

No. 15-1086

IN THE
Supreme Court of the United States

JOSEPH H.,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

**On Petition for a Writ of Certiorari to
the Supreme Court of California**

**BRIEF *AMICUS CURIAE* FOR THE
AMERICAN PROFESSIONAL SOCIETY ON
THE ABUSE OF CHILDREN
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Court Should Grant The Petition To Clarify That Lower Courts Must Weigh The Effects Of Child Maltreatment And Early Adversity In Applying The “Totality Of The Circumstances” Test To Juvenile <i>Miranda</i> Waivers	5
A. Child Maltreatment Cumulatively And Durably Harms Brain Development And Cognitive Capacity	7
B. The Effects Of Child Maltreatment Must Be Considered In The “Totality Of The Circumstances” Analysis Required By <i>Miranda v. Arizona</i>	13
C. This Case Is An Ideal Vehicle For The Court To Provide Guidance On The Role Of Child Maltreatment In The “Totality Of The Circumstances”.....	19
II. Creating A Presumption Of Incapacity To Waive For Children Age Fifteen And Under Will Appropriately Protect The Interests Of Abused Children.....	23
CONCLUSION	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Boyd v. State</i> , 726 S.E.2d 746 (Ga. 2012)	6
<i>Colorado v. Spring</i> , 479 U.S. 564 (1987)	15
<i>In re D.L.H., Jr.</i> , 32 N.E.3d 1075 (Ill. 2015)	18
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	14
<i>Fare v. Michael C.</i> , 442 U.S. 707 (1979)	6
<i>J.D.B. v. North Carolina</i> , 131 S. Ct. 2394 (2011)	5, 6, 13
<i>In re J.G.</i> , 175 Cal. Rptr. 3d 183 (Cal. 2014)	6
<i>Miller v. Alabama</i> , 132 S. Ct. 2455 (2012)	5, 14
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	13
<i>Montgomery v. Louisiana</i> , 577 U.S. __ (2016) (slip op.)	5

	Page(s)
<i>Moran v. Burbine</i> , 475 U.S. 412 (1986).....	14
<i>People v. Jones</i> , 2012 WL 4839858 (Mich. Oct. 11, 2012)	18
<i>People v. Morgan</i> , 758 N.E.2d 813 (Ill. 2001).....	17
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	13
<i>State v. Diaz</i> , 847 N.W.2d 144 (S.D. 2014).....	17
<i>Yarborough v. Arizona</i> , 541 U.S. 652 (2004).....	7

Other Authorities

Robert F. Anda et al., <i>The Enduring Effects of Abuse and Related Adverse Experiences in Childhood</i> , 256 Eur. Arch. of Psychiatry & Clinical Neu- rosci. 174 (2006)	11, 12, 13
Kristine Buffington et al., Nat’l Council of Juvenile & Family Court Judges, <i>Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency</i> (2010)	12, 24
Henry R. Cellini, <i>Child Abuse, Neglect, and Delinquency: The Neurological Link</i> , 55 Juv. & Fam. Ct. J. 1 (Sept. 2004)	9, 10, 11

	Page(s)
Centers for Disease Control & Prevention, Div. of Violence Prevention, <i>ACE Study</i>	12
Dante Cicchetti & Sheree L. Toth, <i>Child Maltreatment</i> , 1 Ann. Rev. Clinical Psychol. 409 (2005)	16
David Finkelhor et al., U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, <i>Polyvictimization: Children’s Exposure to Multiple Types of Violence, Crime, and Abuse</i> (Oct. 2011)	8
Thomas Grisso, <i>Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis</i> , 68 Cal. L. Rev. 1134 (1980).....	13, 15
Martin Guggenheim & Randy Hertz, <i>J.D.B. and the Maturing Juvenile Confession Suppression Law</i> , 38 Wash. U. J. of L. & Pol. 109 (2012)	6
Inst. of Med. & Nat’l Research Council, <i>New Directions in Child Abuse and Neglect Research</i> (2014)	9, 10
Rachel Kahn et al., <i>Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension</i> , 30 L. & Psychol. Rev 119 (2006).....	15

	Page(s)
Kenneth J. King, <i>Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights</i> , 2006 Wis. L. Rev. 431 (2006)	16
MacArthur Foundation, <i>Juvenile Justice in a Developmental Framework</i> (2015)	8, 15, 26
Gary B. Melton, <i>Children’s Concepts of Their Rights</i> , 9 J. Clinical Child Psychol. 186 (1980)	16
Nat’l Child Traumatic Stress Network, Juvenile Justice Working Grp., <i>Victimization and Juvenile Offending</i> (2004).....	24
Note, <i>Juvenile Miranda Waiver and Parental Rights</i> , 126 Harv. L. Rev. 2359 (2013)	6
Office of Justice Programs, Nat’l Inst. of Justice, <i>Child Abuse and Maltreatment</i> (July 1, 2011).....	7
Office of Juvenile Justice & Delinquency Prevention, <i>The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders</i> , 3 J. of Juv. Justice 1 (Spring 2014)	24

