OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: FLORIDA, Petitioner, v. KEVIN DEWAYNE POWELL.

CASE NO: No. 08-1175

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, :

Petitioner :

v. : No. 08-1175

KEVIN DEWAYNE POWELL. :

- x

Washington, D.C.

Monday, December 7, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

JOSEPH W. JACQUOT, ESQ., Deputy Attorney General, Tallahassee, Fla.; on behalf of the Petitioner.

DAVID O'NEIL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next today in Case 08-1175, Florida v. Powell.

Mr. Jacquot.

ORAL ARGUMENT OF JOSEPH W. JACQUOT

ON BEHALF OF THE PETITIONER

MR. JACQUOT: Mr. Chief Justice, and may it please the Court:

As courts have recognized, Miranda warnings protect Fifth Amendment rights and promote voluntary confessions, confessions important to seeking truth, solving crimes, and securing justice. Yet the Florida Supreme Court erred in two ways to suppress a voluntary confession relied upon for Kevin Powell's conviction.

First, the Florida court misapplied the analysis. Rather than evaluating the warning under a reasonably conveyed standard for the right to an attorney, the court strictly parsed the warning, seeking certain words in a certain order.

Second, the court incorrectly found the warning to be misleading. The court ignored the totality of the warning. The court overemphasized the order in which the rights were given, and furthermore, the court applied a hypertechnical analysis of the

warning's language.

JUSTICE GINSBURG: But you agree that it -- suppose we accept your position and the case is remanded. The Florida Supreme Court could say: Well, that's very nice, but we have a Florida Constitution with a counterpart to the Fifth Amendment, so we're just going to have the same opinion, but we are putting it under -- squarely under the Florida Constitution.

They could do that?

MR. JACQUOT: Your Honor, the Florida court theoretically could, but the Florida court would have to do that on State grounds, and in this case, they relied on Federal grounds to reach this decision.

JUSTICE GINSBURG: Yes, that's what I meant. They could do it on State grounds.

MR. JACQUOT: Theoretically. But this Court found in Evans v. Arizona that just because of the theoretical possibility that a court could write its opinion differently on State grounds, this Court still had jurisdiction because the original opinion rested on Federal grounds.

JUSTICE SCALIA: Are the Florida Supreme Court elected? Are they elected judges?

MR. JACQUOT: Your Honor --

JUSTICE SCALIA: Are they elected judges,

the Florida Supreme Court?

MR. JACQUOT: Your Honor, the Florida Supreme Court members are first appointed, and then they are subsequently elected.

JUSTICE SCALIA: How -- how long is their term? There's a retention election when?

MR. JACQUOT: Correct. There is a retention election every 4 years.

JUSTICE SCALIA: Every 4 years. And they'd have to run for their retention election on the ticket that "We've expanded Miranda for Florida purposes," right?

MR. JACQUOT: Well, Your Honor, they are elected.

JUSTICE KENNEDY: Has the -- has the Florida Supreme Court ever explicitly interpreted -- what is it? Article I, section 8, of the Florida Constitution more expansively than -- and explicitly so -- and explicitly so, than Miranda?

MR. JACQUOT: No, Your Honor. The Florida Supreme Court has said that the possibility is there, but in its decisions it has found -- particularly in the case before you --

JUSTICE STEVENS: Well, they did it in this case, didn't they? Under your view, they –- their

ruling goes beyond Miranda, and they said that the Florida Constitution requires this result.

MR. JACQUOT: No, Justice --

JUSTICE STEVENS: So they did do it in this very case.

MR. JACQUOT: No, Justice Stevens. The court specifically relied on Federal law. It just got it wrong.

JUSTICE STEVENS: But it also cited the -- the Florida Constitution, did it not?

MR. JACQUOT: It cited the Florida Constitution --

JUSTICE STEVENS: And did it not also say that this was a violation of the Federal -- I mean, of the Florida Constitution?

MR. JACQUOT: Yes, Your Honor, it mentioned the Florida Constitution. However, in those same sentences, it interwove Federal law. It would say: Under the Florida Constitution and according to Miranda. And this Court in Michigan v. Long has found that opinions that interweave State and Federal law are appropriate for this Court's jurisdiction.

JUSTICE SOTOMAYOR: One of your amici -- one of the amici suggested that the Florida courts cannot read the Florida Constitution more expansively than the

Federal requirements. Are you rejecting that proposition?

MR. JACQUOT: We do indeed, Your Honor. The Florida court in Powell read the warning to -- in line with Miranda.

JUSTICE SOTOMAYOR: And it's a different question. One of the amici suggests that the Florida Constitution and Florida case law says that they can't read the Florida Constitution more broadly than it is read under Federal law.

MR. JACQUOT: Well, Your Honor, the past cases have said that the Florida court could, but they haven't. And in this case they particularly did not.

JUSTICE SOTOMAYOR: So this could be a first, if we were to start from the proposition that Justice Ginsburg did?

MR. JACQUOT: Well, Your Honor, under Michigan v. Long the test is to look at the clear face of the opinion, to look for a plain statement that this case relied on adequate -- adequate and independent State grounds, and that is not there.

JUSTICE SOTOMAYOR: Do -- do you see a conflict between the language of our decisions where we often say that Miranda rights have to be clear and those decisions that say that whatever is said has to

reasonably convey the essence of the Miranda warnings?

Is there a difference between those two statements, and which of our cases or statements would control?

MR. JACQUOT: Your Honor, in Miranda the Court did use the terms "clearly inform." However, this Court has gone on in Prysock to use the term "adequately inform" and Duckworth uses the word "reasonably convey." So, yes, although the rights are consistent from Miranda on --

JUSTICE SOTOMAYOR: So you would suggest that if something is not clear and it's ambiguous, that that's enough? Or -- or is there a difference between reasonable and clarity? That has to be read in a certain way; otherwise an ambiguous warning --

MR. JACQUOT: No, Your Honor, I would say that this Court has said that clarity is judged by whether the warnings reasonably convey the rights under Miranda; that's the standard.

JUSTICE GINSBURG: Did Miranda itself -- I mean, it set out the four requirements, but there was a charge -- I mean there was a warning involved, am I not right? Well, didn't they cite the then-FBI warning? It has been improved considerably, but there was an FBI warning cited in Miranda itself, was there not?

MR. JACQUOT: Yes, Justice Ginsburg, and that warning conveyed only the right to attorney. It did not have the specific --

JUSTICE GINSBURG: It also said you have a right to keep silent.

MR. JACQUOT: Correct. But on the right to attorney warning at issue here, it said only that the suspect has the ability to consult counsel. It did not go into the specific -- detail, the explicit nature of spelling out the terms "present" and the terms "during" that the Florida Supreme Court required. And that's the real issue here before the Court, is whether the Florida Supreme Court applied a standard that is significantly different than the standard that this Court has required.

JUSTICE SCALIA: It told them: You are entitled to confer with counsel before answering questions, right?

