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The Honorable Chair Senator Floyd Prozanski and Members of the Senate Judiciary Committee,

I am faculty at Loyola Law School in Los Angeles, California, a graduate of Stanford Law School, and a visiting clinical law professor at Harvard Law School. I have dedicated over twenty years to working with children and adults in the juvenile and criminal justice system.

Through my work at Loyola's Center for Juvenile Law and Policy, or CJLP, I am the Director of a Juvenile Justice Clinic. CJLP is a legal services organization dedicated to the direct representation of young people and the protection of the rights of children both locally and nationally. Through my work at CJLP, I have provided specialized juvenile indigent defense training across the United States, have created a juvenile trial skills training program, have trained judges, prosecutors, and probation officers on adolescent development and being trauma-informed, and have provided testimony to U.S. Congress on issues related to juvenile justice such as the use of solitary confinement and the school-to-prison pipeline. I have also published numerous law review articles about the impact of adolescent development on the treatment of youthful offenders.

Within the Juvenile Justice Clinic, I teach substantive classes on trial skills and juvenile law and I supervise law students representing clients in delinquency proceedings in Los Angeles. In addition, I teach Criminal Procedure and a seminar course on issues in criminal justice. Before joining the faculty at Loyola, I was a trial attorney at the Public Defender Service for the District of Columbia ("PDS"). At PDS, I represented three categories of clients: 1) children charged in delinquency court, 2) children charged as adults with serious and violent felonies, including homicide, and 3) adults charged with serious and violent felonies, including homicide. Prior to becoming a lawyer, I taught high school and ran an after-school volunteer program at the Maya Angelou Public Charter School in Washington, D.C. As a teacher, I worked with many youth who had been adjudicated delinquent and had spent time in juvenile correction facilities.

My testimony will propose that all interviews of youthful offenders should be recorded in accordance with HB 3261. I have chosen a story about one of my clients that highlights several reasons why recording interrogations is essential to protect youthful offenders. First, this legislation will guard against false confessions, which is important because youth falsely confess at a higher rate than adults. Second, due to their developmental stage, youth are more vulnerable to pressure and interrogation tactics, which makes them more likely to confess. Third, beyond developmental immaturity impacting all youth, juvenile justice involved youth are doubly at risk of being overwhelmed in an interrogation and susceptible to confusion. Youth who are in the juvenile justice system disproportionally have special education issues, have experienced trauma, and have mental health needs. Lastly, recordings not only keep the

interrogators honest at the time of the interrogation, but also allow courts to later analyze the interrogation to determine if the law was followed and the resulting statement of the child is admissible. Because youthful offenders are more vulnerable in interrogation settings than adults, their interrogations require a higher level of scrutiny. Therefore, an interview, whether conducted by a school official or a police officer, should be recorded as required under HB 3261.

The recording of school-based interrogations are just as important as the recording of interrogations at a police station. The Supreme Court case *J.D.B. v. N.C.* is about a 13 year old who was questioned *in school by school officials* as well as police officers. Indeed, it is not uncommon for children to be interrogated in a public school setting, whether by teachers, administrators, or law enforcement. Many children are arrested in school.[1] Probation officers, school-based police officers, and officers investigating cases may look for the children they wish to question at their school, whether or not the underlying offense took place at school.

J.D.B. was a 13-year-old student in a North Carolina public middle school who was pulled out of class and interrogated by four adults, including a uniformed police officer and a juvenile investigator with the local police force.[2] They questioned J.D.B. for around thirty minutes about a recent home break-in that occurred in the neighborhood.[3] Although the adults knew his age, no one called his grandmother or read him his *Miranda* rights prior to questioning.[4] After denying any involvement, the investigator pressed J.D.B. to "do the right thing" and warned that the investigator may need to get a secure custody order if he thought J.D.B. would continue to break into homes.[5] Fearing juvenile detention from the court order, J.D.B. confessed that he and his friend were responsible for the break-ins.[6] It was not until J.D.B. confessed that the investigator told him that he could refuse to answer the investigator's questions and was free to leave.[7] When asked if he understood, J.D.B. nodded and continued giving details about the crime.[8]

