks a discernable relationship to the actual text and original meaning of the Constitution.[18] Of course, Supreme Court caselaw is binding and must be faithfully applied. *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). But if a fair reading of the precedent does not resolve the issue we

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responding to concerns" about the practical cost of the warnings. *Id.* The positioning of the discussion, however, does nothing to negate *Miranda*'s clear statements approving the FBI warnings, most notably that the FBI's "present pattern of warnings and respect for the rights of the individual . . . is consistent with the procedure which we delineate today." *Miranda*, 384 US at 483-484.

[18] See *Dickerson v United States*, 530 US 428, 448 (Scalia, J., dissenting) ("[T]he decision in *Miranda*, if read as an explication of what the Constitution *requires*, is preposterous."); Markman, Miranda v Arizona: *A Historical Perspective*, 24 Am Crim L Rev 193, 241 (1987) ("Perhaps more than any Supreme Court decision preceding it, *Miranda* found the Court straying from the moorings of both the Constitution and the traditionally conceived judicial role to craft detailed, code-like prescriptions governing criminal justice. The *Miranda* decision had no basis in history or precedent but reflected, rather, a departure from the authoritative sources of law."); see generally Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997), pp 48-49 ("Modern understandings of the [Fifth Amendment self-incrimination] clause deviate far from its early American implementation, from plain meaning, and from common sense.").

face, we have the power and the responsibility to decide the issue for ourselves. We are under no obligation to extend the scope of a precedent to cover the matter at hand, especially when, as here, the Supreme Court has already signaled its approval of the practice.

I would not extend a decision like *Miranda* unless the extension can be independently justified under the proper interpretive approach, that is, unless the extension is required by the Constitution's original meaning.[19] It is no easy task, however, to discern original meaning in an area where the caselaw has long since been uncoupled from that meaning. Here, for example, the interpretive endeavor required by *Miranda* revolves around a specific set of warnings promulgated by the Court. A judge's traditional tools of textual and historical inquiry mean little in this analytical framework. Does the text of the Fifth Amendment, as originally understood, require the conclusion that a person has been "compelled . . . to be

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[19] See Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 NYU J L & Liberty 44, 51 (2019) (arguing that originalist lower court judges "should only extend a Supreme Court precedent if the original meaning of the Constitution can support that extension"); cf. *Garza v Idaho*, 586 US ___, ___; 139 S Ct 738, 756 (2019) (Thomas, J., dissenting) (noting that the Court should "tread carefully before extending our precedents" when they do not reflect the Constitution's original meaning); *Free Enterprise Fund v Public Co Accounting Oversight Bd*, 383 US App DC 119, 150 (2008) (Kavanaugh, J., dissenting) ("We should resolve questions about the scope of . . . precedent[] in light of and in the direction of the constitutional text and constitutional history."), aff'd in part and rev'd in part 561 US 477 (2010).

a witness against himself" on the basis of statements he made without first being explicitly warned that he has a right to consult an attorney before and during custodial interrogation? Certainly, no one in this case has offered such an argument, and accordingly I will not assay an answer. Merely posing the question demonstrates the need for caution in this area.[20]

For these reasons, I would not extend *Miranda* to provide that preinterrogation warnings must expressly advise of the right to counsel before and during the questioning. It is enough that a suspect, like defendant here, be notified of her unqualified right to counsel.

IV

In denying leave in this case, the Court declines to exercise the proper measure of circumspection that the issue requires and instead submits, without comment, to the Court of Appeals' extension of *Miranda* in a published opinion. I disagree that the warnings here were deficient under *Miranda*, and I would not extend that decision to prohibit these warnings. Accordingly, I believe the Court of Appeals' decision should be reversed, and I therefore respectfully dissent.

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[20] Absent an analysis of original meaning—either in *Miranda* itself or with regard to its extension—this Court is forced to consult *Miranda*'s text rather than the Constitution's text. Thus, even though the Court's comments on the FBI warnings could be cast off as unnecessary to the decision, they take on more significance since they are all we have to work with in this situation.

MARKMAN and ZAHRA, JJ., join the statement of VIVIANO, J.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v. LARICCA SEMINTA MATHEWS, Defendant-Appellee.	FOR PUBLICATION May 22, 2018 9:10 a.m. No. 339079 Oakland Circuit Court LC No. 2016-260482-FC

Before: O'CONNELL, P.J., and HOEKSTRA and K. F. KELLY, JJ.

HOEKSTRA, J.

Defendant has been charged with open murder, MCL 750.316, discharge of a firearm in a building, MCL 750.234b, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Before trial, defendant filed a motion to suppress statements she made to police based on the contention that the police failed to adequately advise her of her rights as required by *Miranda v. Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The trial court granted defendant's motion. The prosecution filed an interlocutory application for leave to appeal in this Court, which we denied.[1] The prosecutor then filed an application for leave to appeal in the Michigan

[1] *People v. Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079).

Supreme Court, and in lieu of granting leave, the Supreme Court remanded to this Court for consideration as on leave granted, specifically instructing this Court "to consider whether either of the bases for suppression advanced by the defendant in the trial court rendered the warnings in this case deficient" under *Miranda*. *People v. Mathews*, 501 Mich 950, 950 (2018). On remand, we find no merit to defendant's assertion that the police were required to inform her that she could cut off questioning at any time during the interrogation. However, because generally advising defendant that she had "a right to a lawyer" did not sufficiently convey her right to consult with an attorney and to have an attorney present during the interrogation, we conclude that the *Miranda* warnings in this case were defective and affirm the trial court's suppression of defendant's statement.

This case arises from the shooting death of defendant's boyfriend, Gabriel Dumas, who was killed in defendant's apartment on August 12, 2016. After the shooting, defendant called 911 and told the dispatcher that she had shot Dumas. Police responded to the scene, and defendant was taken into custody and transported to the Wixom Police Department. At the police station, defendant was interviewed twice. Detective Brian Stowinsky conducted the first interview. During the first interview, Stowinsky presented defendant with a written advice-of-rights form, which stated:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used

> against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.
>
> I understand what my rights are and am willing to talk.