MR. JACQUOT: What warning, Justice Scalia?

JUSTICE SCALIA: Wasn't that -- wasn't that the warning given -- given in this case? You are entitled to consult counsel before answering questions?

MR. JACQUOT: Yes, the warning in this case said you have the right to talk to a lawyer before answering any of our questions. And, furthermore --

CHIEF JUSTICE ROBERTS: Now, "any" –- just to make sure; you've said two different things. It says "any of our questions," right?

MR. JACQUOT: Well, Mr. Chief Justice, the warning said, "You have the right to talk to a lawyer before answering any of our questions." And then the warning went on to say, "You have the right to use this right at any time during this interview."

We would argue that this expresses all the rights required under Miranda.

JUSTICE BREYER: What about the right in Miranda that says -- in Miranda -- "We hold an individual held for interrogation must be clearly informed that he has the right to consult with the lawyer and to have the lawyer with him during interrogation." Okay?

Where does it say that? Interpret it any way you want. You know, we are used to grand juries. In a grand jury, he can go consult with a lawyer, but he doesn't have the lawyer with him. So, where does it tell him that?

MR. JACQUOT: Well, Your Honor, the standard being “reasonably convey” --

JUSTICE BREYER: Yes.

MR. JACQUOT: -- the warning lays out that

you have the right --

JUSTICE BREYER: I'm just asking you to point to the words that tell him that.

MR. JACQUOT: The right to talk to a lawyer.

JUSTICE BREYER: Don't have you a right to talk to a lawyer at a grand jury?

MR. JACQUOT: Yes, but a -- Your Honor, a grand jury operates very differently than a criminal interrogation.

JUSTICE BREYER: Yes, correct. And so aren't you supposed to tell this person, that unlike a grand jury, you have a right to have the lawyer with you during interrogation? I mean, it isn't as if that was said in passing in Miranda. They wrote eight paragraphs about it. And I just wonder, where does it say in this warning you have the right to have the lawyer with you during the interrogation?

MR. JACQUOT: Well, Justice Breyer, I would have three responses to that. First, under Miranda the FBI warning did not use the terms "present," did not use the terms "with you," and --

JUSTICE BREYER: It doesn't use the word "present," Miranda? It says right here: "We hold" -- it says -- "not just prior to questioning, but also to have counsel present during any questioning." That's

what Miranda says. And then Miranda, after discussing it for five pages, goes on to use the words I just said. You have to tell him he has the right to have counsel with him. So it does use the word "present."

JUSTICE GINSBURG: It -- it used it in determining -- in -- in stating the obligation of the State, but it didn't use those words in setting out the warning that the FBI then gave.

MR. JACQUOT: Correct.

JUSTICE GINSBURG: It said, this is what -- States, this is what your obligation is, what you must say to the defendant is. And I think the Florida court is the same way. It said: You are entitled to the help of a lawyer. Then it spells it out in that opinion, but -- but what it said had to be communicated was not the -- the full range. Just you're entitled, I think it was, to the help of a lawyer.

So there's -- there's a confusion, I think, between what Miranda spells out and many other cases spell out as the State's obligation, what the State must do, and the statement that must be made to the defendant to communicate that.

MR. JACQUOT: Justice Ginsburg, let me be very clear and answer Justice Breyer with the three points I began. Miranda requires that law enforcement

effectively communicate the fact that you can access your right to an attorney present and during an interrogation. However, in the Miranda opinion they approvingly cited the FBI warning that only had the terms -- the generalized warning: Consult with counsel.

Furthermore, the ability to talk to your lawyer, which is at issue in this warning, is the first natural step to getting your attorney.

And, third, as this Court has held in Minnick, that it’s the representation that matters in custodial interrogations --

JUSTICE BREYER: Well, what FBI are we talking about? Because the FBI advice of rights says: "You have the right to have a lawyer with you during questioning." Were they -- and -- and I was taken by the fact, "We hold that an individual must be clearly informed."

And so, is there some other case that says -- or some other FBI statement that they give people that doesn't use the words "with you," that says you don't have to say "with you during," or doesn't have to say "present during"? Was there some other case that said that?

MR. JACQUOT: Your Honor, the current FBI warning does have that. However, there have been

several cases in the circuits that have held generalized warnings to be sufficient, warnings that say only the right to an attorney. And one of the issues --

JUSTICE GINSBURG: The -- the warning that Justice Breyer has just referred to -- that's long after Miranda itself, and it was not the warning that the FBI gave at the time of Miranda.

MR. JACQUOT: Correct, Your Honor. And -- and that is the issue, is what is, first, the standard that courts must currently apply in terms of whether a warning reasonably conveys. That is not the standard of analysis that the Florida court applied.

And secondly, when evaluating that warning, the -- the Florida court incorrectly finds that this warning was misleading. Now --

JUSTICE SOTOMAYOR: I have a difficulty in terms of this argument about burdening law enforcement. This is a preprinted form that the police made up, correct?

MR. JACQUOT: Correct.

JUSTICE SOTOMAYOR: So what's the added burden by making the form absolutely and abundantly clear or conforming the form to the statements in Miranda? What's the cost to the State? They're going to print the form anyway. They are telling their

officers to read from the form anyway. What's the added cost?

MR. JACQUOT: Your Honor, there are three reasons why the Florida Supreme Court's explicit standard is problematic. First, the same standard applies to written warnings as to verbal warnings. So you've had situations where you have a law enforcement officer who doesn't have his card in the field; there's a verbal error; there's an inconsistency in translations. If a suspect is asking questions trying to get clarity, the law enforcement officer is going outside of the card to provide that clarity. Those are situations that may not meet the explicit express advice standard of the Court.

JUSTICE SOTOMAYOR: Well, there is a question about how much the subjective intent of the questioner should be involved in this process or not. There are cases where it appears the plurality of our Court has said it should always be an objective standard, and others where certain members have expressed a question about subjective.

But if we are dealing with a printed form, why wouldn't the intent of the entity at issue be placed in question? Meaning, you could have -- the police here could have chosen to be explicit, but instead they chose

to be -- to obfuscate a little bit and be less explicit. Shouldn't we assume that that's an intent to deceive or perhaps to confuse?

MR. JACQUOT: Absolutely not, Your Honor. The Tampa Police, in having this warning drafted, is attempting to reasonably convey the warning, and there is good public policy reasons why.

JUSTICE SOTOMAYOR: But why? The -- the easy solution is to do what 90 percent of the jurisdictions are doing: Copy Miranda.

MR. JACQUOT: Well, Your Honor, we would claim that this warning falls within the 97 percent cited by amici because it has the word "during" in the warning. The Florida court ignored the totality of the warning. It chose to place the order of the warning's rights in a way that this Court in Prysock and Duckworth has found is not the proper analysis.