The Supreme Court's decision in J.D.B. highlighted the accepted view in "[a]ll American jurisdictions . . . that a person's childhood is a relevant circumstance" in assessing the

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[1] School- based court referrals are the largest source of the growing prosecution of youth for low and mid-level juvenile offenses. *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV.383, 403 (2013) (discussing how the increase in low and mid-level offenses for juvenile court prosecutions is due to schools referrals); *see also id.* at 410 (stating that in North Carolina for instance, 40% of juvenile court referrals were from schools and that the increase in school-based court referrals correlates with an increased presence of school police and has a disproportionate impact on minority youth)(internal citation omitted).

[2] J.D.B. v. North Carolina, 564 U.S. 261, 266-67 (2011).
[3] *Id.* at 266.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 267.
[7] *Id.*
[8] *Id.*

reasonable person standard as it relates to custody.[9] Just as the Supreme Court has reasoned time and time again, Justice Sotomayor explained that children are “less mature and responsible than adults . . . lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and are more vulnerable to outside pressures.[10] The Court in J.D.B. concluded that age is an essential factor in analyzing whether or not a young person is technically in custody. Even if a reasonable adult would feel as though he was free to leave a situation, a child in the same circumstance may feel as though he is in the custody of the police. Custody is the legal term of art which triggers the reading of Miranda warnings pursuant to the Fifth Amendment to the U.S. Constitution. Indeed, age is routinely considered when determining liability beyond the criminal context because the diminished capacity of minors necessitates extra protections.[11]

As J.D.B. itself demonstrates, children may be in custody and subjected to questioning in school. The legal term of art for questioning about an offense is interrogation. A recording of that questioning can help to capture some of the circumstances of an interrogation which will help a reviewing court to assess whether the child is in custody during a school interrogation. It can also help to determine the legality of the tactics employed during the interrogation. A recording may reveal information about the questioning that has bearing on the child’s functioning that may not have been apparent to the officer in the moment of the questioning.

To illustrate how a recording can shed light not just on factors relevant to custody but also factors relevant to Miranda waiver, Fourteenth Amendment voluntariness, and overall reliability of a juvenile statement, I share the comparison of what was contained in a police report about 17 year old Toby’s statement and what was gleaned from the video recording, particularly ways in which the video recording undermined the assertions in the officer’s report memorializing the Miranda waiver.

Toby’s story[12]:

Toby was arrested at 17 years old along with two other minor suspects for an attempted, unarmed, and unsuccessful theft of a bicycle.

At the time of the alleged crime and resulting investigation, Toby, a 17 year old high school student, was a special education student who struggled with an auditory processing disorder. That means Toby could not make sense of what he hears. Toby had an individualized education program (“IEP”) [13] in place since he was about 4 years old. According to the IEP documents authored just prior to his arrest, Toby needed as an accommodation, “extended time for processing (30-40 seconds)” when teachers read questions to him, and if he still did not understand, then the teacher was required to reword the question. Additionally, the IEP

[9] *Id.* at 274.
[10] Id. at 273 (internal citations omitted).
[11] *See id.* at 274–76.
[12] Toby is not the client’s real name. The pseudonym Toby was used to protect the client’s identity.
[13] A child is entitled to special education services and an IEP under the Individuals with Disabilities Education Act (“IDEA”), a federal law incorporated into state law in all fifty states and the District of Columbia.

indicated that, in order to ensure comprehension, Toby should "repeat back questions" and his teachers may need to "clarify and repeat directions" or "check for understanding."

Because English is Toby's second language, his IEP documents noted that he is an English Language Learner and his most recent test scores placed him at the level of Early Intermediate in listening proficiency (i.e. understanding verbal language). Early Intermediate listening proficiency is defined thusly: "Students who perform at this level … typically understand basic vocabulary and syntax, with frequent errors and limited comprehension." Indeed, the concept of rights, as in Miranda rights, is not a matter of basic vocabulary; the concept of rights is difficult for children to comprehend and apply.

