No. S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

STEVE M.,

Defendant and Appellant.

ON REVIEW AFTER AN UNPUBLISHED DECISION OF THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE, NO. B287803, LOS ANGELES COUNTY SUPERIOR COURT NO. FJ54509
HONORABLE COMMISSIONER BENJAMIN CAMPOS

PETITION FOR REVIEW

SAMANTHA BUCKINGHAM (SBN 227113)
Center for Juvenile Law and Policy Loyola Law School
919 Albany Street Los Angeles, CA 90015
Telephone: (213) 736-1328 office / (202) 607-1470 mobile
Email: samantha.buckingham@lls.edu
Attorney for Defendant and Appellant Steve M.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. STEVE M., Defendant and Appellant,	Court of Appeal No. B287803 Los Angeles County Superior Court No. FJ54509

PETITION FOR REVIEW

OF DECISION OF THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and appellant, Steve M., respectfully petitions this Honorable Court for review in the above-entitled matter, following filing of an unpublished opinion by the Court of Appeal of the State of California, Second Appellate District, Division Five, on April 17, 2019, affirming the judgment of the lower court. A copy of the opinion of the Court of Appeal is attached (Exhibit A).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

FEDERAL CASES

STATUTES

CALIFORNIA CODE

OTHER AUTHORITIES

Adams, E. J., Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense (2010). Justice Policy Institute, 2 20
Allison Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas* (2010) 62 Rutgers L. Rev. 943 31
Angela Weis, John Howard Inst., INCARCERATED YOUTH &CHILDHOOD TRAUMA 19
Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, (2013) 23 Cornell J.L. & Pub. Pol'y 395 20
Child Welfare Information Gateway, Understanding the effects of maltreatment on brain development (2015) Washington, DC: U.S. Department of Health and Human Services, Children's Bureau 19, 36
Denise C. Herz, Ph.D., Kristine Chan, MSW, Los Angeles County Probation Outcomes Study, Advancement Project (2015) Cal State LA, Children's Defense Fund California, and USC School of Social Work 22
Hui Huang, Joseph P. Ryan, & Denise Herz, *The Journey of Dually-Involved Youth: The Description and Prediction of Rereporting and Recidivism* (2012) 34 CHILDREN & YOUTH SERVICES REV. 254 ... 19
Jackie Mader and Sarah Burymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children* (October 26, 2014) The Hechinger Report 22
Karen M. Abram, et al., PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth (2013) U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, 1 ..... 19, 20
Loreli Laird, *Police Routinely Read Juveniles their Miranda Rights, But Do Kids Really Understand Them?* (August 8, 2016) Center on Children and the Law, Child Law Practice Today 21
Marsha L. Levick, Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind*? (2012) 47 Harv. C.R.-C.L. L. Rev. 501 27
Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence* (2012).15 U. PA. J.L & SOC. CHANGE 285 18
Michelle Evans Chase, Addressing Trauma and Psychosocial Development In Juvenile Justice-Involved Youth: A Synthesis Of The Developmental Neuroscience (2014), Juvenile Justice and Trauma Literature, 747 20
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 (2018) 21 N.Y.U. J. Legis. & Pub. Pol'y 1 21
Samantha Buckingham, *A Tale of Two Systems: How Schools and the Juvenile Justice System Are Failing Kids* (2013) 13 U. Md. L.J. Race, Religion, Gender & Class 179 22
Saul M. Kasson et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs (2007) 31 Law & Hum. Behab. 381 20
Shonkoff, J. P., The lifelong effects of early childhood adversity and toxic stress(2012). Pediatrics, 129 ..... 19, 36
Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* (2007) 34 N. Ky. L. Rev. 257 31
Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post–DNA World* (2004) 82 N.C.L.Rev. 891 30

QUESTIONS PRESENTED

1) Whether juvenile suspects should be exempt from "implied waivers" of *Miranda* because of the high risk that juveniles, as a class, will misunderstand their rights and become too intimidated to assert them.

2) Whether the police should be prohibited from using deceptive tactics, such as ruses, to goad juvenile suspects to confess because juveniles, as a class, falsely confess at a much higher rate than adults in response to coercive interrogation techniques.

3) Whether, under the totality of the circumstances, including the juvenile suspect's learning disability and traumatic history, the implied waiver of Miranda was not knowing, intelligent, and voluntary and the confession was also involuntary.

NECESSITY FOR REVIEW

Petitioner respectfully requests that review be granted under California Rules of Court, rule 8.500(b)(1), because it is necessary to settle the following important questions of law:

"[I]t is the odd legal rule that does not have some form of exception for children." (*Miller v. Alabama* (2012) 567 U.S. 460, 481.)

Given Supreme Court precedent establishing that children must be afforded greater protections than adults due to the nature of adolescence, their lack of life experience, increased susceptibility to pressure, and risk of false confession as well as the prevalence of learning disabilities and trauma amongst justice involved youth, *Miranda* waiver is one area of the law where youth MUST be afforded protections above and beyond those afforded to adults. No previous California Cases address the validity of

Miranda waivers in light of both trauma and learning disability.

The U.S. Supreme Court and this Court have a history "replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 274.) A "child's age is far more than a chronological fact. It generates commonsense conclusions about behavior and perception that apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge." (*Id.* at 272.) (internal citations and quotations omitted).

