

## The Right to Remain Silent Webcast Q&A Section

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*Answers provided by Dr. David Miller, AMU Professor of Legal Studies and  
Sergeant Scott McBride, Fulton County Police Department*

***Q: I work for a County just south of Atlanta. One of the questions we ask is, "Do you wish to talk to me without an attorney?" Do you think this question would solve some of these problems?***

**Professor Miller:** Yes. They require written waivers that includes that question or something like it. As a matter of protocol, I would advise that the questions are set up so that they don't just go down the list checking the first box. It looks a little suspicious if the answer is always yes. Defendants sometimes argue that they weren't given a chance to read them and they were told just to say yes to everything. It's a weak argument, but it's easy to avoid it. On the other hand, some officers have discovered that the suspects DON'T read and just check yes to everything. My recommendation (not a legal opinion) is that you go one by one.

**Sergeant McBride:** In my opinion, I think that if you ask that question after getting them Mirandized, you have covered all the bases. This is one of the questions that I also ask after reading Miranda as well.

***Q: Do you think that in the Miranda warning read to suspects, should there be a line that states: "If you wish to remain silent you must say 'I wish to invoke my right to remain silent.'"? This would then clear up any ambiguity on the subject.***

**Prof. Miller:** Thompkins' appellate defense attorney raises this argument. Yes, this would clear up the ambiguity, but it might curtail interviews. The warning that the Detectives had Thompkins read aloud is close to what you're suggesting.

**Sgt. McBride:** I agree with Professor Miller that having to speak to remain silent might be asking too much, although it would probably clear up any questions right away. I also don't know how well that would play out in an interview.

***Q: At what time would an interview be too long? Is there a specific time limit or do you think that a time limit should be adopted?***

**Prof. Miller:** It's hard to give an exact time limit because there are so many factors involved. Officers have to consider the environment of the interview room, the mental state of the suspect, the number of and time allotted for food, drinks and restroom breaks, the amount of sleep the suspect has had, and other factors.

**Sgt. McBride:** I agree with Professor Miller again, I think that each situation needs to be tailored to the suspect's limits. Medical status, age, physique and such play an important role as does the seriousness of the crime. You need to be very, very careful when you have an interview that last an inordinate amount of time. You open yourself up to claims of coercion, torture and the like, when have an extremely extended interview. (Especially if you are not video recording the interview.) There can also be questions about what took place while the suspect was out of the interview room using the bathroom, stretching his legs etc.

***Q: Do you think that there is a moral dilemma using God as technique to interrogate a suspect?***

**Prof. Miller:** I think you have to answer this for yourself. If you aren't comfortable using this technique, don't use it. Your partner might be able to use it for you, or you might decide on other tactics.

**Sgt. McBride:** I concur again; I think it is a personal choice. With one exception, every officer I talked to had used God or Religion at some point in an interview. Of course, this is not a common occurrence, but I think that most detectives will use whatever they legally can to get a confession. Of course, I did speak to one detective who felt

that it wasn't right to bring up religion, but he admitted as well that he might change his mind in the right circumstances. Of course, it all depends on how you use God or religion in the interview. I am sure there are many different ways someone could use someone's religion against them that could be immoral. But, in my opinion, you are not likely to see them in a police interview and if you did, the courts are there to provide remedies.

**Q: During the discussion, officer Scott McBride stated that some officers have taken to using their personal smartphones (i.e., video cameras) for collecting evidence. I believe he stated that most judges have allowed the evidence to be admissible so far. Can the data/video be manipulated in any way? And how is the DA or police dept ensuring that video or data has not been manipulated? Has this technique or practice (officers using their personal phones) been subject to criticism?**

**Prof. Miller:** This issue is handled like any other chain of custody process and ultimately boils down to the integrity of the officer involved. My understanding from our forensic people is that it's possible to determine whether video has been tampered with although I doubt the prosecution would spend the money for this unless it became an important issue.

