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State of Michigan
In the Supreme Court

People of State of Michigan,

Plaintiff-Appellee,

v.

Joshua Lamar-James Stewart,

Defendant-Appellant.

SC No.

COA No. 343755

Wayne County Circuit Court
Case No. 16-005731-01-FC

Filed under AO 2019-6

Appellant Joshua Lamar-James Stewart Application for Leave to Appeal

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Judgment Appealed from and Concise Allegations of Error

> *Mr. Stewart:* I am now desiring and agree to answer any questions to put me or to make any statement in the presence of – this supposed to be my name?
>
> *Officer MacDonald*: No, that would be me.
>
> *Mr. Stewart*: Okay.
>
> *Officer MacDonald:* You just initial—put your initials here. Your personalized initials. [Interrogation, p. 6., Appendix A]

Eighteen-year-old alternative high school student Joshua Stewart read his *Miranda* rights aloud to himself and at the end asked: "this supposed to be my name?" Mr. Stewart was referring to a blank space designated for the name of the person to whom he was agreeing to make a statement to. But he asked: "this supposed to be my name?" If Mr. Stewart had actually comprehended the words he was reading, he would not have asked that question. Mr. Stewart's subsequent waiver at the behest of the detective was invalid.

The Court of Appeals held that Mr. Stewart's waiver was valid because Mr. Stewart was able to read and because he was not suffering from a mental condition. *People v Stewart,* unpublished per curiam opinion of the Court of Appeals, issued November 24, 2020 (Docket No. 343755), Appendix B. But that is not the correct legal analysis, which requires a totality of the circumstances review. The Court of Appeals ignored the circumstances, particularly the police behavior and Mr. Stewart's increased susceptibility to coercive police tactics. Mr. Stewart was cajoled into waiving his *Miranda* rights by experienced detectives who used techniques to make him believe that signing his rights away was a forgone conclusion and just part of the process.

The police here intentionally minimized Mr. Stewart's constitutional rights by disguising them as ritualistic "paperwork" and directed him to sign away those rights, even when there was proof he did not understand their meaning. The police have no incentive to behave otherwise. Experience has told these officers that no one will care enough about

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someone like Mr. Stewart to hold them accountable for their blatant disregard of his constitutional rights. This Court should prove them wrong.

In addition, due to ineffective assistance of counsel, Mr. Stewart's three-hour interrogation video was admitted in full to the jury without redaction even though it contained references to a prior gun charge and unfounded accusations of gang involvement. The Court of Appeals agreed that the information in the interrogation video "was possibly untrue and was completely irrelevant" and that there could be no strategic reason for allowing the admission of evidence that "was contrary to the theory of the defense." *Id.* at 6. Still, the court determined Mr. Stewart suffered no prejudice. The unobjected to admission of this evidence prejudiced Mr. Stewart according to the court's own finding: the interrogation video "unnecessarily exposed Stewart to the risk that the jury could conclude that he committed the charged crimes because he was acting in conformity with typical gang activity." *Id. c*iting *People v Bynum*, 496 Mich 610 (2014). This is quintessential prejudice and Mr. Stewart is entitled to a new trial.

Lastly, Mr. Stewart's within guideline minimum sentence of 23 years for armed robbery is disproportionate and he is entitled to resentencing. In his concurring opinion, Judge Shapiro urged this Court to take action to address the question it left unanswered in *People v Ames,* 504 Mich 899 (2019): "How then can it be constitutional to mandate that appellate courts affirm any sentence that falls within the guidelines?" *Stewart,* (SHAPIRO, J., concurring), unpub op at 1. "A sentence cannot be both only *presumptively* proportionate and yet beyond review. And it is unconstitutional for the guidelines, now merely advisory, to bind a court, including appellate courts." *Id*. at 2. This Court should grant leave to issue an opinion making it clear that within guideline sentences are reviewable for proportionality by appellate courts.

This case is a vehicle to address multiple areas of jurisprudentially significant legal questions around *Miranda*, diminished culpability of youth, ineffective assistance of counsel, the rules of evidence, and the sentencing guidelines. This Court should grant leave to appeal to explore these significant issues.