Furthermore, this court used a hypertechnical approach. It took the words "before answering any of our questions," turned that into an exclusive statement to say, "only before questioning" and then, as a result of that, attempted to discount the last sentence of the warning. That's the kind of parsing, that's the kind of precise formulation, that's the kind of construing warnings like a will or defining

terms like an easement that this Court has rejected.

JUSTICE GINSBURG: What about the danger that Tampa, if you should prevail, will go back to the old way? Now, it has a clearer form -- whether this form was adequate is one thing. But now, it has the form that the -- like the one the FBI currently uses. If you prevail, then Tampa can go back to what it had before?

MR. JACQUOT: Your Honor, you are correct, in that Tampa has a new form now that does have the words "present" and "during" in a different formulation.

However, there's no indication that they would go back to the other form, for several reasons. One, law enforcement has an incentive to have Miranda rights properly given because they desire there to be confessions and for those confessions to be admissible.

JUSTICE SCALIA: Well, once we say this is properly given, my goodness, here's -- here's an instruction approved specifically by this Court. I mean, I think they should use that, don't you?

I mean, the other one they are going to have to guess about, but this one is approved in a case involving Florida by this Court. So you -- it's pretty attractive to use that one.

MR. JACQUOT: Well, Your Honor, law

enforcement agencies will look to courts for approval of this -- of their warnings. The warning at issue in Powell --

JUSTICE SCALIA: Well, you have to say it's okay. You are arguing that it's perfectly okay, so why do you hesitate when you are asked, you know, could the State go back to doing it? You should say, yes, of course, they -- they might; we don't think it's likely, but they might, and if they did, it's perfectly okay.

Isn't that your position?

MR. JACQUOT: Well, Justice Scalia, as a --

JUSTICE SCALIA: It's not your position?

MR. JACQUOT: Justice Scalia, they theoretically could, because the warning was reasonably conveyed. It was sufficient. However, it’s unlikely they would. Law enforcement agencies modify their warnings when they become issue. So when a litigation begins on a warning, they often modify it at that point.

JUSTICE STEVENS: Let me -- let me ask you one question. Isn't it the case that this particular warning is used in one judicial district, and the warning that was approved in Traylor was used in the rest of the State? And so there is an interest -- the Florida
Supreme Court has, in effect, required the same warning

throughout the State. And if you prevail, there may be one standard warning in one judicial district, and the other districts may continue to use the one they have used in the past. Isn't that right?

MR. JACQUOT: Well, Justice Stevens, it is not true that every jurisdiction in Florida uses this same warning. There are varieties of warnings.

JUSTICE STEVENS: That's true, but if you -- if they all followed the Florida Supreme Court in this case, then they all would use the same warning?

MR. JACQUOT: Well, Justice Stevens, if they were all following the Florida Supreme Court here, they would have to explicitly state certain terms in their warning.

JUSTICE STEVENS: Which most of them do already.

MR. JACQUOT: Well, not necessarily. In --

JUSTICE STEVENS: Not all, but some.

MR. JACQUOT: Some -- some do, some do not, and one of the fears in having an express advice standard is that you will have continuing terms that are required. For instance, the term "before" is lacking in 30 of 90 jurisdictions in Florida.

There is nothing to stop the Florida Supreme Court, if this Court was to allow an express advice

Standard, from then requiring the term "before questioning" in addition. That's the kind of danger in having an analysis that is much stricter, that essentially looks at words that should be in a warning, rather than looking at whether the right to attorney is reasonably conveyed to the suspect.

Mr. Chief Justice, if there are no more questions, I'd like to save the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. O'Neil.

ORAL ARGUMENT OF DAVID O'NEIL

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. O'NEIL: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to go directly to Justice Ginsburg's question about what would happen if this Court affirmed the warnings in this case, and I think Respondent's amici make the argument that it will somehow promote a race to the bottom.

And I think that history and experience are the best answer to that question. Respondent's amici, who have carefully studied this issue, have found that some police officers have attempted to evade Miranda by interrogation techniques, but there is no indication

that police have tried to accomplish that purpose by changing the language of the warnings, and that is not because they couldn't do so. For the last 20 years, Duckworth and Prysock have been on the books, and have made clear that no standard formulation of the warnings is necessary and that variant warnings will be upheld. And if it were true --

JUSTICE SOTOMAYOR: Except that Justice Scalia just pointed out, if we approve the language of this, then -- of this particular warning, it becomes the new sort of floor.

And if we make it the new floor, it -- doesn't it provide an incentive for police departments to move away from the explicit warnings that say “during and” -- “before and during” interrogations; now we're saying -- you know, generalize them more.

MR. O'NEIL: Well, Justice --

JUSTICE SOTOMAYOR: Aren't we encouraging that?

MR. O'NEIL: Justice Sotomayor, I have two responses to that: The first is that this Court upheld the warning in Duckworth, which said, we have no way of providing you an attorney, but one will be provided if and when you go to court.

Now, if you -- if it were true that police

were looking for every way to get around the warnings and if changing the warnings were an effective way to do that, we should have seen every jurisdiction adopt those warnings.

In fact, of the 900 warnings that are included in the survey that Respondent relies heavily on, only 5 have that formulation. Second, four circuit courts have held --

JUSTICE SOTOMAYOR: How many after Duckworth? Do you know?

MR. O'NEIL: I don't -- it doesn't indicate when they were adopted, but I think it's fair to say that, if police did have that incentive, that we would have seen at least some jurisdictions adopt that warning.

JUSTICE SOTOMAYOR: So we don't know how many --

JUSTICE KENNEDY: But your case has to be that, if we adopt the Petitioner's petition, it's perfectly fine for every jurisdiction in the country to use this warning, right?

MR. O'NEIL: We agree that this warning is adequate, and our position is --

JUSTICE KENNEDY: And every jurisdiction in the country can use it, so we can -- we can talk about

whether or not it's adequate.

MR. O'NEIL: They can, and we think that's unlikely, and if the concern here is that it will destroy the uniformity that the Federal government thinks is a good thing as a matter of policy, we think that that concern is simply not warranted. But, yes, we do agree that these warnings adequately convey the substance --

JUSTICE KENNEDY: Excuse me. You think lack of uniformity is a good idea?

MR. O'NEIL: No, we think that affirming these warnings will not disrupt the uniformity that seems to be in place around the country, and -- for exactly the reason that I said, Justice Kennedy, because Justice Sotomayor mentioned general right to counsel warnings, that if we upheld a general right to counsel warning, that jurisdictions would begin to drop the more specific language that's contained, for example, in the FBI form. Well --

CHIEF JUSTICE ROBERTS: Where -- where is that? Is that set forth in the -- in the briefs? The FBI form? Where -- where is that set forth?

MR. O'NEIL: I don't believe the FBI form is set out in full. It's on pages 383 and 384 of Miranda, and the description of the court's discussion is on page

29 of our brief.

