No. 17-634

In the Supreme Court of the United States

PARISH RAMON CARTER,

Petitioner,

v.

COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the bare-bones statement "you have the right to have an attorney," without any information about *when* the suspect has a right to an attorney, satisfies *Miranda*'s requirement that a suspect be clearly informed of his right to an attorney before and during interrogation.

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INTEREST OF THE *AMICI CURIAE*[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have received timely notice of the intent to file this brief, and have consented to this filing.

justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

Law enforcement officers across the country continue to drain the substance out of *Miranda*. Law enforcement training programs and manuals exacerbate the systemic subversion of *Miranda's* protections.

Interrogating officers trivialize *Miranda* warnings, calling them a mere formality or, in this case, "formal little rights things." As they did in this case, officers regularly do all of the following. Officers speed up the warnings and avoid eye contact to convey that the warnings are not important. Officers recite the warnings from memory, often failing to inform suspects of their complete *Miranda* rights. Officers often fail to ask suspects if they understand the *Miranda* warnings. And officers often fail to tell suspects that they can invoke their rights at any time. These interrogation tactics are pervasive. One study found that they are used in nearly half of interrogations.

These interrogation tactics are symptomatic of the flawed law enforcement trainings that encourage them. Widely used training materials teach law enforcement officers to "introduce *Miranda* casually" and to give the warnings in a way that signals that they are a barrier to communicating important information. Officers are taught that they may have "something to gain" by obtaining an admission that can be used—even without a proper *Miranda* warn-

ing—for impeachment. And, other widely used materials train officers to inform suspects who seem unlikely to waive their *Miranda* rights that they are not in custody, and then interview them without a *Miranda* warning. These interrogation tactics are widespread.

This Court has sharply rebuked such interrogation tactics. *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (plurality) ("Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what . . . Congress could not do by statute" to impair *Miranda*). This Court has also found that even practices that are perhaps "exception[s]" can be "sufficiently widespread to be the object of concern" and can merit this Court's attention. *Miranda v. Arizona*, 384 U.S. 436, 447 (1966); *see also Seibert*, 542 U.S. at 609 (plurality) ("Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri.").

The systemic use of these tactics undermines *Miranda's* goals of ensuring that suspects are adequately informed of their rights and that their waivers are voluntary. Such tactics, when combined with the failure here to inform a suspect that he or she is entitled to an attorney immediately, at the interrogation itself, diminishes *Miranda* to the vanishing point. This Court should grant the Petitioner's petition for a writ of certiorari from the Colorado Supreme Court, and should ultimately reverse the decision below, and restore the promise of *Miranda*.

ARGUMENT

Miranda established safeguards to encourage truly voluntary waivers and subsequent confessions free from "all interrogation practices . . . [that] exert such

pressure upon an individual as to disable him from making a free and rational choice." *Miranda,* 384 U.S. at 464-65. Indeed, *Miranda* rights can be waived only with informed and knowing consent. *California v. Prysock*, 453 U.S. 355, 359 (1981); *see also Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Florida v. Powell*, 559 U.S. 50, 51 (2010). And a *Miranda* warning is constitutional only if it "reasonably conve[ys] to [a suspect] his rights as required by *Miranda*." *Prysock*, 453 U.S. at 361.

Training programs and manuals teach law enforcement officers to use tactics that induce *Miranda* waivers, even though many of those tactics violate *Miranda's* admonitions.[2] In 2004, this Court found in *Seibert* that the warnings at issue did not reasonably convey the suspect's rights where the police used interrogation tactics, learned during their training, that were "adapted to undermine the *Miranda* warnings." *Seibert*, 542 U.S. at 616-17 (plurality).

Regrettably, law enforcement officers continue to give unconstitutional *Miranda* warnings to induce waivers on a large scale, because officers are still commonly trained to use tactics to evade *Miranda*.[3] This Court's intervention is therefore necessary to restore the protections set forth in *Miranda*.

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[2] Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 419 (1999).

