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# Miranda or Its Equivalent: The Two "W's" of Reasonable Conveyance

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# *MIRANDA* OR ITS EQUIVALENT: THE TWO "W'S" OF REASONABLE CONVEYANCE

## COURT OF APPEALS OF NEW YORK

People v. Dunbar[1]
(decided on October 28, 2014)

## I. INTRODUCTION

In *Miranda v. Arizona*[2] the United States Supreme Court required that certain warnings must be conveyed to the individual being questioned during a custodial interrogation.[3] An adequate warning must inform the individual: (1) of "the right to remain silent"; (2) "that anything said can be used against the individual in court"; (3) of the right to have counsel present during questioning prior to trial; and (4) if one cannot afford an attorney one will be appointed.[4] Only after this warning "or its equivalent" has been given may statements made during questioning be introduced at trial.[5] The ambiguity in the phrase "or its equivalent" is where interpretation issues arise.[6]

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[1] 23 N.E.3d 946 (N.Y. 2014).

[2] 384 U.S. 436 (1966).

[3] *Id.* at 478-79. *See id.* at 444 ("By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) ("Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' "); and Rhode Island v. Innis 446 U.S. 291, 301 (1980) (The Court extended custodial interrogation to include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."). *See also* J.F. Ghent, *What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring that Suspect be Informed of His Federal Constitutional Rights Before Custodial Interrogation*, 31 A.L.R.3d 565 (1970).

[4] *Miranda*, 384 U.S. at 469-74.

[5] *Id.* at 478-79. *See Innis*, 446 U.S. at 297.

[6] *Right to Remain Silent Not Understood by Many Suspects*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Aug. 5, 2011), http://www.apa.org/news/press/releases/2011/08/remain-

In 2007, the Queens County District Attorney implemented a pre-arraignment interview procedure.[7] Pursuant to the procedure an assistant district attorney and a detective investigator would conduct an interview with a suspect, which occurred before a suspect was arraigned.[8] The detective investigator would begin the interview with a "scripted preamble" to the Miranda warnings.[9] The preamble included the following statements:

> If you have an alibi, give me as much information as you can, including the names of any people you were with; If your version of what happened is different from what we've been told, this is your opportunity to tell us your story; If there is something you need us to investigate about this case you have to tell us now so we can look into it; This will be your only opportunity to speak with us before you go to court on these charges.[10]

The defendants in *People v. Dunbar*,[11] Jermaine Dunbar and Collin F. Lloyd-Douglas (the "defendants"), were both questioned using this method.[12] The New York Court of Appeals held that the preamble undermined the protection required by *Miranda*, and therefore the defendants' statements during the interview were inadmissible.[13] The court found that the confusing and contradictory nature of the preamble negated the effect of the *Miranda* warnings that followed.[14]

This case note will begin with a discussion of *Dunbar* fol-

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silent.aspx ("More than 800 different versions of Miranda warnings are used by police agencies across the United States, and vary in reading level from second grade to post-college level.").

[7] *Dunbar*, 23 N.E.3d at 947.

[8] *Id.*

[9] *Id.* at 947-48.

[10] *Id.* at 948.

[11] *Id.* at 946.

[12] *Dunbar*, 23 N.E.3d at 947-50.

[13] *Id.* at 953.

[14] *Id. See also* People v. Perez, 946 N.Y.S.2d 835 (Sup. Ct. Queens Cty. 2012). *Dunbar* was not the first case to challenge the Preamble-Miranda Warning Procedure. *Id.* During the suppression hearing initiated by the defendant in *Perez*, the court found that the preamble violated the New York Rule of Professional Conduct 8.4(c). *Id.* at 842-45. Rule 8.4(c) provides in pertinent part that "[a] lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation." NEW YORK STATE RULES OF PROF'L CONDUCT R. 8.4 (2013), http://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf. The preamble's statement to investigate followed by the People's failure to do so is a direct violation of that rule. *Perez*, 946 N.Y.S at 842-45.

lowed by an analysis of the purpose and rationale behind the *Miranda* decision. This note then will argue that an acceptable warning may state the warning in *Miranda* or its equivalent, thus establishing the principle of "reasonable conveyance." In the next section, the note will examine how New York courts have applied *Miranda* and what constitutes acceptable deviations from the exact formulation stated by the Supreme Court in the *Miranda* opinion. The note will demonstrate that the New York Court of Appeals' decision in *Dunbar* is consistent with *Miranda* and the subsequent federal and New York State case law.

