

**In the
Supreme Court of the United States**

PARISH RAMON CARTER,

Petitioner,

v.

COLORADO,

Respondent.

**On Petition for a Writ of Certiorari
to the Colorado Supreme Court**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Colorado offers two arguments for denying the petition—first, that the facts of this case do not implicate the Question Presented (BIO 6-8); and second, that the Court already addressed this issue in *Florida v. Powell*, 559 U.S. 50 (2010) (BIO 8-16). Colorado is mistaken in both respects.

Colorado’s first argument is based on a misreading of the record. When Detective Fronapfel prefaced her minimalistic version of *Miranda* warnings by saying “before I can even talk to you I have to do the formal little rights things,” Pet. App. 3a, she was explaining that she had to *recite the warnings* before the interrogation, not that Carter was entitled to an attorney before the interrogation. As both the majority and the dissenting opinions of the Colorado Supreme Court recognized, Detective Fronapfel simply told Carter that he had “the right to have an attorney,” without telling him that he had the right to an attorney before and during the interrogation. Pet. App. 9a-10a, 18a. The Question Presented is whether this bare-bones present-tense statement satisfies *Miranda*. In many jurisdictions it would not.

Colorado’s second argument is based on a misreading of *Florida v. Powell*. As our petition for certiorari explained (Pet. 16-17), *Powell* addressed a different question concerning a more detailed advisement of the right to counsel. In *Powell*, the Court held that an advisement that informed the defendant that he had “the right to talk to a lawyer before answering” questions, and that he could invoke this right “at any time” during the interrogation, was sufficient to convey the defendant’s right to an attorney during the interrogation as well as before. *Powell*,

559 U.S. at 53, 62. *Powell* had no occasion to address, and thus did not address, the more fundamental issue in our case—whether an advisement that provides no temporal information at all satisfies *Miranda*. As the lower courts have recognized (*see* Pet. 16-17), the deep conflict on this issue remains just as intractable after *Powell* as it was before.

ARGUMENT

I. This case squarely implicates the Question Presented, because Carter was merely told he had a “right to have an attorney,” without any information as to when.

Because Detective Fronapfel had been trained to “Minimize’ the impact of *Miranda* warnings,” Pet. App. 26a, she did not use the Aurora Police Department’s standard written warnings, which would have explicitly informed Carter that he had “the right to talk to a lawyer *and have him present with you while you are being questioned.*” Pet. App. 26a (emphasis added). Instead, she made up her own version of *Miranda* warnings, in which she deleted all information about when Carter’s right to counsel would attach. Detective Fronapfel’s stripped-down warnings were, in their entirety:

Since you’re in custody, before I can even talk to you I have to do the formal little rights things, okay? So you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney. If you cannot afford to hire a[n] attorney, one will be appointed to you without cost. Do you understand those?

Pet. App. 3a.

Colorado erroneously suggests (BIO 6-7) that Detective Fronapfel’s introductory sentence—“before I can even talk to you I have to do the formal little rights things”—conveyed to Carter that his right to counsel would attach before she spoke with him. But Fronapfel was obviously explaining that she had to *recite the warnings* before she spoke with him, not that Carter’s right to counsel would attach before she spoke with him. The point of this introductory sentence was to make the warnings seem insignificant, not to tell Carter when his right to counsel would attach. Detective Fronapfel did not advise Carter that he had the right to consult a lawyer before the interrogation began, which is what she should have done. Rather, she brushed off Carter’s rights as mere formalities, just as she had been trained to do, in a transparent effort to get him to talk.

Below, the majority and dissenting opinions of the Colorado Supreme Court both recognized that Fronapfel’s introductory sentence about “the formal little rights things” referred to the fact that she had to advise Carter of his rights before interrogating him, not to the fact of when Carter’s right to counsel would attach. As the majority noted, Fronapfel’s use of the phrase “before I can even talk to you” was “a clear reference to the advisement of rights that followed forthwith.” Pet. App. 10a. The dissenting justices observed, more pointedly, that “the detective’s trivializing of the *Miranda* warnings did not serve to somehow enhance the effectiveness of the oral, bare-bones advisement she provided,” but rather “rendered it even more perfunctory and seems to have

been intended to lull Carter into complacency.” Pet. App. 18a.

Colorado also contends (BIO 7) that because Detective Fronapfel’s advisement of the right to counsel was worded in the present tense—“You have the right to have an attorney”—it adequately conveyed to Carter that his right to counsel attached before Fronapfel questioned him. Below, the Colorado Supreme Court majority took the same view. Pet. App. 10a. But the primary reason for granting certiorari is that many other courts take precisely the opposite view. The exact words used by Detective Fronapfel would contravene *Miranda* in several jurisdictions. As we showed in our petition (Pet. 10-13), a bare-bones present-tense advisement of the right to counsel, without any explanation that the right attaches before and during the interrogation, has been found insufficient by the Supreme Courts of Alaska and Idaho, by the Fifth, Sixth, and Tenth Circuits, and by intermediate appellate courts in Texas, Louisiana, and Arizona.

The facts of this case thus squarely implicate the Question Presented. Parish Carter was told only that he had “the right to have an attorney,” without any information as to when. In several jurisdictions, this bare-bones advisement satisfies *Miranda*. In several others, it contravenes *Miranda*’s requirement that a person held for interrogation “be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interro-

gation.” *Miranda v. Arizona*, 384 U.S. 438, 471 (1966).¹

II. The Court did not address this issue in *Florida v. Powell*.

Colorado also errs in suggesting (BIO 8-16) that the Court addressed this issue in *Florida v. Powell*. *Powell* addressed a different issue. The lower court conflict on our question that existed before *Powell* has not gone away; indeed, it has only grown larger.