Stowinsky also orally reviewed the statements on the advice-of-rights form with defendant. Specifically, the following exchange took place:

> [Detective Stowinsky]: Ok, um, I'm going to review these, ok?
>
> [Defendant]: Uh hmm.
>
> [Detective Stowinsky]: I'm going to read these to you.
>
> [Defendant]: Uh hmm.
>
> [Detective Stowinsky]: Um, before I question, start asking you, you should know that you have a right to remain silent.
>
> [Defendant]: Uh hmm.
>
> [Detective Stowinsky]: Anything you say maybe [sic] used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?
>
> [Defendant]: Yes.

Defendant agreed to talk with Stowinsky, and she signed the advice-of-rights form. During the questioning that followed, defendant told Stowinsky that she

quarreled with Dumas, that Dumas attacked her, and that she shot him.

Later the same day, defendant was interviewed a second time by Sergeant Michael DesRosiers. At the beginning of that second interview, the following exchange took place between defendant and DesRosiers:

> [Sergeant DesRosiers]: Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?
>
> [Defendant]: Uh hmm.
>
> [Sergeant DesRosiers]: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.
>
> [Defendant]: Ok.
>
> [Sergeant DesRosiers]: So, um, we're just continuing the interview that you started with him.

DesRosiers then proceeded to question defendant about inconsistencies between her previous statements and the physical evidence, including the location of Dumas's fatal bullet wound. Defendant again admitted shooting Dumas, and she attempted to explain the location of the bullet wound by suggesting that the bullet may have ricocheted. She also suggested that the shooting may have been an accident insofar as her finger may have "slipped" while on the trigger because it was "so hot and muggy."

Following a preliminary examination, defendant was bound over for trial in the circuit court. In the circuit court, defendant moved to suppress her statements to the police, asserting that the *Miranda* warnings given before her interviews were inadequate because (1) the police failed to advise her that she could terminate the interrogation at any point and (2) the police did not inform her that she had the right to consult with an attorney before the interview and to have an attorney present during the interrogation. The trial court did not address whether the police were required to inform defendant that she had an ongoing right to cut off questioning at any point. Nevertheless, the trial court granted defendant's motion to suppress, reasoning that the *Miranda* warnings were defective because the police failed to inform defendant that she had the right to have an attorney present before and during the interrogation. The prosecution filed an interlocutory application for leave to appeal, and the case is now before us on remand from the Michigan Supreme Court for consideration as on leave granted.

On appeal, the prosecution argues that the warnings given to defendant complied with *Miranda* and that the trial court erred by suppressing defendant's statements to police. First, with regard to a suspect's right to cut off questioning, the prosecution asserts that *Miranda* does not require police to give an explicit warning that a suspect may terminate the interrogation at any time. Second, in terms of a suspect's right to the presence of counsel, the prosecution argues that, although the warnings given to defendant did not

expressly advise her of her right to the presence of counsel during the interrogation, the warnings given before defendant's interrogations were sufficient because they advised defendant that she had the right to a lawyer. According to the prosecution, *Miranda* does not require the police to provide a suspect with more specific information regarding the right to the presence of an attorney before and during questioning.

When reviewing a decision on a motion to suppress, we review a trial court's factual findings for clear error. *People v. Tanner*, 496 Mich 199, 206 (2014). "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *id.* (quotation marks and citation omitted). "We review de novo a trial court's ultimate decision on a motion to suppress." *People v. Beuschlein*, 245 Mich App 744, 748 (2001).

"Both the state and federal constitutions guarantee that no person shall be compelled to be a witness against himself or herself." *People v. Cortez (On Remand)*, 299 Mich App 679, 691 (2013) (opinion by METER, J.). To protect this constitutional guarantee against compelled self-incrimination, before any custodial interrogation, the police must give a suspect the now-familiar *Miranda* warnings. *People v. Daoud*, 462 Mich 621, 624 n 1 (2000). In particular, under *Miranda*, a suspect must be provided four essential warnings as follows:

> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." [*Florida v. Powell*, 559 US 50, 59-60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010), quoting *Miranda*, 384 US at 479 (alterations by the *Powell* Court).]

"The four warnings *Miranda* requires are invariable, but [the United States Supreme Court] has not dictated the words in which the essential information must be conveyed." *Powell*, 559 US at 60. In other words, "[a] verbatim recital of the words of the *Miranda* opinion is not required." *People v. Hoffman*, 205 Mich App 1, 14 (1994). "Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *California v. Prysock*, 453 US 355, 359; 101 S Ct 2806; 69 L Ed 2d 696 (1981). Rather, when the "exact form" set out in *Miranda* is not used, "a fully effective equivalent" will suffice. *Duckworth v. Eagan*, 492 US 195, 202; 109 S Ct 2875; 106 L Ed 2d 166 (1989) (quotation marks and emphasis omitted). "Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." *id.* at 203. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *id.*, quoting *Prysock*, 453 US at 361 (alterations by the *Duckworth* Court). Ultimately, "[i]f the custodial

interrogation is not preceded by an adequate warning, statements made during the custodial interrogation may not be introduced into evidence at the accused's criminal trial." *People v. Elliott*, 494 Mich 292, 301 (2013).

A. RIGHT TO CUT OFF QUESTIONING

In the trial court, defendant challenged the adequacy of the *Miranda* warnings on two grounds. First, defendant argued that the right to cut off questioning is a "critical safeguard" under *Miranda* and that the police were thus required to warn defendant that she could cease answering questions at any point. Although the police informed defendant of her right to remain silent, she asserts that her statement must be suppressed because she was not more specifically informed that she could terminate the interrogation at any time. This argument is without merit.

As noted, *Miranda* requires the police to provide a suspect with four—and only four—essential warnings: "[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Powell*, 559 US at 59-60 (quotation marks and citation omitted; alterations by the *Powell* Court). See also *United States v. Crumpton*, 824 F3d

593, 611 (CA 6, 2016).[2] From a simple review of these warnings, it is clear that the right to cut off questioning is not among the specific enumerated warnings that must be given.[3] See *United States v. Ellis*, 125 Fed App'x 691, 699 (CA 6, 2005) ("[A] statement instructing [a suspect] that he has the right to stop answering questions at any point after questioning has begun, is not a phrase that the Supreme Court in *Miranda* suggested should be read to criminal suspects before interrogation."). It is true that, as emphasized by defendant, "a 'critical safeguard' identified in *Miranda* was a person's right to cut off questioning." *People v. Adams*, 245 Mich App 226, 231; 627 NW2d 623 (2001), quoting *Michigan v. Mosley*, 423 US 96, 103; 96 S Ct 321; 46 L Ed 2d 313 (1975). As explained in *Miranda*:

> *Once warnings have been given, the subsequent procedure is clear.* If the individual

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[2] "Lower federal court decisions are not binding on this Court, but may be considered on the basis of their persuasive analysis." *People v. Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013).

