STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

KEVIN LIONEL THOMPSON, JR.,

Defendant-Appellant.

Docket No. 163224

COA: 344834

Genesee CC: 16-039869-FC

Lindsay Ponce (P80904)
Jaqueline J. McCann (P58774)
Assistant Defenders
Counsel for Defendant-Appellant
State Appellate Defendant Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
lponce@sado.org
(313) 256-9833

MILLER, CANFIELD, PADDOCK and STONE, P.L.C.
Ashley N. Higginson (P83992)
Sydney G. Rohlicek (P85655)
Higginson@millercanfield.com
Rochlicek@millercanfield.com
Attorneys for Amicus Curiae
The Innocence Project, Inc.
120 N. Washington Square, Suite 900
One Michigan Avenue Building
Lansing, Michigan 48933
(517) 487-2070

Alena Clark (P73252)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee
Genesee County Prosecutor's Office
900 S. Saginaw St., Suite 102
Flint, Michigan 48502
AClark@geneseecountymi.gov
(810) 259-3496

Lauren Gottesman (*pro hac vice pending*)
Tania Brief
Counsel Attorneys for Amicus Curiae
The Innocence Project, Inc.
40 Worth Street, Suite 701
New York, New York 10013
LGottesman@innocenceproject.org
TBrief@innocenceproject.com
(212) 364-5392

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC.
IN SUPPORT OF DEFENDANT-APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

Constitional Provision

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the Innocence Project, Inc., a non-profit organization dedicated to providing pro bono legal services to incarcerated people whose innocence may be established through the development of a post-conviction record. The Innocence Project has served as counsel or otherwise provided assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide. The Innocence Project also seeks to prevent wrongful convictions by researching the causes of wrongful conviction and pursuing legislative, administrative, and judicial reform initiatives designed to enhance the truth-seeking functions of the criminal justice system, and to prevent the admission of unreliable evidence in courts around the country. Such reforms include those designed to prevent the elicitation and evidentiary admission of coerced, false confessions—a primary cause of wrongful convictions.

In an effort to prevent law enforcement from eliciting false confessions, Amicus has been urging courts around the nation to acknowledge the inherent unreliability of polygraph testing and, correspondingly, the powerful coercion involved in confronting a subject of custodial interrogation with unscientific polygraph results as if they were conclusive proof of guilt[2]—just as the interrogating officer did here. Because such interrogation tactics place innocent people at risk of falsely confessing, Amicus has a compelling interest in urging the Court to issue a decision that (1) finds that Appellant's attorney's failure to ensure that he was present during a highly coercive post-polygraph interrogation created an unacceptable risk of false confession, and (2) prohibits

[1] Pursuant to MCR 7.312(H)(4), counsel for a party has not authored this brief in whole or in part and no party has made any monetary contribution intended to fund the preparation or submission of this brief.

[2] The Innocence Project has filed amicus curiae briefs on this precise subject matter in the Wisconsin Supreme Court in *State v Vice*, No 2018AP2220-CR (Wis 2020), in the Oklahoma Court of Criminal Appeals in *Petty v State*, No RE-2020-805 (Okla 2022), and in a New York trial court, in *People v Krivak*, Ind No 39-1996 (NY 2022).

uncounseled *Miranda*[3] waivers once the right to counsel guaranteed by the Michigan Constitution has attached or, at minimum, prohibits such waivers by young people, like Appellant, who are categorically more vulnerable to interrogation coercion and have diminished capacity to comprehend their *Miranda* rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

False confession is a primary cause of wrongful conviction, contributing to approximately one-third of all cases eventually overturned using DNA evidence.[4] Notably, the use of polygraph examination during interrogation played a part in *nearly twenty percent* (20%) of these wrongful convictions.[5] False confession is particularly prevalent in cases like this one—homicide offenses involving young suspects.[6]

Kevin Lionel Thompson's case provides a stark example of a highly unreliable confession, elicited in response to various coercive and deceptive tactics that have been demonstrated to place innocent people—and particularly young people like Kevin, who was just 18 years old—at risk of providing a coerced, false confession. Despite the fact that polygraph results are widely understood by both scientists and courts to be unreliable—so unreliable, in fact, that their admission in evidence to establish guilt in a criminal proceeding is barred in 49 out of 50 states—Thompson's attorney arranged for him to submit to a polygraph examination without ensuring either that the

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[3] *Miranda v Arizona*, 384 US 436 (1966).

[4] See Innocence Project, *DNA Exonerations in the United States (1989-2020)*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed August 29, 2023) (hereafter referred to as "US DNA Exonerations").

[5] This statistic accounts for DNA exonerations only and does not include many other additional known instances of innocent people that were given a polygraph examination and then falsely confessed. See, e.g., National Registry of Exonerations List ("NRE"), available at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last accessed August 30, 2023).

[6] See *id*. (nearly 75% of all known false confessions elicited from people aged 18 or younger resulted in wrongful murder convictions).

exam would be administered while his attorney was on premises or that law enforcement would not interrogate him in the absence of his attorney afterward. Consequently, in his attorney's absence, Kevin waived his right to counsel, submitted to the polygraph, and was deemed to have "failed" the exam. The interrogator then leveraged the polygraph results to coerce Kevin into participating in further interrogation without his attorney and, eventually, used additional powerfully coercive interrogation tactics to elicit a "confession." A confession obtained under such circumstances is highly unreliable and should cause this Court grave concern.

As such, Amicus offers this brief to provide information to the Court about several relevant issues. First, to illuminate the profound impact of the ineffective representation provided to Kevin by his counsel, Amicus writes to describe the significant risk of false confession posed by tactics such as the "false evidence ploy"—in which police lie to a suspect, claiming to have inculpatory evidence that does not in fact exist—and why the Court should consider the use of highly unreliable but seemingly "scientific" polygraph results in an interrogation to be tantamount to such a ploy (Section I(C), infra). Second, Amicus seeks to provide information to the Court on the particular susceptibility of the adolescent brain to such coercive tactics (Section I(D), infra), a susceptibility that this Court has recently recognized.[7] Finally, in order to provide meaningful safeguards against coercive, deceptive interrogations that lead to false confessions, Amicus urges this Court to hold that, once the right to counsel under article 1, section 20 of the Michigan Constitution has attached, any subsequent, uncounseled *Miranda* waiver—especially by a young person—is insufficient to waive the fundamental right to counsel, rendering any resulting confession inadmissible (Section

[7] *People v Stewart*, ___ NW2d ___, 2023 WL 4874412, at *9 (Mich July 31, 2023) (reasoning that adolescents' vulnerabilities "may lead an interrogee to prioritize immediate benefits over long-term consequences—resulting in behaviors such as falsely confessing in exchange for release—or to comply with the authority or perceived desires of a police officer regardless of the consequences").

II, infra).[8]

STATEMENT OF RELEVANT FACTS

After learning that he was a person of interest in the investigation of a homicide that occurred in Flint, Michigan, Kevin Lionel Thompson—who had just turned 18 and had never been in legal trouble of any kind (Appellant's Appendix ("App") 11a, 1372a)—retained counsel and drove to the Flint Police Department to voluntarily turn himself in. (*Id.* 1692a.) After arraignment on homicide and related charges, and in an apparent effort to demonstrate his innocence, Kevin's counsel arranged for him to submit to a polygraph examination conducted by law enforcement. According to Kevin's counsel, he was to be present when the polygraph exam was administered at the agreed-upon time and date, and Kevin would not be subjected to post-polygraph questioning. (*Id.* 202a, 233a.)

Instead, several hours before the polygraph had been scheduled to occur, Kevin was transported from the local jail to the interrogation room inside the courthouse. (*Id.* 180a-182a.) Without his counsel present, Kevin was subjected to a polygraph examination by David Dwyre, a Special Agent with the Michigan Department of Attorney General, who misleadingly presented himself as Kevin's "advocate" and made numerous statements trivializing the important protections inherent in Kevin's *Miranda* rights before extracting an uncounseled waiver of those rights and subjecting him to an interrogation. (*Id.* 8a.)

[8] This case presents the question of whether attorneys provide constitutionally effective assistance of counsel when they fail to take reasonable measures to protect a client from an inherently coercive post-polygraph interrogation and whether any resulting prejudice is overcome by an uncounseled *Miranda* waiver. Amicus will not herein reiterate the argument that Kevin was denied constitutionally effective assistance of counsel and prejudiced by that denial—that argument is well addressed by the Appellant's brief and is hereby fully endorsed by Amicus—but instead writes to provide the Court with additional information and argument about the consequences of such ineffective representation and, relatedly, the danger of permitting anyone, but especially young people, to waive their *Miranda* rights without counsel once the right to counsel has attached.

Specifically, Dwyre falsely suggested that he was separate and distinct from law enforcement and was a neutral "middle man" without a "dog in [the] fight." (*Id.* 9a.) Dwyre further assured Kevin that if he passed the polygraph exam, Dwyre would be his "advocate" and the charges would be dismissed. (*Id.* 7a.) Dwyre also falsely told Kevin that Dwyre had previously administered polygraph exams to Kevin's attorney's other clients, and that all who passed were released.[9] (*Id.* 8a.)

After deceptively assuring Kevin that passing the polygraph would result in his release and the dismissal of charges against him, Dwyre described the *Miranda* waiver as a mere "permission form" that would simply "giv[e] [Dwyre] permission to give [Kevin] a polygraph exam." (*Id.* 13a.) Social science demonstrates that such tactics diminish a suspect's attention to and, consequently, their comprehension of their *Miranda* rights.[10] Additionally, Dwyre blurred the lines between the polygraph exam—the results of which could never be introduced into evidence against him under

[9] In reality, Special Agent Dwyre had never conducted a polygraph examination of any of Kevin's lawyer's prior clients, nor, of course, did he have the authority to instruct Karen Hanson, the prosecutor assigned to the case, to drop the charges against Kevin if he determined that Kevin passed the polygraph. (*Id.* 1658a-1659a.) In fact, Hanson testified at pre-trial hearings that she herself was even without the authority to make that charging decision because it would have gone to "[their] boss, the [elected] prosecutor, Prosecutor Leyton, and he would've decided that." (*Id.* 1670a.)

[10] When police deceptively trivialize the importance of a suspect's *Miranda* rights, or waiver thereof, an average adult suspect's comprehension of their rights is significantly reduced. See Kyle C. Scherr & Stephanie Madon, *"Go Ahead and Sign": An Experimental Examination of Miranda Waivers and Comprehension*, 37 Law & Hum Behav 208, 214 (2013); accord *State v O.D.A.-C.*, 250 NJ 408, 422; 273 A3d 413 (2022) ("Referring to *Miranda* warnings as a 'formality,' . . . [or] suggest[ing] that *Miranda* warnings are little more than a box on a bureaucratic checklist waiting to be checked off . . . . minimizes their import and undermines 'the very purpose of *Miranda*.'") (internal citations omitted).

Michigan law[11]—and any potential post-polygraph interrogation that could be and, indeed, was used against him.[12]

After obtaining Kevin's *Miranda* waiver, Dwyre continued to deceive Kevin about the nature of the interrogation, his role as an adversary, and the consequences of confession. Specifically, Dwyre erroneously represented to Kevin that the test was not being recorded. (*Id.* 13a.) Dwyre also remarked that Kevin's attorney "trust[s] that I know what the hell I'm doing." (*Id.*) He further gave Kevin false assurances that "[i]f you were there [at the crime scene] . . . that doesn't mean that you need to be charged for this, a charge that puts you in prison for the rest of your life." (*Id.* 40a.) Additionally, utilizing a coercive interrogation technique known as "minimization,"[13] Dwyre deceptively suggested several times that involvement in a homicide

[11] See *People v Jones*, 468 Mich 345, 351; 662 NW2d 376 (2003) (it is a "bright-line rule" that the result of a polygraph examination is not admissible evidence); *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977) (holding that polygraph-examination evidence is excluded from trial because it "ha[s] not received the degree of standardization or acceptance among scientists which would warrant admissibility").

[12] As this Court has recognized, Dwyre's failure to explain this distinction likely created "confusion" in the waiver process. *People v Ray*, 431 Mich 260, 267-268; 430 NW2d 626 (1988) (recognizing "a potential for confusion exists," as here, "in a situation where a defendant may not knowingly and intelligently waive certain rights *if* the distinction between results of a polygraph examination and statements made before, during, or after a polygraph examination is not adequately explained to the defendant") (emphasis in original).

[13] "Minimization" is an umbrella term used for techniques "designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question." Kassin et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 Law & Hum Behav 3, 12 (2010). These tactics—including suggestions that the crime was an accident, it was the victim's fault, or there was some defensible reason for the perpetrator's criminal conduct—"communicate[] by implication that leniency in punishment is forthcoming upon confession" and may "lead innocent people who feel trapped to confess." *Id.* at 18. Because of the risk that minimization tactics will elicit a false confession from an innocent suspect, the Innocence Project, in another amicus curiae brief submitted to this Court in *People v Stewart*, has argued that an interrogating officer's use of such tactics that communicate a promise of leniency, should render the subsequent confession per se involuntary and inadmissible. The Court did not adopt such a test but acknowledged the "extensive research regarding the interplay between [such] coercive interrogation tactics and false confessions[.]" 2023 WL 4874412 at *11, n9.

offense like this may not be criminal and, instead, is understandable or justifiable. (See, e.g., *id.* 47a (Dwyre telling Kevin that "[i]f you were there, and you took part at all in this robbery, it doesn't mean that you're a killer"); *id.* 54a ("[J]ust because you held a gun, there's no crime in holding a gun"); *id.* 83a-84a (Dwyre telling Kevin that he "believe(s) it was just an accident" and that there is a "[d]ifference between life in prison and accident," and assuring Kevin, "you're not a bad guy. You're a good guy. I'm going to try to help you the best I can.").)

Through both the questioning that preceded the polygraph examination and throughout the examination, Kevin steadfastly maintained his innocence. (*Id.* 40a, 74a-79a.) Upon conclusion of the examination, sixty seconds of silence passed before Dwyre indicated to Kevin that "some of these questions were giving you problems" and asked, "Which ones bothered you the most?" (*Id.* 79a.) Dwyre then proceeded to "go over the results" with Kevin, explaining that he had observed a drastic spike in heart rate when Kevin was questioned about his involvement in the robbery. (*Id.* 79a-80a.) He then leveraged his interpretation of the results to insist on Kevin's guilt while minimizing Kevin's culpability, all in an apparent effort to elicit a confession from Kevin that he represented to Kevin would "save him." Specifically, Dwyre asserted that the test result "doesn't mean you killed anybody . . . [but] what it does mean *for sure* is that you – you were around there when – when that went down." (*Id.*) (emphasis added). Dwyre continued with his questioning, insisting that the polygraph, which he described as a "cold and impartial scientific instrument" (*id.* 46a), irrefutably demonstrated that Kevin was "lying"—while simultaneously reassuring Kevin that, in seeking his confession, he was "trying to save [Kevin]." (*Id.* 80a.)

After an hour and forty minutes, and Kevin's preceding refusal to answer a string of questions,[14] Kevin eventually agreed with Dwyre's assertion that he was involved in the incident that led to the shooting. Notably, he was unable to describe how the shooting unfolded, but summarily answered "yes" when Dwyre again asked, "was it an accident?" (*Id.* 85a.) Eventually, however, Kevin adopted the full narrative proposed by Dwyre—that the gun went off accidentally when the victim grabbed Kevin. (*Id.* 85a-86a.)

Dwyre then took Kevin out for a cigarette break, where they were out of range of the recording equipment. (*Id.* 90a-91a.) Upon returning, Kevin recanted his confession, and insisted that he did not shoot the victim. (*Id.* 91a-92a.) After making note of the recantation, Dwyre told Kevin that he had just "fucked [him]self" (*id.* 130a) and threatened Kevin that changing his mind in this way would mean that Kevin would be sentenced to significant time in prison. (*Id.* 106a (insisting Kevin's recantation was "a fuckin' lie" and, as a result, he was "gonna go to prison . . . . going to end up doing a lot of time").) In response, Kevin asked Dwyre what he should do, and Dwyre encouraged him to tell the "truth"—that is, the version of the truth Dwyre insisted upon—and admit to shooting the victim accidentally. (*Id.*) Ultimately, Kevin relented and answered "yes" to Dwyre's repeated assertions that he shot the victim and that the shooting was an accident. (*Id.* 108a.)

[14] See, e.g., *id.* 85a ("did he grab your hand? Did he bump it with the door? What happened? Or did you just – did you just kind of panic? What happened, bro?").

ARGUMENT

I. CONFRONTING A CUSTODIAL SUBJECT WITH "FAILED" POLYGRAPH RESULTS IS A DECEPTIVE AND COERCIVE INTERROGATION TACTIC THAT PUTS INNOCENT PEOPLE—PARTICULARLY YOUNG PEOPLE, LIKE KEVIN—AT RISK OF FALSE CONFESSION AND WRONGFUL CONVICTION

As noted, false confessions elicited in response to coercive police interrogations are responsible, in whole or in part, for the wrongful convictions underlying nearly one-third of all known exonerations uncovered through DNA testing. The "false evidence ploy"—a tactic in which police lie to suspects about incriminating evidence against them—is a powerfully coercive tactic that has played an outsized role in the elicitation of these documented false confessions.

As discussed infra, polygraph examinations are "intrinsically susceptible to producing erroneous results," and, as such, a polygraph examiner cannot conclude with scientific certainty that a test subject is in fact deceitful. Stephen E. Fienberg et al, National Research Council, *The Polygraph and Lie Detection* (The National Academies Press, 2003), p 2.[15] See also William G. Iacono & Gershon Ben-Shakhar, *Current Status of Forensic Lie Detection With the Comparison Question Technique: An Update of the 2003 National Academy of Sciences Report on Polygraph Testing*, 43 Law & Hum Behav 86, 91 (2019). Accordingly, when interrogators inform a suspect that they "failed" the polygraph and suggest that this result is irrefutable evidence of the suspect's deception and guilt—just as the polygraph examiner did during Kevin's interrogation here—they are, in effect, using a powerful false evidence ploy and misleading the suspect into believing that there is objective, "scientific" evidence of guilt. Such confrontation with polygraph results places innocent people at risk of providing a false confession and, consequently, of wrongful conviction. When these tactics are, as here, used against an adolescent, the risk of false confession is elevated, as young people are categorically more vulnerable to such coercive techniques. In light of the risk

[15] Available at https://doi.org/10.17226/10420 (last accessed August 30, 2023).

that an innocent person will "confess" in response to law enforcement's use of unreliable polygraph results in a post-polygraph interrogation, Amicus urges this Court to find that Kevin's counsel was ineffective and, as such, compel attorneys to take reasonable measures to be present during a polygraph examination and any interrogation that may follow.

A. False Confession Is a Leading Cause of Wrongful Conviction

In the last several decades, false confession—innocent people "admitting" to having committed a crime—has been revealed as a leading cause of wrongful convictions. Indeed, false confession contributed to wrongful convictions in nearly one-third of all DNA-based exonerations,[16] and approximately twelve percent of all known exonerations nationwide.[17] These *documented* false confessions "most surely represent the tip of an iceberg," Kassin et al, *Police-Induced Confessions,*, 34 Law & Hum Behav 3 (2010),[18] since they do not include cases where the confession may have been disproved before trial, DNA testing is unavailable to establish innocence, or the case is resolved by a guilty plea or otherwise receives no post-conviction scrutiny. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J Am Acad Psychiatry L 332 (2009).[19] Thus, the phenomenon of false confession, though understandably hard to comprehend, is in fact widespread.

It is unsurprising that false confessions cause wrongful convictions—they constitute powerful evidence of guilt, influencing not only judges and juries, but potentially compromising entire investigations. Indeed, once a false confession is uttered in an interrogation room, it often

[16] See US DNA Exonerations, supra note 4.
[17] See NRE.
[18] This "white paper" was approved by the American Psychology Law Society – "one of only two such papers published in the history of that division of the American Psychological Association." *People v Powell*, 37 NY3d 476, 485; 182 NE3d 1028 (2021).
[19] Available at < https://jaapl.org/content/jaapl/37/3/332.full.pdf> (Last accessed August 30, 2023).

biases the investigative process, catalyzing a course of events that leads to the wrongful conviction of the innocent "confessor." As one expert aptly stated, "no other class of evidence is so profoundly prejudicial" as the false confession, which has a "strong biasing effect on the perceptions and decision-making of criminal justice officials." See *id.* at 340 (citation omitted). Following a confession, police often "close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation." Saul M. Kassin, *Why Confessions Trump Innocence,* 67 Am Psychologist 431, 433 (2012) (citations omitted) (false confessions may also "taint[] the perceptions of . . . forensic experts"); accord Kassin et al, *Police-Induced Confessions*, 34 Law & Hum Behav at 23-24 (describing a study in which fingerprint experts changed 17% of their previously correct matches or exclusions when presented with a false confession).

Critically, once admitted into evidence, false confessions have an overwhelming impact on factfinders and, *even in the face of compelling evidence of innocence,* an innocent "confessor" is at significant risk of wrongful conviction. Social scientists studying the influence of false confessions on jurors have found "unequivocal" evidence that "confessions have more impact on verdicts" than most other, more reliable forms of evidence. Sara C. Appleby et al, *When Self-Report Trumps Science: Effects of Confession, DNA, and Prosecutorial Theories on Perceptions of Guilt* 22 Psychol Pub Pol'y & Law 127, 127-129 (2016) (citation omitted). In fact, 22% of exonerees whose wrongful convictions were based on confession evidence now known to be false were convicted *despite the availability of exculpatory DNA evidence* at the time of trial. See US DNA *Exonerations, supra* note 4; see also *When Self-Report Trumps Science,* 22 Psychol Pub Pol'y & Law at 128 (discussing a report analyzing 19 cases in which innocent confessors to rape and/or murder were tried and convicted despite having been exculpated by DNA tests).

False confessions may be particularly compelling (wrongful) evidence of guilt when the confession is "contaminated," meaning the innocent suspect adopts detailed facts supplied to them by their interrogators (often inadvertently), for example, through leading questioning or photographs. See Appleby, Hasel, & Kassin, *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 Psychol, Crime & L 111, 124-125 (2013). The resulting contaminated "confession" seems verifiably true and highly persuasive. See Richard A Leo et al, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 Temp L Rev 759, 764 (2013).

B. The Vast Majority of Known False Confessions Involve Police Deception

Thirty years of scientific study reveal that police deception during interrogation significantly increases the risk that a suspect will falsely confess. See, e.g., Kassin et al, *Police-Induced Confessions*, 34 Law & Hum Behav at 12; *see also* Stewart, J. M., Woody, W. D. et al, *The Prevalence of False Confessions in Experimental Laboratory Simulations: A Meta-Analysis*, 36 Behavioral Sci & L 12, 26 (2018) (finding, as a result of a "meta-analytic" study, that "deception during police interrogation. . . increase[s] [the] likelihood of false confessions"); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 Law & Hum Behav 327, 330, 335 (2011) ("[T]he presentation of false evidence, on its own, significantly increased the [false] confession rate" and deceptive techniques such as the "bluff" technique where one pretends to have evidence to be tested "increased the false confession rate, by 60%.").[20]

[20] Because of the risk that the false evidence ploy will elicit a false confession from an innocent suspect, the Innocent Project, in another amicus curiae brief submitted to this Court in *People v Stewart*, has argued that an interrogating officer's use of a false evidence ploy should render the subsequent confession *per se* involuntary and inadmissible. 2023 WL 4874412 at *11, n 9.

Deceptive interrogation techniques can take many forms, but perhaps none is as powerfully manipulative as the "false evidence ploy"—a tactic that involves presenting the suspect with non-existent evidence of guilt, such as fictional eyewitness identification or fabricated incriminating forensic results. Kassin et al. *Police-Induced Confessions*, 34 Law & Hum Behav at 28. The false evidence ploy has been "implicated in the vast majority of documented police-induced false confessions." *Id*. at 12*;* see also Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb L J 791 (2006) (describing the use of false evidence ploys to extract confessions in the Central Park Five case[21]); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan L Rev 1051, 1097-1099 (2010) (describing various additional cases of innocent people falsely confessing in response to the false evidence ploy); Richard Leo, *Structural Police Deception in American Police Interrogation: A Closer Look at Minimization and Maximization*, University of San Francisco Law Research Paper No 2020-13 at 183-184 (detailing the case of Martin Tankleff, an innocent teenager who was lied to by interrogating officers and, as a result, confessed, was wrongfully convicted, and spent nearly two decades in prison before he was ultimately exonerated and released) in Eidam,

Although the Court declined to adopt such a per se rule, it noted that the "[r]esearch illustrating a strong correlation between the use of false evidence and an interrogee providing a false confession is particularly concerning." *Id.*

[21] The Central Park Five, also known as the Exonerated Five, are five men who falsely confessed to the attack and rape of a woman in Central Park when they were young adolescents, the youngest being 14. The detectives who interviewed them repeatedly lied about the existence of evidence against them, as well as falsely told the young suspects that they had implicated each other. They spent 13 years in prison before the actual perpetrator confessed to the crime and they were exonerated. Salaam, Richardson & Santana, *We Are the 'Exonerated 5.' What Happened to Us Isn't Past, It's Present*, N.Y. Times, (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions.html> (accessed Aug. 30, 2023).

Lindemann & Ransiek, eds, *Interrogation, Confession, and Truth: Comparative Studies in Criminal Procedure* (Baden-Baden: Nomos Verlagsgesellschaft, 2020).[22]

In addition to the myriad real-world examples of the coercive power of the false evidence ploy, laboratory experiments have demonstrated that the tactic can and does induce innocent people to falsely confess to crimes or other misconduct, including, for example, "cheating, in violation of a university honour code[,] . . . stealing money from the 'bank' in a computerized gambling experiment . . . and recalling past transgressions, including acts of violence." Snook et al, *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 Legal & Criminological Psychol 1, 10 (2021) (citations omitted). Indeed, the "presentations of false information" are so powerful that they can "substantially alter subjects' visual judgments, beliefs, perceptions of other people, behaviors toward other people, emotional states, . . . self-assessments, memories for observed and experienced events, and even certain medical outcomes, as seen in studies of the placebo effect." Kassin et al, *Police-Induced Confessions*, 34 Law & Hum Behav at 17 (citing eleven "highly recognized [classic studies] in the field" that "revealed that misinformation renders people vulnerable to manipulation"); Saul M. Kassin et al, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 Am Psychologist 63, 70 (2018) (misinformation "can alter a person's memory for that event."). Consequently, presentation of false evidence during an inherently stressful interrogation can even produce a "coerced-internalized" false confession—an incriminating admission by an innocent suspect who, persuaded by the interrogators' misrepresentation of the evidence, begins to doubt their memory of the event and wrongfully believe in their own guilt.

[22] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584817. (Last accessed August 30, 2023).

Kassin et al, *Police-Induced* Confessions, 34 Law & Hum Behav at 15; see also Perillo & Kassin, *Inside Interrogation*, 35 Law & Hum Behav at 328 (describing the results of a laboratory study in which misinformation "increased the number [of participants] who internalized guilt, from 12[%] to 55%").

In light of the robust evidentiary support for the fact that police deception in interrogation is highly coercive and places innocent suspects at grave risk of wrongful conviction, there is consensus among relevant experts that the tactic is dangerously manipulative. See e.g., Snook et al, *Urgent Issues and Prospects in Reforming Interrogation Practices*, 26 Legal & Criminological Psychol at 10 (noting that "the scientific community is in agreement regarding the risk of false evidence" in interrogation because it is "clear that misinformation renders people vulnerable to manipulation" and "[n]umerous laboratory experiments specifically demonstrate the false evidence effect"). Indeed, in a 2018 survey of leading experts on false confession and interrogation coercion, nearly all agreed that "presentations of false incriminating evidence during interrogation increase the risk that an innocent suspect would confess to a crime he or she did not commit." Kassin et al, *On the General Acceptance of Confessions Research*, 73 Am Psychologist at 70-72. These experts overwhelmingly agreed that the false evidence ploy increases the risk of false confession in a manner "equally perilous" to the use of "explicit promises of leniency, threats of harm or punishment," and even *torture*. *Id*. at 75.

C. Confronting a Subject of Custodial Interrogation with "Failed" Polygraph Results as Conclusive Evidence of Guilt is a Potent False Evidence Ploy

In Michigan, as in most states, the results of a polygraph examination are not admissible at trial because there are "serious scientific questions" regarding their accuracy. *Barbara*, 400 Mich at 390. Indeed, because of the fundamental lack of demonstrated reliability, 49 of the 50 states bar introduction of polygraph results as evidence against someone charged with a crime absent

agreement of the parties.[23] The United States Supreme Court has upheld such per se bans, citing the lack of scientific consensus surrounding polygraphs. See, e.g., *United States v Scheffer*, 523 US 303, 305-314 (1998) (noting that per se polygraph rules served several legitimate interests, "such as ensuring that only reliable evidence was introduced at trial").

Because polygraph examination yields inherently unreliable results, presenting suspects with evidence that they "failed" a polygraph test as if it were scientific proof of guilt (rather than a highly unreliable proxy for truth-telling) is a particularly "potent" false evidence ploy that places suspects at risk of falsely confessing by leveraging the interrogator's subjective interpretation of "evidence." Accord Richard A. Leo, *Police Interrogations and American Justice* (First Harvard Univ Press, 2008), p 217.[24]

1. *Polygraph Examination Yields Unreliable Results*

In 2003, the National Academy of Sciences (NAS) published a report titled *The Polygraph and Lie Detection*, describing how, despite "almost a century of research in scientific psychology and physiology," *no studies* have established that polygraph tests are, in fact, reliable. Indeed, the report concluded that the polygraph is "intrinsically susceptible to producing erroneous results," and that efforts to improve polygraph procedures are unlikely to bring significant improvements in accuracy. Stephen E. Fienberg et al, *The Polygraph and Lie Detection* 2 (2003).

Nearly two decades later, this scientific consensus surrounding polygraphs remains unchanged. See Iacono & Ben-Shakhar, *Current Status of Forensic Lie Detection*, 43 Law & Hum

[23] Although polygraph is generally inadmissible, some jurisdictions allow for its admission in criminal trials only if "both parties stipulate in advance to circumstances of test and to scope of its admissibility." See § 5169.3 *Lie Detectors—Twenty-First Century Lie Detector Status*, 22 Fed Prac & Proc Evid § 5169.3 (2d ed.).

[24] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243909 (last accessed Aug. 30, 2023).

Behav at 86.[25] The fundamental problem with polygraph testing is that, while "psychological states often associated with deception . . . do tend to affect the physiological responses that the polygraph measures, *these same states can arise in the absence of deception*[,] . . . [because] many other psychological and physiological factors (e.g., anxiety about being tested) also affect those responses." *Id.* at 2 (emphasis added). In other words, deception is not the only explanation for a test subject's change in physiological states measured by the polygraph—such as changes in heart rate, blood pressure, sweat levels, or breathing rate. *Id.* (noting the "ambiguity of the physiological measures used in the polygraph").

Accordingly, an innocent, truthful person experiencing negative stress may produce a chart which "mimic[s] the physiological signs of deception." *Id.* at 74-75. Moreover, research has demonstrated that a stressor "can have profoundly different effects on physiological activation across individuals or circumstances." *Id.* at 82. Thus, "there is considerable lack of correspondence between the physiological data the polygraph provides and the underlying constructs that polygraph examiners believe them to measure." *Id.* at 83, 78 ("There is no unique physiological response that indicates deception.").

Furthermore, the polygraph test is administered and analyzed by an examiner—a human being who is necessarily informed by personal prior experiences, knowledge, and implicit biases. These factors can affect the outcome of a polygraph test in two ways: "[b]y influencing the way examiners conduct their interviews and the questions they ask[;] and by influencing the conclusions they draw from the test results." Saul M. Kassin, et al, *The forensic confirmation bias: problems, perspectives, and proposed solutions*, 2 J of Applied Res in Memory & Cognition 42,

[25] The authors undertook a scientific review of polygraph examinations, concluding that the "quality of research has changed little in the years elapsing since the release of the National Academy of Sciences report, *supra*, and that the report's landmark conclusions still stand." *Id.*

46 (2013). A law enforcement agent with knowledge of the crime under investigation—like the polygraph examiner in this case—will necessarily administer and score the exam with "forensic confirmation bias," meaning the officer's "preexisting beliefs, expectations, motives, and situational context [will] influence the collection, perception, and interpretation of evidence[.]" *Id.* at 45. Accordingly, "it is unclear the extent to which the results of the [polygraph] reflect psychophysiological detection as opposed to the influence of extraneous information and resulting examiner confirmation bias on the way the physiological data are collected and interpreted." Iacono & Ben-Shakhar, *Current Status of Forensic Lie Detection*, 43 Law & Hum Behav at 91. As a recent scientific review of polygraph examinations aptly explained, "[t]here is no objective lie detection device; ultimately, the examiner *is* the lie detector." *Id.* (emphasis added). Stated simply, because of the inherent ambiguity and subjectivity of modern polygraph testing, a polygraph examiner cannot conclude with scientific certainty that a test subject is in fact deceitful. See *id.* (warning that polygraph "results should be treated with great caution"); accord *Sullivan v State*, 328 Mich App 74, 84; 935 NW2d 413 (2019) ("Polygraph results are inadmissible because 'there is simply no consensus that polygraph evidence is reliable.'") (quoting *Scheffer*, 523 US at 309).

2. *Because Polygraph Results Are Unreliable, the Suggestion in an Interrogation that "Failed" Results Constitute Proof of Guilt Constitutes a False Evidence Ploy*

Because of the inherent unreliability of polygraph examination, when interrogators present a suspect with a "failed" polygraph result as incontrovertible evidence of the suspect's deception and guilt—as the interrogators did here—they are necessarily using a false evidence ploy, regardless of whether the examiner honestly believes that the subject "failed" the exam. Indeed, "numerous studies and case anecdotes support the fact that innocent people can be induced to

confess by the *true or false* presentation of . . . [a] failed polygraph[.]" M. Kassin, et al, *The Forensic Confirmation Bias*, J of Applied Res in Memory & Cognition at 48 (emphasis added).

As courts around the country are beginning to acknowledge, misrepresenting polygraph results during an interrogation is highly coercive and risks eliciting a coerced, false confession. Significantly, one state Supreme Court has ruled that use of falsified polygraph results to elicit confessions renders subsequent statements involuntary per se. *State v Matsumoto*, 145 Haw 313, 327; 452 P3d 310 (2019) (holding that "providing falsified polygraph test results to a suspect as part of a custodial interrogation is an extrinsic falsehood that poses an unacceptable risk of inducing an untrue statement or influencing an accused to make a confession regardless of guilt"). Likewise, other courts have acknowledged that confronting a suspect with polygraph results injects a high degree of coercion into the interrogation. See, e.g., *State v Valero*, 153 Idaho 910, 914; 285 P3d 1014 (Ct App 2012) (finding a confession involuntary where "the detective conveyed to [defendant] that, from the polygraph, there was no question what [defendant] had done and, in essence, that the polygraph was determinative of his guilt"); *United States v Coriz*, 2018 WL 4222383, at *10 (DNM, September 5, 2018) (suppressing a post-polygraph statement as involuntary, noting that "the use of the polygraph test added to the pressure of the interrogation").[26]

Relatedly, the Seventh Circuit found impermissible coercion when police falsely led a suspect to believe they were in possession of forensic evidence that objectively and conclusively established the suspect's guilt. *Aleman v Vill of Hanover Park*, 662 F3d 897, 906 (CA 7, 2011). The *Aleman* court reasoned that false presentation of evidence by an interrogator may "destroy the information required for a rational choice." *Id.* Particularly when interrogators' misrepresentation

[26] Pursuant to MCR 7.215, this unpublished opinion is provided to the court given its relevance to the matters at issue on appeal and the circumstances presented here.

of evidence "foreclose[s] any other conclusion" but that the suspect committed the offense and the misrepresentation is such that a layperson would not be able to challenge the evidence presented, the suspect's choice—and, potentially, perception of reality—may be "seriously distort[ed]." *Id.* (quoting *United States v Rutledge*, 900 F2d 1127, 1129-1130 (CA 7, 1990)). Indeed, as that court recognized, when such powerfully manipulative ploys are used during an interrogation, the "confession so induced is worthless as evidence[.]" *Id.* at 907. Confronting suspects with failed polygraph results as if the suspect's guilt and deceit are "foregone conclusions" likewise will "seriously distort" the suspect's perception of their choices and place them at risk of uttering an unreliable or, potentially, false confession. *Id.*; accord *People v Thomas*, 22 NY3d 629, 642 (2014) (holding that the interrogating officers' use of deception during the interrogation at issue functioned to "nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed" against a vulnerable suspect).

Special Agent Dwyre's representation about Kevin's polygraph results epitomize the misleading and coercive effect an unreliable polygraph result can have in the course of a post-polygraph interrogation. He explicitly leveraged the results from what he described as a "cold and impartial machine" to emphasize the irrefutability of Kevin's guilt—telling him that the test results "mean *for sure*" that Kevin was at the crime scene when the homicide occurred and there was "[n]o question about it"—in order to extract his confession. As courts and scientists have made clear, the results of the polygraph are unreliable, and the reliability of a confession obtained as a result of leveraging such results is necessarily suspect.[27]

[27] Decades ago, in *People v Ray*, this Court reasoned that "a statement may be reliable and voluntary even though it was made during the course of a polygraph examination." 431 Mich at 267. This Court went on to explain that "a blanket prohibition of polygraph use in investigative practices is not warranted[,] [and] . . . [declined to hold] that statements made before, during, or

D. Young People are Especially Vulnerable to Interrogation Coercion

The psychological impact of deceptive police interrogation tactics is amplified when used against young people—like Kevin—whose brains are still developing and maturing. See Catherine Insel et al, Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (Jan. 27, 2022) (hereinafter "White Paper on the Science of Late Adolescence"). [28] Consequently, the majority of proven false confessions have been elicited from young people under age 25. See NRE, supra note 5 (documenting that nearly 64% of false confessions contained within the database were elicited from individuals under age 25); see also US DNA Exonerations, supra note 4 (providing that 49% of the false confessors were 21 years old or younger at the time of arrest).

Modern neuroscience helps to explain the disproportionate number of innocent young people who succumb to interrogative pressures and falsely confess. Specifically, decades of scientific research have revealed that the areas and systems of the brain that are responsible for future planning, judgment, and decision making—the prefrontal cortex and other regions that make up the "cognitive-control networks"—are not fully developed until a person's early to mid-twenties, resulting in adolescent and teenage immaturity and cognitive impairments. See Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions in Psychological Science 55, 55-59 (2007). There is now "consensus on the

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after the administration of a polygraph examination are excludable *per se* as evidence at trial." *Id.* at 268. Amicus's position is not in tension with the ruling in *Ray* in that Amicus is urging only that this Court acknowledge that when polygraph *results* are used to suggest to the subject that police have irrefutable proof of the suspect's guilt and deception, the subject of interrogation is placed at an increased risk of falsely confessing. Amicus's position is that the interrogator's *confrontation* of the custodial subject with polygraph results through coercive interrogation tactics—but not the use of the polygraph in and of itself—is what creates the dangerously coercive condition.

[28] Available at <https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/>. (Last accessed August 30, 2023).

notion that adolescents are neurobiologically distinct from both children and adults in ways that directly impact decision making." Hayley M.D. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 Psychol Pub Pol'y & Law 118, 120 (2017).

As this Court has recently recognized, these neurological differences manifest in various ways that implicate innocent young people's ability to withstand interrogative coercion and, consequently, "may lead an [adolescent] interrogee to prioritize immediate benefits over long-term consequences[[29]]—resulting in behaviors such as falsely confessing in exchange for release—or to comply with the authority or perceived desires of a police officer regardless of the consequences."[30] *Stewart*, 2023 WL 4874412 at *9. Further, young people have a diminished ability to respond to stress during interrogations. Interrogation is "stress-inducing by design," Kassin et al, *Police-Induced Confessions*, 34 Law & Hum Behav at 7, and, although stress impacts the decision-making capacity of people of all ages, stress especially impedes the judgment of

[29] As a result of ongoing neurological development, young people are less capable than adults of adequately accounting for the future consequences of their actions during police interrogation. As a result, young people may have a distorted perception of the duration of an interrogation, so that even a relatively short period of interrogation may be perceived by a young person as endless, adding to the pressure on the young suspect to adopt interrogators' narratives, regardless of guilt. *Id*. In fact, many young people who have falsely confessed have explained that they did so to put an end to the interrogation or, in the context of a police-station interview, so that they would be permitted to "go home." *Id*. at 120. See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L Rev 891, 969-70 (2004).

[30] Young people have heightened susceptibility to the "powerful phenomenon" of obedience to authority figures. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Age of Influence and Suggestibility*, 27 Law & Hum Behav 141, 152 (2003), available at <https://www.researchgate.net/publication/10772895_Taking_Responsibility_for_an_Act_Not_Committed_The_Influence_of_Age_and_Suggestibility/link/0fcfd5092a5c6163ea000000/download> (last accessed August 31, 2023). An "interrogation interaction itself—by virtue of the process and the social and legal roles of those involved—likely fosters perceived compulsory compliance" with the interrogating officers. Cleary, *Lessons of Developmental Psychology*, 23 Psychol Pub Pol'y & Law at 122.

young people who are "vulnerable to further distortion[]" of their "already skewed cost-benefit analyses[.]" Jessica Owen-Kostelnik et al, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 Am Psychologist 286, 295 (2006).[31]

In addition to their increased susceptibility to coercion, young people, particularly those under age twenty, are less likely than adults to understand and assert their *Miranda* rights in the interrogation room—the very rights that are supposed to "protect against the coercion that can occur when a citizen is suddenly engulfed in a police-dominated environment." *People v Cortez*, 299 Mich App 679, 702; 832 NW2d 1 (2013) (O'Connell, P J, concurring). See also, e.g., Naomi E. S. Goldstein et al., *Evaluation of Miranda Waiver Capacity*, in APA Handbook of Psychol and Juvenile Justice 467, 475 (Kirk Heilbrun ed, 2016) ("Many juveniles . . . may not be able to apply the *Miranda* rights to their own situations or to recognize the consequences of waiving or asserting their rights[.]"); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal L Rev 1134, 1152-54 (1980) (reporting that a majority of young people who received *Miranda* warnings did not understand them well enough to waive their rights; that only 20.9% of the young people exhibited understanding of all four components of a *Miranda* warning; and that 55.3% manifested no comprehension of at least one of the four warnings). Even if they comprehend the literal meaning of *Miranda* warnings, children and teenagers may not comprehend the warnings' "relevan[ce] to the situation they are in," nor appreciate that they could actually *exercise* their rights, even in the face of a police officer's request for compliance. Kassin et al, *Police-Induced Confessions*, 34 Law & Hum Behav at 6; Barry C. Feld, *Police Interrogation of*

[31] See also Cleary, supra, at 120-121 (citing Alexandra O Cohen et al, *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, Psychol Sci 27, 549–562 (2016) (surveying neuroimaging of teenagers and concluding that teens "demonstrated less cognitive control than adults under threatening conditions . . . in both brief and prolonged states of negative emotional arousal").

Juveniles An Empirical Study, 97 J of Crim L and Criminology 219, 229-30 (2006) ("Juveniles . . . have greater difficulty than adults conceiving of a right as an absolute entitlement that they can exercise without adverse consequences.").

Here, 18-year-old Kevin waived his *Miranda* rights without his retained attorney present and only after being misled by Dwyre about Dwyre's role in the investigation and the accuracy of the polygraph results, and, as such, was left vulnerable to Dwyre's highly coercive, deceptive interrogation tactics. As this Court has acknowledged, an eighteenth birthday and the consequent change from a "juvenile" to an "adult" under the law does not impart on young adults the sudden capacity to withstand interrogation coercion or comprehend *Miranda* rights, as their brains, like younger adolescents, are still developing. *Stewart*, 2023 WL 4874412 at *9 (noting that although turning 18 "renders defendant an adult under the law, [the Court] ha[s] elsewhere recognized that 18-year-olds are still undergoing physiological and neurological maturation, meaning that their decision-making abilities are not fully developed") (citing *People v Parks*, 510 Mich 225; 987 NW2d 161 (2002)).

Adolescents' vulnerabilities in the interrogation room and their diminished capacities to comprehend *Miranda* rights serve to underscore the need to vigorously safeguard their right to effective assistance of counsel during a polygraph examination and any post-polygraph interrogation. Likewise, this science demonstrating young people's susceptibility to coercion reveals the gravity of ensuring that young people's fundamental right to counsel guaranteed by this State's constitution is not waived away by an uncounseled execution of a *Miranda* form, discussed infra.

II. AFTER THE RIGHT TO COUNSEL HAS ATTACHED, POLICE EFFORTS TO OBTAIN AN UNCOUNSELED *MIRANDA* WAIVER VIOLATE THIS STATE'S CONSTITUTIONAL RIGHT TO COUNSEL AND LEAVE INNOCENT PEOPLE—PARTICULARLY INNOCENT ADOLESCENTS—AT RISK OF FALSELY CONFESSING

To provide a critical safeguard against false confessions, Amicus urges this Court to hold that, once the right to counsel, pursuant to article 1, section 20 of the Michigan Constitution, has attached, a *Miranda* waiver will be valid only if made with counsel present and upon counsel's advice. Stated differently, an uncounseled *Miranda* waiver alone should be insufficient to waive the fundamental right to counsel once that right has attached. In the alternative, Amicus urges the Court, at a minimum, to adopt such a rule for young people under age twenty-five,[32] who are categorically more likely to falsely confess in the face of coercive interrogation and less able to comprehend their rights in the interrogation room without the assistance of counsel. (See Section I(D), supra.) As explored below, the risk of false confession and, consequently, wrongful conviction that inures when police are permitted to seek uncounseled *Miranda* waivers from a represented person, as well as the well-reasoned opinions from other state supreme courts and this Court's interpretation of Michigan's constitutional provisions concerning the right to counsel, all

[32] While there is some disagreement in the field as to what precisely constitutes adolescence and adulthood, since brain development does "not rigidly conform to chronological boundaries," leading experts define adolescents as those aged 10 to 17, late adolescents as those aged 18 to 21, and young adults as those aged 22 to 25. See *White Paper on the Science of Late Adolescence*, *supra* n 26 at 46, n242. Although adults—including adults without any cognitive, developmental, or mental health issues—can and do falsely confess in the face of coercive police tactics, young people under age 25 make up the majority of known false confessors. See University of Michigan Law School, The National Registry of Exonerations <https://www.law.umich.edu/special/exoneration/Pages/ detaillist.aspx> (accessed Aug. 30, 2023) (documenting that nearly 64% of false confessions contained within the database were elicited from individuals under age 25); Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L Rev 891 at 945 (discussing a study of 125 false confessions that found children under age 18 made up approximately one-third of false confessors in the sample considered, and another 27% of innocent confessors were between 18 and 24 years old).

constitute compelling reasons to interpret this State's right to counsel as providing more robust protections in the interrogation room than the federal Sixth Amendment right.

As "a corollary of the right against compelled self-incrimination," the right to counsel enshrined in the Sixth Amendment of the federal constitution and article 1, section 20 of this State's Constitution, helps to ensure that "statements made in the government-established atmosphere are not the product of compulsion." *People v Tanner*, 496 Mich 199, 207-208; 853 NW2d 653 (2014) (citing *Miranda*, 384 US at 455). As this Court has repeatedly recognized, "[w]hile all constitutional rights are important, the right to counsel has always been elevated to a particularly lofty status, because without this right the defendant may be denied the practical enjoyment of his other rights." *People v Gonyea*, 421 Mich 462, 476; 365 NW2d 136 (1984); see also *People v Pubrat*, 451 Mich 589, 593; 548 NW2d 595 (1996) (noting that "[t]he right to counsel is considered fundamental because it is essential to a fair trial.").

Although the United States Supreme Court has, likewise, historically recognized the unique importance of the right to counsel to ensure access to other constitutional rights, in 2009, a divided Court overturned prior federal precedent and held that, under the federal Sixth Amendment right to counsel, an individual who is already represented by counsel may waive this constitutional right when approached and questioned by police and that "the decision to waive need not itself be counseled." *Montejo v Louisiana*, 556 US 778, 786 (2009) (overruling *Michigan v Jackson*, 475 US 625 (1986), which had established a rule that "forbid[] police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding"). Accordingly, pursuant to current federal law, a represented person can, as here, be approached by law enforcement and interrogated without their lawyer present, even after the individual's right to counsel has attached, so long as the individual waives their *Miranda* rights voluntarily, knowingly,

and intelligently. *Id.* ("[W]hen a defendant is read his *Miranda* rights . . . and agrees to waive those rights, that typically does the trick[.]"). Significantly, however, the United States Supreme Court contemplated that states may opt to provide more robust protection to its residents under state law. *See id.* at 793 ("If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so.").

At least three states—West Virginia, Kansas, and, most recently, Kentucky—have accepted the Supreme Court's invitation to provide more protection to their citizens under their respective state laws and declined to follow *Montejo*. These courts have reasoned, *inter alia*, that their state laws are inconsistent with the *Montejo* ruling, which "completely disregarded the unavoidable deterioration of the right to counsel that results" when police are permitted to extract uncounseled *Miranda* waivers and interrogate a represented person without counsel present. *Keysor v Commonwealth*, 486 SW3d 273, 281 (Ky 2016) ("*Montejo*'s degradation of the right to counsel is antithetical to our perception of the right to counsel provided under Section 11 of the Kentucky Constitution"). The Kentucky Supreme Court, for example, recognized that the *Montejo* rule allows police to exploit counsel's absence and "easily induce[]" a *Miranda* waiver, thereby leaving "police . . . with an easy opportunity to adeptly place a wedge between the accused and his lawyer[,] [by] [f]or example, . . . entic[ing] an unsuspecting defendant with favors his attorney cannot obtain, like alluring assurances of better outcomes and offers of leniency in exchange for cooperative waivers." *Keysor*, 486 SW3d at 281. Likewise, as the Supreme Court of West Virginia aptly stated:

> [N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. **No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights**.

State v Bevel, 231 W Va 346, 355-356 (2013) (holding that the right to counsel embedded in the West Virginia constitution provides more protection than the federal Sixth Amendment right in this regard and that "[i]f police initiate interrogation after a defendant asserts his right to counsel at an arraignment or similar proceeding, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid as being taken in violation of the defendant's right to counsel under article III, section 14 of the Constitution of West Virginia") (emphasis added); see also *State v Lawson*, 296 Kan 1084, 1098-1099 (2013) (finding that, under Kansas' statutory rule which codified the state's right-to-counsel law, "after the statutory right to counsel has attached, the defendant's uncounseled waiver of that right will not be valid").[33]

This Court has not yet considered whether the *Montejo* decision is consistent with the Michigan Constitution's right to counsel.[34] Although the language of article 1, section 20 of the

[33] Here, the concerns expressed by the state supreme courts that have rejected *Montejo* are at issue. Special Agent Dwyre succeeded in "entic[ing] an unsuspecting defendant with favors his attorney cannot obtain, like alluring assurances of better outcomes and offers of leniency in exchange for cooperative waivers." *Keysor*, 486 SW3d at 281. Armed with an uncounseled *Miranda* waiver—which was procured based on deception regarding Dwyre's role as an "advocate" and misleading characterizations of the *Miranda* waiver as a mere "permission form" for a polygraph—Dwyre proceeded to use deception, manipulation, and minimization tactics that implied Kevin would receive leniency upon confession to entice his teenaged suspect to confess.

[34] While this Court has not yet engaged with *Montejo*, some appellate courts have, seemingly, assumed that the *Montejo* rule applies. See, e.g., *People v Calkins*, 2010 WL 2925359, at *2 (Mich Ct App, July 27, 2010) ("*Miranda* warnings are sufficient to ensure that a defendant's waiver of his right to counsel during post-indictment questioning is voluntary, knowing, and intelligent") (citing *Montejo*); *People v Degroot*, 2020 WL 1816005, at *4 (Mich Ct App, April 9, 2020); *People v Allen*, 2016 WL 3314460, at *5 (Mich Ct App, June 14, 2016); *People v Jernagin*, 2015 WL 340127, at *2 (Mich Ct App, January 27, 2015); *People v LeSears*, 2013 WL 4866270, at *3 (Mich Ct App, September 12, 2013). Pursuant to MCR 7.215(C), the cited unpublished decisions in this section are included to demonstrate that while panels of the Michigan Court of Appeals have broached the subject, this Court has not yet issued a holding as to whether the *Montejo* rule shall apply as it relates to uncounseled waivers.

Michigan Constitution mirrors the language of the federal Sixth Amendment right to counsel,[35] that does not resolve the question of whether the Michigan constitution affords its citizens' broader rights than the federal corollary. Accord *People v Tanner*, 496 Mich 199, 228; 853 NW2d 653 (2014) (noting that "[a]lthough the text of Article 1, § 17 [Michigan constitution's provision protecting the right against self-incrimination] has mirrored its federal counterpart since its incorporation, the conclusion does not follow that this Court has interpreted the provision identically to the United States Supreme Court's interpretation of the Fifth Amendment."). As this Court has explained, while "[t]he judiciary of this state is not free to simply engraft onto [in this case, Const 1963, art 1, § 20] more 'enlightened' rights than the framers intended[,] . . . [the Court also] may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection." *People v Reichenbach*, 459 Mich 109, 118-119; 587 NW2d 1 (1998) (citations and quotation marks omitted; alteration in original); see also *Tanner*, 496 Mich at 221-223 ("[W]e need not, and cannot, defer to the United States Supreme Court in giving meaning to the [Michigan Constitution]. Instead, it is this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].'") (citations omitted).

Accordingly, as here, "[w]here the language of the federal constitution and that of the Michigan Constitution are nearly identical, a 'compelling reason' must justify interpreting one instrument of government as granting greater rights under the latter than under the former."

[35] See Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall … have the right to the assistance of counsel for his or her defense[.]"). Cf. US Const, Amend VI ("In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.").

Reichenbach, 459 Mich at 118-119. In assessing whether a "compelling reason" exists to interpret the Michigan Constitution more broadly than its federal counterpart, "what is required of this Court is a searching examination to discover what law 'the people have made.'" *Reichenbach*, 459 Mich at 118-119 (citations omitted); see also *Tanner*, 496 Mich at 223 n16 (noting that while "[t]his Court has on occasion seemed to suggest" a compelling reason is *required* to interpret the "Michigan Constitution differently than the words of the United states constitution . . . . this cannot precisely describe this Court's relationship with the federal judiciary" and rather, the Court's "responsibility in giving meaning to the Michigan Constitution must invariably focus upon its particular language and history, and the specific intentions of its ratifiers, and not those of the federal Constitution."). Thus, "[i]n interpreting [Michigan's] state constitutional right-to-counsel provision, this Court must recognize the law as it existed in Michigan at the time Const. 1963, art. 1, § 20 was adopted[,]" *People v Wright*, 441 Mich 140, 156; 490 NW2d 351 (1992) (Cavanagh, J., concurring) (overruled on other grounds), and inquire whether rights that are more expansive than the federal corollary are "deeply rooted" in the Michigan Constitution, *People v Vaughn*, 491 Mich 642, 651; 821 NW2d 288 (2012); see also *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011).

Here, an examination of the contours of an individual's right to counsel in interrogation at the time of the adoption of article 1, section 20 of the Michigan Constitution reveals a deeply rooted understanding that the right to counsel precluded precisely the type of conduct that occurred here—the elicitation of an uncounseled waiver of the right to counsel by police, after the right to counsel has attached, by mere extraction of a *Miranda* waiver from the represented, but presently uncounseled, party. At the time that the Michigan Constitution was passed, the prevailing understanding of the right to counsel was one that contemplated the assistance of counsel during

post-arraignment interrogation. See, e.g., *Spano v New York*, 360 US 315, 325 (1959) (Douglas, J., concurring) ("Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.") (citing *Powell v Alabama*, 287 US 45 (1932)). Indeed, this Court, in the years preceding the passage of the 1963 Constitution, likewise emphasized that incommunicado interrogation of an accused, without access to counsel, "is inhibited by the right of an accused to have the assistance of counsel[,]" *People v Cavanaugh*, 246 Mich 680, 686; 225 NW 501 (1929), and that any such waiver of the right to counsel "is not lightly to be made[,]" *People v Whitsitt*, 359 Mich 656, 663; 103 NW2d 424 (1960).

Significantly, following the passage of the 1963 Constitution, this Court has, when interpreting article 1, section 20, expressly condemned the elicitation of uncounseled *Miranda* waivers as a manner of waiving this fundamental right, revealing the deep roots of this state's constitutional protections against uncounseled waivers of this constitutional right. In *People v Leonard*, this Court held that merely giving "the *Miranda* explanation and ask[ing] the *Miranda* questions . . . f[a]ll far short of article 1, § 20 constitutional requirements." 421 Mich 207, 227; 364 NW2d 625 (1984) (holding that a defendant can only waive his right to counsel after the right has attached "if he knows what he is doing and his choice is made with his eyes open," meaning there must be record evidence that the accused has been "informed of the importance of having counsel with him in his particular circumstances and the danger he faces without counsel"). The Court thus held that "a waiver [of the right to counsel under Const 1963, art 1, § 20] is tested by a strict standard" and that "[c]ourts will indulge in every reasonable presumption against waiver." *Id.* at 224. Four years after *Leonard*, the Court again "decline[d] to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made

to a magistrate based solely on waivers of *Miranda* rights." *People v Bladel*, 421 Mich 39, 65; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson*, 475 US 625 (1986), and abrogated on other grounds by *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988). This Court explained that, where the accused "requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations, their post-arraignment confessions were improperly obtained [under the Sixth Amendment] and must be suppressed." *Id.* In so ruling, the Court held that the "standard *Miranda* warnings prior to their post-arraignment interrogations . . . [which] . . . were designed to advise an accused only of his Fifth Amendment rights[,]" did not suffice to constitute a valid waiver of the broader Sixth Amendment right. *Id.* (holding that "a *Miranda* waiver is insufficient to ensure a valid waiver of the . . . Sixth Amendment right."). Likewise, in acknowledging the "particular importance of the right to counsel," this Court has reasoned that the right to counsel, which is "so important to the sound maintenance of our system of justice[,] must be protected ***with the broadest prophylactic measures possible***." *People v Gonyea*, 421 Mich at 478-81 (emphasis added) (holding that "any inculpatory statements extracted from a defendant in violation of his Const. 1963, art. 1, § 20 right to counsel are inadmissible for both substantive and impeachment purposes").

Further, this Court's more modern precedent likewise supports a conclusion that the fundamental right to counsel under the Michigan Constitution cannot be forfeited or waived by an uncounseled *Miranda* waiver. See, e.g., *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004) (noting that "it is a long-held principle that courts are to make every reasonable presumption against the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel") (footnotes omitted); accord *People v King*, ___ NW2d ___, 2023 WL

4845609, at *6 (Mich, July 28, 2023)[36] (reasoning that, in the context of a defendant proceeding pro se, "a defendant need not affirmatively invoke their right to counsel in order to preserve that right—the right is preserved absent a personal and informed waiver, and it is not forfeitable. Therefore, without a valid waiver, a defendant *remains entitled* to the right to counsel for every critical stage of criminal proceedings.") (emphasis added).

Accordingly, guided by this Court's precedent—which reflects a deeply rooted understanding that this state's Constitution requires more than an uncounseled *Miranda* waiver to waive the fundamental right to counsel—and to help safeguard against the risk of false confession when police exploit counsel's absence in the interrogation room, the Court should find there is compelling reason to hold that Michigan's constitutional right to counsel prohibits the elicitation of an uncounseled *Miranda* waiver once the right has attached, despite the federal rule to the contrary. Indeed, this Court has recognized that the "unique import of a defendant's constitutional right to counsel [and] [t]he exceptional nature of this constitutional protection counsels for similarly *atypical protection*." *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994) (citations omitted and emphasis added). Although perhaps "atypical," granting Michigan citizens more protection of their right to counsel than that provided under *Montejo* is dictated by this Court's precedent, as explored above, and the interpretation of the Michigan Constitution in a manner that provides more rights to its citizens than under the federal constitution's corollary is not unprecedented. See, e.g., *People v Parks*, 510 Mich 225, 242; 987 NW2d 161 (2022) (holding

[36] Pursuant to MCR 7.215, this unpublished opinion is provided to the Court given its relevance to the matters at issue on appeal and the circumstances presented here.

that "the state Constitution's ban on 'cruel or unusual' punishment offers broader protection than its federal counterpart"); *People v Bullock*, 440 Mich 15, 35, 485 NW2d 866, 874 (1992) (same).[37]

In the alternative, and at minimum, this Court should apply such a rule to children, adolescents, and young adults under the age of 25 who, as noted above, are still maturing cognitively and thus are categorically more vulnerable to interrogation coercion. See Section II, supra; accord *State v Rivas*, 2017-NMSC-022, ¶ 50, 398 P3d 299, 313 (2017) (holding that "the juvenile Sixth Amendment right to counsel is absolute and indelible; once the right has attached, it may not be waived outside the presence of counsel"). As this Court has repeatedly, and recently, recognized—and as demonstrated by the substantial research discussed above—adolescents' and young adults' neurological and psychological development is distinct from that of older adults and necessitates heightened legal protection.[38] Moreover, as both the United States and Michigan

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[37] Amicus notes that this Court has "decline[d] to hold [both] that the *right to a public trial* [under Const 1963, art 1, § 20] is more expansive under the Michigan Constitution than it is under the United States Constitution[,] [and that] . . . [t]he intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of *ineffective assistance of counsel*." *Vaughn*, 491 Mich at 669, n104 (emphases added); see also *People v Walters*, 463 Mich 717, 721; 624 NW2d 922 (2001) (noting that the "Const. 1963, art. 1, § 20, affords no greater rights than the Sixth Amendment with respect to the right to appointed counsel."); *Reichenbach*, 459 Mich at 118 (declining to "construe the Michigan Constitution more broadly than its federal counterpart with respect to the right to appointed counsel for a defendant charged with a misdemeanor offense"); *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994).

This prior precedent, holding that specific aspects of Const 1963, art 1, § 20 are coextensive with the federal constitution, does not foreclose a different conclusion with regard to the right to counsel in the distinct context of a post-arraignment or post-indictment interrogation.

[38] Specifically, this Court has recognized as much, requiring consideration of youth in sentencing determinations because "late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead," and "the prefrontal cortex—the last region of the brain to develop, and the region responsible for risk-weighing and understanding consequences—is not fully developed until age 25." *People v Parks*, 510 Mich at 250-251. See also *Stewart*, 2023 WL 4874412 at *9; *People v Stovall*, 510 Mich 301, 312; 987 NW2d 85 (2022) (quoting *Miller v Alabama*, 567 US 460, 471 (2012) (finding that juveniles "have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness,

Supreme Courts have repeatedly recognized, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper v Simmons*, 543 US 551, 574 (2005); *People v Masalmani*, 505 Mich 1090; 943 NW2d 359 (2020) (McCormack, CJ, dissenting) (reiterating that the United States Supreme Court "was not suggesting that the adolescent development period ends at the age of 18" in drawing the line at the legal age of majority for purposes of the prohibition against mandatory life in prison for young defendants in *Miller*, 567 US at 474); *Stewart*, 2023 WL 4874412 at *9 (noting that, although turning 18 "renders defendant an adult under the law, [the Court] ha[s] elsewhere recognized that 18-year-olds are still undergoing physiological and neurological maturation, meaning that their decision-making abilities are not fully developed") (citing *People v Parks*, 510 Mich 225; 987 NW2d 161 (2002)). Thus, the same logic that compels consideration of youth in sentencing and as a factor in determining the voluntariness of a custodial statement should compel a ruling that requires more than an uncounseled *Miranda* waiver for young people to waive their right to counsel under the Michigan Constitution, particularly given "the peculiar importance of assistance of counsel in an interrogation situation." *Leonard*, 421 Mich at 211. See also *Esper v Commonwealth*, 2018 WL 898215, at *16 (Ky, February 15, 2018) (Venters, J, dissenting) ("[R]esearch has shown that juveniles as a class are not able to understand the nature and significance of their *Miranda* right");[39] *Gallegos v Colorado*, 370 US 49, 54 (1962); *Haley v Ohio*, 332 US 596, 599-600 (1948) (finding that a 15-year-old "needs counsel and support if he is not to become the victim first of fear, then of panic" in an interrogation and further

impulsivity, and risk-taking"). Pursuant to MCR 7.215(C), the cited unpublished decisions in this section are included given their factual relevancy here as it relates to this Court's treatment of young adults in the criminal context. All unpublished decisions are attached.

[39] Pursuant to MCR 7.215(C) this cited unpublished decision provides context to the manner in which courts outside of Michigan review and consider juvenile and youth defendants and their *Miranda* rights.

observing that "[h]e needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him"). Indeed, a number of states have passed legislation that prohibits young people from executing *Miranda* waivers without attorney consultation, *even before* Sixth Amendment rights attach.[40]

Moreover, the risk of wrongful conviction involved when counsel is not made available to an adolescent in an interrogation room is particularly grave, and thus provides further support for finding a compelling reason to interpret the Michigan Constitution in a manner that carefully safeguards young people's right to counsel—a right that has been historically understood as helping to prevent against the wrongful conviction of the innocent. Accord *Gideon v Wainwright*, 372 US 335, 345 (1963) (reasoning that the accused "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence") (quoting *Powell v Alabama*, 287 US 45, 68-69 (1932)); *Coleman v Alabama*, 399 US 1, 9 (1970) (noting that the assistance of an attorney at a preliminary hearing is "essential to protect the indigent accused against an erroneous or improper prosecution").

[40] See Cal Welf & Inst Code § 625.6 (requiring that "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger . . . consult with legal counsel"); Md Code Ann, Cts & Jud Proc § 3-8A-14.2 ("A law enforcement officer may not conduct a custodial interrogation of a child until[] . . . [t]he child has consulted with an attorney"). Such protections are consistent with expert recommendations. See, e.g., Cleary, supra, at 127 (recommending consideration of "mandatory assistance of counsel" to "compensate for youths' deficits in the interrogation room"); Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False confessions and Potential Solutions*, 41 W St L Rev 29, 52-53 (2013) (advocating for a per se ban on *Miranda* waivers for juveniles, without consultation with an attorney). Amicus emphasizes that, in proposing this rule, it is not asking the Court to make a "statutory decision that is only in the purview of the legislature." *Parks*, 510 Mich at 254. Rather, this Court's "consideration of brain science . . . is no different than the analysis the United States Supreme Court undertook a decade ago in *Miller*." *Id.* at 248.

Amicus thus urges the Court to seize the opportunity presented here to extend protections afforded by Michigan law under this fundamental right beyond that of its federal counterpart. There is sufficient and compelling reason, guided by this Court's precedent, to prohibit the elicitation of uncounseled *Miranda* waivers once the right to counsel has attached, thereby preserving the right to counsel in interrogation under Michigan law and safeguarding against deceptive interrogation tactics, like those at issue here. At minimum, such a rule should be applied for children and young adults under the age of 25.

CONCLUSION

For the reasons stated above, the Innocence Project respectfully submits that, in consideration of the science discussed above, this Court issue a decision that compels attorneys to take reasonable measures to assure that their clients are not subjected to uncounseled, highly coercive post-polygraph interrogations that place suspects at risk of false confession, and hold that once the right to counsel pursuant to article 1, section 20 of the Michigan Constitution has attached, any uncounseled *Miranda* waiver is invalid and ineffective.

Respectfully submitted,

By: */s/ Lauren Gottesman (with permission)*
Lauren Gottesman (*pro hac vice pending*)
Tania Brief
Counsel Attorneys for Amicus Curiae
The Innocence Project, Inc.
40 Worth Street, Suite 701
New York, New York 10013
LGottesman@innocenceproject.org
TBrief@innocenceproject.com
(212) 364-5392

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

BY:*/s/ Ashley N. Higginson*
Ashley N. Higginson (P83992)
Sydney G. Rohlicek (P85655)
higginson@millercanfield.com
rohlicek@millercanfield.com
Attorneys for Amicus Curiae
The Innocence Project
120 N. Washington Square, Suite 900
One Michigan Avenue Building
Lansing, Michigan 48933
(517) 487-2070

September 1, 2023

CERTIFICATE OF SERVICE

On September 1, 2023, the foregoing was served via electronic filing on the counsel of record for all parties in this case.

By: */s/ Ashley N. Higginson*
Ashley N. Higginson (P83992)
higginson@millercanfield.com
120 N. Washington Square, Suite 900
One Michigan Avenue Building
Lansing, MI 48933
(517) 487-2070

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

KEVIN LIONEL THOMPSON, JR.,

Defendant-Appellant.

Docket No. 163224

COA: 344834

Genesee CC: 16-039869-FC

Lindsay Ponce (P80904)
Jaqueline J. McCann (P58774)
Assistant Defenders
Counsel for Defendant-Appellant
State Appellate Defendant Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
lponce@sado.org
(313) 256-9833

MILLER, CANFIELD, PADDOCK and STONE, P.L.C.
Ashley N. Higginson (P83992)
Sydney G. Rohlicek (P85655)
Higginson@millercanfield.com
Rochlicek@millercanfield.com
Attorneys for Amicus Curiae
The Innocence Project, Inc.
120 N. Washington Square, Suite 900
One Michigan Avenue Building
Lansing, Michigan 48933
(517) 487-2070

Alena Clark (P73252)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee
Genesee County Prosecutor's Office
900 S. Saginaw St., Suite 102
Flint, Michigan 48502
AClark@geneseecountymi.gov
(810) 259-3496

Lauren Gottesman (*pro hac vice pending*)
Tania Brief
Counsel Attorneys for Amicus Curiae
The Innocence Project, Inc.
40 Worth Street, Suite 701
New York, New York 10013
LGottesman@innocenceproject.org
TBrief@innocenceproject.com
(212) 364-5392

EXHIBITS TO
BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC.
IN SUPPORT OF DEFENDANT-APPELLANT

Exhibit 1 **Unpublished Cases**

Esper v Commonwealth, 2018 WL 898215 (Ky, February 15, 2018)

People v Allen, 2016 WL 3314460 (Mich Ct App, June 14, 2016)

People v Calkins, 2010 WL 2925359 (Mich Ct App, July 27, 2010)

People v Degroot, 2020 WL 1816005 (Mich Ct App, April 9, 2020)

People v Jernagin, 2015 WL 340127 (Mich Ct App, January 27, 2015)

People v King, 2023 WL 4845609 (Mich, July 28, 2023)

People v LeSears, 2013 WL 4866270 (Mich Ct App, September 12, 2013)

People v Stewart, 2023 WL 4874412 (Mich July 31, 2023)

People v Stewart, 2022 WL 11160913 (Mich, 2022)

United States v Coriz, 2018 WL 4222383 (DNM, September 5, 2018)

Exhibit 2 **Other Authorities**

Cleary, Hayley M.D., *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 Psychol Pub Pol'y & Law 118 (2017)

Goldstein, Naomi E.S. et. al., *Evaluation of Miranda Waiver Capacity*, APA Handbook of Psychol and Juvenile Justice 467 (Kirk Heilbrun ed, 2016)

Steinberg, Laurence, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions in Psychological Science 55 (2007)

Stewart, J. M., Woody, W.D. et. Al., *The Prevalence of False Confessions in Experimental Laboratory Simulations: A Meta-Analysis*, 36 Behavioral Sci & L 12 (2018)

Exhibit 1

2018 WL 898215
Only the Westlaw citation is currently available.

NOT TO BE PUBLISHED
Supreme Court of Kentucky.

Christopher ESPER, Appellant
v.
COMMONWEALTH of Kentucky, Appellee

2016–SC–000366–MR
|
FEBRUARY 15, 2018

ON APPEAL FROM KENTON CIRCUIT COURT, HONORABLE GREGORY M. BARTLETT, JUDGE, NO. 14–CR–01022

Attorneys and Law Firms

COUNSEL FOR APPELLANT:, Samuel N. Potter, Assistant Public Advocate, Department of Public Advocacy

COUNSEL FOR APPELLEE:, Andy Beshear, Attorney General of Kentucky, Susan Roncarti Lenz, Assistant Attorney General

MEMORANDUM OPINION OF THE COURT

***1** Christopher Esper appeals as a matter of right from the Kenton Circuit Court's judgment convicting him of first-degree rape, victim under 12 years of age, for the rape of his six-year-old niece, and sentencing him to twenty-five years' imprisonment. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND.

On September 28, 2014, Esper's six-year-old niece ("the victim") presented at the doctor with symptoms of vaginal discharge and burning during urination. Her lab test for gonorrhea came back positive. As a result, Detective Nick Klaiss began investigating the possible sexual assault of the victim. Because the case involved a juvenile, the Cabinet for Health and Family Services ordered that all the men in the victim's household be tested for gonorrhea, which included her step-grandfather and two uncles (one of whom was Esper). Only Esper tested positive for gonorrhea, and for the same strand as the victim.

After learning of the lab results, Det. Klaiss went to the home of Esper's girlfriend on October 9, 2014, and told Esper that he needed him to come to the police station for an interview. At the station, Det. Klaiss read Esper his *Miranda* [1] rights; Esper then signed a waiver form indicating that he understood his rights and was willing to voluntarily talk with the police.

Esper initially denied having sexual contact with the victim. Eventually, Esper confessed that sexual contact with the victim had occurred one time after he had ingested two Xanax pills and while he was giving the victim a bath. Esper detailed the incident—he was standing outside of the bathtub and entered the victim's vagina from behind while she was standing in the bathtub, facing away from him. He said the intercourse lasted about two minutes. At trial, the victim described the incident similarly: she testified that Esper touched her private part "in a bad way" while she was in the bathtub. Esper wavered on when the incident occurred; he originally said last winter (February or March of 2014) then later said more recently, about two months ago (August

or September of 2014). Esper eventually admitted that it occurred after his 18th birthday, which was July 26, 2014.

Near the end of the interrogation, Det. Klaiss asked Esper if he would like to write a letter to the victim. Esper said yes and proceeded to write the following:

> Dear [victim]: This is uncle Chris. Im writing this letter to you to let you know Im very sorry for my horrible actions. You are innocent. Your smart, funny and a blessing brought to this world. I seen you since you were a newborn and you're growing up so fast it seems like yesterday. *I will accept the punishment given to me.* I'm guilty and ashamed of my actions. You didn't deserve any of this. I hope oneday this will all be flushed down the drain and will be a great family all over again, you just keep going to school and having fun. Listen to mommy and grandpa. Danny too, he's your biggest uncle. I Love you and I am truly sorry. I will take help for this horrible behavior. Sincerely: uncle Chris [2]

***2** (emphasis added). At trial, Det. Klaiss read this letter in its entirety to the jury, despite Esper's motion to redact the sentence, "I will accept the punishment given to me."

Leading up to trial, Esper filed a motion to suppress the recorded interrogation, arguing that he was not properly advised of his *Miranda* rights, and that any waiver of his *Miranda* rights was not voluntarily, knowingly, and intelligently made. Following a suppression hearing, the trial court denied Esper's motion, finding that he was properly advised of, and waived, his *Miranda* rights, and that Det. Klaiss's interrogation techniques were not unduly coercive so as to overcome Esper's free will.