[3] *Id.*

I. The tactics that the interrogating officer was trained to use on Petitioner undermined *Miranda*.

This case demonstrates the modern tactics law enforcement officers use. The record below shows that the detective interrogating Petitioner coupled the bare-bones warning "you have a right to an attorney" with several tactics that exacerbated the bare-bones warning:

- Minimized the importance of the *Miranda* warnings by calling them "formal little rights things";[4]
- Sped through the warnings in only 10 to 15 seconds;[5]
- Recited the warnings (incompletely) from memory though the complete written warnings were easily accessible to her;[6]
- Failed to confirm Petitioner's understanding after each warning, and failed to do so even after giving all of the warnings;[7]
- Failed to ask at the end of the warnings, "having these rights in mind, do you wish to speak to me now," or any similar ques-

[4] *Carter v. People,* 398 P.3d 124, 125 (Colo. 2017).

[5] Detective Fronapfel Testimony at Pre-Trial Evidentiary Hearing (Aug. 24, 2007), at 221.

[6] *Carter*, 398 P.3d at 134 (Hood, J., dissenting); Fronapfel Testimony, *supra* at 202.

[7] *Carter*, 398 P.3d at 125.

tion, and proceeded directly to interview Petitioner;[8]

- Failed to inform Petitioner that he could exercise his rights at any time.[9]

The detective admitted that she began using these techniques after attending a training program by the Aurora, Colorado Police Department that taught her to "[m]inimize the impact of *Miranda* on the interview."[10]

This case is not an anomaly. These interrogation tactics are largely a byproduct of systemic defects in law enforcement training programs and manuals across the country.

II. Law enforcement officers nationwide are trained to issue ambiguous and bare-bones *Miranda* warnings.

This Court's concern over training defects dates back to *Miranda* itself. In *Miranda*, this Court established safeguards specifically to target training materials that encouraged sharp practices during custodial interrogations. This Court emphasized that police manuals and texts "present the most . . . effective means presently used to obtain statements through custodial interrogation." *Miranda*, 384 U.S. at 449. The *Miranda* Court highlighted the defects in the training manuals that existed at the time, one of which advised:

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 134 (Hood, J., dissenting).

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.[11]

Despite *Miranda's* admonitions, systemic deficiencies in law enforcement training persist. With the goal of eliciting confessions, law enforcement officers are incentivized to "game" the rules of constitutional criminal procedure by "pushing on blind spots, blurry zones, or gaps in rules and remedies" that they perceive as barriers to conducting successful interrogations.[12] Many officers see the *Miranda* warnings as one such "stumbling block," and some admit that they "try to de-emphasize it, at least its importance, when [they are] doing the interrogation."[13]

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[11] *Miranda*, 384 U.S. at 449-50 (quoting Charles E. O'Hara & Gregory L. O'Hara, Fundamentals of Criminal Investigation 99 (1956)).

[12] Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1409 (2011).

[13] Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 663 (1996); *see also* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1175 (2001).

To be sure, an interrogating officer's subjective intent to evade *Miranda* does not make a given *Miranda* warning unconstitutional. Rather, law enforcement's objective to evade *Miranda* explains why tactics that inject ambiguity into *Miranda* warnings are pervasive.

Since this Court's decision in *Miranda*, police manuals have issued new and sophisticated strategies for interrogators to overcome "obstacles" while they give *Miranda* warnings.[14] The examples abound:

- John E. Reid & Associates[15] Training Manual on Criminal Interrogation and Confessions:[16] Interrogators should "introduce *Miranda* casually," stand in front of the suspect while holding a thick folder as a prop, and finger through the case folder to create the impression that it contains material of an incriminating nature about the suspect.[17]

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[14] Leo & White, *supra* at 407-08.

[15] John E. Reid & Associates is the largest national provider of interrogation training. Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1530 (2008). Reid & Associates states that more than 300,000 law enforcement professionals have attended their three-day program since it began in 1974. *Id.*

[16] This is the leading training manual for police interrogations. Alexander Nguyen, *The Assault on Miranda*, THE AMERICAN PROSPECT (Dec. 19, 2001), http://prospect.org/article/assault-miranda.

