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IN THE SUPREME COURT OF OHIO

IN RE M.H.,	:	Case No. 2019-0621
A Minor Child	:	
	:	On APPEAL from the
	:	Cuyahoga County Court of Appeals
	:	Eighth Appellate District
	:	
	:	C.A. Case No. 105742

BRIEF OF AMICUS CURIAE JUVENILE LAW CENTER IN SUPPORT OF APPELLANT, M.H.

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Bellotti v. Baird,
443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) 12

Bruton v. United States,
391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) 10

Colorado v. Connelly,
479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) 10

Eddings v.Oklahoma,
455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) 1, 2

Gallegos v. Colorado,
370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962) 4, 5

Graham v. Florida,
560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2009) 3, 5

Haley v. Ohio,
332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948) 4, 5, 6

In re A.S.,
99 A.2d 1136 (N.J. 2009) 13

In re Gault,
387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) 4, 5, 11, 12

In re Steven William T.,
299 S.E.2d 876 (W.Va. 1997) 13

J.D.B. v. North Carolina,
564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) 1, 2, 3, 5

Little v. Arkansas,
435 U.S. 957, 55 L. Ed. 2d 809, 98 S. Ct. 1590 (1978) 12-13

Miller v. Alabama,
567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) 3, 5

Montgomery v. Louisiana,
136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) 3,5

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 3

Parham v. J.R.,
442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) 12

Prince v. Massachusetts,
321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) 12

Roper v. Simmons,
543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) 3, 5

Other Sources

A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 San Diego L.Rev. 39, 53 (1970) 5

Allison D. Redlich and Gail S. Goodman,
Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility, 27 L.& Hum.Behavior 141 (2003) 10

Amelia Courtney Hritz et al.,
Children's Suggestibility Research: Things to Know before Interviewing a Child, 25 Anuario de Psicología Jurídica 3 (2015), *available at* https://www.sciencedirect.com/science/article/pii/S1133074015000124 7

Barbara Kaban & Ann E. Toby,
When Police Question Children, Are Protections Adequate? 1 J.Ctr.Child &Cts. 151 (1999) 14

Barry C. Feld,
Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 Minn.L.Rev. 141 (1984) 14

Barry C. Feld,
Real Interrogation: What Actually Happens When Cops Question Kids, 47 L.& Soc'y Rev. 1 (2013) 8

Blackstone,
Commentaries 375 (8th ed. 1778)... 10

Christine S. Scott-Hayward,
Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation, 31 L.& Psychol.Rev. 53, 61 (2007) 9

Elizabeth S. Scott & Laurence Steinberg,
Adolescent Development and the Regulation of Youth Crime, 18 The Future of Children 15, 20 (2008).. 2

Elizabeth Scott & Laurence Steinberg,
Rethinking Juvenile Justice (2008)... 2

Hillary B. Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?, 41 Am.Crim.L.Rev. 1277 (2004) 12, 13

Jennifer Mayer Cox et al.,
The Impact of Juveniles' Age and Levels of Psychosocial Maturity on Judges' Opinions About Adjudicative Competence, 36 L.& Hum.Behav. 21 (2012).................... 6

Jessica R. Meyer & N. Dicken Reppuci,
Police Practices and Perception Regarding Juvenile Interrogation and Interrogative Suggestibility, 25 Behav.Sci.&L. 757 (2007) 7

Jessica L. Powell,
Do You Understand Your Rights As I Have Read Them to You? Understanding the Warnings Fifty Years Post Miranda, 43 N.Ky.L.Rev. 435 (2016) 5

Kevin Lapp,
Taking Back Juvenile Confessions, 68 U.C.L.A.L.Rev. 902 (2017) .... 6, 8 , 9, 14

Laurence Steinberg,
A Social Neuroscience Perspective on Adolescent Risk-Taking,
28 Dev.Rev. 78 (2008).. 1

Laurence Steinberg,
Adolescent Development and Juvenile Justice, 5 Ann.Rev. of Clinical Psychol.
459 (2009).. 2

