

False Confessions: What Every Attorney Should Know

WHAT: This document is a compilation of topics related to the phenomenon of false confessions. The material is separated into sections that are “*free-standing*”, meaning the reader can go to topics that are of most interest. Because of this format, some material is repeated in different sections.

WHO: Dr. Paul Simpson is a criminal forensic psychologist with almost 4 decades of courtroom experience. He has specialties in suggestibility and memory, and authored a book in 1997 titled “*Second Thoughts: Understanding the False Memory Crisis*”.

WHO: The intended audience . . .

This resource was created in an effort to better equip defense attorneys to provide the best defense for their clients. But it is also written for prosecutors to better understand the standards of care that need to be met and identify potentially untruthful confessions.

WHEN:

The document you are reading was first drafted in January 2022. You’ll notice the date is placed at the bottom of each page. However, the material is designed to be regularly updated. Be sure to go to ArizonaForensics.com to see this same resource formatted for the website.

- Introduction
- A Brief History of Modern Police Interviewing
- Classifying False Confessions
- Three Bites of the Apple
- Research Related to False Confessions

Introduction

The U.S. Supreme Court has noted, quoting Justice White’s dissent in *Bruton v. United States*:

A confession is like no other evidence. Indeed, “*the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so*” [Ref. 31, p 296].

- Research consistently shows that confessions have a greater impact on jury decisions than do witness statements, or even hard evidence (e.g. Appleby et al., 2013, Kassin & Neumann, 1997). (p.187)
- Drawing on a sample of 496 Canadians convicted of a sentence of 2 years or more for a sexual offense (typically a sexual assault), St-Yves (2002) observed that confessing during a police interrogation was more likely among suspects who were Caucasian, single, had a higher IQ, expressed feelings of guilt, had a dependent personality, and had sexually, but nonviolently victimized a (young) male victim. (p.198)
- . . . it was found that perpetrators with a criminal history of mainly sex offenses, who are younger (≤ 40.5 years old), and who committed their crime during the day showed the highest likelihood of confessing during police interrogations (68%). Although individuals with a versatile criminal history (i.e., having prior convictions mainly for nonsexual crimes) were generally less likely to confess (35%), those who targeted an unknown victim that was not from a vulnerable and criminogenic environment (i.e., dysfunctional background, involved in prostitution activities, alcohol and/or drug abuse) still showed a reasonably high likelihood of confessing (54%). (pp.198-199)

But the problem arises when innocent suspects provide incriminating statements to investigators.

“Gone are the days when the police would shine bright lights on the suspects, grill them for 24 hours at a time, or beaten with rubber hose, but observational studies shown that the use of physical force is given way to more psychologically oriented techniques, such as feigned sympathy and friendship, appeals to God and religion, the use of informants, the presentation of false evidence, and other forms of trickery and deception.” (Confessions in the Courtroom, Saul Kassin, 1993)

The phenomenon of false confessions is a profound problem within the American legal system.

- As of January 2020, the Innocence Project has documented over 375 DNA exonerations in the United States. Although these individuals were innocent of these crimes, (<https://innocenceproject.org/research-resources/>)
 - 29%: Involved false confessions
 - 44 of 375 (12%) pled guilty to crimes they did not commit
 - At least 43 (52%) of the 83 DNA exonerees who falsely confessed included non-public facts in their confessions [as of July 29, 2020]
 - 23 (22%) of the 104 people whose cases involved false confessions had exculpatory DNA evidence available at the time of trial but were still wrongfully convicted [as of July 29, 2020]
 - 83 (61%) of the 137 DNA exonerees who were wrongfully convicted for murder had false confessions involved in their cases (33 confessed themselves, 20 had co-defendants who confessed, and another 30 confessed themselves and had co-defendants who confessed) [as of July 29, 2020]
 - 69%: Involved eyewitness misidentification and of these:
 - 84% of the misidentification cases involved a misidentification by a surviving victim
 - 42% involved a cross-racial misidentification<https://innocenceproject.org/dna-exonerations-in-the-united-states/> [as of 12/29/2021]
- Bedau and Radelet identified 350 wrongful convictions in capital and potential capital cases between 1900 and 1985 and found that 49 of them were caused by false confessions.
- Gross and colleagues examined 340 exonerations in the United States from 1989 through 2003, of which 144 were cleared by DNA evidence and found that 15 percent of these individuals had falsely confessed. That study further indicated that 69 percent of the innocent confessors were either mentally ill or mentally retarded.
- In 2000, Scheck and collaborators analyzed 62 cases of wrongfully convicted individuals who had been exonerated by DNA evidence and found that approximately 24 percent involved false confessions.
- A 2008 empirical study found that 16 percent of the first 200 individuals exonerated by postconviction DNA testing in the United States had false confessions introduced during their trials.

Scientific research reveals the phenomenon of false confessions is driven by a combination of interrogator-suspect interactions and a suspect's psychological make-up. Despite advances in our understanding, the occurrence of false confessions is counterintuitive to the average juror. In instances of suspected false confession, it is critical that the defense attorney provides expert testimony to better educate the trier-of-fact and challenge the powerful implication of guilt that a confession suggests. In various jurisdictions, the defense is allowed to proffer expert testimony to

educate the trier-of-fact regarding how aggressive interview techniques and/or the accused's psychological characteristics can lead to a possible false confession. But the expert's testimony must be based on clinically-based opinion and related to the specific confession in your case.

