SC22-458

In the Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

v.

ZACHARY JOSEPH PENNA,
Respondent.

On Petition for Discretionary Review from the
Fourth District Court of Appeal
DCA No. 4D20-345

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE ISSUE

Whether a defendant's Fifth Amendment *Miranda* rights are automatically violated when an officer fails to re-read a *Miranda* warning following a defendant's voluntary re-initiation of contact.

STATEMENT OF THE CASE AND FACTS

1. In November 2015, Zachary Penna stabbed two men to death in their Palm Beach County home; stole their SUV; drove that SUV to a nearby neighborhood where he robbed an elderly woman at knifepoint; kept driving to a co-worker's home, where he forced the co-worker into the SUV at knifepoint and then fled. App.6. When Penna stopped the SUV at a fast-food restaurant, the co-worker escaped. App.6. Penna drove north, eventually reaching Brevard County. App.6. Once there, he tried to steal another man's car. App. 6. When the victim resisted, Penna stabbed him and bolted into the woods. App.6.

The police soon arrived. A police dog was sent into the woods, but Penna stabbed it. App.6. Penna later charged out of the woods towards the police while holding the knife. App.6. The police shot Penna. App.6. He was then taken into custody and brought to the hospital for treatment.

2. On November 21, 2015, a couple days after the crime spree, the lead detective on the Palm Beach County case—Detective D'Angelo—went to the hospital to speak with Penna. R.329–34. At the time, although Penna was being treated for his gunshot wounds, he was "coherent," "alert," and "able to speak." R.535; *see also* R.575. At the start of the meeting, Detective D'Angelo began reading Penna the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). R.536. Penna, however, "at his own will, started repeating" the warnings "back to" Detective D'Angelo, "explaining . . . or reciting them in his own words." R.536–37, 541. Penna told Detective D'Angelo that "anything you say can be used against you in a [c]ourt of [l]aw" and that "he has a right to an attorney." R.537. Detective D'Angelo complimented Penna's recitation, saying "oh, you know them, that's pretty good." R.537.

Nonetheless, Detective D'Angelo read Penna his rights off of a department-issued card. R.537. Penna "acknowledge[d] that he understood each right." R.537.

Detective D'Angelo proceeded with the interview. R.537. But

Penna did not answer many questions. R.538. Instead, after answering a couple questions identifying the victims, Penna asked for his lawyer. R.538–39. In response, Detective D'Angelo ended the interview and left the room. R.539–40. Detective D'Angelo never attempted to interview Penna again. R.540.[1]

3. Less than a month later, on December 16, 2015, Deputy Nettles was assigned to monitor Penna at the hospital. R.587; R.591; App.6. Penna's statements to Nettles are at issue in this case. Deputy Nettles' job was to ensure the safety of Penna and hospital personnel while Penna remained confined at the hospital. R.584. In that role, Deputy Nettles sat with Penna in the hospital room. R.584. Nettles was supposed to monitor "everything that" Penna did, "anyone coming in and out" of the room, and check the "things that are in the room" to ensure that no one was "attack[ed]" or "injur[ed]." R.585. He was also supposed to "pay attention" to what Penna said, R.585, and to "assist" if Penna needed anything, R.587. Deputy Nettles did not have an investigative role. R.586.

[1] Later, another detective attempted to interview Penna. R.540. Penna again invoked his right to a lawyer. R.540. That conduct is not "at issue" in this appeal. App.6.

When Deputy Nettles first was assigned to guard Penna, Penna mostly slept. R.589. Penna at first did not make any statements to Nettles. R.590.

December 17 Statements. On the second day Deputy Nettles was guarding him, Penna made an "unsolicited" comment. R.591. Penna asked why he was in the hospital. R.591–92, 642. Nettles responded by asking "you don't know why you're here?" R.593. Soon after, Penna again spontaneously said "I stabbed a couple of people." R.595. When Nettles responded, "you stabbed a couple of people," Penna said "[y]eah, a couple of fags and a damn dog." R.595. The conversation was "completely initiated by" Penna. R.595. At that point the conversation ended. R.596.

December 19 Statements. Deputy Nettles did not monitor Penna on December 18, but he returned on December 19. R.596. The two engaged in "casual conversation, things about the TV, just general conversation." R.597. Deputy Nettles did not initiate conversation that was "germane or specific to the case." R.598. Penna at one point volunteered that he was in a bad mood. R.599. Deputy Nettles asked why, and Penna responded, "Dude, I'm fucked. I know what I did. I'm

going to prison for my whole fucking life." R.601. Later that day, Penna also made unsolicited comments about his past drug use. R.602–03.

December 20 Statements. Deputy Nettles again guarded Penna on December 20. R.603. By that point, Penna and Nettles had a pretty good rapport and continued to talk about largely "innocuous topics." R.603. Nonetheless, Nettles warned Penna that they were not simple friends: Deputy Nettles said "[h]ey, I'm a law enforcement officer and you can say anything you want to me, but I'm going to write it down." R.604. In fact, Deputy Nettles visibly wrote down Penna's statements on his full-size laptop—asking Penna at times to slow down so Nettles could type what Penna said. R.605.

At some point that day, Penna turned to Nettles and without prompting asked "[w]hat do you think I'll get?" R.605. Deputy Nettles responded by asking what Penna meant. R.605. Penna replied, "[w]hat do you think I'll get for killing those two fags?" R.605–06. Nettles asked what Penna thought the punishment would be. R.606. Penna said he was "going to tell . . . how the whole thing happened."