	Page(s)
Bruce D. Perry et al., <i>Childhood Trauma, the Neurobiology of Adaptation, and “Use-Dependent Development” of the Brain: How “States” Become “Traits”</i> , 16(4) <i>Infant Mental Health J.</i> 271 (1995)	8
Katharine W. Scrivner, <i>Crossover Kids: The Dilemma of the Abused Delinquent</i> , 40 <i>Fam. Ct. Rev.</i> 1 (2002)	7
Elizabeth S. Scott & Laurence Steinberg, <i>Adolescent Development and the Regulation of Youth Crime</i> , 18(2) <i>The Future of Children</i> 15 (2008)	4
U.S. Dep’t of Health & Human Servs., Admin. for Children & Families, Children & Families, Children’s Bureau, <i>Child Maltreatment 2014</i> (2016)	2
U.S. Dep’t of Health & Human Servs., Child Welfare Info. Gateway, <i>Understanding the Effects of Maltreatment on Brain Development</i> (2015)	9
Heather Welfare et al., <i>Involvement in Extreme Violence and Violence-Related Trauma: A Review with Relevance to Young People in Custody</i> , <i>Legal & Crim. Psychol.</i> 6 (2012)	23, 24

	Page(s)
Christopher Wildeman et al., <i>The Prevalence of Confirmed Maltreatment Among US Children, 2004–2011</i> , 168 JAMA Pediatrics 706 (2014).....	2

INTEREST OF *AMICUS CURIAE*

The American Professional Society on the Abuse of Children (“APSAC”) is the leading national organization for professionals serving children and families affected by child maltreatment, which includes both abuse and neglect.¹ A multidisciplinary group, APSAC achieves its mission through expert training and educational activities, policy leadership and collaboration, and consultation emphasizing theoretically sound, evidence-based principles.

For 28 years, APSAC has played a central role in developing guidelines that address child maltreatment. It is qualified to inform the Court about the damage child maltreatment can inflict on children’s brain development and cognitive ability. APSAC submits this brief to assist the Court in understanding how a child’s ability to understand legal concepts, including waiver of the right to remain silent and the right to a lawyer, is affected by maltreatment.²

Petitioner Joseph H. suffered severe maltreatment that affected his ability to waive his Fifth Amendment rights and to understand the wrongfulness of his conduct. APSAC members have a direct and substantial interest in these issues because of

¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus and its counsel, make a monetary contribution to the preparation or submission of this brief.

² Amicus acknowledges the assistance and contributions of Abraham Matsui, member of the University of Michigan Law School Class of 2017, and Rachel Boochever, member of the Stanford Law School Class of 2018.

their historical and scientific experience with juvenile brain development, particularly where child maltreatment is involved. APSAC is therefore uniquely qualified to advise the Court on the impact of child maltreatment on petitioner's competence to understand and waive his rights and to comprehend wrongfulness.

This brief is filed with the written consent of all parties pursuant to United States Supreme Court Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

Every year, thousands of children in the United States are subjected to maltreatment. The numbers are staggering. By the age of 18, one in eight children is a victim; in 2013, approximately 3.2 million children were *confirmed* affected.³ Contrary to popular wisdom, maltreated infants and children do not simply “get over it.” Rather, the damage to developing minds can be cumulative and permanent. Here, the lower court acknowledged but then

³ Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among US Children, 2004–2011*, 168 JAMA Pediatrics 706, 709 (2014); see also U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Children's Bureau, *Child Maltreatment 2014* 19 (2016), <http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2014>. Obstacles to reporting and confirming child maltreatment almost certainly result in underreporting of the phenomenon.

brushed aside this crucial consequence of petitioner's maltreatment.

Joseph H., who was severely abused and neglected since before his birth, sought review in the California Court of Appeal of his adjudication for murdering his father at the age of ten. A key question on appeal was whether Joseph had sufficient capacity to make a knowing, intelligent, and voluntary waiver of his *Miranda* rights. The court of appeal acknowledged Joseph's history of maltreatment, including exposure to "heroin, methamphetamine, LSD, marijuana and alcohol ingested by his biological mother prenatally," physical and sexual abuse, and "numerous reports to Child Protective Services relating to neglect." Pet. App. 3a.

Following this litany, the court wrote: "Joseph was a difficult child." *Ibid.* But the same abuse that rendered Joseph "difficult" also severely damaged his cognitive capacity, compromising his ability to understand his rights to silence and counsel. By failing to adequately weigh the impact of Joseph's maltreatment, the court violated his constitutional rights. This Court should grant review to provide direction to lower courts that mistakenly see maltreated children as *difficult*, but intelligent enough to waive their rights, rather than as *damaged*, and therefore easily confused and unable to understand the profound consequences of a *Miranda* waiver.

The science of child brain development provides ample ground for the Court to act. Studies in the fields of neurobiology and neuropsychology confirm that child maltreatment often negatively impacts the developing mind. Most pertinent to Joseph's case,

severe abuse frequently damages “executive function”: cognition, judgment, emotional regulation, and the ability to understand the consequences of an action.⁴ As little as the average ten-year-old child is able to understand the significance of *Miranda* warnings, see Pet. 20–24, a severely maltreated child like Joseph is entirely unequal to the task.

