No. _____

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

LARICCA SEMINTA MATHEWS,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JESSICA R. COOPER
Counsel of Record
Prosecuting Attorney
Oakland County, Michigan
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-1000
cooperj@oakgov.com

THOMAS R. GRDEN
Chief, Appellate Division

MATTHEW A. FILLMORE
Assistant Prosecuting Attorney

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Should this Court grant certiorari to resolve the split in the United States Courts of Appeals and the state appellate courts regarding whether *Miranda v. Arizona*, 384 U.S. 436 (1966), is satisfied when a suspect in custody is advised at the beginning of an interrogation that they have the right to an attorney, but is not explicitly advised that they are entitled to the attorney's presence before and during interrogation?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is the People of the State of Michigan represented by the Oakland County Prosecutor's Office and the respondent is Laricca Seminta Mathews.

RELATED PROCEEDINGS

On June 13, 2017, the Oakland County Circuit Court issued an opinion and order granting respondent's motion to suppress her statements. *People v. Mathews*, No. 2016-260482-FC, Oakland Circuit Court. Judgment entered June 13, 2017. App. 54-65. On May 22, 2018, the Michigan Court of Appeals issued a published 2-1 opinion affirming the suppression of respondent's statements. *People v. Mathews*, No. 339079, Michigan Court of Appeals. Judgment entered May 22, 2018. 324 Mich. App. 416; 922 N.W.2d 371 (2018). App. 24-53. On June 12, 2020, the Michigan Supreme Court entered a 4-3 order denying petitioner's application for leave to appeal. *People v. Mathews*, No. 158102, Michigan Supreme Court. Judgment entered June 12, 2020. ___ Mich. ___; 943 N.W.2d 636 (2020). App. 1-23.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

On June 13, 2017, the Oakland County Circuit Court issued an opinion and order granting respondent's motion to suppress her statements. App. 54-65. On May 22, 2018, the Michigan Court of Appeals issued a published 2-1 opinion affirming the suppression of respondent's statements. *People v. Mathews*, 324 Mich. App. 416; 922 N.W.2d 371 (2018). App. 24-53. On June 12, 2020, the Michigan Supreme Court entered a 4-3 order denying petitioner's application for leave to appeal. *People v. Mathews*, ___ Mich. ___; 943 N.W.2d 636 (2020). App. 1-23.

JURISDICTION

The Michigan Court of Appeals issued its published opinion in this case on May 22, 2018. App. 24-53. The Michigan Supreme Court did not deny discretionary review on this matter until two years later on June 12, 2020. App. 1-23. The Michigan Court of Appeals opinion became effective and final upon entry of the Michigan Supreme Court's order denying petitioner's application for leave to appeal. Mich. Ct. Rule 7.215(F)(1)(a). The Michigan Supreme Court order denying leave to appeal was effective on the day it was entered. Mich. Ct. Rule 7.315(D). This Court may grant a petition for certiorari from the decision of an intermediate state appellate court after the state appellate court of last resort denies discretionary review. *Gallick v. B & O R.R.*, 372 U.S. 108, 109 (1963).

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the Michigan Court of Appeals ruled on the scope of the Fifth Amendment right against self-incrimination as interpreted by *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States. [28 U.S.C. § 1257(a).]

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

public use, without just compensation. [U.S. Const. amend. V.]

INTRODUCTION AND SUMMARY OF ARGUMENT

This murder case squarely presents an issue that has divided the federal courts of appeals and state appellate courts throughout the nation: Whether *Miranda v. Arizona*, 384 U.S. 436 (1966), is satisfied when a suspect is advised at the beginning of an interrogation that they have the right to an attorney, but is not explicitly advised that they are entitled to the attorney's presence before and during interrogation.[1]

The *Miranda* decision itself is unclear regarding whether the warnings given to a suspect in custody must include an express reference to the right to have an attorney present during interrogation. *Miranda*,

[1] See generally McMahon, *Necessity that* Miranda *Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 A.L.R. Fed. 123 (2020 update) (collecting and commenting on cases); Bazelon, *Comment: Adding (Or Reaffirming) A Temporal Element to the* Miranda *Warning "You Have the Right to an Attorney*," 90 Marq. L. Rev. 1009, 1010 (2007) ("Currently, however, the circuit courts are divided on whether the Fifth Amendment and *Miranda* require *Miranda* warnings to include an express reference to the right to have an attorney present during interrogation in order for statements to be admissible in the prosecution's case-in-chief. Several circuits hold that the standard warning, which warns the suspect only of the general right to an attorney, is constitutionally adequate, while other circuits require an explicit reference to the right to consult with an attorney during interrogation.").