R.606. Penna then confessed to stabbing two people "about a hundred times." R.607. Penna added that he "drank blood from the people that he had assaulted." R.608. He also admitted to taking a car from their home. R.608. On the way to a co-worker's home, Penna "requested" a shirt and purse from an elderly woman. R.608–09. At the co-worker's home, Penna threatened the co-worker at knifepoint before getting back on the road and running out of gas. R.609–10. Seeing sirens, he ran into the woods where he stabbed a police dog that had caught up to him. T.1583–84. Penna followed the retreating dog out of the woods and was shot by the police. T.1584.

December 25 Statements. On December 25, Penna again asked Nettles how much time he would get. R.614. Nettles responded: "[W]hat time would you get for what." T.1588. Penna then spoke of "the stabbing of two homosexuals and the K-9 dog," and said that he thought he would get "life in prison." T.1589. Penna also said that "he felt bad for" the old lady that he had robbed "because of her age." T.1589. Asked why he had not turned himself in if he felt bad, Penna said that "he was just too far into it at that point" and that he was "fucked." T.1590.

January 7 Statements. Nettles returned to guard Penna on January 7. R.616. At Penna's suggestion, the two watched Law and Order. R.616. That led Penna to ask Deputy Nettles about prison. R.617. Without solicitation, Penna said that he would spend time in prison for "killing two guys" and "stabbing a dog." R.617. Penna asked what prison was like. R.617. Nettles responded that he had only worked in a county facility. R.617. Later that day Penna remarked, "I can get out, you know. They can say I'm crazy, but I know what the fuck is going on." T.1592–93.

4. Before trial, Penna moved to suppress his statements to Deputy Nettles as violating *Miranda*. R.244–56. The trial court held a hearing where both Deputy D'Angelo and Deputy Nettles testified. R.522–736. The trial court, after hearing that testimony, denied the motion on the first day of trial. T.11–14. The jury ultimately convicted, and Penna appealed. R.450, 510.

5. The Fourth District reversed. It recognized that Penna had received *Miranda* warnings, App.5, and that he had reinitiated contact with the police, App.6–11. Still the district court considered itself bound by this Court's decision in *Shelly*, in which a 4-3 majority

stated that anytime an interrogation is reinitiated, even at a defendant's prompting, new *Miranda* warnings must be "specifically given." App.21 (emphasis omitted) (quoting *Shelly v. State*, 262 So. 3d 1, 13 (Fla. 2018)). Because Deputy Nettles had not re-read the *Miranda* warnings, the panel found error even though "a reasonable person in the defendant's position may have been able to remember"—and thus knowingly and intelligently waive—"his *Miranda* rights." App.24–25.

On the State's motion, the Fourth District certified the following question of great public importance:

> Whether a defendant's Fifth Amendment *Miranda* rights are automatically violated when an officer fails to re-read a *Miranda* warning following a defendant's voluntary re-initiation of contact.

App.33–34.

SUMMARY OF THE ARGUMENT

I. *Shelly* clearly erred in categorically concluding that the police must re-read *Miranda* warnings when a Mirandized defendant reinitiates an interrogation. *Shelly* ultimately derived its rule from the United States Supreme Court's decision in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). But *Bradshaw* and similar cases stand for the opposite proposition. Far from demanding rigid re-warnings, Supreme

Court case law instructs courts to ask whether the suspect knowingly and voluntarily waived his *Miranda* rights based on the totality of the circumstances.

That was the rule in Florida before *Shelly*, and *Shelly* offered no good reason to change course. Nor could it have. A categorical requirement that the police offer second warnings before rekindling interrogations finds no support in the text or history of the Fifth Amendment. While *Miranda*'s prophylactic protections are a longstanding tenet of constitutional jurisprudence, courts should not further expand *Miranda*'s requirements unless the United States Supreme Court has done so. Finally, *Shelly* makes little sense. As it stands, the Supreme Court's totality-of-the-circumstances approach suffices to protect the rights of defendants by ensuring that police reread a suspect's rights when a *Miranda* waiver would otherwise be unknowing or involuntary. By rigidly insisting on a re-reading of the *Miranda* warnings in every case, even for those suspects who demonstrably remember their rights, all *Shelly* does is afford a windfall to defendants who knowingly and voluntarily confessed their crimes yet later come to regret that decision.

Because *Shelly* was clearly wrong, this Court should recede from it unless sufficient reliance or other interests strongly counsel otherwise. They do not. *Shelly* is a rule of criminal procedure that typically does not engender significant reliance. Indeed, because *Shelly* governs police conduct, no criminal defendant would have behaved differently had he or she known that this Court might eventually recede from *Shelly*. And by definition, anyone who knew of *Shelly*'s existence—such that they might have relied on it—would have known their rights to begin with.

II. Once the Court recedes from *Shelly*, it should conclude that Penna's confession was admissible. The trial court made factual findings that even before Penna received *Miranda* warnings, he knew his rights. There is thus every reason to think that Penna was fully aware of his rights when he spoke with Deputy Nettles and made the knowing, intelligent, and voluntary decision to waive them.

Regardless, the trial court was correct to admit Deputy Nettles testimony because it impeached Penna's statements.