Richard A. Leo & Welsh S. White, Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda, 84 Minn.L.Rev. 397 (1999)...8-9

Samuel R. Gross & Michael Shaffer,
The Nat'l Registry of Exonerations: Exonerations in the United States1989-2012 (2012)... 9, 10

Sarah-Jayne Blakemore & Suparna Choudhury, Development of the Adolescent Brain: Implications for Executive Function and Social Cognition, J.Child Psychol. & Psychiatry 296 (2006).. 1

Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*,
34 L.& Hum.Behav. 3 (2010)... 3, 10, 11, 14

Saul M. Kassin & Rebecca J. Norwick,
Why People Waive Their Miranda Rights: The Power of Innocence, 28 L.& Hum.Behav. 211 (2004)... 10

Steven A. Drizin & Richard A. Leo,
The Problem of False Confessions in the Post-DNA World, 82 N.C.L.Rev. 891 (2004)... 7, 9

Steven Drizin & Greg Luloff,
Are Juvenile Courts a Breeding Ground for Wrongful Convictions?, 34 N. Ky. L. Rev. 257, 274-75 (2007) 9

Thomas Grisso et al.,
Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 L.&Hum.Behav. 333 (2003) 2, 10

Thomas Grisso,
Juveniles' Waiver of Rights: Legal and Psychological Competence (1981).................... 13

Marsha Levick et al.,
The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence, 15 U.Pa.J.L. & Soc.Change 285 (2012).. 2, 8

STATEMENT OF INTEREST OF AMICUS CURIAE

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs; policy reform; public education; training and consulting; and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

STATEMENT OF FACTS

Kids are different. Young people are not just "miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (quoting *Eddings v.Oklahoma*, 455 U.S. 104, 115-16, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). They occupy a distinct developmental space, and social science teaches that they react differently to peer pressures, prioritize different values, and are less mature decision makers when compared to adults. These distinctions, combined with their lower cognitive functioning and social norms that make them more likely to obey authority, leave children more susceptible to involuntary and unknowing confessions than adults.

Youth make decisions differently than adults in part because of developmental differences in a variety of brain regions. *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev.Rev. 78, 83-92 (2008). The prefrontal cortex, which controls executive functioning, matures late in adolescence. Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social*

Cognition, J. Child Psychol. & Psychiatry 296, 301 (2006). Developmental changes within this brain region are essential to developing higher-order cognitive functions, such as using foresight, weighing risks and rewards, and making decisions that require the simultaneous consideration of multiple sources of information. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. of Clinical Psychol. 459, 466 (2009). As a result, youth have difficulty assessing potential long-term consequences and tend to assign less weight to consequences that they have identified. *See* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 15, 20 (2008).

Youth decision-making is also affected by their psychosocial immaturity and societal pressure. Children are groomed to answer questions posed by adults. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L.& Hum.Behav. 333, 357 (2003). Compared to young adults, "[a]dolescents are more likely . . . to make choices that reflect a propensity to comply with authority figures." *Id.* The identity of the adult does not matter: Compliance with adult requests is "reflexiv[e]," and youth "*assume*[] superior status" of adults. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U.Pa.J.L. & Soc.Change 285, 291 (2012) (emphasis added); *See also* Elizabeth Scott & Laurence Steinberg, Rethinking Juvenile Justice 440 (2008) (concluding that adolescents have "a much stronger tendency . . . to make choices in compliance with the perceived desires of authority figures" than do adults).

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

"'[O]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. at 274, 131 S.Ct. 2394, 180 L.Ed.2d 310 (quoting *Eddings v.Oklahoma*, 455 U.S. at 115-16, 102 S.Ct. 869, 71 L.Ed.2d 1).