Recent developments in law and neurological science have confirmed that children are entitled to greater constitutional protections than adults because they "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." (*Id.* at 272.). Children are also "more vulnerable or susceptible to... outside pressures" than adults and "have limited understandings of the criminal justice system and the roles of the institutional actors within it."(*Id.)*

In "the specific context of police interrogation, [the U.S. Supreme Court has] observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." (*J.D.B.*, *supra*, 564 U.S. at 272.) Steve M. is one of many juveniles who have been overpowered in a police investigation. The manner in which *Miranda* rights were read to Steve did not offer him the opportunity to make a fully informed and voluntary choice about whether or not to sacrifice important Constitutional rights. Every aspect of the interrogation was geared toward eliciting incriminating statements. Police officers exploited Steve's difficulty appreciating a concept as complex as legal rights, barriers to

comprehending due to an auditory processing learning disability, immaturity due to trauma exposure, vulnerability to pressure, susceptibility to influence from authoritative adults, and his limited understanding of police interrogation or its consequences. Indeed, the high level of trauma amongst justice system involved youth impacts their brain development and makes them even more susceptible to authoritative influence and pressure. (Samantha Buckingham, *Trauma Informed Juvenile Justice* (2016) 53 Am. Crim. L. Rev. 641, 660, 664-5.) This information was available to both lower courts when they assessed Steve's capacity to voluntarily waive *Miranda* rights and assert himself throughout the interrogation.

This Court should review two specific techniques police used against 17- year-old Steve. First, police relied on an implied waiver of *Miranda* and did not even attempt to elicit an express waiver or explain that Steve was giving up his *Miranda* rights by speaking to them. Thus his waiver was neither knowing nor voluntary. Second, the interrogating officer insisted *falsely* that he had incriminating video of Steve, after which Steve adopted the officer's version of events.

Recent developments in juvenile law and policy, neuroscience, and the *Reid* manual on interrogation support a categorical rule barring police from using these coercive tactics against children. *(In re Elias V. (2015)* 237 Cal. App. 4th 568, 588.) Review is required to determine whether juveniles like Steve should be protected from some of the most deceptive and coercive interrogation techniques employed by officers.

Steve's case offers a perfect example of how a youth, even at 17, is vulnerable to misunderstanding Miranda rights and succumbing to police pressure interrogation due to his adolescence and amplified immaturity

stemming from his trauma, specific learning disability, and experience with depression.

STATEMENT OF FACTS

I. Background

A. Childhood Trauma and Depression

Steve was a 17-year-old child at the time of his arrest and presentment in juvenile delinquency court and had no prior adjudications. (CT 5.) Because Steve's biological father was absent, Steve spent his childhood with his siblings and single mother, Jannet Gloria. Throughout his childhood, Steve witnessed violence in his home. (*Id.* at p. 13.) For instance, Gloria was the victim of domestic violence at the hands of her live-in boyfriend. (*Id*.) In addition, a few years prior to his arrest in this case, the Department of Child and Family Services substantiated Steve's sister's claims that Gloria's boyfriend had sexually abused her. (*Id.*) Then, Steve's disabled brother was removed from the home and Steve's older sister left the house. (§ 782 Motion[1] 2.)

Psychologist Dr. Artha Gillis evaluated Steve and determined that he suffered from major depressive disorder from age 14, at around the same time that DCFS became involved with his family. (§ 782 Motion 5.) Steve experienced depressed mood, guilt, hopelessness, sadness, tearfulness, low appetite, and early insomnia. While his mother noticed the onset of these symptoms, there was not much she could offer to help him. (*Id.*) Steve's untreated depression led him to twice attempt to hurt himself. (*Id.*)

[1] Defense Motion to Dismiss Pursuant to WIC § 782, added to the record on February 8, 2019.

B. Learning Disabilities

At the time of the crime and resulting investigation, Steve was a special education student struggling with processing disorders. Steve has had an individualized education program ("IEP") [2] since he was about 4 years old. (CT 39.) According to the IEP documents authored just prior to his arrest, when listening and being asked questions, Steve needed as an accommodation, "extended time for processing (30-40 seconds)", and rewording the question. (*Id.* at pp. 39-52.) Additionally, the IEP indicated that, in order to ensure comprehension, Steve may have needed to "repeat back questions" while his teachers may have needed to "clarify and repeat directions" or "check for understanding." (*Id.* at p. 106.)

Because English is Steve's second language, his IEP documents noted that he is an English Language Learner and his most recent California English Language Development Test ("CELDT") score placed him at "Early Intermediate in listening proficiency (i.e. understanding verbal language). (CT 105.) "Students who perform at [Steve's] level on the CELDT typically understand basic vocabulary and syntax, with frequent errors and limited comprehension." (*Id.* at pp. 109-110.)

II. The Offense

Around 12:30 am on December 4, 2016, officers received a radio call about an attempted robbery near Vermont and 36th Place. (ART 311.) The complaining witness, Alfonso Castellanos, claimed that three unarmed boys approached him and attempted to take his bicycle. (CT 10.) The boys were unsuccessful in their efforts. (*Id*.) Castellanos left the brief encounter

[2] A child is entitled to special education services and an IEP under the Individuals with Disabilities Education Act ("IDEA").

with all of his property and reported the incident to the police. (*Id.* at p. 12.)

Officers located Steve and his two teenage companions and detained them. (*Id.* at pp. 68-69.) After the officers stopped the three boys, the officers moved the boys to another location for a show-up identification. (ART 346.) Steve was handcuffed during the identification procedure. (ART 359-360.)