ARGUMENT

I. THERE IS NO PER SE REQUIREMENT THAT POLICE RE-READ *MIRANDA* WARNINGS WHEN A SUSPECT REINITIATES AN INTERROGATION.

In *Shelly*, the Court announced that "if an accused invokes his or her *Miranda* rights but later reinitiates communication, an accused must be reminded of his or her *Miranda* rights." 262 So. 3d 1, 11–14 (Fla. 2018). In doing so, the Court clearly erred; and because no reliance interests warrant standing by that decision, the Court should recede from it and hold that such a confession is valid if the totality of the circumstances reflects that the suspect knowingly and voluntarily waived his rights.

A. *Shelly* was "clearly erroneous" in adopting a per se requirement that police re-read *Miranda* warnings.

Shelly was clearly erroneous for four reasons. It departed from United States Supreme Court precedent, ignored or misread this Court's own precedent, strayed far from the original meaning of the constitution, and erred in assessing policy.

1. In *Miranda v. Arizona*, the United States Supreme Court announced the prophylactic rule that when police elicit a statement in an interrogation without warning the suspect of his rights, that statement may not be used in the prosecution's case-in-chief. 384 U.S.

436 (1966). The Court "also indicated the procedures to be followed subsequent to the warnings." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). "If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.'" *Id.* (quoting *Miranda*, 384 U.S. at 474). An accused may waive those rights. *E.g.*, *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

The Court later addressed what happens when an accused invokes his *Miranda* rights but then changes his mind and wishes to resume an interrogation. *See Wyrick v. Fields*, 459 U.S. 42 (1982). In *Wyrick*, it explained that when a suspect reinitiates an interrogation, courts should "examine the 'totality of the circumstances'" to determine whether the suspect's waiver of his *Miranda* rights is knowing and intelligent. *Id.* at 46–47. *Oregon v. Bradshaw* confirmed that approach. 462 U.S. 1039 (1983) (plurality op.). The plurality explained that when the accused reinitiates an interrogation, the remaining inquiry is "whether the purported waiver [i]s knowing and intelligent and found to be so under the totality of the circumstances." *Id.* at 1046 (quoting *Edwards*, 451 U.S. at 486 n.9); *see also id.* at 1048

(Powell, J., concurring in judgment). As Supreme Court case law stands, if an accused invokes *Miranda*, "courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

In *Shelly*, this Court added an additional requirement to that framework. 262 So. 3d at 11–14. The Court explained that "if an accused invokes his or her *Miranda* rights but later reinitiates communication, an accused must be reminded of his or her *Miranda* rights." *Id.* at 13 (emphasis omitted). *Shelly* traced that rule to *Bradshaw*. *See Shelly*, 262 So. 3d at 11. But as explained, *Bradshaw* says the opposite: it instructs courts to ask whether a "purported waiver was knowing and intelligent and found to be so *under the totality of the circumstances*." 462 U.S. at 1046 (emphasis added) (quoting *Edwards*, 451 U.S. at 486 n.9). That inquiry, *Bradshaw* says, necessarily depends on all the "facts and circumstances," not, as *Shelly* suggested, on whether the police reminded the suspect about his *Miranda* rights. *Id.* (quoting *Butler*, 441 U.S. at 374–75); *accord id.* at

1047–51 (Powell, J., concurring in judgment).

And *Bradshaw* is not alone in focusing on the totality of the circumstances. The United States Supreme Court said the same thing in *Edwards*. There, the Court explained that when a suspect reinitiates an interrogation, the next question "would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances." *Edwards*, 451 U.S. at 486 n.9; *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986) (focusing on the totality of the circumstances); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (same). As Justice Lawson explained, "the United States Supreme Court has never articulated or implied a third inquiry or standard requiring that police 'remind' the accused of his or her *Miranda* rights, in *Bradshaw* or any other case." *Shelly*, 262 So. 3d at 22 (Lawson, J., dissenting).

Indeed, *Shelly* made the exact error the United States Supreme Court corrected over three decades earlier in *Wyrick*. There, a Mirandized defendant agreed to a polygraph examination. 459 U.S. at 44.

During the polygraph test, the defendant made inculpatory statements. *Id.* at 45. Ultimately, a federal appellate court concluded that the statements needed to be suppressed. *Id.* at 45–46. In doing so, the court of appeals "fashioned" a "per se" "rule of its own": "that, notwithstanding a voluntary, knowing, and intelligent waiver . . . the police again must advise the suspect of his rights before questioning him at the same interrogation about the results of the polygraph." *Id.* at 48. The Supreme Court summarily reversed. In adopting a per se rule, the Court reasoned, the court of appeals failed to "examine the 'totality of the circumstances.'" *Id.* at 47. It further explained that a per se rule requiring new warnings "f[ound] no support in" precedent and was "an unjustifiable restriction on reasonable police questioning." *Id.* at 48–49. The Court was clear that per se rules were not "logical" in this area because in many circumstances there will be no reason to believe that a suspect "forg[o]t the rights of which he had been" previously "advised" and thus no reason to think that a waiver without new warnings was unknowing or involuntary. *Id.* at 49; *cf. also Oregon v. Elstad*, 470 U.S. 298, 318 (1985) ("Far from establishing a rigid rule, we direct courts to avoid one.").

