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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Allendale County
Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5824 (S.C. Ct. App. filed June 16, 2021)
Lower Court Case No. 2015-GS-03-0050

THE STATE ..... *Respondent*,

v.

ROBERT LEE MILLER, III..... *Petitioner*.

BRIEF OF JUSTICE 360 AND CORNELL JUVENILE JUSTICE PROJECT AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are advocates and academics who work on behalf of juveniles in South Carolina. The Cornell Juvenile Justice Project is an outgrowth of the Cornell Death Penalty Project, which is a program housed at Cornell Law School in Ithaca, New York. Over the last twenty years, the Death Penalty and Juvenile Justice Projects have been actively involved in academic research, legislative reform efforts, and individual case representation in South Carolina and other jurisdictions. Justice 360 is a nonprofit organization based in Columbia, South Carolina, whose mission is to promote fair and just process for people accused of serious offenses. As part of that mission, Justice 360 attorneys represent juvenile clients in criminal proceedings in South Carolina and have been involved in litigation and criminal justice reform efforts on behalf of juvenile clients since the Supreme Court of the United States decided *Miller v. Alabama*.

Justice 360 and the Death Penalty and Juvenile Justice Projects are actively involved in individual cases on behalf of juvenile clients, including those with low intellectual functioning, who have been subject to police interrogation. Accordingly, *amici* have a vested interest in promoting a legal system in South Carolina that takes account of academic and scientific research regarding juvenile interrogation and protects the interests of juvenile offenders in the State.

INTRODUCTION

South Carolina law enforcement agents subjected Robert Miller, a fifteen-year-old boy with the intellectual capacity of a fourth grader, to multiple coercive, incommunicado interrogations during nearly thirteen hours[2] of custody in violation of his due process and *Miranda*

[2] Although there are disparities in the record on the time that Robert spent in custody, his trial attorney explained that Robert entered the station at approximately 2:00 p.m. or 3:00 p.m. with Ms. Tiffany Sabb and her son, Jonathan Capers, and remained there until 3:00 a.m., when he was booked into the Department of Juvenile Justice. R.10, ll.11–28.

rights. From approximately 2:00 p.m. to 3:00 a.m., five different officers took turns interrogating Robert without ever informing his mother.[3] The agents were aware of Robert's age and intellectual difficulties, but when he refused to tell them what they wanted, they nevertheless turned to interrogation tactics that are sufficiently coercive to overcome the will of an adult of average intelligence and that are notorious for inducing false confessions—especially from young people.[4] Not surprisingly, Robert eventually gave an incriminating statement, which later became the centerpiece of the State's evidence against him at trial. And although the State defended (and continues to defend) Robert's statement on the basis that he signed a *Miranda* waiver, the record evidence reveals that Robert lacked a proper understanding of his legal rights and the protections afforded him by the Supreme Court of the United States.

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[3] SLED Agents Richard Johnson and Natasha Merrell recorded their interrogation of Robert on Merrell's cell phone. The recording of the interrogation is incomplete because Merrell's cell phone stopped recording while she received phone calls. This thirty-minute recording is the only available record of the interactions between law enforcement officers and Robert during his approximately thirteen hours in custody and the three-hour interrogation with the two SLED agents. R.50, ll.14–15; R.77, ll.16–21.

[4] *E.g.*, Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J AM. ACAD. PSYCH. L. 332, 332 (2009). The tactics the officers in Robert's case used include isolation, intimidation, promises of leniency, and deception. Some notorious cases in which these kinds of tactics have produced false confessions include Lavelle Burt, who was twenty years old when he wrongfully confessed to killing a toddler; Robert Lee Veal, a fourteen-year-old who falsely confessed to the rape and murder of a teenage girl and who, along with four other teenagers known collectively as the Dixmoor Five, spent decades in prison before DNA testing proved the identity of the actual killer; the Central Park Five, another group of teenagers convicted of rape on the basis of a confession the police coerced from one of them; Anthony Caravella, a 15-year-old with an IQ of 67, who wrongly spent 26 years in prison for rape and murder as a result of four statements he gave to interrogators; and Huwe Burton, a sixteen-year-old who falsely confessed to killing his mother, spending 19 years in prison before the Bronx District Attorney's Conviction Integrity Unit recommended his release based on the psychologically coercive tactics used during his interrogation. *See Lavelle Burt*, CTR. ON WRONGFUL CONVICTIONS, https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/lavelle-burt.html; Joyce Lee, *Roster of Exonerations Shows the Particular Vulnerability of Juveniles Under Questioning*, JUV. JUST. INFO. EXCHANGE (Jan. 4, 2013); Evan Nesterak, *Coerced to Confess: The Psychology of False Confessions*, BEHAV. SCIENTIST (Oct. 21, 2014); Andrea Arndorfer & Lindsay C. Malloy, *Interrogations, Confessions and the Vulnerability of Youth,* AP-LS NEWS (July 2013); Innocence Staff, *Bronx Man's 1991 Murder Conviction Vacated*, INNOCENCE PROJECT (Jan. 24, 2019).

The trial judge should have suppressed Robert's statement for two independent but related reasons: (1) it was involuntarily given and its admission into evidence therefore violated Robert's rights under the Due Process Clause of the Fourteenth Amendment; and (2) Robert did not knowingly, intelligently and voluntarily waive his rights under *Miranda*. Although Robert's youth and limited intellectual functioning explain why he eventually succumbed to the officers' coercive interrogation and gave a statement, the order admitting the statement gives short shrift to those factors. This, in turn, reflects both the court's failure to appreciate the extent to which Robert, a person with diminished intellectual functioning, was incapable of withstanding the psychological pressures of incommunicado police interrogation, and the significance of decisions from this Court and the Supreme Court that highlight how adolescence affects a juvenile's response to interrogation. Specifically, various neurological, psychological, and social factors unique to juveniles (and especially juveniles with low intellectual functioning) make them susceptible to coercive interrogation: juveniles tend to focus on short term relief; they fail to appreciate long-term consequences; they possess limited ability to manage stress and cope with intimidation; and juveniles are quick to trust and comply with authority figures, rendering them prone to manipulation. These same factors, coupled with relatively unsophisticated verbal comprehension and limited legal knowledge, render them more likely to miscomprehend legal rights, waive *Miranda* protections, and give false confessions.[5]

In order to deter the kind of coercive interrogation to which Robert was subjected and to give meaning to this Court's prior decisions respecting the unique frailties of youth and intellectual

[5] For example, in one study of 328 exonerees, 44% of the juvenile exonerees falsely confessed as compared to 13% of adults; and of the juveniles between the ages of 12 to 15 years old, 75% falsely confessed in response to interrogation. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. L. 757, 759 (2007).

disability, the Court should grant *certiorari* in Robert's case and make clear that trial courts must give due weight to the "characteristics of the accused" and the "details of the interrogation."[6]

ARGUMENT

"Any police interview of an individual suspected of a crime has 'coercive aspects to it.'"[7] Thus, before the prosecution may admit into evidence a statement obtained by custodial interrogation, the State has the burden of proving that: (1) the statement was voluntary under the Due Process Clause, an inquiry that "takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation" to determine "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession;"[8] and, (2) the suspect was advised of the rights afforded to him under *Miranda* and that he knowingly, intelligently and voluntarily waived them, an inquiry that hinges on a suspect's custodial status out of a concern that custodial interrogation "blurs the line between voluntary and involuntary statements."[9] Both the constitutional voluntariness inquiry and *Miranda*'s waiver inquiry require special consideration of youth and cognitive ability since both are subjective, totality of the circumstances tests.