The court of appeal acknowledged research suggesting that even developmentally *normal* juveniles may be incompetent to waive their *Miranda* rights. Pet. App. 22a n. 11. But the court nonetheless found no evidence of “developmental incompetence” to support the premise that Joseph himself was “confused or suggestible.” Id. at 22a n. 11; 24a. The lower court’s formalistic approach—which relied solely on a few words regarding “right” and “wrong” spoken by a traumatized ten-year-old child—cannot suffice to overcome the body of replicated science demonstrating that severely abused young children most likely are simply incapable of understanding sophisticated concepts like *Miranda* rights.

⁴ See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18(2) *The Future of Children* 15, 23 (2008).

ARGUMENT

I. **The Court Should Grant The Petition To Clarify That Lower Courts Must Weigh The Effects Of Child Maltreatment And Early Adversity In Applying The “Totality Of The Circumstances” Test To Juvenile *Miranda* Waivers.**

This Court has acknowledged in a series of recent decisions that children are “constitutionally different” from adults in ways that require more careful protection of their constitutional rights. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). Specifically, the Court has observed that because children are still developing physically, mentally, and emotionally, their actions are less likely to evidence “irretrievable depravity” than those of an adult. *Ibid.* (alterations omitted); see also *Montgomery v. Louisiana*, 577 U.S. __ (2016) (slip op. at 15–17); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (“[C]hildren cannot be viewed simply as miniature adults.”).

The principle of “constitutional[] differen[ce]” is even weightier for children like Joseph, who have suffered a lifetime of severe abuse and neglect. Maltreatment, particularly in combination with other traumatic experiences, can significantly degrade a child’s cognitive capacity and psychological functioning, including the ability to understand abstract, complex concepts. Maltreated children are frequently at a significant disadvantage compared to their peers in terms of maturity, impulse control, susceptibility to influence, and understanding of long-term consequences. See Part I.A, *infra*. In light of the potentially serious adverse effects of long-term

maltreatment and trauma on children, courts must be especially vigilant in safeguarding their constitutional rights.

This Court has already held that age is an appropriate factor to consider in the *Miranda* custody analysis, *J.D.B.*, 131 S. Ct. at 2408, and commentators and lower courts have suggested that the concerns animating *J.D.B.* apply equally to the *Miranda* waiver context.⁵ But the Court has provided little guidance on the role of age and child development in the “totality of the circumstances” inquiry courts employ to determine the validity of a *Miranda* waiver, other than to acknowledge that a child’s “age, experience, education, background, and intelligence” are among the relevant factors. *Fare v. Michael C.*,

⁵ See, e.g., Note, *Juvenile Miranda Waiver and Parental Rights*, 126 Harv. L. Rev. 2359, 2363 (2013) (“The lesson of *J.D.B.*—that emotional, impulsive, suggestible, and present-focused juveniles struggle to grasp their options when dealing with police—suggests that children also differ categorically from adults for purposes of *Miranda* waiver.”); Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing Juvenile Confession Suppression Law*, 38 Wash. U. J. of L. & Pol. 109, 167 (2012) (suggesting that courts “take to heart the lessons of *J.D.B.* and revise *Miranda* standards for the interrogation of juveniles”); see also *In re J.G.*, 175 Cal. Rptr. 3d 183, 189 (Cal. 2014) (“*J.D.B.*’s holding * * * may implicate other areas of criminal procedure—including voluntariness of waivers of rights and seizure inquiries as well as areas of substantive criminal law, such as blameworthiness of [the subject’s] conduct and/or state of mind.”) (internal quotation marks omitted); *Boyd v. State*, 726 S.E.2d 746, 750–751 (Ga. 2012) (explaining that *J.D.B.* “provide[s] pertinent perspective” on the *Miranda* waiver analysis).

442 U.S. 707, 725 (1979); see also *Yarborough v. Arizona*, 541 U.S. 652, 668 (2004). As a result, the effects of child maltreatment have been systematically undervalued in the *Miranda* waiver analysis. Child trauma survivors who commit a criminal offense thus “find themselves in the netherworld of both victim and offender”: they are held to account for their conduct, but are not assured counsel when their need is greatest.⁶ This court should intervene to ensure that the Fifth Amendment rights of this vulnerable population are protected.

A. Child Maltreatment Cumulatively And Durably Harms Brain Development And Cognitive Capacity.

There is significant evidence that severe child maltreatment alters brain development and damages cognition, emotional regulation, and moral reasoning.⁷ And the scientific research demonstrates that it is not enough to consider particular impacts of child maltreatment in isolation, as the court below did here. Rather, different types of early adversity interact with and reinforce each other in powerfully

⁶ Katharine W. Scriver, *Crossover Kids: The Dilemma of the Abused Delinquent*, 40 Fam. Ct. Rev. 1, 135 (2002).