Data Sources for Research on Exonerations

- The *National Registry of Exonerations* (NRE) is a public database that records all exonerations in the United States since 1989, including cases in which DNA played a limited or no role in the exoneration. In January 2020, the NRE database contained more than 2,500 cases. Their website is well suited to sorting and subsetting cases, and it provides graphic displays of case variables, including crime details and factors contributing to wrongful conviction. The site also has reports on special topics. Spreadsheets of the data are available upon request.
- *Convicting the Innocent* is a public database developed in conjunction with Brandon Garrett, the author of the book *Convicting the Innocent*, an analysis of the first 250 DNA exonerations in the U.S. This database is limited to DNA exonerations and is updated annually. In January 2020 it included 367 cases. It has search capabilities and includes trial transcript excerpts and other source documents, as well as citations to judicial opinions.
- *The Innocence Record*, a collaboration between the Innocence Project and Winston & Strawn, LLP, is an online repository of available case documentation from DNA exonerations nationwide. It provides searchable case summaries and a digital archive of underlying documents, including police and laboratory reports, trial transcripts and post-conviction motions and pleadings. Researchers may apply for full access to this resource by completing and submitting an online application.

Competent Waiver in Miranda

Miranda Reasoning and Competent Waiver Decisions: Are Models of Legal Decision Making Applicable?

Blackwood, Hayley L.

Doctor of Philosophy (Clinical Psychology), May 2013, 145 pp., 22 tables, references, 129 titles. (Summary remarks pp. 92-117)

DISCUSSION

Custodial incommunicado interrogations were deemed inherently coercive by the Supreme Court in *Miranda*, who implemented safeguards to protect Constitutional rights. Specifically, the Court acknowledged the “innate secrecy” of interrogations in the landmark *Miranda* decision (see p. 532) and has accordingly imposed procedural safeguards to uphold legal protections afforded by the Fifth and Sixth Amendments of the U.S. Constitution. Those safeguards require that suspects (a) be advised of their legal rights, and (b) knowingly, intelligently, and voluntarily waive their rights prior to interrogation by law enforcement. If challenged, suspects’ statements made outside those safeguards are not admissible as evidence in court. As indicated in the Introduction, Kassin and Gudjonsson (2004) identified two primary reasons for such guidelines, which entail (a) protecting the accused against violations of their Constitutional rights, and (b) minimizing the risk for false confessions by innocent suspects.

Constitutional safeguards are intended to protect the more than 13 million individuals arrested annually in the United States (Uniform Crime Report; FBI data; 2011). With few exceptions, those millions of suspects were informed of their Constitutional rights to silence and legal counsel prior to any custodial questioning by law enforcement. Despite routine advisements of legal safeguards, approximately 80% of suspects waive their rights, thereby agreeing to answer law enforcement’s

questions without the benefit of legal counsel (Kassin et al., 2007; Leo, 1996; Leo & White, 1999; Moston, Stephenson, & Williams, 1993). Subsequently, approximately half of suspects 92 waive their rights and proceed to provide incriminating evidence – if not a full confession – regarding their involvement in a crime (Gudjonsson, 2003).

Suspects waiving their rights to legal counsel may not fully appreciate the importance of their decisions and the potential consequences in the context of any admissions to law enforcement. Confessions, even if false, are extremely powerful and have detrimental consequences. Drizin and Leo (2004) characterized confession evidence as “inherently prejudicial and highly damaging to the defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proved false beyond any reasonable doubt” (p. 959). As such, the decision to waive interrogative rights may be the single most consequential legal decision a defendant can make.

Surprisingly, the validity of Miranda waivers is rarely questioned despite the high prevalence of waivers and their potentially dire consequences for both guilty and innocent suspects (Rogers et al., 2010). An informal survey of public defenders revealed that out of about 22,000 felony cases Miranda waiver validity issues were not raised in a single case (Rogers, 2008). As a potential explanation for the infrequency of contested Miranda waivers, Rogers (2011) introduced the professional neglect hypothesis. According to the professional neglect hypothesis, legal professionals do not question Miranda waivers because of their own assumptions about Miranda and defendants’ capacities.

At least two factors emerge as logical explanations underlying Rogers (2011) professional neglect hypothesis: (a) the legal threshold for a valid waiver is low and (b) there is an implicit assumption that everyone – including suspects – already understands their Miranda rights. On the first point, the Court specified in *North Carolina v. Butler* (1979, p. 373) that “an express written or oral statement of a waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver.” In that regard, once a suspect is Mirandized and subsequently agrees to talk, it is generally assumed that such a waiver represents knowing, intelligent, and voluntary decisions.

As noted by Rogers, Shuman, and Drogin (2008, p. 5), courts assume “everyone understands” Miranda warnings. One explanation for this strongly held belief is that most defendants affirm their understanding of the warnings when queried on the matter. According to Rogers (2008), 84.6% of Miranda warnings used in U.S. jurisdictions ask suspects whether they understand their Miranda advisements. If suspects appear to listen to Miranda warnings, confirm their understanding, and indicate their willingness to talk to law enforcement agents, the commonsensical conclusion is that such waivers are knowing and intelligent. Given defendants’ self-appraisal of their understanding and the previously stated assumption (i.e., everyone understands the Miranda warnings), this conclusion appears reasonable. Moreover, it seems counterintuitive that suspects would claim understanding of such critical information when they lack an adequate grasp of the information. However, results from the current study and previous Miranda-related research challenge this fundamental assumption of Miranda’s framework. Specifically, research (Rogers, 2008) indicates a breath-taking number of defendants (e.g., more than 318,000 annually) waive their rights annually when they understood less than 50% of the Miranda warnings. This finding is particularly problematic considering that self-appraisals are often considered strong evidence of a knowing and intelligent waiver.

