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COMMENT

WAIVING *MIRANDA*: A KNOWING AND INTELLIGENT APPROACH

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I. INTRODUCTION

Pragmatism is the key to *Miranda*. The doctrine emanating from the Supreme Court's decision in *Miranda v. Arizona*[1] has slowly formed one of the more convoluted exclusionary rules in American jurisprudence. What on paper is axiomatic in determining the admissibility of statements made by a suspect in custody has instead left open a significant question: who can make a knowing and intelligent waiver? The problems posed by this question are obviously a concern for suspects who, by reason of their cognitive impairment, lack the mental capacity to satisfy the standard for a knowing and intelligent waiver.

Each year, an estimated 695,000 cognitively impaired individuals are arrested and mirandized[2] while arguably suffering the effects of their respective impairment.[3] While a considerable number of individuals suffering from such a cognitive impairment manifest their inability through their physical appearance or behavior, a genuine issue arises with those cognitively impaired suspects who, at the time they are interrogated, appear lucid and objectively capable of waiving their rights to the investigating officer, as if they had no impairment at all. If post-hoc fact-finding, primarily through psychological evaluations, contradicts what an officer plainly witnessed in the course of an interrogation, a court enjoys broad discretion in determining whether the waiver was in fact knowing and intelligent. Addressing the practicality of the question will put at ease the plethora of literature advocating that cognitively impaired individuals are subject to a fundamentally unfair criminal justice system.

II. BACKGROUND

Collective scholarship on *Miranda* is redundant and daunting. It painstakingly lays out what would otherwise constitute a treatise on a particularly narrow area of the law. Yet, there remains few areas fertile for

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Mirandized, a verb, meaning "to recite the *Miranda* warnings to (a person under arrest)." *Mirandize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Mirandize#h1 (last visited Feb. 4, 2020).

[3] Richard Rogers et al., Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants, 31 LAW & HUM. BEHAV. 401, 403 (2007).

analysis. The purpose of this section is to apprise the reader of only the doctrinal information pertinent to the knowing and intelligent prong of a *Miranda* waiver. Even in cases where the issue of a knowing and intelligent waiver goes unanswered or fails to reach meaningful analysis on the merits, the dicta, rationale, and reasonable inferences are usable to deduce and articulate the foreseeable jurisprudence on the issue.

A. *Interpreting* Miranda*: Voluntary, Knowing, and Intelligent*

The Fifth Amendment Self-Incrimination Clause reads: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[4] The Supreme Court in *Miranda* extended the Clause to the custodial interrogation setting.[5] In doing so, the Court also summarized the exclusionary effect of its holding: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[6] Thus, at a minimum, *Miranda* mandates (with limited exceptions) that police inform suspects of their rights and the consequences of relinquishing those rights before commencing an interrogation.[7] These procedural safeguards met a high volume of criticism for the "substantial cost [imposed] on the societal interest in law enforcement by its proscription of what concededly is relevant evidence."[8]

The specific language required to satisfy the procedural safeguards mandated by *Miranda* varies among jurisdictions. Generally, police must inform a suspect in custody of his or her right to remain silent and right to the presence of counsel.[9] Police must also inform a suspect that any statements made may be used as evidence against him or her.[10]

To ensure compliance with the newly implemented procedural safeguards of *Miranda*, as well as to avoid suppression of evidence if any of the mandates were omitted or inaccurately recited, "Miranda Cards" were printed and distributed to police departments. A Miranda Card for the San Francisco Police Department reads:

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[4] U.S. CONST. amend. V.

[5] *Miranda*, 384 U.S. 436, 444 (1966); James J. Tomkovicz, Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order 108 (2011).

[6] *Miranda*, 384 U.S. at 444.

[7] See *id.*

[8] Colorado v. Connelly, 479 U.S. 157, 166 (1986) (quoting United States v. Janis, 428 U.S. 433, 448–49 (1976)).

[9] *Miranda*, 384 U.S. at 444.

[10] *Id.*

> 1. You have the right to remain silent.
> 2. Anything you say can and will be used against you in a court of law.
> 3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
> 4. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning, if you wish one.
>
> . . . .
>
> 1. Do you understand each of these rights I have explained to you?
> 2. Having these rights in mind, do you wish to talk to us now?[11]

The *Miranda* Court declared that testimony obtained while failing to comply with these safeguards renders the evidence inadmissible at trial.[12] However, to ensure that law enforcement was not unduly hindered from pursuing legitimate government interests, the Court provided that a suspect may waive these rights. With limited exceptions, such a waiver is valid if it "is made voluntarily, knowingly, and intelligently."[13]

Additionally, the Court placed a "heavy burden" on the government to prove that statements made outside the presence of an attorney were knowing and intelligent.[14] Presuming that a suspect in custody will in fact exercise her constitutional rights,[15] the burden borne by the government is to prove that the waiver was made "fairly and [with] full knowledge of the consequences."[16] The primary justification for imposing this heavy burden is based on the Court's precedent pertaining to waivers of similar constitutional rights.[17] Imposition of this burden was further justified by the inherently coercive nature of the custodial interrogation setting; that is, the "isolated circumstances" in which the interrogation takes place, as well as the government possessing the most corroborative, if not the only, evidence of administering the warnings.[18]

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[11] Fred P. Graham, The Self-Inflicted Wound 138 (1970).

[12] *Miranda*, 384 U.S. at 444; TOMKOVICZ, *supra* note 5, at 108.

[13] *Miranda*, 384 U.S. at 444.

[14] *Id.* at 475.

[15] 42 AM. JUR. 3D *Proof of Facts* § 10 (1997).

[16] *Id.*; *see also Miranda*, 384 U.S. at 476 (noting circumstances that do not support a presumption of waiver).

[17] *Miranda*, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

[18] *Id.*

Time has shown that this "heavy burden" of proof was merely nominal: the government need only prove a waiver by a preponderance of the evidence.[19] Justification for this standard, rather than proof beyond a reasonable doubt, rests on multiple considerations. First, the validity of a waiver bears no relation to the elements of the crime alleged; that is, it bears no relation to whether a jury verdict is reliable.[20] Second, the Court has relied on precedent in holding the burden of proving the voluntariness of a confession to the same standard.[21] Third, the burden of proof satisfactorily safeguards the values that the rule is intended to protect, while still fulfilling the ultimate purpose of the exclusionary rule as a deterrent for coercive police misconduct.[22] Lastly, and ultimately, the evidentiary rules of each jurisdiction are better equipped to necessitate a more stringent burden of proof, rather than the Due Process Clause, if necessary.[23]

Although the *Miranda* Court failed to define what constitutes a "knowing and intelligent" waiver, it implicitly required that a suspect's mental capacity be considered in reaching a judgment.[24] The requisite inquisition into the faculties of a suspect's mind is further bolstered by the fact that knowledge and intelligence are inherently a product of mental functionality.[25] In his concurring opinion, Justice Clark foresaw the inevitable difficulties in analyzing whether a waiver satisfies the knowing and intelligent prong:

> The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on

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[19] *Connelly*, 479 U.S. at 168.

[20] *Id.*; Lego v. Twomey, 404 U.S. 477, 488 (1972).

[21] *Lego*, 404 U.S. at 484.

[22] *Connelly*, 479 U.S. at 169 ("[Exclusionary] rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in . . . suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." (alterations in original) (quoting *Lego*, 404 U.S. at 489)).

[23] *Connelly*, 479 U.S. at 167.

[24] *Miranda*, 384 U.S. at 492 ("The mere fact that [a suspect] signed a statement . . . stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights.").

[25] *Connelly*, 479 U.S. at 166–67 (hinting at the difficulty inherent in conducting "sweeping inquiries" into a suspect's mind, absent police coercion).

> the mind and will of an accused . . . .[26]

This difficult distinction is still a polarizing complexity among inferior federal and state courts seeking guidance in determining whether a suspect's waiver was knowing and intelligent.

B. *Applying* Miranda*: Voluntary, (and) Knowing and Intelligent*

Like it has done for the waiver of other constitutional guarantees, the Court has bisected the necessary requirements for a valid waiver under *Miranda*.[27] The validity of a waiver is not to be analyzed under the guise of *Miranda*'s prescribed adverbial triplet; rather, a waiver's validity requires analyses of "two distinct dimensions," such that it must be both voluntary, and knowing and intelligent.[28]

A suspect's waiver is voluntary if it is the "product of a free and deliberate choice rather than intimidation, coercion, or deception."[29] The Court has had little difficulty in applying this standard in the confession context: "In thirty-six opinions the Supreme Court . . . decided, on the basis of the 'totality of the circumstances,' that some confessions had been 'the offspring of a reasoned choice,' and that others had been *products of 'a will overborne*.'"[30] For a suspect's waiver to be sufficiently knowing and intelligent, the Court articulated in *Moran v. Burbine*:

> [T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.[31]

Since *Moran*, the Court has continued to emphasize the bisectional nature of the two prongs, requiring that both satisfy the necessary standards of the doctrine before statements made following waiver are admissible at trial.

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[26] *Miranda*, 384 U.S. at 502 (Clark, J., concurring in part) (quoting Haynes v. Washington, 373 U.S. 503, 515 (1963)); *accord* Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

[27] Fare v. Michael C., 442 U.S. 707, 724–25 (1979).

[28] *E.g.*, Berghuis v. Thompkins, 560 U.S. 370, 382–83 (2010) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

[29] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[30] GRAHAM, *supra* note 11, at 161 (emphasis added).

