Case No. S_____

IN THE
SUPREME COURT OF CALIFORNIA

_____

IN RE J.H.

THE PEOPLE,

Plaintiff, Respondent,

v.

J.H.,

Defendant, Minor-Appellant.

_____

PETITION FOR REVIEW

_____

After a Decision of the Court of Appeal, Fourth Appellate District,
Division Two, Juvenile Case No. E059942

Riverside County Superior Court Case No. RIJ1100624
Honorable Jean P. Leonard, Judge

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I.

ISSUES PRESENTED

1. Did petitioner, a ten year old child at the time of the alleged crime and interrogation, have the capacity to comprehend, and knowingly and intelligently waive, his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and did he waive them?

2. May a valid *Miranda* waiver be based on an interrogating officer's erroneous advice that the juvenile's waiver decision is shared with a parent, particularly where the parent was present during the interrogation and had clearly conflicting interests?

3. Is it a violation of the Fifth and Sixth Amendments to permit the People to use evidence from a compelled psychiatric examination for purposes other than the rebuttal of the juvenile's psychiatric evidence where the juvenile did not offer a mental-state affirmative defense and was not permitted to have counsel present at the examination?

None of the above issues was the subject of a Petition for Rehearing to the Court of Appeal.

II.

INTRODUCTION AND WHY FURTHER REVIEW IS NECESSARY

On May 1, 2011, Joseph H. ("Joseph"), then ten years old, shot and killed his father at their home in Riverside, California.

Joseph's father – Jeffrey H. ("Jeff") – was the regional leader of the National Socialist Movement (the "Neo-Nazi Party") in Riverside, California. Jeff held Neo-Nazi Party meetings at his home, preaching hate and violence to his children, including Joseph. Joseph's mother and Jeff's first wife, Leticia N. ("Leticia"), used drugs throughout her pregnancy. Joseph endured substantial mental, physical, and sexual abuse. This abuse,

beginning even before his birth, caused Joseph to suffer from significant disabilities.

After the shooting, the police unconstitutionally extracted a confession from Joseph based on a waiver that was not knowingly and intelligently given. Police also improperly advised Joseph that he shared his *Miranda* rights with his stepmother, an individual with adverse interests – not only because it was her husband who was killed but because her own actions were tangled with the offense – and then continued to question Joseph despite his feeble understanding of the situation. The juvenile court expressly relied upon statements made during that confession in finding that Joseph understood the "wrongfulness" of his actions – a key showing the People have the burden of proving in a juvenile case under Penal Code Section 26. Compounding those errors, Joseph's Fifth and Sixth Amendment rights were violated when the juvenile court appointed a psychological expert to evaluate Joseph for the People's case-in-chief, and in contravention of this Court's holding in *Maldonado v. Superior Court*, 53 Cal. 4th 1112 (2012). Despite these errors, the juvenile court granted the People's petition and sentenced Joseph to forty years to life. The Court of Appeal for the Fourth District (the "Court of Appeal") affirmed. *See In re Joseph H.*, 237 Cal. App. 4th 517 (2015) (hereinafter, "COA," attached as Attachment A).

Review of the Court of Appeal's decision is necessary to address important questions of law raised in this case and legal errors that have consequences for all California juvenile defendants.

First, this Court should grant review in order to hold that Joseph lacked the developmental maturity and intellectual capability to understand, and knowingly and intelligently waive, his *Miranda* rights. The facts of this case make that conclusion inescapable, and this Court's consideration of the matter would address substantial confusion on an issue of great

significance to the administration of justice. This case presents an opportunity for this Court to consider the overwhelming research demonstrating that juveniles fifteen and younger demonstrate a severely limited capacity to understand *Miranda* warnings or the consequences of waiver.[1] That research deserves, but is not receiving, considerable weight by courts in balancing the "totality of the circumstances" surrounding a young juvenile's waiver of constitutional rights. Moreover, it would support a rule that all juveniles under fifteen at least presumptively lack the capacity to give a knowing and intelligent waiver.[2] Since 1960, the U.S. Supreme Court has rendered a series of decisions considering juveniles' custodial confessions. Those cases have acknowledged that juveniles are different, and that those differences must be taken into account to protect a

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[1] Fifteen years of age is an appropriate demarcating line to distinguish between juveniles and determine when it is appropriate to presume a minor lacks capacity to understand *Miranda*. *See* 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 the defining age). Joseph, at ten years old during his interrogation, was five years younger than the point at which the overwhelming weight of research "strongly indicates" that he would "lack the cognitive abilities and qualities of judgment to exercise [his] *Miranda* rights." Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, 52 (2006).

[2] Joseph did not argue for a categorical rule below, but it is fairly embraced by his strenuous arguments that he himself lacked capacity to give a knowing and intelligent waiver, in part due to his age and developmental maturity. Litigants may always advance additional *arguments* on appeal in support of a federal claim that was pressed below. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992); *People v. Cole*, 33 Cal. 4th 1158, 1195 n.6 (2004) ("[N]o useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved[.]" (quotation omitted)). And regardless, this Court always has discretion to consider a pure issue of law. *See Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 5-6 (1998). To be sure, this Court previously rejected a *per se* rule for juveniles. *See People v. Lara*, 67 Cal. 2d 365, 383 (1967). New research and legal trends discussed herein, however, uniquely present the opportunity for the Court to consider whether *Lara* and subsequent decisions should be revisited.

juvenile's *Miranda* rights. In its 2011 decision, *J.D.B. v. North Carolina*, the Court reconsidered *Miranda*'s custody requirement to address growing concerns set forth in scientific research that juveniles "characteristically lack the capacity to exercise mature judgment" in a *Miranda* setting. 131 S. Ct. 2394, 2403 (2011) (quotation omitted). California courts have since struggled with *J.D.B.*'s broader impact on *Miranda*'s key provisions, including waiver.[3] A juvenile's capacity to waive *Miranda* rights without counsel is ripe for review.