Numerous authors (Godsey, 2006; Nguyen, 2000; Rogers, 2008; Rogers & Drogin, 2008) have observed the ubiquity of Miranda warnings in American culture by the frequency with which they appear on television shows related to the criminal justice system. As a result, it seems implausible for most English-speaking persons living in the United States to deny familiarity with the Miranda warnings. In fact, Rogers (2008) commented that most Americans believe they know their legal rights. Unfortunately, the pervasive influence of police dramas has resulted in the often-inaccurate assumption that everyone knows their Miranda rights.

The Supreme Court ostensibly presumes familiarity equates knowledge and comprehension, as prior experience with the legal system is indicated in *Coyote v. U.S.* (1967) as a relevant factor to consider in the totality of circumstances surrounding a waiver of rights. Indeed, most defendants (78.8%) in the current research study acknowledged they had been exposed to the Miranda rights via police dramas on television. A slight majority (57.5%) even recalled the warnings from a previous arrest. However, as found in previous studies (Rogers 2011; Rogers et al., 2010), their experienced-based familiarity cannot be equated with accurate understanding. Moreover, defendants with over-estimated self-appraisals (e.g., believe they already know their rights) may not attend to Miranda warnings, thereby curtailing their potential effectiveness in informing the criminally accused.

In light of the potentially detrimental consequences of confessions, the practical application of Miranda rights has become increasingly scrutinized in both research and forensic practice (Helms, 2003). Based on the aforementioned statistics, there are a remarkable number of defendants who are at risk of having their Constitutional protections disregarded. Legal professionals must pursue adequate precautions to minimize violations of these defendants' Constitutional rights.

Knowing and Intelligent decisions to waive legal rights rely on a "reasoned choice among available alternatives" (Godinez v. Moran, 1993, p. 394), although the Supreme Court has not specified the conditions of a "reasoned choice." Without such specification, operational definitions and subsequent clinical frameworks for assessing rational abilities – as examined in the Introduction – rely on guidance from theoretical perspectives provided by traditional and legal decision making models. Based on those models, a reasoned decision relies on three underlying capacities: Understanding, Appreciation, and Reasoning. This chapter primarily (a) provides a brief review each of these three capacities, (b) reviews how pretrial defendants in the current study performed with respect to each capacity, and (c) discusses the applicability of different legal decision making models in the context of their applicability or inapplicability to pretrial defendants' Miranda waiver decisions in the current study.

Understanding of Miranda Rights

The adequacy of defendants' legal decisions relies heavily on the capacity to understand information relevant to these determinations. Using a decisional competence model, Hoge, Bonnie, Poythress, and colleagues (1997) proposed that understanding – the first level of decisional competence – requires both factual knowledge of legal rights and procedures and the capacity to identify plausible reasons for alternative legal options. As applied to Miranda waiver decisions, a factual knowledge is achieved only with a demonstrated understanding of (a) the words and phrases of the Miranda warnings and (b) the legal rights the warnings are intended to convey (Grisso, 2003; Rogers & Shuman, 2005). With respect to legal procedures, Rogers and Shuman suggested that decisional competence also relies on whether suspects adequately comprehend how Miranda waiver decisions could consequently affect their legal cases at the time of their decision and in the future. From a clinical perspective, the requisite capacities for adequate understanding include accurate recall of the Miranda warning, knowledge of Miranda vocabulary, and sufficient

understanding of the recalled information. To examine whether suspects meet requirements indicated at the first level of decisional competence, each of these functional abilities were evaluated in the current study.

Miranda Warning Recall

Custodial suspects are typically informed of their legal rights to silence and legal counsel via oral or written advisements of Miranda rights subsequent to their arrests. They must then process and later recall the relevant information communicated in the warnings in order to make informed decisions whether to waive or assert their rights. As a basis for this determination, defendants must demonstrate the capacity to recall the basic components of the Miranda warnings. The current study employed methods used in previous research (e.g., Grisso, 1998; Rogers, 2008; Rogers et al., 2011) to test defendants' capacity to recall Miranda warning content. Specifically, the pretrial defendants were presented with the five Miranda warning components and subsequently asked to paraphrase the content of each component using their own words. Notably, the five Miranda components were presented one at a time, which likely maximizes recall.

Quite concerning, only small numbers of defendants in the current study exhibited adequate recall of the Miranda warnings. Using a low benchmark for good recall (i.e., $\geq 70\%$), merely 15.2% demonstrated adequate recall of a moderately difficult Miranda warning. Although the percentage of defendants with good Miranda recall is substantially less than ideal, findings from the current study are not surprising when compared with previous research. Using the same methodology, Rogers (2008) found only 20.5% of a pretrial defendant sample exhibited good Miranda warning recall. It can be hypothesized the subtle differences obtained in the current research may be attributed to sample characteristics (e.g., arrests, cognitive abilities); however, those data were not available for comparison. Nonetheless, current results provide consistent support for Rogers' conclusion that, even at the most basic level, defendants are often unable to grasp Miranda's words and phrases. As such, a remarkable number of Miranda waivers may be deemed insufficient according to the Supreme Court's standards for knowing and intelligent waiver decisions.