After his arrest, Toby was held in a cell at the police station. When Toby was interrogated several hours after his arrest, it was then the middle of the night. The police report indicated merely that Toby had read each Miranda right and acknowledged he understood the rights by saying, "Yes sir" when asked. The Detective memorialized in his police report three facts which were discredited when compared to the video recording:

1. Toby expressly waived his rights,
2. Toby was asked the question, "Do you want to talk about what happened,"
   Note: This is what is termed an "express" waiver because the child is being asked specifically if he wishes to speak to the police.
3. Toby responded to the express waiver question, "yeah."

Further, the police report memorialized Toby's statement in one sentence even though it was later discovered that the interrogation was 15 minutes long, creating greater context to understand Toby's version of events.

The following was revealed in the recording and was not contained in the police report.:

- Contrary to the assertion in the police report, the Detective did *not* ask Toby if he expressly waived his Miranda rights
- Contrary to the assertion in the police report, Toby did not state that he expressly waived his Miranda rights
- The reading of each right was followed immediately by the question "do you understand?" and upon a softly mumbled, "yes, sir," in response, the Detective went on to the next right
- The Detective spent a total of 36 seconds reading the Miranda rights and conducting the waiver
  - Note: This "rapid reading" of Miranda rights is a tactic that is used strategically to under-emphasize the importance of the rights, and, thus, encourage waiver.

- Before admonishing Toby of Miranda rights, the Detective asked a number of questions which related to an assessment of Toby's comprehension
  - The Detective asked Toby if he had been drinking
  - The Detective asked Toby if he was "snorting"
  - The Detective asked Toby if he was high

  - The Detective asked Toby for his phone number and Toby did not know his own telephone number
  - The Detective did not explain the Miranda rights beyond reading each of them
  - The Detective did not ask Toby to explain his understanding of the right in his own words

- Toby was in handcuffs and shackles when he was brought into the interrogation room
- Toby was escorted into the interrogation room by a second officer who remained in the room during the Detective's interrogation

- The Detective asked Toby numerous times during the interrogation, "are you following me"?
- The Detective said to Toby, "are you with me?" and "I don't believe you are with me"
- The Detective falsely stated that Toby was captured committing the alleged offense on video in an attempt to pressure Toby into a confession, a technique that is frowned upon for use with juveniles by the police interrogation training program called the Reid Technique

Ultimately, the Detective completed the police report about the Miranda waiver falsely, indicating he had procured an express waiver and Toby had indeed expressly waived his Miranda rights, despite never having even asked Toby for an express waiver.

This was relevant not only as to the waiver analysis but also as to the credibility of the officer when he relayed that he perceived that Toby "understood" his Miranda rights.

1) CHILDREN ARE AT HIGH RISK OF FALSELY CONFESSING

Studies consistently show that juveniles are more likely than adults to falsely confess. In a study sample of 125 people who had falsely confessed to crimes, juveniles under 18 years old were an overrepresented group comprising approximately 33% of the sample.[14] Another study found that "juveniles are over-represented in proven false confession cases, typically accounting for about one-third of the samples".[15]

2) YOUTH ARE MORE VULNERABLE TO PRESSURE AND INTERROGATION TACTICS BY VIRTUE OF THEIR DEVELOPMENTAL STAGE

   a. The Importance of Adolescent Development in the Context of Interrogation

The neuroscience and psychology of adolescent development demonstrate how

[14] *See* Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post–DNA World*, 82 N.C.L.Rev. (2004)
[15] Allison Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943, 952 (2010).

and why children are different from adults: they are more impulsive; they have difficulty accurately predicting long-term consequences, engaging in cost-benefit analysis, and planning; they are vulnerable to trauma and influence; they are susceptible to peer pressure and have difficulty making decisions in the company of other children; they are less sophisticated and thus easily manipulated by adults; and they have potential to grow and learn in ways that cannot be accurately predicted by adults in the criminal justice system.[16] Thus, the Supreme Court of the United States has held, "children cannot be viewed simply as miniature adults."[17] Indeed, children must be afforded greater protection than adults under the Constitutions of the United States and of the State of Oregon.[18]

Children "generally are less mature and responsible than adults" and "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[19] Children also "have limited understandings of the criminal justice system and the roles of the institutional actors within it."[20] Given these significant differences, children charged with offenses must be treated differently than adults.