[31] *Moran*, 475 U.S. at 421 (quoting *Fare*, 442 U.S. at 725).

C. *Justifying* Miranda*: The Constitution or Prophylaxis?*

In addition to the standard prescribed by the Court, it is necessary to address the foundations of the rule in constitutional jurisprudence. In the summer of 1968, approximately two years after the *Miranda* decision, Congress enacted 18 U.S.C. § 3501 as an apparent measure to overrule the judicially-prescribed mandates under the Fifth Amendment.[32] In *Dickerson v. United States*, the Court changed course and affirmatively declared that the requirement of a voluntary, knowing, and intelligent waiver is a constitutional rule, incapable of usurpation by legislative enactment.[33] The *Dickerson* Court declined to overrule *Miranda* and thus, held that § 3501 was unconstitutional.[34]

Under § 3501(a), a suspect's confession was admissible in a federal criminal prosecution if the trial judge merely determined that it was voluntarily made, regardless of whether the police employed the *Miranda* procedural safeguards.[35] While appearing to effectively nullify *Miranda*'s knowing and intelligent prong, the circumstances prescribed by § 3501(b) to be considered by a trial judge in determining voluntariness included factors relating to the suspect's mental ability:

> [I]n determining . . . voluntariness [the judge] shall take into consideration all the circumstances surrounding the giving of the confession, including . . . whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, . . . [and] whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel . . .[36]

However, as made plain by the Court's decision, these considerations were inadequate to an interpretation of the knowing and intelligent prong, "essentially return[ing] interrogation procedures to the pre-*Miranda* era."[37]

Under § 3501(b), a trial judge could take into consideration whether a

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[32] ALAN M. GOLDSTEIN & NAOMI E. SEVIN GOLDSTEIN, EVALUATING CAPACITY TO WAIVE MIRANDA RIGHTS 32–33 (2010); *see also* 18 U.S.C. § 3501, *invalidated* by Dickerson v. United States, 530 U.S. 428 (2000).

[33] *Dickerson*, 530 U.S. at 444 (2000).

[34] *Id.*

[35] 18 U.S.C. § 3501(a) ("[A] confession . . . shall be admissible in evidence if it is voluntarily given."); GOLDSTEIN, *supra* note 32, at 33.

[36] 18 U.S.C. § 3501(b); *see also* GOLDSTEIN, *supra* note 32, at 33.

[37] GOLDSTEIN, *supra* note 32, at 33.

suspect was advised of or knew he had a right to remain silent, but only whether he had been advised of the right to have an attorney present without considering whether the suspect "knew" that right was guaranteed.[38] Arguably, these factors lend credence to a belief that the knowing and intelligent requirement of *Miranda* was incorporated into the statute. However, because of the absence of any definition of "knew," these factors were disparaging to the standard for a knowing and intelligent waiver, and additionally, they were merely factors to be considered. At least one other federal Circuit argued to no avail the unconstitutionality of the statute's usurpation of *Miranda*, claiming that "§ 3501 allows greater discretion in the trial court in determining the issue of voluntariness and thus the admissibility of a confession than the principles of Miranda which are constitutionally mandated to satisfy the commands of the Fifth Amendment."[39] Thus, the judicially-prescribed *requirement* that procedural safeguards be employed, and that a waiver must be knowing and intelligent before a suspect's custodial testimony is admissible at trial, was free for any federal judge to discount or disregard.

Despite a prior upholding of § 3501 in the federal circuit and consistent with principles of *stare decisis*, the *Dickerson* Court elected not to overrule *Miranda* and held that § 3501 was unconstitutional.[40] The Court reasoned that *Miranda*, while not immutable, was a constitutional decision, and that its mandates had become so embedded in the national culture that there was adequate reason not to overrule it.[41] Additionally, and notably absent from the decision, was the fact that the government avoided invoking § 3501 in most federal criminal cases, appearing to have acknowledged the impropriety and potential unconstitutionality of the statute.[42]

Regardless of critics' position on the foundations of the *Miranda* decision, they are hard pressed to argue against the justifications for *stare decisis* in this instance, considering the embedment of *Miranda*'s procedural safeguards into the minds of Americans through recitation in multiple popular

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[38] *See* 18 U.S.C. § 3501(b).

[39] United States v. Crocker, 510 F.2d 1129, 1136 (10th Cir. 1975), *abrogated by* United States v. Bustillos-Munoz, 235 F.3d 505, 516 (2000).

[40] *Dickerson*, 530 U.S. at 444.

[41] *Id.* at 443 (citations omitted).

[42] "In fact, with limited exceptions . . . [§ 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." Davis v. United States, 512 U.S. 452, 463–64 (1994) (Scalia, J., concurring) (citing OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, REPORT TO ATTORNEY GENERAL ON LAW OF PRE–TRIAL INTERROGATION 72–73 (1986)).

television programs.[43] Thus, the Court held that the voluntary, knowing, and intelligent requirements, as mandated by *Miranda*, were necessary for the admission of statements into evidence in order to fully comport with the Constitution.

D. Colorado v. Connelly

While predating the *Dickerson* decision by fourteen years, the *Connelly* opinion is the genesis of the jurisdictional split pertaining to the knowing and intelligent prong.[44] The two prongs of analyzing a *Miranda* waiver's validity, while beneficial to suspects yearning for the most protection the law can afford, are the source of the confusion stemming from this case. Despite what appears to be axiomatic from the plain language of the opinion, the requirement that a waiver be both voluntary, and knowing and intelligent, has since been muddled by inferior federal and state courts' interpretations of the *Connelly* decision.

Francis Connelly suffered from chronic paranoid schizophrenia; a "longstanding severe mental disorder."[45] After traveling from Massachusetts to Colorado, Connelly approached a uniformed police officer and confessed to the 1982 murder of a Denver woman.[46] At the time of his confession, Connelly stated that he understood his rights and appeared (to the officer) capable of "understand[ing] fully the nature of his acts."[47] Police verified that a woman had in fact gone missing around the timeframe posed in Connelly's confession, leading additional officers to investigate the site at which Connelly claimed to have committed the murder.[48] During this time, Connelly's ability to understand the situation he placed himself in remained apparent to the investigative officers.[49]

At trial, Connelly moved to suppress his statements to the police officer

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[43] Arthur H. Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. & POL. 303, 326 n.108 (2014) ("The television series *Law and Order* . . . comment[ed] on both the quality of the American justice system as well as the meaning and application of justice and the rule of law . . ."); Ronald Steiner et. al., *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 224 (2011) (noting that television shows like *Dragnet* and *Law & Order* "made Miranda warnings part of popular culture, which seems to have saved them from a potential elimination.").

[44] *See generally* Colorado v. Connelly, 479 U.S. 157 (1986).

[45] *Id.* at 174 (Brennan & Marshall, JJ., dissenting).

[46] *Id.* at 160 (majority opinion).

[47] *Id.*

[48] *Id.* at 160–61.

[49] *Id.* at 161 ("Detective Antuna perceived no indication whatsoever that [Connelly] was suffering from any kind of mental illness.").

regarding the murder.[50] He claimed that his confession was involuntary because it was compelled by the "voice of God."[51] The trial court granted the motion, holding that Connelly's statements were involuntary due to the impairment of Connelly's volition as a result of his schizophrenia and giving credence to the government-appointed psychologist's determination that "Connelly's psychosis motivated his confession."[52] The Supreme Court of Colorado affirmed the trial court's holding, reasoning that the voluntariness of a statement is ultimately determined by whether it was the product of rational intellect and free will.[53]

The Supreme Court granted the State of Colorado's petition for certiorari, particularly due to its disagreement with how the Supreme Court of Colorado analyzed the voluntariness issue.[54] The Court stated that the Supreme Court of Colorado erred by incorporating notions of "free will" into its analysis.[55] To the displeasure of those advocating for greater protection of cognitively-impaired suspects who waive their *Miranda* rights, the Court also reemphasized that an individual's privilege against self-incrimination is "not concerned 'with moral and psychological pressures emanating from sources other than official coercion.'"[56]

The Court affirmatively set forth the limits of protection afforded by the Self-Incrimination Clause in a clear attempt to cabin the highly criticized prophylactic rule of *Miranda*.[57] The Court held that police coercion was a necessary predicate to deeming a waiver involuntary within the context of the Due Process Clause of the Fourteenth Amendment.[58] To emphasize that the decision applied only to the voluntary prong of an effective waiver, the majority stated in a footnote:

> It is possible to read the opinion of the Supreme Court of Colorado as finding respondent's *Miranda* waiver invalid on other grounds. Even if that is the case, however, we nonetheless reverse the judgment in its entirety because of our belief that the Supreme Court of Colorado's analysis was

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[50] *Connelly*, 479 U.S. at 161.

[51] *Id.*

[52] *Id.* at 162.

[53] People v. Connelly, 702 P.2d 722, 728 (Colo. 1985), *rev'd*, Colorado v. Connelly, 479 U.S. 157 (1986).

[54] *Connelly*, 479 U.S. at 171 n.4.

[55] *Id.* at 169.

[56] *Id.* at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

[57] *Id.* at 169–71.

[58] *Id.* at 167.

> influenced by its mistaken view of "voluntariness" in the constitutional sense. Reconsideration of other issues, not inconsistent with our opinion, is of course open to the Supreme Court of Colorado on remand.[59]

Despite what appears to be an unambiguous statement by the Court that its holding applies only to the voluntary prong of analysis, this disclosure in a mere footnote and the totality of the decision are the primary cause of confusion among the inferior federal and state courts as to the fate of the knowing and intelligent prong.