⁷ The federal government defines “child maltreatment” to include physical, sexual, or emotional abuse, in addition to neglect (defined as failure of a parent to provide for a child's development when in a financial position to do so). Office of Justice Programs, Nat'l Inst. of Justice, *Child Abuse and Maltreatment* (July 1, 2011), <http://www.nij.gov/topics/crime/child-abuse/pages/welcome.aspx>.

damaging ways⁸ that render traumatized children even *less* capable than developmentally normal children of understanding *Miranda* rights.⁹

1. The Human Brain Is Characterized By Plasticity; It Develops In Response To Positive And Negative External Stimuli.

The brains of infants and children are highly plastic. Centuries of evolution have trained the brain to develop in response to its environment, and the most important feature of neurons in the brain is that they “change in response to external signals.”¹⁰

⁸ The Department of Justice notes that “polyvictimization,” or exposure to multiple forms of violence, results in “high[er] levels of distress” including indicators of anxiety, depression, anger, and PTSD. David Finkelhor et al., U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Polyvictimization: Children’s Exposure to Multiple Types of Violence, Crime, and Abuse* 5 (Oct. 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/235504.pdf>.

⁹ See MacArthur Foundation, *Juvenile Justice in a Developmental Framework* 11 (2015), https://www.macfound.org/media/files/MacArthur_Foundation_2015_Status_Report.pdf (*MacArthur Report*) (“Strong evidence shows that adolescents, especially those age 15 and under, are as poorly prepared to [decide whether to submit to police interrogation] as adults with serious mental illness. * * * This suggests that at all points of contact with the system, young people require the assistance of counsel.”).

¹⁰ Bruce D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and “Use-Dependent Development” of*

Under normal circumstances, the interaction between child and caregiver facilitates healthy brain development. But when an infant or child is maltreated, the brain “will adapt to a negative environment just as readily as it will adapt to a positive one.”¹¹ Such adaptations “can cause permanent, lifelong neurological damage and have a significant negative impact on the developing brain.”¹² So, while exposure to good experiences benefits the brain, exposure to bad experiences—like severe maltreatment and abuse—can damage the brain.¹³

The impact of child maltreatment is therefore neurological and biological as well as psychological. Severe maltreatment and complex trauma can, and often do, cause temporary or permanent physical brain damage as the child’s brain molds to fit its dangerous and frightening environment.

the Brain: How “States” Become “Traits”, 16(4) *Infant Mental Health J.* 271, 274 (1995).

¹¹ U.S. Dep’t of Health & Human Servs., Child Welfare Info. Gateway, *Understanding the Effects of Maltreatment on Brain Development* 4 (2015), http://www.childwelfare.gov/pubPDFs/brain_development.pdf.

¹² Henry R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, 55 *Juv. & Fam. Ct. J.* 1, 10 (Sept. 2004).

¹³ Inst. of Med. & Nat’l Research Council, *New Directions in Child Abuse and Neglect Research* 119 (2014) (*New Directions*).

2. Child Maltreatment Is Especially Damaging To “Executive Function,” Which Includes Complex Reasoning And Evaluation Of Consequences.

The negative adaptations characteristic of child abuse victims are a “natural biological reaction to early threats on a person’s system,” and these abnormal patterns in the brain frequently cause problems with “self-control, memory, emotion, judgement, consequential thinking, and moral reasoning.”¹⁴ These aspects of cognition are especially at risk in abused children because they are located in the prefrontal cortex, and damage to this area of the brain is especially prominent in cases of abuse and neglect.¹⁵ Because the prefrontal cortex is the “seat of moral development and judgment,” this damage can be debilitating in contexts requiring judgment and consequential thinking.¹⁶ Damage done in childhood and adolescence is particularly significant because the period of greatest sensitivity and plasticity for the prefrontal cortex “extend[s] well into the adolescent period.”¹⁷

Further, the prefrontal cortex controls “executive functioning,” which includes higher-order cognitive processes like “holding information in working memory, inhibiting impulses, planning, sustaining attention amid distraction, and flexibly shifting

¹⁴ Cellini, 55 Juv. & Fam. Ct. J. at 3, 1.

¹⁵ Id. at 1.

¹⁶ Id. at 5.

¹⁷ *New Directions* 120.

attention to achieve goals.”¹⁸ The prefrontal cortex also governs the ability to stay on task and to make complicated decisions with long-term consequences. Maltreated children are at risk for deficits in these essential functions, which are often evidenced by intellectual impairment, decreased IQ, difficulty controlling impulses, and an inability to maintain attention.¹⁹

3. The Cognitive Damage Caused By Child Maltreatment Is Often Cumulative And Persistent.

Especially in cases of long-term maltreatment and trauma, the impacts of adverse experiences are not isolated, and children do not simply “get over” them.²⁰ Rather, a “dose-response” effect causes multiple forms and instances of abuse to amplify the negative impact that each has on a child’s mental and physical health.²¹ Researchers studying “Adverse Childhood Events” (“ACEs”) have demonstrated this phenomenon, revealing the potential significance of the damage to maltreated and traumatized children.

¹⁸ Id. at 128 (collecting studies).

¹⁹ Id. at 128–129.

²⁰ Cellini, 55 Juv. & Fam. Ct. J. at 3.