Second, the interrogating officer stated that the decision to waive his rights rested with Joseph *and his stepmother*. The Court of Appeal ignored that error, which is both common and of great significance. A young juvenile's already questionable capacity to understand, and knowingly and intelligently waive, his individual rights is further undermined when he is told that the decision is not really his but rests in part with an adult guardian he has been taught to obey, and who may not have his best interests at heart. Joseph claimed his stepmother convinced him to commit the offense; she also testified against him, and was herself charged for leaving the gun within Joseph's reach. The Court should grant review both to address the propriety of the officer's warning and to clarify what weight should be given to Joseph's stepmother's conflict of interest in determining if Joseph's waiver was voluntary, knowing, and intelligent. The tragic facts of this case provide an unusually clear opportunity to address these issues.

Third, the Court should grant review to clarify confusion and uncertainty arising from its prior decision in *Maldonado v. Superior Court*, 53 Cal. 4th 1112 (2012), holding that the prosecution may not use evidence

[3] *See, e.g.*, *In re J.G.*, 228 Cal. App. 4th 402, 410 (2014) ("*J.D.B.*'s holding – that a juvenile's age is a factor in the reasonable-person analysis of Fifth Amendment custody – may implicate other areas of criminal procedure-including voluntariness of waivers of rights[.]" (quotation omitted)).

from a compelled psychiatric examination to bolster its case-in-chief, but only for purposes of determining competence to stand trial and in rebuttal if the defendant voluntarily places his own mental state at issue in the trial. The trial court and Court of Appeal here held erroneously that the People could use compelled psychiatric testimony *for all purposes* – including satisfying their own burden of proof in the case-in-chief. That approach makes a mockery of *Maldonado* and impermissibly burdens the defendant's Fifth and Sixth Amendment rights.

Review of the foregoing questions is "necessary to secure uniformity of decision" and "to settle [] important question[s]" of juvenile and constitutional law. Cal. R. Ct. 8.500(b)(1). The Court should grant review.

III.

STATEMENT OF THE CASE

A. Joseph's Childhood And Family

Jeff was a leader of the Neo-Nazi Party. (*See* R., Vol. 2, at 387.)[4] Joseph was born during Jeff's first marriage to Leticia. Jeff later had three additional children with Krista M. ("Krista"), his second wife, who served as one of Joseph's primary caregivers. (R., Vol. 1, at 103-04.)

Child Protective Services ("CPS") issued 23 reports concerning allegations of physical and sexual abuse, poor living conditions, and neglect for Joseph's households – both with Leticia and Jeff. (R., Vol. 2, at 303.) In particular, Jeff was addicted to drugs such as methamphetamine, was "frequently violent towards both Krista and Joseph," and sometimes

[4] References to the Reporter's Transcript are denoted by "R.," then the volume. References to the Clerk's Transcript are denoted by "Clerk's Tr.," followed by the volume.

"would just lose control, and start beating on Joseph." (COA at 4.) Despite the rampant abuse, CPS never took remedial action.

Joseph was regularly exposed to Neo-Nazi teachings. Each month, Jeff and other members of the Neo-Nazi Party met at the family's home for meetings. (R., Vol. 1, at 139.) Jeff frequently took his children to Neo-Nazi Party rallies and forbade them from having friends of different races. (*Id.*) Jeff even brought Joseph on armed border patrols where he taught Joseph to handle firearms. (*See* COA at 4.)

B. The Incident

On April 30, 2011, Jeff held a Neo-Nazi Party meeting at home; approximately a dozen people attended, including Krista and the children. (R., Vol. 1 at 140.) Jeff left in the evening to give a young woman a ride home. (*Id.* at 141.) He did not return until around 3:00 a.m., after which he fell asleep on the couch. (*Id.* at 141-42.) Krista testified that, while she slept, Joseph took Jeff's gun from the closet in the master bedroom and went downstairs where his father was asleep on the couch. (*See* R., Vol. 1, at 168-70.) Shortly thereafter, Krista said she heard a "crash," and went downstairs to find that Jeff had been shot.

C. The Investigation

The police arrived at the residence at around 4:04 a.m., all of the occupants exited, and the children were taken into police vehicles. (COA at 5.) Joseph spontaneously said he "grabbed the gun and shot his dad in the ear" because "his father had beaten him and his mother." (COA at 5.) In the police car, Joseph told an officer that Jeff "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." (COA at 6.) Joseph also made statements indicating that he did not understand the finality of his act. (*See* Supp.

Clerk's Tr., Vol. 2, at 360 (asking, "How many lives do people usually get?").)

Only a few hours later, Joseph was brought into the Riverside Police Station, where he was interviewed for more than an hour with Krista. Detective Roberta Hopewell asked Joseph a few "warm-up" questions from Penal Code form 26. The P.C. 26 form is intended to ascertain whether the juvenile understands the nature of criminal questioning, but because the juvenile's answers could incriminate him the form states: "To be filled out on all arrestees under 14 years of age after Miranda Rights have been waived." (Clerk's Tr., Vol. 1, at 220 (emphases in original).) The form is incriminatory because the People must prove in their case-in-chief that a juvenile suspect under the age of fourteen knew the "wrongfulness" of his actions. *See* Cal. Pen. Code § 26.

