

## Oral Miranda warnings: A checklist and a model presentation

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*Although the U.S. Supreme Court requires that police advise suspects of their Constitutional rights prior to custodial interrogation, the Court has not delineated a specific format for presentation of those rights (Miranda, 1966). To use any subsequent statement, the state must show that the suspect waived his Miranda rights, and that the waiver was knowing, intelligent, and voluntary. Gradually, more police interrogators are electronically recording the entire interrogation, including the Miranda warning. That creates the opportunity for a police interrogator to elicit verbal responses from a suspect that show whether and to what extent the suspect understands the Miranda warnings and makes a knowing and intelligent waiver of them.*

*Did the suspect show that he or she understood the Miranda warnings? Did the suspect give a knowing and intelligent waiver? This article presents a new checklist designed to help answer those questions.*

*How can a police officer create a record that clearly shows whether a suspect understands and knowingly waives Miranda warnings? This article presents a new model oral Miranda warning that encourages suspects to show that they understand their rights. This presentation uses clear and unambiguous language that should be understandable at a second-grade level. The presentation is*

*designed to elicit responses showing how well the suspect understands each right. The presentation addresses important issues often left off of written forms: clear statements that there is no penalty for exercising one's rights, and clear descriptions of exactly how to decline or terminate questioning should the subject so choose.*

KEY WORDS: *Miranda rights, Miranda warnings, Miranda waiver, knowing and intelligent, police interrogations, police confessions, forensic psychology.*

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The U.S. Supreme Court decided over 40 years ago that interrogation of a person in police custody can only occur if police advise the person of certain rights guaranteed by our Constitution and warn the suspect that the police are about to embark on an enterprise that, without the person's permission, would clearly violate those Constitutional rights (*Miranda v. Arizona, 1966*). *Miranda* requires that the contents of the warnings be stated in "clear and unambiguous language" (p. 468) lest the process devolve into "empty formalities."

Requirements for a valid waiver of Miranda rights are described in *Colorado v. Spring* (1987, p. 573):

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, *the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.* Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. (Emphasis added.)

What does it take for the prosecution to show that a suspect understood his rights at the time that he waived them? In my experience, some prosecutors have expected that it is enough

to wave a Miranda form with the suspect-cum-defendant's signature and have a police officer testify that the defendant signed the form. And some judges have said that was good enough. Psychologists can play an important role in gathering evidence regarding a defendant's current understanding of Miranda rights, along with current intelligence, achievement, and various personality test scores (DeClue, 2005a, b). But more and more interrogations are being recorded, allowing an opportunity for detectives to create a record that clearly shows whether and to what extent a suspect understands his or her Miranda rights.

Three current cases for which I am consulting illustrate this opportunity and show that police vary considerably in the extent to which they capitalize on it. In each case, the interrogation was video-recorded. (Each case involves different police in different jurisdictions.)

T is a 16-year-old male with average intelligence, Attention-Deficit Disorder, and a learning disability. Police suspected him of committing murder. A detective deliberately downplayed the importance of the rights, described the procedure as a formality, read the rights quickly, interspersed with comments that would be more likely to confuse than enlighten the boy, and then told T "you can just sign it right there." T was never asked to show his understanding of the rights, and the record did not provide much useful data about whether he understood his rights or not. See Appendix 1 for a transcript of the relevant portion from the video-recording.

L is a 17-year-old female with average intelligence and behavioral problems and no (other) significant psychiatric symptoms or history. Police suspected her of committing murder. A detective asked her to explain her understanding of each right as it was read to her. The detective asked T to rephrase the right in her own words, and then he clarified apparent misconceptions. See Appendix 2 for a transcript of the relevant portion from the video-recording.