## II. THE ROAD TO THE NEW YORK COURT OF APPEALS

### A. Jermaine Dunbar

Jermaine Dunbar was taken into custody on April 23, 2009, after he was identified as a suspect in connection with an armed robbery.[15] Before arraignment, an assistant district attorney and a detective investigator interviewed Dunbar.[16] The assistant district attorney and the detective investigator delivered the scripted preamble, the *Miranda* rights, and then informed Dunbar that the interview was being taped.[17] Dunbar demonstrated an understanding of his rights and participated in the questioning.[18] The information gathered from the interview led to his being charged with second-degree attempted robbery and other crimes.[19] The People sought to introduce Dunbar's statements at his trial.[20] Dunbar made a motion to suppress his statements arguing that the "scripted preamble" to the interview violated his constitutional right against self-incrimination.[21] However, the prosecution claimed that the statements were a result of a valid *Miranda* warning and waiver.[22]

After a review of the totality of the circumstances, the Sup-

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15 *Dunbar*, 23 N.E.3d at 948.
16 *Id.*
17 *Id.*
18 *Id.* at 948-49.
19 *Id.* at 949.
20 *Dunbar*, 23 N.E.3d at 949.
21 *Id.*
22 *Id.*

pression Court denied Dunbar's motion.[23] The court concluded that the statements were made after an adequate *Miranda* warning and a voluntary waiver.[24] Therefore, Dunbar's statements were admissible at trial.[25] The jury convicted Dunbar and the Queens County Supreme Court sentenced Dunbar to prison for a term of seventeen years to life.[26]

### B. Collin F. Lloyd-Douglas

Collin F. Lloyd-Douglas was taken into custody on June 12, 2008 due to a violent altercation that took place in 2005 between Lloyd-Douglas and a woman he was romantically involved with.[27] Similar to Dunbar, an assistant district attorney and a detective investigator interviewed Lloyd-Douglas before arraignment.[28] Following the recitation of the preamble and *Miranda* warnings, he was informed that the interview was being taped.[29] Lloyd-Douglas was charged with numerous crimes including attempted murder in the second degree, first-degree assault, and first-degree robbery.[30] The People sought to introduce the incriminating statements made at trial.[31] Lloyd-Douglas alleged that his statements were not voluntarily made because he had been held at booking for twenty-two hours and had not been asked if he needed to use the facilities or if he wanted any water or food.[32] Lloyd-Douglas' suppression motion had a similar result to that of Dunbar's.[33] The Judicial Hearing Officer determined that his statements "were made pursuant to his knowing, intelligent, and voluntary waiver of his constitutional rights."[34] Subsequently, the jury convicted Lloyd-Douglas and the Queens County Supreme Court sentenced him to fifteen years in prison.[35]

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[23] *Id.*
[24] *Id.*
[25] *Dunbar*, 23 N.E.3d at 949.
[26] *Id.*
[27] *Id.* at 949-50.
[28] *Id.*
[29] *Id.*
[30] *Dunbar*, 23 N.E.3d at 950.
[31] *Id.*
[32] *Id.* at 950.
[33] *Id.* at 950-51.
[34] *Id.* at 951.
[35] *Dunbar*, 23 N.E.3d at 951.

### C. The Appellate Decision

On appeal, the Appellate Division for the Second Department reversed the trial court's decisions in both Dunbar's and Lloyd-Douglas's cases.[36] The Appellate Court found that the addition of the preamble "prevent[ed the *Miranda* warnings] from effectively conveying to the suspects their rights . . . , convey[ing] a 'muddled and ambiguous' message."[37] The court held that the preamble effected a negation of the rights granted by the Fifth Amendment of the United States Constitution, due to its confusing and misleading nature.[38] The Appellate Court ordered a new trial.[39]

## III. THE DUNBAR DECISION

The New York Court of Appeals consolidated both Dunbar's and Lloyd-Douglas's cases for the purposes of the appeal.[40] On review, the court concluded that the preamble "effectively vitiated or at least neutralized the effect of the subsequent-delivered *Miranda* warnings."[41]

The court began its analysis by citing *Miranda v. Arizona*,[42] which established that a person, prior to an interrogation by law enforcement, "must be adequately and effectively apprised of his rights" provided by the Fifth Amendment.[43] The Fifth Amendment protects individuals against self-incrimination and is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[44] The *Miranda* warnings are an "absolute prerequisite to inter-

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[36] *Id.*

[37] *See* People v. Dunbar, 958 N.Y.S.2d 764, 772 (App. Div. 2d Dep't 2013); *see also* People v. Lloyd-Douglas, 958 N.Y.S.2d 744, 746 (App. Div. 2d Dep't 2013) (holding that "[b]ecause this procedure was not effective to secure the defendant's fundamental constitutional privilege against self-incrimination and right to counsel, the defendant's videotaped statement should have been suppressed.").

[38] *Dunbar*, 958 N.Y.S.2d at 772; *Lloyd-Douglas*, 958 N.Y.S.2d at 746.

[39] *Dunbar*, 23 N.E.3d at 951.

[40] *Id.*

[41] *Id.* at 953. *See id.* at 948 (demonstrating the rejection of the preamble by the number of times the opinion states the court's holding: "the preamble undermined the subsequently-communicated *Miranda* warnings to the extent that Dunbar and Lloyd-Douglas were not 'adequately and effectively' advised of the choice [the Fifth Amendment] guarantees' against self-incrimination before they agreed to speak with law enforcement authorities.").

[42] 384 U.S. 436 (1966).

[43] *Dunbar*, 23 N.E.3d at 951.