[17] *Id.*; Weisselberg, *supra* at 1560 (citing John E. Reid & Associates, Inc., *Conducting a Custodial Behavior Analysis In-*

- Seminar materials developed by a private training institute for police departments: Give *Miranda* warnings in a way that signals that they are a barrier to communicating important information to a suspect. For example, preface warnings with: "As you know, we are investigating . . . (issue) . . . . I want to fill you in on what's going on with . . . (issue) . . . , but before we go on I want you to know that . . . ."[18]
- California District Attorneys Association Training Bulletin: Police officers have "little to lose and perhaps something to gain" by not complying with *Miranda* and obtaining a confession that is admissible for impeachment.[19]
- Training materials produced by POST[20] and other law enforcement entities instruct that:
    - If a subject appears cooperative and ready to waive his or her *Miranda* rights, administer a *Miranda* warn-

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terview, Investigator Tips (Jan.-Feb. 2008), http://www.reid.com/educational_info/r_tips.html).

[18] Weisselberg, *supra* at 1560.

[19] Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 133-34 (1998) (citing *Oregon v. Hass*, 420 U.S. 714, 723 (1975)).

[20] California Commission on Peace Officer Standards and Training (POST) is an agency in the California Department of Justice that sets standards for police training, certifies courses for law enforcement officers, and distributes its own training materials. Weisselberg, *Mourning Miranda*, *supra* at 1542.

ing and obtain a waiver, thus eliminating the issue; or

- If a subject appears to be uncooperative and unlikely to waive his or her *Miranda* rights, take the coerciveness (i.e., the "custody") out of the interrogation by simply informing the suspect that he or she is not under arrest and interview the subject without a *Miranda* admonishment and waiver.[21]

Trainings that encourage interrogation "outside *Miranda*" and "question first, warn later" tactics as discussed in *Elstad*[22] and *Seibert*[23] also persist and appear to be spreading.[24]

For example, in *Smith v. Clark*, 612 F. App'x 418 (9th Cir.), *reh'g denied*, 804 F.3d 983 (2015), *cert. de-*

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[21] *Id.*; *see California v. Beheler*, 463 U.S. 1121 (1983) (per curiam) (finding that *Miranda* warnings were not required for a suspect who was not in custodial interrogation); *Smith v. Clark*, 612 F. App'x 418, 424 (9th Cir. 2015) (describing officers using this practice and calling it "*Beheler*-ing").

[22] *Oregon v. Elstad*, 470 U.S. 298, 301 (1985).

[23] *Seibert*, 542 U.S. at 609-11, 616 n.6 (plurality).

[24] Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to "Save" Miranda*, 40 VAL. U. L. REV. 645, 670 (2006) (citing Weisselberg, *Saving Miranda, supra* at 132-37); *see California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1041 (9th Cir. 1999) (police officers were trained to continue interrogations "outside *Miranda*" despite suspects' invocation of their *Miranda* rights); *United States v. Fautz*, 812 F. Supp. 2d 570, 592 (D.N.J. 2011) (police officers were trained to not administer *Miranda* warnings to suspects who previously indicated their interest in obtaining an attorney).

nied, 136 S. Ct. 1464 (2016), the Ninth Circuit affirmed a defendant's conviction and denied his petition for federal habeas corpus relief because this Court's guidance in *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam), never clarified how much weight a statement that a suspect "is not under arrest" should be given. Indeed, California police departments commonly interpret *Beheler* to mean that so long as a suspect is told he or she is not under arrest, *Miranda* warnings are unnecessary. The Ninth Circuit gave nearly dispositive weight to the fact that the defendant had been told he was not under arrest, even though all other circumstances suggested that the defendant was "in custody" for *Miranda* purposes. *Smith*, 612 F. App'x at 421, 423.

In *Smith*, the police intensely interrogated the 16-year-old defendant in a small, windowless room in the police station, for hours, without any family members present. *Id.* at 422 (Watford, J., concurring). In considering the defendant's petition for habeas relief, the only factor the court identified in finding that the defendant was not in custody was that he had been advised three times that he was not under arrest. *Id.* One interrogating officer asked another after the defendant's initial interrogation, "You *Beheler*-ing here?" *Id.*

As Judge Watford points out in his concurring opinion, "[u]ntil the Supreme Court says otherwise, California courts will remain free to validate the '*Beheler*-ing' of suspects, even when that practice is used to *evade Miranda's* requirements." *Id.* (emphasis added). Law enforcement's systemic effort to skirt *Miranda's* requirements, often guided by training practices and manuals, like *Beheler*-ing, will continue to undermine *Miranda* unless this Court intervenes.