**Sgt. McBride:** It is my understanding that any digital data can be manipulated. If the data is transferred from the device to some read-only format such as a CD or DVD as soon as possible and then placed into evidence you should be fine. Of course, that is only my opinion, but common sense seems to be the rule so far in my experience. In reality, almost any evidence can be manipulated but when the proper chain of custody rules are followed the chances of this occurring are minimized. As long as the detective or officer does not take an inordinate amount of time to turn the recording into evidence then, I would have to say that the chances of him or her being accused of this are minimal. Of course, the defense can also do an analysis on any digital data and could possibly discover any tampering as well. The point I think needs to be made is that digital evidence is the same as regular evidence. If established rules of evidence are followed then the question is much less likely to come up. Officers know, or should know, that when they tamper with evidence in any way they are liable to criminal and civil actions.

In my department we have general orders that guide how we handle all evidence including digital evidence. Our property/evidence officers take these rules very, very seriously, as do the District Attorneys and Judges.

As far as criticism is concerned, I have not seen it. I know that one detective has been successfully using his smart phone for out of office interview for several years now. Of course, we are not talking capital crimes here; mostly they are used for street level interviews of minor to moderate level crimes.

**Q: Does the issue of "coercion" come up from a defendant who has been convicted of a crime? A claim may come during interrogation if the officer uses the "religion" card to get information if the person does not affirm "MIRANDA" rights? Has this been an issue?**

**Prof. Miller:** The appellate defense counsel for Thompkins makes this argument, but the majority opinion dismisses it. "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" (quoting *Oregon v. Elstad*, 470 U. S. 298, 305 (1985)). In other words, if your guilty conscious makes you confess, it's admissible.

**Sgt. McBride:** I have not seen this as an issue, but in my department if we don't get Miranda affirmed we don't do the interview. I have talked to many detectives and getting people to acknowledge they understand their rights has not really been a problem. Generally people either clearly invoke their rights or they clearly waive them.

On the use of religion and God in interrogations I would like to point out that in all the detectives and police officers I spoke to used it in a non-confrontational way. It was used to get them talking and such, or as a play on their guilty feelings. I have heard of religion used more aggressively in non-law enforcement interrogations that might be coloring this question. (it was asked several different ways) I have not seen any hint of those techniques used in law enforcement in the United States. But of course, I am only basing all this on my own training and experiences, other law enforcement officers might have a different take on it.

**Q: Are these ambiguous statements upheld in the Supreme Court or are they individual state decisions?**

**Prof. Miller:** Those statements were state opinions. Given this case, they probably won't be appealed to the Supreme Court.

**Q: If a suspect does not sign the waiver, but initials each question with a yes or no, would that have helped the question of understanding the rights?**

**Prof. Miller:** Probably. The majority opinion in this case dismissed the "understanding" part of the issue and focused more on the "I waive these rights" issue.

**Q: Should the interviewer have knowledge in varying religions before using The God Technique?**

**Prof. Miller:** You can do anything that would help you get a suspect talking. If you don't know anything, see if you can get them to tell you about it. For example:

- *Are you a religious person?*
- *What religion?*
- *I don't know much about that. Can you tell me about it?*
- *The Christian Bible says "Thou shalt not kill." Does your religion have anything similar?*
- *But if someone killed another accidentally, would that be a sin (or whatever their word is)?*
- *Would it be a sin if the killing was in self-defense?*
- *So was this an accident or self-defense?*

**Sgt. McBride:** I don't think you really have to have a lot of knowledge about the religion, as Professor Miller mentioned, the overall idea is to get the suspect talking, or maybe to distract or delay the suspect if that is what the detective needs at that time. In my opinion, it is just a tool to be used (or not) by the detective.

**Q: If officers are using their own personal phones, doesn't that open their phone up to discovery to the defense?**

**Prof. Miller:** Probably. It's better to use a department issued phone.

**Sergeant McBride:** It is my understanding that it can open a phone up to discovery. It is also my understanding that this, (so far) is pretty rare so long as there are no questions about the chain of custody. If it is allowed by the officers department, then it is strictly a personal decision. The trend I see developing is that as video recording equipment shrinks in price and size more departments are issuing it.