[44] U.S. CONST. amend. V. ("No person shall be . . . compelled in any criminal case to be a

rogation."[45]

The New York Court of Appeals rejected the State's argument that Dunbar and Lloyd-Douglas's statements were admissible following the preamble and the *Miranda* warning, reasoning that simply stating the warnings is not enough in every situation.[46] If the warning fails to "convey to a suspect his rights as required by *Miranda*" it will not be found sufficient.[47] The court found the preamble contradicted the subsequent *Miranda* warnings that were given and it created an atmosphere where keeping silent would be detrimental to one's case.[48] Specifically, the fact that "remaining silent or invoking the right to counsel would come at a price—they would be giving up a valuable opportunity to speak with an assistant district attorney, to have their cases investigated or to assert alibi defenses."[49] Accordingly, the preamble coupled with the *Miranda* warning failed to convey the necessary rights.[50]

## IV. *MIRANDA V. ARIZONA*

An explanation of the federal case law protecting compelled self-incrimination is necessary in order to demonstrate why the preamble undermines a constitutionally protected right. The Fifth Amendment of the United States Constitution provides the privilege against self-incrimination—specifically, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[51] The Supreme Court of the United States, in the historic case *Miranda v. Arizona*,[52] extended the protections provided by the Constitution to individuals during a custodial interrogation.[53]

The United States Supreme Court held that a state agent must inform a person of his or her Fifth Amendment privileges prior to any

witness against himself.").

45 *Dunbar*, 23 N.E.3d at 951.

46 *Id*. at 952-53; *see* Berkemer v. McCarty, 468 U.S. 420, 433 (1984) ("Cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

47 *Dunbar*, 23 N.E.3d at 952-53.

48 *Id.* at 953.

49 *Id.*

50 *Id.*

51 U.S. CONST. amend. V.

52 384 U.S. 436 (1966).

53 *Id.* at. 439.

custodial questioning.[54] The Court concluded that an individual

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[55]

The required warnings are necessary safeguards to ensure that any statements made are the result of free choice.[56] The procedural safeguards required in an interrogation include the *Miranda* warnings "or their equivalent."[57]

The rationale behind the Court's holding in *Miranda* provides a foundation for the decisions that follow and establishes what is considered an adequate equivalent.[58] The Court cited two primary reasons to support the need for "safeguards" throughout its opinion.[59] First, the Court examined the environment and circumstances surrounding a custodial interrogation, such as the psychological effect of an interrogation.[60] Due to the very nature of the act, police interrogation is at odds with the free will of the accused.[61] The person being questioned is cut off from the outside world, confined to a room with law enforcement personnel, in an unfamiliar setting.[62] The Court

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[54] *Id.* at 471.

[55] *Id.* at 479; *see id.* at 469 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege but also of the consequences of foregoing it."); *see also Miranda*, 384 U.S. at 466 ("The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils of the interrogation process.").

[56] *Id.* at 457-58.

[57] *See Innis*, 466 U.S. at 297.

[58] *See infra* note 60.

[59] *Miranda*, 384 U.S.at 455.

[60] *Id*. (noting that the prevention of "psychological harm" is a natural follow up to the previously decided unlawful nature of the use of "physical harm"). *Id.* The Court found that the law enforcement personnel had experience in obtaining confessions. *Id.* at 448-52. This was evident after an examination of police manuals that provided tips for obtaining a confession. *Id. See also id.* at 450 ("These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.").

[61] *Miranda*, 384 U.S. at 479 (rejecting the argument "that society's need for interrogation outweighs the privilege").

[62] *Id.* at 449-50.

found that the nature of the interrogation procedure is at times "to subjugate the individual to the will of his examiner."[63] A person could easily be manipulated due to the toll of interrogation.[64]

The opinion relied on case law concerning compelled confessions and the privilege against self-incrimination.[65] Specifically, the Court cited *Bram v. United States*,[66] which provided guidance for determining if a confession was truly voluntary.[67] The Court concluded that when an individual makes "a statement when but for the improper influences he would have remained silent" the words are not voluntary.[68] The Court found that "establishing merely that the confession was not induced by promise or threat" does not prove voluntariness.[69] In order to meet this threshold, the making of communication must be voluntary and any evidence of compulsion will render the statements inadmissible.[70] The Court concluded that a waiver must be explicit and rejected the presumption of a waiver due to silence.[71]

Second, the Court addressed the scope of the privilege against self-incrimination and the applicability of said rights in state court proceedings.[72] The Court began its discussion of the protection against compelled confession with *Escobedo v. State of Illinois*.[73] The Court held in *Escobedo* that the defendant was not adequately advised of his constitutional right against self-incrimination because the emotional state of the defendant had led to a diminished capacity for "rational judgment."[74] In *Escobedo*, law enforcement repeatedly denied the defendant's request for counsel.[75] The position the defendant was in created an environment designed to "produce upon his mind the fear that, if he remained silent, it would be considered an

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[63] *Id.* at 457. *Id.* at 450 (noting that "the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact.").

[64] *Id.*

[65] *Miranda*, 384 U.S. at 460-62.

[66] 168 U.S. 532 (1897).

[67] *Miranda*, 384 U.S. at 461.

