

Case No.

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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STATE OF FLORIDA  
*Petitioner,*  
v.  
KEVIN DWAYNE POWELL  
*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF FLORIDA**

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## QUESTIONS PRESENTED

### I

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION, CONFLICTS WITH *MIRANDA v. ARIZONA* AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS.

### II

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## **OPINION BELOW**

The opinion below is reported as *State of Florida v. Kevin Dewayne Powell*, 998 So. 2d 531 (Fla. 2008), and is contained in the appendix at A1-A34. The relevant trial court proceedings and orders are unpublished.

## **JURISDICTION OF THE SUPREME COURT**

The Supreme Court of Florida issued its opinion on Sept. 29, 2008, and issued a revised opinion on Dec. 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL 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 offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Respondent, Kevin Dewayne Powell, was charged by information with felon in possession of a firearm, in violation of section 790.23(1), Florida Statutes (2004), for events occurring on August 10, 2004, in Hillsborough County, Florida.

Tampa Police Department Officer Salvatore Augeri testified that Powell was arrested and taken to the police department, where he was advised of his *Miranda*<sup>1</sup> warnings. The following warnings given to Powell were contained on the Tampa Police Department Consent and Release Form, which was signed by Powell and received into evidence:

You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Officer Augeri testified Powell willingly agreed to talk with them. However, when the prosecutor asked Officer Augeri if Powell made any statements, the defense attorney objected to the

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<sup>1</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

validity of the *Miranda* warnings on the basis the standard form provides that the defendant has the right to have an attorney present before the questioning, but not during. The trial court overruled the objection, stating, "I think it's already been said that they have the right to question, have an attorney present right before any questioning and you can have one appointed for you so I'm going to overrule the objection."

Officer Augeri testified that Powell confessed that he owned the firearm and carried it for protection. The officer also testified they did not threaten Powell or coerce him in any way to give his statement.

Powell testified at trial and admitted he has been convicted of ten prior felonies, as well as one crime involving dishonesty. Powell acknowledged he signed the waiver of his rights and consented to be interviewed. The defense attorney specifically inquired as follows:

DEFENSE ATTORNEY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?

RESPONDENT: Yes.

(V2/T150).

The jury found Respondent guilty of the charge of felon in possession of a firearm, but did not find him to be in actual possession of the firearm. He appealed his convictions and sentences to the Second District Court of Appeal, Florida,

arguing the *Miranda* warnings he was given were deficient pursuant to the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.

In *Powell v. State*, 969 So. 2d 1060 (Fla. Dist. Ct. App. 2007), two judges of a three-judge panel of the Second District Court of Appeal, agreed and reversed his conviction and remanded the case for further proceedings. Judge Kelly, concurring in part and dissenting in part, observed:

Properly framed, the test for reviewing the adequacy of the warnings provided by law enforcement to an individual taken into custody "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981)). In my view, Mr. Powell was not deprived of any information essential to his ability to knowingly waive his Fifth Amendment privilege against self-incrimination, and in particular, his right to have counsel present during questioning. Because the warnings, in their totality, "touched all of the bases required by *Miranda*," I respectfully dissent from the majority opinion to

the extent that it holds otherwise. *See id.* at 203, 205. Although the majority's thoughtful analysis of the issue is not without persuasive force, I believe the reasoning detailed in Judge Canady's opinion in *M.A.B. v. State*, 957 So. 2d 1219 (Fla. 2d DCA 2007), is more in line with the body of precedent the Supreme Court has provided for guidance on this issue, and accordingly, I adopt that reasoning as my own. I fully concur, however, with the majority's conclusion that, in light of this court's evenly divided opinion in *M.A.B.*, it is appropriate for this panel to address the issue of the adequacy of the *Miranda* warnings Mr. Powell received.