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[6] *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (citations omitted).

[7] *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)).

[8] *Dickerson*, 530 U.S. at 433 (internal quotation marks omitted).

[9] *Id.* at 435.

I. CONSTITUTIONAL VOLUNTARINESS

A. Due process requires that interrogating officers give "special care" to juveniles with intellectual impairment.

Under due process, a statement is inadmissible if the defendant gave the statement involuntarily.[10] Whether a statement was voluntarily given depends on the totality of the circumstances surrounding the custodial interrogation that produced the statement.[11] Although under the totality of the circumstances test nearly everything is relevant and nothing is determinative, courts have identified a number of factors related to both the interrogation and to the suspect that increase the likelihood of an involuntary statement. Among those factors are officers' use of psychological pressure tactics[12]; the length of the interrogation[13]; the length of the detention[14]; officers' use of repeated and prolonged questions[15]; whether the suspect was given breaks for food, water, sleep, or the bathroom[16]; any use of physical punishment[17]; whether the suspect was advised of his constitutional rights[18]; the suspect's age and education level at the time of the interrogation[19]; and the suspect's maturity and mental health.[20] Whether or not a suspect

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[10] *Spano v. New York*, 360 U.S. 315, 323 (1959).

[11] *State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

[12] *Withrow v. Williams*, 507 U.S. 680, 693 (1993). *See also State v. Miller*, 375 S.C. 370, 385, 652 S.E.2d 444, 452 (S.C. Ct. App. 2007).

[13] *Williams*, 507 U.S. at 693; *Pittman*, 373 S.C. at 566.

[14] *Williams*, 507 U.S. at 693.

[15] *Pittman*, 373 S.C. at 566.

[16] *Id.*

[17] *Id.*

[18] *Williams*, 507 U.S. at 693.

[19] *Pittman*, 373 S.C. at 566.

[20] *Williams*, 507 U.S. at 693.

was subjected to coercion is determined from the perspective of the suspect, but for a statement to be involuntary, the questioning officers must have engaged in coercive activity.[21]

Youth is of particular significance in assessing voluntariness because, as the Supreme Court has noted, children are not simply "miniature adults."[22] In *J.D.B. v. North Carolina*, the Court acknowledged that a child's age is far more than a mere "chronological fact" and that courts must take "particular care to ensure that [young children's] incriminating statements were not obtained involuntarily."[23] The Court highlighted the well-established characteristics of youth that warrant this particular care, notably juveniles' lack of maturity, inexperience to exercise good judgement, vulnerability to outside pressures, and fledgling character.[24] In other words, "no matter how sophisticated," juveniles subjected to police interrogation "cannot be compared" to an adult,[25] as their unique vulnerabilities render them susceptible to coercion. As this Court summarized in its most recent discussion of the role of youth in criminal sentencing, it is now "established that children [are] constitutionally different . . . based on common sense and social science."[26]

Courts have further recognized the importance of considering the characteristic of cognitive ability.[27] As interrogators move away from physical coercion to "more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more

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[21] *E.g.*, *United States v. Braxton*, 112 F.3d 777, 780–81 (4th Cir. 1997).

[22] *J.D.B.*, 564 U.S. at 274.

[23] *Id.* at 280-81. Although the holding in *J.D.B.* concerned the issue of custody, the same traits of youth become relevant in determining whether the will of a child is overborne under interrogation.

[24] *Id.* at 272-73 (citing various cases, including *Eddings v. Oklahoma,* 455 U.S. 104, 114-15 (1982), *Roper v. Simmons,* 543 U.S. 551, 569 (2005), and *Graham v. Florida,* 560 U.S. 48, 68 (2010)).

[25] *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

[26] *Aiken v. Byars*, 410 S.C. 534, 541-42, 765 S.E.2d 572, 576 (2014).

[27] *United States v. Preston*, 751 F.3d 1008, 1027-28 (9th Cir. 2014); *State v. Collins*, 435 S.C. 31, 54, 864 S.E.2d 914, 926 (S.C. Ct. App. 2021), *reh'g denied* (Sept. 29, 2021).

significant factor in the 'voluntariness' calculus."[28] Methods of interrogation, even those types of "subtle coercion" can "have an extraordinary effect on one of low mental capabilities."[29] In *United States v. Preston*, the United States Court of Appeals for the Ninth Circuit considered scientific literature explaining that those with intellectual impairment are more prone to confusion, "highly suggestible and easy to manipulate," "unable to understand what is being said," very susceptible to "leading, misleading, and erroneous information," and are more likely to agree or "repeat back false," misleading, or incriminating statements.[30] As such, the Court held that Preston, an eighteen-year-old with an IQ of 65, had his will overborne in light of the police's use of "repetitive questioning," "threats that [interrogation] would continue without end," pressure to "adopt certain responses," "alternative questions that assumed his culpability," multiple falsehoods about the use of his statement, "suggestive questioning" that fed him details of the crime, and "false promises of leniency and confidentiality."[31]

i. There is a scientific consensus that juveniles are "unusually vulnerable" to police interrogation.

Adolescent psychological, neurological, and social development research echoes and amplifies the Court's concerns regarding juveniles' susceptibility to police interrogation; studies demonstrate that heightened reward sensitivity, lack of self-regulation, poor future orientation, and social pressure to comply with authority all increase a juvenile's propensity to give unreliable confessions in the face of coercive interrogation techniques.

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

[29] *Preston*, 751 F.3d at 1028 (quotation marks omitted).

[30] *Id.* at 1022 (quotation marks omitted).

[31] *Id.* at 1027-28.

Juveniles have increased reward sensitivity as compared with adults, meaning that they are more responsive than adults to the prospect of instant gratification.[32] The characteristically juvenile desire for instant gratification manifests in various ways when youth are under police interrogation. Juveniles tend to make decisions, or in severe cases, confess to crimes, in order to hasten the end of an interrogation.[33] A study of adolescent false confessions determined that the most frequent reason juveniles confessed was "getting to go home."[34] When police interrogate juveniles for long stretches of time, these concerns are heightened: long interrogations, particularly with young, intellectually impaired or psychologically vulnerable, is "strongly associated with eliciting false confessions."[35] In one study of confessions that are known to be false and that were obtained from persons with "normal intelligence," nearly all of the interrogations at issue lasted for several hours, usually more than six; another study of juvenile false confessions demonstrated that 85% of false confessions were elicited during interrogations lasting six hours or more.[36]

Juveniles further lack self-regulation. In the interrogation context, youths experience "interrogation-related regulatory decline" (IRRD), situational and individual circumstances that diminish decision-making ability, at higher rates than adults.[37] Juveniles tend to experience heightened stress and a poor ability to manage that anxiety.[38] Fears of "getting into trouble,"

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[32] Hayley M. D. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 PSYCH., PUB. POL'Y., & L. 118, 120 (2017).

[33] *Id.*

[34] *Id.*

[35] Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice,* 97 J. CRIM. L. & CRIMINOLOGY 219, 308 (2006–2007)

[36] *Id.*

[37] Cleary, 23 PSYCH., PUB POL'Y & L. at 120-21.

