No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a ten-year-old child with developmental disabilities, was interrogated by police after shooting his abusive father, a regional leader of the Neo-Nazi movement. The California Court of Appeal held that Petitioner voluntarily, knowingly and intelligently waived his *Miranda* rights in a custodial interrogation, despite demonstrating a manifest misunderstanding of those rights characteristic of a child his age, and despite the fact that the only adult guidance he had came from his stepmother — who was laboring under a serious conflict of interest, and who ultimately testified for the prosecution. The questions presented are:

1. Whether a ten-year-old child in a custodial interrogation can give a voluntary, knowing and intelligent waiver of his rights against self-incrimination and to legal counsel in a criminal case, without further constitutional protections such as mandatory access to legal counsel or an unconflicted adult guardian.

2. Whether the presence of Petitioner's conflicted stepmother during his interrogation tainted his purported waiver.

3. Whether Petitioner voluntarily, knowingly and intelligently waived his rights under the circumstances.

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OPINIONS BELOW

The opinion of the Court of Appeal is reported at 237 Cal. App. 4th 517. *See* Petition and Supplemental Appendices ("App.") 1a-40a. The order of the Supreme Court of California denying review, and Justice Goodwin Liu's dissent, are unreported. *Id.* at 41a-53a.

JURISDICTION

The Court of Appeal filed its opinion denying all of Joseph H.'s ("Joseph" or "Petitioner") assignments of error in his direct appeal on July 8, 2015. App. 1a; *see* Cal. R. Ct. 8.264(b). On October 16, 2015, the Supreme Court of California denied Joseph's petition for review, ending its path through the California courts and rendering the Court of Appeal's decision final. App. 41a; Cal. R. Ct. 8.528(b)(2). This Court has jurisdiction from the Supreme Court of California's denial of review under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend XIV, § 1.

The Fifth Amendment provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.

INTRODUCTION

In a series of important recent decisions, this Court has acknowledged the settled scientific consensus that minors "characteristically lack the capacity to exercise

mature judgment" that the law expects from fully responsible adults, and that the Constitution requires special consideration of those unique incapacities in various criminal law contexts. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (age of child must be considered when determining whether interrogation was custodial); *see also*, *e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2464, 2468 (2012) (no mandatory life without parole for children, who generally have an "inability to deal with police officers or prosecutors"); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (life without parole for minors unconstitutional for non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (capital punishment for minors unconstitutional). But the Court has never, in the modern era, addressed the implications of that scientific consensus for determining whether a child's purported waiver of constitutional rights in a custodial interrogation was valid. Instead, courts around the country routinely apply the "totality of the circumstances" standard mandated by this Court with no real understanding or recognition of the modern science, and find purportedly voluntary, knowing and intelligent waivers of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), by young children.

As Justice Goodwin Liu explained in a rare dissent from the California Supreme Court's denial of review, this case raises "several questions worthy of . . . review" implicating important legal issues that "affect[] hundreds of cases each year." App. 49a, 52a. The tragic underlying events, and Petitioner's treatment by the California courts, have been widely reported and have attracted significant national public

and academic concern.[1] On May 1, 2011, Joseph, then ten years old, shot and killed his father at their home in Riverside, California. Joseph's father, Jeffrey H. ("Jeffrey"), was a regional leader of the Neo-Nazi movement. Joseph had endured substantial mental and physical abuse at the hands of his parents and stepparents, and suffered from significant developmental disabilities.

After the shooting, the police extracted a confession from Joseph in an interrogation conducted without counsel and in the presence of his stepmother, Krista M. ("Krista") — who faced significant conflicts of interest because her husband was the victim and her own conduct was implicated in the shooting. Krista ultimately pled guilty to a child endangerment charge in connection with the offense and testified for the prosecution against Joseph. Although Joseph was negatively affected by Krista's presence, and although his responses to questions during the interrogation demonstrated a profoundly childlike and constitutionally insufficient understanding of the warnings given by police (for example, he understood the "right to remain silent" as the "right to stay calm"), the California courts held that under the "totality of

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[1] *See, e.g.*, Bob Egelko, *Confession of boy, 10, raises doubts over grasp of Miranda rights*, San Francisco Chron. (Oct. 25, 2015), http://www.sfchronicle.com/news/article/Confession-of-boy-10-raises-doubts-over-grasp-6589676.php; Erwin Chemerinsky, *Court gets it wrong with boy who killed neo-Nazi dad*, Orange Cnty. Register (Oct. 22, 2015), http://www.ocregister.com/articles/court-688579-boy-rights.html; *see also* Amy Wallace, *A Very Dangerous Boy*, GQ Magazine (Nov. 4, 2013), http://www.gq.com/story/joseph-hall-murders-neo-nazi-father-story.

the circumstances" his waiver of his *Miranda* rights was voluntary, knowing and intelligent.

That holding resolved important federal issues in a manner that conflicts with decisions in other States, and that cannot be reconciled with this Court's recent jurisprudence. Sup. Ct. R. 10(b), (c). Review should be granted to provide much-needed guidance to State and federal courts nationwide on a number of issues.

First, experience has shown that the *Miranda* warnings and the "totality of the circumstances" standard do not, by themselves, adequately protect the rights of children in custodial interrogations. *Miranda* itself rested on a recognition that a strict prophylactic warning rule was necessary to ensure that constitutional rights would be respected, as a real and practical matter, in interrogation rooms across the country. Those warnings cannot fulfill such a role when delivered to children who are too young to understand and appreciate the real significance of interrogation, and who lack appropriate adult guidance.

Justice Liu opined that "there [may be] an age below which the concept of a voluntary, knowing and intelligent [*Miranda*] waiver has no meaningful application" without additional constitutional safeguards. App. 49a. This Court should grant review to announce a prophylactic rule that a purported waiver by a ten-year-old child without legal counsel or other appropriate adult guidance is invalid. Although this Court would of course be free to frame its holding more broadly or narrowly, extending such a rule to all children as old as fifteen would be substantially justified under the prevailing scientific consensus that such children are uniquely impaired in the interrogation setting. Appointing counsel, or involving

an appropriate adult guardian, before subjecting such children to inherently coercive interrogations will not unduly burden law enforcement and is essential if important rights are to be respected.

Second, this Court has never addressed how the presence of a conflicted parent or guardian at an interrogation of a child ought to impact judicial consideration of a child's waiver. There is considerable evidence that in custodial interrogations, parents often are unable or unwilling to advise in their child's best interest, and this case presents an unusually good vehicle to address that issue. Joseph's stepmother had important conflicts of interest, and the role she played in the interrogation should have precluded any finding that Joseph's waiver was voluntary, knowing and intelligent. This Court should grant review to make clear that police, and reviewing courts, should be much more careful about how parents with potentially conflicting interests are involved in the inherently coercive interrogations of their children.

Third, at a minimum this Court should grant review to apply the "totality of the circumstances" analysis to the facts of Joseph's case, in light of the modern science of child development that it has discussed in decisions like *Miller* and *J.D.B.* An opinion from this Court addressing these issues would provide much-needed clarity and structure to judicial decisions around the country that at present are too often uninformed, haphazard, and arbitrary.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Joseph's Childhood and Family

Jeffrey was a leader of the Neo-Nazi movement in Southern California. *See* R., Vol. 2, at 335, 387-88.[2] Joseph was born during Jeffrey's first marriage, but Jeffrey later had three additional children with Krista, his second wife, who served as one of Joseph's primary caregivers.[3] *Id.*, Vol. 1, at 103-04.

California Child Protective Services issued 23 reports concerning allegations of abuse, poor living conditions and neglect for households where Joseph had lived. *Id.*, Vol. 2, at 303. Jeffrey was addicted to drugs including methamphetamine, was "frequently violent towards both Krista and Joseph" and "would . . . beat[] on Joseph." App. 4a. Despite the rampant abuse, the authorities never took remedial action. R., Vol. 1, at 161.

B. The Incident

On April 30, 2011, Jeffrey held a Neo-Nazi meeting at his home; approximately a dozen people attended.

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[2] Record references are made to the State's compiled record below. References to the Trial Reporter's Transcript are denoted by "R.," then the volume. References to the Trial Clerk's Transcript, and the Supplemental Trial Clerk's Transcript, are denoted by "Clerk's Tr." or "Supp. Clerk's Tr.," respectively, followed by the volume. The majority of the record was filed under seal. The Supplemental Appendix to this Petition contains such material and is concurrently lodged under seal before this Court.

[3] Joseph moved in with Krista and Jeffrey after leaving the home of his biological mother, who had previously exposed him to drugs in utero. R., Vol. 2, at 303-05, 320.

R., Vol. 1 at 140. Jeffrey left in the evening to give a young woman a ride home and did not return until the early hours of the next morning, after which he fell asleep on the couch. App. 5a. Krista testified that, while she slept, Joseph took Jeffrey's gun from her bedroom and went downstairs. *See* R., Vol. 1, at 146-49, 168-70. Krista said she then heard a "crash" and found that Jeffrey had been shot. *Id.*

C. The Investigation

Police arrived at the residence at approximately 4:04 a.m., and all occupants exited. App. 5a. The children were taken into police vehicles. *Id.* at 6a. Joseph spontaneously said he had "grabbed the gun and shot his dad in the ear" because "his father had beaten him and his mother." *Id.* In the police car, Joseph told an officer that Jeffrey "had abused him and other members of the family repeatedly, and that the previous night, his father had threatened to remove all the smoke detectors and burn the house down, while the family slept." *Id.* Around the same time, Joseph asked police, "How many lives do people usually get?" *See* Supp. Clerk's Tr., Vol. 2, at 360:7.

Joseph was then taken into custody and interviewed for more than an hour in the presence of Krista. Roberta Hopewell, a child specialist detective, proceeded to ask Joseph questions from what is known as the Penal Code section 26 "*Gladys R.* Questionnaire," which expressly states: "To be filled out on all arrestees under 14 years of age after Miranda Rights have been waived." App. 95a.[4]

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[4] Under California law, the State must prove in its case-in-chief that a child under fourteen knows and appreciates the

However, Detective Hopewell neglected to advise Joseph of his rights prior to administering the *Gladys R.* Questionnaire. In fact, Detective Hopewell did not attempt to administer warnings until roughly two minutes into the interrogation, at which point she and Joseph had the following exchange:

> **HOPEWELL**: Okay. Now, I'm going to read you something and it's – it's called your Miranda Rights. And, I know you don't understand really what that is. But, that's why your mom's here. Okay? And, she's gonna listen to it and then, she's going to give me your answers. Okay? If you want to answer for you, that's great too. Okay? If you don't understand something, w-when I state something. I want you to tell me. I don't know what you're talking about or I don't understand.
>
> **JOSEPH**: All right.
>
> **HOPEWELL**: Okay? All right. Right now, you know you're here because of what happened to your dad?
>
> **JOSEPH**: Yeah.
>
> **HOPEWELL**: All right. So, you have the right to remain silent. You know what that means?
>
> **JOSEPH**: Yes, that means that I have the right to stay calm.
>
> **HOPEWELL**: That means y-you do not have to talk to me.
>
> **JOSEPH**: Right.
>
> **HOPEWELL**: Okay? And, anything you say, will be used against you in a court of law. Do you know what that means? [no response] That means that if

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"wrongfulness" of a crime in order to be found liable. *See* Cal. Pen. Code § 26 ("P.C. 26").

we have to go to court and tell the judge what, what you did, that whatever you're gonna tell me today, I can tell the judge, "This is what Joseph told me." Okay?

JOSEPH: Okay.

HOPEWELL: You understand that?

JOSEPH: Yeah.

HOPEWELL: Okay. And, you have the right to talk to a lawyer and have a lawyer here with you – an attorney – before I ask you any questions. Do you understand that? And, you shake your head upside uh what does that . . .

JOSEPH: Yes.

HOPEWELL: . . . mean? What does that mean to you?

JOSEPH: It means, don't talk until that means to not talk till the attorney or . . .

HOPEWELL: That means, you have the choice. That you can talk to me with your mom here or you can wait and have an attorney before you talk to me.

JOSEPH: Okay.

HOPEWELL: Okay? But it's your choice and it's your mom's choice. Okay?

JOSEPH: Okay.

HOPEWELL: All right. And, if you can't afford one – 'cause I know you don't have a job, no money – um, the court will appoint one, an attorney for you. Before I talk to you about anything. Do you understand that?

JOSEPH: Yeah.

Id. at 46a-48a (quoting *id.* at 101a-03a). From that point, Detective Hopewell extracted information

considered critical by the juvenile court to the question of whether Joseph knew and appreciated the wrongfulness of his act under P.C. 26. *See infra* n.5. Throughout the remaining interrogation, Krista continuously encouraged Joseph to answer questions. *See* Supp. Clerk's Tr., Vol. 1, at 91:34.

II. PROCEDURAL BACKGROUND

A. The Delinquency Proceedings

On May 3, 2011, the State filed a wardship petition charging Joseph with second degree murder under California Penal Code Section 187(a).

Throughout trial, the court received evidence of physical and mental abuse, poor living conditions and neglect. *See, e.g.*, R., Vol. 2, at 312:4-11. The juvenile court rejected Joseph's argument that his *Miranda* rights were violated during the interrogation, admitting the vast majority of the statements Joseph made to Detective Hopewell. App. 69a-74a, 82a-84a. It then accepted the State's allegations on the wardship charge, concluding that Joseph's statements within the first 24 hours after the incident — including statements made during the lengthy interrogation — were the most probative of his P.C. 26 *mens rea*, *i.e.*, that he knew and appreciated the wrongfulness of his conduct. *See* R., Vol. 4, at 835:5-15; *see also* App. 87a-94a.

B. The Court of Appeal Affirms and the Supreme Court of California Denies Review

Joseph appealed. App. 2a. The Court of Appeal held that Detective Hopewell's failure to advise Joseph of his rights during the initial minutes of the interrogation and prior to administering warnings was

improper, but it held that such error was harmless because Joseph previously admitted to the commission of the offense.[5] *See id.* at 20a-21a. The court also held that Joseph's *Miranda* waiver, once the warnings were given, was valid under the totality of the circumstances, despite his age, disabilities and the presence of his conflicted stepmother at the interrogation. *Id.* at 21a-25a. The court gave little weight to Joseph's age in its analysis, noting only that "[a]ge *may* be a factor in determining the voluntariness of a confession." *Id.* at 22a (emphasis added). It also did not focus on Joseph's disabilities, instead reasoning that "[n]othing in the record supports the premise that [Joseph] was confused or suggestible" during the interrogation. *Id.* at 24a.