And I think, Justice Sotomayor, it's significant that four circuit courts have upheld general right to counsel warnings of the kind that were in the FBI warnings in 1966. But the police departments in those jurisdictions have not abandoned the more specific language that is contained in the FBI formulation. In New York City, the Second Circuit has held in Lamia --

JUSTICE SOTOMAYOR: What -- how do we deal with the fact that, if the purpose of Miranda is to give clear warnings, and your adversary says -- not your adversary -- your co-counsel -- Petitioner's counsel says that means -- "clear" means does it reasonably convey?

We've got a split of circuit courts and State courts on whether this reasonably conveys or not. Shouldn't that be enough of an ambiguity for us to conclude it can't reasonably convey, if there's this many courts holding that it doesn't?

MR. O'NEIL: No, Justice Sotomayor. This is not like a qualified immunity inquiry, where grounds for debate among reasonable jurists would invalidate the warning.

JUSTICE SOTOMAYOR: Are you calling the Florida State Supreme Court majority unreasonable

jurists?

MR. O'NEIL: No, I think -- I think the problem with a standard that permits of no ambiguity is that, as Florida just said, this standard will apply, not just to printed forms -- and it is easy enough to create a printed form in advance that includes more specific language -- but it will also apply to inadvertent departures from the standard forms as a result of mistake.

JUSTICE SOTOMAYOR: What happens now is that we are dealing with the exception rather than the rule, and -- but this was the rule, meaning this was the form that they were reading. And if it has some significant ambiguity in it, sufficient for at least one court to say it wasn't sufficiently clear, it wasn't explicit enough, should we worry about the exception as an exception?

MR. O'NEIL: Well, I think -- I think the exception is -- needs to be captured within the rule that this Court adopts as -- as the standard.

I -- I also think that it -- it is -- it's simply not the case that if this Court, as I said, adopts a standard that permits a less explicit, less precise warning than the FBI wants --

JUSTICE STEVENS: Mr. O'Neil, isn't one of

the problems here that Florida had two different printed forms before this case arose, and that Florida Supreme Court has said they'll all have the same one hereafter?

MR. O'NEIL: Justice Stevens, I'm not aware that Florida had two printed forms. I mean, each jurisdiction used its own form, and this was the form that was in place --

JUSTICE STEVENS: So at least two of them?

MR. O'NEIL: Well, every jurisdiction adopts a slightly--

JUSTICE STEVENS: And isn't it -- isn't it wiser generally to have the same form used throughout the State?

MR. O'NEIL: It is. The government believes it is wiser to do that, and the Federal law enforcement agencies do that because it avoids --

JUSTICE SCALIA: And the Constitution requires it, right?

MR. O'NEIL: Well, no, the Constitution does not require the precise words of Miranda.

JUSTICE SCALIA: Well, Miranda supposedly says the Constitution requires this warning, and if the warning must be in a standard form that everybody uses, the Constitution must require a standard form that

everybody uses.

MR. O'NEIL: Nowhere in Miranda does it say that a -- a standard form is necessary, and this Court summarily rejected exactly that argument.

JUSTICE BREYER: Excuse me. Can you just devote one minute before you finish --

MR. O'NEIL: Yes.

JUSTICE BREYER: -- to the question of why these are adequate? If you remember my question, I tried to explain why I thought they might not be adequate.

MR. O'NEIL: Justice Breyer, these warnings state three rights: The right --

JUSTICE BREYER: But there were four. One is to have during, in the presence of, the right to have a lawyer during the interrogation, in the presence of, with him at the time.

MR. O'NEIL: Absolutely.

JUSTICE BREYER: Now, that's one of the four. That's one of the things they devote two pages to Miranda, and they repeat it when they summarize what you have to say. I just want to know where in this statement does it say that?

MR. O'NEIL: Justice Breyer, there is no reason to think that a suspect who hears that he can

talk to an attorney before answering any questions and during this interview would infer the unstated restriction that he can talk to an attorney but only by phone or only remotely --

JUSTICE BREYER: Really? I guess anybody who has had prior experience with the law, as this man might have done, might be familiar with a grand jury proceeding.

MR. O'NEIL: But for the same reason we don't ask whether the suspect has sufficient knowledge to supplement the information he needs.

JUSTICE BREYER: No, no, no. But I tell you: Here's your right to talk to a lawyer before questioning.

MR. O'NEIL: Well, it --

JUSTICE BREYER: Now, you then repeat, you can assert that right whenever you want, to talk to him before questioning.

MR. O'NEIL: Well --

JUSTICE BREYER: And my question is, how does that tell him he has a right to have a lawyer with him during questioning, that the questioning he has a right to have take place from beginning to end in the presence of a lawyer, a matter that the Miranda Court repeated three times in the summary and wrote eight

full paragraphs about why that was important?

MR. O'NEIL: Well, first, as Justice Ginsburg noted, Miranda went out of its way to -- to specifically approve an FBI warning that said, quote --

JUSTICE BREYER: Where does it say it approves that?

MR. O'NEIL: It said this pattern of warnings is consistent with the decision that we announced today. And I think --

JUSTICE BREYER: It wasn't though, actually.

MR. O'NEIL: -- it couldn't have been clearer.

JUSTICE BREYER: It isn't -- it isn't consistent with it. That's interesting.

MR. O'NEIL: Well, that argument was made by Justice Clark in dissent, and the Court did not agree with that. And I think it is clear that the Court thought that --

JUSTICE BREYER: They didn't say anything about during.

MR. O'NEIL: Well, no, they didn't.

JUSTICE BREYER: So anyway -- then they don't need to mention "during" at all because if that's right, the FBI warning at that time, J. Edgar Hoover's letter or whatever it was, just talked about telling

you, you have a right to counsel. It doesn't say anything about “during.”

MR. O'NEIL: Well, I think that's exactly the point, that you don't assume that a suspect is only capable of understanding --

JUSTICE BREYER: So then you think that, in fact, going by that warning, that there is no constitutional right to have them say a word about during. This would be okay if they said nothing at all about it.

MR. O'NEIL: I think a -- a -- advice of the right to counsel or, as the Court put it in a different place in the Miranda opinion, the right to obtain the services of an attorney of his choice, that would be constitutionally adequate. The Federal Government does not use those warnings because they create a list -- a risk of litigation.

We think that's the correct reading of Miranda, but that, of course, is not guarantee that other courts would read it that way. And, indeed, 2 years after Miranda, the Fifth Circuit had gone the other way and decided that, in fact, a right to counsel warning is not sufficient.

But, Justice Breyer, I think that the answer to how these warnings convey presence is that a suspect

is not going to draw the highly counterintuitive assumption that if he is told that he can have an attorney not only before answering any questions but during this interview, that he is going to need to walk in and out of the room each time he wants to talk to an attorney. It may --

JUSTICE SOTOMAYOR: Just so I get the bottom line -- if all this warning had said was, you have a right to a lawyer before questioning --

MR. O'NEIL: I'm sorry.