The majority however, relied heavily upon an earlier, evenly split *en banc* decision, in *M.A.B. v. State*, 957 So. 2d 1219 (Fla. Dist. Ct. App. 2007), and concluded "Although decisional law has not prescribed talismanic warning language, we conclude the warning given to Mr. Powell did not comply with the dictates of *Miranda* and its progeny. Critical in this analysis is *Miranda's* mandate that a suspect be told that he or she has the right to the presence of an attorney. This is the overarching right from which the right to talk to or consult with an attorney flows. Advising a suspect that he or she has the right "to talk to a lawyer before answering . . . any of our questions"

constitutes a narrower and less functional warning than that required by *Miranda*.” (Footnote in text omitted).<sup>2</sup>

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<sup>2</sup> In *M.A.B. v. State*, 957 So. 2d 1219 (Fla. Dist. Ct. App. 2007), the Florida Second District Court of Appeal, en banc, based upon the same warnings at issue in the instant case, was evenly split on the question of the adequacy of the warnings.

However, Judge Altenbernd of the Florida Second District Court of Appeal aptly observed, in yet another case, that “Miranda warnings are not, as a general rule, read to English majors or philosophers studying theoretical linguistics.” *Mitchell v. State*, 32 Fla. L. Weekly D2958, 2959 (Fla. Dist. Ct. App. 2007). He concluded that the form found to be deficient in *Powell* accomplishes the critical function of *Miranda*:

to communicate by both words and actions to a person of average intelligence (1) that the giving of a statement to the police can have serious legal consequences, (2) that the person is not obligated to provide the statement, (3) that the matter is serious enough that the person may need to consult with a lawyer, and (4) that the State will provide a lawyer upon request and without continuing questioning if the person indicates he wants one and cannot afford one.

The State of Florida sought review in the Supreme Court of Florida. The Supreme Court of Florida accepted jurisdiction, *State v. Powell*, 973 So. 2d 1123 (Fla. 2008), and after briefing and oral argument affirmed the opinion of the district court. The Florida Supreme Court held the *Miranda* warnings informing a defendant he had the right to talk with a lawyer before questioning, and that he could use that right at any time during the interview, were insufficient to inform him of his right to have counsel present during questioning as required by the principals espoused in this Court's decision in *Miranda* and the protections given by the Fifth Amendment. The Florida Supreme Court has misinterpreted this Court's holding in *Miranda* to require a suspect be *expressly* advised of his right to counsel during questioning. *State v. Powell*, 998 So. 2d 531 (Fla. 2008).

## REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the United States Constitution guarantees all individuals the right against compelled self-incrimination. This Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), in considering the privilege against self-incrimination, established certain procedural safeguards to protect individual's rights under the Constitution's Fifth and Fourteenth Amendments before commencing custodial interrogation. This Court stated, “[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.

The prophylactic *Miranda* warnings are not themselves rights protected by the Constitution, but are measures set out to insure that the right against compulsory self-incrimination is protected. Therefore, reviewing courts need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. In the years since the *Miranda* decision, this Court has held *Miranda* did not require of, nor impose upon, law enforcement a rigid and precise formulation of the warnings given a criminal defendant. *California v. Prysock*, 453 U.S. 355 (1981); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)(courts should consider if the language is adequate to safeguard the right not to incriminate oneself).

The inquiry is whether the warnings, such as the following recited in this case:

You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

*reasonably convey* to a suspect his or her rights as required by *Miranda*. However, Federal courts of appeal and state courts of last resort are divided on the issue of whether this Court's holding in *Miranda* require a defendant to be *expressly* advised of his right to counsel during questioning. This Court's resolution of this recurring conflict among the courts of this country is crucial.

## I

**THE DECISION OF THE FLORIDA SUPREME COURT ADDS TO THE RECURRING CONFLICT AMONG STATE AND FEDERAL COURTS REGARDING THE PROPER INTERPRETATION OF THIS COURT'S DECISION IN *MIRANDA* AND ITS PROGENY.**

**A. Courts Holding that *Miranda* Entitles a Suspect to be Expressly Advised of the Right to Have Counsel Present During Custodial Questioning.**

There is a split among the different federal circuits with respect to whether informing a suspect that he has a right to an attorney prior to questioning effectively conveys that counsel may remain during questioning. Depending on the circumstances, federal courts have reached varying conclusions on the necessity for express warnings of the right to have counsel present during interrogation. The Fifth, Sixth, Ninth and Tenth Circuits have held that a suspect is entitled to be expressly informed of the right to have an attorney present during questioning. *United States v. Windsor*, 389 F.2d 530, 533 (5th Cir. 1968); *United States v. Tillman*, 963 F.2d 127, 140-42 (6th Cir. 1992); *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669, 672-74 (10th Cir. 1981).