Detective Hopewell neglected to advise Joseph of his rights until later in the interview. (Supp. Clerk's Tr., Vol. 1, at 61-63.) Before this, and while filling out the form, she asked Joseph questions about the difference between right and wrong. (*See, e.g., id.* at 62.) After several incriminating questions, the following exchange occurred:

> **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 going to 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 an a- lawyer and have a lawyer with you – an attorney – before I ask you any questions. Do you understand that? . . . . 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.

(*Id.* at 63-65.) From that point, Detective Hopewell extracted information from Joseph, which was heavily considered by the juvenile court.

D. The Delinquency Proceedings

On May 3, 2011, the District Attorney brought a wardship petition charging Joseph with murder.

At an initial hearing, Joseph's counsel requested that he be evaluated to determine trial competency. (COA at 7.) Dr. Craig Rath and another clinical psychologist evaluated Joseph for this purpose and concluded he was competent. (*Id.*) Subsequently, Joseph entered pleas of not guilty and not guilty by reason of insanity ("NGI"). (*Id.*)

The contested jurisdictional hearing on the Petition commenced on October 30, 2012. (*Id.* at 8.) Throughout trial, the juvenile court received evidence of physical and sexual abuse, poor living conditions, and neglect. (*See, e.g.*, R., Vol. 2, at 312 ("[There was a] long history of abuse – emotional, physical, likely sexual – from different parents or parent surrogates, the home [Joseph] was in, what he's been exposed to, [and] the level of violence directed at [] him[.]").) Dr. Robert Geffner, a leading expert in neuropsychology, testified for the defense regarding Joseph's capacity under P.C. 26. (*See* R., Vol. 2, at 290.) Dr. Geffner opined that Joseph suffered from a series of mental disabilities resulting from a lifetime of exposure to violence and trauma. As a result, Joseph had problems with social functioning, experienced moral confusion, and had an "inability to understand what actually is society's standpoint of right and wrong." (*Id.* at 358, 376.)

On the third day of trial, the People tried to call Dr. Rath to testify. (COA at 8-9.) Joseph objected because "Dr. Rath was [] appointed to conduct evaluations both as to [Joseph's] capacity" and to testify on merits-related issues, in violation of *People v. Arcega*, 32 Cal. 3d 504 (1982). (*Id.* at 9.) The juvenile court sustained the objection, but nonetheless allowed the People a second bite at the apple. (*See id.*) Specifically, for the express purpose of rebutting Dr. Geffner's testimony *and* to offer evidence for the

People's case-in-chief, the court allowed a new expert (Dr. Anna Salter) to evaluate Joseph without his attorney present. Joseph's counsel objected to the examination as late discovery and because it presented the risk of self-incrimination. (*Id.*) Dr. Salter testified both as to P.C. 26 and the accuracy of Dr. Geffner's findings. (*See* R., Vol. 4, at 643-51.)

On January 14, 2013, the juvenile court affirmed the petition. (*See id.* at 839-40.) It derived its critical view on which of Joseph's statements were most probative of his P.C. 26 *mens rea* from Dr. Salter's evaluation, which went far beyond the scope of Dr. Geffner's report and concluded that statements made within the first 24 hours were the most important. (*See* R., Vol. 4, at 838.) The court committed Joseph to the Division of Juvenile Justice ("DJJ").

E. The Court Of Appeal Erroneously Affirms The Petition.

Joseph timely appealed. (COA at 13.) Following oral argument, the Court of Appeal issued a published opinion on June 8, 2015, rejecting Joseph's assignments of error. Relevantly, it concluded that Joseph waived his *Miranda* rights during the interrogation, despite his age, undisputed disabilities, and confusion. (*Id.* at 23-24.) The court failed to address Joseph's argument that Detective Hopewell's advisement was defective due to her suggestion that Joseph's waiver rights were shared with his stepmother, Krista. (*Id.* at 23.) Krista was conflicted under the circumstances as she was charged with child endangerment for leaving the gun within reach, testified against Joseph, and was alleged by Joseph to have prodded him to commit the act to protect the family. (*See, e.g.*, R., Vol. 1, at 168-70.) While the court agreed that Detective Hopewell failed to advise Joseph of his rights at the outset of the interrogation in violation of *Miranda*, it found the error harmless because Joseph spontaneously admitted he shot his father. (*See* COA at 19-20.) These statements did not

indicate, however, that Joseph appreciated the *wrongfulness* of his actions under P.C. 26.[5]

Finally, the Court of Appeal erroneously concluded that Dr. Salter's mid-trial appointment and examination of Joseph without counsel did not violate Joseph's rights because Joseph purportedly placed his mental state in issue. (*See id.* at 24-25.) The court ratified the juvenile court's determination that the prosecution can use compelled evidence not only for rebuttal but also for its case-in-chief.

IV.

DISCUSSION ON ISSUES MERITING FURTHER REVIEW

A. The Prosecution Failed To Meet Its Elevated Burden Of Demonstrating That Joseph Waived His *Miranda* Rights.

In assessing *Miranda* waivers, courts must consider whether the defendant "knowingly and voluntarily waived his [] rights" under the "totality of the circumstances." *In re Art T.*, 234 Cal. App. 4th 335, 351 (2015). Courts must use "extreme caution," however, when evaluating whether a juvenile has waived his rights under this test. *In re Elias V.*, 237 Cal. App. 4th 568, 587 (2015). This is because custodial interrogations keenly implicate the unique vulnerabilities of juveniles. Indeed, the U.S. Supreme Court has recognized that juveniles "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," *J.D.B.*, 131 S. Ct. at 2403 (quotation

[5] The court's harmless error finding was erroneous because it relied upon Joseph's confession to the *commission* of the act, not untainted evidence that he appreciated the act's *wrongfulness*. (*See* COA at 19-20.) Nevertheless, the court did not apply harmless error to the other errors raised. When considering these errors, the *Miranda* violations were not harmless. *See People v. Mil*, 53 Cal. 4th 400, 417 (2012). Joseph will fully brief this issue if the petition is granted.

omitted); demonstrate a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking," *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)); and have a "character [] not as 'well formed' as an adult's[,]" *id*. (quotations omitted).