²¹ Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 Eur. Arch. of Psychiatry & Clinical Neurosci. 174, 176 (2006). Scientists use the term “dose-response relationship” to indicate that while low doses of a particular substance may have little physiological effect on an individual, the impact will increase as the amount of the substance increases.

The foundational ACE study, a collaboration between Kaiser Permanente and the Centers for Disease Control and Prevention,²² seeks to “assess the impact of numerous, interrelated ACEs on a wide variety of health behaviors and outcomes.”²³ ACEs comprise three types of child abuse—emotional, physical, and contact sexual abuse—and exposure to five types of household dysfunction—substance abuse, mental illness, violent treatment of mother or stepmother, criminal behavior, and parental separation or divorce.²⁴ Researchers counted both the number of ACEs an individual experienced and the severity of the exposure. They found—as others have found in allied studies—that “the effects of multiple forms of abuse and related stressors are cumulative and affect a wide variety of outcomes.”²⁵

A core insight of the ACEs study is that in addition to direct abuse, traumatic experiences include witnessing domestic violence and parental marital discord, and growing up with mentally ill, criminal,

²² For further explanation of the ACE study, see Centers for Disease Control & Prevention, Div. of Violence Prevention, *ACE Study*, available at <http://www.cdc.gov/violenceprevention/acestudy/>.

²³ Anda, 256 *Eur. Arch. of Psychiatry & Clinical Neurosci.* at 176.

²⁴ *Ibid.*

²⁵ *Ibid.*; see also Kristine Buffington et al., Nat’l Council of Juvenile & Family Court Judges, *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency* 6 (2010) (explaining that exposure to complex trauma is cumulative and highly likely to derail a child’s development).

and/or substance-abusing caretakers.²⁶ These factors often interact with other forms of abuse and maltreatment to amplify damage to a child's developing brain. The study thus confirms that children exposed to numerous adverse experiences *in addition to* maltreatment are highly likely to suffer damage to cognition and executive function, calling seriously into doubt their ability to effect valid *Miranda* waivers.

B. The Effects Of Child Maltreatment Must Be Considered In The “Totality Of The Circumstances” Analysis Required By *Miranda v. Arizona*.

To determine whether a *Miranda* waiver is valid, courts have long considered whether, under the totality of the circumstances, a defendant voluntarily, knowingly, and intelligently waived his rights. *J.D.B.*, 131 S. Ct. at 2401; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). See Pet. 15. The test is flexible, and “there are numerous combinations of factors possible and no guidelines as to how they should be weighed and balanced,” resulting in “almost unlimited judicial discretion.”²⁷

Although the Court has acknowledged that “psychology and brain science continue to show fundamental differences between juvenile and adult minds,” *Roper v. Simmons*, 543 U.S. 551, 570 (2005),

²⁶ Anda, 256 Eur. Arch. of Psychiatry & Clinical Neurosci. at 176.

²⁷ Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1138–1139 (1980).

the petition notes that lower courts often undervalue or ignore this factor, disregarding the science of child development. Pet. 16–17. The problem is magnified when the defendant is a juvenile with a history of abuse, neglect, and trauma. In other contexts, this Court has recognized that the severe impact of child maltreatment demands the conclusion that “youth is more than a chronological fact.”²⁸ We urge the Court to apply this principle to the waiver of critical constitutional rights.

The effects of childhood trauma call sharply into question the validity of purportedly “knowing” and “intelligent” *Miranda* waivers by juvenile defendants who have themselves been victims of severe maltreatment. This Court has held that a knowing and intelligent waiver is one that is “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). “Only if the totality of the circumstances surrounding the interrogation reveal * * * the requisite level of comprehension may a court properly

²⁸ See, e.g., *Miller*, 132 S. Ct. at 2469 (explaining the need to consider maltreatment in sentencing juveniles, and specifically observing that the petitioner’s history of physical abuse, neglect, exposure to drug and alcohol addiction, and suicide attempts “contributed to [his] commission of [the] crime”); *Eddings v. Oklahoma*, 455 U.S. 104, 115, 116 (1982) (overturning death sentence of a 16-year-old because the lower court failed to consider as mitigating evidence the child’s history of abuse and neglect, and explaining that courts should consider “the background and mental and emotional development of a youthful defendant”).

conclude that the *Miranda* rights have been waived.” Ibid. (internal quotation marks omitted). This includes “the full panoply of rights set out in the *Miranda* warnings,” id. at 422, not merely an elementary understanding of right and wrong or the definition of “silence.” So while a suspect need not know and understand every possible consequence of relinquishing his Fifth Amendment rights, *Colorado v. Spring*, 479 U.S. 564, 574 (1987), a defendant may not waive *Miranda* without a meaningful understanding of its four components: (1) the right to remain silent, (2) the possibility that the defendant’s statements may be used against him in court, (3) the right to an attorney, and (4) the right to appointed counsel if the defendant is indigent.

In deciding whether to waive or invoke *Miranda*, a child must use logical reasoning skills, engage with abstract (and likely unfamiliar) legal concepts related to the right to remain silent and the right to counsel, and evaluate the short- and long-term consequences of his decision. For developmentally normal children, this experience and other interactions with the criminal justice system can be “both frightening and incomprehensible.”²⁹ Indeed, the data show that a significant portion of the juvenile population cannot form an adequate understanding of *Miranda* rights.³⁰

²⁹ *MacArthur Report* 25.