[3] It is apparently not uncommon for law enforcement officials to include some type of "fifth prong" or "catch-all" provision in the recitation of *Miranda* warnings, advising suspects that their rights may be asserted at any point during the interrogation. See Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Human Behavior 124, 131 (2008) (reporting that over 80% of jurisdictions include a "fifth prong"). See, e.g., *Powell*, 559 US at 55 (involving a catch-all addition to the *Miranda* warnings in which the suspect was told that he had "the right to use any of these rights at any time you want during this interview") (quotation marks omitted). But the fact remains that *Miranda* itself did not include such a warning.

> indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. [*Miranda*, 384 US at 473-474 (emphasis added).]

However, contrary to defendant's arguments, this "subsequent procedure" to cut off questioning as described in *Miranda* does not establish a "special warning requirement" regarding the right to terminate an interrogation. *People v. Tubbs*, 22 Mich App 549, 555-556; 177 NW2d 622 (1970).[4] Instead, this right to end the interrogation is merely a means of exercising the right to remain silent. See *id.*; *United States v. Alba*, 732 F Supp 306, 310 (D Conn, 1990) ("The right to cut off questioning is not one of the essential Fifth Amendment rights"; rather, it is "a way in which [a suspect] might have manifested his wish to invoke his right to remain silent."). An individual who has been informed in "clear and unequivocal terms" at the

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[4] Although published decisions of this Court issued before November 1, 1990, are not precedentially binding, MCR 7.215(J)(1), they may be considered as persuasive authority. *People v. Barbarich*, 291 Mich App 468, 476 n 2; 807 NW2d 56 (2011).

outset of the interrogation that "he has the right to remain silent" will understand "that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Miranda*, 384 US at 467-468. See also *Colorado v. Spring*, 479 US 564, 574; 107 S Ct. 851; 93 L Ed 2d 954 (1987) (recognizing that a suspect advised of his *Miranda* warnings "knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time"). Consequently, when a defendant has been advised of his or her right to remain silent as required by *Miranda*, the police need not also expressly inform the defendant that this right to remain silent may be exercised to cut off questioning at any point during the interrogation. See *Tubbs*, 22 Mich App at 555-556; see also *Crumpton*, 824 F3d at 611 ("[A] defendant need not be informed of a right to stop questioning after it has begun.") (quotation marks and citation omitted); *United States v. Lares-Valdez*, 939 F2d 688, 690 (CA 9, 1991) ("*Miranda* requires that [the suspect] understood the right to remain silent; when and how he then chose to exercise that right is up to him."). Because defendant was advised of her right to remain silent, the *Miranda* warnings were not defective merely because she was not more specifically advised that she could exercise this right at any point during the interrogation.

B. RIGHT TO THE PRESENCE OF AN ATTORNEY

In the lower court, defendant argued and the trial court agreed, that a general warning regarding the

"right to a lawyer" did not adequately inform defendant of her right to have an attorney present before and during the interrogation. Although there is conflicting authority on this issue, we agree with the trial court and we hold that a general warning regarding a "right to a lawyer" does not comply with the dictates of *Miranda*. Consequently, we affirm the trial court's suppression of defendant's statements.

We begin our analysis by again noting what is required by *Miranda*. As explained by the United States Supreme Court:

> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." [*Powell*, 559 US at 59-60, quoting *Miranda*, 384 US at 479 (alterations by the *Powell* Court).]

It is the third warning—the "right to the presence of an attorney"—that is at issue in this case. Under *Miranda*, in the context of custodial interrogation, the right to the presence of counsel was recognized as "indispensable to the protection of the Fifth Amendment privilege. . . ." *Miranda*, 384 US at 469. As "a corollary of the right against compelled self-incrimination," the right to the presence of counsel "affords a way to 'insure that statements made in the government-established atmosphere are not the product of

compulsion.'" *Tanner*, 496 Mich at 207, quoting *Miranda*, 384 US at 466. Notably, this "need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Miranda*, 384 US at 470. Thus, "as 'an absolute prerequisite to interrogation,'" the United States Supreme Court has held that "an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471.

Recognizing that *Miranda* mandates advice regarding the right to the presence of counsel, while also acknowledging that a talismanic incantation of the *Miranda* warnings is not required, *Prysock*, 453 US at 359, the question before us in this case is whether a general warning before an interrogation advising the suspect that he or she has a "right to a lawyer," reasonably conveys to a suspect that she has the right to consult with a lawyer before questioning and to have a lawyer present during the interrogation. We are not aware of any binding caselaw resolving this issue. On appeal, the prosecutor asserts that specific information regarding the right to the presence of counsel during interrogation is unnecessary in light of controlling United States Supreme Court precedent—namely, *Powell*, 559 US 50; *Duckworth*, 492 US 195; and *Prysock*, 453 US 355. Certainly, as discussed, these cases stand for the proposition that no exact, talismanic

incantation of the *Miranda* warnings is required. See *Powell*, 559 US at 60; *Duckworth*, 492 US at 202; *Prysock*, 453 US at 359. But, none of these cases involved a barebones warning that the suspect had "a right to an attorney." To the contrary, *Prysock* and *Duckworth* both involved situations in which the suspect was undoubtedly told of the right to consult with an attorney and to have an attorney present during questioning, and the *Miranda* challenge related to whether information, or lack of information, regarding when counsel would be appointed rendered the warnings deficient. See *Duckworth*, 492 US at 203 (reviewing a warning in which the suspect was told, in part, that "he had the right to speak to an attorney before and during questioning" and that he had the "right to the advice and presence of a lawyer even if [he could] not afford to hire one") (quotation marks omitted; alteration by the *Duckworth* Court); *Prysock*, 453 US at 356 (involving a warning in which the suspect was told that he had "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"). *Powell* is perhaps the closest factual situation to the present case, but it, too, is distinguishable. In *Powell*, the suspect was told, in relevant part:

> 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. [*Powell*, 559 US at 54.]