Miranda warnings are ineffective as procedural safeguards unless custodial suspects have adequate knowledge regarding each of the Miranda warning components (Godsey, 2006). As indicated by Helms and Holloway (2006), understanding of only a portion of the warnings would not fulfill the Supreme Court's requirements outlined in *Miranda* (1966). For each of the five Miranda warning statements, at least one key concept was omitted by more than half of defendants in the current study. Errors in recall were observed even for the first component (i.e., right to silence), which previous studies consistently found to be the easiest component to accurately paraphrase (Blackwood, 2009; Helms & Holloway, 2006; Rogers, Rogstad, Gillard, Drogin, Blackwood, & Shuman, 2010; Rogers et al., 2011).

Two common errors in recall were observed for the first Miranda component in the current study. First, when recounting the right to silence component, defendants frequently (61.3%) failed to grasp that asserting their Miranda rights would stop questioning. In other words, they are often insufficiently apprised of the beneficial consequences of choosing to invoke the right to silence. As a second common error, 67.5% did not grasp their silence is safeguarded (i.e., cannot be used against them). In comparison, Rogers and colleagues (2011) found that the potential risks of asserting silence was often misunderstood by criminal defendants. When tested using various language versions of the first Miranda component, defendants in their study frequently (49.5% - 60.4%) failed to recall that an assertion of rights cannot be used as incriminating evidence. Common errors in recall for the second component – also related to the right to silence – included failure to grasp that making a statement was equivalent to “giving up” the right to silence (70.0%).

Defendants also frequently (57.5%) did not indicate the context in which incriminating statements could be used (i.e., in court).

Suspects' right to legal counsel is conveyed in the third Miranda component, and the fourth component communicates the opportunity for court-appointed legal counsel for indigent suspects. Consistent with previous research (Blackwood, 2009; Cooper & Zapf, 2008; Everington & Fulero, 1999; Grisso, 1998; Helms & Holloway, 2006; Rogers et al., 2011), current findings indicate that comprehension of the right to counsel is 99% considerably more difficult relative to other components. Defendants in the current study typically recalled the basic concept of the right to an attorney. However, similar to Rogers and colleagues (2011) and Blackwood (2009), slightly more than half of defendants in the current study had difficulty recalling the timing for which an attorney may be consulted. Similar percentages did not recall they could talk with an attorney before questioning (56.3%) or have an attorney present during questioning (51.3%). Regarding concerns about appointed legal counsel for indigent defendants, many failed to grasp they would not be held financially responsible for appointed counsel (63.8%). Moreover, almost all defendants (97.5%) may not realize that counsel can be appointed prior to any formal questioning. In that regard, many defendants may believe appointed legal counsel is reserved for representation in court rather than in the more immediate circumstances of interrogation.

The fifth Miranda component relates the ongoing nature of Miranda rights from arrest to the end of trial proceedings. In the current study, 50.0% of defendants could not recall their rights could be reasserted at any time, suggesting they may assume that an initial decision to waive Miranda rights is a permanent one. In comparison, Rogers and colleagues (2011, p. 272) also found almost half of defendants (42.4% - 51.1%) failed to recall "the decision to renounce these rights is not final and can be revoked when you so desire." In summary, both the current study and past research consistently evidence problematic phrases of Miranda warnings that may need further emphasis or explanation for defendants to accurately grasp the key knowledge necessary to make an informed Miranda waiver decision. Importantly, basic recall of Miranda warnings does not equate comprehension of legal rights (Rogers, 2008). In other words, mere recitation of Miranda concepts cannot be automatically equated with genuine understanding.

Comprehension of Miranda Warning

Vocabulary Comprehension of key terminology used in Miranda warnings provides the foundation for any knowledgeable understanding of Constitutional protections. In the current study, approximately one-fourth of pretrial defendants failed to demonstrate even partial comprehension for 14 (38.9%) of the 36 Miranda terms, with seven of those terms being poorly understood by a majority (55% - 88%) of defendants. The highest failure rates occurred for the related words "coerced" (88.6%) and "coercion" (87.3%). Remarkably high failure rates for these words may be attributed to their difficulty, as they require an advanced education (i.e., 16th and 13th grade level respectively). Despite the high level of word difficulty, these words are commonly used in Miranda warnings across the United States (Rogers, Hazelwood, Harrison, et al., 2008).

The majority (60.8%) of defendants failed to provide an accurate definition for the word "right," which is one of the most important Miranda terms. Their most common problem was defining "right" as it applies in a legal context, rather than other contexts (e.g., "correct"). Without a contextual understanding of a "right" as an entitlement, this component of Miranda warnings is likely to become an empty formality. "Proceedings" and "incriminate" were also among the most poorly defined words. These words are critical to adequate Miranda warning comprehension and subsequent waiver decisions. As suggested by Rogers and colleagues (2011), such problematic terms could easily be replaced with simpler terms such as "trial" and "against you."

Six of the seven most commonly missed Miranda terms in the current study also topped the list of poorly understood words in Rogers and colleagues' (2011) research. In the current study, "prosecution" was also inaccurately defined by a majority of defendants. Despite the one word discrepancy, data from current and past research consistently indicates criminal defendants are unable to accurately define a subset of frequently used Miranda terms. This issue could easily be addressed with substituting simpler words with similar meanings.

For the six terms (i.e., consult, attorney, interrogation, appoint, entitled, and right) tested by Grisso (1998), findings from the current study evidenced a substantially larger percentage of defendants failed to demonstrate correct understanding for five of the words. "Interrogation" was the one exception, as Grisso found this word to be incomprehensible for almost twice as many adult offenders. The higher failure rates for five words in the current study may be attributed to sample differences. Specifically, the current sample was comprised of pretrial detainees, whereas Grisso's sample was comprised of probationers living in the community. The considerably greater impairment found for the current sample is likely related to the increased distress resulting from the current detainment of defendants in the current study.