On the Thursday before the Tuesday, April 26 scheduled trial date, the court held a pretrial conference to discuss pending motions, and expressed concern over Esper's last-minute motions. One motion was for exculpatory evidence relating to records of the victim's March 30, 2016, meeting with prosecutors, during which she had made allegations of sexual contact against her other uncle and her grandmother as well. Since no investigation into the allegations against the other uncle and grandmother was underway, Esper wished to use the victim's "demonstrably false" allegations to impeach her credibility pursuant to *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010), and to also present an "alternate perpetrator" defense.

In response, the Commonwealth indicated it did not believe the victim's allegations to be false, but nonetheless had no plans to investigate what it described as vague allegations against the other uncle and grandmother. The Commonwealth further pointed out that the victim's other allegations had no bearing on the sexual contact alleged in this case, which was substantiated by the gonorrhea lab results and Esper's confession. Esper stated that he would file a motion to continue the trial date, suggesting that in the interim the victim's allegations could be investigated. The trial court determined that the victim's allegations against the other uncle and grandmother were not demonstrably false and therefore would not be admissible at trial. The court stated it would proceed with the April 26 trial date.

On Monday, the day before trial, the court held another pretrial conference and stated that it had been informed on the Friday before at 2:00 p.m. that Esper wished to plead guilty. However, Esper changed his mind over the weekend, and now sought to file a constitutional challenge to the *Dennis* standard, requesting a one-week continuance to inform the Attorney General and give defense counsel more time to prepare for trial. The trial court denied Esper's motion for a continuance, emphasizing that the child victim and expert witnesses were entitled to resolution of the case, which had been pending since December 2014. The court further noted that it lacked authority to declare the *Dennis* case unconstitutional.

On the morning of trial, Esper again requested a continuance on grounds that counsel had not prepared for trial over the weekend since Esper had indicated the Friday before that he wished to plead guilty. The trial court denied defense's motion to continue, noting that the case had been set for trial since January 2016 and defense had had ample time to prepare. At this point, Esper's lead defense counsel stated that she could not ethically or physically do the trial and that she was resigning "as of now." She then left the courtroom. Esper's second chair defense counsel remained, but also indicated that he had not reviewed all the records, was not prepared to

go forward, and would certainly be "ineffective." The trial court observed that there had been no hint the previous week during the pretrial conference that defense counsel would not be prepared to try the case, and expressed concern over the ethical considerations of lead defense counsel quitting the day of trial.[3] The two prosecutors stated that they had received the case just two weeks earlier, had stayed up until 3:00 a.m. preparing, and were ready to proceed. The Commonwealth emphasized that nothing had changed since the pretrial conference the week before, except for Esper changing his mind about pleading guilty.

***3** The trial court proceeded with voir dire, and Esper's second chair defense counsel actively participated. Esper's lead defense counsel returned to the courtroom before opening statements and participated in the remainder of the trial. During the three-day trial, Esper testified, as well as the Commonwealth's nine witnesses: the victim, two police officers, three doctors, two nurses, and one lab technician. The videotaped interrogation (including Esper's confession), and Esper's apology letter were presented to the jury. Ultimately, the jury convicted Esper of first-degree rape, victim under 12 years of age, but was unable to unanimously agree on a penalty, so the trial court imposed a twenty-five-year sentence. This appeal followed.

ANALYSIS.

I. The Trial Court Did Not Abuse Its Discretion by Denying Esper's Motions to Continue.

Esper was indicted in December 2014. His case was originally scheduled for trial on January 20, 2016; but was continued until April 26, 2016 because one of the Commonwealth's material witnesses was scheduled for surgery and unavailable to testify. On the Thursday before the Tuesday trial date, at the pretrial conference, the defense did not indicate that it was unprepared or had not received all discovery from the Commonwealth. Rather, defense indicated that it wished to introduce at trial the victim's allegations of sexual abuse against her other uncle and her grandmother to impeach the victim on cross examination, and present an alternative perpetrator defense. Esper requested a continuance to investigate the victim's other allegations, which the trial court denied. At the pretrial conference the day before trial, Esper again requested a continuance, which the court again denied.

On the morning of trial, Esper renewed his motion for a continuance, with defense counsel emphasizing their heavy caseloads, physical exhaustion, and their belief that they could not meet their legal and ethical obligations to present an adequate defense for Esper if the case went to trial that day. The trial court denied the motion to continue, citing the fact that this case was 16 months old, the child victim was prepared to testify, and eight expert witnesses had been subpoenaed to testify.

Esper now argues that he was denied his right to a fair trial because the court refused to grant a continuance. With respect to a trial court's broad discretion and factors to be considered in granting a continuance, this Court has stated:

> Under RCr[4] 9.04, the trial court may, "upon motion and sufficient cause shown by either party, ... grant a postponement of the hearing or trial." The trial court's discretion under this rule is very broad, and the denial of a motion for a postponement or continuance does not provide grounds for reversing a conviction " 'unless that discretion has been plainly abused and manifest injustice has resulted.' " *Hudson v. Commonwealth,* 202 S.W.3d 17, 22 (Ky. 2006) (quoting *Taylor v. Commonwealth,* 545 S.W.2d 76, 77 (Ky. 1976)). Whether a continuance is warranted in a particular case depends on the totality of the circumstances, *Snodgrass v. Commonwealth,* 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by* *Lawson v. Commonwealth,* 53 S.W.3d 534 (Ky. 2001), but often important are the following factors to be considered by the trial court:
>
> > length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.
>
> *Snodgrass,* 814 S.W.2d at 581. Identifiable prejudice is especially important. Conclusory or speculative contentions that additional time might prove helpful are insufficient. The movant, rather, must be able to state with particularity how his or her case will suffer if the motion to postpone is denied. *Hudson,* 202 S.W.3d at 23 (collecting cases).

***4** *Bartley v. Commonwealth,* 400 S.W.3d 714, 733 (Ky. 2013).

Esper asserts that a continuance was warranted due to defense counsels' lack of preparation and the exculpatory evidence revealed during the victim's March 30 meeting with prosecutors, wherein she alleged sexual contact with her other uncle and her grandmother. Esper maintains that the victim's allegations merited further investigation, and could be used to challenge the victim's credibility during trial, as well as possibly identify alternate perpetrators of the sexual contact.

Esper's assertions must be balanced against the following considerations: his case had been pending for 16 months, the trial court had already continued it once, and defense counsel had had ample time to prepare. Considering the parties had not entered into a formal plea agreement, defense counsel should have anticipated and been prepared for the possibility of the case going to trial as scheduled. Further, the Commonwealth had subpoenaed eight expert witnesses to testify, all of whom were professionals with busy schedules. And the case involved a child victim who, according to the guardian ad litem, had been suffering trauma in anticipation of the trial. Despite claims of exhaustion and unpreparedness on the part of Esper's counsel, the record shows that defense counsel actively participated throughout the trial. Lastly, the victim's allegations against her other uncle and her grandmother were irrelevant to the case against Esper; his attempt to present an alternative perpetrator defense does not eviscerate the undisputed fact that he had tested positive for the same strand of gonorrhea as the victim, and was the only adult in the household who did.

Accordingly, we believe the *Bartley* factors weigh heavily in favor of denying Esper's motion to continue. Moreover, Esper has shown no identifiable prejudice resulting from the denial of his request for a continuance. "In these circumstances, where no identifiable prejudice has been shown, the trial court cannot be said to have abused its discretion by deciding against the obvious inconvenience of postponing a trial on the verge of its commencement." *Id.* at 734. Esper's "on-the-verge-of-trial request was untimely, and its untimeliness was not the result of late disclosure by the Commonwealth[.]" *Parker v. Commonwealth,* 482 S.W.3d 394, 404 (Ky. 2016). His request for a continuance was "not necessitated by the late disclosure of evidence with 'articulable' exculpatory potential, and thus the denial of that request was not prejudicial." *Id.* "Conclusory or speculative contentions that additional time might prove helpful are insufficient." *Morgan v. Commonwealth,* 421 S.W.3d 388, 393 (Ky. 2014) (internal quotations omitted). Under these circumstances, therefore, the trial court did not abuse its discretion by denying Esper's motions to continue.

II. Esper's Confession Was Properly Admitted.

Esper moved to suppress the recorded interrogation on grounds that Det. Klaiss coerced his confession by using manipulative interrogation techniques, thereby rendering it involuntarily and inadmissible. Specifically, Esper argues that Det. Klaiss made false statements designed to induce a confession from him; minimized the moral seriousness of, and penalty for, the crime; and used his training and experience to exert pressure on Esper to change his story and the date of the incident to after Esper's 18th birthday, so he could charge Esper with a Class A felony.

***5** As an initial matter, we note that during the two-hour interview, which was recorded in full, the door to the interrogation room remained unlocked, and Esper was offered food, drink, cigarettes, and bathroom breaks. Esper never asked to leave the room and never asked for an attorney. At the beginning of the interrogation, Det. Klaiss did falsely tell Esper that he had not yet received the lab results from Esper's gonorrhea test, and that he would have to call the doctors later to obtain them. At trial, Det. Klaiss explained that he had the test results the entire time, but employed this strategy to leave Esper alone in the room for short periods of time while he checked on the test results, so Esper would have time to think about things. Det. Klaiss testified that he used this technique,[5] among others, such as establishing a rapport and minimization of the crime, when interrogating a suspect since in his experience a suspect never confesses right away; instead, a suspect typically denies the allegation at first, provides a little information, and then provides more information after additional questioning. Det. Klaiss explained that his approach was to get Esper to provide details of the incident, and not put words in Esper's mouth.

After Det. Klaiss presented Esper the test results showing he tested positive for gonorrhea, and explaining that the disease is transmitted through sexual contact, the conversation went as follows:

> Esper: I'm going to jail for this, right?
>
> Det. Klaiss: I would say, I would imagine so. I'm not going to lie to you. But from here on out, what's important is

that people are going to want to hear your side of the story. That's the whole point of this, is that we have all the evidence in the world against you. And that you're going to sound like the uncle creeper.

Esper: That's fucked up man.

Det. Klaiss: And it is.

Esper: It's really like, between my family.

Det. Klaiss: I agree that it's fucked up. But I don't think it has to be fucked up. Because, uh, I've been doing this for years, I've heard about every explanation in the book. And people that are sitting in your seat are scared, they're nervous, and they don't think people are going to believe them.

Esper: Yeah.

Det. Klaiss: But believe me, that everyone that I've heard, and when I tell people, they're like yeah I've made a mistake in my life, I could see how that could happen. It puts a personal touch to the story. Makes people believe in second chances. Because if they don't have the story, they just have all the evidence, they think, why should we give this dude a second chance.

Esper: Right.

Det. Klaiss: But when they have the story, and they have the second....they have what happened, the background is what I call it, then they'll want to give that guy a second chance. Because they want to believe people have just made a mistake. Especially somebody like you, I already ran you through all the courts, you have no criminal record. But in order to get that second chance, and get people believing in that, we need to know what happened. I have all the evidence to show that it did happen and you're giving all the signs that it did happen, Chris, I'm just being honest with you. I believe that it was something that only happened once, I don't think we're talking about years of abuse or anything like that because quite frankly, if I did think that then we wouldn't be sitting here. I'd just pick you up and take you into jail. But that's not what we do when we think it's something that only happened one time. If it happened once, we can talk it through. Make sure it doesn't happen again. That's all that matters.

Esper: It happened one time, man. It happened one time, man.

Det. Klaiss: Alright. Tell me what happened.

Esper: I wasn't feeling good. Came back from a friend's. He gave me Xanax. Popped two pills. Two Xanax pills. And I came home, and [the victim] and I, we was just chilling, talking, hanging out, watching tv. And she wanted to take a bath. So we took a bath, I gave her a bath. My mom wasn't there, she works third shift, and I was there late night. I was her guardian, but I wasn't 18, I was 17. I didn't get in the bath with her. She got in the bath, and uh, she started taking a little bath and uh, that's it man.

***6** Det. Klaiss: And then what happened?

Esper: I didn't...I didn't. This is bullshit, man. This is a mistake.

Det. Klaiss: It is a mistake.

Esper: I didn't get in there and start having sex with my niece, man.

Det. Klaiss: Ok. What happened?

Esper: The rag, man, I was playing with the rag. I was washing [inaudible] the rag. But before like I just broke up with my girlfriend. Straight up. I'd go in the bathroom and I didn't really like have a lot of girls to have sex with so I'd go to the bathroom and I'd ejaculate you know what I'm saying. I'd wipe it off with a rag and I'd use that same rag.

Det. Klaiss: Ok, we're getting closer. I'm not going to lie, when semen hits oxygen it starts dying. So I know it's not from ejaculating and then doing it later. I know it sucks, I know it's hard to talk about.

Esper: Yeah.

Det. Klaiss: But I do believe you're talking about the right thing with the bathtub, but you're not telling the whole story. And that's ok, it tough as shit, Chris, it's hard to talk about. It's hard to talk about stupid shit you do that's wrong, much less something like this. But I know what really happened in the bathtub.

Esper: I got in the bathtub and uh was kind of high off pills.

Det. Klaiss: How many Xanax do you think you took?

Esper: I took two, two and a half.

Det. Klaiss: How often do you usually take them?

Esper: I don't take them a whole lot.

Det. Klaiss: I mean, so you were pretty fucked up then?

Esper: Yeah I was pretty fucked up. There was something that, off that high, it's like a high that...you can't even remember twenty minutes ago, you can't remember ten minutes ago. Depends on how you treat your high. You know what I'm saying. I can't remember what happened, man. But I do remember what happened, man.

Det. Klaiss: Right, tell me what happened.

Esper: [says victim's name]...ugh, talking this out. I put it inside her.

Det. Klaiss: Inside her vagina?

Esper: Yeah, I put it in her vagina.

Det. Klaiss: How long do you think it happened?

Esper: Maybe a minute or so, man.

Det. Klaiss: Did you ejaculate?

Esper: Nah, nah.

Det. Klaiss: Ok.

Esper: [inaudible]...wintertime.

Det. Klaiss: Last winter?

Esper: Yes.

Det. Klaiss: So, like almost a year ago?

Esper: Yeah, a year ago.

Det. Klaiss: Ok.

Esper: But ever since that day, man, it was a big regret.

Det. Klaiss: Mmm hmm, I can tell. I wasn't bullshitting you. I talk to people all day long, I can tell the people who don't care.

Esper: Yeah.

Det. Klaiss: This was rough. I have more to talk to you about, let me get you a cigarette. You want a cigarette?

Esper: Cool.

Det. Klaiss: Alright. You need something else to drink?

Esper: Nah, this is fine. I got the water.

Det. Klaiss: You want another water?

Esper: Nah, I'm good.

[Det. Klaiss leaves room. Transcript picks up at next relevant exchange.]

Esper: I don't want to ruin my relationship between my family, man, that's all that matters to me, like, my family, man.

Det. Klaiss: I'm going to tell them it was a one-time mistake, [inaudible] But I'm going to be honest with you, I interview with people all day long. That day when it happened, are you sexually attracted to kids?

***7** Esper: Nah, hell nah.

Det. Klaiss: Ok.

Esper: The thing is, it was the high, man.

Det. Klaiss: Yeah.

Esper: I took a lot of pain pills...the Xanax. It causes horniness and uh but that's what I'm saying. I felt so disgusted after that. Man, to this day, every time I think about that shit, I'm like what the fuck, is there a demon in me, man.

Det. Klaiss: Right.

Esper: It was not a continuous process, I mean, I don't wake up every day looking forward to something like that. It was just a mistake, man, I feel like we all make mistakes.

Det. Klaiss: Yeah, if we all didn't make mistakes we wouldn't be human.

Esper: Right, but I want to get help for this. I want to talk to somebody about this. [inaudible] I feel like I'm a creeper, man.

Det. Klaiss: Was that the only time that it happened?

Esper: Yeah, one time. Once upon a time...the story that is.

Det. Klaiss: Was she completely naked?

Esper: Yes, yes.

Det. Klaiss: Were you completely naked?

Esper: Nah, nah.

Det. Klaiss: And how were your clothes?

Esper: Shirt on, pants pulled down to my knees, that's it.

Det. Klaiss: Ok. Were you in the bathtub?

Esper: Nah, nah.

Det. Klaiss: Where was she at?

Esper: She was standing up in the bathtub.

Det. Klaiss: Ok.

Esper: I remember parts of it, man.

Det. Klaiss: So, if she's standing up in the bathtub, where are you?

Esper: I'm standing right outside the bathtub and she like, I'm still the same length [sic "height"] as her.

Det. Klaiss: So, was she looking away from you?

Esper: Yeah.

Det. Klaiss: Ok. And you entered her from behind?

Esper: Yeah.

Det. Klaiss: Alright. How long do you think it really lasted?

Esper: About two minutes.

Det. Klaiss: Ok. And uh [inaudible] ejaculation doesn't have to occur, but it usually does. If you ejaculated inside of her, that's fine.

Esper: I didn't.

Det. Klaiss: It doesn't change anything, you understand that right?

Esper: Yeah, I understand. But, it didn't happen.

Det. Klaiss: So you think you were inside [the victim] for about two minutes? What made you stop?

Esper: Stop, man.

Det. Klaiss: What made you stop?

Esper: It's not me, man, not me. It was the drugs, man, it was the drugs. And anger, man. [inaudible] I didn't grow up having anything. So, it was like a little bit of anger, man. But she doesn't deserve that, man.

Det. Klaiss: Who were you mad at?

Esper: Childhood man.

Det. Klaiss: Just growing up?

Esper: Just growing up. People, things I didn't have. As I got older though that shit flew out the window.

Det. Klaiss: What made you think it was last winter?

Esper: It was last winter 'cause it was wintertime, it was cold. Wintertime is when it happened...this past year. [inaudible] I'm going to be doing serious fucking time for this, man.

Det. Klaiss: You don't have any criminal history so don't worry about all that stuff. Just worry about right now.

Esper: That's what I'm saying. I don't want to mess my life up, man. I'm trying to go to college and everything, man, and this shit just sets me back. What's gonna like happen today?

Det. Klaiss: Well um, I gotta go make another phone call. Do you want to write [the victim] a letter?

***8** Esper: Mmm hmm. I will do that.

Det. Klaiss: You don't have to do it. But if you'd like to, I can give it to her.

Esper: This is going to be the last thing before I go to jail?

Det. Klaiss: For right now, you're going to jail, yeah. [inaudible] I'll be right back, ok?

Esper: Ok. [inaudible cross talk]

Det. Klaiss: When's the last time you did any drugs?

Esper: Marijuana uh yesterday. Yesterday, yeah.

Det. Klaiss: About what time?

Esper: Let's see, 9 or 10 o'clock at night.

Det. Klaiss: Ok just wondering, thanks. [leaves room while Esper writes letter, re-enters later].

Det. Klaiss: So I made some phone calls. The one thing they're having trouble with is there's a period of time from last winter to her diagnosis so leads them to believe it happened more recently since then.

Esper: I'll say recently then.

Det. Klaiss: Don't just say recently.

Esper: Yeah, but I don't have like an exact time, man. It happened one time, man.

Det. Klaiss: When was it?

Esper: I don't know.

Det. Klaiss: If it was last week, it was last week.

Esper: Maybe about two months before.

Det. Klaiss: Two months ago?

Esper: Two months ago, yeah.

Det. Klaiss: Ok. Was it summertime?

Esper: School time.

Det. Klaiss: And so it happened about two months ago?

Esper: Yeah.

Det. Klaiss: So why'd you say last winter?

Esper: I don't know, man,

Det. Klaiss: You just scared?

Esper: Yeah, a little bit. I don't know what's gonna happen to me...[inaudible]

Det. Klaiss: Well you know people make mistakes.

Esper: That's what I'm saying...[inaudible]

Det. Klaiss: That ain't gonna happen. You have too much to shoot for. You have too much to look for. You're a good kid you just made a simple mistake.

Esper: That's what I'm saying.

Det. Klaiss: So this would have happened after you turned 18 then?

Esper: What?

Det. Klaiss: This. Two months ago.

Esper: Yeah, yeah....yeah, yeah, 18.

Det. Klaiss: Do you remember about how long after you turned 18 that it happened?

Esper: Nah, not exact man. It's kind of like a blur, man..

Det. Klaiss: But you remember it was after your birthday?

Esper: Yeah.

Det. Klaiss: Ok. And it doesn't make any difference to me, Chris. I'm just asking you because this is your chance to get out in front of everything. So it only happened once?

Esper: Yeah, one time. That's what I'm saying. It's not a repeated action, ya know what I mean? I learned from the first time I did, man. I was like, damn. I shouldn't never have did that shit. That fucking drug. [inaudible]

Det. Klaiss: Alright, I'll be right back, ok?

Esper: Alright. [Det. Klaiss leaves room].

When examining a trial court's ruling on a motion to suppress, "[w]e review the trial court's findings of fact for clear error, but legal determinations we examine de novo." *Gray v. Commonwealth,* 480 S.W.3d 253, 259 (Ky. 2016) (footnote omitted). With respect to false statement made by Det. Klaiss during the interrogation (that he had not yet received the test results when in fact he had), the trial court noted that the use of false statements during an interrogation was not prohibited so long as the statements could not be considered to have overwhelmed the defendant's will. *Id.* at 260.

***9** In *Gray,* this Court explained,

> The Due Process Clause of the Fourteenth Amendment precludes the use of involuntary confessions against a criminal defendant at trial. The United States Supreme Court defines an *involuntary confession* as one that is "not the product of a rational intellect and a free will." And "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."

Id. at 259–60 (internal footnotes omitted).

The voluntariness of a confession is evaluated using a three-part test: "(1) whether police activity was objectively coercive; (2) whether the coercion overwhelmed the will of the defendant; and (3) whether the defendant has shown that the coercive activity was the 'crucial motivating factor' behind his confession." *Id.* at 260 (internal footnote omitted). Factors to consider include "the defendant's age, intelligence, education, criminal experience, and criminal and mental condition at the time of the interrogation" as well as the "methods employed in the interrogation itself, including whether there was any physical or mental coercion, threats, promises, delay, and the extent of trickery and deception used in questioning." *Id.* Police trickery alone does not automatically result in suppression of a confession. Indeed, "the mere employment of a ruse, or strategic deception, does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion." *Id.* (internal quotation omitted). In *Gray,* this Court found that the defendant's will was overcome during a seven-and-a-half-hour interrogation (most of which was not recorded), in which a large amount of false evidence was presented to the defendant, including a fake DNA report. 480 S.W.3d at 263–64.

In *Leger v. Commonwealth,* 400 S.W.3d 745 (Ky. 2013), this Court held that the police officer's response to a question posed by the defendant during his custodial interrogation vitiated the previously-given *Miranda* warning by assuring the defendant that his statement would not be used against him, but would instead remain between the two of them. In *Leger,* the defendant pointedly asked the officer whether what he was about to tell him would remain confidential/just between the two of them, and not used in a court of law. *Id.* at 749–50. Based on the officer's assurance that it would remain confidential, Leger was induced to incriminate himself. *Id.* This Court held that the officer's assurance of confidentiality directly contradicted the *Miranda* requirement that a suspect be warned that anything he says could and would be used against him in a court of law and, as a result, Leger's confession should have been suppressed. *Id.* at 751. In so ruling, this Court recognized that "our law allows, and should allow, police officers to use deception and artifice to mislead a suspect or lull him into a false sense of security that, *despite his understanding of the Miranda warning,* might prompt him to speak against his own interest." *Id.* at 750 (internal quotations and citation omitted). However, Leger did not ignore a warning that his words could be used against him in a court of law—he directly asked if his words would remain confidential and was expressly told that what he said would not be used against him. "Artful deception is an invaluable and legitimate tool in the police officer's bag of clever investigative devices, but deception about the rights protected by *Miranda* and the legal effects of giving up those rights is not one of those tools." *Id.*

***10** More recently, in *Bond v. Commonwealth,* 453 S.W.3d 729 (Ky. 2015), this Court further defined the bounds of acceptable investigative tactics. After giving the suspect a *Miranda* warning, the police officer told Bond that he had a digital audio recorder for his use because "he forgets a lot" and that the digital recorder was "just for him to remember." *Id.* at 733. He then asked Bond if it was okay to record the interview, and Bond said it was. *Id.* Bond later moved to suppress the statements he made during the interview, arguing that the officer's behavior was the same type of behavior this Court condemned in *Leger. Id.* at 733–34. This Court disagreed, noting that the officer simply said the recorder was for his use; he did not assure Bond that his statements would be kept confidential. *Id.* at 734.

Here, Det. Klaiss read Esper his *Miranda* warnings, which Esper chose to waive by signing the *Miranda* waiver form. Esper was 18 years old at the time; nothing in the record suggests that he was under the influence or incoherent, or otherwise not able to intelligently and voluntarily decide to speak with police. He never asked for an attorney or to leave the interrogation room at any point.

Esper complains that Det. Klaiss unfairly minimized the crime and downplayed the potential penalty, thereby coercing him to confess. Det. Klaiss testified at the suppression hearing that he knew rather than a "second chance," 18–year–old Esper's future was a prison sentence of at least 20 years with an 85% parole eligibility date if convicted. However, upon review of the interrogation, we do not believe Det. Klaiss's technique exceeded the bounds of acceptable investigative tactics. Esper was 18 years old at the time of the interrogation; he should have known that having intercourse with his six-year-old niece would result in serious jail time. In fact, when he asked Det. Klaiss if he was going to jail for this, Det. Klaiss responded, "For right now, you're going to jail, yeah." Esper further acknowledged as much during the interrogation, saying, "I'm going to do some serious fucking time for this, man."

Furthermore, with respect to the date of the sexual contact, in addition to Esper's admission that it occurred after his 18th birthday, evidence was presented at trial from the victim's treating physician, Dr. Kristin Belanger, who testified that the victim presented on September 28, 2014 with symptoms of vaginal discharge and burning during urination, which are common symptoms of gonorrhea. Dr. Belanger stated that "with gonorrhea, symptoms typically would appear within 1–2 weeks after sexual contact." That would put the sexual contact occurring during the month of September 2014, clearly after Esper's July birthday. "It has long been the law that the Commonwealth can prove all the elements of a crime by circumstantial evidence. *Commonwealth v. Goss,* 428 S.W.3d 619, 625 (Ky. 2014). Thus, the jury had sufficient proof to believe that the sexual contact between Esper and the victim took place after Esper's 18th birthday, even without Esper's confession.

III. The Trial Court Did Not Abuse Its Discretion by Admitting Esper's Apology Letter in Its Entirety.

Esper asserts that the trial court abused its discretion by not redacting his apology letter to omit the sentence "I will accept the punishment given to me." Esper does not dispute that the letter was properly admitted under the admissions of a party opponent exception codified in KRE[6] 801A(b)(1). Rather, he argues that "I will accept the punishment given to me" was irrelevant under KRE 402 or, if relevant, its prejudicial effect substantially outweighed its probative value, thereby rendering it inadmissible under KRE 403. In response, the Commonwealth asserts that the statement reflects Esper's state of mind, was relevant, and not unduly prejudicial under KRE 403. The trial court found that the statement went to establishing that Esper was in fact admitting guilt and, given the context, was not unduly prejudicial. Accordingly, the trial court permitted Det. Klaiss to read the letter in its entirety to the jury.

***11** "Evidence which is not relevant is not admissible." KRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. The record reflects that Esper voluntarily wrote the letter, which included his willingness to accept the consequences of his actions, making it more probable that he was in fact guilty of the crime. Esper cites to no case law that would preclude admission of this portion of an otherwise admissible statement reflecting a defendant's culpability for the crime for which he is being tried. The statement is clearly relevant.

Moreover, the probative value of the statement is not outweighed by the danger of undue prejudice. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice[.]" KRE 403. The decision to exclude evidence pursuant to KRE 403 is within the sound discretion of the circuit court. *Webb v. Commonwealth,* 387 S.W.3d 319, 324 (Ky. 2012). This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles," *Id.*

Esper has failed to persuade us that the probative value of his statement is substantially outweighed by the danger of undue prejudice. "KRE 403, which is derived from its Federal counterpart, does not offer protection against evidence that is merely prejudicial in the sense that it is detrimental to a party's case." *Webb,* 387 S.W.3d at 326. Obviously, Esper's statement was detrimental to his case. However, his statement was benign when compared to the content of the letter, including his admission to raping his innocent six-year-old niece, and certainly was not unduly prejudicial. If anything, his statement could have served as mitigating evidence, allowing the jury to infer that he was remorseful and willing to accept responsibility for his actions.

Thus, the trial court did not abuse its discretion by finding that Esper's statement was relevant to establishing guilt, and was not unduly prejudicial. The court's decision to admit the letter in its entirety was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d at 945. Accordingly, this claim of error is without merit.

IV. The Trial Court Did Not Abuse Its Discretion or Err by Denying Esper's Motion to Strike Two Jurors for Cause.

Esper contends the trial court abused its discretion and erred by failing to excuse two jurors for cause. The decision whether to strike a juror for cause "rests upon the sound discretion of the trial court and on appellate review, we will not reverse the trial court's determination unless the action of the trial court is an abuse of discretion or is clearly erroneous."

Sturgeon v. Commonwealth, 521 S.W.3d 189, 192 (Ky. 2017) (internal quotations omitted).

During voir dire, the trial court asked if any of the prospective jurors, their family members, or a close friend, had been the victim of a crime. Juror 9 approached the bench and stated that her aunt had been robbed and murdered in Covington approximately 20 years earlier. Juror 9 acknowledged that Esper's case was a different case involving different charges, and when asked whether her aunt's murder would impact her ability to decide Esper's case, the juror responded that this was a rape case and she would be okay. She stated that she had not been involved in her aunt's trial, and the perpetrator had been found guilty and was still in prison. She also stated that she did not think anything about her aunt's case would cause her to favor the prosecution or not view Esper impartially. Esper moved to strike Juror 9 for cause "just based on her experience." The trial court denied his motion.

***12** Juror 10 approached the bench and stated that her aunt had been brutally murdered in 2007 in Minnesota. The trial court asked if that would have any bearing on her ability to serve as a juror in this case, and she stated she did not know if it would affect her decision. The trial court pointed out that her aunt's murder and Esper's case were different crimes involving different people; in response, this juror said she thought it would be fine and nodded her head affirmatively. Juror 10 stated that she had not been involved in her aunt's trial and the perpetrator had been prosecuted. When defense counsel asked if anything about her aunt's process would cause her to give more credibility to the prosecution's witnesses, she stated she did not know; she was glad to see her aunt's perpetrator convicted. She stated, "I don't know if it would affect." She was not questioned further.

Esper moved to strike, arguing that Juror 10 had equivocated about her ability to remain impartial. The Commonwealth pointed out that this potential juror had realized Esper's case was a separate proceeding. The trial court noted that the juror's aunt's case had taken place years ago in Minnesota, and that this was not a situation in which a potential juror had been unhappy with the system and felt the need for retribution; the fact that a family member had been a crime victim simply was not enough to strike when the juror also stated that she could perform her job as a juror. Accordingly, the trial court declined to excuse Juror 10 for cause. Both Juror 9 and 10 ended up sitting on the jury panel. Esper now argues that the trial court's decision not to strike these two jurors was an abuse of its discretion and erroneous.

In *Sturgeon,* this Court reexamined and clarified the standard for judging for-cause challenges of prospective jurors, conceding that "we have allowed the standard for judging for-cause challenges of prospective jurors to drift too far from its anchor: RCr 9.36(1)." *Id.* at 193.

> RCr 9.36(1) plainly and succinctly establishes the standard by which trial courts are to decide whether a juror must be excused for cause. The rule says: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified."

Id. Over time, "the test" that evolved for determining whether a prospective juror should be excused for cause became " 'whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.' " *Id.* (quoting *Mabe v. Commonwealth,* 884 S.W.2d 668, 671 (Ky. 1994)). In *Sturgeon,* we explained that "[t]aken in context, the expression in *Mabe* was accurate, but its appropriation in other cases to stand as 'the true test' for addressing for-cause challenges to prospective jurors is misleading. RCr 9.36(1) is the only standard to be applied[.]" 521 S.W.3d at 194–95.

Here, the question is whether reasonable grounds exist to believe Jurors 9 and 10 could not have rendered a fair and impartial verdict on the evidence, and therefore should have been excused for cause. The fact that a family member of a juror was a victim of a *similar* crime is insufficient, in and of itself, to warrant removal for cause. *Bowling,* 942 S.W.2d at 299. If being the victim of a *similar* crime is insufficient to mandate excusal, certainly having a family member who was the victim of a *different* crime would likewise be insufficient alone to mandate recusal. When questioned, Juror 9 made clear that nothing about her aunt's circumstance would cause her to be partial in Esper's case. Thus, the trial court properly declined to strike her.

Juror 10 initially stated that she did not know whether her aunt's murder would affect her in this case, but after the trial court noted the distinctions between her aunt's case and Esper's, the juror said she thought it would be fine and nodded her head affirmatively. Defense counsel followed up, asking if it would cause her to give more credibility to the Commonwealth's witnesses. She stated, "I don't know if it would affect." No further follow-up questions were asked.

***13** In *Paulley v. Commonwealth,* 323 S.W.3d 715 (Ky. 2010), this Court held that the trial court committed reversible error by refusing to strike for cause a prospective juror who had been a victim of a *similar* crime and who was unsure she could listen to all the evidence and not allow her previous experience to cloud her ability to consider the defendant's case. In the case at bar, neither juror was involved in the prosecution of their aunts' murder cases, and in both cases, the convicted murderers were sent to prison. No apparent desire for retribution was present in either juror, seeking to redress a prior miscarriage of justice. Furthermore, after the trial court emphasized the distinction between the crimes committed in their aunts' cases, and the crime Esper was accused of committing, both jurors concluded that they would in fact be "okay" and "fine." Based on our review of the record, we do not believe a reasonable doubt existed as to the jurors' ability to remain impartial and fair, that would require excusing them for cause. As a result, the trial court did not abuse its discretion or act erroneously by declining to strike these jurors.

CONCLUSION.

For the foregoing reasons, the judgment and sentence of the Kenton Circuit Court is affirmed.

All sitting. Minton, C.J.; Hughes, VanMeter and Wright, JJ., concur. Keller, J., concurs in result only. Cunningham, J., dissents by separate opinion in which Venters, J., joins. Venters, J., dissents by separate opinion in which Cunningham, J., joins.

CUNNINGHAM, J., DISSENTING:
Respectfully, I dissent.

I fully concur with the excellent scholarship and analysis by Justice Venters in his dissent. I only write to offer a more charitable hand to the interrogating police officer in this case.

We should fully applaud and endorse the manner in which the police officer conducted his interrogation in this case. Aesop was one of the first to recognize and report that we get more out of people by being kind than being mean. The officer in this case was highly professional and considerate. For this I highly commend him.

There is no question, in my mind, that there is nothing inappropriate for law enforcement to obtain confessions by appearing to be a defendant's friend and even confidant, and luring the accused into a false sense of security and well-being. Even misleading and deceitful statements in drawing out incriminating confessions are an acceptable part of the interrogation process.

However, when it comes to the constitutional rights of the suspect, they must not be unclear, or diminished in their importance. Neither should they be contradicted by subsequent comments from the person reading the rights and doing the questioning. *Miranda* has been around for over 50 years now and these rights are given in most cases by rote. I'm afraid that it has become common practice to hurry through them in such a perfunctory manner that they lose their meaning. Or, as in this case, are spoken and then subsequently countermanded.

It is true that coming clean and confessing will help the defendant to a degree. An investigative officer who has dealt with a cooperative and confessing suspect is highly likely to put in a good word to the prosecutor, which might lighten the penalty to be recommended by the State.

However, this ameliorating assistance to a defendant pales in comparison to the damning consequences of admitting to committing a crime. In this case, the advantages of making incriminating statements were overplayed by the interrogator. I therefore fall in line with the thrust of the dissent by Justice Venters.

Venters, J., joins.

VENTERS, J., DISSENTING:
I respectfully dissent. Imagine if cigarette manufacturers were allowed to follow the mandatory cancer warning on the cigarette pack with a retraction promising the smoker many healthful advantages if he will just keep on smoking. That is exactly what the Majority does to the *Miranda* warnings. [7]

It is indeed ironic that this Court, which lacks the power to overrule *Miranda,* now hands the power to do so to every police agency in this state. The Majority says, in effect, to police: "Even when you give the *Miranda* warnings to a suspect in custody, you may immediately retract them with false promises that the warnings are not true; and, that instead

of being used against him in a court of law, anything he says will really be used to help him. By the Majority's rationale, the police may also vitiate the other great element of the *Miranda* warnings by telling a properly *Mirandized* suspect: "you are not really going to get a lawyer appointed to represent you so you might as well talk to us now."

***14** In exactly that way, this Court now sanctifies a begrudging and barely-perceptible recitation of the *Miranda* warnings and turns a blind eye toward the ardent and convincing retraction of that warning with false assurances to an 18–year–old suspect that the courts will give a "second chance," a lighter sentence, including, perhaps, "family counseling," if he will confess to the crime.

We should not wince at calling that constitutional error; but we do.

I. THE POLICE VITIATED THE *MIRANDA* WARNING BY ASSURING ESPER THAT A CONFESSION WOULD BE USED TO HELP HIM GET A LENIENT SENTENCE

We show complete disrespect for the constitutional mandate of *Miranda,* which requires the police to warn a suspect that "anything you say can and will be used *against* you in a court of law," when we allow the police to immediately rescind the warning with a deceitfully polite promise that his confession will be used to get him a "second chance." We would unanimously condemn a police officer's false promise to pay a young suspect $1,000.00 for his confession. Why then are we so reticent when, instead of using cash, the police purchase the same confession with the false promise of a "second chance" and some "family counseling?"

We addressed this issue in *Leger v. Commonwealth,* 400 S.W.3d 745, 750 (Ky. 2013). Citing several cases from around the country, we said: "Requiring police to give the proper *Miranda* warning and then allowing it to be countermanded with a false assurance that the suspect's statements *will not* be used against him, requires suppression of any statements the suspect makes thereafter during the interrogation." 400 S.W.3d at 751 (citation and quotation marks omitted). Quoting *Lee v. State,* 12 A.3d 1238, 1247–1248 (Md. 2011), we said:

> Since *Miranda* was decided, courts have applied the principles of that case and its progeny to hold that, after proper warnings and a knowing, intelligent, and voluntary waiver, the interrogator may not say or do something during the ensuing interrogation that *subverts those warnings and thereby vitiates the suspect's earlier waiver* ....

400 S.W.3d at 749.

Leger emphasized that "artful deception" was a valuable and legitimate law enforcement tool, but *Leger* also drew the very bright line that "deception about the rights protected by *Miranda* and the legal effects of giving up those rights is not one of those tools.... As the warnings are constitutionally required, interrogation techniques designed to mislead suspects about those warnings are impermissible." *Id.* at 750–751 (citation and internal quotation marks omitted). [8]

Leger marked the boundary line for permissible police interrogation tactics at the point of countermanding any of the *Miranda* warnings. When that line is crossed, it is as though the *Miranda* warning was never given. Officer Klaiss crossed the line by assuring Esper that, because he was young and had no criminal record, he would get a second chance and people would want to help him if he would abandon his claim of innocence and confess. Despite his certain knowledge that Esper's confession could not lead to a "second chance" or "family counseling," and that whatever Esper said would be used against him, Klaiss told Esper exactly the opposite: confess and "they'll want to give a guy [who confesses] a second chance." It matters not whether Esper even heard Klaiss' mumbled *Miranda* warning because Klaiss quickly retracted it with this contrary warning: "*In order to get that second chance, and get people believing in that, we need to know what happened.*" Everything Esper said after that, including his apology letter, was involuntary and inadmissible. *Leger,* 400 S.W.3d at 751.

***15** The Majority offers a meaningless factual difference to distinguish this case from *Leger.* What matters is that in both cases the police countermanded *Miranda* by promising the suspect that his confession would not be used against him. In *Leger,* the officer promised the suspect that his statement would not be used against him because it would be kept confidential. Here, the officer promised Esper that his confession would not be used against him because everybody that heard it would then feel compelled to give him a "second chance." In both cases, the police countermanded the *Miranda* warning by assuring a suspect that anything he said would NOT be used against him, which is the exact opposite of what *Miranda* requires.

For over two generations, the courts of this nation and this Commonwealth have steadfastly maintained that police officers must warn suspects of their right to remain silent, and that the "*warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.*" *Miranda,* 384 U.S. at 469 (emphasis added). We would do well to remember the reason for the rule:

> This warning is needed in order to make [the suspect] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.... [T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.
>
> ***... Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end.***

Id. at 469–470 (emphasis added).

Klaiss' rapid and sometimes mumbling speech during the interrogation makes the audio recording somewhat difficult to discern. While I do not entirely agree with the Majority's transcription of the essential parts of the interrogation, our differences are immaterial. It is clear that Klaiss began the interrogation of Esper by dutifully mumbling the obligatory *Miranda* warnings in a flat monotonic voice, spending scarcely one second on the "anything you say will be used against you" part. After Esper had repeatedly protested his innocence, Klaiss spent a major part of interrogation assuring Esper that if he confessed, everything would get better for him. Klaiss told Esper, if he confessed, "well get something in place for you," hinting that "family counseling" would be the consequence of a confession. Klaiss then constructed the interview to lead Esper into a confession that fit all the parameters of the crime as Klaiss believed them to be. Klaiss knew, as the *Miranda* warning attests, that Esper's confession would be used to put him in prison for a term of at least 20 years with an 85% parole eligibility date. Klaiss buried the *Miranda* warning beneath his persistent assurance that Esper's confession would assure him a "second chance" and maybe family counseling. The Majority thinks that's okay; I think it's a constitutional violation and a contemptable insult to the dignity of this Court's duty to apply and enforce the *Miranda* rule.

I further submit that the error cannot be brushed aside as harmless. Esper had just turned 18 and the victim's account of when the crime occurred was ambiguous. The medical analysis was inconclusive because, even assuming she contracted gonorrhea from Esper, the available evidence showed only that she had symptoms of gonorrhea *after* Esper's 18th birthday. But, the police had no evidence to show when those symptoms first appeared. It was entirely plausible that the victim was infected "in the winter" before Esper turned 18. This ambiguity in the proof created a reasonable doubt that blocked Klaiss' path to prosecution. Even if Esper confessed to the crime, he could not be convicted without proof beyond a reasonable doubt that the crime happened *after* his 18th birthday.

***16** Therefore, Klaiss knew he had to continue the interrogation, building upon the false assurances that confession would result in lenient treatment with a series of leading questions designed to manipulate Esper's confession toward a date after his 18th birthday. Without that evidence, there was not proof beyond a reasonable doubt to sustain the Commonwealth's burden of proving that Esper was an adult when the crime occurred. We cannot turn another blind eye from the seriousness of this error by calling it harmless beyond a reasonable doubt.

I believe that great harm is done to constitutional authority when government agents are allowed to subvert *Miranda* by convincing a suspect that *Miranda* is the lie and that the false

assurance that a confession will only be used in court to help him is the truth. We were warned against an unhealthy police dependence upon confession in *Escobedo v. Illinois*:

> We have learned the lesson of history, ancient and modem, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

378 U.S. 478, 488–489 (1964) (footnotes omitted). The Majority opinion disregards that warning as cavalierly as it undermines the constitutional values embedded in *Miranda.*

For those reasons, I dissent.

II. THE "REID" TECHNIQUE

Although my disagreement with the Majority is entirely based upon Klaiss' rescission of the *Miranda* warning, I write further to point out rising criticism of the Reid Interrogation Technique which the Majority failed to mention. The late Justice (then-Court of Appeals Judge) Wil Schroder reminded us in *Herndon v. Commonwealth,* "the 'Reid' interrogation method ... is notorious for producing false confessions."[9]

The United States Supreme Court specifically identifies "the Reid method" at least eleven times in the *Miranda* opinion as a psychologically-coercive stratagem for which the *Miranda* warnings were crafted.[10] The Court observed that "[w]hen normal procedures fail to produce the needed result" the police resort to "deceptive stratagems" of the Reid method to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights," 384 U.S. at 455. Numerous law journals validate the Supreme Court's concern. For example, Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,* 32 Harv. C.R.–C.L.L. Rev. 105, 119 (1997), states: "But, as experts in psychology have noted, suspects who deny guilt will sometimes experience anxiety during [a Reid] interrogation even though they are not deceiving the police with respect to the offense of which they are accused."

The use of the Reid Technique on youthful suspects is even more suspect: "The special vulnerability of youthful suspects has been recognized. In particular, research has shown that juveniles as a class are not able to understand the nature and significance of their *Miranda* right." *Id.* at 157 n. 200.[11]

***17** When presented with a well-developed record based upon competent academic and scientific expertise, it would be appropriate for this Court to consider the evidentiary validity of confessions obtained using the Reid Interrogation Technique. Until then, I would place upon the Commonwealth the heavy burden of establishing the validity of any self-incriminating evidence derived by its use of the Reid Interrogation Technique.

Cunningham, J., joins.

All Citations

Not Reported in S.W. Rptr., 2018 WL 898215

Footnotes

1 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

2 The letter contains numerous grammatical errors, which we have not corrected.

3 In his Brief, Esper states that sometime after the final sentencing and before the filing of his Brief, lead trial defense counsel retired from the Department of Public Advocacy.

4 Kentucky Rules of Criminal Procedure.

5 Det. Klaiss testified he used tactics learned via the Reid Technique of Interviewing and Interrogation, which was developed in 1947 and is a commercial trademarked product that is sold to police agencies by John E. Reid & Associates, Inc. through seminars, books, videos and training material. *See* http://www.reid.com. Reid's seminal publication, *Inbau & Reid Criminal Interrogations and Confessions,* is now in its fifth edition.

6 Kentucky Rules of Evidence.

7 *Miranda v. Arizona,* 384 U.S. 436 (1966).

8 We recognized in *Gray v. Commonwealth,* 480 S.W.3d 253, 263 (Ky. 2016), that deceptive interview techniques which, through the use of falsified documents, exploit a suspect's fear and induce a confession are presumed to be unconstitutional. The Commonwealth bears the burden of establishing that its deceptive tactic did not overwhelm the defendant's will and was not a critical factor in securing the confession.

9 2000–CA–002734–MR, 2004 WL 2634420 at *3 n. 9 (Ky. App. Nov. 19, 2004).

10 *See* 384 U.S. at 449 nn. 9–10; 450 nn. 12–13; 452 nn. 15–17; 454 nn. 20–22; 455 n. 23.

11 *See also* Barry C. Feld, *Police Interrogation of Juveniles; An Empirical Study of Policy and Practice,* 97 J. Grim. L. & Criminology 219, 244 (2006) (citations omitted):

> Youths' diminished competence relative to adults increases their susceptibility to interrogation techniques and concomitant risks of false confessions. Adolescents have fewer life experiences or psychological resources with which to resist the pressures of interrogation. Juveniles' lesser understanding of legal rights or consequences increases their vulnerability to manipulative tactics. They think less strategically and more readily assume responsibility for peers than do adults. They are more likely to comply with authority figures and to tell police what they think the police want to hear.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Carl Duncan ALLEN, Defendant–Appellant.

Docket No. 325568.
|
June 14, 2016.

Wayne Circuit Court; LC No. 14–005270–FC.

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced to life imprisonment for his first-degree murder conviction to run consecutive to two years' imprisonment for his felony-firearm conviction. We affirm defendant's convictions, reverse defendant's sentences, and remand for resentencing.

I. FACTUAL BACKGROUND

This case arises from the shooting death of Antonio Dwight Revis in June 2014. Shortly after midnight on June 5, 2014, Revis and his then-girlfriend, Jaleesa Underwood, drove to the corner of Sanilac Street and Morang Avenue in Detroit, Michigan. Upon their arrival, Underwood parked her silver 2012 Dodge Charger on Sanilac Street near the corner. Revis exited the car and walked toward the back of the vehicle. According to Underwood, three young males walked out of a house on the street and met Revis behind the vehicle. She noticed that one of the males was defendant, whom she recognized from the neighborhood. Revis talked with the three men for a period of time. Suddenly, Underwood saw defendant and another chase Revis toward Morang Avenue and heard approximately four gunshots. She immediately started her vehicle and made a U-turn in order to follow the commotion. She then observed defendant standing over a now-prostrate Revis, shooting "a couple more times" into his body.

Robert Williams, an unrelated bystander who happened to be in the area sitting in his car, observed the events in a similar way. Williams saw two males chasing another male down the street and heard approximately four gunshots. He started his car and drove away when he heard the gunfire. However, when he returned a short time later, he saw Revis on the ground and Underwood crying.

At the scene, a Detroit police officer found three unfired .380–caliber cartridges and four spent nine-millimeter casings. At approximately 4:00 p.m. on June 5, 2014, the same day of the shooting, Detroit police officers apprehended defendant and two other men in a Checker cab. The officers noticed that one of the men, Fernando Williams, was sitting on top of a Walter PK .380–caliber pistol. Subsequent DNA testing on the pistol indicated that defendant was not a significant contributor to the DNA on the gun.

On June 6, 2014, defendant was interviewed by Detroit police officers. Defendant initially told the officers that he was present at the scene of the offense, but his friend "Tay" was responsible for the shooting. Defendant then told the officers that he held an unloaded nine-millimeter pistol during the incident, but he did not shoot Revis. Later, however, when asked, "Why did you shoot 'Tone, and how do you feel about it?", defendant replied, "I feel bad." The officers then asked, "Why did you shoot him?" Defendant replied, "Cuz, he ... I thought he had something to do with killing my daddy...." At the end of the interview, when asked if he killed Revis, defendant responded, "I ain't sure I want to answer that." When asked why, defendant reasoned, "I rather for them to prove it." One of the officers then retorted, "But you just told me you shot him." Defendant replied, "But you didn't write it down." Defendant then asked the officer to write down that he did not shoot Revis.

***2** At trial, in addition to the witnesses' testimony and defendant's statement during the interview, the prosecution presented testimony from the doctor who conducted an autopsy on Revis's body as well as testimony regarding the results of ballistics testing on the bullets recovered from the body. The ballistics testing revealed that three of the bullets

came from the .380–caliber pistol recovered by the police, three other bullets came from a gun that could have been a .380–caliber, .38–caliber, or 9–millimeter pistol, and the last bullet possibly came from the same gun as the latter three bullets. A jury then convicted defendant of first-degree murder and felony-firearm.

Defendant now appeals as of right.

II. FAILURE TO REQUEST THE APPOINTMENT OF EXPERT WITNESSES

Defendant first argues that defense counsel provided ineffective assistance when he failed to request the appointment of expert witnesses on the subjects of eyewitness identification and false confessions. We disagree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

Because defendant did not move for a new trial or a *Ginther* [1] hearing in the trial court, and no *Ginther* hearing was held, [2] our review of his ineffective assistance of counsel claim is limited to mistakes apparent from the record. *People v. Payne,* 285 Mich.App 181, 188; 774 NW2d 714 (2009); *People v. Petri,* 279 Mich.App 407, 410; 760 NW2d 882 (2008). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Petri,* 279 Mich.App at 410, citing *People v. LeBlanc,* 465 Mich. 575, 579; 640 NW2d 246 (2002).

The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prove that counsel provided ineffective assistance, a defendant must demonstrate that (1) " 'counsel's representation fell below an objective standard of reasonableness,' " and (2) defendant was prejudiced, i.e., "that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Vaughn,* 491 Mich. 642, 669–671; 821 NW2d 288 (2012), quoting *Strickland v. Washington,* 466 U.S. 668, 688, 694; 104 S Ct 2052; 80 L.Ed.2d 674 (1984). "A defendant must also show that the result that did occur was fundamentally unfair or unreliable." *People v. Lockett,* 295 Mich.App 165, 187; 814 NW2d 295 (2012). "Effective assistance of counsel is presumed," and a defendant bears a heavy burden of proving otherwise. *Petri,* 279 Mich.App at 410; see also *Vaughn,* 491 Mich. at 670 ("Defense counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.") (quotation marks and citation omitted).

***3** "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight.... [T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v. Dixon,* 263 Mich.App 393, 398; 688 NW2d 308 (2004) (quotation marks and footnotes omitted).

B. DEFENSE IDENTIFICATION STRATEGY

It is apparent from the record that defense counsel's strategy was to demonstrate, through unrelenting cross-examination and an acerbic closing argument, that Underwood *intentionally lied* when she identified defendant as the shooter, not that Underwood mistakenly identified defendant. In particular, defense counsel dynamically attacked Underwood's credibility by emphasizing her past theft conviction, her inability to consistently recount the number of times that she had seen defendant previously, and her inconsistent statements regarding the number of gunshots that she heard during the incident. Requesting an expert on the unreliability of witness identification testimony would have been inconsistent with this defense strategy, and we will not second-guess defense counsel's decisions on this with the benefit of hindsight. See *id.* Likewise, given defense counsel's cross-examination and closing argument, failing to call such an expert did not deprive defendant of the defense that Underwood was an unreliable witness. See *id.* Further, in light of defense counsel's cross-examination of Underwood, counsel may have reasonably concluded that presenting expert testimony on eyewitness identifications would have been cumulative to his defense or redundant for the jury, as such an expert would have "stat[ed] the obvious: memories

and perceptions are sometimes inaccurate." *People v. Cooper,* 236 Mich.App 643, 658; 601 NW2d 409 (1999).

Thus, defendant has not overcome the presumption that defense counsel's decision not to call an expert was sound trial strategy. See *id.* Accordingly, he has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. See *Vaughn,* 491 Mich. at 669–671.

In addition, even if defense counsel's performance fell below an objective standard of reasonableness, defendant has not met the test's second prong. He has failed to establish the factual predicate of his claim, as he "offers no proof that an expert witness would have testified favorably if called by the defense." *People v. Ackerman,* 257 Mich.App 434, 455–456; 669 NW2d 818 (2003). Although he cites secondary sources and cases discussing the unreliability of eyewitness identifications in general, he provides no proof, apart from his own speculation based on the cited literature, that an expert would have testified in his favor if called by the defense *in this case.* For this reason alone, defendant has failed to establish the requisite prejudice. See *id* . Further, given the significant evidence of defendant's involvement in the crime, and the fact that the jury apparently believed the majority of Underwood's testimony despite defense counsel's zealous cross-examination, there is not a reasonable probability that the outcome of the trial would have been different but for defense counsel's failure to request an eyewitness identification expert. See *Vaughn,* 491 Mich. at 669–671.

C. FALSE CONFESSIONS

***4** Defendant next argues that defense counsel was ineffective for failing to request an expert witness on false confessions. Defendant again does not overcome the presumption that defense counsel's decision not to call such an expert was a reasonable trial strategy. In the trial court, defense counsel argued that defendant's statement to the police did not constitute a confession *at all.* Given this position, presenting an expert on false confessions, and thereby implicitly conceding that defendant made *a confession,* would have been inconsistent with counsel's defense strategy. As stated, we will not second-guess this strategy with the benefit of hindsight.

In addition, defendant has failed to establish the factual basis of his claim, as he provides no proof of the content of such expert testimony and, accordingly, offers no proof that an expert would have testified in his favor. See *Ackerman,* 257 Mich.App at 455–456. Rather, he again cites secondary sources and cases discussing circumstances that often give rise to false confessions and general indicators of false confessions, contending that defendant's police interview displays all of these factors. Contrary to defendant's claims, it is possible that an expert would have testified contrary to defendant's position. Further, without any indication of the actual content and foundation of an expert's testimony, defendant has failed to demonstrate that the testimony would have been admissible in this case. See *People v. Kowalski,* 492 Mich. 106, 132–138; 821 NW2d 14 (2012) (upholding the exclusion of expert testimony "based on research and literature about the phenomenon of false confessions" under MRE 702, but leaving open the possibility of admitting psychological testing evidence consisting of the "defendant's psychological profile, which [was] constructed from psychological tests and clinical interviews of defendant."). Accordingly, defendant has failed to show that there is a reasonable probability that the outcome of the trial would have been different but for defense counsel's failure to request an expert on false confessions. See *Vaughn,* 491 Mich. at 669–671.

III. SUPPRESSION OF DEFENDANT'S STATEMENT TO THE POLICE

Defendant next asserts that his statement to the police during his interview was involuntary and, therefore, erroneously admitted by the trial court. Similarly, defendant contends that defense counsel was ineffective for failing to move to suppress his statement. We disagree.

A. STANDARD OF REVIEW

To the extent that defendant generally challenges the admissibility of his statement, as well as the trial court's failure to conduct, *sua sponte,* a *Walker*[3] hearing, these claims are unpreserved because defendant never moved to suppress the statement or requested a *Walker* hearing to determine whether his statement was voluntary. We review unpreserved issues for plain error affecting substantial

rights. *People v. Carines,* 460 Mich. 750, 763–764; 597 NW2d 130 (1999). Defendant's ineffective assistance claim is reviewed under the rules discussed *supra.*

B. ANALYSIS

***5** As an initial matter, the record shows that the defense stipulated to the admission of the video containing defendant's statement to the police and stipulated that defendant knowingly and voluntarily waived his constitutional rights before the interview. Accordingly, to the extent that defendant contends that his statement to the police was inadmissible because he did not voluntarily waive his rights, and argues that the trial court should have held, *sua sponte,* a hearing on the voluntariness of his statement, defendant has waived review of these claims. [4] See *Vaughn,* 491 Mich. at 663 ("[W]aiver is the *intentional* relinquishment or abandonment of a known right. A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right.") (quotation marks and footnotes omitted).

Next, we reject defendant's claim of ineffective assistance based on defense counsel's failure to move to suppress defendant's statement. First, defendant has failed to overcome the strong presumption that this decision was a reasonable exercise of professional judgment. See *Vaughn,* 491 Mich. at 670; *Petri,* 279 Mich.App at 410. As demonstrated by the parties' stipulation on the record, it is clear that defense counsel proactively agreed to the introduction of defendant's statement to police, seemingly because he wished for the jury to hear defendant's account of the circumstances of the crime and his relationship with the victim. Likewise, it is apparent that counsel wanted the jury to hear defendant's multiple denials of shooting Revis. Although this strategy proved unsuccessful, it would have been inconsistent and unreasonable for defense counsel to both stipulate to the admission of the video so that the jury would have the opportunity to consider the entirety of defendant's statement and also attempt to suppress the statement on constitutional grounds.

Further, the record shows that defendant's statement was admissible, as it was made after he voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. [5] "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v. Gipson,* 287 Mich.App 261, 264; 787 NW2d 126 (2010). "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 264–265. Regarding the voluntariness of a confession,

> [t]he test of voluntariness ... [is] whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired...." The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."
>
> ***6** In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v. Cipriano,* 431 Mich. 315, 333–334; 429 NW2d 781 (1988) (citations omitted).]

Additionally, a court should consider the defendant's overall mental and physical state and any promises of leniency. *Gipson,* 287 Mich.App at 264. "Whether a waiver was made knowingly and intelligently requires an inquiry into defendant[']s level of understanding, irrespective of police conduct." *Id.* "A defendant does not need to

> understand the consequences and ramifications of waiving his or her rights. A very basic understanding of those rights is all that is necessary." *Id.* Moreover, a waiver need not be express: if the record shows that a *Miranda* [6] warning was given and that the defendant understood the warning, his "uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis v. Thompkins,* 560 U.S. 370, 384; 130 S Ct 2250; 176 L.Ed.2d 1098 (2010).

On appeal, defendant contends that his confession was involuntary for the following reasons: "[He] was just shy of his 18th birthday.... He was questioned for a long time and stated to the officers that he hadn't been sleeping since the incident. The interview demonstrates that he was unsophisticated and susceptible to manipulation." Despite defendant's claims regarding his own vulnerability, defendant does not, in fact, assert that the officers engaged in anything improper. Further, there is no indication in the record, including the video recording of the police interview, that defendant was coerced, intimidated, or deceived into waiving his constitutional rights, or that his subsequent statement was involuntary.

When the interview began, one of the officers stated that he would read aloud each of defendant's rights and defendant should indicate whether he understood each one. If defendant did not understand something, the officer would explain it to him. The officer then proceeded to read each *Miranda* right to defendant, and defendant said, "Okay," after hearing each right. Defendant then signed a written advice of rights form, initialing next to each right. He later stated that he can read and write. After defendant acknowledged his rights, the officers did not physically abuse or coerce defendant into speaking, and they provided water and food from the vending machine during the interview. Although defendant was 17 years old at the time, [7] defendant's statements throughout the interview evinced a knowledge of police procedure and a level of maturity that further indicates that defendant voluntarily waived his rights and answered the officers' questions. [8] Additionally, there is no indication that the length of the interview, which was approximately three hours, or defendant's lack of sleep allowed him to be manipulated or coerced by the officers, or that these factors affected the voluntariness of his statement. Further, the record includes no basis for concluding that any other factors exist for finding that defendant's statement was involuntary. See *Cipriano,* 431 Mich. at 333–334. Thus, in considering the totality of the circumstances, the record shows that defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights and voluntarily answered the officers' questions, such that his statement was constitutionally valid and admissible. See *id.*

***7** Defendant also suggests that defense counsel was ineffective for failing to move to suppress defendant's confession because "there were solid grounds for arguing that after [defendant] maintained that he needed a lawyer [,] ... the interview should have stopped at that time." "When a defendant invokes his right to counsel, the police must terminate their interrogation immediately and may not resume questioning until such counsel arrives. However, the defendant's invocation of his right to counsel must be unequivocal." *People v. Tierney,* 266 Mich.App 687, 710–711; 703 NW2d 204 (2005) (citations omitted). A defendant who merely states, "Maybe I should talk to an attorney," does not unequivocally invoke his right to counsel. *Id.* at 711.

Here, although defendant appeared to consider out loud whether he needed a lawyer near the end of the interview, his request was equivocal. After the officers restated Underwood's account of the incident, defendant said, "If [Underwood] said I fired a gun out there, I need a lawyer then." The first officer then asked, "So is that what you're saying, you want a lawyer?" Defendant responded, "I mean, what other choice do I have [when] y'all saying I fired a gun and I didn't." The second officer began to reply, "You have the choice to tell the truth because ...," but he then stopped himself and asked, "Well, do you want a lawyer? That's up to you. We don't care." Defendant responded, "I mean, I want y'all to help me out with the situation." The first officer stated, "You have to help yourself. You gotta tell me, because you brought up the lawyer, do you want to stop this interview?" Defendant replied, "No, sir." The first officer asked, "So you want to continue this interview without a lawyer?" Defendant answered, "Yes." The officers then asked if defendant was sure and stated that they did not care either way. The first officer also said, "This is your last opportunity, so I want you to decide if you want a lawyer or you want to continue talking to us." Defendant again asked the officers to "help [him] in any type of way," and the first officer replied, "What I'm telling you is, I cannot further this conversation if you asking [sic] for a lawyer." The second officer clarified, "If you're saying you don't want a lawyer, then we can continue. If you saying [sic] you want a lawyer, we are done." Defendant replied, "I only want a lawyer if I need one." The second officer then said, "You're not understanding the question." Defendant then replied, "No, I don't want one. Can I finish the conversation?"

On this record, defendant's statements were not sufficiently unequivocal to invoke his right to counsel and require termination of the interview. See *Tierney,* 266 Mich.App at 710711. When defendant mentioned the prospect of a lawyer, the officers immediately stopped the interrogation and repeatedly asked defendant whether he wanted a lawyer, rephrasing the question in multiple ways to ensure that defendant understood the implications of asking for a lawyer. Defendant then clearly stated that he did not want a lawyer and asked to finish the interview. Thus, defendant's confession was admissible, as his statement was not elicited in violation of his constitutional rights.

***8** Accordingly, defense counsel's failure to move to suppress defendant's statement did not constitute ineffective assistance, as "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v. Ericksen,* 288 Mich.App 192, 201; 793 NW2d 120 (2010).

IV. CRUEL AND UNUSUAL PUNISHMENT

In a supplemental brief, defendant argues that his sentence of mandatory life imprisonment without parole violates his Eight Amendment right against cruel and unusual punishment because he was 17 years old when he committed the offenses. The prosecution agrees that resentencing is required in this case.

A. STANDARD OF REVIEW

We review unpreserved constitutional claims for plain error affecting substantial rights. *People v. Bowling,* 299 Mich.App 552, 557; 830 NW2d 800 (2013).

B. ANALYSIS

In *Miller v. Alabama,* —— U.S. ——; 132 S Ct 2455, 2460; 183 L.Ed.2d 407 (2012), the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " See also *Montgomery v. Louisiana,* —— U.S. ——; 136 S Ct 718, 734; 193 L.Ed.2d 599 (2016) (holding that *Miller* has retroactive application). However, in *Miller,* "the Court fell short of categorically barring life without parole for juvenile offenders; instead, it held that a sentencing court must 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " *People v. Perkins,* —— Mich.App ——, ——; —— NW2d —— (2016) (Docket Nos. 323454, 323876, 325741), slip op at 14; quoting *Miller,* 132 S Ct at 2469. See also *People v. Skinner,* 312 Mich.App 15, 27; 877 NW2d 482 (2015). Accordingly, our Legislature enacted MCL 769.25 and MCL 769.25a in response to *Miller,* which provide a series of requirements that must be fulfilled in order to impose a term of life imprisonment without parole on a juvenile offender, including, among other things, the requirement that a trial court must consider the factors listed in *Miller* when determining whether a juvenile offender should be sentenced to life without parole.

Here, the prosecution agrees that defendant was 17 years old when he committed the offense and concedes that he is entitled to resentencing pursuant to MCL 769.25. In particular, the prosecution recognizes that it failed to file a motion requesting a *Miller* sentencing hearing within 21 days after defendant's conviction, as required by MCL 769.25(3). Thus, the prosecution agrees that defendant is entitled to be sentenced to a term of years, as provided under MCL 769.25(9), given its failure to file such a motion. MCL 769.25(4). See *People v. Perkins,* —— Mich.App at ——; slip op at 16.

Thus, as the parties agree, we conclude that resentencing is required pursuant to MCL 769.25.

V. CONCLUSION

***9** We reject defendant's ineffective assistance and evidentiary claims. Accordingly, we affirm his convictions. However, we agree with the parties that resentencing is required.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2016 WL 3314460

Footnotes

1 *People v. Ginther,* 390 Mich. 436, 443; 212 NW2d 922 (1973).

2 Defendant filed a motion to remand this case for an evidentiary hearing pursuant to MCR 7.211(C)(1), which we denied. *People v. Allen,* unpublished order of the Court of Appeals, entered August 13, 2015 (Docket No. 325568).

3 *People v. Walker (On Rehearing),* 374 Mich. 331, 337–338; 132 NW2d 87 (1965).

4 The trial court should conduct an "inquiry into the voluntariness of the [confession]" *sua sponte* if there are "certain alerting circumstances," such as "a defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress." *People v. Ray,* 431 Mich. 260, 269–271; 430 NW2d 626 (1988) (quotation marks and citation omitted). However, the trial court is required to hold a *Walker* hearing *sua sponte* only in "cases in which the evidence clearly and substantially reflects a question about the voluntary nature of a confession or implicates other due process concerns." *Id.* at 271. Even if defendant had not waived review of this issue, the record includes no evidence of alerting circumstances that would require the court to hold a *Walker* hearing *sua sponte* in this case.

5 We note that a waiver of *Miranda* rights can constitute a knowing and intelligent waiver of a defendant's Fifth and Sixth Amendment rights. *Montejo v. Louisiana,* 556 U.S. 778, 786–787; 129 S Ct 2079; 173 L.Ed.2d 955 (2009).

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

7 It is noteworthy that defendant emphasized during the police interview that he was born in October 1995 and, therefore, was 18 years old during the interview on June 6, 2014. When the officers stated that they had received paperwork indicating that defendant was born in 1996, defendant reasoned that someone must have made a mistake because he was born in 1995. However, other documents in the lower court record indicate that defendant was born in October 1996 and, thus, was 17 years old at the time of the offense and police interview. The prosecution stated in its supplemental brief on appeal that it obtained defendant's birth certificate and confirmed that he was born in October 1996.

8 For example, defendant at one point stated, "I rather for them to prove it." This indicates defendant's understanding of the prosecution's burden in prosecuting a case.

2010 WL 2925359
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Isaiah Laray CALKINS, Defendant–Appellant.

Docket No. 290485.
|
July 27, 2010.

Genesee Circuit Court; LC No. 08–021983–FC.

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC) (under 13), MCL 750.520b(1)(a), and one count of second-degree CSC (under 13), MCL 750.520c(1)(a). This case arises from defendant's sexual assault of his ex-girlfriend's nine year old daughter on various occasions at the apartment they shared in Davison, Michigan during 2007. Because defendant was not denied the effective assistance of counsel following the preliminary examination or at trial, and the prosecutor did not engage in misconduct warranting reversal, we affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel because his trial counsel, Patricia Lazzio, refused to accompany him to a polygraph examination that resulted in defendant being subjected to a custodial interrogation and making incriminating statements later admitted at trial. The prosecutor counters that defendant requested the polygraph examination and that both defendant and his counsel understood she would not be allowed access to defendant during the polygraph examination. The prosecutor also argues that defendant made the incriminating statements in the pre-polygraph interview during which time defendant never requested counsel's presence.

The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v. Dendel,* 481 Mich. 114, 124; 748 NW2d 859 (2008). We review the trial court's factual findings for clear error and review its constitutional determinations de novo. *Id.* Because defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, review is limited to mistakes apparent on the record. *People v. Wilson,* 242 Mich.App 350, 352; 619 NW2d 413 (2000).

The Sixth Amendment right to counsel attaches at "the initiation of adversary judicial criminal proceedings" such as a preliminary examination. *Moore v. Illinois,* 434 U.S. 220, 231; 98 S Ct 458; 54 L.Ed.2d 424 (1977). Once the Sixth Amendment right to counsel attaches, defendant has a right to counsel at all "critical" proceedings, including interrogation. *People v. Frazier,* 478 Mich. 231, 244 n 11; 733 NW2d 713 (2007). The Sixth Amendment also grants a defendant the right to effective assistance of counsel as part of the right to counsel. *Strickland v. Washington,* 466 U.S. 668, 687–688; 104 S Ct 2052; 80 L.Ed.2d 674 (1984). Therefore, defendant's Sixth Amendment right to effective assistance of counsel had attached at the time of his pre-polygraph interview with Police Detective David Dwyre because the interview occurred after the preliminary examination.

Once the Sixth Amendment right to counsel has attached, however, a defendant may still validly waive that right to counsel (and, therefore, the right to effective assistance of counsel), even if the interrogation was initiated by the police. *Montejo v. Louisiana,* —— U.S. ——; 129 S Ct 2079; 173 L.Ed.2d 955 (2009). *Montejo* reflects a recent change in the law. Previously, in *Michigan v. Jackson,* 475 U.S. 625, 636; 106 S Ct 1404; 89 L.Ed.2d 631 (1986), overruled *Montejo,* 129 S Ct at 2090–2091, the United States Supreme Court held that once the Sixth Amendment right to counsel (and the right to effective counsel) attached, a defendant could not validly waive that right to counsel in police initiated custodial interrogation. *Jackson,* 475 U.S. at 636. The holding in *Jackson* was expressly overruled in *Montejo. Montejo,* 129 S Ct at 2090. The United States Supreme Court held that the right to counsel may be validly waived in custodial interrogation after the Sixth Amendment right to counsel has attached, even if the interrogation was police initiated. *Montejo,* 129 S Ct at 2090.

***2** A defendant's constitutional right to counsel may be waived if waiver is voluntary, knowing, and intelligent. *People v. McElhaney,* 215 Mich.App 269, 274; 545 NW2d 18 (1996). The existence of a knowing and intelligent waiver of the Sixth Amendment right to counsel depends on the particular circumstances of a case, including the background, experience, and conduct of the defendant. *Id. Miranda* warnings are sufficient to ensure that a defendant's waiver of his right to counsel during post-indictment questioning is voluntary, knowing, and intelligent. *Montejo,* 129 S Ct at 2085 An officer is not required to inform the defendant of the gravity of his position and the urgency of his need for a lawyer. *McElhaney,* 215 Mich.App at 276.

In this case, defendant has failed to demonstrate that he did not validly waive his right to counsel. Defendant argued to the trial court in his motion to suppress that his incriminating statements to Dwyre were coerced and that he was not read his rights and did not understand them. After a two day *Walker*[1] hearing, the trial court found that defendant's statements to Dwyre were voluntary and not subject to suppression. Evidence at the hearings indicated that Dwyre gave defendant a paper with his *Miranda*[2] rights written on it and had defendant read his rights aloud. Defendant admitted to signing a form indicating that he understood his rights and was waiving them, but he still claimed that he did not understand those rights. The record does not support defendant's position that his waiver of counsel was invalid. We conclude that the trial court did not clearly err in finding that defendant validly waived his right to counsel. Therefore, defendant may not now claim ineffective assistance.

Defendant's second issue on appeal is that the prosecutor engaged in misconduct by improperly asking the jurors to base their decision on their civic duty, rather than the facts of the case. Because defendant did not preserve this issue in the trial court, this Court reviews it for plain error. *People v. Carines,* 460 Mich. 750, 763–764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v. Thomas,* 260 Mich.App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v. Brown,* 279 Mich.App 116, 135–136; 755 NW2d 664 (2008). A prosecutor may not appeal to the jury's civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment. *Thomas,* 260 Mich.App at 455–456. However, a prosecutor has great latitude to argue the evidence and all inferences relating to his theory of the case. *Id.* at 456.

***3** Defendant contends that the following statement by the prosecutor amounted to an improper appeal to the jury's civic duty:

> Now, defense counsel will come up and he will argue his facts. I will have an opportunity to come and talk to you for a brief moment after defense counsel makes his statement, but it is no longer a secret. We all know what happened and it's not just Savanna's words. It's in the defendant's own words, the words that he'd like to take back now, but nonetheless, his own words.
>
> When you're done deliberating with this case, once the verdict is handed down by the jury, you're going to go home, and it's only at that time, and the Court will tell you it's only at that time, that you might be permitted to talk to other people about what happened here, and what are you going to tell them. What are you going to tell them?
>
> Well, we had a case, a confession case where the father confessed to sexually molesting his child. Now, is that the kind of case that you feel comfortable in entering a guilty verdict? Yes, but could you, under those facts and circumstances, find the defendant not guilty? Well, that's what you'll decide and that's what you'll be able to talk about later.
>
> So on behalf of the victim, on behalf of the Genesee County prosecutor's office, on behalf of the Davison Township Police Department, I ask you to find the defendant guilty....
>
> Although the prosecutor was referring to how the jurors would feel explaining their decision to the community, the prosecutor was not improperly referring to the jurors' civic duty. Instead, the prosecutor explicitly referred to

explaining the jurors' decision based on the facts of the case—that defendant confessed to the crime—not their civic duty. Therefore, we conclude that there was nothing improper in the prosecutor's comments. Furthermore, because the prosecutor was not making an improper civic duty argument but was, instead, making an argument on the basis of the evidence in the case, an objection by defense counsel to the prosecutor's statements would have been futile. Counsel is not ineffective for failing to assert a futile objection. *People v. Unger,* 278 Mich.App 210, 256; 749 NW2d 272 (2008). Defendant has not established that he was denied the effective assistance of counsel at trial.