The purported deficiency in the warnings in *Powell* was that informing the suspect that he had a right to talk to a lawyer *before* answering questions would mislead a suspect by suggesting that the right to consult an attorney did not also exist *during* the interrogation. *Id.* at 55. In rejecting this argument, the Court read the warning as a whole and concluded that the warning communicated that the suspect could consult with a lawyer "before" answering questions and that, because this right could also be used at any time "during" the interview, it also conveyed the suspect's right to have an attorney present at all times.[5] *Powell*, 559 US at 62. The warning in *Powell*

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[5] The dissent emphasizes that the warnings given to defendant in this case were prefaced with the word "before," and the dissent concludes that this was sufficient to convey to defendant her right to an attorney before questioning as well as during questioning. This reliance on the word "before" is unpersuasive for two reasons. First, the word "before" is not used in the warnings as an indication of *when* defendant's right to counsel exists. That is, she was not told that she had a right to an attorney before questioning; rather, she was told that before any questions were asked, she should know that she has a right to an attorney. Second, even if the use of "before" is read to have informed defendant of her right to counsel *before* questioning, contrary to the dissent's conclusion, there is a meaningful difference between the right to consult a lawyer before questioning and the right to have a lawyer present during questioning. Indeed, the warning in *Powell* was found adequate because it conveyed the right to counsel, "not only at the outset of interrogation, but at all times" during the interrogation. *Powell*, 559 US at 62. If anything, the argument could be made that the use of the term "before," without any indication that the right also applied during the

thus plainly conveyed the critical information about a suspect's right to counsel—i.e., "the right to consult with a lawyer and to have the lawyer with him during interrogation." *id.* at 60, quoting *Miranda*, 384 US at 471 (quotation marks omitted). See also *Powell*, 559 US at 62 n 5. In short, none of the Supreme Court cases cited by the prosecution involved warnings comparable to those in this case, and none of these cases resolved the issue now before us. Ultimately, we are not aware of any binding caselaw addressing the precise issue before us.

Although there is no binding authority, the issue whether a general warning of the "right to an attorney" satisfies *Miranda*'s strictures has been considered by numerous courts, including this Court. In several decisions from this Court issued soon after *Miranda* was decided, this Court concluded that general warnings, such as informing a suspect that he was "entitled to an attorney," did not comply with *Miranda* because such warnings did not sufficiently convey a suspect's right to the presence of an attorney during questioning. *People v. Whisenant*, 11 Mich App 432, 434, 437; 161 NW2d 425 (1968). See also *People v. Hopper*, 21 Mich App 276, 279; 175 NW2d 889 (1970); *People v. Jourdan*, 14 Mich App 743, 744; 165 NW2d 890 (1968). While nonbinding under MCR 7.215(J)(1), this Court's opinions indicate that to comply with *Miranda*, the police must impart more than a broad warning

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interrogation, functioned as an improper temporal limitation, suggesting that the right to counsel existed before any questions were asked, but not during questioning.

regarding the right to counsel; that is, the warning must somehow convey the right to have counsel *present* during the interrogation. See *People v. Johnson*, 90 Mich App 415, 419-420; 282 NW2d 340 (1979) (distinguishing cases with warnings regarding the right "to an attorney" from those involving the right to have an attorney "present"). Similarly, numerous courts from other jurisdictions have interpreted *Miranda* as requiring the police to explicitly inform a suspect of the right to the presence of counsel before and during the interrogation. See, e.g., *Bridgers v. Dretke*, 431 F3d 853, 860 n 6 (CA 5, 2005) ("[A] suspect must be explicitly warned that he has the right to counsel during interrogation."); *United States v. Tillman*, 963 F2d 137, 141 (CA 6, 1992) ("[T]he police failed to convey to defendant that he had the right to an attorney both before, during and after questioning."); *Smith v. Rhay*, 419 F2d 160, 163 (CA 9, 1969) ("Although [the suspect] was told that he had the right to an attorney, he was not . . . told, as required by *Miranda*, that he had the right to the presence of an attorney. . . ."); *State v. McNeely*, 162 Idaho 413, 416; 398 P3d 146 (2017) (concluding that a warning regarding "the right to an attorney . . . [to] help you with—stuff" did not adequately convey the right to the presence of counsel before and during questioning); *Coffey v. State*, 435 SW3d 834, 841-842 (Tex App, 2014) (holding that a preinterrogation warning that the defendant had "the right to an attorney" did not comply with *Miranda*).

Courts requiring an explicit warning regarding the right to the presence of counsel during the interrogation—as opposed to simply the right to an attorney—have "stressed the importance of informing defendants that they have the right to the actual *physical presence* of an attorney," *United States v. Noti*, 731 F2d 610, 615 (CA 9, 1984), and emphasized the significance of advising defendants of the temporal immediacy of the right to counsel, see, e.g., *State v. Williams*, 144 So 3d 56, 59 (La Ct App, 2014) (recognizing that *Miranda* does not require a verbatim recitation but concluding that the "temporal requirement that the right to the lawyer attaches before and during any interrogation is key") (quotation marks and citation omitted); *United States v. Takai*, 943 F Supp 2d 1315, 1326 (D Utah, 2013) (concluding that the "warning was defective because it omitted reference to Defendant's right to have an attorney present during questioning, i.e. at the present time"). See also *State v. Carlson*, 228 Ariz 343, 346, 266 P3d 369 (App., 2011) (distinguishing "mere eventual representation by an attorney" from the right to the presence of an attorney that "applied before, and continued during, any questioning"). Likewise, as noted, this Court has previously acknowledged that *Miranda* warnings must provide a suspect with temporal information regarding the immediate right to the presence of counsel during questioning. See *Whisenant*, 11 Mich App at 437. For example, in *Johnson*, 90 Mich App at 420, we found a warning that the defendant "'had the right to have an attorney present'" sufficient to convey the essential information required by *Miranda* because the right to have an

attorney *present* "cannot reasonably be understood otherwise than as informing defendant of his right to counsel *during interrogation* and not merely at some subsequent trial."[6] While no specific language is required, these cases persuasively recognize, based on *Miranda*'s requirements, that the advice regarding counsel must convey "the immediacy of the right in the sense that it exists both before and during interrogation." 2 LaFave et al., Criminal Procedure (4th ed.), § 6.8(a), pp. 886-887.