The Supreme Court of California denied Joseph's petition for review by a vote of 4-3 on October 16, 2015. However, Justice Liu penned a dissent from the denial, explaining that review was warranted because the case "raises an important legal issue that likely affects hundreds of children each year." *Id.* at 42a. As Justice

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[5] The court's harmless-error analysis is inapplicable to the errors raised by Joseph's Petition, because those errors cover the evidence elicited from the entire interrogation — not just the first few minutes. In any event, the Court of Appeal's analysis was erroneous. Virtually all of the statements cited by the court to demonstrate harmlessness went to whether Joseph *committed* the act, not whether he *appreciated the wrongfulness* of it, which was Joseph's key defense at trial under P.C. 26 and the focus of his *Miranda* arguments. *See* App. 20a-21a. Joseph never contested the fact that he pulled the trigger. And of course this Court would be free to leave any harmless error issues to the State courts on remand. *See, e.g.*, *Hurst v. Florida*, No. 14-7505, 2016 WL 112683, at *8 (U.S. Jan. 12, 2016) (U.S. Jan. 12, 2016) ("not reach[ing] the State's assertion that any error was harmless").

Liu explained, "waivers by juveniles present special concerns" that should be reconsidered in light of this Court's "affirm[ance of] the commonsense conclusion that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; [and] that they are more vulnerable or susceptible to . . . outside pressures than adults." *Id.* at 43a (omission in original) (citations and internal quotation marks omitted).

REASONS FOR GRANTING THE WRIT

This Court has repeatedly recognized the modern science showing that children are different, in terms of their cognitive capacities and their abilities to appreciate the significance of their actions and decisions, and has held that the criminal law must take account of those differences. But the Court has never explained the legal significance of these issues to the evaluation of whether a child has given a valid waiver of important constitutional rights in custodial interrogations. In the absence of such guidance, courts around the country apply a vague "totality of the circumstances" test in a manner that systematically undervalues the particular incapacities and limitations of childhood. It is not realistic or appropriate to expect that the solution to that problem will emerge from the lower courts, bottom-up. This Court has the position, the expertise and the resources to grapple with the relevant science and constitutional values and to articulate the appropriate path forward. This case presents a compelling opportunity and vehicle to address these important questions.

First, Petitioner respectfully submits that a ten-year-old child subjected to custodial interrogation

needs the assistance of competent legal counsel, or at least a competent and unconflicted adult guardian, before any waiver of *Miranda v. Arizona* rights may be accepted. 384 U.S. 436 (1966). Such assistance is necessary, as a practical matter, to ensure that the child's rights are respected and that whatever testimony given is not the product of inappropriate coercion. This Court should articulate a clear prophylactic rule which should encompass all children at least up to age fifteen — before which the research demonstrates that children lack capacity to exercise *Miranda* rights[6] — although the Court would of course be free to frame its holding more broadly or narrowly as it believes appropriate.

Second, this Court should grant review to explain how police and reviewing courts should approach the presence at a child's interrogation of parents who may have a conflict of interest or be otherwise incompetent to provide meaningful consultation with the child. This issue arises frequently, and there is a strong scholarly consensus that such facts pose serious dangers to a child's rights in interrogations. The Court has never addressed these issues, and this case would be an unusually good opportunity to explore them. Joseph's stepmother was not an appropriate guardian of his interests, and the role she played during his interrogation should have precluded a finding that Joseph's waiver was voluntary, knowing and intelligent.

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[6] *See, e.g.*, Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice*, 83 N.C. L. Rev. 793, 817 (2005) (research shows fifteen to be a defining age in psychological development).

Third, at a minimum, review should be granted to apply the "totality of the circumstances" standard to the facts here, in light of the modern science of child development as explained in this Court's recent case law. Only an opinion from this Court can ensure that the principles recognized in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), are appropriately incorporated into the waiver analysis by the lower courts. This case provides a unique opportunity for the Court to offer much needed guidance on an issue of great importance nationwide.

I. THE MODERN SCIENCE OF CHILD DEVELOPMENT RECOGNIZED BY THIS COURT SHOULD BE APPLIED TO THE *MIRANDA* WAIVER DOCTRINE

In several areas of the criminal law, this Court has acknowledged the growing body of research recognizing that "children are constitutionally different from adults" and need special protections. *Miller*, 132 S. Ct. at 2464. That jurisprudence arises from a recognition, rooted in the common law and supported by modern neuro-scientific research, that the social, psychological and neurological differences between children and adults highlight "incompetencies associated with youth" such as the "inability to deal with police officers or prosecutors" and "to assess [criminal] consequences." *Id.* at 2468, 2464-65; *see also Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."). These differences often serve as a substantial factor in procuring convictions of children. *See Miller*,

132 S. Ct. at 2468 (child may "have been charged and convicted of a lesser offense if not for incompetencies associated with youth").

Nearly five years ago in *J.D.B.*, this Court addressed these issues in deciding whether an interrogation should be considered "custodial," and hence inherently coercive, for purposes of whether *Miranda* warnings are required at all. And it recognized that the "custody" question could not sensibly be evaluated without careful consideration of the age of the defendant. The Court discussed the scientific evidence that "children characteristically lack the capacity to exercise mature judgment," and held that "to ignore the very real differences between children and adults . . . would be to deny children the full scope of . . . procedural safeguards that *Miranda* guarantees." *J.D.B.*, 131 S. Ct. at 2403, 2408. It held that children are categorically different "as a class" from adults for purposes of *Miranda*'s application. *See id.* at 2403-04.

J.D.B. did not consider whether and how the defendant's age should affect the evaluation of whether he has given a valid waiver. But the Court expressly acknowledged that there are "question[s of] whether children of all ages can comprehend *Miranda* warnings" and whether "additional procedural safeguards may be necessary to protect . . . *Miranda* rights." *Id.* at 2401 n.4.

For five decades, waivers of *Miranda* rights have been judged under a standard that asks, for adults and children alike, whether the defendant voluntarily, knowingly and intelligently waived his rights under the totality of the circumstances. *Id.* at 2401. A waiver "must be [1] voluntary in the sense that it was the

product of a free and deliberate choice rather than intimidation, coercion, or deception, and [2] made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010) (citations and internal quotations marks omitted). In theory, that standard is flexible enough to take account of the unique limitations and incapacities of childhood.[7] But the Court has not provided meaningful guidance about how it should be understood and applied in cases involving minor defendants, in the modern era.

As a result, decisions in the lower courts remain ad hoc, unstructured, largely uninformed by the modern science of child development and distressingly arbitrary. A few courts have concluded that young children inherently may not understand *Miranda* warnings. *See, e.g.*, *In re Joshua David C.*, 698 A.2d 1155, 1162-63 (Md. Ct. Spec. App. 1997) (questioning whether a ten-year-old can waive his rights).[8] But

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[7] Some of this Court's older cases indicate that age should be a significant factor. *See In re Gault*, 387 U.S. 1, 3, 55-57 (1967) (confession of fifteen-year-old involuntary); *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962) (confession of fourteen-year-old involuntary); *Haley v. Ohio*, 332 U.S. 596, 600-01 (1948) (plurality) (confession of fifteen-year-old involuntary; "a boy of fifteen, without aid of counsel, [cannot be assumed to] have a full appreciation of [his rights]"); *cf. Fare v. Michael C.*, 442 U.S. 707, 726 (1979) (sixteen-year-old's waiver held constitutional). In support of Petitioner's arguments, even if implicitly, the foregoing decisions demonstrate fifteen years of age as the line at which this Court has concluded minors are impaired in custodial contexts. *See infra* Section II.

[8] *See also In re Elias V.*, 237 Cal. App. 4th 568, 588-89, 600 (2015) (considering exhaustive scientific research, and finding no

most courts, like the Court of Appeal below, invoke purported consideration of the "totality of the circumstances" as a substitute for meaningful scrutiny and systematically undervalue the significance of age in the constitutional analysis.

Although the nature of the issue does not permit identification of a crisp "split," there are many cases finding valid waivers by very young children (often with additional impairments). *See, e.g.*, *W.M. v. State*, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991) ("Despite the child's age of being ten (10) years old and despite the fact that the child attended [Specific Learning Disability] classes, the Court finds that the child was able to understand and comprehend the Miranda warnings."); *see also* Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in Youth on Trial: A Developmental Perspective on Juvenile Justice* 105, 113 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("Courts readily admit the confessions of . . . juveniles with I.Q.s in the sixties whom psychologists characterize as incapable of abstract reasoning.").[9] Those decisions

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waiver of thirteen-year-old in light of deficits); *accord A.M. v. Butler*, 360 F.3d 787, 799-800, 801 n.11 (7th Cir. 2004) (finding "no reason to believe that [eleven]-year-old could understand the inherently abstract concepts of . . . *Miranda* rights and what it means to waive them").

9 *See also, e.g.*, *State ex rel. A.W.*, 51 A.3d 793, 795, 807 (N.J. 2012) (thirteen-year-old waived his rights); *State ex rel. Juvenile Dep't of Marion Cty. v. L.A.W. (In re L.A.W.)*, 226 P.3d 60, 64, 66 (Or. Ct. App. 2010) (reversing the trial court's finding that a twelve-year-old, who only responded "yeah" when asked if he understood his rights, was unable to comprehend the *Miranda* warnings, citing the "youth's age, intelligence, education, and demonstrated cognitive ability to track with and respond to the

reflect a grave injustice that this Court should correct. *See* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 Wash. U. J.L. & Pol'y 109, 166 (2012) ("If the lower courts apply *J.D.B.*'s 'general presumptions' about the nature of youth fully and faithfully, surely most juvenile waivers of *Miranda* rights will not withstand constitutional scrutiny.").

Simply put, the "growing body of scientific research that . . . assess[es] differences in mental capabilities between children and adults" (App. 50a) has not been incorporated into real judicial decision-making in far too many courtrooms across this country. Many prominent scholars have pointed out that *Miranda* waiver decisions in the lower courts are not appropriately reflecting the science discussed by this Court in *J.D.B.* (and in the Eighth Amendment decisions like *Miller*) about child defendants. *See, e.g.*, Note, *Juvenile* Miranda *Waiver and Parental Rights*, 126 Harv. L. Rev. 2359, 2363-64 (2013) ("[T]he 'evolution of juvenile justice standards' has not made its way to [the] waiver doctrine." (citation omitted)); Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 89 (2013) (jurisprudence holding that

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detective's questions"); *State ex rel. Juvenile Dep't of Clatsop Cty. v. Cecil (In re Cecil)*, 34 P.3d 742, 743-44 (Or. Ct. App. 2001) (admitting custodial statements of a twelve-year-old, who had an IQ of 73 and testified that he did not understand that he could choose not to speak to the police, even where psychologist testified that the child likely did not have the capacity to assert his rights); *In re Ronald Y.Z.*, 10 Misc. 3d 1067(A), at *4 (N.Y. Fam. Ct. 2005) (eight-year-old waived his rights); *In re Goins*, 738 N.E.2d 385, 389 (Ohio Ct. App. 1999) (eleven-year-old waived his rights).

"children are different" has broad "constitutional implications" (citation omitted)).

Guidance from this Court is necessary to elucidate how the modern science it has discussed in cases like *Miller* and *J.D.B.* should inform the waiver inquiry. Every year, tens of thousands of ten- to twelve-year-olds, and hundreds of thousands of children under fifteen, are arrested in the United States.[10] The issues presented here are of great importance to the administration of justice nationwide and merit review by this Court.

II. THE COURT SHOULD ADOPT A PROPHYLACTIC RULE REQUIRING THE PRESENCE OF, AND MEANINGFUL CONSULTATION WITH, AN ATTORNEY OR APPROPRIATE ADULT FOR YOUNG CHILDREN IN CUSTODIAL INTERROGATIONS

This Court should grant review to hold that no waiver by a ten-year-old child like Joseph may be accepted if the child has not been provided meaningful adult guidance, whether from appointed legal counsel or at least a non-conflicted parent or guardian competent to advise the child about waiver. That rule should be extended to all children fifteen and under, although of course this Court will frame its holding as broadly or as narrowly as it thinks appropriate.[11]

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[10] *See generally* Howard N. Snyder & Joseph Mulako-Wangota, Bureau of Justice Statistics, Arrest Data Analysis Tool, http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm# (last visited Jan. 9, 2016).

[11] Joseph argued for a bright-line rule of this nature in his petition to the Supreme Court of California, but not before the

A. Overwhelming Scientific Research Supports a Finding That Ten-Year-Olds Cannot Waive Their *Miranda* Rights without Adult Guidance

"Developmental psychologists report a significant drop-off in the cognitive and judgment abilities of youths fifteen years of age and younger," which are critical to understanding criminal justice concepts like *Miranda*. Barry C. Feld, *Kids, Cops, and Confessions: Inside the Interrogation Room* 87 (2013); *see* Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, 48 (2006) ("For youths fifteen years of age and younger, these disabilities [*e.g.*, the capacity to exercise *Miranda* rights] emerge clearly in the research."); *see also*, *e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 356 (2003) ("[J]uveniles aged [fifteen] and younger are significantly more likely than older adolescents and

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Court of Appeal. A holding along these lines would, however, have been fairly embraced by his arguments that he lacked capacity to give a knowing and intelligent waiver due to his age and developmental maturity. *See, e.g.*, App. 23a-24a, 72a. Litigants may always advance additional arguments on appeal in support of a claim that was properly pressed below. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim."). Regardless, the California courts are limited by the State constitution from adopting exclusionary rules not required by the federal Constitution as interpreted by this Court. Cal. Const., art. I, § 28(f)(2). This Court is therefore the first forum in which Joseph can effectively advocate for a change in the "totality of the circumstances" standard this Court has previously articulated.

young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding.").