Affirmed.

All Citations

Not Reported in N.W.2d, 2010 WL 2925359

Footnotes

1 *People v. Walker,* 374 Mich. 331; 132 NW2d 87 (1965).

2 *Miranda v. Arizona,* 384 U.S. 436, 444; 86 S Ct 1602; 16 L.Ed.2d 694 (1966).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Brian Keith DEGROOT, Defendant-Appellant.

No. 344986
|
April 9, 2020

Kalkaska Circuit Court, LC No. 17-004027-FC

Before: Cavanagh, P.J., and Beckering and Gleicher, JJ.

Opinion

Per Curiam.

***1** Defendant appeals as of right his jury convictions of first-degree murder, MCL 750.316(1), and torture, MCL 750.85. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to serve a life term for murder and 356 months to 60 years for torture. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with murdering and torturing his father-in-law, the victim in this case. Law enforcement found a crossbow bolt in a burn barrel on defendant's mother's property. Salt was discovered on the victim's body, and when it was analyzed, two compounds common in table salt were found with it. The forensic examiner found seven stab wounds in the victim. One wound, the most life-threatening, almost severed the victim's heart. The other stab wounds were not as life-threatening, except for a stab wound in the neck that was capable of causing significant bleeding. Of the weapons shown to him at trial, the forensic examiner testified that the crossbow arrow shaft was the best candidate for having caused the wound to the heart.

Defendant twice confessed to killing the victim. Defendant's first confession occurred while in a police car outside of his mother's house. Defendant's second confession occurred while he was in jail, after being arraigned. Defense counsel attempted to suppress the second confession, but the trial court found that defendant's waiver of his *Miranda* rights was made in a knowing, intelligent, and voluntary manner. Defendant admitted that he attacked the victim. Defendant confessed to slashing defendant on the back and then stabbing him. Defendant stated that the victim ran into the shower. While the victim was in the shower, defendant told him to rinse off because defendant did not want blood everywhere. Defendant told the victim that when the victim came out, defendant was going to kill him. Defendant confessed to shooting the victim with a crossbow after he had slashed his throat. Defendant stated that he did not remember pouring salt into the victim's wounds.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE FOR TORTURE

Defendant first argues that there was insufficient evidence to convict him of torture, MCL 750.85. We disagree.

1. STANDARD OF REVIEW

This Court reviews sufficiency-of-the-evidence claims de novo. *People v. Harverson*, 291 Mich. App. 171, 177; 804 N.W.2d 757 (2010). This Court must determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v. Nowack*, 462 Mich. 392, 399; 614 N.W.2d 78 (2000). Reviewing courts must draw all reasonable inferences and credibility determinations in favor of the jury's verdict. *Id.* at 400.

2. ANALYSIS AND APPLICATION

MCL 750.85 states that "[a] person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years." MCL 750.85(2)

(c)(*ii*) defines great bodily injury to include "severe cuts, or multiple puncture wounds." MCL 750.85(2)(a) defines cruel as "brutal, inhuman, sadistic, or that which torments."

***2** Defendant's first argument is that there was not sufficient evidence of custody or physical control over the victim because the victim was able to take a shower and attempted to escape. MCL 750.85(2)(b) defines "custody or physical control" as "the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority." Defendant stabbed the victim in the chest in the victim's garage. After the victim retreated to the shower, defendant locked the door to prevent the victim from escaping, and defendant's wife assisted in preventing the victim from escaping. These are examples of "forcibly restricting" the victim's movement, which satisfy MCL 750.85(2)(b).

Defendant's second argument is that he did not torture the victim because the stabbings were part of the homicide. MCL 750.85(1) applies when a defendant inflicts great bodily injury or severe mental pain or suffering upon another person. MCL 750.85(c)(*ii*) defines "great bodily injury" as "[o]ne or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds." MCL 750.85(4) states, "A conviction or sentence under this section does not preclude a conviction or sentence for a violation of any other law of this state arising from the same transaction." Defendant admitted to both cutting and stabbing the victim. The forensic examiner found seven stab wounds on the victim. Defendant claimed that he did not stab the victim seven times. However, defendant admitted to slashing and cutting the victim. Defendant inflicted great bodily harm on the victim in this case because he severely cut and stabbed the victim, who had multiple puncture wounds. To the extent that defendant argues that the cuts and stabs were part of a homicide and should not be considered for a torture conviction, MCL 750.85(4) applies and allows defendant to be convicted of both torture and homicide. On appeal, this Court considers all reasonable inferences and credibility determinations in favor of the jury verdict. *Nowack*, 462 Mich. at 400. As a result, the jury's determination that defendant stabbed and cut the victim enough to support torture should not be disturbed; it is a reasonable inference drawn from the physical evidence and confessions. [1]

B. VOLUNTARY MANSLAUGHTER JURY INSTRUCTION

Defendant next argues that the jury should have been instructed on manslaughter. We disagree. A rational view of the evidence does not support a conviction of manslaughter where the murder was not committed with adequate provocation in the heat of passion.

1. STANDARD OF REVIEW

This Court generally reviews de novo claims of jury instruction error, but the trial court's determination regarding whether a jury instruction is applicable to the facts of a case is reviewed for abuse of discretion. *People v. Dobek*, 274 Mich. App. 58, 82; 732 N.W.2d 546 (2007). Additionally, a defendant must show that the asserted instructional error resulted in a miscarriage of justice. *People v. Dupree*, 486 Mich. 693, 702; 788 N.W.2d 399 (2010).

2. ANALYSIS AND APPLICATION

***3** Manslaughter, both voluntary and involuntary, is necessarily a lesser included offense of murder. *People v. Mendoza*, 468 Mich. 527, 540; 664 N.W.2d 685 (2003). An instruction for an inferior offense is only appropriate when a rational view of the evidence supports a conviction of the lesser crime. *Id.* at 545. A trial court does not err by denying a jury instruction when a rational view of the evidence does not support a conviction of the lesser offense. *Id.* at 548. First-degree murder is governed by MCL 750.316. Second-degree murder, which includes all other murders, requires the following four elements: "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *Id.* at 534. Manslaughter includes the same elements as second-degree murder except for malice. *Id.* Voluntary manslaughter occurs when a defendant "killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id.* at 535. Provocation negates malice rather than forming an element of

its own. *Id.* at 536. Involuntary manslaughter occurs when the killing is unintentional. *Id.*

Defendant's argument focuses on the trial court's denial of a voluntary manslaughter jury instruction. The trial court did not err because there was no adequate provocation alleged such that a rational view of the evidence would support manslaughter. Adequate provocation causes a defendant to "act out of passion rather than reason." *People v. Mitchell*, 301 Mich. App. 282, 287; 835 N.W.2d 615 (2013) (quotation marks and citations omitted). In *Mitchell*, this Court held that there was evidence to support a voluntary manslaughter jury instruction because the victim had threatened to harm the defendant, the defendant maintained that the victim was the initial aggressor, and the defendant had wounds on him when he was arrested. *Id.* at 287-288. Words alone generally do not constitute adequate provocation, although the Michigan Supreme Court has declined to create a per se rule that words alone may never be adequate provocation. *People v. Pouncey*, 437 Mich. 382, 391; 471 N.W.2d 346 (1991). The jury determines whether there is adequate provocation, but the trial court determines the standard of what is adequate provocation. *Id.* at 390. The provocation must blur the defendant's reasoning so that the killing was in the heat of passion. *Id.* Deliberate and reasoned acts can show that a person was not provoked such that voluntary manslaughter is appropriate. *Id.* at 390 n. 9.

Defendant alleges that adequate provocation was demonstrated by either the victim's threat against defendant or his throwing of brass filings at defendant after the attack had begun that led to the victim's death. The alleged threat by the victim against defendant was not adequate provocation because it was only words and there was minimal evidence in the record of the threat. Defendant said in his interview that he heard a threat from the victim approximately a year before the murder. The investigating officer testified that there was some talk about the victim having threatened defendant with a knife. Although the alleged threat by the victim was graphic and descriptive,[2] the threat was still mere words. In addition, defendant stated in his interview that he reacted to that threat by thinking, "Okay, whatever." Defendant admitted that he and the victim were getting along before the murder. Defendant admitted that the victim did not come after defendant with a weapon that night. Therefore, defendant's act was not in the heat of passion because he did not have a strong emotional reaction to the threat, which occurred over a year before the incident. See *Pouncey*, 437 Mich. at 390 (noting that the defendant's statement that he was not angry supported a finding that his ability to reason was not blurred by passion). In this case, defendant admitted that he planned the attack to happen in the garage. The trial court's denial of defendant's motion for an instruction on voluntary manslaughter was not erroneous because a rational view of the evidence could not support that a verbal threat from a year before could be adequate provocation.[3]

***4** In addition, defendant was not entitled to a jury instruction on voluntary manslaughter because a rational view of the evidence does not support a finding that the killing was in the heat of passion. Voluntary manslaughter requires that there not be a lapse of time that would allow a reasonable person to control his passions. *Id.* at 388. In *Pouncey*, the defendant walked into a house and then came outside about 30 seconds later with a shotgun. *Id.* at 385. The Michigan Supreme Court considered that to be a sufficient " 'cooling-off period' " because the defendant could have stayed in the house. *Id.* at 392. Defendant in this case stated that the threat was made about a year before the murder. The murder occurred in the victim's house. Defendant could have stayed away from the victim's house, and a year is sufficient time to cool off. In addition, there were seven wounds on the victim. Defendant admitted that he planned the attack to happen in the garage. The victim ran into the shower, and while the victim was in the shower, defendant told the victim he was going to kill the victim. All of these facts demonstrate that there was time for defendant to "have cooled off" and that the killing was not in the heat of passion. Therefore, the trial court did not err by denying defendant a voluntary manslaughter instruction.

C. OV 13 SCORING

The prosecution concedes that the trial court erred by relying solely on the fact of criminal charges in scoring OV 13. Although it is clear that the trial court erred, no remand is necessary in this case because the scoring error does not alter the appropriate sentencing guidelines range even when the OV 13 points are removed.

1. STANDARD OF REVIEW

The trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of

the evidence. *People v. Hardy*, 494 Mich. 430, 438; 835 N.W.2d 340 (2013). The application of the facts to the sentencing guidelines is reviewed de novo because it is a question of law. *Id.*

2. ANALYSIS AND APPLICATION

A trial court may consider dismissed charges as long as there is a preponderance of the evidence supporting a finding that the crime occurred. *People v. Nix*, 301 Mich. App. 195, 205; 836 N.W.2d 224 (2013). The trial court in this case stated that OV 13 was appropriately scored because there were charges pending at the time defendant committed this crime. The trial court stated that it had the police report, but was not sure the underlying facts were "operative." As the prosecution concedes, the trial court erred in this case because instead of determining whether the home invasion occurred by a preponderance of the evidence, it instead determined that OV 13 was satisfied merely because there were charges.

However, the trial court's OV 13 error does not entitle defendant to a remand because subtracting the 25 points assessed would not result in a change in his sentencing guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v. Francisco*, 474 Mich. 82, 89 n. 8; 711 N.W.2d 44 (2006); see also MCL 777.62. Therefore, because defendant's minimum guidelines range would have been the same even without the OV 13 score, defendant is not entitled to a remand despite the error.

D. DEFENDANT'S SECOND CONFESSION

Defendant argues that his waivers of his Fifth Amendment and Sixth Amendment rights to have counsel present when he made his statements to police were invalid. We disagree.

1. STANDARD OF REVIEW

A trial court's factual findings regarding the waiver of *Miranda*[4] rights are reviewed for clear error. *People v. Daoud*, 462 Mich. 621, 629; 614 N.W.2d 152 (2000). The meaning of the phrase "knowing and intelligent" is a question of law that is reviewed de novo. *Id.* at 629-630.

2. ANALYSIS AND APPLICATION

The Fifth Amendment provides the right to have an attorney present during custodial interrogation. *People v. Smielewski*, 214 Mich. App. 55, 60; 542 N.W.2d 293 (1995). The Sixth Amendment prohibits waiver of the right to counsel, after the right has been invoked, in a police-initiated custodial interrogation. *Id.* at 61. The Sixth Amendment rights only attach once adversarial judicial proceedings have begun.[5] *Id.* at 60. *Miranda* rights may be waived by a voluntary waiver that is made knowing and intelligently. *Daoud*, 462 Mich. at 639. Generally, the provision of *Miranda* warnings, and a waiver of these warnings, is sufficient for warning and waiving both the Fifth and Sixth Amendment protections. *Montejo v. Louisiana*, 556 U.S. 778, 786-787; 129 S. Ct. 2079; 173 L. Ed. 2d 955 (2009).

***5** The Michigan Supreme Court in *Daoud* determined that " '[t]he mental state that is necessary to validly waive *Miranda* rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer.' " *Daoud*, 462 Mich. at 640-641, quoting *In re W.C.*, 167 Ill. 2d 307, 328; 657 N.E.2d 908 (1995). "[A] knowing and intelligent waiver of the *Miranda* rights does not require that a suspect 'understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him.' " *Daoud*, 462 Mich. at 642, quoting *People v. Cheatham*, 453 Mich. 1, 28; 551 N.W.2d 355 (1996). Instead, "a very basic understanding is all that is necessary for a valid waiver." *Daoud*, 462 Mich. at 642. In *Daoud*, the Court held that a defendant needed to understand that he did not have to speak, that he had the right to have an attorney present, and that the information could be used against him. *Id.* at 643-644. In *Daoud*, an expert witness's "basic position was that defendant simply ignored the consequences of confessing because of his delusions, not that defendant could not understand those consequences. Indeed, Dr. Mogy acknowledged that defendant could understand the literal aspects of his *Miranda* rights." *Id.* at 644. The Michigan

Supreme Court determined that the trial court's statements showed that it found that defendant understood his *Miranda* rights, and therefore the trial court erred by suppressing the statement. *Id.*

Defendant's argument that he did not make a knowing and intelligent statement is contradicted by the record. In *Daoud*, the defendant's statement that he understood each *Miranda* warning as it was given "clearly evidences defendant's awareness of the events that were transpiring." *Id.* at 641. In this case, defendant was the one who requested the interview. Defendant was read his *Miranda* rights, he was told he could have his attorney present, and he stated that he understood the rights he was waiving. The detectives told defendant that he had an attorney assigned to him and he had the right to have that attorney present. Defendant said he understood that and still wanted to talk. This is evidence that he understood the rights he was waiving. While defendant, on appeal, argues that his mental health issues rendered the confession involuntary, he cites no specific evidence to demonstrate that.

Moreover, defendant fails to show how his mental health issues rendered him unable to understand the "literal aspects of his *Miranda* rights." *Daoud*, 462 Mich. at 644. A defendant only needs to understand that he does not have to speak, that he has the right to have an attorney present, and that his confession can be used against him. *Id.* at 643-644. A defendant's waiver of his rights is valid when he knows there will be consequences but believes for a delusional reason he will escape them. *Id.* at 644. Defendant stated during his confession that he wanted to help himself and "get as good as what I can possibly get." Defendant did not think that he should have to serve significantly more prison time than his wife when she helped murder her father. Defendant also stated that he knew that he was probably going to spend the rest of his life in prison. Defendant said he talked to the detectives of his own free will. Defendant's stated reasons for talking to the detectives—because he believed it could help him and so that they knew what his wife did—shows that he understood the information could be used against him. Additionally, his statement that he knew he was probably going to be in prison for the rest of his life demonstrated that he was aware that his statements could be used against him.

Defendant also argues that his confession was not voluntary. "[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion." *Daoud*, 462 Mich. at 635. A waiver of *Miranda* rights must come from a free and deliberate choice, and it must not come from intimidation, coercion, or deception. *Id.* The following factors should be considered to determine whether a confession is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v. Cipriano*, 431 Mich. 315, 334; 429 N.W.2d 781 (1988).]

***6** The ultimate test is whether the totality of the circumstances demonstrates that the confession was freely made. *Id.*

Defendant's confession was voluntary because there was no police coercion. The voluntariness prong focuses on the absence of police coercion. *Daoud*, 462 Mich. at 635. This is different from the knowing-and-intelligent prong, which focuses on what the defendant understood. See *Id.* at 636. Defendant does not provide any argument or evidence of police coercion. Defendant requested the interview while in jail. Defendant was read his *Miranda* rights, and defendant then decided to waive them. Defendant's argument that the police should have offered to actually contact defendant's attorney or specifically inform him that the interview could be rescheduled is irrelevant to the coercion argument because

defendant was informed of his right to remain silent and his right to counsel.

Having reviewed defendant's confession, there is nothing to indicate that the interviewing officers used any potential mental or emotional health issue defendant may have had to manipulate or coerce him. Defendant admitted that he was talking to the detectives of his own free will. As discussed earlier in this opinion, defendant's decision to talk to the detectives was motivated by his concern that his wife was going to receive a significantly shorter sentence than he despite defendant's belief that she helped him murder the victim. Defendant presented no evidence that the detectives attempted to coerce him, and a review of defendant's second confession demonstrates that defendant had a reason for talking to the detectives. Therefore, defendant's argument that his confession was coerced is without merit.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that trial counsel provided constitutionally ineffective assistance. We disagree.

1. STANDARD OF REVIEW

We review the trial court's findings of fact for clear error, and we review the ultimate constitutional issue in a claim of ineffective assistance of counsel de novo. *People v. Swain*, 288 Mich. App. 609, 643; 794 N.W.2d 92 (2010). When a *Ginther*[6] hearing has not occurred, as here, our review is limited to mistakes apparent on the record. *People v. Payne*, 285 Mich. App. 181, 188; 774 N.W.2d 714 (2009).

2. ANALYSIS AND APPLICATION

Both the Michigan Constitution of 1963 and the United States Constitution "require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v. Trakhtenberg*, 493 Mich. 38, 51; 826 N.W.2d 136 (2012). For a new trial to be warranted, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id.*

There is a strong presumption that counsel's performance "was born from a sound trial strategy." *Id.* at 52. A court must consider whether the strategic choices were made after an incomplete investigation and whether a choice was reasonable to the extent that reasonable professional judgments support the limitations on the investigation. *Id.* Defense counsel is not required to make frivolous or meritless motions. *People v. Knapp*, 244 Mich. App. 361, 386; 624 N.W.2d 227 (2001).

***7** Defendant cannot show that his counsel was ineffective for refusing to challenge the voluntariness and knowingness of defendant's confession because the confession was admissible, and because defense counsel did in fact attempt to suppress the confession. Defense counsel did challenge the admissibility of defendant's second confession. The trial court, in its opinion and order, discussed whether defendant's waiver was made knowingly, intelligently, and voluntarily. Defendant's argument that trial counsel was ineffective for failing to raise a Sixth Amendment challenge to the confession is contrary to the record. In addition, defense counsel is not required to make frivolous or meritless motions. *Id.* To the extent that defendant is arguing that defense counsel failed to provide effective assistance by not challenging his confession on Fifth Amendment grounds, or by not specifically arguing that defendant's alleged mental illness prevented him from making a knowing, intelligent, or voluntary confession, defendant's argument is meritless because none of those arguments would have prevailed, as discussed earlier in this opinion. Therefore, trial counsel was not ineffective.

A defendant must also show that a different result would be reasonably probable but for defense counsel's error. *Trakhtenberg*, 493 Mich. at 56. The burden may be met even if the errors cannot be shown by a preponderance of the evidence to have determined the outcome. *Id.* In cases where there is relatively little evidence to support a finding of guilt, the magnitude of errors to find prejudice is less than where there is greater evidence supporting a finding of the defendant's guilt. *Id.*

There was no prejudice to defendant in this case. Prejudice occurs when it is reasonably probable that defendant would not have been convicted but for defense counsel's error. *Id.* In this case, defendant made an earlier confession to the police. In that confession, defendant admitted to killing the

victim. The evidence from the first confession combined with the forensic evidence would have been sufficient to convict defendant because defendant admitted to killing the victim and the physical evidence showed that the victim had been murdered. Therefore, even if defense counsel had erred, defendant would not be entitled to relief because he did not suffer prejudice.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 1816005

Footnotes

1 Defendant also argues that there is insufficient evidence for his torture conviction because there is not sufficient evidence that he poured salt in the victim's wounds. For the reasons discussed already, the jury had sufficient evidence to convict defendant of torture regardless of the salt. Defendant, in his confession, stated that if he did pour salt in the victim's wounds, he did not remember it. However, salt was found on the victim's body, and when it was analyzed, two compounds commonly found in table salt were in it. Therefore, there was also sufficient evidence that defendant poured salt in the victim's wounds.

2 Defendant claimed that the victim told others to tell defendant that he would skin the victim in the street and kill his family.

3 Defendant's argument that a voluntary manslaughter instruction was appropriate because the victim threw metal filings at defendant after the assault began is meritless because the victim's use of force was in self-defense. Defendant was the initial aggressor in the encounter, and he had stabbed the victim multiple times. Although an initial aggressor may sometimes claim that the act was one of voluntary manslaughter, *People v. Reese*, 491 Mich. 127, 150-153; 815 N.W.2d 85 (2012), in this case defendant was in the victim's home, and attacked the victim repeatedly. In addition, defendant admitted that throwing the metal filings was the only time the victim fought back.

4 *Miranda v. Arizona*, 384 U.S. 436, 469-473; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966).

5 Defendant was arraigned before the second confession took place.

6 *People v. Ginther*, 390 Mich. 436, 443; 212 N.W.2d 922 (1973).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Danell Dupriest JERNAGIN, Defendant–Appellant.

Docket No. 316615.
|
Jan. 27, 2015.

Oakland Circuit Court; LC No.2012–241497–FC.

Before: MURRAY, P.J., and SAAD and K.F. KELLY, JJ.

Opinion

PER CURIAM.

***1** A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(*ii*) (relationship with a victim at least 13 but less than 16 years of age). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to a prison term of 30 to 75 years for each conviction, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant was convicted of sexually assaulting his teenage stepdaughter. The victim described three separate incidents in which defendant sexually abused her in the family home during a period spanning the Thanksgiving holiday in 2011 through February 2012. After defendant was bound over for trial following a preliminary examination, he requested a polygraph examination, which was conducted in September 2012. Defense counsel was not present during the polygraph examination. Deputy Christopher Lanfear, the officer who conducted the examination, testified at trial that defendant admitted engaging in sexual activity with the victim, but claimed that the activity was consensual and was initiated by the victim, and that the victim was lying about the dates.

I. THE POLYGRAPH EXAMINATION

Defendant presents several arguments relating to the polygraph examination procedure and the admission at trial of his statements made during the polygraph examination. Although defendant did not object to the admission of his statements at trial, he raised his arguments in a postjudgment motion for a new trial, which the trial court denied. In *People v. Terrell,* 289 Mich.App 553, 558–559; 797 NW2d 684 (2010), this Court set forth the following standards for reviewing a trial court's decision to grant or deny a motion for a new trial:

> We review for an abuse of discretion a trial court's decision to grant or deny a new trial. *People v. Miller,* 482 Mich. 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v. Blackston,* 481 Mich. 451, 467; 751 NW2d 408 (2008). Underlying questions of law are reviewed de novo, *People v. Washington,* 468 Mich. 667, 670–671; 664 NW2d 203 (2003), while a trial court's factual findings are reviewed for clear error, MCR 2.613(C); *People v. Cress,* 468 Mich. 678, 691; 664 NW2d 174 (2003). "A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice." *People v. Jones,* 236 Mich.App 396, 404; 600 NW2d 652 (1999), citing MCR 6.431(B).

Because defendant was charged with first-degree CSC, he was permitted to request a polygraph examination under MCL 776.21(5). Defendant does not dispute that he requested the polygraph examination, and he agrees that statements made while submitting to a polygraph examination are generally admissible. See *People v. Ray,* 431 Mich. 260, 267–268; 430 NW2d 626 (1988). He contends, however, that the prosecution and the police abused that opportunity to obtain statements from him that were not knowingly, intelligently, and voluntarily made.

***2** Both the state and federal constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. Statements made by an accused while subject to custodial interrogation are not admissible unless,

prior to the questioning, the accused is warned (1) that he has a right to remain silent, (2) that his statements could be used against him, and (3) that he has the right to counsel. The accused must have voluntarily, knowingly, and intelligently waived his rights. *Miranda v. Arizona,* 384 U.S. 436, 467; 86 S Ct 1602; 16 L.Ed.2d 694 (1966); *People v. Daoud,* 462 Mich. 621, 633; 614 NW2d 152 (2000); *People v. Harris,* 261 Mich.App 44, 55; 680 NW2d 17 (2004).

We reject defendant's argument that the polygraph interrogation was conducted in violation of his Sixth Amendment right to counsel. The right to counsel is also guaranteed under both the Fifth and Sixth Amendments of the United States Constitution. US Const, Am V, Am VI. See also Const 1963, art 1, §§ 17, 20. The Sixth Amendment right to counsel attaches once criminal proceedings have been initiated. *Moore v. Illinois,* 434 U.S. 220, 231; 98 S Ct 458; 54 L.Ed.2d 424 (1977). Defendant had already been arraigned and a preliminary examination had already been held by the time defendant requested the polygraph examination in September 2012. Therefore, defendant's Sixth Amendment right to counsel, which includes the right to the effective assistance of counsel, had attached before the polygraph interrogation. *Strickland v. Washington,* 466 U.S. 668, 687–688; 104 S Ct 2052; 80 L.Ed.2d 674 (1984); *People v. Frazier,* 478 Mich. 231, 244 n 11; 733 NW2d 713 (2007). Once the Sixth Amendment right to counsel has attached, it may still be waived. *Montejo v. Louisiana,* 556 U.S. 778, 786–787; 129 S Ct 2079; 173 L.Ed.2d 955 (2009).

A valid waiver must be voluntary, knowing, and intelligent. *People v. McElhaney,* 215 Mich.App 269, 274; 545 NW2d 18 (1996). "Whether a waiver is voluntary was determined by examining police conduct, but the determination whether it was made knowingly and intelligently depends, in part, on the defendant's capacity." *People v. Tierney,* 266 Mich.App 687, 707; 703 NW2d 204 (2005). "The existence of a knowing and intelligent waiver of the Sixth Amendment right to counsel depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *McElhaney,* 215 Mich.App at 274. Observing the requirements for *Miranda* warnings under the Fifth Amendment is generally sufficient to ensure that a defendant's waiver of his right to counsel during post-indictment questioning is knowing and intelligent.[1] *Id.* at 275–277, citing *Patterson v. Illinois,* 487 U.S. 285, 298–300; 108 S Ct 2389; 101 L.Ed.2d 261 (1988). See also *Montejo,* 556 U.S. at 786–787. An officer is not required to advise the defendant of the gravity of his position and the urgency of his need for a lawyer. *McElhaney,* 215 Mich.App at 276.

***3** It was defendant who initiated the police interrogation by requesting the polygraph examination. The record does not support defendant's claim that he did not knowingly agree to be interrogated or interviewed without his attorney present. Defense counsel testified at a posttrial evidentiary hearing that he advised defendant of the process involved in submitting to a polygraph examination, which included a waiver of his rights to remain silent and the right to the assistance of counsel during the examination process. Consistent with this testimony, defense counsel submitted a copy of a letter that he sent to the prosecutor requesting the polygraph examination, which included counsel's statement that he had advised defendant that he would have to sign a form waiving his rights in order to take the examination.

The record also supports the trial court's finding that defendant was provided with an advice-of-rights form at the time of the police interview, which notified defendant of his right to remain silent and his right to counsel. The record does not, however, support defendant's contention that he was unable to read and understand the form. Defense counsel testified that he provided defendant with all of the discovery materials, and defendant never mentioned that he was unable to read or write. On the contrary, defendant demonstrated an ability to read and write during trial when he communicated with defense counsel with notes, some of which referred to preliminary examination testimony.

Accordingly, the record supports the trial court's finding that defendant made a knowing and intelligent waiver of his right to counsel and right to remain silent when he agreed to a polygraph examination.

Defendant also argues that his statements during the police interrogation were not voluntary because the police improperly used the polygraph procedure to coerce his admissions. In *Tierney,* 266 Mich.App at 707–708, this Court explained:

> The right against self-incrimination is guaranteed by both the United States Constitution and the Michigan Constitution. US Const, Am V; Const 1963, art 1, § 17; *People v. Cheatham,* 453 Mich. 1, 9; 551 NW2d 355

(1996) (opinion by BOYLE, J.). Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives that Fifth Amendment right. *Miranda, supra* at 444.

* * *

... In determining voluntariness, the court should consider all the circumstances, including: "[1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse." *People v. Cipriano,* 431 Mich. 315, 334; 429 NW2d 781 (1988). No single factor is determinative. [*People v. Sexton,* 461 Mich, 746, 753; 609 NW2d 822 (2000).] "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano, supra* at 334. [Bracketed numbers in original.]

***4** It was undisputed before the trial court that it was defendant who initiated the police questioning by requesting the polygraph examination. Moreover, the trial court recognized that defendant had prior experience with the criminal justice system and knew that he did not have to talk to the police, and knew that he could invoke his right to counsel or to remain silent. The record also supports the conclusion that defendant had the ability to read and write. There was no evidence that defendant was ill, under the influence of any drugs or alcohol, deprived of medication, physically abused, threatened, hungry, or sleep-deprived at the time of the interview. Defendant does not dispute that he was provided with a form before the interview that advised him of his rights and that he was given an opportunity to review the form. There is no evidence that the interview was unduly long. In sum, there is no record support for defendant's argument that the police used the polygraph examination procedure to coerce an otherwise voluntary confession. The trial court did not err.

Defendant further contends that he should have been allowed to have his attorney present during the polygraph examination, either in the room where the interview occurred or in another room where counsel could observe the interview over a closed-circuit television. As previously explained, defendant had the right to counsel, but validly waived that right. Although defendant had a statutory right to a polygraph examination, he was not allowed to dictate how the examination should be conducted. Once he requested the examination, he was subject to the police agency's procedures. See *People v. Manser,* 250 Mich.App 21, 31–32; 645 NW2d 65 (2002), overruled on other grounds in *People v. Miller,* 482 Mich. 540, 561 n 26; 759 NW2d 850 (2008). Moreover, defendant had conferred with defense counsel before the examination, and he did not assert his right to counsel to stop the examination before or during the interview. Accordingly, defendant is not entitled to relief on this basis.

Finally, defendant challenges the admission of his statements on the basis that the interview was not recorded by the police. Defendant was interviewed on September 18, 2012. At that time, this state did not require a custodial interrogation to be recorded as an element of due process.[2] *People v. Geno,* 261 Mich.App 624, 627; 683 NW2d 687 (2004); *People v. Fike,* 228 Mich.App 178, 184; 577 NW2d 903 (1998). Accordingly, the failure to record defendant's interview did not preclude the admission at trial of any statements made during the interview.

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to this issue.

II. PROSECUTORIAL ERROR

Defendant next argues that the prosecutor's conduct related to defendant's decision to request a polygraph examination, and to use any statements that defendant made during the examination at trial, deprived him of a fair trial. Claims of prosecutorial error are decided case by case and the challenged conduct must be considered in context. *McElhaney,* 215 Mich.App at 283. The test for prosecutorial misconduct is whether the defendant was denied a fair trial.

People v. Bahoda, 448 Mich. 261, 266–267; 531 NW2d 659 (1995).

***5** Defendant reiterates that he did not waive his right to counsel or his right against self-incrimination when he agreed to the polygraph examination. He appears to argue that the prosecutor engaged in misconduct by somehow convincing him to take the polygraph examination and misusing that process. As previously indicated, it was defendant who elected to exercise his statutory right to a polygraph examination, and the record demonstrates that defendant knowingly and intelligently waived his right to remain silent and his right to the assistance of counsel when he agreed to the polygraph examination. His statements made during the examination were also voluntarily made. Accordingly, the trial court did not err in rejecting defendant's claim of misconduct associated with the decision to submit to the polygraph examination.

Defendant also argues that the prosecutor engaged in misconduct by the manner in which he questioned Deputy Lanfear about defendant's statements. Prosecutorial error may not be predicated on good-faith efforts to admit evidence. *People v. Noble,* 238 Mich.App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the trial court, so long as it does not prejudice the defendant. *Id.* at 660–661. At trial, the prosecutor questioned Deputy Lanfear about his interviewing method. Lanfear explained that he did not ask specific questions, but allowed defendant to tell his side of the story after Lanfear informed defendant that he was aware of the investigation. The prosecutor then followed up and asked Lanfear about a technique he used to evaluate defendant's side of the story, which involved paying attention to defendant's account. Deputy Lanfear found it significant that defendant focused on blaming the victim rather than professing his innocence. The trial court briefly excused the jury out of concern that Lanfear's testimony was suggestive of some type of scientific technique. When the jury returned, the trial court further questioned Lanfear who clarified that there was no scientific basis for concluding that a person is lying if they continually blame the other person.

Defendant does not dispute that neither the prosecutor nor Lanfear ever referred to a polygraph examination at trial. To the extent that the prosecutor's questioning may have suggested that Lanfear's testimony was based on some scientific method for determining whether defendant was being truthful, any perceived prejudice was cured when the trial court intervened to clarify that Lanfear was only explaining his interviewing technique, and not suggesting that there was a scientific basis for determining whether defendant was lying. Accordingly, the prosecutor's questions did not deprive defendant of a fair trial, and the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to this issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

***6** Defendant raises two arguments of ineffective assistance of counsel, one of which was raised before and decided by the trial court. We review the trial court's findings of fact in relation to a claim of ineffective assistance of counsel for clear error. *People v. LeBlanc,* 465 Mich. 575, 579; 640 NW2d 246 (2002). Whether those facts satisfy the test for ineffective assistance of counsel involves a question of constitutional law, which we review de novo. *Id.* To the extent that defendant raises an ineffective assistance of counsel claim that was not raised in the trial court, our review is limited to errors apparent from the record. *People v. Matuszak,* 263 Mich.App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and resulting prejudice. *People v. Pickens,* 446 Mich. 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v. Tommolino,* 187 Mich.App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v. Johnson,* 451 Mich. 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v. Hoag,* 460 Mich. 1, 6; 594 NW2d 57 (1999).

A. FAILURE TO FILE A MOTION TO SUPPRESS

Defendant argues that defense counsel was ineffective for not moving to suppress defendant's statements made during the polygraph examination interview, and for not ensuring that defendant understood the polygraph procedure.

As explained in section I, there is no basis for concluding that defendant's statements during the polygraph examination interview were inadmissible. Further, the record does not support defendant's argument that he was not adequately advised of the polygraph procedure, including that he would be waiving his right to remain silent and his right to the assistance of counsel during the polygraph examination. The trial court found that defendant was able to read and write, that defendant was advised of his rights in the form that Deputy Lanfear provided to him at the time of the polygraph examination. The court also found that defense counsel's testimony at the evidentiary hearing established that "[d]efendant was advised of the ramifications of his agreeing to take the polygraph examination, and that he waived his right against self-incrimination." These findings are supported by the evidence of defendant's written communications with defense counsel, the testimony of Deputy Lanfear and Detective Buchmann regarding the advice-of-rights form that was provided to defendant before the polygraph examination, and defense counsel's testimony at the evidentiary hearing. Accordingly, the trial court did not err in finding that "[d]efense counsel did not have an argument to make that would have persuaded the Court that the statements were inadmissible." Counsel is not ineffective for failing to file a futile motion. *People v. Darden,* 230 Mich.App 597, 605; 585 NW2d 27 (1998).

B. EXPERT TESTIMONY

***7** Defendant lastly argues that defense counsel was ineffective for not calling an expert witness to testify regarding the "usual hallmarks" of pedophiles or a predatory relationship, to show that defendant did not engage in such behavior with the victim. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v. Payne,* 285 Mich.App 181, 190; 774 NW2d 714 (2009). A defendant has a heavy burden to overcome the presumption that counsel employed effective trial strategy. *Id.* The failure to call a witness will generally constitute ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *Id.*

Defendant has not established any factual support for this argument. This Court previously denied defendant's motion to remand with respect to this issue because defendant did not offer any proposed expert testimony or even identify a possible expert. Without such evidence, defendant's claim that an expert witness could have provided favorable testimony in merely speculative. *Id* . Defendant has also not established a reasonable probability that the outcome of the trial would have been different if an expert had testified. Although defendant again requests that this Court remand this matter to allow him to further develop the record regarding this issue, because defendant has not made an appropriate offer of proof, such as submitting an affidavit from a proposed expert summarizing any proposed testimony, defendant has not demonstrated that a remand is warranted.

Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 340127

Footnotes

1 Defendant's reliance on *People v. Williams,* 470 Mich. 634, 641; 683 NW2d 597 (2004), as setting forth the test for a valid waiver of the right to counsel is misplaced. That case addresses waivers of counsel when a defendant elects to represent himself at trial. In *McElhaney,* 215 Mich.App at 275, this Court observed that a more formal inquiry is required before a defendant may waive his right to counsel at a trial than is required for a waiver for purposes of post-indictment questioning.

2 MCL 763.8, as added by 2012 PA 479, effective March 28, 2013, now requires that custodial interrogations be recorded in certain specified circumstances.

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2023 WL 4845609
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Frank KING, Defendant-Appellant.

No. 162327
|
Argued on application for leave to appeal March 1, 2023
|
Decided July 28, 2023

Synopsis

Background: Defendant entered a no-contest plea in the Circuit Court, Macomb County, Joseph Toia, J., to breaking and entering as a fourth-offense habitual offender in exchange for a *Cobbs* agreement that capped the minimum sentence imposed at 72 months, to be served concurrently with the sentence he was serving in his other case. Defendant sought leave to appeal his conviction, and the Court of Appeals denied his delayed application for leave to appeal. Defendant sought leave to appeal. The Supreme Court, 505 Mich. 851, 934 N.W.2d 279, remanded. On remand, the Court of Appeals, 2020 WL 6117685, affirmed, and defendant sought leave to appeal.

Holdings: The Supreme Court, Bolden, J., held that:

[1] forfeiture doctrine does not apply when self-represented defendant fails to object when trial court fails to obtain a valid waiver of the right to counsel;

[2] defendant's purported waiver of counsel was invalid because trial court failed to comply with factors set forth in *People v Anderson,* 398 Mich. 361, 247 N.W.2d 857, and court rule governing appointment or waiver of lawyer; and

[3] defendant was denied his right to counsel during most of the critical stages of the proceedings, and thus, the error was subject to automatic reversal.

Reversed and remanded.

Viviano, J., concurred dubitante and filed opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (29)

[1] **Criminal Law** Counsel for accused

Forfeiture doctrine does not apply when a self-represented defendant fails to object when the trial court fails to obtain a valid waiver of the right to counsel. U.S. Const. Amend. 6.

[2] **Criminal Law** Counsel for Accused

Absent a defendant's valid waiver of his right to counsel, deprivation of counsel during critical stages of the criminal proceedings is a structural error subject to automatic reversal, even when a defendant formally requests to represent himself. U.S. Const. Amend. 6.

[3] **Criminal Law** Representations, promises, or coercion; plea bargaining

Accepted plea offers in which the parties exchange specific sentencing information when formulating their plea agreement are colloquially known as "*Cobbs* agreements" pursuant to *People v Cobbs*, 443 Mich. 276, 505 N.W.2d 208, holding that, at the request of a party, before the trial court enters a plea agreement the court may state on the record, based on the information then available to the court, the length of the sentence that appears to be appropriate for the charged offense.

[4] **Estoppel** Waiver Distinguished

Estoppel Nature and elements of waiver

Whereas "forfeiture" is the failure to make the timely assertion of a right, "waiver" is the intentional relinquishment or abandonment of a known right.

[5] **Criminal Law** Presentation of questions in general

"Waiver" extinguishes a known right, as well as any right to pursue an alleged error on appeal.

[6] **Criminal Law** Presentation of questions in general

When litigant fails to timely assert a right or object to an alleged error, it is deemed to be "forfeited," but the error is not extinguished.

[7] **Criminal Law** Prejudice to rights of party as ground of review

Preserved structural errors are a limited class of constitutional errors that are not subject to harmless-error analysis, but are instead subject to automatic reversal.

[8] **Criminal Law** Prejudice to rights of party as ground of review

Defining feature of a "structural error" is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

[9] **Criminal Law** Prejudice to rights of party as ground of review

Purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial.

[10] **Criminal Law** Constitutional questions

Unpreserved constitutional errors, including structural errors, are reviewed for plain error affecting substantial rights.

[11] **Criminal Law** Burden of showing error

Forfeited structural error creates a formal presumption that "prejudice" prong of the plain-error standard has been satisfied, and formal rebuttable presumption in cases of forfeited structural error shifts the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding, and in such instances, the prosecutor must present specific facts that affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved.

[12] **Criminal Law** Penalty, potential or actual

Criminal Law Critical stages

Right to the assistance of counsel at all critical stages of criminal proceedings for an accused facing incarceration is protected by the Sixth Amendment, applicable to the States through the Fourteenth Amendment. U.S. Const. Amends. 6, 14.

[13] **Constitutional Law** Fourteenth Amendment in general

Criminal Law In general; right to appear pro se

The right to self-representation is protected by the Sixth and Fourteenth Amendments. U.S. Const. Amends. 6, 14.

[14] **Criminal Law** Right of Defendant to Counsel

Criminal Law In general; right to appear pro se

Both the right to self-representation and the right to counsel are protected by the Michigan Constitution. Mich. Const. art. 1, §§ 13, 20.

[15] **Criminal Law** Critical stages

Trial is a "critical stage" of criminal proceedings for which defendant has the right to the assistance of counsel. U.S. Const. Amend. 6.

[16] **Criminal Law** Guilty pleas; plea negotiations, plea hearings, motion to withdraw

Plea hearing qualifies as a "critical stage" of trial for which defendant has the right to the assistance of counsel. U.S. Const. Amend. 6.

[17] **Criminal Law** In general; right to appear pro se

Choosing self-representation necessarily requires waiving right to be represented by counsel. U.S. Const. Amend. 6.

[18] **Criminal Law** Capacity and requisites in general

Constitution requires a defendant to give a knowing, voluntary, and intelligent waiver of the right to counsel in order to exercise the right to self-representation. U.S. Const. Amend. 6.

[19] **Criminal Law** Capacity and requisites in general

Criminal Law Waiver of right to counsel

Before granting a defendant's request to proceed in propria persona, a trial court must substantially comply with the factors set forth in *People v Anderson,* 398 Mich. 361, 247 N.W.2d 857, and court rule governing appointment or waiver of a lawyer in order for a defendant to effectuate a valid waiver of the right to counsel. U.S. Const. Amend. 6; Mich. Ct. R. 6.005(D).

[20] **Criminal Law** Capacity and requisites in general

Before granting defendant's request to proceed in propria persona, a trial court must substantially comply with the factors set forth in *People v Anderson*, 398 Mich. 361, 247 N.W.2d 857, and under *Anderson*, the trial court must find that the following three factors have been met: (1) the defendant's request to represent himself is unequivocal; (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation; and (3) the defendant's self-representation will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. U.S. Const. Amend. 6.

[21] **Criminal Law** Validity and sufficiency, particular cases

Criminal Law Waiver of right to counsel

Choosing self-representation necessarily required waiving the right to be represented by counsel, and defendant's purported waiver of counsel was invalid because trial court failed to comply with factors set forth in *People v Anderson,* 398 Mich. 361, 247 N.W.2d 857, and court rule governing appointment or waiver of a lawyer. U.S. Const. Amend. 6; Mich. Ct. R. 6.005(D).

[22] **Criminal Law** In general; right to appear pro se

Right to counsel, unlike the right to a public trial, is a fundamental right that cannot be forfeited and is preserved absent a personal waiver. U.S. Const. Amend. 6.

[23] **Criminal Law** In general; right to appear pro se

Defendant need not affirmatively invoke his right to counsel in order to preserve that right; the right is preserved absent a personal and informed waiver, and it is not forfeitable. U.S. Const. Amend. 6.

[24] **Criminal Law** In general; right to appear pro se

When there is an invalid waiver of a defendant's right to counsel, the defendant remains entitled to full representation at each critical stage of the criminal proceedings. U.S. Const. Amend. 6.

[25] **Criminal Law** Appointment; waiver; appearance pro se

Criminal Law Validity and sufficiency, particular cases

Because self-represented defendant's waiver of counsel was invalid and occurred before his trial began, defendant was denied his right to counsel during most of the critical stages of the proceedings, including at trial, and thus, the error was subject to automatic reversal. U.S. Const. Amend. 6.

[26] **Criminal Law** Nature and effect of plea

Valid no-contest plea at a later stage of proceedings does not necessarily or fully cure the deficiencies at the earlier waiver-of-counsel stage, especially with respect to whether defendant should have known to object to the deficient waiver. U.S. Const. Amend. 6.

[27] **Criminal Law** Requisites and Proceedings for Entry

Focus of plea hearing is to ensure the plea is entered understandingly, voluntarily, and accurately. Mich. Ct. R. 6.302.

[28] **Criminal Law** Nature and effect of plea

Criminal Law Validity and sufficiency, particular cases

Self-represented defendant's invalid waiver of his right to counsel was not extinguished by defendant's eventual plea agreement and by fact that his standby counsel acted as his trial counsel; defendant's no-contest plea at a later stage of proceedings did not necessarily or fully cure the deficiencies at the earlier waiver-of-counsel stage, whether defendant understood his right to counsel and properly waived that right was not addressed by trial court when it granted defendant's request to represent himself, and standby counsel was not constitutionally sufficient. U.S. Const. Amend. 6.

[29] **Criminal Law** Counsel for accused

Criminal Law In general; right to appear pro se

Self-represented defendant was not required to affirmatively invoke his Sixth Amendment right to counsel in order to preserve that right, and he was not required to object to the invalid waiver of the right to counsel; forfeiture doctrine did not apply. U.S. Const. Amend. 6.

BEFORE THE ENTIRE BENCH

OPINION

Bolden, J.

[1] **[2]** This case concerns whether the forfeiture doctrine articulated in *People v Carines*, 460 Mich. 750, 597 N.W.2d 130 (1999), applies where a self-represented defendant fails to object when the trial court fails to obtain a valid waiver of the right to counsel. We hold it does not. Absent a defendant's valid waiver of their right to counsel, deprivation of counsel during critical stages of the criminal proceedings is a structural error subject to automatic reversal, even when a defendant formally requests to represent themself.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged with breaking and entering as a fourth-offense habitual offender. The trial court appointed counsel for defendant. A few months before trial, defendant moved the trial court to terminate his relationship with his appointed attorney, and he requested to proceed *in propria persona*. The trial court held a hearing on the motion on March 22, 2018. At the hearing, defendant claimed that defense counsel had failed to pursue his previously filed pro se motions, adequately investigate defenses he wished to pursue, and represent him in the way that he requested. Defense counsel responded that he could not endorse any of the motions that defendant had filed on his own behalf and that defendant would have to either engage a different

attorney who was willing to pursue the motions or represent himself. [1] During the hearing to determine whether defendant could represent himself, the following exchange between the trial court and defendant occurred:

> ***3** *The Court*: How do you want to proceed, [defendant], because I'm not going to appoint another attorney. You've already been through several. This matter is set for trial.
>
> [*Defendant*]: I'll proceed in pro per, your Honor.
>
> *The Court*: All right. I'm going to keep [defense counsel] on for advisory, as advisory counsel only.
>
> [*Defense Counsel*]: Very well.
>
> *The Court*: Be prepared to try your case, sir.
>
> [*Defendant*]: Yes, sir. Thank you, your Honor.

Following this exchange, the trial court granted defendant's request to represent himself. However, the trial court ordered defendant's now former defense counsel to act as advisory counsel to defendant. Trial was scheduled to begin approximately six weeks later, on May 1, 2018.

[3] At a subsequent pretrial hearing held in April 2018, the prosecutor indicated that defendant did not wish to enter a plea. The prosecutor estimated that, if defendant were to be found guilty as charged, his sentencing guidelines would reflect a minimum sentence range of 72 to 240 months' imprisonment, and the prosecutor would request that defendant be sentenced to a minimum prison term of 15 to 20 years, or 180 to 240 months. Before the hearing, the prosecutor suggested to advisory counsel that the court might consider a *Cobbs* [2] agreement, which could result in a sentence running concurrently with a sentence that defendant was already serving for an unrelated conviction. [3] However, at that time, defendant was not interested in this *Cobbs* agreement and wished to proceed to trial.

On the first day of trial, following jury selection, preliminary instructions, opening statements, and some witness testimony, defendant decided to enter a plea. He entered a no-contest plea in exchange for a *Cobbs* agreement that capped the minimum sentence imposed at 72 months, to be served concurrently with the sentence he was serving in his other case. Advisory counsel apparently handled the details of the sentencing arrangement that were understood to be part of the *Cobbs* agreement. The plea colloquy included multiple references to the advisory attorney as defendant's "attorney," although the court also noted that defendant represented himself. At the sentencing hearing, advisory counsel indicated that he had spent a great deal of time working out the *Cobbs* agreement, and defendant was sentenced consistent with that agreement.

***4** Defendant sought leave to appeal his conviction, and the Court of Appeals denied his delayed application for leave to appeal. *People v King*, unpublished order of the Court of Appeals, entered February 20, 2019 (Docket No. 346559). Defendant then sought leave to appeal in this Court, and we remanded the case to the Court of Appeals as on leave granted "to address: (1) whether the defendant's waiver of his Sixth Amendment right to counsel was constitutionally valid; and (2) if so, what effect, if any, the defendant's subsequent no contest plea had on that waiver." *People v King*, 505 Mich. 851, 934 N.W.2d 279 (2019).

On remand, the Court of Appeals affirmed. *People v King*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2020, 2020 WL 6117685 (Docket No. 346559). To obtain relief, the Court of Appeals determined that defendant was required to establish: (1) the error had occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence. *Id.* at 7, citing *Carines*, 460 Mich. at 763-764, 597 N.W.2d 130.

Applying the *Carines* test, the Court of Appeals held that the first three factors of the test were met. The purported waiver of counsel was invalid and thus constituted plain error because the trial court had "failed to comply with the substance of [*People v Anderson*, 398 Mich. 361, 247 N.W.2d 857 (1976),] and the court rule, [MCR 6.005(D)] ...." *King*, unpub. op. at 8. The plain error also affected defendant's substantial rights. See *id.* However, the panel opined that the "underlying purposes" of the right to counsel were upheld during the *Cobbs* plea because "defense counsel played a significant role in the plea process" and thus defendant had "actually reaped the benefits of being represented by counsel despite purporting to represent himself." *Id.* at 10. [4] Further, defendant showed some

knowledge of his rights by citing *Faretta v California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), and echoing this Court's language in *Anderson*, 398 Mich. at 367-368, 247 N.W.2d 857. For these reasons, the panel held that the fourth prong had not been met, recognizing that "[r]eversal is not justified under the fourth *Carines* prong if the 'underlying purposes' of the right at issue have been alternatively upheld." *King*, unpub. op. at 8-9, quoting *People v Cain*, 498 Mich. 108, 119, 869 N.W.2d 829 (2015). Judge SWARTZLE concurred *dubitante*, agreeing that the majority correctly applied the *Carines* plain-error test but noting the absurdity of requiring a defendant, who is requesting to proceed *in propria persona*, to object in order to preserve the appellate right to challenge the waiver of legal counsel. See *King* (SWARTZLE, J., concurring *dubitante*), unpub. op. at 1-2.

Defendant sought leave to appeal in this Court. In response, we ordered oral argument on the application, directing the parties to address (1) whether the Court of Appeals erred by concluding that the trial court's failure to comply with the requirements of *Anderson* and MCR 6.005(D) did not warrant reversal, and (2) whether the standard of review for unpreserved constitutional errors from *Carines* should apply when a criminal defendant argues on appeal that their waiver of counsel was invalid. *People v King*, 508 Mich. 938, 938-939, 957 N.W.2d 797 (2021).

II. ANALYSIS

A. FORFEITURE v WAIVER

[4] [5] [6] [7] [8] [9] The United States Supreme Court has made clear that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993), quoting *Johnson v Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). A waiver extinguishes the right, as well as any right to pursue an alleged error on appeal. See *Olano*, 507 U.S. at 733, 113 S.Ct. 1770; see also *People v Carter*, 462 Mich. 206, 215, 612 N.W.2d 144 (2000) ("One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.") (quotation marks and citation omitted). On the other hand, when a litigant fails to timely assert a right or object to an alleged error, it is deemed to be *forfeited*, but the error is not extinguished. *Id.* at 215, 612 N.W.2d 144; *Olano*, 507 U.S. at 733, 113 S.Ct. 1770. Notably, preserved structural errors [5] are a limited class of constitutional errors that are not subject to harmless-error analysis, see *Arizona v Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991), but are instead subject to automatic reversal, *Neder v United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999).

***5 [10] [11]** As properly recognized by the Court of Appeals, unpreserved constitutional errors, including structural errors, are reviewed for plain error affecting substantial rights. See *Carines*, 460 Mich. at 764, 597 N.W.2d 130. This Court recently modified the *Carines* "plain error" test as applied to unpreserved structural errors in *People v Davis*, 509 Mich. 52, 67-68, 983 N.W.2d 325 (2022). In addressing the third prong, also known as the prejudice prong, the *Davis* Court held that "a forfeited structural error creates a formal presumption that this prong of the plain-error standard has been satisfied." *Id.* at 75, 983 N.W.2d 325. "The formal rebuttable presumption in cases of forfeited structural error ... shift[s] the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding." *Id.* at 76, 983 N.W.2d 325. In such instances, the prosecutor must present specific facts that "affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved." *Id.*

B. RIGHT TO COUNSEL

[12] [13] [14] [15] [16] The right to the assistance of counsel at all critical stages of criminal proceedings for an accused facing incarceration is protected by the Sixth Amendment, applicable to the states through the Fourteenth Amendment. *People v Williams*, 470 Mich. 634, 641, 683

N.W.2d 597 (2004), citing *Maine v Moulton*, 474 U.S. 159, 170, 106 S.Ct. 477, 88 L.Ed. 2d 481 (1985), and *Gideon v Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); see also U.S. Const., Ams. VI and XIV. The right to self-representation is also protected by the Sixth and Fourteenth Amendments. See *Faretta*, 422 U.S. at 818-821, 95 S.Ct. 2525. Additionally, both the right to self-representation and the right to counsel are protected by the Michigan Constitution. Const. 1963, art. 1, §§ 13 and 20. Trial is a critical stage of criminal proceedings. *People v Russell*, 471 Mich. 182, 187-188, 684 N.W.2d 745 (2004). A plea hearing also qualifies as a critical stage. *Iowa v Tovar*, 541 U.S. 77, 87, 124 S.Ct. 1379, 158 L.Ed. 2d 209 (2004).

[17] [18] [19] [20] [21] Choosing self-representation necessarily requires waiving the right to be represented by counsel. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525. Therefore, the Constitution requires a defendant to give a "knowing, voluntary, and intelligent" waiver of the right to counsel in order to exercise the right to self-representation. *Tovar*, 541 U.S. at 87-88, 124 S.Ct. 1379. Before granting a defendant's request to proceed *in propria persona*, a trial court must substantially comply with the factors set forth in *Anderson*, 398 Mich. at 367-368, 247 N.W.2d 857, and MCR 6.005(D) for a defendant to effectuate a valid waiver of the right to counsel. *Russell*, 471 Mich. at 191-192, 684 N.W.2d 745. Under *Anderson*, 398 Mich. at 367-368, 247 N.W.2d 857, the trial court must find that the following three factors have been met: (1) the defendant's request to represent themself is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." Additionally, MCR 6.005(D) provides that the trial court "may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first":

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

C. FORFEITURE OF THE RIGHT TO COUNSEL

The first issue we address is the applicable standard of review when a defendant requests to represent themself but fails to object to an invalid waiver of their right to counsel.[6] It is undisputed that defendant's waiver of his right to counsel was invalid.

***6** The crucial question here is whether a defendant may forfeit the right to counsel. In *People v Vaughn*, 491 Mich. 642, 654-655, 821 N.W.2d 288 (2012), this Court addressed the application of the *Carines* forfeiture rule to the right to public trial. We held that the *Carines* forfeiture doctrine was applicable to unpreserved issues involving violations of the Sixth Amendment public-trial right because, although structural in nature, this right was not one of those few rights that cannot be waived absent informed personal consent. See *id.* at 655-657, 664, 821 N.W.2d 288.

In reaching this conclusion, the *Vaughn* Court distinguished between constitutional rights that require an *affirmative* invocation and the narrow class of constitutional rights that are preserved *absent* a personal and informed waiver:

> While certain constitutional rights are preserved absent a personal waiver, those rights constitute a narrow class of foundational constitutional rights that "are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process." Indeed, each of the foundational constitutional rights that are preserved absent a personal waiver necessarily implicates a defendant's *other* constitutional rights. For example, the purpose of the right to counsel "would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution" because it is counsel's responsibility to "protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights ...." Because the right to counsel "invokes, of itself, the protection of a trial court," preservation of the right does not require an

affirmative invocation. [*Id.* at 655-657, 821 N.W.2d 288 (citations omitted).]

Vaughn concluded that a violation of the right to a public trial, which was at issue in that case, was not an error that " 'necessarily affect[ed] qualitatively the guilt-determining process or the defendant's ability to participate in the process' " and therefore was subject to preservation requirements. *Id.* at 657, 821 N.W.2d 288 (citation omitted). However, as stated, *Vaughn* recognized at the outset that a violation of the right to counsel is an error that does not require preservation. See also *id.* at 656 n 42, 821 N.W.2d 288 (stating that under *New York v Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed. 2d 560 (2000), violation of the right to counsel is a structural error that "fall[s] outside the ordinary issue preservation requirements because [it] require[s] a personal waiver"); *Vaughn*, 491 Mich. at 656 n 44, 821 N.W.2d 288 (stating that under *Hill* the right to counsel "exist[s] outside our ordinary preservation requirements").

[22] **[23]** According to *Vaughn*, the right to counsel, unlike the right to a public trial, is a fundamental right that cannot be forfeited and is preserved "absent a personal waiver." See *id.* at 655-657, 821 N.W.2d 288 ("Because the right to counsel 'invokes, of itself, the protection of a trial court,' preservation of the right does not require an affirmative invocation.") (citation omitted). Accordingly, a defendant need not affirmatively invoke their right to counsel in order to preserve that right—the right is preserved absent a personal and informed waiver, and it is not forfeitable. Therefore, without a valid waiver, a defendant *remains entitled* to the right to counsel for every critical stage of criminal proceedings. See *Russell*, 471 Mich. at 189-190, 684 N.W.2d 745 ("[A]lthough the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, 'is the standard, not the exception,' in the absence of a proper waiver.") (citation omitted).

***7** **[24]** Requiring a defendant who did not make a knowing and intelligent waiver of the right to counsel to recognize and object to their own waiver as invalid would be an impractical rule. Because "forfeiture is the failure to make the timely assertion of a right," and the right to counsel is the "standard" and "does not require an affirmative invocation," it defies logic to argue that such a right *could* be forfeited. See *id.*; *Olano*, 507 U.S. at 733, 113 S.Ct. 1770; *Vaughn*, 491 Mich. at 657, 821 N.W.2d 288. In other words, when there is an invalid waiver of a defendant's right to counsel, the defendant remains entitled to full representation at each critical stage of the criminal proceedings.

In *People v Lewis*, 501 Mich. 1, 3-4, 903 N.W.2d 816 (2017), this Court considered whether deprivation of the right to counsel during a preliminary examination entitled a defendant to automatic reversal. We concluded that *Coleman v Alabama*, 399 U.S. 1, 11, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970), controlled, narrowly holding that denial of counsel at a preliminary examination is not a structural error and is, therefore, subject to harmless-error review. *Lewis*, 501 Mich. at 3-4, 9-10, 903 N.W.2d 816. Importantly, *Lewis* differentiated the denial of counsel at a preliminary examination from denial of counsel at other critical stages of the proceedings, including the denial of counsel at trial. See *id.* at 10-11, 903 N.W.2d 816 ("*Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination.").

[25] *Lewis* is categorically different from the instant case. The defendant in *Lewis* was only denied counsel during a preliminary examination. *Id.* at 3, 903 N.W.2d 816. Harmless-error analysis applied in *Lewis* because after defendant's preliminary examination, he was found guilty beyond a reasonable doubt in an otherwise fair trial. *Id.* at 11, 903 N.W.2d 816. Here, because defendant's invalid waiver of counsel occurred before his trial began, defendant was denied his right to counsel during most of the critical stages of the proceedings. See *Williams*, 470 Mich. at 641, 683 N.W.2d 597; *Russell*, 471 Mich. at 187-188, 684 N.W.2d 745; *Tovar*, 541 U.S. at 87, 124 S.Ct. 1379.

As a result of the invalid waiver of his right to counsel, defendant was deprived of his right to counsel, at a minimum, during (1) pretrial preparations, including at least one pretrial hearing, (2) jury selection, (3) opening statements, (4) judge's instructions, and (5) direct and cross-examination of key

witnesses. Because defendant was deprived of his right to counsel at critical stages of the criminal proceedings, including at trial, the error is subject to automatic reversal. See *Gideon*, 372 U.S. at 344, 83 S.Ct. 792; *Russell*, 471 Mich. at 194 n 29, 684 N.W.2d 745 ("The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal.").

[26] [27] [28] We are unpersuaded by the prosecutor's remaining arguments that defendant is not entitled to relief because any error was extinguished by defendant's eventual plea agreement and because his standby counsel acted as his trial counsel for Sixth Amendment purposes. As recognized by Judge SWARTZLE, a valid no-contest plea at a later stage of proceedings "does not necessarily or fully cure the deficiencies at the earlier waiver-of-counsel stage, especially with respect to whether defendant should have known to object to the deficient waiver." *King* (SWARTZLE, J., concurring *dubitante*), unpub. op. at 2. Indeed, the focus of the plea hearing was to ensure the plea was understanding, voluntary, and accurate. See MCR 6.302. Whether defendant understood his right to counsel and properly waived that right in accordance with *Anderson* and MCR 6.005(D) was not addressed. [7] Further, although counsel was present at trial and the plea hearing, he served as standby counsel, which is not constitutionally sufficient. See *People v Lane*, 453 Mich. 132, 138, 551 N.W.2d 382 (1996) ("The presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards. The presence of standby counsel is not recognized as an exception to the *Anderson* or court rule requirements."), citing *People v Dennany*, 445 Mich. 412, 446, 519 N.W.2d 128 (1994) (opinion by GRIFFIN, J.).

III. CONCLUSION

***8 [29]** Defendant was not required to affirmatively invoke his Sixth Amendment right to counsel in order to preserve that right. Defendant was not required to object to the invalid waiver of the right to counsel, and the *Carines* forfeiture doctrine does not apply. Because defendant's waiver of his right to counsel was invalid, he was deprived of counsel during significant portions of the critical stages in the proceedings, including trial, and the error is subject to automatic reversal. Accordingly, we reverse the Court of Appeals judgment and remand to the trial court for further proceedings.

Elizabeth T. Clement, C.J., Brian K. Zahra, Richard H. Bernstein, Megan K. Cavanagh, Elizabeth M. Welch, JJ., concur.

Viviano, J. (concurring dubitante).

In our adversary system, courts are largely constrained to the issues presented and developed by the parties. It is generally inappropriate for a court to reframe a case, raising new issues and arguments. For this reason, I am constrained to concur in the majority opinion—but I do so *dubitante*, which is to say that I have doubts about the soundness of the outcome but am unwilling, given the issues and arguments before us, to conclude it is wrong. See *Black's Law Dictionary* (11th ed.) (explaining that "*dubitante*" is a "term ... placed in a law report next to a judge's name, indicating that the judge doubted a legal point but was unwilling to state that it was wrong").

In particular, I question whether a different result would have been reached had two additional issues or arguments been properly raised. It appears to me that because defendant's conviction arose from a plea of no contest, to reverse the conviction we must find some error in or affecting the plea. The majority reverses on the basis of an error—the invalid waiver of the right to counsel prior to the partial trial—that occurred before the plea. The majority does not consider whether this error had any relationship to defendant's plea in this case. Generally, however, a defendant's guilty plea bars the defendant from obtaining relief based on constitutional violations that occurred prior to the plea:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he

> received from counsel was not within the standards set forth in [previous caselaw]. [*Tollett v Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).]

Thus, when a defendant enters a plea of guilty or no contest, any errors that might have impacted the question of factual guilt—constitutional or otherwise—are rendered irrelevant. See *Menna v New York*, 423 U.S. 61, 62 n 2, 96 S.Ct. 241, 46 L.Ed. 2d 195 (1975) ("The point of [*Tollett* and its progeny] is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.").

***9** This Court, in *People v New*, 427 Mich. 482, 491, 398 N.W.2d 358 (1986), recognized the *Tollett* rule and explained further that

> a defendant, after pleading guilty, may raise on appeal only those defenses and rights which would preclude the state from obtaining a valid conviction against the defendant. Such rights and defenses "reach beyond the factual determination of defendant's guilt and implicate the very *authority* of the state to bring a defendant to trial ...." [*People v*] *White*, 411 Mich[366,] 398[, 308 N.W.2d 128 (1981)] (MOODY, J., concurring in part and dissenting in part.) In such cases, the state has no legitimate interest in securing a conviction. On the other hand, where the defense or right asserted by defendant relates solely to the capacity of the state to prove defendant's factual guilt, it is subsumed by defendant's guilty plea.

Under this logic, numerous courts have held that claims based on an earlier deprivation of counsel are waived when a defendant decides to plead guilty and the plea is not related to the deprivation. [1]

In the present case, this issue and the relevant authorities have not been raised or discussed. [2] Moreover, it is not entirely clear how they would apply. It would seem that the earlier deprivation of counsel at trial could be waived by defendant's subsequent plea. But defendant observes that he was never given a proper advisement of his right to counsel, either before trial or as part of the plea process. It might be contended, therefore, that the deprivation related to or affected defendant's decision to plead no contest. *Tollett*, of course, does not prevent a defendant from challenging the voluntariness of the plea. Thus, even if the deprivation of counsel during the partial trial was waived under *Tollett*, defendant may argue—and indeed in this case has argued—that the deprivation of counsel during the partial trial created a separate error by rendering the plea involuntary.

***10** On the other hand, defendant had standby counsel who actively participated during the plea. The majority relies on *People v Lane*, 453 Mich. 132, 138, 551 N.W.2d 382 (1996), for the proposition that standby counsel cannot act as Sixth Amendment counsel. But in *Lane*, we merely said that "[t]he *presence* of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards. The presence of standby counsel is not recognized as an exception to" the rules requiring advisement of the defendant's rights to counsel. *Id.* at 138, 551 N.W.2d 382 (emphasis added). We did not consider whether standby counsel who actively participated in the proceedings could satisfy the Sixth Amendment right to counsel. The federal circuit courts appear to be split on this question, but those that have found standby counsel to be constitutionally sufficient have raised strong arguments worth our consideration in an appropriate case. [3] The Court of Appeals has apparently sided with those courts holding that standby counsel is always insufficient to satisfy the Constitution. See *People v Willing*, 267 Mich App 208, 227-228, 704 N.W.2d 472 (2005). The prosecutor has not addressed the relevant caselaw or otherwise developed this issue such that we can decide it now. But even assuming that the standby counsel here was constitutionally sufficient, we would need to determine whether defendant's no-contest plea waived or cured the earlier deprivation of counsel.

My own research has discovered no case involving the precise circumstances before us. Given the lack of guidance on these complicated matters and, more importantly, the parties' failure to address the relevant issues, I agree with the result reached by the majority on the questions we confront today.

But because those questions are the narrow ones presented by the parties, I see nothing in the majority opinion that would foreclose the arguments I have sketched above.[4] For these reasons, I concur *dubitante.*

All Citations

--- N.W.2d ----, 2023 WL 4845609

Footnotes

1 The pro se motions at issue included a motion to quash and a motion to dismiss, which defendant had filed in October and November 2017.

2 In *People v Cobbs*, 443 Mich. 276, 283, 505 N.W.2d 208 (1993), this Court held that at the request of a party, before the trial court enters a plea agreement the court may state on the record, based on the information then available to the court, "the length of the sentence that ... appears to be appropriate for the charged offense." Over time, accepted plea offers in which the parties exchange specific sentencing information when formulating their plea agreement have become colloquially known as "*Cobbs* agreements." See, e.g., *People v Brown*, 492 Mich. 684, 705, 822 N.W.2d 208 (2012) (YOUNG, C.J., concurring in part and dissenting in part) (explaining that a genuine *Cobbs* agreement is one in which a defendant enters a guilty plea in exchange for a specific sentence disposition by the trial court).

3 Defendant was also on parole at the time of this offense and was advised during the proceedings that his sentence in this case and his sentence for the unrelated conviction would run consecutively with his sentence for the parole violation.

4 The Court of Appeals also recognized that the mere presence of "standby" or advisory counsel did not cure the error in this case. See *King*, unpub. op. at 10 n. 6.

5 "[T]he defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v Massachusetts*, 582 U.S. 286, 295, 137 S.Ct. 1899, 198 L.Ed. 2d 420 (2017) (quotation marks, citation, and brackets omitted). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* at 294-295, 137 S Ct 1899.

6 The prosecution urges this Court to review the issue as a request to withdraw a plea and apply the standard articulated for such requests as discussed in *People v Cole*, 491 Mich. 325, 817 N.W.2d 497 (2012), because defendant waived his right to trial and elected to plead no contest pursuant to a *Cobbs* agreement. We decline to review the issue in the manner suggested by the prosecutor. The issue raised in this appeal concerns the invalid waiver of the right to counsel (which occurred both before trial was completed and before the plea agreement was entered), not defendant's ability to withdraw his plea. See *King*, 508 Mich. at 939, 957 N.W.2d 797. Alternatively, the prosecution argues that the modified plain-error standard articulated in *Davis*, 509 Mich. at 67-68, 983 N.W.2d 325, applies. As discussed below, because defendant's claim of error is preserved, this Court's recent modification of the standard for reviewing unpreserved structural errors in *Davis* does not apply.

7 Whether entry of a no-contest plea can be considered valid when the earlier proceedings have been so corrupted by deprivation of counsel without a valid waiver is a question that this opinion need not decide.

1 See, e.g., *Fields v Attorney General of Maryland*, 956 F.2d 1290, 1296 (4th Cir. 1992) ("[The defendant] alleges that because [defense counsel] did not attend the rearraignments, he was denied counsel at a critical stage of the proceedings in violation of the Sixth Amendment .... Yet this claim concerns an alleged constitutional deprivation that occurred prior to [the defendant's] guilty plea and is unrelated to it. *Tollett* therefore bars this claim."); *United States v Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (holding that the defendant's plea waived the argument that he was deprived of Sixth Amendment counsel during an *in camera* hearing that determined the validity of one of his defenses); *Davila v State*, 831 P.2d 204, 206 (Wy, 1992) ("Denial of the right to representation does not implicate 'the very power of the state to bring the defendant into court to answer the charge brought against him,' and would not have prevented a trial.") (citation omitted); *State v Spates*, 64 Ohio St 3d 269, 273, 595 N.E.2d 351 (1992) (claim regarding denial of counsel at the preliminary hearing barred by *Tollett*); *Powell v State*, 309 Ga. 523, 528, 847 S.E.2d 338 (2020) (stating that, even if the defendant had properly requested new counsel, his claim that the trial court erred by denying his request need not be considered because, "[a]s a general rule, a guilty plea waives all defenses except that based on the knowing and voluntary nature of the plea").

2 Although defendant pleaded no contest rather than guilty, this distinction would not appear to matter for purposes of *Tollett* and *New*. See *People v Cole*, 491 Mich. 325, 332 n 6, 817 N.W.2d 497 (2012) ("No-contest pleas are essentially admissions of all the elements of the charged offense and are treated the same as guilty pleas for purposes of the case in which the no-contest plea is entered."), citing *New*, 427 Mich. at 493 n 10, 398 N.W.2d 358.

3 Compare *United States v Oreye*, 263 F.3d 669, 672 (7th Cir. 2001) ("[The attorney], while labeled standby counsel, was functionally counsel, period. We are mindful of the many cases which hold or imply that appointment of standby counsel does not satisfy the Sixth Amendment, if the defendant wants to be represented.... But we do not submit gracefully to the tyranny of labels. If the defendant's counsel provides all the assistance required by the Sixth Amendment, the fact that he is called 'standby counsel' would not violate the amendment."); *McClinton v United States*, 817 A.2d 844, 859 (DC, 2003) ("In essence, as in *Oreye*, standby counsel for [the defendant] 'was functionally counsel.' "); *United States v Ross*, 703 F.3d 856, 871 (6th Cir. 2012) ("Despite the failure of the trial court to appoint full-time counsel, participation by standby counsel during a competency hearing may be sufficient to overcome a denial of counsel claim."); with *United States v Taylor*, 933 F.2d 307, 312 (5th Cir. 1991) (rejecting the contention that standby counsel could satisfy the constitutional right to counsel).

4 To its credit, the majority forthrightly acknowledges that its opinion does not address whether defendant understood his right to counsel and validly waived that right at the plea hearing. See *ante* at ——. And the majority also appears to leave open the issues I have raised here for another day. See *id.* at —— n 7.

2013 WL 4866270
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Calvin Jerome LeSEARS, Defendant–Appellant.

Docket No. 305314.
|
Sept. 12, 2013.

Genesee Circuit Court; LC No. 10–027292–FC.

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

Opinion

PER CURIAM.

***1** Defendant, Calvin Jerome LeSears, appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. LeSears was sentenced to life in prison on the first-degree murder conviction, 24 to 60 months' imprisonment on the carrying a concealed weapon conviction, and two years in prison for the felony-firearm conviction. This case arises from the murder of Gregory Ingram, Jr. on February 26, 2010, in Flint, Michigan. LeSears was tried with his co-defendants, Gary Lee Robinson and Dequeze Dixon, before separate juries. Robinson and Dixon appeal separately in Docket Nos. 304936 and 305185, respectively. We affirm.

The primary witness was Jason Sutton, who was present during the murder but uninvolved. He testified that he knew Robinson and Dixon already at the time, but he discovered LeSears's identity later. Sutton testified that he was picked up by defendants while walking home. Dixon was driving a vehicle owned by his girlfriend, Devonda Jiles. Either Dixon or Robinson told Sutton, "If we didn't know who you was, we were going to get you." They drove past the victim, at which point Dixon said, "There's Greg, let's get on him." Robinson got out of the car first, and then Dixon turned the car around and parked, whereupon Dixon and LeSears also got out. Sutton remained in the vehicle using his telephone.

Sutton testified that he heard a barrage of gunfire from multiple guns: an assault rifle, a shotgun, and a handgun. He saw all three defendants outside shooting the victim. A medical examination would later identify the victim's cause of death as multiple gunshot wounds from at least three different kinds of guns. When defendants returned to the vehicle, Sutton observed Robinson with an assault rifle, Dixon with a shotgun, and LeSears with a handgun. Dixon advised Sutton that they would kill him if he told anyone about the events of the evening. They then dropped Sutton off at his house. Sutton continued to associate with defendants out of fear that they would believe he had told authorities about the shooting. A few weeks later, Sutton was again in the same vehicle with Dixon and Sutton's cousin, when police attempted to pull the vehicle over, apparently for unrelated reasons. All of the occupants jumped out and fled; Sutton was the only one apprehended. He was taken into custody for fleeing and eluding, and Jiles's car was impounded.