This Court's intervention is especially needed given that courts continue to weigh these interrogation trainings, though defective, in favor of law enforcement officers' credibility when analyzing the adequacy of the *Miranda* warnings and the voluntariness of the resulting waivers. *See, e.g.*, *United States v. Bradshaw*, No. 09-CR-10296-RGS, 2011 WL 1085122 (D. Mass. Mar. 22, 2011) (rejecting defendant's claim that no *Miranda* warnings were given, finding that one likely was given because (1) *Miranda* is embedded in police practice and culture and (2) the officers received interrogation training). Yet, law enforcement officers are taught to frame the *Miranda* warnings in ways that convince suspects to not exercise their rights, induce waivers, and elicit confessions.[25]

III. Law enforcement officers routinely use tactics to minimize *Miranda* warnings to induce waiver as was done here.

Researchers have found that "virtually all successful interrogations . . . involve some deception."[26] Law enforcement officers readily admit that there are "a lot of ways to get around *Miranda* . . .. Most guys know how to get somebody to waive their rights."[27]

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[25] Aurora Maoz, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320 (2012); Adam S. Bazelon, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning "You Have the Right to an Attorney*," 90 MARQ. L. REV. 1009, 1034 (2007).

[26] Magid, *supra* at 1168.

[27] Nguyen, *supra*.

These tactics are so successful that suspects waive their rights 80 to 93 percent of the time.[28]

Law enforcement's tactics cut against suspects having "full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them].'" *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The bare-bones warning "you have a right to an attorney" is even more troubling and deserving of this Court's review when coupled with tactics that further inject ambiguity into *the Miranda* warnings. Some commonly employed tactics that were used against Petitioner include:

A. Tactic 1: Trivializing the warnings as mere bureaucratic formalities seen on television or glossing over them in conversation so as to not call attention to them.

"Perhaps the most common strategy employed by interrogators seeking *Miranda* waivers is to deemphasize the significance of the required warnings."[29] Researchers have studied this practice extensively, finding that law enforcement officers minimize the *Miranda* warnings by:

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[28] Anthony J. Domanico et. al., *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 8 (2012); *see also* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive their Miranda Rights: The Power of Innocence*, 28 L. & HUMAN BEHAVIOR 211, 214-15 (2004) (study showing effect of various interrogation tactics on waiver rates).

[29] Leo & White, *supra* at 433.

- Calling attention to the formality of the warnings as a business matter that needs to be dispensed with before questioning;
- Trivializing the legal significance of the warnings by referring to their popularity on television and in movies, perhaps joking that the suspect is already well-aware of his or her rights and can likely recite them from memory;
- Characterizing the warnings as "mutually beneficial" to downplay that these rights belong to the suspect; and
- Camouflaging the warnings by blending them into the conversation, delivering them in a perfunctory or bureaucratic tone of voice, and refraining from doing or saying anything unusual to ensure that the suspect pays no special attention to the *Miranda* warnings.[30]

Using these tactics, officers attempt to convey that the warnings should not concern the suspect and that waiver is a foregone conclusion. The interrogators' "hope is that the suspect will . . . come to see the *Miranda* warning and waiver requirements . . . as equivalent to other standard bureaucratic forms that one signs without reading or giving much thought."[31] One study found that officers minimized *Miranda's* importance in 45 percent of interrogations.[32] Other

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[30] *Id.* at 433-35; Leo, *supra* at 662-63; Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1018-1019 (2001); Weisselberg, *Mourning Miranda*, *supra* at 1558; Domanico, *supra* at 8; Bazelon, *supra* at 1034-35.

[31] Leo & White, *supra* at 435.