[38] *Id.*

coupled with pressure from authorities, unfamiliar environments, and a lack of support system in that environment contribute to stress and fear that disrupts decision-making skills.[39] One study of incarcerated youth demonstrated that one-third of the juveniles self-reported "police pressure to confess."[40] This stress is typically heightened in relation to the number of officers present and the lack of parent or attorney present.[41]

Juveniles' heightened sensitivity to rewards and lack of self-regulation is often coupled with poor "future orientation."[42] Youths struggle to connect present circumstances with future events; as such they may struggle to "continually prioritize long-term interests over short-term impulses in the process of constant self-monitoring," leaving them more susceptible to police pressure.[43] Even short interrogations seem "painfully long" to a juvenile for this reason; as a result, juveniles may comply with police at whatever cost to leave.[44] In one study, youths' cited the police's immediate response as the common consequence of waiving the right to silence, failing to prioritize or recognize the legal implications of waiver.[45] Another study demonstrated that 33% of juvenile false confessions were a result of duress, potentially indicating motivation to "quickly obviate police pressure."[46]

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[39] *Id.*

[40] *Id.*

[41] *See id.*

[42] *Id.* at 121-22.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

Socially, juveniles are particularly sensitive to the "power imbalance between themselves and authority," resulting in even more compliance-oriented behaviors during interrogation.[47] Juveniles are likely to trust that adults have their best interest at heart, as the desire to comply with authority to is a "deeply rooted social norm[]." Requests by authority figures during interrogation carry with them the extra weight of potential punishment, resulting in "perceived compulsory compliance" by the juvenile. In general, police fail to recognize and account for these differences. Studies demonstrate that "how police perceive youth in general and how they perceive and treat them specifically in the interrogation context may be contradictory;" the general view of police is that juveniles "can be dealt with in the same manner in interrogations as adults."[48]

ii. Juvenile vulnerabilities to coercion are heightened by factors such as intellectual impairment, race, and income status.

The harms of coercive interrogation are exacerbated for non-white juveniles, juveniles from low-income households, and juveniles with diminished intellectual ability.[49] Studies demonstrate that Black individuals in police encounters are more likely to suffer from "stereotype threat," a phenomenon that places them at risk of "confirming, as self-characteristic, a negative stereotype about one's group."[50] Awareness of harmful stereotypes increases an individual's experience of stress, and in turn, heightens the risk that interrogators perceive stress-induced behaviors as signs of guilt or deceit.[51] Additionally, minority youth that exhibit "typical behavior for their culture," including less eye contact, more frequent hand movements, and "inappropriate

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[47] Cleary, 23 PSYCH., PUB POL'Y & L. at 120-21.

[48] Meyer & Reppucci, 25 BEHAV. SCI. L. at 778.

[49] *Id.* at 764-65; Feld, 97 J. CRIM. L. & CRIMINOLOGY at 230.

[50] Iris Blandón-Gitlin, Hayley Cleary, & Alisa Blair, *Race and Ethnicity as a Compound Risk Factor in Police Interrogation of Youth*, in THE LEGACY OF RACE FOR CHILDREN: PSYCHOLOGY, PUBLIC POLICY, AND LAW 174 (Margaret C. Stevenson, Bette L. Bottoms, & Kelly C. Burke eds., 2020).

[51] *Id.*

smiles," are more likely to "be evaluated as deceptive or suspicious" to police in the interrogation context; racial minorities may also speak less directly to authority figures to "avoid provoking conflict."[52] Police officers, relying on harmful stereotypes, may be more likely to perceive Black suspects as guilty than White suspects, resulting in the use of more aggressive interrogation tactics.[53] In one study, after controlling for IQ, Afro-Caribbean suspects demonstrated "higher levels of susceptibility and anxiety than White suspects," rendering them more vulnerable to tactics like minimalization, suggestion, and false evidence.[54] Studies have found that juveniles from lower socio-economic backgrounds similarly tend to be "more suggestible," heightening their risk of false confessions.[55]

Persons who have developmental disabilities are susceptible to false confessions for similar reasons as juveniles. This is because they often lack the ability to adequately comprehend verbal or written statements, consider consequences of their actions, manage stress, and recognize the antagonistic nature of the social interaction. Additionally, people with developmental disabilities tend to mask cognitive difficulties by agreeing with statements made by others, demonstrate an eagerness to please and dissolve conflict, and engage in "biased responding," or responding to a question affirmatively if they believe the response to be desirable to the questioner.[56] In *Wilson v. Missouri*, suspect Johnny Lee Wilson, a person with intellectual disability, signed a confession statement that falsely implicated him. Later, he admitted "I wasn't there, but if you say I did it, I

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[52] *Id.* at 176; Feld, 97 J. CRIM. L. & CRIMINOLOGY at 230-31.

[53] Blandón-Gitlin, Cleary, & Blair, *Race and Ethnicity*, at 176.

[54] *Id.* at 178.

[55] Meyer & Reppucci, 25 BEHAV. SCI. L. at 764-65.

[56] Leo, 37 J. AM. ACAD. PSYCH. L. at 332, 335-336. For example, "when an authority figure says, 'I am your friend, I am here to help you,' it is difficult for a person with cognitive impairments to consider the situation independently or think critically." Joan Petersilia, *Doing Justice? Criminal Offenders with Developmental Disabilities*, California Policy Research Center 2 (2000).

must have."[57] These notions of guilt are most common in those who lack comprehension and abstract reasoning skills.

iii. Robert's youth and intellectual impairment rendered him more susceptible to coercive police interrogation.

Robert, only fifteen years old at the time of his alleged crime and interrogation, was particularly vulnerable to police interrogation and coercive techniques. Three years prior to his arrest, he carried a security blanket with him, and at the time of the interrogation, he carried candy in his pocket.[58] Even the trial judge acknowledged that Robert appeared to be particularly young and vulnerable, noting his age and susceptibility to the social pressure, agreeing that his criminal activity was a result of older peer and familial pressure.[59]

Robert's race, low-income background, and intellectual impairment heightened his vulnerability to coercion. Robert entered foster care at four years old and bounced between homes.[60] His mother physically abused and neglected him, and due to her drug and alcohol abuse, Robert and his siblings had to "raise themselves."[61] Over a six-year span, fifteen 911 calls were made from Robert's mother's home.[62] At the time of his arrest, fifteen-year-old Robert was in eighth grade at an alternative school.[63] He had an obtained IQ of 76.[64] A psychological evaluation administered while he was in the custody of the Department of Juvenile Justice ("DJJ") described

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[57] Petersilia, *Doing Justice? Criminal Offenders with Developmental Disabilities*, California Policy Research Center at 14.

[58] R.420, ll.22-25.

[59] R.440, ll.7-10.

[60] R.13, ll.18-25; R.14, ll.1-4.

[61] R.423, ll.22-25.

[62] R.5, ll.21-23.

[63] R.86, ll.4-7.