Children "generally are less mature and responsible than adults," "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," and "are more vulnerable or susceptible to . . . outside pressures" than adults. *Id.* at 272 (quotations omitted). Youth's limited capacity to control, understand, and make decisions about their environment informs almost every aspect of legal doctrine and require enhanced protections for young people. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2009); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *J.D.B.*; *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). The law thus reflects that "the differentiating characteristics of youth are universal" and that these differences carry constitutional weight. *J.D.B.* at 274; *Miller* at 471 ("[C]hildren are constitutionally different than adults"). Amicus Curiae write to shed light on those developmental differences and to explain how Due Process requires different and careful treatment of young people when they are subject to state-initiated interrogations.

Proposition of Law I: **The statement of a child to a government social worker may be involuntary and violate due process even when the government social worker was not required to give Miranda warnings.**

Interrogation coerces by design. *Miranda v. Arizona*, 384 U.S. 436, 448, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *J.D.B.* at 272. The Constitution, common sense, and the state's interest in uncovering the truth in investigations all require that courts regulate interrogation. *See generally, J.D.B*. When the subject of interrogation is a child, the risk of coercion is only heightened. *Id.* at 272; *see also*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L.& Hum.Behav. 3, 19—20 (2010). Young people are conditioned to comply with requests from adults, are cognitively at a disadvantage when navigating the juvenile justice system, and misunderstand their rights even in the limited circumstances when they are informed of them. These factors—true of all youth—exist even when the person questioning them

is not a police officer. M.H.'s confession illustrates both how youth bend to pressures that adults might more readily resist and why they need additional protections to ensure procedural fairness.

I. Due Process Protects Youth When They Are Subject to Questioning by a State Actor

Both the Fifth and the Fourteenth Amendments of the United States Constitution protect against involuntary confessions. *Gallegos v. Colorado*, 370 U.S. 49, 51, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). The Fifth Amendment places limits on the element of compulsion that exists during custodial interrogations. *Id.* The Fourteenth Amendment, applicable to interrogations by any state actor, limits procedural unfairness that arises when a confession is obtained under physical or psychological pressure. *Id.* Due Process requires strict observation of procedural safeguards before "forfeiture of the lives, liberties or property of people accused of crime." *Id.*

Although Fourteenth Amendment Due Process protections may be similar to those afforded under the Fifth Amendment, they are not duplicative of the Fifth Amendment and need not arise under identical circumstances. In *Haley v. Ohio*, the Supreme Court suppressed a 15-year-old boy's confession, despite that he was advised of and waived his constitutional rights before signing the confession. 332 U.S. 596, 601, 68 S. Ct. 302, 92 L. Ed. 224 (1948). Declining to assume that this procedure was adequate to ensure that the child had "freedom of choice," the Court found his confession involuntary on Due Process grounds. *Id.*

The Supreme Court subsequently applied a Due Process lens to juvenile adjudications of delinquency in *In re Gault*. 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). While the Sixth Amendment's right to counsel might have been inapplicable in the delinquency context, the Supreme Court held a right to counsel inured under the Fourteenth Amendment Due Process Clause. *Id*. And as the Supreme Court recognized in *Gault* and repeatedly since, ensuring fundamental fairness requires meeting young people where they are developmentally. *See, e.g.,*

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1; *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407; *J.D.B*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310; *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599.

Differences between children and adults are perhaps most profound in coercive contexts, and the United States Supreme Court has long and repeatedly affirmed that youth are entitled to heightened protections during interrogations. *Haley v. Ohio*; *Gallegos v. Colorado*, 370 U.S. 49, 53, 82 S.Ct. 1209, 8 L.Ed.2d 325; *J.D.B.* at 274. Courts must take "the greatest care . . . to assure that the admissions [of a child is] voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Gault*. Research overwhelmingly reveals that rote application of Fifth Amendment protections—developed to safeguard the rights of adults during interrogation—does little to ensure that youthful confessions are knowing, voluntary, and free of coercive influence.[1] Fundamental fairness and Due Process therefore require that state-initiated interrogations be conducted with youth-focused safeguards in place, like the presence of counsel. Otherwise, they create an unacceptably high risk of violating youth's rights.