³⁰ See Grisso, 68 Cal. L. Rev. at 1153–1154 (finding that only 21% of juveniles reached a total understanding of *Miranda*, and more than 55% reached no adequate understanding of at least one of the four *Miranda* rights); Rachel Kahn et al., *Readability of Miranda Warnings and*

For a maltreated child, whose executive functions are precisely those most likely to be compromised by childhood neglect, abuse, and trauma, a meaningful understanding of *Miranda* is even less likely. The abusive family is a toxic relational environment that profoundly impacts the development of the abused child.³¹ Children raised in such families see themselves as having few rights.³² Abused children are thus less capable of understanding that they possess “rights” foreign to their experience, that they can refuse to speak to an adult, and that the law will protect them, because no adult ever has. It is unsurprising, then, that commentators have observed that children “laboring under the burdens of mental illness, substance abuse, impaired understanding, learning disabilities, or parental abuse and neglect, are at grave risk of making hasty, thoughtless decisions to waive rights—decisions that do not fairly qualify as ‘knowing, intelligent and voluntary.’”³³

Waivers: Implications for Evaluating Miranda Comprehension, 30 L. & Psychol. Rev. 119, 130 (2006) (empirical analysis concluding that in developmentally normal adolescents, “the comprehension level of *Miranda* warnings was impaired at age twelve or below and was variable between the ages of thirteen and fifteen”).

³¹ Dante Cicchetti & Sheree L. Toth, *Child Maltreatment*, 1 Ann. Rev. Clinical Psychol. 409, 414 (2005).

³² Gary B. Melton, *Children’s Concepts of Their Rights*, 9 J. Clinical Child Psychol. 186, 189 (1980).

³³ Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing*,

Lower courts have varied significantly in their consideration of the effects of child maltreatment on juvenile competency to waive *Miranda*. But despite evidence that maltreatment impairs a child’s cognitive and psychological functioning, courts frequently undervalue its effects, or disregard them altogether. In addition to the cases cited by petitioner, other cases from various state courts highlight the ease with which courts find that abused and cognitively compromised children have validly waived *Miranda* under the “totality of the circumstances” test:

- In *People v. Morgan*, the Illinois Supreme Court upheld the *Miranda* waiver and admissibility of the subsequent murder confession of a 14-year-old boy with major depression, attention deficit disorder, suicidal tendencies, and a history of physical and emotional abuse and death threats at the hands of his guardians. 758 N.E.2d 813, 819–820 (Ill. 2001). The dissent described the majority opinion as “devoid of any details” regarding the child’s emotional characteristics. *Id.* at 845 (Freeman, J., dissenting).
- In *State v. Diaz*, the South Dakota Supreme Court upheld the *Miranda* waiver of an “emotionally unstable and immature” 15-year-old girl with a history of physical and sexual abuse. 847 N.W.2d 144, 155–156 (S.D. 2014). Although it acknowledged that the juvenile was “young, immature, a victim of abuse, and limited in English,” the court nonetheless

Unintelligent, and Involuntary Waivers of Miranda Rights, 2006 Wis. L. Rev. 431, 444 (2006).

concluded that she had validly waived *Miranda*. The dissent expressed doubt that “a dislocated child of an illegal immigrant, a sexually and physically abused runaway, an emotionally unstable, immature, and conduct-disordered youth” could be capable of “understanding the ominous consequences of relinquishing her fundamental rights.” *Id.* at 169 (Konenkamp, J., dissenting).

- In *People v. Jones*, the Michigan Supreme Court upheld a *Miranda* waiver by a seventh-grader of “low average intelligence” where no parent or attorney was present and the juvenile was told that if he did not cooperate, his parents would be put in jail. 2012 WL 4839858, at *3 (Mich. Oct. 11, 2012). The court observed, “there is no specific guide to decision whether a juvenile confession was voluntary, except the totality of the circumstances involved in each particular case.” *Ibid.*

Cases addressing *Miranda* waiver for children as young as ten are extremely rare, but the petition notes that courts have found valid waivers for children as young as *eight*. Pet. 16 n.9.³⁴

³⁴ The lack of consideration lower courts give to the effects of abuse is reinforced in cases involving non-custodial situations in which courts have found that statements by maltreated juveniles were voluntary. See, e.g., *In re D.L.H., Jr.*, 32 N.E.3d 1075, 1092 (Ill. 2015) (holding that the statements of a nine-year-old with a history of physical abuse were voluntary despite “his young chronological age, his even younger mental age, his

C. This Case Is An Ideal Vehicle For The Court To Provide Guidance On The Role Of Child Maltreatment In The “Totality Of The Circumstances.”

This case provides an especially good opportunity for the Court to address the role of child maltreatment in the “totality of the circumstances” *Miranda* analysis. Joseph was the victim of severe abuse and neglect, as well as significant trauma resulting from other adverse experiences, including permanent separation from his biological mother by the age of four and a home life marked by domestic violence and substance abuse. These experiences rendered Joseph fundamentally incapable of understanding the nature of his *Miranda* rights or effecting a knowing, intelligent, and voluntary waiver.