[64] R.12, ll.8-25.

him as operating "at a fourth grade level," "years behind his grade level in understanding comprehension" and cognitive and reasoning skills.[65] Although Robert had been diagnosed with ADHD and had a documented history of engaging in impulsive and immature behaviors, his father discontinued medication and counseling for him.[66] During a different psychological evaluation administered by DJJ after his arrest, Robert told the psychologist that he did not understand the right to remain silent or the right to an attorney, and both concepts were explained to him then.[67] Upon reading the transcript of the interrogation, the judge noted that the defendant was "somewhat limited on an educational basis," making the interaction difficult to understand.[68]

On the day of the interrogation, police, without administering *Miranda* warnings, took Robert to DJJ at approximately 2:00 p.m. or 3:00 p.m.[69] He remained in custody for almost thirteen hours, until he was finally allowed to leave at 3:00 a.m.[70] During this time, Robert, without a parent, was shuffled from room to room, was interrogated by up to five law enforcement agents, and was never told he could leave.[71] First, Marvin Williams, Chief of the Fairfax Police Department, interrogated Robert for two hours.[72] With no other witness, officer, or adult present, he isolated Robert, failed to record the interview, declined to write a police report, and did not request a written statement from Robert.[73] During this time, he purportedly obtained a *Miranda*

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[65] *Id.*

[66] R.425, ll. 17-19. R.426, ll.14-17, 18-20.

[67] R.12, ll.3-7.

[68] R.85, ll.7-15.

[69] R.10, ll.11-25.

[70] *Id.*

[71] *Id.* R.38, 1-20.

[72] R.37-45.

[73] *Id.*

waiver from Robert in the form of a paper that Robert initialed and "signed" by printing his name.[74] The paper itself, however, indicates that Robert did not understand what was happening. He failed to properly fill out the data fields, writing his street name in the phone number box and leaving the address field blank.[75] Chief Williams testified that he knew Robert was fifteen years old at the time of interrogation, but despite this, he did not provide Robert with a simplified, juvenile version of the *Miranda* rights form.[76]

Next, Robert was interrogated by two SLED officers, Special Agents Natasha Merrell and Richard Johnson.[77] At some point during this part of Robert's interrogation, Tiffany Sabb, the mother of another suspect, entered the room.[78] The agents knew that Ms. Sabb was not Robert's legal guardian, but they let her enter the room anyway.[79] Significantly, the officers also did not tell Robert that Ms. Sabb was not there to help him; her biological son and Robert's codefendant in another case, Jonathan, was also under interrogation that day and he told police that Robert shot two people.[80] As a result, Robert had no legal guardian or unconflicted adult to support him during the interrogation—even though Ms. Sabb's presence may have misled Robert into thinking he did.

The SLED agents knew that Robert was fifteen, only in the eighth grade, and enrolled in alternative school.[81] Robert demonstrated to the agents during the interview that he did not know

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[74] *Id.*

[75] R.445.

[76] R.37-45.

[77] R.46-67.

[78] *Id.* R.37-45.

[79] R.46–67. Robert described her to them as "like a mother to me," indicating that she had no legal or biological relation to him. *Id.*

[80] *Id.*

[81] *Id.*

his full street address or social security number.[82] Agent Johnson had serious doubts about Robert's ability to read or write so he gave Robert a test, asking him to read a certificate to make sure Robert "understood right from wrong."[83] Robert could not read the word "contribution."[84] In response to a question regarding what day something occurred, Robert provided a description of the time of day and temperature.[85] At no point did the SLED agents administer Robert *Miranda* warnings or attempt to discern whether he understood the previous warnings.[86] Instead, they subjected him to an interrogation that scared Robert and left him in tears.[87]

During the interview, Robert demonstrated behaviors that reflected his increased susceptibility to interrogation due to his youth and intellectual deficits. First, he immediately grew fearful of Agent Johnson and asked that Agent Johnson leave the room because he "intimidated" him.[88] Left alone with Agent Merrell, who is a woman, Robert failed to appreciate the antagonistic nature of the interrogation, appearing to believe her assertions that she wanted to "help [him] out" and confirming that she "just want[s] to talk."[89] He expressed his fears of SLED to Agent Merrell,

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[82] *Id.*

[83] *Id.*

[84] *Id.* The words "waive," "terminate," and "coercion" appeared in Robert's signed *Miranda* form. Robert operates at a fourth-grade level of comprehension. R.12, ll.8–25. According to the *Plain English Lexicon*, the lowest U.S. grade level ("LWV") where at least 67% of the tested students understood the word "contribution" was sixth grade; the same study lists the LWV for "waive" as 13th grade and for "terminate" as 12th grade. MARTIN CUTTS, PLAIN ENGLISH LEXICON 27, 84, 93 (2d ed. 2011). Similarly, the *EDL Reading Core Vocabulary* lists the word "waiver" as 11th grade level, "coerce" as 12th grade level, and "terminate" as 9th grade level. STANFORD E. THYLOR, HELEN FRACKENPOHL, AND CATHERINE E. WHITE, EDL CORE VOCABULARIES IN READING, MATHEMATICS, SCIENCE, AND SOCIAL STUDIES 39, 65, 67 (1989). Robert's fourth-grade level of comprehension raises serious doubts about his ability to understand the words in the waiver form and his ability to knowingly and intelligently waive his *Miranda* rights.

[85] R.448-49.

[86] R.46-67.

[87] *Id.*

[88] R.447.

[89] R.451, 452.

telling her that he heard SLED would point a gun at him, accuse him of murder, beat or "slam" him, and mock him."[90] Later, he recounted his stress and fears again, telling Agent Merrell he heard SLED would "catch me" and "shoot me down."[91] When Agent Johnson reentered the room without warning or Robert's consent, he immediately began to scare him, telling him he was going to jail, he was in for an "ass" of a time, and that his answers were "wrong."[92] Overwhelmed by the aggressive exchange, Robert, on the verge of tears, begged Agent Johnson to "just please stop, just please stop with me . . . please, just please."[93] Robert at this point expressed that he "just wanna go home," and began to give a confession to Agent Johnson, agreeing to details of the crime in an attempt to hasten the interrogation.[94] At the end of the interview, Robert, in tears, told Agent Johnson again that he "just wanna, I just wanna, I just wanna leave here . . . I'm done talking . . . Whenever y'all ready to lock me up, I'm ready . . . . Let's go please . . . I'm ready."[95] At that point, at least five hours into his almost thirteen-hour detention and three hours into his second interrogation of the night,[96] Robert's will was overborne and he told Agent Johnson what he wanted to hear. Afterwards, Robert laid down on the floor of the interrogation room and went to sleep.[97]

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[90] R.452.

[91] R.453.

[92] R.454-55.

[93] R.456.

[94] R.456-57.

[95] R.457.

[96] Robert arrived at the station at approximately 2:00 p.m. or 3:00 p.m. He signed the *Miranda* form at 4:56 p.m. after his first interrogation. His second interrogation began sometime after that. SLED agents interviewed Robert for at least two or three hours before he gave a confession. R.15, ll.20-22; R.77, ll.16-21.

[97] R.419, ll.20-22; R.420, ll. 14-17; R.428, ll.20-23.

Robert, acting in accordance with neurological, behavioral, and social characteristics of youth and intellectual impairment, had his will overborne by the multi-hour interrogation by the various officers. The lower court failed to give adequate weight to these factors in the decision below, recognizing them in isolation and explaining that neither his age nor cognitive ability alone was enough to render the statement inadmissible. Considering Robert's specific characteristics of age and intellectual impairment in the totality of the circumstances of the investigation, including the length of questioning, the presence of multiple officers in the interrogation room, Robert's inability to leave the police station, his isolation, his pleading to go home, his immaturity, and the specific form of psychological coercion he endured (discussed below), the custodial interrogation violated his constitutional right to voluntariness.