Knowledge of Miranda Rights

Criminal suspects cannot be viewed as "blank slates" without prior knowledge that are expected to absorb information via a cursory reading of Miranda warnings. As evidenced in previous and current research, defendants often have impaired abilities to sufficiently recall fundamental concepts of Miranda warnings, even immediately after a recent exposure to the warnings. Miranda warning comprehension is further complicated because some Miranda information is previously learned, or more importantly, mislearned (Rogers, 2008). Firmly held misconceptions about Miranda rights and their application may lead to impaired Miranda rights understanding regardless of whether a defendant sufficiently comprehends the Miranda components. The current study assessed defendants' prior (mis)assumptions pertaining to salient Miranda warning content. As expected based on previous research (Rogers et al., 2010), defendants in the current study evidenced substantial Miranda misconceptions. On average, they held eight misguided beliefs about the application of their legal rights to silence and presence of legal counsel.

Defendants in the current study held inaccurate beliefs regarding many of the same Miranda issues as found by Rogers and colleagues (2010). They were particularly misinformed about the legality of deceptive police interrogation tactics, and they commonly held misconceptions regarding the applicability of Miranda rights. For example, many falsely believed police are legally prohibited from introducing evidence of fictitious crimes (58.8%) or eyewitnesses (60.0%) as a method to extract a confession during interrogations. Regarding the application of Miranda rights, a substantial majority (67.5% to 75.0%) held inaccurate knowledge about the circumstances in which Miranda applies. Quite concerning, more than one-fourth (26.3%) of defendants believed there is no reason to pay attention when advised of their rights because all Miranda warnings are the same. In this case, previously mislearned information about Miranda cannot be corrected, and therefore, may continue to misinform subsequent waiver decisions. It is not surprising that defendants are poorly informed about deceptive police practices considering it is not specifically addressed in the five components of Miranda warnings required by Supreme Court standards. However, such misassumptions may often play a determining role in Miranda waiver decisions.

Any firmly held inaccurate belief may be extremely influential, and potentially detrimental, to Miranda understanding and subsequent waiver decisions. Notably, 11 (44.0%) items were failed by more than one-third of defendants. In addition to the problematic items noted above, defendants

frequently failed to understand items containing legalese, such as “withdraw your waiver” for reassertion of rights or “indigent defendants” when referring to free legal services. As perhaps the most blatant false belief, about one-third (35.0%) of defendants believed their silence in itself could be incriminating. Misinformation about the right to silence may be corrected if suspects seek legal consultation. Unfortunately, however, past research indicates that a substantial majority will not seek legal counsel, thus their Miranda waiver decisions may frequently be driven by faulty information. In those cases, defendants’ decisional competence is at risk for impaired reasoning.

Appreciation of Miranda Rights

Relevant knowledge of Miranda warning words and phrases constitutes only a minimal standard of Miranda knowledge. It is a moot point if defendants fail to appreciate how their rights apply to their own legal circumstances. As a more stringent requisite for decisional competence, competent decisions require sufficient appreciation of the nature and significance of the decision faced with (Bonnie, 1992, 1993; Grisso & Appelbaum, 1998). In that regard, appreciation refers to the ability to apply key knowledge to one’s own circumstances.

The necessary appreciation for competent Miranda waiver decisions is construed as an understanding of general functions of Miranda rights. Specifically, as outlined in the Introduction, Grisso (1998, 2003) proposed competent waiver decisions require accurate perceptions of the legal system in three fundamental areas: (a) the adversarial nature of police proceedings, (b) the potential value of attorney consultation, and (c) the continuous nature of the right to silence.

Defendants who hold inaccurate perceptions about the function of Miranda rights may be unable to apply critical information to their legal circumstances and make competent waiver decisions. In the current study, Grisso’s (1998) Function of Rights in Interrogation (FRI) was used to evaluate the pretrial defendants’ capacity to appreciate their Miranda rights. As expected based on Grisso’s (1998) normative data, the pretrial defendants in the current study had cognitive inaccuracies that impaired their capacity to fully grasp how Miranda rights apply in their legal circumstances. Overall, 47.5% exhibited inadequate appreciation for at least two FRI concepts and a substantial minority (21.3%) were impaired in three or more areas of Miranda appreciation.

Defendants commonly acknowledge the adversarial nature of police questioning, but fail to fully appreciate the application to their own cases. Grisso (1998) found that 97.0% of adult offenders understood the general purpose of interrogation is to elicit incriminating evidence. In contrast, 25.1% did not appreciate the direct consequences of providing such incriminating evidence (i.e., used in their prosecution). Results from the current research closely mirrored Grisso’s previous findings; 93.8% of defendants recognized the general purpose of interrogative questioning, yet only 17.5% identified how any incriminating statements would consequently be used against them in future court proceedings. As noted by Rogers and Shuman (2005), full appreciation requires awareness of Miranda waiver consequences.

Defendants evidenced substantially greater appreciation regarding the right to counsel and the potential value of seeking legal consultation. In the current study, defendants’ responses reflected adequate appreciation for all queries related to the purpose of legal counsel (5.0% or less failed any item). Grisso’s (1998) offender sample also performed significantly better in this area of Miranda appreciation relative to other domains. Specifically, he found failure rates ranging from 3.9% to 9.9% for items assessing the right to legal counsel, which is slightly more variable than the current research ($\leq 5.0\%$) failures. In comparison, 5.0% or less of the current sample evidenced poor appreciation in their responses to the same inquiries.