While incarcerated, Sutton asked to talk to the police about the victim's murder. After Sutton was interviewed, Robinson was arrested two days later, and Dixon was arrested later that same day. Sutton subsequently picked LeSears out of a photographic lineup as the third individual, asserting that he was about 80 percent certain. LeSears was arrested about a month later for an unrelated matter, after which Sutton identified LeSears with certainty out of a physical lineup. After being informed that he had been identified, LeSears explained that he had been attempting to contact the police "for a few days," wishing to speak about the homicide. An interview was conducted and recorded, and LeSears made a statement indicating, among other things, that he had not been attempting to hit the victim, but rather fire in his direction "trying to scare him off."

***2** LeSears argues that his conviction of first-degree murder cannot be sustained because there was insufficient evidence to demonstrate his participation as a principal or an aider and abettor in the murder. He specifically argues a lack of evidence of premeditation or deliberation and a lack of evidence of aiding and abetting. We disagree. We review a challenge to the sufficiency of the evidence de novo to determine whether a rational trier of fact could have found the elements of the charged offense proven beyond a reasonable

doubt. *People v. Lockett,* 295 Mich.App 165, 180; 814 NW2d 295 (2012). In so doing, we "will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses." *People v. Kanaan,* 278 Mich.App 594, 619; 751 NW2d 57 (2008).

First-degree premeditated murder is a specific intent crime that requires proof that the defendant had an intention to kill. *People v. Herndon,* 246 Mich.App 371, 386; 633 NW2d 376 (2001). The killing must furthermore be deliberate and premeditated. *People v. Schollaert,* 194 Mich.App 158, 170; 486 NW2d 312 (1992); MCL 750.316(1)(1). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v. Furman,* 158 Mich.App 302, 308; 404 NW2d 246 (1987). A defendant's state of mind may be inferred from any facts in evidence, including circumstantial evidence. *People v. Unger,* 278 Mich.App 210, 229; 749 NW2d 272 (2008).

The evidence showed that defendant had a handgun not only accessible and available, but in fact ready. The other two defendants also had guns, a fact of which LeSears was impliedly aware. After Dixon said, "let's get him," Robinson was the first to exit the vehicle. LeSears did not: rather, Dixon turned the vehicle around and parked. The length of time necessary to show premeditation and deliberation need only be sufficient for a reasonable person to be able to take a "second look" at the situation. *People v. Tilley,* 405 Mich. 38, 45; 273 NW2d 471 (1979). We find that LeSears had that opportunity. Furthermore, we are not impressed with the contention that LeSears essentially "shot to miss." First, it is essentially axiomatic that discharging a firearm even in the general direction of a person demonstrates, at a minimum, a reckless disregard for ensuing harm. More significantly, LeSears did not, in fact, miss. The jury could reasonably have found LeSears's statement that he did not intend to shoot the victim unworthy of credibility in light of Sutton's testimony that he saw all three defendants standing *over* the victim and firing their guns, as well as the evidence of handgun-inflicted injuries to the victim.

While conflicting evidence may have existed, any such conflicts are resolved in favor of the jury's verdict and this Court defers to the jury's credibility determinations at trial. *Unger,* 278 Mich.App at 222. The use of a dangerous weapon, the type and number of injuries inflicted, along with LeSears's conduct permit an inference of an intent to kill. *People v. Mills,* 450 Mich. 61, 71; 537 NW2d 909 (1995), mod 450 Mich. 1212 (1995).

***3** Additionally, any advice, aid, or encouragement, however slight, is sufficient to establish guilt on an aiding and abetting theory. *People v. Wilson,* 196 Mich.App 604, 614; 493 NW2d 471 (1992). The intent element can be established by proof that a defendant had a specific intent to commit the crime, that the defendant had knowledge of the principal's intent, or that the criminal act committed by the principal was an incidental consequence that might reasonably have been expected to result as a natural and probable consequence of the intended wrong. *People v. Robinson,* 475 Mich. 1, 6–7, 9; 715 NW2d 44 (2006). Intent may be inferred from all of the facts and circumstances, and minimal circumstantial evidence is sufficient. *People v. Fetterley,* 229 Mich.App 511, 517–518; 583 NW2d 199 (1998). Here, defendant was unambiguously aware of the crime, and even if he had not in fact intended to shoot the victim, he participated in the crime and impliedly approved of it by standing over Ingram with his codefendants. Simply because the medical examiner could not determine which bullet was the immediate cause of Ingram's death is irrelevant given the numerous wounds inflicted and their location, which reasonably leads to the conclusion that death would be the natural and probable consequence of defendants' actions. *Robinson,* 475 Mich. at 6–7, 9.

LeSears also challenges the admissibility of his inculpatory statement to police. We find no error. We review a trial court's ultimate decision on a motion to suppress de novo, but we review the court's factual findings for clear error. *People v. Elliott,* 295 Mich.App 623, 631; 815 NW2d 575 (2012). At his first interview, LeSears was read his *Miranda* [1] rights, and in that interview he denied any involvement in the homicide. The police testified that LeSears participated in the physical lineup voluntarily, but LeSears testified that he only did so because he believed the lineup was for an entirely different matter. When the interviewing officer approached LeSears after the lineup, he immediately began discussing the Ingram murder. LeSears was again read his *Miranda* rights, and LeSears confirmed that he understood them. LeSears

denied having been threatened by the interviewing officer and confirmed being offered food and drink. However, he asserted that he had been threatened by another officer, and that was why he spoke to the police about the Ingram homicide. The trial court denied the suppression motion.

Significantly, LeSears does not dispute that he was provided with his rights pursuant to *Miranda,* that he understood those rights, that he initiated his post-lineup interview, or that the police engaged in proper interrogation methods. He acknowledges that he did not provide any indication during the first or second interviews that he wished to refuse to answer questions posed by police or that he wanted an attorney to be present. Rather, his assertion of error is premised on the appointment and availability of counsel to him on an unrelated matter, and the awareness of the police regarding the existence of counsel, when questioned regarding the Ingram homicide. This is, however, irrelevant: a "defendant may waive the right [to counsel] whether or not he is already represented by counsel; the decision to waive need not itself be counseled." *Montejo v. Louisiana,* 556 U.S. 778, 786; 129 S Ct 2079; 173 L.Ed.2d 955 (2009). Defendant was in jail and had an attorney on another charge. The reality is any waiver of counsel is valid so long as it was not based on "intimidation, coercion, or deception" and was made with full comprehension of the waiver. *People v. Daoud,* 462 Mich. 621, 635–636; 614 NW2d 152 (2000) (citation omitted). Neither of those two elements is in dispute. [2]

***4** In any event, even if the inculpatory statement should not have been admitted, we examine the remaining evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt. *People v. Whitehead,* 238 Mich.App 1, 10; 604 NW2d 737 (1999). Admission of mere cumulative evidence is not prejudicial. *People v. Rodriquez (On Remand),* 216 Mich.App 329, 332; 549 NW2d 359 (1996). Sutton identified LeSears and placed him at the scene as an active participant in the homicide. Sutton's testimony, if believed, was sufficient to convict LeSears. While LeSears contends that Sutton was not a credible witness because of the leniency afforded to him in exchange for his testimony, credibility determinations are solely within the purview of the jury. *People v. Hughes,* 217 Mich.App 242, 248; 550 NW2d 871 (1996). LeSears's suggestion that Sutton lacked credibility does not constitute a sufficient basis to overturn his conviction on appeal. *Id.*

Finally, LeSears asserts as error the failure of the trial court, in accordance with the doctrine of completeness, to admit an earlier exculpatory statement he made to police. We disagree. The "rule of completeness," codified at MRE 106, requires the admission of the remainder of a writing or recorded statement if part of it has been introduced and "a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v. McReavy,* 436 Mich. 197, 214–215; 462 NW2d 1 (1990). It does not permit the introduction of *other* pieces of evidence. Here, the admitted statement was already complete, so the "rule of completeness" simply has no applicability to a completely different statement. Otherwise, "[a]n exculpatory statement by a defendant made after his arrest is properly excluded at trial as self-serving." *People v. Taylor,* 98 Mich.App 685, 690; 296 NW2d 631 (1980). As a result, the trial court did not err in denying Lesears's request that the jury also be provided his exculpatory statement.

Affirmed.

All Citations

Not Reported in N.W.2d, 2013 WL 4866270

Footnotes

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

2 Defendant appears to conflate the voluntariness of his statement with the alleged involuntariness of his participation in the lineup due to his misunderstanding of the lineup's purpose. These are independent issues, and his failure to elaborate an argument or provide citation to law on his contentions pertaining to the propriety

of the live line-up results in an abandonment of that claim. MCR 7.212(C)(5); *People v. Matuszak,* 263 Mich.App 42, 59; 687 NW2d 342 (2004).

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2023 WL 4874412
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Joshua Lamar-James STEWART, Defendant-Appellant.

No. 162497
|
Argued on application for leave
to appeal January 11, 2023
|
Decided July 31, 2023.

Synopsis

Background: Defendant was convicted in the Circuit Court, Wayne County, Michael James Callahan, J., of armed robbery, assault, receiving or concealing stolen property, and a firearms offense. Defendant appealed. The Court of Appeals, 2020 WL 6939998, affirmed. Defendant sought leave to appeal, which was granted.

Holdings: The Supreme Court, Clement, C.J., held that:

[1] defendant's statements during three-hour nighttime combative interrogation were involuntary, and

[2] due process error in the use of involuntary statements at trial was not harmless.

Judgment of Court of Appeals reversed and case remanded.

Viviano, J., filed dissenting opinion in which Zahra, J., agreed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (20)

[1] **Criminal Law** Mootness

Supreme Court's resolution of defendant's challenge to voluntariness of his statements in his favor, resulting in reversal of his convictions for armed robbery and other offenses, mooted issues relating to sentencing.

[2] **Criminal Law** Review De Novo

Criminal Law Evidence wrongfully obtained

Supreme Court reviews de novo a trial court's decision on a motion to suppress but reviews all underlying factual findings for clear error.

[3] **Criminal Law** Evidence wrongfully obtained

A trial court's factual finding following a suppression hearing is "clearly erroneous" if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that the trial court made a mistake.

[4] **Constitutional Law** Circumstances Under Which Made; Interrogation

Criminal Law Necessity of showing voluntary character

The use of a defendant's involuntary statement elicited by coercive state action in a criminal trial violates due process and the constitutional protection against self-incrimination. U.S. Const. Amends. 5, 14; Mich. Const. art. 1, § 17.

[5] **Criminal Law** Coercion

If a defendant's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because it was coerced.

[6] **Criminal Law** Coercion

Coercive police tactics that can overbear a defendant's will and make his confession involuntary include both physical intimidation and psychological pressure.

[7] **Criminal Law** Voluntariness

When the voluntariness of a confession is challenged, the State has the burden to demonstrate voluntariness by a preponderance of the evidence.

[8] **Criminal Law** What constitutes voluntary statement, admission, or confession

To determine whether a confession was involuntary because of state coercion, a court must consider whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.

[9] **Criminal Law** Promise of leniency in general

Promises of leniency can render a confession involuntary.

[10] **Criminal Law** Promise of leniency in general

While general observations by the police regarding leniency will not render a defendant's confession involuntary, express or implied assurances that cooperation will aid the defense or result in a lesser sentence may do so.

[11] **Criminal Law** Promise of leniency in general

Promises of leniency are one factor in analysis of whether a confession is involuntary.

[12] **Criminal Law** Age

A defendant's age alone does not render a confession involuntary.

[13] **Criminal Law** Age

Criminal Law Experience with legal system

A defendant's age of 18 is one factor in the analysis of whether a confession is involuntary, and courts should look to the totality of the circumstances of the defendant's interaction with law enforcement to determine whether the characteristics of youth affected the defendant's actions and to what extent.

[14] **Criminal Law** Particular cases

Criminal Law Promise of leniency in general

Criminal Law Deception

Statements of 18-year-old defendant during three-hour interrogation that started in middle of night, after his arrest in hospital parking lot, were involuntary, even though defendant was not injured, intoxicated, or drugged during interrogation and he was not subjected to physical abuse, where defendant did not sleep or have opportunity to sleep after he arrived at hospital driving a bullet-ridden vehicle transporting a gunshot victim, defendant apparently had recent cancer treatment, with ill effects, that might have affected his ability to endure interrogation, police officers made repeated and specific references to leniency, overall tone of interrogation was combative, officers made frequent use of profanity and racial slurs, which isolated and belittled defendant, and officers lied to defendant about extent of evidence against him.

[15] **Criminal Law** Promise of leniency in general

Police officers' use of limited qualifying language when referring to leniency during interrogation of 18-year-old defendant was not sufficient to undo the coercive effect of implied promises of leniency, where officers continued to make implications of leniency.

[16] **Criminal Law** Particular cases

One police officer's status as a Black male, like the 18-year-old defendant, did not preclude a finding that officers used racial slurs against

defendant in a harmful or coercive manner during interrogation, as a factor for determining the voluntariness of defendant's statements.

[17] **Criminal Law** Statements, confessions, and admissions

On review of denial of suppression motion concerning voluntariness of defendant's statements, the Supreme Court's determination that police officers' misrepresentations to defendant regarding criminal investigation, along with other circumstances, overcame his free will represented a different conclusion of law from that of the trial court, not divergent factual findings, for purposes of the deference that the Court was to accord to the trial court's factual findings.

[18] **Criminal Law** Statements, confessions, and admissions

On review of denial of suppression motion concerning voluntariness of defendant's statements, the Supreme Court was not required to rely on absence of factual findings from trial court about whether police officers' language during interrogation was combative, whether defendant was sleep-deprived, and whether defendant might have been affected by previous cancer treatments, where the Court's analysis of the entire record, including a video recording of the interrogation, left it with a firm and definite conviction that the trial court made a mistake by failing to make findings in keeping with those made by the Court.

[19] **Criminal Law** Acts, admissions, declarations, and confessions of accused

Defendant's convictions for armed robbery and other offenses could stand only if State could prove that the due process error in the State's use of defendant's involuntary statements to police was harmless beyond a reasonable doubt. U.S. Const. Amend. 14; Mich. Const. art. 1, § 17.

[20] **Criminal Law** Acts, admissions, declarations, and confessions of accused

Due process error in the use of defendant's involuntary statements at trial was not harmless and required reversal of his convictions, even though defendant arrived at hospital driving a vehicle that was used in robberies, where the only additional evidence that tied defendant to robberies was defendant's own incriminating, involuntary statements, in prosecution for armed robbery, assault, receiving or concealing stolen property, and a firearms offense. U.S. Const. Amend. 14; Mich. Const. art. 1, § 17.

BEFORE THE ENTIRE BENCH

OPINION

Clement, C.J.

***3** At issue in this case is whether defendant's statements to law enforcement, made during an early-hours interrogation, were voluntary. Considering the totality of the circumstances, we conclude that defendant's statements were involuntary and that the trial court erred by failing to suppress them.

I. FACTS AND PROCEDURAL HISTORY

On May 6, 2016, then-18-year-old defendant allegedly aided and abetted two other men in a pair of armed robberies by serving as a getaway driver. Two victims were targeted during the first robbery, and one of the victims (Aaron Foster) was shot. During the second robbery, a shootout ensued between the perpetrators and the victims, and a perpetrator (Deontea White) and a victim (Daniel Claxton) were both shot. The perpetrators' vehicle, a Dodge Intrepid, was struck by bullets multiple times during the shootout.

Foster, Claxton, and White were all taken to Detroit Receiving Hospital for treatment. Foster arrived first, accompanied by Detroit Police Officer John Siejutt, and was announced dead on arrival. Claxton arrived second, driven by his brother, who had also been present for the second robbery. Finally, White arrived last, driven by defendant.

After defendant and White arrived, hospital security alerted Officer Siejutt that a bullet-riddled vehicle transporting a gunshot victim had arrived at the hospital. Officer Siejutt approached and questioned defendant in the parking lot. Defendant disavowed involvement in any shooting, claiming instead that he had been walking down the street when he saw White lying wounded in the backseat of the Intrepid. According to defendant, he decided to get into the driver's seat and transport White to the hospital.

While Officer Siejutt questioned defendant, another officer brought Claxton's brother to the parking lot. There, Claxton's brother stated that he recognized the Intrepid as the shooters' vehicle and defendant's white T-shirt as the white T-shirt worn by the shooters' driver. Shortly thereafter, the officers determined that the Intrepid had been reported as stolen, and the officers arrested defendant. A subsequent search of the vehicle resulted in the discovery of Foster's stolen belongings, linking the Intrepid to the first robbery.

The officers interrogated defendant after the arrest, during the early hours of the morning. Defendant eventually admitted to driving the Intrepid during both robberies but denied knowing that the other two men had been armed and intended to commit robberies that day.

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b); three counts of armed robbery, MCL 750.529; assault with intent to commit murder (AWIM), MCL 750.83; assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84; assault with intent to rob while armed, MCL 750.89; receiving or concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Before trial, defendant moved to suppress the admission of his statements from the May 7, 2016 law enforcement interrogation, arguing, in part, that his statements were involuntarily made because of coercive interrogation techniques and promises of leniency. The trial court disagreed and denied defendant's motion.

***4** A jury trial commenced, and ultimately, the jury acquitted defendant of murder and AWIM but found defendant guilty of all remaining charges.

[1] On appeal, defendant pursued his claim that his interrogation statements were involuntarily made and should not have been admitted at trial. But, in an unpublished, per curiam opinion, the Court of Appeals rejected that claim and defendant's remaining arguments and affirmed defendant's convictions. *People v Stewart*, unpublished per curiam opinion of the Court of Appeals, issued November 24, 2020 (Docket No. 343755). Defendant sought leave to appeal, and this Court directed oral argument on the application regarding "whether the statement [defendant] made to the police was not voluntary because the interrogating officers employed overly coercive tactics, including promises of leniency. *People v Conte*, 421 Mich. 704[, 365 N.W.2d 648] (1984)[;] see also *People v Shipley*, 256 Mich App 367, 373[, 662 N.W.2d 856] (2003)." [1] *People v Stewart*, 508 Mich. 941, 941, 964 N.W.2d 363 (2021).

II. LEGAL BACKGROUND AND ANALYSIS

[2] **[3]** This Court reviews de novo a trial court's decision on a motion to suppress but reviews all underlying factual findings for clear error. See *People v Elliott*, 494 Mich. 292, 300-301, 833 N.W.2d 284 (2013). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *People v Givans*, 227 Mich App 113, 119, 575 N.W.2d 84 (1997).

A. INVOLUNTARINESS

[4] **[5]** **[6]** **[7]** Both the United States and Michigan Constitutions protect citizens against self-incrimination and afford due process of law. U.S. Const., Ams. V and XIV; Const. 1963, art. 1, § 17. The use of an involuntary statement elicited by coercive state action in a criminal trial violates these constitutional protections. *Colorado v Connelly*, 479 U.S. 157, 165, 107 S Ct 515, 93 L Ed 2d 473 (1986); *People v Cipriano*, 431 Mich. 315, 331, 429 N.W.2d 781 (1988). In other words, "[i]f an individual's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because [it was] coerced." *Townsend v Sain*, 372 U.S. 293, 307, 83 S Ct 745, 9 L Ed 2d 770 (1963) (quotation marks and citations omitted), overruled in part on other grounds *Keeney v*

Tamayo-Reyes, 504 U.S. 1, 112 S Ct 1715, 118 L Ed 2d 318 (1992). Coercive tactics that can overbear an individual's will include both physical intimidation and psychological pressure. *Townsend*, 372 U.S. at 307, 83 S.Ct. 745; see also *Jackson v Denno*, 378 U.S. 368, 389, 84 S Ct 1774, 12 L Ed 2d 908 (1964) (observing that a continuum of means of overcoming a defendant's free will exist, "from acts of clear physical brutality to more refined and subtle methods"). When the voluntariness of a confession is challenged, "the burden is on the people to demonstrate voluntariness by a preponderance of the evidence." *Conte*, 421 Mich. at 754-755, 365 N.W.2d 648 (opinion by BOYLE, J.) (citation omitted).

***5** **[8]** **[9]** **[10]** **[11]** To determine whether a statement was involuntary because of state coercion, a reviewing court must consider "whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781. While all relevant circumstances must be considered, this Court has specifically directed consideration of the following factors:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*]

Further, promises of leniency can render a confession involuntary. *Conte*, 421 Mich. at 724-725, 365 N.W.2d 648 (opinion by WILLIAMS, C.J.). While general observations regarding leniency—e.g., that it would be better if the interrogee told the truth, that the interrogee's cooperation will be brought to the attention of officials responsible for charging or sentencing decisions, or that cooperation has been looked upon favorably by those officials in the past—will not render a statement involuntary, express or implied assurances that cooperation will aid the interrogee's defense or result in a lesser sentence may do so. See *id.* at 740, 365 N.W.2d 648; see also *Givans*, 227 Mich App at 119-120, 575 N.W.2d 84. However, promises of leniency remain only one factor to be considered within the totality-of-the-circumstances analysis. *Conte*, 421 Mich. at 754, 365 N.W.2d 648 (opinion by BOYLE, J.);[2] *Givans*, 227 Mich App at 117, 575 N.W.2d 84.

B. DETAILS OF THE MAY 7, 2016 INTERROGATION

To determine whether defendant's May 7, 2016 statements to law enforcement were voluntary, a closer examination of the interrogation is necessary.

As detailed above, after defendant arrived at the hospital, he was briefly questioned by Officer Siejutt in the hospital parking lot. When officers discovered that the Intrepid that defendant had been driving was stolen, officers arrested defendant.

Defendant's postarrest interrogation began at 3:36 a.m. and lasted until 6:41 a.m. At the beginning of the interrogation, Detroit Police Officer James MacDonald proposed that they "go through some paperwork real quick" and proceeded to ask defendant general questions about defendant's background, including the spelling of defendant's name, his date of birth, and his level of education. Officer MacDonald then presented defendant with an advice-of-rights form and asked defendant to read, sign, and date it; defendant complied. Defendant asked the officers what his charges were, and Officer MacDonald replied that they were there "to talk to [defendant] about the—the stolen car." Officer MacDonald then returned to questioning defendant regarding his background and other general information.

***6** Eventually, the officers guided the interrogation back to the day's events. Officer MacDonald asked defendant: "So

tell us about—tell us about today. What—what happened?" Defendant repeated the series of events he had earlier described to Officer Siejutt:

> *Mr. Stewart*: ... I seen [White [3]] in the car shot up. And hopped in the car, drove to the hospital. The door was open. Ran up to the car, that was in the backseat. He was shot up in the neck. Couldn't really see the other places but I know when I got to the hospital he had three bullet wounds or whatever. Got in and drove him down there. That was it. That's all I—you know.

The officers questioned how defendant had happened upon White lying wounded in the Intrepid. Defendant explained that a cousin had given him a ride partway to a store, dropping defendant off at an intersection before heading to the other side of town. While en route to the store on foot, defendant encountered White and the bullet-riddled vehicle. The officers expressed some skepticism of this explanation and defendant's narrative overall. For example, Officer MacDonald asked, "So, you get dropped at Emery and Greeley and you want me and my partner [to] sit here and believe that you just happened to come across your boy in a car, shot up[?]"

Shortly thereafter, Officer MacDonald informed defendant that he was investigating not only the stolen car, but also the shooting that resulted in White's injuries. He then posited that defendant was involved in the two robberies that had occurred that day:

> *Officer MacDonald*: ... Ya'll [sic] pull up, do a robbery—just listen. Ya'll do a robbery and [White] end up getting shot cause my man got a pistol. So then [White] drop the gun. A black gun with an extended clip. And you race him to the hospital. Right? So, now ya'll at the hospital. [White] shot. You locked up for being in the car. So, in the car that you driving is evidence or items taken from another robbery that happened off of Packard and [Savage] .... So you ain't involved in not one of those?

When defendant denied his involvement, Officer MacDonald countered that defendant could not verify his whereabouts and accused him of having conflicting stories. [4] At this point in time, the interrogation took on a more confrontational tone:

> [*Detroit Police Detective Kelly Lucie*]: After the Family Dollar where were you going to go?
>
> *Mr. Stewart*: Smoke.
>
> *Detective Lucie*: With who?
>
> *Mr. Stewart*: What you mean with who? Myself. I'm smoke by myself.
>
> *Detective Lucie*: You trying to get smart with me?
>
> *Mr. Stewart*: No.
>
> *Detective Lucie*: Cause you don't want to battle.
>
> * * *
>
> *Detective Lucie*: If I ask you who the fuck you was smoking with you tell me.
>
> *Mr. Stewart*: And I'm saying myself. I said I was going to smoke by myself.
>
> *Detective Lucie*: But you didn't.
>
> *Mr. Stewart*: Cause I never got to it. I never got to the Family Dollar.
>
> *Detective Lucie*: I know. Cause you were doing something else.

As the interrogation continued, both officers continued to express strong disbelief regarding defendant's narrative of events:

> *Officer MacDonald*: But I'm not going to believe that—that—that bullshit. Cause don't nobody in the hood just be walking down the street and be like oh let me fucking go be nosy. Let me be a mother fucking hero.
>
> **7
>
> * * *

Officer MacDonald: All right, Josh listen. At what point are you going to sit here and say and be honest about what the fuck happened? Because I'm not buying that shit.

* * *

Officer MacDonald: Who did you rehearse this story [w]ith? Who did you ask what you should tell the police? You asked somebody. You asked somebody. I gotta talk to the police when I get there so what should I say.

* * *

Officer MacDonald: You know what else is dumb sitting here telling me this bullshit ass story you telling me. N*****, you had a better off chance stumbling across a mother fucking gold before you stumbled across a mother fucking car that's shot the fuck up. That shit just don't happen.

* * *

Detective Lucie: Be in charge of your life right now and quit playing [w]ith me. Quit playing [w]ith me. Just tell me the truth. Just tell me the truth.

* * *

Officer MacDonald: So it's like you trying to sit there and convince your mother and your father that you didn't do some shit when we know you did. We didn't say you killed nobody.

* * *

Officer MacDonald: ... You sitting here—instead of sit here manning up and be like hey this is what happened. That wasn't supposed to happen. I didn't know that was going to happen. Instead you sitting here saying I stumbled across the mother fucking car [w]ith somebody shot in it and lo[ ] and behold it's a dude I fucking know so I took his ass to the hospital instead of calling the police cause I don't know what the fuck going on .... And I'm supposed to—me and my partner supposed to take this thing. Oh, oh shit, okay. All right Josh. All right, Josh. Yep, yep, yep. Hell no. I been doing this shit 15 years. She been doing this shit 16. That shit don't work that way.

* * *

Officer MacDonald: ... You can sit here and lie about all this other shit but that mother fucking phone going to be like, hey Officer MacDonald. Come holler at me.

* * *

... So, you sit there across that fucking table and you keep telling me and my partner I don't know what the fuck you talking about. You keep playing that game. Cause that phone's a [witness] against your ass. That's what your phone is. It's a [witness] against you .... Now you can sit here and throw that shit away and let your phone be your fucking worst enemy or you fucking let your phone fucking be your fucking friend and fucking help you out. It's your fucking decision. But we came to you as a fucking man. You 18. You considered a fucking man. Legally. But you don't fucking act like one. Gotta fucking start manning up to shit.

Defendant, in return, insisted that his narrative of events was true, that it was not concocted with others as an alibi, and that he had explained it consistently to law enforcement. He also repeatedly stated, "I'm trying to just get out of here," and at one point, he asked, "What else do ya'll need though?"

***8** Alongside their increasing expressions of disbelief, the officers introduced the likelihood that White would blame defendant for the robberies and resultant deaths, their belief that defendant was not responsible for the persons harmed, and their encouragement for defendant to disclose his further involvement in the robberies. In so doing, the officers referred to the possibility of defendant serving "20 to life":

Detective Lucie: Just tell us what happened. Get this shit off your chest, man. Because at the end of the day he's smarter than you. He made bad decisions. He got caught up. But he smarter than you. He going to run circles around your ass when it comes to the judicial system. He gone to have you looking stupid as fuck and you going to do 20 to life—

Mr. Stewart: Why I'm going to do 20 to life?

Detective Lucie: Cause you're involved.

* * *

Officer MacDonald: So, you want to sit here and put your fate in what you think mother fuckers can't prove? You going to lose.

Mr. Stewart: Man,

Officer MacDonald: Listen—

Mr. Stewart: Dude, 20 years though—

Officer MacDonald: Man, I didn't say you was going to do 20 years. I didn't say he was going to do 20 years. You control that. You control—listen, Man—at the end of the day, Bro, you control your own—you control your own destiny.

Officer MacDonald later elaborated on this theme of taking responsibility with the story of another, similarly situated defendant who cooperated with law enforcement and received a lesser sentence:

Officer MacDonald: [Y]ou know I just got done doing a homicide trial, Man? This mother fucker shot two people with his sister in the car .... And she was scared to leave. You know what this mother fucker did? Point the gun at her and told her drive the fuck off because he didn't give a fuck about her. And when she got locked up I talked to her. She did the same shit you did. "Man, I don't got nothing to say. I'm protect[ing] my brother." Two weeks later you know what she did? "Hey, MacDonald, Man, I want to talk to you." Fuck that. I ain't let this mother fucker decide my fate. This mother fucker got found guilty of murder. You know what she got, Bro? Mother fucking two years. Because she decided her own mother fucking fate. If she'd went into that courtroom with the same attitude you got you know what happen to her? She get found guilty of murder. And then she'd been gone forever. But instead she took her own fate in her own hands and she got two years. ...

* * *

She doing two years. Soon as you do two years her record is clean.

Eventually, after nearly two hours of expressly disclaiming any involvement in the robberies, defendant admitted he was responsible for "[d]riving there," lamenting, "Ya'll talking bout two, three years." He again referred to the suggested length of imprisonment later during the interrogation as the motivation behind his admissions:

Mr. Stewart: ... For my mama though. Cause ya'll talking about 20 or 2. Who wouldn't take 2. Do you feel me?

Detective Lucie: Well, we're not saying—

Mr. Stewart: Hell.

Detective Lucie: We're not the judge and we're not the jury. We don't—we don't hand down sentencing. All we do is investigate the crime. But over the years we've seen that we've been explaining how someone does the right thing they come out winning. It's the people that's—

Mr. Stewart: So I should come out a winner.

Detective Lucie: You can be.

Officer MacDonald elaborated, "You sit here and asked her am I going to turn out good on this and I sit here and told you yeah if you 100%—if you truthful all the way through this yeah it's gonna turn out good for you."

***9** The officers then sought additional information from defendant about the chronology of the robberies. Officer MacDonald encouraged, "You heading [in] the right direction." As the officers continued to attempt to solicit additional information, defendant responded in frustration, "I was driving the car. That was it. What else? Cause I know you want something else."

Ultimately, much of the additional information defendant then provided was first mentioned by the officers. For example, defendant stated that White dropped his firearm after Officer MacDonald stated that White did so, but he could not provide any details as to how that happened. And after initially saying that it was just defendant and White in the vehicle, defendant amended his narrative to say that there was a third person present—but only after Officer MacDonald falsely informed him that one of the nearby houses had a surveillance camera that had captured the event and showed three participants.

By the close of the interrogation, the officers had elicited statements from defendant that he was responsible for driving the vehicle and that he saw one of the perpetrators return to the vehicle with a rifle after the first robbery.

C. DEFENDANT'S STATEMENTS WERE INVOLUNTARY

At issue here is whether the statements given by defendant during the May 7, 2016 interrogation were voluntary. Although all relevant circumstances must be considered, we begin first with the factors specifically identified by this Court in *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781.

Regarding defendant's age, defendant was 18 years old at the time of the interrogation. While this renders defendant an adult under the law, we have elsewhere recognized that 18-year-olds are still undergoing physiological and neurological maturation, meaning that their decision-making abilities are not fully developed. See generally *People v Parks*, 510 Mich. 225, 987 N.W.2d 161 (2022). Because their development is not yet complete, 18-year-olds "are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead"; are "more susceptible to negative outside influences, including peer pressure"; and are "less fixed in their characteristics and more susceptible to change as they age." *Id.* at 250-251, 987 N.W.2d 161. In the context of a police interrogation, as here, these characteristics may lead an interrogee to prioritize immediate benefits over long-term consequences—resulting in behaviors such as falsely confessing in exchange for release—or to comply with the authority or perceived desires of a police officer regardless of the consequences. See *J.D.B. v North Carolina*, 564 U.S. 261, 275-276, 131 S Ct 2394, 180 L Ed 2d 310 (2011) (discussing the potential effects of youth on interrogees under 18 years old); *Gallegos v Colorado*, 370 U.S. 49, 52-54, 82 S Ct 1209, 8 L Ed 2d 325 (1962) (same). [5]

***10** **[12]** To be clear, a defendant's age alone does not render their statements involuntary, and defendant here was likely less influenced by these characteristics than, for example, a 14-year-old. But defendant's age and its attendant characteristics are relevant to our analysis. When defendant was interrogated, he was still attending secondary school and living with family. He made repeated requests to call his mother during the interrogation and repeatedly lamented that he let her down. Further, the officers made frequent and repeated references to defendant's young age. They told him to "man[ ] up," chastised him for not "fucking act[ing] like [a man]," and commented on shifts in the depth of defendant's voice. Defendant's age mattered, both in how he perceived and responded to the officers' statements, and in how the officers treated him. And as discussed, defendant's age made him more susceptible to suggestions from law enforcement and less likely to engage in reasoned decision-making.

[13] The dissent inaccurately characterizes our consideration of defendant's youth as a bright-line rule that "18-year-olds are too immature to resist pressures to confess or make other significant life decisions." Today's decision does not create a bright-line rule that any statement by an 18-year-old to law enforcement is involuntarily given. Instead, we contemplate age as a relevant circumstance to be considered as one factor in the voluntariness analysis, which is consistent with decades of established caselaw. See, e.g., *Haley v Ohio*, 332 U.S. 596, 600-601, 68 S Ct 302, 92 L Ed 224 (1948); *Schneckloth v Bustamonte*, 412 U.S. 218, 226, 93 S Ct 2041, 36 L Ed 2d 854 (1973); *J.D.B.*, 564 U.S. at 280-281, 131 S.Ct. 2394; *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781. This Court's recent decision in *Parks* provides additional context regarding how age may affect the decision-making process of 18-year-olds, and we find it appropriate to consider that context here when determining whether defendant's statements were "freely and voluntarily made." *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781. Courts in the future should—as we have here—look to the totality of the circumstances of the defendant's interaction with law enforcement to determine whether the characteristics of youth affected the defendant's actions and to what extent. This will not always result in a finding of involuntariness, just as the consideration of similar factors does not always result in a term-of-years sentence in the context of juvenile sentencing. [6]

***11** **[14]** Returning to the *Cipriano* factors, the length of the interrogation, at approximately three hours, was not excessively long. Compare with *id.* at 336-337, 429 N.W.2d 781 (agreeing with the defendant's concession that his statements were voluntary despite the fact that his interrogation lasted nearly 26 hours). [7] However, relatedly, the interrogation occurred during early morning hours, from approximately 3:36 a.m. until 6:41 a.m. There is no indication that defendant slept or had the opportunity to sleep between his arrival at the hospital with White the evening prior, his arrest later that evening, and the beginning of the interrogation. At minimum, defendant was awake and subject to interrogation from 3:36 a.m. to 6:41 a.m., and one can reasonably infer that the deprivation of sleep during those early morning hours affected defendant's decision-making abilities. [8] Like the deprivation of other basic necessities such as food and water, sleep deprivation has been long considered a factor weighing against the voluntariness of a statement. See *Ashcraft v Tennessee*, 322 U.S. 143, 150 n 6, 64 S Ct 921, 88 L Ed 1192 (1944).

Regarding defendant's health, although the details are sparse in the record, there is an indication that defendant had recently received a cancer diagnosis, had undergone treatment, and was suffering ill effects, including weight loss and inhibited movement, that may have affected his ability to endure interrogation.

Other *Cipriano* factors, however, weigh in favor of voluntariness or are largely neutral. The officers advised defendant of his constitutional rights at the start of the interrogation, and defendant both read and signed the advice-of-rights form. Defendant does not allege that he was injured, intoxicated, or drugged when he was interrogated. Defendant also denies that he was physically abused. Further, although defendant reported that he had missed a grade and was enrolled as a senior in an alternative school, the record is silent as to whether these circumstances were due to academic or behavioral struggles. And finally, defendant's previous juvenile adjudication meant that he had some limited previous experience with law enforcement, albeit in a different context.

Outside of the factors specifically identified in *Cipriano*, this Court must also address any other factual circumstances, psychological effects, and coercive tactics employed by the officers that may have contributed to an overbearing of the defendant's free will. See *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781, and *Schneckloth v Bustamonte*, 412 U.S. 218, 226, 93 S Ct 2041, 36 L Ed 2d 854 (1973). While many interrogation strategies do not *necessarily* render a confession involuntary, these tactics tend to undermine a defendant's free will and so must be considered in the voluntariness analysis. [9] Here, one such tactic employed by law enforcement was the officers' repeated and specific references to leniency. While the officers did not make explicit promises of leniency, they heavily implied that defendant would receive a sentence of 20 years to life if he did not cooperate but that he could receive a sentence as low as two years if he did. Specifically, while coaxing defendant to "[j]ust tell us what happened," Detective Lucie told defendant that if he did not, White would turn on defendant and blame defendant, and as a result, "you going to do 20 to life." When Officer MacDonald later stated that he "didn't say you was going to do 20 years," he explained that "[y]ou control that ... you control your own destiny." This clarification emphasized that it was defendant's cooperation that determined whether defendant would receive a 20-to-life sentence or a lesser sentence. Officer MacDonald also offered an analogy of a similarly situated defendant who "took her own fate in her own hands" and cooperated with law enforcement when faced with murder charges and instead of being "gone forever," she "got two years."

***12** **[15]** The transcript reflects that defendant took these statements as an assurance of a lesser sentence if he cooperated. He repeatedly referred to his potential punishments as set forth by the officers, including his statements that "[y]a'll talking about two, three years" and "[y]a'll talking about 20 or 2. Who wouldn't take 2?" [10] Although Detective Lucie later clarified that the officers "don't hand down sentencing," she nonetheless emphasized that "someone does the right thing they come out winning" and affirmed defendant when he said, "So I should come out a winner." Officer MacDonald also shortly thereafter elaborated, "if you truthful all the way through this yeah it's gonna turn out good for you." Given that the officers continued to make these implications of leniency, their limited qualifying language was not sufficient to undo the implications' coercive effect. See *Conte*, 421 Mich. at 740, 365 N.W.2d 648 (opinion by WILLIAMS, C.J.) (stating that "subtle intimations [of leniency] can convey as much as express statements" and that "admonitions to tell the truth, coupled with other factors which could lead the defendant to believe that it is in his best interest to cooperate may amount to a promise of leniency"). [11] Such promises or inducements can render a confession involuntary, *id.* at 730, 365 N.W.2d 648, as they may "excite hopes ... that [the defendant may] be materially benefitted by making disclosures [and] can undermine a defendant's ability to make an autonomous decision to confess," *Commonwealth v Baye*, 462 Mass. 246, 257-258, 967 N.E.2d 1120 (2012) (quotation marks and citation omitted).

Further, during the interrogation, the officers also lied to defendant about the extent of the existing evidence against him. The officers, while asserting that they had not lied to defendant all evening, told defendant that they had an eyewitness who confidently placed defendant at the scene of one of the robberies and home video surveillance that did the same. Neither claim was true. This exaggeration of the strength of the case against defendant and the conviction of the officers' belief in defendant's guilt weighs against a finding that defendant's inculpatory statements were made of a free and voluntary mind. See *State v Baker*, 147 Hawai'i 413, 431-432, 465 P.3d 860 (2020) (finding that "misrepresentations about the existence of incontrovertible

physical evidence that directly implicates the accused is an exceptionally coercive investigation tactic" because it may cause innocent persons to perceive that conviction and punishment are inevitable and therefore falsely confess to ameliorate their current conditions).

[16] Finally, the overall tone of the interrogation was combative. The officers repeatedly told defendant to "man up," chided defendant for "trying to get smart with [them]," and told defendant, "you don't want to battle [with me]." They also persistently used racial slurs and cursed often. [12] The officers' choice of language and tone throughout the interrogation isolated and belittled defendant and likely rendered him more susceptible to the other coercive tactics that were employed. See *Haley v Ohio*, 332 U.S. 596, 600-601, 68 S Ct 302, 92 L Ed 224 (1948) (relying on the defendant's young age, "the hours when he was grilled, [and] the duration of his quizzing," among other factors, to find that the defendant's statements were involuntarily made).

***13** **[17]** **[18]** While any one of the circumstances discussed above might not be sufficient to render defendant's statements involuntary, we must consider the circumstances collectively and their cumulative effect on defendant's free will. [13] And when considered collectively, we find that the overall effect of the circumstances at hand—defendant's age, the timing of the interrogation, the implications of leniency, the use of false evidence, and the language and tone employed by the officers—was such that defendant's statements were not "freely and voluntarily made." See *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781. See also *Baker*, 147 Hawai'i at 433 ("An interrogator's use of multiple coercive interrogation tactics in conjunction can exacerbate the coercive effect of the individual tactics.").

[19] **[20]** Because the use of these involuntary statements at trial violated defendant's constitutional right to due process, see *Cipriano*, 431 Mich. at 331, 429 N.W.2d 781, defendant's conviction may only stand if the prosecutor can prove that the error was harmless beyond a reasonable doubt, *People v Carines*, 460 Mich. 750, 774, 597 N.W.2d 130 (1999). Here, the prosecutor cannot do so. Although defendant arrived at the hospital in the vehicle used in the robberies, the only additional evidence that tied him to the robberies was defendant's own incriminating, involuntary statements. Although Claxton's brother identified defendant as the driver of the shooters' vehicle on direct examination at trial, on cross-examination, he admitted that he had not actually seen defendant driving the vehicle. Instead, he remembered that the driver had been wearing a white T-shirt, and he assumed that defendant was the driver when he observed defendant at the hospital wearing a white T-shirt and sitting on the hood of the Intrepid. [14] Defendant's association with the shooters' vehicle at the hospital may be probative of guilt, but it is not evidence sufficient for us to conclude *beyond a reasonable doubt* that a rational jury would have found defendant guilty absent the error in admitting his involuntary statement. See *People v Shepherd*, 472 Mich. 343, 347, 697 N.W.2d 144 (2005) ("A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.") (quotation marks, citations, and brackets omitted); *People v Sammons*, 505 Mich. 31, 56, 949 N.W.2d 36 (2020) ("When evaluating whether erroneously admitted evidence was harmless beyond a reasonable doubt, we must determine the probable effect of that testimony on the minds of an average jury. Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony.") (quotation marks and citations omitted). Accordingly, defendant is entitled to relief.

III. CONCLUSION

***14** The totality of the circumstances of defendant's interrogation—including his age, the timing of the interrogation, the officers' references to leniency, the officers' use of falsehoods, and the officers' overall tone and use of language—created an environment in which defendant's free will was overborne and the statements he gave were involuntary. Further, the use of these statements at trial violated defendant's constitutional rights, and the prosecution has not proved that their admission at trial was harmless beyond a reasonable doubt. We, accordingly, reverse the judgment of the Court of Appeals. Defendant is therefore entitled to a new trial, and we remand for proceedings consistent with that determination.

We do not retain jurisdiction.

Richard H. Bernstein, Megan K. Cavanagh, Elizabeth M. Welch, Kyra H. Bolden, JJ., concur.

Viviano, J. (dissenting).

To find that a suspect gave an involuntary confession, a court must examine the totality of the circumstances, including various factors such as the suspect's age, education, and health, along with the length of questioning and any physical abuse or threats. *People v Cipriano*, 431 Mich. 315, 334, 429 N.W.2d 781 (1988). Here, the majority examines the factors and correctly finds that individually, they do not offer much support for the conclusion that defendant's confession was involuntary. Yet, as if by magic, these factors, insufficient on their own, somehow combine to render the confession involuntary. In reaching that conclusion, the majority overrides the decision of the experienced lower court judges who thoroughly and correctly assessed the record and determined the confession was voluntary. I cannot agree with the majority's ultimate conclusion, even if I agree with many of the majority's separate analyses of the factors that seem to find each one inadequate to make the confession involuntary. Because there were no threats, promises of leniency, or physical abuse in this case, and none of the more subjective factors supports a finding of involuntariness, I would hold that the confession was voluntary.

I. BACKGROUND LAW

The Supreme Court has explained that the rule against involuntary confessions prohibits coercion, i.e., the suspect's will to resist cannot be overborne by law enforcement officials such that the confession is not "freely self-determined." *Rogers v Richmond*, 365 U.S. 534, 544, 81 S Ct 735, 5 L Ed 2d 760 (1961). With regard to the test used to assess coercion, we have stated that "[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781.

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*]

This list includes psychological factors, and it is true that "coercion can be mental as well as physical ...." *Miranda v Arizona*, 384 U.S. 436, 448, 86 S Ct 1602, 16 L Ed 2d 694 (1966). [1] Yet the Supreme Court has explained that "voluntariness ... has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Colorado v Connelly*, 479 U.S. 157, 170, 107 S Ct 515, 93 L Ed 2d 473 (1986); see also *United States v Rutledge*, 900 F.2d 1127, 1129 (CA 7, 1990) (reading *Connelly* to provide that a confession is voluntary as long as it is not police conduct that destroys the defendant's power of free choice). In light of this guidance, courts have questioned "just what relevance the characteristics and status of the person who gave the confession have in determining whether the requisite element of 'police overreaching' is present." 2 LaFave, Criminal Procedure (4th ed.), § 6.2(c), p. 687. And as the Seventh Circuit recently observed, "[t]he Supreme Court has not found that police tactics not involving physical or mental exhaustion taken alone were sufficient to show involuntariness." *Dassey v Dittmann*, 877 F.3d 297, 304 (CA 7, 2017) (en banc); see also *United States v Roberts*, 975 F.3d 709, 718 (CA 8, 2020) ("Absent improper threats, use of physical force, or intimidation tactics, psychological pressure almost never renders a confession involuntary."). In fact, courts have repeatedly recognized that, in attempting to elicit evidence from otherwise unwilling individuals while investigating serious or violent criminal activity, police may

"play on a suspect's ignorance, fears and anxieties" so long as they do not render "a rational decision ... impossible." *United States v Sablotny*, 21 F.3d 747, 752 (CA 7, 1994); see, e.g., *United States v LeBrun*, 363 F.3d 715, 724 (CA 8, 2004) (explaining that police questioning that subjected "a suspect to psychological pressure, making false promises, playing on a suspect's emotions, and using his family against him did not render a confession involuntary"), citing *United States v Astello*, 241 F.3d 965, 967-968 (CA 8, 2001).

***15** In other words, even if the defendant's characteristics can be considered, the focus of the analysis should be upon police conduct and whether any threats, intimidation, or physical force were employed. It is therefore jarring that the thrust of the majority's analysis in the present case is on the psychological and subjective factors relating to defendant's characteristics rather than on any police misconduct.

II. ANALYSIS

A. *MIRANDA* WARNING

The majority acknowledges, in passing, the officers' administration of *Miranda* warnings as supporting a finding of voluntariness.[2] But the majority does not address the matter at any length or note the significance of this factor. Indeed, the majority does not cite *Miranda v Arizona* anywhere in its opinion.

This is a major omission that undermines the conclusion of the majority. It has often been assumed that giving the *Miranda* warnings will generally render any subsequent confession voluntary. See Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 Mich L Rev 1, 13 (2015) ("To be sure, *Miranda* ... did not obviate the requirement that a confession be voluntary. But, when the police read a suspect his rights and obtained a valid waiver of those rights, the courts almost always found the resulting confession voluntary."); Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val U L Rev 601, 603 (2006) ("The common assumption is often made that, however debatable *Miranda* may be, it has had a definitive impact and has essentially eliminated the need to consider the messy and ineffective rules regarding voluntariness in the interrogation process that were in play before 1966."); 22 Am Jur 2d, Proof of Facts, § 1, p. 546 ("It was thought by many that the *Miranda* decision ... would render the issue of voluntariness of a confession unimportant.").

While this assumption may not always prove true, it is generally a safe one. The United States Supreme Court has recognized that *Miranda* warnings do not "dispense with the voluntariness inquiry" for confessions or statements made after the warnings are given. *Dickerson v United States*, 530 U.S. 428, 444, 120 S Ct 2326, 147 L Ed 2d 405 (2000); see also Nissman & Hagen, Law of Confessions (2d ed, June 2022 update), § 2:1 ("A confession can still be attacked on voluntariness grounds even if police give complete *Miranda* warnings and obtain proper waivers."). But the Court observed that " 'cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are *rare*.' " *Dickerson*, 530 U.S. at 444, 120 S.Ct. 2326, quoting *Berkemer v McCarty*, 468 U.S. 420, 433 n 20, 104 S Ct 3138, 82 L Ed 2d 317 (1984) (emphasis added; brackets omitted); see also *Missouri v Seibert*, 542 U.S. 600, 608-609, 124 S Ct 2601, 159 L Ed 2d 643 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."). This makes sense, as the *Miranda* requirement displays a "palpable hostility toward the act of confession *per se*, rather than toward what the Constitution abhors, *compelled* confession." *Dickerson*, 530 U.S. at 450, 120 S.Ct. 2326 (Scalia, J., dissenting). The only "conceivable basis" for *Miranda* is to "[p]revent[ ] foolish (rather than compelled) confessions ...." *Id.* at 449, 120 S Ct 2326.

***16** In the present case, defendant was provided *Miranda* warnings, although he quibbles with their administration. Although declining to provide any substantial analysis on the topic, the majority does not appear to dispute that defendant's *Miranda* warnings were properly administered. Defendant

first objects that the officers unduly minimized the importance of the warnings by taking only five minutes to go through them and characterizing them as "paperwork." As an initial matter, as the Court of Appeals noted, defendant has not provided any legal support for the proposition that characterizing the warnings as "paperwork" (or the like) blunts their effectiveness or is somehow problematic. Nor has he offered anything suggesting that the rendition of the warnings must take a certain amount of time or come in a certain form. "*Miranda* was not intended, and has not been interpreted, as establishing a precise incantation that must be given prior to a custodial interrogation." *People v Mathews*, 505 Mich. 1114, 1116, 943 N.W.2d 636 (2020) (VIVIANO, J., dissenting). The key is that the " 'essential information must be conveyed.' " *Id.* at 1117, 943 N.W.2d 636 (citation omitted). The warnings themselves are not long and can easily be conveyed in five minutes. And the prefatory remark about "paperwork" here did not deny or conflict with the information being conveyed. Indeed, it is hard to see how calling the warnings "paperwork" somehow undercuts the warnings. In a very real sense, the warnings were "paperwork": defendant was given a paper sheet from which he was asked to read the warnings aloud. [3]

Defendant cannot identify any flaws with the information being conveyed by the warnings, which defendant read aloud. Instead, he notes simply that he mispronounced the word "present" when he read the following line: "I have the right to have an attorney, lawyer present during the time I answer my questions or make any statements." He pronounced it as a verb, with the emphasis on the second syllable, in the sense that the attorney could make a presentation. But properly read as a noun and pronounced with the emphasis on the first syllable, it means that the lawyer can be physically with the defendant during the questioning. See *Miranda*, 384 U.S. at 470, 86 S.Ct. 1602. This does not suggest, however, that defendant misunderstood the nature of the right. The entire line clearly indicates that whatever the lawyer would do on his behalf, it would be done while defendant was being interrogated. Even with the mispronunciation, defendant clearly repeated that the lawyer could represent him during questioning.

Defendant also observes that at the end of his recitation of the warnings, he asked whether to put his initials in the spot marked for the police officer's name. But anyone who has completed a form knows that the spots for initials and signatures can sometimes be confusing. His apparent confusion about how to fill out the form does not suggest that he did not understand the content of the rights listed therein. [4]

***17** Consequently, because the *Miranda* warnings were properly given, it would be a "rare" case in which the subsequent confession could be deemed involuntary. And as noted above, it would be rarer still—indeed, beyond the scope of Supreme Court precedent—to find that the confession was involuntary based solely on psychological coercion stemming from defendant's subjective characteristics.

B. DEFENDANT'S CHARACTERISTICS

1. AGE

The majority's analysis begins by examining defendant's age. The majority notes that although defendant was 18 years old and "an adult under the law, we have elsewhere recognized that 18-year-olds are still undergoing physiological and neurological maturation, meaning that their decision-making abilities are not fully developed." Citing *People v Parks*, 510 Mich. 225, 987 N.W.2d 161 (2022). According to the majority, 18-year-olds are still developing and susceptible to outside pressures.

In response, I can do no better than to offer the words of the author of the present majority opinion, who dissented from these precise sentiments in *Parks* just last term:

> We are not the first court to consider that young adults are still developing neurologically and still have some juvenile traits. The United States Supreme Court recognized young adults' ongoing neurological development in 2005 in *Roper v Simmons*, 543 U.S. 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005), in which it found that the execution of juvenile offenders was unconstitutional. Tellingly, the Court commented:
>
> > Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. [*Id.* at 574, 125 S Ct 1183.]

> I find that reasoning persuasive. A line must be drawn, and that line will always lead to some arbitrary results, as there will be no appreciable difference between a person one day before his 18th birthday versus on his 18th birthday—or now, under the majority's holding, one day before his 19th birthday versus on his 19th birthday. Though the age at which society considers a person an adult has changed and is not consistent across every activity, it is still true that 18 is the general age at which society considers someone an adult. *Roper*, 543 U.S. at 574, 125 S.Ct. 1183 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood."). Even if 18-year-olds are not so well-developed neurologically as 27-year-olds, *they are sufficiently neurologically developed to make major decisions about their lives.* [*Parks*, 510 Mich. at 283-284, 987 N.W.2d 161 (CLEMENT, J., dissenting) (emphasis added).]

The *Parks* dissent further expressed hesitance about accepting the scientific claims made by the majority, noting that those claims involved a policy determination that should be left to the legislative branch, which is "better able to consider scientific evidence and weigh competing interests. Unlike the Legislature, the judiciary resolves disputes between parties. That function does not easily translate to evaluating the strength of scientific claims. Despite the decades of legal experience the justices on this Court have, I do not believe we are well-suited for this foray into neuroscience." *Id.* at 296-297, 987 N.W.2d 161 (citations omitted).

***18** There have been trenchant criticisms of the use of the studies that the majority here ultimately relies on, via *Parks*.[5] Moreover, there are significant equality and autonomy concerns with the majority's conclusion that 18-year-olds are too immature to resist pressures to confess or make other significant life decisions. If this is true, then is an 18-year-old, for example, able to decide whether to have an abortion? *Roper*, 543 U.S. at 617-618, 125 S.Ct. 1183 (Scalia, J., dissenting) (criticizing the American Psychological Association for taking the position that "persons under 18 lack the ability to take moral responsibility for their decisions," when the Association had previously argued that "juveniles are mature enough to decide whether to obtain an abortion without parental involvement"). Are other groups, such as the elderly, who experience cognitive changes, unable to make significant life decisions? See *Sablotny*, 21 F.3d at 751-752. What about athletes and other individuals who have experienced multiple concussions or people who have experienced brain injuries?

I fear that the majority, by relying on questionable scientific studies to suggest that an adult is too young to make significant life decisions, is opening the door to making age irrelevant to the test. As the *Parks* dissent concluded, a line must be drawn somewhere, and certainly 18 years represents an age of sufficient maturity. This reflects the common view of courts across the country, which have not afforded special treatment in this context to 18-year-olds or other groups of adults on the basis of age.[6]

2. EDUCATIONAL BACKGROUND AND HEALTH

***19** Although defendant contends that his educational background supports a finding that the confession was involuntary, the majority lists this factor as either neutral or supporting voluntariness. The majority's rationale is that "although defendant reported that he had missed a grade and was enrolled as a senior in an alternative school, the record is silent as to whether these circumstances were due to academic or behavioral struggles." I agree with this but would add that, according to defendant's brief, the alternative school he attended was for students "who cannot learn effectively in a traditional school environment ... due to learning disabilities, *certain medical conditions*, psychological and behavioral issues, or advanced skills." (Emphasis added.) Defendant did have cancer, which was in remission, and it is entirely possible that he attended the school for this reason, which would not relate to any cognitive challenges or behavioral issues.

I disagree with the majority's reliance on defendant's cancer treatment as a meaningful factor in determining that the confession was involuntary. Certainly, such treatment can be difficult and draining. But defendant indicated that he was in remission and has provided no direct evidence of the effect of the types of treatments he had undergone on his decision-making. The majority asserts that defendant's "weight loss and inhibited movement ... may have affected his ability to endure interrogation." But again, there is no evidence to support this speculation and it does not appear that defendant ever requested a break from the interview. The trial court, not this Court, is the finder of fact, and the trial court's decision

is devoid of any conclusion that defendant was affected by cancer treatments. The standard of review applicable to the trial court's factual determinations is clear error, and this standard does not permit us to credit a new construction of the facts or review the facts de novo. *Anderson v City of Bessemer City*, 470 U.S. 564, 573, 105 S Ct 1504, 84 L Ed 2d 518 (1985) (" 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' ") (citation omitted); 5 Am Jur 2d, Appellate Review, § 591, p. 423 (explaining that on clear-error review it is inappropriate for appellate courts to "give the facts another construction" or "resolve ambiguities differently" than the trier of fact).[7] Thus, while this factor might lend some support to defendant's argument, it does not add much, given the sparse record.

C. OTHER FACTORS

1. DURATION AND TIMING OF THE INTERVIEW

***20** The majority admits that the timing of the interview—roughly three hours—"was not excessively long." However, the majority believes it is significant that the interview occurred in the early morning and that "[t]here is no indication that defendant slept or had the opportunity to sleep" between being detained by the police and being questioned. I agree with the majority that the length of the interview does not support a finding of involuntariness. Defendant has not provided any authority for the suggestion that a three-hour interrogation is so lengthy as to be coercive. Professor Eve Primus has noted that "[m]ost scholars who have looked at this problem [i.e., the optimal length of time for a police interrogation] have suggested that continuous questioning be limited to between four and six hours." *The Future of Confession Law*, 114 Mich L Rev at 37. And, as the majority here acknowledges, this Court has upheld an interrogation that intermittently occurred over the course of 26 hours. *Cipriano*, 431 Mich. at 336-337, 429 N.W.2d 781. The interrogation here was well below these levels.

As for the timing of the interview, I disagree with the majority. The Court of Appeals noted that "[a]lthough the officers interrogated [defendant] in the middle of the night, there is no evidence that he was deprived of sleep, food, or drink." *People v Stewart*, unpublished per curiam opinion of the Court of Appeals, issued November 24, 2020 (Docket No. 343755), p. 4. Notably, the trial court, as the finder of fact, reviewed the available record and made no finding that defendant was sleep deprived. See *Anderson*, 470 U.S. at 573, 105 S.Ct. 1504. The majority seems to infer that defendant was sleep deprived, but other than the hour of the interview there is no record evidence to support this inference. And even to the extent he might have been tired, that was not a result of the police conduct—the alleged crimes being investigated had occurred the night before, and the police had just apprehended him. There is no contention that the police somehow dragged out proceedings, let alone that they did so to deprive defendant of sleep or weaken his resolve. It is not clear what the majority would expect police officers to do in these circumstances, when a criminal investigation leads to a detention late at night or early in the morning. Must the police offer suspects a comfortable bed (or jail cell) to rest in before questioning them, even if (as here) the suspects never indicate they are tired? The majority cites nothing to support such a proposition. And " '[a] statement is not involuntary simply because a defendant was tired or under the influence of drugs; the condition must have rendered the defendant confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent.' " *State v Spencer*, —— Kan ——, ——*State v Spencer*, —— Kan ——, ——; 317 Kan. 295, 527 P.3d 921, 926 (2023) (citation omitted). The majority points to nothing suggesting that any supposed fatigue on defendant's part led to his confusion or inability to understand what was transpiring.

2. PROMISES OF LENIENCY

The majority finds that the officers implied defendant would receive leniency in exchange for a confession and that such implications were coercive. This Court has rejected a per se rule that would find as coercive promises of leniency that led to a confession. *People v Conte*, 421 Mich. 704, 365 N.W.2d 648 (1984). And "the Supreme Court has not treated general assurances of leniency in exchange for cooperation or confession as coercive .... [S]uch general assurances are not legally relevant facts for determining whether a suspect's will was overborne and a confession was involuntary." *Dassey*, 877 F.3d at 316 (collecting sources); *United States v Jacques*, 744 F.3d 804, 809-810 (CA 1, 2014) (stating that it is "well settled" that "suggesting ... cooperation may lead to more favorable treatment" does

not coerce a defendant to confess); *LeBrun*, 363 F.3d at 724-725 (explaining that an express promise of leniency for the defendant, coupled with disclaimers that the police do not control the outcome of criminal proceedings, did not support a finding of coercion); see also 2 LaFave, Criminal Procedure (4th ed.), § 6.2(c), pp. 699-700 (noting that general assurances are not coercive). Moreover, courts have held that officers can recite potential sentences the suspect might receive. See *United States v Bautista-Avila*, 6 F.3d 1360, 1364-1365 (CA 9, 1993) (collecting sources); *United States v Montgomery*, 555 F.3d 623, 630 (CA 7, 2009) (noting that an officer's provision of inaccurate information on a potential sentence was not coercive when the statement was not tied to a deal or obligation to cooperate); *Astello*, 241 F.3d at 966-968 (holding that the officers' assertion that a life sentence was a possible punishment and their implication that the defendant could potentially receive a reduced sentence if he confessed did not render the confession coercive). This is true even when the suspect is a minor. See *Simmons v Bowersox*, 235 F.3d 1124, 1133 (CA 8, 2001) ("Furthermore, '[a] truthful and noncoercive statement of the possible penalties which an accused faces may be given to the accused without overbearing one's free will,' even when the accused is a minor."), quoting *United States v Ballard*, 586 F.2d 1060, 1063 (CA 5, 1978) (alteration in *Simmons*).

21** Nothing in the present case amounts to an impermissible promise of leniency. Indeed, the alleged promises here could not reasonably be interpreted as promises at all. At one point, roughly halfway into the interrogation, the officers were encouraging defendant to tell the truth. They asked him whether his phone records would put him at the locations of the crimes. He said "no." Officer MacDonald then said, "I'm doing the search warrant on your phone .... I ain't bluffed you all day .... So, you want to sit here and put your fate in what you think mother f*** can't prove? You going to lose." Defendant responded, "Dude, 20 years though," apparently referring to an anticipated prison sentence. Officer MacDonald replied: "Man, I didn't say you was going to do 20 years. I didn't say he [i.e., the other defendant] was going to do 20 years. You control that. You control—listen, Man—at the end of the day, Bro, you control your own—you control your own destiny." This statement implied that defendant himself has some control over the outcome in this case, but the officer expressly denied stating any number of years for the sentence. Furthermore, given that defendant potentially faced charges of first-degree felony murder, armed robbery, and assault with intent to commit murder, it was abundantly reasonable and accurate to believe that defendant could receive a sentence of 20 years' imprisonment. See, e.g., MCL 750.316(1) (stating that first-degree murder is punishable "by imprisonment for life without eligibility for parole"); MCL 750.83 ("Assault with intent to commit murder—Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). In fact, the officers' reference to a possible 20-year sentence could be viewed as an understatement, given that defendant was acquitted of multiple charges but was still sentenced to a minimum of 25 years' imprisonment.

The other examples of "promises" during defendant's interrogation are all of the same sort. Indeed, Officer MacDonald unambiguously explained to defendant that the cops did not have power over sentencing:

> I'm not trying to send kids to prison. I'm trying to find out the truth of what happened. That's my job. Is to find out what happened. What led up to it and what happened afterwards. What's the evidence. That's all I'm here. I don't send anybody to prison .... I'm not the f****** judge. I'm not the f****** jury. I'm the guy that's supposed to find out what happened. And that's it. That's my job. And once I find out what happened I'm done. My job is over. I give it to somebody else.

Shortly after this, he told defendant that "[y]ou facing the judicial system," and then he related the example of the female suspect who got two years:

> I just got done doing a homicide trial, Man? This mother f***** shot two people with his sister in the car. With his sister in the car he killed two people. With his sister in the car. And she was scared to leave. You know what this mother f***** did? Point the gun at her and told her drive the f*** off because he didn't give a f*** about her. And when she got locked up I talked to her. She did the same s*** you did. 'Man, I don't got nothing to say. I'm protect my brother.' Two weeks later you know what she did? 'Hey, MacDonald, Man, I want to talk to you.' F*** that. I ain't

> let this mother f***** decide my fate. This mother f***** got found guilty of murder. You know what she got, Bro? Mother f****** two years. Because she decided her own mother f****** fate. If she'd went into that courtroom with the same attitude you got you know what happen to her? She get found guilty of murder. And then she'd been gone forever. But instead she took her own fate in her own hands and she got two years. But she wasn't no letting no [sic] brother f****** intimidate her and f****** go to prison for life.

There is no indication that this story was false, nor is there any indication that it was wrong to imply that cooperation with the police could redound to the benefit of defendant or others like him. See, e.g., *Dassey*, 877 F.3d at 316 (holding that "general assurances of leniency in exchange for cooperation or confession" are "not legally relevant facts for determining whether a suspect's will was overborne and a confession was involuntary"); *Simmons*, 235 F.3d at 1133 ("The statement to an accused that telling the truth 'would be better for him' does not constitute an implied or express promise of leniency for the purpose of rendering his confession involuntary.") (citation omitted); *LeBrun*, 363 F.3d at 725 (promises of leniency did not render a confession coerced because the police disclaimed any certainty as to whether the defendant would be prosecuted and a "mistaken belief" by a defendant "does not render a confession involuntary") (emphasis omitted).

Defendant was clearly affected by this, as he repeatedly responded, "Oh, god." He then said he did not take a vehicle or shoot anyone or have a gun. Next, he expressed despair over his situation:

> ***22** *Detective Lucie*: So, what did you do?
>
> *Officer MacDonald*: Josh, was you in the car when they was—when they was on Savage?
>
> *Mr. Stewart*: I don't even want to be living no more, Man.
>
> *Officer MacDonald*: Hey, Bro, Come on.
>
> *Mr. Stewart*: I'm serious, Man.
>
> *Officer MacDonald*: Listen—Listen—Bro, don't even—don't even—don't even
>
> *Mr. Stewart*: I just f***** my life up. Might just Dog. I just f***** my s***.

But after this exchange, they started talking about the events at issue. Defendant asserted he was just in there for a stolen car. The police disabused him of this belief:

> *Detective Lucie*: You think that?
>
> *Mr. Stewart*: I'm here for murder? That's what I'm in here for?
>
> *Detective Lucie*: I'm a police officer that works for the homicide—homicide section. Yes. Exactly what I do.
>
> *Officer MacDonald*: Well that's the game of murder, Man.

After this, defendant referred again to a two-year sentence, but Officer MacDonald made it clear that he was not promising that:

> *Mr. Stewart*: Ya'll talking bout two, three years.
>
> *Officer MacDonald*: You want two years or—I mean—*I'm not saying you getting two years*. I just gave you an example of what happened.
>
> *Detective Lucie*: That's the business.
>
> *Officer MacDonald*: I gave an example of what somebody did by taking their own path. By taking their own life in their own hands and that was her outcome.
>
> *Mr. Stewart*: Right. Right.
>
> *Officer MacDonald*: A'ight? I'm trying to give you an example of what somebody—what happened when somebody took their own life in their own—and put it in their hands. [Emphasis added.]

Shortly after this, defendant began giving his statement of his involvement in the crimes.

The officers made clear that there was no promise being offered and that they had no power to make such a promise. They repeatedly advised defendant that the example they had related earlier of the female suspect was just that, an example. Even under a strict rule where promises of leniency are per se coercive, it is hard to see any such promise here. And even assuming there was such a promise, it was hedged with so many qualifications that it cannot be given great weight under the totality-of-the-circumstances test.

In coming to the opposite conclusion, the majority relies heavily on its interpretation of defendant's statements as

reflecting his belief that he would obtain a lesser sentence if he confessed. But, as noted, implications of potential leniency and mistaken beliefs as to a reduced sentence are simply insufficient to render a confession coerced. See, e.g., *Dassey*, 877 F.3d at 316; *LeBrun*, 363 F.3d at 724-725; *Simmons*, 235 F.3d at 1133. Defendant nowhere stated that he understood the officers to be making any promises. He simply stated, "[y]a'll [sic] talking about two, three years" and "[y]a'll talking about 20 or 2. Who wouldn't take 2?" But defendant made these statements after providing his confession. And even so, the officers repeatedly emphasized that they had no power to offer leniency.

In light of these denials, to find an impermissible promise of leniency based solely on defendant's supposed misunderstanding would make meaningless the rule that general assurances of leniency are permissible. Officers could not make any statements concerning leniency lest the suspect feign a misunderstanding of those statements as a promise—a misunderstanding that, according to the majority's logic, the officers could not undo despite express and repeated explanations that no promises were being made. That the majority lacks support for its approach is demonstrated by the fact that it must rely on the opinion for affirmance in *Conte*, which a majority of the Court rejected, promulgating a per se rule against assurances of lenience. See *Conte*, 421 Mich. at 740, 365 N.W.2d 648 (opinion by WILLIAMS, C.J.).

***23** I therefore would not find that any promises of leniency were made here.

3. FALSE EVIDENCE AND THREATS

The majority also concludes that the confession was involuntary because the police in the interview inflated the nature and extent of the evidence against defendant and because "the overall tone of the interrogation was combative." With regard to the inflated evidence, the police here misrepresented the strength of the evidence against defendant, falsely telling him they had video evidence, that they had witnesses from the incidents, and that another defendant would testify that he fired the shots.

In general, trickery short of outright fraud (such as false promises of leniency) is permissible—the United States Supreme Court has expressly rejected a per se ban on such tactics. See *Frazier v Cupp*, 394 U.S. 731, 89 S Ct 1420, 22 L Ed 2d 684 (1969).[8] And, in particular, these sorts of false allegations, concerning the defendant's connections to the crime and the evidence thereof, are considered the least coercive form of trickery. See *Holland v McGinnis*, 963 F.2d 1044, 1051 (CA 7, 1992) ("Of the numerous varieties of police trickery, ... a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary."). This is because "[i]nflating evidence of [a suspect's] guilt interfere[s] little, if at all, with his 'free and deliberate choice' of whether to confess ...." *Id.* Such misrepresentations do not interfere with a suspect's rational decision-making, as they do not lead him to considerations "beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime." *Id.* Another reason why intrinsic evidence is less coercive is that the suspect is more likely to have firsthand knowledge about it. See generally 2 LaFave, Criminal Procedure (4th ed.), § 6.2(c), pp. 708-709 ("Moreover, a distinction must be made between the kind of trickery discussed earlier, involving facts of which a defendant has firsthand knowledge, and trickery by 'a lie unrelated to the government's evidence of his guilt, that had consequences to others,' as the latter instance is more likely to induce an innocent person to give a confession.").[9]

***24** Consequently, the use of the false evidence here is not indicative of coercion. Moreover, the false evidence here was not extensive. Regarding the supposed video evidence, the cops did not dwell on it or say that defendant appeared in the video. As for the witnesses, the police barely referred to them except to say that they existed. Furthermore, there was eyewitness and other circumstantial evidence that defendant was the driver in this case. With regard to the assertion that a codefendant would testify against defendant, it is not clear that the police were suggesting that the codefendant had actually made this assertion or that they had evidence to this effect. Rather, they were predicting what the codefendant would do: "You're not saying what happened," they told defendant. The codefendant is "smart enough to put you as the shooter. He knows how to lie better than you do. He will testify in the court, in a room full of people, in front of a judge that you the one killed dude .... He's going to put the one that killed somebody in your hand. So he can take the

plea deal and be out and be able to make babies and s*** before he get old." Indeed, shortly after this, the cops told defendant that they already knew he was not the shooter and that they were not trying to get defendant to admit to things he did not do. In context, then, this was not a definite and false statement about the evidence the cops had assembled against defendant. And, in any event, it is not coercive to encourage even juvenile suspects to tell the truth by indicating that their co-participants will provide evidence against them. *United States v Ballard*, 586 F.2d 1060, 1063 (CA 5, 1978) ("Encouraging a suspect to tell the truth and suggesting that his cohorts might leave him 'holding the bag' does not, as a matter of law, overcome a confessor's will, even though he or she may be sixteen years of age.").

As for the "combative" tone of the interrogation, the majority does not suggest that any threats were made against defendant or his family. At best, the majority accuses the officers of using intemperate language.[10] But the majority offers no persuasive support that such a tactic is coercive.[11] And it would take a willful distortion of the evidence to suggest that the "combative tone" involved impermissible threats. One statement that could be perceived as threatening when taken out of context was Officer MacDonald's remark that he was going to have to "battle this b**** out." But this came toward the end of the interrogation, and he was not threatening defendant at all, let alone with a physical altercation. In fact, his reference to "battle" was not even about his conversation with defendant—it was about the officer's future conversation with the codefendant. He was telling defendant that they had witnesses as well as direct physical evidence of what happened, specifically, codefendant's gunshot wound, so he would not need to rely on what the other participants told him. "So, I don't need you," he told defendant. "I don't need to go back and say bro this is what [defendant] told me. I don't need to say this." He continued:

> *Officer MacDonald*: ... So I don't need to—I don't need to play you. That's not—I don't need to—that's not my game. I come straight at a mother f***** one-on-one. No sidebar. I don't bring in mother f****** off the sideline .... I come at your a** straight up man to man and we have this talk. And I smell b******* I let you know it's b*******. Did I not do that today? Did I go and say Josh you pulled a s*** dude[?]
>
> *Mr. Stewart*: Right.
>
> *Officer MacDonald*: That s*** like that don't happen in the D. Cause I know. So, I ain't have to come at you with no side s***. When I go to this [n-word] I don't gotta go sideways. I'm coming his a** head on. My gloves on, his gloves on and we gone sit there and we gone battle this b**** out. And I'm going to tell him straight up. You got holes in you. You got evidence in your body. I don't need nothing else. So, you can sit here and you can do whatever you want to do and then we gone go back and forth. So, your name won't come up. That's not me. I don't do that. I ain't do that with you. I ain't gone do it with him. I don't do it with nobody else I talk to. I'm 100. I head on.

The officer was not suggesting a battle with defendant, and the battle he was talking about was clearly not going to be physical—he referred to it as sitting and talking. Moreover, it seems apparent that the officer was trying to assure defendant that his name would not be used in the interrogation with the codefendant. This can hardly be considered a threat.