[68] *Id.* at 462 (citing *Bram*, 168 U.S. at 549).

[69] *Id.*

[70] *Miranda*, 384 U.S. at 462. *See Bram*, 168 U.S. 532.

[71] *Miranda*, 384 U.S. at 475. *See* Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[72] *Miranda*, 384 U.S.at 458-66.

[73] 378 U.S. 478 (1964). *See Miranda*, 384 U.S. at 440-42, 465-66.

[74] *Miranda*, 384 U.S. at 465. *See Escobedo*, 378 U.S. at 385-86.

[75] *Escobedo*, 378 U.S. at 385-86.

admission of guilt."[76] Therefore, the defendant did not competently or knowingly waive his rights because he was not adequately informed of his rights.[77]

After an examination of the nature and environment of an interrogation and the history behind *Miranda*, the Court concluded that "only by effective and express explanation to the indigent of [these] right[s] can there be assurance that he was truly in a position to exercise [them]."[78]

## V. THE TWO "W'S" OF DEFINING "REASONABLY CONVEY"

After the *Miranda* decision, the Supreme Court decided multiple cases that clarified what is considered to be an adequate "safeguard." This was in part due to the fact that the Court in *Miranda* only dictated the rights that are to be conveyed by the warning—the Court did not dictate the actual language to be used.[79] States have the discretion to script their own warnings; however, issues arise when the deviation from the *Miranda* warnings fails to adequately inform the detainee of the protections required by *Miranda*.[80] The safeguard issues can be broken up into two categories: (1) the language used, and (2) the timing of the warning.

### A. The "What?" of Reasonably Conveyance

The United States Supreme Court has held that additional language or a change in the wording of the warning does not automatically render the warning ineffective or in violation of the holding

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[76] *Id.* at 485.

[77] *Miranda*, 384 U.S. at 465-66. *See also id.* at 465 ("[T]he compelling atmosphere of the in-custody interrogation, and not an independent decision on [the defendant's] part, caused the defendant to speak."); *Id.* at 466 ("The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils of the interrogation process.").

[78] *Id.* at 473.

[79] *Id.* at 476. *See* California v. Prysock, 453 U.S. 355, 359 (1981) ("This Court has never indicated that the rigidity of Miranda extends to the precise formulation of the warnings given a criminal defendant."); *Innis*, 466 U.S. at 297 (explaining that the acceptable safeguards are "Miranda warnings . . . or their equivalent"); Duckworth v. Eagan, 492 U.S. 195, 202-03 (1989) ("We have never insisted that Miranda warnings be given in the exact form described in that decision.").

[80] *See supra* notes 4-6.

in *Miranda*.[81] For instance, the Court in *California v. Prysock*[82] provided clarity on acceptable deviations from the language of *Miranda*.[83] The Supreme Court addressed the issue of whether the detainee was adequately advised of the *Miranda* warning with concern to the right to counsel.[84] The specific issue was whether "the right to appointed counsel was linked with some future point in time after police interrogation," thus in violation of *Miranda*.[85] Specifically the language at issue was "[y]ou have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning" and "[y]ou all, uh – if, – you have the right to have a lawyer appointed to represent you at no cost to yourself."[86] After each statement the officer asked the defendant if he understood his rights, and the defendant answered in the affirmative.[87]

The Court held that the additional language in *Prysock* did not act in contravention of *Miranda*.[88] The Court supported its holding by citing to prior cases where lower courts rejected warnings as violative of Miranda.[89] Specifically, a violation did not occur when the additional language used, with concern to appointed counsel, "was linked to a future point in time after police interrogation."[90] The

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[81] *Miranda*, 384 U.S. at 490.

> We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.

*Id.*

[82] 453 U.S. 355 (1981).

[83] *Id.* at 359-60.

[84] *Id.* at 360.

[85] *Id.*

[86] *Id.* at 356-57.

[87] *Prysock*, 453 U.S. at 356-57.

[88] *Id.* at 362.

[89] *Id.* at 360.

[90] *Id. See* United States v. Garcia, 431 F.2d 134, 134 (9th Cir. 1970) (rejecting the notion that one could "have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court."); People v. Bolinski, 67 Cal. Rptr. 347 358-61 (Cal. Ct. App. 1968). The court there rejected two different warnings as inadequate. *Id.* The first "if he was charged . . . he would be appointed counsel" and the second concerned a defendant who was being moved to another state and was told that "the court would appoint an attorney" after he was moved. *Id.*

Court found that the additional language in the supportive cases failed to inform the suspect of his right to counsel during such interrogation.[91] The Court distinguished these warnings from the warnings given to the defendant in *Prysock*, and found that nothing "suggested any limitation on the right to the presence of appointed counsel."[92] Thus, the Court held the warnings given to the defendant were consistent with *Miranda* because he was fully informed of his rights.[93] The language used did not undermine the warnings granted in *Miranda*, nor did it manipulate the warnings to the advantage of the questioner.[94]