First, children "manifest[] significantly inferior comprehension of the meaning and importance of *Miranda* warnings." Scott & Grisso, *Developmental Incompetence*, *supra*, at 825; Feld, *Kids*, *supra*, at 73 (study found that "the majority of younger juveniles . . . exhibited [a] significant lack of understanding" of their *Miranda* rights) (citing Jodi Viljeon et al., *Adjudicative Competence and Comprehension of* Miranda *Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 Behav. Sciences & the Law 1 (2007))); *see also* Abigail Kay Kohlman, Note, *Kids Waive the Darndest Constitutional Rights: The Impact of* J.D.B. v. North Carolina *on Juvenile Interrogation*, 49 Am. Crim. L. Rev. 1623, 1636 (2012) (more than a high school education necessary for an adequate comprehension of *Miranda*); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1160 (1980) (age weighs heavily in misunderstanding *Miranda* warnings). Few if any children as young as Joseph have a satisfactory understanding of *Miranda* warnings. *See* Richard Rogers et al., *Comprehensibility And Content Of Juvenile* Miranda *Warnings*, 14 Psychol. Pub. Pol'y & L. 63, 78 (2008) (children in Joseph's age range "are simply unlikely to grasp key *Miranda* components").

Similarly, because the decision to waive *Miranda* requires an appreciation of "the tactical and strategic ramifications of relinquishing rights," and because children are impulsive and make decisions more rashly, a decision to waive may not be knowing and intelligent

even if the words of warning spoken are understood. *See* Feld, *Kids*, *supra*, at 82 ("Delinquent youth share . . . characteristics . . . that impair *Miranda* understanding."); *see also* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 Wis. L. Rev. 431, 435-36 (2006) ("[C]hildren do not think and reason like adults because they cannot."). Thus, even with the "appearance of comprehension[,] . . . an affirmation of understanding [and an] absence of signs of confusion . . . may reflect compliance with authority or passive acquiescence rather than true understanding." Feld, *Kids*, *supra*, at 90. Most children simply "are more likely to believe that they should waive their rights and tell what they have done," not due to adequate comprehension, but "because they are still young enough to believe that they should never disobey authority." Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 8 (2010).

Second, for a waiver to be "voluntary," it must be "the product of a free and deliberate choice." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). But a child's ability to effect a voluntary waiver is impaired by an "[unformed] sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure." Kohlman, *Kids Waive*, *supra*, at 1636 (quoting King, *Waiving Childhood Goodbye*, *supra*, at 436 (internal quotation marks omitted)). These characteristics amplify the coerciveness of an interrogation, and may be aggravated by officers who deceptively downplay the seriousness of the situation. *See J.D.B.*, 131 S. Ct.

2403-04.[12] In fact, a child's particular vulnerabilities in this respect create a serious "risk [that] interrogation[s] will produce [] false confession[s]" in a "significantly greater [amount] for [children] than for adults." *Elias V.*, 237 Cal. App. 4th at 588; *see* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 544-45 (2005) (study of 340 exonerations, finding that minors were more likely to give a false confession than adults); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 Law & Psychol. Rev. 53, 61 (2007) ("[Y]oung people are especially prone to confessing falsely.").

J.D.B. itself reaffirmed that the physical and psychological pressures of a custodial interrogation — which "can undermine the individual's will to resist" and "compel him to speak" — are "so immense that [they] can induce a frighteningly high percentage of people to confess to crimes they never committed." 131 S. Ct. at 2401 (citations and internal quotations marks omitted). "That risk is all the more troubling . . . [and]

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[12] This Court has recognized that the police typically resort to "[k]indness, cajolery, entreaty, [and] deception" to "unbend [suspects'] reluctance" to incriminate themselves. *Culombe v. Connecticut*, 367 U.S. 568, 571-72 (1961) (plurality). In that spirit, lower courts have questioned whether common and permissible interviewing techniques for adults are coercive for minors. *See Boyd v. State*, 726 S.E.2d 746, 750 (Ga. Ct. App. 2012) (interviewing techniques for adults "may be ill-advised when interviewing a juvenile"); *see also State v. Unga*, 196 P.3d 645, 653 (Wash. 2008) ("[A] friendly relationship might tend to indicate coercion if it is employed to cause the suspect to relax and confide in the officer.").

acute . . . when the subject of custodial interrogation is a juvenile." *Id.*

B. The "Totality of the Circumstances" Inquiry Does Not Protect the Rights of Children without Additional Safeguards, Such as the Mandatory Appointment of an Attorney or Unconflicted Adult

The research discussed above, together with the research relied upon by this Court in cases like *Miller* and *J.D.B.*, makes clear that the framework established by *Miranda* does not sufficiently protect the rights of children in custodial interrogations. Petitioner respectfully submits that the science and constitutional considerations support a prophylactic rule that no waiver should be accepted from a ten-year-old child unless he has been provided with an attorney, or at least a competent and unconflicted adult guardian, who can understand the warnings and their significance and give objective advice.

Scholars overwhelmingly support a categorical rule along the lines recommended by this Petition. *See, e.g.*, Ellen Marrus, *Can I Talk Now? Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 Temp. L. Rev. 515, 528 (2006) ("[I]t would be easier for the courts and for law enforcement personnel to adhere to a bright-line per se rule rather than the amorphous totality of the circumstances test."); Grisso, *Juveniles' Capacities*, *supra*, at 1143 (recommending "per se exclusionary rules . . . to protect" children, and in particular those under fifteen, from involuntary confessions); Kimberly Larson, Note, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 Vill. L.

Rev. 629, 631, 661 (2003) ("[The L]egal community must re-evaluate the safeguards afforded to juveniles during interrogations if the law is to coincide with current psychological research."); Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 Am. Crim. L. Rev. 1277, 1312 (2004) ("[P]roviding juveniles with a mandatory non-waivable right to counsel in the pre-interrogation setting is the surest way to insure the protections aspired to in both *Miranda* and *Gault*."). Indeed, many commentators argue that only a mandatory appointment of an attorney can supply the required safeguards. *See*, *e.g.*, Thomas Grisso & Melissa Ring, *Parents' Attitudes toward Juveniles' Rights in Interrogation*, 6 Crim. Just. & Behav. 211, 224 (1979) (parental guidance is an inadequate "substitute for the advice of trained legal counsel"); Feld, *Kids*, *supra*, at 44-45, 187-89 (presence of parents at an interrogation is detrimental); Rogers et al., *Comprehensibility*, *supra*, at 66 ("[P]arental motivations ... may not serve to protect juvenile suspects.").

Moreover, a significant minority of States have adopted applicable rules, by statute or judicial decision, which in many instances require that children have access to appropriate adult guidance in interrogations, and/or that counsel or a parent must consent to a waiver.[13] Although those statutes and decisions may

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[13] *See* N.M. Stat. Ann. § 32A-2-14(f) (no confessions admissible against children under thirteen); W. Va. Code § 49-4-701(*l*) (statement by child under fourteen inadmissible unless counsel present); N.C. Gen. Stat. § 7B-2101(b) (confessions inadmissible against children under sixteen unless parent, guardian, custodian, or attorney present); Okla. Stat. tit. 10A, § 2-

implement State law, they reflect widespread awareness of a problem that has serious federal constitutional dimensions. And a prophylactic rule that children cannot waive their vital Fifth Amendment rights without appropriate adult guidance finds support in longstanding principles of common law and family law, which preclude children from binding themselves to a wide variety of potentially life-altering decisions without adult assistance and/or consent.[14]

2-301(A) (same); Conn. Gen. Stat. § 46b-137(a) (no confessions admissible against children under sixteen unless parent or guardian present); Colo. Rev. Stat. § 19-2-511(1) (same, for all children); Kan. Stat. Ann. § 38-2333(a) (confessions inadmissible against children under fourteen prior to consultation with attorney or parent before waiver); N.D. Cent. Code § 27-20-26(1) (children under eighteen must be represented by counsel or their parent, guardian, or custodian); Ind. Code § 31-32-5-1 (waiver requires consent of child and counsel or guardian); 705 Ill. Comp. Stat. 405/5-170 (counsel required for minors under thirteen for certain offenses); Iowa Code § 232.11(2) (parental consent required for waiver of child under sixteen); Mont. Code Ann. § 41-5-331(2) (parent, guardian, or counsel must consent to waiver for child under sixteen); Tex. Fam. Code Ann. § 51.095(a)(1)(B) (procedures requiring a child to give statements before a magistrate, outside of the presence of law enforcement); *Commonwealth v. A Juvenile (No. 1)*, 449 N.E.2d 654, 657 (Mass. 1983) ("[State] should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights."); *State v. Presha*, 748 A.2d 1108, 1115-17 (N.J. 2000) (parent generally required where child under fourteen is subject to custodial interrogation); *In re E.T.C.*, 449 A.2d 937, 939-40 (Vt. 1982) (requiring consultation with an adult who "is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution").

[14] *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 637 (1979) (plurality) ("The State commonly protects its youth from adverse

At bottom, the Fifth Amendment aims to reduce the inequality between the suspect and the police in the interest of basic fairness, and there can be no real dispute that a child like Joseph, at *ten years old*, could not exercise his vital rights without appropriate adult guidance. *Haley*, 332 U.S. at 599-600 ("[A] lad of tender years is [no] match for the police . . . ."). Nevertheless, the decision below reflects the reality that the vast majority of States have no clear rule that children must be given access to an appropriate adult who can protect their interests. For the reasons explained above, that conflict has nationwide federal constitutional implications that should be addressed and resolved by this Court. A regime in which children are interrogated without appropriate guidance ensures that the rights of those children will be systematically violated.

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governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."). Children have long been protected from the economic perils of commercial contracting. *See, e.g.*, Cal. Fam. Code §§ 6500, 6710; Colo. Rev. Stat. § 13-22-101(1)(a); N.Y. Gen. Oblig. § 3-101. They are also frequently limited in other areas of the law, such as the inability to consent to marriage, *see, e.g.*, Cal. Fam. Code § 301; N.Y. Dom. Rel. § 7, consent to sexual activity, *see, e.g.*, Tex. Penal Code Ann. § 22.011(a)(2), (c)(1), incur liability for torts, *see* Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 136 (2d ed.), Westlaw (database updated June 2015), and "vot[e]" or "serv[e] on juries," *Roper*, 543 U.S. at 569.

III. THIS COURT SHOULD GRANT REVIEW TO CONSIDER HOW THE PRESENCE OF JOSEPH'S CONFLICTED STEPMOTHER AT HIS INTERROGATION SHOULD AFFECT THE WAIVER ANALYSIS

As Justice Liu explained, Joseph's case also presents an excellent vehicle to explore whether there are "conditions [where] a [conflicted] parent or guardian would be unable to play [a] role" in a child's waiver decision. App. 49a. This Court has never addressed that issue, and both the lower courts and law enforcement need guidance about how to approach the common circumstance in which a parent's conflict of interest may impair his or her ability to protect a child's rights. The decision below is inconsistent with decisions of other States, which have held that a child's waiver is invalid if facilitated by a parent laboring under a conflict of interest.[15] As explained, there is a strong scholarly consensus that in many circumstances a parent's involvement impairs a child's ability to understand the situation and give a valid waiver, especially if the parent has a conflict. *See generally* Farber, *supra*, at 1291 (conflicts often affect an adult's ability to act in the child's best interest). In such

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[15] *See, e.g.*, *State ex rel. A.S.*, 999 A.2d 1136, 1150 (N.J. 2010) ("[When] a parent has competing and clashing interests . . . , the police minimally should take steps to ensure that the parent is not allowed to assume the role of interrogator . . . ."); *Ezell v. State*, 489 P.2d 781, 783-84 (Okla. Crim. App. 1971) (confession inadmissible despite presence of mother and legal guardian; no showing that either was "capable of protecting defendant's constitutional rights"); *cf. McBride v. Jacobs*, 247 F.2d 595, 596 (D.C. Cir. 1957) (parent may waive child's rights if waiver is "intelligent [and] knowing" and "there is no conflict of interest between them").

circumstances, or if the parent or guardian is unavailable, counsel should be provided for a child during an interrogation, or a resulting waiver should be deemed invalid.

In Joseph's case, the parental figure present during his interrogation, his stepmother Krista, had clear conflicts of interest. Krista's husband (Jeffrey) had just been killed. She immediately faced criminal charges of her own for her involvement in the offense after Joseph was questioned. And ultimately, she testified as one of the prosecution's key witnesses against Joseph at trial. Despite all this, the detective wrongly instructed Joseph, who was already confused, that he shared his *Miranda* rights with Krista, and went so far as to advise that Krista could answer for him. *See* App. 46a (quoting App. 101a) ("[S]he's gonna listen to it and then, she's going to give me your answers. Okay? If you want to answer for you, that's great too."); *id.* at 48a (quoting App. 103a) ("[I]t's your choice and it's your mom's choice."). Unsurprisingly, Krista encouraged Joseph to continue answering questions, urging him that everything would be fine "as long as you told . . . about . . . [w]hat you did." Supp. Clerk's Tr., Vol. 1, at 91:34. Under any view of the circumstances, this was bad advice.

The Court of Appeal entirely discounted the significance of Krista's presence, holding that the interrogation was not coercive *because* "Joseph frequently looked to his stepmother for support." App. 24a. But that entirely misses the point — Krista could not provide disinterested advice because she "was plainly not in a position to [do so] with only [Joseph's] interests in mind, especially on the day of the murder," despite the fact that Joseph viewed her as his guiding

counsel. *Little v. Arkansas*, 435 U.S. 957, 959 (1978) (denying certiorari) (Marshall, J., dissenting). Indeed, Joseph frequently looked to her for affirmation of the accuracy of his own admissions during the interrogation. *See* Supp. Clerk's Tr., Vol. 1, at 87:8 ("What did my mom say?"); *id.* at 91:28 ("[D]id everything I says [sic] was right?"). At a time when "she was supposed to be giving dispassionate advice," Krista could not. *Little*, 435 U.S. at 960 (Marshall, J., dissenting) ("[A] child's waiver on the ground that she received parental advice is surely questionable when the parent has two obvious conflicts of interest, one arising from the possibility that the parent herself is a suspect, and the other from the fact that she is 'advising' the person accused of killing her spouse.").

IV. THE COURT SHOULD GRANT REVIEW TO EXPLAIN HOW THE MODERN SCIENCE OF CHILD DEVELOPMENT SHOULD INFORM THE "TOTALITY OF THE CIRCUMSTANCES" INQUIRY

At a minimum, the Court should grant review in order to assess the validity of Joseph's purported waiver under the "totality of the circumstances" test, as informed by the modern science of child development and this Court's recent jurisprudence. Guidance from this Court about the application of that standard in circumstances like these would have enormous value, in part because lower courts often do not have the time or resources to engage deeply with the science in the way that this Court can.