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Statement of the Questions Involved

I. Did Mr. Stewart validly waive his *Miranda* rights where there is proof he did not understand what he was reading, where police used coercive tactics to obtain the waiver, and where Mr. Stewart's youth and limited intellect made him more susceptible to those tactics?

II. Did Mr. Stewart's involuntary waiver lead to an involuntary statement that was the product of psychological coercion by two experienced homicide detectives?

III. Was trial counsel ineffective for failing to object to the admission of the interrogation video played in full to the jury, and that contained repeated references to Mr. Stewart's prior gun conviction and to accusations that he was affiliated with a gang?

IV. Is Mr. Stewart's within guideline sentence disproportionate and subject to review by an appellate court?

Mr. Stewart answers:	Yes.
Court of Appeals answered:	No.

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Issue Preservation and Standard of Review

Issues I and II regarding the involuntary waiver and statement are preserved. Issue III regarding trial counsel's ineffectiveness is unpreserved. Mr. Stewart filed a motion to remand under MCR 7.211(C)(1), which was denied. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v LaPlaunt,* 217 Mich App 733; 552 NW2d 692 (1996). Issue IV regarding the disproportionality review of his sentence is not required to be preserved for review.

Factual questions are reviewed for clear error while the constitutional question of law is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579 (2002). Whether a rule of evidence or statute precludes admissibility of the evidence, is a question of law which is reviewed de novo. *People v Sierb,* 456 Mich 519, 522 (1998).

This Court may review the video tape of the interrogation and make its own findings without deference to the trial court. *People v Kavanaugh*, 320 Mich App 293, 298, (2017); *People v Kavanaugh*, 503 Mich 933 (2018).

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Statement of Facts

Mr. Stewart was 18 years old when he was arrested on the night of May 6, 2016 for incidents occurring earlier that day. The prosecution alleged that two men—not Mr. Stewart—committed robberies and assaults, leading to one death. It was alleged that Mr. Stewart's only involvement was as the driver of the car transporting the robbers, one of whom was co-defendant Deontae White. Mr. Stewart was arrested when police saw him at the hospital where Mr. Stewart took Mr. White who had been shot.

Mr. Stewart admitted his involvement as the driver to police during an interrogation that is the subject of this appeal.

The First Offense

Etoh Walker testified that he was with his friend Aaron Foster at around 5:00 pm walking down a street in Detroit. (I[1], 53). While walking to a gas station, a car pulled up near them, containing three men. Mr. Walker testified that two men jumped out of the back seat of the car, each armed with guns, and started to rob them. Mr. Walker identified co-defendant Deontea White as one of those two men. (II, 57). He testified that Mr. White fired several shots towards his feet in an effort to get Mr. Walker to give up his property. He gave Mr. White some cash from his pocket. (II, 67). He saw Mr. Foster give up some of his belongings to the men. Mr. Walker testified that Mr. White and the second man walked back to the car, but once they got there, Mr. White turned and fired at Mr. Foster, hitting him in the back and killing him. (II, 61-62). When he was running to help Mr. Foster, Mr. White saw the two men get back into the car as it drove away. (II, 63). He described the car as a dark colored Intrepid. (II, 64).

[1] The trial transcripts will be referenced in this brief by volume and page number. Other transcripts will be referenced by date and page number.

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The Second Offense

Kyle Upshaw testified that at around 6:00 pm, he was standing outside his house washing his car when a blue Intrepid rapidly drove up and stopped, and two men carrying guns got out. (III, 34). He identified Mr. White as one of those men who got out of the car. The men demanded money from Mr. Upshaw, but he responded he did not have any money on him. (III, 35). Mr. Upshaw then heard shots being fired, but did not see who was shooting. (III, 36). He ducked down behind his car and began shooting at the robbers with his own gun. (III, 37). Mr. Upshaw heard his brother, Daniel Claxton, calling from the house that he had been shot, and he ran into the house to help. Mr. Upshaw saw the car drive off. (III, 38). Mr. Upshaw drove his brother to the hospital for treatment.