[1] Multiple studies cast doubt on whether *Miranda* warnings and the rights to remain silent and to request an attorney actually protect children. Research shows that *Miranda* warnings are incomprehensible to children—both because of the vocabulary of the warnings and children's misconception of the term "right" as conditional. *See generally* Jessica L. Powell, *Do You Understand Your Rights As I Have Read Them to You? Understanding the Warnings Fifty Years Post Miranda*, 43 N.Ky.L.Rev. 435, 438-43 (2016) (explaining the research). It also reveals that children waive their rights to counsel and to remain silent at an astounding rate of 90%. A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 San Diego L.Rev. 39, 53 (1970).

II. State-Initiated Interrogation Risks Unknowing and Involuntary Youth Confessions

Differences between adults and young people, in addition to "what any parent knows," are well-documented by social science research and have been continuously recognized by the United States Supreme Court. *Roper v. Simmons* at 569. Compared to adults, youth underestimate potential risk; misperceive consequences; heavily discount consequences that they do perceive; prioritize immediate gains; and are more suggestible. Kevin Lapp, *Taking Back Juvenile Confessions*, 68 U.C.L.A.L.Rev. 902, 917 (2017). These traits lead youth to feel "easily overwhelm[ed]" in interrogations, even in circumstances that "would leave a [grown] cold and unimpressed." *Haley v. Ohio*, 332 U.S. at 599, 68 S. Ct. 302, 92 L. Ed. 224.

A. Youth Are Susceptible to Making Unknowing and Involuntary Confessions When Questioned by Any Adult

Youth's unique developmental status puts them at risk of making involuntary statements in violation of Due Process. Youth, who are still developing higher-order cognitive functions, typically underestimate risk when compared to adults, heavily discount future consequences, and prioritize potential immediate gains over comparatively more distant potential or certain losses. Lapp at 917. If an interrogator explains that continuing a conversation with them will end the interrogation more quickly than resisting, a typical young person will talk. Jennifer Mayer Cox et al., *The Impact of Juveniles' Age and Levels of Psychosocial Maturity on Judges' Opinions About Adjudicative Competence*, 36 L.& Hum.Behav. 21, 21 (2012). In other words, youth will answer questions simply to end an uncomfortable situation.

Youth also misperceive the consequences of making incriminating statements. *See Haley*, 332 U.S. at 599, 68 S.Ct. 302, 92 L.Ed. 224 ("[A youth] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."). As one man explained of his false confession to a murder he made at age 17:"'[I]f I said, yeah, I did it, I could

go home. If I said I didn't do it, I could go to jail so I said I did it and I want to see my parents and everything.'" Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 968 (2004) (quoting *20-20* (ABC television broadcast, Mar. 15, 2002)).

M.H.'s free admission of a sexual relationship with his half-sister similarly belies that he understood the consequences of speaking with Bradley, who admitted her intention was determine if "anything criminal happened." (Ct. App. Op. at ¶ 49.) Youth see admitting an offense as a "get out of a jail free" card, rather than a sure ticket to juvenile detention. Against this backdrop, courts must examine whether these admissions are made voluntarily.

B. Youth Are More Susceptible to Coercion than Adults

Youth's developmental differences also render them more vulnerable than adults to coercive questioning. Youth "are more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated, and suggestive fashion." Jessica R. Meyer & N. Dicken Reppuci, *Police Practices and Perception Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav.Sci.&L. 757, 763 (2007) (citing studies). Mere questioning by an adult may pressure a youth to talk when they would otherwise remain silent. *See supra* at 2. This is true regardless of the adult's identity: early studies on child suggestibility, eagerness to please, and firm trust in people of authority began in the context of forensic interviews conducted by child welfare social workers and confirm that failing to consider youthful interrogative suggestibility and psychsocial immaturity during interrogation renders their results unreliable. Meyer & Reppucci at 763-64 (collecting studies); *see also*, Amelia Courtney Hritz et al., *Children's Suggestibility Research: Things to Know before Interviewing a Child*, 25 Anuario de Psicología Jurídica 3 (2015), *available at* https://www.sciencedirect.com/science/article/pii/S1133074015000124 (collecting studies on

youth suggestibility in a variety of interview settings, including child welfare forensic interviews). The "voluntary" nature of any child's confession at the hands of an adult state-actor is inherently dubious, due to youth's propensity to make decisions based on authoritative demands, rather than exercise of independent judgment. *See, e.g.*, Levick et al., 15 U.Pa.J.L. & Soc. Change at 291.