Joseph, like the typical ten-year-old, viewed his custodial interrogation and his rights through a fundamentally different lens than an adult would. He was unable to and did not appreciate the significance of

his purported waiver. Notably, when Joseph attempted to verbalize his understanding of his *Miranda* rights, his explanations were unintelligible. When Detective Hopewell asked him if he understood the right to remain silent, Joseph incorrectly replied, "Yes, that means that I have the right to stay calm." App. 46a (quoting App. 102a). Joseph was articulating his childlike understanding of what it means to be "silent" — that is, to be quiet, stay calm, and listen to authority, not that he had the option not to incriminate himself. The continued questioning of Joseph as if he were an adult who understood his rights and appreciated the significance of surrendering those rights is fundamentally at odds with *Miranda*, as a key purpose of the warnings is to ensure that the suspect will understand that he *does not have to speak with police*. *See* 384 U.S. at 445.

Likewise, Detective Hopewell's attempt to explain Joseph's right to counsel was met with a completely incoherent response, in which Joseph explained that he understood the right to mean, "don't talk until that means to not talk till the attorney or . . ." App. 47a (quoting App. 102a). When Detective Hopewell asked if he knew what it meant that "anything you say, will be used against you in a court of law," as demonstrated from the interrogation video, Joseph initially did not respond at all. *Id.* He had no appreciation of the fact that the State was going to use his statements, as it did, to establish criminal liability against him at trial.

When faced with Joseph's obvious lack of understanding, Detective Hopewell made some effort to rephrase her rigidly legalistic explanations in an attempt to correct Joseph's confusion. But this was an empty gesture because she never ensured that Joseph

understood her rephrased description of his rights. Joseph could not possibly have had a real understanding of his rights and the importance of a waiver in response to a few leading questions, requiring "yes" or "no" responses, immediately following a manifest demonstration of misunderstanding. *See* Feld, *Kids*, *supra*, at 90 (appearance of comprehension not enough to ensure it).

Joseph's failure to appreciate his rights and the impact of continuing with the interrogation is further evidenced by his later comments during the interview, when he explained that he "thought he was going home" afterwards. R., Vol. 4, at 835; *see* Supp. Clerk's Tr., Vol. 1, at 94:27-28 (Joseph asking, "When we get home . . . could we see if there's anything good there that we can [do] to . . . get all this out of my mind[?]").[16] Joseph, like other minors his age, simply indicated a desire to comply with police and his stepmother. Supp. Clerk's Tr., Vol. 1, at 91:28 (Joseph asking Krista after a portion of the interview, "did everything I says [sic] was right?").

Despite his complete failure to appreciate the *Miranda* warning administered, the Court of Appeal upheld Joseph's waiver, lauding Detective Hopewell's approach and minimizing the importance of Joseph's age and demonstrated confusion. App. 23a-24a. The court inaccurately stated that "[a]ge *may* be a factor in determining the voluntariness of a confession," and it manifestly gave that factor no meaningful weight. *Id.* at 22a (emphasis added).

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[16] Even before the interrogation, Joseph demonstrated a fantastical view of the situation, asking police, "How many lives do people usually get?" *See* Supp. Clerk's Tr., Vol. 2, at 360:7.

Joseph also suffered from "borderline intellectual functioning and other cognitive deficits" including pervasive Attention Deficit Hyperactivity Disorder ("ADHD") and low average intelligence, such that his real level of comprehension was substantially lower than that expected for his chronological age. *See* App. 23a (citation and internal quotation marks omitted); *see also* R., Vol. 2, at 350-74; Clerk's Tr., Vol. 2, at 487-88. The Court of Appeal likewise disregarded these facts, finding that, although it was "possible" Joseph was affected by his disabilities, his responses to Detective Hopewell's questions demonstrated that he "understood" the warnings. App. 23a-25a. Thus, in addition to the disregard of Joseph's age, the court neglected adequately to consider his disabilities. *See* Feld, *Juveniles' Competence to Exercise* Miranda, *supra*, at 80 n.175 (discussing the impact of developmental disabilities in minors' interrogations); Rogers et al., *Comprehensibility*, *supra*, at 79 (low intelligence and mental disorders are likely to have "catastrophic effects on *Miranda* comprehension").

In recent years, this Court has held repeatedly that decisions about children in the criminal justice system must be informed by a scientific understanding of how a child's cognitive and decisionmaking capacities differ from those of an adult. The decision below illustrates that those principles have not been appropriately incorporated into judicial assessment of whether *Miranda* waivers by children were voluntary, knowing and intelligent. This Court has never addressed that issue, its guidance is urgently needed, and this case presents an excellent vehicle to provide it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 14, 2016

APPENDIX

APPENDIX TABLE OF CONTENTS

Public Material (Appended to Petition)

Under Seal Material (Supplemental Appendix Volume)

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.H., a Person Coming Under the Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,
v.
J.H.,
Defendant and Appellant

E059942

(Super.Ct.No. RIJ1100624)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge. Affirmed.

Latham & Watkins, Amy C. Quartarolo, Nima H. Mohebbi and Liliana Paparelli for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Sean M. Rodriquez, Deputy Attorneys General, for Plaintiff and Respondent.

Best, Best & Krieger, Jack Clarke, Jr., Kira L. Klatchko and Irene S. Zurko for the Riverside County Office of Education as Amicus Curiae on behalf of Plaintiff and Respondent.

Joseph H., the minor, at age 10, woke up early one morning and shot his father in the head as the latter slept on the sofa. A wardship petition was filed alleging the minor had committed acts which would have been crimes if committed by an adult, specifically, murder (Pen. Code, § 187, subd. (a)),[1] with a special allegation of discharging a firearm causing death (§ 12022.53, subd. (d)). After a contested hearing, the juvenile court found that the minor understood the wrongfulness of his acts despite the statutory presumption of incapacity (§ 26), had committed an act which would have been second degree murder if committed by an adult, and had discharged a firearm within the meaning of section 12022.53, subdivision (d). The minor was committed to the Department of Juvenile Justice and appealed.

On appeal, the minor argues (1) the court erroneously considered statements obtained in violation of his *Miranda* rights[2]; (2) his evaluation by a prosecution expert during trial, without counsel

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Referring to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602] (*Miranda*).

present, violated his due process rights; (3) the court improperly weighed the evidence in finding that he knew the wrongfulness of his conduct; (4) the true findings must be reversed due to cumulative errors during the adjudicatory hearing; and (5) the court abused its discretion in committing him to the Department of Juvenile Justice. We affirm.

BACKGROUND

Although the facts relating to the incident are fairly straightforward, a significant amount of evidence was presented to the juvenile court relating to the minor's capacity to commit a crime, and his mental health issues. We provide an overview of the historical information in this section. In the discussion of the individual issues, we will discuss additional evidence introduced at trial as it may be relevant.

The minor, born June 19, 2000, and his younger sister Shirley, lived with their biological mother until Joseph was three or four, when they were placed with their father, Jeff, after numerous reports to Child Protective Services relating to neglect by their mother. Joseph had been exposed to heroin, methamphetamine, LSD, marijuana and alcohol ingested by his biological mother prenatally. Joseph had been physically abused and severely neglected by his mother, and was sexually abused by his mother's boyfriend. By this time, Joseph's father was married to Krista McC., with whom he had three additional children.

Joseph was a difficult child. From the time he was three years old, his paternal grandmother could not babysit him because she could not control his outbursts. He suffered from Attention Deficit Hyperactivity Disorder (ADHD) resulting in trouble at school due to his inability to sit still; he also engaged in

impulsive and violent behavior towards both children and teachers, which included hitting, kicking, biting, scratching, stabbing with pencils or other sharp objects, and hitting with objects, as well as running out of class. At school, he also threw tantrums where he threw over all the students' desks and chairs. Joseph had an IEP (Individualized Education Program) for a learning disability.

Joseph also turned his wrath on the teacher, kicking, hitting, and scratching the teacher, pulling the teacher's hair, calling her a "fucking bitch," and threatening to kill the teacher. Jeff and Krista got therapy for Joseph, but Joseph was in at least six different schools due to violent outbursts and running out of class. Eventually, Jeff and Krista took Joseph out of school and homeschooled him. Joseph also hit his sisters.

For his part, Joseph's father Jeff had an unstable work history and was unemployed for the three years leading up to his death, although he had worked for a time as a plumber. He was addicted to Percocet and methamphetamine, and was frequently violent towards both Krista and Joseph. He was worse when he was drunk or high; on those occasions he would just lose control, and start beating on Joseph. Sometimes Jeff's abuse of Joseph was such that Krista had to intervene. A few days before the shooting, Jeff became violent with Krista, throwing a glass cup at her, which caused a cut. Jeff's mood swings, and his infidelity, made Krista unhappy.

In approximately 2007, after Krista's sister was killed in a hit-run automobile accident involving an undocumented Mexican citizen, Jeff became involved in the National Socialist Movement (NSM, or Neo-Nazis)

and the Save Our State (SOS) movement, anti-illegal immigration groups. Jeff owned guns, which he frequently showed off, including a handgun that was kept in the closet of the bedroom. There were no child protection locks for the gun, which was kept loaded. Jeff sometimes took Joseph to the border of Mexico where the NSM group did patrols, and taught Joseph how to use guns.

On April 30, 2011, Jeff and Krista hosted an NSM meeting at their home, described by both Joseph and Shirley as a party, attended by approximately 12 member guests. The meeting started at noon. Alcohol was served, and both Jeff and Krista drank. Between 6:51 and 6:56 p.m., Krista received text messages from Jeff indicating he intended to throw her out of the home. At approximately 7:00 p.m., the meeting ended, and Jeff left with a friend to take a woman member home. Krista fell asleep watching television with her three younger children, while Joseph and Shirley went to their own room. Later that same night, Krista heard Jeff return, and heard him talking to someone on the telephone. She went downstairs and found him in the kitchen, drinking, and in a bad mood. They argued because Jeff found out Krista planned to move out.

In the very early hours of May 1, 2011, Krista was startled awake by a loud noise. Thinking that a kitchen shelf had fallen (as had happened previously), she went to the restroom and then went downstairs. Downstairs, Krista found the television on, but the lights were off. When she turned on the lights, she saw Jeff on the couch, bleeding. Joseph came downstairs and told Krista, "I shot dad." Krista called 911.

At approximately 4:04 a.m., police were dispatched to the residence. All the occupants of the house were

required to exit the residence as police performed a safety sweep for other victims or suspects. Jeff was lying on the couch with a large pool of blood emanating from a single gunshot wound to the head. One officer asked Krista what happened while she and the children were outside. Joseph volunteered that he had grabbed the gun and shot his dad in the ear. Joseph explained he did so because his father had beaten him and his mother, and his father had kicked Joseph "in the ass" the day before. Joseph also said he used his father's gun and that he had put it under his bed after the shooting. When the residence was searched, the gun used in the shooting was found under Joseph's bed. Joseph's statements were recorded on a belt recorder and played in open court.

At some point, all the surviving family members were placed in separate police cars. While sitting alone in the back of one patrol car, unhand-cuffed, Joseph talked a lot, although no questions were asked of him. Joseph admitted he had shot his father, said he wished he had not done it, and indicated he knew it was wrong. Joseph asked if his father were dead, or just injured, and explained the events leading up to the shooting. Joseph told the officer his father had abused him and other members of the family repeatedly, and that the previous night, his father had threatened to remove all the smoke detectors and burn the house down, while the family slept. Joseph was aware of his father's new girlfriend and was concerned that he would have to choose between living with his dad or his mom.[3]

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[3] Joseph referred to his stepmother Krista as his mother. We will refer to her as his stepmother, except when quoting Joseph or another witness.

Joseph explained that his father returned home and fell asleep on the couch, after which Joseph got the gun from his mother's bedroom, went downstairs and shot his father in the head. He did not mention being told by anyone else to shoot his father. However, Joseph was worried that his sisters would be angry with him.

At the police station, Joseph was interviewed by Detective Hopewell, who first asked questions to determine if he understood the difference between right and wrong, before admonishing Joseph of his *Miranda* rights. A videotape of the interview was played in open court. Joseph admitted shooting his father and explained the circumstances much as he had done in the patrol car. Specifically, Joseph described how his father came home, the family decided to have a movie night, then going to bed where he woke up after a little while and "started thinking that I should end the son versus father thing."

On May 3, 2011, a wardship petition was filed pursuant to Welfare and Institutions Code, section 602, alleging that Joseph had committed an act which would be a crime if committed by an adult. Specifically, the petition alleged that the minor had committed murder (§ 187, subd. (a)), and that in the commission of the crime, he personally discharged a firearm that proximately cause death (§ 12022.53, subd. (d)).

At the initial hearing, Joseph's counsel requested that the minor be evaluated in anticipation of entering a plea of not guilty by reason of insanity. At a subsequent hearing—still prior to entering a plea on the petition—delinquency proceedings were suspended pursuant to Welfare and Institutions Code section 709,

to determine Joseph's competency.[4] Drs. Miller and Rath, psychologists, were appointed for this evaluation. On March 28, 2012, the reports of the appointed evaluators were read and both counsel stipulated that the issues of competency be submitted to the court. The court considered the psychological evaluations and concluded the minor was competent. Delinquency proceedings were reinstated.

On June 5, 2012, Joseph entered pleas of not guilty and not guilty by reason of insanity (NGI). The court ordered an NGI evaluation to be conducted by two experts, appointing Dr. Kania and Dr. Rath. Between May 3, 2011 and May 18, 2012, three separate applications regarding psychotropic medications were made and granted to address Joseph's ADHD. On July 9, 2012, Dr. Rath submitted his report finding Joseph was not insane. On July 24, 2012, Dr. Kania submitted his report, reaching the same conclusion.

The contested jurisdictional hearing commenced on October 30, 2012. Minor's counsel objected to the admission of Joseph's responses to questions asked by Detective Hopewell, pursuant to a section 26 questionnaire (see *In re Gladys R.* (1970) 1 Cal.3d 855, 862 (*Gladys R.*)), because the inquiry was conducted before he was admonished of his *Miranda* rights. The court was concerned about two questions and their responses and struck them. However, the court eventually reconsidered and ruled that the response to one question was admissible.

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[4] The clerk's minutes refer to Welfare and Institutions Code section 790, but the actual referral was made pursuant to section 709.