Courts have long recognized that juveniles and adults are different in their ability to comprehend and appreciate the consequences of police interaction. *See id.* at 2468 (highlighting the "incompetencies associated with youth" such as "inability to deal with police officers or prosecutors") (citing *Graham v. Florida*, 560 U.S. 48, 78 (2010) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.")).

Recent research provides neuro-scientific support for matters long understood as common sense, highlighting social, psychological, and neurological development issues which cause reactive, impulsive, and irrational behavior in children – particularly those under fifteen. *See, e.g.*, Barry C. Feld, *Kids, Cops, and Confessions* 82, 89 (2013); Feld, *Juveniles' Competence*, *supra*, at 52. This Court and the Supreme Court of the United States have relied on this research in recent decisions recognizing the need for additional protection for juveniles in criminal cases. *See, e.g., J.D.B.*, 131 S. Ct. at 2301, 2403-06 (research considered in assessing age under the "custody" requirement to further the fundamental goals of *Miranda*); *see also Roper*, 543 U.S. at 568 (capital punishment for juveniles unconstitutional); *Graham*, 560 U.S. at 74 (life without parole for juveniles unconstitutional for non-homicide); *Miller*, 132 S. Ct. at 2460 (mandatory life without parole unconstitutional for juveniles); *see also People v. Gutierrez*, 58 Cal. 4th 1354, 1361 (2014) (presumption in favor of life without parole for juveniles unconstitutional).

Put simply, the relevant research and authorities demonstrate that juveniles under fifteen have a substantially diminished ability to execute valid waivers of their rights. Certainly Joseph, a ten year old with developmental disabilities, was incapable of waiving *Miranda* without an attorney, given his age, disabilities, and confusion.[6] Nevertheless, a majority of courts in this State, including the Court of Appeal here, neglect to give proper weight to the unique circumstances of juveniles and routinely find that juveniles fifteen and younger have waived *Miranda*'s protections without an attorney present. (*See* Section IV.A.1, *infra*.) This is an issue of "widespread importance," and review by this Court to clarify the controlling legal principles would be "in the public interest." *Cedars-Sinai Med. Ctr.*, 18 Cal. 4th at 6.

1. Courts Routinely Fail Properly To Scrutinize Juvenile Waivers Under The Totality-Of-The-Circumstances Test.

A juvenile's age is a "crucial factor" under *Miranda*. *See Gallegos v. Colorado*, 370 U.S. 49, 53 (1962) (a juvenile is "a person . . . not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protest his own interests or . . . rights"). To prove a juvenile's waiver, the prosecution must make an additional heightened showing, beyond its ordinarily "heavy burden," that the waiver was "voluntary, knowing, and intelligent." *People v. Lewis*, 26 Cal. 4th 334, 383-84 (2001). Courts have long questioned the ability of juveniles to execute voluntary, knowing, and intelligent waivers because they are not "in full possession of [their] senses

[6] A proper juvenile waiver standard requires an attorney. The presence of parents is inadequate. Relying on parents to safeguard a juvenile's constitutional rights assumes they have an understanding of the legal system, that they do not have any conflicts of interest, that they do not have an emotional reaction to the arrest, and that their presence will not pressure a confession. Feld, *Kids, Cops, and Confessions*, *supra*, at 44-45. An attorney obviates these problems.

and knowledgeable of the consequences of [their] admissions" and do not understand "the consequences of [their] confession[s] [] without advice as to [their] rights." *Gallegos*, 370 U.S. at 54. As a result, courts must take "the greatest care" with juvenile waivers "[i]f counsel was not present . . . when an admission was obtained." *In re Gault*, 387 U.S. 1, 55 (1967).

The U.S. Supreme Court recently emphasized these principles with respect to *Miranda*, holding 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 2408. This pronouncement tracks overwhelming scientific research, *id.*, and accords with a "developing consensus about the dangers of interrogation" for juveniles. *In re Elias V.*, 237 Cal. App. 4th at 588.

Nevertheless, Courts of this State regularly fail to accord appropriate weight to age and capacity under the totality-of-the-circumstances approach, and find waiver in the overwhelming majority of cases involving juveniles. *See, e.g.*, *In re Charles P.*, 134 Cal. App. 3d 768, 771-72 (1982) (holding that twelve year old waived *Miranda* and noting without support that many minors are "far more sophisticated and knowledgeable in these areas than their parents"); *see also People v. Nelson*, 53 Cal. 4th 367, 382 (2012) (fifteen year old waived rights); *People v. Lewis*, 26 Cal. 4th 334, 384-85 (2001) (thirteen year old waived rights); *In re Anthony J.*, 107 Cal. App. 3d 962, 971 (1980) (fifteen year old waived rights); *In re Abdul Y.*, 130 Cal. App. 3d 847, 867 (1982) (fourteen year old waived rights). Courts have, in other words, undervalued the age variable notwithstanding substantial evidence demonstrating that "[y]ouths fifteen years of age and younger exhibit[] the clearest and greatest disability" to understanding and

exercising *Miranda*.[7] *In re Elias V.*, 237 Cal. App. 4th at 595 (quotations omitted).

2. Substantial Research Confirms That Juveniles Like Joseph Are Severely Diminished In Their Ability To Understand *Miranda*.