The circumstances of M.H.'s confession are illustrative of a young person's desire to comply with adult authority. M.H.'s mother brought him to Ms. Bradley's office. No evidence suggests that anyone told M.H. he could decline to answer Ms. Bradley's questions, rely on an adult or lawyer for support and guidance, or get up and leave when he wanted to. (Ct. App. Op. at ¶ 49.) To most 13-year-old children, when their mother takes them to a meeting with another adult and shuts the door, there is no meaningful choice but to continue. Presuming that such statements are voluntarily-made is based on an adult's perception of risk over reward and knowledge of potential consequences, not a child's.

Youth are also susceptible to different *types* of interrogation techniques. Individuals trained in interrogation techniques learn both maximization and minimization methods. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L.& Soc'y Rev. 1, 5 (2013). Maximization techniques "convey the interrogator's rock solid belief that the suspect is guilty and that denials will fail." *Id.* These techniques include making accusations, ignoring the suspect's protests, lying about evidence, and making the suspect feel hopeless. *Id.* Minimization techniques, by contrast, involve "offering sympathy and understanding" and "normalizing" the situation. *Id.* Thus, "[t]he ingratiating, rapport-building, small talk deployed by interrogators before mentioning warnings, and portrayals of the investigator 'as the suspect's friend, confidant, or guardian,' more easily convince a juvenile suspect to waive his rights and confess." Lapp, 68 U.C.L.A.L.Rev. at 916 (quoting Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern*

Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda, 84 Minn.L.Rev. 397, 438 (1999)).

Minimization techniques may also escape judicial condemnation as coercive because they paint the interrogator as empathetic and caring about the subject. Indeed, Ms. Bradley testified that her interview technique was to build rapport with M.H. and hide her true intent to evince incriminating evidence. (Ct. App. Op. at ¶ 60.) As a ten-year veteran of the Atlanta police force (*id.* at ¶ 62), Ms. Bradley approached her interrogation well-trained in ingratiating herself to her suspect, *see generally*, Lapp at 910-13 (discussing interrogation methods taught to police officers). Yet the Court of Appeals reversed suppression in part because it did not find "evidence of overt intimidation or coercion." (Ct. App. Op. at ¶¶ 34, 40.) Popular perception of the tactic aside, minimization plays upon youths' developmental vulnerabilities and heightens the risk that a child's confession is coerced.

III. Procedural Unfairness Results in Substantive Unfairness When Youth Are Subject to Interrogation by a State Actor

Youth's unique developmental status not only puts them at risk of making involuntary and unknowing statements, it also means that their confessions are more likely to be false. Lapp at 920; Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L.& Psychol.Rev. 53, 61 (2007); Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N.Ky.L.Rev. 257, 274-75 (2007). A leading study on proven false confession cases found that 32% of false confessors were under eighteen at the time of their confession. Drizin & Leo at 944. Another study of 340 exonerees revealed that individuals under age 18 were three times more likely to falsely confess than adults. Samuel R. Gross & Michael Shaffer, The Nat'l Registry of Exonerations: Exonerations in the United States 1989-2012 58, 60 (2012). And while youth as a whole are more likely than adults to

falsely confess, the very young—those under fifteen—are most at risk: the same study found that youth between 11 and 14 were more than twice as likely as 15- to 17-year-olds to confess falsely. *Id.; see also* Grisso et al., 27 L.& Hum.Behav. at 356.