[32] Domanico, *supra* at 15-16.

researchers have confirmed the use of this tactic in several independent studies of police interrogations.[33]

The officer in this case was trained to use this strategy and she admittedly used this strategy by calling Petitioner's *Miranda* rights "formal little rights things." Yet the Colorado Supreme Court found that the *Miranda* warnings here were adequate.

Troublingly, the court below was not alone. Courts routinely approve of this tactic, refusing to suppress the statements given to officers who used it. *See, e.g.*, *Olson v. State*, 262 P.3d 227, 229 (Alaska Ct. App. 2011) ("I have to read you *Miranda*. Only because, that's the way the rules are . . . and that way we are allowed to have our conversation without getting me in trouble."); *Commonwealth v. Gaboriault*, 785 N.E.2d 691, 696 (Mass. 2003) ("just a formality"); *Commonwealth v. Accardi*, 57 Va. Cir. 177, 179 (2001) ("kind of a formality that I got to go through.

[33] Leo, *supra* at 663 (citing three examples where these tactics were used and resulted in waiver); Leo & White, *supra* at 434 (citing two interrogations as examples of these tactics where officers said "don't let this ruffle your feathers or anything like that it's just a formality that we have to go through" and "before we talk to anybody about anything, there's a thing called *Miranda* and I don't know if you've heard about it, if you've seen it on TV, um . . . the . . . just to cover ourselves and to cover you, to protect you, we need to, to advise you of your *Miranda* rights . . . "); Maoz, *supra* at 1320 (citing an example where an interrogator said "In order for me to talk to you . . . I need to advise you of your rights. It's a formality. I'm sure you've watched television with the cop shows, right, and you hear them say their rights and so you can probably recite this better than I can, but it's something I need to do and we can [get] this out of the way before we talk about what's happened.").

I'm just going to read you this, kind of get it out of the way."); *State v. Diaz*, 847 N.W.2d 144, 151 (S.D. 2014) ("protocol that I've gotta go through first, okay? Not a big deal at all and we'll get through this and well getcha taken care of."); *State v. Quigley*, 2005-Ohio-5276, ¶ 21 (Ct. App. 2005) ("as a courtesy"); *People v. Musselwhite*, 954 P.2d 475, 487 (Cal. 1998) (defendant argued that the interrogating officer characterized the warnings as "an unimportant 'technicality'"); *People v. Johnson*, 107 Cal. Rptr. 3d 228, 259 (Cal. Ct. App. 2010) (defendant argued that the interrogating officer characterized the warnings as "clearing a 'technicality'"); *Chaffin v. State*, 121 So. 3d 608, 613 (Fla. Dist. Ct. App. 2013); ("formality"); *State v. Doe*, 50 P.3d 1014, 1018 (Idaho 2002) ("this little piece of paper"); *State v. Stone*, 303 P.3d 636, 644 (Idaho Ct. App. 2013) (defendant argued that the interrogating officer characterized the warnings as "mere formalities"); *Wright v. State*, 161 So. 3d 442, 449 (Fla. Ct. App. 2014) ("something I have to do"); *State v. Hughes*, 272 S.W.3d 246, 255 n.6 (Mo. Ct. App. 2008) (defendant argued that the interrogating officer "clearly intended . . . to minimize the effect of the *Miranda* warning . . . and weaken his ability to knowingly and voluntarily exercise his rights" and the officers presented him the wavier form "in such a way as to suggest that his signature on the form was a mere administrative task such as getting the correct spelling of his name"); *Watkinson v. State*, 980 P.2d 469, 471 (Alaska Ct. App. 1999) (defendant argued that the interrogating officers "downplayed" his rights); *State v. Hernandez*, 34 A.3d 669, 676 (N.H. 2011) ("minimization techniques"); *Harris v. State*, 979 So. 2d 372, 373-74 (Fla. Ct. App. 2008) (defendant argued that the interrogating officers "minimized the significance of the rights").