***25** The other officer also referred to "battle" during the interrogation. Defendant was saying that he went to get a smoke at some point. The officer asked, "With who?" Defendant responded, "What you mean with who? Myself. I'm smoke by myself." The officer then asked:

> *Detective Lucie*: You trying to get smart with me?
>
> *Mr. Stewart*: No.
>
> *Detective Lucie*: Cause you don't want to battle.
>
> *Mr. Stewart*: No. There ain't no battle or none of that.
>
> *Detective Lucie*: This is your life.
>
> *Mr. Stewart*: Right.
>
> *Detective Lucie*: If I ask you who the f*** you was smoking with you tell me.
>
> *Mr. Stewart*: And I'm saying myself. I said I was going to smoke by myself.

Clearly, the officer was not talking about some physical confrontation. And defendant did not misunderstand the meaning. The officer verbally confronted defendant after defendant shifted his story repeatedly and claimed he had simply come upon his codefendant in a car riddled with bullet holes, which the officers believed to be false. He said there was "no battle" occurring, by which he meant that there was no present battle—he would have no need to assure the officer that there was no *physical* battle going on, because the officer would be well aware of that. By assuring the officer that there

was no battle happening, he meant that he was not trying to be argumentative or rude. Notably, the trial court reviewing this record made no finding that the officer's language was coercive or violent.

Consequently, I cannot agree that there were any threats. And any combative tone is legally irrelevant without more.

4. ADDITIONAL FACTORS AND TOTALITY ANALYSIS

The majority correctly recognizes that some of the most critical factors favor a finding of voluntariness. Defendant was not physically abused or threatened. He was not "injured, intoxicated, or drugged" when interviewed. *Cipriano*, 431 Mich. at 334, 429 N.W.2d 781. Further, he had prior experience with law enforcement. The majority never explains why these key factors are overcome by the more subjective and psychological factors that no court has ever found sufficient, on their own, to make a confession involuntary. Indeed, as noted, the majority admits that many of these factors are insufficient to find coercion. The majority is forced to soft-pedal even those factors that it claims support today's holding. For example, it acknowledges that no express promises were made to defendant and that the officers repeatedly attempted to dispel any misunderstanding on that point.

We are thus left with a balance of generally insufficient factors that, at very best, offer tepid support for the majority's conclusion, against more important factors that weigh heavily against it. In these circumstances, it is impossible to discern a principled and generally applicable rationale for the result reached today.

III. CONCLUSION

In light of the above analysis, I believe defendant's confession was voluntary; the analysis of the trial court and the unanimous panel of the Court of Appeals was correct; and the jury's convictions of robbery, assault, theft, and illegal firearm possession should stand. Significantly, defendant was given *Miranda* warnings, he was not physically abused, he was not threatened, and there were no promises of leniency. Under the caselaw discussed above, these are the most important factors to consider. Indeed, as mentioned, the United States Supreme Court has never found psychological coercion alone to be sufficient to render a confession involuntary. Yet that is essentially what the majority decides today. It relies on dubious research from *Parks* to conclude that some adults are too young to be treated as adults, suggests that the police must offer suspects a respite before late-night or early-morning questioning, and emphasizes that the officers' rudeness is coercive. In so doing, the majority substitutes its views on best practices for police interrogations for what the Constitution demands. I fear that standard police interview techniques—ones that have been used for decades to solve some of the most heinous crimes—will be imperiled by today's decision. Under the majority's rationale, it appears that police interrogation of an adult suspect involved in a violent crime will need to be conducted as though it were a social conversation among friends rather than an effort to protect the community and bring the guilty to justice. I therefore dissent. [12]

Brian K. Zahra, J., agrees.

All Citations

--- N.W.2d ----, 2023 WL 4874412

Footnotes

1 This Court also directed oral argument regarding defendant's sentencing arguments. However, our resolution of defendant's voluntariness issue renders these other issues moot. See *People v Richmond*, 486 Mich. 29, 34, 782 N.W.2d 187 (2010).

2 In *Conte*, a majority of this Court rejected a proposition to consider promises of leniency under a separate, more stringent analysis. Although the lead opinion, authored by then Chief Justice WILLIAMS and joined by Justices LEVIN and KAVANAGH, advocated for the more stringent analysis, see *Conte*, 421 Mich. at 729, 365 N.W.2d 648 (opinion by WILLIAMS, C.J.), Justices BOYLE, RYAN, BRICKLEY, and CAVANAGH held that promises of leniency should be considered within the totality-of-the-circumstances analysis, see *id.* at 754-755, 365 N.W.2d 648 (opinion by BOYLE, J.); *id.* at 761, 365 N.W.2d 648 (BRICKLEY, J., concurring in part with BOYLE, J.); *id.* at 761-762, 365 N.W.2d 648 (CAVANAGH, J., concurring in part with BOYLE, J.). See also *Givans*, 227 Mich App at 119-120, 575 N.W.2d 84 (counting the votes in *Conte* and concluding the same).

3 During the interrogation, defendant referred to White as "Prophet," the name by which he knew White.

4 When asked what store he was going to, defendant at one point responded, "I wasn't even going to the store. I was just roaming the hood." But when reminded that he had said earlier that he was going to the store, defendant clarified that he was going to the Family Dollar to purchase blunts. This discrepancy appears to be the basis of Officer MacDonald's accusation of conflicting stories.

5 More specifically, studies have established that adolescents who were under the age of 18 at the time of an alleged offense and were later exonerated had falsely confessed at a much higher rate than adult exonerees. See Gross & Shaffer, *Exonerations in the United States, 1989–2012: Report by the National Registry of Exonerations* (June 22, 2012), p. 60 (citing a 2003 report that examined 873 exonerations and found that 42% of adolescent exonerees had falsely confessed, as compared to 15% of all exonerees and 8% of adult exonerees without known known mental disabilities), available at <https://perma.cc/SM4D-D7MY>; Tepfer, Nirider & Tricarico, *Arrested Development: Convictions of Innocent Youth*, 62 Rutgers L Rev 887, 904 (2010) (finding that 31.1% of adolescent-offender exonerees in the study had falsely confessed, compared to 17.8% of adult-offender exonerees); Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L Rev 891, 945 (2004) (concluding that a "suspect's age is strongly correlated with the likelihood of eliciting a false confession"). While these studies, as well as the *JDB* and *Gallegos* decisions, concern juvenile interviewees, given our recognition in *Parks* of the continuing effects of youth on 18-year-olds, we believe that these considerations may remain relevant after the age of majority.

6 In support of its argument, the dissent also cites this author's dissenting opinion in *Parks*, which concerned whether the categorical exclusion from mandatory life-without-parole sentences for persons aged 17 and younger should be extended to 18-year-olds. This author dissented, concluding that both the United States and Michigan Constitutions permit the imposition of mandatory life-without-parole sentences upon 18-year-olds and that this Court should not "strike down a statute because we disagree with the Legislature's policy choice." *Parks*, 510 Mich. at 295, 987 N.W.2d 161 (CLEMENT, J., dissenting).

Regarding the former, this author's statement that 18-year-olds "are sufficiently neurologically developed to make major decisions about their lives" was a recognition that 18 is the general age at which society considers a person to be an adult. *Id.* at 283-284, 987 N.W.2d 161. This statement was made in the context of the constitutional proportionality analysis, which requires courts to measure the severity of the punishment against the gravity of the crime committed. In other words, the fact that society generally allows 18-year-olds to make major decisions about their lives weighed in favor of a finding that the severity of the punishment fit the gravity of the offense for that class of defendants. But this conclusion is not inherently incompatible with the premise that 18-year-olds are still developing neurologically. (In fact, as this author

stated explicitly in *Parks*, "I do not argue with the science the majority discusses." *Id.* at 282, 987 N.W.2d 161.) The *Cipriano* factors involve no bright-line rule like the one at issue in *Parks*, nor do they require a constitutional proportionality analysis; instead, they simply mandate that the courts take age into account when assessing voluntariness. Considering the common-sense principle that very young adults are more susceptible and impressionable is a simple application of the *Cipriano* factors, just as it would be if this Court were assessing an elderly defendant suffering from mental vulnerabilities due to age.

Regarding the latter, this Court's present opinion does not interfere with the policy-making function of the Legislature as this author charged the majority opinion in *Parks* with doing. This Court's present opinion does not strike down an existing statute or otherwise interfere with the Legislature's existing expression of policy. Finally, to whatever extent this author's dissenting opinion in *Parks* does conflict with today's holding, it is the majority decision in *Parks* that is binding law.

7 We do not mean to suggest that police questioning that lasts less than 26 hours can never be considered excessively long for purposes of determining whether a defendant's constitutional rights were violated. The duration of an interrogation must be viewed along a spectrum, and three hours of questioning, while lengthy, does not fall on the excessive end of that spectrum.

8 We do not suggest, as the dissent wonders, that law enforcement must always avoid nighttime interrogations. The objective circumstances here indicate some level of sleep deprivation, and this weighs toward, but is not dispositive of, involuntariness. The dissent challenges the lack of record support for sleep deprivation, but the record establishes the timing of the early-hours interrogation, and there is no record support in opposition to the common-sense conclusion that an interrogation from 3:36 a.m. until 6:41 a.m. results in some level of sleep deprivation that is likely to have harmful effects.

9 Defendant and amici, citing extensive research regarding the interplay between coercive interrogation tactics and false confessions, urge this Court to hold that statements given during interrogations in which certain coercive tactics were used are per se inadmissible. Research illustrating a strong correlation between the use of false evidence and an interrogee providing a false confession is particularly concerning. See Kassin, *Duped: Why Innocent People Confess—and Why We Believe Their Confessions* (Lanham: Prometheus Books, 2022); Snook et al., *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 Legal & Criminological Psychol 1 (2021); Appleby, Hasel, & Kassin, *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 Psychol, Crime & L 111 (2013); Kassin et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 Law & Hum Behav 3 (2010); Perillo & Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 Law & Hum Behav 327 (2011); Horselenberg, Merckelbach, & Josephs, *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 Psychol, Crime & L 1 (2003).

However, we decline defendant's and amici's invitations to adopt a per se rule at this time. "The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this" that involve "fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused," *Haynes v Washington*, 373 U.S. 503, 515, 83 S Ct 1336, 10 L Ed 2d 513 (1963). While our understanding of interrogation tactics and their effects on free will have evolved since *Haynes* and will continue to do so, at present, the totality-of-the-circumstances analysis employed by this Court in *Cipriano* is sufficient to account for the effect of these tactics on a defendant's free will.

10 The dissent disregards these specific statements because they were made after defendant made his first inculpatory statement. We do not agree that the timing of these statements renders them irrelevant. Further, to the extent that one may argue that the comments—because of their timing—constitute an attempt by defendant to remedy the giving of the inculpatory statement, defendant made other statements before admitting to "[d]riving there" that reflect the same understanding of the officers' references to punishment. For example, defendant asked, "Why I'm going to do 20 to life?" and stated, "Dude, 20 years though—" long before he made his first inculpatory statement.

11 The dissent criticizes our citation of then Chief Justice WILLIAMS's opinion in *Conte*, correctly noting that the majority in *Conte* rejected that opinion's proposal for a per se rule of exclusion applicable to statements induced by promises of leniency. But while the *Conte* majority rejected the per se rule, it acknowledged and did not dispute the coercive effect of promises of leniency discussed by then Chief Justice WILLIAMS and concluded that courts should consider such promises within the totality-of-the-circumstances inquiry to determine whether the inducements overcame the interviewee's free will. See, e.g., *Conte*, 421 Mich. at 753-754, 365 N.W.2d 648 (opinion by BOYLE, J.); *id.* at 761, 365 N.W.2d 648 (opinion by BRICKLEY, J., concurring in part with BOYLE, J.); *id.* at 761-762, 365 N.W.2d 648 (opinion by CAVANAGH, J., concurring in part with BOYLE, J.).

12 Our dissenting colleague notes that one of the officers in the interrogation was also a Black male, like defendant, but that does not preclude the use of racial overtones against defendant in a harmful or coercive manner. Although Justice VIVIANO speculates that, at times, Officer MacDonald may have been trying to bridge a connection to defendant through their shared background, it is hard to imagine how the sustained use of the n-word throughout the interrogation was meant to accomplish this. Moreover, the officers expressed doubts that "n***** ... in fucking Detroit"—terms they also used to describe defendant—would ever act altruistically when allegedly coming upon an injured person in a bullet-ridden vehicle on a public street. Whatever the officers' intent, the dehumanizing and coercive nature of racial slurs is heightened when used by a public official—even more so when directed toward a member of the public, regardless of whether the official and the person share a racial or ethnic connection.

13 The dissent argues, in part, that we have reached this conclusion without giving due deference to the trial court's factual findings. We note that our analyses of some attendant circumstances of defendant's statements are consistent with the trial court's factual findings. For example, the trial court found that law enforcement made misrepresentations to defendant regarding the criminal investigation. That we determined that these misrepresentations (along with other circumstances) overcame defendant's free will, and the trial court did not, represent different conclusions of law, not divergent factual findings—and this Court is not required to give the same deference to a trial court's conclusions of law as to its factual findings. See *Elliott*, 494 Mich. at 300-301, 833 N.W.2d 284. But the dissent is correct that some of our factual findings are not present in the trial court record, specifically that the language used by law enforcement was combative, that defendant was sleep-deprived, and that defendant may have been affected by previous cancer treatments. Although the trial court did not make these factual findings, neither did it make factual findings to the contrary. The trial court addressed only the advisement of rights, the length of the interrogation, and law enforcement's misrepresentations to defendant. However, even assuming that a court's lack of factual findings is subject to the same deference as its affirmative factual findings, this Court's analysis of the entire record (including the videorecording of defendant's interrogation) has left it with a firm and definite conviction that the trial court made a mistake by failing to make findings in keeping with those made by this Court. See *Givans*, 277 Mich App at 119, 743 N.W.2d 233. Notably, the Court of Appeals' decision in *People v Kavanaugh*, 320 Mich App 293, 298, 907 N.W.2d 845 (2017), provides that a reviewing court need not rely on the trial court's factual

findings regarding videorecording evidence contained in the record, and the parties in this case have not asked this Court to revisit that holding.

14 It bears noting that a white T-shirt is a particularly common item of clothing, especially among young men, such that its utility as a measure of identification is minimal, at best.

1 Both this Court and the United States Supreme Court have noted that the same standard applies in the present context (i.e., the voluntariness of confessions) as in determining whether a waiver of *Miranda* rights was voluntary. See *People v Cheatham*, 453 Mich. 1, 17, 551 N.W.2d 355 (1996), discussing *Colorado v Connelly*, 479 U.S. 157, 169-170, 107 S Ct 515, 93 L Ed 2d 473 (1986).

2 Under *Miranda*, "an individual must be 'clearly informed,' prior to custodial questioning, that he has, among other rights, 'the right to consult with a lawyer and to have the lawyer with him during interrogation.' " *Florida v Powell*, 559 U.S. 50, 53, 130 S Ct 1195, 175 L Ed 2d 1009 (2010), quoting *Miranda*, 384 U.S. at 471, 86 S.Ct. 1602.

3 It is not even apparent that the officers referred to the warnings as "paperwork." Officer MacDonald started off the interview respectfully, asking defendant, "You want me [to] call you Mr. Stewart or call you Josh?" Defendant responded, "Call me Josh." After that, Officer MacDonald made the remark about paperwork: "All right. Let's go through some paperwork real quick, Man. There's going to be a couple questions about what happened—about what happened tonight." He then asked defendant about the name of his friend, how to spell defendant's last name, when defendant was born, and what grade in school defendant had completed. At that point, he gave defendant "a certificate of your constitutional rights," asking defendant to "read one through five and then next to each one you's [sic] going to put your initials. And all your initials indicates means [sic] you understand what you're reading and then if you have any questions you just ask me." Thus, it is not clear that the officer intended to link his stray comment about "paperwork" to the *Miranda* warnings or that defendant (or any reasonable person in defendant's position) would have believed there was such a link. And even so, the officer expressly told defendant to ask him any questions he might have.

4 Even to the extent that defendant's question could signal some substantive confusion, it is well below the level of confusion necessary to render a confession invalid. For example, in one recent federal circuit case, the suspect had limited intellectual ability, he appeared to have misunderstood the officers' promises, and "[a]t times it appeared as though [he] simply did not grasp the gravity of his confession—after confessing to rape and murder, he asked the officers if he would be back at school that afternoon in time to turn in a project." *Dassey*, 877 F.3d at 312. Yet the court upheld a state court's application of the Supreme Court precedent finding that, under a totality test, the confession was voluntary. *Id.* at 313. If the suspect there, who did not understand the nature of the interview or his admissions, could voluntarily confess, then the fact that defendant here was uncertain where to initial the form hardly suggests that the confession was involuntary.

5 Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L Rev 89, 161-163 (2009) ("In support of this narrative advocates, experts, and commentators most frequently cite to a small number of functional-imaging studies that show teens to display more amygdala, and less frontal-lobe, activation than adults when engaged in an emotion-recognition task. These studies provide little support for the assertion. In a typical study, subjects' brains are scanned while they view photographs of unfamiliar persons displaying stylized 'fearful' facial expressions; they then are asked to identify the emotion being displayed. This task bears little relation to juvenile offending. The only reported behavioral outcome is teens' higher rate of misidentification of the emotion, and that differential may be erased by using color photographs and including images of people the teens know. It is tempting to conclude (as at least one researcher has)

that a teenager, if confronted with a person displaying a fearful expression, is likely to misinterpret that expression and harm the person out of a misguided instinct toward self-defense. That conclusion may be true, but it cannot be reached on the basis of the studies. Indeed, other studies show that when presented with different tasks teenagers tend to display *greater* frontal-lobe activity than adults. This does not suggest that they are somehow more 'rational,' but instead may indicate that processes that have by adulthood become automatic require more effortful thought for adolescents. Some studies indicate that aggression and violence sometimes correlate with *low* levels of amygdala activation; yet others suggest that teens have great variation in amygdala response.") (citations omitted); *Roper*, 543 U.S. at 618, 125 S.Ct. 1183 (Scalia, J., dissenting) ("At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes."); *Commonwealth v DiGiambattista*, 442 Mass. 423, 459, 813 N.E.2d 516 (2004) (Spina, J., dissenting) (noting that these experiments have been "dubbed 'not yet ready for "prime time" ' research"), quoting Agar, *The Admissibility of False Confession Expert Testimony*, 8 Army Lawyer 26, 42 (1999); see also *DiGiambattista*, 442 Mass. at 458-459, 813 N.E.2d 516 (Spina, J., dissenting) (" 'Currently, the empirical base that supports the [false confession] theory has too many unanswered questions, no known error rate, and just one laboratory experiment to back it up. This foundation cannot support reliable conclusions just yet.' ") (second alteration omitted), quoting *The Admissibility*, 8 Army Lawyer at 42.

6 See, e.g., *Oregon v Elstad*, 470 U.S. 298, 105 S Ct 1285, 84 L Ed 2d 222 (1985) (holding that a confession by an 18-year-old was admissible, despite the police failing to initially provide *Miranda* warnings, and without any indication that the defendant's age was a relevant consideration); *Astello*, 241 F.3d at 967-968 (concluding that a confession was voluntary when an 18-year-old discussed his wish to see his mother, police implied potential benefits upon confession, police referred and appealed to the individual's family honor, and the individual had been previously arrested, and emphasizing the difference between the individual and "juvenile[s]"); *Sablotny*, 21 F.3d at 751-752 (declining to apply a "special standard" to an individual on the basis of being elderly); cf. *J.D.B. v North Carolina*, 564 U.S. 261, 277, 131 S Ct 2394, 180 L Ed 2d 310 (2011) (suggesting that even teenagers close to the age of 18 might react during interrogations as would a typical 18-year-old and that, consequently, age in those cases would not be a significant factor in determining whether the individual is in custody for purposes of *Miranda*).

7 In response to this charge, the majority admits that much of its analysis is based on its own factual findings and not on its agreement (or disagreement) with the facts found by the trial court. However, our role as an appellate court is limited to reexamining the trial court's factual findings and the legal conclusions it made by applying the law to those facts. If the majority deems it necessary to address other facts, it should remand to the trial court for it to make factual findings on the points the majority believes it missed the first time around. As the United States Supreme Court has explained, "[f]actfinding is the basic responsibility of district courts, rather than appellate courts," and appellate courts "should not ... in the first instance" resolve a factual dispute." See *Pullman-Standard v Swint*, 456 U.S. 273, 291-292, 102 S Ct 1781, 72 L Ed 2d 66 (1982) (quotation marks and citation omitted). Our Court of Appeals has also adhered to this basic principle of appellate review. See *In re Martin*, 200 Mich App 703, 717, 504 N.W.2d 917 (1993) ("It is not the function of an appellate court to decide disputed questions of fact in the first instance and then choose between affirmance or reversal by testing its factual conclusion against that which the trial court *might* have ... reached.") (quotation marks and citation omitted). See generally Steinman, *Appellate Courts As First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 Notre Dame L Rev 1521, 1521-1522 (2012) ("Legal professionals, litigants, and the people of this country ... view it to be the role of trial judges

and juries, administrative agencies, and arbitrators—not appellate courts—to make the initial findings of fact, reach the initial conclusions of law, apply the law to the facts in the first instance, and exercise discretion as to issues, raised in the foundational proceeding, whose resolution is not dictated by rules of law. We then see it as the function of courts of appeals acting as such to re-examine fact-findings, conclusions of law, applications of law to fact, and exercises of discretion under appropriate standards of review. We generally expect courts of appeals ... not to act as a court of first instance in finding facts, stating the law, or exercising other judicial functions.").

8 See *Rutledge*, 900 F.2d at 1131 ("Far from making the police a fiduciary of the suspect, the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded here."); *Hadley v Williams*, 368 F.3d 747, 749 (CA 7, 2004) (explaining that the law "draws the line at outright fraud, as where police extract a confession in exchange for a false promise to set the defendant free"); see also *United States v Villalpando*, 588 F.3d 1124, 1128 (CA 7, 2009) ("In these cases, we made clear that while a false promise of leniency may render a statement involuntary, police tactics short of the false promise are usually permissible. 'Trickery, deceit, even impersonation do not render a confession inadmissible ....' ") (citation omitted); *Ledbetter v Edwards*, 35 F.3d 1062, 1069 (CA 6, 1994) (" 'Neither "mere emotionalism and confusion," nor mere "trickery," will alone necessarily invalidate a confession.' ") (citations omitted).

9 By contrast with these so-called intrinsic considerations, courts have found that extrinsic considerations—those not related to a defendant's connection with the crime—are more coercive. *Holland*, 963 F.2d at 1051-1052. Those extrinsic considerations involve threats and promises, such as that a defendant's children will be removed or his or her welfare benefits cut off. *Id.* Such concerns impair free choice and the reliability of the confession. *Id.* at 1052. A false promise distorts the suspect's view of the alternatives among which he or she is being asked to choose. *Villalpando*, 588 F.3d at 1128.

10 This includes Officer MacDonald's use of the n-word. But defendant and his supporting amici have not cited any caselaw indicating that the use of this word renders a confession involuntary. It is also worth noting that Officer MacDonald, who is black (like defendant), attempted to use race to foster a connection with defendant: "But you sit here—you thinking these mother f****** trying to send me to prison forever. They don't understand. Mother f*****, we black. I ain't white. I ain't grow up with a mother f****** silver spoon in my mother f****** mouth. I had hustle .... So, I ain't trying to sit here and act like I don't know what the f*** [is] going on."

11 The majority cites only a pre-*Miranda* case for support, *Haley v Ohio*, 332 U.S. 596, 68 S Ct 302, 92 L Ed 224 (1948). The facts there were a far cry from those in the present case. Most significantly, the suspect in *Haley* was 15 years old and was never offered or given counsel. *Id.* at 599-600, 68 S Ct 302. The Court also found it significant that after the confession, the suspect "was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission" and that the suspect's mother "was not allowed to see him for over five days after his arrest." *Id.* at 600, 68 S Ct 302. Further, the questioning took five hours. *Id.* at 598, 68 S Ct 302. This hardly suggests that a combative tone is coercive as to an 18-year-old who was given *Miranda* warnings and questioned for a shorter period of time.

12 Defendant also raised a challenge to his sentencing, specifically that MCL 769.34(10) is unconstitutional because it requires an appellate court to affirm within-guidelines sentences such as defendant's here. For the reasons given in Part II of Chief Justice CLEMENT's partial dissent in *People v Posey*, —— Mich ——*People*

v Posey, —— Mich ——; —— NW2d —— (2023)—— NW2d —— (2023) (Docket No. 162373), I would reject defendant's argument.

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2022 WL 11160913 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

Joshua LAMAR- JAMES STEWART, Defendant-Appellant.

No. 162497.
September 27, 2022.

Coa No. 343755
Wayne CC. 16-005731-01-FC

Brief of Amici Curiae The Georgetown Juvenile Justice Clinic & Initiative and Leading Youth Defenders: The Gault Center and The Detroit Justice Center

Kristin Henning (pro hac vice), the Georgetown Juvenile Justice, Clinic & Initiative, 600 New Jersey Ave NW, Washington, DC 20001, (202)-662-9592, hennink@georgetown.edu, Desiree Ferguson (P34904), Detroit Justice Center, 1420 Washington Blvd #301, Detroit, MI 48226, 313-319-8259, dferguson @detroitjustice.org, Counsel for Amici Curiae.

2 *TABLE OF CONTENTS

***4** *INDEX OF AUTHORITIES*

Cases

Constitutional Provisions

Other Authorities

*8 *STATEMENT OF QUESTION PRESENTED*

Did the police violate the constitutional rights of 18-year-old Joshua Lamar-James Stewart by using coercive tactics that made it impossible for him to knowingly, voluntarily, and intelligently waive his rights? Was Joshua Lamar-James Stewart's confession a product of these coercive tactics and is it inadmissible?

INTEREST AND IDENTITY OF AMICI CURIAE [1]

Amici curiae Georgetown Law Juvenile Justice Clinic & Initiative and Leading Youth Defenders: The Gault Center and The Detroit Justice Center file this brief to offer social science research relevant to the Court's evaluation of the constitutionality of the interrogation in this case. *Amici* are leaders in the field of youth defense and have a strong interest in ensuring that states, such as Michigan, have access to this research when addressing the constitutionality of interrogation practices.

Georgetown Law Juvenile Justice Clinic & Initiative

The Georgetown Law Juvenile Justice Clinic was founded in 1973 to represent children accused of offenses in the District of Columbia. Clinic faculty, fellows, and students provide highly effective holistic representation to their clients by protecting the rights and interests of youth in the juvenile legal system, advocating on behalf of youth in related special education and school disciplinary hearings, and lobbying for mental health services, drug treatment, and other interventions that are appropriately matched to the needs of the child. In 2015, the Clinic established the **Georgetown Law Juvenile Justice Initiative** to explore and advance new policies and programs to assist young people and to train youth defenders across the nation. Operating at the national, regional, and local level with a primary focus on racial justice, the mission of the Juvenile Justice Initiative is to advocate for a smaller, better, and more just juvenile legal system in the District of Columbia, the Mid-Atlantic region, and across the country.

The Gault Center

The Gault Center, formerly the National Juvenile Defender Center, was created to promote justice for all children by ensuring excellence in youth defense. The Gault Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and nonprofit law centers to ensure quality representation for youth in urban, suburban, rural, and tribal areas. The Gault Center has developed national standards for the performance of youth defense ***9** attorneys; conducts assessments of states' youth defense delivery systems; and developed a 42-lesson, skills-based youth defense specialization training program. The Gault Center also provides training and technical assistance to thousands of youth defense attorneys and juvenile court stakeholders each year. The Gault Center is committed to promoting racial justice, eliminating racial and ethnic disparities, and advocating for overrepresented populations of youth in court. The Gault Center advocates for the use of youth-affirming language, including omitting the use of the word "juvenile" when referring to young people; this prompted the organization's decision to become The Gault Center in 2022. The Gault Center (as the National Juvenile Defender Center) has participated as *amicus curiae* before the United States Supreme Court and federal and state courts across the country.

Detroit Justice Center

The Detroit Justice Center (DJC)[2] is a non-profit social justice law firm advocating alongside Metro-Detroit communities to create economic opportunities, transform the criminal punishment system, and promote just cities. We seek to create a "just city" by working towards two goals that are often considered separately, but that fully intersect: (1) how to build equitable communities free from racial and socio-economic discrimination and (2) how to transform our criminal legal system. We believe we cannot build inclusive cities where everyone can feel safe and thrive without remedying the effects of mass incarceration.

DJC works to challenge entrenched opinions that incarceration serves as a solution. In furtherance of this goal, DJC utilizes the following three-pronged approach: (1) defense (e.g. representing system-involved clients and advocating for systemic change), (2) offense (e.g. developing creative economic innovations such as worker-owned co-ops and community land trusts that empower community members, with an emphasis on formerly incarcerated individuals) and (3) dreaming (e.g. envisioning, articulating and actualizing what we could "build instead" if we prioritized communities over incarceration).

Since its inception in 2018, DJC has consistently shared its research and perspectives to protect the rights of youth and young adults of color and to encourage the court to consider systemic racism's harmful impacts on matters before the court. Earlier in 2022, the DJC submitted a brief of *amici curiae* in the case of *People v Poole,*[3] where we shared research about the adultification of Black youth[4] with this Honorable Court, and urged the Court to hold that ***10** mandatory life without the possibility of parole for those with ever-developing adolescent brains was unconstitutional. Such efforts, along with those of several other interested organizations and allies, contributed to the Court's ultimate extension *of Miller v Alabama*[5] protections to 18-year-olds.

The DJC has also led several "Know Your Rights" empowerment workshops, where our attorneys have taught hundreds of youth and young adults throughout Metro Detroit about their constitutional protections when interacting with police officers. With this present brief, the DJC continues its commitment to expanding the public safety conversation to explore how we can divest from carceral structures to invest in communities, while simultaneously protecting the constitutional rights of those currently impacted by racial bias in the criminal punishment system.

SUMMARY OF ARGUMENT

The tactics used by the officers in the interrogation of Joshua Lamar-James Stewart created an unconstitutional and coercive atmosphere that was particularly conducive to a false confession and made it impossible for Joshua [6] to knowingly, voluntarily, and intelligently waive his rights. *Amici* submit this brief to offer social science and psychological research to aid the Court in evaluating the constitutionality of the *Miranda* wavier and voluntariness of the confession of Joshua. This research is particularly relevant in evaluating the coercive impact of the interrogating officer's use of the "n-word' and other tactics, including the use of profanity, threats of physical violence, and deceit.

Years of research demonstrate that implicit racial bias negatively affects police officers' judgments, causing them to view Black men as more culpable in criminal matters and contributing to the use of increasingly coercive interrogation tactics. In this case, the officers' assessment of Joshua's initial responses and credibility during interrogation were likely influenced by implicit racial bias. The officer's use of the "n-word" also likely reflects his own racial bias. Throughout the interrogation, officers drew upon racial stereotypes and preconceptions concerning the alleged criminality of Black boys and men and remained unmoved by Joshua's initial and repeated denial ***11** of any guilty knowledge and involvement in a criminal act. The officers' misconduct and dangerous beliefs reflect a growing body of research documenting the many ways in which people are affected by implicit bias and subconsciously rely on stereotypes to make judgments about Black people.

Additional research presented in this brief demonstrates how direct and vicarious police encounters negatively affect the mental and physical health of Black people like Joshua. Over-policing increases the likelihood that community members will experience police brutality and evokes memories of America's long history of police violence against the Black community. These direct and vicarious encounters are often experienced as traumatic events that disrupt a Black person's ability to knowingly, intelligently, and voluntarily waive their *Miranda* rights, as well as freely and voluntarily give a statement during police interrogation. Researchers have also found that the psychological phenomenon known as stereotype threat impacts and often dictates the ways Black men respond to police presence, increasing their anxiety and interfering with their ability to resist police coercion.

Joshua's interrogation was tainted by myriad dishonest and escalating tactics. The officers used everything from profanity, threats of physical violence, racially dehumanizing language, and deception with Joshua in the early hours of a sleep deprived morning. Drawing upon the research and facts contained within this brief, *amici* argue that this Court should hold that Joshua's statement to police was the product of police coercion, involuntarily given, and inadmissible. Any other ruling would, in effect, endorse law enforcement's use of a racial slur and likely lead to an increase of such language during interrogations and other police encounters, perpetuating considerable harm to Black communities across Michigan and denigrating the integrity of the legal process.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the facts and procedural history described in Defendant-Appellant's Supplemental Brief and the interrogation transcript. Briefly restated, Joshua Lamar-James Stewart was arrested under suspicion of armed robbery on May 6, 2016 when he was 18 years old. He was subsequently interrogated by two veteran police officers during the early morning hours of the following day before having an opportunity to speak to an attorney or his mother. When the ***12** interrogation began, Joshua

was asked to read and sign some "paperwork." (3a) [7] . This "paperwork" turned out to be Joshua's *Miranda* warnings and waiver. The officers did not explain the *Miranda* warnings and waiver to Joshua nor did they confirm he understood his rights. (5a-6a).

After the waiver was quickly signed, officers misrepresented the nature of the interrogation and allowed Joshua to believe he was being questioned in relation to a stolen car. (6a). When Joshua did not answer questions to the officers' satisfaction, they threatened him and his codefendant with physical harm. (33a, 130a). Throughout the course of the interrogation officers repeatedly made use of lies and deception, false promises, profanity, name calling, and the "n-word" to induce Joshua's confession. (62a, 82a, 102a, 142a-144a, 57a, 129a, 102a, 84a-85a). After nearly three hours of these escalating, sustained, and coercive interrogation tactics, Joshua admitted involvement in the armed robbery.

During pretrial hearings, Joshua's motion to suppress his statements to police was denied by the trial court, and he was subsequently convicted largely on the basis of his custodial statements. Upon conviction, Joshua sought reversal from the Michigan Court of Appeals but was again unsuccessful. The Court must now determine if Joshua's confession was given after a knowing, voluntary, and intelligent waiver of his rights and not gained through coercion and deception by the interrogating officers.

ARGUMENT

I. AS A BLACK ADOLESCENT MALE, JOSHUA IS ESPECIALLY VULNERABLE TO COERCIVE TACTICS, SUCH AS THE USE OF RACIAL SLURS, IN A CUSTODIAL INTERROGATION LEADING TO AN INVOLUNTARY WAIVER OF HIS *MIRANDA* RIGHTS.

A. Joshua Did Not Knowingly, Intelligently, and Voluntarily Waive His Right Against Self-Incrimination as Required by the Federal and State Constitutions.

The Constitution of the State of Michigan and the United States Constitution protect the rights of individuals from the overwhelming power of the state in police interrogations. ***13** Const 1963, art 1, § 17; US Const, Ams V, XIV. The right against self-incrimination guaranteed by the Fifth Amendment may only be waived if the waiver is made voluntarily, knowingly, and intelligently. [8] The validity of a *Miranda* waiver is determined by analyzing the totality of the circumstances which requires an evaluation of a suspect's age, experience with law enforcement, education, background, and intelligence, and "whether he has the capacity to understand the warnings given to him." *Fare vMichael C*, 442 US 707, 725 (1979).

Officers failed to adequately advise Joshua of his rights prior to proceeding with the interrogation, and Joshua did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. The presentation of Joshua's *Miranda* rights lasted only a couple of minutes and involved no serious check on his comprehension of his rights. Officer MacDonald described Joshua's *Miranda* waiver as mere "paperwork," implying it was an insignificant component of the interrogation process. (3a). Joshua was subsequently instructed to read and initial the *Miranda* waiver prior to asking questions (5a), which further communicated to Joshua that the waiver was purely an administrative document and not something of constitutional importance. [9] Once Joshua read his *Miranda* rights aloud, he immediately asked why he was being detained. (6a). Joshua was under the impression he was being interrogated due to a stolen vehicle. *Id.* Although Officer MacDonald knew the focus of the investigation concerned a homicide, he willfully misrepresented the nature of the interrogation saying, "Yeah. I'm going to talk to you about the - the stolen car." *Id.* Not until later in the interrogation did Officer MacDonald acknowledge the true nature of his questioning. (29a). Unfortunately, by this time Joshua had succumbed to Officer MacDonald's deceptive tactics and unknowingly and involuntarily waived away the very rights that would have protected him from police overreach. [10]

Additionally, officers did not consider Joshua's youthfulness, background, and experience, nor did they consider whether he possessed the capacity to adequately understand his *Miranda* rights, let alone waive them. Officer MacDonald only asked Joshua what grade he had last completed and if he could read and write before proceeding with the interrogation. (4a). This amounted

to a mere surface-level check of comprehension. When Joshua informed officers he was attending an "alternative" school, there was no inquiry as to why he attended such a school or if his attendance was due to a learning disability that would have affected his ability to understand ***14** his rights. *Id.* Furthermore, officers did not ask if Joshua understood his rights or had questions concerning his *Miranda* rights after reading them aloud. (5a - 6a). When Officer MacDonald pressed Joshua for a confession, Joshua asked if the statement would be going to the judge. MacDonald responded that it was going to Joshua's lawyer, to which Joshua responded "If I have a lawyer." (133a). This strongly suggests that Joshua did not understand at least one core tenet of *his Miranda* rights, namely his right to have an attorney appointed to represent him if he could not afford one. It is the confluence of these elements - the trivialization of Joshua's constitutional rights and the complete disregard for ensuring basic comprehension - which shows he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights.

Not only must *Miranda* waivers be knowingly and intelligently made, but the waiver and any subsequent statement must also be a voluntary product of an individual's own free will and deliberate choice, and not the product of intimidation, coercion, or deception. *Colorado v Connelly*, 479 US 157, 170 (1986). Joshua's waiver of his *Miranda* rights and subsequent confession were involuntary. Joshua experienced both threats of physical violence and psychological pressure at the hands of two seasoned police officers. *Id.* Throughout the interrogation, officers relied upon confrontational language to induce a confession. At one point Detective Lucie asked Joshua if he was "trying to get smart with [her]" followed by the veiled threat "you don't want to battle." (33a). Officer MacDonald was less discreet. When describing how he would be interrogating Joshua's codefendant, Officer MacDonald implied it would be physical, stating "my gloves on, his gloves on and we gone sit there, and we gone battle this bitch out." (130a). Additionally, the interrogation was littered with profanity and lies about witnesses, video evidence, and what Joshua's codefendant may have told police, along with false promises of a lighter sentence if a confession was given. (62a, 82a, 102a, 142a-144a, 57a, 129a, 102a, 84a-85a).

Joshua was not only worn down by these mentally corrosive tactics, but he was also repeatedly confronted with arguably the single-worst racial epithet in the American lexicon, "nigger." It was hurled at him nearly 50 times throughout the course of a sleep deprived, three-hour interrogation that began in the early hours of the morning. (46a, 82a, 188a). It was only through these aggressive, psychologically taxing, and coercive tactics that a confession was elicited. If law enforcement extracts a waiver or subsequent statement through any coercion, the confession should be declared involuntary and inadmissible. *Connelly*, 479 US at 170. Given the ***15** coercive nature of the interrogation, Joshua's statements were given involuntarily and in violation of the Due Process Clause of the 5th and 14th Amendments, and they should be suppressed. [11]

B. Officer MacDonald's Repeated Use of a Racial Slur Caused Psychological Harm to Joshua, Constituting a Coercive Interrogation Tactic.

The psychological harm caused by the "n-word" is undeniable. It is a racial slur with a long history of being used to dehumanize Black people in the United States. As the legal scholar Michele Goodwin wrote, "'nigger' was the word kissing the air as families were auctioned throughout the American South. It hovered below [B]lack lynched bodies and accompanied civilian and police brutality against [B]lacks throughout the last century." Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temple L Rev 129, 193 (2003). From slavery through the Jim Crow era, white people used the "n-word" to perpetuate injustice and violence against African Americans by deeming them less fully human with fewer rights and protections under the law compared to their white counterparts. *Id.* The images associated with the word invoked stereotypes of deceitfulness and criminality. David Pilgrim and Phillip Middleton, *Nigger and Caricatures, Ferris State Univ Museum of Racist Memorabilia* (Sept 2001), available at *http://www.ferris.edu/jimcrow/caricature.* Today, the "n-word" continues to invoke otherness, inferiority, and an association with crime. Goodwin, *supra*, at 193. Based on these longstanding underpinnings of the word, it is likely that Officer MacDonald's use of this slur during the interrogation caused Joshua to fear that he was being stereotyped as criminal based on his race. This fear can cause Black men to feel anxious and hopeless, leading to cognitive overload and a reduction in their ability to fully understand and assert their *Miranda* rights. Deborah Davis and Richard Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 J Psychol, Pub Policy, and Law 673, 673 (2012). Deborah Davis and J Guillermo Villalobos, *Interrogation and the Minority Suspect: Pathways to True and False Confession*,

Advances in Psychology and Law Vol 1, New York: Springer, (2016). This psychological phenomenon, known as stereotype threat, and its implications in the interrogation context are further described in Section I.E. below.

Not only did the use of the "n-word" likely contribute to Joshua's fears that he was being stereotyped based on his race, but it also served to dehumanize Joshua. Dehumanizing language like the "n-word" can contribute to feelings of hopelessness in the interrogation context. When a person believes they are viewed as not fully human, they may reasonably conclude that no matter ***16** what they do, their rights as a citizen will not be respected. They may also fear that verbal affronts, like the use of the "n-word," will escalate to physical abuse. Officer MacDonald's use of the "n-word" in his interrogation of Joshua increased the coercive nature of the interrogation. Joshua reasonably believed he had no choice but to comply with the officer's demands for a confession and that there was no use in resisting when everything that happened during the interrogation told him that he was seen as subhuman, his rights would not be protected, and if he did not comply now, the next step may be physical violence.

Although the legal standards vary, the Court can look to caselaw involving the use of the "n-word" in creating racially hostile work environments for guidance in assessing the impact of Officer MacDonald's use of this racial slur against Joshua in the interrogation environment. In one employment case, the Fourth Circuit wrote that the "n-word" is "far more than a mere offensive utterance, the word nigger is pure anathema to African Americans." *Spriggs v Diamond Auto Glass*, 242 F3d 179, 185 (4th Cir 2001). In another employment case, the Seventh Circuit opined that "perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rodgers v Western-Southern Life Ins Co*, 12 F3d 668, 675 (7th Cir 1993). In a case where a Black employee complained of the harm caused by his Black supervisor referring to him by racial epithets, including the "n-word," the Eighth Circuit rejected the idea that a Black person could not subject another Black person to a racially hostile work environment. *Ross v Douglas County* 234 F3d 391, 393 (8th Cir 2000). In another case involving a Black supervisor referring to a Black employee as a "nigga" multiple times in a single conversation, a jury in the Southern District of New York determined the supervisor's conduct was unlawful, regardless of the supervisor's race and his assertions that he did not intend to use the term in a derogatory manner. Abigail L Perdue, Gregory S Parks, *The Nth Degree: Examining Intra-racial Use of the N-Word in Employment Discrimination Cases*, 64(1) DePaul L Rev 65, 66 (2014), *citing* *Johnson v Strive East Harlem Employment Group* 990 F Supp 2d 435, 442 (SDNY 2014).

While it is clear that the "n-word" causes great harm in the workplace, the harm caused by its use in a police interrogation is arguably even greater. When a police officer uses the "n-word" while interrogating a Black teenager who is being investigated for murder and robberies, the potential consequences are far graver. While a supervisor has power over the livelihood of an employee, a police officer has immense power over the very life and liberty of a person in Joshua's position. While a supervisor's use of the "n-word" makes a workplace hostile, a police officer calling a Black teenager the "n-word" nearly 50 times during the course of a three-hour interrogation is nothing short of coercion by means of psychological manipulation.

***17 C. The Use of a Racial Slur Reflects Officer MacDonald's Racial Bias, Impacting Both the Delivery of the *Miranda* Warning and the Coerciveness of the Interrogation.**

1. People of all races, including police officers, have implicit racial bias.

All people rely on assumptions and cognitive shortcuts to sort through the vast amount of information they encounter daily, fill in missing details, and categorize people and information according to cultural stereotypes. L Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L J 2626, 2629 (2013). Implicit bias is a cognitive shortcut that involves "attitudes or stereotypes that affect our understanding, decision-making, and behavior without our even realizing it." Jerry Kang et al, *Implicit Bias in the Courtroom*, 59 UCLA L Rev 1124, 1126 (2012). Pervasive cultural stereotypes create implicit associations between Black people, men in particular, and criminality. The cognitive association between Blackness and criminality is so strong that it is said to be "bidirectional." Jennifer Eberhardt et al, *Seeing Black: Race, Crime, and Visual*

Processing, 87 J Personality & Soc Psychol 876, 886 (2004). "Bidirectional" associations occur when two concepts are so intertwined in one's perception that it does not matter which one we think of first, we will always think of the other. *Id.* The cultural stereotype of Black people as criminal is so pervasive within our society that when people think of crime, they think of Black people. When they think of Black people, they think of crime. This is true regardless of race. In a 2018 study, both Black and white participants were quicker to categorize ambiguous objects as dangerous after being primed with a Black face, indicating that Black faces are generally associated with feelings of danger. Luca Guido Valla et al, *Not Only Whites: Racial Priming Effect for Black Faces in Black People*, 40(4) Basic & Applied Social Psychology 195-200 (2018).

Police officers, like all people, have implicit racial bias. By the very nature of their work, police officers must focus on crime. Because thoughts of crime invoke thoughts of Black people, they are at great risk of perceiving Black men through the lens of implicit racial bias. Marie Pryor et al, *Risky Situations: Sources of Racial Disparities in Police Behavior*, 16 Ann Rev of L and Soc Sci 343, 349-50 (2020). When individuals think of the stereotype of Black people as criminal, they are more prone to acting on their implicit racial bias and behaving in a racially disparate way. *Id.* (citing Eberhardt et al, *supra)*. Officers are at greater risk of acting on this bias when they are working long or late hours and cognitively taxed by processing multiple pieces of information in high-stress environments. Pryor et al, *supra.* In this case, Officer MacDonald was working the night shift, and the three-hour interrogation at issue began at 3:40 in the morning, making him especially susceptible to acting on his implicit biases. Officer MacDonald's racial bias is both implicit and explicit and is evident here in the way he interacts with Joshua. Based on the officer's use of racial slurs, it is reasonable to conclude that he views Joshua differently because of his race.

***18 2. Officer MacDonald's racial bias contributed to a coercive interrogation environment and increased the risk of a false confession.**

Officer MacDonald's racial bias manifested itself in the way he spoke to Joshua during the interrogation. MacDonald used a racial slur multiple times, was aggressive toward Joshua, and assumed Joshua was guilty. Each of these behaviors indicate that implicit racial bias likely contributed to Officer MacDonald's view of Joshua as dishonest, criminal, culpable, and older because of his race.

Despite Joshua's race being entirely unrelated to the crime at issue, Officer MacDonald consistently referred to him by his race, using the "n-word" nearly 50 times in the course of the interrogation, making it clear that his race was incredibly salient in the officer's perception of him. When Joshua told officers that he was simply driving someone to the hospital who looked like they needed help, Officer MacDonald instantly decided that Joshua was lying. (495a). From Officer MacDonald's perspective, a Black person, particularly one who lives in "the hood" like Joshua, would never go out of their way to help someone they do not know. (40a). In reference to Joshua's account of events, Officer MacDonald said:

> "I ain't never heard a mother fucking story like that in fucking Detroit. Where n----s just help a mother fucker in a car, shot the fuck up. You mother fucker's (sic) -- you know n———s don't do that shit. They walk past like 'damn that n——— fucked up' ... and get to stepping ... that's the n---- way."

Excerpts such as this make clear that Officer MacDonald made race-based presumptions about Joshua and the type of person he is before he ever stepped foot in the interrogation room.

In addition to using Joshua's race to make assumptions about his trustworthiness, guilt, and culpability, the officers were also combative and aggressive toward Joshua. They told Joshua that they would "battle" if he did not answer their questions, (33a), and regularly cursed at the teenager during the interrogation. *See e.g.*, (33a), (35a), (38a - 43a), (45a-46a), (59a), (62a), (64a).

As a Black teenage male, Joshua is particularly vulnerable to police pressures like those utilized here, and he is more susceptible to giving a false confession as the result of these coercive tactics. Black people make up over half of all exoneration cases that involve false confessions. [12] Youth are even more vulnerable than adults. As of 2020, 67% of all exonerated youth who falsely confessed were Black, suggesting that young Black suspects may face more coercive ***19** interrogations and may be more vulnerable to such coercion. [13] Here, Officer MacDonald's use of racial slurs, aggression, threats, and false promises created a highly coercive interrogation that would predictably lead to Joshua giving a false confession in an attempt to appease the officers and protect himself from further harm. *See* Kristin Henning and Rebba Omer, *Vulnerable Yet Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 AZ St L J 883, 919 (2020). It is apparent from the interrogation transcript that the officers were unwilling to accept anything Joshua told them unless it implicated him in the crime. Officer MacDonald went into the interview with a preconceived notion of who Joshua was and what he had done based on his race, and he was willing to do whatever it took to get a confession out of him. Joshua's confession was a product of coercive police tactics motivated by officers' racially biased view of Joshua as guilty. The confession was not given willingly and voluntarily and should therefore be inadmissible.

3. Implicit racial bias likely contributed to Officer MacDonald's failure to recognize and treat Joshua as a teenager.

Officer MacDonald acted as though Joshua was older and more mature than he was, despite knowing Joshua was only a teenager who had not completed high school. Officer MacDonald treated him as though he were fully developed, saying things like "It's your fucking decision. But we came to you as a fucking man. You 18. You considered a fucking man. Legally. But you don't fucking act like one. Gotta fucking start manning up to shit." (82a). Such behavior is evidence that Officer MacDonald viewed Joshua as having the capacity and maturity to act like a "man" much older than he was and assumed that Joshua was guilty and therefore deserving of this harshness. *See*, Phillip Atiba Goff et al, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J Personality & Soc Psychol 533, 35 (2014).

Empirical research confirms that in addition to associating Blackness with criminality, people also tend to view Black youth as older and more culpable than their same-aged white peers. *Id.* at 540. In a series of studies conducted by Dr. Phillip Atiba Goff and his colleagues regarding the perception of "innocence," age, and culpability of Black children, both law enforcement and civilian participants perceived Black youth to be more than four and a half years older than they actually were. *Id.* at 531 and 534. Thus, officers interacting with Black youth are less likely to perceive them as innocent and may be more likely to assume that they have preexisting knowledge of the criminal legal system. *See Id.* at 540. Officers who presume the culpability of Black youth ***20** may be especially motivated to secure a confession and *Miranda* waiver from a child during an interrogation.

The delivery of the *Miranda* warnings in this case likely was impacted by the officers' perception of Joshua as older, more knowledgeable about the legal system, and less innocent due to his race. These perceptions likely contributed to the officers downplaying the significance of Joshua's *Miranda* warnings, either because they assumed, as a Black teenager, he would already have knowledge of these rights, or because they wanted to secure a waiver from someone who they had already presumed was guilty.

As a result, the officers did little to ensure that Joshua understood his rights and was able to give a knowing and voluntary waiver, as is required under the Constitution. The officers merely asked if Joshua knew how to read and write, and then had him read his rights aloud. (4a-5a). Although the officers knew that Joshua did not have a high school diploma, they did not read his rights to him, did not offer any additional explanation of his rights, and did not ask explicitly if he understood his rights. They also referred to the waiver forms as "paperwork," suggesting that they were merely a procedural formality and not a waiver of significant constitutional rights. (3a). Even when Joshua mispronounced one of the words while reading his rights aloud, the officers did not verify that he meaningfully understood what he was reading. (5a; DVD at 3:38). Ultimately, the officers' manipulative tactics were effective in ensuring Joshua waived his rights, despite clear evidence that he did not understand the waiver.

D. The Considerable Fear of Police That Black Men and Adolescents Experience Undermines Their Ability to Knowingly, Intelligently, and Voluntarily Waive Their *Miranda* Rights and Resist Police Coercion During Interrogation.

Empirical evidence confirms that Black boys and men experience considerable fear of police and resulting trauma due to the many instances of police brutality, some resulting in death, they have directly and vicariously experienced. This fear undermines their ability to make a voluntary, knowing, and intelligent waiver of their *Miranda* rights and to resist police coercion during interrogation.

Fear and a deep-seated, generational mistrust between police and Black Americans often exacerbate the psychological atmosphere that underpins custodial interrogations, disrupting Black people's ability to voluntarily waive their rights. This effect is amplified for adolescents like Joshua. This mistrust has developed over three centuries of police-community relations characterized by racialized violence under the color of state and local law. Police violence against the Black community is threaded throughout American history: slavery in the Antebellum South, ***21** convict leasing programs, lynching, Jim Crow, the War on Drugs and, presently, mass-incarceration. This important history is not only so pervasive that it comprises a shared community memory passed from one generation to the next, but it has also created a toxic relationship between the Black community and law enforcement. *See* Chad Posick & Akiv Dawson, *The Health Outcomes of Direct and Witnessed Interactions with the Police: Do Race and Ethnicity Matter?* 61 J Adolesc Health 183, 184 (2021).

This relationship persists today, as Black people are more likely to experience police contact than white citizens. Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 L & Soc R 960, 960 (2018). Police contacts with Black residents are more likely to lead to use of force than contacts with white residents. Joscha Legewie, *Racial Profiling and Use of Force in Police Stops: How Local Events Trigger Periods of Increased Discrimination*, 122 Am J Sociol 379, 381-82 (2016). [14] Officers are more likely to shoot Black people than white people and are much more likely to shoot unarmed, nonattacking young people than older people. Mike Males, *Police Shooting Statistics of Unarmed Suspects Show the Young More Likely to be Killed*, Juvenile Justice Information Exchange, February 11, 2021. Black men are roughly two and a half times more likely to lose their life at the hands of police officers than are white men. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16794 (2019).

Research has shown that in communities of color, like those in Detroit, [15] traumatic experiences with police begin early in life. Amanda Geller, *Youth-Police Contact: Burdens and Inequities in an Adverse Childhood Experience*, 111 Am J Pub Health 1300, 1300 (2021). This result is likely due to the over-policing of urban communities, which increases the risk of police exposure. Joscha Legewie & Jeffrey Fagan, *Aggressive Policing and the Educational Performance of Minority Youth*, 84 Am Sociological Review 220, 220-21 (2019) (discussing New York City police department that conducted more than four million pedestrian stops between 2004 and 2012, with more than half concentrated among persons younger than 25 years of age); Geller, *supra*, at 1306 (finding that extensive exposure to aggressive policing has the potential to negatively impact the immediate and long-term health of young people). Considering both the overrepresentation of police and the disproportionately high amount of police violence that occurs in communities of ***22** color, Black adolescents are more likely to experience police stops as aggressive and unfair. Dylan B Jackson et al, *Unpacking Racial/Ethnic Disparities in Emotional Distress Among Adolescents During Witnessed Police Stops*, 69 J Adolescent Health 248, 249 (2021).

Research on the effects of policing also reveals that police contact negatively impacts the mental and physical health of Black adolescents. Adolescents experiencing more frequent police contact report heightened levels of emotional distress. Dylan B. Jackson et al, *Police Stops Among At-Risk Youth: Repercussionsfor Mental Health*, 65 J. Adolesc Health 627, 631 (2019) [hereinafter *Police Stops Among At-Risk Youth]*. When police encounters result in the use of physical force, victims and witnesses report feelings of distrust, fear, anger, and post-traumatic stress symptoms. Thema Bryant-Davis et al, *The Trauma Lens of Police Violence Against Racial and Ethnic Minorities*, 73 J. Soc Iss 852-71 (2017). Black adolescents also experience

vicarious trauma through incessant news coverage of police violence against other Black adolescents, widely disseminated through social media. Posick, *supra*, at 183; Brendesha M. Tynes et al, *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 J Adolescent Health 371 (2019). Sleep deprivation or a generally lower quality of sleep is often a byproduct of witnessed or direct police encounters. Dylan B Jackson et al, *Police Stops and Sleep Behaviors AmongAt-Risk Youth*, 6(4) J Nat Sleep Foundation, 435-440 (2020).

Black people have experienced violence, both directly and vicariously, for centuries. This has an acute generational impact on the Black community, imbuing the relationship between law enforcement and community members with the memory of past trauma and reasonable fear of how police will behave today. Posick, *supra*, at 183. Joshua was not immune to either the memories of past trauma shared with him by community members or to the fear created by his own direct and vicarious experiences with police while growing up Black in the city of Detroit. The Detroit Police Department's (DPD) relationship with its Black community contains a long and bloody history stretching as far back as the Truman administration. From 1957 to 1973, Detroit police killed 188 civilians (110 unarmed), with 111 of those killings occurring between 1971 and 1973. Matthew D Lassiter & The Policing and Social Justice History Lab, *Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era*, University of Michigan Carceral State Project (2021). [16] Out of the 188 civilians, 126 were Black (79%), despite Black residents making up only 29% of the total Detroit population in 1960 and 44% by 1970. Only 31 ***23** of those killed were white, and 29 were an undetermined race. *Id.* Thus, police killed Black community members at rates nearly double that of their percentage of the total population through the late 1960s and roughly six times the rate of white people. *Id.* Detroit police were also notorious for maintaining an illegal practice of making investigative arrests without probable cause. *Id.* From 1948 to 1956, DPD made 67,301 non-traffic arrests, nearly half of which were made without a warrant and without meeting the legal standard of probable cause. *Id.* This practice primarily targeted Black community members. Instances of police brutality and misconduct became so prevalent that by the early 1960s the NAACP declared the DPD to be suffering from a complete disregard of the constitutional rights of its Black citizens. *Id.* By 1973, a state investigation into the DPD uncovered rampant corruption, abuse of power, drug dealing, and other crimes, which resulted in the indictment often officers, although law enforcement estimated more than 200 DPD officers were involved in corruption and criminality. *Id.*

Unfortunately, the DPD's abuse of authority and violence continued well into the late 1990s when from 1995 to 2000, 40 people lost their lives at the hands of officers. George Hunter & Christine Ferretti, *Federal Oversight Forced Reforms on Detroit's Often Violent Police Department*, The Detroit News, June 09, 2020. This misconduct, which extended into Joshua's lifetime, prompted the Department of Justice (DOJ) to intervene, and from 2003 to 2014, the DPD was under the oversight of the DOJ. The United States Department of Justice, *Justice Department Announces Successful Resolution of Consent Judgment Involving Detroit Police Department*, August 25, 2014. [17]

In light of the pervasive media attention surrounding DPD's problematic history - including a continual stream of misconduct allegations that persist today - it is reasonable to conclude that Joshua was well aware of DPD's reputation and that he had been negatively affected by direct and vicarious contact with law enforcement. George Hunter, *Detroit Police Probe Yields Allegations of Widespread Corruption in Drug Unit*, The Detroit News, December 11, 2019 (reporting on Detroit Police Department Internal Affairs investigation going back ten years and uncovering alleged corruption that narcotics officers planted evidence, lied to prosecutors to secure search warrant affidavits, robbed drug traffickers and embezzled funds); Bryce Huffman, *DPD Complaint Investigators Vow 'More Efficient' Process*, Bridge Detroit, July 22, 2022 (noting that at the time of this article, there existed a backlog of uninvestigated officer misconduct complaints in excess of 800 dating back three years).

***24** Joshua's experiences were then amplified by the psychological battlefield he was subjected to during interrogation. *See* Geller, *supra*, 1301 (noting that instances of police intrusion generate elevated levels of anxiety and post-traumatic stress disorder). A sleep deprived Joshua began his interrogation at 3:40 am without having been afforded any phone calls to his mother or other family members, although he had been arrested the day before. Throughout the three-hour long interrogation, officers employed myriad tactics including verbal abuse, deceit, threats, and an abhorrent reliance on racial slurs to spur a confession. Considering such tactics, it is likely that Joshua internalized his interrogation as an aggressive and racially-charged police encounter that left him intimidated, frightened, and unable to voluntarily waive his *Miranda* rights. *See* Dylan B Jackson,

The Case for Conceptualizing Youth-Police Contact as a Racialized Adverse Childhood Experience, 111 Am J Pub Health 1189, 1189 (2021). Aggressive youth-police encounters are traumatic, as they are often experienced as frightening, overwhelming, or life-threatening and have the capacity to trigger recurring negative emotions and physiological symptoms. *Id.*

In addition to the often-debilitating trauma Black teenagers experience due to over policing, teenagers like Joshua are especially vulnerable to *Miranda* waivers and coerced confessions because their brains are not fully formed. The prefrontal cortex, the part of the brain responsible for making judgement, does not reach full maturity until the mid-twenties. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 NC L Rev 793, 812 (2005) (noting the development of the prefrontal cortex continues through adolescence and is one of the last regions of the brain to reach full development). In the intervening time, an adolescent does not have the same capacity to make reasoned decisions as fully-developed adults, especially while under stressful conditions. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann Rev Clinical Psych 459, 464-65 (2009). This becomes especially troubling in the context of a custodial interrogation where emotions are heightened. Not only are adolescents' brains still developing, but young people have also been socialized to comply with the demands of adult authority figures, including answering their questions. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCH. REV. 53, 62 (2007) (citing Thomas Grisso et al., *Juveniles' Competence To Stand Trial A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L and Human Behavior 333, 357 (2003)) (explaining that youth tend to heed authority figures when making choices). In the context of custodial interrogation, teenagers are incredibly vulnerable to *Miranda* waivers that are not knowing, intelligent, or voluntary and to being coerced into confessing by police officers.

*25 E. Black Men and Adolescents, Like Joshua, Are Significantly More Likely to Feel Anxious in Police Encounters and Fear That They Will Be Perceived as Guilty, Which Heightens the Coercive Nature of Interrogation.

As discussed in Section I.B. above, Black people live with the fear of being stereotyped as criminal solely because of their race. Goff et al., *supra*, at 536. This fear is called "stereotype threat." Aware that officers are likely to perceive them as guilty, Black men and adolescents often experience anxiety during police encounters and work to dispel these stereotypes and make themselves appear innocent. Davis and Leo, *supra*, at 673. Unfortunately, this conscious effort to appear innocent can result in a phenomenon known as "stereotype threat response" in which the attempts to disprove a stereotype can actually manifest in the exact behaviors the individual seeks to avoid, thereby making them appear guilty. Kimberly Barsamian Kahn, Jean M McMahon, and Greg Stewart, *Misinterpreting Danger? Stereotype Threat, Pre-Attack Indicators, and Police-Citizen Interactions*, 33 J Police & Crim Psych 45-54 (2018).

1. Stereotype threat response can cause Black people to display behaviors that may be interpreted as suspicious.

In the context of police interrogations, stereotype threat can cause innocent Black men to experience higher sensitivity to emotional cues, which can cloud their thinking and cause cognitive overload. Cynthia Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects are at Risk for Confessing Falsely*, 17 J Psycho, Pub Policy, and Law, 562-591 (2011). Black people who are afraid of being stereotyped spend mental energy worrying about how they are perceived and appear anxious. Davis and Leo, *supra*, at 689-90. Additionally, the psychological effects of stereotype threat can manifest as nonverbal behaviors that could be interpreted as deceptive or suspicious, including fidgeting, chewing on a lip, playing with hair, nail biting, nervous smiling, stiff posture, and averting eyes, among others. Jennifer Bosson, Ethan Haymovitz and Elizabeth Pinel, *When Saying and Doing Diverge: The Effects Of Stereotype Threat On Self-Reported Versus Non-Verbal Anxiety*, 40 J Exp Soc Psychol 247-255 (2004). These physical manifestations of stereotype threat response can be interpreted as signs of a guilty conscious by an outside observer. Barsamian Kahn, McMahon and Stewart, *supra*, at 45-54.

Throughout the interrogation in this case, Officer MacDonald repeatedly indicated that he believed Joshua to be lying, despite Joshua's insistence that he was telling the truth. *See, e.g.*, (20a), (28a). (38a), (40a). Joshua feared that the officers were stereotyping him as guilty, stating "I'm scared though ..." and "You probably won't believe me." (127a). Additionally, Officer

MacDonald continuously referred to Joshua as the "n-word," which has a long history of association with stereotypes of criminality described in Section I.B. above. Extreme interrogation ***26** tactics, including lies about the existence and quality of evidence and false promises, increased with each denial, ultimately resulting in a coercive interrogation environment.

2. Stereotype threat can lead to feelings of hopelessness, contributing to the coerciveness of the interrogation.

Awareness of stereotypes associating race with criminality can instill feelings of hopelessness in Black men during interrogations. Davis and Leo, *supra*, at 673. Knowing that they may be perceived as guilty regardless of their actual guilt or innocence, Black men are likely to feel that their claims of innocence will be ignored during police encounters. *Id.* These feelings of hopelessness can lead Black suspects to confess, even when they are not guilty, in an attempt to protect themselves from the threat of greater punishment for failure to confess.

In this case, Joshua's feelings of helplessness are apparent throughout the interrogation. *See e.g.*, (127a) ("I'm scared though ...") ("you probably won't believe me"). It is evident that Officer MacDonald assumes Joshua is lying about his account of events from the beginning of the interrogation. *See e.g.*, (80a), (81a), (96a). When Joshua insists that he is telling the truth, Officer MacDonald makes clear that he is "not going to believe that ... bullshit." (40a). Knowing that the officers believed him to be guilty made Joshua more vulnerable to giving a false confession. This vulnerability was exacerbated by the officers threatening that Joshua would receive a 20-year sentence if he did not confess. (84a). The officers then told Joshua about a woman in a similar position to him who confessed to being involved in a crime and got only two years. (108-09a). These coercive interrogation tactics, combined with the underlying knowledge that the officers would perceive him as guilty because of racial stereotypes, coerced Joshua to confess.

3. The stress caused by stereotype threat can be mentally and cognitively taxing, interfering with Black people's ability to think clearly and resist pressure and making them vulnerable to invalid *Miranda* waivers and coerced false confessions.

Stereotype threat can impair one's ability to think clearly and resist pressures in an interrogation setting. *See* Davis and Leo, *supra*, at 673-704. The awareness of negative racial stereotypes can increase cognitive stress in Black suspects as they work consciously to control the behaviors and emotions associated with a stereotype threat. *Id.* This hyper-vigilance and the accompanying self-regulatory efforts impact the ability of Black people to resist police pressures during interrogations and make them more vulnerable to invalid *Miranda* waivers and coerced confessions. The cognitive effects of stereotype threat likely impaired Joshua's ability to understand the significance of a *Miranda* waiver, to think through the long-term consequences of ***27** a confession, and ultimately to resist the aggressive and intimidating police tactics used against him.

F. Threats to Joshua's Masculinity Further Contributed to the Coerciveness of the Interrogation.

In addition to the racial stereotypes at play during the interrogation, Officer MacDonald threatened Joshua's masculinity. Black teenagers, like Joshua, are particularly concerned about their social status and care a lot about maintaining respect. Jennifer L. Woolard, Samantha Harvell, and Sandra Graham, *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26(2) Behavioral Sciences and the Law 207, 209 (2008); Norman J. Finkel, *But It's Not Fair! Common Sense Notions of Unfairness*, 6(4) Psychology, Public Policy, and Law 898, 903-4 (2000). The interrogating officer's challenges to Joshua's manhood contributed to the coercive environment and, not surprisingly, evoked a visceral response from Joshua and secured a confession from him. Officer MacDonald taunted Joshua with claims that he "won't even man up," saying "You considered a fucking man. Legally. But you don't fucking act like one. Gotta start manning up to shit." (82a). By speaking to Joshua this way, Officer MacDonald attempted to engage Joshua in a "masculinity contest," or a "face-off between men where one party is able to bolster his masculine esteem by dominating the other." Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 Columbia J. Gender and Law 671, 675 (2009). When police officers engage young men in masculinity contests such as this, it is in effect "bullying." *Id.* at 678-679. It is

likely that Joshua subconsciously felt as though he needed to re-assert his masculine identity by meeting the officer's demands for a confession. Phillip Atiba Goff and Hilary Rau, *Predicting Bad Policing: Theorizing Burdensome and Racially Disparate Policing Through the Lenses of Social Psychology and Routine Activities*, 687(1) The Annals of the American Academy of Political Science 67-88, 74-76 (2020).

II. ENDORSING LAW ENFORCEMENT'S USE OF A RACIAL SLUR IN INTERROGATION WOULD CAUSE HARM TO BOTH INDIVIDUALS AND COMMUNITIES AND SIMULTANEOUSLY UNDERMINE THE FAIRNESS AND LEGITIMACY OF THE LEGAL SYSTEM

A. Endorsing the Use of Racial Slurs in Interrogation Will Damage the Mental Health of Black Communities.

If the Court holds that using a racial slur in an interrogation is not coercive, the Court will effectively be endorsing the use of racial slurs in all police interactions, which could increase the ***28** frequency of such language not only in interrogations but also in on-the-street police encounters. This result will have a detrimental impact on the mental health of Black people across the community. As discussed in Section I.B., police encounters harm the mental health of young Black men. Even when they are simply stopped by police, young Black males experience higher levels of anxiety and trauma than those who are not stopped. Amanda Geller et al. *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am J Pub Health 2321, 2324-25 (2014). Research shows that young men who experience harsh language, even language that is not explicitly racial like the slur used in this case, are more likely to experience post-traumatic stress symptoms after the interaction. *Id.* at 2324. Endorsing the use of racial slurs in interrogations could deepen and expand the community-wide harms of policing on the mental health and well-being of Black residents.

B. Using Racial Slurs in Interrogations Erodes the Trust Communities Have in Police, Contributing to a Low Respect for the Law and Reduced Willingness to Cooperate in Future Investigations, Which Reduces Public Safety.

Endorsing the use of a racial slur as if it were a non-coercive interrogation tactic would not only harm the mental health of individuals and communities, but it would also weaken public safety and diminish community trust in law enforcement. Courts must make the bounds of lawful interrogation clear to prevent harmful and racially discriminatory use of discretion by police officers. If this Court finds that an officer's repeated use of a racial slur during an interrogation was within the bounds of the law, the community's trust in law enforcement and the legal system would diminish.

Communities of color that experience frequent police intrusion, including the use of racially-charged language, "become increasingly distrustful and cynical toward law enforcement." Susan A. Bandes et al, *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 Behav Sci Law 176, 184 (2019). This type of cynicism "may rationalize the weakening or dissolution of social norms and encourage rejection of the obligations of legal compliance and cooperation with police personnel." *Id.* at 185. Not only may individuals be more likely to engage in criminal behavior due to decreased respect for the law, but witnesses may become unwilling to cooperate. When this dissolution occurs in under-resourced communities, "crime and violence are more likely to proliferate, reducing police effectiveness and rendering communities even more unsafe." *Id.* While this most significantly and obviously impacts the Black community, it may also decrease trust other communities have for the police by causing them to fear they could also be subjected to discriminatory language during interactions with officers.

***29** This distrust of law enforcement, which would be exacerbated by lack of accountability for using racial slurs, impacts young people even more acutely. When young people believe they have been racially profiled or that their interaction with police officers are fundamentally unfair, the detrimental mental health impacts associated with police interaction may be amplified. *Police Stops Among At-Risk Youth, supra*, at 628; Naomi F Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 Am Socio Rev 719, 723 (2017). Not only do young people care deeply about fairness, but witnessing or experiencing negative and demeaning interactions with the police and other procedural injustices during adolescence can shape lifelong views about the legitimacy of law enforcement and the legal system. Erika K Penner et al,

Procedural Justice Versus Risk Factors for Offending: Predicting Recidivism in Youth, 38 L & Hum Behav 225, 225 (2014) (noting that adolescents are particularly sensitive to issues of fairness and respect).; Thomas C O'Brien and Tom R Tyler, *Rebuilding Trust Between Police & Communities Through Procedural Justice & Reconciliation*, 5 Behavioral Science and Police 35, 50 (2109); Lorraine Mazzerolle et al, *Shaping Citizen Perceptions of Police Legitimacy: A RandomizedField Trial Of Procedural Justice*, 51 Criminology 33, 60 (2013). Procedural injustice can impact a person's willingness to comply with the law throughout their lives.

C. False Confessions-Including Those Caused by the Use of Racial Slurs in Interrogation-Harm Communities for Generations and Waste Public Resources.

As discussed in Section I.C.2. above, coercive interrogation tactics, including the use of racial slurs, increase the risk that Black youth, like Joshua, will be coerced into making a false confession. The harm that false confessions have on Black individuals and communities is immense. Confessions almost always lead to convictions, ensuring that people who falsely confess will be drawn deeper into the system. *See* Saul M Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 Crim Just & Behav 1309, 1315 (2008). Adolescents, like Joshua, who falsely confess may end up serving long prison sentences and are no longer able to contribute to the economic viability of the community. The highly controlled environment of a prison deprives young people of the opportunity to develop essential skills like problem solving, self-control, time-management, and independence. [18] These missed opportunities create overwhelming ***30** obstacles for young people once they are released. Incarcerated youth and adults are deprived of the opportunity to develop community and social connections and maintain family relationships. Children of wrongfully convicted parents suffer immensely from their parents' absence in their lives. The Innocence Project, *After 15 Years Apart, Wrongfully Convicted Darril Henry is Spending Father's Day with His Children* (June 19, 2020), available: *https ://innocenceproject.org/fathers-day-new-orleans-darrill-henry-wrongful-conviction/.*

The public at large is also harmed by coerced confessions. After release, wrongfully convicted adults and young people face additional obstacles to finding employment and limited access to mental health treatment to recover from the trauma of incarceration. Henning and Omer, *supra*, at 919. This combination of factors leads to economic instability and lack of positive peer support, which can increase risk of engaging in criminal activity and thereby decrease public safety. *Id.* Additionally, coerced confessions deprive victims of the closure they need to heal and the expense of both prosecuting and then overturning wrongful convictions wastes public resources.

D. The Use of Racial Slurs in Interrogation Interject Racial Bias into Subsequent Trials, Putting Due Process Rights at Risk.

The use of a racial slur not only impacts the individual being interrogated, but likely also impacts juries if the interrogation tape is played at trial, as happened in Joshua's case. Social psychologists Jeff Greenberg and Tom Pyszcyznki performed a study in 1985 to determine how hearing racial slurs impacts third-party listeners. *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21(1) J Experimental Soc Psych 61-72 (1985). White college students were asked to judge debates between white and Black contestants. Immediately following the debates, the college students heard people either refer to the Black contestants as the "n-word," criticize them in a nonracist manner, or make no comment at all. The study found that the college students who overheard the Black contestants called the "n-word" exhibited a significant tendency to lower their evaluation of the Black contestants. These results suggest that the use of the "n-word" can lead to prejudiced actions by the listener, as well as the speaker. The researchers noted that this prejudice has implications in various settings, including parole board meetings and jury deliberation. *Id.*

***31** It is likely that hearing a Black person referred to as the "n-word," especially in the context of a police interrogation, can reinforce implicit associations between Black men and crime. This would impact the jury's evaluation of the accused person's guilt or innocence. Such evidence should be excluded as more prejudicial than probative. If the Court endorses the use of the

"n-word" in interrogation, the due process rights of Black individuals will be placed in jeopardy when the interrogation tape is played at trial.