III. THE UNKNOWING PROBLEM

The perpetual tension between legitimate government interests and individual liberty is demonstrated through an analysis of the knowing and intelligent prong.[60] There are certainly instances in which a defendant's characteristics, viewed objectively through the perspective of an interrogating officer, reveal that the defendant lacks the required ability to comprehend. However, these competing interests clash most forcefully in instances where an interrogating officer employs due diligence to apprise a suspect of his *Miranda* rights and objectively determines, based on the defendant's manifested characteristics, that he possesses the mental capacity to make a knowing and intelligent waiver. In these instances, the police have exercised good faith in obtaining what would otherwise be admissible testimony; however, the suspect's alleged incapacity to make a knowing and intelligent waiver suggests that there is some exercise of undue influence over the suspect's will. The link between the interrogating officer's behavior and the suspect's incapacity to comprehend is tenable at best. This due diligence is expressed through explaining the *Miranda* rights (and repeating the rights), providing the terms of waiver in writing, and providing the terms of waiver in a non-English language. How is the law to be shaped when there is no unconstitutional conduct to deter and evidence of mental incapacity is highly limited to post-hoc psychological evaluation?

Literature discussing *Connelly* and its progeny of related cases justifiably articulates why it is unfair for the government to use self-incriminating statements from cognitively impaired suspects and how admission of these

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[59] *Id.* at 171 n.4.

[60] *E.g.,* Collins v. Gaetz, 612 F.3d 574, 590 (7th Cir. 2010) ("The Miranda warnings represent a balance between the desire to obtain truthful confessions and the desire to protect some of our most fundamental rights.").

statements poses a substantial threat of incarcerating innocent individuals.[61] However, these authors fail to see the two sides of the coin. The government has an interest in using legitimate law enforcement techniques to garner evidence from those suspected of committing crime, typically in the form of written or oral statements of culpability.[62] As the Supreme Court noted: "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable."[63]

On the other end of the spectrum, the fact that an individual may be subjected to an indefinite period of incarceration due to a psychological impulse to confess implicates concerns of personal liberty. And, of course, there is always the overarching public policy concern that the government should not take advantage of the cognitively impaired in its administration of the law.[64] How willing is the government to disregard a suspect's mental capacity in determining guilt or innocence?

Here are the two sides of the jurisdictional split regarding the knowing and intelligent prong: some courts hold that police coercion is a necessary predicate to finding a waiver invalid; other courts hold that police coercion is a necessary predicate *only* to finding a waiver involuntary (*i.e.,* police coercion is not necessary to find the waiver was not knowing or intelligent). The former read *Connelly* to allow legitimate law enforcement practices by deeming a waiver knowing and intelligent based on an objective analysis of an investigating officer's perception of the suspect.[65] Those jurisdictions hold that a waiver is invalid only if there are indicia of police coercion present, with some explicitly giving primary significance to law enforcement observations of the interrogation. The latter advocate the value and necessity of the defendant's individual characteristics in determining whether the

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[61] See generally Morgan Cloud et. al., Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. CHI. L. REV. 495 (2002); Brian Corcoran, Note, "This Has to Be Wrong": Mirandizing the Mentally Challenged, 6 GEO. J.L. & PUB. POL'Y 629 (2008); Noel Moran, Confessions Compelled by Mental Illness: What's an Insane Person to Do?, 56 U. CIN. L. REV. 1049 (1988); Michael R. Pace, Fifth and Fourteenth Amendments–Defining the Protections of the Fifth and Fourteenth Amendments Against Self-Incrimination for the Mentally Impaired, 78 J. CRIM. L. & CRIMINOLOGY 877 (1988); Allison D. Redlich, Voluntary, but Knowing and Intelligent? Comprehension in Mental Health Courts, 11 PSYCHOL. PUB. POL'Y & L. 605 (2005); Claudio Salas, Note, The Case for Excluding the Criminal Confessions of the Mentally Ill, 16 YALE J.L. & HUMAN. 243 (2004).

[62] *Connelly*, 479 U.S. at 166.

[63] United States v. Washington, 431 U.S. 181, 187 (1977).

[64] Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

[65] Garner v. Mitchell, 557 F.3d 257, 262, 262 n.1 (6th Cir. 2009) (quoting Rice v. Cooper, 148 F.3d 747, 750–751 (7th Cir. 1998)); *see* Woodley v. Bradshaw, 451 F. App'x 529, 540 (6th Cir. 2011).

totality of the circumstances objectively reveal a knowing and intelligent waiver.[66] Those jurisdictions utilize the totality of the circumstances test applied to involuntary confessions and analyze a suspect's mental ability as a factor apart from an officer's conduct and observations.[67] Ultimately, the inferior federal and state courts hold that police coercion is either (1) a necessary predicate to deeming a waiver involuntary; or (2) a necessary predicate to deeming a waiver invalid.[68]

A. *Who Can Make a Knowing and Intelligent Waiver?*

Of the 695,000 cognitively impaired individuals that are arrested each year, it is reasonable to assume that at least some are mirandized while suffering the effects of their respective impairment.[69] While this Comment will focus primarily on those suspects who are subject to psychotic disorders, the rationale is applicable to all cognitive impairments, such as intellectual disability, adolescence, low IQ, and language comprehension.

To understand the problem that has led to the split, it is important to explain why a cognitively impaired individual who fails to manifest any indicia of impairment cannot meet the legal standard for a knowing and intelligent waiver as prescribed by the Court:

> [T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.[70]

On its face, one could draw a conclusion that most, if not all, suspects suffering from cognitive impairments are incapable of achieving full awareness as to the nature of the right or the consequences of its relinquishment. However, intellectually disabled, low IQ, and non-English speaking suspects have been found capable of waiving these rights. Based on

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[66] United States v. Bradshaw, 935 F.2d 295, 298, 300 (D.C. Cir. 1991); *see also* United States v. Cristobal, 293 F.3d 134, 142 (4th Cir. 2002).

[67] *Woodley*, 451 F. App'x at 540.

[68] Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").

[69] Rogers et al., *supra* note 3, at 403.

[70] Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)).

this, what is the "requisite level of comprehension"? Does it necessarily vary from individual to individual? Is there a legal standard that provides uniformity in the *Miranda* waiver context? Based on lower court decisions, it appears that the "requisite level of comprehension" standard varies based on each court's totality of the circumstances analysis. However, because comprehension is arguably different among individuals, this inquiry yields inapposite results. This Comment will propose to remedy this inadequacy.

For a cognitively-impaired individual—or any individual for that matter—to knowingly and intelligently waive his rights, she must have full awareness of the nature underlying the right to remain silent and the right to have an attorney present during the interrogation.[71] She must be fully aware of the consequences of relinquishing those rights in favor of speaking with police outside the presence of an attorney.[72] Yet, it is not required that a suspect be informed of every consequence that may result from waiving the right to remain silent or the right to counsel.[73]

The Court has long bifurcated the elements into a requirement that a waiver be (1) voluntary, and (2) knowing and intelligent; and proven by a preponderance of the evidence.[74] However, some scholars assert that the requirements of a valid waiver are apportioned into triplets,[75] analogizing the distinction between "knowing" and "intelligent" to the distinction between a factual and rational understanding in determining a criminal defendant's competency to stand trial.[76]

Whether viewed as two prongs or three, the essence of a knowing waiver is the suspect's ability to understand the nature of the rights possessed, as well as the manner in which he is apprised of those rights.[77] Whether a waiver is made knowingly "depends both on the suspect's ability to know or understand what each of the four *Miranda* rights mean and the way in which the rights were presented to him."[78] The manner in which the suspect is apprised of his rights provides bountiful opportunity for coercion.[79] Thus,

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[71] See *id.*

[72] See *id.*

[73] *E.g.*, Colorado v. Spring, 479 U.S. 564, 574 (1987).

[74] *See supra* Section II.B.

[75] I. Bruce Frumkin & Alfredo Garcia, *Psychological Evaluations and the Competency to Waive Miranda Rights*, 27 CHAMPION 12, 13–14 (2003); *see generally* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2d ed. 2003).

[76] Frumkin & Garcia, *supra* note 75, at 14.

[77] *Id.* at 13.

[78] *Id.*

[79] *See* United States v. Murphy, 703 F.3d 182 (2d Cir. 2012); Clay v. State, 725 S.E.2d 260 (Ga. 2012); Commonwealth v. Lukach, 163 A.3d 1003 (Pa. 2017).

the suspect's ability to understand is not wholly independent of the officer's conduct.

An intelligent waiver "requires the suspect to be able to weigh his options and their consequences, thereby exhibiting the capacity to make a decision."[80] When viewed as its own peculiar requirement, an intelligent waiver implies that the suspect makes a rational choice based on an appreciation of the contingent consequences surrounding the decision.[81] This, however, is wholly independent of the police's conduct.