While there is authority recognizing the necessity of an explicit warning regarding the presence of counsel during the interrogation, courts are by no means uniform in reaching this conclusion. See *Bridgers*, 431 F3d at 859 (describing the split among federal circuit courts as to whether *Miranda* warnings must explicitly provide that a suspect is entitled to the presence of counsel during an interrogation). Unlike courts concluding that *Miranda* warnings must contain information regarding the right to the presence of counsel during an interrogation, numerous other courts reason that *Miranda* does not require "highly particularized warnings" regarding "all possible circumstances in which *Miranda* rights might apply." *United States v. Frankson*, 83 F3d 79, 82 (CA 4, 1996). Consequently, these cases conclude that when the police provide a

[6] Numerous decisions from the Michigan Supreme Court have similarly quoted formulations of the *Miranda* warnings that convey the right to the "presence of an attorney" or more specifically the right to "the presence of an attorney during any questioning." See, e.g., *Tanner*, 496 Mich at 207 n 3; *Elliott*, 494 Mich at 301; *Daoud*, 462 Mich at 624 n 1.

generalized warning regarding the "right to an attorney"—without any temporal qualifications or limitations on that right—the police have complied with *Miranda* because a reasonable person would understand that an unqualified right to an attorney begins immediately and continues forward in time without qualification. *id.* See also *United States v. Warren*, 642 F3d 182, 185-187 (CA 3, 2011) ("[I]t cannot be said that the *Miranda* court regarded an express reference to the temporal durability of [the right to an attorney] as elemental to a valid warning."); *United States v. Caldwell*, 954 F2d 496, 502 (CA 8, 1992) (concluding, under plain-error review, that warning of the "right to an attorney" was not deficient because there was nothing "suggesting a false limitation" on the right to counsel and thus the suspect was not "actively misled"); *United States v. Lamia*, 429 F2d 373, 376-377 (CA 2, 1970) (holding that failure to inform the defendant that he had the right to the "presence" of an attorney did not render warnings deficient when he had been told "without qualification that he had the right to an attorney"); *Carter v. People*, 398 P3d 124, 128 (Colo, 2017), as mod on denial of reh (July 31, 2017) ("[I]t would be highly counterintuitive for a reasonable suspect in a custodial setting, who has just been informed that the police cannot talk to him until after they advise him of his rights to remain silent and to have an attorney, to understand that an interrogation may then proceed without permitting him to exercise either of those rights."); *People v. Walton*, 199 Ill App 341, 344-345; 556 NE2d 892 (1990) ("While the better practice would be for the police to make explicit that

defendant's right to consult with a lawyer may be both before and during any police interrogation, we hold that the language used in this case [that the defendant had a right to consult with a lawyer] was sufficient to *imply* the right to counsel's presence during questioning" because "no restrictions were stated by the police in the present case as to *how, when*, or *where* defendant might exercise his right 'to consult with a lawyer.' ").[7]

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[7] In support of the conclusion that general warnings are sufficient, some of these cases also note that *Miranda* discussed, with apparent approval, the warnings given by the Federal Bureau of Investigation (FBI) at the time *Miranda* was decided. See, e.g., *Warren*, 642 F3d at 184-185; *Lamia*, 429 F2d at 376. As set forth in *Miranda*, at that time the FBI's practice was to warn a suspect that "he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay." *Miranda*, 384 US at 483. Because the FBI warnings discussed in *Miranda* did not contain a temporal reference to a suspect's right to the presence of counsel during the interrogation, cases such as *Warren* and *Lamia* reason—and the prosecutor argues on appeal—that *Miranda* does not contain such a requirement. Admittedly, there is tension between what *Miranda*, 384 US at 479, demanded and what the FBI warnings discussed in *Miranda* conveyed. Indeed, in dissenting opinions to *Miranda*, Justice Clark and Justice Harlan both opined that the FBI warnings in question did not satisfy the strictures laid down by the *Miranda* majority. See *id.* at 500 n 3 (CLARK, J., dissenting); *id.* at 521 (HARLAN, J., dissenting). It does not appear that the Supreme Court has resolved this tension. See *Powell*, 559 US at 73 n 8 (STEVENS, J., dissenting) (expressing doubt as to whether "warning a suspect of his 'right to counsel,' without more, reasonably conveys a suspect's full rights under *Miranda*"). Moreover, we note that the discussion of FBI practices in the *Miranda* majority was immediately followed by a discussion of the then-current practices in England, Scotland, India, Ceylon, and the United States military courts in the larger context of

Under these cases, provided that no improper or misleading limitations on the right to counsel are expressly communicated, a general warning regarding the "right to counsel" is sufficient to comply with *Miranda*'s requirements.

Considering the conflicting persuasive authority, we conclude that the essential information required by *Miranda* includes a temporally related warning regarding the right to consult an attorney and to have an attorney present during the interrogation, not merely general information regarding the "right to an attorney." Consequently, we reaffirm our decision in *Whisenant*, 11 Mich App at 437, and we hold that a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the "right to an attorney" that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with an attorney and to have an attorney present during the interrogation. See *Powell*, 559 US at 60; *Miranda*, 384 US at 471. In reaching this conclusion, we fully acknowledge that there is a certain logic in the proposition that an

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responding to concerns that pre-interrogation warnings would place an undue burden on investigators and detrimentally affect criminal law enforcement. See *Miranda*, 384 US at 481-489. Given the context in which the *Miranda* Court expressed approval of the FBI's warnings and the difference of opinion that currently exists among the various courts regarding the necessity of warning a suspect about the right to the presence of counsel during interrogation, it is not clear to us that *Miranda*'s discussion of the FBI practices compels the conclusion that advising a suspect of the right to counsel is sufficient to convey the right to the presence of counsel during an interrogation.

unqualified general warning about a "right to an attorney" encompasses *all* facets of the right to counsel such that a broad warning before interrogation regarding the "right to an attorney" impliedly informs a suspect of the right to consult an attorney and to have an attorney present during the interrogation. See *Warren*, 642 F3d at 186-187; *Frankson*, 83 F3d at 82; *Walton*, 199 Ill App 3d at 344-345. But, in our view, this conclusion is disingenuous in light of *Miranda*'s mandate for clear and unambiguous warnings, and it assumes—contrary to *Miranda*—that all suspects, regardless of their backgrounds, have a working knowledge of everything implied by a reference to their "right to an attorney."