Other courts have recognized that this strategy is unfairly coercive and induces involuntary waivers of suspects' *Miranda* rights. *See, e.g.*, *Doody v. Ryan*, 649 F.3d 986, 991, 1004-05 (9th Cir. 2011) (en banc) ("formality" and "mutual benefit"); *People v. Alfonso*, 142 A.D.3d 1180, 1180-81 (N.Y. App. Div. 2016) ("[expletive] form that he had to get past" and "detective testified . . . that he characterized the form in this way to 'downplay' it and 'minimize its importance'"); *Ross v. State*, 45 So. 3d 403, 430 (Fla. 2010) ("just a matter of procedure"); *State v. Grimestad*, 598 P.2d 198, 200 (Mont. 1979) ("part of the procedure"); *Frias v. State*, 722 P.2d 135, 142-43 (Wyo. 1986) ("seriously downplayed" and "lip service" and "formalities"); *Ramirez v. State*, 739 So. 2d 568, 575-76 (Fla. 1999) ("minimize and downplay" and "casual, offhand manner"); *State v. Luckett*, 981 A.2d 835, 848 (Md. Ct. App. 2009) ("downplayed"); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 526 (Mass. 2004) ("minimization"); *Laurito v. State*, 120 So. 3d 203, 205 (Fla. Dist. Ct. App. 2013) ("minimized"); *United States v. Gonzalez*, 719 F. Supp. 2d 167, 177 (D. Mass. 2010) ("designed in a way to minimize the risk that Gonzalez would exercise his *Miranda* rights").

The use of this pervasive tactic makes the barebones *Miranda* warning in this case even more troubling and deserving of this Court's review.

B. Tactic 2: Rushing through the warnings to minimize their impact on the interrogation.

Another way interrogators skirt *Miranda* warnings is by delivering the warnings quickly, without

pausing or looking at the suspect, to communicate that the warnings are insignificant.[34] The officer in this case sped through the warnings in only 10 to 15 seconds of a two-hour interview.[35]

This case is far from an anomaly. One study shows that officers speak significantly (31%) faster when they are delivering the *Miranda* warnings than when they are speaking in the thirty seconds before or after the warnings.[36] Listeners find this increased rate of speaking difficult to understand.[37] Courts have also noted this tactic. *See, e.g.*, *United States v. Toliver*, 480 F. Supp. 2d 1216, 1224 (D. Nev. 2007), *aff'd*, 380 F. App'x 570 (9th Cir. 2010) ("spoke rapidly"); *Luckett*, 981 A.2d at 848 ("tongue was faster than the ear"); *Reed v. State*, 96 So. 3d 1118, 1118 (Fla. Ct. App. 2012) (Wolf, J., concurring) ("rapid fire manner"); *cf. Chaffin v. State*, 121 So. 3d 608, 614 (Fla. Ct. App. 2013) ("normal cadence"); *Wright v. State*, 161 So. 3d 442, 450 (Fla. Ct. App. 2014) ("moderate pace").

A speedy recitation of the warnings does not satisfy *Miranda* if the listener cannot follow the words being spoken. This tactic, which was used here, further undermines *Miranda* and substantiates the need

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[34] Leo, *Questioning the Relevance, supra* at 1018-19; Leo & White, *supra* at 433-34.

[35] Fronapfel Testimony, *supra* at 221, 226.

[36] Domanico, *supra* at 17.

[37] *Id.* ("In our sample, detectives read the *Miranda* warning at an average rate of 268 words per minute (wpm). This finding is worrisome because speech comprehension declines slightly up to a speaking rate of 275 wpm (and even more rapidly beyond that point.)").

for this Court's review to confirm that failing to inform a suspect that he or she is entitled to an attorney immediately, at the interrogation itself, violates *Miranda*.

C. Tactic 3: Failing to clarify that a suspect has understood his or her rights after each warning or at the end of all of the warnings.

Law enforcement officers also fail to clarify whether suspects understand their *Miranda* rights. To preserve *Miranda*, officers should encourage comprehension by asking suspects whether they understand each right after reciting the respective warning. Yet studies show that officers rarely confirm whether suspects understand their *Miranda* rights after each warning, and do not even do so after reading the warnings in their entirety.