In the context of forensic mental health, the legal requirement of "knowing" is analogous to "understanding," while "intelligent" is analogous to "appreciation."[82] Essentially, the question posited when a suspect fails to manifest any indicia of cognitive impairment is whether he understood the procedural safeguards in the manner in which they were presented and whether he was able to apply those safeguards to his own situation, thereby "grasp[ing] the potential consequences of waiving those rights."[83] These formulations are at odds with the Court's explicit holding that a suspect does not need to understand all of the consequences of his waiver in order to effect a valid one.[84] It also conflicts with the consistently affirmed position of the Supreme Court noted above: "The waiver inquiry 'has two distinct dimensions.'"[85]

Compared to most other persons suffering from prevalent mental disorders in the United States, paranoid schizophrenics are significantly more impaired in their cognitive functions.[86] In regard to adjudicative competence, which is analogous to an individual's capacity to waive his rights, 72% of paranoid schizophrenics are typically considered "impaired," while only 25% of individuals suffering from other mental disorders are considered "impaired."[87] In an evaluation of understanding, reasoning, and appreciation, only 48.1% of all schizophrenics performed adequately, in comparison to 76.1% of those suffering from depression.[88] Comprehension ability among individuals of average intelligence is additionally relevant. Research reveals that even 45% of functioning members of society conduct

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[80] Frumkin & Garcia, *supra* note 75, at 14.

[81] *Id.*

[82] GOLDSTEIN, *supra* note 32, at 41.

[83] *Id.* at 41–42.

[84] Colorado v. Spring, 479 U.S. 564, 574 (1987).

[85] Berghuis v. Thompkins, 560 U.S. 370, 382–83 (2010) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

[86] Redlich, *supra* note 61, at 611.

[87] *Id.*

[88] *Id.*

themselves in the custodial context under the false notion that oral statements cannot be used against them.[89]

B. *Coercion is a Necessary Predicate to Deeming a Waiver Invalid*

This section will present two cases which found a suspect's waiver valid despite evidence of diminished mental capacity. In both cases, and others whose citation would be cumulative, the suspect's mental capacity is alleged in some effect to have altered his ability to make a knowing and intelligent waiver. However, the absence of police coercion causes each court to reach outside doctrinal mandates and inquire pragmatically into the purposes underlying *Miranda*.

1. *Rice v. Cooper*

This case arose in the United States Court of Appeals for the Seventh Circuit twelve years after the *Connelly* decision and has served as persuasive authority for other jurisdictions.[90] The decision is also notorious for what appeared to be a my-hands-are-tied approach by Judge Richard Posner.[91]

Gerald Rice was an illiterate, "mildly retarded" sixteen-year-old man with atypical depression.[92] Rice hurled a bottle of gasoline inside an apartment building, killing four residents, and was subsequently convicted of first-degree murder and sentenced to life in prison.[93] Rice was arrested a short time after the detonation and subject to questioning on three separate occasions.[94] On all three occasions, Rice was read his *Miranda* rights by the investigating officer and indicated that he understood the rights as given.[95] Despite Rice's contention that physical force was used against him in order to obtain the confession, the trial court found that this was not in fact the case.[96]

Post-hoc psychological evaluations performed by two clinical psychologists provided testimony that Rice was mentally incompetent at the time he waived his rights but was nonetheless competent to stand trial.[97]

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[89] Frumkin & Garcia, *supra* note 75, at 14.

[90] *See generally* Rice v. Cooper, 148 F.3d 747 (7th Cir. 1998).

[91] *See generally* Corcoran, *supra* note 61, at 639–45 (discussing the policy implications of the *Rice* decision).

[92] *Rice*, 148 F.3d at 749. Atypical depression means "a depressive episode with atypical features." *Id.* (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM–IV) 386 (4th ed. 1994)).

[93] *Id.*

[94] People v. Rice, 628 N.E.2d 837, 838–39 (Ill. App. Ct. 1993).

[95] *Id.*

[96] *Id.* at 842–43.

[97] *Rice*, 148 F.3d at 749–50.

Police testimony proffered that at the time of Rice's interrogation, there was nothing that would give rise to an inference that Rice lacked the mental capacity to make a knowing and intelligent waiver.[98] However, the record reflected that at the time the police provided Rice his *Miranda* rights, Rice sought clarification as to the meaning of certain recitations.[99] With all of this evidence, the Seventh Circuit was left to determine "the duty, if any, of the police to protect a mentally impaired person from incriminating himself."[100]

Despite psychological expert testimony regarding Rice's mental capacity, the court held that Rice validly waived his *Miranda* rights.[101] The court reasoned that there was no evidence of police abuse nor compelling evidence of his mental incapacity.[102] However, it is unclear which of these reasons—the absence of abuse or the uncompelling testimony—provided the greatest force in concluding that Rice's waiver was valid.[103]

Judge Posner opined at length about the court's inability to meaningfully discern when a *Miranda* waiver is invalid in the absence of police coercion.[104] Thinking aloud, he wrote:

> Maybe the real difference between the two cases is that judges are more confident about being able to determine whether a suspect understands the Miranda warnings than about being able to determine whether he waived them because he was remorseful, calculating, or merely impulsive, on the one hand, or mentally ill or deficient on the other.[105]

Judge Posner expressed his disbelief in his own opinion: "[T]his has to be wrong, though we cannot find a case that says so."[106] Opponents of the Seventh Circuit's interpretation of *Connelly* claim that it rendered the protections afforded by *Miranda* meaningless to individuals who are undetectably impaired by mental disorders during custodial interrogations.[107] While there are other citable cases that illustrate the tension

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98 *Id.* at 751.

99 *Rice*, 628 N.E.2d at 842.

100 *Rice*, 148 F.3d at 750.

101 *Id.* at 749, 752.

102 *Id.* at 752.

103 *Id.*

104 *Id.* at 750–52.

105 *Id.* at 751–52.

106 *Rice,* 148 F.3d at 750.

107 Corcoran, *supra* note 61, at 640 ("[The Seventh Circuit's] interpretation of *Connelly* renders *Miranda* and the Fifth Amendment meaningless for a substantial segment of the population.").

between the competing interests and favor the approach of the Seventh Circuit, the *Rice* decision is succinctly adequate to pose the main points of argument.

2. *Garner v. Mitchell*

A more recent case in which the absence of police coercion led to finding a valid waiver, despite evidence of the suspect's diminished mental capacity, arose in the United States Court of Appeals for the Sixth Circuit in 2009. Among other charges, William Garner was convicted of five counts of aggravated murder after burglarizing an apartment and setting it ablaze with five children sleeping inside.[108] The taxi-cab driver who drove Garner from the arson site to his residence provided evidence of Garner's identity as the perpetrator, facilitating the police's search of Garner's apartment and subsequent arrest.[109] The police read Garner his *Miranda* rights at the time of arrest and a second time upon arrival at the precinct.[110] Garner agreed to waive his *Miranda* rights by an express waiver and provided a taped statement of the events leading up to the crime.[111]

The Sixth Circuit held that, under the totality of the circumstances, Garner made a knowing and intelligent waiver of his *Miranda* rights.[112] The court looked specifically to the manner in which police apprised Garner of his rights, as well as to his fluent response in waiving those rights.[113] At the time of the interrogation, police reached the conclusion that Garner appeared "perfectly normal" and "very coherent."[114] Each time an officer recited one of the procedural safeguards afforded to Garner, the police exercised their due diligence by confirming that Garner understood the right as provided.[115] Garner's response in the affirmative was sufficient to dissuade any belief that he lacked the requisite mental capacity in comport with the standards set out in *Miranda*.[116]

The court particularly noted that Garner's ability to understand the consequences of his actions in his custodial statements were indicative of his

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[108] Garner v. Mitchell, 557 F.3d 257, 258 (6th Cir. 2009).

[109] *Id.* at 259.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 260.

[113] *Id.* at 261.

[114] *Garner,* 557 F.3d at 261.

[115] *Id.*

[116] *Id.*

ability to understand the consequences of waiving his rights.[117] Expert testimony offered at trial indicated that Garner appeared capable of understanding the implications of waiving his *Miranda* rights at the time of interrogation.[118] Relying on the *Rice* opinion, the court opined that even if the record reflected an inability to make a knowing and intelligent waiver, the officer's inability to detect such incapacity and the deterrent rationale of *Miranda* precluded a contrary holding.[119]

The court hammered down on this rationale:

> At no point did the Supreme Court say that one of the two dimensions is to be examined from the perspective of the police while the other is to be examined from the perspective of later scientific inquiry. Instead, both are to be evaluated from the "totality of the circumstances surrounding the interrogation."[120]

The absence of any manifestation from Garner that would cause the interrogating officers to conclude that he lacked the requisite mental capacity to waive his rights, coupled with the officer's diligence in obtaining Garner's waiver consistent with the principles outlined in *Miranda*, led the court to ultimately conclude that there was no basis on which it could invalidate Garner's waiver.[121]

C. *Police Coercion is a Necessary Predicate to Deeming a Waiver Involuntary*

The United States Court of Appeals for the District of Columbia Circuit took an alternative approach in *United States v. Bradshaw*.[122] The defendant, Larry Bradshaw, had a detailed history of bank robberies and mental illness.[123] Bradshaw was diagnosed as a schizophrenic more than fifteen years before the bank robbery that led to his arrest.[124] While fleeing from the scene of this heist, the money-bag's dye pack exploded; Bradshaw was arrested,

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[117] *Id.* ("We have held, in the similar context of a challenge to the voluntariness of a confession, that a defendant's capacity to devise a criminal scheme was evidence of capacity to admit to devising the scheme." (citing United States v. Macklin, 900 F.2d 948, 952 (6th Cir. 1990))).

[118] *Id.* at 262.

[119] *Id.*

[120] *Garner,* 557 F.3d at 263.

[121] *Id.*

[122] United States v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991).

[123] *Id.* at 297.