B. Constitutional voluntariness takes into account the specific form of psychological coercion applied to the specific suspect.

Robert's interrogation further violated constitutional voluntariness in consideration of the specific form of psychological coercion that he faced. Most police interrogation protocols incorporate Fred E. Inbau and John E. Reid's recommended psychological techniques for criminal interrogation known as the "Reid Method."[98] This method involves a nine-step process designed to elicit confessions and extract information and emphasizes the psychological processes of isolation, maximization, minimalization, promises of leniency, contamination, and deception.[99] These interrogation procedures are "'inextricably linked'" to false confessions, causing the Supreme Court to express concern that they "induce a frighteningly high percent" of false

[98] Feld, 97 J. CRIM. L. & CRIMINOLOGY at 235-37, 243-44.

[99] *Id. See also* Marco Luna, *Juvenile False Confessions: Juvenile Psychology, Police Interrogation Tactics, and Prosecutorial Discretion*, 18 NEV. L.J. 291, 301-05 (2018).

confessions, regardless of age.[100] As the Court in *J.D.B.* explained, the risk is all the more disturbing when the suspect in a custodial interrogation is a child; the "dangerous combination that results from children's developmental deficiencies in the interrogation room" with "the structure of the modern interrogation process" results in a "disproportionately high incidence of false confessions" for juveniles.[101] Studies demonstrate that youth offenders are "two to three times more likely to false confess" than adults, and that "approximately one-third of all 125 known false confessions" are from juveniles.[102] The following techniques, coupled with juveniles' impaired ability to manage stress and fear, refute authority, and consider future consequences, constitute coercion.[103]

Isolation

Officers often isolate juveniles in an attempt to extract information.[104] Without the support of a parent, attorney, or other figure of support, a child is less likely to resist police intimidation and questioning and more likely to confess to a crime.[105] Isolation increases anxiety, stress, and fear; to escape the uncomfortable situation, juveniles will comply with police demands for short-

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[100] Ariel Spierer, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 NYU L. REV. 1719, 1730 (2017).

[101] *Id.* at 1731.

[102] *Id.* ("In another study that analyzed 340 exonerations, forty-two percent of children were found to have given false confessions while only thirteen percent of adults did the same.").

[103] One Illinois statute, recognizing the inherent risk of coercion from Reid tactics, has made juvenile statements obtained by deception, namely lying about evidence or making unauthorized promises of leniency, presumptively inadmissible evidence. 705 Ill. Comp. Stat. Ann. 405/5-401.6. *See also*, Equal Justice Initiative, *Illinois Bans Police Deception in Juvenile Interrogations* (Jul. 18, 2021), https://eji.org/news/illinois-lawmakers-ban-police-deception-in-juvenile-interrogations/.

[104] *Feld*, 97 J. CRIM. L. & CRIMINOLOGY at 243-44.

[105] *Id. See also*, Caitlin N. August & Kelsey S. Henderson, *Juveniles in the Interrogation Room: Defense Attorneys as a Protective Factor*, 27 PSYCH., PUB. POL'Y & L. 268, 268-67 (2021).

term relief from interrogation.[106] Recognizing this risk, approximately twelve states have laws requiring the presence of a parent or "interested adult" in order for a child to legally waive their *Miranda* rights,[107] and states including California and Illinois have passed laws requiring attorney involvement during custodial interrogations of juveniles depending on the crime.[108]

Both Chief Williams of the Fairfax Police Department and the SLED agents isolated Robert.[109] First, Chief Williams, knowing that Robert's mother was not present at the police station, interrogated Robert alone.[110] He did not record his interrogation or memorialize it afterwards in a police report.[111] Next, SLED agents Johnson and Merrell continued to isolate Robert.[112] They asked Robert where his mother was, and he told them she was at home.[113] Robert's only relief was the brief presence of Ms. Sabb, but even she had a conflict of interest that rendered her unable to provide adequate loyalty and support to Robert and nobody informed Robert of that fact; beyond not protecting Robert, Ms. Sabb's presence likely had the opposite effect by inviting him to think he was safe and in the presence of adults who had his best interests at heart.[114] Regardless, Agent Johnson testified that he asked Ms. Sabb to leave at some point during the interview and she complied, again leaving Robert alone with the two agents.[115] Robert's isolation

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[106] Caitlyn Wigler, *Juvenile Due Process: Applying Contract Principles to Ensure Voluntary Criminal Confessions*, 168 U. PA. L. REV. 1425, 1443 (2020).

[107] Feld, 97 J. CRIM. L. & CRIMINOLOGY at 222.

[108] August & Kelsey, 27 PSYCH., PUB. POL'Y & L. at 269.

[109] R.37-45.

[110] *Id.*

[111] *Id.*

[112] R.46-67.

[113] *Id.*

[114] *Id.*

[115] *Id.*

likely increased his fear and anxiety about the SLED agents, compounded his desire to comply and leave the situation as quickly as possible, and contributed to his emotional breakdown at the end of the interview.

Maximization

Maximization is a technique designed to shift a suspect's "mental state from confident to hopeless" by impressing on the suspecting an "irrefutable belief that the suspect is guilty," the "futility of denial," and intimidation.[116] Examples of maximization include overemphasizing the serious of the crimes, using deception like citing to evidence that may or may not exist, directly accusing the suspect, overriding any attempts to deny, labelling accounts as inconsistent, implausible, or unbelievable, calling a suspect a liar, playing on a suspect's fears, and making threats of harsher sentences. One study indicated that 88% of juveniles aged 15 to 16 years old falsely confessed to a crime when presented with false evidence.[117]

The SLED agents employed multiple maximization techniques throughout the recorded portions of their custodial interrogation of Robert. First, Agent Johnson intimidated Robert. After Robert requested that Agent Merrell conduct the interview alone, Agent Johnson responded, "Okay that's fine, you don't like males? I intimidate you?"[118] Agent Johnson reentered the room in later in the interview without warning; upon his arrival, he immediately launched into a slew of threats:

> Johnson: Um, what are we trying to get at? Here's the thing: You're going to jail.
> Miller: Today?
> Johnson: Yea, and there ain't anything we can do to stop it?

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[116] Luna, 18 NEV. L.J. at 301; Feld, 97 J. CRIM. L. & CRIMINOLOGY at 261.

[117] August & Kelsey, 27 PSYCH., PUB. POL'Y & L. at 270.

[118] R.446.

Miller: I know.[119]

He continued the exchange by deceiving Robert, telling him the police "already got what we need," communicating his irrefutable belief that Robert was guilty, and telling him he would likely face an "ass" of time:

> Johnson: I'm lazy. I'm ready to go home. Alright? There's this thing that you don't know. That while you were here, we already got what we need. You ever watch CSI?
> Miller: How many years I got?
> Johnson: I don't know. I don't know. You know what an ass is? You know what an ass is? That's a lot of time. You ever hear the prosecutor say an ass of time?[120]

Shortly after this exchange, Robert began to change his story, confessing to the crime and giving information to the agents. Agent Johnson used this opportunity to mold Robert's responses by indicating whether they were "right" or "wrong."