Studies confirm that juveniles under fifteen differ significantly even from adolescents sixteen to eighteen years of age in their level of psychological development. Scott & Grisso, *Developmental Incompetence*, *supra*, at 817. Consequently, they are "significantly more likely than older adolescents and young adults to be impaired" in criminal proceedings. *See* Thomas Grisso, *et al.*, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 356 (2003). The research emphasizes that a ten year old like Joseph with developmental disabilities has significantly impaired cognition and judgment. Any waiver executed by such a child without an attorney present should invoke very serious doubt as to its validity under both prongs of the waiver analysis. *See* Feld, *Kids, Cops, and Confessions*, *supra*, at 89.

a. Voluntariness

For a confession to be "voluntary" – the first part of the waiver inquiry – it must be "the product of a free and deliberate choice." *People v. Whitson*, 17 Cal. 4th 229, 247 (1998). Juveniles' ability to effect a

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[7] By contrast, the U.S. Supreme Court has consistently held that juveniles under fifteen did not execute valid waivers because they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality). *See In re Gault*, 387 U.S. at 55 (confession of fifteen year old involuntary); *Gallegos*, 370 U.S. at 55 (confession of fourteen year old involuntary); *Haley v. Ohio*, 332 U.S. 596, 600-01 (1948) (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 constitutional).

voluntary waiver is impaired by their "sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure." Abigail Kay Kohlman, *Kids Waive the Darndest Constitutional Rights* 49 Am. Crim. L. Rev. 1623, 1635 (2012) (citing 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, 436 (2006)). These characteristics amplify the coerciveness of an interrogation. *See J.D.B.*, 131 S. Ct. at 2403.

Indeed, the physical and psychological pressures of a custodial interrogation – which "undermine the individual's will to resist" and "compel [a juvenile] to speak" – often improperly induce false confessions from juveniles.[8] *Id.* at 2401 (quotation marks omitted); *see In re Elias V.*, 237 Cal. App. 4th at 578 (citing research showing that "more than one-third . . . of proven false confessions were obtained" from juveniles). Juvenile vulnerabilities thus structurally undermine *Miranda*'s guarantees, creating a "risk [that interrogations] will produce [] false confession[s]" in a "significantly greater [amount] for juveniles than for adults." *In re 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, 545 (2005) (study of nearly 350 exonerations, finding that minors under eighteen were three times as likely to give a false confession than adults). Most troublingly, these risks are greatly increased for a child as young as ten. Richard Rogers, *Comprehensibility And Content Of Juvenile Miranda*

[8] Police can take advantage of susceptibility to adult influence by "predispos[ing] the suspect to . . . talk with police." Barry Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, 73 (2006); *see also* Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 Law & Soc'y Rev. 259, 271-73 (1996).

Warnings, 14 Psych. Pub. Pol. & L. 63, 66 (2008) ("Younger ages are clearly associated with a higher likelihood of waiving rights and providing confessions.").

b. Knowing And Intelligent Waiver

Research similarly reveals that a juvenile's ability to comprehend *Miranda* warnings, and "knowingly and intelligently" waive them, is significantly diminished.

Juveniles are particularly disadvantaged in their capacity to understand *Miranda* because they lack the "requisite level of comprehension" of the criminal justice system to support a valid waiver. *Whitson*, 17 Cal. 4th at 247. For example, recent studies comparing adults in the criminal justice system with juveniles found that juveniles "manifest[]significantly inferior comprehension of the meaning and importance of *Miranda* warnings." *See* Scott & Grisso, *Developmental Incompetence, supra*, at 825 (alteration added); Feld, *Kids, Cops, and Confessions*, *supra*, at 73 (study found that "the majority of younger juveniles . . . exhibited [a] significant lack of understanding" of their *Miranda* rights) (citing J.L. Viljeon, *et al., Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, Behavioral Sciences & the Law 25:1-19 (2007))); *see also* Kohlman, *Kids Waive, supra*, at 1636 (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, 1153-54, 1160 (1980) (age weighs heavily in misunderstanding). For children as young as Joseph, an adequate understanding of *Miranda* is exceptionally rare. *See* Rogers, *Comprehensibility*, *supra*, at 78 ("[M]ost juveniles ages 13 and younger are simply unlikely to grasp key *Miranda* components[.]").

Moreover, "[p]sycho-social development proceeds more slowly than cognitive development" such that, "even when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment." Barry C. Feld, *Adolescent Criminal Responsibility Proportionality and Sentencing*, 31 Law & Ineq. 263, 282 n.89 (2013) (quotation omitted); *see* Scott & Grisso, *Developmental Incompetence*, *supra*, at 813 ("Youths in early and mid-adolescence generally are neurologically immature."). Because the decision to waive *Miranda* requires an appreciation of the "tactical and strategic ramifications of relinquishing rights," and because juveniles are more impulsive than adults and make decisions more rashly, a juvenile's decision to waive may not be appropriately knowing and intelligent even if he understands the words spoken. *See* Feld, *Kids, Cops, and Confessions*, *supra*, at 82 (citing Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices after Dickerson* 81 (2003)); King, *Waiving Childhood Goodbye*, *supra*, at 435-36. 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, Cops, and Confessions*, *supra*, at 90. 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).

3. The Court Of Appeal Failed Properly To Consider Joseph's Age In Applying The Totality-Of-The-Circumstances Approach And Found Waiver Despite Demonstrated Confusion.