[124] *Id.*

interrogated, and ultimately confessed.[125]

Bradshaw's counsel moved to suppress the confession, arguing that because of his mental illness and the excessive quantity of alcohol he consumed before the robbery, he was unable to understand his rights or the consequences of relinquishing them.[126] The district court, however, denied the motion to suppress, adjudicating on the assumption that police coercion was a necessary predicate to deeming a waiver invalid.[127]

The appellate court held that the district court erred in denying the motion to suppress Bradshaw's confession.[128] The court reasoned that the district court's failure to make any explicit findings as to Bradshaw's capacity to understand was the result of an incorrect interpretation of the holding in *Connelly*.[129] The court spoke on *Connelly* at length, noting its distinctions from the facts of the case at hand and emphasizing that the principal argument in Connelly's case was that his waiver was involuntary, not that it was unknowing and unintelligent.[130] Additionally, the court noted that only Connelly's volitional abilities were impaired by his schizophrenia and that his cognitive functions were not significantly impaired.[131]

In rationalizing the *Connelly* Court's explicit restriction of its holding to the voluntary prong, the court articulated what similarly situated jurisdictions have come to adopt as an analysis of the knowing and intelligent prong:

> We read *Connelly* . . . as holding only that police coercion is a necessary prerequisite to a determination that a waiver was *involuntary* and not as bearing on the separate question whether the waiver was knowing and intelligent. Connelly's claims, as noted above, were clearly directed only towards the voluntariness of his actions; the knowledge test was not involved in the case. And there is no other way to explain the Supreme Court's disclaimer: aside from the knowledge inquiry, there are no "other grounds" on which the lower court's ruling could have been based . . .[132]

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125 *Id.*

126 *Id.* at 297.

127 *Id.*

128 *Bradshaw*, 935 F.2d at 300.

129 *Id.* at 298–99.

130 *Id.* at 299.

131 *Id.*

132 *Id.* (emphasis in original).

Analysis of whether Bradshaw's waiver was knowing and intelligent under this standard would have supplied valuable authority for other jurisdictions contemplating the issue. However, because there were no findings of fact pertaining to Bradshaw's ability to understand, the court was limited to remanding the case for further findings, rather than definitively determining the knowing and intelligent issue for the circuit.[133]

D. *Conclusion*

The crux of the problem is the difficulty in distinguishing a suspect's irresistible impulse to confess from a suspect confessing due to an inability to understand his right to *not* confess. Cognitively impaired suspects, who do not outwardly manifest indicia of their inability to understand, face the greatest consequences of this problem. However, as this Comment will demonstrate below, a standard consistent with *Rice* and *Garner* does not diminish a cognitively impaired individual's protections in the absence of police coercion.

IV. THE INTELLIGENT APPROACH

Some jurisdictions read *Connelly* to mean that when a waiver is contested, there must be some evidence of police coercion in order to find the waiver invalid. On the other end of the spectrum, some jurisdictions read *Connelly* as applying only to the voluntariness of a waiver and admonish lower courts who fail to consider individualized evidence of the suspect's capacity to comprehend the warnings. The results reached by the respective jurisdictions are not so incongruent as to warrant preference for one or the other. But explication of both lends credence to implementation of a new rule governing such instances of waiver.

As a preface, there are necessary concessions. The plain language in the *Connelly* decision reflects that the voluntariness prong was the primary issue addressed without offering meaningful analysis on the knowing and intelligent prong. There is nothing in the opinion that could be interpreted textually as directing lower courts to invalidate a waiver only if police coercion is present. In theory, the two-prong analysis has been the cornerstone of *Miranda* waiver jurisprudence for the last thirty-five years, and an interpretation aligned with that of Judge Posner (in theory) could render the knowing and intelligent prong superfluous.[134]

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[133] *Id.* at 300.

[134] Moran v. Burbine, 475 U.S. 412, 421 (1986) ("*Only* if the 'totality of the circumstances surrounding the interrogation' reveal *both* an uncoerced choice and the *requisite level of comprehension* may a court properly conclude that the Miranda rights have been waived."

However, the context surrounding the voluntariness issue in *Connelly* (i.e., Connelly confessed while suffering under a schizophrenic episode) is not insignificant in advocating this Comment's contrary interpretation, like that of the Seventh Circuit, that coercion is necessary to prove a waiver invalid in its totality. Cognitively impaired suspects who do not outwardly manifest indicia of their inability to comprehend face the greatest consequences of this problem. The crux of the problem is distinguishing between a suspect's irresistible impulse to confess and a suspect confessing due to an inability to understand his right to not confess when that inability is unapparent to the interrogating officer.

Considering precedent, the purposes of *Miranda*, and the necessity of encouraging effective and legitimate law enforcement, an interpretation of *Connelly* more aligned with that of the Seventh Circuit is more logically and utilitarianly sound. Additionally, a cognitively impaired suspect who allegedly made an unknowing and unintelligent waiver is not deprived of the same level of protection. Coercive police misconduct should be necessary to invalidate a waiver of *Miranda* rights for three reasons: the fact that the Constitution shields only infringing government action, the original justification for the *Miranda* rule, and the effect that a contrary holding would have on legitimate law enforcement operations.

A. *The Unknowing Suspect: Ted's Case*

For practical reference of this Comment's proposal, consider the following scenario: Ted is brought in for questioning after his girlfriend, Carol, is found dead at a local lagoon. Officer Sue reads Ted his *Miranda* rights and asks Ted if he understands each, to which he responds in the affirmative. Officer Sue provides, and Ted signs, a written waiver of his *Miranda* rights. There is nothing at this moment that would lead Officer Sue to believe that Ted lacked the capacity to make a knowing and intelligent waiver of his rights. He heard Officer Sue state the warnings, confirmed that he understood them as presented, and further, signed a written waiver as affirmance to his stance to waive his rights.

Officer Sue asks Ted whether he knows who is responsible for the death of Carol, to which Ted blurts out, "I did it! I killed Carol!" Officer Sue inquires further, asking for details, to which Ted responds, "I stabbed her with a knife at the local lagoon." Seeking clarification of details pertaining to motive, Officer Sue inquires further, and Ted begins to justify his act by stating that the voices in his head compelled him to do it; that it was a necessary act in his

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(emphasis added)). *See supra* Section III.C (discussion of courts finding police coercion as a necessary predicate to deeming a waiver invalid).

progression to enlightenment. Sensing a disconnect from reality, Officer Sue asks if Ted would like to have an attorney present, to which he responds in the affirmative. Officer Sue ceases questioning.

A knife with Carol's blood is found at the local lagoon, and a search warrant is executed at Ted's residence. The knife is a missing part of a kitchen set inside Ted's residence. Ted is arrested and charged with first-degree murder in the killing of Carol. At trial, defense counsel moves to suppress Ted's statements made while in custody, arguing that his waiver was not made knowingly and intelligently. Dr. Toboggan, an accredited clinical psychologist, diagnoses Ted with paranoid schizophrenia and prescribes him the appropriate medication to aid in his treatment. Ted had not previously been diagnosed with schizophrenia or any other mental disorder, nor had he been given any mental health treatment or medication.

In light of the medication prescribed to Ted, the trial court determines he is competent to stand trial. However, Dr. Toboggan testifies that it was highly probable that, at the time of the interrogation, Ted was in a psychotic state and suffering from severe delusions and paranoia. The prosecution's medical expert confirms that Ted's behavior was unusual but disagrees with Dr. Toboggan's determination that Ted was suffering from paranoid schizophrenia at the time of the interrogation.

Faced with the motion to suppress in a jurisdiction that has yet to take a definitive stance on the issue, the trial court judge will analyze and consider the following authorities of this section to reach the ultimate conclusion that the motion to suppress Ted's statements should be denied.

B. *Looking to the Constitution: What Triggers Protection?*

For better or for worse, the Constitution serves as the initial authority of inquiry into the question posed.[135] The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[136] *Miranda* unambiguously served as a prophylactic extension of this protection to the custodial interrogation setting.[137] In the immediate aftermath and still today, the reasons justifying cynicism toward

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[135] *See* discussion *supra* Section II.A.

[136] U.S. CONST. amend. V.

[137] Dickerson v. United States, 530 U.S. 428, 437 (2000); North Carolina v. Butler, 441 U.S. 369, 374 (1979).

the decision are bountiful.[138] However, the Court's holding in *Dickerson* necessarily requires looking to the proverbial text.[139]

1. The Police

Analysis of the voluntary prong requires a delving inquiry into the fundamental principles rooted in the Constitution. Absent from Magna Carta, the Petition of Right, and the Bill of Rights, the privilege against self-incrimination is primarily derived from the persecution of Puritans during the reign of Charles I.[140] During this period, the Court of High Commission and the Court of Star Chamber were concerned with religious and political subversion, respectively.[141] These courts "pry[ed] into men's minds since they were largely concerned with dangerous thoughts."[142] Justifiably, this practice warranted the inclusion of the privilege into the Constitution, as the involuntary nature of Charles I's special prerogative courts were largely at odds with principles of fundamental fairness.[143]

However, an analysis of this period fails to sufficiently address the knowing and intelligent requirement mandated by the *Miranda* Court. This is a primary reason the knowing and intelligent prong fails to receive equally meaningful attention as the voluntary prong, not so much by reason of judicial failure to conduct such an inquiry, but rather, the absence of justification yielded from such an inquiry.

The Constitution in large part serves as a guarantee of individual liberty from government intrusion. Thus, invoking the Constitution as a defender of these guarantees requires some act to be committed by the government or one acting in concert with the government.[144] Bouvier Law Dictionary succinctly summarizes what constitutes state action:

> An action by, for, with, or under the protection of state law or officials. State action is an action that deprives a person of a federally protected right because of some

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[138] *E.g.,* GRAHAM, *supra* note 11, at 158–60; Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 622 (1996).