> Johnson: Alright, so you say Gabriel tie him down?
> Miller: I say (inaudible)
> Johnson: No, no that's the wrong answer, that's the wrong answer, wrong.
> Miller: No (inaudible) I was just posted up the whole time.
> Johnson: Yep. That's right.
> Miller: (inaudible)
> Johnson: That's right. You stayed in the living room with him, with, with the old man.
> Miller: Watching him.
> Johnson: Watching him, that's right.[121]

Agent Johnson disrupted any of Robert's attempts to deny the accusations, spoke over him, labeled his story as unbelievable, and continued to assert that Robert was lying and "going to jail."

> Miller: I don't.
> Johnson: I told you up front.
> Miller: I don't. [B]ut listen.
> Johnson: (Inaudible talking over each other) [G]oing to jail.
> Miller: Just please stop, just please stop with me. [P]lease, just please.
> Johnson: What do you wanna do?

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[119] R.454.

[120] R.455.

[121] R.455-56.

Miller: I just wanna go home man.
Johnson: I just wanna go home man.
Johnson: Well you ain't going home, but what you wanna do?
Miller: I'm being honest with y'all. I told you.
Johnson: No, the only thing you told us was that you didn't want to be there and Gabriel planned. Gabriel did this, Gabriel did that. [A]nd. [B]ut you didn't tell us details.[122]

Finally, Agent Johnson deceived Robert, asserting false evidence:

Johnson: And you know your prints and stuff will be on that wallet.
Miller: (Inaudible)
Johnson: Thank you. That's why I asked you if you have ever seen CSI.
Miller: (Inaudible)[123]

Agent Johnson succeeded in breaking Robert down, a simple task for an adult officer facing a fearful juvenile with intellectual impairment. At the end of the interrogation, Robert pleaded, "I just wanna, I just wanna, I just wanna leave here. I'm done talking. Whenever y'all ready to lock me up, I'm ready. Let's go please. I'm ready."[124] His response indicated his pressing desire to escape the situation by any means necessary.

Minimalization

Police use minimalization techniques in conjunction with maximization to induce confessions by providing "face-saving excuses" and "moral justifications" for the suspect's alleged actions.[125] By providing the suspect with a "moral justification to neutralize guilt," the suspect may "adopt the proffered excuses to end questioning."[126] An interrogator may demonstrate calculated sympathy and tell the suspect that the crime is understandable, spontaneous, accidental, provoked, or a result of peer pressure to shift personal blame and secure a confession.[127]

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[122] R.456.

[123] R.457.

[124] *Id.*

[125] Feld, 97 J. CRIM. L. & CRIMINOLOGY at 243-44, 277-78.

[126] *Id.*

[127] Luna, 18 NEV. L.J. at 302.

Agents Merrell and Johnson both employed minimization techniques throughout the interrogation. Immediately at the outset of the interrogation, Agent Merrell offered sympathy to Robert, coaxing him into opening up to her:

> Merrell: Okay, Rob, I'm asking you to. I'm trying to help you out, okay?
> Miller: Yes ma'am.
> Merrell: And I want you to be completely honest with me. I'm being completely honest with you.
> Miller: Yes ma'am.
> Miller: So y'all just want to talk to me, that's it?
> Merrell: Yeah I just wanna talk to you.[128]

Agent Merrell preyed on Robert's susceptibility to trusting adults, and women in particular, by telling him she was on his side, just trying to help him, and by inviting him to open up to her. Agent Johnson combined the above maximization techniques with moral justifications to encourage agreement from Robert about the facts:

> Johnson: Rob, look at me bo, look at me, look at me Rob. Shit happens. You said you didn't wanna be there and from what we was told it wasn't supposed to go down like that. Y'all was just doing a lick. Shit happens. Now the thing to do is let's see how we can minimize it. I told you.[129]

By downplaying Robert's alleged participation and offering him the moral excuse that he "didn't wanna be there" and it "wasn't supposed to go down like that," he offered Robert a more palatable version of events for the juvenile to agree to.

Promises of Leniency

Often, interrogators offer explicit (actual) or implicit (implied) promises of leniency, or benefits to cooperation, during interrogations. Examples of promises of leniency include offers to help the suspect secure a lesser sentence or favorable treatment throughout the legal process. The South Carolina Court of Appeals recognized in Robert's case that "[a] statement may not be

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[128] R.451.

[129] R.456.

'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence'" because of the inherent risks of coercion under this tactic.[130] But the court below failed to appreciate that officers in Robert's case used promises of leniency, and those promises were especially effective at coercing a confession given Robert's personal circumstances.

In one study of leniency, both adults and juveniles were approximately "three times more likely to think that [a] suspect should confess" when interrogators offered implicit and explicit conditions of leniency; juveniles were twice as likely than adults to think the suspect should confess, more likely to believe the suspect could go home if he confessed, and more likely to believe he would receive a harsher sentence if he did not confess under the implicit and explicit leniency conditions.[131] As such, the risks associated with leniency are heightened when a juvenile undergoes interrogation.

Agent Johnson offered multiple implicit and explicit promises of leniency to Robert. First, immediately after threating Robert with jail, Agent Johnson told him he would get less time if he cooperated.

> Johnson: Um, what are we trying to get at? Here's the thing: You're going to jail.
> Miller: Today?
> Johnson: Yea, and there ain't anything we can do to stop it?
> Miller: I know.
> Johnson: Here's what we want to try and do is help you on the far end. Why? When you're young. Truth, you're the very first one we're talking to and that's why you getting that break. Cause in South Carolina, the hand of one is the hand of all. It doesn't matter which one of you did what, you were there. That makes you equal. Oh, if we charge you with assault and battery, everybody else is going to get charged with assault and battery."

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[130] *Miller*, 375 S.C. at 386, 652 S.E.2d at 452.

[131] Allison D. Redlich, Reveka V. Shteynberg & Laura H. Nirider, *Pragmatic Implication in the Interrogation Room: a Comparison of Juveniles and Adults*, 16 J. EXPERIMENTAL CRIMINOLOGY 555 (2020).

> Johnson: Everybody is getting the same amount time except for the one that is cooperating.[132]

He later returned to this technique by telling Robert his situation was inescapable, but that he (Agent Johnson) could put a good word in for Robert to the prosecutor to get him less time, if only Robert would cooperate and confess.

> Miller: So what can I do to get me out of this situation?
> Johnson: You ain't getting out of this, but what you can do is minimize the kind of time. Look at it this way, alright, I don't know what kind of time you'll get. I can't tell you that. I'm not the judge or the lawyer. But here's what I'm getting at, I'm just throwing some hypothetical numbers out. Let's say you were looking at 30 years because you talked, let's say you tell the truth and come clean. One second. You come clean and you lay it out on the table, and you cooperate? What we do is, is let the prosecutor know. You know who the prosecutor is?
> Miller: No, sir.[133]
>
> . . .
>
> Johnson: Alright, so. All we, all we need is a clear picture from you, so when I talk with the Solicitor, this is what Robert told us. He's hurt. I can tell he is hurt about it. Whatever you can do to help him, you help him. But like I told you from the beginning, ain't nothing we can do about stopping jail time.[134]

Ultimately, Agent Johnson promised Robert that he would get less time if he cooperated, pushing Robert to share details to comply and escape the situation.

Contamination

Contamination is a technique where officers transfer "inside information" or details about the crime only the perpetrator would know in order to inform the suspect of the facts.[135] The interrogator, by providing these details, either deliberately or accidentally causes the suspect to accept that version of the story.[136] The tactic helps craft a "clear and composed account" of the

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[132] R.454-55.