In an interrogation context, their developmental stage results in adolescents reflexively complying with authoritative figures because of their assumed superior status, meaning that adolescents are likely to make decisions based on authoritative demands, rather than logical reasoning or independent judgment.[21]

For over a decade, the Supreme Court has recognized that these qualities make juveniles different from adults at every stage of criminal proceedings against them.[22] In the *Roper/Graham/Miller* line of cases, the Supreme Court has recognized that even in the most extreme cases, juveniles are entitled to greater constitutional protections than adults.

Further, the U.S. Supreme Court has recognized that juveniles are different from adults in the interrogation context long before those recent developments in juvenile

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[16] (*Ibid.*)

[17] *J.D.B. v. North Carolina* 564 U.S. 261 (2011) [131 S.Ct. 2394, 2396].)

[18] *See Roper v. Simmons* 543 U.S. 551 (2005) [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Graham v. Florida* 560 U.S. 48 (2010) [130 S.Ct. 2011, 176 L.Ed.2d 825], *as modified (July 6, 2010)*; *Miller v. Alabama* 567 U.S. 460 (2012) [132 S.Ct. 2455, 183 L.Ed.2d 407].)

[19] *J.D.B v. North Carolina*, 564 U.S. 261, 272 (2011).

[20] *Id.* (citing *Roper v. Simmons* 543 U.S. 551, 569 (2005); *Graham v. Florida* 560 U.S. 48, 78 (2010)).

[21] Marsha Levick et al., *The Eight Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L & SOC. CHANGE 285, 291 (2012).

[22] *Roper, supra*, 543 U.S. at 568 (barring capital punishment for juveniles); *Graham*, *supra*, 560 U.S. at 74-75 (barring life without the possibility of parole for juvenile offenders who committed non-homicide crimes because "juveniles' lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions"); *see also Miller*, *supra*, 567 U.S. 460 at 480 (requiring courts to consider a juvenile's "diminished culpability" before imposing a life without parole sentence).

law, policy, and neuroscience.[23] After the *Roper/Graham/Miller* cases, the Court again emphasized in *J.D.B.* that, in "the specific context of police interrogation, [...] events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." [24] In juvenile interrogations, the U.S. Supreme Court has long acknowledged that, "the greatest care must be taken to assure that the admission was . . . not the product of ignorance of rights or of adolescent fantasy, fright or despair."[25]

As the U.S. Supreme Court acknowledged in *Gallegos v. Colorado*, "[minors] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself."[26]

b. Coercive Police Tactics Exert Unconstitutional Pressure on Youth and Yield Unreliable Statements

Tactics which may not be coercive when applied to adults might be considered coercive when used on teenage suspects.[27] Juveniles are more likely than adults to provide false confessions because they tend to yield to police tactics, such as leading and repetitive questioning, due largely to their adolescent brain development and the pressure to please authority figures.[28]

The "voluntariness test" looks at both the external circumstances of the interrogation as well as the internal attributes of the suspect that may make the suspect particularly vulnerable to police pressure. While it requires some evidence of police coercion, the U.S. Supreme Court has found "police overreaching" to constitute the requisite coercion in cases involving a vulnerable suspect if the police knew of the suspect's vulnerabilities, and their questioning "exploit[ed] this weakness."[29]

When the suspect is a juvenile, the courts have been more willing to find that certain deceptive interrogation techniques crossed the line, thereby creating a constitutionally impermissible coercion or risk of inducing a false confession. When the Detective said to Toby that he was caught committing the offense on video, that is an example of a deceptive technique which exerts pressure on a suspect. As the California Appellate Court for the Fourth District held in *People v. Elias,* the use of deceptive interrogation techniques on a juvenile