JUSTICE SOTOMAYOR: You have a right to a lawyer before questioning --

MR. O'NEIL: Well, we think that --

JUSTICE SOTOMAYOR: -- it would be your position that standing alone that would be enough?

MR. O'NEIL: We think that -- that -- that was the warning that this Court confronted in Bridgers, and we think that would be a much closer and more difficult case, but we think that, yes, we -- we agree with the decision cited in our brief that a suspect would not assume that that attorney will become unavailable the minute the first question is asked. We think that --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. O'NEIL: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Brueckheimer.

ORAL ARGUMENT OF DEBORAH K. BRUECKHEIMER

ON BEHALF OF THE RESPONDENT

MS. BRUECKHEIMER: Mr. Chief Justice, and may it please the Court:

Clearly, Miranda could not have been more specific when it said 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. That's --

CHIEF JUSTICE ROBERTS: So the --

MS. BRUECKHEIMER: -- at 471.

CHIEF JUSTICE ROBERTS: So the FBI warning that was specifically approved in Miranda was inconsistent with Miranda?

MS. BRUECKHEIMER: I disagree with that representation that it was approved of. What this Court said --

CHIEF JUSTICE ROBERTS: It says consistent -- consistent with the procedure which we delineate today.

MS. BRUECKHEIMER: Consistent with is not the same. At -- in the few pages beforehand, the Court specifically set forth these Miranda warnings in what it required, including the presence of counsel.

JUSTICE KENNEDY: Could you tell us where that is? I think you mean page 479, but I'm not sure.

MS. BRUECKHEIMER: Right. Correct, at page 479, this Court set forth the warnings that it wants to have read to every --

JUSTICE SCALIA: It set forth the substance of what had to be conveyed --

MS. BRUECKHEIMER: Right.

JUSTICE SCALIA: -- but it set forth, on page 484, its belief that the FBI warning adequately conveyed that substance. It said this warning is consistent with our opinion today. And -- and that warning said --

MS. BRUECKHEIMER: Yes, I have the warning. Yes.

JUSTICE SCALIA: You want to read it?

MS. BRUECKHEIMER: Yes, I can read it.

JUSTICE SCALIA: Good.

MS. BRUECKHEIMER: The -- the warning says that -- let's see -- at the -- at the outset of the interview that he is not required to make a statement, that any statement may be used against him in court, and that the individual may obtain the services of an attorney of his own choice. And, more recently, that he has the right to free counsel.

However, the purpose --

JUSTICE SCALIA: Well, I mean, that's so much worse than -- than --

MS. BRUECKHEIMER: Yes, and the purpose of --

JUSTICE SCALIA: -- what you have here.

MS. BRUECKHEIMER: -- of saying this was because the question was, is this going to be burdensome to the government, to the police to issue these warden -- these warnings? And the very beginning of that sentence, right before they said it, was they -- that the FBI has compiled --

JUSTICE KENNEDY: What page are you on now?

MS. BRUECKHEIMER: We are still on 483. We are in the sentence right above it. Over the years the FBI has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person at the outset of the interview that he is not required to make a statement -- and then I just read it.

So, the -- that was to counteract whether it was too burdensome. Not that they were approving --

CHIEF JUSTICE ROBERTS: Well, maybe, but it says -- it says the -- what the FBI -- the pattern of warning -- well, let me make sure I get it exact. "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 we delineate today."

And the FBI warning says nothing about presence or with -- or with counsel with him.

MS. BRUECKHEIMER: Consistent with but not identical.

CHIEF JUSTICE ROBERTS: Well, okay. I'll take "consistent with." That means that it complies with the rule in Miranda.

MS. BRUECKHEIMER: No, I -- in all due respect, Mr. Chief Justice, I believe that this Court went a little further and required the presence of counsel. And then --

CHIEF JUSTICE ROBERTS: Then how is the FBI warning consistent with the procedure the Court delineated in Miranda?

MS. BRUECKHEIMER: It doesn't say that the -- the attorney has to be present with --

CHIEF JUSTICE ROBERTS: No, I said how is it --

MS. BRUECKHEIMER: How is it consistent?

CHIEF JUSTICE ROBERTS: Yes.

MS. BRUECKHEIMER: It -- because it -- it gave three of the basic -- you know, you have the right

to remain silent, you have the right to an attorney, the services of an attorney; and that you have the right to -- or any -- any statement you make will be used against you. So they just didn't go far enough in the FBI warnings.

CHIEF JUSTICE ROBERTS: So I would say that it's not consistent with Miranda.

MS. BRUECKHEIMER: It's -- it's consistent to a point, but it --

CHIEF JUSTICE ROBERTS: Okay.

MS. BRUECKHEIMER: And just as if -- and -- and they have added in, more recently, the right to free counsel.

JUSTICE STEVENS: Well, while you're looking at whether it would be an undue burden on law enforcement, it was -- it has a burden that's consistent with the ones that Miranda required expressly.

MS. BRUECKHEIMER: I'm sorry. The --

JUSTICE STEVENS: I say when you were inquiring, as you were at that part of the opinion, into how burdensome it would be on law enforcement to give these warnings --

MS. BRUECKHEIMER: Right.

JUSTICE STEVENS: -- you are saying the burden would be consistent under the new warnings with

those previously given by the FBI.

MS. BRUECKHEIMER: Correct. It's -- it's not any more burdensome by adding in the -- an additional requirement.

CHIEF JUSTICE ROBERTS: What it says is that the respect for the rights of the individual followed in the FBI is consistent with.

MS. BRUECKHEIMER: Uh-huh. The rights of the individual, right.

And the -- the Miranda Court just made sure that they've added in the additional requirement, and the FBI did change their warnings, and has continued to modify and change their warnings to be consistent with Miranda.

JUSTICE SOTOMAYOR: The bottom line in my mind -- the question is, whether these warnings are substantively or otherwise different than the FBI warnings that some believe were approved in Miranda. Are these equivalent?

MS. BRUECKHEIMER: I don't -- I believe that -- that requiring the presence of counsel during the interrogation goes a little bit -- a lot further. And it -- it is not equivalent to the FBI.

JUSTICE SOTOMAYOR: I don't disagree with you, but that wasn't my question. My question was, did

the FBI warning at issue or --

MS. BRUECKHEIMER: At issue in Miranda?

JUSTICE SOTOMAYOR: Not at issue because it wasn't at issue.

MS. BRUECKHEIMER: It wasn't.

JUSTICE SOTOMAYOR: But that was reviewed and approved in Miranda, did it give that --

MS. BRUECKHEIMER: No, it did not. And that why -- and that's why I don't believe the Court in Miranda ever said we -- it's consistent with, but they never said, we approve. They never said, we are adopting that language.

JUSTICE BREYER: Is -- is there since then -- I mean, as I read it now I see that, as I said, it seems very clear that they intend you to have to say that the counsel has to be -- is present with you. Present, okay? Now the FBI warnings, which they did say is consistent, don't say that.

MS. BRUECKHEIMER: No, they don't.