III. The Interrogation

Two hours later, an officer led Steve, handcuffed, into the small interrogation room and placed Steve in a chair across from Detective Gallego, a large officer who chewed and spat tobacco throughout the interrogation. (1 PEX 2:37:36.[3]) The second officer remained in the room.

At the beginning of Steve's questioning, Gallego asked Steve basic questions: "How old are you?" "Where do you live?" "Who do you live with?" "What is your phone number?" (2 PEX 1-2.) When Gallego asked Steve his phone number, Steve stated that he did not know his phone number. (*Id*. at p. 2.) Gallego responded, "You been drinking tonight?....You been snorting?" (*Id.*) Steve admitted to smoking marijuana earlier that night. (*Ibid.*)

After asking introductory questions, Gallego read Steve's *Miranda* rights, spending a total of only 32 seconds doing so. (1 PEX 2:39:04-2:39:36.) For each *Miranda* right, Gallego informed Steve of the right and asked if he understood. (*Ibid.*) The Investigative Action Form has a section for an officer to fill out if they seek an express waiver of *Miranda* rights. (3

[3] People's Exhibit One: the police interrogation video. The time noted in the citations to this video refer to the time stamp that appears in the footage itself.

PEX.) When completing the form, Detective Gallego checked the box on the Form that Steve had indeed expressly waived his *Miranda* rights. (ART 332-334.) Further, Gallego wrote "yeah" as the exact words Steve used in expressly waiving his rights. (*Id.* at 333.) Gallego completed the form in this manner wihtout having asked Steve the fifth and final question on the *Miranda* form for an express waiver. (2 PEX 3.)

More than once, Gallego asked Steve if he was "following" the conversation. (2 PEX 5.) In addition, Gallego had to explain to Steve what he meant by "arrest" because Steve took that to mean getting in trouble at school or getting a ticket. (*Id.* at p. 9.)

Ultimately, Gallego employed a variety of coercive tactics to pressure Steve to confess. First, Gallego interrupted and denied Steve's protestations of innocence. (2 PEX 5-6) Then Gallego lied to Steve about video evidence that existed, a tactic known as a "ruse." (2 PEX 5.) Gallego demonstrated his power by repeatedly interrupting Steve. For instance, Gallego ordered, "put your hat back on." (2 PEX 11.) At the end of the interrogation, Gallego shot a series of rapid-fire questions at Steve, interrupting Steve's answers with further questions. (2 PEX 12.) Finally, Gallego said, "[Castellanos] identified all three of you as someone who tried to rob him….[b]ecause he thought you were gonna try to rob him? Because you were going to?" (*Ibid.*) Worn down and confused, Steve assented. (*Ibid.*) Steve did not elaborate further in his own words. Gallego abruptly concluded the interrogation. (*Ibid.*)

IV. The Proceedings

On February 7, 2017, Steve was arraigned on a Welfare and Institutions Code section 602 petition alleging attempted robbery in

violation of Pen. Code § 644/211 for his purported conduct on December 4, 2016 when Steve was 17 and not quite two months old. (CT 11.)

On June 2, 2017, Steve moved to exclude his statements and identification evidence. (Ex. A. At 3) On November 7, 2017, Commissioner Campos denied the motion to suppress Steve's statements finding a lack of case law prohibiting Gallego's method of administering Steve's *Miranda* warning. (ART 625.)

On November 29, 2017, Steve entered an admission of guilty pursuant to an agreement with the prosecution. As part of the plea deal, the court and the assistant district attorney agreed Steve would retain the right to appeal pretrial decisions. (RT 8.) The court ordered a deferred entry of judgment and placed Steve on probation. (RT 4-5.)

On January 26, 2018, Steve's counsel filed a timely notice of appeal. (CT 130-131.)

V. Appellate Decision

On April 17, 2019 the Court of Appeals for the second district issued a decision denying Steve's appeal on all grounds. The opinion erroneously stated that Steve was 17 and nine months old at the time of events on December 4, 2016. (Ex. A at 3.)

ARGUMENT

I. Juvenile Suspects Should Be Exempt From "Implied Waivers" Of *Miranda* Because Of The High Risk That Juveniles, As A Class, Will Misunderstand Their Rights And Be Too Intimidated To Assert Them.

The Court of Appeal declined to consider the effect of recent developments in juvenile law and policy that recognize that children are more susceptible to pressure from authority and less capable of understanding the complexities of criminal proceedings against them. These vulnerabilities are most important when a child's consent to give up constitutional rights is at issue.

A. Standard of Review

The Court of Appeal gave improper deference to the trial court's determination that Steve voluntarily waived his *Miranda* rights. The opinion first cited the correct standard for independent review of the trial court's legal determinations. (Ex. A at 14, [We] "accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*.") (citations omitted). But then it erroneously cited a legal standard that only applies to supreme courts and allows a higher court to weigh the legal conclusions of the intermediate appellate court. (*See id.)* The opinion stated, "we note that when we undertake a substantial evidence review, if the evidence reasonably justifies the juvenile court's facts, whether they might also reasonably support a contrary finding, does not warrant reversal." (Id.) Typically, when this Court reviews the "trial court's decision on a *Miranda* issue, [the Court] accept[s] the trial court's determination of disputed facts if

supported by substantial evidence, but [it] independently decide[s] whether the challenged statements were obtained in violation of *Miranda.*" (*In re Art T.* (2005) 234 Cal.App. 4th 335.) Here, the legal conclusions were precisely the determinations that the Court of Appeal was required to evaluate independently. In Steve's case, the police interrogation was recorded on video, which was also transcribed. (*See* 1 PEX and 2 PEX*.)*

B. U.S. Supreme Court Recognizes Children Are Afforded Greater Protection Due To Their Susceptibility To Pressure, Inability To Predict Negative Outcomes, Limited Life Experience, And Impaired Decision-Making Abilities.