[139] *See generally* Dickerson v. United States, 530 U.S. 428, 444 (2000) (declining to overrule *Miranda* on bases of *stare decisis*).

[140] David Fellman, The Defendant's Rights 154 (1958).

[141] *Id.* at 154–55.

[142] *Id.* at 155.

[143] *Id*.

[144] Monroe v. Pape, 365 U.S. 167, 184 (1961) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (quoting United States v. Classic, 313 U.S. 299, 326 (1941))).

> relationship between the action and the state. The element of state responsibility or involvement or authorization of the act makes the act state action. In the absence of a state relationship to an act that harms a person, the person might have a private cause of action but no constitutional claim, because the Constitution, or at least the Fourteenth Amendment, has been interpreted to apply to state action and not to private, or non-state, action.[145]

A suspect in custody must be able to point to an action of the state that deprived him of his privilege against self-incrimination. Particularly, he must prove the state's responsibility, involvement, or authorization as the source of such deprivation.[146] In the context of whether a waiver is voluntary, this necessitates the presence of police coercion. But in the context of whether a waiver is knowing and intelligent, it is harder to find what quantifiable responsibility or involvement the police have in the psychological forces steering a suspect's compulsion to confess or produce statements of culpability.

In every interrogation there is at least some form of responsibility or involvement attributable to the government. As the *Miranda* Court noted, a suspect in custody is subject to "inherently compelling pressures."[147] A suspect in custody is presumably fearful of the restrictions placed on his liberty at that precise moment, while the fear of indefinite incarceration looms. However, this omnipresent coercive pressure is not, in and of itself, sufficient to justify the exclusion of statements and confessions obtained. After the police have informed a suspect of his *Miranda* rights, something more compulsory is necessary to justify exclusion under both the voluntary and the knowing and intelligent prongs. Thus, police conduct that is coercive in nature and overbears the suspect's will invokes the need for constitutional

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[145] *State Action (Governmental Actor or State Actor)*, BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed. 2012).

[146] Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("Our 'involuntary confession' jurisprudence is entirely consistent with the settled law requiring some sort of 'state action' to support a claim of violation of the Due Process Clause of the Fourteenth Amendment."); *see* United States v. Stanley, 109 U.S. 3, 58 (1883) ("Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the State, and is clothed with the State's power, his act is that of the State.").

[147] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

protection, thereby limiting the bounds by which testimony from a vulnerable suspect can be admitted as evidence.[148]

Because the police serve as the executors of laws enacted by Congress or other legislatures, police action that infringes upon a right afforded to a suspect implicates a constitutional analysis. Thus, the verb "coerce" necessarily invokes the Constitution's protection.[149] The Constitution's protection is justified because a suspect is able to point to a specific instance of police conduct that overbore the suspect's will and compelled him to provide statements of culpability.

However, in Ted's case, what can he point to as an act of the state that compelled his outburst confession? The same rationale for invoking constitutional protection for claims of involuntariness cannot justifiably be applied to the psychological forces of a suspect's mind. A suspect suffering under psychotic duress, yet appearing objectively capable of understanding, has no source to which he can attribute state action. Provided there is no coercive misconduct, the psychological forces of the suspect's mind are not the responsibility of the police, and due to neurological complexities, inferences attributing the suspect's psychological forces to benign police conduct are untenable: "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[150]

Additionally, the *Connelly* Court recognized, almost with disdain, that the Constitution was ill-equipped to afford protection to suspects whose psychological forces motivated them to speak: "Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"[151] The Court established that "settled law" for a violation of due process claim is necessitated by some form of state action.[152] In the context of a suspect's ability to knowingly and intelligently waive his *Miranda* rights, where is this state action? In short, it is absent.

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[148] Berghuis v. Thompkins, 560 U.S. 370, 403 (2010) (Sotomayor, J., dissenting).

[149] *E.g.*, Michigan v. Tucker, 417 U.S. 433, 441 (1974) ("Where the State's actions offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confessions in court."); *see also Coerce*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To compel by force or threat <coerce a confession>.").

[150] Colorado v. Connelly, 479 U.S. 157, 164 (1986).

[151] *Id.* at 170 (1986) (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

[152] *Id.* at 165 (1986).

2. The Courts

The absence of justification for invoking constitutional protection in the absence of police coercion should not discourage those seeking what they deem to be fundamentally fair in this area of the law. Suspects alleging invalid waivers due to psychosis still maintain the ability to attribute state action to the trial judge.[153] Dissenting in *Connelly*, Justice Brennan articulated that coercion was not limited to presenting itself only in the custodial interrogation context:

> This Court abandons this precedent in favor of the view that only confessions rendered involuntary by some state action are inadmissible, and that the only relevant form of state action is police conduct. But even if state action is required, police overreaching is not its only relevant form. . . . "[T]he due process clause requires 'that state action, *whether through one agency or another,* shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[154]

As abstract as the principles of "liberty" and "justice" are, their breadth is sufficient to encompass any evidence unjustly admitted by a trial judge in light of the totality of the circumstances.

In the absence of police coercion, when a trial judge is presented with evidence of a suspect's inability to make a knowing and intelligent waiver, yet admits the evidence, this would necessarily be coercive action of the state through the judiciary. This is so, even in the event that defense counsel fails to raise an objection after admission of the tainted evidence.[155] Put another way:

> Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. And while it is true that

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[153] *See Connelly*, 479 U.S. at 179–80 (Brennan, J., dissenting).

[154] *Id.* (emphasis in original) (quoting Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

[155] *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (stating that to introduce a coerced confession, even if defense counsel did not object, would "[make] the whole proceeding a mere pretense of a trial").

> ordinarily the competency of a confession must be raised when the evidence is introduced, there are exceptions to that rule . . .[156]

This "second layer" of procedural protection for a suspect in a jurisdiction like the Sixth and Seventh Circuits who otherwise would unsuccessfully claim his waiver was invalid, allows for additional challenges to the admission of evidence.[157]

3. Conclusion

While the Constitution protects individuals from the infringements of those who by oath or affirmation swear to defend it, it is incapable of protecting an individual from himself.[158] Even if a concoction of a persuasive argument is otherwise possible, the Court has already acknowledged the unquantifiable difficulty that would accompany an inquiry into a suspect's mind.[159] Thus, absent any police coercion, if the suspect "understands the Miranda warnings yet is moved by a crazy impulse to blurt out a confession, the confession is admissible."[160] As evidenced by the flawed reasoning of the Colorado state courts in *Connelly*, there must be an "essential link between coercive activity of the State" and the testimonial evidence proffered in order to invoke protection under the Constitution.[161] Because the knowing and intelligent prong refers to a suspect's cognitive ability to understand and make rational decisions, the prong lacks the capability of infringement by a force external to the suspect. Therefore, in looking to the Constitution for support in excluding Ted's statements, the meat is lacking.

C. *Looking to Precedent:* Miranda *and Good Faith*

After looking to the Constitution for answers, there are two deducible conclusions. First, the Constitution does not protect an individual from himself, only from state action; thus, there is no constitutional support. Or, second, despite the absence of any constitutional support for the proposition,

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156 Fisher v. State, 110 So. 361, 365 (Miss. 1926).

157 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.").

158 Rice v. Cooper, 148 F.3d 747, 750 (7th Cir. 1998).

159 *Connelly*, 479 U.S. at 165–66 ("The flaw in respondent's constitutional argument is that it would expand our previous line of 'voluntariness' cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision.").

160 *Rice*, 148 F.3d at 750.

161 *Connelly*, 479 U.S. at 165.

a prophylactic extension could be implemented to offer more protection to this vulnerable class of suspects. While the utility of the second conclusion is admirable, the Court is perpetually hesitant to extend these sorts of prophylactic constitutional protections.[162] Thus, courts must look next to the purpose and rationale underlying the *Miranda* doctrine for support.

1. *Miranda*: What is the Purpose?

After concluding that the text and structure of the Constitution alone fail to provide justification for the exclusion of Ted's statements, the next step of inquiry requires looking to *Miranda* and its prevailing doctrine. At the time the decision was rendered, the rationale for *Miranda* was rooted in the Court's efforts to deter police interrogation practices that were harmful to the criminal justice system, which were largely in tune with the growing Civil Rights Movement of the era.[163] In addition to this justification, the Court subsequently stated that "[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel."[164]

These purposes are not mutually exclusive, however; as in Ted's case, there is no definite point at which the government can state with absolute certainty that a suspect "understands" his right. All police can and must do is ensure that the suspect is advised of his rights and, before proceeding to interrogate, objectively determine that the suspect is capable of understanding such rights. When an officer's good faith determination is not entirely accurate, however, what purpose is served by exclusion of the evidence? Arguably, the government has taken the appropriate and necessary measures to ensure that the suspect is advised of and understands his rights. Thus, there appears to be no state action to deter and therefore no justification for the exclusion of such evidence.

In support of this proposition, the Court ruled that the intentional withholding by police of information potentially beneficial to a suspect's interrogation does not bear on whether a waiver is knowing and intelligent: "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend

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[162] *See* TOMKOVICZ, *supra* note 5, at 145–47.

[163] *See* Miranda v. Arizona, 384 U.S. 436, 444–46 (1966); Fare v. Michael C., 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."); Berghuis v. Thompkins, 560 U.S. 370, 383 (2010).