JUSTICE BREYER: They don't.

MS. BRUECKHEIMER: They do not.

JUSTICE BREYER: Okay. Now, since the time of Miranda, has this Court ever talked about that? Has there been any lower court or have there been -- has the practice of the departments to any great extent been

such that they stopped talking, or did not talk, or never spoke about a right to have a counsel with you during -- during -- “during” just dropped out. They just said forget about “during.” It wasn't --

MS. BRUECKHEIMER: No, the case law has always referred to both, both by this Court and then -- and then the circuit courts. And the --

JUSTICE SCALIA: This Court said in Miranda --

JUSTICE BREYER: This Court has referred to “during.”

JUSTICE SCALIA: Yes.

MS. BRUECKHEIMER: Has -- has -- in many opinions, it talked about before interrogation and during interrogation the right to have counsel present.

JUSTICE SCALIA: But I must say I -- this is –- this is angels dancing on the head of a pin. You want us to believe that your client, who decided to talk, even though he was told he could consult an attorney before any question was asked, and he could consult an attorney at any time during the interview, and he went ahead and -- and confessed -- you are saying, oh, if he had only known. Oh, if I knew that I could have an attorney present during the interview, well, that would have been a different kettle of fish

and I would never have confessed.

I mean, doesn't that seem to you quite fantastic?

MS. BRUECKHEIMER: No, Your Honor, especially not with a reasonable suspect that's being questioned.

There -- there -- we are not talking about reasonable lawyers or reasonable justices; we are talking about --

JUSTICE GINSBURG: Well, how about the reasonable defendant in this very case? Powell's lawyer questioned him and asked him: "You waived the right to have an attorney present during your questioning by the detectives?"

Answer: "Yes."

This is at appendix page 80. So, apparently, counsel understood the warning to have conveyed the right to have an attorney present during questioning by the -- by the detectives. Counsel understood that?

MS. BRUECKHEIMER: No, counsel --

JUSTICE GINSBURG: Did she ever --

MS. BRUECKHEIMER: -- never -- never asked him did you knowingly waive; did you intelligently waive? She was trying to set up the fact that the

client had waived his rights before he made a statement in order to get to his -- his argument that his statements were coerced.

But she was never giving up the argument that she had made previously to that -- that testimony that -- that the waiver was knowing and intelligent. She just had already lost that argument in front of the judge, and now she was addressing the jury.

JUSTICE GINSBURG: Was she asking her client a legal question? You waived the right to have an attorney present during your questioning by detectives, is that what you are telling the jury?

MS. BRUECKHEIMER: Yes. Well, he did waive his rights, but he didn't knowingly and intelligently waive his rights, and he did sign the form. Because that was the next question: Did you sign the form?

JUSTICE ALITO: Do you think that the average person hearing this warning would envision the sort of procedure that occurs before a grand jury?

MS. BRUECKHEIMER: I don't --

JUSTICE ALITO: That's what it would be taken to mean?

MS. BRUECKHEIMER: I -- I don't think most -- most people have been in front of a grand jury, so I don't envision that they would have that kind

of reaction.

JUSTICE GINSBURG: But do --

MS. BRUECKHEIMER: I think they would focus on the “before.”

JUSTICE GINSBURG: Do you think that a suspect would think, now, I'm in this custodial room, they want me to stay put, that they’re going to have me hopping in and out of the room to talk to my lawyer? Wouldn't the assumption be, I'm stuck in this room, they are holding me here, and if I have a right to talk to a lawyer, it's got to be there and not my walking in and out of the holding room.

MS. BRUECKHEIMER: And a right -- but they never told him that he’d have the ability to talk to a lawyer during the interrogation.

CHIEF JUSTICE ROBERTS: Is there -- is there any -- I'm not sure this is pertinent -- but is there any malevolent reason Tampa police would adopt this warning? I mean, someone says, well, here's what the FBI uses. And they say, well, I tell you what, if we just say you have a right to an attorney before answering any questions and then later say you can exercise this right any time, maybe we'll be able to trick some people who don't think they can actually have the lawyer there. In other words was this just --

MS. BRUECKHEIMER: It's -- it's hard for us to be able to delve into the minds of the Tampa Police Department and the people who create these forms. However, in the Thompson case, which is before you in the briefs, in 1984, they had it right. They said you have the right to talk to an attorney beforehand and to the presence of an attorney during interrogation. This was in a death case, and there was something wrong with the right to free counsel. They either didn't give it to them or not.

So why they went and changed the part to the right to an attorney before -- before the questioning, and then during questioning, we don't know.

CHIEF JUSTICE ROBERTS: So -- and you can't think of any bad reason they might have done it.

MS. BRUECKHEIMER: Well, Professor Leo could, and there is a memo he attaches at the end of his appendix in the amicus brief, but I -- I would just say that it doesn't really matter what the motives are, and that it all depends on how the defendant or the person in custody is -- is perceiving these warnings and whether he's getting the information he or she needs to be --

JUSTICE GINSBURG: What do you do with the -- the Court’s decisions in Prysock and Duckworth that

dealt with the right to appointed counsel and the suspect was not explicitly told that he had a right to appointed counsel at the pre-arraignment stage. It said something about a court would give you --

MS. BRUECKHEIMER: Right. The -- the language in those cases had something to do with -- you know, the idea being that, it was almost informational -- too much information, additional information as to when you're going to get your counsel. But the four core --

JUSTICE GINSBURG: You wouldn't have to have any additional information; you just tell them, you have a right to have a -- have counsel now. That would be fewer words.

MS. BRUECKHEIMER: Well, they -- in Prysock it was a matter of the order, but in Duckworth it was, we can't get one for you at this moment kind of thing. And no State is obligated -- or agency -- to provide counsel on demand.

JUSTICE GINSBURG: Didn't one of them say "court," and the suspect was not in court at the time?

MS. BRUECKHEIMER: Was not in court?

JUSTICE GINSBURG: Yes. That the court will appoint counsel for you.

MS. BRUECKHEIMER: Right. And that would be

sometime in the future. But -- but they did -- but they did tell them that if you're going -- if you're going to be questioned, you have the right to counsel with you at that time. And that was the important thing. Even if we had to wait, they couldn't question him until he had his attorney with him.

JUSTICE ALITO: If this warning is read the way we might -- lawyers might read a statute or a contract or something like that, then I don't know why saying, "You have the right to remain silent," isn't potentially misleading. It says you have the right to remain silent. But once you break your silence, there is nothing in there that says you have the right to resume your silence.

MS. BRUECKHEIMER: No.

JUSTICE ALITO: Would you agree with that?

MS. BRUECKHEIMER: Except for that -- that catch-all phrase that they used at the bottom, which is you have the right to use any of these at any time.

JUSTICE ALITO: Do you think that is defective, too?

MS. BRUECKHEIMER: Well, I think that it -- it's probably okay as far as reinforcing the right to remain silent and informing him that any of your answers can be used against you, but I don't think it salvages a

right that's not there, which is the right to presence during interrogation.