No wonder, then, that Florida is an extreme (perhaps lone) outlier under *Shelly*. The federal courts unanimously ask whether a waiver was knowing and voluntary under the totality of the circumstances; they do not apply *Shelly*'s mechanical rule.[2] And the state courts of last resort are in accord.[3] Summarizing this jurisprudential

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[2] *E.g.*, *Judd v. Vose*, 813 F.2d 494, 497 (1st Cir. 1987); *United States v. Medunjanin*, 752 F.3d 576, 586 (2d Cir. 2014); *United States v. Velasquez*, 885 F.2d 1076, 1086 (3d Cir. 1989); *Poyner v. Murray*, 964 F.2d 1404, 1413 (4th Cir. 1992); *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir. 1975); *Treesh v. Bagley*, 612 F.3d 424, 431–32 (6th Cir. 2010); *United States v. Robinson*, 586 F.3d 540, 545 (7th Cir. 2009); *Lamp v. Farrier*, 763 F.2d 994, 997 (8th Cir. 1985); *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995); *Pickens v. Gibson*, 206 F.3d 988, 995 (10th Cir. 2000); *United States v. Muhammad*, 196 F. App'x 882, 887 (11th Cir. 2006); *United States v. Straker*, 800 F.3d 570, 625 (D.C. Cir. 2015) (per curiam).

[3] *E.g.*, *Ex parte Landrum*, 57 So. 3d 77, 81 (Ala. 2010) (explaining that it is "well settled" that "a failure to repeat the warnings before a subsequent interrogation will not automatically preclude the admission of the inculpatory response" (cleaned up)); *Williams v. State*, 214 S.W.3d 829, 837 (Ark. 2005) ("*Miranda* warnings need only be repeated when the circumstances have changed so seriously that the accused's answers are no longer voluntary, or the accused is no longer making a knowing and intelligent relinquishment or abandonment of his rights."); *In re Kevin K.*, 7 A.3d 898, 907 & n.7 (Conn. 2010) (observing that the United States Supreme Court "has eschewed per se rules mandating that a suspect be re-advised of his rights" (cleaned up)); *Hawkins v. United States*, 461 A.2d 1025, 1032 (D.C. 1983) (applying a totality-of-the-circumstances test); *State v. Culbertson*, 666 P.2d 1139, 1141 (Idaho 1983) ("*Edwards* does not state a per se rule but that the totality of the circumstances is controlling."); *Wise v. Commonwealth*, 422 S.W.3d 262, 273 (Ky. 2013)

(discussing how *Wyrick* rejected a per se rule); *Bivins v. State*, 642 N.E.2d 928, 939 (Ind. 1994) ("This interrogation sequence did not require new advisements of rights."); *State v. Morgan*, 559 N.W.2d 603, 607 (Iowa 1997) ("We conclude that it was not necessary to give Morgan a fresh set of *Miranda* warnings after he refused to take the polygraph examination."); *State v. Green*, 443 So. 2d 531, 536 (La. 1983) (applying a totality-of-the-circumstances test); *State v. Clark*, 483 A.2d 1221, 1226 (Me. 1984) ("[W]e find no error in the court's conclusion that the effect of the initial warnings carried over to the post-polygraph interview."); *State v. Tolbert*, 850 A.2d 1192, 1200 (Md. 2004) ("[S]tatements made by a suspect are not inadmissible in evidence merely because the police did not repeat properly administered *Miranda* warnings previously given to the suspect . . . ."); *People v. Ray*, 430 N.W.2d 626, 633 (Mich. 1988) ("We conclude in the circumstances of this case that it was not necessary to rewarn the defendant of his constitutional rights in the limited exchange that ensued immediately after the polygraph machine was shut off."); *State v. Hale*, 453 N.W.2d 704, 708 n.1 (Minn. 1990) ("Although prudent police officers will perhaps choose to give a defendant another *Miranda* warning before resuming custodial interrogation of a suspect, it is not necessary as a matter of law to do so unless circumstances have changed in some significant way."); *In re Miah S.*, 861 N.W.2d 406, 412 (Neb. 2015) ("There is no fixed time limit as to how much time must pass before the warnings are ineffective, because courts must consider the totality of the circumstances with respect to a suspect's waiver of his or her rights under *Miranda*."); *Koger v. State*, 17 P.3d 428, 432 (Nev. 2001) (per curiam) ("[W]e conclude that there was no need for Sergeant Crickett to fully advise Koger of her *Miranda* rights once again."); *State v. Monroe*, 711 A.2d 878, 886 (N.H. 1998) ("Once a defendant has made a knowing, intelligent, and voluntary waiver, there is no *per se* requirement to remind him of his rights continually. Rather, the need for an additional warning is determined by the totality of the circumstances. (citations omitted)); *State v. Hunter*, 914 N.W.2d 527, 533 (N.D. 2018) (rejecting a per se rule and collecting cases that adopt a totality-of-the-circumstances test); *State v. Treesh*, 739 N.E.2d 749, 764 (Ohio 2001) ("It is also well established, however, that a suspect who receives adequate *Miranda* warnings prior to a custodial interrogation need not be warned

consensus, the federal Fifth Circuit observed that "[a] great many courts, state and federal, have . . . held that repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them." *Biddy*, 516 F.2d at 122. *Shelly* broke from all of them.