**Q: Have you experienced any cross over with Miranda and a suspect's status of being on probation or parole? These persons usually have conditions that require them to cooperate with law enforcement. What are the advantages and or traps within this population?**

**Prof. Miller:** They still have rights against self incrimination and to an attorney.

**Sgt. McBride:** I am only aware of probation and parole restrictions that allow parole officers and sometimes police officers to search the subjects.

**Q: Doesn't this drop to the level of trickery and play on emotion to get a confession and thus clear a case?**

**Prof. Miller:** Generally the test is whether an innocent person would confess over the tactic. Claiming to have witnesses or evidence that you don't have is allowed. Giving them a chance to "clear their conscious" or "come clean" is okay. I would say most interview techniques use some form of emotional appeal.

**Sgt. McBride:** There is nothing wrong with trickery, in my opinion, so long as you do not cross the line into coercion. There is a world of difference between telling a suspect you have him on video tape and telling him you are going to

arrest his wife if he does not confess. In this example, the innocent man is going to demand to see the videotape because he knows he did not commit the crime. But on the other hand, the same innocent man might confess to protect his wife from an arrest.

**Q: *Didn't they reword Miranda?***

**Prof. Miller:** My understanding is that the standard Miranda rights were given, and this statement was added:

*5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."*

This is the one Detective Helgert had Thompkins read aloud.

**Sgt. McBride:** I don't remember Miranda being reworded anytime in the recent past.

**Q: *Wasn't this case hinged on the ambiguity of his acknowledgement of Miranda?***

**Prof. Miller:** Not really. The key issue is whether he waived his rights, not whether he knew them.

**Q: *So is it okay to lie during an interview as long as you are using coercion?***

**Prof. Miller:** "Pressure" is allowed; "coercion" is not. We generally think of coercion as force or threat of force. The test is whether this would lead an innocent person to confess.

**Sgt. McBride:** You can lie to a suspect so long as you are NOT using coercion. I would refer to the example above about trickery.

**Q: *Has a study been conducted as to how people interpret "right to remain silent"? Do people think that remaining silent means that they do not have to sign anything either?***

**Prof. Miller:** I don't know of any study on this. There are many suspects who won't sign anything. As Sgt. McBride said, the departments in his area won't do an interview without a written waiver, and from a legal standpoint I understand this. This case said it's not required.

**Sgt. McBride:** I haven't seen one, but I think it is a great idea. I think that television and other media plays a very big role in many people's understanding of their rights. It is along the lines of someone asking an undercover officer if he or she is a police officer. Of course they going to say no, but you would be surprised how many think that they legally have to say yes.

**Q: *What does he mean by "I don't know that I orally asked him."? Are not all arrested READ Miranda in English or in Spanish? If deaf, interpreter should be available.***

**Prof. Miller:** At a suppression hearing, Helgert testified that Thompkins verbally confirmed that he understood his rights, at trial, Helgert stated, "I don't know that I orally asked him" whether Thompkins understood his rights. The majority opinion didn't find this a persuasive argument. Thompkins read one of the rights aloud. Helgert read the others to him. He was given a chance to read the others. Thompkins' appellate defense attorney doesn't argue whether he understood his rights.

If there's any doubt that there's a language barrier, I think (not a legal opinion) that the police should wait until there's a translator is available.

**Sgt. McBride:** We use interpreters as well as a telephone language translation service on the streets. Miranda in Spanish and other languages can be tricky; you definitely want to record it somehow so that you can prove it was a good translation in court. If the suspect was deaf, I would definitely get everything in writing or video record the sign language translation for the same reason.