JUSTICE ALITO: So once you break your -- you have the right to remain silent, but once you break that right, the fact that you have that right to use that right to remain silent in the future doesn't mean you can stop answering questions.

MS. BRUECKHEIMER: Well, the -- the catch-all phrase might inform them that they could stop, but, clearly, if they had the right to presence of counsel with them, that might --

JUSTICE KENNEDY: We could write that down. It could be the next case.

(Laughter.)

MS. BRUECKHEIMER: Right. And I do -- I also contest the language that the opposing counsel uses that says that we have somehow locked in everybody with -- with what the -- what the decision below said.

The decision below held that, and I quote at 541, "We hold that Powell should have been clearly informed of his right to the presence of counsel during the custodial interrogation." It's not magic language. It's not so -- so written in stone that -- it's not explicit language.

There's -- there's -- this language follows

what this -- this Court has said. The reasonable language, the clearly informed language. It isn't locking everyone into these exact words down the line. And there are hundreds of ways that this could be said. So -- and then the court noted that the catch-all phrase did not effectively convey to Mr. Powell his rights to presence before and during and that the last sentence could not effectively convey a right that he was never told he had.

As far as whether or not this case should even be here, even though the Florida Constitution and the Florida court has gone along the same road, traveled a parallel road with this Court, and it hasn't seen a need to deviate, they -- they may see a need to deviate here, should this Court disagree with what --

JUSTICE GINSBURG: Well, they are -- they are free to do that. I mean, politically, they might consider it risky, but if we say that the charge was good enough, the Florida court could say, but it's not good enough under our Constitution.

MS. BRUECKHEIMER: Correct. And -- and I believe they would.

JUSTICE KENNEDY: Well, I'm -- I'm not sure that's the case. The remand in Long was only to address another issue. The Long Court took its determination as

being binding on the issue that was before the Court in Long --

MS. BRUECKHEIMER: Well --

JUSTICE KENNEDY: -- in that case.

MS. BRUECKHEIMER: -- the Florida Supreme Court must have referred to its constitutional provision, Article I, section 9, at least five times.

JUSTICE KENNEDY: And in each time, it said that it was by extension from Miranda. It always linked it, and that was the question that was presented in the State court --

MS. BRUECKHEIMER: Right. And the --

JUSTICE KENNEDY: -- that it certified.

MS. BRUECKHEIMER: It's almost like Miranda is being used as a generic concept for warnings -- you know, we're complying with Miranda --

JUSTICE KENNEDY: That's the whole reason we have jurisdiction, so that Miranda will not be confused, and so that it won't be a hazard on the landscape when people say "Miranda" and they mean something else.

MS. BRUECKHEIMER: Right, but -- you know --

JUSTICE KENNEDY: And it's not at all clear that the Washington -- that the Florida Supreme Court could in this case go back to the Constitution. That's -- you can't get that out of Long.

MS. BRUECKHEIMER: You can't go lower than the Federal Constitution, but they can give more rights.

JUSTICE KENNEDY: It's -- maybe in some other case. Not necessarily in this one, because Long leads to -- to the contrary.

MS. BRUECKHEIMER: Well, in -- in Traylor, which is the court that -- it's the case that the -- the Florida Supreme Court and the decision below relied heavily upon, they said that we are the ceiling and the court is the bottom, and --

JUSTICE KENNEDY: But you have no case in which the Florida Supreme Court has explicitly said that we have a warning that is more strict, more rigorous than what Miranda requires? You have no case?

MS. BRUECKHEIMER: No, and they -- they didn't feel like they had to -- to deviate, because they felt like their definition of presence of counsel, which was the right to consult with an attorney before and the right to have counsel present during the interrogation, was consistent with the holdings in Miranda. So they didn't feel the need to deviate.

But they did say that that is our definition as we set forth in -- in Traylor, and that is --

JUSTICE SCALIA: I'm curious: When this goes back to them, do you think they can deviate? They

were answering a certified question, which was simply whether this -- this warning complied with Miranda. That was the only certified question.

So when it goes back, I assume they, having said no, will now have to say yes. Can they go on and say: Oh, and by the way, even though it doesn't violate Miranda, we think it violates the State Constitution?

MS. BRUECKHEIMER: I believe they can, because as long as they are not going below what this Court mandates --

JUSTICE SCALIA: Well, but that --

MS. BRUECKHEIMER: -- if they provide more protections.

JUSTICE SCALIA: But that wasn't the question asked of them. The only question asked of them was whether it complied with Miranda.

MS. BRUECKHEIMER: Right. And they --

JUSTICE STEVENS: That's really not -- that's really not quite accurate, because they used the term "Miranda warnings" generically --

MS. BRUECKHEIMER: Generically, and --

JUSTICE STEVENS: -- as opposed to a category of warnings which are required by both the Federal Constitution and the State constitution, and they said it violated the State constitution.

MS. BRUECKHEIMER: Yes, they did. And they did -- they did say we have our standard under Traylor, that we defined the right to the presence of counsel or to the help of counsel as requiring presence during, as --

JUSTICE KENNEDY: Well, except the words that it quoted from the lower court opinion -- that is, we are talking about the -- the Fifth Amendment, and by extension, Article I, section 9.

MS. BRUECKHEIMER: Right.

JUSTICE KENNEDY: So that seems to me to indicate that it’s incorporating, not going further.

MS. BRUECKHEIMER: Well, if -- if --

JUSTICE STEVENS: That's not in the question they -- they took.

MS. BRUECKHEIMER: No. No, that's not in the question.

But there is a way to -- you know, they repeated all along the way, Article I, section 9. They kept repeating it. They didn't have to. If they were just going to say, oh, by the way, our Constitution goes along with this, they could have said it in passing. They could have also said that we -- we choose not to interpret this other right.

JUSTICE KENNEDY: I think the opposite. I

think the repeated linkage shows that they think they are the same.

MS. BRUECKHEIMER: Well -- and, again, I would say that they -- they agree that we are traveling along the same road, but they have -- they have -- they are stressing the fact that they have set a line in the sand as far as what they're interpreting the right to presence --

JUSTICE GINSBURG: I think --

JUSTICE SCALIA: Well, the question asked: Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate Miranda warnings?

Okay? That's the question. They have a footnote after Miranda, which reads, “Miranda v. Arizona, 384 U.S. 436.” I take that to mean that the question is whether this warning violated Miranda.

MS. BRUECKHEIMER: And, of course, if they did violate the baseline, the minimum standard set forth in Miranda --

JUSTICE SCALIA: Right.

MS. BRUECKHEIMER: -- then it would be unconstitutional.

JUSTICE SCALIA: Absolutely.

MS. BRUECKHEIMER: So -- which is why

Traylor and the Florida constitution kept making -- because they didn't have to really get to what the bottom or the baseline or the minimum standard was, as long as Florida had set forth a standard.