However, recently in the context of an ADEPA petition, the Fifth Circuit, in *Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), *cert denied*, 548 U.S. 909, 126 S.Ct. 2961, 165 L.Ed.2d 959 (2006), held that warnings which informed a defendant he had the right to presence of counsel prior to questioning but was not explicitly told of right to counsel during questioning, were adequate and not an unreasonable application of federal law requiring federal habeas relief. Although, the court did recognize its prior decision in *Atwell v. United*

*States*, 398 F.2d 507, 510 (5th Cir. 1968), in which it held a suspect must be expressly warned of the right to presence of counsel during interrogation, to be binding precedent for cases on direct appeal.

Notably, this Court denied Bridgers's petition for certiorari review. In doing so, Justices Breyer, Stevens, and Souter issued the following statement, "Although this Court has declined to demand 'rigidity in the form of the required warnings,' *California v. Prysock*, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) (per curiam), the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element." *Bridgers v. Texas*, 532 U.S. 1034 (2001).

Justice Breyer further commented in *Bridgers* that, "Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. And because the police apparently read the warnings from a standard-issue card, I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention." *Id.*

In the eight years since this Court denied Bridgers's petition for certiorari review, the purported problem continues to be a recurring one, and there is clearly a need for a resolution from

this Court to the existing division among the courts across the country.

**B. Courts Holding *Miranda* Warnings Adequate When Suspect is not Specifically Advised of Right to Presence of Counsel During Police Questioning.**

The Second, Fourth, Seventh and Eighth Circuits, have found sufficient *Miranda* warnings that did not specifically advise a suspect of his right to have an attorney present during interrogation. *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982); *United States v. Frankson*, 83 F.3d 79, 81-82 (4th Cir. 1996); *United States v. Caldwell*, 954 F.2d 496, 500-04 (8th Cir. 1992).

The Seventh Circuit, in *United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973), held that a suspect had been Mirandized effectively despite the fact that the warnings he received did not inform him of his right to have an attorney present during questioning. In *Adams*, the court cited to *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), in which the Second Circuit found sufficient the *Miranda* warnings that did not specifically inform a suspect of his right to counsel during questioning, but did inform him of his right to remain silent and to refuse to answer questions, that if he did not have an attorney one would be provided without cost, and that anything he said could be used against him in court. *Adams*, 484 F.2d at 362.

As such, it seems the Seventh Circuit has acknowledged that the failure to expressly tell a suspect that he has the right to have an attorney present during questioning does not render *Miranda* warnings constitutionally deficient when, collectively, the warnings made this right clear. *Id.*

The Fourth Circuit affirmed the district court's holding in *Young v. Warden, Maryland Penitentiary*, 383 F. Supp. 986 (D. Md. 1974), *aff'd*, 532 F.2d 753 (4th Cir. Md. 1976), *cert. denied*, 425 U.S. 980 (1978), which considered the defendant's allegation that he was not informed of his right to have counsel present during interrogation. The officer who gave the *Miranda* warnings testified that the defendant was advised of his right to remain silent; that the defendant could get a lawyer of his own choosing; and that if the defendant could not afford a lawyer, the police were obliged to obtain one for him. *Id.* The officer also testified that he warned the defendant on another occasion that the defendant did not have to say anything further and that the police would get an attorney if the defendant had no means to obtain one.

The court, in dismissing the habeas petition of the defendant, found the defendant had been adequately advised of his right to have counsel before and during any questioning. *Id.* The court reasoned that the defendant was adequately advised of an unqualified right to an attorney at any time, and the failure to expand the warning to

include an express “here and now” was not fatal logically, particularly in view of this Court’s approval in *Miranda* itself of the FBI warnings that omitted these rubric words. *Young*, 383 F. Supp. at 1005. In making its determination the court found, “As to what is necessary effectively to convey the substance of the *Miranda* warnings, several of the courts have taken what appears to this Court to be hypertechnically narrow approaches.” *Id.* at 1001.