While it is difficult to gather data on *Miranda* warnings, one study considered 29 interrogations. The police rarely took steps to ensure that suspects understood their *Miranda* rights. In 23 of 29 interrogations (79%), police officers asked the suspects if they understood their rights only after all of the *Miranda* warnings were read. In four interrogations (14%), officers asked the suspects if they understood their rights after some, but not all, of the individual warnings had been read. Only in two interrogations (7%), did officers ask the suspects if they understood their rights after each *Miranda* warning."[38]

The officer in this case gave the warning "you have a right to an attorney" without asking Petitioner

[38] Domanico, *supra* at 15.

if he understood his rights. Instead, after speeding through the warnings, the officer went straight into questioning. And yet, the court below concluded that he knowingly waived his right to have an attorney present at the interrogation.

D. Tactic 4: Reciting the warnings from memory instead of reading written warnings.

Law enforcement officers also recite the *Miranda* warnings from memory rather than read the warnings directly from their department's written cards. Much like the reasons behind saying the warnings are something the suspect has perhaps already memorized from television, officers recite warnings from memory to trivialize the warnings' legal significance.[39] Indeed, the detective interrogating Petitioner admitted that she abandoned the practice of reading the warnings from her department's card and gave them from memory after being trained to "[m]inimize the impact of *Miranda* on the interview." *Carter*, 398 P.3d at 134 (Hood, J., dissenting).

Reciting the *Miranda* warnings from memory also risks misstating them and often results in officers leaving out crucial admonishments. *State v. Wright*, 2015 Del. Super. LEXIS 59, at *6-7 (Del. S. Ct. Feb. 2, 2015) (noting that the "risk [of misstating the *Miranda* rights], even for seasoned detectives, of not using

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[39] Leo & White, *supra* at 435 ("[I]nterrogators seek to trivialize the warnings' legal significance. Their hope is that the suspect will not come to see the *Miranda* warning and waiver requirements as a crucial transition point in the questioning or as an opportunity to terminate the interrogation . . . .").

a *Miranda* cards" was illustrated by the officer omitting the suspect's right to counsel).

This tactic was used, for example, in *Doody* where the Ninth Circuit held that the officer's "ad libbed" warning regarding the right to counsel was unconstitutional because the interrogating detective "downplayed the warnings' significance" and "deviated from an accurate reading of the *Miranda* waiver form." *Doody*, 649 F.3d at 991, 1003. The court thus found that the Miranda warnings were unconstitutional, and granted the defendant's writ of habeas corpus. *Id*. at 1023.

Other courts have invalidated *Miranda* warnings given from memory. *See, e.g.*, *Commonwealth v. Miranda*, 641 N.E.2d 139, 140-41 (Mass. Ct. App. 1994) (finding that *Miranda* warnings given by the officer from memory were unconstitutional where the officer omitted the defendant's right to have an attorney during the interrogation); *State v. Grey*, 907 P.2d 951, 955 (Mont. 1995) (finding the officer gave "mere lip service to the *Miranda* requirements" and that the officer, who was trained to recite the warnings from memory, "chose not to use a [standard] waiver form because he did not want to jeopardize the interrogation"); *Toliver*, 480 F. Supp. 2d at 1243 (finding the *Miranda* warnings unconstitutional where the officer admitted that "rather than use . . . a form or card to read the *Miranda* warnings to defendant, he 'chose to revert back to [his] training' and recite the warnings from memory"); *Ramirez*, 739 So. 2d at 578 (finding the defendant's waiver invalid where the officer "minimize[d] and downplay[ed] the significance of the *Miranda* rights" and administered them orally).

However, many other courts have admitted statements obtained from incomplete *Miranda* warnings recited from memory. *See, e.g.*, *United States v. Lamia,* 429 F.2d 373, 375 (2d Cir. 1970) (finding that the *Miranda* warnings given from the officer's memory that omitted the suspect's right to have an attorney present at his interrogation was adequate); *United States v. Warren,* 642 F.3d 182, 190 (3d Cir. 2011) (same); *State v. Figueroa*, 146 A.3d 427, 429, 432 (Me. 2016) (same); *United States v. Gwathney-Law*, 2016 U.S. Dist. LEXIS 185388, at *31 (W.D. Ky. Dec. 1, 2016) (same); *Commonwealth v. Woodbine*, 964 N.E.2d 956, 966 (Mass. 2012) (finding the *Miranda* warnings given from the officer's memory at the interrogation were complete, though there was no recording of them and the same officer failed to give complete warnings during cross-examination at trial when asked to recite them from memory).