Counsel also argued that the minor's statements were obtained in violation of *Miranda* because there were two people present,[5] the minor was admonished that the decision to answer questions was his choice and his mother's choice, and the detective did not adequately explain that Joseph did not have to talk to her. The court overruled these objections.

Additionally, on the third day of trial, the minor objected to any testimony by Dr. Rath as to Joseph's capacity to commit the crime on the ground Dr. Rath was inappropriately appointed to conduct evaluations both as to the minor's capacity as well as on the issue of sanity. The court sustained the objection, but allowed the prosecutor to retain another expert on the issue of the minor's sanity. The court granted the prosecution's request that Dr. Salter be permitted to interview the minor and that she would be permitted to testify for the purpose of impeaching the minor's expert. Defense counsel requested to be present when Dr. Salter interviewed the minor, but the court denied the request. Later, minor's counsel objected to Dr. Salter's report on the ground of late discovery, which objection was overruled.

In the end, the parties stipulated to the admissibility of the reports of Dr. Salter and Dr. Geffner (the defendant's expert), and, after the People rested, the minor withdrew his plea of not guilty by reason of insanity. The minor made a motion to dismiss pursuant to Welfare and Institutions Code section 701.1, which was denied. The court found by clear

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5 Although minor's counsel did not expressly indicate, we assume the second objection was made on the ground of involuntariness.

proof that the minor knew the wrongfulness of his acts, within the meaning of section 26. The court ruled the minor came within Welfare and Institutions Code section 602 upon a finding that the allegations of the petition were true, specifically, that the minor had committed second degree murder, a felony, and that he personally and intentionally discharged a firearm.

The probation officer's dispositional report recommended commitment to the Division of Juvenile Justice (DJJ) because the minor was screened by 15 different county and private placements, and had been rejected by all but one, which referral was still pending. The probation officer indicated that the minor appeared to be beyond the scope of any private or county facilities, including the Youthful Offender Program (YOP), because he posed a serious risk to the community, and because he was in need of a long term, highly structured, well-supervised environment. The average commitment to YOP was seven months, and the average age of the minors at YOP was 17. At YOP, Joseph would not be eligible for most of the programs because they were not age appropriate. Most significantly, Joseph was not eligible for probation because of the true finding on the gun discharge enhancement.

The probation officer noted that DJJ had screened the minor, but a diagnostic study pursuant to Welfare and Institutions Code section 704[6] would have to be

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[6] The court's order referred to a 90-day diagnostic study pursuant to Welfare and Institutions Code section 707.2. However, section 707.2 relates to criminal defendants under the age of 18, who are eligible for treatment at CYA (now DJJ) pursuant to Welfare and Institutions Code section 1731.5. For minors found to be persons described by Welfare and Institutions

completed first, because of Joseph's age. Additionally, the Screening Committee decided to have the minor's case screened by the Department of Mental Health (DMH) for a Rate Classification 13/14 Level (RCL) placement,[7] requiring more time. The court continued the disposition hearing to facilitate the diagnostic study.

On February 15, 2013, the Department of Mental Health submitted its assessment for the RCL 13/14 level of care. The assessment indicated Joseph qualified for RCL 14 level, but had not been certified. DMH believed Joseph had neurological issues and would benefit from participating in an MRI (magnetic resonance imaging) to determine the extent of damage done to his brain due to his past history[8]. To this end, the probation officer requested that the court order a functional MRI, although the record does not indicate

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Code section 602 who are eligible for commitment to CYA (now DJJ), the diagnostic study is conducted pursuant to Welfare and Institutions Code section 704.

[7] This rate classification apparently refers to the California Department of Social Services (CDSS) and Foster Care Rates Bureau classification levels of group homes, according to a report entitled "The Classification of Group Home Programs under the Standardized Schedule of Rates System," prepared by CDSS on August 30, 1989. (See Welf. & Inst. Code, § 11462, subd. (b).) The rates are set depending on the level of care required by a child, based on a point system, with Rate Classification Levels 13 and 14 representing the highest level of care.

(See, http://www.childsworld.ca.gov/Res/pdf/OverviewClassificationLvls.pdf as of January 15, 2015.)

[8] The probation report does not indicate whether the Department of Mental Health was concerned about Joseph's past history of prenatal substance abuse exposure, the physical abuse he suffered, or his history of behavioral problems.

whether this was ordered or performed. The report also indicated that on the date of the shooting, Joseph was not taking his psychotropic medications. The probation officer noted, in response to the court's request for an update, that an IEP had been completed on August 28, 2012, and had been updated on February 11, 2013.

On March 1, 2013, the court ordered the probation officer to submit another addendum report to follow up on a letter from Copper Hills Youth Center of Utah, indicating that Joseph was eligible for placement there. The probation officer did so after contacting Copper Hills Youth Center. However, the probation officer learned that the facility had accepted Joseph without having interviewed him, based solely on the recommendation of an official with DMH that Joseph was a level-headed, polite kid. Copper Hills took his word for it that Joseph would be a good fit. The probation department had reservations about the acceptance because no out-of-state facility had ever accepted a minor without interviewing the minor either in person, or via telephone. The probation officer was also concerned that Copper Hills was a 197-bed facility with 119 openings. The probation officer again recommended commitment to DJJ. On April 2, 2013, the court ordered the Welfare and Institution Code section 704 diagnostic evaluation.

On April 29, 2013, the probation officer submitted an ex parte memo, outlining difficulties with the DJJ packet that prevented completion of the diagnostic study. The DJJ reported the packet that had been sent contained errors, one of which was the fact that the correct Welfare and Institutions Code section for the examination was 704, not 707.2, as indicated in the

minute order. For this reason, as of June 3, 2013, the DJJ diagnostic study had not been completed due to an apparent bureaucratic runaround. Nevertheless, on July 22, 2013, the DJJ sent a letter informing the probation department that Joseph had been accepted.

On July 15, 2013, the minor's educational advocate filed a motion to join the Riverside County Office of Education (RCOE). The grounds for joinder related to the fact that administrative law proceedings were ongoing to determine what the least restrictive educational placement would be for the minor under federal law, and that this information would be relevant to the issue of whether the minor would benefit from a DJJ placement. On October 7, 2013, the court denied the joinder motion without prejudice.

The contested dispositional hearing commenced October 21, 2013. The parties stipulated that the court consider several expert evaluations and reports assessing Joseph. Minor's counsel informed the court there were two additional possible placements to consider, namely the San Diego Children's Center, and the Devereaux School in Texas. The court ordered counsel to provide information to the probation department for a verbal report On October 25, 2013, during a break between witnesses, the probation officer reported that neither of the proposed alternative placements were secured facilities. Further, the San Diego Center for Children had informed the probation officer that it would not accept a case such as Joseph's due to the magnitude of this case.

The court reviewed the documentary evidence and heard testimony over several days. On October 31, 2013, the court found that less restrictive alternatives

would be ineffective and inappropriate, and that commitment to DJJ would be beneficial. The court noted that the minor is a danger to the public who must be housed in a secure facility, and that he would not receive the intensive services he needs, nor would society be protected, in a less restrictive placement. The court adjudged the minor a ward of the court, found he was a person with exceptional needs, and committed him to the DJJ. The court set his maximum confinement time as 40 years to life, consisting of 15 years to life for the murder finding, plus 25 years to life for the gun discharge enhancement pursuant to section 12022.53, subdivision (d).

The minor timely appealed.

DISCUSSION

1. The Juvenile Court Did Not Err in Admitting the Minor's Statements in Response to Questions Relating to His Capacity to Commit a Crime.

a. *Background*

After being taken to the police station, the minor was interviewed by Detective Hopewell, a detective assigned to the Sexual Assault and Child Abuse Unit, whose role was to interview Joseph and his siblings. Prior to admonishing Joseph of his *Miranda* rights or interviewing him about the shooting itself, the detective asked him questions pursuant to a *Gladys R.* questionnaire, designed to determine if an arrestee under the age of 14 understands the wrongfulness of his or her actions, within the meaning of section 26.

Following that questionnaire, the detective asked Joseph if stealing candy from a store without paying for it was right or wrong; Joseph replied it was wrong. She then asked Joseph to give her an example of doing something right and doing something wrong. Joseph

responded that doing wrong things could hurt people, while it was good to care, and to help people. After asking him for an example of something that he would do that would be right, she asked Joseph to give an example of doing something that was wrong, to which Joseph replied, "Well, I shot my dad." Shortly thereafter, the detective advised Joseph pursuant to *Miranda* and proceeded to question him about the shooting.

At trial, minor's counsel objected on the ground that Joseph was in custody when asked the questions from the *Gladys R.* questionnaire, but he had not been *Mirandized*, rendering his responses to the *Gladys R.* questionnaire inadmissible. Counsel also argued that the statements obtained after the admonishment must be excluded because they were tainted by the initial failure to admonish. Minor's counsel later objected that the *Miranda* warning given by the detective was defective because she told Joseph that the choice to remain silent was his choice and his mother's choice.

On appeal, the minor renews the argument that Joseph's statements in response to the questions asked prior to being *Mirandized* were inadmissible. In addition, the minor argues that his waivers under *Miranda* were involuntary because he did not understand the nature of his right to be free of coercive confessions due to his mental disabilities and because his stepmother was present, creating a coercive atmosphere.[9] On review of a trial court's decision on a *Miranda* issue, we accept the trial court's

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[9] The last two theories were not argued in the trial court. Nevertheless, we have discretion to address them. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.)

determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. (*People v. Davis* (2009) 46 Cal.4th 539, 586.)

b. *Any Error in Failing to Admonish the Minor of his Miranda Rights Prior to Conducting the Gladys R. Inquiry Was Harmless Beyond a Reasonable Doubt.*

The United States Supreme Court has recognized that any police interview of an individual suspected of a crime has coercive aspects to it. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [97 S.Ct. 711, 50 L.Ed.2d 714].) Those interrogations that occur while a suspect is in police custody heighten the risk that statements obtained are not the product of the suspect's free choice. (*Dickerson v. United States* (2000) 530 U.S. 428, 435 [120 S.Ct. 2326, 147 L.Ed.2d 405].) For this reason, *Miranda* warnings are required before a person is subjected to a custodial interrogation, which is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. (*Miranda*, *supra*, 384 U.S. at p. 444.)

Because the prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination come into play for custodial interrogations, an officer's obligation to administer *Miranda* warnings attaches only where there has been such a restriction of freedom of movement as to render the suspect "in custody." (*Stansbury v. California* (1994) 511 U.S. 318, 322 [114 S.Ct. 1526, 128 L.Ed.2d 292].) This determination is based on the objective circumstances of the interrogation. (*Ibid.*) Two

inquiries are essential to this determination: first, what are the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112 [116 S.Ct. 457, 133 L.Ed.2d 383].)

Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. (*Miranda*, *supra*, 384 U.S. at p. 467.) The pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. (*Corley v. United States* (2009) 556 U.S. 303, 321 [129 S.Ct. 1558, 173 L.Ed.2d 443].)

The risk is all the more troubling and acute when the subject of custodial interrogation is a juvenile. (*J.D.B. v. North Carolina* (2011) ___U.S.___ [131 S.Ct. 2394, 2401, 180 L.Ed.2d 310].) Recognizing the inherently coercive nature of custodial interrogation, it has long been held that prior to questioning, a suspect must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. (*Miranda*, *supra*, 384 U.S. at p. 444.)

In some circumstances, a child's age will affect how a reasonable person in the suspect's position would perceive his or her freedom to leave. (*J.D.B. v. North Carolina*, *supra*, 131 S.Ct. at pp. 2402-2403.) Thus, where the child's age is known to the officer at the time of police questioning, or would have been objectively

apparent to the reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test, although the child's age may not be a determinative factor in every case. (*Id.* at p. 2406.)

A significant factor in the present case is the fact that the detective commenced the interview with a *Gladys R.* questionnaire. That questionnaire was designed to satisfy the requirement of section 26 that a child under 14 appreciate the wrongfulness of his or her conduct. It is well settled that in order to become a ward of the court under Welfare and Institutions Code section 602, clear proof must show that a child under the age of 14 years at the time of committing the act appreciated its wrongfulness. (*Gladys R.*, *supra*, 1 Cal.3d at p. 862.) The *Gladys R.* questionnaire was devised specifically for minors suspected of committing an offense that would be criminal if committed by an adult. The detective would not have needed to make a determination that Joseph appreciated the wrongfulness of his conduct if there had been no intention of charging him with a crime. Thus, the fact that the detective commenced the interview with a *Gladys R.* questionnaire is, in itself, a factor which leads us to conclude the minor was in custody at the time.

The court never expressly ruled on the question of whether the minor was in custody at the time the detective commenced the *Gladys R.* inquiry. However, the questionnaire used in this case carried the warning that a minor should be *Mirandized* prior to asking the questions designed to determine if he or she appreciated the wrongfulness of his conduct. This, the detective did not do. For this reason, the court expressed concern about Joseph's responses to

questions 3 and 7 of the *Gladys R.* questionnaire.[10] The court initially concluded that the minor should have received *Miranda* warnings prior to asking the questions at the top of the form, including questions 3 and 7, because the statements were testimonial, requiring advisals. Later, however, the court reconsidered the exclusion of the response to question No. 7.

Joseph was transported to the police station after making several spontaneous incriminatory statements. Before being admonished of his *Miranda* rights, the detective stated, "Right now, you know you're here because of what happened to your dad?" The detective had already interviewed Joseph's stepmother and siblings, and had learned that the previous day Joseph was upset with his father and told his sister he wanted to shoot his father. The minor was in custody.

The juvenile court's concern with whether the statements were testimonial or not was irrelevant; as party admissions, they were admissible under Evidence Code section 1220 and not subject to exclusion for violating the Confrontation Clause. (Ref. *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354].) The detective should

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[10] Question No. 3 of the *Gladys R.* questionnaire asked, "Give me an example of something that is wrong to do." In response to this question, Joseph stated, "Well, I shot my dad." Question No. 7 (as adapted by the detective) inquired, "And, at the time that you hurt your dad, did you know it was wrong to do that?" The court found that the failure to admonish Joseph of his rights under *Miranda* required the exclusion of his response to question No. 3, but eventually decided to admit the response to No. 7, with the proviso that the court would give it minimal weight.

have advised Joseph of his constitutional rights prior to asking any questions about his appreciation of the wrongfulness of his conduct. But this does not end our inquiry.