The issue was re-addressed in *Duckworth v. Eagan*[95] eight years later. The warning in that case included all the requirements of *Miranda*.[96] The detainee was told of her right to remain silent and her right to an attorney.[97] However, the police added the language "if and when you go to court" to the warning given with respect to counsel.[98] The United States Supreme Court held that the warnings "in their totality" were in compliance with *Miranda*.[99] The Court supported its holding with two rationales.[100] First, the language did not undermine the *Miranda* warnings because the additional language could be reasonably deemed in anticipation of a common question: When does one have an attorney appointed?[101] The Court saw the statement as advice, which was consistent with *Miranda*.[102] Second, the required information, that "he has a right to an attorney before and during questioning," was still conveyed to the detainee.[103] The free will of the detainee was still intact.[104]

Recently, the United States Supreme Court in *Florida v. Powell*[105] further clarified what an acceptable deviation from the exact

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91 *Prysock*, 453 U.S. at 360.
92 *Id.* at 360-61.
93 *Id.*
94 *Id.* at 361-62.
95 492 U.S. 195 (1989).
96 *Id.* at 198-99.
97 *Id.*
98 *Id.* at 198.
99 *Id.* at 205.
100 *Duckworth*, 492 U.S at 204.
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 203.
105 559 U.S. 50 (2010).

warnings dictated in *Miranda*.[106] The police force had taken the defendant into custody and delivered their equivalent to *Miranda* warnings before any questioning, stating:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.[107]

After the defendant signed a form to confirm that he understood his rights, he chose to speak with the officers, which led to a confession and subsequent indictment.[108] The defendant moved to have the statements suppressed claiming the *Miranda* warnings he was given were defective.[109] On certiorari, the Court expressed the issue simply, as "whether the warnings reasonably 'conve[yed] to [a suspect] his rights as required by *Miranda*.'"[110] The Court concluded that the warnings given were sufficient because they "did not 'entirely omi[t]' any information *Miranda* required them to impart."[111] The warnings were deemed to reasonably convey the defendant's right to have an attorney present at any time.[112] A consistent feature of the cases in this section is the consistency with respect to the standard the equivalent warning must meet; however, the Court's analysis varies depending on the specific facts of each case.

### B. The "When?" of Reasonably Convey

The Court's analysis of when the warning must be recited relies on whether the timing of the warning hampers the detained individual's ability to truly exercise his or her constitutional rights.[113] In

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106 *Id.* at 60-62.
107 *Id.* at 53-54.
108 *Id.* at 54.
109 *Id.*
110 *Powell*, 559 U.S. at 60. *See Duckworth*, 492 U.S. at 203; *Prysock*, 453 U.S. at 361.
111 *Powell*, 559 U.S. at 62.
112 *Id.*
113 *See* Missouri v. Seibert, 542 U.S. 600 (2004).

*Missouri v. Seibert*,[114] the Court addressed the issue concerning the adequacy of a *Miranda* warning given mid-questioning.[115] The defendant was taken into custody and was subsequently questioned by a police officer for thirty to forty minutes.[116] Following the officer's questioning, the defendant signed a waiver after she was informed of her *Miranda* warnings.[117] However, prior to the warning, the defendant had already confessed to the crime she was being questioned about.[118] At trial, the defendant sought to suppress both the statements made pre-*Miranda* and post-*Miranda*.[119] The trial court admitted the statements made after the warning.[120] As a result, Seibert was charged and convicted of first-degree murder and various other crimes.[121] However, the Missouri Supreme Court reversed and concluded that "the second statement, clearly the product of the invalid first statement, should have been suppressed."[122]

The Supreme Court's decision in *Seibert* established that *Miranda* warnings made after an interrogation begins are unacceptable and a violation of the defendant's Fifth Amendment right against self-incrimination.[123] The *Miranda* opinion clearly demonstrated that the warning must be given prior to any questioning to achieve its intended purpose.[124] A warning in the middle of questioning does not have the same effect as a warning given prior to any questioning.[125] The questioning after the *Miranda* warning coerced the defendant into answering consistently with her prior statements.[126] Further, the statements that the defendant made before the *Miranda* warning could in a sense be seen as being held against her because the second round of questioning used the information from the pre-*Miranda* questioning to obtain an admissible confession.[127]

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[114] *Id.*
[115] *Id.* at 604.
[116] *Id.* at 604-5.
[117] *Id.* at 605.
[118] *Seibert*, 542 U.S. at 605.
[119] *Id.* at 605-06.
[120] *Id.* at 606.
[121] *Id.* at 605-07.
[122] *Id.*
[123] *Seibert*, 542 at 617.
[124] *Miranda*, 384 U.S. at 471.
[125] *Seibert*, 542 U.S. at 612-13.
[126] *Id.* at 605.
[127] *Id.* at 613, 616 (The Court noted that the question-warn-question sequence is a "police strategy adopted to undermine the Miranda warnings.").

## VI. ANALYSIS OF *DUNBAR* UTILIZING *MIRANDA* AND ITS PROGENY

*Miranda* does not create a scripted straitjacket for custodial interrogation.[128] The cases described above establish the premise that the failure to give the exact warning dictated in *Miranda* will not automatically render the statements inadmissible and the mere recitation of the Miranda warning will not render statements admissible.

