YOU HAVE THE RIGHT TO REMAIN SILENT, EVEN WHEN YOU DO NOT KNOW WHAT SILENT MEANS: SHOULD POLICE COERCION BE REQUIRED TO FIND THAT AN ACCUSED UNKNOWINGLY AND UNINTELLEGENTLY WAIVED *MIRANDA* RIGHTS?

I. INTRODUCTION

After *Miranda v. Arizona*, [1] we know two things: any waiver of Fifth Amendment privileges must be done voluntarily, knowingly, and intelligently, [2] and having counsel at interrogations is "indispensable to the protection of the Fifth Amendment privilege." [3] Circuit courts are split about how to construe the elements "knowingly" and "intelligently." [4] While most Circuits around the nation require police coercion to find that someone unintelligently or unknowingly waived their *Miranda* rights, the District of Columbia and the Eleventh Circuits do not require police coercion.[5] Since there is a Circuit split on whether police coercion is necessary to unknowingly or unintelligently waive one's *Miranda* rights, this essay sides with the Eleventh and the District of Columbia Circuits and argues that police coercion should not be a necessary prerequisite for an individual to unknowingly and unintelligently waive his or her *Miranda* rights.

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[1] 385 U.S. 436 (1966).

[2] Id. at 444

[3] Id. at 469

[4] *See Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998) (held that "an illiterate and mildly retarded 16-year-old" waived his *Miranda* rights because of "the absence of police abuses.") compared to *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988) (held that a "mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his *Miranda* rights").

[5] The Sixth (*see Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009)), Seventh (*see Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998)), Eight (*see United States v. Turner*, 157 F.3d 552 (8th Cir. 1998)), and Ninth (*see Derrick v. Peterson*, 924 F.2d 813 (9th Cir. 1990)) Circuits require some showing of police coercion to consider a waiver of *Miranda* rights unknowing or unintelligent. The District of Columbia (*see United states v. Bradshaw*, 935 F. 2d 295 (D.C. Cir. 1991)) and the Eleventh (*see Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988)) Circuits do not make police coercion a prerequisite to unknowingly or unintelligently waiving their *Miranda* rights.

The Supreme Court has already made clear the elements needed to constitute a valid waiver and police coercion is not one of the elements listed.[6] To begin, this essay will introduce you to John McNabb, a man with an IQ of 59 that did not know the meaning of the words "silent" and "attorney" when he waived his *Miranda* rights and as a result is now a convicted felon. Next, this essay will discuss *Miranda* and its progeny of cases, particularly, how *Miranda* provides a framework for cases like *Fare v. Michael C.* [7] and *Edward v. Arizona.* [8] That framework, although subsequently abandoned, indicates that "knowledge" means knowledge as defined by the authorities in the English language and "intelligently" means intelligently as defined by the same authorities. The essay will argue that requiring police coercion as the determining factor as to whether a waiver was knowingly or intelligently provided will cause further mistrust in our judicial system and mistrust of our government as a whole. Finally, should the Supreme Court hear John McNabb's case on certiorari and if so how should they decide the case? This essay will provide a clear, constitutionally based answer.

II. MEET ONE-PART OF THE SON-OF-THUNDER, JOHN MCNABB

John dropped out of school in the ninth grade and has an IQ of 59. Mr. McNabb captivated the media in the summer of 2009, when he was exonerated by a West Dakota court, from a robbery charge. On a very stormy day, in July 2013, John hijacked a rented helicopter and forced the hostage pilot to fly him to the Mason River Correctional Center. John apparently planned on flying the helicopter to a jail that held his brother, James. Under what seems to be an illusion, John

[6] According to *Miranda* the elements for waiver are 1) voluntarily, 2) knowingly 3) intelligently.
[7] 442 U.S. 707 (1979).
[8] 451 U.S. 477 (1981).

thought that he could land the hijacked helicopter on the roof of the jail, get into a gun-fight with the guards and eventually escape with his brother James. The plan was never carried out, however, because the helicopter was struck by lightning causing the pilot to lose power and crash into the river. Fortunately, the pilot and John were able to escape on a flotation device that delivered them directly to a United States Federal Agent.