The neuroscience and psychology of adolescent development demonstrate how 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 pressure and have difficulty making decisions; they are less sophisticated and thus easily manipulated by adults; and they have greater potential to grow than adults. (*J.D.B. v. North Carolina (2011) 564 U.S. 261;* Roper v. Simmons (2005) 543 U.S. 55; *Graham v. Florida (2010) 560 U.S. 48*.)

The U.S. Supreme Court has steadfastly recognized that juveniles are different from adults in the interrogation context. *(See, e.g., In re Gault (1967)* 387 U.S. 1, 45, "Admissions and confessions of juveniles require special caution.") Adolescents reflexively comply with authority 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. (Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence* (2012).15 U. PA. J.L & SOC. CHANGE 285, 291.) In juvenile interrogations, the Court has long acknowledged, "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." (*Gault, supra,* 387 U.S. at p. 55.)

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." (Gallegos v. Colorado (1962) 370 U.S. 49.), 54.

C. Adolescent Susceptibility to Pressure Is Even More Pronounced for Children with a History of Trauma.

In addition to their adolescent immaturity, justice involved youth disproportionately have traumatic backgrounds and mental health needs, making them even more vulnerable to pressure when interrogated. Many children in the juvenile justice system have unmet needs relating to abuse, disabilities, behavioral health issues, and poverty. Children often enter the delinquency system from poor performing schools and with a history in the child welfare system. (*See* Hui Huang, Joseph P. Ryan, & Denise Herz,

The Journey of Dually-Involved Youth: The Description and Prediction of Rereporting and Recidivism (2012) 34 CHILDREN & YOUTH SERVICES REV. 254, 254.)

The vast majority of justice involved youth have experienced trauma. 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 experienced at least one traumatic event.[4]

Further, recent literature suggests that children who have experienced trauma, exhibit reduced maturity levels. In fact, "children's experiences with … maltreatment or other forms of toxic stress, such as domestic violence or disasters, can negatively affect brain development." (Child Welfare Information Gateway, Understanding the effects of maltreatment on brain development (2015) Washington, DC: U.S. Department of Health and Human Services, Children's Bureau; see also Shonkoff, J. P., The lifelong effects of early childhood adversity and toxic stress(2012). Pediatrics, 129, e232–e246.) 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." (Adams, E. J., Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes

[4] Angela Weis, John Howard Inst., INCARCERATED YOUTH &CHILDHOOD TRAUMA at 1, http://www.thejha.org/trauma; Karen M. Abram, et al., *PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth* (2013) U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, 1, 10–12. (Finding that youth who experienced trauma in the last year reported "witnessing violence as the precipitating trauma.")

Sense (2010). Justice Policy Institute, 2.) Relevant to the issue of waiver of *Miranda* rights, youth who have suffered from trauma are more susceptible to pressure and outside influence. (*Roper v. Simmons* (2005) 543 U.S. 551, 570.)

Children in the juvenile justice system also suffer from mental health concerns at rates higher than the general population of children. Prior experiences of trauma subject youth to a greater chance of justice system involvement. (*See* Michelle Evans Chase, Addressing Trauma and Psychosocial Development In Juvenile Justice-Involved Youth: A Synthesis Of The Developmental Neuroscience (2014)Juvenile Justice and Trauma Literature, 747.) In addition to causing trauma disorders, trauma experiences compromise mental health. (Abram et al., *supra*, note 17.)

D. Children Require protections To Ensure They Comprehend Their Rights Prior To A *Miranda* Waiver

When it comes to waiving *Miranda* rights, adolescents waive their rights at a rate of 90 percent. (Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, (2013) 23 Cornell J.L. & Pub. Pol'y 395, 429.) Adults, by contrast, only waive their *Miranda* rights an estimated 68 percent of the time. (Saul M. Kasson et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs (2007) 31 Law & Hum. Behab. 381, 389.) 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. (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 (2018) 21 N.Y.U. J. Legis. & Pub. Pol'y 1, 29.)

Miranda rights are not easy to understand. Research indicates that even youth who have a basic understanding of the words of *Miranda* warnings have difficulty grasping their significance and comprehending how their rights apply to an interrogation. (Id.) Indeed, among youth who are between 12 to 19, around 94 percent exhibit "less than adequate appreciation of the significance and consequence of waiving their rights."(Id.) In fact, youth often understand "the right to remain silent" to mean that they should not speak unless it is to answer questions. (Loreli Laird, *Police Routinely Read Juveniles their Miranda Rights, But Do Kids Really Understand Them?* (August 8, 2016) Center on Children and the Law, Child Law Practice Today.)

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. (Jackie Mader and Sarah Burymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children* (October 26, 2014) The Hechinger Report at 2.) 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.[5] That same study demonstrated that developmental disability and IEPs are prevalent amongst juvenile justice youth in LA County.[6] 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.[7]

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[5] 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, (2015) Cal State LA, Children's Defense Fund California, and USC School of Social Work, at 10; *Id.* at p. 71, explaining, "One-fifth of suitable placement males and one-quarter of camp males were identified as developmentally disabled. One third of suitable placement youth and just under one-fifth of camp youth, on the other hand, had an Individual Education Plan."

[6] *Id.* at p. 71.