JUSTICE SCALIA: Well, that's true, but -- but if they -- if they felt the authority to go beyond Miranda, wouldn't they have had to say no to this question, if we find that way, and then go on to say: But it does violate our own? And that's beyond the question that they -- that they -- that was certified to them.

MS. BRUECKHEIMER: And I believe the idea that they didn't think it was deviating from the Miranda case.

JUSTICE SCALIA: Right. I --

MS. BRUECKHEIMER: But if this Court finds that it does, then they -- they will probably -- and I feel confident that they would fall back on the constitution -- of the Florida constitution.

JUSTICE GINSBURG: But they did say over and over again -- one was the certified question; another was the issue before the court is whether the failure to provide express advice of the right to the presence of counsel during custodial interrogation violates the principles espoused in Miranda, with the citation.

I mean, they said many, many times that the question was -- what did Miranda mean was the issue, not what -- what did Florida's extension of Miranda.

MS. BRUECKHEIMER: Well, they do have a section in looking at, you know, other circuit courts in the Federal system, and all -- what our Florida courts are doing, and -- which is when they get into the concept of -- well, they start out talking about Traylor and our constitution at the beginning, and they -- they repeat it at the end because they believe it is consistent with. They believe it is following along.

But they never say that -- that our constitution isn't insignificant or that it's not important. If they did, they wouldn't have felt the need to cite Traylor.

JUSTICE GINSBURG: I think you would have had a much weightier argument if it hadn't been for Michigan v. Long. If you could have said --

MS. BRUECKHEIMER: It -- it would have been nice.

(Laughter.)

JUSTICE GINSBURG: We could have then remanded to ask the Florida Supreme Court: Was it independently ruling under its constitution?

MS. BRUECKHEIMER: I -- I will keep that in

mind.

(Laughter.)

MS. BRUECKHEIMER: The -- the idea of clear, reasonably clear -- whichever the standard is, Justice Sotomayor, I believe the Florida Supreme Court used the correct standard and used the one by saying that it was clear -- you know, whether or not Mr. Powell was clearly informed.

So no matter which standard you use, as far as functionally equivalent or whatever, I believe that this falls within the four corners of that.

The obligation -- let's see, I'm looking to see what other cases -- general cases.

They -- the opposition cites to the fact that there's this great conflict going on among the circuits. I don't believe that such a conflict is -- whatever those cases were deciding, I don't believe they would have approved of this language.

This language, because of the "before" limiting language and excluding the "presence during" language, became misleading. And the -- the general cases that like -- just the plain language, you have the right to the presence of counsel, they -- they are not inconsistent with -- with what Florida has required. They -- they would not disagree that there --

JUSTICE ALITO: Well, you said that the average person wouldn't take this warning to mean -- to -- wouldn't envision a procedure like the grand jury procedure. What does it mislead the average person to think?

MS. BRUECKHEIMER: That he -- that once questioning starts, that he -- he has no right to consult with a lawyer anymore, and it certainly doesn't -- and tell him that he has the right to the presence of an attorney with him in an interrogation room, where the coercion takes on a highly new meaning.

I mean the coercive practices that are -- that are --

JUSTICE ALITO: But the latter part of that is the grand jury question. You have a right to consult an attorney, but you don't have the right to have an attorney present.

MS. BRUECKHEIMER: I don't -- I don't believe -- any -- any of the normal reasonable suspects are -- would probably be even aware of what the grand jury proceeding was about.

JUSTICE ALITO: Okay. So then your argument is that this -- that what -- what a normal -- an average person would take this to mean is that you -- you can talk an -- to an attorney before starting to answer

questions, but not once the questioning begins. That's what you take it to mean?

MS. BRUECKHEIMER: Correct, and I'm not the only one. There were five supreme court justices, a majority on the second -- the majority of the second district judges in Powell and seven judges on the second district level, who all found that to be the case, and we're talking someone who doesn't have that level of intelligence.

And he may have had a prior record -- he did have a prior record, but that doesn't mean --

JUSTICE ALITO: Well, all of those people are lawyers, and lawyers are known to read legal documents very precisely. The average person may read them very differently.

MS. BRUECKHEIMER: Correct, and in this case --

JUSTICE SCALIA: Sometimes, a little knowledge is a dangerous thing.

(Laughter.)

MS. BRUECKHEIMER: Yes.

And I do believe that, if this Court were to reverse, that would set a new floor for these forms and that there would be the danger of the fact that -- I mean, if -- if the Tampa public -- police department is

always changing its forms -- which they have shown to be the case -- they have changed these forms in the past -- why wouldn't other agencies decide to change their forms and make things more --

CHIEF JUSTICE ROBERTS: You -- you think it's a good thing, though, that they changed their forms to track the FBI form after -- after this litigation started.

MS. BRUECKHEIMER: I -- I -- yes. I do believe that, when they changed the form to comply with the decision below and with what's going on in 97 percent -- or 96 percent of the jurisdictions -- it doesn't have to be exact language; it just has to be there. Then -- then the -- then the system runs beautifully.

I can't tell you the last time I had a Miranda warning case, and I have been doing this for almost 30 years.

There is no litigation when it's done correctly, and it's mostly done correctly.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Counsel, you have a minute remaining.

REBUTTAL ARGUMENT OF JOSEPH W. JACQUOT

ON BEHALF OF THE PETITIONER

MR. JACQUOT: Mr. Chief Justice, let me make three brief points, after responding to a question that Justice Stevens asked.

In terms of independent and adequate State grounds, in our brief, we relied on the Florida court citing Miranda, the case, not Miranda, as the phraseology, that the Florida Supreme Court interwove the Federal law based on Miranda, the case itself, and there is no plain statement to the otherwise.

Three quick points: There is no manipulation behind this warning. This warning is the result of litigation in Thompson v. State. That was a 1991 decision by the Florida Supreme Court.

The -- the Tampa police had changed its warning. The previous warning had 148 words. This warning is simpler, with 79 words. The previous warning had arcane and redundant language. This language is more straightforward.

Those are the reasons behind the change in the warning, not any kind of inference, as amici makes, towards manipulation.

Second, what Respondent is asking for is exactly what this Court chose not to do in Prysock.

It told the --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:15 p.m., the case in the above-entitled matter was submitted.)

A

abandoned 24:6
ability 9:8 13:6 42:14
able 42:23 43:2
above-entitled 1:11 60:3
absolutely 14:22 16:4 27:18 52:24
abundantly 14:22
accept 4:3
access 13:1
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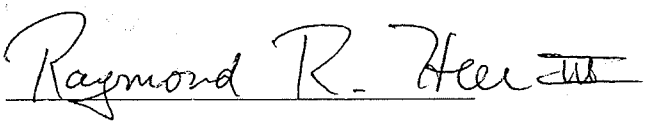
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: FLORIDA, Petitioner, v. KEVIN DEWAYNE POWELL; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.



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