The same factors that motivate youth to speak with their interrogators drive their false confessions: suggestibility, prioritization of immediate gain and reward over risk, and desire to please adult authority figures. *See* Grisso et al., at 333. Thus, the phenomenon of false confessions is not limited to police interrogations. In one study, adult researchers were able to obtain false confessions from 12- and 13-year olds at a rate of 73%, compared to 50% of young adults, using false evidence—all while presenting themselves as social scientists. Allison D. Redlich and Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L.& Hum.Behavior 141, 148 (2003). Disturbingly, innocent children are especially likely to confess, because suspects who did nothing wrong are more willing to begin frank conversations with police. Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L.& Hum.Behav. 211, 217-18 (2004).

Legal scholarship has long recognized the limited probative value of confessions, which Blackstone condemned as "the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces." Blackstone, Commentaries 375 (8th ed. 1778). Yet a confession is damning in virtually every instance—even when the confession is false and uncorroborated. *See, e.g.*, Kassin et al., 34 L.& Hum. Behav. at 5; *see also Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) ("[A] confession is like not other evidence."); *Colorado v. Connelly*, 479 U.S. 157, 182, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (Brennan, J., dissenting) ("[N]o other class of evidence is so profoundly prejudicial."); *Bruton v. United States*, 391 U.S. 123, 139, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J.,

dissenting) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."). In one study, 81% of false confessors whose cases went to trial were wrongfully convicted. Kassin et al., at 5.

The de facto dispositive treatment of a confession exposes just how critical safeguards for young people are at the precise moment a state actor intends to elicit incriminating statements from them.

***Proposition of Law II*: A child does not feel free to leave when he is driven to a government agency for questioning by a parent and separated from that parent and interrogated in a private interrogation room without being told he is free to leave or that he need not cooperate.**

The Court of Appeals held that M.H.'s statements were voluntary and that M.H. was not subject to a custodial interrogation in part because it found M.H. was free to leave the closed-door interrogation room where Ms. Bradley asked M.H. to implicate himself in a sex offense. (Ct. App. Op. ¶ 33.) In reaching this conclusion, the Court of Appeals relies on the fact that M.H.'s mother voluntarily brought him to the interview,[2] allowed Ms. Bradley to isolate M.H, and failed to convey the purpose or consequence of interrogation to M.H. (Ct. App. Op. ¶¶ 32-34.) In addition to ignoring developmental characteristics that would leave M.H. with no meaningful choice but to participate in the interrogation, *see supra* § II, this position ignores that children are always in some form of custody and are accustomed to limited freedom of movement, to obeying their parents, and to complying with adult authority generally. *See Gault* 387 U.S. 1, 17, 87 S.Ct. 1428, 18 L.Ed.2d 527.

[2] Substantial evidence contradicts that M.H.'s mother understood the purpose of the appointment, that she could decline to produce M.H., or that she could be present during interrogation. *See, e.g.*, Ct. App. Op. at ¶ 32 ("M.H.'s mother likely felt compelled to respond to the social worker's 'request' and did not fully appreciate that she could, in fact, refuse to deliver M.H. to Bradley as requested in the letter or sit in the interview.")

Moreover, it improperly cedes the obligation to protect children's Fifth and Fourteenth Amendment rights to their parents. Here, M.H. risks a delinquency adjudication, time in detention, and registration as a sex offender because his mother made the decision to comply with Ms. Bradley's request. M.H. bears the consequences of an involuntary confession. *See Gault* at 27 ("Instead of mother and father and sisters and brothers and friends and classmates, [when a youth is adjudicated delinquent,] his world is peopled by guards, custodians, state employees, and 'delinquents.'"). The person at risk of implicating himself in criminal conduct must be the one to decide to participate in an interrogation, not his parent. *See generally, id.* (holding that youth are owed Due Process when subject to juvenile justice proceedings).