[7] Samantha Buckingham, *A Tale of Two Systems: How Schools and the Juvenile Justice System Are Failing Kids* (2013) 13 U. Md. L.J. Race, Religion, Gender & Class 179 at 205-206, starting 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)."

E. California Law Recognizes The Need To Protect Children In The *Miranda* Waiver Context

California's recent legislative trends compel this Court to invalidate the practice of implicit *Miranda* waiver. In October 2017, Governor Brown approved Senate Bill 395 adding section 625.6 to the Welfare and Institutions Code ("section 625.6"). (2017 California Senate Bill No. 395, California 2017-2018 Regular Session.) The new law requires, with some exceptions, that, "[p]rior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference." (Welf. & Inst. Code, § 625.6.) In addition, the law prohibits a waiver of the consultation. (*Ibid.*)

As justification for the new law, the bill authors noted that "[p]eople under 18 years of age have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver. A large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions." (Senate Bill No. 395.)

This law increased protections afforded children age 15 and younger, though it sadly left those justice involved youth who are 16 and 17 just as vulnerable as adults in a *Miranda* waiver scenario.

F. *Miranda* Waiver Analysis of Juvenile Suspect's Rights

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." (*People v. Sims* (1993) 5 Cal.4th 405, 440.) 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." *(Fare v. Michael C. (1979)* 442 U.S. 707, 725.)

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." (*People v. Lessie* (2010) 47 Cal.4th 1152, 1165–1166.) As stated in *Lessie*, "[t]he 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." (*Id.* at 1167.)

G. Implicit Waiver of *Miranda* Does Not Adequately Protect Youth from Abandoning Important Rights

The U.S. Supreme Court cases addressing implicit waiver pre-date *J.D.B.* and address the validity of implied waiver with adult suspects, not children like Steve.

The U.S. Supreme Court has approved of implied waivers of *Miranda* rights under limited circumstances. In *Butler,* the agent gave the adult suspect an official FBI "Advice of Rights Form" that "fully advised [the suspect] of the rights delineated in the *Miranda* case," including his right to invoke or waive his *Miranda* rights. (*North Carolina v. Butler (1979)* 441 U.S. 369, 370-371.) After reading the form, Butler

stated, "I will talk to you but I am not signing any form." (*Id.* at 371.) The Court held that Butler's refusal to sign the form did not invalidate his otherwise knowing and intelligent waiver. (*Id.* at 373.) Similarly, in *Berghuis* the adult suspect was presented with a written form that reflected each *Miranda* warning and a "fifth warning" advising him that he could invoke these rights at any time. (*Berghuis v. Thompkins (2010)* 560 U.S. 370, 375, 386.)[8] In *Thompkins*, the officer had Thompkins read the warning aloud to verify that Thompkins could read and understand English. (*Id.* at 9a.) No such safeguard was employed with Steve.

This case is distinguishable from *Butler* and *Berghuis* because, here, Detective Gallego did not provide Steve with the Investigative Action Form to read himself, did not take any steps to ensure Steve's ability to read or to understand English, and, most significantly, *deliberately refrained from reading the fifth question on the form that directly relates to the issue of waiver*. (*See* 1 PEX 2:39:00-40.) The failure to read the fifth question on the Investigative Action Form – "Do you want to talk about what happened?" – deprived Steve of the knowledge that the adult suspects in *Butler* and *Berghuis* clearly possessed before speaking to the police: an understanding that the ultimate choice to invoke or waive *Miranda* rights and speak to the police rests with the individual suspect, not the interrogating officers.

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[8] In *Thompkins*, the fifth warning was even more elaborate than the fifth warning on the CA *Miranda* form in this case. The officer had the adult suspect read this aloud, "5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." Brief for Petitioner 60 (some capitalization omitted).

Absent being asked the fifth question, Steve had no way of knowing that he had the right not to speak with the officers. As such, there is no basis in the record on which to infer a knowing, voluntary, and intelligent waiver.

H. No Previous California Case Addresses The Propriety Of An Implied Waiver Of *Miranda* Rights In Light Of Learning Disability And Trauma Exposure

This issue is a novel and ripe issue for the California Supreme Court. The purported implied waiver in this case raises similar concerns as the custody issue in *J.D.B.*

While the California Supreme Court has referred to a juvenile impliedly waiving *Miranda,* the court has not had the opportunity to evaluate implied waiver in light of *J.D.B*, which radically changed the landscape of juvenile interrogations. In addition, none of the previous California Supreme Court juvenile cases addresses the same scenario presented in Steve's case where the juvenile suspect has a documented learning disability and history of trauma.

J.D.B. affords juveniles greater protection in a custodial interrogation setting by mandating that age is a factor in assessing the reasonable person analysis of Fifth Amendment custody.[9] Justice Sotomayor stressed in *J.D.B.* that to ignore the youth's age and adolescent immaturity in determining whether "a suspect has been

[9] Legal scholars recently wrote that *J.D.B.*'s holding implicates "other areas of criminal procedure—including voluntariness of waivers of rights ..." Marsha L. Levick, Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind*? (2012) 47 Harv. C.R.-C.L. L. Rev. 501, 504.

taken into custody – and thus 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." *J.D.B.* at 281. In California, *In re Art T* established that *J.D.B.*'s incorporation of age as a factor of Fifth Amendment protections during an interrogation goes beyond custody to assertion of right to counsel, reasoning that "the same considerations that informed the J.D.B. decision apply to this inquiry." In re Art T. 234 Cal. App.4th 335, 353 (2015) Here, Steve argues that J.D.B. and In re Art T together mean that age impacts the knowing, intelligent, and voluntary nature of a *Miranda* waiver of Fifth Amendment rights of all children.