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[23] *See, e.g., In re Gault* 387 U.S. 1, 45 (1967) ("Admissions and confessions of juveniles require special caution").
[24] *J.D.B., supra* 564 U.S. at 272.
[25] *Application of Gault* 387 U.S. 1, 55 (1967).
[26] (1962) 370 U.S. 49 at page 54
[27] See *Haley v. Ohio*, 332 U.S. 596, 599 ("that which would leave an adult cold and unimpressed can overawe and overwhelm" a fifteen year-old).
[28] Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 274-75 (2007)
[29] *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (discussing *Blackburn v. Alabama*, 361 U.S. 199 (1960)).

suspect rendered his confession involuntary because such tactics substantially increased the likelihood that a juvenile would give a false confession.[30]

c. Youthful Offenders and *Miranda* Rights Waivers

Psychological studies have demonstrated that juveniles under the age of 15 do not understand the meaning of the words of their Miranda rights as well as adults and also frequently fail to understand the function of the Miranda rights and the ways in which such rights can protect them during interrogations.[31] *Miranda* rights are not easy to understand. Research indicates that even youth who have a basic understanding of the words and phrasing of *Miranda* warnings have difficulty grasping the significance of the warnings and comprehending how their rights apply in an interrogation.[32] Indeed, among youth who are between twelve to nineteen, around 94 percent exhibit "less than adequate appreciation of the significance and consequence of waiving their rights."[33]

Youthful offenders are also more likely to waive their *Miranda* rights. Adolescents waive their rights at a rate of 90 percent.[34] Adults, by contrast, only waive their *Miranda* rights an estimated 68 percent of the time.[35] According to juvenile justice experts:

> The greater suggestibility and deference to authority exhibited by youth relative to adults may make them more likely to waive their rights to silence and counsel, regardless of whether they fully comprehend the rights they are forfeiting. That very few children and adolescents invoke their Miranda rights underscores the importance of considering the extent to which youth comprehend their rights before they should be allowed to waive them.[36]

"In an interrogation setting, when presented with the opportunity to waive her rights or remain silent, a juvenile's method of processing information may negatively impact her ability to fully weigh both options and the long-term consequences thereof."[37]

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[30] *People v. Elias V*., 237 Cal.App.4th 568 (2015).
[31] *See* Thomas M. Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134-1166 (1980).
[32] Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol'y 1 (2018) at 29 (internal citations omitted).
[33] *Id.*
[34] Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, 23 Cornell J.L. & Pub. Pol'y 395, 429 (2013).
[35] Saul M. Kasson et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 Law & Hum. Behab. 381, 389 (2007).
[36] Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol'y 1 (2018) at 29 (internal citations omitted).
[37] Zoë Overbeck, *No Match for the Police: An analysis of Miranda's Problematic Application to Juvenile Defendants*, 38 Hastings Const. L.Q. 1053, 1066 (2011)

A common investigative tactic used by police officers is to de-emphasize the importance of *Miranda* rights.[38] Further, the California Court of Appeals for the Fifth District held in 2017 that the "rapid reading" of Miranda rights is a coercive tactic in the case In Re T.F.[39] When the Detective sped through the reading of Miranda rights in Toby's interrogation, it was problematic for this reason.

> In situations wherein police present the waiver decision as an inconsequential formality, the youth faced with the question may be ill-equipped to independently grasp the significance of waiving rights. That youth may also be less able to resist the perceived pressure to submit to the officers' continued questioning.[40]

Of note, studies of *Miranda* are also conducted in less stressful circumstances than actual interrogation, which are "inherently high-stress."[41]

3) YOUTH IN THE JUVENILE JUSTICE SYSTEM ARE VULNERABLE: THEY DISPROPORTIONALLY HAVE TRAUMATIC BACKGROUNDS, SPECIAL EDUCATION ISSUES, AND MENTAL HEALTH NEEDS, MAKING THEM EVEN MORE VULNERABLE TO PRESSURE IN AN INTERROGATION