Joseph was born to Jeffrey’s first wife, Leticia Neal, who used marijuana, heroin, methamphetamines, and alcohol throughout her pregnancy. From the time Joseph was born until the incident in this case, Child Protective Services issued 23 reports involving allegations of physical and sexual abuse, poor living conditions, and neglect at Joseph’s home. At Joseph’s delinquency proceeding, the court received voluminous evidence of physical, emotional, and sexual abuse to which Joseph was subjected. Joseph also witnessed Jeffrey’s brutal attacks on his wife, which were often fueled by Jeffrey’s abuse of alcohol and drugs. Through Jeffrey’s leadership in the National Socialist Movement (also known as the “Neo-Nazi” movement), he exposed Joseph from a

mental deficits, * * * [and] his inability to understand the legal proceedings”).

very young age to Neo-Nazi teachings, including forbidding Joseph from having friends of different races and teaching Joseph how to handle firearms on Neo-Nazi border patrols. At trial, Dr. Robert Geffner, a leading expert in the field of neuropsychology, testified that there was “a very significant and pretty high level of violence in the home,” and Joseph’s stepmother explained that Jeffrey’s abuse of Joseph included “[h]itting, smacking, the belt, and kicking.” Pet. C.A. Br. 10. Joseph spent his entire childhood in an environment in which he was neglected, exposed to trauma, and threatened with violence. Indeed, Joseph explained that on the evening before he shot his father, Jeffrey threatened to kill Joseph and the rest of the family, saying that he would “remove all the smoke detectors and burn the house down while the family slept.” Pet. App. 6a.

Joseph’s comments and behavior immediately after the incident reflect his inability to comprehend the nature or consequences of his actions. Joseph spoke freely to law enforcement officers, his words revealing no understanding of the finality of his actions. Joseph asked, “[h]ow many lives do people usually get?” and stated “[m]y Dad’s gonna be upset.” Pet. C.A. Br. 6. He later explained that he shot his father because he thought it would restore their relationship, saying “[w]ell, I thought that maybe that would teach him a lesson * * *. So, I thought maybe if I shoot him * * * then maybe we could go back to being friends and start all over.” Id. at 9. Joseph also stated that he thought he would need to apologize to his dad, and suggested that “[m]aybe when we get home can we see * * * if there’s anything good that we can [] do to get all this out of my mind.” Ibid.

When Detective Hopewell read Joseph his *Miranda* warnings after completing several pages of the *Gladys R.* questionnaire, Joseph demonstrated a lack of understanding of *Miranda* consistent with his low cognitive functioning. When asked if he understood what the “right to remain silent” means, he responded, “[t]hat means that I have the right to stay calm.” Pet. 8. When Detective Hopewell asked if Joseph understood that he had a right to an attorney, Joseph responded incoherently: “It means, don’t talk until that means to not talk till the attorney or * * * .” Id. at 9. Although Joseph’s stepmother was present during the interview, she took no steps to facilitate Joseph’s understanding of the warnings and was at best conflicted in her role as guardian and advisor to Joseph, who had just shot her husband.³⁵ Compounding this conflict, Detective Hopewell erroneously told Joseph that the decision to continue the interview belonged to him *and* his stepmother. Pet. 9. Joseph’s lack of understanding of both the finality of his actions and the consequences of waiving *Miranda* is entirely consistent with the effects of abuse and neglect on the cognitive functioning of children.

While there is no evidence that Joseph understood his rights, the record provides ample documen-

³⁵ Joseph later stated that his stepmother encouraged him to shoot his father, telling him that Jeffrey “wouldn’t die,” but would just “be in a coma for awhile [sic] and learn a lesson to treat [the] family better.” Pet. C.A. Br. 9 n.3. Joseph said his stepmother told him that Jeffrey was leaving the family to live with his girlfriend, and that if Joseph shot his dad, “it would keep the family together.” Ibid.

tation of his disabilities. Joseph suffered from significant emotional and mental challenges as a result of long-term trauma and neglect. Specifically, Joseph had been diagnosed with ADHD, PTSD, Borderline Intellectual Functioning, and a number of learning disabilities. Pet. C.A. Br. 10 n.4. He suffered from communication disorders, movement disorders, extremely poor reading proficiency, and possible brain damage. In light of these conditions, it is simply unrealistic to conclude that Joseph had any meaningful understanding of his legal rights or, for that matter, that he could have effectively communicated an invocation of those rights if he had desired to do so.

Despite the overwhelming evidence of Joseph's compromised cognitive functioning, the appeals court concluded that Joseph validly waived his *Miranda* rights. Dispensing with any analysis of whether Joseph's waiver was "knowing" or "intelligent," the court focused solely on whether there was police coercion that would render the waiver involuntary, and concluded that "[a]bsent coercive conduct by the police, and despite his young age, his ADHD, and low-average intelligence," Joseph's waiver was valid. Pet. App. 24a. Although the court of appeal took note of Joseph's severe maltreatment and exposure to early adversity, acknowledging that the Department of Mental Health believed Joseph would benefit from an MRI "to determine the extent of damage done to his brain due to his past history," Pet. App. 11a, these facts played essentially no role in the court's *Miranda* analysis. Rather, the court remained wedded to its initial observation—"Joseph was a difficult

child”³⁶—and the origins and impacts of that “difficulty” remained unaddressed.