The Court of Appeal failed to give appropriate weight to Joseph's age and disabilities in determining whether he understood the nature of his

Miranda rights and the consequences of waiving them under the totality-of-the-circumstances test. The court acknowledged that "[a]ge *may* be a factor in determining the voluntariness of a confession," but held Joseph's waiver valid purportedly because he "understood" his rights and "had no trouble communicating." (COA at 21-23 (emphasis added).) When Joseph's age, experience, education, background, and intelligence are given appropriate consideration, especially in light of the research discussed above, the record demonstrates that he did not understand his rights, let alone the consequences of waiving them.

At the time of the interrogation, Joseph was ten years old – squarely within the range where juveniles are "simply unlikely to grasp key *Miranda* components" or to appreciate the circumstances of an inherently coercive interrogation. *See* Rogers, *Comprehensibility*, *supra*, at 78 (alteration added). To compound matters, Joseph had severe mental impairments and other developmental and learning disabilities, including ADHD, PTSD, susceptibility to suggestion, and trouble communicating. (*See* Clerk's Tr., Vol. 2, at 355; R., Vol. 2, at 350-74.) The record contains substantial evidence that, educationally and developmentally, Joseph functioned at a level substantially *lower* than his chronological age, and that he lacked the ability to comprehend his rights. (*See* R., Vol. 2, at 350-74; Clerk's Tr., Vol. 2, at 488); *see also* Feld, *Juveniles' Competence*, *supra*, at 80 n.175 (differences between adults and juveniles compounded by developmental disabilities); Rogers, *Comprehensibility*, *supra*, at 80 (low intelligence and mental disorders are likely have "catastrophic effects on Miranda comprehension"). Joseph was uniquely impaired.

The facts of the interrogation confirm that Joseph did not understand the *Miranda* warnings that were given, despite affirming to the contrary. On the two occasions when Joseph attempted to verbalize his understanding, his explanations were unintelligible. For example, when

Detective Hopewell asked if he understood the right to remain silent, Joseph replied, "Yes, that means that I have the right to stay calm." (Supp. Clerk Tr., Vol. 1, at 64.) In response, Detective Hopewell explained the right in a leading question – and Joseph simply responded, "right." (*Id.*) Next, when Detective Hopewell attempted to explain Joseph's right to counsel and asked Joseph what that right meant to him, Joseph was again unable to formulate a coherent response, stating that the right means, "don't talk until that means to not talk till the attorney or . . . ." (*Id.*) Detective Hopewell again reformulated her initial explanation in attempting to correct Joseph's confusion. However, in the wake of Joseph's clear statements of misunderstanding and confusion, this was an empty gesture. *See Whitson*, 17 Cal. 4th at 245 ("It is only through [] awareness of [*Miranda*] that there can be any assurance of real understanding."); *see also* Feld, *Kids, Cops, and Confessions*, *supra*, at 90 (appearance of comprehension for a minor does not demonstrate comprehension).

Nor did Joseph appreciate the consequences of waiving his rights. When Detective Hopewell asked if Joseph knew what it meant that "anything you say, will be used against you in a court of law," Joseph did not even respond. (Supp. Clerk's Tr., Vol. 1, at 64.) Joseph's comments throughout the interview demonstrate that he had no appreciation of the severity of the circumstances and potential legal consequences. (*See id.* at 94 (Joseph asking, "When we get home could we see – could we see if there's anything good there that we can [do to] . . . get all this out of my mind."); R., Vol. 4, at 835 ("[Joseph] thought he was going home [during interrogation].").)

The court's analysis is further limited by its sole focus on the voluntariness of the alleged waiver. (COA at 20-24.) This Court has explained that the voluntariness of a waiver must be considered *separately* from whether it was knowing and intelligent. *Whitson*, 17 Cal. 4th at 247.

Contrary to the court's opinion, a juvenile need not demonstrate police coercion to show that a waiver was not "knowing and intelligent." The narrow scope of the court's analysis led to an inadequate assessment of waiver.

The record simply does not support that Joseph made the requisite voluntary, knowing, and intelligent waiver. Detective Hopewell's roughly two minutes explaining these critical rights to Joseph, despite his incomprehensible responses, his age, and his disabilities, cannot satisfy the People's burden.

* * *

The research and the applicable case law concur that a juvenile "cannot be compared with an adult in full possession of his sense and knowledgeable of the consequences of his admissions." *Gallegos*, 370 U.S. at 54. Without legal advice or the benefit of mature judgment, a juvenile "ha[s] no way of knowing [] the consequences of his confession" or "the steps he should take in the predicament in which he [finds] himself." *Id*. A juvenile can become "an easy victim of the law." *Haley*, 332 U.S. at 599. Acknowledging these issues, at least ten states currently "recognize[] bright-line rule[s] that juveniles under a certain age (usually between the ages of thirteen and sixteen) [] do not have the capacity to make an effective waiver of their *Miranda* rights." *See* Kohlman, *Kids Waive*, *supra*, at 1639.

Joseph was ten years old with developmental disabilities, and his need for an attorney was unmistakable. He did not understand his rights, and did not knowingly and intelligently waive them. This Court should grant review of the petition and consider whether the Court of Appeal endorsed an improperly limited totality-of-the-circumstances analysis despite Joseph's age, disabilities, confusion, and the overwhelming research contextualizing his cognitive limitations. Recent lower court

decisions have begun to grapple with how this research ought to affect *Miranda*'s totality-of-the-circumstances standard. *See, e.g.*, *In re Elias V.*, 237 Cal. App. 4th at 587-600 (relying on research in juvenile confession case and finding confession involuntary). But a review of the case law demonstrates that the courts of this state are systematically undervaluing the significance of a juvenile's age and developmental limitations. (*See* Section IV.A.1, *supra*.) This Court should grant review to provide guidance on this critical issue. Much greater weight should be placed on the scale against finding waiver for a minor under fifteen – and even greater weight against such a finding for a ten year old child like Joseph who demonstrated manifest confusion of his rights. Indeed, the science would support a categorical rule, or at least a strong presumption,[9] against any finding of a voluntary, knowing, and intelligent waiver when a child is under fifteen. The Court of Appeal should have taken a harder look at Joseph's case.[10]