2. *Shelly* was clearly erroneous for other reasons: it reversed a 20-year-old precedent of this Court without so much as a word about

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again before each subsequent interrogation."); *State v. Rogers*, 188 S.W.3d 593, 606 (Tenn. 2006) ("Courts must examine the totality of the circumstances to determine whether renewed warnings are required."); *State v. Newton*, 682 P.2d 295, 297 (Utah 1984) ("[T]he Court clarified the holding in *Edwards* by explaining that the rule established in *Edwards* is not a *per se* rule but requires a consideration of the totality of the circumstances to determine if a defendant should have been re-advised of his rights prior to additional questioning."); *State v. Prue*, 153 A.3d 551, 564 (Vt. 2016) ("The U.S. Supreme Court has mandated that in deciding whether fresh *Miranda* warnings are required after a period of time has elapsed between the initial warning and an inculpatory statement, a court must consider the totality of the circumstances."); *Bradshaw v. Commonwealth*, 323 S.E.2d 567, 570 (Va. 1984) ("Whether a suspect makes a knowing and intelligent relinquishment or abandonment of his right depends upon the totality of the facts and circumstances of each case."); *State v. DeWeese*, 582 S.E.2d 786, 797–98 (W. Va. 2003) (applying a totality-of-the-circumstances test); *cf. also State v. Grady,* 766 N.W.2d 729, 734 (Wis. 2009) ("The United States Supreme Court has made clear its reluctance to adopt per se rules in the context of *Miranda* warnings. Instead of delineating bright-line rules, the Supreme Court has embraced a more flexible approach whereby courts consider the totality of the circumstances.").

why it was doing so, and misread this Court's decision in *Welch v. State*, 992 So. 2d 206 (2008).

In *Davis v. State*, a suspect reinitiated an interrogation with the police after invoking his right to counsel. 698 So. 2d 1182, 1188–89 (Fla. 1997). This Court held that the subsequent confession was admissible even though the suspect "was not given a fresh set of *Miranda* warnings." *Id.* at 1189. As the Court explained, "numerous state and federal courts have rejected the talismanic notion that a complete readvisement of *Miranda* warnings is necessary every time an accused undergoes additional custodial interrogation." *Id.* And it rejected a categorical readvisement rule as "an overly mechanical application of *Miranda*." *Id.*

Instead of discussing *Davis*, *Shelly* pointed to this Court's decision in *Welch* as supporting its newfound inflexible rule. 262 So. 3d at 11. In *Welch*, this Court, citing *Bradshaw*, said that "even when an accused has invoked the right to silence or right to counsel, if the accused initiates further conversation, is reminded of his rights, and knowingly and voluntarily waives those rights, any incriminating

statements made during this conversation may be properly admitted." 992 So. 2d 206, 214 (2008). But that single sentence did not announce anything like the per se rule adopted in *Shelly*. On the contrary, in attaching significance to whether the suspect has "knowingly and voluntarily waive[d]" his rights, *id.*, the *Welch* court invoked the exact totality-of-the-circumstances approach that the Court in *Shelly* rejected. *See Shelly*, 262 So. 3d at 23 (Lawson, J., dissenting). And consistent with the totality test, when *Welch* applied its rule, it considered all the facts "[t]ogether." 992 So. 2d at 215.

3. Even if United States Supreme Court precedent were ambiguous on the point, there would be no basis for adopting *Shelly*'s expansion of the prophylactic *Miranda* rule. Quite the opposite, the Fifth Amendment's text and history provide no support for it.

Of course, *Miranda* remains the law unless overruled by the United States Supreme Court. But consistent with the judicial "oath to uphold the Constitution," judges should "decide every case faithful to the text and original understanding of the Constitution[] to the maximum extent permitted by a faithful reading of binding prece-

dent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). In practice that means that when controlling precedent is of dubious original origins, courts "should tread carefully before extending" it. *Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting). Careful consideration requires courts to resolve questions about the scope of precedent "in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanagh, J., dissenting). And thus, when constitutional text and history cut against precedent, "the rule of law may dictate confining the precedent, rather than extending it further." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 543 (6th Cir. 2021) (Bush, J., concurring) (quoting *NLRB v. Int'l Ass'n of Bridge Iron Workers, Local 229*, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc)).

Here, there is no basis for expanding *Miranda* further than the United States Supreme Court has. Begin with the text. The Fifth Amendment's Self-Incrimination Clause, which mirrors Article I, Section 9 of the Florida Constitution, provides that "[n]o person . . . shall

be compelled in any criminal case to be a witness against himself." Amend. V, U.S. Const.; Art I, § 9, Fla. Const. ("No person shall . . . be compelled in any criminal matter to be a witness against oneself."); *see also Shelly*, 262 So. 3d at 21 n.7 (Lawson, J., dissenting) (explaining that "[a]lthough this Court could develop a Florida standard governing the right against self-incrimination" *Shelly* tracked federal precedent). That text (and Florida's parallel provision) constitutionalized a common-law British rule, which provided that no person should be forced to incriminate himself. *E.g.*, *Brown v. Walker*, 161 U.S. 591, 597 (1896); Joseph D. Grano, Confessions, Truth, and the Law 124, 131 (1993) (tracing the history of the protection against compulsory self-incrimination to the mandatory oaths of the English ecclesiastical courts, High Commission, and Star Chamber). And "[a]t common law, there was no requirement that a suspect be advised in pre-trial interrogation that he could remain silent or that his statements could be used against him." Dep't of Justice, Report to the Attorney General on the Law of Pre-Trial Interrogation at 25 (Feb. 12, 1986), available at https://tinyurl.com/2p8kkncv; *accord State v.*

Turnquest, 827 S.E.2d 865, 871 (Ga. 2019) ("[The defendant] concedes that English common law did not require a suspect in custody to be warned of any constitutional rights. And we have found no evidence that English common law as of 1776 required as much."); *see also Powers v. United States*, 223 U.S. 303, 313–15 (1912); *Pierce v. United States*, 160 U.S. 355, 357 (1896); *Wilson v. United States*, 162 U.S. 613, 623–24 (1896). Instead, common law courts excluded confessions if they were involuntary under all the circumstances. *E.g.*, *Sparf v. United States*, 156 U.S. 51, 55–56 (1895). Even taking *Miranda* as given, history therefore supports applying a totality-of-the-circumstances approach to whether *Miranda* warnings have been waived.