C is a 43-year-old male with average intelligence. Police suspected him of capital sexual battery. The audio portion of the video-recording equipment was not working during the initial part of the interview, and it was during that time that the detective read Miranda rights to C. The police were aware of the problem with the audio equipment (it produced white noise) and fixed it after about 10 minutes. Just after the noise abated, the detective commented about the audio difficulty, announced that C had been read his rights, and moved on. This illustrates how little importance some police officers place on the opportunity to create a record that shows whether and to what extent a suspect's "waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it" (*Colorado v. Spring*, 1987, p. 573). Suspect C had signed a Miranda form and that was that. Although the video- and audio-recording equipment was now working properly, the detective made no effort to memorialize C's understanding regarding his rights; he proceeded with the interrogation. See Appendix 3 for a transcript of the relevant portion from the video-recording.

### Checklist

For what should we look and listen as we analyze a recording of an orally presented Miranda warning? I prepared a preliminary checklist based on my review of legal decisions (DeClue, 2005a) and my experiences in current forensic cases. I submitted a proposed checklist to some colleagues and requested input (including suggested additions, corrections, deletions, style changes, etc.). Appendix 4 is a current working checklist that should be useful to psychologists and others who analyze recordings of orally presented Miranda warnings to assist judges in deciding whether a suspect's "waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it" (*Colorado v. Spring*, 1987, p. 573).

## Model Warning

Miranda warnings devolve into empty formalities if the suspect does not understand them. An extreme example would be presenting the rights in German to a person who does not know how to read or write German. Less obvious is presenting the rights at a comprehension level beyond that of the suspect. Rogers, Harrison, Shuman, Sewell, and Hazelwood (2007) collected 560 different versions of the Miranda warnings and found that their reading levels varied from elementary-school to post-graduate levels (using Flesch-Kincaid reading comprehension; Flesch, 1950). The version of Miranda that was easiest to read was at the second grade, eighth month (2.8) level.

Rogers et al. (2007, p. 190) report, anecdotally, that “college students do not understand the term ‘right’ as a *protection*. Instead, the large majority of students construed ‘right’ as simply an option, but an option for which they will be severely penalized (i.e., their non-cooperation will be used in court as incriminating evidence).” They note (p. 186): “The Miranda decision articulates several mechanisms to protect the Constitutional privilege against self-incrimination including (a) the assertion of rights will stop further interrogation and (b) the exercising of rights cannot be used as incriminating evidence. The Supreme Court did not specify whether these protections needed to be expressed to custodial suspects. We found that they remain unexplained in almost all Miranda warnings (98.2%).”

In the recent case of T (mentioned above, and see Appendix 1), I was asked to assist the court in determining whether a teenager with average intelligence, a learning disability, and attention-deficit disorder gave a knowing, intelligent, and voluntary waiver of his Miranda rights. The interrogation, including the Miranda warnings and waiver, were electronically recorded, providing a good-quality audiovisual record of the proceedings, and there was a Miranda rights form with the

youth's signature on it. Nevertheless, there was a serious dispute about whether the boy understood his rights. The rights were presented orally, with interspersed comments that appeared to minimize the importance of the rights, distract the boy from recognizing exactly what rights he was waiving, suggest that his parents might somehow substitute for a lawyer, and convey that not signing the form would be an indication of refusal to cooperate with the police – with the implication that failure to cooperate would have negative consequences. After the rights were rapidly read to the boy, he was told to “sign here,” with no clear indication of what his signature meant: That he was read his rights? That he understood them? That he wished to waive his rights and talk to the police?

I testified during a hearing in which the judge was asked to suppress T's interrogation and his responses therein. I described how the manner of presentation of the Miranda rights appeared likely to exploit the child's weaknesses, as shown in his school records and as measured by relevant psychological tests (DeClue, 2005a, b). I explained that the comprehension level of the rights and waiver used was higher than the boy's comprehension level on several relevant tests. That raised a serious question as to whether the boy could understand his rights at the time they were read to him. The boy's lawyer reminded the Court that the state has a burden to show that the boy understood his rights, and I testified that, in my opinion, the boy's responses during the recorded interview failed to show that the boy understood his rights. On cross examination the prosecutor tried to insist that I answer that the boy either did understand his rights or did not. Instead I explained that the manner in which his rights were presented failed to elicit responses from him that showed whether, and to what extent, he understood his rights, and whether he was truly waiving them. (Voluntariness of the waiver was not challenged in this case.)<sup>1</sup>