Many of the children in the juvenile justice system have unmet needs in relation to abuse, disabilities, behavioral health issues, and poverty. Children often enter the delinquency system from poor performing public schools and with a history of the child welfare system.[42]

Most children who have committed offenses have experienced trauma in their short lives.[43] While 34% of all children in the U.S. report experiencing at least one traumatic event, between 75%–93% of children entering the juvenile justice system report that they have

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[38] Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol'y 1 (2018) at 36 explaining in part, "Most often, Miranda warnings are delivered without preamble and in a seemingly neutral tone. By doing this, police officers give the impression that they are indifferent to the suspect's response and that the warnings are a mere formality that do not merit the suspect's concern." (internal citations omitted).

[39] *In re T.F.*, 16 Cal.App.5th 202 (2017).

[40] Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol'y 1 (2018) at p. 27.

[41] Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights, 21 N.Y.U. J. Legis. & Pub. Pol'y 1 (2018) at 33.

[42] *See* Hui Huang, Joseph P. Ryan, & Denise Herz, *The Journey of Dually-Involved Youth: The Description and Prediction of Rereporting and Recidivism*, 34 CHILDREN & YOUTH SERVICES REV. 254, 254 (2012).

[43] A recent study found that ninety-three percent of youth in an urban detention facility had experienced at least one traumatic experience in the past year, and more than half of those youth reported "witnessing violence as the precipitating trauma." KAREN M. ABRAM ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH, 10–12 (2013), http://www.ojjdp.gov/pubs/239603.pdf.

experienced at least one traumatic event.[44] Rates of PTSD in juvenile justice-involved youth are comparable to the PTSD rates of soldiers returning from deployment in Iraq.[45] There are higher rates of PTSD among females than there are among males.[46] PTSD is also more prevalent among racial and ethnic minorities in the United States.[47]

Further, recent scholarly literature suggests that children who have experienced trauma, exhibit maturity levels much younger than their chronological age. In fact, "children's experiences with child maltreatment or other forms of toxic stress, such as domestic violence or disasters, can negatively affect brain development."[48] While youth are impulsive generally, neuroscience has shown that "for those youth who have suffered trauma, brain structures that regulate emotion, behavior and impulsivity are less developed and function irregularly."[49] Relevant to the issue of waiver of Miranda rights, youth who have suffered from trauma are more vulnerable and susceptible to pressure and outside influence.[50]

Children in the juvenile justice system disproportionately suffer from learning disabilities. Nationwide, at least one in three youth who are arrested have a disability, and some researchers estimate that the disability rate amongst juvenile justice involved youth is as high as 70 percent.[51] For example, in Los Angeles, according to a probation outcomes report published in 2015, children detained and attending probation schools in LA County are significantly behind in reading and math.[52] That same study demonstrated that developmental

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[44] ADAMS, *supra* note 71, at 2; ANGELA WEIS, JOHN HOWARD INST., INCARCERATED YOUTH & CHILDHOOD TRAUMA at 1, http://www.thejha.org/trauma (last visited Mar. 22, 2016). Further, when adults are studied, those who have been exposed to trauma constitute upwards of 93% of criminal offender population.

[45] JENNIFER MELTZER WOLPAW & JULIAN D. FORD, NAT'L CHILD TRAUMATIC STRESS NETWORK, ASSESSING EXPOSURE TO PSYCHOLOGICAL TRAUMA AND POST-TRAUMATIC STRESS IN JUVENILE JUSTICE POPULATION 3 (2004), http://www.nctsnet.org/sites/default/files/assets/pdfs/assessing_trauma_in_jj_population.pdf; Bob Roehr, *High Rate of PTSD in Returning Iraq War Veterans*, MEDSCAPE (Nov. 6, 2007), www.medscape.com/viewarticle/56540.

[46] NAT'L JUVENILE DEFENDER CENTER, *supra* note 41, at 7.