In this regard, as noted, *Miranda* was focused on the right to counsel as a corollary to the right against compelled self-incrimination, i.e., the right to counsel that exists during custodial interrogation to "protect an accused's Fifth Amendment privilege in the face of interrogation." *Miranda*, 384 US at 471. This is a specific right, and it is this right to counsel in connection with custodial interrogation that must be overtly conveyed to a suspect under *Miranda*.[8] See *id.*

[8] In comparison to the right to counsel during custodial interrogation incident to the Fifth Amendment, the Sixth Amendment right to counsel attaches at, or after, the initiation of adversary judicial proceedings and extends to all critical states of the proceedings. See *People v. Buie (On Remand)*, 298 Mich App 50, 61; 825 NW2d 361(2012); *People v. Williams*, 244 Mich App 533, 538; 624 NW2d 575 (2001). Obviously, the police do not have to provide suspects with a constitutional exegesis on the right to counsel. But for *Miranda* warnings to be meaningful, there needs to be an overt expression of the immediacy of the right to

In this context, basic temporal information is key to ensuring that a defendant understands what the right to counsel entails, i.e., that it applies before and during the interrogation as opposed to some future point. In contrast to decisions like *Frankson*, 83 F3d at 82, we are simply not persuaded by the conclusion that a reasonable person facing custodial interrogation, regardless of the person's background, would understand from a general reference to "right to an attorney" that this right includes the right to consult an attorney and to have an attorney present during the interrogation. Undoubtedly, such an inference can reasonably be drawn by individuals with a preexisting understanding of the right to an attorney, including the fact that this right exists during custodial interrogation. But, "[c]onstitutional rights of an accused at the preliminary stage of the in-custody interrogation process is not common placed," and absent information regarding the immediacy of this right to counsel, the right to counsel could be "interpreted by an accused, in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or some time or event other than the moment the advice was given and the interrogation following."[9] *Atwell v. United States*, 398 F2d 507, 510 (CA 5, 1968).

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counsel—that it "exists both before and during interrogation." 2 LaFave et al., Criminal Procedure (4th ed.), § 6.8(a), pp. 886-887. See also *Noti*, 731 F2d at 615 ("The right to have counsel present during questioning is meaningful. Advisement of this right is not left to the option of the police. . . .").

[9] See also *Carlson*, 228 Ariz at 346 (discussing the fact that the suspect was unaware "that he had a right to the presence of

Rather than assume people are capable of inferring their constitutional rights, *Miranda* provides specific, clearcut warnings that must be given regardless of "age, education, intelligence, or prior contact with authorities. . . ."[10] *Miranda*, 384 US at 468-469. With regard to the right to counsel, *Miranda* and its progeny categorically provide that, "as 'an absolute prerequisite to interrogation,' . . . an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471. "Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda*, 384 US at 472. In the face of *Miranda*'s clear dictates, we fail to see how a warning lacking this essential information regarding the right to consult an attorney and have an attorney present during an

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an attorney (as distinguished from mere eventual representation by an attorney), and that the right applied before, and continued during, any questioning"); *Roberts v. State*, 874 So.2d 1225, 1226 (Fla Dist Ct App, 2004) (noting that the suspect believed he could only have a lawyer "'in the courtroom'"). Indeed, even among cases concluding that general warnings may suffice, those courts have acknowledged that generality in the warnings may potentially lead to ambiguity, *Caldwell*, 954 F2d at 502, and that general warnings merely "imply" the right to counsel during the interrogation, *Walton*, 199 Ill App 3d at 344-345.

[10] "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." *Miranda*, 384 US at 468.

interrogation can be considered adequate. See *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471.

In this case, neither Stowinsky nor DesRosiers explained to defendant that she had the right to the presence of counsel. Although defendant was generally advised that she had a right to an attorney, this broad warning failed to reasonably convey to defendant that she could consult an attorney before she was questioned and during her interrogation. Because defendant was not adequately advised of her right to the presence of counsel, her subsequent statements are inadmissible at trial. *Miranda*, 384 US at 470; *Elliott*, 494 Mich at 301. Accordingly, the trial court did not err by granting defendant's motion to suppress her statements.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v. LARICCA SEMINTA MATHEWS, Defendant-Appellee.	FOR PUBLICATION May 22, 2018 9:10 a.m. No. 339079 Oakland Circuit Court LC No. 2016-260482-FC

Before: O'CONNELL, P.J., and HOEKSTRA and K. F. KELLY, JJ.

O'CONNELL, P.J. (*concurring in part and dissenting in part*).

At 11:33 a.m., on August 12, 2016, defendant called the Wixom Police Department and informed the police that she had shot her boyfriend, Gabriel Dumas. The police were immediately dispatched to defendant's home. Defendant was arrested and transported to the Wixom Police Department.

At the police station, defendant was interviewed by Detective Brian Stowinsky and Sergeant Michael DeRosiers. Detective Stowinsky first told defendant that he was going to question her about happened. Before he began questioning defendant, he gave her the following warnings:

> [B]efore I question, start asking you, you should know that you have a right to remain silent.
>
> * * *
>
> Anything you say may be used against you. You have a right to a lawyer[.] [I]f you cannot afford a lawyer, one will be provided for free. Do you understand your rights?

Defendant answered, "[y]es." Importantly, in addition to the oral *Miranda*[1] rights, defendant signed a written advice of rights, which read:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.
>
> I understand what my rights are and am willing to talk.

Defendant's interview lasted approximately 61 minutes.