California cases addressing implied waiver are inapplicable to the instant case. First, in 2010, in *People v. Lessie*, the California Supreme Court held that a juvenile's request to call a parent during an interrogation does not trigger an invocation of Fifth Amendment protections and that a child could impliedly waive his *Miranda* rights. (*People v. Lessie* (2010) 47 Cal.4th 1152.) In *Lessie*, the 16 year-old defendant was charged in adult criminal court with a homicide.(*Id*.) Lessie, unlike Steve, did not have any documented learning disabilities, was not an English Language Learner, had prior juvenile justice involvement, had been to juvenile delinquency court, and had previously been represented in court by a lawyer.(*Id*.) Perhaps most importantly, *Lessie* was decided in 2010 and pre-dates *J.D.B.* as well as the California legislature's increased protections for youth during interrogations and can be factually distinguished from the instant case.

Second, in both *People v. Nelson (2012) 53 Cal. 4th 367* and *In re Art T. (2015) 234 Cal. App. 4th 335*, California juvenile cases involving an implied waiver of *Miranda* after *J.D.B.* was decided, the assertion of *Miranda* rights, not the implied waiver, was at issue. In both cases, the implied waiver was *not* challenged by the parties. In *Nelson,* the Court noted that it is undisputed that he made a knowing, voluntary, and intelligent waiver. (*Nelson, supra*, 53 Cal.4th 367). *Nelson* only held that a juvenile suspect's mid-interrogation request to speak with his mother and request for the police to leave him alone was not an invocation of the right to counsel.

The appellate court held in *In re Art T.* in 2015 that a 13-year-old boy's statement, "Could I have an attorney?" was an invocation of his Fifth Amendment right to counsel. (*In re Art T* (2015) 234 Cal. App. 4th 335, 356.) The Court applied the following standard: "whether a reasonable officer in light of circumstances known to the officer that would have been objectively apparent to a reasonable officer, including a juvenile's age, would understand the statement by a juvenile to be a request for an attorney." (Id. at 339)[10]

Third, in 2017, the Court of Appeal for the First District invalidated both the voluntariness of a *Miranda* waiver and the overall involuntariness of a juvenile statement in the case *In re T.F. (2017)* 16 Cal. App.5th 202. The trial court had found that T.F. made a

[10] *Cf*. In *People v. Jones*, in 2017, a 16-year-old homicide defendant with no learning disability and extensive prior justice system and court involvement had not involuntarily waived his *Miranda* rights nor made an involuntary statement pursuant to the Fourteenth Amendment. *People v. Jones* (2017) 7 Cal. App.5th 787, 811.

valid implied waiver of his *Miranda* rights. (*Id.* at 209.) In deciding that the implied waiver was involuntary, Court relied heavily on the tactics used by the detectives and features of the juvenile subject. Similar to Steve's case, the detective from *In re T.F.* engaged in a rapid reading of *Miranda* rights (*Id.* at 211) the juvenile subject had been in a special education program (Id. at 213), and the subject was never previously in police custody or interrogated by police. (*Id.* at 212)

Fourth, the California Supreme Court has never endorsed deputies extracting an implied waiver out of a juvenile suspect by skipping the final question on an approved form that would have alerted the juvenile that he did not have to talk to the police. In fact, courts have disapproved of law enforcement employing similar rushed and incomplete *Miranda* advisements to elicit an implied waiver from a juvenile suspect. (*See, e.g., In re T.F., supra,* 16 Cal. App.5th at pp. 202)

II. Police Should Be Prohibited From Using Deceptive Tactics, Such As Ruses, To Goad Juvenile Suspects To Confess Because Juveniles Falsely Confess At A Much Higher Rate Than Adults In Response To Such Coercive Interrogation Techniques.

A. Standard of Review

Whether coercive police activity was present and whether a suspect's statement was voluntary are subject to independent review on appeal. (*People v. Jones (1998)* 17 Cal. 4th 279, 296.) The trial court's findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, are reviewed for substantial evidence. (*Id.)*

B. The Court of Appeal Erred When It Held that the Same

Deceptive Tactics that are Appropriate for Adults Should Be Used Against a Child.

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. (*See* Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post–DNA World* (2004) 82 N.C.L.Rev. 891.) Another study found that "juveniles are over-represented in proven false confession cases, typically accounting for about one-third of the samples." (Allison Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas* (2010) 62 Rutgers L. Rev. 943, 952.)

Tactics which may not be coercive when applied to adults might be considered coercive when used on teenage suspects.[11] 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. (Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* (2007) 34 N. Ky. L. Rev. 257, 274-75.) *In re T.F.* cautions that using deception or a ruse "should be avoided with a youthful suspect with low social maturity." (*In re T.F., supra,* 16 Cal. App.5th at p. 215) (internal citations omitted) The Court of Appeals has recognized that even a ruse that appeared to be "calm,"

[11] See *Haley v. Ohio* (1948) 332 U.S. 596, 599 ("that which would leave an adult cold and unimpressed can overawe and overwhelm" a 15 year-old).

"gentle," and "not convoluted" was too coercive for a juvenile. (*People v. Elias V*. (2015) 237 Cal.App.4th 568, 569.)

The "voluntariness test" looks at both external circumstances of the interrogation as well as 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." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 discussing *Blackburn v. Alabama* (1960) 361 U.S. 199.).