Daniel Claxton, Mr. Upshaw's brother, was inside the house when he heard shouting from outside. (III, 9). When he looked outside, he saw two men with guns pointed at his brother. Mr. Claxton then grabbed his own gun and started firing at the two men. (III, 10). He exchanged shots with a man he identified in court as Mr. White. (III, 10). He believed that some of his shots hit Mr. White and that he was hit in the stomach by a shot fired by Mr. White. (III, 11-12). He later identified a photo of Mr. White as the person who shot him.

Mr. Stewart was Not Identified

No one identified Mr. Stewart as the driver of the car. Mr. Claxton nor Mr. Walker identified Mr. Stewart as involved in the incident. Neither did Mr. Upshaw.

When Mr. Upshaw first talked to police, the only description he was able to give of the driver was that he was wearing a white shirt. (III, 46; 57). At the preliminary examination two months later, Mr. Upshaw did not identify Mr. Stewart as the driver of the car. (III, 44). At trial four months later, however, he attempted to testify that he saw the driver and that it was Mr. Stewart. (III, 34-35). But, he eventually agreed that he had not seen Mr. Stewart driving the car at the time of the incident and had only seen him later that day at the hospital near an Intrepid.

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(III, 46, 48-49, 55). He admitted he had assumed Mr. Stewart was the driver of the car once he saw him with the Intrepid at the hospital. (III, 56).

Mr. Stewart is Arrested at the Hospital

Police at the hospital noticed a blue Dodge Intrepid arrive with its rear window broken out and damaged with bullet holes. (III, 71-72). Mr. Stewart was driving this car and was held at the scene by the police. Mr. White was in the car, suffering from gunshot wounds, and was taken into the hospital for treatment. (III, 72-73).

When he was first questioned, Mr. Stewart told the officers that he had been walking along, had seen a man in a car who had been shot, and offered to drive him to the hospital. (III, 73). The officers took Mr. Stewart into custody as they believed the Intrepid had been stolen. (III, 74).

Miranda[2] Warnings

At approximately 3:30 am, Mr. Stewart was brought into an interrogation room with two homicide detectives who told him they were questioning him about a stolen car.

At the start of the interrogation, Mr. Stewart told Detective MacDonald that he could read and write and that he last completed the 11th grade but had not finished 12th grade. (See DVD of interrogation at 3:36 through 3:41 that will be provided to this Court under separate cover; See also Appendix A, Interrogation Transcript, 4.)[3] He told the

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

[3] The video of the interrogation was played to the jury and admitted as an exhibit, but was not transcribed. On appeal, the parties stipulated to having the interrogation video transcribed by a certified court reporter to aid with the litigation of these issues. The transcript of the interrogation is attached as Appendix A and referred to as "Int." followed by the page number.

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detectives that he was attending Clintondale, an alternative school. The detectives asked no questions about his grades or reason for being in an alternative school placement. (Int., 4).

Detective MacDonald handed Mr. Stewart a certificate of rights form and asked Mr. Stewart to read his rights aloud: "So this is a certificate of your constitutional rights. So all I want you to do is read one through five and then next to each one you's [sic] going to put your initials. And all your initials indicates means you understand what you're reading and then if you have any questions you just ask me." (Int., 5). Mr. Stewart replies, "Right," and the officer directed: "And then what you'll do is you'll sign it here and we'll put the date and then we'll put the time." (Int., 5).

Mr. Stewart read the form aloud, stating:

> I understand that I have the right to remain silent and do not have do not have – do not have to answer any questions that – or make any statements. Any statements – this number two – any statement I make or anything I say will used against me in the court of law. I have the right to have an attorney, lawyer present[4] during the time I answer my questions or make any statements. If I cannot afford an attorney, lawyer, one will be appointed for me without cost by the court prior to any questions. I can decide at any time to exercise my rights and not answer any questions or make any statement. I understand that these are my rights under the law. I have not been threatened or promised anything. I am now desiring and agree to answer any questions to put me or to make any statement in the presence of – this supposed to be my name? [Int., 6; See also DVD at 3:38:58 - 3:39:47].

Immediately, Detective MacDonald reached over to the form and began pointing and stated, "No, that would be me" and "You just initial

[4] Mr. Stewart pronounces "present" as a verb rather than an adjective.