How could a Miranda warning be administered in a case like this, to provide a clear record of whether a suspect gives a

knowing, intelligent, and voluntary waiver? Using principles identified by Rogers et al. (2007) I developed a model oral Miranda warning (see Appendix 5). This warning is presented in “clear and unambiguous language” as the text of Miranda appears to require. It uses simple language, understandable at a second-grade level<sup>2</sup>. It incorporates clear promises that exercising one’s Constitutional rights does not constitute a failure to cooperate, and that exercising one’s rights cannot be used against the suspect. It also includes clear directions on how to exercise the rights.

The model oral Miranda warning (Appendix 5) is intended to be presented orally, and the presentation should be electronically recorded (Innocence Project, 2007; Ofshe and Leo, 1997). A law-enforcement agency could adapt this oral warning to match the agency’s written form, or the agency could adapt its written form to match this oral warning.<sup>3</sup>

### Summary

In custodial interrogations, police are required to advise suspects of their Constitutional rights, as described in Miranda. Unless a suspect waives his or her Miranda rights, nothing the suspect says can be used in court. The state carries the burden of showing that the suspect understood his or her rights and voluntarily waived them. As more police interrogations are electronically recorded (see, e.g., Weigl, 2007), police have increasing opportunities to create a clear record of whether and to what extent a suspect understands his or her rights *at the time the suspect is advised of his or her rights*.

When police have electronically recorded the entire interrogation, including the Miranda warning, the checklist presented as Appendix 4 should aid in analyzing whether and to what extent the suspect understood his or her rights. This is a rationally derived checklist consisting of items that are

considered subjectively. This checklist should be a useful tool to enhance a comprehensive assessment, along with ability and achievement testing, clinical interview, school records, etc. Of course, it is the judge who makes the final decision about whether a particular suspect made a knowing and intelligent waiver of his Miranda rights.

It is increasingly recognized that it is unfair and inadequate for police to interrogate a suspect in secret, and only turn on electronic recording devices after the suspect has been persuaded to confess to a crime (DeClue, 2005a, b; Gudjonsson, 2003; Kassin, 2005; Kassin & Gudjonsson, 2004). In the United States we are living in an interesting time: Police are increasingly recording entire interrogations, now showing techniques that were formerly conducted in secret. In many police departments, current cases constitute the first times that their detectives' work is being exposed to scrutiny by people from outside the department. Perhaps some police practices are cleaned up as the police know that their actions are being recorded, but to a large extent police are doing what they always did, and are just now in a position to get useful feedback.

My experience with T's case (Appendix 1), for example, is that the police genuinely believed—and, perhaps, still believe—that because T signed the form, that proves that he understood all of his Miranda rights and all of the consequences of waiving those rights. The prosecutor argued as much in the suppression hearing, giving every impression that he, too, considers a signature on a form to be proof that T understood his rights and the consequences of waiving them.

What more could a judge expect from a video-recorded interchange as police advise a suspect of his or her Miranda rights and ask the suspect to knowingly and intelligently waive those rights? Quite a bit, it turns out, though nothing complicated or time consuming. The checklist (Appendix 4) can help when analyzing an already recorded interrogation.



The model oral warning (Appendix 5) can guide detectives as they advise a suspect of his or her rights during their next interrogation.

- Notes**
1. I invite the reader to use the checklist (Appendix 4) to analyze T's interview (Appendix 1).
  2. This Miranda warning has a Flesch-Kincaid reading comprehension level of 2.6, slightly lower than that of the easiest of the 560 warnings studied by Rogers et al. (2007). Reading comprehension and listening comprehension are significantly correlated (Hoover & Gough, 1990; Jackson & McClelland, 1979; Savage, 2001).
  3. Agencies are encouraged to check the comprehension level (e.g. Flesch-Kincaid) of whatever written form they use. If an agency decides to alter the wording of this oral warning, the effect on the comprehension level of the new oral warning should be checked. See Rogers et al. (2007) for additional recommendations.