however, approved of FBI warnings that did not contain such express references. In a subsequent trilogy of cases, this Court held that "right to an attorney" warnings are deficient if they contain temporal limitations that might mislead suspects into thinking that they do not have the right to a lawyer before or during interrogation. *California v. Prysock*, 453 U.S. 355 (1981); *Duckworth v. Eagan*, 492 U.S. 195 (1989); and *Florida v. Powell*, 559 U.S. 50 (2010). The Court has never, however, ruled on the validity of general "right to an attorney" warnings that *lack* express temporal language. This lack of clarity has resulted in a split in both the United States Courts of Appeals and numerous state appellate courts, as well as confusion in law enforcement. The Second, Third, Fourth, Seventh, and Eighth Circuits have all held that a general warning that the suspect has the right to a lawyer satisfies *Miranda*, but the Fifth and Tenth Circuits have held that such a general warning is insufficient. There are even intra-circuit splits, such as in the Sixth and Ninth Circuits, where decisions in the same circuit appear to conflict on the issue. The state appellate courts that have decided this issue are relatively evenly split on this issue.

In this case, the Michigan Court of Appeals issued a 2-1 published opinion defining the extent to which police must advise custodial suspects under *Miranda* in order to safeguard their Fifth Amendment rights. The court joined the states and federal circuits holding that a general "right to counsel" warning is insufficient and that *Miranda* requires language expressly warning the suspect of the right to the presence of counsel

before and during interrogation. Two years later, a divided Michigan Supreme Court declined to conduct discretionary review of the Michigan Court of Appeals ruling. The Michigan Court of Appeals decision squarely conflicts with not only other state appellate courts of last resort but several United States Courts of Appeals. And because of the Michigan Court of Appeals decision, a conflict exists with the latest decision of the United States Court of Appeals for the Sixth Circuit. This creates the awkward situation in Michigan where the requirements for officers giving *Miranda* warnings are now different depending on whether the case ends up in state or federal court.

The issue of what *Miranda* requires of officers when warning a suspect of their right to an attorney arises every time officers question a suspect in custody. This obviously has broad application. The intractable conflict in the courts over the required scope of the "right to an attorney" warning has created uncertainty among law enforcement, attorneys, and courts for decades now. Additionally, decisions like that of the Michigan Court of Appeals that require police to add temporal language to *Miranda* warnings create uncertainty regarding whether the added temporal language is precise enough that it does not mislead the suspect into believing that their right to an attorney is time-limited in some way. Only this Court can clarify the *Miranda* decision and resolve the split of authorities interpreting it. It is imperative that this Court resolve the conflict now.

This is the case that can resolve the circuit split and clarify whether *Miranda* requires more than a general "right to an attorney" warning. The facts relevant to this issue are clear and do not appear to be in dispute. This case is on direct appeal from the Michigan Court of Appeals following an interlocutory ruling by the trial court. There are no procedural or factual barriers that would prevent this Court from reaching the heart of the issue. This Court should grant certiorari in this case to resolve the split of authorities on this important issue.

STATEMENT OF THE CASE

A. The Underlying Facts

The facts relevant to this appeal appear to be undisputed. The Michigan Court of Appeals accurately summarized the facts as follows:

> 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.["][2]

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

---

[2] See App. 66.

will be provided for free. Do you understand your rights?

[*Defendant*]: Yes.["[3]]

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.["[4]]

---

[3] See App. 67-68.

[4] See App. 69.

> 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." [*People v. Mathews*, 324 Mich. App. 416, 421-423; 922 N.W.2d 371 (2018). App. 25-27.]

B. The Trial Court Proceedings

Respondent was charged with statutory short-form murder, Mich. Comp. Laws § 750.316, reckless discharge of a firearm in a building, Mich. Comp. Laws § 750.234b, and two counts of possession of a firearm in the commission of a felony, Mich. Comp. Laws § 750.227b. She filed a motion to suppress the statements she made during the police interviews, arguing that the statements were involuntary and therefore inadmissible because the police did not explicitly advise her that (1) she had the right to stop the interrogation at any point and (2) she had a right to a lawyer present during interrogation. Petitioner responded that the advice of rights was sufficient under *Miranda v. Arizona*, 384 U.S. 436 (1966). On May 24, 2017, the parties argued respondent's motion before Oakland Circuit Court Judge Phyllis C. McMillen.

On June 13, 2017, the trial court issued an opinion and order granting respondent's motion to suppress. App. 54-65. The court held that the warnings the detective gave respondent did not adequately inform her that she had a right to have a lawyer with her during interrogation:

> 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. [App. 61.]

The court concluded as follows:

> 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 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. [App. 64-65.]