The interrogating officer in this case was trained to improvise her *Miranda* warnings, and did so, inducing a waiver following her inadequate warning.

E. Tactic 5: Failing to explain that suspects can invoke their rights at any time.

Lastly, law enforcements officers routinely fail to advise suspects that the *Miranda* rights can be exercised at any time. One study found that 20 percent of jurisdictions do not ordinarily use this warning.[40] The interrogating officer did not clarify that Petitioner could assert his rights at any time, and the Colorado Supreme Court found that the warnings here were constitutional.

[40] Weisselberg, *Mourning Miranda*, *supra* at 1565-66.

Yet courts have recognized it is "preferable practice" to give this warning. *See, e.g.*, *State v. Sherwood*, 353 A.2d 137, 139 (N.J. Super. App. Div. 1976) ("It cannot be gainsaid that it is preferable practice for police officials to advise a suspect that he can terminate the questioning and assert his rights at any time after the interrogation begins."). In a similar vein, some courts have held that *Miranda* requires interrogating officers to advise suspects that they have a right to end an interview at any time. *Umana v. State*, 447 S.W.3d 346, 354 n.3 (Tex. App. 2014) ("*Miranda* require[s] an accused be warned of: his right to remain silent; that any statement may be used against him in court; his right to have a lawyer present; his right to an appointed lawyer if he cannot employ one; and his right to terminate the interview at any time.") ; *People v. McCaw*, 137 A.D.3d 813, 814 (N.Y. App. Div. 2016) (same); *State v. Herron*, 318 P.3d 281, 283 (Wash. Ct. App. 2015) (same).

Here, the interrogating officer: (1) did not tell Petitioner *when* he had a right to an attorney, i.e., immediately; and (2) did not tell Petitioner that he could exercise this right at any time. The officer's failure to advise Petitioner that he could exercise his right at any time made it more likely that Petitioner failed to understand the insufficient warning "you have a right to an attorney," further militating in favor of review here.

V. These tactics prevent suspects from understanding their *Miranda* rights.

The inevitable result of these tactics is that suspects waive their rights at extraordinarily high

rates—80 to 93 percent of the time[41]—because they fail to fully understand the rights that they are waiving. Studies show that understanding the *Miranda* warnings generally requires a higher level of education than most criminal defendants have. To fully understand the *Miranda* warnings, a tenth-grade reading level is required.[42] But 70 percent of criminal inmates read at a sixth-grade level or below.[43] One study found that "only 21% of juveniles and 42% of adults fully understood the *Miranda* warning that was presented to them."[44]

When suspects cannot understand the significance or the content of their *Miranda* rights, the warnings have little to none of their intended effect. This problem is exacerbated where, as here, the defendant is mentally impaired. The alarmingly high waiver rates militate in favor of this Court granting review on the issue whether the warning in question—"you have a right to an attorney"—is inadequate and thus unconstitutional.

CONCLUSION

Law enforcement officers routinely issue *Miranda* warnings using interrogation tactics that make the warnings even more difficult to understand. Some of

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[41] Domanico, *supra* at 8.

[42] *Id.* at 14.

[43] D. Christopher Dearborn, *"You Have the Right to an Attorney," But Not Right Now: Combating Miranda's Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 374-75 (2011).

[44] Domanico, *supra* at 10.

the tactics, taught in training programs and manuals, are often used to deliberately evade *Miranda*.

The interrogating officer in this case employed many of these pervasive and widespread tactics. They undermine *Miranda* warnings. This makes it especially unlikely that a suspect will understand, after being told "you have a right to an attorney," that the suspect has a right to an attorney immediately, at the interrogation itself. This Court should thus grant review and find that the bare-bones *Miranda* warning Petitioner received is unconstitutional.

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