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APPENDIX 1 **Excerpt from Transcript of the Interrogation of T**

Detective: I am just going to explain this, this rights waiver form to you and your folks. We kinda talked about it before. But, um, you know I want you to know, now that I mean we read you your rights so people understand your rights and so you know anytime you are interviewed by the police for the most part and you come down to the station or interview room here, um, people sometimes get the impression that maybe they are in custody and they are not free to leave. So, it's a good time to give you your rights so you understand you know your rights are per Miranda. I'm going to go ahead and read them to you. If you have any questions, just let me know. It says before you are asked any questions, you must understand your rights, okay? You have the right to remain silent. However, anything you do say can and will be used against you in court, okay? You have the right to talk to a lawyer for advice before you are asked any questions and have him with you during questioning, okay? You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. That means if you cannot afford to hire one, that you get a public defender is what that means, okay, so one will be appointed to you. If you wish to answer questions or make a statement at this time without a lawyer being present, you have the right to refuse to answer any questions, okay, and to have this interview terminated at any time, okay? Do you understand those rights?

T: Yeah.

Detective: In a nutshell, it means that you understand anything you say can and will be used against you. At the same token, if we ask you something you do not like, you are not being forced to answer any questions, okay?

T: Okay.

Detective: The second part of this is just merely a waiver and the waiver says that I read you the form, that I have read

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you the statement of your rights, and I have shown you, and I have told you what your rights are, okay? I desire to answer questions and to make a statement without first consulting an attorney, which I think you have today, and without having a lawyer present at this time, okay? But you have your parents here because you are a juvenile and you know they have rights over you there. This decision is voluntary on your part and your parents', right, and no promises and threats of force of any nature have been made against you to get you to come in here and talk, okay?

T: Okay.

Detective: So again it's voluntary, it's totally on your own free will and we are just going to sit and it will be basically five people in here talking and you can just sign it right there, just your signature that you understand your rights.

[T signs or does not sign the form at this point.]

APPENDIX 2 **Excerpt from Transcript of the Interrogation of L**

Detective G: There's a couple things that we want you to know. I understand that since you've been here you've been great. You've been talking to everybody and trying to tell your side of the story. Our job is to gather all of the facts, okay, and try to put this whole picture together. It's kind of like a big jigsaw puzzle. We try to put it together. We had to talk to a bunch of people and get a whole bunch of information and you're kind of the last person on the list to talk to, so we can get your side. But there's some things I want to go over first before we talk about any of that stuff. How old are you?

L: Seventeen.

Detective G: Okay, um, do you go to school?

L: No.

Detective G: . . . How far did you go in school? . . . What kind of grades did you get? . . . Do you drive? . . . Did you ever get a driver's license? . . . Have you ever been in trouble with the police before? . . . Have you ever been to court before? . . . Do you think you understand the court system a little bit? . . . I'm sure you've watched television and seen different things. When somebody gets arrested for a crime there's certain rights that they have. I'm gonna go over those rights with you because I want to make sure that you understand them. The first right that they talk about is: I understand that I have a right to remain silent. Do you understand that?

L: Mm-hm [yes].

Detective G: What does that mean?

L: I'm not s'pose to say anything.

Detective G: Is it you're not supposed to say anything or you don't have to say anything?

L: I don't have to say anything.

Detective G: Okay. So if you want to say something you could, but if you didn't want to, you also have that right.

L: Okay.

Detective G: I understand that anything I say can be used against me in a court of law. Do you understand that?

L: Mm-hm [yes].

Detective G: What does that mean?

L: That mean anything I say, that could be brought up again in court.