Even assuming that the *Gladys R.* questions violated the principles of *Miranda*, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S.Ct. 824]; *People v. Davis* (2009) 46 Cal.4th 539, 594.) Prior to being taken to the police station, Joseph spontaneously and repeatedly informed various officers who responded to the initial dispatch after the shooting that he had shot his father. For instance, when police initially responded to the scene of the shooting, and secured the house, Officer Moulton spoke with Krista, and asked her what happened. Joseph volunteered that he had grabbed the gun and shot his father in the ear because his father had beaten him and his mother. Additionally, Officer Monreal assisted in containing the perimeter of the residence. Before conducting a safety sweep of the residence, he spoke with Joseph, although he did not ask any questions. Joseph said he had shot his father in the head and discussed how his father had hurt him and his siblings. Joseph's sister said, "I thought you were going to shoot him in the stomach." Officer Foster was also involved in the sealing or securing of the scene. When he went back outside the house, Krista stated there had been a shooting, and Joseph volunteered that the gun was under his bed. Later, Joseph was placed in the backseat of Officer Foster's patrol vehicle, where Joseph talked about how he had shot his father.

Joseph also made incriminating admissions to his stepmother and sister, to which no objections were

made at trial. Even if the incriminating responses to question numbers 3 and 7 of the *Gladys R.* questionnaire had been excluded, the remaining statements, admitted without challenge at trial, provided the same information to the trier of fact. Thus, unless there was a defect in the *Miranda* advisement or Joseph's waiver of his rights under *Miranda*, no different result would have been obtained, under any standard.

c. *Joseph's Waiver of His Right to Remain Silent was Voluntary.*

The minor refers to the videotape and transcript of the interview as support for the assertion that Joseph fundamentally misunderstood the nature of *Miranda* and his right to be free of coercive confessions. He argues that his equivocal response when the detective asked if understood what she was saying, his body language, and his hesitation showed he did not understand what was being explained. We disagree.

To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary. (*People v. Nelson* (2012) 53 Cal.4th 367, 374-375.) This determination requires "an evaluation of the defendant's state of mind" (*People v. Williams* (2010) 49 Cal.4th 405, 428) and an "inquiry into all the circumstances surrounding the interrogation." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197, 99 S.Ct. 2560] (*Fare*).) The totality of the circumstances approach is adequate to determine whether there has been a waiver even where the interrogation involves juveniles. (*Id.* at p. 725; *People v. Lessie* (2010) 47 Cal.4th 1152, 1167 (*Lessie*).)

Admissions and confessions of juveniles require special caution, and courts must use special care in scrutinizing the record to determine whether a minor's custodial confession is voluntary.[11] (*Lessie*, *supra*, 47 Cal.4th at pp. 1166-1167, citing *Haley v. Ohio* (1948) 332 U.S. 596, 599 [92 L.Ed. 224, 68 S.Ct. 302].) Age may be a factor in determining the voluntariness of a confession. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.) This is because threats, promises, confinement, and lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult. (*In re Aven* S. (1991) 1 Cal.App.4th 69, 75.) Similarly, the mental sub-normality of an accused does not ipso facto render his confession inadmissible; it is but one factor, albeit a significant one, to be considered with all others bearing on the question of voluntariness. (*People v. Lara* (1967) 67 Cal.2d 365, 386.) But it cannot be said that a juvenile cannot waive constitutional rights as a matter of law. (*Id.* at pp. 390-391.) It is a factual matter to be decided by the trial judge in each case. (*Id.* at p. 391.)

The test for determining whether a confession was voluntary is whether the questioned suspect's will was overborne at the time he confessed. (*People v. Cruz* (2008) 44 Cal.4th 636, 669.) A confession is involuntary under the federal and state guaranties of due process when it has been extracted by any sort of threats or violence, or obtained by any direct or implied promises,

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[11] We are aware of research suggesting that juveniles, even those without learning disabilities, are incompetent to waive their *Miranda* rights from a developmental standpoint. (Grisso and Schwartz, *Youth on Trial, A Developmental Perspective on Juvenile Justice*, (Chicago Press, 2000), pp. 105, 113-115.) However, no evidence of developmental incompetence was presented at trial and this record is devoid of that evidence.

however slight, or by the exertion of any improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778 (*Benson*), citing *Hutto v. Ross* (1976) 429 U.S. 28, 30 [50 L.Ed.2d 194, 97 S.Ct. 202] (*per curiam*).) Coercive police activity is a necessary predicate to a finding that a confession was involuntary under both the federal and state Constitutions. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [93 L.Ed.2d 473, 107 S.Ct. 515]; *People v. Kelly* (1990) 51 Cal.3d 931, 973.) On the record before us, there is no evidence of coercive police activity to support such a finding.

On appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including all the surrounding circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 93 S.Ct. 2041]; *Benson*, *supra*, 52 Cal.3d at p. 779.) We therefore exercise our independent judgment and apply federal standards to determine whether the statements were involuntary, coerced, or obtained in violation of *Miranda*. (*People v. Massie* (1998) 19 Cal.4th 550, 576; *In re Aven S.*, *supra*, 1 Cal.App.4th at pp. 69, 76.)

Here, the minor points to his age, and the fact that he suffers from ADHD and other mental disabilities, to argue that he was susceptible to suggestion. The minor relies on the testimony of Dr. Geffner's opinion that "[H]aving borderline intellectual functioning and other cognitive deficits can make a person more easily suggestible." This may be true, but Dr. Geffner's suggestion that it was "possible" he was more easily suggestible, is not evidence that Joseph was, in fact, suggestible or confused. The detective repeatedly asked Joseph if he understood what she was explaining

about his rights, and when he demonstrated misunderstanding, she provided additional explanation; Joseph's responses indicated he understood. Nothing in the record supports the premise that he was confused or suggestible.

The minor also argues that his communication deficits made it "self-evident that he would have had trouble effectively communicating his reservations and preserving his rights." The videotape of the interview shows he had no trouble communicating, aside from needing explanation of a few terms. In this respect, the detective was careful to follow up the explanation of his rights with questions to insure he understood what she was explaining, so the assertion he had difficulty communicating his reservations is not supported by the evidence.

The minor argues that the presence of his stepmother (whom he accused at trial of inducing him to commit the crime) created a coercive atmosphere. The video (which we have viewed) reveals that Joseph frequently looked to his stepmother for support, so we are not persuaded. Even if her presence had created a coercive atmosphere, the minor has not demonstrated any *police coercion*, a prerequisite to a finding of involuntariness, so this argument fails. (*People v. McWhorter* (2009) 47 Cal.4th 318, 347.)

Further, the record does not support the minor's assertion that his hesitation, confusion, and misunderstanding of the full scope of what it meant to "waive" his rights, showed involuntariness. To the contrary, the video shows he felt guilty for what he had done. Absent coercive conduct by police, and despite his young age, his ADHD, and low-average intelligence, the finding that Joseph voluntarily waived

his rights, guaranteed by the Fifth Amendment, is supported by the record.

2. *The Juvenile Court Did Not Err in Permitting Dr. Salter to Evaluate the Minor Without Counsel Being Present, or in Appointing Dr. Salter Mid-Trial.*

During trial, defense counsel objected to Dr. Rath's report and testimony on the issue of sanity because the expert had been appointed to conduct both a competency and a sanity evaluation. After researching the issue, the court agreed that Dr. Rath could not testify. The court permitted the prosecution to retain its own expert to evaluate the minor in order to impeach testimony proffered by the minor's expert, Dr. Geffner, on the issue of Joseph's capacity, under section 26. On appeal, the minor argues that Dr. Salter's evaluation of Joseph during trial, without defense counsel being present, violated his right to statutory due process, and right to counsel. We disagree.

When a minor in a juvenile proceeding places his mental state in issue, the prosecution may obtain a court order that the defendant submit to examination by a prosecution-retained mental health expert. (§ 1054.3, subd. (b)(1); *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1119 (*Maldonado*).) Minor sets forth the due process rights which protected him, including the right to notice, and the opportunity to prepare and present a defense, as well as the right to counsel at critical stages of the process. However, he cites no authority holding that counsel must be present at a psychiatric or psychological evaluation. Absent a due process right to the presence of counsel at an examination, there can be no violation of such a right.

There is no due process right to have counsel present at a psychiatric examination. To the contrary, case law supports the proposition that the presence of counsel at the psychiatric examination is not constitutionally required as long as three conditions are met: (1) counsel is informed of the appointment of psychiatrists; (2) the court-appointed psychiatrists are not permitted to testify at the guilt trial unless the defendant places his mental condition into issue; and (3) where the defendant does place his mental condition into issue at the guilt trial, and the psychiatrist testifies, the court must give the jury a limiting instruction. (*Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 469.) With those protections, a defendant is not entitled to counsel at the psychiatric examinations, although the trial court, in its discretion, may permit counsel to be present as an observer. (*Ibid.*)

Further, in denying defense counsel's request to be present, the court referred to Dr. Geffner's own testimony as its reasoning. Dr. Geffner testified that having observers present during an evaluation risked tainting the results. To argue now that the court erred by disallowing counsel to be present at the evaluation is to contradict the minor's own expert.

The minor also argues that the introduction of Dr. Salter's testimony was procedurally improper under section 1054.3, subdivision (b)(1), because the prosecution's request was not timely. In this respect, minor's argument must fail because the prosecution's timing was the direct product of the minor's objection to the testimony by Dr. Rath, made midtrial. The contested jurisdictional hearing commenced on October 30, 2012, when in limine motions and opening

statements were made. Defense counsel raised the issue of whether Dr. Rath could testify on the basis of the improper dual appointment on November 2, 2012, the third day of trial. The prosecution informed the court that it had just received Dr. Geffner's report when the trial commenced, and that it needed to have another doctor review that report. The court put the issue over until the following Monday, November 5, 2012, to research the issue.

At that time, the court concluded that Dr. Rath should not have been appointed to conduct both the competency and the capacity assessments. Because the issue had been "sprung" on the prosecution at the last minute the previous Friday, the court determined that the prosecutor should have some time to get another doctor, in case it was necessary to impeach Dr. Geffner's testimony. The timing of the prosecution's request and the subsequent break in the proceedings to allow the prosecutor's expert to evaluate Joseph, prepare a report, and serve it on the defense, was the direct product of the timing of the objection to Dr. Rath's testimony. This is not to say that defense counsel acted improperly or in bad faith. Nevertheless, the trial court properly granted leave for the prosecution to retain an expert to review Dr. Geffner's late-received report and to prepare for rebuttal.

Because the prosecution made its request at the earliest *possible* time, given the timing of the minor's objection to Dr. Rath's report and testimony, we cannot say it was untimely. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 287 [prosecutor produced notes to the defense the same morning he received them, during trial, held to be timely]; see also, *Butler v. Bell*

Helicopter Textron, Inc. (2003) 109 Cal.App.4th 1073, 1084, fn. 18 [statutory interpretations that defy common sense, or lead to mischief or absurdity, are to be avoided], citing *California Mfrs. Assn. v. Public Utilities Comm.* (1979) 24 Cal.3d 836, 844; see also, *Garcia v. Superior Court* (2006) 137 Cal.App.4th 342, 348 ["To this, we add that statutes should be construed with a dollop of common sense."].) We interpret the term "timely," found in section 1054.3, subdivision (c), in a common sense manner, to mean "at the earliest time possible."

Regarding the minor's argument that the introduction of Dr. Salter's testimony was "procedurally improper," we note that the minor's only objections at trial were that the prosecution's request was untimely, and that receipt of discovery of the expert's report was late. He did not object on the ground of any other procedural irregularity at trial, so he has forfeited that claim. (Evid. Code, § 353; *People v. Banks* (2014) 59 Cal.4th 1113, 1193.)

Dr. Geffner testified about Joseph's ability to appreciate the wrongfulness of his conduct due to neurological impairment resulting from abuse, neglect, and limited intellectual functioning. Whether necessary to present evidence on the NGI issue[12] or

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[12] Because, the minor's NGI plea had not been withdrawn at that particular point in the proceedings, a second opinion was required for the sanity determination. (Welf. & Inst. Code, § 702.3, subd. (d) [providing the procedures set forth in §§ 1026, et seq., are applicable when a minor enters an NGI plea]; § 1027 [requirement that the court appoint two or more psychiatrists or psychologists to investigate the defendant's mental status].) With the exclusion of Dr. Rath's report and testimony on the NGI issue,

the capacity issue, the prosecution was entitled to a fair opportunity to rebut any mental-state evidence pursuant to section 1054.3, subdivision (b)(1). (*Maldonado*, *supra*, 53 Cal.4th at p. 1117.)

To the extent that section 1054.3 passes constitutional muster (*Maldonado*, *supra*, 53 Cal.4th at p. 1132, fn. 12 [reciprocal discovery provisions satisfy due process]), and to the extent the timing of the prosecutor's request was directly related to the timing of the defense objection to Dr. Rath's testimony, the order permitting the prosecution to retain its own expert was procedurally proper.

3. *There Is Substantial Evidence to Support the Juvenile Court's Finding that Joseph Understood the Wrongfulness of his Conduct.*

Pursuant to section 26, a minor under the age of 14 is presumed to be incapable of committing a crime. Thus, a finding of capacity is a prerequisite to an adjudication of wardship for a minor under 14. (*Gladys R.*, *supra*, 1 Cal.3d at p. 867; see also, *People v. Cottone* (2013) 57 Cal.4th 269, 280.) The presumption of incapacity may be rebutted by the production of "clear proof" that the minor appreciated the wrongfulness of the conduct when it was committed. (*In re Manuel L.* (1994) 7 Cal.4th 229, 232.) "Clear proof" means clear and convincing evidence. (*Id* at p. 232.)

The test on appeal is whether substantial evidence supports the conclusion of the trier of fact. (*In re James B.* (2003) 109 Cal.App.4th 862, 872 (*James B.*), citing *In re Paul C.* (1990) 221 Cal.App.3d 43, 52.) We review the entire record in the light most favorable to

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a second expert was needed until the point when the defendant actually withdrew his NGI plea.

the judgment and affirm the trial court's findings that the minor understood the wrongfulness of his conduct if they are supported by substantial evidence—that is, evidence that it reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof. (*James B.*, *supra*, 109 Cal.App.4th at p. 872.)