The court in *Young* found the opinion by the Second Circuit in *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968), to misconstrue *Miranda*, in which the Second Circuit ruled the warnings given to Fox gave no indication that he was entitled to have an attorney present during questioning, although he was told that he could consult an attorney prior to any questioning. *Young*, 383 F. Supp. at 1001-1002. The *Young* court found the dissent in *Fox* to be persuasive and cited the following from that opinion:

The second deviation found by the majority from their conception of *Miranda* standards is that Fox was only told that ‘he could consult an attorney prior to any question,’ whereas he should have been told that he had ‘the right to the presence of an attorney.’ But if he had the right to consult an attorney ‘prior to any question’, the attorney could have prevented any interrogation without

his being present- or any interrogation at all.

*Young*, 383 F. Supp. at 1002, *citing United States v. Fox*, 403 F.2d at 104-105 (Moore, J., dissenting).

Two years after *Fox*, the Second Circuit addressed the adequacy of *Miranda* warnings in *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), *cert. denied*, 400 U.S. 907 (1970), in which the defendant was told he had the “right to an attorney” and if he was not able to afford an attorney one would be appointed by the court.

Lamia argued the warning did not apprise him of his right to the “presence” of an attorney during questioning. *Id.* However, the Second Circuit held otherwise and found that Lamia had been told without qualification of his right to an attorney and that one would be appointed if he could not afford one. *Id.* In viewing the statement in context, in which Lamia was just informed he did not have to make any statement to the agents, the court found Lamia was effectively warned that he need not make any statement until he had the advice of an attorney. *Lamia*, 429 F.2d at 376-77.

Additionally, in *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996), the Fourth Circuit found the officer’s notification to the defendant that he had a right to an attorney was sufficient, and the officer need not have specified the right to an attorney applied both prior to and during interrogation. The court found the notification

informed the defendant of his immediate right to an attorney with no time restrictions, and that the right “continued forward in time without qualification.” *Id.* at 82. The court stated, “*Miranda* and its progeny simply do not require that police officers provide highly particularized warnings. Such a requirement would pose an onerous burden on police officers to accurately list all possible circumstances in which *Miranda* rights might apply.” *Id.* at 82. The court concluded that satisfaction of *Miranda* does not depend on the precise formulation of the warnings, but on whether the officer reasonably conveyed the general rights enumerated in *Miranda* to the suspect. *Id.*

Several state and federal courts have upheld warnings in which the suspect was advised that he had the right to consult with an attorney prior to any questioning. In *State v. Arnold*, 496 P.2d 919, 922-23 (Or. Ct. App. 1972), the court found such warnings sufficient because it was, “unreasonable to assume ... that [the defendant] would not have requested the [p]resence of an attorney while he answered the police officer’s questions.” See also *United States v. Vanterpool*, 394 F.2d 697, 699 (2d Cir. 1968)(validity of *Miranda* warnings upheld where defendant was advised he had the right to consult with a lawyer, “at this time”); *United States v. Anderson*, 394 F.2d 743, 746-47 (2d Cir. 1968)(defendant advised he had right to attorney at that time was considered sufficient warning pursuant to *Miranda*).

The court in *Young v. Warden, Maryland Penitentiary*, 383 F. Supp. 986 (D. Md. 1974), *aff'd*, 532 F.2d 753 (4th Cir. Md. 1976), *cert. denied*, 425 U.S. 980 (1978), reasoned that:

... a strong argument can be made that the ordinary accused might well be confused as to the meaning of the warning that he was entitled to have an attorney with him during questioning and that one could be appointed for him, but not until he went into court; but that he could answer questions in advance of such appointment.

*Id.* at 1004.