The trial court ruled that because the warnings were deficient, "the constitutional standards for the

protection of the Fifth Amendment right against self-incrimination have not been met," and respondent's statements could not be used in a trial against her. App. 65.

C. The Michigan Appellate Court Proceedings

Petitioner filed an interlocutory application for leave to appeal the trial court's ruling suppressing respondent's statements. In a 2-1 decision, the Michigan Court of Appeals denied petitioner's application for leave to appeal for lack of merit in the grounds presented. *People v. Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079). But the Michigan Supreme Court remanded to the Court of Appeals for consideration as on leave granted. *People v. Mathews*, 501 Mich. 950; 904 N.W.2d 865 (2018).

On remand, the Michigan Court of Appeals, in a 2-1 published opinion, affirmed the trial court's order suppressing the evidence. *People v. Mathews*, 324 Mich. App. 416; 922 N.W.2d 371 (2018). App. 24-53. The Court of Appeals majority (HOEKSTRA, J., and K.F. KELLY, J.) first summarized its holding in relevant part as follows:

> [B]ecause 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. [*Mathews*, 324 Mich. App. at 420. App. 25.]

In regard to the issue now being contested in this Court, the majority held: "Although there is conflicting authority on this issue, we agree with the trial court and hold that a general warning regarding a 'right to a lawyer' does not comply with the dictates of *Miranda*." *Id.* at 429. App. 35. In reaching this conclusion, the majority acknowledged that it was "not aware of any binding caselaw resolving this issue." *Id.* at 430. App. 36. The majority discussed decisions from numerous courts that had reached different conclusions on the issue of whether the general warning of the "right to an attorney" satisfies *Miranda*. *Id.* at 433-438. App. 39-45. It then decided that the cases requiring a temporally-related warning were more persuasive than the cases holding that a general "right to an attorney" was sufficient. *Id.* at 438. App. 45. But in reaching this conclusion, the majority conceded:

> [W]e fully acknowledge that there is a certain logic in the proposition that an 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. [*Id.* App. 45-46.]

That being said, the majority rejected this logic as "disingenuous," concluded that the warnings in this case were insufficient, and affirmed the trial court's suppression of respondent's statements. *Id.* at 438-441. App. 46-49.[5]

Judge Peter D. O'Connell dissented from the part of the majority opinion ruling that the police did not adequately inform respondent of her right to consult with an attorney. *People v. Mathews*, 324 Mich. App. 416, 441; 922 N.W.2d 371 (2018) (O'CONNELL, P.J., concurring in part and dissenting in part). App. 50. In contrast to the majority, he agreed 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." *Id.* at 443. App. 52-53. He queried, "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?" *Id.* at 443 n. 2. App. 53.

Petitioner applied for leave to appeal the part of the Court of Appeals majority opinion holding that the

---

[5] The majority agreed with petitioner, however, that the police were not required to inform respondent that she could cut off questioning at any time during the interrogation: "[W]hen a defendant has been advised of his or her right to remain silent as required by *Miranda*, 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." *Id.* at 428. App. 34.

"right to counsel" warnings were insufficient to satisfy *Miranda*. On October 24, 2018, the Michigan Supreme Court granted oral argument and ordered supplemental briefing on the application. *People v. Mathews*, 503 Mich. 882; 918 N.W.2d 530 (2018). Oral argument was conducted on October 3, 2019.

On June 12, 2020, the Michigan Supreme Court entered a 4-3 order denying petitioner's application for leave to appeal "because we are not persuaded that the question presented should be reviewed by this Court." *People v. Mathews*, ___ Mich. ___; 943 N.W.2d 636 (2020). App. 1. Justice David F. Viviano filed a 13-page dissenting opinion, which was joined by Justices Stephen J. Markman and Brian K. Zahra. *Id.* (VIVIANO, J., dissenting). App. 2. The dissent opined that the Michigan Court of Appeals erred in concluding that the warnings provided to respondent were insufficient under *Miranda* and its progeny. In conclusion, the dissent stated as follows:

> 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. [*Id.* at 645. App. 22.]

Petitioner has now filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. This is a case that presents an excellent vehicle for this Court to resolve the split in the United States Courts of Appeals and the state appellate courts regarding whether a general "right to an attorney" warning, without any attached temporal limitations, reasonably conveys to a suspect in custody their right to the presence of counsel, as required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

A. The federal circuits and state appellate courts are split regarding whether a general "right to an attorney" warning satisfies *Miranda*.