**Q: Are we at a point where we need the Miranda to be re-written? Items that will be understood and followed in all US states?**

**Prof. Miller:** Miranda isn't a law. It's a creation by the Supreme Court to protect Constitutional Rights. However, like any law the Court couldn't have known all the possible circumstances that would arise, which is why we hear new cases at all levels of courts. I gave you a number of state cases on ambiguous requests to remain silent. They all depended on a particular fact pattern, so it's almost impossible to come up with one rule that would cover all possible situations. That's why the courts have hearings.

**Sgt. McBride:** I don't think so; Miranda has evolved over time and probably will change in the future. In my opinion, it is a well balanced counter to police power during an interview.

**Q: Have you ever heard of a request for a religious figure (priest, rabbi, etc)? Would deception in this matter bring a valid confession?**

**Prof. Miller:** It would be totally inappropriate for an officer to pretend to be a religious figure. When people confess to a religious figure that confession is protected by clergy-penitent privilege and cannot be disclosed. Anything said to the fake priest would be inadmissible and any evidence discovered as a result that confession would be suppressed under the "fruit of the poisonous tree" doctrine.

**Sgt. McBride:** I do remember one barricaded gunman who wanted his preacher. After the negotiator got him on scene, the suspect came out and was taken into custody. I believe they allowed his preacher to be in the interview room afterwards. In my department it would be up to the detective's supervisor whether this was allowed or not. In regards to masquerading as a religious figure, wow, I can't see where that would ever work. The outrage of the community would probably not be very pretty, not to mention the illegality of anything gotten from such a confession.

**Q: To what extent can an interrogator go in attempting to deceive a suspect?**

**Prof. Miller:** The test is whether an innocent person would confess. Lying doesn't break this rule, but if a suspect catches you in a lie you'll lose your rapport.

**Sgt. McBride:** I completely agree with the professor on this one, you have to be smart with your lies but the sky is the limit as long as you don't coerce anything with your lies. As Professor Miller said, if an innocent man would confess you have crossed the line. ( Confess or we will arrest your sick wife and put her in jail vs. we have you on video tape committing the crime)

**Q: Can you discuss the timing of Miranda and the need to re-Mirandize? Specifically if there is a break of time in the interrogation.**

**Prof. Miller:** With short breaks (bathroom, food, etc.) it's not necessary. I would recommend (not a legal opinion) that officers re-Mirandize after overnight breaks. It's better to be safe than sorry.

**Sgt. McBride:** I have seen Miranda given after a 1 hour break where the suspect took the detectives to the scene of the crime to show where a weapon was hidden. Miranda was reissued after they came back since there was more than a few minute break in the interview.

**Q: You said earlier that a 14-year-old does not have the capacity to understand their rights as read by an officer – is there case law to back that? At what age does one not need an interpreter and if the officer takes time to help the juvenile to understand would that suffice the courts?**

**Prof. Miller:** With juveniles it's a totality of the circumstances test, of which age is only one factor. The older they are the stronger the argument is that they can give a knowledgeable waiver. This is one where I think you need to have departmental guidelines set up with guidance from your prosecutor's office. Such guidelines also help prevent civil rights violations law suits.

**Sgt. McBride:** In my department we can't interrogate 16-year-olds or younger without the presence of a parent or guardian. Those adults who are under diminished capacity whether for drugs or alcohol are also generally considered off limits as well.

**Q: *Does this affect spontaneous utterances in any way?***

**Prof. Miller:** I think the term you mean is "excited utterances," and the answer is no, this case doesn't deal with those. These usually happen before rights are read. For example, an officer responds to a call of a shooting and upon arrival at the scene someone runs up and said, "I didn't mean it...it was an accident." That's a confession and is admissible even though Miranda wasn't read because the statement was given in the heat of the moment. Lots of 911 calls come into evidence this way.

**Sgt. McBride:** I have seen this sort of thing when the officer first arrives at the scene of the crime and is still trying to figure out what the problem is. People say things like, "yeah I hit him, because he was sleeping with my wife." The officer does not need to read Miranda because at that point the officer is still sorting out the situation and is still trying to find out if a crime had even been committed.