Without hesitation, John was arrested and given his *Miranda* rights. Agent Peterson was assigned to question John the next day. When Agent Peterson questioned John, he gave John his *Miranda* warning again, even taking the extra step of having John initial the rights he was waiving as Peterson read them to him. The only issue was that John did not understand the words that Agent Peterson was reading to him. After the United States charged John with serious federal offenses, John's attorney successfully petitioned the court for a psychological evaluation. The findings of the evaluation revealed that John, at the time of his statements to the police, did not know the meaning of the words "silent" and "attorney," the foundational words that convey the privilege afforded to every American by the U.S. Constitution. [9] The law enforcement officers, however, never coerced John into waiving his rights and John never gave any indication to the agent that he was mentally handicapped. John was found guilty of a federal crime after the district court denied John's motion to suppress the statement John made to Agent Peterson. John argued that he did not knowingly or intelligently waive his constitutional rights, but the District Court and the Twelfth Circuit Court did not accept John's argument. The Twelfth Circuit sided with other circuits that require police coercion before finding that a person did not knowingly, or intelligently, waive their constitutional privilege.

[9] *See* U.S. CONST. amend. V.

III. THE FOUNDATION: *MIRANDA*

A. *Miranda v. Ariz.*

About 50 years ago, in an effort to assist law enforcement and courts around the nation on how to ensure that citizens are afforded their constitutional privilege to not become a witness against themselves and to have assistance of counsel, the Supreme Court gave "concrete constitutional guidelines". [10] As such, the Court created "procedural safeguards" designed to "secure the privilege" of not self-incriminating and the entitlement to a lawyer during an interrogation. [11] When deciding *Miranda*, the Court was aware of situations where a defendant may want to waive their rights so they noted that "provided the waiver is made voluntarily, knowingly and intelligently" an interrogation can continue until the accused invokes the right again. [12] Procedural safeguards, like the Court developed in *Miranda*, were necessary because law enforcement officers "are instructed to induce a confession out of trickery." [13] Awareness is "the threshold requirement for an intelligent decision" as to whether someone in custody chooses to exercise their constitutional privilege. [14] Before an interrogator is to interrogate someone in custody "they must make known to him that he is entitled to a lawyer." [15] Since *Miranda*, the Supreme Court has decided a handful of cases including *Fare* [16] and *Edwards*. [17]

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[10] *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

[11] Id. at 444.

[12] Id.

[13] Id. at 453.

[14] Id. at 468.

[15] Id. at 474

[16] 442 U.S. 707 (1979).

[17] 451 U.S. 477 (1981).

B. *Miranda's* progeny of Cases: *Fare* and *Edwards*

Fare is a case that was decided in 1979 about a juvenile, experienced in dealing with law enforcement, requesting a probation officer while he was interrogated. [18] The police officer, nonetheless, continued to question the juvenile without providing the juvenile the opportunity to talk to his probation officer. The California Supreme Court ruled that statements made during that interrogation were inadmissible against the juvenile because the police failed to allow the juvenile to exercise his *Miranda* rights. [19] Although the Supreme Court overruled the California Supreme Court, the Supreme Court of the United States indicated that "the issue of waiver" should be viewed "on the basis of all the circumstances surrounding the interrogation of the respondent." [20] Factors, including the accused's experience with the police and whether the accused has "[s]ufficient intelligence to understand the rights he was waiving" are used to determine if waiver is effectively given. [21] *Fare* went on to establish the importance of the right to request that an attorney be present during questioning. The Court indicated that "an accused's request for an attorney is *per se* and invocation of his Fifth Amendment rights." [22]

The issue in *Edwards* surrounded the seriousness of the invocation of the right to an attorney. In *Edwards*, the respondent was implicated in a variety of crimes including murder. When the respondent was arrested he was given his *Miranda* warnings and the respondent initially waived his rights. Soon after a failed attempt to "make a deal," the respondent requested an

[18] *Fare v. Michael C.,* 442 U.S. 707 (1981).