In *Florida v. Powell*, the Court considered the adequacy of an advisement that the defendant had “the right to talk to a lawyer before answering” questions, and that the defendant could invoke this right “at any time” during the interrogation. *Powell*, 559 U.S. at 53. The Court determined that these warnings adequately informed the defendant of his right to have an attorney present *during* the interrogation as well as *before* the interrogation. *Id.* at 63.

In *Powell*, the Court had no occasion to address the issue in our case, which is even more basic. The

¹ Colorado mistakenly suggests (BIO 8 n.2) that this case is a poor vehicle because one of the three Court of Appeals judges found the error harmless. The state fails to mention that none of the other nine appellate judges below found harmless error. Three (two on the state Supreme Court, one on the Court of Appeals) found prejudicial error, while six (five on the state Supreme Court, one on the Court of Appeals) found no error at all. If the Court grants certiorari and reverses, the state courts will of course be free to consider harmless on remand, just as in every other case. For what it’s worth, the error was certainly not harmless beyond a reasonable doubt. The erroneously admitted video recording of the interrogation was a crucial part of the prosecution’s case, for the reasons stated in Judge Ney’s thorough opinion in the Court of Appeals. *See* Pet. App. 50a-56a.

issue in our case is the adequacy of an advisement that the defendant has “the right to have an attorney,” without *any* information about when that right attaches. Because our issue did not arise in *Powell*, the Court did not address it. *See Powell*, 559 U.S. at 73 n.8 (Stevens, J., dissenting) (noting the still-extant conflict on our issue).

In the years since *Powell*, the lower courts have lamented the fact that *Powell* did not resolve the issue in our case. *See United States v. Nelson*, 2013 WL 1899832, *4 (N.D. Iowa 2013) (noting that in *Powell* “the Supreme Court did not address the sufficiency of an unqualified warning that defendant has the right to counsel”); *State v. Shipley*, 2010 WL 1838316, *5 (La. Ct. App. 2010) (“[T]he Court did not decide what minimal language would be necessary to satisfy *Miranda* regarding the right to speak to an attorney. Thus, whether ‘you have the right to an attorney’ satisfies *Miranda* under *Powell* is not clear. ... [T]he *Powell* Court did not resolve the federal circuit split.”).

Because *Powell* did not address this issue, the lower court conflict has grown even larger since *Powell* was decided.

On one side, the Idaho Supreme Court recently held that the statement “You have the right to have an attorney” does not satisfy *Miranda*, because “[t]his warning did not reasonably convey to [the defendant] that he had the right to have the presence of counsel before and during questioning.” *State v. McNeely*, 398 P.3d 146, 149 (Idaho 2017). *Accord United States v. Lambrose*, 2014 WL 559560, *6 (D. Utah 2014); *Coffey v. State*, 435 S.W.3d 834, 841-42 (Tex. Ct. App. 2014); *United States v. James*, 2012

WL 2200476, *2 (N.D. Fla. 2012) (noting the circuit split on this issue); *State v. Harris*, 98 So. 3d 903, 915 (La. Ct. App. 2012); *State v. Carlson*, 266 P.3d 369, 373-74 (Ariz. Ct. App. 2011).

On the other side, the Maine Supreme Court recently held that the statement “You have a right to an attorney” *does* satisfy *Miranda*, because “the warnings communicated an unqualified right to counsel, which could have been invoked by [the defendant] at any time.” *State v. Figueroa*, 146 A.3d 427, 432 (Me. 2016). The Third Circuit, also after *Powell*, likewise held that the statement “You have the right to an attorney” satisfies *Miranda*, because the statement would not “be regarded as time-limited.” *United States v. Warren*, 642 F.3d 182, 186 (3d Cir. 2011); *see id.* at 191 & n.3 (Greenaway, J., dissenting) (noting the circuit split on this issue). *Accord United States v. Allen*, 2017 WL 2880544, *3-4 (D.R.I. 2017).

These post-*Powell* cases have swelled both sides of the lower court conflict, which, as Colorado concedes (BIO 10), already included several state supreme courts and federal courts of appeals on both sides. *See* Pet. 10-16.

Colorado tries in vain (BIO 12-16) to make factual distinctions between all these cases and our case, but the relevant facts are the same. In our case, as in all the cases on both sides of the conflict, the defendant was merely advised “you have the right to an attorney.” The defendant was never told that his right to an attorney attached *before and during the interrogation*. The lower courts were deeply divided on the adequacy of this bare-bones warning before *Powell*, and they remain deeply divided today.

There is no reason to let this conflict fester any longer. As Amici MacArthur Justice Center et al. demonstrate, Detective Fronapfel's *Miranda*-lite warnings in this case are all too typical of police behavior throughout the country. Officers are being trained to treat *Miranda* as a game, in which victory is defined as ensuring that the defendant obtains the least information possible about his constitutional rights. (For a sobering discussion of one aspect of this problem, see Judge Watford's concurring opinion in *Smith v. Clark*, 612 Fed. Appx. 418, 421-24 (9th Cir. 2015) (Watford, J., concurring).) Our case is a blatant example: A police officer deliberately injected ambiguity into her *Miranda* warnings, to lull a mentally disabled suspect into being interrogated without counsel. The police play this kind of game with *Miranda* every day. They will not stop until this Court tells them to.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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