In determining capacity pursuant to section 26, the juvenile court must consider the child's age, experience, and understanding. (*Gladys R.*, *supra*, 1 Cal.3d at p. 864; *James B.*, *supra*, 109 Cal.App.4th at pp. 872-873.) A minor's knowledge of his act's wrongfulness may be inferred from the circumstances, such as the method of its commission or its concealment. (*People v. Lewis* (2001) 26 Cal. 4th 334, 378, citing *In re Tony C.* (1978) 21 Cal. 3d 888, 900.)

Here, Dr. Salter testified that Joseph knew the difference between right from wrong. The court heard the testimony of Drs. Geffner and Salter, and read all the reports and statements that were admitted into evidence, including Joseph's own statements that he understood right from wrong, and understood he would be punished when he did something wrong. The court also considered Joseph's age and the circumstances of the crime, including Joseph's planning of the event while lying in bed (when he decided to end the "father-son thing") and the fact he hid the gun under his bed to avoid getting caught. These factors support the trial court's finding.

In arguing that Joseph lacked capacity to commit the crime, the minor relies exclusively on the report and testimony of the defense expert, Dr. Geffner. But as a reviewing court, we are required to review the

entire record, giving deference to the trier of fact, viewing the evidence in the light most favorable to the respondent, and presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) We have no power to reweigh the evidence or judge the credibility of witnesses (*People v. Moore* (2010) 187 Cal.App.4th 937, 940) and we must discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*Ibid.*)

The minor also argues that the trial court's finding was based on inadmissible evidence, obtained in violation of Joseph's *Miranda* rights. As we have previously held, only one statement was obtained in violation of Joseph's *Miranda* rights, and a myriad of other statements were available for the court's consideration. The wealth of other admissible statements by Joseph, in which he discusses the circumstances of the crime and his understanding of what he did, persuades us that the court's finding pursuant to section 26 was not tainted in any way.

Additionally, the minor argues that in the vast majority of published cases in which the capacity finding has been upheld, strong emphasis was placed on the child's age. He emphasizes that Dr. Geffner's testing showed Joseph's mental age was younger than his chronological age. This argument is also unpersuasive. Age is but one factor to be weighed, and Dr. Geffner's *opinion* was not binding on the court. (*People v. Wright* (1988) 45 Cal.3d 1126, 1142; *People v. Engstrom* (2011) 201 Cal.App.4th 174, 187; see also, *In re Thomas C.* (1986) 183 Cal.App.3d 786, 797.)

The minor argues that the circumstances of the crime compel a conclusion he did not appreciate the wrongfulness of his conduct, pointing to the fact that he walked into his stepmother's room where she and a few of the other children were asleep, took the gun, went downstairs to shoot his father, causing a loud noise that awoke the house occupants, then went upstairs, hid the gun under his bed and told his stepmother what he had done. These circumstances may raise an inference that Joseph was not a sophisticated criminal, but they do not support an inference that he failed to appreciate the wrongfulness of his act. To the contrary, secretly taking a gun while the occupants of the house, including the victim, were asleep, shooting his father, and then hiding the gun under his bed, demonstrate he knew what he was doing was wrong, as well as some degree of sophistication.

Finally, the minor argues that the court erroneously "weighed the evidence" in finding that Joseph knew the wrongfulness of his conduct. We do not need to reach this issue because it is a well-established rule that reviewing courts are not permitted to reweigh the evidence. (*In re Aarica S.* (2014) 223 Cal.App.4th 1480, 1488; *In re Juan G.* (2003) 112 Cal.App.4th 1, 6.)

The court found by clear and convincing evidence that Joseph knew the wrongfulness of the act. Substantial evidence supports this finding.

4. *There Was No Cumulative Error Requiring Reversal.*

The minor argues that the "conviction" (true finding) should be reversed due to the cumulative prejudicial errors during the "guilt phase"

(adjudicatory or jurisdiction hearing) of the trial. We disagree.

It is theoretically possible that a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Hill* (1998) 17 Cal.4th 800, 844.) However, in this case, we have found only one, non-prejudicial error. Reversal is not required.

5. *The Juvenile Court Did Not Abuse Its Discretion In Committing the Minor to the Division of Juvenile Justice.*

The minor argues the disposition was procedurally and substantively unreasonable, in that "[t]he juvenile court refused to consider viable alternative placements for Joseph, and placed him at the DJJ[13] despite overwhelming evidence that the DJJ was unfit to provide him with the educational and mental health services he needs." We disagree.

a. *Preliminary Matters—The Outstanding Augment Request*

We reserved the decision on the minor's request to augment the record to include the January 24, 2014 Administrative Law Judge's decision in the case of *Joseph Hall v. Riverside County Office of Education*, by the California Office of Administrative Hearings

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[13] DJF refers to the Division of Juvenile Facilities, a division of the Department of Corrections and Rehabilitation. (See Welf. & Inst. Code, § 733.) DJJ refers to the Division of Juvenile Justice, the current name for the former California Youth Authority. (See *In re Jose T.* (2010) 191 Cal.App.4th 1142, 1145, fn. 1.)

(OAH).[14] Our order deemed it a request for judicial notice. We now decline to take judicial notice of the opinion because (a) it was not submitted to the juvenile court for consideration in connection with the dispositional hearing; (b) it is cumulative of other information presented at the contested disposition hearing; and (c) it is not relevant to the issue of whether the trial court properly exercised its discretion in determining the proper disposition for the minor.

As to our first basis for denying the request, we agree with the People that a discretionary decision of a lower court should be evaluated on the basis of evidence actually before the court at the time of the decision. (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1108 [Fourth Dist., Div. Two], citing *People v. Sanchez* (1995) 12 Cal.4th 1, 59, fn. 5 [overruled on a different point in *People v. Doolin* (2009) 45 Cal.4th 390, 421]; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 [reviewing courts generally do not take judicial notice of evidence not presented to the trial court].)

Even if it were appropriate to take judicial notice of the OAH decision, such notice would be limited. We can take judicial notice of official acts and public records, but we cannot take judicial notice of the truth of the matters stated therein. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, overruled on a different point by *In re Tobacco Cases*

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[14] The Riverside County Office of Education submitted an amicus brief urging us to disregard the ALJ's decision. We appreciate the RCOE's contribution, but our resolution turns on an independent ground.

II (2007) 41 Cal.4th 1257, 1276; see also, *People v. Castillo* (2010) 49 Cal.4th 145, 157.) Thus, even if we took judicial notice that the OAH issued a decision on January 24, 2014, we could not take judicial notice of what was stated in that opinion.

As to our second and third bases for denial of the request, the information in the OAH decision was cumulative. At the disposition hearing, the court heard testimony of DJJ witnesses called by the prosecution, as well as the testimony of Dr. Jose Fuentes, a neuropsychologist who assessed Joseph at the request of the RCOE in connection with Joseph's IEP. After the People rested, the defense indicated it had no witnesses, and rested. Because Joseph's educational needs were but one of the concerns at the disposition hearing, the decision of the OAH on the subject of the minor's educational needs was cumulative of information already before the court.

b. *Considering All of Joseph's Needs, the Court Properly Exercised Its Discretion.*

Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. (Welf. & Inst. Code, § 202, subd. (b).) This guidance may include punishment that is consistent with the rehabilitative objectives of the Juvenile Court Law. (*Ibid.*)

When determining the proper disposition for a minor who has been found to be a delinquent, the court must consider (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous

delinquent history. (Welf. & Inst. Code, § 725.5; *In re Greg F.* (2012) 55 Cal.4th 393, 404.) Additionally, there must be evidence in the record demonstrating both a probable benefit to the minor by a Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485.) In fact, no ward of the juvenile court shall be committed to the DJF unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable he will be benefited by the reformatory educational discipline or other treatment provided by DJF. (Welf. & Inst. Code, § 734; *In re Edward C.* (2014) 223 Cal.App.4th 813, 829.)

A minor who has committed an offense described in subdivision (b) of Welfare & Institutions Code section 707, may be committed to the DJF unless he or she is otherwise ineligible for commitment to the division under Welfare & Institutions Code, section 733. (Welf. & Inst. Code, § 731, subd. (a)(4).) A ward is ineligible for commitment to the DJF if (a) the ward is under 11 years of age; (b) the ward is suffering from a contagious or infectious disease that would endanger the lives or health of other inmates; or (c) the most recent offense charged in any petition is not described in subdivision (b) of Welfare & Institutions Code section 707, or subdivision (c) of section 290.008. (Welf. & Inst., Code, § 733.) Joseph was eligible for commitment.

We review a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) A decision to

commit a minor to the DJF does not constitute an abuse of discretion where the evidence demonstrates probable benefit to the minor from the commitment to DJF and that less restrictive alternatives would be ineffective or inappropriate. (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

The minor contends the court did not consider all residential treatment center alternatives, including "several possible in-state and out-of-state placement options." The minor also challenges the juvenile court's findings that a DJF commitment would be of probable benefit to him due to his educational needs. Focusing exclusively on the minor's rights to a "Free and Appropriate Public Education" (FAPE) and Individuals with Disabilities Education Act (IDEA) (Ed. Code, §§ 56150, 56000, subd. (a)), the minor argues that DJF was an unsuitable placement because the Administrative Law Judge's opinion showed Joseph's IEPs failed to identify the correct accommodations and services he needs. Yet, the court did not have the Administrative Law Judge's opinion to consider at the time of the order. It heard testimony that the DJF school where Joseph would be educated provides IEP and special education services comparable to the services available in the public sector schools. The minor did not present any evidence to the contrary, and the only alternative placements suggested at the hearing were unsecured placements which were unacceptable.

A commitment decision, especially a decision involving a minor with multifarious complex problems of low-average intelligence, aggressive and assaultive behavior, ADHD, and a history of abuse and neglect, who has been found to have committed an act which

would be murder if he were an adult, cannot be driven by one problem. While the minor was entitled to a Free and Appropriate Public Education (FAPE), as well as special education services pursuant to the Individuals with Disabilities Education Act (IDEA), the educational needs of the child are not the only issue before the court. Providing a child with an appropriate education as part of the treatment and rehabilitative services provided by DJJ/DJF, so any commitment to such a facility necessarily includes services for any special educational needs (see *In re Angela M.*, *supra*, 111 Cal.App.4th at p. 1398, fn. 6), among other important considerations.[15] The minor's special education needs did not trump other factors the court was required to weigh in making its commitment decision.

The juvenile court heard testimony from Dr. Fuentes, the neuropsychological expert hired by the Office of Education, along with other evidence relating to his history of aggressive, assaultive, and violent behavior, his problems with impulse control, his distractibility, as well as his need for special education. The court also considered five reports, pursuant to the parties' stipulation, as well as the DJJ compliance and oversight reports.

The testimony adduced at the contested disposition hearing (at which the minor did not present any

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[15] At oral argument, counsel for RCOE requested that we clarify that an educational placement under IDEA is not the same as a placement under the Juvenile Court Law. In juvenile court proceedings, the court orders commitments to DJJ/DJF, rather than placements, so clarification is unnecessary. More significantly, this issue was not before the juvenile court, so it is not properly before us.

witnesses) also showed that the minor had greatly improved cognitively while detained in juvenile hall, and had progressed academically. Further, the minor reported that he liked it at the DJJ. Dr. Fuentes felt that the minor would have difficulty managing behaviors and emotional control outside a highly structured environment. To Dr. Fuentes, "least restrictive placement" meant the most normalized educational setting, which could be in a penal institution. He indicated Joseph needs services for socially emotional needs, counseling with language pragmatics, without which his ability to access education would be impeded. However, Dr. Fuentes also testified that Joseph requires supervision; it was not safe for either him or the public to be released into the community.

The court also heard evidence that DJJ could provide the special education services recommended by Dr. Fuentes, and could meet his mental and emotional needs. All other secured facilities had rejected Joseph due to the level of his offense, his age, or his special needs, except for Copper Hills Youth Center in Utah. The probation officer did not recommend a commitment to that facility because it had accepted Joseph on the recommendation of an official with DMH, without interviewing Joseph. Yet, the defense did not present any testimony from a representative of Copper Hills to assuage any of the probation officer's reservations, or to persuade the juvenile court that it was an appropriate placement. Further, at the dispositional hearing, the minor did not ask the court to consider placement at Copper Hills. The minor cannot complain that the court rejected Copper Hills as an alternative placement.

Notwithstanding the complexity of this case, and the problems confronting Joseph, the record before us demonstrates that the trial court nevertheless considered all the evidence presented, addressed of the issues, and properly exercised its discretion to commit Joseph to DJF. On this record, that discretion was not abused.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

RAMIREZ
P.J.

We concur:

McKINSTER
J.

CODRINGTON
J.

SUPREME COURT
FILED
OCT 16 2015
Frank A. McGuire Clerk
Deputy

Court of Appeal, Fourth Appellate District, Division Two – No. E05994

S227929

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSEPH H., a Person Coming Under the Juvenile Court Law

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THE PEOPLE, Plaintiff and Respondent,

v.

JOSEPH H., Defendant and Appellant.

The petition for review is denied.

Liu, Cuéllar and Kruger, JJ., are of the opinion the petition should be granted.

Cantil-Sakauye
Chief Justice

DISSENTING STATEMENT
by Liu, J.

I write to explain why I believe this case merits our review.

Petitioner Joseph H., at age 10, shot and killed his sleeping father and then confessed to a police detective during a custodial interview. A video recording of the interview shows Joseph sitting on a couch next to his stepmother, Krista McCary, whose husband Joseph had just killed. Riverside Police Detective Roberta Hopewell sat in an adjacent chair; she was courteous and not overbearing. At the beginning of the interview, Detective Hopewell informed Joseph of his *Miranda* rights, and he purported to waive them. (*Miranda v. Arizona* (1966) 384 U.S. 436.) In a published opinion, the Court of Appeal found that "Joseph's responses indicated he understood" his *Miranda* rights and that he validly waived his rights "despite his young age, his ADHD [attention deficit hyperactivity disorder], and low-average intelligence." (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 535.)

In 2011, Joseph was one of 613 children under the age of 12 arrested for a felony in California. (Cal. Dept. of Justice, Juvenile Justice in California (2011) p. 59, table 4.) This case raises an important legal issue that likely affects hundreds of children each year: whether and, if so, how the concept of a voluntary, knowing, and intelligent *Miranda* waiver can be meaningfully applied to a child as young as 10 years old.