Detective G: Correct. I understand that I have a right to talk to an attorney and have him or her present with me while I'm being questioned. Do you understand that?

L: Mm-hm [yes].

Detective G: What does that mean to you?

L: That I could hire a lawyer and that, um, discussing it, he be right there.

Detective G: He could be with you, or she could be with you, when you're talking.

L: Mm-hm [yes].

Detective G: Okay. I understand that if I want an attorney and cannot afford one that an attorney will be appointed to represent me free of charge before any questioning. Do you understand that?

L: Mm-hm [yes].

Detective G: What does that mean?

L: Like a public defender.

Detective G: Okay, um, if you came in here today and you had no money to afford, to pay for an attorney, would you still have the right to have one before we talked?

L: Mm. I don't know. Yeah. I don't know.

Detective G: Okay. Let's go over that. It says [pointing to the page] if I want an attorney and cannot afford one that an attorney will be appointed to represent me free of charge before any questioning.

L: Okay.

Detective G: Okay. So in other words if you came in here and you didn't have the money for an attorney but you wanted one, you could get one before you talked. Is that right or wrong?

L: Right.

Detective G: Okay. And feel free to correct me if I say something that's not correct. Okay. I understand that at any time I can decide to exercise these rights and not answer any questions or make any statements. Do you understand that?

L: Yeah.

Detective G: What does that mean?

L: If you ask me a question, that I don't have to answer it.

Detective G: Correct. If we talked for however long we talked and all of a sudden you decided, you know what, I don't want to talk anymore, do you have that right?

L: Mm-hm [yes].

Detective G: Yes you do. Okay. Understanding these rights explained to me I wish to make a statement at this time. Would you like to talk about what happened today?

[L answers yes or no at that point.]

APPENDIX 3: **Excerpt from Transcript of the Interrogation of C**

Detective A: All right, we'll go ahead and get started. . . . C, raise your right hand. You swear the statement you're about to give is gonna be the truth, nothing but the truth?

C: Yes.

Detective A: Okay. (to Detective B) I got him to sign here. He signed his Miranda. So that's good. Can you witness this for me real quick?

Detective B: (to C) This is your signature right here?

C: Yes.

[Detective B signs the "witness" section of the Miranda form, and there is no further discussion regarding Miranda rights.]



APPENDIX 4 **Oral Miranda Warning Checklist**

Did the suspect show, in his or her own words, understanding of the following (If so, list page and line numbers from the transcript.):

- 1) I am/am not free to leave.
- 2) I do not have to talk to the police.
- 3) If I do talk to the police, anything I say can be used against me in court.
- 4) If I do not talk to the police, my choice not to do so cannot be used against me in court.
- 5) I can talk to an attorney.
- 6) If I cannot afford an attorney, an attorney will be provided for free.
- 7) I can talk to an attorney before I decide whether to talk to the police.
- 8) If I decide to talk to the police, I can talk to an attorney before talking to the police.
- 9) If I decide to talk to the police, I can talk to an attorney while I talk to the police.
- 10) If I decide to talk to the police, I do not have to answer every question. I can choose not to answer any question. If I choose not to answer a question, that cannot be used against me in court.
- 11) If I decide to talk to the police, I can decide at any time to stop talking to the police, and the decision to stop talking cannot be used against me in court.
- 12) If I say, "I do not want to talk to you anymore," the police will stop asking me questions and the interview is over.
- 13) If I say, "I want a lawyer," the police will stop asking me questions and the interview is over.
- A) Did the police make any statements before, during, or after advising the suspect of Miranda warnings that directly contradict

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any of the above? (If so, list page and line numbers from the transcript.)

- B) Did the police make any statements before, during, or after advising the suspect of Miranda warnings that (perhaps implicitly) may contradict any of the above? (If so, list page and line numbers from the transcript.)