### A. The "What?" of Reasonably Convey Applied to the Preamble in *Dunbar*

First, the language of the preamble given to Dunbar and Lloyd-Douglas failed to reasonably convey the necessary rights and privileges granted to the defendants.[129] The Supreme Court requires an inquiry into whether the "equivalent" warning is consistent with the warnings required by *Miranda* to determine whether the language is acceptable.[130] The Court has defined a warning consistent with *Miranda* as a warning that "reasonably conveys" the rights granted.[131] The rights must be clearly stated in order to insure a detainee understands them. The preamble lacks clarity.

The preamble to the *Miranda* warnings that the defendants were given failed to reasonably convey the privileges that protect against self-incrimination because the preamble could be seen as a limitation on the right to remain silent.[132] The preamble's contradictory terms dilute the *Miranda* warnings that follow.[133] The preamble told the defendants "this is your opportunity to tell us your story," and to "give me as much information as you can."[134] These statements are contradictory to the *Miranda* warning that followed, which informed them that they do have "the right to remain silent."[135]

The preamble also posed a limitation on the right to coun-

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128 *See supra* note 78.

129 *See supra* note 41.

130 *Dunbar*, 23 N.E.3d at 952-53.

131 *Prysock*, 453 U.S. at 361 (concluding that a deviation from the order of the warning in *Miranda* does not render the warning inadequate).

132 *Dunbar*, 23 N.E.3d at 953.

133 *Id.*

134 *Id.*

135 *Id.* at 948.

sel.[136] The scripted preamble included the statement "this will be your only opportunity to speak with us before you go to court on these charges."[137] Consequently, the preamble conveys that a right to counsel was not available during the pre-arraignment questioning and prior to seeing a judge.[138]

Further, the introduction before the warning could be seen as insinuating that collaboration and cooperation with law enforcement would help the defendants' cases.[139] The United States Supreme Court has noted in numerous cases that the surrounding circumstances of a criminal defendant's interrogation requires a heightened protection of his or her rights against self-incrimination.[140] The fact that the defendants were told that a subsequent investigation would be conducted if they spoke to the investigators was in direct conflict with the requisite warning that "anything they said could and would be used against them."[141] The preamble allowed the investigator and the district attorney to take advantage of the fear and uncertainty already present.[142] This specific manipulation of the *Miranda* warning requirement is unacceptable and fails to meet the threshold the courts require.[143]

The dissenting opinion in *Dunbar* distinguished persuasion from trickery.[144] The dissent contended that persuasion is an important tool for law enforcement.[145] Further, it argued that the use of persuasion does not desecrate the *Miranda* warnings.[146] However, this argument is easily rebuttable.[147] The preamble's effect on the *Miranda* warnings goes beyond persuasion.[148] A reasonable inference drawn after an examination of the preamble is that refraining from talking could potentially come at a price, while discussion of the

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136 *Dunbar*, 23 N.E.3d at 953.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* at 952-53.

141 *Dunbar*, 23 N.E.3d at 953.

142 *Id.*

143 *Id.*

144 *Id.* at 954-55 (Smith, J., dissenting) (reasoning that "*Miranda* does not require law enforcement officials to repress, or forbid them to encourage, the tendency of criminals to talk too much.").

145 *Id.*

146 *Dunbar*, 23 N.E.3d at 954-55.

147 *Id.* at 953.

148 *Id.*

occurrence could be to the detainee's advantage.[149]

### B. The "When?" of Reasonably Convey Applied to the Preamble in *Dunbar*

The recitation of *Miranda* or an equivalent does not automatically render the detainee's statements admissible. In *Seibert* the mid-questioning Miranda warning procedure failed to adequately advise the defendant of her privileges.[150] The procedure's effect was contrary to the purpose the United States Supreme Court sought to further in *Miranda*, thereby undermining its holding.[151] The procedure in *Dunbar*—the preamble followed by the *Miranda* warnings—is comparable to the procedure in *Seibert*.[152] A valid conclusion could be that the preamble followed by the contradictory *Miranda* warnings in a way cancel each other.[153] Consequently, both are inconsistent with the Court's purpose and intent in *Miranda*.[154]

Furthermore, the preamble in general does not convey the desired purpose of the *Miranda* warnings.[155] The purpose of *Miranda* is to inform the defendant of his or her rights and thereby put the defendant in a position to exercise the right if he or she chooses to do so.[156] The People allege that the "purpose of the [preamble] was to get exculpatory information from the innocent; not exculpatory statements or evidence."[157] It is doubtful that this is the legitimate reason for the practice and instead the primary purpose is to circumvent the *Miranda* warnings that follow the preamble.

The Court has suggested that each sentence or thought in the warnings has a purpose.[158] For example, the phrase "you have the right to remain silent" is immediately followed by the phrase "anything you say can be used against you in the court of law."[159] This

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149 *Id.*

150 *Id.* at 952-53.

151 *Dunbar*, 23 N.E.3d at 952-53.

152 *Id.*

153 *Id.*

154 *Id.* at 953.