The Supreme Court of Illinois found sufficient *Miranda* warnings that informed a defendant he had a right to remain silent and did not have to give a statement, followed by the advice that he had a right to have counsel present. The court determined that the defendant was clearly told he had a right to have an attorney present at the contemplated interrogation and not some future time. *People v. Prim*, 289 N.E. 2d 601 (Ill. 1972). *See also, People v. Johnson*, 282 N.W. 2d 340 (Mich. App. 1979)(holding advising a defendant he has “a right to have an attorney present” cannot reasonably be understood otherwise than as

informing the defendant of his right to counsel during interrogation and not at some future time).

Additionally, in an unpublished opinion the Eleventh Circuit Court of Appeal, in considering *Miranda*, noted:

Importantly, the Supreme Court has never insisted *Miranda* warnings be given in the exact form described in that decision. In *California v. Prysock*, the Supreme Court stated the rigidity of *Miranda* does not extend “to the precise formulation of the warnings given a criminal defendant,” and “no talismanic incantation [is] required to satisfy its strictures.” 453 U.S. 355, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981). Therefore, the inquiry is simply whether the warnings reasonably “conveyed [to a suspect] his rights as required by *Miranda*.” *Id.* at 2810.

*United States v. Harris*, 151 Fed. Appx. 882, 885 (11th Cir. 2005).

In *Harris* the court further reasoned, “[a] waiver is effective where the ‘totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension.’” *Harris*, 151 Fed. Appx. at 885,

citing, *Moran v. Burbine*, 475 U.S. 412 (1986)(quotation omitted).

### C. The *Miranda* Court

This Court has never explicitly held that to protect a defendant's Fifth Amendment rights, he must be expressly advised that he has the right to the presence of counsel *during* custodial questioning. In fact, in *Miranda*, this Court stated:

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.

*Miranda*, 384 U.S. at 483-84.

Although no reference is made to the right to have counsel present during questioning, this Court stated 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.” *Id.* at 483-84.

The Florida Supreme Court, and other courts in interpreting a defendant’s federal constitutional right to be explicitly informed of his right to have counsel present during custodial questioning, is demanding more from law enforcement than this Court ever envisioned or deemed necessary in *Miranda* and its progeny in order to protect individuals’ Fifth Amendment rights. And thus has eliminated otherwise valid confessions resulting in the unnecessary exclusion of critical evidence, resulting in an even more unreasonable narrowing in the application of the exclusionary rule.

## II

**AND IF SO, DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VIOLATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?**

Furthermore, this *Miranda* assessment of constitutionally mandated rubric contorts reasoning to suggest the warnings given to Respondent in the instant case did not reasonably convey his right to have his attorney present

during questioning. Only based on a strained, literalistic reading, inattentive to context, could the warnings given to Respondent be interpreted as implying that he could talk to a lawyer before questioning and at any time during questioning, but could not have a lawyer present during questioning. While the warnings at issue may not be the most elegant formulation of *Miranda* warnings, the test is reasonable clarity, not elegance. The language in this case meets the reasonable clarity test.

While cognizant that the admission of statements obtained in violation of *Miranda*, are subject to a harmless error analysis, whether analyzed under *Chapman v. California*, 386 U.S. 18 (1967), or *Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), the Court has identified the instant "constitutional error" as "trial error," not a "structural error," subject to "harmless error" analysis. Under either standard, the erroneous opinion of the Supreme Court of Florida, that the admission of Powell's confession was harmless beyond a reasonable doubt, demonstrates the absurd result which followed based upon the court's conclusion that "with the exception of Powell's unwarned statements, the evidence does not establish that Powell committed the crime of possession of a firearm."

From a practical viewpoint, otherwise valid confessions are being suppressed because courts are continually interpreting *Miranda* differently.

The division among the courts is so intense it has created intra-circuit conflict as in *Bridgers*, in which the *Miranda* warnings were found to be inadequate on direct appeal but found to be sufficient to satisfy the standards of a federal habeas petition.

In order to resolve the ongoing conflict in state and federal courts regarding this issue, and provide guidance to law enforcement and those subjected to custodial interrogation, this Court should grant a writ of certiorari in this case and resolve what will continue to be a problem plaguing the application of *Miranda*.

**CONCLUSION**

For the foregoing reasons the writ should be granted.

Respectfully Submitted,

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