[19] Id. at 715

[20] Id. at 725

[21] Id. at 726

[22] Id. at 719

attorney. [23] Although the questioning ceased that night, the next morning, two other law enforcement officers sought out the respondent for questioning. Again, the respondent indicated that he wanted an attorney present before talking to the interrogator. After instruction by the detention officer that "he had" to talk to the interrogators, the respondent implicated himself in the crime.[24] Before his trial was to begin, "the respondent moved to suppress his confession on the ground that his *Miranda* rights had been violated." [25] The trial court eventually denied the motion and on appeal, the Arizona Supreme Court held that although the respondent invoked his right to counsel on the initial night of questioning, he waived his right the following day "when he voluntarily gave his statement to the detective after again being informed that he need not answer questions and that he need not answer without advice of counsel." [26] The Supreme Court reversed the Arizona Supreme Court and held that once an accused "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities." [27] *Miranda* and its progeny of cases establishes the constitutional importance of American rights to not self-incriminate and have assistance of an attorney in criminal matters especially police questionings.

IV. POLICE COERCION IS NOT AN ELEMENT FOR WAIVING *MIRANDA* RIGHTS.

[23] *Edwards v. Ariz*., 451 U.S. 477, 479 (1981).

[24] Id.

[25] Id.

[26] Id. at 480.

[27] Id. at 484

A. English language authorities have defined words used by the Supreme Court

Miranda and all the subsequent cases have used the English words "knowingly" and "intelligently" as terms to describe elements of what constitutes a waiver of one's *Miranda* rights. Black's law dictionary defines "knowledge" as: "an awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." [28] The Merriam-Webster dictionary defines "intelligent" as being "able to learn and understand things." [29] Therefore, when the Supreme Court uses the terms "knowingly" and "intelligently," without further instructions, the Court means the words as defined by authorities of the English language, thus, police coercion is not a necessary prerequisite for an individual to unknowingly and unintelligently waive his or her *Miranda* rights. Circuits around the nation should abide by the rule established by the Supreme Court's words.

B. Lawyers are indispensable during interrogations.

The use of a lawyer during any criminal investigation is "indispensable" to the protection of the Fifth Amendment and *Miranda* makes this very clear, so clear, that the Court in *Miranda* even took time to set out what establishes a valid waiver of this important right. [30] A court must look at the "totality of circumstances" surrounding an interrogation to determine if a waiver was done knowingly and intelligently. [31] If someone does not know the meaning of "lawyer" they cannot intelligently, or even knowingly, waive the right to one. Mandating a showing of police coercion changes the Supreme Court decision in *Miranda* and creates a *per se* kind of standard.

[28] KNOWLEDGE, Black's Law Dictionary (10th ed. 2014).

[29] INTELLEGENT, Merriam-Webster Collegiate Dictionary (11th ed. 2003).

[30] *See Miranda v. Ariz.*, 385 U.S. 436, 446 (1966) ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently).

[31] Id.

This new standard, which is opposite of what *Miranda* requires, is that as long as the police officer does not do something unconscionable, all waivers are *per se* valid. Chief Justice Warren, the author of the majority opinion in *Miranda*, did not envision a *per se* approach when he developed his opinion in the case, thus, Circuit Courts should not create one.

C. Morality, anyone?

There are several fundamental moral reasons why coercion should not be a prerequisite for an individual unknowingly and unintelligently waiving his *Miranda* rights. God gives every human free will, even the free will not to serve their creator. Thus, fundamental fairness dictates that in order for something to be done voluntarily, it must be done in accordance to one's free will. In *Miranda*, the Court not only indicated that a waiver must be done by one's free will, it added the requirement that the decision to waive *Miranda* warnings must also be knowledgeable and intelligent. Why would the Court take this extra step if all they wanted to avoid was police coercion? The Court wanted to protect American citizens and encourage them to seek an attorney before answering police questions. The Court wanted to protect people like John McNabb. The burden of proof, a preponderance of evidence, to show a waiver is already very low; making police coercion a prerequisite will effectively negate the need of ever showing that an accused knowingly and intelligently waived their right. As long as there was not police coercion, the accused automatically has knowingly and intelligently waived his or her right and this gives the state extraordinary power over its citizens.