4. One more error in *Shelly*. Its inflexible rule both fails to meaningfully protect defendants' rights and inflicts real costs on the justice system.

To begin with, *Shelly* is unnecessary to protect constitutional rights. With or without *Shelly*, *Miranda* ensures that a defendant speaks to police with full knowledge of his rights. By the time *Shelly* kicks in, after all, a suspect will already have received *Miranda*'s

prophylactic warnings at least once and benefited from *Edwards*' prophylactic rule that once a suspect invokes *Miranda* the police cannot reinitiate the interrogation. Yet a third prophylactic requiring repeat warnings is simply unnecessary. If anything, by invoking his rights after the first set of warnings, the suspect demonstrated his understanding of those rights.

Meanwhile, to the extent doubts remain about the validity of the defendant's waiver, the totality-of-the-circumstances test more than suffices to discern knowledge and voluntariness. When an accused does not know his *Miranda* rights, *Wyrick*, *Edwards*, and *Bradshaw* likely require a second warning to satisfy the totality-of-the-circumstances test. That is, if a suspect cannot be said to know his *Miranda* rights without being given a second warning, then the totality-of-the-circumstances inquiry demands a second warning to ensure a knowing and voluntary waiver. *Shelly*'s "task" in other words "can be performed more accurately by adjudicating the voluntariness question directly." *Withrow v. Williams*, 507 U.S. 680, 703–04 (1993) (O'Connor, J., concurring in part).

On the other side of the scale, *Shelly* inflicts substantial harms

on the justice system by affording defendants a windfall: It needlessly suppresses even voluntarily obtained confessions. Indeed, *Shelly* renders the actual voluntariness of a confession irrelevant. It imposes a "completely rigid and formal" rule "in the sense that no showing, however strong, that a suspect's statements were freely given and truthful is deemed sufficient to excuse non-compliance." Report to the Attorney General on the Law of Pre-Trial Interrogation at 99. As Justice Lawson noted, *Shelly*'s inflexible rule would even demand that "a seasoned criminal defense attorney," fully aware of her rights, receive a second warning. *Shelly*, 262 So. 3d at 22 n.8 (Lawson, J., dissenting). That serves no conceivable purpose beyond "the freeing of known criminals or the prolongation of the anguish of crime victims through years of additional litigation." Report to the Attorney General on the Law of Pre-Trial Interrogation at 99.

But *Shelly*'s haphazard results are not confined to special categories of defendants who tend to know their rights. The Fourth District's decision in *Quarles v. State* provides an example. 290 So. 3d 505 (Fla. 4th DCA 2020). There, the defendant was convicted of second-degree murder after he shot his victim while announcing that he

was "not scared to pull the trigger over [a dispute about] a bike." *Id.* at 506. The defendant later confessed to shooting the victim. *Id.* at 507. Yet, compelled by *Shelly*, the Fourth District reversed the conviction because the defendant had not been "re-read" his *Miranda* rights when he reinitiated conversation with the police. *Id.* It reached that result even though the defendant had received his *Miranda* warnings about an hour before the confession, and even though the detective made "a reasonable inquiry into whether Defendant remembered and understood his *Miranda* rights, and that [the defendant's] desire to speak with the detective was not coerced." *Id.* at 507–08. The Constitution does not require such a result.

B. This Court should recede from *Shelly*.

When this Court confronts a decision that interprets the constitution in a clearly erroneous way, the Court's "job is to apply" the constitution "correctly." *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). "[T]he proper question" is "whether there is a valid reason *why not* to recede from that precedent." *Id.* (emphasis in original). Generally, the "critical consideration" in deciding whether to keep an incorrect precedent "will be reliance." *Id.* Nothing warrants standing by

Shelly.[4]

"[R]eliance interests are lowest in cases"—like this one—"involving procedural and evidentiary rules." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Penna and defendants like him cannot claim to have changed their behavior or legal positions based on *Shelly*'s procedural rule. *See State v. Maisonet-Maldonado*, 308 So. 3d 63, 69–70 (Fla. 2020). *Shelly* dictates the behavior of *police*, by instructing them when they must re-read the *Miranda* warnings. But a suspect makes no decisions on the assumption that *Shelly* will remain the law—indeed, the whole premise of *Shelly* is that a criminal defendant does *not* know the law, which is why *Shelly* demands an additional round of prophylactic warnings.[5]

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[4] *Shelly* does not merit *stare decisis* protection for another reason: as Justice Lawson explained, its adoption of a prophylactic rule was dicta because the case was resolved on the antecedent question of whether the police complied with *Edwards*. *See Shelly*, 262 So. 3d at 24 (Lawson, J., dissenting); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (dicta does not merit full stare decisis protection). True enough, the majority framed its discussion as a holding. But if Justice Lawson's reading of the case is correct, then it warrants even less *stare decisis* protection.