Since *Miranda*, 384 U.S. 436, was decided in 1966 and continuing after this Court's 2010 decision in *Powell*, 559 U.S. 50, the federal and state courts of appeals have issued conflicting decisions regarding whether a general "right to counsel" warning is sufficient to convey to a suspect in custody their right to the presence of counsel during interrogation, as required by *Miranda*. The United States Courts of Appeals for the Second, Third, Fourth, Seventh, and Eighth Circuits have all held that a general warning that the suspect has the right to a lawyer satisfies *Miranda*. See *United States v. Lamia*, 429 F.2d 373, 375-377 (2d

Cir. 1970) (holding that a general warning that the defendant had the "right to an attorney" adequately conveyed to the defendant his *Miranda* rights because he was told "without qualification that he had the right to an attorney");[6] *United States v. Warren*, 642 F.3d 182 (3d Cir. 2011) (holding that the unmodified statement "[y]ou have the right to an attorney" reasonably conveyed the substance of the rights expressed in *Miranda* because it was not time-limited and did not indicate that counsel's presence could be restricted after questioning commenced); *United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996) (holding that the warning "'[y]ou have the right to an attorney' . . . communicated to [the defendant] that his right to an attorney began immediately and continued forward in time without qualification");[7] *United States v. Adams*, 484 F.2d 357, 361-362 (7th Cir. 1973) (holding that the general warning that the defendant had the "right to counsel" satisfied *Miranda*); and *United States v. Caldwell*, 954 F.2d 496, 502-504 (8th Cir. 1992) (holding that the general warning that the defendant had the right to an attorney did not amount to plain error under *Miranda*

---

[6] See also *United States v. Vanterpool*, 394 F.2d 697, 698-699 (2d Cir. 1968) (holding that the warning "you have a right to an attorney and to consult with a lawyer at this time" was adequate under *Miranda*); and *United States v. Burns*, 684 F.2d 1066, 1074 (2d Cir. 1982).

[7] See also *United States v. Nash*, 739 Fed. Appx. 762, 765 (4th Cir. 2018) (holding that "the 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.").

because it did not link the right to counsel to a future point in time after interrogation).[8]

Conversely, the United States Courts of Appeals for the Fifth and Tenth Circuits have held that *Miranda* warnings must include an explicit statement that the suspect has a right to the presence of counsel during interrogation. See *Windsor v. United States*, 389 F.2d 530, 533 (5th Cir. 1968) (holding that the warning that the defendant could speak to an attorney before saying anything did not satisfy *Miranda*);[9] and *United*

---

[8] See also *Evans v. Swenson*, 455 F.2d 291, 295-296 (8th Cir. 1972) (holding that where the officer told the defendant, "I want to tell you something before you say anything at all to me," followed by "you also have a right to an attorney," satisfied *Miranda* because it "clearly advised and informed in substance that [the defendant] had a right to have an attorney at that time, prior to his making any statements or being interrogated by an officer, and during such interrogation. . . ."); but see *South Dakota v. Long*, 465 F.2d 65, 70 (8th Cir. 1972) (quoting *Smith v. Rhay*, 419 F.2d 160, 163 (9th Cir. 1969), for the proposition that "warnings are inadequate where the accused, although advised he had the right to an attorney, was not advised that 'he had the right to the presence of an attorney and that, if he could not afford one, a lawyer could be appointed to represent him *prior to any questioning*.'" [Emphasis in original]).

[9] See also *Atwell v. United States*, 398 F.2d 507, 510 (5th Cir. 1968) ("The advice that the accused was entitled to consult with an attorney, retained or appointed, 'at anytime' does not comply with *Miranda*'s directive "* * * 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 see *Bridgers v. Dretke*, 431 F.3d 853, 856 (5th Cir. 2005) (upholding in habeas proceedings the decision of the Texas Court of Appeals that the warning "You have the right to the presence of an attorney/lawyer prior to any questioning" complied with *Miranda*).

States v. Anthon, 648 F.2d 669, 672-674 (10th Cir. 1981) (holding that the warnings were insufficient where the defendant "was not advised that his right to counsel encompassed the right to appointed counsel in the event he could not afford counsel, that his right to counsel encompassed the right to have counsel present during any questioning, and that he had the right to stop the questioning at any time.").

And finally, the Courts of Appeals for the Sixth and Ninth Circuits have issued apparently conflicting decisions holding both ways. See *United States v. Tillman*, 963 F.2d 137, 140-141 (6th Cir. 1992) (holding that the warnings did not satisfy *Miranda* where the defendant was not told that he had the right to an attorney before, during, and after interrogation or that any statements he might make could be used against him); but see *United States v. Clayton*, 937 F.3d 630, 639-641 (6th Cir. 2019) (holding that the warning "You have the right to talk to a lawyer before we ask you any questions" sufficiently advised the defendant of the scope of his right to counsel under *Miranda*); and see *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984) (holding that a suspect must be expressly advised of the right to the presence of counsel during interrogation);[10] but see *Sweeney v. United States*, 408 F.2d 121, 124 (9th Cir. 1969) (holding that the general warning that the

[10] See also *Smith*, 419 F.2d at 163 ("Although Smith 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 and that, if he could not afford one, a lawyer could be appointed to represent him prior to any questioning." [Emphasis in original.]).

defendant "was entitled to an attorney" was sufficient under *Miranda* because "[t]he reference to the right to counsel, 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. . . .").