Very troubling, nearly three-fourths of defendants had inadequate appreciation of the meaning of their right to silence. As two common inaccuracies, both past (Grisso, 1998) and current findings illustrate defendants often (a) fail to understand a “right” as a Constitutional safeguard and (b) misperceive the continuous nature of the right to silence. Regarding the first, 21.7% of Grisso’s offenders and 20.0% of the current defendants failed to appreciate that their silence was protected. On the second point, many failed to conceptualize the continuous nature of the right to silence. Specifically, Grisso found that 42.9% were unaware that their right to silence applies in future court proceedings (e.g., trial). As a corollary to Grisso’s research, 55.0% of the current defendants believed their right to silence could be revoked by a judge during a future court proceeding. A significant, yet much smaller percentage (17.5% failed) had no understanding of the consequences of invoking silence (e.g., police should comply with defendant’s request to be silence). In general, these findings suggest defendants generally exhibit understanding of the immediate advantages of the right to silence, but often fail to grasp its application to future criminal proceedings.

The practical effectiveness of Miranda warnings relied on the assumption that defendants can understand both the general meaning and the personal significance of the warnings (Cloud et al., 2001). Contrary to this assumption, research indicates that many who waive their rights grasp how Miranda rights apply in general, but are unaware of the personal and legal significance.

Miranda Reasoning

As the third level of decisional competence, knowing and intelligent Miranda waiver decisions require that defendants rationally consider relevant information to inform subsequent legal decisions. Legal frameworks (e.g., *Godinez v. Moran*, 1993, p. 394) indicate the competence or incompetence of a waiver of legal rights lies in defendants’ capacity to produce a “reasoned choice among available options.” To parallel those guidelines from previous legal cases, clinical conceptualizations of decisional competence (Appelbaum & Grisso, 1988; Bonnie, 1992, 1993) incorporate rational abilities into their formulations of what constitutes a rational legal decision. Currently, however, no bright-line standards exist regarding specific rational abilities necessary for knowing and intelligent legal decisions.

As outlined in the Introduction, decisional competence models propose a common subset of rational abilities necessary for competent legal decisions. However, alternative decision making models differ conceptually in the type of decisional capacities perceived as essential to the development of a rational decision. In that regard, the current study focused on the process by which defendants make Miranda waiver decisions to examine the applicability of proposed decision making models. As summarized in the Introduction, five common components of rational reasoning abilities emerge across models of legal decision making (Appelbaum & Grisso, 1988, 1995; Bonnie, 1992, 1993; Grisso, 1997, 2003; Hilgendorf & Irving, 1981; Rogers & Shuman, 2005). As previously discussed in detail (see Table 2), those five rational reasoning abilities include (a) identifying alternative options, (b) generating consequences for each alternative, (c) evaluating the desirability of perceived consequences, (d) assessing the likelihood of perceived consequences, and (e) utilizing a rational reasoning process to arrive at the best decision under a given set of circumstances. Traditional decisional competence models based on informed consent theory (Appelbaum & Grisso, 1988; Bonnie, 1992, 1993) have focused primarily on cognitive tasks underlying decision making. Other models provide broader perspectives that introduce the potential effects of impaired judgment of circumstances (Scott et al., 1995) and potential effects of situational factors (Hilgendorf & Irving, 1981). The following section discusses the applicability of decisional models in the context of the current defendants’ Miranda waiver decisions.

Decisional Competence Model

Bonnie's (1992, 1993) decisional competence model focuses heavily on the cognitive aspects of decision making, particularly the ability to rationally manipulate relevant knowledge in reaching a decision. In his model, the rationality of legal decisions relies primarily on the decisional process rather than the outcome. Specifically, a reasoned choice requires the capacity to weigh relevant information in order to arrive at a decision that might best meet an individual's needs in a given set of circumstances. Rational reasoning, therefore, requires sufficient cognitive capacities to think rationally about alternatives and consequences of legal decisions.

Perceived appraisals of the likelihood and desirability for alternative consequences play an essential role in the process of legal decision making (Appelbaum & Grisso, 1988, 1995; Bonnie, 1992, 1993; Grisso, 1997, 2003; Hilgendorf & Irving, 1981; Rogers & Shuman, 2005). In theory, defendants' decisions are rationally based on their appraisals of potential consequences of each alternative. Past Miranda reasoning studies (Rogers, Harrison, Hazelwood, & Sewell, 2007; Grisso, 1981) have taken a first step by broadly focusing on defendants' identified reasons for waiving or asserting Miranda rights. Questions remain, however, regarding the manner in which defendants weigh perceived consequences of waiver decisions. Thus, a primary focus of the current study was to evaluate how defendants appraise risks and benefits of what they perceive as consequences for alternative Miranda waiver decisions. As discussed below, the current study aimed to answer the important question of whether criminal defendants make rational decisions based on their personal appraisals of perceived Miranda waiver consequences.