155 *Id.*

156 *Miranda*, 384 U.S. at 469 ("Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.").

157 *Dunbar*, 958 N.Y.S.2d 777.

158 *Dunbar*, 23 N.E. at 953.

159 *Id.* at 952-53.

format is desired to adequately inform the detainee of a cause and effect of speaking.[160] Thus, the individual being questioned is made aware of the right to remain silent and the consequences if he chooses to assert or not to assert the right.[161] In *Dunbar*, the preamble immediately followed by the *Miranda* warning renders the warning similar to the defective warning in *Seibert*, in that the manipulation of when the warning is given is being used to obtain a confession.[162] Thus, the timing of the preamble takes away from the *Miranda* warnings that followed.[163]

Therefore, the preamble is a contradiction of the *Miranda* warnings that followed.[164] A reasonable conclusion drawn is that the two separate phrases negate each other.[165] It can be argued that a *Miranda* warning was not given at all, and without further inquiry, the statements made during the interrogation would be inadmissible.[166]

## VII. "REASONABLE CONVEYANCE" IN NEW YORK

The New York State Constitution's provision protecting the accused is exactly the same as its United States Constitution's counterpart, which provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[167] Although New York has a history of expanding the protection of constitutionally protected rights, the case law has demonstrated a consistent adherence to the federal law established in *Miranda* and its progeny.[168]

### A. The "What?" of Reasonable Conveyance in New York

New York State case law is consistent with federal case law on the topic of additional language and the effect of the *Miranda* warning. For instance, in *People v. Lewis*,[169] the court rejected the

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160 *Dunbar*, 23 N.E.3d at 953.
161 *Id.*
162 *Id.* at 952-53.
163 *Id.* at 953.
164 *Id.*
165 *Dunbar*, 23 N.E.3d at 953.
166 *Id.*
167 N.Y. CONST. art. I, § 6.
168 *See* 20 N.Y. Jur. 2d *Constitutional Law* § 31.
169 557 N.Y.S.2d 453 (App. Div. 2d Dep't 1990).

defendant's claim that the addition of "[n]ow that I have advised you of your rights, are you willing to answer questions" negated the *Miranda* warning that had preceded.[170] The court reasoned that the warnings in their totality were acceptable because the "words used convey[ed] the requisite information."[171]

Another example of an acceptable addition to the *Miranda* warning comes from *People v. Bailey*.[172] In *Bailey*, the Appellate Division for the Second Department held that the defendant's statements were admissible.[173] Prior to the detective informing the defendant of his *Miranda* rights, she advised him, "[T]ell me in [your] own words what took place," and "[I] want you to tell me what happened."[174] The court concluded that the detective's additional statements were not "to evoke an incriminating response from the defendant" and thus did not threaten the purpose of the *Miranda* warnings that followed.[175]

The New York State courts have concluded that a ritualistic formula is not required.[176] The only requirement is that the defendant is made aware of the "requisite information."[177]

### B. The "When?" of Reasonable Conveyance in New York

The New York State courts have consistently applied a "single continuous chain of events" test to determine if the timing of the Miranda warning is acceptable.[178] This inquiry was established in *People v. Chapple*.[179] In *Chapple* a state police officer noticed the defendant walking in the vicinity of where a burglary had recently

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170 *Id.* at 454.

171 *Id.*

172 808 N.Y.S.2d 300 (App. Div. 2d Dep't 2005).

173 *Id.* at 301.

174 *Id.*

175 *Id. See also* People v. Boyd, 801 N.Y.S.2d 469 (App. Div. 4th Dep't 2005).

176 *See supra* section VII. A.

177 *See supra* note 166. *See also* People v. Bartlett, 595 N.Y.S.2d 89, 90-91 (App. Div. 2d Dep't 1993) (holding that after the warning required by Miranda the sentence "[i]f you can not afford to hire a lawyer, one will be furnished for you if you wish, and you have the right to keep silent until you have had a chance to talk with a lawyer" the suspect was reasonably conveyed his rights.).

178 341 N.E.2d 243 (N.Y. 1975).

179 *Id.*

occurred.[180] The officer pulled up alongside the defendant in his automobile.[181] The officer then informed the defendant that he wanted to talk to him and told the defendant to get in the car.[182] Subsequently, the officer began questioning the defendant as he drove him to the site of the burglary, culminating in a confession.[183] Thereafter, the officer gave the defendant his *Miranda* warnings and resumed questioning him.[184]

The defendant sought to suppress his post-*Miranda* statements and ultimate confession in the Clinton County Supreme Court.[185] The court stated that the appropriate inquiry is whether "there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning."[186] Accordingly, the court granted the defendant's motion to suppress because he "was subjected to such a continuous interrogation that the Miranda warnings administered at the site of the burglary were insufficient to protect his rights."[187]