I. Parent and Child Interests May Not Be Aligned When a Young Person is Subject to Interrogation

Parents may not "make martyrs of their children." *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Thus, the law holds children's rights paramount when parents' interests conflict with their children's constitutional rights. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 642, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) ("The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter."); *Parham v. J.R.*, 442 U.S. 584, 597—98, 611, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (guarding against parents "dump[ing]" children in mental institutions).

Parent and child interests frequently conflict when a child is subject to a child welfare investigation—let alone one intended to result in the child's arrest. For example, the parents themselves may be suspects in the investigation or have a relationship—familial, sexual, or otherwise—with another suspect. Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 Am.Crim.L.Rev. 1277, 1293 (2004); *Little v.*

Arkansas, 435 U.S. 957, 55 L. Ed. 2d 809, 98 S. Ct. 1590 (1978) (Marshall, J., dissenting) (taking position that court should have granted certiorari to resolve whether an attorney should have consulted child before she waived her constitutional rights, despite "parental advice," when parent advisor believed herself to be a suspect in the investigation); *In re Steven William T.*, 299 S.E.2d 876, 886 (W.Va. 1997) (finding that parents were not sufficiently interested in child's welfare to advise him on confession, when one parent was estranged and the other maintained a sexual relationship with another suspect). Or, as is the case here, they may have a relationship with the victim. Farber at 1293; *see, e.g.*, *In re A.S.*, 999 A.2d 1136 (N.J. 2009) (reversing delinquency adjudication based on child's confession, obtained with mother's consent, when mother was also grandparent of the victim). A parent, ordinarily charged with protecting their child's welfare, "consciously or subsconsiously [may act] as more of a fact-finder or inquisitor in order to determine how her loved one was harmed." Farber at 1294.

Even parents considering their children's needs regularly fail to safeguard their children's legal rights. Compelled by societal pressure or personal values to teach respect for authority and the importance of truth-telling, many parents will advise their children to be candid with interrogators. Farber at 1295 n.102 (citing examples form case law). Parents may also believe their children should be taught a lesson, or face punishment for their actions. One study revealed that 80% of parents of high school students believed that children should not be able to withhold information from the police. Thomas Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence 175-80 (1981). Even parents who acknowledged that young people have a right avoid self-incrimination reported they would nevertheless encourage their own children to waive the right to remain silent during an interrogation. *Id.* at 183.

II. Social Science Research Confirms that Parents Fail to Safeguard Their Children Against Involuntary Confessions

Empirical evidence supports that parents, in practice, fail to safeguard against their children's involuntary confessions. Studies show that the presence of a parent or guardian during a young person's interrogation at best has little to no impact on the rate at which youth waive their Fifth Amendment rights, and at worst actually increases coercive pressure on youth. Lapp, 64 U.C.L.A.L.Rev. at 934 (citing Kassin et al., 34 L.& Hum.Behav. at 9 ("[T]he presence of parents at *Miranda* waiver events typically does not result in any advice at all or, when it does, provides added pressure for the youth to waive rights and make statement.")); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn.L.Rev. 141, 182 (1984) ("Rather than mitigating the pressures of interrogation, parents appear predisposed to coercing their children to waive the right to silence."); *see also* Barbara Kaban & Ann E. Toby, *When Police Question Children, Are Protections Adequate?* 1 J.Ctr.Child &Cts. 151, 154 (1999) ("[I]t has been anecdotally observed that parents often push their children to 'talk' to authorities and to 'tell the truth.'").

This Court must decide whether a minor child made involuntary statements during a state-initiated interrogation. It may not decline to address this important issue on the fiction that his mother's decision replaces his own free will.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Juvenile Law Center respectfully requests that this Court reverse the decision of the Court of Appeals and sustain the trial court's suppression of M.H.'s statements to Ms. Bradley.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A hereby certify that on this date I caused a copy of the foregoing to be sent by email to Joanna N. Lopez, Counsel of Record for Appellee, at jlopez@prosecutor.cuyahogacounty.us; and to Paul A. Kuzmins, Counsel of Record for Appellant, at pkuzmins@cuyahogacounty.us.

Dated: September 16, 2019

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