Maltreatment has a profound impact on a child’s cognitive abilities, and is therefore highly relevant to determining whether a juvenile’s *Miranda* waiver was voluntary, knowing, and intelligent. This Court should therefore, at a minimum, instruct lower courts to consider the effects of childhood abuse, neglect, and trauma in the “totality of the circumstances” analysis.

II. Creating A Presumption Of Incapacity To Waive For Children Age Fifteen And Under Will Appropriately Protect The Interests Of Abused Children.

A number of factors weigh in favor of a rule requiring appointment of counsel for all children 15 and younger from the time they are in custody. APSAC therefore supports petitioner’s suggestion that such a rule may be appropriate.

First, as explained by petitioner, Pet. 20–24, normal child development benchmarks indicate that

³⁶ In light of Joseph’s history of severe maltreatment, his emotional and behavioral challenges are unsurprising. Traumatized children often respond to adverse experiences by exhibiting aggression and defiance, which can lead to them being judged as “oppositional” in educational and other settings. Heather Welfare et al., *Involvement in Extreme Violence and Violence-Related Trauma: A Review with Relevance to Young People in Custody*, *Legal & Crim. Psychol.* 6 (2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.2044-8333.2010.02002.x/abstract>.

even normal children 15 and under are uniquely vulnerable to interrogation and, without the assistance of counsel, will lack the capacity to understand the consequences of *Miranda* waiver.

Second, most juvenile offenders *are not* developmentally average children—rather, a significant portion of these defendants have experienced maltreatment and abuse. Numerous studies sampling juvenile and adult offenders have found “strikingly higher rates of childhood abuse and neglect” than among the general population.³⁷ A recent study of juvenile justice system-involved youth found that 50% of these children reported four or more ACEs, and nearly 90% reported at least two.³⁸ One researcher has argued that nearly the entire criminal justice population in the United States demonstrates childhood histories of trauma, abuse, and neglect.³⁹

Courts have begun to recognize the high probability that juvenile defendants coming before them have suffered maltreatment. The National Council of Juvenile and Family Court Judges has issued recommendations to judges responsible for adjudicating their cases.⁴⁰ In its report, the Council noted that

³⁷ Nat’l Child Traumatic Stress Network, Juvenile Justice Working Grp., *Victimization and Juvenile Offending* 5 (2004) (collecting studies).

³⁸ Office of Juvenile Justice & Delinquency Prevention, *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. of Juv. Justice 1, 9–10 (Spring 2014).

³⁹ Welfare, 17 Legal & Crim. Psychol. at 7 (citing study).

⁴⁰ See generally Buffington.

“most youth who are detained in juvenile detention centers have been exposed to both community and family violence and many have been threatened with, or been the direct target of, such violence.”⁴¹ The Council concluded that “the majority of youth in the juvenile justice system have experienced traumatic events; the juvenile court is disadvantaged if this fact is overlooked.”⁴²

Third, because of the neurobiological damage that can be caused by chronic abuse and trauma, juvenile offenders 15 years of age and under who have also been victims of maltreatment are almost certainly incapable of knowingly, intelligently, and voluntarily waiving their *Miranda* rights. See pp. 5–13, *supra*. Given that most juvenile defendants are victims of maltreatment and abuse, a prophylactic rule requiring counsel from the time a child 15 years of age or younger is in custody may be the most effective way to protect the constitutional rights of these vulnerable defendants and assist juvenile courts in the orderly administration of justice.

Finally, a prophylactic or exclusionary rule, or a rebuttable presumption of incapacity, may prove simpler and easier to administer in these cases than the “totality of the circumstances” balancing test. When a detective arrives at the scene of a crime allegedly perpetrated by a juvenile, the officer has no way to assess the child for developmental stage or trauma exposure before commencing an interrogation. In practice, then, the rights of children may be

⁴¹ *Id.* at 2 (collecting studies).

⁴² *Id.* at 13.

violated if they are only protected by a post-hoc, multi-factor test. Because most children 15 and under will be unable to meaningfully understand the decision to waive *Miranda*, providing counsel to these children once they are in custody may be the most effective way to protect their rights.⁴³

⁴³ The MacArthur Foundation has recently concluded that even for developmentally normal children, a rule requiring assistance of counsel from the time of initial contact with police to post-disposition most appropriately protects juvenile defendants' rights. See *MacArthur Report 25* ("Adolescents tend to make impulsive decisions, don't consider long-term consequences, and are highly susceptible to coercion, especially by authority figures. They need attorneys * * * to help them understand what is happening and make good decisions."). The MacArthur Foundation stressed that this rule is also important because parents' interests can easily conflict with those of their children. *Id.* at 25–26.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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