Likewise the New York Court of Appeals in *People v. Paulman*[188] applied the *Chapple* analysis and concluded that the defendant's statements were admissible due to the lack of "a continuous chain of events" between the non-*Mirandized* and *Mirandized* questioning.[189] The defendant moved to suppress four incriminating statements he had made to law enforcement even though half of the statements were made after a *Miranda* warning.[190] The defendant alleged that the earlier questioning tainted the statements following the *Miranda* warning.[191] The court found a break in the chain of questioning due to "a change in the police personnel involved in the successive interrogatories, which took place in a different location, and there were significant differences in the methods eliciting infor-

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180 *Id.* at 244.
181 *Id.*
182 *Id.*
183 *Chapple*, 341 N.E.2d at 244.
184 *Id.* at 244-45.
185 *Id.*
186 *Id.* at 245-46.
187 *Id.* at 246.
188 833 N.E.2d 239 (N.Y. 2005).
189 *Id.* at 244-47.
190 *Id.* at 242.
191 *Id.*

mation."[192] Accordingly, the statements the defendant made after the *Miranda* warning were admitted.[193] The New York courts have consistently approached motions to suppress statements based on a timing issue in like manner.[194]

## VIII. A COMPARISON OF THE FEDERAL AND NEW YORK APPROACHES

The federal and New York State courts have approached the "reasonable conveyance" threshold in an unusually consistent way. A common feature of the New York case law is to go beyond the scope of the federal courts when analyzing a constitutional provision.[195] The phenomenon is not present with respect to the implementation of the *Miranda* holding to New York State cases.

## IX. CONCLUSION

A *Miranda* warning is a required safeguard. That being said, the law does not support an inference or an expectation of knowledge as a responsibility of the suspect during a custodial interrogation.[196] As a result, officers delivering the warnings are required to do so in a clear and concise way.[197] The preamble and the *Miranda* warning in *People v. Dunbar* failed to properly deliver the privileges afforded to a detainee due to its muddled and contradictory language.[198] Consequently, with the preamble procedure in place, the pre-arraignment

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[192] *Id.* at 245.

[193] *Paulman*, 833 N.E.2d at 247.

[194] *See* People v. Bethea, 493 N.E.2d 937, 939 (N.Y. 1986) (per curiam) (reaffirming the rule established in *Chapple* and as a result suppressing statements made by the defendant prior and following the Miranda warning. The court supported this conclusion because of "the close sequence between the unwarned custodial statements in the van and its repetition soon after defendant arrived at the precinct."). *See also* People v. Malaussena, 891 N.E.2d 725 (N.Y. 2008) (holding that the defendant's confession is admissible. The statements made before the Miranda warning and after the *Miranda* warning were not part of a "single continuous chain of events" due to a four-hour gap between the questioning.).

[195] *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] state is free as a matter of its own law to impose greater restrictions on police activity than those the Court holds to be necessary upon federal constitutional standards."). *See also* People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (Fourth Amendment); and O'Neill v. Oakgrove Construction, Inc., 523 N.E.2d 277 (N.Y. 1988) (First Amendment).

[196] *Miranda*, 384 U.S. at 471-72 ("No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").

[197] *Id.* at 465-71.

[198] *Dunbar*, 23 N.E.3d at 953.

interrogation will most likely never be admissible. Furthermore, even if the procedure is found to be consistent with *Miranda*, a waiver of the privileges provided will likely never be accepted.[199] It is in the best interest of both the detainee and the state to remove the scripted preamble procedure.

On February 4, 2015, the People of New York petitioned for certiorari to the United States Supreme Court.[200] The public interest in criminal procedure, specifically the *Miranda* rights, arguably could have persuaded the Court to hear the case.[201] However, on May 4, 2015 the Court denied the People's petition for certiorari.[202] In the event that the Supreme Court did hear the case, it is likely that the Court would have held that the procedure is unconstitutional and undermines the warnings required by *Miranda*. Holding otherwise would contradict all that *Miranda* seeks to protect.

*Amanda Miller*[*]

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[199] *See Miranda*, 384 U.S. at 476 ("Any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."); Moran v. Burbine, 475 U.S 412, 419 (1986) (The Court found no waiver due to a deprivation of "information crucial to [the defendant's] ability to waive his rights knowingly and intelligently.").

[200] New York v. Dunbar, 135 S. Ct. 2052 (2015).

[201] *See* George C. Thomas III, Richard A Leo, *The Effects of Miranda v. Arizona: "Embedded" In Our National Culture?*, 29 CRIME & JUST. 203 (2002); Russ Buettner, S*cript Read to Suspects is Leading to New Trials*, N.Y. TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/nyregion/appellate-panel-overturns-3-queens-convictions-based-on-rights-preamble.html?_r=0.html (*Dunbar* specifically received attention in mainstream media outlets).

[202] New York v. Dunbar, 135 S. Ct. 2052 (2015). *See* People of the State of New York v. Dunbar, 2015 WL 3408703 (U.S.), 11-12; People of the State of New York v. Lloyd-Douglas, 2015 WL 3408699 (U.S.), 12 (In opposition to the Supreme Court hearing the case two arguments were asserted. First, the case is now moot because in 2010 the Queens District Attorney's Office abandoned the "scripted preamble" procedure. Second, the preamble procedure is not in wide use among the jurisdictions.).

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