A *Miranda* waiver, to be valid, must be "made voluntarily, knowingly and intelligently." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) The waiver must be made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Ibid.*) In assessing the validity of a waiver, a reviewing court must "conduct

an independent review of the trial court's legal determination" of "whether the *Miranda* waiver was voluntary, knowing, and intelligent under the totality of circumstances surrounding the interrogation." (*People v. Williams* (2010) 49 Cal.4th 405, 425, alterations omitted; see *People v. Whitson* (1998) 17 Cal.4th 229, 236 [conducting "independent review of the evidence" in upholding trial court's finding of valid waiver].)

Juveniles, like adults, may waive their *Miranda* rights. (*People v. Lara* (1967) 67 Cal.2d 365, 389 (*Lara*); *In re Gault* (1967) 387 U.S. 1, 55.) Yet *Miranda* waivers by juveniles present special concerns. The United States Supreme Court has affirmed the "commonsense" conclusion that "children 'generally are less mature and responsible than adults' [citation]; that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them' [citation]; that they 'are more vulnerable or susceptible to ... outside pressures' than adults. [Citation.] Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.' " (*J.D.B. v. North Carolina* (2011) 564 U.S. __, __ [131 S.Ct. 2394, 2403] (*J.D.B.*).) The "very real differences between children and adults" must be factored into any assessment of whether a child validly waived his *Miranda* rights. (*Id.* at p. __ [131 S.Ct. at p. 2408].) "When a juvenile's waiver is at issue, consideration must be given to factors such as 'the juvenile's age, experience, education, background, and intelligence, and ... 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.' " (*People v. Nelson* (2012) 53 Cal.4th 367, 375.)

It is not uncommon for California courts to find valid *Miranda* waivers by children 15 years old or older. (See, e.g., *Nelson*, *supra*, 53 Cal.4th at p. 382 [15-year-old]; *In re Anthony J.* (1980) 107 Cal.App.3d 962, 971 [15-year-old].) There are also cases finding valid *Miranda* waivers by 14-year-olds. (See *In re Jessie L.* (1982) 131 Cal.App.3d 202, 215; *In re Abdul Y.* (1982) 130 Cal.App.3d 847, 867.) In *People v. Lewis* (2001) 26 Cal.4th 334, 384-385, this court found a valid *Miranda* waiver by a 13-year-old. And I have found one published case upholding a *Miranda* waiver by a 12-year-old. (*In re Charles P.* (1982) 134 Cal.App.3d 768, 772.)

Apart from this case, there does not appear to be any California decision upholding a *Miranda* waiver by a child younger than 12. The one published case to address a *Miranda* waiver for a child in this age range, *In re Michael B.* (1983) 149 Cal.App.3d 1073, 1084-1086, concluded that the waiver by a nine-year-old was invalid.

There are few out-of-state cases addressing *Miranda* waivers by such young children. In *In re Joshua David C.* (Md.Ct.App. 1997) 698 A.2d 1155, which involved a 10-year-old, the court noted that the officer conducting the interview "essentially conceded that, due to his age, appellant probably did not understand his rights" and concluded that the state failed to show the child " 'had the mental capacity to comprehend the significance of *Miranda* and the rights waived.' " (*Id.* at pp. 1162, 1163.) While recognizing that the interviewing officer had "superficially

satisfie[d] *Miranda*'s dictates," the court said: " 'But in the case of a child of age ten years, is that enough? Did he realize what services an attorney could perform for him? Did he understand that he was incriminating himself? … Those questions and others lead us to believe that [appellant's] waiver of *Miranda* was almost, if not totally, meaningless.' " (*Id.* at p. 1163; see also *Matter of Robert O.* (N.Y.Fam.Ct. 1981) 439 N.Y.S.2d 994, 1004 [invalidating *Miranda* waiver of a 10-year-old under federal law because the totality of the circumstances showed the child "lacked the capacity and ability to comprehend the Fifth Amendment privilege of self-incrimination and the right to counsel and was unable to understand the concept of waiver"].)

I am aware of only one reported case upholding a *Miranda* waiver by a child as young as 10. (*W.M. v. State* (Fla.Dist.Ct.App. 1991) 585 So.2d 979, 983 (*W.M.*).) In that divided decision, the majority began by saying, "We have some difficulty with the proposition that a 10-year-old child could ever understand, in the sense that a mature adult could, the consequences of waiving his constitutional rights to silence and counsel, and of giving a statement about the crimes charged against him." (*Id.* at p. 980.) But the majority believed it could not say the trial court had erred in its finding of a valid waiver, noting (without elaboration) that "[t]he detectives explained to the child in language to make sure the child understood the warnings." (*Id.* at p. 983.) The dissenting judge said, "Even recognizing that there is no per se rule against juvenile confessions, at the lowest end of the age spectrum there must be some ages where no confession will ever be admissible. It seems to me that, on age,

I.Q. and learning disability alone, this child is at the outer edges of the universe of those who are capable as a matter of law of validly confessing to crimes. Indeed he is, even the majority might concede, barely at the age when reason begins." (*Id.* at p. 985 (dis. opn. of Farmer, J.).)

In this case, Detective Hopewell explained to Joseph his *Miranda* rights and elicited his waiver in the following colloquy:

HOPEWELL: Okay. Now, I'm going to read you something and it's – it's called your Miranda Rights. And, I know you don't understand really what that is. But, that's why your mom's here. Okay? And, she's gonna listen to it and then, she's going to give me your answers. Okay? If you want to answer for you, that's great too. Okay? If you don't understand something, w-when I state something, I want you to tell me. I don't know what you're talking about or I don't understand.

JOSEPH: All right.

HOPEWELL: Okay? All right. Right now, you know you're here because of what happened to your dad?

JOSEPH: Yeah.

HOPEWELL: All right. So, you have the right to remain silent. You know what that means?

JOSEPH: Yes, that means that I have the right to stay calm.

HOPEWELL: That means y-you do not have to talk to me.

JOSEPH: Right.

HOPEWELL: Okay? And, anything you say, will be used against you in a court of law. Do you know what that means? That means that if we have to go to court and tell the judge what, what you did, that whatever you're gonna tell me today, I can tell the judge, "This is what Joseph told me." Okay?

JOSEPH: Okay.

HOPEWELL: You understand that?

JOSEPH: Yeah.

HOPEWELL: Okay. And, you have the right to talk to a lawyer and have a lawyer here with you—an attorney—before I ask you any questions. Do you understand that? And, you shake your head upside uh what does that ...

JOSEPH: Yes.

HOPEWELL: ... mean? What does that mean to you?

JOSEPH: It means, don't talk until that means to not talk till the attorney or ...

HOPEWELL: That means, you have the choice. That you can talk to me with your mom here or you can wait and have an attorney before you talk to me.

JOSEPH: Okay.

HOPEWELL: Okay? But it's your choice and it's your mom's choice. Okay?

JOSEPH: Okay.

HOPEWELL: All right. And, if you can't afford one— 'cause I know you don't have a job, no money—um, the court will appoint one, an attorney for you. Before I talk to you about anything. Do you understand that?

JOSEPH: Yeah.

HOPEWELL: Okay. So, with you—you got your mom here. I have some questions that I do want to ask you. What happened with your dad. Do you want to talk to me and tell me what happened?

JOSEPH: Um, first, do you want to know what hap- what we were doing before?

HOPEWELL: Yeah, I want you to tell me everything that was going on. So, do you want to talk to me about that?

JOSEPH: (Nods head in the affirmative.) [End of colloquy.]

The high court has instructed that "admissions and confessions of juveniles require special caution" and that " 'when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used." (*In re Gault*, *supra*, 387 U.S. at p. 45 [involving a 15-year-old], quoting *Haley v. Ohio*

(1948) 332 U.S. 596, 599 [also involving a 15-year-old].) Here the petition for review and supporting letters contend that as a matter of "social science and cognitive science" as well as "what 'any parent knows'—indeed, what any person knows—about children generally" (*J.D.B.*, *supra*, 564 U.S. at p. __ & fn. 5 [131 S.Ct. at p. 2403 & fn. 5]), it is doubtful that Joseph understood or was capable of understanding the nature of *Miranda* rights and the consequences of waiving those rights. The petition further contends that the presence of Joseph's stepmother Krista during the interview does not aid the validity of the waiver because Krista had a conflict of interest and, in any event, sat silently and gave no advice as Joseph waived his rights.

Having reviewed the transcript and video of the interview, I believe the issue of whether Joseph validly waived his *Miranda* rights subsumes several questions worthy of our review: (1) whether there is an age below which the concept of a voluntary, knowing, and intelligent waiver has no meaningful application, (2) whether and, if so, how the *Miranda* warnings and waiver decision can realistically be made intelligible to very young children, and (3) what role parents, guardians, or counsel should play in aiding a valid waiver decision by such children, and under what conditions a parent or guardian would be unable to play that role. In *Lara*, we said "the immaturity of most minors will make it desirable for those in custody to have the advice of counsel or other responsible adult," but we held that "the presence or consent of counsel or other responsible adult" is not invariably a requirement for a valid *Miranda* waiver by a juvenile. (*Lara*, *supra*, 67 Cal.2d at pp. 382, 383.) However,

Lara involved one defendant who was "18 years old" and another who was "38 days short of his 18th birthday" at the time of their custodial interrogations. (*Id.* at p. 376, fn. 4.) In affirming the applicability of the totality-of-the-circumstances test to juvenile waivers, *Lara* discussed numerous cases involving minors as young as 14 but nowhere considered waivers by children in Joseph's age range. (See *id.* at pp. 381-390.) *Lara* also predates by several decades the growing body of scientific research that the high court has repeatedly found relevant in assessing differences in mental capabilities between children and adults. (See *Miller*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2464]; *J.D.B.*, *supra*, 564 U.S. at p. __, fn. 5 [131 S.Ct. at p. 2403, fn. 5]; *Graham v. Florida* (2010) 560 U.S. 48, 68; *Roper v. Simmons* (2005) 543 U.S. 551, 569-570.) A key issue in this case is whether *Lara*'s rule that a valid *Miranda* waiver does not invariably require the presence of counsel or an interested adult applies to children under age 14, including children as young as 10. (Cf. *J.D.B.*, at p. __ [at p. 2407] ["a 7-year-old is not a 13-year-old and neither is an adult"].)

In evaluating whether this case merits our review, I note that other state high courts have addressed these issues by formulating standards and procedures specific to young children. (See, e.g., *State v. Presha* (N.J. 2000) 748 A.2d 1108, 1117-1118 [adopting a "bright-line rule" that "[w]hen the juvenile is under the age of fourteen, the adult's absence will render the young offender's statement inadmissible as a matter of law—unless the adult is truly unavailable, in which case, the voluntariness of the waiver should be determined by considering the totality of circumstances"]; *Matter of B.M.B.* (Kan. 1998) 955 P.2d

1302, 1312-1313 [concluding that for children under 14 "the totality of the circumstances is not sufficient to ensure that the child makes an intelligent and knowing waiver of his rights," and holding that "a juvenile under 14 years of age must be given an opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to an attorney and against self-incrimination"]; *Commonwealth v. A Juvenile (No. 1)* (Mass. 1982) 449 N.E.2d 654, 657 ["We conclude that, for the Commonwealth successfully to demonstrate a knowing and intelligent waiver by a juvenile, in most cases it should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights. For the purpose of obtaining the waiver, in the case of juveniles who are under the age of fourteen, we conclude that no waiver can be effective without this added protection.... For cases involving a juvenile who has reached the age of fourteen, there should ordinarily be a meaningful consultation with the parent, interested adult, or attorney to ensure that the waiver is knowing and intelligent. For a waiver to be valid without such a consultation the circumstances should demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile."].)

We have not extensively examined the issue of juvenile *Miranda* waivers since our decision in *Lara* almost a half-century ago. Although we are barred from adopting an exclusionary rule that is not required by the federal Constitution (Cal. Const., art. I, § 28, subd. (f)(2)), whether federal constitutional law

requires the type of safeguards that other courts have adopted for children as young as Joseph is a question that neither the high court nor this court has examined. As noted, there were 613 felony arrests of children under age 12 in California in 2011, the year Joseph killed his father. In 2012, there were 523 such arrests; in 2013, there were 449; and in 2014, there were 381. (Cal. Dept. of Justice, Juvenile Justice in California (2012-2014) p. 59, table 4; cf. Kim et al., The School-to-prison Pipeline: Structuring Legal Reform (2010).) The proper application of *Miranda* to children in Joseph's age range likely affects hundreds of cases each year, even though few such cases result in a trial and appeal. For these reasons, I vote to grant review.

Finally, it bears mention that consideration of special safeguards for young children need not await judicial action. Many states have found the issue worthy of legislative attention. (See 705 Ill.Comp.Stat. 405/5-170 [child under age 13 suspected of serious crimes must be represented by counsel throughout the entire custodial process, including the reading of *Miranda* rights]; Iowa Code § 232.11 [child under 16 cannot waive right to counsel without written consent of the child's parent]; Mont. Code § 41-5-331 [child under 16 can waive rights only with a parent's agreement; when a parent does not agree, the child can waive only after consulting with counsel]; N.M. Stat. § 32A-2-14(F) [prohibiting admission of a statement by a child under 13 in the adjudicatory phase of a delinquency proceeding, and presuming that a child of age 13 or 14 is incapable of making a valid *Miranda* waiver]; Wash. Rev. Code § 13.40.140(10) [parent must waive rights when a child is under 12]; Colo. Rev. Stat. § 19-2-511 [for children under 18, a parent or the child's

counsel must be present and informed of the child's rights for any custodial statement to be admissible; the child and parent may waive parental presence in writing]; Conn. Gen. Stat. § 46b-137 [no statement of a child made during custodial interrogation is admissible in juvenile court unless a parent is present and advised of the child's rights]; Ind. Code § 31-32 [child's rights can be waived only by a parent or counsel unless the child has been emancipated]; N.C. Gen. Stat. § 7B-2101 [child under 14 cannot waive *Miranda* rights unless a parent or attorney is present]; Okla. Stat. tit. 10A, § 2-2-301 [advisement of rights of child 16 or younger attendant to custodial interrogation must take place in the presence of a parent, guardian, or counsel].) Our Legislature may wish to take up this issue in light of this court's decision not to do so here. (See Cal. Const., art. I, § 28, subd. (f)(2).)

Cuéllar, J., concurs.