[133] R.455.

[134] R.457.

[135] Luna, 18 NEV. L.J. at 302.

[136] *Id.*

crime, helping prove the suspect must have committed by including those details in their narrative.[137]

On the face of the available transcript, officers used contamination to mold Robert's answers.

> Johnson: Who put the bag over his head?
> Miller: I did.
> Johnson: Thank you. You did. Alright, you took the wallet out of his, umm, pocket?
> Miller: I did.
> Johnson: And you know your prints and stuff will be on that wallet.
> Miller: (Inaudible)
> Johnson: Thank you. That's why I asked you if you have ever seen CSI.[138]

With no previous mention of the act, Johnson asked Robert who put a bag over the victim's head. Similarly, Agent Johnson asked Robert who took the wallet from the victim's pocket, despite no mention of a wallet being taken in the previous exchange. By revealing these details to Robert, Agent Johnson ensured they would make an appearance in the coerced confession, securing Robert's guilt. Agent Johnson concluded the interview by assuring that the account he solicited made sense, borrowing straight from the Reid playbook. He explicitly shared his goal with Robert, indicating, "[a]lright, so. All we, all we need is a clear picture from you, so when I talk with the Solicitor, this is what Robert told us."[139]

In sum, the voluntariness standard requires that the court take special care to meaningfully consider the forms of coercion and the characteristics of the suspect. Police subjected Robert to interrogation techniques, including intimidation, isolation, and promises of leniency, that are designed to test the will of even adults of average intelligence. The police interrogation tactics

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[137] *Id.*

[138] R.457.

[139] R.457.

used against Robert, an intellectually impaired child, were demonstrably severe enough to overcome his will, leaving him crying, compliant, and drained at the end of the encounter. These factors, taken into consideration with his specific characteristics and the totality of the other circumstances of the investigation, demonstrate that the police subjected him to psychological coercion and violated Robert's right to voluntariness.

II. *MIRANDA*

A. *Miranda* analysis requires "special care" for juveniles and people with intellectual impairment.

"[I]n *Miranda*, the Court concluded that the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated."[140] The Court held that "the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for the purposes of the prosecution's case in chief."[141] Under *Miranda* and its progeny, a statement procured by police during custodial interrogation is inadmissible unless the police have issued four warnings:

> [A] suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[142]

When a suspect makes a statement during a custodial interrogation, even if he has been given *Miranda* warnings, "the burden is on the Government to show, as a prerequisite to the statement's admissibility," that the defendant "voluntarily, knowingly and intelligently waived his

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[140] *United States v. Patane*, 542 U.S. 630, 639 (2004) (quoting *Dickerson*, 530 U.S. 428, 434-35 (2000); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

[141] *Id.*

[142] *Dickerson*, 530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 479).

rights."[143] "The State bears this burden of proof even [when] a defendant has signed a waiver of rights form."[144]

Miranda's prophylactic protections apply where the statement in question was procured through custodial interrogation. The custody inquiry is objective and requires courts to evaluate the circumstances around the interrogation and whether a reasonable person would have felt free to end the interrogation and leave.[145] Like the due process test, this test requires courts and police to examine all circumstances affecting a reasonable person's perception of freedom,[146] including "factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning."[147]

In the context of custodial interrogation, a child's emotional and intellectual deficiencies take on an outsized role because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[148] Or, as the U.S. Supreme Court has explained, "events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'"[149] Thus, "[s]o long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer," the child's age is an important consideration in the custody analysis.[150]

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[143] *J.D.B.*, 564 U.S. at 269 (internal quotation marks omitted); *see also State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986); *State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989) (quoting *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988)).

[144] *J.D.B.*, 564 U.S. at 269 (internal quotation marks omitted).

[145] *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

[146] *J.D.B.*, 564 U.S. at 270-71 (internal quotation marks omitted).

[147] *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 420 (2003).

[148] *J.D.B.*, 564 U.S. at 272.

[149] *Id.* (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion)).

[150] *Id.* at 274; *see also In re Gault*, 387 U.S. 1, 55 (1967) ("[T]he greatest care must be taken to assure that [a minor's confession] was voluntary."); *Gallegos*, 370 U.S. at 53 ("special care . . . must be used").

Custody is not in dispute in this case. However, it is worth noting that police took Robert into custody by taking him without a parent to the police station for approximately thirteen hours, subjecting him to multi-hour interrogations by multiple law enforcement officials in various rooms of the station, and failing at any point to Robert that he could leave the premise. Chief Williams and Agents Merrell and Johnson both knew that Robert was fifteen years old and in the eighth grade, Robert, under the impression he could not leave and telling the officers multiple times during the interview that he wanted to go home, laid on the floor of the station and went to sleep at the end of one interview. From the perspective of a fifteen-year-old boy with patent intellectual impairments facing prolonged interrogation, Robert was in police custody throughout the interrogation.

Express questioning or its functional equivalent while in custody amounts to an interrogation.[151] Police subjected Robert to interrogation while he was in custody by asking him questions about his involvement in two crimes.

Because Robert was subjected to custodial interrogation, a valid waiver would require that Robert knowingly, voluntarily, and intelligently waived his right to remain silent. A waiver may be inferred from the totality of circumstances, which is a subjective test considering an individual defendant's characteristics such as age, experience, education, background, intelligence, and the capacity to understand the warning, nature of the rights, and consequences of a waiver.[152]

B. Juveniles generally fail to adequately comprehend and voluntarily waive their *Miranda* rights.

Due to "cognitive and psychosocial differences," most juveniles are unable to adequately comprehend *Miranda* warnings; and many struggle to understand the concept and implications of

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[151] *Rhode Island v. Innis*, 446 US 291 (1980).

[152] *Fare v. Michael C.*, 442 US 707 (1979).

"rights."[153] Social scientists have known since at least 1981 that there are age-based differences in *Miranda* comprehension, and fewer than a quarter of juveniles appear to be capable of "understanding of all components of the warnings." Juveniles under fifteen are especially likely to misunderstand "one or more" warnings.[154] As a result, juveniles waive their *Miranda* rights as often as 90% of the time.[155] In practice, this means that juveniles who are administered *Miranda* warnings fail to understand that they may consult with attorneys before or during interrogation, believe attorneys "could only protect the innocent," and assume judges "could later revoke the right to remain silent."[156]

Additionally, the neurological, psychological, and social vulnerabilities of children and persons with intellectual impairment apply in equal force in the context of *Miranda* waivers. Prone to coercive pressures, intellectually impaired juveniles are more likely to waive their rights under intimidation, stress, and an eagerness to comply with authority.[157] Particularly, a juvenile's "focus on short-term relief" may induce waiver when the juvenile incorrectly assumes compliance will ensure quick release.[158] One study demonstrated that even college students posing as suspects "showed poorer *Miranda* rights comprehension" under "experimentally induced stress."[159]

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[153] Cleary, 23 PSYCH., PUB. POL'Y., & L. at 123. *See also* Meyer & Reppucci, 25 BEHAV. SCI. L. at 762; Luna, 18 NEV. L.J. at 298-99.

[154] Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & PSYCH. REV. 53, 65-66 (2007); Luna, 18 NEV. L.J. at 298–99.

[155] Hayley M. D. Cleary & Sarah Vidal, *Miranda in Actual Juvenile Interrogations: Delivery, Waiver, and Readability*, 41 CRIM. JUST. REV. 98, 111 (2016).