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 Steve that he was caught committing the offense on video, that was a deceptive technique exerting undue 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 suspect rendered his confession involuntary because such tactics substantially increased the likelihood that a juvenile would give a false confession. *Elias V*., supra, 237 Cal.App.4th 568.) There is a need in light of the "growing consensus—among the supporters of those techniques, not just the critics—about the need for extreme caution in applying them to juveniles." (*Id. at 587.)*

III. Steve Did Not Knowingly, Intelligently, And Voluntarily Waive His *Miranda* Rights And Steve's Will Was Overpowered By Detective Gallego

In *North Carolina v. Butler* (1979) 441 U.S. 369, the Supreme Court held that "courts must presume that a defendant did not waive his rights" and that "the prosecution's burden is great." No court could, on this record, be convinced that Steve could voluntarily, knowingly, and intelligently provide an implied waiver under these circumstances.

Here, the People did not meet their burden. There are two areas to examine: Steve's particular characteristics and Detective Gallego's manner of questioning which included coercive tactics, such as speeding through the *Miranda* warnings, failing to explain the rights, ignoring comprehension issues Steve demonstrated, and failing to seek an express waiver.

Steve experienced significant childhood trauma. Steve experienced domestic violence in his home with his mother and sister as the victim. In addition, Steve's developmentally disabled brother was removed from the family home. This trauma delayed Steve's intellectual and emotional maturity level. The U.S. Supreme Court has acknowledged that juveniles are "susceptible to influence and to psychological damage" and that courts must consider evidence of "neglectful and violent family background." (*Miller v. Alabama* (2012) 567 U.S. 460, 476.)

The court also had before it information directly relevant to Steve's ability to understand *Miranda* warnings. According to Steve's recent IEP just prior to his arrest in this matter, Steve needed as an accommodation, "extended time for processing (30-40 seconds)" when teachers read questions to him (CT 39-52, 106), and if he still did not understand, then

the teacher was required to reword the question. (*Id.* at pp. 39-52.) The IEP instructed that, in order to ensure comprehension, Steve may have needed to "repeat back questions" while his teachers may have needed to "clarify and repeat directions" or "check for understanding." (*Id.* at p. 106.) Detective Gallego did not explain important Constitutional rights to Steve, he did not rephrase the *Miranda* rights and re-read them, nor did he check for Steve's comprehension by asking Steve to explain back what he understood his rights to be. In addition, Steve's IEP documents noted that he is as an English Language Learner and his most recent testing placed him only at the Early Intermediate level in listening proficiency. (CT 105.)

A. Detective Gallego Used Tactics Which Interfered With A Knowing, Intelligent, And Voluntary Waiver Of *Miranda* Rights

Detective Gallego noticed Steve's diminished intellectual ability and the outward signs of Steve's difficulty comprehending the interrogation. In fact, Gallego repeatedly asked Steve questions searching for an explanation for Steve's confusion and clear lack of understanding. (2 PEX 5.) More than once, Gallego had to ask Steve if he was following the conversation. (*Id.*) This is not surprising given that Steve's IEP indicated that he required repetition of directions, extra time for processing, and checks for understanding.

Detective Gallego was aware of Steve's comprehension and special education issues, from outset of his meeting with Steve. Before reading some of the *Miranda* warnings, Detective Gallego asked Steve twice who he lived with. (1 PEX 2:38:24-7.) In response to a request for his telephone number, Steve could not provide the number to Gallego. (1 PEX

2:38:36-38.) Steve's poor responses and ineffective manner of speech during the booking questions clearly concerned the detective. In fact, Gallego asked Steve at this point, "have you been drinking tonight?" (1 PEX 2:38:47.) Then he asked Steve, "have you been snorting?" (1 PEX 2:38:49.) When viewed objectively these questions reflect that a reasonable police officer in Gallego's position was concerned about Steve's comprehension and ability to communicate, at least in part due to what appeared to be intoxication. We now know that Steve's communication difficulties from the onset of his conversation with Gallego had to do with his specific learning disability, adolescence, trauma exposure, and intoxication, all of which vitiated a valid waiver of *Miranda*.[12] Nonetheless, Detective Gallego blasted through the *Miranda* warnings and then proceeded immediately to the interrogation, saying to Steve, "we are going to talk about why you're here." (2 PEX 10.)

Just as an officer would observe the age of a child before him, he would observe the attendant "differentiating characteristics of youth" discussed by the Supreme Court in J.D.B. as "commonsense" and "universal." (J.D.B, supra, 564 U.S. at pp. 272-74.) Here, given Steve's evident lack of understanding, an objectively reasonable police officer would have identified that Steve had comprehension issues at the interrogation's outset, even before the rights were read. Further, an objectively reasonable police officer knows that youth in the juvenile

[12] See *In re Peter G*. (1980) 110 Cal. App. 3d 576, 585 (holding that "due to [Peter G.'s] tender age and heavy intoxication at the time of the police interview appellant did not possess the requisite free will and rational intellect to waive his Miranda rights.")

justice system suffer from learning disabilities at a higher rate than children in the general population.

Gallego read each right and immediately asked Steve if he understood and moved on to the next right. There was no explanation, no pausing for Steve to relay back what he thought he heard, and no opportunity for questions or clarification. Gallego spent a total of 32 seconds reading the warnings and asking if Steve understood. (1 PEX 2:39:04-2:39:36) The Court of Appeals for the First District condemned the practice of rapidly reading *Miranda* rights with a learning-disabled juvenile suspect. (*In re T.F.*, supra, 16 Cal. App, 5th 202.)