Rationality of Pretrial Defendants' Case-specific Miranda Waiver Decisions

The rationality of pretrial defendants' Miranda waiver decisions was determined by implementing theoretical concepts outlined in traditional decisional competence models. As indicated by traditional legal decision making conceptualizations (Appelbaum & Grisso, 1988, 1995; Bonnie, 1992, 1993; Grisso, 1997, 2003; Hilgendorf & Irving, 1981), rational reasoning relies on a cost-benefit analysis of relevant information to determine the best decision among options. In that regard, a defendant's personal appraisal of the likelihood and probability of perceived consequences forms the foundation for subsequently weighing which alternative is most rational. A reasoned choice is defined as one that maximizes expected utility when considering the weight (i.e., the likelihood and the desirability of each consequence) assigned to perceived consequences of decision options. Using that model of a reasoned choice, the current study evaluated whether pretrial defendants made rational Miranda waiver decisions in their own cases based on the subjective cost-benefit analysis of each alternative related to Miranda waiver decisions.

As discussed above, weighing alternatives and their consequences when considering whether to waive or assert Miranda rights is an essential component of rationally reasoned waiver decisions. Equally important, is whether defendants can apply such rational abilities to their own legal circumstances when making legal decisions. Using a cost-benefit analysis, defendants in the current study weighed the decision to exercise Miranda as significantly ($d = 0.60$) more valuable than the decision to waive Miranda. In abstract, therefore, defendants reported they perceived exercising Miranda as the best decision. However, this logical reasoning was not necessarily applied in their cases.

Defendants frequently made irrational waiver decisions in their own legal cases. That is, their decisions conflicted with their weighted alternatives. When defendants' preferred choice was compared to their actual Miranda waiver decisions, general findings were remarkably contradictory to expectations. Of those defendants who believed asserting Miranda was the best decision, 45.5% cast that reasoning aside and relinquished their legal rights in their own cases.

The same trend was true for a large majority of defendants whose reasoning indicated a preference for waiving Miranda; 79.2% actually invoked their rights when faced with the decision in their own cases. Across both options, nearly half (48.8%) discounted their rational reasoning by choosing the less favorable alternative in their own cases. Interestingly, no significant differences were observed for these groups when comparing their cognitive or Miranda-related abilities. These findings indicate traditional decisional competence models appear conceptually sound, but often failed when applied to real-world legal decisions. As the first study of decision making models, no data exist for comparative purposes. As discussed in subsequent sections, however, several broad hypotheses for defendants' seemingly irrational decisions can be considered in the context of alternative legal decision making models.

Judgment Model of Legal Decisions

Defendants' seemingly irrational decisions may be attributed to impaired judgment. As discussed in the Introduction, critics such as Scott and colleagues (1995) have argue decisional competence models (e.g., Bonnie, 1992, 1993) provide narrow, incomplete conceptualizations of legal decisions. They propose traditional decisional models fail to address how immature or impaired judgment compromises legal decision making capacities. Focusing on that limitation, Scott and colleagues introduced a judgment model by expanding traditional models to address how poor judgment abilities affect legal decisions. Specifically, their model focuses on potential effects of three judgment-related abilities, including risk perception, temporal perspective, and compliance with authority. As an initial investigation, the current research focuses on risk perception and temporal perspective.

Risk Perception

According to U.S. Supreme Court decisions (*Iowa v. Tovar*, 2004; *Colorado v. Spring*, 1987; *Miranda v. Arizona*, 1966), risk awareness constitutes an essential functional capacity required for any reasoned Miranda waiver decision. The landmark Miranda decision requires recognition of the risk of self-incrimination, as interrogation involves gathering evidence against the accused. *Colorado v. Spring* later reaffirmed this requirement in ruling suspects must be "fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him" (p., 479).

Based on current findings, a significant proportion of criminal defendants fail to identify the risk of self-incrimination when considering alternative Miranda waiver decisions and their consequences. One-fourth of pretrial defendants failed to identify potential self-incrimination when generating perceived problems with waiving their right to silence. When defendants who exercised Miranda in their own cases were specifically asked about their personal reason for doing so, only 22.9% reported their decision making incorporated a consideration the risk of self-incrimination. In comparison to mentally disordered offenders with severe psychological impairment (Rogers, Harrison, Hazelwood, et al., 2007), only a slightly smaller percentage of nondisordered defendants in the current study identified an awareness of the risk of selfincrimination. Whereas one-fourth of current defendants failed to identify this risk, the deficit was only about 10% higher for Rogers and colleagues' mentally disordered defendants (i.e., 36.4%).

Defendants must also be aware of the risks of waiving legal counsel. The Supreme Court in *Iowa v. Tovar* (2004) held that valid waivers of legal counsel require awareness that a waiver is associated with the risk that a viable defense will be overlooked. Among current defendants who asserted their right to counsel, 32.3% broadly indicated they did so because they believed an attorney could assist with their legal case. Very few indicated their decision was influenced by specific defense-related expectations, such as inability to defend oneself adequately (3.2%),

inability to communicate effectively with legal professionals (3.2%), or poor knowledge of legal procedures (3.2%). A comparison with Rogers, Harrison, Hazelwood, and colleagues' (2007) study revealed a surprising discrepancy: A strikingly higher percentage of their mentally disordered offenders (83.2%) identified legal assistance as an advantage of asserting the right to counsel. One potential explanation for the remarkable difference may be attributed differences in methodology. Specifically, defendants in the current study were asked about their case-specific reasons for asserting rights, while past research inquired about possible rather than personal reasons.

In the context of Miranda waiver decisions, Woolard (2003) argued good judgment requires defendants to weigh perceived risks of waiving their legal rights (e.g., self-incrimination) more heavily in comparison to perceived risks of exercising legal rights (e.g., angering police). As a study of developmental differences, Grisso, Steinberg, Woolard, and colleagues (2003) found youth under the age of 14 identified fewer risks associated with legal decisions, perceived those risks as less likely to occur, and anticipated less impact from risks. While previous research examined developmental differences, the current study expanded to adult offenders and uniquely focused on the novel question: How do defendants weigh risks compared to benefits of waiving and exercising Miranda rights?