B. Krista's Presence At The Interrogation Tainted The Waiver.

Detective Hopewell's warnings to Joseph also were defective because she told Joseph that his choice to talk and waive his rights rested with Krista. (*See* Supp. Clerk's Tr., Vol. 1, at 63 ("[S]he's gonna listen to it and then, *she's going to give me your answers*." (emphasis added)); 65 ("But *it's your choice and it's your mom's choice*. Okay?" (emphasis

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[9] It bears mention that P.C. 26 – the criminal statute at issue in Joseph's case – sets forth a presumption that a juvenile "under the age of 14 is incapable of committing a crime." *In re Manuel L.*, 7 Cal. 4th 229, 231 (1994). A juvenile who is presumptively unable to commit a crime should be presumptively unable to waive his criminal rights.

[10] The Court of Appeal was wrong that there is "no evidence of developmental incompetence." (COA at 21 n.11.) Joseph presented overwhelming evidence of incapacity and his developmental deficits at trial, before the Court of Appeal in his briefing, and at oral argument. (*See, e.g.*, R., Vol. 2, at 350-74.)

added)).) The Court of Appeal erroneously found a valid waiver despite this erroneous suggestion and the fact that Krista had significant conflicts of interest that should have precluded her from being present while Joseph was interrogated.

1. The Court Of Appeal Wrongly Endorsed The View That Joseph Could Share His *Miranda* Rights.

Miranda rights cannot be shared. *See In re Michael B.*, 149 Cal. App. 3d 1073, 1084 (1983) (waiver invalid where juvenile waived his rights and signed a written form "because his mother told him to do so"). When, as here, *Miranda* warnings are improperly administered, resulting waivers are invalid. *See Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (waiver invalidated where warnings provided "expressly misinformed [the defendant] regarding his right to counsel"). Detective Hopewell's instruction that the choice to continue speaking with her without first seeking the advice of counsel rested not only with Joseph, but also with Krista, misinformed Joseph as to who could choose whether he would waive his rights.

The Court of Appeal failed to address the impropriety of this instruction, instead focusing on the separate issue of "police coercion." (COA at 23.) In so doing, the Court of Appeal neglected to consider Joseph's argument that the *advisement* of the warning itself was defective. The court's resulting decision was erroneous and sets a dangerous precedent, which permits critical waiver decisions to be shared between a juvenile and a third party. It was Joseph's choice – and his alone – to decide whether he wanted to invoke or waive his rights. He was not required, as the detective suggested, to accept Krista's advice.

2. Joseph's Waiver Was Not Valid Because It Was Made In The Presence Of A Parent With Conflicting Interests.

More fundamentally, Krista's *presence* at the interrogation demonstrates that Joseph's waiver was not valid under the totality of the

circumstances and, indeed, should imply a presumption against waiver. Krista was conflicted due to a child endangerment charge simultaneously lodged against her, her decision to testify against Joseph as one of the People's key witnesses, and the fact that Joseph alleged that she prompted him to commit the crime. (R., Vol. 4, at 837 (juvenile court crediting Krista's testimony that "she taught [Joseph] right from wrong"); *see* Clerk's Tr., Vol. 2, at 404, 428.) Krista's presence was clearly detrimental, as Joseph looked to her for guidance in answering questions. (Supp. Clerk's Tr., Vol. 1, at 91 ("[D]id everything I says [sic] was right?").) Krista did not tell him he was incriminating himself, but rather convinced him to keep talking. (*Id.*); *see Woods v. Clusen*, 794 F.2d 293, 297 (7th Cir. 1986) ("[S]tatement to the juvenile that it would 'be better' if [he] talked was dubious advice to the ignorant, as any minimally competent defense counsel would be quick to attest.").

This Court should grant review to consider how the presence of a parent with such plainly conflicting interests should inform the waiver analysis, and in particular whether it creates a presumption against a valid waiver. *See* Feld, *Kids, Cops and Confessions*, *supra*, at 44-45; 187-89 (presence of parents at an interrogation is detrimental); Rogers, *Comprehensibility*, *supra*, at 66 ("[P]arental motivations [] may not serve to protect juvenile suspects."). Numerous courts have endorsed such a view. *See*, *e.g.*, *In re A.S.*, 999 A.2d 1136, 1150 (N.J. 2010) ("[W]hen . . . 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."); *In re E.T.C.*, 449 A.2d 937, 940 (VT 1982) (juvenile "must be given the opportunity to consult with an adult" who is "completely independent from and disassociated with the prosecution"). The record here uniquely presents this question.

C. The Appointment Of Dr. Salter Violated Joseph's Right To Counsel And Right Against Self-Incrimination.

The Court of Appeal affirmed the juvenile court's decision to appoint Dr. Anna Salter mid-trial to examine Joseph for six hours without his attorney. Dr. Salter wrote a report reflecting a number of incriminating statements made by Joseph during the evaluation, and then testified in support of the People's burden under P.C. 26. Dr. Salter's examination violated Joseph's Fifth Amendment right against self-incrimination, as well as his Sixth Amendment right to counsel.