Can a deaf man that mumbles something have knowingly and intelligently waived their right to counsel? The answer to this should be intuitive, that deaf man can not knowingly or intelligently waive his *Miranda* rights. The concept of "knowing" is similar to "informed consent." Informed Consent is defined as: "a person's agreement to allow something to happen, made with

full knowledge of the risks involved and the alternatives." [32] If an accused is unaware of the risks involved with waiving their *Miranda* rights, the accused cannot knowingly waive such right.

D. Proponents and their flawed arguments.

Proponents of making police coercion required as a prerequisite to knowingly and intelligently waiving *Miranda* rights argue that *Miranda* is not a constitutional provision, rather it is a prophylactic rule. This argument fails to realize that the Supreme Court has been granted the power to interpret the Constitution and thus determine what must be done to abide by it. *Miranda*, as the Court interpreted it, means that the Fifth and Fourteenth amendments were protected by this safeguard, thus, it would be unconstitutional not to provide the *Miranda* warnings. *Miranda* is firm, valid, constitutional law. Proponents also argue that the purpose of *Miranda* is simply to deter police misbehavior. *Miranda* itself set out its purpose as to "insure that what was proclaimed in the Constitution had not become but a 'form of word.'" [33] Another popular argument is that we cannot expect law enforcement officers to read people's minds and thus, requiring police coercion sets a standard that everyone can follow. The Constitution was written by "we the people" and therefore applies to the people. Law enforcement can easily seek a psychological evaluation of an accused that waives his right if the officer wants to ensure that the accused is knowingly and intelligently waiving his rights. Law enforcement can make it practice not to question an accused without a lawyer since it has already been established how important a lawyer is to safeguarding the Fifth Amendment. With the advancement of technology and the tools already afforded to law enforcement, the waiving of *Miranda* rights will have little to no impact on the day to day operations of law enforcement. There are established exceptions to the *Miranda* warning

[32] CONSENT, Black's Law Dictionary (10th ed. 2014)

[33] *Miranda v. Ariz.*, 385 U.S. 436, 443 (1966).

requirement, including the "public-safety" exemption that allow law enforcement officers to properly continue to perform their duties. Besides, any law enforcement office that relies on testimony from an accused to build a case against the accused, will most likely not have a very strong case.

V. SHOULD THE SUPREME COURT OF THE UNITED STATES HEAR MCNABB'S CASE?

The Supreme Court should grant certiorari to John McNabb and decide that Mr. McNabb could not have knowingly or intelligently waived his *Miranda* rights. McNabb did not know what "silent" meant nor did he know what a "lawyer" was. McNabb's IQ is very low and since circuits are split on how to deal with this delicate constitutional matter, the Supreme Court of the United States should step in and provide further guidance for the nation instructing circuits to not require a showing of police coercion to determine that an accused unknowingly and unintelligently waived his *Miranda* rights. The Court should reverse the Twelfth Circuit and remand the case back to the lower courts to determine if McNabb knowingly and intelligently waived his *Miranda* rights without requiring the showing of police coercion.

VI. CONCLUSION

The Supreme Court in *Miranda* created the elements of waiver of *Miranda* rights and police coercion is not one of the elements. Circuit courts around the nation are split as to whether to require a showing of police coercion in order to find that an accused unknowingly or unintelligently waived their *Miranda* rights. Since police coercion is not an element of waiver as set out by the Supreme Court, circuit courts should not make police coercion an additional element. John McNabb did not knowingly and intelligently waive his *Miranda* rights, thus, the Supreme Court should hear his case on certiorari and remand McNabb case to the lower court.