CONCLUSION

Officer MacDonald's egregious use of the "n word" while interrogating Joshua, combined with other coercive tactics, resulted in Joshua making both a *Miranda* waiver that was not knowing, intelligent, or voluntary and a subsequent involuntary statement. As a Black teenager in Detroit, a city with a long history of police harming Black men and boys, Joshua was especially vulnerable to this type of police coercion. Law enforcement failed to consider Joshua's age and his capacity to understand and appreciate his rights, and they exacerbated the already racially-charged dynamic by exerting extreme pressure on him while in custody. Law enforcement turned Joshua's constitutional rights into a mere "form of words," the exact harm the U.S. Supreme Court aimed to prevent when it instituted the *Miranda* requirement. *Miranda*, 384 US at 444. This Court must hold that Joshua's confession was inadmissible as it was involuntary and extracted by racially-charged coercion.

Respectfully submitted,

By: <<signature>>

Kristin Henning (*pro hac vice*)

The Georgetown Juvenile Justice Clinic & Initiative

600 New Jersey Ave NW

Washington, DC 20001

(202)-662-9592

hennink@georgetown.edu

<<signature>>

Desiree Ferguson (P34904)

Detroit Justice Center

1420 Washington Blvd #301

Detroit, MI 48226

313-319-8259

dferguson@detroitjustice.org

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Footnotes

1 Counsel for *amici* authored this Brief in full. No person or entity, including counsel or *amici*, made a monetary contribution intended to fund the preparation or submission of the brief.

2 *See* The Detroit Justice Center website at https://www.detroitjustice.org/.

3 *People v Poole*, ___ Mich ___ (2022); Docket No 161529.

4 *See e.g. S.* Diaz, *Black Children are Children: Tamir Rice and the Adultification of Black Bodies*, ACLU of Ohio (2016), *https://www.acluohio.org/en/news/black-children-are-children-tamir-rice-and-adultification-black-bodies; Keisha Dauphin, RacialAdultification and the American Criminal Justice System, Master's Theses and Projects (2020)*, https://vc.bridgew.edu/theses/91.

5 *Miller v* *Alabama*, 567 US 460 (2012).

6 *Amici* have deliberately chosen to use Joshua's first name throughout this brief. Although Joshua was prosecuted as an adult, he is an 18-year-old teenager whose brain is still forming. Referring to adolescents as "Mr. Stewart," increases the likelihood that they will be perceived as older and more experienced than they actually are, as described in Section I. C. 3. of the brief.

7 Citations to the interrogation transcript contained within this brief are from *Interrogation of Mr. Stewart, May 7, 2016*, Joshua Lamar-James Stewart's Appendix to Supplemental Brief, la-197a, filed in this Court by Marilena David on June 30, 2022.

8 *Edwards v Arizona*, 451 US 477, 482 (1981) (Not only must waivers of counsel be voluntary, knowing, and intelligent, but they must be decided based upon the "particular facts and circumstances surrounding that case, including the background [and] experience ... of the accused").

9 *Interrogation of Mr. Stewart*, 5a ("So all I want you to do is read one through five and then next to each one [you're] going to put your initials ... *then* if you have any questions, you just ask me") (emphasis added).

10 *Colorado v Spring*, 479 US 564, 582 (1987) (Footnote 8 - "In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege.").

11 *Id.* at 167 ("[C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment").

12 Kristin Henning and Rebba Omer, *Vulnerable Yet Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 AZ St L J 883, 919 (2020) (citing data provided by The Nat'l Registry of Exonerations).

13 Kristin Henning and Rebba Omer, *Vulnerable Yet Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 AZ St L J 883, 919 (2020) (citing data provided by The Nat'l Registry of Exonerations).

14 Explaining that, for example, in NYC's stop-and-frisk operations, 22% of stops involving Black people resulted in a physical use-of-force compared to only 16% for white people - furthermore, in the aftermath of violence meted out

against police officers, physical use-of-force by police officers against Black people increases substantially, but not against other racial groups).

15 United States Census Bureau, *QuickFacts Detroit city, Michigan* (2021). *U.S. Census Bureau OuickFacts: Detroit city. Michigan* (noting that as of July 01, 2021, the city of Detroit is approximately 77% Black/African-American).

16 *Detroit Under Fire: Police Violence. Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era Home • Omeka Beta Service (umich.edu)* (noting that out of the 188 civilians killed by the Detroit police department, 151 of them were killed by on-duty police officers with the remaining 37 by off-duty officers. Furthermore, it should be noted that during the year range of 1971-1973, where the Detroit police were declared the deadliest police department in the nation, it also coincided with a substantial increase in the Black population of Detroit and a sharp decrease in the white population).

17 *Justice Department Announces Successful Resolution of Consent Judgment Involving Detroit Police Department OPA | Department of Justice*

18 The highly controlled environment of a youth or adult prison denies teenagers necessary opportunities to practice problem solving, self-control, time-management, and independence that are essential to healthy development. This is especially true for youth in the adult system where there are even fewer developmentally appropriate opportunities for education, work, or mentorship. When youth are released, they will face the additional obstacle of a criminal record impacting their ability to find employment and housing. This combination of factors leads to economic instability, lack of positive peer support, and little access to necessary mental health treatment, all of which can contribute to engaging in criminal activity and decreasing public safety. Additionally, the community is harmed by the expense of both prosecuting and then overturning wrongful convictions and lack of closure for victims.

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UNITED STATES of America, Plaintiff,
v.
Tyrone CORIZ, Defendant.

Cr. No. 17-1105 JCH
|
Filed 09/05/2018

Attorneys and Law Firms

Nicholas James Marshall, U.S. Attorney's Office, Albuquerque, NM, for Plaintiff.

MEMORANDUM OPINION AND ORDER

JUDITH C. HERRERA, UNITED STATES DISTRICT JUDGE

***1 THIS MATTER** comes before the Court on Defendant Tyrone Coriz's Motion to Suppress Statement (ECF No. 31). The Court held hearings on the motion on June 14, 2018 and August 21, 2018. Defendant asserts that his statement must be suppressed because he invoked his Fifth Amendment right to remain silent and terminate the interrogation, yet Special Agent Jennifer Sullivan failed to honor his rights. Defendant additionally contends that his statement must be suppressed because the Government cannot meet its burden to show his confession was voluntary because Special Agent Sullivan misrepresented material facts, promised treatment in lieu of incarceration, threatened him, and ignored his attempts to end the questioning and make a phone call, resulting in psychological coercion that overbore his will. The Court, having considered the motion, briefs, evidence, argument, and otherwise being fully advised, concludes that the motion to suppress must be granted on the grounds that Special Agent Sullivan violated Defendant Coriz's Fifth Amendment right to end the interrogation when she failed to scrupulously honor Defendant Coriz's unequivocal right to remain silent, and the resulting confession, based on the totality of the circumstances, was not voluntary.

I. FACTUAL FINDINGS

For the purposes of the motion before the Court, the Court finds the facts as follows:

At the time of the interview in question, Tyrone Coriz ("Coriz" or "Defendant") was a 45-year old man who completed the 11th grade and was previously a tribal official whose duties included assistant to the war chief with San Felipe Pueblo. *See* June 14, 2018 Hr'g Tr. 12:25-13:11 & 26:7-14; *compare* Gov.'s Hr'g Ex. 9, *with* Def.'s Mot. 15, ECF No. 31.

In 2002, a Bureau of Indian Affairs ("BIA") agent investigated Mr. Coriz regarding an allegation of sexual assault, and after giving a couple of statements, Mr. Coriz said he did not want to participate in the interview further. *See* June 14, 2018 Hr'g Tr. 11:10-12:19. Special Agent Bourgeois investigated another allegation of sexual assault in 2006 against Coriz. *See* June 14, 2018 Hr'g Tr. 12:23-17:9. Special Agent Bourgeois interviewed Coriz after his arrest and read him an FD-395 Advice of Rights form, which Mr. Coriz appeared to understand. *Id.* 14:7-15:6. Coriz spoke to Special Agent Bourgeois, but then discontinued the interview by saying he no longer wished to talk. *See id.* 15:14-17:9. Accordingly, Coriz was familiar and understood his *Miranda* rights based on his prior experience with the criminal justice system.

BIA Agent James Jojola ("Jojola") conducted an investigation of Coriz regarding new allegations against Coriz of sexual assault, and arranged a date for Coriz to come to the Federal Bureau of Investigations ("FBI") office in Albuquerque to undergo a polygraph test. *See* June 14, 2018 Hr'g Tr. 22:23-23:25; Gov.'s Hr'g Ex. 1. On May 24, 2016, Coriz came to the Albuquerque FBI office voluntarily on or around 9:00 a.m. after getting a ride with his girlfriend *See* June 14, 2018 Hr'g Tr. 23:10-24:21, 35:13-15; Gov.'s Hr'g Ex. 6 (Consent to Interview Form). Special Agent Jennifer Sullivan ("Sullivan") conducted the test. June 14, 2018 Hr'g Tr. 22:18-20. Sullivan met Coriz and Jojola in the lobby and walked them back to the polygraph room where she gave Coriz an overview of what they were going to do that day. *See* June 14, 2018 Hr'g Tr. 23:24-24:7.

***2** Jojola left, and then Sullivan discussed with Coriz a consent form to give her written permission to take the polygraph and a second form advising him of his *Miranda* rights. *Id.* 24:6-25:7. Coriz signed the "Consent to Interview with Polygraph" form at 9:19 a.m. and the "Advice of Rights" form at 9:29 a.m. prior to the test. *Id.* 25:12-17; Gov.'s Hr'g

Ex. 5 & 6. Sullivan then asked personal history information of Coriz. June 14, 2018 Hr'g Tr. 25:20-26:4. She explained the questions she was going to ask to ensure he understood the vocabulary she would use, the testing equipment and devices she would use, and what the polygraph test monitors and records. *Id.* 29:2-30:4, 31:23-32:12. Sullivan then placed Coriz in a chair and put the equipment on him, re-explaining as she went what each piece of equipment did. *See id.* 32:13-15. The pre-test took about 90 minutes. *See id.* 83:16-85:8.

Sullivan was trained in and used the FBI MGQT polygraph test, a variant of the federally approved Air Force MGQT. *See id.* 21:25-22:3, 156:11-21. The FBI MGQT test is designed to be more conservative to increase the likelihood that an innocent person may be deemed inconclusive in order to minimize the likelihood of a guilty person passing the test. *Id.* 157:7-24; August 21, 2018 Hr'g Tr. 15:15-16:13.

Sullivan went over each of the eight questions on the test: two relevant questions, two control questions, three irrelevant questions, and a sacrifice relevant question. *Id.* 32:24-33:4. Sullivan asked two relevant questions during the testing: "In the last year did you ever touch [Jane Doe's] vagina?" and "In the last year did you ever touch [Jane Doe's] vagina inside Albert's house?" *Id.* 30:22-31:14; Gov.'s Hr'g Ex. 7 (Polygraph Examination Report) at 4 of 4. The questions Sullivan used met the standards of the polygraph profession. *See* June 14, 2018 Hr'g Tr. 161:8-162:12, 164:23-165:13; August 21, 2018 Hr'g Tr. 33:16-23.

During the polygraph test, Sullivan conducted three separate charts using the exact same questions moved around in different ways. *See* June 14, 2018 Hr'g Tr. 31:15-22. The polygraph test, including the three charts and practice test, took approximately 30-35 minutes. *See id.* 33:11-14. Sullivan began Chart 1 at about 11:02 a.m. and finished Chart 3, ending the polygraph test, at about 11:14 a.m. *See id.* 85:7-8, 98:7-17.

Sullivan scored the test after each chart. *See id.* 96:6-9. The cardiovascular reading in Coriz's polygraph chart revealed that he had premature ventricular contractions ("PVCs") during the test, which are defects in the heart rhythm, and it is best practice not to consider the cardio measure on a polygraph chart when PVCs are present. *See id.* 66:22-68:8, 69:20-74:19, 186:17-21, 187:24-188:17; August 21, 2018 Hr'g Tr. 24:16-26:1. Sullivan scored the cardiovascular reading, despite the presence of PVCs, and scored the test as deception indicated. *Compare* June 14, 2018 Hr'g Tr. 69:20-74:19, 93:25-94:5, *with* Def.'s Ex. A, C-E. Numeric scoring of Coriz's charts would not result in accurate results in light of the presence of PVCs and "messy," poor quality physiological data. *See* June 14, 2018 Hr'g Tr. 178:17-179:7, 180:7-15, 186:14-16; August 21, 2018 Hr'g Tr. 23:11-18. Numerical analysis is preferred when possible, and FBI policy is typically not to use a global analysis, which is a subjective test that is not scientifically valid. *See* June 14, 2018 Hr'g Tr. 186:8-13; August 21, 2018 Hr'g Tr. 22:23-23:6. If Sullivan's cardio scores were not factored into her analysis, the numeric score from her results using her scoring method would have resulted in an inconclusive score. *See* August 21, 2018 Hr'g Tr. 37:10-38:16, 48:14-18. *See also* Def.'s Ex. N ¶ 23 ("Had SA Sullivan followed current Federal scoring practices and not scored the PVC recoveries as responses her outcome, then even with the biased FBI decision practices the Coriz Examination would have resulted in an inconclusive outcome."). Accordingly, Sullivan's conclusion of deception indicated was inaccurate using her numeric scoring system; a more accurate conclusion from her results and scoring method should have been inconclusive. *Compare* June 14, 2018 Hr'g Tr. 94:18-94:23, with August 21, 2018 Hr'g Tr. 37:10-38:16. Even with an inconclusive test result, FBI procedure is to conduct a post-test interview. *See* June 14, 2018 Hr'g Tr. 94:24-95:11, 160:15-161:2, 194:6-14.

***3** Despite the polygraph test results being inconclusive under her scoring method, at the end of the test, Sullivan got up and told Coriz that he failed the test, so she took off the equipment and started the post-test interview. June 14, 2018 Hr'g Tr. 33:23-34:12, 104:12-17. Sullivan video and audio recorded only the post-polygraph interview. June 14, 2018 Hr'g Tr. 35:25-36:12; Gov.'s Hr'g Ex. 1 (Video Recording ("Video")) & Hr'g Ex. 2 (Enhanced Audio Recording ("Enhanced Audio")). Coriz had water and Sullivan offered him food during the test. Video 1:23-2:10; [1] Gov.'s Ex. 4 ("Interview Tr.") at 2. Sullivan confronted Coriz with the results of the polygraph, telling Coriz he failed the test, he was not even close, and the polygraph says what is inside his body. *See* Video 1:23-4:55; Interview Tr. 2:6-4:6.

At 12:40 running time, when Sullivan was asking Coriz about a report involving allegations against him, Coriz said that he does not want to talk anymore. *See* Video 12:40-12:46. Sullivan asked why they would make it up. *Id.* 12:46-12:50. Sullivan continued to interrogate Coriz. *See id.* 12:50-13:49.

At 13:49 running time, Coriz said, "I don't want to argue no more. If they really want me that bad and they want

to throw away the key at me, fine." Video 13:49-13:54. Sullivan responded, "Are you telling me that when James or the BIA or whoever ..." *Id.* 13:54-58. Upon review of the Video and Enhanced Audio, the Court finds that the audio is not inaudible and that Coriz interrupted her and said: "I have nothing more to say." *Id.* 13:58-14:01. Sullivan replied, "OK." *Id.* 14:01-14:02. Coriz continued talking, saying, that he knows in his heart he is telling the truth. *See id.* 14:02-14:13. Sullivan stated, "You realize it's not going away. I mean, you get that, right." *Id.* 14:13-14:16. Coriz said that is fine, if they want him gone that bad, my own family, and he continued to talk. *See id.* 14:17-15:09. The interview resumed with Sullivan responding and asking more questions. *See id.* 15:09-17:49.

Sullivan had Coriz read a paragraph in one of the reports of prior incidents, which he did aloud, and she asked why she would make it up. *Id.* at 17:49-18:40. Upon review of the Video and Enhanced Audio, the Court finds that the audio is not inaudible and that Coriz said, "I don't need to say anymore." Video at 18:46. Sullivan replied, "All right." Video 18:46. She tossed the report down on the floor, and continued, "Just so you know, it's not going away." *Id.* 18:46-18:48. Coriz responded, "Yeah. But." *Id.* 18:50. Sullivan then said, "That's the thing. So once the community learns that you failed the polygraph test, they probably are not going to be that impressed with what's going on." *Id.* at 18:47-18:58. Defendant said that's their opinion. Id. at 18:58-19:01. Sullivan replied the "BIA is going to have to really continue enforcing their investigation." *Id.* at 19:03-19:08. Coriz responded, "Well, that's fine" and said something else inaudible. *See id.* at 19:08-19:13. Sullivan said, "Well, here's the deal. You came here to clear your name and your name is not cleared. That's what I'm telling you." *Id.* at 19:12-19:16. Coriz started to say something and Sullivan continued, "Well, let me talk. So I don't have to ask you any questions. You don't have to talk. If you're done talking, quit talking. That's fine." *Id.* 19:16-19:26. Sullivan understood that Coriz had expressed his desire not to talk to her anymore.

She then discussed how there were seven people saying this. *See id.* 19:26-19:37. Coriz said that he wanted to see the victim's polygraph results. *Id.* 19:54-:56. Sullivan asked why he should see her polygraph, stating that she would not look at his. *See id.* at 19:27-20:12. Sullivan then stated: "It doesn't really matter because, remember, you're done with this. You don't have anything more to say. You don't know why you failed the polygraph. You got nothing to say." *Id.* 20:12-20:20.

***4** Sullivan then discussed his problem is when the victim gets on the stand and the other witnesses get on the stand. *See id.* at 20:20-20:59. She then talked about his new family, how he had his own daughter, that if this was a sickness or behavior he can't help, then he needed to prove to these people that he wanted help. *See id.* at 20:59-22:59. Sullivan warned that Jojola is going to sit down with his wife and tell her about all the victims in the past, unless he has a problem and wanted to fix it, then that is a different story. *See id.* at 22:57-23:30. She stated that she is going to get Jojola, tell him he failed, and it can go one of two ways – he can continue to deny it or he can take responsibility, get help, cooperate, and try to stay out of prison, if he can. *See id.* at 23:33-23:59.

She then said it's a pattern and discussed how people get help, get therapy and counseling, that there are resources and programs for getting help. *See id.* at 24:15-29:59. Coriz remained silent after Sullivan told him to let her talk, and he began re-engaging in the conversation at 29:19 in the Video. *See id.* Sullivan continued to urge him to get help by admitting to his shortcomings, and Coriz began responding to Sullivan's questions. *See id.* 29:19-47:17.

At around 48:16 into the recording, the Court finds that Coriz said, "I just want to talk to my girlfriend." *Compare id.* 48:16-23, *with* Enhanced Audio 48:16-23. In response, Sullivan stated: "Here's the only thing I have to say about that ... I understand why you need to call Rolanna. I get it." *Id.* 48:14-48:40. Coriz responded that he wanted to talk to her, but Sullivan replied that once he walks out of here, she can't help him, she can't defend him, and she can't sit next to him. *See id.* 48:40-48:52. He again expressed wanting to call her, Sullivan responded that he is just going to worry her, and Coriz became visibly frustrated and upset. *See id.* 48:52-49:26. Sullivan continued interrogating Coriz, going through prior reports with him. *See id.* at 49:26-59:48.

After about an hour into the recording, Sullivan raised her voice and said that she will leave it like that because he is not trying to get help; she told him the difficulties victims go through and how they are getting counseling; and she said that he can't be a decent dad until he gets help, that she will help him, but he should not spin this, and that he should write an apology to each girl for crossing the line; and she said that he better hope that his daughter doesn't end up like one of these girls. *See id.* at 1:03:32-1:08:15. Sullivan then stated that if he wanted to go to the lobby and call his girlfriend and get a ride home, great, but if he wanted to get her (Sullivan) and James (Jojola) in his corner, she would stay, but he cannot have it

both ways. *See id.* 108:22-39. Coriz responded that he was so young back then. *Id.* at 1:08:40-50. Sullivan replied that it was just wrong, and that if he wanted her help, she would hang with him, and then she suggested again he write apology letters, because he needed help and needed a psychologist. *See id.* 1:09:13-1:11:37.

Coriz began confessing to touching the victims from the reports. *See id.* 1:12:48-1:19:35. Per Sullivan's suggestion, he wrote five letters of apology, one to each victim. *See id.* 1:20:48-1:29:34. Sullivan suggested certain content for the letters, which he used in writing the letters. June 14, 2018 Hr'g Tr. 49:19-25, 133:7-138:25. *Compare* Hr'g Ex. 4 *with* Def.'s Ex. I-M. The post-polygraph interview lasted approximately two hours. *See* June 14, 2018 Hr'g Tr. 37:10-13. The interview ended around 1:30 p.m., so Coriz was at the FBI office a total of approximately four and a half hours. *See id.* 54:5-15.

II. ANALYSIS

The Fifth Amendment states: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. Relying on the Fifth Amendment, the Supreme Court has held that if police take a suspect into custody and interrogate him, they must inform him of his *Miranda* rights or his responses cannot be introduced into evidence at trial to establish his guilt. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). A statement may be deemed involuntary even if a suspect has been given his *Miranda* rights and properly waived them. *See United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006). "But cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer*, 468 U.S. at 433 n.20. The government bears the burden of showing by a preponderance of the evidence that the confession is voluntary. *Lopez*, 437 F.3d at 1063.

***5** In this case, Defendant signed and understood the Advice of Rights form, so the Government has met its burden to show that Sullivan provided Coriz with the requisite *Miranda* warnings before the interview began and that he initially waived the right to remain silent.

A. Invocation of Right to Silence

A suspect who has waived his *Miranda* rights may contradict the waiver "by an invocation at any time." *Berghuis v. Thompkins*, 560 U.S. 370, 387-88 (2010). If a suspect invokes his right to remain silent at any point during questioning, "further interrogation must cease." *Id.* at 388. The Supreme Court in *Davis v. United States*, 512 U.S. 452 (1994), "held that custodial interrogation may continue unless and until a suspect actually invokes his right to counsel; ambiguous or equivocal statements that might be construed as invoking the right to counsel do not require the police to discontinue their questioning." *United States v. Nelson*, 450 F.3d 1201, 1212 (10th Cir. 2006) (italics in original) (citing *Davis*, 512 U.S. at 458-59). Determining whether a suspect has invoked his right to counsel is an objective inquiry in which a court looks at whether the suspect's statement is sufficiently clear that a reasonable officer would understand the statement to be a request for an attorney. *Id.* (quoting *Davis*, 512 U.S. at 459). The Tenth Circuit has joined every other circuit to have addressed the issue squarely in concluding that *Davis* applies to both the right to counsel and the right to remain silent. *Id.* at 1211-12.

The rigid prophylactic rule requiring all questioning to cease upon a suspect's invocation of his right to counsel "is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' " *Davis*, 512 U.S. at 458 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). A suspect's right to cut off questioning must be "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). "If an individual expresses his desire to remain silent, all interrogation must cease." *United States v. Alexander*, 447 F.3d 1290, 1294 (10th Cir. 2006).

Defendant asserts that he unambiguously invoked his right to remain silent more than once. The Government argues that the video is inaudible and he did not clearly invoke his rights. Despite that the transcript states "inaudible" at virtually all the crucial moments in the interview, the Court finds that the video and enhanced audio evidence is audible at the critical portions upon careful review. Defendant invoked his right to silence three separate times: first, at 12:40 to 12:46 running time, Coriz says that he does not want to talk anymore; second, at 13:58 to 14:01, Coriz said, "I have nothing more to say;" and third, at 18:46 Coriz said, "I don't need to say anymore." Coriz's statements are clear and unequivocal.

The Government suggests Sullivan may not have heard Coriz, but the video provides strong evidence to the contrary, particularly after his invocation at 18:46 when in response to Coriz's statement, Sullivan drops her report and says, "Just so you know it's not going away ... That's the thing. So once the community learns that you failed the polygraph test, they probably are not going to be that impressed with what's going on." Video 18:47-18:58. Sullivan also indicated a bit later her understanding of his earlier statement when she says: "Well, let me talk. So I don't have to ask you any questions. You don't have to talk. If you're done talking, quit talking. That's fine." *Id.* 19:21-19:26. She acknowledged shortly thereafter: "It doesn't really matter because, remember, you're done with this. You don't have anything more to say. You don't know why you failed the polygraph. You got nothing to say." *Id.* 20:12-:21. Sullivan's testimony that she does not know what he said during the critical "inaudible" portions is not credible based on her own words captured clearly in the recording or any good faith review of the video and enhanced audio recordings.

***6** Although it is an objective test, the fact that Sullivan construed Defendant's statement as an invocation by dropping the report, telling him it isn't going away, as well as later acknowledging he did not need to talk, suggests that a reasonable officer would likewise consider the statement he made to be a clear invocation of his rights. From the entire context, the Court concludes Defendant unambiguously invoked his right to remain silent. "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." *Smith v. Illinois*, 469 U.S. 91, 98 (1984). An "accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked." *Id.*

B. Waiver of right to silence

Police may only reinitiate questioning if four conditions are met:

> (1) at the time the defendant invoked his right to remain silent, the questioning ceased; (2) a substantial interval passed before the second interrogation; (3) the defendant was given a fresh set of *Miranda* warnings; and (4) the subject of the second interrogation [is] unrelated to the first.

Id. (citing *Mosley*, 423 U.S. at 104-05). If, however, the suspect, and not the police, reinitiates further discussion and agrees to questioning, then a defendant's right to remain silent is not violated, so long as the government did not coerce him into doing so. *Id. See also United States v. Santistevan*, 701 F.3d 1289, 1294 (10th Cir. 2012) ("It is well settled that a defendant, who has previously invoked the right to counsel, may change his mind and speak with police so long as the defendant '(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.' ") (quoting *Smith*, 469 U.S. at 95). The Supreme Court has emphasized, however, "that a valid waiver 'cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation.' " *Smith*, 469 U.S. at 98 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)).

The Government argues that Defendant never completely withdrew from the discussion, because he continued to talk to Sullivan. Although a defendant may reinitiate communication and negate the invocation of his right, the Court should consider whether law enforcement took an active role in continuing the interview or moved to end the encounter. This Court's extensive analysis in *United States v. McCluskey*, 893 F.Supp.2d 1117 (D.N.M. 2012) illuminates the issue here of whether Coriz initiated further exchanges with Sullivan:

> Thus, the question before the Court is whether McCluskey initiated further "communication, exchanges, or conversations" with Rominger after he invoked his right counsel. *See Edwards*, 451 U.S. at 485, 101 S.Ct. 1880. For guidance, the Court turns to decisions from the Supreme Court and the Tenth Circuit discussing similar issues. In *Edwards*, the defendant invoked his right to counsel, but the next morning detectives appeared at the jail, where the detention officer told the defendant that he "had to" speak with police and took the defendant [to] meet with the detectives. *Id.* at 479, 101 S.Ct. 1880. Thus, *Edwards* presented a clear case where the defendant did not reinitiate further communication with police.

In *United States v. Rambo*, 365 F.3d 906 (10th Cir. 2004), the defendant was taken into custody on suspicion of committing armed robberies, and his interrogation was videotaped. At the beginning of the interview, the officer told Rambo that a lot of the responsibility for the crimes would be on his shoulders, and that he did not want to put more responsibility on Rambo's female accomplice than need be. *Id.* at 908. After Rambo asked whether his accomplice would be released or remain in jail, the officer said, "I don't know. [pause] You know if you want to talk to me about this stuff, that's fine." *Id.* After Rambo inquired again about the welfare of his accomplice and her children, the officer again asked, "Do you want to talk to me about this stuff?" and Rambo responded, "No." *Id.* This was an unambiguous invocation of the right to remain silent. However, the officer did not terminate the interview. Instead, he responded, "You don't? [pause] OK. [long pause] That's fine. [pause] But that's what you're getting charged with." *Id.* The officer then proceeded to attempt to coax Rambo to talk by informing him that other law enforcement agencies would be involved, and that "If you think back over the last two months since you've been out of prison, all the shit you've been involved in. Think about this. Think about the towns that are going to want to talk to you, ok? Or that have stuff on you." *Id.* At that point, Rambo began to talk about his lack of involvement in certain crimes, so the officer interrupted him and said, "Before we get into this stuff, Chris, I gotta know if you want to talk to me ... I can't sit here and talk with you like this if you don't want to talk to me. So do you want to talk to me?" *Id.* Rambo assented, and the officer informed him of his *Miranda* rights. *Id.* at 909. Then, Rambo confessed his crimes. *Id.* The Tenth Circuit rejected the government's contention that it was Rambo who reinitiated communication after invoking his right to remain silent:

> ***7** That argument ignores Moran's active role in continuing the interview after Rambo invoked his rights. When Rambo stated that he did not want to discuss the robberies, Moran made no move to end the encounter. Instead he acknowledged Rambo's request, but told Rambo that he would be charged with two aggravated robberies and that other agencies would want to speak with Rambo. Those comments reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo's present request to terminate discussion of the topic, he would be questioned further.

Id. at 911. Thus, the Tenth Circuit concluded that the defendant's capitulation and agreement to talk to police was not at his own behest but rather was a product of the improper interrogation that continued after he invoked his right to silence. *Id.*

That is essentially what happened in this case. Here, McCluskey unambiguously invoked his right to counsel both at the beginning and in the middle of the interview. In neither instance did Rominger terminate the encounter. Instead, he proceeded to attempt to elicit an incriminating response from McCluskey by urging him to make a statement that would protect Welch. And it was this persistent, improper continued interrogation that persuaded McCluskey to agree to talk if Welch told him to do so. To reach any other conclusion, this Court would have to "ignore [Rominger's] active role in continuing the interview after [McCluskey] invoked his rights."

The other cases the Government cites do not alter this conclusion. In *United States v. Glover*, 104 F.3d 1570, 1580–81 (1997), the Tenth Circuit held that the defendant's confession was admissible where the individual in custody, rather than the police, initiated further discussion after the defendant invoked his right to counsel. There, the police arrested Glover and advised him of his *Miranda* rights. *Id.* at 1575. Glover indicated that he did not want to talk, and the officers immediately ceased questioning him. *Id.* The police then questioned Glover's co-defendant, who was not in custody. *Id.* After obtaining her statement, one officer approached Glover but a second officer immediately intervened and reminded him that Glover had invoked his rights. When the officers began to discuss which particular right Glover had invoked, Glover reminded them that he had invoked his right to silence, but then he stated that he now wanted to talk. *Id.* The officers began to interrogate him and did not readvise him of his *Miranda* rights. *Id.* The Tenth Circuit concluded that Glover, rather than the police, had initiated the further discussion that led to his confession. *Id.* at 1581. The Court reasoned that after Glover invoked his right to silence, police ceased all questioning and it was only later, after the confusion over which *Miranda* rights he had invoked, that Glover himself volunteered that he wished to talk. *Id.* This subsequent willingness to talk, the court noted, did not stem from improper interrogation by the police. *Id.*

....

Edwards, Rambo, Glover, and [*United States v. Alexander*, 447 F.3d 1290 (10th Cir. 2006)] persuade the Court that under the facts of this case, McCluskey did not validly reinitiate contact with Rominger after invoking his right to counsel. While it is true that it was McCluskey's own suggestion that he would talk if Welch told him to do so, he made that suggestion only after Rominger continued to interrogate him after he twice invoked his right to counsel. It is undisputed that McCluskey invoked that right and that, despite the invocation, Rominger did not terminate the encounter. As the Court has explained, Rominger continued not only to "explain the benefits of cooperation," (as the Government characterizes it), but also to interrogate McCluskey. It was only after—and as a result of—that continued interrogation that McCluskey offered to confess if Welch directed him to do so. It is this type of pressure to acquiesce that *Edwards* is intended to prevent....

***8** ... In that regard, this case is similar to *Rambo*, in which police did not terminate the interview when the defendant invoked his Fifth Amendment rights, but instead continued to interrogate him through means other than express questioning until he agreed to speak to them. Here, McCluskey did not agree to talk to Rominger at the direction of Welch until after Rominger improperly interrogated him.... Further, this case is distinguishable from *Glover* and *Alexander*. In both of those cases, unlike here, the police immediately ceased their interrogation when the defendant asserted his Fifth Amendment rights. In *Glover*, it was the defendant who, long after the interrogation ended, offered to speak to police. And in *Alexander*, the FBI ceased questioning the defendant when he asserted his rights, and his reinitiation of the interrogation was the product not of continued questioning, but of independent persuasion by his co-defendant.

McCluskey, 893 F.Supp.2d at 1140-43. This Court found a significant distinction between the cases in which the police immediately halt their interrogations after the invocation of *Miranda* rights, and the contrary situation in *McCluskey* in which the interrogation did not cease. *See id.* at 1143-44. The Court thus concluded that McCluskey did not initiate further conversation, as required to avoid suppression under *Edwards*. *See id.* at 1144.

Turning to the facts of this case, Sullivan did not cease her questioning after any of the three invocations of Coriz's right to silence. There was no substantial interval between each of Defendant's invocation and Sullivan's continued questioning and commentary. Sullivan did not give Coriz a fresh set of *Miranda* warnings, and the subjects of the interrogation before and after the invocations were related. Consequently, the four-factor test in *Mosley* has not been met to permit Sullivan to reinitiate questioning.

As to whether Coriz reinitiated communication, after the first invocation, Sullivan asked why they would make it up. *See* Video 12:46-12:50. After the second invocation, Sullivan replied, "OK," *id.* 14:01-14:02, and when Coriz continued by saying that he knows in his heart he is telling the truth, *see id.* 14:02-14:13, Sullivan stated, "You realize it's not going away. I mean, you get that, right." *Id.* 14:13-14:16. Sullivan did not attempt to cut off the interview immediately, but instead, coaxed Defendant to cooperate. After the third invocation, Sullivan applied even more pressure when she said it wasn't going away and suggested the community would be upset with him. Defendant responded to that comment, with "Yeah, well, that's your opinion." When Sullivan said the BIA would continue its investigation, Coriz responded, "That's fine. That's fine." Although Coriz spoke, his statements were in response to pressure by Sullivan and did not suggest that he was changing his mind about speaking with Sullivan. Rather, those comments indicated that, despite what Sullivan said, it was "fine" and he would rather not talk.

Sullivan then continued pressuring him saying he did not clear his name, told him not to talk, and then explained to him the strength of the government's case against him. Although Coriz brought up wanting to see the alleged victim's polygraph results, this request occurred after he invoked his right to silence, and after Sullivan pressured him, which as in *Rambo*, amounted to a suggestion that despite his earlier request to remain silent, he would be questioned further. Moreover, a significant degree of coercion or the egregiousness of police conduct is not the standard to use after the invocation of the right to counsel. In *Rambo*, the officer merely coaxed the suspect to waive his invoked right to silence, yet the Tenth Circuit suppressed Rambo's statements. *See Rambo*, 365 F.3d at 908-11. Rather than analyzing the degree of coercion, the Tenth Circuit focused on whether law enforcement played an active role in continuing the interview and whether there was "some break in the interrogation." *Id.* at 911.

***9** Applying that analysis here, Sullivan did not pause or suspend the interrogation after Coriz invoked his right to silence; rather, she played an active role in continuing the interview. Coriz could not have reopened another conversation when the previous conversation begun by Sullivan had not ended. Any pressure appears to be too much after the right to silence or request for counsel has been invoked. Instead, under the Supreme Court's "bright-line" rule in *Edwards*, police must scrupulously adhere to a request for silence, stop the interrogation, and give space to a suspect to reinitiate the conversation on his own. Where police offer no break, the courts have found a Fifth Amendment violation. Based on the evidence, the Court concludes that Defendant unambiguously invoked his right to remain silent, Sullivan did not scrupulously honor his request, and Defendant resumed the conversation only after Sullivan's pressure, which does not constitute a valid waiver of his invocation. *Cf.* *United States v. McCarthy*, 382 F. App'x 789, 791-92 (10th Cir. June 16, 2010) (holding that officers failed to scrupulously honor defendant's request to cut off questioning when they continued to discuss the consequences of cooperating or refusing to cooperate after defendant stated "I don't want nothing to say to anyone"); *Rambo*, 365 F.3d at 911 ("When Rambo stated that he did not want to discuss the robberies, Moran made no move to end the encounter. Instead he acknowledged Rambo's request, but told Rambo that he would be charged with two aggravated robberies and that other agencies would want to speak with Rambo. Those comments reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo's present request to terminate discussion of the topic, he would be questioned further."). The Court therefore concludes that all statements made after his invocations of his right to silence must be suppressed. [2]

C. Voluntariness of Confession

Statements made by a defendant under circumstances violating *Miranda* may nonetheless be admissible for impeachment if their trustworthiness satisfies legal standards. *Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978). "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law, 'even though there is ample evidence aside from the confession to support the conviction.' " *Id.* at 398 (quoting *Jackson v. Denno*, 378 U.S. 368, 376 (1964)) (italics in original). Defendant argues his confession was the product of coercion; therefore, the Court must consider whether Coriz's statements were the product of a rational intellect and free will. *See id.*

The test of voluntariness is based on the totality of the circumstances, considering both the characteristics of the defendant and the details of the interrogation. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1976); *Lopez*, 437 F.3d at 1063. The court must determine whether the defendant's confession is the product of an essentially free and unconstrained choice or if his will was overborne by physical or psychological coercion, threats, or by improper inducement. *See* *Lopez*, 437 F.3d at 1063; *United States v. Erving L.*, 147 F.3d 1240, 1248-49 (10th Cir. 1998). A confession is only involuntary if the police use coercive activity to undermine the suspect's ability to exercise free will. *Erving L.*, 147 F.3d at 1249.

No single factor is determinative in the voluntariness inquiry. *Lopez*, 437 F.3d at 1063. Relevant factors include (1) the suspect's age, education, and intelligence; (2) whether the suspect has been arrested and given *Miranda* warnings on earlier occasions, indicating previous experience with the criminal justice system; (3) the length of the detention and questioning; (4) the nature of the detention and questioning, such as whether threats or promises of leniency were made; (5) any advice of a suspect's constitutional rights; (6) the use of physical punishment; and (7) whether the suspect confessed to the crime or consistently denied any involvement in the crimes throughout the interview. *See* *Schneckloth*, 412 U.S. at 226; *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1153 (10th Cir. 2006); *Lopez*, 437 F.3d at 1063-65; *United States v. Chalan*, 812 F.2d 1302, 1307-08 (10th Cir. 1987). A suspect's personal characteristics are only relevant if the court first concludes that the officer's conduct was coercive. *Lopez*, 437 F.3d at 1064.

As for the nature of the questioning, promises of leniency are relevant in determining whether a confession was involuntary and may render a confession coerced. *Clanton v. Cooper*, 129 F.3d 1147, 1159 (10th Cir. 1997), *overruling on other grounds recognized by* *Estate of Papadakos v. Norton*, 663 F. App'x 651, 657 (10th Cir. Oct. 13, 2016) (unpublished). The court must initially determine whether a promise of leniency was made to the defendant or if the defendant reasonably

believed that such a promise had been made. *See* *United States v. Garot*, 801 F.2d 1241, 1244-45 (10th Cir. 1986). If so, the court must determine whether the inducing promise was coercive -- whether the accused was so gripped by a hope of leniency that he did not or could not freely and rationally choose among available courses of action. *See* *id.* at 1245.

***10** Coriz voluntarily agreed to take the polygraph test and was given written *Miranda* warnings, which he signed. *See* Gov.'s Ex. 2, ECF No. 35-2. That he knew and understood his rights and went to the test voluntarily generally supports a finding of voluntariness of his statements; but in this case, the fact that Sullivan did not scrupulously honor Coriz's repeated invocations of this *Miranda* right to silence weighs strongly in favor of a finding of coercion.

Although Sullivan did not use any physical punishment against Coriz, Sullivan repeatedly pressured Coriz to confess by telling him he failed the test. Although she knew or should have known the results were inconclusive under her own scoring system, Sullivan told him it was not even close. *See* Interview Tr. 2:13. The use of the polygraph test added to the pressure of the interrogation. Coriz initially denied having committed the crimes, but confessed only after Sullivan did not adhere to his request to stop talking and after Sullivan repeatedly and misleadingly told him he failed the polygraph test. *See* June 14, 2018 Hr'g Tr. 104:18-107:14.

"It is well-settled that a confession is not considered coerced merely because the police misrepresented to a suspect the strength of the evidence against him." *Lopez*, 437 F.3d at 1065 (quoting *Clanton*, 129 F.3d at 1158). However, an agent's misrepresentation of the evidence against the defendant together with a promise of leniency if the defendant confessed may be sufficient circumstances to overbear the defendant's will and make his confession involuntary. *See id. See also* *Clanton*, 129 F.3d at 1159 ("Though the lies themselves are not unconstitutional, a reasonable official should have been aware that adding the lies to the apparent promises would make it more likely that the confession would be considered involuntary."). Whether a statement was a promise of leniency is a factual question to resolve. *Lopez*, 437 F.3d at 1064. Vague and non-committal promises do not render a confession coerced. *See* *id.* at 1064-65.

In this case, Sullivan repeatedly urged Coriz to admit what he had done so that he could get psychological counseling and/or therapy. *See* June 14, 2018 Hr'g Tr. 107:15-25; Interview Tr. 19:21-21:10, 22:5-8, 23:10-14, 30:1-2, 37:13-23, 52:5-10, 53:1-2, 56:1-10. At one point, Sullivan suggested that he should take responsibility, get help, and try to stay out of prison, if he can. Interview Tr. 20:25-21:2. She later said that no one was trying to put him in prison. *See id.* 21:25-22:1. Subsequently, Sullivan explained, "We address the problem. We get them help to stay with their family." *Id.* 30:19-20. Sullivan told him she could not "defend" him and "sit next to" him if he walked out of there. *See id.* 38:5-8. Although Sullivan's statements may be too vague to constitute a promise of leniency, her statements emphasized getting him counseling or therapy if he confessed, and minimized the prospect of prison. Sullivan's statements thus contributed to the pressure on Coriz.

Sullivan also made some statements that Coriz could reasonably construe as threatened action if he failed to confess. Sullivan suggested that Coriz's community would be told he failed the test. *See* Video at 18:47-18:58. Sullivan also indicated that Jojola would tell Coriz's girlfriend about all the allegations if he did not cooperate. *See* Interview Tr. 20:10-21:3.

It is the combination of evidence of psychological pressure that crosses the threshold to coercion: misrepresenting that Coriz failed the polygraph and that it was not even close; repeatedly suggesting that he could get help and therapy, rather than prison if he confessed; suggesting agents would tell his community he failed the polygraph test if he did not confess; and most significantly, not ending the interview when Coriz said he did not want to say anything more. The personal characteristics of Coriz do not mitigate the coercion, as he has only an 11th grade education. Although Coriz understood his rights and had invoked his rights on prior occasions, in this case when he invoked his right to not say anything more, Sullivan did not scrupulously honor his rights. For all the foregoing reasons, the Court finds that the Government has not met its burden of persuasion to show that Coriz's confession was made voluntarily.

***11 IT IS THEREFORE ORDERED** that Defendant Tyrone Coriz's Motion to Suppress Statement (**ECF No. 31**) is **GRANTED**.

All Citations

Not Reported in Fed. Supp., 2018 WL 4222383

Footnotes

1 Unless otherwise noted, the Court cites to the Video and Enhanced Audio using the recorded running time, rather than the time stamp.

2 In light of this ruling, the Court does not need to consider Defendant's alternative argument that his subsequent request to call his girlfriend constituted an unambiguous invocation of his right to remain silent.

Exhibit 2

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Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice

Hayley M. D. Cleary
Virginia Commonwealth University

Police interrogation of criminal suspects is a core function of the American justice system that involves numerous cognitive, social, and other psychological processes. While a robust psycholegal literature on police interrogation has emerged, the subset of that literature focusing on adolescent suspects is less cohesive, despite substantial and well-known developmental differences between adult and juvenile suspects. With a few notable exceptions, the current juvenile interrogation literature has not systematically leveraged the many lessons of normative adolescent development that have emerged from basic scientific research. Developmental psychology has much to offer the study of juvenile interrogation, and as police–youth interactions increasingly capture the public's attention and raise important questions about how police handle juveniles, now is the time to adopt a more explicitly developmental approach. This article highlights key features of adolescent psychosocial, neurobiological, and social development that are directly relevant to the police interrogation context. It argues that an explicit recognition of developmental principles is vital to juvenile suspects' due process rights and to the future of juvenile interrogation research. The article outlines specific directions for future research on juvenile interrogation, including recommendations for interdisciplinary collaborations, laboratory research, and field studies. It then discusses implications of several key recommendations for interrogation policy and practice as they apply specifically to juvenile suspects.

Keywords: juvenile interrogation, adolescents, juvenile justice, police, developmental psychology

Police interrogation of adolescent suspects tends to capture the public's attention when it involves egregious miscarriages of justice, such as false confessions or police coercion. The 1998 arrest and interrogation of 14-year-old Michael Crowe is a leading example. Michael's 12-year-old sister was found stabbed to death in her bedroom, and police quickly zeroed in on Michael and two of his friends as suspects. After 9 hours of interrogation over 2 days without a lawyer or parent present, Crowe (falsely) confessed to the murder. This case generated extensive media coverage, including an interview with Michael Crowe on the Oprah Winfrey Show, and inspired a made-for-TV movie about the case. More recently, the 10-part documentary *Making a Murderer* (released in December 2015) featured the interrogation of Brendan Dassey, a 16-year-old with reported intellectual disability who confessed to the rape and murder of a 25-year-old woman in 2006. In Dassey's 4-hr videotaped interrogation, police seem to shepherd him through the process, providing negative feedback and introducing details about the crime that Dassey later incorporated into his confession. In August, 2016, a federal judge overturned Dassey's conviction, ruling the confession involuntary.

These cases captivate the public and evoke intense scrutiny of the justice system's handling of adolescent offenders (Redlich & Meissner, 2009). They inspire important conversations about false confessions and their correlates (Kassin & Gudjonsson, 2004). False confessions and wrongful convictions are undeniable failures of the criminal justice system and deserve the public and empirical attention they receive, for they cause irreparable harm to wrongfully accused individuals and their families. However, although the false confession incidence rate is not known (and is likely impossible to estimate; Kassin et al., 2010), there is no evidence to indicate that false confessions occur in anywhere near the majority of interrogations. Instead, current evidence suggests that a "small but significant minority of innocent people confess under interrogation" (Kassin et al., 2010, p. 5). If we accept the premise put forth by law enforcement that most suspects being interrogated are actually guilty (Inbau, Reid, Buckley, & Jayne, 2013; though this has not been substantiated empirically) and that most innocent suspects will not confess falsely, then the likelihood that any particular interrogation among the scores of interrogations conducted daily among 18,000 law enforcement agencies across the United States (Reaves, 2011) will result in a false confession seems quite low indeed.

A low incidence rate in no way diminishes the tragedy of false confessions for those whose lives are impacted nor the immediacy of the need for research that reveals their causes and correlates. False confession research, without question, can and should continue to expand as it has in recent years (Kassin, 2012), particularly since false confession rates among juveniles are higher (Gross & Shaffer, 2012). However, it is argued here that equal or even greater empirical attention should focus on the potential "everyday injustices" that may occur in routine interrogations—even for suspects who are actually guilty—and especially for juvenile sus-

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Correspondence concerning this article should be addressed to Hayley M. D. Cleary, Department of Criminal Justice, L. Douglas Wilder School of Government and Public Affairs, Virginia Commonwealth University, P. O. Box 842028, Richmond, VA 23284. E-mail: hmcleary@vcu.edu

pects. Specifically, if vulnerabilities associated with normative adolescent development—vulnerabilities that are developmentally driven and usually time delimited—influence youths' perceptions of the interrogation context or impact their interrogation behavior and decision making, then we must consider the implications for due process and fundamental fairness even for factually guilty youth.

This article argues that developmental science should play a larger role in research and national conversations about police interrogation of juveniles. A broader argument could be made that interrogation research in general should pay greater consideration to developmental factors, given that emerging developmental science (discussed below) highlights certain developmental processes that remain incomplete until the mid-20s and that more than one third of all arrests nationally involve persons under age 25 (Federal Bureau of Investigation, 2013). However, because of the bright line age distinctions that differentiate youth and adults in legal and procedural matters, the discussion here is limited to police interrogation of legal minors, which in most states includes youth under age 18 (Zang, 2015).

The Value of a Developmental Approach

In the larger interrogation literature, empirical work focusing on youth is overshadowed by research with or in reference to adult suspects. This relative inattention is not without reason. After all, despite the substantial development of this literature, interrogation scholars are just beginning to disentangle fundamental questions such as which interrogation methods are more likely to produce true and false confessions (Meissner et al., 2014), when interrogators should disclose evidence (Hartwig, Granhag, & Luke, 2014), or which internal and external factors influence suspects' decision to confess (Davis & Leo, 2012). Although precise figures are not known, it is likely that adult interrogations simply outnumber juvenile interrogations; there is therefore great utility in devoting empirical attention to adult populations. Moreover, due to juvenile case record privacy protections, parental consent requirements, and enhanced ethics board protections for youth populations, it is often extremely difficult for researchers to access youths' records or the youth themselves. However, there are numerous advantages to considering adolescent suspects as a fundamentally unique class of individuals and subsequently focusing our scholarship resources on that class.

First, there are important legal distinctions between juveniles and adults regarding police interrogation procedures. For example, state laws and policies differ with respect to parental involvement when youth waive Miranda warnings. At the time of this writing, 10 states require the presence of a parent or interested adult for youths' Miranda waiver. Others adopt a tiered approach that requires parental presence for younger youth but not for older youth (Feld, 2013). Still other differences exist in officers' requirements to notify parents about youths' custodial interrogations or to secure parental presence during the interrogation. As discussed below and as noted by others (Feld, 2013; Woolard, Cleary, Harvell, & Chen, 2008), these policies contain inherent assumptions about parents' competence in this role that early research has shown to be problematic. Regardless of policy variations, however, the very fact of involving a parent, custodial guardian, or interested adult—to whatever degree and in whatever form—differentiates juvenile interrogations from adult interrogations in important ways. The implications are much more than logistical; a parent's involvement—or even presence—in a youth's interrogation likely shifts the dynamic of the interaction, potentially impacting anything from its duration to the types of questions asked to the ultimate outcome.

Second, and perhaps more important, are the well-known developmental differences between youth and adults. These developmental changes that all youth—regardless of legal involvement—experience during adolescence hold the potential to powerfully impact youth perceptions, behavior, and decision making inside the interrogation room. For example, contemporary research in adolescent neurobiological development has revolutionized the way we think about adolescent risk taking and reward motivation. Developmental neuroscientists have identified structural and maturational changes at the cortical level that govern adolescents' sensitivity to reward, desire to seek novel sensations, and susceptibility to peer influence (Braams, van Leijenhorst, & Crone, 2014). Studies have shown that adolescent decision making is influenced by a complex interplay of neurological systems and is highly variable across contexts (Steinberg, 2014). What is missing in the juvenile interrogation literature is an explicit empirical awareness of these developmental forces. How can we best apply our knowledge of normative adolescent development to this specific (and legally consequential) context? What have we learned about adolescent judgment and cognition that can inform future research questions? Social scientists would do well to recognize and account for the well-known traits, qualities, and vulnerabilities that youth bring into the interrogation room—to keep at the forefront of our minds that juvenile suspects are adolescents first, and suspects second. Such a conceptual reorientation in our approach to the study of juvenile interrogation holds the potential to greatly inform our understanding about how key players in this event—interrogators, parents, and the adolescents themselves—navigate this important context.

Applying Developmental Principles to the Interrogation Context

That adolescents fundamentally differ from adults in numerous important ways—biologically, cognitively, psychosocially—is underscored by decades of developmental psychological research. As briefly noted in the American Psychology-Law Society scientific consensus paper, youths' developmental status is directly relevant to interrogation-related behavior and decision making (Kassin et al., 2010). Owen-Kostelnik, Reppucci, and Meyer (2006) comprehensively reviewed the relevant case law differentiating juvenile offenders from adults as well as evidence on youths' cognitive and verbal abilities, their comprehension of Miranda warnings, and interrogators' perceptions of juvenile suspects' credibility. The authors highlighted the problem of false confessions among adolescents and focused particularly on the role of suggestibility. The present article complements, updates, and expands upon that work by adopting a more updated framework of adolescent development, with a particular emphasis on neurobiological processes. The following section discusses several developmental domains that are relevant to police interrogation and illustrates how developmental psychological research from those domains can inform interrogation research moving forward.

Adolescent Psychosocial and Neurobiological Development

Psychosocial maturity has been operationalized in slightly different ways (e.g., Cauffman & Steinberg, 2012; Dmitrieva, Monahan, Cauffman, & Steinberg, 2012; Steinberg, Cauffman, Woolard, Graham, & Banich, 2009) but generally involves the development of adolescent judgment in socioemotional domains. The construct is typically defined and measured as some combination of (a) peer influence; (b) reward sensitivity; (c) sensation seeking; (d) impulse control or self-regulation; and (e) future orientation. It is often assessed using either global measures (Dmitrieva et al., 2012) or self-report or behavioral measures of individual factors (Monahan, Steinberg, Cauffman, & Mulvey, 2013). Some of these factors, discussed below, have clear applications to the interrogation context.

Because psychosocial development during adolescence is so closely linked to structural and functional changes in the adolescent brain, it is useful to discuss adolescent psychosocial and neurobiological development in concert. Findings from both human and animal studies suggest that the adolescent brain's developmental pathways are divergent and localized (Steinberg, 2010). Several similar models have been proposed to explain how these pathways influence adolescent decision making (Shulman et al., 2016), including the dual systems model (Steinberg, 2008), driven dual systems model (Luna & Wright, 2016), triad model (Ernst & Fudge, 2009), and the maturational imbalance approach (Casey, Getz, & Galvan, 2008). These models differ in the specific developmental trajectories they propose (Shulman et al., 2016) as well as the degree to which they view structural developmental pathways as orthogonal or interactive (Casey, Galvan, & Somerville, 2016). Dual systems models posit that the brain's "socioemotional" system and its associated subcortical structures experience a dramatic expansion in dopaminergic activity, which is thought to drive the increases in reward-seeking behavior that are evident throughout early and middle adolescence and decline thereafter. At the same time, development of the brain's "cognitive control" system, driven especially by structural and functional maturation in the prefrontal cortex, occurs gradually and continues into young adulthood (Steinberg, 2010). However, alternative models emphasize the role of connectivity among subcortical and cortical regions and argue that development brings a refinement of circuitry that enables top-down cognitive control processes to better modulate emotional responses (Casey et al., 2016).

Though specific mechanisms and pathways are still being debated and explored, there is consensus on the notion that adolescents are neurobiologically distinct from both children and adults in ways that directly impact decision making. Not all elements of adolescent neurobiological or psychosocial development are necessarily directly relevant to decision making during police interrogation. This section highlights three factors—reward sensitivity, self-regulation, and future orientation—that may be particularly applicable to the juvenile interrogation context. For each factor, I briefly review the psychological and neurobiological evidence and discuss implications specific to juvenile interrogations.

Reward sensitivity. Our scientific knowledge of how individuals respond to and are motivated by reward across the life span has experienced something of a revolution in the last decade. Advances in both animal and human developmental neuroscience have begun to disentangle the relationships among reward sensitivity, impulsivity, and risky behavior—related but conceptually (and perhaps biologically) distinct processes. Contemporary research clearly indicates adolescents' hypersensitivity to reward, as evidenced by increased recruitment of the ventral striatum and related elements of reward circuitry (Luna, Padmanabhan, & Geier, 2014); this effect appears to be distinct from both children and adults and has been reported using a variety of different tasks (Braams et al., 2014). Recent studies attempting to distinguish anticipation of reward from actual receipt of reward raise the possibility that subcortical structures are recruited differentially in these situations (Braams et al., 2014). Some argue that reward sensitivity is closely linked to the onset of puberty, such that pubertally driven hormone surges sensitize the reward-processing areas of the brain (Braams et al., 2014; Shulman et al., 2016).

Behavioral evidence from juvenile interrogation studies provides clues that adolescents' preference for immediate rewards may manifest in police interrogations. One application involves youths' proclivity to make decisions that would hasten the conclusion of an interrogation—in essence, the notion that confessing allows one to "go home." Most often this idea is discussed in reference to juvenile false confessions, and real-world examples abound (Drizin & Colgan, 2004). One study reported that among the adolescent cases in its sample of documented false confessions, getting to go home was one of the most common reasons cited for falsely confessing (Drizin & Leo, 2004). Scholars have argued that police intentionally imply leniency as a minimization tactic, "making confession seem like an expedient means of escape" (Kassin et al., 2010, p. 18). However, while the relevance to false confessions should not be diminished, it is important to consider how reward sensitivity might influence juveniles' confession decisions in general, even true confessions—the more routine interactions between police officers and youth. While these "everyday" interrogations are perhaps less shocking than false confession cases, they are no less important. In fact, Malloy, Shulman, and Cauffman (2014) reported in their study of incarcerated adolescent males that "getting it over with" was tendered as a confession motivation in true confessions but not false confessions. Though true confessions may be desirable from a social control perspective, the American justice system affords the accused the right to make decisions in their best legal interest within the confines of due process. Research has indicated that developmental factors such as reward sensitivity may drive adolescent decision making and that these developmental influences on decision making are temporary. Ignoring such developmental incapacities effectively "penalizes" adolescents for making poor decisions influenced by transitory characteristics that they will likely outgrow.

Self-regulation. Reward sensitivity can be tempered by the ability to control one's impulses and self-regulate behavior. Steinberg (2014) considers the development of self-regulation the "central task of adolescence" (p. 16). Self-regulation involves capacities such as impulse control, response inhibition, resistance to peer influence, and ability to delay gratification (Steinberg et al., 2008). Recent work highlights the critical role of emotional information in adolescents' cognitive control abilities. While adolescents perform similarly to adults on cognitive control tasks in neutral contexts, adolescents show deficits relative to both children and adults when asked to self-regulate in the presence of emotionally salient stimuli (Casey & Caudle, 2013). One recent study using

both behavioral and neuroimaging techniques reported that both teens and young adults (ages 18–21) demonstrated less cognitive control than adults under threatening conditions; notably, the effect was present only under conditions of negative emotional arousal (as compared to positive or neutral) and was reported in both brief and prolonged states of negative emotional arousal (Cohen et al., 2016).

Davis and Leo (2012) applied the notion of self-regulation to the interrogation context, proposing the concept of *interrogation-related regulatory decline* (IRRD) to describe the myriad individual and situational factors that impair interrogation decision-making abilities even among mentally healthy adults. Given the lessons of developmental psychology, it stands to reason that adolescent suspects are even more susceptible to IRRD, yet IRRD has never been studied in adolescents. Particularly relevant dispositional factors are fatigue, stress, and the influence of drugs or alcohol, all of which suspects could be experiencing even before an interrogation begins (Davis & Leo, 2012). While these factors may certainly impair even adult suspects' interrogation functioning, developmental research suggests that they may disrupt a youth's still-developing cognitive control system even more (Steinberg, 2014). In essence, adolescents' emergent abilities to exercise restraint and manage stress are particularly vulnerable during police interrogation.

Regarding stress, it is reasonable to presume that typical adolescents would perceive an interrogation interaction as stressful and that youths' anxieties may differ from adults' in type and degree. Anticipating a parent's reaction, the worry of "getting in trouble," mounting pressure from police, or simply being an unfamiliar environment without a support system could all contribute to feelings of stress. The limited existing data on actual interrogation experiences support the notion that these factors may be present. Malloy et al. (2014) reported that nearly one third of the incarcerated youth they interviewed felt police pressure to confess. Studies of actual juvenile interrogations (Cleary, 2014) and youths' self-reported experiences (Malloy et al., 2014) suggest that interrogation by multiple officers is common (but see Feld, 2013), which may heighten youth suspects' anxieties. Moreover, the presence of a parent or friendly adult is not common and attorney presence is virtually nonexistent (Cleary, 2014; Feld, 2013; Malloy et al., 2014), so the social isolation of the interrogation context could contribute to youth suspects' stress.

Regarding drug or alcohol use, the impact on cognition is well known but the extent to which juvenile interviewees experience it during interrogation is not. More than one third (38.7%) of incarcerated youth in Malloy et al.'s (2014) study reported that they were under the influence of drugs or alcohol during police interrogation. Regarding fatigue, lengthy interrogations have been cited as contributing to suspect fatigue (Davis & Leo, 2012), and fatigue is known to interfere with adolescent decision making (Steinberg, 2014). Again, although lengthy interrogations (and by extension suspect fatigue) are often discussed in relation to false confessions (Drizin & Leo, 2004), it is important to consider the potentially amplified effect of fatigue on juveniles' even true confession decisions. Observational and self-report data on juvenile interrogation length are quite variable (Cleary, 2014; Feld, 2013; Malloy et al., 2014), perhaps due to different sampling strategies, but it is clear that at least some juveniles are interrogated for extended periods of time and that such prolonged stress may interfere with adolescents' cognitive functioning even more than adults.

Future orientation. Though long interrogations are problematic, even shorter interrogations may seem painfully long to an adolescent due to limited future orientation. This umbrella term has been operationalized in numerous ways (e.g., time perspective, temporal extension) and refers to a constellation of abilities to think and reason about the future or connect current behavior with future events (Steinberg, Graham et al., 2009). While it is clear that future orientation generally increases with age (Cauffman & Steinberg, 2012), developmental trajectories for future orientation have been difficult to pinpoint because the literature is sparse and the existing studies differ in whether they conceptualize the construct as having cognitive, attitudinal, or motivational origins. Studies assessing behavioral tasks and self-report indicate that age differences peak around age 16 for delayed discounting, time perspective, and anticipation of future events, while planning ahead continues to increase throughout early adulthood (Steinberg, Graham et al., 2009). Studies with delinquent samples have found that incarcerated youth are less future oriented than nonincarcerated youth (Cauffman, Steinberg, & Piquero, 2005) and that growth in future orientation among serious juvenile offenders increases well into one's 20s (Monahan et al., 2013).

Future orientation almost certainly plays a role in suspects' abilities to withstand the pressures of interrogation. Davis and Leo (2012) argued that in order to successfully resist interrogator persuasion one must continually prioritize long-term interests over short-term impulses in the process of constant self-monitoring. Adolescents' relative deficits in future orientation likely combine with their heightened reward sensitivity and limited self-regulatory abilities to render youth especially vulnerable to poor interrogation decision making. Youth with underdeveloped time perspective may feel that even a brief encounter with police is painfully long. What is a routine half-hour information-gathering interview to a police officer may seem like eternity to a youth sitting alone and nervous in an interrogation room. These youth may comply with interrogators' requests to whatever extent necessary for them to be released, even to their legal detriment. Research with delinquent samples, though limited, supports this notion. In one study, when delinquent youth were asked to describe the consequences of waiving one's right to silence when questioned by police, the consequence mentioned most frequently was the police's immediate response (i.e., police will let youth go if they talk; Grisso, 1981). A more recent study found that 20% of adolescent detainees' (self-reported) true confessions and 33% of false confessions resulted from duress (Malloy et al., 2014), perhaps indicating that confession decisions are motivated by a desire to quickly obviate police pressure.

Taken together, research on psychosocial development and its neurological underpinnings suggests that (a) systematic, developmentally driven differences exist between typically developing adolescents and adults and (b) adolescents' relative incapacities place them at a disadvantage in interrogation decision making. The key implication is that neurobiological and psychosocial immaturity is a temporary developmental stage for most youth. It is important to acknowledge that individual differences exist in the domains of both adolescent development and adult decision making, including within-group differences among healthy adolescents at the neurobiological level (Luciana, Wahlstrom, Porter, & Col-

lins, 2012). When questioned by police, some adolescents can readily withstand interrogative pressures while some adults cannot. However, youth as a class are disadvantaged because their developing cognitive capacities are tempered by differences in values and judgment that are unique to adolescence as a developmental period.

Adolescent Social Development

Police interrogation has been described as a "process of social influence . . . a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measures success by the ability to extract an admission from that target" (Kassin & Gudjonsson, 2004, p. 41). This characterization illustrates the social psychological dynamics that render the interrogation process inherently coercive (*Miranda v. Arizona*, 1966). Interrogation strategies, procedures, and environments are structured so as to maximize the imbalance of power between interrogator and suspect (Inbau et al., 2013). Interrogators are trained to exploit the power of their position and of the situation to obtain information from even the most recalcitrant suspects. The Miranda Court—in reference to adult suspects—recognized that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals" (*Miranda v. Arizona*, 1966, p. 455).

While adults are also vulnerable to social influence (Cialdini & Goldstein, 2004), the magnitude of situational interrogation pressures may be intensified when the suspect is a youth. Youth are socialized to respect authority and obey adults (Koocher, 1992). Laws and social norms declaring an age of majority for "adult" behaviors (e.g., alcohol and cigarette consumption, voting, marriage) reinforce adolescents' comparatively marginal status (Steinberg, 2014). These social forces governing youth–adult interactions in everyday contexts are perhaps even more palpable when the authority figure is a police officer and the adolescent suspect is "in trouble." In the interrogation context, the roles of *adult* and *authority figure* are indivisible, as are the roles of *youth* and *suspect*. Adolescents' potentially differential response to authority may manifest during interrogation in several ways, each of which may compromise the youth suspect's rights or disserve his legal best interests.

Compliance with authority. One highly relevant but surprisingly infrequently examined question is whether youth are more obedient or compliant with their interrogators than adult suspects. Do juveniles answer the questions they are asked? Do they behave as they are told without argument or resistance? When applying the literature on compliance to the interrogation context, it is important to consider the nature of the adult's authority, the suspect's age, and the nature of the request. Is the authority figure a parent, teacher, or police officer? Is the request one for information (e.g., whereabouts last night), admission (confess to a crime) or action (sign a Miranda waiver agreement)? Is the youth 10 years old or 16? Much of the commentary on compliance in juvenile interrogations is focused squarely on false confessions (e.g., Drizin & Colgan, 2004). However, given that false confessions likely occur in a very small proportion of custodial interrogations, the more pressing question may be whether developmentally based inclinations to comply with authoritative requests in more typical interrogation situations may compromise youths' best legal interests or due process of law.

One example of authoritative requests that (in theory) occur in all custodial juvenile interrogations is waiver of the privilege against self-incrimination. Interrogations are persuasive by design (Inbau et al., 2013), and interrogators use a variety of techniques to elicit incriminating statements from suspects. All suspects must consent to speak with police outside the presence of an attorney; without a valid Miranda waiver any incriminating statements are likely inadmissible in court. Police have developed strategies for minimizing the significance of this transaction, including first developing a rapport with the suspect or dismissing waiver procedures as a mere bureaucratic formality (Cleary & Vidal, 2016; Feld, 2013; Inbau et al., 2013). Even when every effort is made to communicate the importance of Miranda rights and the implications of waiver, which is probably rare (Cleary & Vidal, 2016; Feld, 2013), there is reason to expect little effect on juveniles' waiver decisions. Developmental psychologist Gerald Koocher (1992) once noted: "Adults' interactions with children are often framed as requests, yet children are seldom fooled into thinking that they have a real option to decline. . . . this does not suggest unfettered voluntariness in children's decision-making" (p. 715).

The social and legal power asymmetry between interrogator and youth suspect likely compels many youth to waive their rights and exhibit other compliance-oriented interrogation behaviors. This is evidenced by the consistently high waiver rates among juvenile suspects—as high as 90% in several studies (Cleary & Vidal, 2016; Feld, 2013; Grisso, 1981), though waiver rates are also high among adults (Kassin & Norwick, 2004; Leo, 1996). Moreover, youth are doubly disadvantaged during interrogation because the existing social status differential is conflated with the juvenile's liberty interest. When interrogators make requests of virtually any sort, it stands to reason that both deeply rooted social norms as well as the juvenile's desire to extricate himself from the situation would weigh heavily on his decision to comply. That is, the interrogation interaction itself—by virtue of the process and the social and legal roles of those involved—likely fosters perceived compulsory compliance with authority. The very nature of the process raises serious concerns about whether juvenile waivers can be knowing, voluntary, and intelligent as the law requires (*Fare v. Michael C.*, 1979).

Furthermore, compliance could be a relevant variable even before the Miranda interaction commences if the youth's perception of being in police custody does not align with the officer's. The Supreme Court's decision in *J.D.B. v North Carolina* brought into focus the notion that youthfulness impacts juvenile suspects' perceptions of police custody for the purposes of Miranda, explicitly acknowledging for the first time that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go" (*J.D.B. v. North Carolina*, 2011). The legal importance of juvenile suspects' perceptions of police custody cannot be underscored enough. Adolescents are sensitive to the power imbalance between themselves and authority figures (e.g., parents, teachers) and have cited that power imbalance as a cause of communication problems with adult authority figures (Drury, 2003).

What little research that exists on interrogation-specific compliance with authority suggests that youth do indeed more frequently make interrogation decisions that reflect a propensity for compli-

ance. Grisso et al. (2003) found that both incarcerated and community youth under age 16 were more likely to comply with requests from police officers in a vignette scenario. Redlich and Goodman (2003) examined age differences in compliance using an experimental laboratory paradigm; compliance rates for signing a (false) statement of guilt decreased with age and were as high as 78% for 12- to 13-year-olds. These studies reported age differences under relatively benign testing conditions; it stands to reason that the tangible pressures of actual interrogation—ethically and practically unavailable in field studies or laboratories—may exacerbate preexisting tendencies toward compliance.

The role of parents. Parents represent authority figures of a very different nature. The role of the parent–child relationship in decision making is complex and can be a source of both conflict (Murphy, Donohue, Azrin, Teichner, & Crum, 2003) and support (McElhaney, Allen, Stephenson, & Hare, 2009). The nature and quality of this relationship impacts a plethora of child outcomes, including academic achievement, self-esteem, empathy, prosocial behavior, emotional regulation, and delinquency (Morris, Cui, & Steinberg, 2013). Of all the unanswered research questions, it is argued here that the most pressing question involves how parents' behavior and decision making before, during, and after police questioning impacts their children's legal case. We know alarmingly little about how parents navigate the interrogation process. To my knowledge, only two studies have directly assessed parents' knowledge or attitudes about juvenile interrogations. Grisso and Ring (1979) reported that parents wanted to retain control over their child's interrogation decision making, yet Woolard et al.'s (2008) interviews with parent–adolescent pairs suggest that parents do not reliably possess the requisite knowledge to effectively advocate for their children. Moreover, from a conceptual standpoint it is arguably unfair to place parents in this intermediary position. Scholars have noted the conflicting roles parents face, wanting to protect their children against accusations and legal harm on the one hand but desiring to serve as educator and moral guide on the other (Farber, 2004). Parents may also have a conflict of interest with their child or financial disincentives (Drizin & Luloff, 2007; Feld, 2013). Existing research is limited but suggests that these varied perspectives may indeed play out in actual juvenile interrogations. Only two studies of videotaped juvenile interrogations have examined parents, and they reported that parental presence was infrequent (Cleary, 2014; Feld, 2013) and their behavior substantially variable (Cleary, 2014). We simply cannot divorce juvenile suspects' status as suspects from their status as legal dependents; children are nested within the family unit, and the influence of parents and family is critical to explore when examining how adolescents behave during police questioning.

Adolescents' Legal and Procedural Knowledge

Though not a "domain" of adolescent development in the traditional sense, youths' reasoning capacities, comprehension of legal terminology, and functional knowledge about legal procedures also represent a class of abilities that are highly relevant to police interrogation and that are generally not equivalent to those of adults. Throughout the last century, the Supreme Court has periodically, though inconsistently, acknowledged that juveniles' incomplete development may contribute to their poor understanding of the interrogation process or its consequences (*Gallegos v. Colorado*, 1962), susceptibility to police coercion (*Haley v. Ohio*, 1948), propensity toward false confessions (*In re Gault*, 1967), and more recently, perceptions of police custody (*J.D.B. v. North Carolina*, 2011). Researchers have tested many of the Court's assumptions about adolescent development, and a substantial body of research now identifies areas in which juveniles' incomplete or inadequate legal knowledge, understanding, or reasoning may affect decisional outcomes in the courtroom. Early work examined whether developmental incapacities affected juvenile defendants' adjudicative competence (see, generally, Grisso & Schwartz, 2000), which was operationalized according to the criteria for a defendant's effective participation in his own legal defense as outlined in *Dusky v. United States* (1960). The Supreme Court has emphasized the injustice inherent in subjecting incapacitated defendants to a legal process they do not fully understand, particularly when they may face serious legal sanctions; to do so would be to violate defendants' constitutional due process rights (*Drope v. Missouri*, 1975).

As with adjudicative competence in a courtroom context, the existing developmental research on youths' legal knowledge, while fragmentary, indicates that adolescents as a class are ill equipped to withstand the pressures of modern police interrogation. Though the Supreme Court has not enumerated any specific criteria for "interrogative competence," an established literature demonstrates substantial deficits in youths' understanding of the Miranda warnings and the constitutional rights they convey, while a modest (but growing) literature suggests similar knowledge deficits pertaining to police interrogation practices.

In order to invoke constitutionally protected rights signified by the Miranda warnings, a suspect must first understand what a "right" is. Research has consistently demonstrated that adolescents as a class fail to adequately comprehend their constitutional rights (Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003) or the function and durability of rights in general (Melton, 1980). Regardless of whether comparisons are made to adult suspects (Woolard et al., 2008), legal standards (Viljoen, Zapf, & Roesch, 2007), or to younger versus older adolescents (Goldstein et al., 2003), the evidence for youths' inadequate Miranda comprehension is robust and has been carefully reviewed elsewhere (Goldstein et al., 2015). For the purposes of this article, it is important to note that adolescents' comparatively poor Miranda comprehension is at least partly driven by cognitive and psychosocial deficits that are unique to their developmental stage and, for youth in the aggregate, temporary in nature.

Beyond Miranda comprehension, researchers are beginning to question whether adolescents are able to apply legal knowledge in a meaningful way to their own cases, a capacity termed *effectiveness of participation* in the adjudication context (Grisso, 2000). For example, can juvenile defendants manage their behavior in the courtroom? Can they provide attorneys with relevant information when asked? It is argued here that effectiveness of participation similarly applies to pretrial legal contexts, including police interrogation. Regarding Miranda comprehension, Kassin et al. (2010) observed that even a factually accurate understanding of basic Miranda elements is insufficient if the suspect is unable to apply that understanding to their own situation or harbors distorted beliefs about how rights function in context. For example, even if youth understand that "right to silence" means they are not required to answer police officers' questions, can they extend that

knowledge to recognize that they may stop answering questions if they have already started? Do they know about standard interrogation practices, such as the fact that interrogators are legally permitted to lie? Woolard et al. (2008) reported substantial knowledge deficits among youth (as well as many parents) regarding police practices for parental notification and police use of deception. Knowledge varied by item, and older youth were more accurate than younger youth. More research is needed to pinpoint the precise nature of youths' misconceptions about custodial and noncustodial police questioning.

New Directions for Research Approaches

Juvenile interrogation researchers face the daunting task of studying this complex phenomenon—one that comprises legal, social, and developmental forces—in the absence of a concrete legal standard. *Miranda* and *Fare* did provide criteria to evaluate juvenile Miranda waivers retrospectively, and *J.D.B.* now requires a suspect's age to be considered in Miranda custody analyses. However, the sway of developmental research in totality of the circumstances determinations is dubious (Feld, 2013), and currently there are no restrictions whatsoever on who may be interrogated. Moreover, the Supreme Court has consistently protected police officers' lack of obligation to judge suspects' capacities, knowledge, or mental states (*Berkemer v. McCarty*, 1984; *Stansbury v. California*, 1994; but see *J.D.B. v. North Carolina*, 2011).