The right to counsel extends to "critical stages of the criminal proceedings," *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (internal quotation marks omitted), including compelled psychiatric evaluations during which a high risk is presented that a juvenile may incriminate himself, *see In re Spencer*, 63 Cal. 2d 400, 410 (1965). The Court of Appeal relied upon *Maldonado v. Superior Court*, 53 Cal. 4th 1112 (2012), to hold that Dr. Salter's appointment was proper so that the People could rebut Dr. Geffner, who testified regarding Joseph's understanding of right and wrong. The Court of Appeal concluded that through Dr. Geffner, Joseph put his "mental condition into issue." (COA at 24-25.)

The Court of Appeal's holding contravenes *Maldonado*. In that case, this Court considered whether "[a] criminal defendant who tenders his [] mental state as a guilt [] issue waives the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to counsel," such that the prosecution may use compelled evidence against him. 53 Cal. 4th at 1116. The Court answered that question in the affirmative, reasoning that the People may use such evidence "to rebut a mental-state defense." *Id.* at 1141. However, the Court emphasized that compelled evidence may be used *only* to rebut a mental state defense, and "*may not* be used, either

directly or as a lead to other evidence, *to bolster the prosecution's case against the defendant*." *Id.* at 1125 (emphases added).

P.C. 26 is *not* a mental-state defense, but the People's affirmative burden to establish by clear and convincing evidence. *See In re Manuel L.*, 7 Cal. 4th at 232.[11] The Court of Appeal impermissibly extended *Maldonado* to hold that the People's use of compelled psychiatric evidence extends beyond the People's case in rebuttal. (COA at 27 (evidence could be used on "capacity issue").) Under *Maldonado*, the People may use evidence derived from a compelled examination only to rebut mental-state evidence offered by the defendant, *not to bolster its case-in-chief*. *See* 53 Cal. 4th at 1142 (evidence limited to "rebut[ting] mental-state evidence the defense has already indicated it intends to present"). Here, the juvenile court expressly held that the purpose of Dr. Salter's testimony was both: (1) "to [] impeach Dr. Geffner's report"; *and* (2) "then also . . . she would go to the . . . PC 26 issue." (R., Vol. 3, at 427.) The court acknowledged on the record that Dr. Salter was a witness for the "the People's case in chief," and based its findings on P.C. 26 on Dr. Salter's testimony that Joseph's statements during the first 24 hours after the incident (including statements made to Detective Hopewell) were most probative of his knowledge of wrongfulness. (R., Vol. 4, at 834-35.)

In other words, Dr. Salter's testimony, including her opinion regarding the first 24 hours, went far beyond rebutting Dr. Geffner's report, and violated the principle articulated in *Maldonado* that compelled

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[11] While Joseph initially maintained an NGI plea, he withdrew that plea, extinguishing any evidentiary privileges for the People in connection with it. *See Maldonado*, 53 Cal. 4th at 1132 (where a defendant "abandon[s] the defense, any self-incriminating results of the examination[] cannot be . . . used against him"). The Court should consider whether *Maldonado* even applies to the circumstances here: where Joseph offered mental state *evidence*, but not an affirmative defense, on an issue that the prosecution was required to prove in its case-in-chief.

examination evidence "may not be used . . . to bolster the prosecution's case against the defendant." 53 Cal. 4th at 1125. Joseph's Fifth and Sixth Amendment rights were violated. The Court of Appeal endorsed an inappropriate expansion of the permissible uses of compelled psychiatric examinations.

D. Additional Grounds Of Error Should Be Exhausted For Purposes Of Federal Collateral Review.

Joseph challenged the sufficiency of the evidence below, arguing that the People had presented insufficient evidence on the issue of P.C. 26 to support a verdict. Second, Joseph raised unfair-surprise, late discovery, and due process challenges to the late appointment of Dr. Salter. Third, Joseph raised a cumulative error challenge. Finally, Joseph argued that his disposition was unreasonable as the Court failed appropriately to apply federal educational law under the Individuals with Disabilities Act to Joseph's case, failed to provide Joseph the necessary treatment for his disabilities in his housing in the DJJ, and failed to consider adequate alternative placement facilities. Joseph does not present these issues as "grounds for review under rule 8.500(b)"; however, Joseph raises them herein "solely to exhaust state remedies for federal habeas corpus purposes." Cal. R. Ct. 8.508(b)(3)(A). The factual background of this petition contains the required "brief statement of the underlying proceedings." Cal. R. Ct. 8.508(b)(3)(B).

V.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for review.

DATED: July 20, 2015

Respectfully submitted,

LATHAM & WATKINS LLP

By: _____
Nima H. Mohebbi
Attorneys for Minor-Appellant

CERTIFICATE OF WORD COUNT

The text of this brief consist of 8,174 words as counted by the Microsoft Office Word word-processing program used to generate the brief.

Dated: July 20, 2015

Nima H. Mohebbi

Attachment A

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 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.

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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*).

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] 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,

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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.

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.

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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.

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.

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.

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

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 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 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

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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 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.)

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 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

[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.

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 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,

[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.)

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

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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.

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 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.)

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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.

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, 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 the capacity issue, the prosecution was entitled to a fair opportunity to rebut any mental-state

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

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 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 (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.

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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.)

[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.

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 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

[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.

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 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.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111.

On **July 20, 2015**, I served the following document described as:

PETITION FOR REVIEW

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Office of the Attorney General P.O. Box 85266 San Diego, CA 92186-5266	Kamala D. Harris Attorney General of California Julie L. Garland Senior Assistant Attorney General Arlene A. Sevidal Supervising Deputy Attorney General Sean M. Rodriquez Deputy Attorney General

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Based on California Rules of Court, rule 8.212 to accept service by electronic transmission, I caused the above referenced document to be sent to the California Supreme Court, at the web address listed above. I then received an email confirmation that the document has been submitted.

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **July 20, 2015**, at San Francisco, California.

Domonique Roberts