[5] Though not the focus of the reliance inquiry, Penna himself cannot purport to have relied on *Shelly*. He committed the crimes at issue here in late 2015. His interactions with Deputy Nettles occurred in December 2015 and January 2016. At that time, *Shelly* was not

Once that is accounted for, "[t]o the extent that reliance interests factor here at all, they lean heavily in favor of the victims of [Penna's] crimes and of society's interest in holding [Penna] to account and in the substantial resources that have been spent litigating and adjudicating [Penna's] case." *Poole*, 297 So. 3d at 507. The citizenry as a whole depends on "reasonable police questioning," *see Wyrick*, 459 U.S. at 49, to help protect people from crime. Decisions like *Shelly* erode that interest.

II. UNDER THE CORRECT STANDARD, PENNA'S CONFESSION WAS ADMISSIBLE.

1. If the Court recedes from *Shelly*, it should hold that all of Penna's statements to Deputy Nettles were admissible because Penna knowingly, intelligently, and voluntarily waived his *Miranda* rights.

To admit Penna's statements, the trial court was required to find that Penna initiated the conversations with Deputy Nettles and that Penna knowingly, intelligently, and voluntarily waived his *Miranda* rights. *E.g.*, *Welch*, 992 So. 2d at 214–15. The trial court explicitly found the first fact, explaining that "every time there was a

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the law; *Davis* was, and required no re-reading of *Miranda*. *Supra* Part I.A.2.

conversation it was initiated by Mr. Penna." T.13. And in permitting Deputy Nettles testimony, T.14, the trial court also implicitly found the second fact, *e.g.*, *State v. Dorsey*, 991 So. 2d 393, 394 (Fla. 1st DCA 2008) (recognizing that trial court made an "implicit finding" in deciding a motion to suppress). At least the subsidiary historical facts underlying those rulings are reversible only if they are unsupported by competent substantial evidence. *E.g.*, *Thompson v. State*, 548 So. 2d 198, 204 n.5 (Fla. 1989); *State v. Setzler*, 667 So. 2d 343, 346 (Fla. 1st DCA 1995) ("A reviewing court is bound by the trial court's findings of fact—even if only implicit—made after a suppression hearing, unless they are clearly erroneous.").

Competent, substantial evidence supported the trial court's finding that Penna knowingly, intelligently, and voluntarily waived his *Miranda* rights. Most prominently, the trial court made a factual finding that Penna was able to "tell[]" the detective what his rights were. T.11. Indeed, the trial court found that even before being read his rights, Penna was "familiar with them." T.11. Penna's familiarity only grew when he was read his rights. T.11.

That finding is both unchallenged and supported by ample evidence that Penna knew and understood his *Miranda* rights even absent any warnings. Immediately after being shot and hospitalized, R.550, Penna "understood" his *Miranda* rights, R.539. So much so that, as Detective D'Angelo testified, Penna interrupted the reading of the warnings, "explained" his *Miranda* rights, and "recited them." R.541. And even while being treated for his bullet wounds, Penna was able to twice invoke his rights. R.539–40.

Those facts alone are enough to uphold the trial court's ruling. "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010). Here, the trial court found that Penna was familiar with his rights, and there is no dispute that by speaking with Deputy Nettles, Penna acted in a manner inconsistent with his right's exercise. That is a valid waiver.

But the Court need not rest on that alone. Given Penna's familiarity with *Miranda*, Deputy Nettles' statements—just weeks after he

received his *Miranda* warnings—would have reminded Penna of his rights. As the trial court found, Deputy Nettles "reminded" Penna "that he was law enforcement," "and that he was going to [] write down or type everything that Mr. Penna told him." T.13. He also told Penna that Penna's statements could be used against him—one of the warnings required by *Miranda*. R.669. And Deputy Nettles testified that Penna was cogent when they spoke and "knew what he was saying." R.620–21; *accord* R.669–70, 673–74; *see also Davis v. State*, 859 So. 2d 465, 472 (Fla. 2003) (relying on similar facts to reject claim that a confession was unknowing).

It is unsurprising that Penna knew his rights. *Miranda* "warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). These days, *Miranda* warnings are "well-known," such that "many undoubtedly can name one or more of the four warnings an officer must give before questioning a suspect in custody." *United States v. Clayton*, 937 F.3d 630, 637 (6th Cir. 2019). And when the well-known nature of *Miranda* warnings is combined with Penna's actual knowledge, T.11–14, it is clear that Penna's waiver was knowing and intelligent. That is all that is needed because

"[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis*, 560 U.S. at 384.

There remains voluntariness. But the trial court found that Penna "initiated" every conversation he had with Deputy Nettles. T.13. And no one accuses Deputy Nettles of issuing "threats, promises or inducements to talk," *Bradshaw*, 462 U.S. at 1046 (citation omitted)—on the contrary, the trial court found that Deputy Nettles was candid that he would write down everything Penna said. T.13. Deputy Nettles further testified that he does not treat suspects "in a subvers[ive] way," R.586, but rather treats them "as human beings," R.587. Consistent with that approach, Deputy Nettles consistently testified that he did not do anything to coerce or entice Penna's remarks. *E.g.*, R.594, 595, 601, 604, 606, 612, 613, 620. Deputy Nettles also testified that he did not force, threaten, or coerce Penna to speak with him. R.620. Neither did Deputy Nettles offer Penna a "quid pro quo" for his statements. R.620. That should settle the matter because *Miranda* "goes no further" than protecting "defendants against

government coercion leading them to surrender rights." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986); *Schoenwetter v. State*, 931 So. 2d 857, 867 (Fla. 2006) ("[T]o establish that a statement is involuntary, there must be a finding of coercive police conduct."). And thus, without evidence of governmental coercion, Penna cannot show that his waiver was involuntary. *Id.*