[47] *Id.*

[48] Child Welfare Information Gateway (2015) Understanding the effects of maltreatment on brain development. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau; see also Shonkoff, J. P. (2012). The lifelong effects of early childhood adversity and toxic stress. Pediatrics, 129, e232–e246 ["In addition to short-term changes in observable behavior, toxic stress in young children can lead to less outwardly visible yet permanent changes in brain structure and function."].

[49] Samantha Buckingham *Trauma Informed Juvenile Justice*, 53 Am. Crim. L. Rev. 641, 660 (2016).

[50] Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 Am. Crim. L. Rev. 641, 664-5 (2016).

[51] Jackie Mader and Sarah Burymowicz, Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children, The Hechinger Report, October 26, 2014 at 2. Available at: https://jjie.org/2014/10/26/pipeline-to-prison-special-education-too-often-leads-to-jail-for-thousands-of-american-children/#. Last visited 8/28/2018.

[52] Denise C. Herz, Ph.D., Kristine Chan, MSW, Susan K. Lee, Esq., Melissa Nalani Ross, MPP, Jaquelyn McCroskey, DSW, Michelle Newell, MPP, Caneel Fraser, Esq., Los Angeles County Probation Outcomes Study, Advancement Project, Cal State LA, Children's Defense Fund California, and USC School of Social Work, 2015 at 10, stating in part, "Standardized tests indicate that youth placed in probation camps are, on average, 16.7 years old and therefore are in the 11th grade but are achieving at a fifth grade level in math and Reading." (internal citation omitted) Id at 71, explaining, "One-fifth of suitable placement males and one-quarter of camp males were identified as

disability and IEPs are prevalent amongst juvenile justice youth in LA County.[53] Once a child becomes a client of the Juvenile Justice Clinic at the Center for Juvenile Law and Policy because of a juvenile delinquency case in Los Angeles, attorneys vet each case for special education services, and in 73 percent of cases education advocacy was needed.[54]

In addition, children in the juvenile justice system suffer from mental health concerns at rates higher than the general population of children. Prior experiences of trauma and victimization subject youth to a greater chance of justice system involvement.[55] In addition to causing trauma disorders, trauma experiences also increase the likelihood of a co-existing mental health condition.[56]

4) RECORDING WILL KEEP INTERROGATORS HONEST AND WILL AID THE COURT

As Toby's case demonstrates, recording interrogations will assist the Oregon courts in assessing (1) the factors establishing custody, (2) the constitutionality of the tactics employed by interrogators be they law enforcement, teachers, or school administrators, (3) the context and reliability of any of the suspect's admissions, and (4) the credibility of the person who has conducted the interrogation.

The U.S. Supreme Court in *Arizona v. Fulminante* 499 U.S. 279 (1991) stressed that:

> A confession is like no other evidence. The defendant's own confession is probably the most probative and damaging evidence that can be used against him . . . . In the case of a coerced confession . . . the risk that a confession is unreliable, coupled with the profound impact the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that

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developmentally disabled (note: data were not available for female youth). One third of suitable placement youth and just under one-fifth of camp youth, on the other hand, had an Individual Education Plan."

[53] *Id.* at p. 71, explaining, "One-fifth of suitable placement males and one-quarter of camp males were identified as developmentally disabled (note: data were not available for female youth). One third of suitable placement youth and just under one-fifth of camp youth, on the other hand, had an Individual Education Plan."

[54] Samantha Buckingham, *A Tale of Two Systems: How Schools and the Juvenile Justice System Are Failing Kids*, 13 U. Md. L.J. Race, Religion, Gender & Class 179 (2013), at 205-206, stating in footnote 98, "Out of the 153 clients our juvenile justice clinic has represented from July 2009 through the end of August 2013, 111 became dual clients of our Youth Justice Education Clinic through this vetting process because they were in need of an educational advocate. Of those 111 clients dually represented for delinquency and education by our clinics, 50 have IEPS. Of the 50 students with IEPs, 21 became eligible for special education due to the representation of our educational advocacy and another three received Section 504 plans to accommodate their disability. Section 504 plans provide critical accommodations for students whose disabilities fall outside the scope of the IDEA. Rehabilitation Act of 1973, Pub. L. No. 93—112, § 504, 87 Stat. 355 (1973); 42 U.S.C.A. § 12204 (1990)."