As one commenter has stated, "What is clear . . . is that the intra-circuit conflicts . . . and the overall circuit split beg the Supreme court to speak with clarity on this issue." Bazelon, *Comment: Adding (or Reaffirming) a Temporal Element to the* Miranda *Warning "You Have the Right to an Attorney,"* 90 Marq. L. Rev. 1009, 1024 (2007).

State appellate courts are also split on this issue. In addition to the Michigan Court of Appeals decision in this case, several other state appellate courts have held that *Miranda* requires the police to explicitly inform a suspect of the right to the presence of counsel before and during interrogation. See, e.g., *State v. McNeely*, 162 Idaho 413, 416; 398 P.3d 146 (2017) (concluding that a warning that "'[y]ou have the right to an attorney . . . [t]o help you with—stuff'" was insufficient under *Miranda*); *Coffey v. State*, 435 S.W.3d 834, 841-842 (Tex. App. 2014) (holding that the warning that the defendant had "the right to an attorney" did not comply with *Miranda*); *State v. Williams*, 144 So. 3d 56, 59 (La. App. 2014) (holding that a general "right to an attorney" warning did not satisfy *Miranda*); *State v. Carlson*, 228 Ariz. 343, 346-348; 266 P.3d 369 (Ariz. App. 2011) (holding that *Miranda* warnings must

specifically articulate the right to counsel before and during questioning); and *Commonwealth v. Miranda*, 37 Mass. App. Ct. 939, 939-940; 641 N.E.2d 139 (1994) (holding that the general "right to an attorney" warning was insufficient because the officer "never informed the defendant that he had the right to the *presence of an attorney, either retained or appointed, during any interrogation*." [Emphasis in original]).

Conversely, multiple state appellate courts have held that a general right to counsel warning, without any attached temporal limitations, satisfies *Miranda*. See, e.g., *State v. King*, ___ So. 2d ___, ___ (La. 2020) (Docket No. 2019-KK-01332); 2020 La. LEXIS 665, slip. op. at *8-9 (holding that the general warning that "[y]ou have the right to an attorney" "reasonably conveyed to defendant his rights as required by *Miranda*" because "[t]he unelaborated upon warning given in the present case, which lacked any temporal aspect at all, implied no limitation on the right to counsel."); *Commonwealth v. Lajoie*, 95 Mass. App. Ct. 10, 11, 16; 120 N.E.3d 352 (Mass. App. 2019) (holding that the warning that "[y]ou have the right to an attorney" and that an attorney, if he could not afford one, would be appointed "prior to any questioning" complied with *Miranda*); *Carter v. People*, 398 P.3d 124, 128; 2017 CO 59M (Colo. 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. Martinez*, 372 Ill. App. 3d 750, 754-755; 867 N.E.2d 24 (Ill. App. 2007), quoting *People v. Walton*, 199 Ill. App. 3d 341, 344-345; 556 N.E.2d 892 (Ill. App. 1990) (holding that the general warning that the defendant had a right to an attorney "'was sufficient to imply the right to counsel's presence during questioning'" because "'no restrictions were stated by the police . . . as to how, when, or where defendant might exercise his right "to consult with a lawyer."'"); *State v. Quinn*, 112 Ore. App. 608, 614; 831 P.2d 48 (Or. App. 1992) (holding that the general warning that the defendant had the right to an attorney "could not mislead him into believing that he *would have* the right to counsel at some future time, nor did it suggest that defendant's right to counsel was conditioned upon any event. Instead, the warning effectively informed defendant that his right to counsel attached immediately and unconditionally." [Emphasis in original]); *Eubanks v. State*, 240 Ga. 166, 167-168; 240 S.E.2d 54 (Ga. 1977) (holding that the warning that the defendant had the right to an attorney was sufficient because it was "implicit in this instruction that if the suspect desired an attorney the interrogation would cease until the attorney was present"); and *Criswell v. State*, 84 Nev. 459, 462; 443 P.2d 552 (Nev. 1968) ("While the warnings given in the district attorney's office did not specifically advise the [defendant] that he was entitled to have an attorney present at that moment and during all stages of interrogation, no other reasonable inference could be drawn from the warnings as given.").