Taking all those facts together, this case is, in many ways, an easier one than *Davis v. State*, 698 So. 2d 1182 (Fla. 1997). There, a suspect was brought into the police station in March for questioning on a murder. *Id.* at 1186. He did not receive *Miranda* warnings but requested an attorney and the interview accordingly ceased. *Id.* The defendant was then placed in a holding cell. *Id.* Nonetheless, a detective approached the suspect and said he "was disappointed" in the suspect. *Id.* In response, the suspect ultimately confessed. *Id.* At that point, the police Mirandized the suspect and he again confessed on a taped interview. *Id.* Two months later, in May, the suspect "wrote a note asking to speak to detectives about the case." *Id.* At the subsequent interview, "[p]olice asked [the suspect] if he was willing to proceed without the advice of his counsel, to which [he] responded yes,

but specific *Miranda* warnings were not recited." *Id.* The suspect then confessed again. *Id.* This Court held that the government properly admitted the second confession at trial. *Id.* at 1189. As the Court explained, the "underlying concerns of *Miranda* were fully satisfied" because the suspect "had previously received full *Miranda* warnings" and knew about them because he was reminded of his "right to counsel." *Id.* And the Court made that finding even though the suspect had gone about two months without fresh *Miranda* warnings. *Id.*; *see also Davis v. McNeil*, No. 8:04-cv-2549, 2009 WL 860628, at *21 (M.D. Fla. Mar. 30, 2009) ("The circumstances of this case demonstrate that on May 26, 1994, Davis fully understood both the nature of his Fifth Amendment rights and the consequences of his decision to abandon those rights. The record demonstrates a knowing and voluntary waiver by Davis of his constitutional rights."). The time that elapsed here between the *Miranda* warnings and Penna's reinitation was far less than that: Penna spoke with Nettles about a month after receiving his *Miranda* warnings. *Davis* therefore supports admitting his confessions.

2. Even if Penna did not validly waive *Miranda*'s protections

when he made some of his statements to Deputy Nettles, those statements were still admissible; they properly impeached Penna's defense expert's use of Penna's own statements to show that Penna was insane at the time of the offense.

The Supreme Court has long held that although unlawfully obtained evidence cannot be used to prove the government's case in chief, it can be used for impeachment purposes. *See Walder v. United States*, 347 U.S. 62, 65 (1954) ("to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths" would be a "perversion" of the Constitution). That rule applies fully to *Miranda* violations. *See Oregon v. Hass*, 420 U.S. 714, 722 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterance.").

Here, though Penna did not testify in his own defense, his experts both put his statements at issue. Dr. Williamson testified that Penna "was suffering from a significant mental illness." T.1979. In

explaining that conclusion to the jury, Dr. Williamson parroted Penna's own statements. Defense counsel asked Dr. Williamson to "talk" about "the things that Mr. Penna said" that led him to the conclusion that Penna "was still not fully in touch with reality." T.1994. To that end, Williamson told the jury that Penna talked to him "about aliens, the sun God Ra, [and] pyramids," T.1995—all of which informed the doctor's opinion that Penna was insane at the time of the crimes. Dr. Maher's testimony was similar. Relying on Penna's statements, he told the jury that Penna suffers from "major mental illness." T.2118, 2121, 2129 (repeating statements about Penna's purported "special powers" to the jury).

Penna's statements to Deputy Nettles directly impeach Penna's statements that the jury heard through Williamson and Maher. Most directly, although Williamson and Maher told the jury that Penna has said he had special powers inspired by divine beings including Ra, Penna told Deputy Nettles that "I could get out you know. They can say I'm crazy, but I know what the fuck is going on." T.1592–93. And thus, just as the jury in its "search for truth," *Hass*, 420 U.S. at 722, would have been entitled to hear Deputy Nettles' testimony about

Penna's statements if Penna had directly testified, the jury was entitled to hear Deputy Nettles' testimony when Penna testified through his experts. Any other rule would "pervert[]" *Miranda* into a "license to" put perjured statements before the jury. *Harris*, 401 U.S. at 226.[6]

CONCLUSION

This Court should answer the certified question in the negative and quash the Fourth District's decision.[7]

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[6] To be sure, in *James v. Illinois*, the United States Supreme Court held that prosecutors cannot use improperly obtained evidence to impeach "*all* defense witnesses." 493 U.S. 307, 309 (1990). But that is not what happened here. Penna's statements were not used to impeach any defense witness; they were used to impeach Penna—whose statements were introduced through an expert. In this circumstance, the statements are entirely admissible: Just as "the decision to testify in one's behalf and risk incrimination during cross-examination, the decision to plead insanity and tender proof is not a pathway without stones." *Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970); *see also Allen v. State*, 322 So. 3d 589, 602 (Fla. 2021) ("The Fifth Amendment is a shield, not a sword or a scalpel."); *United States v. Rosales-Aguilar*. 818 F.3d 965, 968–69 (9th Cir. 2016) (affirming introduction of statements as impeachment evidence under similar facts).

[7] In light of its *Miranda* holding, the Fourth District did not reach two of Penna's additional arguments for reversal. App.29. Those arguments can be decided on remand.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 7,806 words.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the e-filing portal to Paul Edward Petillo, Assistant Public Defender, at appeals@pd15.state.fl.us, ppetillo@pd15.org, and mroberts@pd15.org via the Florida e-Filing Portal on this **27th** day of December 2022.

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