[55] *See* MICHELLE EVANS-CHASE, ADDRESSING TRAUMA AND PSYCHOSOCIAL DEVELOPMENT IN JUVENILE JUSTICE-INVOLVED YOUTH: A SYNTHESIS OF THE DEVELOPMENTAL NEUROSCIENCE, JUVENILE JUSTICE, AND TRAUMA LITERATURE 747 (2014) (warning that "as a youth experiences repeated victimizations and/or exposures to violence," their chances of justice system involvement due to self-protective behavior increases "exponentially")

[56] *See generally*, ABRAM ET AL., *supra* note 17.

the confession's admission was harmless.[57]

The primary holding in *J.D.B.* is that a minor's age is relevant to *Miranda* custody analysis.[58] As *J.D.B.* says, "to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."[59]

A suspect may not be subjected to custodial interrogation unless he or she "knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent." [60] The court at a motions hearing to suppress must weigh "the juvenile's age, experience, education, background, and intelligence, and … whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[61]

In cases of juvenile interrogations, the court employs a "totality of the circumstances" test to determine whether the accused knowingly, voluntarily, and intelligently "decided to forgo his rights to remain silent and to have the assistance of counsel."[62] "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation" including "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[63]

In the adult context, police officers have an obligation to stop questioning a suspect if the suspect clearly and unambiguously asserts his or her right to counsel.[64] In assessing waiver, the Supreme Court held in the adult case of *North Carolina v. Butler* that "courts must presume that a defendant did not waive his rights" and that "the prosecution's burden is great."[65]

Typically, all of the circumstances surrounding a statement are not completely recorded in police reports or even in video and audio recordings. It is only through a full hearing on a motion to suppress that the complete picture emerges. Exploring the totality of the circumstances is essential for claims of inadequate waiver of Fifth Amendment Miranda rights as well as claims of overall coercion and involuntariness pursuant to the Fourteenth Amendment. Even with exculpatory statements it is important to file a motion to suppress because it is often impossible to predict whether facts will emerge at trial that make the statement more damaging than it appears at first glance. For example, a statement in which

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[57] *Id.* at 296.
[58] *J.D.B. v. North Carolina* 564 U.S. 261, 277 [131 S.Ct. 2394, 2406] (2011).
[59] *Id.* at 281.
[60] *People v. Sims* 5 Cal.4th 405, 440 (1993).
[61] *Fare v. Michael C.,* 442 U.S. 707, 725 (1979).

[62] *See*, *People v. Lessie* 47 Cal.4th 1152, 1165–1166 (2010.
[63] *Id.* 1167.
[64] *Davis v. U.S.* 512 U.S. 452, 462 [114 S.Ct. 2350, 2356, 129 L.Ed.2d 362] (1994).
[65] 441 U.S. 369, 373 [99 S.Ct. 1755, 1757] (1979).

the defendant claims self-defense may prove damaging in the absence of any compelling evidence that the defendant was even present at the crime scene.

If there are suspected issues with the validity of a Miranda waiver, it is important to raise claims on both Fifth and Fourteenth Amendment grounds. A voluntariness claim may exist at the same moment in time as a Miranda claim, or a voluntariness claim may not be present until hours into an interrogation. When police officers continue to question a suspect accusatorily despite protestations of innocence and assert belief in a suspect's guilt in the face of the proclamations of innocence, Fourteenth Amendment claims may become ripe. If an issue exists with police interrogators exerting coercion and exploiting a child's vulnerabilities at time of extracting a Miranda waiver, then the entire statement may be excluded on Fifth Amendment grounds due to a Miranda violation and also pursuant to a Fourteenth Amendment voluntariness claim.

Recordings will help courts to assess factors about which officers may or may not be aware at the time of the interrogation.