**APPENDIX 5 Model Oral Miranda Warning**

We would like to talk to you today. We would like to ask you some questions. You do not have to talk to us. You do not have to be here today. You do not have to stay here. You can leave if you want. You can leave any time you want. If you do not talk to us, that cannot be used against you in court. If you do talk to us, anything you say can be used against you in court.

Now, I'm going to read you your rights. These are important rights. The U.S. Supreme Court says that these apply to every suspect in a criminal case. Right now you are a suspect in a criminal case, and that's why I'm going to read you your rights.

It is important that you understand your rights. I know you're probably feeling nervous right now. I'm going to read these to you slowly and carefully. I'm going to ask you to tell me in your own words what each right means. So I'll read each right to you. And then I would like you to show me whether you understand or not. Tell me in your own words what the right is. Ready?

You have the right to remain silent. Tell me in your own words what that means. ... And being silent is your right. You don't have to talk to us. And if you don't talk to us we can't hold that against you. We can't use it against you in any way. You can say no right now, and that's it. We'll stop. We will not hold it against you that you chose not to talk to us. If you do choose to talk to us, at any time you can say the magic words. "Stop, I don't want to talk anymore." And that's it. We'll stop. And we won't hold that against you.

Anything you say can and will be used against you in court. Tell me in your own words what that means. ... So if you do talk to us, anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before you are asked any questions. Tell me in your own words what that means. ... So you could say, "Stop, I want to talk to a lawyer." Those are magic words, too. And if you say those magic words, "Stop, I want to talk to a lawyer," we will stop. We won't ask you any more questions. We won't say or do anything to try to get you to talk more. And the fact that you told us to stop cannot be used against you. You can say that

before we ever start. If you do, we won't ask you any questions. You can say that right now, and we will stop right now. Or if you do agree to start answering questions, it is up to you when we stop. All you have to do is say those magic words. "Stop, I want to talk to a lawyer."

Also, you have the right to have a lawyer present with you during questioning. Tell me in your own words what that means. . . . So, if you want to have a lawyer present right now while we talk, that's fine. Or if you want to talk to a lawyer first, and then also have a lawyer present while we talk, that's fine, too. And if you choose to talk to a lawyer or to have a lawyer present while we talk, that's fine. That's a fine way for you to cooperate with us in the investigation. There is nothing uncooperative about talking with a lawyer. There is nothing uncooperative about having a lawyer present while you talk to us. If you'd like to have a lawyer present, we won't hold that against you in any way.

You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. Tell me in your own words what that means. . . . So if you do not have the money to pay for a lawyer, you can still say, "Stop, I want a lawyer." And we stop. And you get a lawyer for free. And you can talk to the lawyer and decide whether you want to talk to us. And if you do decide to talk to us, you can have a lawyer present, even if you don't have the money to pay for a lawyer.

If you talk to me, you do not have to answer every question. Tell me in your own words what that means. . . . So if I ask you something that you don't want to answer, all you have to say is, "I don't want to answer that." Or "I don't want to talk about that." And we won't hold it against you.

You have the right to stop this interview at any time. Tell me in your own words what that means. . . . Like I said, just say the magic words. "Stop, I don't want to talk anymore." Or "Stop, I want a lawyer." And we'll stop. And we won't hold it against you.

Now, do you understand all of those rights? Do you have any questions? . . . Like I said, you don't have to talk to us. And we won't hold it against you if you don't talk to us. Do you want to talk to us now? [If yes] If you understand each of these rights, please put your initials next to each right. But listen, if you put your initials there, that

means that we went over these rights, *and you're saying that you understand the right*. So, here's the first one. You have the right to remain silent. *If you understand that*, please put your initials here, next to that one. [Continue for each of the rights.]

And now I'm asking you, having these rights in mind, do you want to talk to us? . . . Do you have any more questions? Okay, then, if you want to talk to us, then sign here. Your signature here means that you understand the rights, and you are choosing to talk to us. . . . Okay, now remember, you can talk to us as long as you want. But any time you want to stop, all you have to do is say the magic words.

Okay, here we go.