Perhaps because there is no concrete legal requirement to assess empirically, psychology lacks a unifying theoretical construct that encompasses the myriad developmental forces that likely impact youth behavior and decision making during interrogation. There is no "interrogative competence" akin to adjudicative competence in the courtroom context. However, such a construct(s) is sorely needed and would greatly contribute to our understanding of how juvenile suspects navigate the interrogation process. Were a construct such as "interrogative competence" to exist, it would include relevant scientific knowledge from the various traditional domains of adolescent development reviewed above that are thought to influence the juvenile interrogation interaction, as well as recognition of adolescent suspects' unique social and cultural roles vis-à-vis parents and legal authority figures. Additional research in several key areas could greatly enhance our understanding of how youth navigate this important legal interaction.

Interdisciplinary Collaboration

Some of the most important contributions in psycholegal research have come from interdisciplinary research teams that included attorneys, social psychologists, developmental neuroscientists, community psychologists, criminologists, or forensic clinicians (see, generally, the MacArthur Foundation Research Network on Law and Neuroscience and the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice). Juvenile interrogation research would be greatly served not only by continued collaboration among those under the psychology and law rubric but also by extending collaboration to seemingly less related disciplines. For example, what does linguistic discourse analysis have to say about communication styles between adolescents and adults? What can the education literature tell us about how youth process verbal and written information or respond to authority figures in a school context? How might sociological research on intersectionality and social location expand our understanding of the role of race, social class, gender, and culture in the interrogation room, especially for youth who are not native English speakers?

The value of interdisciplinary collaboration extends well beyond academic disciplines, too. Researcher–practitioner partnerships are especially vital for the study of juvenile interrogation because of each group's disparate yet complementary knowledge and experience with adolescents and the interrogation context. Law enforcement officials are uniquely qualified to help researchers develop informed, relevant, and meaningful research questions. Open, purposeful consultation with the professionals who conduct juvenile interrogations can greatly inform the design of new approaches that are developmentally sensitive yet palatable to law enforcement. PEACE, the nonaccusatorial, information-gathering approach to suspect interviewing introduced in the 1990s and now widely adopted in the U.K., was a successful collaboration between police officers and psychologists (Bull, 2014). Police officials developed this new model with substantial input from psychologists, and while PEACE was not a research endeavor, it is a valuable example of how such collaborations can effect meaningful change. Other legal actors' perspectives can also create valuable insights. For example, what do youth report to attorneys about their interrogation experiences? Do those reports differ from police officers' reports or objective records of the interaction (i.e., electronic recordings)?

Laboratory Research

Controlled laboratory research with adolescent participants—both community and justice-involved samples—is sparse. A few studies have examined youths' interrogation-related behaviors in controlled settings. For example, Redlich and Goodman (2003) found that younger adolescents (under 16) were more likely than college students to accept responsibility for crashing a computer and that use of false evidence and participants' suggestibility were related to compliance. Pimentel, Arndorfer, and Malloy (2015) explored differences in 14–17 year olds' compared to college students' willingness to accept responsibility for a confederate's cheating on a laboratory task. These studies begin to unpack certain aspects of the interrogation process. However, experimentalists face ethical and logistical challenges when bringing adolescents into the lab, and when it comes to a field-based, context-specific process such as police interrogation, concerns about ecological validity are more than just a footnote limitation. Laboratory-based methods could perhaps be most beneficial when focused on social or even biological processes that cannot be easily measured outside the lab. As one example, what is the role of stress in youths' Miranda comprehension? One laboratory study found that college student "suspects" who experienced experimentally induced stress showed poorer Miranda rights comprehension than those who did not (Scherr & Madon, 2012). Given the developmental psychological findings that stress differentially impacts adolescents' cognitive functioning, research examining the role of stress in younger and older adolescents' Miranda comprehension would be informative.

Field Research

Field-based research and field validation of laboratory studies are also critically important for understanding complex context-specific processes such as interrogation. This is especially true for developmentally driven behavior and decision making. The laboratory research noted above—while critical for exploring developmental differences with the benefit of experimental control—is only useful insofar as it translates to actual interrogations. Here the literature on adolescent legal competence and culpability can certainly inform hypotheses about youths' interrogation decision making. But the actual legal procedures, as well as the stressors and cognitive and emotional demands of the courtroom (competence) or the circumstances surrounding the delinquent act (culpability), may or may not translate to the interrogation context. We simply have not yet built a solid enough empirical foundation. As Dixon (2010) drily noted,

> A factor which seems inexplicable is the dearth of field-based, empirical research on U.S. police interrogation. So much talent, so many resources . . . so many case-focused law journal articles and psychological experiments on students, and so few sociological or criminological fieldwork studies. (p. 435)

When conceptualizing fieldwork studies it also is important to remember that the actual physical location of police–youth interaction may differ from adults. While adults and adolescents are certainly both informally questioned (e.g., on the street) and custodially questioned (e.g., at the police station), there is at least one context that is unique to adolescents: school. The prevalence and authority of School Resource Officers (SROs) has expanded rapidly in recent years, owing largely to isolated but high profile acts of violence on school property (Weiler & Cray, 2011). As a result, adolescents and police are interacting more frequently than ever before, with some of these interactions involving conflict, questioning, and eventual referral to the juvenile justice system (Robers, Zhang, Morgan, & Musu-Gillette, 2015). *J.D.B. v. North Carolina* (2011) propelled this issue into the nation's consciousness, yet interrogation of juveniles in the school context is virtually uncharted research territory. With the rate of school-based incident referrals ever increasing (Robers et al., 2015) and interrogation training corporations now offering interrogation trainings specifically designed for school administrators (Starr, 2016), the immediacy of this issue cannot be overstated. School-based interrogations may well be the next frontier in juvenile interrogation research.

Qualitative Research

Finally, it is argued here that not only is there room for qualitative work in the juvenile interrogation literature, but there is a pressing need. Community surveys and assessments of detained youth can and have captured important aspects of the juvenile suspect's interrogation experience; certainly more are needed to augment the sparse literature. But qualitative work can provide a richness and depth about adolescents' perceptions, interpretations, fears and attitudes that is currently missing. For example, what characteristics of the officer or environment are most salient? How do youth interpret officers' statements or body language? Qualitative work with youth who have experienced both informal questioning and custodial interrogation could shed new light on youths' own perceptions of the process, ultimately contributing to best practices and policy reform.

New Directions for Research Questions

Taken together, the time seems right to refocus our research questions and redouble our efforts to better understand how youth experience this process. The school/SRO question is a prime example. From a descriptive standpoint, when, where, how, and by whom are adolescent students questioned about illegal acts? Are students properly Mirandized? How do adolescents perceive their "freedom to leave" an interaction with a police officer, either within or outside school walls? How might perceptions differ among minority youth, given the particular institutional and implicit biases they face? As it is, little is known about how youth perceive "freedom to leave" for the purposes of Miranda in non-school contexts. It is reasonable to believe that being at school—a legally required activity—would impact youths' perceptions of police custody. These research questions remain unanswered but are critical to address, as they impact real adolescents' lives.

Another example involves the use of various interrogation techniques with juvenile suspects. Almost no research has directly examined police approaches to juvenile interrogation; Feld's (2013) observational/case review analysis of maximization and minimization techniques in 307 juvenile felony cases is a notable exception. A few studies have reported law enforcement officers' self-reported use of various techniques with juvenile suspects (Cleary & Warner, 2016; Kostelnik & Reppucci, 2009; Meyer & Reppucci, 2007) and have revealed, generally, that police typically endorse using the same variety of techniques (both coercive and nonadversarial) with juveniles as they do with adults. One study with incarcerated youth reported that high pressure interrogation techniques were associated with negative perceptions of police among youth (Arndorfer, Malloy, & Cauffman, 2015). While these studies are tremendously important to our understanding of how police question youth, the juvenile interrogation technique literature still suffers from the condition of finding only what we seek. That is, if researchers collect data on interrogation techniques used with youth that were derived from existing literature—which was based on adult interrogations—then we miss the opportunity to capture the possibility that police may use entirely different approaches with adolescents. For example, do police explicitly recognize juvenile suspects' youthful status—or even incorporate that status into a strategy for obtaining a confession? Invoking the idea of parental approval (e.g., "your parent will be happy if you cooperate"), long-term consequences (e.g., "you've got your whole life ahead of you"), benefits of youth legal protections (e.g., "your records are sealed as a juvenile"), the officer's wisdom/experience as an adult (e.g., "trust me—this will be a good learning experience") or practical implications for adulthood (e.g., "this will make it harder to get a job/go back to school") are all strategies that are reasonable to hypothesize that interrogators would use with adolescent suspects. Certainly, it is possible that such strategies are not prevalent or they overlap considerably with existing known techniques. However, we cannot know until we ask. The fact remains that we still know very little about what actually happens when police interrogate youth (i.e., Cleary, 2014; Feld, 2013), and we cannot assume homogeneity in police approaches or youth perceptions.

Similarly, recent challenges to the traditional American approach to custodial interrogation have inspired numerous studies examining the efficacy of alternative approaches to police questioning. The adversarial, sometimes aggressive interrogation techniques that seemingly typify American police interrogations have come under fire in both the academic community (Kassin et al., 2010) and popular media (Kolker, 2016). Alternatives to this model do exist and continue to expand. For example, the Cognitive Interview (Fisher & Geiselman, 1992) has long been heralded as a superior method for gathering accurate information from witnesses (Logue, Book, Frosina, Huizinga, & Amos, 2015), and has been adapted for use with criminal suspects (Cognitive Interview for Suspects [CIS]; Geiselman, 2012). Research examining components of the CIS has supported its value especially for detecting deception (Logue et al., 2015) yet we know very little about how cognitive interviewing approaches might fare in the context of interrogating adolescent suspects. Indeed, the broader area of deception detection in adolescent suspects is ripe for investigation. As one example, postural positions (e.g., slouching), gaze aversion, and response latency—hallmarks of the Reid Technique's Behavioral Symptom Analysis approach to detecting deception—may in fact be typical adolescent behaviors (Meyer & Reppucci, 2007).

Additionally, research on investigative interviewing and its component principles could be further explored with youth. The PEACE model shepherded in the investigative interviewing era in Europe, with its emphasis on fact finding rather than confession (Bull, 2014). The PEACE model and investigative interviewing in general espouse several principles that are especially developmentally appropriate for adolescent interviewees, such as rapport building, open-ended questioning, and a prohibition on police deception and use of false evidence. While rapport building is considered an essential component of child witness interviewing (Hershkowitz, 2011) and has inspired important new work with child witnesses and adult suspects (see Vallano & Schrieber Compo, 2015), its effectiveness with children and adolescents in an interrogation (i.e., confession) context—while theoretically quite promising—is unknown. It should be noted, however, that the United Kingdom also requires the presence of an appropriate adult when police interview minors to safeguard against police misconduct, provide the youth with information, and advocate for the youth's legal rights.

Finally, the recent nationwide expansion of mechanisms to transfer juveniles to criminal court opened a floodgate of unanswered research questions about jurors' perceptions of juvenile interrogation evidence and juvenile defendants. Research has not kept pace with the rapid expansion of juvenile transfer laws, and while some states are beginning to step back from those expansions, tens of thousands of adolescents per year still find themselves before juries in criminal court (Zane, Welsh, & Mears, 2016). Research on juror perceptions of juvenile defendants is limited (Stevenson, Najdowski, Bottoms, & Haegerich, 2009) and typically involves mock juror studies investigating the role of specific characteristics not necessarily related to developmental issues (e.g., race, gender, abuse history). A few studies assessing juror perceptions of hypothetical juvenile defendants with intellectual disabilities have reported that jurors will discount confessions given by disabled juveniles (Najdowski, Bottoms, & Vargas, 2009) and that disability status impacts perceptions of the youth's criminal deviance and self-control (Najdowski & Bottoms, 2012). Molinaro and Malloy (2016) varied vignette suspects' age (10 vs. 16 years), status as victim, witness, or suspect, and statement consistency to examine mock jurors' perceptions of youths' legal testimony. However, it is worth noting that the vignette involved a child sexual abuse case, and people's complex beliefs about child sexual victimization may complicate their judgments about youthful offenders in sex-related cases (Stevenson et al., 2009). Moreover, these and other studies employed undergraduate (often psychology) student samples, and it is important to assess whether diverse jury-eligible community samples demonstrate similar perceptions. Overall, more work is needed to understand how jurors interpret interrogation and confession evidence and account (or do not account) for adolescent defendants' developmental immaturity in interrogation decision making.

Policy and Practice Considerations

Because the juvenile interrogation literature is still emerging, it would be premature to make definitive, specific, or sweeping recommendations for reform of policy or practice. However, the broader psychological literature on adolescent development and the limited juvenile interrogation literature do converge on the notion that due process for adolescent suspects as a class is in jeopardy. In line with Kassin and colleagues (2010), this section addresses several considerations to hopefully inform policy and practice discussions about how to protect both juvenile suspects' legal rights and the integrity of the interrogation process.

Electronic Recording of Juvenile Interrogations

Electronic recording has long been heralded as a cure for a host of interrogation-related ailments, from officer misconduct to false confessions to in-court "swearing contests" between defendants and officers about the details of confessions (Kassin et al., 2010, p. 25); such calls for reform have become commonplace (Dixon, 2010). Numerous scholars have advocated for mandatory electronic recording of interrogations (Drizin & Colgan, 2004; Kassin et al., 2010; Leo & Richman, 2007; Leo, 2009; Slobogin, 2003), some even focusing specifically on juvenile interrogations (Drizin & Colgan, 2001; Feld, 2013). Kassin and colleagues (2010), in their forceful and unequivocal recommendation that all felony suspect custodial interviews and interrogations be recorded, asserted that mandatory electronic recording would reduce secrecy and promote transparency in the process. Leo (2009) argued that mandatory recording is the most important policy reform available. Indeed, in August, 2014 the APA issued a resolution echoing Kassin et al.'s (2010) electronic recording recommendations.

Without question, electronic recording of interrogations is a clear example of evidence-based reform that would irrefutably improve the administration of justice for criminal suspects and defendants in general, including adolescents. However, the lessons of developmental psychology teach us that electronic recording of juvenile interrogations is not likely to be a panacea. Almost certainly it would reduce instances of overt coercion and provide documented evidence of known false confession risk factors such as lengthy interrogations. However, as outlined earlier, the potential injustices that juvenile suspects face come from factors endogenous to the youth themselves. Adolescents' vulnerability in the

interrogation room is driven by their incomplete development. The tendencies that render juvenile suspects in need of additional protections—compliance with authority, self-regulation difficulties, limited future orientation, poor rights comprehension—are not always readily observable on camera. If youths' (even guilty youths') developmental immaturity alters their perceptions of the interrogation process or unduly influences their decision making, then potential miscarriages of justice may be far more commonplace than false confessions.

Mandatory Assistance of Counsel

An additional consideration for the typical youth suspect, then, is the notion of required presence and assistance of an advocate who can compensate for youths' deficits in the interrogation room (or advise against interrogation altogether). It is underscored here that that advocate should not be a parent or guardian. Extant research, though limited, casts serious doubt on the notion that parents can effectively advocate for their children. Whether the driving factor is incomplete or inaccurate legal knowledge (Woolard et al., 2008), unwillingness to concede youths' autonomy in legal decision making (Grisso & Ring, 1979), or one of many potential conflicts of interest with the child (Drizin & Luloff, 2007), until new research indicates otherwise we should proceed on the assumption that in general, parents are ineffective and inappropriate substitutes for trained legal defense counsel. Available data, though limited, indicate that only the presence of an attorney—not a parent or other appropriate adult—prevents youth from providing incriminating information to police (Lamb, Malloy, Hershkowitz, & La Rooy, 2015).

Developmentally Informed Interrogation Strategies

As social scientists, we have an opportunity to provide law enforcement professionals with the knowledge and tools to interview youth in a developmentally appropriate manner. Many police agencies have already adopted policies and practices that recognize youths' vulnerabilities. The International Association of Chiefs of Police (IACP) now disseminates a juvenile interrogation training curriculum to law enforcement officers across the United States (IACP, 2012). Some of the recommendations are well supported by developmental research (e.g., avoid use of deception and promises of leniency). Others, however, may miss the mark. For example, the developmental basis for the assertion that "juveniles can only tolerate about an hour of questioning before a substantial break should occur" (IACP, 2012, p. 8), while well intended, is unclear. Nonetheless, agencies that proactively adopt developmentally sensitive practices are noteworthy and should be recognized and supported.

Conclusion

Police interrogation is an essential investigative tool and core component of the criminal justice process. It is true that many recommendations put forth in recent years (e.g., limiting interrogation length, reducing or eliminating coercive techniques; Kassin et al., 2010) would likely benefit all suspects, regardless of age. However, this article highlights some of the specific mechanisms by which youths' developmental immaturity renders them uniquely vulnerable in police interrogations. While much of the existing scholarship has focused on youths' vulnerability to false confessions or police coercion, it is underscored here that, due to extensively documented features of normative adolescent development, it is the interrogation itself wherein the problem lies. Focusing our knowledge and resources on the everyday interactions among law enforcement and youth is an important step toward promoting justice for all youth citizens. Without question, there are extreme deviations from these everyday interactions (e.g., false confessions, exhaustingly long interrogations, overt police coercion) that do occur and are deserving of empirical examination and public scrutiny. But I argue here that there are other potential threats to justice we should not ignore, and they are much more pernicious for the very reason that they do not stand out. If impermanent, biologically and socially driven vulnerabilities stemming from normative adolescent development influence youths' perceptions of, or especially their behavior and decision making during, police interrogation, then due process for adolescent suspects is at risk. Researchers possess the opportunity to translate information about adolescent development into actionable best practices for interviewing youth. It is time to put the "juvenile" back in juvenile interrogation as we advance research, policy, and practices that acknowledge youths' developmental status and work to promote the sometimes incongruent but equally important goals of due process and public safety.

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CHAPTER 22

EVALUATION OF *MIRANDA* WAIVER CAPACITY

Naomi E. S. Goldstein, Sharon Messenheimer Kelley, Lindsey Peterson, Leah Brogan, Heather Zelle, and Christina Riggs Romaine

In the U.S. legal system, two of the most fundamental due process protections are the right against self-incrimination and the right to counsel. Described in the Fifth and Sixth Amendments, respectively, these rights provide the foundation for an individual's protections against unfair criminal prosecution. For juveniles, these protections are, arguably, even more important than they are for adult defendants because, as evidence reviewed in this chapter shows, juveniles are developmentally disadvantaged during interactions with representatives of the legal system. The *Miranda* warnings provide suspects with basic information about these two fundamental rights and were designed as a protective mechanism for suspects during custodial interrogations.

Although *Miranda* warnings are part of U.S. vernacular, the significance of the U.S. Supreme Court's holding in *Miranda v. Arizona* (1966) is often overlooked. Under most circumstances, individuals are presumed to know the law and are required to invoke their rights without assistance. In *Miranda v. Arizona*, however, the Court recognized that the coercive nature of custodial interrogations places individuals at risk of forfeiting their right against self-incrimination. The Court's decision required police to inform suspects of their rights as a prerequisite to using suspects' statements against them at trial.

Despite their importance, the right against self-incrimination and the right to an attorney can be waived. Valid waivers must meet certain legal requirements—they must be made knowingly, intelligently, and voluntarily. When questions are raised about a defendant's *Miranda* waiver and admissibility of subsequent statements, forensic mental health professionals may provide information to assist the court in determining the waiver's validity.

The *Miranda* decision has a number of implications for law, policy, and psychological study and practice. In this chapter, we review the history and meaning of the *Miranda* decision, the current status of the law surrounding *Miranda*, and empirical evidence about how well juveniles comprehend the *Miranda* warnings. We then review the process of conducting forensic mental health evaluations of juvenile defendants' capacities to have waived *Miranda* rights during custodial interrogations.

RELEVANT HISTORY

The central issue in the *Miranda v. Arizona* (1966) decision, and the fundamental judicial determination that rests on forensic psychologists' evaluations of *Miranda* waiver capacity, is the admissibility of confessions. Decades before *Miranda*, the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law") governed the admissibility of confession evidence (*Brown v. Mississippi*, 1936). Thus, confessions extracted through coercion, whether physical (*Brown v. Mississippi*, 1936) or mental (*Blackburn v. Alabama*, 1960; *Haynes v. Washington*, 1963), could not be admitted into evidence. Nevertheless, lengthy and otherwise coercive interrogation practices continued, and law

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enforcement officers were left without clear indicators of whether particular confessions would be admissible in criminal proceedings.

In 1966, the U.S. Supreme Court resolved four criminal appeals, consolidated under one case: *Miranda v. Arizona*. In each case, suspects had been interrogated at length without being informed of their right to remain silent or their right to counsel. Despite a common perception that the core holding concerned the famous *Miranda* warnings, the case actually had three holdings, all of equal importance (Schulhofer, 1987). First, the Court held that informal pressure to speak in an interrogation setting can constitute compulsion within the meaning of the Fifth Amendment (i.e., "nor shall [any person] be compelled in any criminal case to be a witness against himself"). Second, the Court held that this compulsion exists in any custodial questioning. The third holding contained the actual warnings; the Court held that to "dispel the compulsion inherent in custodial settings," law enforcement officials needed to use certain devices designed to protect the suspect (*Miranda v. Arizona*, 1966, p. 458). The protective device recommended by the Court consisted of a set of warnings, hundreds of versions of which are commonly used today (Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008).

Thus, the holding in *Miranda v. Arizona* (1966) required law enforcement, during custodial interrogations, to inform suspects of their rights as a prerequisite to using their statements against them at trial. Without evidence that a suspect had been informed of these warnings and validly waived them, inculpatory statements cannot be introduced against a defendant at trial as part of the prosecution's case-in-chief. Although the Court has been flexible with respect to the specific language used to communicate suspects' rights (e.g., *California v. Prysock*, 1981; *Florida v. Powell*, 2010), it articulated that suspects must be informed of "the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" (*Miranda v. Arizona*, 1966, p. 444). The Court also stated that suspects have the ability to assert their rights at any time during an interrogation. On the basis of the language of the *Miranda* decision, it is somewhat unclear whether suspects need to be informed of their ability to assert rights at any time. In the Court's first recitation of the warnings, only the first four elements were included. In the second (and final) discussion of the warnings, the first four warnings were followed by the statement "Opportunity to exercise these rights must be afforded to him throughout the interrogation" (*Miranda v. Arizona*, 1966, p. 479). Currently, approximately 80% of jurisdictions include some version of this right as the fifth component of the *Miranda* warnings (Rogers, Hazelwood, Sewell, Shuman, & Blackwood, 2008).

Parallel Protections for Juvenile Suspects

The line of cases just described specifically referenced adult suspects. However, a nearly contemporaneous line of cases also emerged as the Supreme Court began to address the rights of juvenile suspects. Early on, the Court recognized juveniles' vulnerability during interrogations. In *Haley v. Ohio* (1948), police had arrested and questioned the defendant, a 15-year-old boy, about the murder of a confectionary store owner. Officers interrogated the boy overnight in relays of one or two at a time. At 5:00 a.m., the defendant confessed. Justice Douglas, writing for a plurality, held that admitting the defendant's confession was a due process violation. He noted that the Court needed to use special care in evaluating the voluntariness of a juvenile's confession and that the defendant's age, nature of the questioning, absence of a friend or lawyer, and police officers' apparent disregard of his rights indicated that the defendant's due process rights had been violated (*Haley v. Oho*, 1948). Notably, the Court was unwilling to accept the State's argument that the confession was obtained legitimately because the defendant had been advised of his constitutional rights. Justice Douglas wrote, "That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions" (*Haley v. Oho*, 1948, p. 601).

The Court's cautious evaluation of juvenile confessions resurfaced in *Gallegos v. Colorado* (1962). The defendant in *Gallegos* was a 14-year-old boy, arrested in connection with an assault and robbery

and subsequently charged with first-degree murder. The Court quoted at length from *Haley* and, ultimately, held that the defendant's confession was obtained in violation of due process. The Court emphasized that the defendant's youth, in conjunction with the absence of adult protection, indicated that the defendant would be unlikely to understand or assert his constitutional rights.

Haley v. Ohio (1948) and *Gallegos v. Colorado* (1962) laid a foundation for the Court's decision in *In re Gault* (1967), decided 1 year after *Miranda*. In *Gault*, the Court considered the case of a 15-year-old boy who had been found delinquent of making a lewd phone call and subsequently sentenced to a juvenile facility until he was 18. Several due process protections, standard in adult court, were notably absent. The Court's holding specifically extended these due process protections to juvenile proceedings: notice of charges, right to counsel, the rights of confrontation and cross-examination, the right against self-incrimination, and the right to appellate review (but not the right to a jury trial). Therefore, *Gault* extended the *Miranda* warnings, articulated 1 year earlier, to the interrogations of juveniles.

When Does *Miranda* Apply?

Although the *Miranda v. Arizona* (1966) holdings, in part, protect suspects from the coercion inherent in custodial interrogation, the warnings were also intended to allow interrogations to proceed (Schulhofer, 1987). In *Michigan v. Tucker* (1974), Justice Rehnquist wrote that the warnings should "help police officers conduct interrogations without facing continued risk that valuable evidence [will] be lost" (p. 443). Thus, in an important way, the *Miranda* decision was intended to simplify elements of criminal investigations by making it clear to police when they could interrogate a suspect and reasonably expect to use inculpatory evidence against him or her at trial.

With the practical side of *Miranda v. Arizona* (1966) in mind, it should be noted that the *Miranda* decision did not create a procedural rule that police must follow (i.e., that police officers must read suspects their *Miranda* rights before questioning). Instead, *Miranda* created a rule of admissibility: A suspect's statements cannot be admitted into evidence against him or her if the suspect was not informed of his or her *Miranda* rights. Moreover, the holdings in *Miranda* do not apply to every interaction between an individual and law enforcement. For the *Miranda* warnings to govern admissibility of an individual's inculpatory statement, that person must be in police custody and that person must be interrogated. In other words, *Miranda* only applies in cases of custodial interrogation.

The *Miranda v. Arizona* (1966) Court provided a brief definition of this term. "By custodial interrogation, we mean 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 v. Arizona*, 1966, p. 444). In *Thompson v. Keohane* (1995), the Court subsequently clarified the custody inquiry: "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave" (p. 112). Thus, custody is based on an objective evaluation of how a "reasonable person" would have felt under the circumstances specific to the interrogation that took place.

Miranda Waivers

Despite their importance, *Miranda* rights can be, and frequently are, waived by suspects (Kassin et al., 2007). To be accepted by courts, *Miranda* waivers must meet certain requirements. In *Miranda v. Arizona* (1966), the Court indicated that the "defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently" (p. 444). Thus, *knowing*, *intelligent*, and *voluntary* constitute the three requirements of a valid *Miranda* waiver. The Court briefly enumerated these requirements in the decision itself and elaborated on the elements of a knowing, intelligent, and voluntary waiver in later cases. In essence, the knowing and intelligent elements refer to a suspect's ability to comprehend his or her rights and the implications of surrendering them; voluntariness refers to the suspect's decision to waive his or her rights free from police coercion (e.g., *Colorado v. Connelly*, 1986; *Moran v. Burbine*, 1986; *Oregon v. Elstad*, 1985).

The knowing and intelligent components of a valid waiver are frequently discussed together, because they both reference the basic concept of rights comprehension. However, it is noteworthy that the Court used both knowing and intelligent to describe *Miranda* waivers. Although some readers may (correctly) observe that many Supreme Court opinions tend toward the verbose, it is unlikely that the Court, in this context, used two words to convey one meaning. When the knowing and intelligent components are disaggregated, *knowing* is used to convey a basic understanding of one's rights, and *intelligent* references one's ability to apply the rights to one's own situation and appreciate the significance of waiving those rights (e.g., *People v. Lara*, 1967). Despite these comprehension requirements, in later cases the Court stated that suspects do not need complete appreciation of every possible consequence of waiving their rights (e.g., *Colorado v. Spring*, 1987; *Oregon v. Elstad*, 1985). Some states have interpreted these cases to require only a basic understanding of the *Miranda* rights to satisfy the knowing and intelligent requirement (see, e.g., *Illinois v. Young*, 2006; *People v. Cheatham*, 1996), and others have taken an intermediate approach, requiring not only basic understanding, but also a somewhat more complex appreciation of the consequences of waiving one's rights (e.g., *People v. Al-Yousif*, 2002; *State v. Bushey*, 1982). The Court has never issued a dispositive ruling on this subject; however, the language of its decisions implies that the Court requires a basic appreciation of rights without requiring a suspect to appreciate every possible consequence of waiving his or her rights.

The voluntariness component of *Miranda* waivers is more circumscribed than the knowing and intelligent components as a result of the holding in *Colorado v. Connelly* (1986). In this case, the defendant approached an off-duty police officer and spontaneously confessed to a murder. Although a psychiatrist later testified that Connelly had schizophrenia and experienced command hallucinations ordering him to confess to the murder or commit suicide, the Court determined that his confession was, nevertheless, voluntary. The Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'" (*Colorado v. Connelly*, 1986, p. 167). Therefore, the Court effectively foreclosed broader, more philosophical discussions about a suspect's free will or choice by limiting the voluntariness inquiry to police overreaching. Notably, police deception (e.g., lying to suspects about the evidence against them) does not constitute coercion (see *Frazier v. Cupp*, 1969). Other interrogation tactics, such as inducing guilt and empathy for the victim; emphasizing the suspect's need to show remorse to appear favorable to the prosecutor, judge, or jury; or promising to communicate information about a suspect's cooperation to the prosecutor are typically considered legally permissible when determining the voluntariness of a *Miranda* waiver (see *Frazier v. Cupp*, 1969; *Haynes v. Washington*, 1963; *Schneckloth v. Bustamonte*, 1973).

Judicial Evaluations of *Miranda* Waivers

Courts evaluate the validity of *Miranda* waivers by considering the totality of the circumstances around the waiver. Before the *Miranda* decision, courts had evaluated the voluntariness and admissibility of confessions using the totality-of-the-circumstances approach (e.g., *Blackburn v. Alabama*, 1960; *Haynes v. Washington*, 1963; *Johnson v. Zerbst*, 1938; *Spano v. New York*, 1958). Under this approach, a multitude of factors were considered, including characteristics of the suspect and factors specific to his or her interrogation. Thus, the totality of the circumstances is best described as a case-by-case approach in which no one factor necessarily validates or invalidates a *Miranda* waiver (A. M. Goldstein & Goldstein, 2010). In *Fare v. Michael C.* (1979), the Supreme Court clarified that the totality-of-the-circumstances approach should be used to evaluate juveniles' *Miranda* waivers. The Court specified that the approach requires inquiry into "all the circumstances surrounding the interrogation," including the juvenile's "age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights" (*Fare v. Michael*, 1979, p. 725).

Over time and across cases, several common totality factors have emerged. These factors include age, intelligence, comprehension of rights, whether the juvenile was given an opportunity to consult

with an interested adult, methods used in interrogation, length of interrogation, and prior experience with the police or the juvenile justice system (e.g., *A.M. v. Butler*, 2004; *West v. United States*, 1968). However, this list is not exhaustive; states are free to consider other factors or require consideration of specific factors (King, 2006).

Despite the fact that the totality approach is used in the overwhelming majority of jurisdictions, it has certain limitations. One frequently cited problem with this approach is that it leaves law enforcement officers without clear guidance that can be applied in an interrogation context (Feld, 1984). Because the totality analysis is implemented after the interrogation, waiver, and confession have taken place, interrogating officers cannot guarantee that a waiver is valid or that a confession is voluntary. Commentators have also noted that the totality approach gives trial courts a significant amount of discretion—and that such an approach leaves judges without clear indicators of invalid waivers or inadmissible confessions. As a result, certain commentators have observed that juveniles' confessions are only excluded in egregious cases (Drizin & Luloff, 2007).

Notwithstanding the documented shortcomings of a totality-of-the-circumstances analysis, it remains relevant and is used in most jurisdictions. Proponents of the totality approach have noted that it is more consistent with the adversarial system than bright-line tests because it allows judges to consider evidence offered by both the prosecution and the defense (e.g., Huang, 2000). Some supporters of this approach (e.g., Milhizer, 2008) have argued that the totality approach leads to more reliable determinations of valid waivers and voluntary confessions than bright-line tests: "Reliability is a multifaceted, fact-dependent judgment that is not susceptible to bright-line rules or tests" (p. 51).

Role of Psychology in *Miranda* Warnings and Waivers

Thus far, we have covered the law surrounding *Miranda* warnings and waivers. In this section, we address the role of psychology in this area of law and set the stage for a more complete discussion of how forensic mental health professionals conduct evaluations of *Miranda* waiver capacity.

One of the earliest applications of psychology to this particular area of law was Grisso's (1981) effort to describe, empirically, the nature of juveniles' *Miranda* comprehension. Accomplishing this larger goal required two interrelated and important prerequisites. First, the legal terms knowing and intelligent needed to be transformed into useful psychological constructs. Second, a method was needed to assess those two constructs.

Grisso (1981) translated the legal constructs of knowing and intelligent into separate psychological constructs. The term knowing was conceptualized as "understanding"—that is, a person's basic understanding of the rights' meanings. The term intelligent was interpreted as "appreciation," or the extent to which a person can apply the rights to his or her own situation and grasp the consequences of waiving or asserting those rights. Grisso (1998) did not address voluntariness because the courts had ruled that the presence of coercion was a factual matter, rather than a psychological one. Nonetheless, forensic mental health experts address voluntariness by considering totality-of-the-circumstances factors that may increase or decrease an individual's susceptibility to police coercion, if factual evidence establishes its presence (A. M. Goldstein & Goldstein, 2010; Melton, Petrila, Poythress, & Slobogin, 2007).

In the 1970s, Grisso initiated research on suspects' capacities to validly waive *Miranda* rights. He created the Instruments for Assessing Understanding and Appreciation of *Miranda* Rights as a standardized research instrument for evaluating juveniles' capacities to understand and appreciate *Miranda* warnings and the consequences of waiving their rights (A. M. Goldstein & Goldstein, 2010).

With a functional translation of the cognitively based legal requirements into psychological constructs and an assessment tool designed to evaluate information about those constructs, research on juveniles' understanding and appreciation of their rights could proceed. Grisso's (1981) research yielded a number of important findings with respect to juveniles' abilities in an absolute sense (i.e., compared with the set of required abilities), as well as in a relative sense (i.e., compared with a typical suspect or defendant; A. M. Goldstein & Goldstein, 2010).

Age and IQ emerged as robust predictors of *Miranda* comprehension, with younger individuals (i.e., those age 13 years and younger) and those with lower IQ scores (i.e., 70 and below) demonstrating poorer *Miranda* comprehension than older individuals and those with IQ scores above 70. Age was strongly related to *Miranda* understanding through middle adolescence and appeared to plateau around ages 14 to 15. Between the ages of 14 and 16, IQ emerged as a more powerful influence on *Miranda* comprehension and a better predictor of deficits in juveniles' *Miranda* understanding relative to that of adults. Moreover, youths younger than age 16 demonstrated significant deficits in appreciation of the right to silence and right to counsel compared with adults (Grisso, 1981). For example, nearly one third of youths believed that the public defender only works in the interests of the innocent, and a similar proportion believed that a judge could revoke an individual's right to silence. In summary, Grisso's (1981) results suggested that youths' inferior understanding and appreciation of their *Miranda* rights diminished their capacity to offer knowing and intelligent waivers of their rights.

Given juveniles' difficulties with *Miranda* comprehension, some have questioned whether a simplified version of the warnings would facilitate understanding and appreciation (Ferguson & Douglas, 1970; Helms, 2003). It would seem that sentences that are easier to read and require less skill to be understood should be better comprehended. However, youths' understanding and appreciation did not differ when they were presented with simpler and more complex versions of the *Miranda* warnings (Ferguson & Douglas, 1970; N. E. S. Goldstein, Messenheimer, Riggs Romaine, & Zelle, 2012). Such findings have generated suggestions that *Miranda* comprehension may be a conceptual ability and not primarily based on the linguistic properties of the warnings (N. E. S. Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003; N. E. S. Goldstein, Messenheimer, et al., 2012). However, the linguistic complexity of the warnings adds a layer of complication to juveniles' *Miranda* comprehension, even when juvenile-specific versions of the warnings are available. When juvenile-specific and general (i.e., intended for use with adult suspects or both juvenile and adult suspects) versions of the warnings have been compared, juvenile versions tend to be more complicated, with longer warnings, higher reading levels, and lower reading ease scores (Helms, 2007; Kahn, Zapf, & Cooper, 2006; Rogers, Blackwood, et al., 2012; Rogers, Hazelwood, Sewell, Shuman, & Blackwood, 2008).

Empirical examinations of juveniles' *Miranda* comprehension laid the foundation for forensic mental health assessment in this arena. After their development for research purposes, Grisso's (1981) instruments were widely incorporated into forensic evaluations of defendants' capacities to have understood and appreciated their *Miranda* rights during interrogation (Archer, Buffington-Vollum, Stredny, & Handel, 2006; Lally, 2003; Ryba, Brodsky, & Schlosberg, 2007). In contrast to unstructured interviews in which forensic mental health professionals determined, independently, which questions to ask to gather information relevant to a waiver's validity, Grisso's instruments offered a standardized method of evaluating a defendant's understanding and appreciation of *Miranda* rights. In 1998, Grisso enhanced the credibility and admissibility of his instruments by publishing them, along with their psychometric properties, based on data collected in an extensive study of justice-involved youths and adults as well as a community sample of adults (N. E. S. Goldstein, Zelle, & Grisso, 2014). Before N. E. S. Goldstein, Zelle, and Grisso's (2012) revisions of the instruments (discussed below) and later release of Rogers, Sewell, Drogin, and Fiduccia's (2012) measures, Grisso's (1981, 1998) instruments were the only standardized tool to offer forensic evaluators specific information about the degree and type of cognitive abilities required to comprehend *Miranda* warnings and associated rights (N. E. S. Goldstein et al., 2014).

CURRENT EVENTS IN THE LAW AND PSYCHOLOGY OF *MIRANDA*

Several developments have occurred in the legal and psychological landscapes surrounding *Miranda v. Arizona* (1966). In the section that follows, we review recent legal decisions that have affected *Miranda* jurisprudence and, potentially, forensic

evaluations of *Miranda* waiver capacity. Subsequently, we provide an overview of advances in psychology's understanding of adolescent development, particularly with respect to neuropsychological development and the emerging construct of developmental immaturity. Then we describe recent empirical evidence about juveniles' *Miranda* comprehension and the different types of policies that have been implemented to attempt to protect juveniles during the interrogation process, given concerns about their *Miranda* comprehension abilities. Finally, we discuss current best practices for evaluating *Miranda* comprehension and describe the specialized forensic assessment instruments available for this purpose.

Recent *Miranda* Case Law

In the decades since *Miranda v. Arizona* (1966), the decision has been met with some criticism and resistance (e.g., Cassell, 2011). The cornerstone of legal resistance to the *Miranda* decision was a federal statute, 18 U.S.C. § 3501. The statute made decisions about the admissibility of confessions in federal courts turn solely on whether the confession was offered voluntarily, thereby "overruling" the Supreme Court's decision and returning evaluations of confessions to the pre-*Miranda* voluntariness test. In 2000, the Supreme Court addressed a challenge to this statute in *Dickerson v. United States* (2000) and held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively" (p. 444).

Thus, it appears that *Miranda v. Arizona* (1966) is here to stay. Since the *Dickerson v. United States* (2000) decision, the Supreme Court has taken multiple opportunities to clarify and elaborate on the precise meaning of *Miranda* and the limits of that decision. In the past 5 years, the Court has addressed issues such as using a defendant's silence in a noncustodial interrogation against him at trial (*Salinas v. Texas*, 2013) and nuances in the *Miranda* custody analysis (*Howes v. Fields*, 2012; *Maryland v. Shatzer*, 2010). The Court further clarified that it would not scrutinize the language used to convey the *Miranda* warnings (*Florida v. Powell*, 2010) and that law enforcement could use post-*Miranda* behavior that is inconsistent with a prior invocation of *Miranda* as an implicit waiver of rights (*Berghuis v. Thompkins*, 2010).

Notably, the Supreme Court also recently addressed how the legal definition of custody, one of the prerequisites for *Miranda v. Arizona* (1966), should apply to juveniles. In 2011, the Court heard arguments in *J.D.B. v. North Carolina*. The factual question in the case was whether a seventh-grade student, questioned by police in school, was in custody for the purposes of *Miranda*. The broader issue was whether law enforcement officers should consider the age of a child when deciding whether he or she is in police custody. J.D.B. had been removed from his afternoon class by a uniformed police officer and escorted to a conference room where an investigator, assistant principal, and administrative intern were present. The conference room door was closed, and J.D.B. was questioned by the investigator for 30 to 45 minutes without the opportunity to speak with his legal guardian and without receiving the *Miranda* warnings.

In the *J.D.B. v. North Carolina* (2011) decision, the Court reaffirmed the objective nature of the *Miranda v. Arizona* (1966) custody analysis: Given the totality of the circumstances surrounding an interrogation, would "a reasonable person have felt he or she was at liberty to terminate the interrogation and leave" (*J.D.B. v. North Carolina*, 2011, p. 2407, citing *Thompson v. Keohane*, 1995)? The Court also made a number of observations it believed to be consistent with the objective nature of the analysis. Its first observation was that the "law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them" (*J.D.B. v. North Carolina*, 2011, p. 2403). The Court also noted that a "reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go" (*J.D.B. v. North Carolina*, 2011, p. 2403). Ultimately, the Court held that the age of a child, when either known to police at the time of questioning or "objectively apparent to a reasonable officer," is relevant to the *Miranda* custody analysis (*J.D.B. v. North Carolina*, 2011, p. 2406). The Court cautioned, however, that age would not necessarily be a significant factor in every case.

In sum, the Court reaffirmed its commitment to the core holdings in *Miranda v. Arizona* (1966).

At the same time, recent cases have endeavored to provide greater clarity about the precise contours of *Miranda*. With *J.D.B. v. North Carolina* (2011), the Court also required law enforcement to be more attentive to a juvenile's age when determining whether *Miranda* applies.

Advances in Understanding Adolescent Development

The past 2 decades have yielded an abundance of information about adolescents' neurological, cognitive, and social development. We briefly review that information below, particularly as it may relate to adolescents' abilities to understand and appreciate the *Miranda* warnings' meaning and function during interrogations.

Neurological development. Emerging evidence has indicated that the human brain continues to develop well into the 3rd decade of life. Longitudinal imaging studies have revealed that the frontal lobes are both structurally immature and less active during adolescence (Gogtay et al., 2004; Rubia et al., 2000). Simultaneously, the limbic system, which is generally regarded as the socio-emotional center of the brain, is particularly active (Rubia et al., 2000). These developing systems interact as the underdeveloped frontal lobes receive and modulate synaptic transmissions from the highly active limbic system, making the adolescent brain particularly vulnerable to social and emotional cues in decision making and impulsive behavior (Albert & Steinberg, 2011). In addition, the dopaminergic system, which plays an important role in processing rewards, is restructured during adolescence (Steinberg, 2010). The system's projections to the mesolimbic area and prefrontal cortex increase during mid- and late adolescence and then decline. These changes may lead to the increase in reward-seeking behavior observed among adolescents and may increase the reinforcing properties of situations or individuals.

Cognitive and social development. Adolescents are qualitatively different from adults in their cognitive and social functioning; the term *developmental immaturity* is used here to describe these differences. Developmental immaturity refers to the changes that occur during the transition from adolescence to adulthood across four dimensions: independent functioning, decision making, emotional regulation, and general cognitive processing (Kemp, 2010). Independent functioning refers to both one's self-reliance (i.e., the ability to make autonomous decisions) and self-concept (i.e., clarity of values, recognizing personal strengths and weaknesses; Cauffman & Steinberg, 2000; Kemp, 2010). Adolescents often struggle to make decisions that are independent of authority figures or friends and that are consistent with their personal values. In the context of decision making, adolescents are heavily influenced by social and emotional factors and are more likely to engage in sensation- and reward-seeking behaviors (Cauffman & Steinberg, 2000; Steinberg, 2010). Emotion regulation also develops throughout adolescence and into adulthood, meaning that adolescents are less able to recognize and express their feelings, manage their emotions, or cope with undesirable feelings (Kemp, 2010). Finally, cognitive functioning continues to improve into adulthood; thus, adolescents are still developing in domains such as reasoning, memory, processing speed, and verbal fluency (Klaczynski, 2001; Levin et al., 1991).

Implications for juveniles' *Miranda* waiver capacity. These neurologically based age differences in cognitive, social, emotional, and behavioral functioning are important in the context of *Miranda* comprehension for three reasons. First, cognitive abilities influence core *Miranda* comprehension skills such as vocabulary, verbal fluency, and memory (e.g., Levin et al., 1991). Second, the fact that *Miranda* comprehension may be, in part, a conceptual skill also suggests that adults may be better suited to understand and appreciate these rights, because adults' reasoning abilities can be more abstract (Baird & Fugelsang, 2004). Finally, although features of developmental immaturity, such as limited independent functioning and emotion regulation, do not appear to affect *Miranda* comprehension per se, they can influence adolescents' abilities to understand and reason about novel information in a demanding situation such as an interrogation. For example, time-pressured

decision making; the absence of consultation with an informed, objective adult; and heightened emotional arousal all detract from an adolescent's ability to engage in rational decision making (Steinberg, Cauffman, Woolard, Graham, & Banich, 2009).

Therefore, even if a particular adolescent understood her or his *Miranda* rights, the combination of underdeveloped independent functioning, poor emotion regulation abilities, and the pressure exerted by police officers could potentially interfere with the adolescent's ability to appreciate how those rights could benefit her or him and the consequences of waiving those rights. These factors could also make the adolescent more likely to comply with a police officer's explicit or implicit requests to waive his or her rights and provide inculpatory information.

Recent Evidence about Juveniles' *Miranda* Comprehension

Empirical research over the past 40 years has revealed consistent deficits in juveniles' *Miranda* comprehension. Many juveniles continue to struggle with conceptualizing the rights to silence and counsel, the cornerstones of the *Miranda* warnings (N. E. S. Goldstein et al., 2003). One of the foundations of juveniles' poor *Miranda* comprehension may be their fundamental misunderstanding of what rights are; many juveniles define *right* as an opportunity, a choice, or something they are permitted to do instead of as an entitlement. Thus, many juveniles believe that individuals, such as judges, can revoke their rights (N. E. S. Goldstein et al., 2003; Grisso, 1997).

For instance, Peterson-Badali, Abramovitch, Koegl, and Ruck (1999) found that 36% of the juveniles who waived their right to silence or to speak with a parent during an actual interrogation reported believing that they had to waive those rights. Juveniles also frequently misunderstand the role that defense attorneys play in the justice system. Many have reported the belief that a defense attorney plays a fact-finding role and would report inculpatory information to the judge; others have indicated that lawyers are only available to protect the innocent (Abramovitch, Peterson-Badali, & Rohan, 1995; N. E. S. Goldstein et al., 2003; Grisso, 1997). In one sample of youths who had been interrogated by police, 76% did not believe that they had access to a lawyer even though they remembered the police telling them that they had the right to "retain and instruct counsel without delay" (Peterson-Badali et al., 1999, p. 459).

Juveniles demonstrate deficits in the appreciation domain as well, meaning that they may not be able to apply the *Miranda* rights to their own situations or to recognize the consequences of waiving or asserting their rights. For example, one fundamental implication of waiving *Miranda* rights is that police probably will begin or continue an interrogation, seeking a confession or other inculpatory information, and many youths fail to appreciate this consequence (Abramovitch, Higgins-Biss, & Biss, 1993). In the right-to-counsel sphere, many juveniles fail to appreciate how the concepts of confidentiality and privilege apply to the attorney–client relationship. For instance, nearly three quarters (72%) of youths in one study thought the lawyer could relate information to the police, 70% believed the lawyer could report information to the judge, and 84% believed the lawyer could share information with their parents (Peterson-Badali, Abramovitch, & Duda, 1997).

Public Policy on Interrogations of Juveniles

Most of the empirical research reviewed thus far has focused on the nature of juveniles' deficits in *Miranda* comprehension and the disadvantages they have during interrogations. In light of these problems, public policy developments in this area have focused on ways of enhancing juveniles' abilities and protecting them during interactions with police. In this section, we review policies that have been adopted by states or proposed by advocates, including interested-adult rules and the growing trend of recording interrogations.

Interested-adult rules. The notion of an interested adult to protect juveniles during interrogations dates as far back as the Supreme Court's decision in *Haley v. Ohio* (1948), when the Court observed the absence of a friend or counsel during the juvenile suspect's interrogation. Since then, certain states have adopted per se rules requiring the presence of an interested adult during the

interrogation of juveniles younger than a certain age. Seven states have created presumptions that juveniles younger than a certain age cannot waive these rights without consulting with a parent or legal guardian; seven others require a parent or legal guardian's presence during the interrogation of juveniles younger than a certain age (King, 2006). These decisions are sometimes the result of legislation and, less frequently, created by case law (King, 2006). Even in states that have not established per se rules regarding an interested adult, courts rely heavily on the presence or absence of an interested adult in the totality analysis (e.g., *A.M. v. Butler*, 2004; *West v. United States*, 1968).

Interested-adult rules certainly have intuitive appeal, and a number of legal scholars have called for these rules to be implemented on a wider basis (e.g., Huang, 2000; McGuire, 2000). Judges and legal advocates appear to assume that parents will explain the *Miranda* rights to their children and act as legal advocates (e.g., *Commonwealth v. A Juvenile*, 1983). Empirical psychological research, however, has identified some meaningful differences between the theory and practice of interested-adult rules.

The first problem with an interested-adult rule is its assumption that parents have the ability to explain the *Miranda* rights to their children. Research, however, has shown that many adults show poor *Miranda* comprehension themselves. Grisso (1981) found that approximately 23% of his adult sample displayed inadequate *Miranda* comprehension, and fewer than 50% provided an adequate definition of the word *right*. A further problem is that parents frequently do not act as legal advocates for their children (Grisso, 1981). In some instances, parents do not speak with their children at all when given opportunities by police (Grisso & Ring, 1979). When they do speak with their children, parents often direct them to waive their rights and cooperate with police, and they sometimes go so far as to pressure them to confess (Grisso, 1981; Grisso & Ring, 1979). Instead of seeing this evidence as a potential problem with parental presence during interrogations, at least one court has expressed approval of this moral, as opposed to legal, advice (*Anglin v. State*, 1972).

Even if one assumes that parents possess adequate comprehension of *Miranda*, are capable of and willing to explain the meaning of those rights to their children, and actually provide useful legal advice, legal commentators have noted that police are often instructed in how to marginalize parents during interrogations (Drizin & Luloff, 2007). Conflicts of interest can also arise when parents are involved in the interrogations of their children, particularly in domestic violence cases or when the parent is the guilty party (Drizin & Luloff, 2007). In sum, there are a wide variety of reasons why an interested adult may not be able to assist a juvenile during an interrogation and several other reasons why the adult could fail to serve the intended protective function, increasing the probability of a youth's *Miranda* waiver.

Recording interrogations. Advocates and scholars have also promoted efforts to require law enforcement to record interrogations of juveniles (e.g., Kassin et al., 2010; Schlam, 1995). Proponents have argued that video recordings can depict interrogations more accurately than can testimony from either juvenile defendants or police officers and therefore can assist courts in understanding the precise circumstances surrounding juveniles' waivers and admissions. One legal commentator observed that recording interrogations offers a cost-effective and feasible compromise to less practical proposals, such as requiring on-call attorneys for juvenile suspects or requiring a blanket exclusion of juvenile confessions (Schlam, 1995). Additional benefits of videotaping interrogations include reducing frivolous claims of police misconduct and detecting potential false confessions (Kassin et al., 2010; Schlam, 1995).

Through state court decisions or legislative action, 13 jurisdictions require recording of interrogations in at least some circumstances: Alaska, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, New Jersey, Wisconsin, North Carolina, and the District of Columbia (Taslitz, 2012). Surveys of police and sheriffs' offices have revealed that the practice is increasingly common and has been voluntarily adopted by a number of law enforcement agencies in jurisdictions that do not require it (Kassin et al., 2010).

Evaluating Juveniles' *Miranda* Comprehension

Within the context of forensic mental health assessments, identifying convergent information from a variety of sources helps evaluators draw reliable conclusions (Heilbrun, DeMatteo, Brooks Holliday, & LaDuke, 2014; Heilbrun, Marczyk, & DeMatteo, 2002). Therefore, forensic mental health evaluations, regardless of the specific issue, should include information drawn from various sources, including a review of records, a clinical interview, and data gathered from relevant measures.

Record review. Because a focused evaluation will provide the most relevant and material information for the issue at hand while still protecting the privacy of interested parties, the records obtained should include only those that can provide meaningful information for the evaluation of *Miranda* waiver capacity. This means that evaluators should avoid a blanket request for all records. Instead, evaluators should seek to identify and collect those records that are most likely to aid in answering the referral question.

With regard to *Miranda* waiver capacity, evaluators should attempt to collect and review any records that specifically involve the interrogation process in the case and the actual version of the *Miranda* rights administered by police. This latter step is particularly important because the forensic mental health expert must question the defendant about the actual rights administered, not a generic version of the rights (A. M. Goldstein & Goldstein, 2010). If available, evaluators should obtain copies of the signed *Miranda* waiver form, any documents that describe the interrogation or waiver process, and any recordings that involve administration of the *Miranda* warnings, rights waivers, or the interrogation (A. M. Goldstein & Goldstein, 2010; Oberlander & Goldstein, 2001). Finally, although a signed copy or transcript of the defendant's confession may be available, the forensic mental health expert must determine whether it is relevant to the evaluation. If it contains information related to the interrogation process or rights waiver, it may be of great value to the evaluation. However, unless the transcript provides such information or the validity or trustworthiness of the defendant's statement is being questioned, the confession is not relevant to an evaluation of the defendant's *Miranda* waiver capacity, and experts should generally avoid questioning the defendant about details of the crime (A. M. Goldstein & Goldstein, 2010).

In addition to the documents that directly involve the *Miranda* waiver process, evaluators should try to obtain other records that summarize information related to the ability to understand and appreciate the *Miranda* warnings. Such records may include previous psychological assessment data (e.g., IQ scores, educational achievement scores), school records, prior juvenile or criminal justice records, employment records, medical records, and mental health records (A. M. Goldstein & Goldstein, 2010; Oberlander & Goldstein, 2001). Finally, third-party interviews with people familiar with the defendant may help the forensic mental health expert evaluate the reliability of the defendant's assertions about his or her own history or conditions that may have affected his or her *Miranda* waiver capacity (A. M. Goldstein & Goldstein, 2010).

Interview. Before initiating the interview, the evaluator should obtain informed consent from the defendant. This process, while sounding deceptively simple, has a number of complexities with respect to both juveniles and evaluations of *Miranda* waiver capacity. First, when evaluating a juvenile, unless the evaluation was court ordered, consent should be sought from either the parent or legal guardian or the referring defense attorney. Then, regardless of whether the evaluation is the result of a referral or court order, the evaluator should seek the youth's assent. Generally, this means that the evaluator will explain the nature and purpose of the evaluation and the limits of confidentiality, in language that is developmentally appropriate, and then ask the youth to paraphrase the information that was provided (A. M. Goldstein & Goldstein, 2010). The evaluator should anticipate that informed assent will be difficult to obtain because of both (a) developmental limitations that will affect any juvenile's ability to assent to a forensic evaluation and (b) the potential impairments that prompted the referral

for the evaluation (A. M. Goldstein & Goldstein, 2010). Therefore, the evaluator should be prepared to explain and reexplain the required information and document the defendant's responses (A. M. Goldstein & Goldstein, 2010). However, with these explanations, the evaluator should take care not to educate the defendant about information that would contaminate the *Miranda* waiver evaluation—for instance, by directly defining the word *right*.

During the interview, the evaluator gathers data about how the *Miranda* warnings were understood at the time of arrest (Frumkin, 2000; Grisso, 1981). It is important to identify this specific time frame because how the warnings are understood at the current time—the time of the evaluation—is not the most important issue. The way a juvenile understands the warnings at the time of evaluation may be different from the way he or she understood the warnings at the time of arrest for a variety of reasons, including maturation associated with the passing of time; changes in mental status; or more recent interactions with police, attorneys, and other individuals throughout the course of proceedings that may have included explanations of rights or identification of consequences of talking with others about the legal case (A. M. Goldstein & Goldstein, 2010). Therefore, it is important to focus primarily on the time of the waiver and interrogation.

The interview should be designed to gather data about a variety of functional domains that may have affected capacity to provide a valid *Miranda* waiver. Areas of importance include background data and psychological functioning. Background data often include information about education, medical health, vocational history, substance use, prior arrest history, and family (including family mental health and cognitive functioning; Frumkin, 2000; A. M. Goldstein & Goldstein, 2010; Oberlander, 1998).

In addition to these domains, the evaluator should (a) obtain the juvenile's account of the arrest and events surrounding administration of the warnings and the rights waiver, (b) assess comprehension of the warnings, and (c) gauge the juvenile's reaction to being interrogated (A. M. Goldstein & Goldstein, 2010; Oberlander & Goldstein, 2001). As part of the interview and assessment of comprehension, the evaluator may choose to conduct a semistructured clinical interview and use the warnings as worded in the jurisdiction in which the arrest occurred. Evaluators may use a semistructured interview by asking the juvenile to paraphrase the warnings and identify any words he or she does not understand (Frumkin, 2000; Grisso, 1998; Oberlander & Goldstein, 2001). In some cases, evaluators may choose to combine this approach with a structured assessment, described below, by using a semistructured interview to gauge a juvenile's comprehension of the specific warnings provided by police and by administering a structured, specialized measure to compare the juvenile's comprehension with a designated standard. Evaluators must be cognizant of the implications of how they choose to order the semistructured interview and structured assessment. Although conducting the semistructured interview may seem to flow naturally from the clinical interview in which the evaluator gathers background information, this approach may contaminate the psychometrically sound data offered by a structured assessment by providing the defendant with information about his or her *Miranda* rights. The manual for structured *Miranda* assessment instruments states that the instruments should be administered "prior to any discussion or testing that may inform an examinee about the meaning of the *Miranda* warnings" (N. E. S. Goldstein et al., 2014, p. 26).

Assessment. *Miranda* waiver evaluations should include administration of traditional clinical assessment tools (e.g., measures of cognitive ability, academic achievement, personality), as well as administration of forensic mental health tools specific to the legal question of juveniles' capacities to have waived rights during police questioning. To determine which traditional assessment tools should be administered in a *Miranda* waiver evaluation, the evaluator must identify the totality-of-the-circumstance factors that may be relevant to the specific case. Most *Miranda* waiver evaluations include instruments that measure cognitive functioning (e.g., Wechsler Intelligence Scale for Children—Fourth Edition; Wechsler, 2003) and academic achievement (e.g., Wide Range Achievement Test 4

[Wilkinson & Robertson, 2006] and Wechsler Individual Achievement Test—Third Edition [Breaux, 2009]) because these instruments measure abilities that are directly implicated in providing a knowing and intelligent waiver. If mental illness is present, measures should be used to evaluate deficits, particularly those that may have an impact on understanding and appreciation of rights or susceptibility to coercion if it occurred. If a history of impairments or symptoms is well documented (e.g., intellectual disability via school-based IQ testing and individualized education programs), specific tests may be unnecessary to evaluate their existence, and the forensic evaluator can, instead, merely emphasize the link (or lack thereof) between established impairments and the youth's comprehension or susceptibility to coercion that may have occurred (Oberlander & Goldstein, 2001).

In addition to administering traditional assessment measures as part of the evaluation, specialized tools are available that can provide rich data on youths' functioning (Heilbrun et al., 2002, 2014). More important, these instruments can provide both qualitative data about the nature of a youth's specific deficits and quantitative data to identify the extent of deficits and to compare a defendant's scores with those of normative groups. In terms of juvenile *Miranda* waiver evaluations, this means that the evaluator can specifically assess a defendant's understanding and appreciation of the rights to silence and legal counsel and obtain descriptive information about how the rights are understood by the youthful defendant. Such specialized forensic assessment tools also generate instrument scores that can be compared with a normative group, such as same-aged peers, adults in criminal court (if the youth's case is under the jurisdiction of criminal court), or youths of similar intelligence.

Specialized instruments. Instruments for Assessing Understanding and Appreciation of *Miranda* Rights. Grisso's (1981) Instruments for Assessing Understanding and Appreciation of *Miranda* Rights were the first standardized tools to evaluate a defendant's cognitive capacities related to the knowing and intelligent requirements of a valid rights waiver (Grisso, 1998).

Four component measures make up Grisso's (1981) Instruments for Assessing Understanding and Appreciation of *Miranda* Rights: the Comprehension of *Miranda* Rights (CMR), Comprehension of *Miranda* Rights—Recognition (CMR–R), Comprehension of *Miranda* Vocabulary (CMV), and Function of Rights in Interrogation (FRI). The CMR and CMV measure a juvenile's verbal expressive abilities by requiring the examinee to, respectively, paraphrase each *Miranda* warning and define six words that frequently appear in *Miranda* warnings. The CMR–R requires the examinee to identify, rather than verbally express, similarities and differences between sets of preconstructed sentences and specified *Miranda* warning statements. The fourth component measure, the FRI, uses picture stimuli, accompanied by brief vignettes, to assess appreciation of *Miranda* warnings, specifically of the adversarial nature of interrogation (NI subscale), the function of and right to legal counsel (RC subscale), and the right to silence (RS subscale; Grisso, 1998).

Grisso (1998) reported excellent test–retest reliability for the CMR using a juvenile-only sample and sound interrater reliability for the CMR, CMV, and FRI using a mixed adult and juvenile sample. Colwell et al. (2005) later reexamined the psychometric properties with a sample of 85 male and female juvenile offenders and calculated both Cronbach's alphas and intraclass correlation coefficients for the CMR, CMV, and FRI, reporting adequate internal consistency and interrater reliability across all three instruments in their sample. Both Grisso and Colwell et al. established construct validity for the instruments via their associations with IQ and age. Regarding concurrent validity, Grisso (1998) found that instruments assessing the same construct (i.e., understanding) demonstrated greater associations with each other than with instruments assessing different constructs (i.e., appreciation, IQ). Specifically, the CMR, CMR–R, and CMV demonstrated stronger correlations with each other than they did with the FRI or with IQ.

Miranda Rights Comprehension Instruments. The *Miranda* Rights Comprehension Instruments (MRCI; N. E. S. Goldstein, Zelle & Grisso, 2012) are the revised version of Grisso's (1981)

Instruments for Assessing Understanding and Appreciation of *Miranda* Rights. N. E. S. Goldstein et al., (2014) updated Grisso's (1981) original instruments for the following purposes: (a) to simplify the language so that the instruments would better generalize across jurisdictions; (b) to include a fifth right, frequently included in contemporary *Miranda* warnings, that acknowledges the suspect's privilege to assert rights at any time; (c) to generate modern normative data to maintain the instruments' applicability in clinical and research settings; and (d) to update the psychometric properties using modern data and statistical methodology. With these revisions and updates, the MRCI better parallel the current legal standard of *Miranda* comprehension and serve as an important component of evaluating the cognitive capacities associated with the knowing and intelligent requirements of a valid *Miranda* waiver.

Like Grisso's (1981) original instruments, the MRCI assess an individual's understanding and appreciation of the warnings. The MRCI consist of four distinct instruments, each measuring capacities central to the knowing and intelligent requirements of a valid waiver. Each instrument generates a total score, but instrument scores are not totaled to produce one overall MRCI score because each instrument provides a different type of information related to *Miranda* waiver capacities. As with Grisso's (1981) original instruments, score interpretation involves examining patterns of responses, both qualitatively (i.e., specific areas of accurate and inaccurate understanding) and quantitatively (i.e., comparison with normative age group and IQ data), across the four measures (A. M. Goldstein & Goldstein, 2010). The four component instruments are as follows:

1. Comprehension of *Miranda* Rights—II (CMR–II) evaluates an examinee's understanding of the *Miranda* warnings by asking the examinee to paraphrase each of the five *Miranda* warning statements contained in the instrument. Examiners read each warning aloud and simultaneously show it, in written form, to the examinee. Responses are rated as reflecting adequate (2 points), questionable (1 point), or inadequate (0 points) understanding of each warning, and total CMR–II scores can range from 0 to 10. The CMR–II demonstrated moderate internal consistency and test–retest reliability, excellent interrater reliability, and moderate construct validity and convergent validity with justice-involved and community youths (N. E. S. Goldstein et al., 2011, 2014).
2. Comprehension of *Miranda* Rights—Recognition—II (CMR–R–II) evaluates an examinee's understanding of the *Miranda* warnings by differentiating between correct and incorrect interpretations of each warning. The examiner reads aloud a written warning that is also shown to the examinee. The examiner then reads three other statements, and the examinee must identify whether each statement has the same meaning as the warning initially presented. Correct responses receive 1 point, and incorrect responses receive 0 points. Total CMR–R–II scores can range from 0 to 15. The CMR–R–II demonstrated moderate internal consistency and test–retest reliability, as well as moderate construct validity and convergent validity, with justice-involved and community youth samples (N. E. S. Goldstein et al., 2011, 2014).
3. Function of Rights in Interrogation (FRI) evaluates an examinee's appreciation of *Miranda* rights in the context of police interrogations, as well as their implications for later legal proceedings. The FRI is composed of three subscales: Nature of Interrogation (i.e., risks associated with interrogation), Right to Counsel (i.e., purpose of legal counsel), and Right to Silence (i.e., safeguards to the right to silence and role of confessions). The examiner presents four pictures, coupled with brief vignettes related to the interrogation process, and asks a total of 15 questions. The scoring process and criteria (i.e., adequate, questionable, and inadequate responses) parallel those of the CMR–II. Subscale and total scores are calculated for the FRI, with subscale scores ranging from 0 to 10 and total scores ranging from 0 to 30. The FRI demonstrated adequate to moderate subscale and moderate total internal consistency, moderate to excellent subscale and total interrater reliability, and moderate subscale and total

test–retest reliability. Moreover, the FRI demonstrated adequate construct validity and adequate to moderate convergent validity with justice-involved and community youths (N. E. S. Goldstein et al., 2011; N. E. S. Goldstein, Zelle, & Grisso, 2012).

4. Comprehension of *Miranda* Vocabulary—II (CMV–II) evaluates an examinee's ability to define 16 words frequently appearing in *Miranda* warnings. The examiner reads the word aloud, uses it in a sentence, repeats the word, and then asks the examinee to define the word. Similar to the CMR–II and FRI, each response is assigned a score ranging from 0 to 2. Total scores on the CMV–II can range from 0 to 32. The CMV–II demonstrated good to excellent internal consistency and test–retest reliability, excellent interrater reliability, and moderate construct validity and convergent validity with justice-involved and community youths (N. E. S. Goldstein et al., 2011, 2014).

The psychometric properties of the MRCI, based on data gathered from multiple juvenile samples, closely mirror the psychometric properties of Grisso's original instruments (N. E. S. Goldstein et al., 2011). The MRCI have demonstrated moderate internal consistency. All of the instruments have shown excellent interrater reliability and moderate to strong stability over time. Finally, psychometric analyses revealed the MRCI's concurrent (i.e., correlations with age and IQ) and convergent (i.e., cross-test comparisons between MRCI component measures) validity.

Interpreting patterns in an individual's performance on these instruments can be done both quantitatively and qualitatively. Quantitative interpretation involves comparing an individual's scores with those of normative samples, such as those of same-aged youths or those with similar IQ scores. For example, an examiner may choose to compare a 13-year-old's CMR–II score with that of the average 13-year-old involved with the juvenile justice system to reveal similarities or differences in extent of understanding. Alternatively, if this youth's case is under the jurisdiction of criminal court, the evaluator might compare the youth's performance on the CMR–II with that of adult offenders to demonstrate differences between the juvenile defendant's understanding and that of the typical adult in the criminal justice system (A. M. Goldstein & Goldstein, 2010; Grisso, 1981).

Qualitative interpretation involves evaluating the individual's performance across the component instruments, and courts may be interested in learning about a youth's specific understanding and appreciation of the individual rights to silence and counsel. For instance, the evaluator may present and explain the defendant's misinterpretation of the right to silence on the CMR–II (e.g., "You can't speak until they tell you to") by describing the definition of right on the CMV–II (e.g., "Something you are allowed to do") and its implications for appreciation on the FRI item asking about what should happen if a judge learns that a youth suspect would not speak to police (e.g., "He will get in trouble and go to jail"). More important, the examiner should highlight consistency and inconsistency across instruments, as well as accurate and inaccurate appreciation of rights. Interpreting an individual's performance both quantitatively and qualitatively assists the examiner in clearly communicating the defendant's understanding and appreciation of *Miranda* warnings within the context of interrogations (N. E. S. Goldstein et al., 2014; Grisso, 1998).

As with any forensic assessment measure (Heilbrun, 2001), MRCI scores cannot provide determinations of waiver validity because that is a legal decision to be made by the courts. However, quantitative and qualitative data from the MRCI can be used to structure a forensic mental health expert's report or testimony to inform the court about key totality-of-circumstances factors closely related to a suspect's *Miranda* waiver capacities (A. M. Goldstein & Goldstein, 2010).

Standardized Assessment of *Miranda* Abilities. Rogers, Sewell, et al. (2012) developed the Standardized Assessment of *Miranda* Abilities (SAMA) with the goal of making *Miranda* assessments "more accurate, systematic, and informed by domain-specific information" (p. 13). Similar to Grisso's (1998) and N. E. S. Goldstein, Zelle, and Grisso's (2012) instruments, the SAMA follows a legal–empirical–forensic model (Rogers, Sewell,

et al., 2012). However, the SAMA differs from these instruments by incorporating case-specific details into the administration and interpretation of the component measures (Rogers, Sewell, et al., 2012). The SAMA consists of five composite measures, each of which evaluates a *Miranda* comprehension construct through semistructured interviewing, true–false questions, and free recall and interpretation (Rogers, Sewell, et al., 2012). The five composite measures are as follows:

1. The *Miranda* Quiz evaluates potential common misconceptions about the *Miranda* warnings through a 25-item true–false quiz (Rogers, Sewell, et al., 2012). According to the SAMA manual (Rogers, Sewell, et al., 2012), primary items demonstrated low to moderate test–retest reliability and moderate to strong discriminant validity for *Miranda*-related abilities. The *Miranda* Quiz Primary Item Total evidenced adequate test–retest reliability, solid convergent validity with cognitive abilities, and moderate to large discriminant validity with intelligence and *Miranda*-relevant abilities (e.g., *Miranda* vocabulary, comprehension, and reasoning; Rogers, Sewell, et al., 2012). Very good content validity was reported for the *Miranda* Quiz (Rogers, Sewell, et al., 2012).
2. The *Miranda* Reasoning Measure is a semistructured measure designed to evaluate an examinee's recall of his or her considerations in determining whether to waive or exercise the rights to silence and counsel at the time of initial advisement (Rogers, Sewell, et al., 2012). The manual indicated excellent interrater reliability for the *Miranda* Reasoning Measure; appreciable convergent validity for exercise items but weaker convergent validity for waive items; and moderate to high discriminant validity for both exercise and waive items (Rogers, Sewell, et al., 2012).
3. The *Miranda* Comprehension Template is an individualized tool that summarizes case-specific details (i.e., modality in which rights were administered, format of warnings, elapsed time between advisement and waiver) and evaluates the examinee's paraphrasing of the specific warnings used at the time of interrogation to identify possible deficits in an examinee's *Miranda* comprehension at the time of actual advisement (Rogers, Sewell, et al., 2012). Reliability and validity estimates are not available for the *Miranda* Comprehension Template because it is considered to be "a template and not a measure with formal validation" (Rogers, Sewell, et al., 2012, p. 79).
4. The *Miranda* Acquiescence Questionnaire assesses acquiescence and legally relevant beliefs via oppositely worded pairs of questions (Rogers, Sewell, et al., 2012). According to the SAMA manual (Rogers, Sewell, et al., 2012), the *Miranda* Acquiescence Questionnaire has low interitem consistency because of the breadth and inconsistency of its content, as expected. Modest convergent validity and small to large effect sizes for discriminant validity were reported for the Congruent Content and Acquiescence subscales, with good content validity but negligible convergent validity and small to moderate effect sizes for discriminant validity for the Nay-Saying subscale (Rogers, Sewell, et al., 2012).
5. The *Miranda* Vocabulary Scale measures an examinee's capacity to appropriately define 36 *Miranda*-related words. Feigned cognitive impairment may be indicated when a pattern of stronger performance on more difficult items emerges (Rogers, Sewell, et al., 2012). According to the SAMA manual (Rogers, Sewell, et al., 2012), the *Miranda* Vocabulary Scale demonstrated significant internal consistency, very high interrater reliability, and low-moderate to moderate test–retest reliability at the item and scale levels (Rogers, Sewell, et al., 2012). Moreover, strong construct validity and modest to extremely large effect sizes for discriminant validity were reported for the *Miranda* Vocabulary Scale (Rogers, Sewell, et al., 2012).

Evaluating response style and effort. Because defendants may be motivated to present with deficits in their understanding and appreciation of *Miranda* rights, evaluators must consider the possibility that a given defendant is malingering. Defendants may present with exaggeration of cognitive deficits as a result of reduced effort on assessments; they may

fake the presence or embellish the severity of symptoms, or both. Evaluators can assess distortions and malingering through multiple avenues: comparing the information provided by the defendant with that obtained from collateral sources (e.g., records and third-party interviews), evaluating the consistency of the information provided by the defendant, administering objective tests in relevant domains (such as those described above), and administering tests that specifically evaluate feigned cognitive or mental health impairments (A. M. Goldstein & Goldstein, 2010).

Notably, although a number of stand-alone malingering measures have not been normed with children and adolescents, several instruments in other domains include embedded measures of effort and response style that can be used to evaluate the possibility of malingering (e.g., reliable digit span on the Wechsler Intelligence Scale for Children—Fourth Edition; validity scales on the Minnesota Multiphasic Personality Inventory—Adolescent [Butcher et al., 1992] and Personality Assessment Inventory—Adolescent [Morey, 2007]).

Communication of findings. Finally, all the data gathered must be synthesized, interpreted, and communicated in a clear and concise manner. The two primary avenues for communication of findings are written reports and courtroom testimony. There are excellent references for both general principles of written reports and oral testimony (e.g., Heilbrun, 2001) and issues specific to evaluations of *Miranda* waiver capacity (e.g., A. M. Goldstein & Goldstein, 2010). Notably, evaluators should be aware that providing descriptions of any deficits and each of their relationships to *Miranda* comprehension can help illustrate the impact of these totality-of-circumstances factors. When qualitative information is presented in conjunction with quantitative data, statistically relevant information becomes more easily digestible for readers (Oberlander & Goldstein, 2001). When writing reports and providing testimony, it is important to keep the intended audience in mind—reports will be read by a legal audience, not by individuals well versed in technical psychological terminology or statistics. Therefore, brief, descriptive, and clear communication is valued.