There is a reasonable explanation why the federal circuits and the state appellate courts are split regarding whether a general "right to an attorney" warning complies with *Miranda*: the *Miranda* decision does not clearly answer this question.

B. *Miranda* does not clearly address whether a general "right to an attorney" warning is sufficient to convey the right to the presence of counsel before and during the interrogation.

The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.[11] To give force to the Fifth Amendment protection against compelled self-incrimination, this Court established in *Miranda* "'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Powell*, 559 U.S. at 59, quoting *Duckworth*, 492

[11] The Fifth Amendment protection against self-incrimination applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The Michigan Constitution includes the same guarantee against compelled self-incrimination. Mich. Const. 1963, art. 1, § 17. "The wording of the Michigan Constitution granting protection from compelled self-incrimination is identical to the Fifth Amendment protection." *People v. Cheatham*, 453 Mich. 1, 10; 551 N.W.2d 355 (1996). The Michigan Supreme Court has never held that the protection provided by Mich. Const. 1963, art. 1, § 17, exceeds that of the Self-Incrimination Clause of the Fifth Amendment. *People v. Tanner*, 496 Mich. 199, 239, 256; 853 N.W.2d 653 (2014).

U.S. at 201.[12] "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

Miranda held that when a person is in custody, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.[13] But *Miranda* articulated in several different ways what the "right to counsel" portion of the warnings required. At one point, the Court held 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. . . ." *Id.* at 471. But at another point, the Court held that "if the police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation." *Id.* at 474. And in the Court's summary, it stated that the suspect "must be warned prior to any questioning . . . that he has the right to the presence of an attorney,

---

[12] *Miranda* announced a constitutional rule that governs the admissibility of statements made during custodial interrogation in both state and federal courts. *Dickerson v. United States*, 530 U.S. 428, 432, 444 (2000).

[13] Later, in *Michigan v. Mosley*, 423 U.S. 96, 100 n. 6 (1975), this Court reiterated *Miranda*'s requirements by quoting this portion of *Miranda*.

and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. The Court did not explicitly address whether a general warning that the suspect has "the right to an attorney" (along with a right to an appointed attorney) sufficiently conveys to the suspect their rights. But it is clear from *Miranda*'s varying descriptions of the warnings required that no specific language was required to adequately inform a suspect of their rights. In fact, the Court stated that "a fully effective equivalent" of the warnings was sufficient. *Id.* at 476; see also *id.* at 467 ("the accused must be *adequately* and *effectively* apprised of his rights. . . ." [Emphasis added.]).[14]

---

[14] Since *Miranda*, this Court has reiterated multiple times that the warnings need not be given in the exact form described in *Miranda*. *Duckworth*, 492 U.S. at 202. "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *Prysock*, 453 U.S. at 359. This Court "has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." *Id.* (internal quotation marks omitted); see also *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (referring to "*Miranda* warnings . . . or their equivalent"); *Powell*, 559 U.S. at 60 ("The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed."). "In determining whether police officers adequately conveyed the four warnings, . . . reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement.' " *Powell*, 559 U.S. at 60, quoting *Duckworth*, 492 U.S. at 203. Instead, warnings are sufficient if they " 'reasonably "convey to a suspect his rights as required by *Miranda*." ' " *Powell*, 559 U.S. at 60, quoting *Duckworth*, 492 U.S. at 203, quoting *Prysock*, 453 U.S. at 361. This is true if the warnings "touched all of the bases required by *Miranda*." *Duckworth*, 492 U.S. at 203.

C. *Miranda* instructed that the FBI's general "right to an attorney" warnings, which were similar to the warnings given in this case, could be "emulated."

In *Miranda* itself, this Court approved the warnings given by the FBI, which did not explicitly advise suspects of their right to a lawyer during interrogation:

> Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, *that the individual may obtain the services of an attorney of his own choice* and, more recently, that he has a right to free counsel if he is unable to pay. A letter received from the Solicitor General in response to a question from the Bench makes it clear that *the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today*. [*Miranda*, 384 U.S. at 483-484 (emphasis added).]

The *Miranda* Court quoted a letter from the Director of the FBI, which described the warnings FBI agents gave to suspects before an interview:

Warnings should be viewed "in their totality" to determine if they satisfy *Miranda*. *Duckworth*, 492 U.S. at 205.