At the beginning of defendant's second interview later that day, Sergeant DeRosiers said to defendant:

> Detective Stowinsky, remember he talked about your rights and everything?
>
> * * *

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[1] *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

> Same thing applies. . . . [Y]ou don't have to even talk to me if you don't want to. You can get an attorney. . . . [I]f you can't afford one, we'll make sure you get one.

Defendant indicated that she understood and answered Sergeant DeRosiers's questions.

It is clear from these warnings that defendant's right to a lawyer related to the forthcoming questioning by both Detective Stowinsky and Sergeant DeRosiers. The lower court record is devoid of any coercion, compulsion, or wrongful conduct by the police. Also, there is no indication that defendant did not or was not capable of understanding that she was entitled to have a free attorney before, during, or after questioning.

Moreover, the ordinary layperson understands that the right to an attorney *before* questioning extends to the duration of questioning. There is no meaningful difference between a right to a lawyer *before* questioning and *during* questioning. In addition, by the time Sergeant DeRosiers interviewed her, defendant had already been interviewed once. Sergeant DeRosiers's reminder about defendant's rights reinforced her right to an attorney even though she had already been questioned by Detective Stowinsky. For these reasons, I concur with those cases cited in the majority opinion holding that a generalized warning that the suspect has the right to counsel,

without specifying when, satisfies the *Miranda* requirements.[2]

I conclude that defendant was adequately informed of her *Miranda* rights. I would reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

I concur with the balance of the majority opinion.

/s/ Peter D. O'Connell

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[2] Only lawyers are capable of dissecting words and phrases so finely as to confuse the meaning of the *Miranda* warnings. The ordinary layperson clearly understands the right to have an attorney before, during, and after questioning. When the police warn a suspect before the start of questioning that the suspect has the right to counsel, for what other purpose than questioning—the entire duration of questioning—would a suspect be entitled to a lawyer?

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

v

LARICCA SEMINTA
MATHEWS,

Defendant. /

Case No. 16-260482-FC
Hon. Phyllis C. McMillen

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OPINION AND ORDER
At a session of Court
Held in Pontiac, Michigan
On
JUN 13 2017

This matter is before the Court on Defendant's motion to suppress statements made without the advice of her rights established in *Miranda v Arizona* 384 US 436, 439; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant argues that *Miranda* strictly requires that in order for a statement of a custodial suspect to be considered voluntary and admissible in evidence, a suspect must be advised of each of *Miranda*'s individually enumerated rights before any questioning, and that officers did not advise Ms. Mathews of her rights to terminate questioning at any point, or to have a lawyer remain with her throughout questioning.

I. FACTS AND PROCEEDINGS

On August 12, 2016, the Wixom Police Department received a 911 call wherein a female caller told dispatch that she shot her boyfriend. At approximately 11:33 a.m., officers were dispatched to 27046 Sprucewood Dr., Apt. 104. At the direction of dispatch, Defendant Laricca Mathews exited the building with her arms up, at which time she was ordered to the ground, handcuffed and transported to the Wixom Police Department. Following her arrival at the police department, Ms. Mathews was interviewed separately by Detective Brian Stowinsky and Sergeant Michael DesRosiers. The interview with Stowinsky began at

2:43 p.m. and lasted 61 minutes. The interview with DesRosiers began at 6:00 p.m. and lasted 22 minutes.

At the beginning of the first interview, Det. Stowinsky advised Ms. Mathews of some of her rights. The conversation, in relevant part, was as follows:

> *Det. Stowinsky*: Um, before I question, start asking you, you should know that you have a right to remain silent.
>
> *Laricca Mathews*: Uh hmm
>
> *DS*: Anything you say may be used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?
>
> *LM*: Yes.
>
> *DS*: Do you want to talk to me?
>
> *LM*: Yeah, we can talk.

Stowinsky also purportedly[1] used a written advice of rights to assist him, which he testified at preliminary examination was signed by Ms. Mathews. This document reads:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer,

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[1] A review of the video tape of the interrogation makes clear that Ms. Mathews did not read the document she signed containing this language.

> and (4) if you cannot afford a lawyer, one will be provided free.

When DesRosiers re-interviewed Ms. Mathews later that evening, the following exchange took place:

> *Sgt. DesRosiers*: Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?
>
> *LM*: Uh hmm.
>
> *SD*: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.
>
> *LM*: Ok.
>
> *SD*: So, um, we're just continuing the interview that you started with him. . . .

Defendant claims that both the verbal and written advice of rights were deficient, and the resulting statements are inadmissible at trial. Defendant asks that the Court enter an order suppressing both statements from evidence in her trial.

II. STANDARD OF REVIEW

When seeking to admit a defendant's statement into evidence, the government must demonstrate that the statement was voluntary, and the purported waiver of rights was knowingly and intelligently made. *Edwards v Arizona*, 451 US 477, 486 n 9; 101 S Ct

1880; 68 L Ed 2d 378 (1981); *People v Daoud*, 462 Mich 621, 624; 614 NW2d 152 (2000).

The People's burden of proof is a preponderance of the evidence. *People v Sears*, 124 Mich App 735, 738; 336 NW2d 210 (1983). As stated by the United States Supreme Court in Moran v Burbine, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986):

> The inquiry has two distinct dimensions: First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

In the present case, Defendant does not claim that she was subject to intimidation or coercion, rather, the inquiry is whether Ms. Mathews' waiver was knowingly and intelligently made.

III. ANALYSIS

In the case of *Miranda v Arizona*, 384 US 436, 458; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court found that because of the "compulsion inherent in custodial surroundings, no statement

obtained from [a] defendant can truly be the product of his free choice." Because of this, the Court fashioned a set of procedural safeguards "to notify the person of his right of silence [pursuant to the Fifth Amendment] and to assure that the exercise of the right will be scrupulously honored." *Id.* at 479. These safeguards require that the defendant:

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. [Id.]