[164] *Thompkins*, 560 U.S. at 383.

and knowingly relinquish a constitutional right."[165] In *Moran*, this "event" was the diligent efforts of the suspect's sister to provide her brother counsel at the time of his interrogation.[166] The Supreme Court unsympathetically declined to attribute any relevance to the validity of a waiver merely from the suspect's lack of knowledge of events occurring outside of his presence:

> [T]he same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.[167]

Here, neither Ted nor Officer Sue were aware of his potentiality for psychotic diagnosis. Regardless of whatever psychological forces may or may not have been in operation at the time of waiver, it is likely that they would constitute an "event" under *Moran*. Unlike *Moran*, however, this event is internal, not external, to the suspect. Yet, one would be hard pressed to state that psychological forces causing a psychotic episode do not bear on a suspect's ability to comprehend the warnings.

The fact that this "event" is occurring outside of the presence of the suspect and is entirely unknown to him is significant. Aligned with the reasoning in *Moran*, it is arguable that Ted's ignorance to the neurological chemical imbalance of his brain should not be considered in determining the validity of his waiver. Additionally, in *Moran*, the police were aware of the suspect's attorney's efforts to reach him; in Ted's case, however, Officer Sue had as much knowledge of Ted's psychological condition as he did. Neither party is at fault for not knowing the precise timing of a peculiar psychological episode, so what justifies attributing fault to the police?

Whether or not this is considered an event is the penultimate question to determine whether this was an event attributable to state action. In the

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165 Moran v. Burbine, 475 U.S. 412, 422 (1986).

166 *Id.* at 417–18.

167 *Id.* at 422.

absence of coercion, it is untenable to allege routine police interrogation methods were the sufficient cause of a psychotic episode. However, if the police's conduct was of such a nature as to have overborne the defendant's will, a waiver will be invalidated due to its involuntariness. If the police's conduct does not rise to this threshold, is it fair to attribute its acts of due diligence to a remote psychological force equally unknown to the police and the suspect? Even if a psychotic episode constituted an "event," there is sparse legal authority to determine if that type of event would abrogate the *Moran* decision, and state action is still the missing "essential link" to a claim of protection under the Constitution.

Looking to the purposes of *Miranda*, there is no indicia of support that the Constitution protects individuals from themselves. This should not be viewed as a detriment to those cognitively impaired suspects in a custodial interrogation setting. Instances where a suspect's ability to comprehend would be considered are not mutually exclusive of the voluntary question. That is, an unknowing and unintelligent waiver is largely a product of coercion at the root, not a result of the suspect's mental ability alone.

2. *Miranda* Implies Good Faith

Currently, the Court has created two exceptions that allow a suspect's statements to be admitted at trial despite the police's failure to provide the required *Miranda* safeguards: the impeachment use exception and public safety exception.[168] The first exception endorsed by the Court allows otherwise inadmissible statements to be admitted for the limited purpose of impeaching the credibility of a defendant's testimony given on direct examination.[169] Under the second exception—the public safety exception—the police's failure to give *Miranda* warnings will not bar the suspect's subsequent statements from being admitted into evidence if, at the time of the interrogation, the police's failure to provide the warnings was the result of being "reasonably prompted by a concern for the public safety."[170]

To protect both the state's interest in legitimate law enforcement and the suspect's privilege against self-incrimination, it is reasonable at this point in the Court's Self-Incrimination Clause jurisprudence to create a third *Miranda* exception: a good faith exception to the knowing and intelligent prong. The Court has alluded to the possibility of a good faith exception under *Miranda*, yet it has failed to specifically address the exception in the

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[168] TOMKOVICZ, *supra* note 5, at 139.

[169] Harris v. New York, 401 U.S. 222, 224–25 (1971).

[170] New York v. Quarles, 467 U.S. 649, 655–56 (1984).

context of the knowing and intelligent prong.[171] In fact, the two judicially permissible exceptions to *Miranda* allow evidence to be admitted in the absence of providing the procedural warnings for the limited purpose of impeachment or public safety. But how should the Court handle instances where the government has complied with all the procedural safeguards and has done its due diligence in interrogating a suspect in comport with the Constitution?

In *Michigan v. Tucker*, the Court held that it was inappropriate to exclude evidence obtained pre-*Miranda* which violated the safeguards provided therein.[172] Police informed the suspect, Thomas Tucker, that he had the right to remain silent, that anything he said could be used against him, and asked if he would like an attorney present, to which he answered in the negative.[173] However, the police failed to inform Tucker that counsel would be appointed for him if he could not afford one.[174] Tucker's statements were then used to locate a witness, whose testimony the prosecution sought to introduce at trial.[175]

The Court declined to exclude the evidence on the basis of the police's failure to comport with *Miranda's* subsequent procedural safeguards.[176] Rather, the Court looked to historical circumstances underlying the privilege against self-incrimination to determine whether the privilege against self-incrimination was so infringed as to justify exclusion.[177] In doing so, the Court distinguished between a violation of the privilege against self-incrimination and violations of "only the prophylactic rules developed to protect that right."[178] Ultimately, the Court determined as a "question of principle" that the evidence was admissible.[179]

In justifying its decision, the Court stated: "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman investigating serious crimes make no errors whatsoever."[180] The Court reasoned that the purpose of exclusion under the Fifth Amendment, like under the Fourth Amendment, is to deter abusive

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171 TOMKOVICZ, *supra* note 5, at 145; *see generally* Michigan v. Tucker, 417 U.S. 433 (1974).

172 *See Tucker*, 417 U.S. at 435, 450.

173 *Id.* at 436, 444–45.

174 *Id.* at 435.

175 *Id.* at 436–37.

176 *Id.* at 450 ("[W]e do not think that *any* single reason supporting exclusion of this witness' testimony, or all of them together, are very persuasive." (emphasis added)).

177 *Id.* at 444.

178 *Tucker*, 417 U.S. at 439.

179 *Id.* at 446.

180 *Id.*

police practices that stand contrary to the Court's and Constitution's mandates.[181] Implicitly, the Court has recognized that inadvertent police error occurs regularly. Post-*Miranda*, a policeman's failure to provide all the necessary warnings is a *per se* bar to the admission of the resulting evidence, subject to exceptions.[182] However, should the same bar be placed on evidence obtained due to an officer's failure to discern psychological forces undetectable to the human eye? Such a result is inapposite to the deterrence principle surrounding *Miranda*.

A corollary benefit of extending a good faith exception is that the analysis of the voluntary prong remains unaffected. The exception would never apply to the voluntary prong, primarily because any act of police coercion would necessarily be in bad faith. However, under the knowing and intelligent prong, its applicability is particularly relevant:

> An officer might lack "subjective" fault—his neglect of the safeguards might not be intentional or even reckless. An officer might even lack "objective" fault—it might be reasonable to believe that he is complying with the guidelines. . . . An officer, for example, might reasonably believe that he has demonstrated adequate respect for a suspect's assertion of the right to remain silent or that a suspect's conduct following a clear request for counsel's assistance has demonstrated a change of heart and a desire to answer questions without assistance.[183]

This again begs the question: what purpose would there be in excluding evidence that results from the suspect later spewing inculpatory statements?

Using *Miranda*'s deterrent purpose as a guidepost, suppression of custodial statements taken in violation of *Miranda* is denied "when countervailing interests outweigh the risks of constitutional deprivation and when suppression would yield excessive prophylaxis."[184] Exclusion of such evidence is "unjustified when the reach of the *Miranda* bar would be too broad, violating the general requirement of a 'close fit' between prophylactic rules and the core rights they protect."[185] The concern of excessive

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[181] *Id.* ("'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))).

[182] New York v. Quarles, 467 U.S. 649, 655–56 (1984) (public safety exception); Harris v. New York, 401 U.S. 222, 224–25 (1971) (impeachment exception).

[183] TOMKOVICZ, *supra* note 5, at 146.

[184] *Id.* at 147.

[185] *Id.*

prophylaxis is present if the Court were to adopt the position taken by most scholars pertaining to the knowing and intelligent requirement. The delving inquiry that would be required of police to determine whether suspects have the requisite mental capacity to waive their rights before beginning an interrogation would prove to be a wasteful allocation of time and resources.

The deterrent rationale of *Miranda* is equally present in the rationale for the exclusionary rule:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.*[186]

This deterrent principle is similarly employed in handling the exclusion of evidence under violations of the Fourth Amendment.[187] The Court's creation and reliance on constitutional exclusionary rules begs the question: what is the rationale for excluding statements made by an individual who cannot make a knowing and intelligent waiver when the officer receiving such statements acts in good faith compliance with the mandates of *Miranda*?

In *Connelly*, the Court emphasized that the evidence of a suspect's mental condition alone is insufficient to render a confession involuntary.[188] It would be similarly imprudent if the Court were to hold that evidence of a suspect's mental condition alone *is* enough to render a waiver unknowing and unintelligent. Outside of the legal context, this reasoning seems flawed. However, because the validity of a waiver is analyzed under the totality of the circumstances, the suspect's mental condition may not serve as the sole justification for exclusion. This is particularly true when such a claim of mental impairment, as in Ted's case, can only be supported by post-hoc psychological evaluation.

While the Court has not implied that good faith excuses a failure to administer Miranda warnings, it certainly has implied that good faith may

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[186] Michigan v. Tucker, 417 U.S. 433, 447 (1974) (emphasis added).

[187] *E.g.*, Davis v. United States, 564 U.S. 229, 231–32 (2011) ("To supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.").