Applying a judgment model of rational decisions, defendants in the current study rated the likelihood and desirability of perceived consequences of Miranda waiver decisions. Consistent with good judgment, these defendants anticipated negative outcomes were much more likely to occur ($d = 1.14$) than positive outcomes with a decision to waive Miranda rights. Specifically, approximately one-third of defendants indicated they believed the likelihood of risks occurring was higher if they chose to exercise as opposed to waive Miranda. Perhaps the most concerning finding is that the decision for which defendants believed they were most likely to encounter negative consequences was the decision to exercise rights to silence and legal counsel. These findings suggest the high frequency of Miranda rights waivers documented in previous research (Kassin et al., 2007; Leo, 1996; Leo & White, 1999; Moston, Stephenson, & Williams, 1993) may be partially accounted for by defendants' relatively poor perception of the likelihood of potential benefits associated with asserting their legal rights.

Regarding desirability of consequences, defendants rated all identified outcomes as either somewhat or very important suggesting they have an understanding of the seriousness of potential consequences of waiver decisions. On a positive note, defendants' appraisals evidenced the belief it is modestly more important to obtain perceived benefits of exercising their legal rights than to avoid perceived risks ($d = 0.31$). Only a small percentage (11.3%) exhibited impaired judgment by indicating they would rather encounter the negative outcomes of waiving at the expense of forgoing positive outcomes of exercising. Their responses in that regard may indicate their willingness to sacrifice some unpleasantness to ultimately receive greater benefits.

Temporal Perspective

Within the judgment framework, temporal perspective constitutes an essential component to rational legal decision making (Scott et al., 1995). As discussed in the Introduction, temporal perspective is defined as the capacity to identify, incorporate, and weigh the significance of potential long-term consequences of decision options (Woolard, 2003). Rational legal decisions are those demonstrating adequate temporal perspective by weighing future negative consequences (e.g., self-incrimination) more heavily than immediate positive consequences (e.g., completing the interrogation). Sigurdsson and Gudjonsson (1994) recognized the effects of temporal discounting in suspects' decision making. For hundreds of cases, 60% of suspects confessed based on the faulty

premise that they would be allowed to go home if they “cooperated” with police (i.e., an immediate solution).

One potential explanation for the current defendants’ seemingly irrational decisions may be related to temporal discounting. Interesting trends emerged when defendants were asked about the best and worst potential outcomes of alternative Miranda waiver decisions (i.e., waiving and exercising). Slightly more than half (55.0%) of defendants identified a future benefit of waiving their legal rights, while only 43.8% reported a future benefit of exercising. Among the worst potential outcomes identified, 51.3% of defendants acknowledged a future disadvantage of waiving Miranda and 27.5% reported a future risk of exercising Miranda.

As noted by Rogers and Shuman (2005), even when long-term consequences are considered, they are often outweighed by immediate advantages. Current findings further support that conclusion. In the context of their own cases, temporal discounting was remarkably evident among those who waived Miranda compared to those who exercised Miranda. The case-specific reasons provided by defendants who exercised their right to silence were equally divided; half indicated their decisions were driven by immediate consequences and half informed their decision was based on a future outcome. The most salient finding indicative of temporal discounting is that all of the current defendants who waived their right to silence in their own cases reported their decision was based on anticipating some immediate outcome. Consistent with poor temporal perspective, a general conclusion of current findings is that in reality defendants’ Miranda waiver decisions are driven by immediate advantages or disadvantages of available options.

Cognitive Abilities and Miranda-Related Impairments

The question of competence to waive Miranda rights is particularly relevant for defendants with impaired intellectual and achievement abilities. As specified by the U.S. Supreme Court in *Coyote v. U.S.* (1967), cognitive capacities such as education, intelligence, and literacy are relevant factors to consider when determining a defendant’s capacity to provide a knowing and intelligent waiver of Miranda rights. Historically, courts have considered these factors only when severe deficits are apparent (Grisso, 2003). Many defendants have subclinical cognitive deficits that sufficiently interfere with a deeper comprehension of Miranda rights. Furthermore, cognitive abilities may be incrementally impaired by the stressful circumstances of arrest, detainment, and interrogation.

The current research examined the importance of relevant cognitive abilities, including verbal abilities, reading comprehension, and listening comprehension, to each domain of Miranda-related abilities (i.e., understanding, appreciation, and reasoning). A general hypothesis was that while all cognitive variables would predict Miranda abilities, verbal abilities would emerge as the best predictor followed by reading and listening skills. Overall, that hypothesis was minimally supported. As expected based on previous research, all three cognitive abilities were significant predictors of defendants’ performance on measures of Miranda understanding and appreciation. However, with few exceptions, none of the variables emerged as incrementally better predictors when compared systematically. Surprisingly, no significant correlational relationship was found between any cognitive variable and Miranda reasoning abilities. However, a subsequent analysis comparing defendants with adequate versus impaired Miranda reasoning evidenced significant differences in cognitive abilities between the two groups. Compared to defendants with adequate Miranda reasoning, those with impaired reasoning exhibited significantly lower verbal abilities ($d = 0.62$), reading comprehension ($d = 0.63$), and listening comprehension ($d = 0.92$).

Miranda Reasoning and Competent Waiver Decisions: Are Models of Legal Decision Making Applicable?

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(Summary remarks pp. 92-117)