While the Supreme Court has not dictated the words in which the essential information must be conveyed, they have consistently held that the four warnings required by *Miranda* are "invariable" and must be given if a voluntary waiver is to occur. *Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). As in the present case, *Powell* involved *Miranda*'s third

warning, i.e., that the suspect has the right to the presence of an attorney during interrogation. In reviewing the language used by the police in *Powell*, the Court reiterated the concern expressed in *Miranda* that the "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege to remain silent. *Id.*, quoting *Miranda*, 384 US at 469. In response to that concern, as "an absolute prerequisite to interrogation . . . an individual held for questioning must be clearly informed that he has a right to consult with a lawyer and to have the lawyer with him during interrogation." *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471.

As stated by the *Miranda* Court, "[t]he 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.*" *Miranda*, 384 US at 468-469 (footnote omitted; emphasis added).

As directed by the Supreme Court, this Court is to look no further than whether or not the proper warnings were given. "[W]hatever 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.*" *Id* at 469.

From these decisions it can be seen that regardless of her background, intelligence or knowledge, Ms. Mathews had to be advised of her right to consult with a lawyer and to have a have an attorney with her during interrogation. As in *Powell*, the question in the present case is whether the warnings Ms. Mathews received satisfied this requirement. The Court finds that they did not.

Nowhere in the warnings received by Ms. Mathews was she told that she has the right to consult an attorney before her interrogation or to have an attorney present with her during interrogation. Nor is there any language from which it could be inferred that she had that right. In the absence of the explicit indication that she had the right to an attorney present before or during questioning, the inference was that at some point in the future, she would be entitled to have an attorney represent her. As stated in *Miranda*:

> the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require

> knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end . . . [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires. [384 US at 469-470]

The Court went on to say:

> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. [*Id.* at 470].

This language leaves no doubt of the Supreme Court's view of the importance of the right to have an attorney present during interrogation. In conclusion of these thoughts the Court stated:

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during

> interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. [*Id.* at 471]

The prosecutor has cited a number of cases where the court was required to determine whether the warnings concerning the right to have an attorney present given by police were sufficient under *Miranda*. It is telling that in every case cited by the prosecutor, the words "present" or "presence" of an attorney, or have an attorney "with you" were used. In those various cases, the inference of the warning was that the defendant had a right to have an attorney present with them during the interrogation. In *People v Gilleylem*, 34 Mich App 393, 395; 191 NW2d 96 (1971), the police advised the defendant "[y]ou may have this attorney present here before answering any questions." In *People v Watkins* 60 Mich App 124, 128; 230 NW2d 338 (1975), the defendant was advised she had the "right to an attorney or lawyer present before answering any questions or making any statements" and that she could decide to exercise these rights at any time. In *Duckworth v Eagan*, 492 US 195, 198; 109 S Ct 2875; 106 L Ed 2d 166 (1989), the police told the defendant "[y]ou have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning". In *California v Prysock*, 453 US 355, 356; 101 S Ct 2806; 69 L Ed 2d 696 (1981), the defendant was advised he had "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."

The prosecutor also cites *Prysock* for the proposition that police can give a "fully effective equivalent"[2] of the *Miranda* warnings as a prerequisite to the admissibility of any statement made by the Defendant. In the present case, the warnings given do not contain the advice that the Defendant had the right to the presence of a lawyer before being questioned, and therefore were not a "fully effective equivalent."

It should also be noted that the cases cited by the prosecutor all predate the case of *Dickerson v United States*, 530 US 428; 120 S Ct 2326; 147 L Ed 2d 405 (2000), where the Supreme Court made clear that the *Miranda* opinion was meant to "give concrete constitutional guidelines for law enforcement agencies and courts to follow," and that *Miranda* established "constitutional standards for protection of the privilege" against self-incrimination, regardless of prior cases that implied the warnings were not constitutionally required. *Id.* at 438-440.

IV. CONCLUSION

The warnings given by Detective Stowinsky and Sergeant DesRosiers failed to advise the Defendant that she had the right to have an attorney present before and during interrogation. The warnings given were not the fully effective equivalent of advising her

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[2] 453 US at 359.

that she had the right to the presence of an attorney, and that if she could not afford an attorney one would be appointed for her prior to any questioning if she so desired. As set forth in the rulings above, without those warnings, the constitutional standards for the protection of the Fifth Amendment right against self-incrimination have not been met, and the statements Defendant gave to Detective Stowinsky and Sergeant DesRosiers may not be used in a trial against her.

WHEREFORE IT IS HEREBY ORDERED that Defendant's Motion to Suppress Statements is GRANTED.

IT IS SO ORDERED.

/s/ Phyllis C. McMillen
Phyllis C. McMillen,
Circuit Judge

[Certificate Of Service Omitted]

[WRITTEN ADVICE OF RIGHTS FORM]

Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.

I understand what my rights are and am willing to talk.

_____

People v Laricca Seminta Mathews
PO# 16-37248
Interview with Defendant

LM: Laricca Mathews

DS: Detective Stowinsky

DS: Alrighty, I am Detective Brian Stowinsky.

LM: Uh hmm.

DS: Brian, you can call me. I'm going to call you LaLa, it's easier.

LM: Ok.

DS: Mathews, right?

LM: Uh hmm.

DS: What's your phone number?

LM: [redacted]

DS: Ok, (inaudible), um, I'm going to question you about what happened today.

LM: Uh hmm.

DS: Ok, um, I'm going to review these, ok?

LM: Uh hmm.

DS: I'm going to read these to you.

LM: Uh hmm.

DS: Um, before I question, start asking you, you should know that you have a right to remain silent.

LM: Uh hmm.

DS: Anything you say maybe used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?

LM: Yes.

DS: Do you want to talk to me?

LM: Yeah, we can talk.

People v Laricca Seminta Mathews
PO# 16-37248
Second Interview with Defendant

LM: Laricca Mathews

DR: Detective DeRosiers

DR: Have a seat, what side did you sit on last time?

LM: That side right there.

DR: Yep, that's good. Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?

LM: Uh hmm.

DR: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.

LM: Ok.

DR: So, um, we're just continuing the interview that you started with him. I just looked over the statement and have a couple questions about it. Um, so I'm looking at the statement and the problem I have, and you can stop me at any time you want, is, it's from the things in the statement don't necessarily match up with the evidence that we found. Um, and, and to connect these, coming to mind is, you mentioned that he was jumping on you.

LM: Uh hmm.