> "'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F.2d 684 (1965), and *Jackson* v. *U.S.*, 337 F.2d 136 (1964), cert. den. 380 U.S. 935.'" [*Miranda*, 384 U.S. at 484.[15]]

Thus, FBI agents advised suspects of their right to an attorney, but did not explicitly advise them that they had a right to an attorney *during interrogation*. Nonetheless, the *Miranda* Court approved the FBI warnings and stated that they should be emulated: "The practice of the FBI can readily be emulated by state and local enforcement agencies." *Id.* at 486.[16] In other

---

[15] In *Westover v. United States*, 342 F.2d 684, 685 (9th Cir. 1965), rev'd by *Miranda*, 384 U.S. at 495-496, "[t]he F.B.I. agents advised the appellant that he did not have to make a statement; that any statement that he made could be used against him in a court of law; that he had the right to consult an attorney." In *Jackson v. United States*, 119 U.S. App. D.C. 100; 337 F.2d 136, 138 (1964), "[t]he F.B.I. agent immediately advised the appellant 'that he did not have to make any statement, that any statement he did make would be used against him in a court of law, and that he was entitled to an attorney.'"

[16] Forty-three years later during the oral argument in *Powell*, 559 U.S. 50, Justice Ginsburg pointed to *Miranda*'s citation of the FBI warnings in place at the time. *Florida v. Powell* Oral Argument at 6:20, http://www.oyez.org/cases/2000-2009/2009/2009_08_1175 (accessed July 1, 2020). See also *United States v. Warren*, 642 F.3d 182, 185 (3d Cir. 2011) ("[A]s highlighted in questioning by Justice Ginsburg at oral argument, *Miranda* regarded the warning used at that time by the Federal Bureau of

words, a general right to counsel warning given at the outset of an interrogation was sufficient to satisfy *Miranda*.

Justices Clark and Harlan, in their *Miranda* dissents, disagreed with the majority that the warning used by the FBI was broad enough to satisfy the rule created by the majority. In particular, Justice Clark opined that the FBI's "right to counsel" warning was insufficient because it did not expressly inform the suspect that he or she had the right to have counsel present at the interrogation:

> [T]he requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. 484-486, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. . . . As I view the FBI practice, it is not as broad as the one laid down today by the Court. [*Miranda*, 384 U.S. at 500 n. 3 (CLARK, J., dissenting).]

Additionally, Justice Harlan, in his dissent, opined that the FBI practice "falls sensibly short of the Court's [majority's] formalistic rules." *Miranda*, 384 U.S. at 521 (HARLAN, J., dissenting). While Justices Clark and Harlan may have opined that the FBI's general right to counsel warning was not as broad as required by the *Miranda* majority's opinion, the majority clearly

---

Investigation—which did not explicitly state any right to counsel at the time of questioning—as consistent with its holding.").

disagreed, as it approved of the general right to counsel warning given by the FBI.[17]

Despite *Miranda*'s approval of the FBI's general "right to an attorney" warning, multiple federal courts of appeals and state appellate courts have since held that warnings similar to those given by the FBI do not satisfy *Miranda*. This Court should clarify whether *Miranda* meant what it said when it approved the FBI warnings given at the time.

D. This Court's discussions in *Prysock*, *Duckworth*, and *Powell* regarding the significance of temporal limitations in warnings offer clues about, but do not resolve, whether a general "right to an attorney" warning complies with *Miranda*.

This Court's decisions in *Prysock*, 453 U.S. 355, *Duckworth*, 492 U.S. 195, and *Powell*, 559 U.S. 50, provide some guidance for evaluating the sufficiency of "right to an attorney" warnings given to a suspect. Notable among these guidelines is the principle that the warnings cannot convey a temporal limitation on the rights that would mislead the suspect into believing that the rights *Miranda* requires do not apply during the interrogation. In both *Prysock*, 453 U.S. 355,

---

[17] In *Duckworth*, 492 U.S. at 204 n. 7, this Court pointed to the FBI warnings that were in place at the time of *Miranda* and that were endorsed by *Miranda* to support its conclusion that the warnings given in *Duckworth* were also sufficient.

and *Powell*, 559 U.S. 50, this Court upheld *Miranda* warnings that did not include any temporal limitations on the suspect's right to an attorney, appointed or otherwise. In particular, in upholding the warnings in *Prysock*, 453 U.S. at 360-361, this Court found significant that the warnings did not suggest any temporal limitation on the right to the presence of appointed counsel "different from the clearly conveyed rights to a lawyer in general. . . ." In *Duckworth*, 492 U.S. at 203-205, this Court upheld the warnings because they "touched all of the bases required by *Miranda*" and, when viewed in their totality, did not mislead the defendant into thinking that he could not have an appointed attorney during interrogation.