[188] Colorado v. Connelly, 479 U.S. 157, 164–65 (1986).

excuse subsequent revelation of a suspect's inability to make a knowing and intelligent waiver.

D. *Is this Fundamentally Unfair? No.*

Critics of the *Connelly* decision have long argued about how decisions like *Rice* and *Garner* will inevitably produce an inequitable justice system for cognitively impaired suspects. This section serves to assuage those critics by elaborating on the first sentence of this Comment: Pragmatism is the key to *Miranda*. A consensus among inferior federal and state courts that, in the absence of police coercion or bad faith, a waiver is presumed valid, will serve legitimate state interests, while still protecting individual liberties.

1. If the Police Should Have Known, Then the Waiver is Invalid

What is to prevent an investigating officer from claiming that the suspect appeared lucid and capable of understanding, when, in reality, she did not? This is probably the first question that comes to mind when considering an extension of the good faith exception to the knowing and intelligent prong. Obviously, this should be at the forefront of concerns for cognitively impaired suspects subject to interrogation. As a side note, promotion of the value of video recorded interrogations would equally serve to protect this interest. However, even in those cases where the suspect is not afforded the luxury of a videotaped interrogation, the suspect is no worse off.

This is evidenced by *Moore v. Ballone*, where a chronic schizophrenic was subjected to forty-five minutes of interrogation in relation to the rape and murder of an eighty-eight-year-old woman.[189] Evidence of the suspect's mental incapacity was apparent and recognizable, based in part on his continual inquiry as to when his mother would pick him up, as well as incomplete sentences such as "I go home."[190] The court held that the suspect's mental history precluded his ability to make a knowing and intelligent waiver.[191] The court reasoned that the suspect's "understanding and coherence should have been doubted by the officers during the interrogation."[192] Moreover, all psychological evaluations revealed that the suspect suffered from chronic schizophrenia.[193]

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189 Moore v. Ballone, 658 F.2d 218, 220–23, 229 (4th Cir. 1981).

190 *See id.* at 221–22.

191 *Id.* at 229–30.

192 *Id.* at 229.

193 *Id.*

But in the absence of police coercion under this Comment's proposal, does this evidence have any weight? The answer is yes. Even for courts that will search for some form of police coercion before deeming a waiver invalid, this type of evidence provides such. These types of statements may be suppressed by reason of involuntariness, as the Court has stated that a confession "must not be extracted by any sort of threat or violence, or obtained by any direct or implied promises, however slight, nor by the exertion of *any other improper influence*."[194] While the court in *Moore* failed to state so explicitly, the police's continual questioning of Moore with objective awareness of his inability to make a knowing and intelligent waiver is such an improper influence. With awareness of his mental defect, not to precision but enough to objectively determine a suspect is incapable of making a knowing and intelligent waiver, the influence exerted on the suspect in this case would equally serve to invalidate a waiver as involuntary. Thus, because post-hoc psychological analysis is not precluded, the absence of express coercive police conduct does not practically preclude a suspect from suppressing evidence of culpability in the form of statements or confessions proffered while suffering under psychotic episode.

Therefore, contrary to the *Connelly* decision's articulation that the privilege against self-incrimination is not concerned with the psychological forces of the suspect, if those forces were present, and the evidence proffered by the defendant is sufficient to show that the police should have known of the suspect's mental ability, the suspect is equally capable of vindicating themselves from wrongful conviction.

2. Totality of Circumstances is Still Considered

In evaluating a suspect's mental capacity under the totality of the circumstances test, a court is not required to detect the presence of a mental impairment, but rather, to look to the characteristics of the defendant to determine the degree to which he understood and appreciated the significance of waiving those rights.[195] The ultimate test is whether a suspect's characteristics—age, background, experience, and intelligence—display a clear, understandable warning of all of his rights.[196] Thus, a suspect suffering under a psychotic episode at the time of interrogation is likely to display all

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[194] Malloy v. Hogan, 378 U.S. 1, 7 (1963) (emphasis added); *see also* Miller v. Fenton, 474 U.S. 104, 109 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.").

[195] GOLDSTEIN, *supra* note 32, at 45.

[196] Coyote v. United States, 380 F.2d 305, 308 (10th Cir. 1967); *see* Fare v. Michael C., 442 U.S. 707, 725 (1979).

of these characteristics consistent with a person of normal cognitive abilities. This is the difficulty that was encountered by Judge Posner in *Rice*, and with only post-hoc psychological analysis available to support a defendant's contention that his waiver was not knowing and intelligent, the state's interest in legitimate law enforcement should control. As the court in *Garner* articulated, "[t]he underlying police-regulatory purpose of *Miranda* compels that these circumstances be examined, in their totality, primarily from the perspective of the police."[197]

In *Blackburn v. Alabama*, the Court held that the admission of Blackburn's confession into evidence at trial "transgressed the imperatives of fundamental justice."[198] While the Court's holding was in relation to the "voluntary" standard under the Due Process Clause, its comments and rationale pertaining to Blackburn's mental condition are noteworthy. The Court acknowledged that there is undeniably a legitimate and necessary government interest in convicting criminals, but that, above all, "there are considerations which transcend the question of guilt or innocence."[199] Particularly, the Court noted that, notwithstanding whether the confession by Blackburn was true or false, "the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'"[200]

The significance of the Court's decision in *Blackburn*, which to an extent was abrogated by its later decision in *Connelly*, is that mental illness is a factor that will almost always be taken into consideration when constitutional rights are jeopardized. Another significant factor of the Court's decision is its acknowledgment that the contours of determining a suspect's mental ability are not easily discernable and that a judgment on that front is always, by its nature, one of probabilities.[201]

While the primary inquiry into a waiver's validity should focus on what the police were able to discern from the suspect's manifestations, this does not altogether prevent the suspect from bringing in evidence of cognitive impairment to support a motion to suppress.[202] Even in Ted's case, where police coercion is absent, the knowing and intelligent prong, like the voluntary prong, is considered under a totality of the circumstances

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[197] Garner v. Mitchell, 557 F.3d 257, 263 (6th Cir. 2009).

[198] Blackburn v. Alabama, 361 U.S. 199, 211 (1960).

[199] *Id.* at 206.

[200] *Id.* (quoting Lisenba v. People of State of California, 314 U.S. 219, 236 (1941)).

[201] *Id.* at 208.

[202] Garner v. Mitchell, 557 F.3d 257, 263 (6th Cir. 2009) ("[I]f it turns out by subsequent inquiry that a defendant in his mind could not actually understand the warnings, the finder of fact may be more inclined to determine in a close case that the police should have known that the defendant could not understand.").

approach.[203] The great weight of scholarship on the subject has apparently forgotten that this exists. Even in cases like *Rice* and *Garner*, subject to criticism for using the absence of police coercion as a rationale in reaching their holding, these courts still considered the evidence of each suspect's respective mental impairment. It is not as if the moment a court finds that police coercion is absent, it should proceed further without inquiry into the circumstances surrounding the waiver. Again, any impact that police may have on a suspect's knowledge or intelligence in electing to waive *Miranda* rights would necessarily amount to coercion, thus invalidating a waiver as involuntary, rather than unknowing and unintelligent.

3. The Crime Must Still Be Proved Beyond a Reasonable Doubt

A substantial concern for suspects suffering under psychosis at the time of statements made in custody is that the statements or confessions will be false. While it cannot be stated to a degree of scientific accuracy, a suspect's inability to know what he is saying at the time he is in custody could very much lead to a false confession or statement.[204] Ultimately, if the government is unable to proffer any additional inculpatory evidence corroborating the defendant's statements in custody, the likelihood of conviction is significantly diminished.

However, the government is not at odds with securing convictions or pursuing legitimate law enforcement. In the event that a defendant alleges the invalidity of his waiver, the government is not precluded from seeking and admitting additional evidence to prove the crime beyond a reasonable doubt.[205] Both the suspect's individual rights and the government's interest in securing convictions and legitimate law enforcement are equally served under this proposal.

V. CONCLUSION

In determining whether a waiver is made knowingly and intelligently in the absence of police coercion, an interpretation of *Connelly* that is more aligned with *Rice* and *Gardner* provides the most sound law. While the law

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[203] United States v. Walker, 607 F. App'x 247, 256 (4th Cir. 2015) ("As with voluntariness, we consider [the knowing and intelligent prong under] the totality of the circumstances."); Miller v. Dugger, 838 F.2d 1530, 1539 (11th Cir. 1988).

[204] *See* Julie A. Fast, *Do People "Black Out" in Manic Episodes?*, BPHOPE (Mar. 9, 2020), https://www.bphope.com/blog/do-people-black-out-in-manic-episodes/ ("In fact, it is rare for someone who is [in] a deep episode to remember all that happened.").

[205] The remedy for an improperly obtained confession is to exclude only the confession, not evidence derived from the confession. *See* United States v. Patane, 542 U.S. 630, 643 (2004) ("There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of Miranda to [the fruit of an involuntary statement].").

has progressively allocated additional rights to those who are cognitively impaired, there is no constitutional protection from the psychological forces of a suspect's mind. The expense of judicial inquiry would be overbearing and untenable, and the purpose of *Miranda* and its derivative doctrine has consistently been aimed at curbing coercive police misconduct in the custodial interrogation setting. Yet, suspects falling within this class are still afforded procedural safeguards. "Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said . . . that it 'falls with the premise.'"[206]

[206] Johnson v. Zerbst, 304 U.S. 458, 467 (1938) (quoting Mooney v. Holohan, 294 U.S. 103, 113 (1935)).