IMPLICATIONS

Forensic mental health evaluators who receive a referral regarding a juvenile's capacity to have waived *Miranda* rights should consider a number of issues before accepting the case and while completing the evaluation.

Best Practices

In addition to the steps involved in conducting an evaluation of *Miranda* waiver capacity, discussed above, other focal issues include the evaluator's competence to conduct the evaluation and accurate interpretation of results.

First, the evaluator must be competent to conduct this type of forensic mental health assessment. Competence of the evaluator is multifaceted, but it is substantially informed by relevant professional ethical guidelines. For psychologists, the two primary ethical references are the *Ethical Principles of Psychologists and Code of Conduct* (Ethics Code) of the American Psychological Association (2010) and the *Specialty Guidelines for Forensic Psychology* (American Psychological Association, 2013). The latter is an aspirational model that applies the Ethics Code to forensic situations. The Ethics Code specifies that competence is based on "education, training, supervised experience, consultation, study, or professional experience" (Section 2.01). Moreover, psychologists assuming forensic roles must "become reasonably familiar with the judicial or administrative rules governing their roles" (Section 2.01[f]). Similarly, the *Specialty Guidelines for Forensic Psychology* describes the various bases of competence as well as requirements specific to knowledge of the legal system and legal rights of individuals (Section 2.04) and knowledge of the scientific foundations for opinions and testimony (Section 2.05). Professional competence in the context of *Miranda* waiver evaluations requires familiarity with core *Miranda* case law; jurisdiction-specific standards relevant to *Miranda* waivers; how to gather relevant data to answer the referral question, including administration of general and specialized assessment

instruments; and factors unique to adolescence that can affect a juvenile's comprehension of *Miranda* rights and susceptibility to police coercion.

Important best-practice issues also concern how evaluators synthesize and interpret all of the data they collect from record reviews, interviews with third parties, interviews with the defendant, and results from testing. Evaluators should use scientific reasoning (i.e., hypothesis testing) to establish links between the defendant's abilities and clinical condition and the functional legal capacities required under the law (Heilbrun, 2001). In the context of *Miranda* evaluations, the defendant's clinical condition should be connected to her or his ability to make a knowing, intelligent, and voluntary waiver of her or his *Miranda* rights (A. M. Goldstein & Goldstein, 2010). A. M. Goldstein and Goldstein (2010) articulated several hypotheses that evaluators might consider in these evaluations, including the following:

- The defendant was capable of waiving all of the *Miranda* rights, consistent with the knowing and intelligent legal requirements.
- The defendant did not understand (in part or in full) one or more of the *Miranda* rights.
- The defendant understood the basic meaning of all of his *Miranda* rights but failed to appreciate the role of the lawyer as advocate for the suspect. (p. 151)

The expert should carefully review all of the data, including contradictory data, to determine which hypotheses should be rejected or accepted as the forensic evaluator's opinion (A. M. Goldstein & Goldstein, 2010).

New Policy Developments

Perhaps the most notable policy development in the area of *Miranda* waivers and admissibility of confessions involves the blended line between school and police. Over the past several years, there have been increases in the number of school-based police officers, schools' adoption of zero tolerance policies, and the impact of both of these developments on the school-to-prison pipeline (American Psychological Association Zero Tolerance Task Force, 2008). In the context of evaluations of *Miranda* waiver capacity, the most relevant aspect of these policies is school-based questioning and interrogation. As addressed in the *J.D.B. v. North Carolina* (2011) decision described earlier, law enforcement and school personnel may not be cognizant of the ways in which a juvenile's age, the school venue, and the presence of adults from varied settings (e.g., police department, school administration) can interact to influence the *Miranda* custody analysis; they may also be unaware of how the stress of such a situation could affect a youth's capacities to understand and appreciate his or her *Miranda* rights.

Research Directions

Given juveniles' difficulties with *Miranda* comprehension, at least some of which likely stem from developmental immaturity factors that are not immediately modifiable, future research should explore whether environmental variables can enhance juveniles' abilities. For instance, separate from assessing the impact of reading grade and reading ease levels on *Miranda* comprehension, it would be valuable to explore whether *Miranda* understanding and appreciation could be improved by providing explanations of rights within *Miranda* warnings. Similarly, there is a dearth of research on how the delivery of the *Miranda* warnings (e.g., format: oral, written, oral and written; speed) affects juveniles' *Miranda* comprehension and whether the presence of legal advocates could enhance juveniles' understanding and appreciation of their rights. Limited research has been conducted on the effects of school-based educational programs on improving adolescents' *Miranda* comprehension (Kalbeitzer, 2008; Tapp & Levine, 1977), and future research could examine such programming in greater depth and with youths at elevated risk of justice system involvement.

Moreover, as *Miranda* case law develops, it will be important to identify and clarify how judicially identified factors affect comprehension. Because the totality-of-the-circumstances analysis is a flexible approach guided by the particular circumstances of a suspect's interrogation, researchers should be attuned to factors discussed in legal opinions about juveniles' *Miranda* waivers and be prepared to investigate the empirical foundations

of these factors. To a certain extent, it also remains unclear when developments in case law need to be incorporated into forensic evaluations of *Miranda* waiver capacity. For example, the Supreme Court recently held that, although invocations of *Miranda* rights must be explicit, waivers of *Miranda* rights can be implicit—indicated merely by responding to police questions (*Berghuis v. Thompkins*, 2010). The practical implications of this decision have yet to be identified—specifically, whether evaluations of capacity to have waived *Miranda* should assess a defendant's understanding and appreciation of these functional aspects of *Miranda*. In other words, was the defendant aware that she or he needed to explicitly state that she or he was invoking the right to silence and that she or he was waiving that right by speaking with police, even if the defendant had previously asserted the rights to silence and counsel? When such new case law emerges, surveys of forensic mental health professionals may provide data about when and how to incorporate policy into practice.

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Risk Taking in Adolescence

New Perspectives From Brain and Behavioral Science

Laurence Steinberg

Temple University

ABSTRACT—*Trying to understand why adolescents and young adults take more risks than younger or older individuals do has challenged psychologists for decades. Adolescents' inclination to engage in risky behavior does not appear to be due to irrationality, delusions of invulnerability, or ignorance. This paper presents a perspective on adolescent risk taking grounded in developmental neuroscience. According to this view, the temporal gap between puberty, which impels adolescents toward thrill seeking, and the slow maturation of the cognitive-control system, which regulates these impulses, makes adolescence a time of heightened vulnerability for risky behavior. This view of adolescent risk taking helps to explain why educational interventions designed to change adolescents' knowledge, beliefs, or attitudes have been largely ineffective, and suggests that changing the contexts in which risky behavior occurs may be more successful than changing the way adolescents think about risk.*

KEYWORDS—*adolescence; decision making; risk taking; brain development*

Adolescents and college-age individuals take more risks than children or adults do, as indicated by statistics on automobile crashes, binge drinking, contraceptive use, and crime; but trying to understand why risk taking is more common during adolescence than during other periods of development has challenged psychologists for decades (Steinberg, 2004). Numerous theories to account for adolescents' greater involvement in risky behavior have been advanced, but few have withstood empirical scrutiny (but see Reyna & Farley, 2006, for a discussion of some promising approaches).

Address correspondence to Laurence Steinberg, Department of Psychology, Temple University, Philadelphia, PA 19122; lds@temple.edu.

FALSE LEADS IN RISK-TAKING RESEARCH

Systematic research does not support the stereotype of adolescents as irrational individuals who believe they are invulnerable and who are unaware, inattentive to, or unconcerned about the potential harms of risky behavior. In fact, the logical-reasoning abilities of 15-year-olds are comparable to those of adults, adolescents are no worse than adults at perceiving risk or estimating their vulnerability to it (Reyna & Farley, 2006), and increasing the salience of the risks associated with making a potentially dangerous decision has comparable effects on adolescents and adults (Millstein & Halpern-Felsher, 2002). Most studies find few age differences in individuals' evaluations of the risks inherent in a wide range of dangerous behaviors, in judgments about the seriousness of the consequences that might result from risky behavior, or in the ways that the relative costs and benefits of risky activities are evaluated (Beyth-Marom, Austin, Fischoff, Palmgren, & Jacobs-Quadrel, 1993).

Because adolescents and adults reason about risk in similar ways, many researchers have posited that age differences in actual risk taking are due to differences in the information that adolescents and adults use when making decisions. Attempts to reduce adolescent risk taking through interventions designed to alter knowledge, attitudes, or beliefs have proven remarkably disappointing, however (Steinberg, 2004). Efforts to provide adolescents with information about the risks of substance use, reckless driving, and unprotected sex typically result in improvements in young people's thinking about these phenomena but seldom change their actual behavior. Generally speaking, reductions in adolescents' health-compromising behavior are more strongly linked to changes in the contexts in which those risks are taken (e.g., increases in the price of cigarettes, enforcement of graduated licensing programs, more vigorously implemented policies to interdict drugs, or condom distribution programs) than to changes in what adolescents know or believe.

The failure to account for age differences in risk taking through studies of reasoning and knowledge stymied researchers for some time. Health educators, however, have been undaunted, and they have continued to design and offer interventions qof unproven effectiveness, such as Drug Abuse Resistance

Education (DARE), driver's education, or abstinence-only sex education.

A NEW PERSPECTIVE ON RISK TAKING

In recent years, owing to advances in the developmental neuroscience of adolescence and the recognition that the conventional decision-making framework may not be the best way to think about adolescent risk taking, a new perspective on the subject has emerged (Steinberg, 2004). This new view begins from the premise that risk taking in the real world is the product of both logical reasoning and psychosocial factors. However, unlike logical-reasoning abilities, which appear to be more or less fully developed by age 15, psychosocial capacities that improve decision making and moderate risk taking—such as impulse control, emotion regulation, delay of gratification, and resistance to peer influence—continue to mature well into young adulthood (Steinberg, 2004; see Fig. 1). Accordingly, psychosocial immaturity in these respects during adolescence may undermine what otherwise might be competent decision making. The conclusion drawn by many researchers, that adolescents are as competent decision makers as adults are, may hold true only under conditions where the influence of psychosocial factors is minimized.

Evidence From Developmental Neuroscience

Advances in developmental neuroscience provide support for this new way of thinking about adolescent decision making. It appears that heightened risk taking in adolescence is the product of the interaction between two brain networks. The first is a socioemotional network that is especially sensitive to social and emotional stimuli, that is particularly important for reward processing, and that is remodeled in early adolescence by the hormonal changes of puberty. It is localized in limbic and paralimbic areas of the brain, an interior region that includes the amygdala, ventral striatum, orbitofrontal cortex, medial prefrontal cortex, and superior temporal sulcus. The second network is a cognitive-control network that subserves executive functions such as planning, thinking ahead, and self-regulation, and that matures gradually over the course of adolescence and young adulthood largely independently of puberty (Steinberg, 2004). The cognitive-control network mainly consists of outer regions of the brain, including the lateral prefrontal and parietal cortices and those parts of the anterior cingulate cortex to which they are connected.

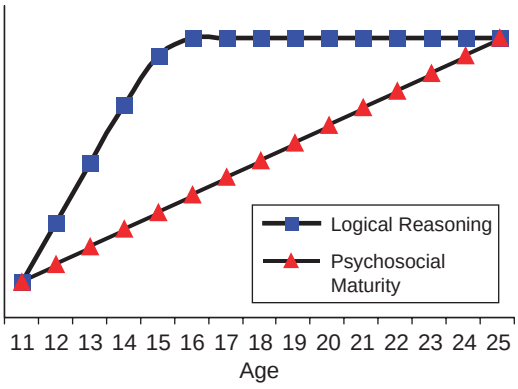

Fig. 1. Hypothetical graph of development of logical reasoning abilities versus psychosocial maturation. Although logical reasoning abilities reach adult levels by age 16, psychosocial capacities, such as impulse control, future orientation, or resistance to peer influence, continue to develop into young adulthood.

In many respects, risk taking is the product of a competition between the socioemotional and cognitive-control networks (Drevets & Raichle, 1998), and adolescence is a period in which the former abruptly becomes more assertive (i.e., at puberty) while the latter gains strength only gradually, over a longer period of time. The socioemotional network is not in a state of constantly high activation during adolescence, though. Indeed, when the socioemotional network is not highly activated (for example, when individuals are not emotionally excited or are alone), the cognitive-control network is strong enough to impose regulatory control over impulsive and risky behavior, even in early adolescence. In the presence of peers or under conditions of emotional arousal, however, the socioemotional network becomes sufficiently activated to diminish the regulatory effectiveness of the cognitive-control network. Over the course of adolescence, the cognitive-control network matures, so that by adulthood, even under conditions of heightened arousal in the socioemotional network, inclinations toward risk taking can be modulated.

It is important to note that mechanisms underlying the processing of emotional information, social information, and reward are closely interconnected. Among adolescents, the regions that are activated during exposure to social and emotional stimuli overlap considerably with regions also shown to be sensitive to variations in reward magnitude (cf. Galvan, et al., 2005; Nelson, Leibenluft, McClure, & Pine, 2005). This finding may be relevant to understanding why so much adolescent risk taking—like drinking, reckless driving, or delinquency—occurs in groups (Steinberg, 2004). Risk taking may be heightened in adolescence because teenagers spend so much time with their peers, and the mere presence of peers makes the rewarding aspects of risky situations more salient by activating the same circuitry that is activated by exposure to nonsocial rewards when individuals are alone.

The competitive interaction between the socioemotional and cognitive-control networks has been implicated in a wide range of decision-making contexts, including drug use, social-decision processing, moral judgments, and the valuation of alternative rewards/costs (e.g., Chambers, Taylor, & Potenza, 2003). In all of these contexts, risk taking is associated with relatively greater activation of the socioemotional network. For example, individuals' preference for smaller immediate rewards over

larger delayed rewards is associated with relatively increased activation of the ventral striatum, orbitofrontal cortex, and medial prefrontal cortex—all regions linked to the socioemotional network—presumably because immediate rewards are especially emotionally arousing (consider the difference between how you might feel if a crisp $100 bill were held in front of you versus being told that you will receive $150 in 2 months). In contrast, regions implicated in cognitive control are engaged equivalently across decision conditions (McClure, Laibson, Loewenstein, & Cohen, 2004). Similarly, studies show that increased activity in regions of the socioemotional network is associated with the selection of comparatively risky (but potentially highly rewarding) choices over more conservative ones (Ernst et al., 2005).

Evidence From Behavioral Science

Three lines of behavioral evidence are consistent with this account. First, studies of susceptibility to antisocial peer influence show that vulnerability to peer pressure increases between preadolescence and mid-adolescence, peaks in mid-adolescence—presumably when the imbalance between the sensitivity to socioemotional arousal (which has increased at puberty) and capacity for cognitive control (which is still immature) is greatest—and gradually declines thereafter (Steinberg, 2004). Second, as noted earlier, studies of decision making generally show no age differences in risk processing between older adolescents and adults when decision making is assessed under conditions likely associated with relatively lower activation of brain systems responsible for emotion, reward, and social processing (e.g., the presentation of hypothetical decision-making dilemmas to individuals tested alone under conditions of low emotional arousal; Millstein, & Halpern-Felsher, 2002). Third, the presence of peers increases risk taking substantially among teenagers, moderately among college-age individuals, and not at all among adults, consistent with the notion that the development of the cognitive-control network is gradual and extends beyond the teen years. In one of our lab's studies, for instance, the presence of peers more than doubled the number of risks teenagers took in a video driving game and increased risk taking by 50% among college undergraduates but had no effect at all among adults (Gardner & Steinberg, 2005; see Fig. 2). In adolescence, then, not only is more merrier—it is also riskier.

What Changes During Adolescence?

Studies of rodents indicate an especially significant increase in reward salience (i.e., how much attention individuals pay to the magnitude of potential rewards) around the time of puberty (Spear, 2000), consistent with human studies showing that increases in sensation seeking occur relatively early in adolescence and are correlated with pubertal maturation but not chronological age (Steinberg, 2004). Given behavioral findings indicating relatively greater reward salience among adolescents

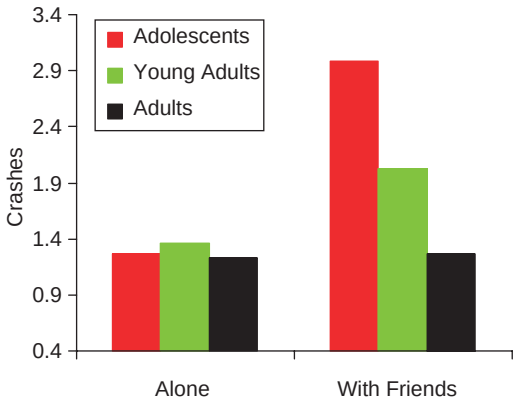

Fig. 2. Risk taking of adolescents, young adults, and adults during a video driving game, when playing alone and when playing with friends. Adapted from Gardner & Steinberg (2004).

than adults in decision-making tasks, there is reason to speculate that, when presented with risky situations that have both potential rewards and potential costs, adolescents may be more sensitive than adults to variation in rewards but comparably sensitive (or perhaps even less sensitive) to variation in costs (Ernst et al., 2005).

It thus appears that the brain system that regulates the processing of rewards, social information, and emotions is becoming more sensitive and more easily aroused around the time of puberty. What about its sibling, the cognitive-control system? Regions making up the cognitive-control network, especially prefrontal regions, continue to exhibit gradual changes in structure and function during adolescence and early adulthood (Casey, Tottenham, Liston, & Durston, 2005). Much publicity has been given to the finding that synaptic pruning (the selective elimination of seldom-used synapses) and myelination (the development of the fatty sheaths that "insulate" neuronal circuitry)—both of which increase the efficiency of information processing—continue to occur in the prefrontal cortex well into the early 20s. But frontal regions also become more integrated with other brain regions during adolescence and early adulthood, leading to gradual improvements in many aspects of cognitive control such as response inhibition; this integration may be an even more important change than changes within the frontal region itself. Imaging studies using tasks in which individuals are asked to inhibit a "prepotent" response–like trying to look away from, rather than toward, a point of light—have shown that adolescents tend to recruit the cognitive-control network less broadly than do adults, perhaps overtaxing the capacity of the more limited number of regions they activate (Luna et al., 2001).

In essence, one of the reasons the cognitive-control system of adults is more effective than that of adolescents is that adults' brains distribute its regulatory responsibilities across a wider network of linked components. This lack of cross-talk across brain regions in adolescence results not only in individuals

acting on gut feelings without fully thinking (the stereotypic portrayal of teenagers) but also in thinking too much when gut feelings ought to be attended to (which teenagers also do from time to time). In one recent study, when asked whether some obviously dangerous activities (e.g., setting one's hair on fire) were "good ideas," adolescents took significantly longer than adults to respond to the questions and activated a less narrowly distributed set of cognitive-control regions (Baird, Fugelsang, & Bennett, 2005). This was not the case when the queried activities were not dangerous ones, however (e.g., eating salad).

The fact that maturation of the socioemotional network appears to be driven by puberty, whereas the maturation of the cognitive-control network does not, raises interesting questions about the impact—at the individual and at the societal levels—of early pubertal maturation on risk-taking. We know that there is wide variability among individuals in the timing of puberty, due to both genetic and environmental factors. We also know that there has been a significant drop in the age of pubertal maturation over the past 200 years. To the extent that the temporal disjunction between the maturation of the socioemotional system and that of the cognitive-control system contributes to adolescent risk taking, we would expect to see higher rates of risk taking among early maturers and a drop over time in the age of initial experimentation with risky behaviors such as sexual intercourse or drug use. There is evidence for both of these patterns (Collins & Steinberg, 2006; Johnson & Gerstein, 1998).

IMPLICATIONS FOR PREVENTION

What does this mean for the prevention of unhealthy risk taking in adolescence? Given extant research suggesting that it is not the way adolescents think or what they don't know or understand that is the problem, a more profitable strategy than attempting to change how adolescents view risky activities might be to focus on limiting opportunities for immature judgment to have harmful consequences. More than 90% of all American high-school students have had sex, drug, and driver education in their schools, yet large proportions of them still have unsafe sex, binge drink, smoke cigarettes, and drive recklessly (often more than one of these at the same time; Steinberg, 2004). Strategies such as raising the price of cigarettes, more vigilantly enforcing laws governing the sale of alcohol, expanding adolescents' access to mental-health and contraceptive services, and raising the driving age would likely be more effective in limiting adolescent smoking, substance abuse, pregnancy, and automobile fatalities than strategies aimed at making adolescents wiser, less impulsive, or less shortsighted. Some things just take time to develop, and, like it or not, mature judgment is probably one of them.

The research reviewed here suggests that heightened risk taking during adolescence is likely to be normative, biologically driven, and, to some extent, inevitable. There is probably very little that can or ought to be done to either attenuate or delay the shift in reward sensitivity that takes place at puberty. It may be possible to accelerate the maturation of self-regulatory competence, but no research has examined whether this is possible. In light of studies showing familial influences on psychosocial maturity in adolescence, understanding how contextual factors influence the development of self-regulation and knowing the neural underpinnings of these processes should be a high priority for those interested in the well-being of young people.

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RESEARCH ARTICLE

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The prevalence of false confessions in experimental laboratory simulations: A meta-analysis

Joshua M. Stewart | William Douglas Woody | Steven Pulos

University of Northern Colorado, Greeley, CO, USA

Correspondence
William Douglas Woody, Ph.D., Professor, School of Psychological Sciences, University of Northern Colorado, Greeley, CO 80639, USA.
Email: william.woody@unco.edu

Present Address
Joshua M. Stewart, Senior Researcher, Marzano Research, 12577 E Caley Ave., Centennial, CO, USA.

We assessed experimental false confession studies using a meta-analysis to evaluate the prevalence of false confessions across methodologies and several moderator variables. False confessions were more likely in typing task studies than in collaborative or individual cheating studies. In typing studies, speed of typing did not affect false confession rates, but placement of the forbidden key in locations that rendered errors less plausible lowered the false confession rates. False-evidence ploys increased the likelihood of false confessions. We explore implications for courts, expert witnesses, scholars, and police interrogators.

1 | INTRODUCTION

False confessions are antithetical to modern systems of justice. They circumvent justice and harm individuals. Harm can include loss of life, freedom, property, and employment. Unfortunately, false confessions do occur, and with disastrous results, leading not only to extremely high primary costs (i.e., to the falsely convicted defendant and to the community which carries the risks of a free perpetrator for whom police no longer search), but also to high secondary costs, both to the legal system and to society at large (e.g., loss of credibility for the police, loss of public confidence in the criminal justice system, and loss of funds used to prosecute an innocent defendant; for reviews see, e.g., Kassin et al., 2010; Kassin & Gudjonsson, 2004; Woody, Forrest, & Stewart, 2011).

Estimates vary regarding the prevalence of false confessions during police interrogation (see Kassin, 1997). West and Meterko (2016) report that 12% of the first 325 individuals DNA-exonerated by the Innocence Project had falsely confessed. Garrett's (2008) review of the first 250 individuals exonerated by the Innocence Project revealed that 16% included a false confession. Similarly, out of 2,128 exonerated individuals listed in the National Registry of Exonerations (2017), 256 individuals (12%) falsely confessed. Other estimates of false confession rates suggest that the problem remains widespread. In a comprehensive study of police detectives, interrogators estimated that 4.78% of innocent suspects provide a partial admission or a complete confession (Kassin et al., 2007). Additionally, Gudjonsson, Sigurdsson, Sigfusdottir, and Young (2012) surveyed 11,388 Icelandic youths and young adults (95% aged 16–24 years). The researchers found that 12.4% of those who had been interrogated by police reported that they had falsely confessed; rates of 7–12% have been reported in similar surveys (e.g., Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006; Steingrimsdottir, Hreinsdottir, Gudjonsson, Sigurdsson, & Neilson, 2007).

Scholars have used at least three different methods to investigate false confessions. First, case studies of individual false confessors remain invaluable. For example, Garrett (2010) examined false confession cases and how such confessions were litigated at trial. Such studies are rich in detail and ecologically valid. Unfortunately, their very

richness and complexity limit generalizability and prevent the identification of specific factors responsible for false confessions.

Second, correlational studies seek to identify personality characteristics of those individuals who engage in false confessions (see Gudjonsson, 1989). For example, Gudjonsson, Sigurdsson, Einarsson, Bragason, and Newton (2010) administered personality tests to male prisoners, including some who reported a history of giving false confessions to police, and the researchers found that inattention and hyperactivity symptoms were significantly more common among the self-reported false confessors. The assumption of this approach is that variability in false confessions rates is due, at least in part, to individual differences (e.g., a greater desire to please others and protect one's own self-esteem and motivations to avoid conflict) as well as to situational variables (Fulero, 2010a; Kassin & Gudjonsson, 2004).

Third, experimental studies allow for the examination of false confessions in controlled situations where independent variables may be manipulated while controlling extraneous variables. This experimental control allows for stronger internal validity than the other two methods but reduces the ecological validity. For example, experimenters have examined the number of false confessions in artificial situations where volunteer participants are accused of crashing a computer when they did not (e.g., Kassin & Kiechel, 1996) or of cheating (Russano, Meissner, Narchet, & Kassin, 2005). Many independent variables can be manipulated to examine their potential effects on false confessions, e.g., use of false-evidence ploys (FEPs). Although a thorough understanding of false confessions will ultimately require integration of all three approaches, the current study focuses only upon the experimental studies.

As the studies increase in number, new problems arise. The proliferation of studies and data can overwhelm policymakers and judges and can result in the well-known phenomenon of battling experts, which can in turn lead to confusion among policymakers, scholars, judges, and, in particular, jurors (see Devenport & Cutler, 2004; Lovett & Kovera, 2008). One expert could cite a study with no false confessions (e.g., Hill, Memon, & McGeorge, 2008), and another could cite a study in which all participants falsely confess (e.g., Nash & Wade, 2009).

Several narrative reviews exist for this area of scholarship. For example, Kassin et al. (2010) reviewed theories and research findings from social psychology as well as several experimentally assessed situational factors that can lead to false confession, and they emphasized the isolation and stress that suspects face in police custody, FEPs, plausibility of the forbidden act (discussed subsequently), and minimization. Similarly, Drizin and Leo (2004) reviewed existing studies as well as the social psychological pressures inherent in custodial isolation, presentation of minimizing themes to justify the crime, minimization and maximization, implicit threats and promises, and FEPs. Kassin and Gudjonsson (2004) review similar factors, including plausibility (discussed as "vulnerability," p. 54), minimization, and the process of confrontation (including interruptions of the suspect's denials and presentation of fabricated evidence). These reviews and others (Leo, 2008; Woody et al., 2011) reach similar conclusions, particularly regarding the increased risks of false confessions after FEPs, minimization, and confrontation about plausible rather than implausible acts, but they connect these claims to individual studies or cases rather than a systematic meta-analysis of the experimental literature. Due to the potential for traditional narrative reviews to be biased and inaccurate, there has been a general call for the use of systematic reviews and meta-analyses (Blumenthal, 2007; Hunter & Schmidt, 1996).

Meta-analyses can serve two functions beyond narrative reviews. One function is to summarize the results of a body of quantitative research, and a second is to identify weaknesses and gaps in the research. Both of these goals can inform scholars, expert witnesses, and courts about the current state of the field. These goals are particularly relevant in this area for several reasons. First, courts have reached different decisions about the relevance of expert testimony and about the testimony itself in cases involving disputed confessions (see Citron & Johnson, 2006; Fulero, 2010b; Watson, Weiss, & Pouncey, 2010). Second, through neglect, unconscious bias, or deliberation, advocates and experts can choose the studies that support their position and neglect contradicting evidence, and this could affect triers of fact. Third, scholars have demonstrated the biasing effects of expert testimony about interrogation and confession on jurors' perceptions of the defendant as well as outcomes of simulated trials (e.g., Blandon-Gitlin, Sperry, & Leo, 2011; Gomes, Stenstrom, & Calvillo, 2014; Leo & Liu, 2009; Woody & Forrest, 2009). It is the purpose of

the current study to conduct a meta-analysis of the body of experimental research on false confessions. Specifically, we examine the false confession rates in experimental studies and moderator variables that affected these rates.

Although there are many current variations of experimental methods in the study of the etiology of false confessions, all have the following components. First, participants agree to participate in a psychological experiment in cognition, which is actually a deception. Second, experimenters tell the participants rules for participating in the experiment. Third, the participants are accused of violating the rules. In some studies (i.e., those using the typing or Alt-key method and the individual cheating method, discussed later), all participants are assumed to be innocent and to have not violated the rules. In some studies (e.g., Horselenberg et al., 2006; Horselenberg, Merckelbach, & Josephs, 2003), scholars verified that no participant hit the forbidden key,[1] although this remains unverified in some other Alt-key studies, forming an important limitation of the body of studies using this method. In other experimental methods (i.e., those that use the social cheating method, discussed later), experimenters allow each participant the opportunity to choose whether or not to violate the rules and then accuse all suspects of the rule violation; in this way scholars can compare responses and perceptions of factually guilty and factually innocent suspects (see Houston, Meissner, & Evans, 2014; Meissner et al., 2014). Fourth, the participants are asked to confess to violating the rules. Whether a suspect confesses acts as the dependent variable in the research, and, as a function of the method, these confessions could *all* be false (i.e., for the Alt-key and the individual cheating method in which all participants are presumed to be factually innocent) or could be false or true, as in the social cheating paradigm.

Many variations on this basic design appear in the literature in order to examine variables that may influence the false confession rate. Variations exist in the type of task, the manner in which participants are asked to confess, and the type of rules given to the participants. Additional components have been added to many studies, such as FEPs (i.e., false claims to have evidence of guilt), the plausibility of the rule violations, and the severity of the consequences for making a false confession. Some of these additions are unique to a study, and others have been used in multiple studies. In the current meta-analysis, we evaluate the following moderators that have been examined frequently enough to be included in a meta-analysis: methods, plausibility, and FEPs.

1.1 | Experimental methods

The first moderator variable is the experimental method used to study false confessions. Conclusions drawn by experts from such a diverse body of work remain vulnerable to challenges in court. What are the consequences of these methodological differences? To study interrogation under controlled experimental conditions, researchers have sought ethical and realistic methods to simulate interrogations. The current methods include three distinct categories. The first is a negligence method (the Alt-key method) in which the experimenter accuses participants of inadvertently violating a rule. A second method (the social cheating method) involves a confederate who asks the participant to cheat. Regardless of whether the participant actually cheats, the experimenter later accuses the participant of cheating. The third method (the individual cheating method) accuses an individual of cheating without the collaboration of another individual. In each method, the dependent variable was whether or not the participant falsely confessed to the accused act. We briefly review each paradigm.

Kassin and Kiechel (1996) conducted the classic Alt-key study, the first method in this line of inquiry, in which a confederate was to read aloud a list of letters and the participant was to type these letters on the keyboard after being told not to press the Alt-key during the study or the computer would crash. The computer crashed. The researcher then falsely accused the participant of pressing the Alt-key and attempted to get the participant to sign a confession, which would have the additional consequence of "a phone call from the principal investigator" (p. 126). All participants were believed to be innocent. Scholars have since replicated and extended this paradigm to assess the effects of

[1]Perillo and Kassin (2011) excluded a single participant who hit the Alt-key (p. 329).

suspect personality (Forrest, Wadkins, & Larson, 2006; Horselenberg et al., 2003), stress (Forrest, Wadkins, & Miller, 2002), suspect age (Redlich & Goodman, 2003), the severity of the consequences (Horselenberg et al., 2006), and the plausibility of the forbidden act (Klaver, Lee, & Rose, 2008), among other variables (see e.g., Blair, 2007).

A second method, the social cheating paradigm, requires participants to work with a collaborator who is actually a confederate (e.g., Russano et al., 2005). The confederate, despite instructions to the contrary, asks the participant for help to do individual work. This paradigm allows comparison of the responses of guilty suspects (i.e., those who inappropriately helped the confederate) and innocent suspects (i.e., those who appropriately refused to help the confederate) during interrogation. The two available meta-analyses of confession studies (Houston et al., 2014; Meissner et al., 2014) evaluated only six and 12 studies, respectively. For Houston et al. (2014), all included studies employed only the Russano method and allowed comparison of true confessions and false confessions. More specifically, these meta-analyses evaluated participants' perceptions of the factors that motivated their true or false confessions in response to an accusation of cheating. Meissner et al. (2014) required that studies manipulate the interviewing approach and evaluate both information-gathering and accusatorial methods, and this meta-analysis included some studies using the Alt-key method as well as studies using the social cheating paradigm. As described subsequently, we extend meta-analytic techniques to the larger body of experimental scholarship.

A third method, the individual cheating paradigm, was used in only two studies (Horselenberg et al., 2006; Nash & Wade, 2009). Here individuals worked alone on a task. The experimenters then told each participant that they had evidence that he or she had cheated. Horselenberg et al. (2006) employed physical evidence to indicate that participants had looked at the answers to the test, and in the Nash and Wade (2009) study, either the participants were informed that video evidence existed to show them cheating or they were shown a doctored video that depicted them cheating. In two of the conditions in the Nash and Wade study it was possible that the participants could believe they had cheated by accident, and these conditions may be closer to the Alt-key condition than to the social cheating task.

One of the main differences between the methods is that in both cheating paradigms the participants are accused of a crime that requires intent, whereas the Alt-key method does not require intent (Houston et al., 2014). In the Alt-key method, an admission is more similar to admissions of negligence in civil court (see Kassin & Kiechel, 1996; Perillo & Kassin, 2011), even though actual civil cases involve distinct and complex decision rules different from those used by participants in these studies (see, e.g., Greene & Bornstein, 2003). Additionally, in civil disputes, potential coercion may occur not in police interrogation rooms but during depositions or cross-examination, in which attorneys may seek to inspire an individual to admit that an act of potential negligence was plausible. Similar questions may arise in criminal courts in jurisdictions that have criminal negligence statutes, even if there exist many differences between civil and criminal negligence (Garfield, 1998). The Alt-key method may also share important characteristics with some specific police interrogation tactics. The minimization of intent in the Alt-key studies is similar to minimization tactics often used by police interrogators who seek to inspire a suspect to confess to committing the crime accidentally rather than intentionally – a theme that Jayne and Buckley (1999) call "The Accident Scenario" (p. 470; see also Kassin et al., 2007; Leo, 1996). In contrast, for both cheating methods, a suspect must decide whether to break the rules, and the decision to follow or break the rules provides a stronger analog to an actual suspect's decisions regarding whether to commit a criminal act. This decision is also expected to be intentional and readily memorable, unlike the Alt-key method in which a participant may confess on the assumption that he or she could have unintentionally hit the Alt-key and either not realized or forgotten that he or she did so (Houston et al., 2014). These differences make the cheating methods stronger analogs to the decisions suspects face in actual police interrogations.

Another limitation to the Alt-key method as an analog for police interrogation is that, in comparison to criminal punishments, the consequences for confessing to pressing the Alt-key are mild. The consequences range from those which may be mild even given the expectations for ethical treatment of participants in psychology research (i.e., a phone call from the presumably upset principal investigator; Kassin & Kiechel, 1996) to more costly consequences that are still substantially less severe than criminal penalties (e.g., payment of €250; Horselenberg et al.,

2006). There exist other differences between these methods with less clear legal implications. One such difference is that in the Alt-key method the participants actually see the effect of rule violation, i.e., the computer crashes, while in the social cheating paradigm they are only told that a violation occurred. Another difference is that in the social cheating paradigm a conscious collaboration is required, but the Alt-key method and the individual cheating method do not require collaboration among individuals.

1.2 | Plausibility

Scholars using the Alt-key paradigm have suggested that the likelihood of committing a false confession is related to the plausibility of the forbidden act (Kassin & Kiechel, 1996). Plausibility has been manipulated in two ways, both of which affect the perceived likelihood of erroneously striking the Alt-key. First, researchers manipulated the speed at which the stimuli appeared on the screen, with the hypothesis that individuals would be more likely to make a false confession because the higher rate of presentation made errors more plausible (Kassin & Kiechel, 1996). The second method varies the location of the forbidden key. If the forbidden key is close to the response key (e.g., the Alt-key next to the spacebar), then hitting it would be more plausible than if it was far away from the response key (e.g., the Esc-key far from the spacebar). Both methods seek to influence participants' "subjective uncertainty concerning their own innocence" (Kassin & Kiechel, 1996, p. 126).

1.3 | False-evidence ploys

Another variable manipulated in a number of studies was the use of FEPs, the presentation of fabricated evidence indicating that the participant committed the crime. Within the Alt-Key paradigm this typically consisted of a witness falsely claiming that he or she saw the participant press the forbidden key (see, e.g., Kassin & Kiechel, 1996). In the cheating paradigm, the FEPs have included explicit or implicit claims to have video evidence of cheating (e.g., Perillo & Kassin, 2011). Across all methods, the hypothesis has been that individuals are more likely to confess falsely when confronted with fabricated evidence of their guilt (see Kassin et al., 2010; Leo, 2008; Woody et al., 2011; for reviews of effects of FEPs).

1.4 | Overview of the current study

To understand better the research literature on false confessions, we assessed previously conducted false confession research with meta-analysis. Application of meta-analysis of false confession research can enhance our understanding of false confession rates across methodologies. Furthermore, we can examine similarities and differences between and within studies to evaluate the effects that particular moderator variables have on false confession rates.

As stated previously, results from this and other meta-analyses can inform and support experts' testimony in court. Although there exists broad agreement among many scholars about false confessions and about some of the moderators listed here (e.g., FEPs; see Kassin, 2008; Kassin et al., 2010; Kassin & Gudjonsson, 2004; Leo, 2008; Woody et al., 2011), larger agreement through the criminal justice system remains elusive. As Cutler, Findley, and Loney (2014) stated, "The courts' response to expert testimony on false confessions … has not been uniformly welcoming" (p. 590). As reported by Fulero (2010a, 2010b), courts may reject psychological testimony due to questions of scientific validity or reliability as well as for other reasons related to Frye, Daubert, or other criteria for admission of experts (see also Cutler et al., 2014; Watson et al., 2010). Inferences about reliability rest on claims testable via meta-analysis.

Additionally, John E. Reid and Associates, Inc. (2010) list more than 60 cases from 2002–2010 in which courts excluded, limited, or rejected expert testimony [they defined "rejected" to include "cases in which the expert offers some testimony but their [sic] argument was rejected by the judge or jury" (p. 6)]. They then take a stronger stance as they summarize a series of court decisions by stating that, "For the past several years the courts have viewed with skepticism the testimony of 'false confession experts', [sic] repeatedly suggesting that there is no actual

science to support their views but rather, anecdotal evidence" (John E. Reid and Associates, 2015a, ¶5). Although these authors are practitioners rather than scholars and although they have a long-term financial interest in the success of the Reid Technique in general and FEPs in particular (see Inbau, Reid, Buckley, & Jayne, 2011[2]), they have trained thousands of police investigators, and they present extensive materials for prosecutors and others to challenge the testimony of confessions in court. In this meta-analysis, we seek to bring more clarity to the ongoing disparities between reliable findings commonly accepted by scholars and rejection of those findings by courts, trainers of interrogators, and others.

Broadly speaking there are two forms of meta-analysis. The first, and most common in psychology, synthesizes relationships among variables within studies. For example, as discussed previously, one meta-analysis examined differences in psychological process in true and false confessions, using six studies that compared both types of confessions (Houston et al., 2014). Such meta-analyses usually focus on correlations or differences among groups. Another meta-analysis (Meissner et al., 2014) examined how different interrogation techniques influenced the false confession and included only studies that compared interrogation techniques.

The second form of meta-analysis focuses on a single variable within a study and examines the estimate of the variable across studies and how it changes with selected moderator variables (Lipsey & Wilson, 2000). This form of meta-analysis includes such foci as test reliability and prevalence studies. Prevalence-based meta-analysis focuses on the proportion of an event within a study (Barendregt, Doi, Lee, Norman, & Vos, 2013). In prevalence-based meta-analysis, relations among variables are examined across studies. Simply stated, one study represents one level of a moderator and another study represents another level of the moderator variables. Such between-studies analyses, because they lack random assignment, have more uncertainty than when the moderator variables are examined within studies that employ random assignment. Nevertheless, such analyses are suggestive of meaningful relations that may be investigated in future research (Wood & Eagly, 2009). One can examine relations among variables that have never been investigated within any single study. Although such an examination may lack the controls of within-study research, they establish the feasibility of hypotheses that can be investigated in future research (Wood & Eagly, 2009).

We employed a prevalence meta-analysis using the false confession rate as the effect size. The false confession rate is the number of participants who make a false confession out of the total number of participants. We compare the false confessions rate across studies and within studies when possible. In order to combine effect sizes across and within studies, we treat independent groups within a study as separate observations and do not employ the statistical analysis conducted within the studies.

2 | METHOD

2.1 | Identification, retrieval, and selection of studies

Using relevant individual search terms (i.e., "false admission," "false confession," "false evidence," "laboratory confession," "interrogation," and "Alt-key"), we searched the following databases for relevant studies: Criminal Justice Abstracts, ERIC, CSA Linguistics and Language Behavior Abstracts, National Criminal Justice Reference Service Abstracts, PAIS International, PsycARTICLES, Social Services Abstracts, Sociological Abstracts, PsycINFO, Access Science, Criminal Justice Abstracts, Criminal Justice Periodicals, Dissertations & Theses, Dissertations & Theses: A&I, Dissertations & Theses: Full Text, JSTOR, GOOGLE scholar, Social Sciences Full Text, Science Citation Index and Science Direct. From this search, we selected experimental studies conducted in laboratory settings in which researchers attempted to elicit confessions from adult participants after falsely accusing the participants of

[2]For a historical point, the Inbau and Reid (1967) manual stated, "if deceit is impermissible a ban will have to be placed on all interrogations of criminal suspects. And without some elements of 'trickery,' such as leading the suspect to believe that the police have some tangible or specific evidence of his guilt, many interrogations will be totally ineffective" (pp. 196–197).

committing a forbidden act. We found additional references by searching the Science Citation Index for relevant articles that cited the selected articles and by examining the references cited in each of the selected studies. We found 19 publications that fitted our criteria for inclusion.

2.2 | Coding system and moderator variables

We developed a coding system to rate each data point within the studies. For the data points in this meta-analysis, we used the individual experimental groups within the studies. The data points consisted of non-overlapping participants who experienced different experimental manipulations; therefore, no participants were in more than one data point. We focused on data points, rather than averaging within a study, to examine the effects of moderator variables.

For each data point, we coded the number of confessions and the total number of participants. Based upon this information, we calculated the prevalence rate of false confessions. We also coded the following potential moderator variables: (1) experiment method (Alt-key, social cheating, or individual cheating); (2) plausibility-typing speed (fast or slow); (3) plausibility-location (high or low); and (4) FEP (present or absent). When coding typing speed, we coded a presentation rate of > 60 characters/minute as fast, and we coded a presentation rate of < 60 characters/minute as slow. The median for fast typing was 67 characters/minute (range 64–67; all but one study had a fast typing rate of 67 characters/minute), and the median for slow typing was 43 characters/minute (range 43–55; all but two studies had a slow typing rate of 43 characters/minute). We coded plausibility-location for typing tasks only, and we coded plausibility-location related to the placement of the forbidden key. We coded forbidden keys within two rows of keys from the spacebar as having high plausibility of error (e.g., Alt-key), and we coded forbidden keys more than two rows away from the spacebar as having low plausibility of error (e.g., Esc-key).

Several studies failed to report the actual number of participants in each data point but reported the percentage of confessions in each. We contacted authors of these articles, but some did not respond to repeated requests. Therefore, in several studies we estimated the number of participants included in each condition by assuming that the groups were all the same size.

2.3 | Analysis

We employed Comprehensive Meta Analysis 2.0 (Borenstein, Hedges, Higgins, & Rothstein, 2005) and Meta Win 2.0 (Rosenberg, Adams, & Gurevitch, 2000) as the statistical platforms for completing the statistical analysis. For the summation of the prevalence findings, we computed prevalence point estimates and 95% confidence intervals (CIs).

The prevalence effect size was the event rate (i.e., number of individuals in a group making a false confession divided by the total number of persons in the group). After a continuity correction, we converted each event rate to a log event rate for the analysis, and we converted it back to event rate when reporting the results. We examined the results with other data transformations (see Barendregt et al., 2013), and the results with other transformations were quite similar for this dataset.

We used a random effects model to calculate the overall mean effect sizes and the 95% CIs (Borenstein, Hedges, Higgins, & Rothstein, 2009). Random effects models allow for the possibilities that there exist both errors stemming from sampling error and random differences between studies associated with variations in procedures, settings, and similar factors. The random effects model was more plausible because data points with different experimental manipulations served as our unit of analysis.

We conducted moderator analyses with a mixed effects model. In a mixed effects analysis, a random effects model is used to combine studies within each group to be compared. A fixed effects model is then used across the groupings in the moderator variables. Here we used a fixed effects model due to the small number of levels within the moderator variables. We based all moderator variables in this analysis upon dichotomous groupings of the data points.

3 | RESULTS

3.1 | Database demographics

The resulting database for this meta-analysis consisted of 19 publications or theses with 24 studies; some publications included more than one study, and 52 data points contained a total of 1,638 participants (Tables 1 and 2). The participants in these studies were not representative of the population of the United States or of defendants

TABLE 1 Typing task studies by first author and year, with sample size, false confession rate (FCR), plausibility location keys, typing speed, and presence (yes or no) of false-evidence ploy (FEP)

Study	Year	Sample size	FCR rate	95% CI	Key(s)	FEP	Typing speed
Blair a	2007	98	0.27	0.19–0.36	Alt-Ctrl-Del	Yes	Not reported
Blair b	2007	98	0.29	0.21–0.38	Alt-Ctrl-Del	No	Not reported
Forrest a	2002	27	0.52	0.33–0.70	Alt	No	67/minute
Forrest b	2002	29	0.69	0.50–0.83	Alt	No	67/minute
Forrest	2006	98	0.82	0.72–0.88	Alt	No	67/minute
Hickcox	2009	56	0.75	0.62–0.85	Alt	No	Not reported
Horselenberg 1a	2006	26	0.58	0.39–0.75	F12	Yes	Not reported
Horselenberg 1b	2006	30	0.77	0.59–0.88	Windows	Yes	Not reported
Horselenberg 2	2006	9	0.11	0.02–0.50	Windows	Yes	Not reported
Horselenberg	2003	34	0.79	0.62–0.92	Shift	Yes	Not reported
Kassin a	1996	17	0.97	0.68–0.99	Alt	Yes	67/minute
Kassin b	1996	18	0.89	0.65–0.77	Alt	Yes	43/minute
Kassin c	1996	17	0.65	0.40–0.83	Alt	No	67/minute
Kassin d	1996	23	0.26	0.12–0.47	Alt	No	43/minute
Klaver a	2008	71	0.70	0.59–0.80	Alt	No	67/minute
Klaver b	2008	62	0.47	0.35–0.59	Alt	No	67/minute
Klaver c	2008	30	0.23	0.12–0.42	Esc	No	67/minute
Klaver d	2008	40	0.05	0.01–0.18	Esc	No	67/minute
Newring	2008	26	0.19	0.08–0.39	Alt	No	64/minute
Perillo 1a	2010	14.2	0.27	0.10–0.54	Alt	No	43/minute
Perillo 1b	2010	14.2	0.36	0.16–0.62	Alt	No	43/minute
Perillo 1c	2010	14.2	0.79	0.51–0.93	Alt	Yes	43/minute
Perillo 1d	2010	14.2	0.87	0.59–0.97	Alt	Yes	43/minute
Perillo 1e	2010	14.2	0.77	0.50–0.92	Alt	Yes	43/minute
Perillo 2a	2010	19	0.74	0.51–0.89	Alt	Yes	43/minute
Perillo 2b	2010	19	0.47	0.27–0.69	Alt	No	43/minute
Redlich a	2003	16	0.69	0.43–0.86	Alt	No	55/minute
Redlich b	2003	16	0.50	0.27–0.73	Alt	Yes	55/minute
Swanner a	2010	25	0.65	0.45–0.81	Tab	Yes	67/minute
Swanner b	2010	25	0.62	0.42–0.78	Tab	Yes	67/minute
Swanner c	2010	25	0.52	0.33–0.70	Tab	No	67/minute
Swanner d	2010	25	0.26	0.12–0.46	Tab	No	67/minute

Note: FEP is either present (yes) or absent (no). The letters following each first author's name indicate experimental subgroups of distinct participants. Sample sizes that are not whole numbers reflect estimates based on percentages reported in publications. CI, confidence interval.

TABLE 2 Cheating task studies by first author and year, with sample size, confession rate, and cheating type (social or individual)

Study	Year	Sample size	Confession rate	95% CI	Cheating type
Guyll	2013	74	0.43	0.33–0.55	Social
Hill a	2008	14	0.03	0.00–0.37	Social
Hill b	2008	13	0.04	0.00–0.38	Social
Horgan a	2009	33	0.42	0.27–0.60	Social
Horgan b	2009	33	0.21	0.11–0.38	Social
Marschall	2013	73	0.29	0.19–0.40	Social
Narchet a	2005	35	0.20	0.10–0.36	Social
Narchet b	2005	35	0.40	0.25–0.57	Social
Narchet c	2005	35	0.29	0.16–0.45	Social
Perillo 3a	2010	15	0.03	0.00–0.35	Social
Perillo 3b	2010	15	0.50	0.27–0.73	Social
Russano a	2005	37	0.05	0.01–0.20	Social
Russano b	2005	37	0.14	0.06–0.29	Social
Russano c	2005	37	0.19	0.09–0.35	Social
Russano d	2005	37	0.43	0.28–0.60	Social
Horselenberg 3	2006	16	0.06	0.01–0.41	Individual
Nash 1a	2009	15	0.73	0.47–0.90	Individual
Nash 1b	2009	15	0.97	0.65–0.99	Individual
Nash 2a	2009	15	0.80	0.53–0.93	Individual
Nash 2b	2009	15	0.93	0.65–0.99	Individual

Note: The letters following each first author's name indicate experimental subgroups of distinct participants. CI, confidence interval.

in criminal cases, as discussed later. All studies evaluated undergraduate students as participants; when specified, all students were in the social sciences. Based upon those studies that reported age, the mean age was 19.60 years (range 18–21.2). All but one study reported the number of males and females; overall, males comprised slightly less than one-third of the sample (32.56%). Other demographic characteristics (e.g., ethnicity) were reported in only a few studies. Comparisons of gender and ethnicity remained rare.

3.2 | Mean effect sizes

The point estimate event rate across groups was 0.47 (95% CI: 0.40–0.55). Across all studies, 47% of the participants falsely confessed. Although our *a priori* decision was to use the random effects model, we examined the fixed effects model as well. The overall rate and CI were similar to the random effects model (fixed model point estimate = 0.47, 95% CI: 0.44–0.50), but the fit of the fixed effects model was poor (Q = 321.01, df = 51, p < 0.001), and I^2 was 84.11, suggesting a very large degree of heterogeneity that cannot be explained only by sampling error (Higgins, Thompson, Deeks, & Altman, 2003).

In any meta-analysis, there is always the possibility that studies exist that were not included due to unavailability and/or being unpublished (i.e., the file-drawer effect). We employed Orwin's (1983) method to determine the number of studies that would make the prevalence trivial. We found that 89 studies with a 1 per 100 prevalence would have to exist to bring the overall prevalence down to 5 per 100.

Publication and selection biases in meta-analysis are more likely to be found in studies with small sample sizes than in those with large sample sizes (Begg, 1994). One way of examining whether that occurred in the current

meta-analysis is the Begg and Mazumdar rank correlation method (Begg & Mazumdar, 1994), which examines the relationship between the ranks assigned for the effect size and the sample sizes. Significant correlations suggest a publication bias. In the current study, we found a very low rank correlation ($\tau = 0.05$, $p = 0.54$). Similar results were found with Egger's test ($t = 0.06$, $p = 0.95$; $df = 50$)

To estimate what the weighted average effect size might be without publication bias, we used the trim-and-fill method (Duval & Tweedie, 2000). The funnel plot showed no obvious signs of asymmetry, and no adjustment was necessary.

3.3 | Sensitivity analyses

We examined the robustness of the overall findings against the effects of an outlier by sequentially eliminating one study at a time and reanalyzing the remaining dataset. A new analysis was conducted after each study was removed. Even when the study with the largest impact was dropped, the resulting point estimate changed by only 0.02. The impact of any single study remained trivial.

We decided to evaluate the effects of data points with no confessions or all confessions. To check how our decision process affected the data, we examined the prevalence after dropping these five studies. The results were very similar to the total sample; the point estimate was 0.48 (95% CI: 0.40–0.56) for the random effects model.

3.4 | Moderator analyses

The only moderator analysis to employ the entire dataset was the comparison of the experimental task (Alt-key, social cheating, or individual cheating). The other moderator analyses examined subsets of studies within the three task types.

3.4.1 | Moderator variables

There was a significant difference across the three methods ($Q = 21.54$, $df = 2$, $p < 0.001$). The event rate (i.e., prevalence of false confessions) of the 32 Alt-key data points (see Table 1) was 0.55 (95% CI: 0.46–0.64). The 15 social cheating data points (see Table 2) had a mean false confession rate of 0.26 (95% CI: 0.18–0.3), and the five individual cheating data points (see Table 2) had a mean false confession rate of 0.75 (95% CI: 0.48–0.90). The event rate for the social cheating method was significantly lower than for the other two methods, which did not differ from each other (social cheating vs. Alt-key, $Q = 16.70$, $df = 1$, $p < 0.001$; social cheating vs. individual cheating, $Q = 14.91$, $df = 1$, $p < 0.001$; Alt-key vs. individual cheating, $Q = 2.05$, $df = 1$, $p = 0.15$). Due to the differences across methods, we examined the remaining moderators within the Alt-key task.

3.4.2 | Within Alt-key task moderators: Plausibility-typing speed

Kassin and Kiechel (1996) hypothesized that asking participants to type faster would lead to greater rates of false confessions due to their perceived increased likelihood of accidentally pressing the forbidden key. In spite of the initial findings of significant differences (Kassin & Kiechel, 1996), across studies speed at which the typing task was performed did not serve as a significant predictor of false confession rates ($Q = 0.95$, $df = 1$, $p = 0.33$). The typing of 11 data points using a slower typing rate had a mean confession rate of 0.62 (95% CI: 0.45–0.76), and the 14 data points with a fast-paced typing rate had a mean confession rate of 0.51 (95% CI: 0.38–0.64).

3.4.3 | Within Alt-key task moderator: Plausibility-location

In several studies, researchers hypothesized that placing the forbidden key far from the spacebar made false confessions less likely because of implausibility of making such errors. Manipulation of plausibility with the placement of the forbidden key in the typing paradigm studies had a significant effect on the false confession rate ($Q = 10.01$, df 1, $p = 0.01$). For the 23 data points with forbidden keys close to the spacebar (e.g., Alt-key, Shift-key, Windows-key or

Control-key) the mean false confession rate was 0.64 (95% CI: 0.55–0.72), and the false confession rate for the 9 data points with the forbidden key was placed far from the spacebar (e.g., Esc-key) was 0.37 (95% CI: 0.25–0.51). Interestingly, the only study to evaluate plausibility-location directly (Horselenberg et al., 2006) found no significant difference.

3.4.4 | Within Alt-key task moderators: FEPs

Several studies hypothesized that the use of FEPs would increase the false confession rate. Across all typing data points we found that FEPs elicited significantly higher rates of false confession ($Q = 4.70$, $df = 1$, $p = 0.030$). The mean false confession rate for the 14 data points with an FEP was 0.68 (95% CI: 0.54–0.79), and for the 18 data points without an FEP the mean false confession rate was 0.47 (95% CI: 0.35–0.59).

A secondary meta-analysis of the six Alt-key studies that directly compared FEPs with no FEPs found that FEPs produced more confessions (log odds =1.034, $p = 0.044$). Across these studies, the false confession rate with FEPs was 57%, and that without FEPs was 37%.

In the individual cheating studies, all conditions used FEPs, while the social cheating studies did not. The single social cheating study that compared FEP conditions (i.e., explicit FEP and bluff, a form of implicit FEP) with a no-FEP condition and found significantly more confessions after FEPs (Perillo & Kassin, 2011).

4 | DISCUSSION

Across studies, approximately 47% of innocent participants falsely confessed. This effect does not differentiate between methods; rather it serves as a limited representation of false confession rates among experimental studies. Additional cautions are necessary. As discussed previously, experimental studies bring benefits of extensive experimental control and ethical treatment of participants, and these factors reduce realism. Additionally, unlike police investigators, researchers have access to the ground truth, and many of the studies in this meta-analysis evaluated only participants presumed to be innocent. Therefore, this single prevalence number reflects the structures of interrogation research rather than an estimated false confession rate among actual suspects, and we do not attempt to connect this outcome to any estimates of the actual rate of false confessions in police interrogations, which, as discussed previously, appear substantially lower as assessed using a variety of methods. In the materials that follow, we evaluate moderator variables and the ways in which these meta-analytic outcomes can guide research and practice.

4.1 | Task

The task served as a major differentiating moderator variable between studies. Studies that utilized the Alt-key task resulted in higher rates of false confessions than did the studies that employed social cheating tasks. A fundamental distinction between the Alt-key studies and social cheating methods is the nature of the act to which participants confess. As discussed, a suspect's admission that he or she accidentally hit the Alt-key is more similar to an admission of negligence than to a confession of an intentional criminal act (Houston et al., 2014; Perillo & Kassin, 2011). These findings suggest that cheating and typing studies comprise distinctive paradigms that reflect the differences between a criminal action and a negligence tort. Future research should seek to examine moderator variables between and within these approaches.

For an additional analysis of the consequences of the task, we compared social and individual cheating methods. The data points from the Russano et al. (2005) social cheating method (e.g., Horgan, 2009; Narchet, 2005; Perillo & Kassin, 2011) resulted in a smaller probability of eliciting a false confession than did studies that used individual cheating tasks (e.g., Hill et al., 2008; Horselenberg et al., 2006; Nash & Wade, 2009). This finding may relate to the power of the FEPs used in all individual cheating studies. For example, across all conditions of the Nash and Wade

(2009) study, all participants confessed when confronted with false claims of video evidence or shown fabricated video evidence. These outcomes demonstrate that differences in interrogation tactics under study and differences in the methods to assess these tactics can lead to important differences in confession rates.

4.2 | Plausibility of error: typing speed and location

Some scholars (e.g., Kassin, 1997; Kassin & Kiechel, 1996) have suggested that the speed at which participants type would influence false confession rates such that participants who type faster would be more likely to believe they made a typing error and, in turn, would be more likely to confess falsely. Similarly, scholars have argued that the location of the forbidden key would affect participants' certainty about their innocence and that participants accused of making a more plausible error would be more likely to confess falsely. As this meta-analysis demonstrates, typing speed does not affect participants' likelihood of false confession, but when the forbidden key was near the spacebar, participants' rates of false confession increased. One explanation for the mixed effects is the small number of conditions that investigated these variables; despite the limitations of the Alt-key method, we recommend a greater degree of replication of research examining typing speed and key location to increase the strength of future meta-analyses.

A second explanation relates to typing speed and forbidden key location as analogs of participants' uncertainty about their innocence and the applicability of this method to criminal interrogations. As noted previously, the Alt-key task does not simulate confessions of intentional criminal acts (see Houston et al., 2014; Perillo & Kassin, 2011), but we recommend further evaluation of this negligence method for three reasons. First, although these manipulations may not simulate a suspect's perceptions of the likelihood that he or she committed a major crime, many negligence cases hinge on defendants' admissions to have failed to take reasonable precautions, and these admissions may function in ways that are similar to the Alt-key paradigm. For example, in a civil or criminal negligence case resulting from an automobile accident, a defendant may be more likely to admit to not using his or her turn signal (i.e., a more plausible act) than to swerving radically across lanes (i.e., a less plausible act). We encourage scholars to extend these research methods into civil questions related to admissions of liability and to resultant damage awards, and we encourage scholars to continue their search for ethically appropriate and ecologically valid manipulations.

A second justification for the continued study of plausibility relates to police interrogation strategies. These findings demonstrate that more plausible false accusations are more likely to induce false confessions, and we encourage scholars to investigate this possibility experimentally as well as with more ecologically valid methods. A third concern relates to the plausibility of FEPs. Alongside concerns about plausible but false accusations, highly plausible forms of FEPs (i.e., fabricated evidence that appears highly plausible), as recommended by trainers of interrogators (Inbau et al., 2011; Jayne & Buckley, 1999), may raise false confession rates. Scholars have not yet experimentally investigated these questions as applied to more or less plausible FEPs.

4.3 | False-evidence ploys

Across studies and methods, FEPs that included presentation of described or actual fabricated evidence increased rates of false confessions.[3] These findings parallel concerns about FEPs in actual cases, particularly because FEPs have "been implicated in the vast majority of documented police-induced false confessions" (Kassin et al., 2010, p. 12). Although John E. Reid and Associates (2015b) argue that a limitation of these studies is that many researcher-

[3]A bluff is a form of an implicit FEP (see Woody et al., 2013) in which investigators falsely claim that evidence exists but will be tested in the future (see Perillo & Kassin, 2011). We included examinations of bluffs by Perillo and Kassin (2011) in our analyses of studies that include explicit FEPs (i.e., a ploy in which investigators directly claim that false evidence exists) for three reasons. First, Perillo and Kassin (2011) found that false confession rates from explicit and implicit FEPs did not differ and that these forms of FEPs raised false confession rates in similar ways. Second, Woody et al. (2013) found that jurors do not distinguish between implicit and explicit FEPs. Third, Woody et al. (2013) argue that implicit and explicit FEPs both involve police deception about evidence and that these methods do not function in psychologically distinct ways.

interrogators have not been formally trained in these techniques, some researchers have received training,[4] and, perhaps more importantly, FEPs executed by trained, experienced interrogators may be more rather than less powerful for both guilty and innocent suspects.

These results suggest that investigators and those who train them (e.g., Inbau et al., 2011; Jayne & Buckley, 1999) remain overconfident in claims that innocent suspects remain safe from negative consequences of FEPs. For example, Inbau et al. (2011) ask readers to "consider an innocent rape suspect who is falsely told that DNA evidence [implicates his guilt]. Would this false statement cause an innocent person to … confess? Of course not! … Under these conditions [false confession] becomes much more plausible … – not because fictitious evidence was presented, but because that evidence was used to augment an improper interrogation technique" (pp. 351–352). The authors then refer to the possibility that an FEP alone could cause a false confession as "absurd" (p 352).[5] Inbau et al. (2011) and others (e.g., Jayne & Buckley, 1999) recommend caution with FEPs, not because of the potential for false confession but because an FEP may backfire and inform a suspect that the police do not have actual evidence (e.g., if police falsely claim that a witness saw the suspect flee through the front door, the guilty suspect who knows that he or she fled out the back door now knows the police do not have an actual eyewitness). We suggest far more caution. Rather than being implausible, the stark and consistent findings of increased false confession rates resulting from FEPs provide further support for claims that these forms of deception are coercive for innocent suspects, particularly given findings from Rogers et al. (2010) that a majority of criminal defendants in their sample erroneously believed that police deception about eyewitness evidence is "legally wrong" (p. 310). Additionally, these findings raise important concerns because under controlled experimental conditions it remains highly unlikely that researchers consistently included improper, illegal, or coercive yet unreported interrogation tactics in their methods, as alleged by Inbau et al. (2011). The increase in false confession rates across studies appears to rest directly on the use of FEPs alone.

These findings reinforce some observers' concerns about the effects of FEPs, particularly because jurors and juries accept confessions and often convict defendants even when confessions result from FEPs (Woody & Forrest, 2009; Woody, Forrest, & Yendra, 2013). Further research, however, should seek to examine how types of FEPs, such as demeanor, testimonial, or scientific FEPs (see Forrest et al., 2012; Leo, 2008; Woody & Forrest, 2009) may differentially affect false confession rates. These meta-analytic findings provide additional justification for courts to revisit the coerciveness of police deception during interrogation, particularly deception about evidence, (see Bandler, 2014a, 2014b; McKinley, 2014; *People v. Thomas*, 2014) as well as for the calls by some scholars for the United States to follow Great Britain in the elimination of police deception during interrogation (e.g., Kassin et al., 2010; Kassin & Gudjonsson, 2004; Woody et al., 2011).

4.4 | Limitations

Limitations exist both for this meta-analysis and for the experimental study of false confessions. Limits to the present meta-analysis include the lack of access to all raw data and extensive variability of research methods across studies. Researchers often did not include raw data, particularly for prevalence of false confessions within each experimental condition, and, as stated previously, some did not respond to our requests for information; therefore, in some cases we estimated the number of participants in conditions.

The extensive variability in these studies is a strength as well as a limitation of the field because scholars have evaluated a wide range of crimes and interrogation methods that include general techniques (e.g., minimization, which includes reducing the perceived legal seriousness of the crime, reducing the perceived moral seriousness of the crime, implicitly reducing the perceived potential consequences of confession, and similar tactics) as well as more specific interrogation tactics [e.g., FEPs involving physical evidence or fabricated video evidence; see Horselenberg et al.,

[4]Among other scholars who have been trained, the following have personally verified their training with at least one of the current authors: J. T. Perillo (personal communication, March, 2010) and S. A. Woestehoff (personal communication, September, 2013).

[5]For a prior use of "absurd," see the 4th edition of the manual (Inbau, Reid, Buckley, & Jayne, 2001, p. 429).

2006 and Nash & Wade, 2009, respectively]. This variation in research methods and variables, however, allows the field to reflect the extensive variation in police interrogation tactics (Leo, 2008; Wallace, 2010). This variability, however, also limits the general conclusions available through meta-analysis. The apparent variability may also be misleading, however, because many studies in this sample emerged from programmatic research generated by a small number of laboratories using similar methods with relatively homogenous populations of university students as participants.

Other limitations of this body of research also limit the meta-analytic conclusions. The participants are not representative, the consequences of confessing are not representative, and the tasks are not representative of actual criminal interrogations. All the studies share substantially limited ecological validity and artificially disconnected variables that co-exist in typical interrogations [e.g., minimization and FEPs may occur within the same interrogation (Kassin et al., 2007) but are generally examined separately in this literature]. The consequences of these limitations remain unknown, but experts are likely to face challenging cross-examination regarding these aspects of the research, as recommended by Inbau et al. (2011), among others.

4.4.1 | Participants

The samples employed in the studies are not representative of the sample of individuals charged with criminal acts, particularly compared with the typical levels of education and the distribution of ages of people in correctional facilities (Bureau of Justice Statistics, 2003a, 2010), criminal defendants, or police suspects. First, across all studies, traditional college students are the only participants, almost all of whom appear to come from the social sciences. Second, across all research methods, the majority of the participants were female, in contrast to the majority of individuals in incarcerated populations (Bureau of Justice Statistics, 2010) and the majority of drivers stopped by police as well as drivers searched by police (Bureau of Justice Statistics, 2003b, 2011). The potential limitations of the generalizability of findings as a function of gender of the participants remain unknown. Additionally, traditional college students may be less vulnerable than criminal suspects due to college students' likelihood of being adults rather than children, low likelihood of intoxication, and low likelihood of cognitive disabilities (Gudjonsson, 2003). Alternatively, college students may be more vulnerable, particularly in the Alt-key and individual cheating studies, due to their factual innocence (Kassin, 2005, 2012) or to their likely limited experience with the law, as courts have suggested (e.g., *Lynumn v. Illinois*, 1963).

4.4.2 | Consequences

The consequences of the perceived transgressions also limit the realism of the research. Scholars working within ethical limits cannot ask undergraduate participants to risk incarceration, publication of their transgressions to family, friends, and other communities, and other consequences that come with conviction and incarceration. Researchers have informed participants that they would face consequences that appear serious to traditional undergraduate participants (e.g., having to speak to a professor about possible cheating allegations; Russano et al., 2005), and, more substantially, when Horselenberg et al. (2006) raised the consequences of false confession to paying €250, this increase in the severity of consequences decreased the false confession rate, but all of these consequences pale in comparison to actual criminal consequences, particularly for severe crimes.

4.4.3 | Tasks

Perhaps the most serious limitation of the research relates to the transgressions to which the students falsely confess. Participants in the Alt-key studies confess to negligence, and participants in the social cheating studies confess to helping a colleague in apparent need, which, as Russano et al. (2005) explained to students who were guilty of violating test rules, was "an admirable, benevolent, and prosocial act" (p. 484). Selection of these violations reflects scholars' ethical goals and requirements for appropriate treatment of participants. Across studies, the transgressions studied would violate what Elliot Turiel (1983, 2002) and colleagues consider conventional rather than moral rules. Much research outside the false confession domain has demonstrated that individuals behave differently when a rule is deemed merely a social convention rather than being based upon moral principles associated with harm and rights.

Perhaps the false confession rate would be much lower if the students, within the constraints of ethical research, were confessing to a moral transgression that harmed another individual rather than to a violation of test norms or of simple arbitrary social conventions.

Additional limits of these conclusions relate to limited realism as necessitated by ethical treatment of participants. As noted previously, researchers cannot ethically require participants to commit actual crimes, expose participants to the actual legal risks of false confession, interrogate participants for hours, or induce the high levels of stress typical in police interrogations (Costanzo & Leo, 2007; Inbau et al., 2011; Jayne & Buckley, 1999; John E. Reid and Associates, 2015b, 2015c; Meissner, Russano, & Narchet, 2010). Scholars have called for increased collaboration with law enforcement officials and other interrogators to increase the realism of research methods while maintaining effective ethical safeguards and to evaluate the diagnosticity of interrogation techniques (Meissner, Hartwig, & Russano, 2010; Woody et al., 2013), and we echo these calls.

Despite the differences between experimental studies and actual interrogations, experimental settings allow for systematic and controlled study of specific techniques and relevant outcomes. Primarily, the factors revealed in the meta-analysis that increase false confessions in experimental studies (e.g., FEPs) also have well-documented consequences for real suspects in the field (Kassin et al., 2010). The advantages of controlled experimental study can provide insights that remain inaccessible in the complex world of actual interrogations.

4.5 | Larger implications

The current study demonstrates that this body of experimental work is now large enough for meta-analysis, suggesting that laboratory false confession research is no longer a fledgling field or specialized research paradigm, but rather an established and growing body of tested, reliable, peer-reviewed experimental research accepted by relevant scientific communities that could inform courts (see Costanzo & Leo, 2007; *Daubert v. Merrell Dow Pharmaceuticals*, 1993; *United States v. Hall*, 1997). Not only has the body of false confession research demonstrated that innocent individuals falsely confess, but the meta-analysis also extends prior narrative reviews and demonstrates that this is "a research literature that is characterized by eclectic methods that have produced convergent results" (Kassin, 2008, p. 204) in some areas and that some interrogation strategies increase the likelihood of false confession. Experts can readily testify to the outcomes and limitations of the existing experimental studies of false confessions (see Fulero, 2010b; Kassin, 2008) and elaborate upon the effects of moderator variables such as FEPs on confession rates. Although courts vary extensively, as noted previously, we hope that these outcomes can provide experts with increased opportunity to educate courts about police interrogation and the potential for false confessions. Additionally, we hope these meta-analytic findings encourage courts to continue to re-evaluate deception during police interrogation, particularly due to the increased likelihood of false confessions that result from FEPs (see Kassin et al., 2010; Kassin & Gudjonsson, 2004; Woody et al., 2011).

Education of courts and of jurors is paramount due to the prevalence of the myth of psychological interrogation, the belief that innocent people will not falsely confess in the absence of physical coercion or serious mental illness (Leo, 2008; Woody & Forrest, 2009; see also Chojnacki, Cicchini, & White, 2008) and the demonstrated impacts of expert testimony on jurors' perceptions and trial decisions (Blandon-Gitlin et al., 2011; Gomes et al., 2014; Leo & Liu, 2009; Woody & Forrest, 2009). Beyond jurors, a recent study of sitting judges revealed that judges view expert testimony as relevant for jurors; 72.7% of responding judges reported that they would allow an expert to educate the court about the police interrogation techniques and the possibility of false confessions (Woody et al., unpublished). Additionally, Woody et al. (unpublished) found that judges recognize the deception inherent in FEPs but that judges do not perceive FEPs as coercive; judges, however, were less likely to recommend conviction after reading expert testimony. Experts who present the risks of FEPs to courts have the potential to affect individual judges as well as to shape legal precedents and the larger legal landscape regarding police interrogation. This testimony may become increasingly relevant as courts reconsider whether specific forms of police deception constitute coercion (Bandler, 2014a, 2014b; McKinley, 2014; *People v. Thomas*, 2014).

Clinical forensic psychologists who serve as experts can also utilize findings from this meta-analysis. As noted previously, most studies in this meta-analysis evaluate college students, most of whom are legal adults rather than juveniles (see Gudjonsson et al., 2006; Redlich & Goodman, 2003; Viljoen, Klaver, & Roesch, 2005), and few of whom have substantial cognitive disabilities (see Gudjonsson & Clare, 1995; Kassin et al., 2010), serious mental illnesses (Redlich, 2004; Redlich, Kulish, & Steadman, 2011) or other factors that increase the vulnerability of a suspect (e.g., high suggestibility; Gudjonsson, 2003). Despite the lack of cognitive and mental health diversity among participants in these studies, these findings demonstrate that some tactics raise the likelihood of confession for participants who are less vulnerable than many actual suspects. If suspects bring additional vulnerabilities into the interrogation room, what impacts might these tactics have above and beyond the impacts on the study participants who are likely to be less vulnerable? Additionally, these tactics may be particularly powerful for those who face multiple vulnerabilities, such as juvenile suspects who struggle with mental illness (Redlich, 2007). Interrogation tactics interact with the identities and potential vulnerabilities of the suspect, and clinical experts can incorporate these findings into their relevant testimony about the larger totality of circumstances.

Due to the limited number of applicable studies as well as the wide variability of methods and moderator variables, we encourage scholars to continue to increase the size of this body of research and to further their commitment to ethical treatment of participants. For this research to continue, ethical standards must continue to evolve with emphases on protection of participants, even with the potentially paradoxical drive for increased realism (e.g., Russano et al., 2005). We join others in calling for increased collaboration with police and other interrogators with emphases on realism, ethics, and diagnosticity (Meissner, Hartwig, et al., 2010, Meissner, Russano, et al. 2010).

We encourage police interrogators and those who train them to consider these findings in their teaching as well as in their practices of interrogation. As Wallace (2010) argued, we perceive interrogators as highly variable practitioners who select methods to fit each suspect, crime, and situation, and we encourage interrogators to consider carefully general approaches as well as specific tactics. In particular, we encourage police interrogators and those who train them to consider carefully the potentially coercive influence of FEPs and other forms of deception during interrogation, particularly for innocent suspects. Fundamentally, we hope that uses and implications of the conclusions from this meta-analysis can decrease the likelihood of false confessions in actual interrogations, which come at an overwhelming price for the accused, the communities in which the crime occurred, and the courts, law enforcement officials, taxpayers, and the criminal justice system as a whole.

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