[156] Luna, 18 NEV. L.J. at 298–99.

[157] Leo, 37 J. AM. ACAD. PSYCH. L. at 335, 336 (explaining that developmentally disabledå juveniles lack the ability to consider consequences, the nature and complexity of adversarial social interaction, look for appropriate behavior cues, are easily overwhelmed by stress, avoid conflict, and tend to trust and seek approval from authority figures).

[158] Spierer, 92 NYU L. REV. at 1746.

[159] Cleary, 23 PSYCH., PUB. POL'Y., & L. at 124-25.

Juveniles, who are more susceptible to stress, are even more likely to suffer comprehension defects in custody and under questioning by law enforcement officers. As noted earlier, one study found that juveniles' most common concern when deciding whether to waive the right to remain silent was the "police's immediate response," as opposed to long term concerns.[160]

C. Juveniles with intellectual impairment are even less likely to voluntarily, knowingly, and intelligently waive their *Miranda* rights.

Juveniles suffering from intellectual disability lack *Miranda* comprehension at even higher rates than non-intellectually impaired juveniles and adults.[161] Studies show that IQ scores tend to be better predictors of *Miranda* comprehension than age.[162] Thomas Grisso's 1981 study demonstrated that a low IQ "negatively impacted *Miranda* comprehension even more for youth" than adults.[163] Another study demonstrated that the language in a typical *Miranda* warning requires "at least a sixth-grade education to comprehend 75% of the warnings" and a ninth-grade education to "fully understand" them.[164] Another study suggested the *Miranda* language reflects a seventh-grade level of readability.[165]

When a juvenile like Robert—and presumably, like many other children in police custody in the state[166] —has an IQ that is one or more standard deviation below the mean,[167] the *Miranda*

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[160] *Id.* at 121-22.

[161] Luna, 18 NEV. L.J. at 298, 299.

[162] *Id.* at 299.

[163] Cleary & Vidal, 41 CRIM. JUST. REV. at 111.

[164] August & Henderson, 27 PSYCH., PUB. POL'Y., & L. at 270.

[165] Cleary & Vidal, 41 CRIM. JUST. REV. at 111.

[166] In a sample of 6000 juveniles in state custody, the average IQ was 81, more than one standard deviation below the mean. Luna, 18 NEV. L.J. at 298-300.

[167] *Id.* An IQ of 85 is one standard deviation below the mean, and an IQ of 70 is two standard deviations below the mean. IQ scores between 70 and 79 demonstrate cognitive impairment, and children with obtained IQ scores as high as 84 may be considered to have "borderline" intellectually disability. *Id.*

warnings have "little practical significance."[168] This reflects what multiple studies demonstrate: most juveniles in the criminal justice system do not possess the cognitive skills to fully comprehend their rights, and this concern is even more egregious for individuals with intellectual impairment and disability.[169] While both the American Bar Association (ABA) in 2010 and the International Association of Chiefs of Police (IACP) in 2012 have recommended simplified warnings for juveniles and "extra care . . . to ensure youths' comprehension," few police units have adopted and utilized simplified templates for juveniles, even those with intellectual impairment.[170] Thus, although there is a broad-based consensus about the problem—juveniles who are involved in the criminal-legal system are unlikely to comprehend *Miranda*—and about a solution—give juveniles a form of the warnings that most criminal-involved juveniles will understand—there is no practical impetus for implementing that solution. Under these circumstances, the only realistic avenue for ensuring the integrity of statements juveniles give to police is through the courts.

In addition to cognitive deficits, the neurological, psychological, and social deficits that juveniles face, including susceptibility to interrogation tactics, eagerness to please authority, and suggestibility, are compounded for juveniles with intellectual difficulties. As a result, "[l]ower comprehension levels and increased compliance threaten the assumption of the effectiveness of the Miranda safeguard for juveniles" and increase the risk of juvenile false confessions.[171]

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[168] Cynthia J. Najdowski & Bette L. Bottoms, *Understanding Jurors' Judgments in Cases Involving Juvenile Defendants: Effects of Confession Evidence and Intellectual Disability*, 18 PSYCH., PUB. POL'Y., AND L. 297, 300 (2012).

[169] *See* Meyer & Reppucci, 25 BEHAV. SCI. L. at 762.

[170] *See id.* at 778.

[171] August & Henderson, 27 PSYCH., PUB. POL'Y., & L. at 270; Luna, 18 NEV. L.J. at 300-01.

D. Robert, a juvenile with intellectual impairment, failed to knowingly and intelligently waive his *Miranda* rights.

Robert's IQ falls almost two standard deviations below the mean, placing him squarely in the group of juveniles with intellectual impairment and cognitive difficulties.[172] Operating at a fourth-grade level, Robert is almost certainly not one of the small number of juveniles who adequately comprehend their *Miranda* rights, particularly where the rights require a sixth or seventh grade level for comprehension at a minimum. Chief Williams, who obtained his alleged waiver, knew that Robert was a fifteen-year-old boy in the eighth grade; additionally, he witnessed Robert's inability to correctly fill in the waiver form, listing his phone number as "Jackson S.t.," leaving the address line blank, and providing a signature in print. Robert, after the interrogation and in response to a question, explicitly told the psychologist conducting his evaluation that he did not understand the right to remain silent or the right to an attorney; he needed the terms explained to him then. This casts into doubt any assertion that Robert understood these terms at a previous point in time or that he knowingly and intelligently waived them in the past.

The State failed to meet its burden of proving waiver: the only evidence that suggests that Robert filled out the form with requisite knowledge is the uncorroborated testimony of Chief Williams, who conducted an undocumented, incommunicado interrogation of Robert. This

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[172] Robert's true IQ is definitely lower than 76 and falls in the range for a diagnosis of intellectual disability. This is due to norm obsolescence, or the "Flynn effect," which reflects the fact that IQ scores on a particular testing instrument increase over time. *See, e.g.*, James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 PSYCH. BULL. 29, 36 (1984) (estimating that "Americans gained 13.8 IQ points from 1932 or 1978" at an average of approximately .33 points per year). These gains cause IQ test norms to become obsolete with time. *Id.* at 39; *see also* Tomoe Kanaya, et al., *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society*, 58 AM. PSYCH. 778, 778 (2003). An IQ score obtained near the end of a test's norming cycle will be artificially inflated whereas a result obtained close in time to the normative data collection point will not. Robert's score of 76 should be adjusted downward for norm obsolescence to account for this scientific principle. Robert took the WISC-IV; the normative data collection point for the exam is 2003. Applying the adjustment here would mean Robert's IQ score is actually 69.

evidence does not overcome the evidence of Robert's low intellectual functioning at a fourth-grade level, corroborated claims that he did not understand his rights after his waiver, and the limited verbal and legal comprehension that accompanies age. Considering evidence of Robert's age and intellectual functioning, and without corroborated evidence supporting his knowledge and understanding of these rights, the court below should have found that Robert failed to knowingly and intelligently waive his *Miranda* rights, rendering him subject to improper, coercive interrogation.

CONCLUSION

The lower court failed to give adequate weight to the characteristics of age and intellectual ability that South Carolina, the Supreme Court, and science demand in assessing the protections of common law due process and the Fifth Amendment. Thereby, Robert's statements, obtained as a result of impermissible coercion, should be suppressed.

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