Perhaps most significantly, in *Powell*, 559 U.S. 50, this Court upheld the validity of warnings that informed the defendant that he had the right to a lawyer *before* questioning, but did not explicitly inform the defendant that he had the right to a lawyer *during* questioning. The Court held that the warnings reasonably conveyed to the defendant his right to have an attorney present before and during the interrogation. *Id.* at 62. The Court concluded as follows:

> They [the officers] informed Powell that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview." App. 3. The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second

> statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times. [*Id.*]

In holding that the warnings were adequate, the Court emphasized that attention must be focused on whether the warnings contained a temporal limitation on the right to the presence of counsel that excluded the right to counsel during interrogation. *Id.* at 61. When the defendant in *Powell* pointed out that "most jurisdictions in Florida and across the Nation expressly advise suspects of the right to have counsel present both before and during interrogation," this Court declined to hold that such explicit warnings were required to comply with *Miranda*'s requirements. *Id.* at 63-64. The Court also praised as "exemplary" and "admirably informative" the standard FBI warnings expressly advising the suspect of the right to talk to a lawyer before questioning and have a lawyer present during questioning but "decline[d] to declare its precise formulation necessary to meet *Miranda*'s requirements" as long as they "communicated the same essential message." *Id.* at 64.

In Justice Stevens's dissent in *Powell*,[18] he opined that the warning in *Powell* "entirely omitted an essential element of a suspect's rights" and that "the warning entirely failed to inform [the defendant] of the separate and distinct right 'to have counsel present

[18] Justice Breyer joined the merits analysis of Justice Stevens's dissent.

during any questioning.'" *Id.* at 72, 75-76 (STEVENS, J., dissenting), quoting *Miranda*, 384 U.S. at 470. Justice Ginsburg, writing for the *Powell* majority,[19] responded to the dissent as follows: "We find the warning in this case adequate, however, only because it communicated just what *Miranda* prescribed." *Powell*, 559 U.S. at 62 n. 5. Justice Stevens also discussed in his dissent the very issue presented in this case—whether *Miranda* warnings must expressly inform a suspect of the right to the presence of counsel during interrogation. *Powell*, 559 U.S. at 73 n. 8 (STEVENS, J., dissenting). Justice Stevens recognized that there was a split in the federal circuits regarding this issue, and made the following observation about those decisions:

> [M]ost of the Circuits that have not required express mention of the right to an attorney's presence have approved only general warnings regarding the right to an attorney; that is, warnings which did not specifically mention the right to counsel's presence during interrogation but which also contained no limiting words that might mislead a suspect as to the broad nature of his right to counsel. [*Id.*]

He then opined that, while he was "doubtful" that such general warnings would satisfy *Miranda*, "at least such a general warning does not include the same sort of misleading temporal limitation as in Powell's warning." *Id*. Aside from these musings, this Court left

---

[19] Justice Ginsburg's majority opinion in *Powell* was joined in full by Justices Roberts, Scalia, Kennedy, Thomas, Alito, and Sotomayor.

unanswered the question whether such warnings complied with *Miranda*.

Under *Prysock*, *Duckworth*, and *Powell*, warnings that affix temporal limitations onto the right to counsel can be defective if they mislead the suspect into thinking that they do not have the right to an attorney during the interrogation. But this Court has never addressed whether *Miranda* requires the police to expressly attach a time-directive to the right to counsel warning, i.e., that the police must expressly inform a suspect of the right to counsel before and during interrogation.

E. Conclusion

In this case, the officer gave respondent a general warning that "you have a right to a lawyer" without attaching any temporal limitations. App. 66-68. The Michigan Court of Appeals struck down these warnings, interpreting *Miranda* as requiring the police to unvaryingly and explicitly advise suspects that they have the right to the presence of an attorney both before and during interrogation. See *Mathews*, 324 Mich. App. at 438-441. App. 45-49. This decision squarely conflicts with decisions from other jurisdictions and adds to the erratic and unpredictable jurisprudence that exists nationwide on this point of law. The split in the federal circuits and the state appellate courts remains unresolved regarding whether such a general "right to an attorney" warning, without any attached temporal limitations, complies with *Miranda*. This split in authorities is especially vexing in states like

Michigan, where the Sixth Circuit Court of Appeals has approved general "right to an attorney" warnings but the state appellate court requires specific temporal language. This direct appeal squarely presents the issue that is the subject of the disagreement. This Court should grant certiorari to resolve the confusion and split of authorities regarding whether general warnings such as those given in this case comply with *Miranda* by reasonably conveying that the right to a lawyer includes the presence of a lawyer before and during interrogation.

RELIEF SOUGHT

The petition for writ of certiorari should be granted.

Respectfully submitted,

JESSICA R. COOPER
Counsel of Record
Prosecuting Attorney
Oakland County, Michigan
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-1000
cooperj@oakgov.com

THOMAS R. GRDEN
Chief, Appellate Division

MATTHEW A. FILLMORE
Assistant Prosecuting Attorney

October 21, 2020