Moreover, Detective Gallego used a common investigative tactic of de-emphasizing the importance of *Miranda* rights.[13]

> 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.[14]

Steve was 17 years old at the time of the interrogation. Researchers have found that with juvenile justice involved youth ages thirteen to 17, "even the most sophisticated and mature youth were able

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[13] 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 (2018) 21 N.Y.U. J. Legis. & Pub. Pol'y 1, 27 (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.")

[14] Id.

to recall only 50 percent of *Miranda* content one minute after the warnings were administered."[15] Studies of *Miranda* are also conducted in less stressful circumstances than actual interrogation, which are "inherently high-stress."[16] Further, recent scholarly literature suggests that children who have experienced trauma, like Steve, 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."[17]

As the interrogation proceeded after the purported waiver, there is further evidence of continued communication impairment. Detective Gallego says to Steve more than once, "Are you following me?" (1 PEX 2:41:38-2:41:50.) Gallego says, "I don't believe you are with me." (Id.) Objectively viewed, these statements by Gallego must mean that a reasonable police officer in Gallego's position was aware that Steve was experiencing communication difficulties that compromised not only the waiver of *Miranda*, but also the voluntariness of his entire statement. Further, when Detective Gallego tried to ask Steve about a prior arrest,[18] Steve demonstrated confusion. Steve told Gallego that he thought that an "arrest" was "getting tickets." (2 PEX 10.)

B. Detective Gallego Falsified A Police Report And Is Impeached

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[15] Id at 111.

[16] Id at 33.

[*] Buckingham, *supra*, at pp. 664-5.

[17] Child Welfare Information Gateway, *supra*; see also Shonkoff, J. P. *supra*, at 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."].

Detective Gallego falsified a police report on December 4, 2017 when he questioned Steve by: (1) checking off that Steve had expressly waived his rights, (2) indicating that he asked Steve if he gave up his rights and wished to speak with the police, and (3) purporting that Steve had responded "yeah." (ART 332-334.) Detective Gallego testified falsely in court even after watching a video just moments earlier in court where he failed to complete the *Miranda* questioning and perform an express waiver. (ART 307-314.) Because Detective Gallego was impeached on the nature of the waiver he employed with Steve, Gallego's testimony should have been afforded zero credibility as to his impression of whether Steve understood his rights. Gallego's falsification of the form and testimony both served to exaggerate the propriety of the waiver.

In light of the weight of relevant factors—Steve's age, experience, education, background, intelligence, and inability to understand the warnings as read to him as well as the speed with which the warnings were read, the lack of explanation, the inattention given the importance of the rights, and the pressure exerted by Gallego—the Superior Court should not have found that the People met their high burden of establishing Steve's *Miranda* waiver.

C. Steve's Confession Was Involuntary Under The 14th Amendment

Here, under the totality of the circumstances, the court must consider that Steve had been detained and in police custody for over two hours in the middle of the night as well as his specific history of trauma, depression, and learning disability. It was not alone the ruse employed by Detective Gallego, but the cumulative impact of all of Gallego's tactics – rapidly reading *Miranda* rights, exploiting Steve's lack of understanding

and intoxication, exploiting Steve's youthful susceptibility to pressure, exaggerating evidence, threatening Steve to "come correct" (1 PEX 2:41:57-2:42:02), spitting tobacco, ordering Steve to take his hat off, denying Steve's protestations of innocence, telling Steve that he was "in jail", and presenting Steve with a guilty scenario – which overwhelmed Steve and resulted in a coerced confession. (See 1 PEX) [19]

D. The Admission Of Steve's Confession Was Prejudicial Under *Chapman*

The *Chapman* prejudice standard applies to evaluate harmless error because *Miranda* rights and voluntariness are federal constitutional protections. Under *Chapman*, the People must prove that the error here was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.) As the Court noted in *Arizona v. Fulminante*, a confession is such compelling evidence that prejudice is easier to find. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) Here, the People only presented two significant evidence sources: (1) Steve's confession, and (2) Castellano's identification. The confession was essential evidence for the People's case. The erroneous admission of the confession was not harmless beyond a reasonable doubt.

CONCLUSION

Review should be granted.

[19] *See Elias V.*, *supra*, 237 Cal. App. 4th at p. 591, noting that police do not need to deprive a child of sleep or food or use an aggressive tone to coerce a juvenile suspect).

Dated: May 28, 2019 Respectfully Submitted,

By: 

Samantha Buckingham (SB No. 227113)
Attorney for Appellant Steve M.

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I, Samantha Buckingham, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 8,200 words as calculated by the word processing software in which it was written. **I** declare under penalty of perjury under the laws of California that the foregoing is true and correct.

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District Attorney of Los Angeles
211 W Temple Street #1200
Los Angeles, CA 90012

Xavier Becerra
Mary Sanchez
Attorney General, State of California
300 S. Spring Street
North Tower #5001
Los Angeles, CA 90013

Steve M.
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Center for Juvenile Law and Policy
Loyola Law School
919 Albany Street
Los Angeles, CA 90015

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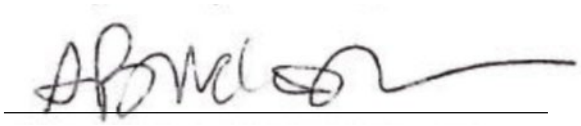

Samantha Buckingham