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– put your initials here. Your personalized initials." (Int., 6; See also DVD at 3:39:47 - 3:39:52).

At the same time, Mr. Stewart asks, "so what is my um charges?" and Detective MacDonald interrupts him to say "that stolen car." (Int., 6; See also DVD at 3:39:52 - 3:40). Mr. Stewart asks about other officers he thought were supposed to talk to him about the stolen car and Detective MacDonald states "I'm here to talk to you about the stolen car." (Int., 6; See also DVD at 3:40 - 3:40:18). Mr. Stewart says, "Oh, alright" and Detective MacDonald immediately points to the form and says, "And then your initials go right here, next to…your initials just mean that you read and you understood it." (Int., 7; See also DVD at 3:40:18 - 3:40:23). Mr. Stewart responds, "Alright." (Int., 7; See also DVD at 3:40:23).

Detective MacDonald tells Mr. Stewart where to sign and date and Mr. Stewart does so. (Int., 7. See also DVD at 3:41:23 - 3:41:43).

The Statement

After that, the interrogation begins. After nearly 2 hours of denying his involvement and being told he needs to "man the fuck up" and "man up to some shit" and "Be 18" (Int., 65, 66, 96, 97), being called a "dummy," (Int., 113), and being told he could potentially get two years if he cooperates with police and "20 to life" if he does not (Int., 84, 108-110, 115-116, 162-163), Mr. Stewart told detectives that he was the driver of the car. (Int., 115).

Pretrial Motion to Suppress

Prior to trial, defense counsel filed a motion to suppress Mr. Stewart's statement arguing that Mr. Stewart's *Miranda* warnings were not given to him properly and that he did not knowingly and voluntarily waive his rights. (Appendix C, Defense Motion to Suppress). Trial counsel argued that the interrogation was coercive and that the police lied and threatened Mr. Stewart to make a statement.

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In its response, the prosecutor argued that there was nothing coercive about the interrogation and that Mr. Stewart's statement and waiver were voluntary. (Appendix D, Prosecution Response to Motion to Suppress, pp. 8-9).

When issuing its decision denying Mr. Stewart's motion, the trial court stated: "The Court recognizes that for purposes of a *Walker*[5] Hearing that the People bear the burden of showing by a preponderance of the evidence that the defendant made a voluntary, knowing and intelligent waiver of his Fifth Amendment and Sixth Amendment rights to make a statement." (10/21/16, 3-4).

But a *Walker* hearing was never held despite Mr. Stewart's request. There was no testimony presented in court and the trial court denied the motion to suppress based on the pleadings alone; in their pleadings, neither party cited to the interrogation video. (See Appendices C and D).

The trial court denied the motion to suppress finding (1) that the length of the interrogation was not significant and (2) that "the reasonable interpretation of the Advice of Rights made by the officers in this case does in fact establish that the defendant was advised of his Constitutional rights." (10/21/16, 4-6). Further, the court found that "looking at the totality of the circumstances, the duration of the interview, the representations made by the officers, I'm not persuaded that it is an involuntary statement." (10/21/16, 8). The trial court never made a ruling on the validity of Mr. Stewart's waiver.

It is unclear whether the trial court even watched the interrogation video before rendering its decision:

> *Mr. Polk (defense counsel):* Judge, for the record there has not been anything placed on the record other than the fact that I filed my motion. The People filed their response, and there was a three-hour video.
>
> Is that video a part of the Court's analysis?

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[5] *People v Walker*, 374 Mich 331 (1965).

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> *The Court.* It is. The video, which is attached and is part of the prosecutor's response, and I think an attachment. It will be made part of the court file for any type of appellate review. [10/21/16, 8].

Interrogation Video Played for the Jury

At trial, the entire three-hour interrogation video was played for the jury. (See DVD video of interrogation that will be provided to this Court under separate cover; See also Appendix A, Interrogation Transcript; V, 5-6; VI, 3).

Throughout the interrogation, there are extensive references to Mr. Stewart's prior 2014-gun conviction and to his alleged affiliation with a rap group that the officers repeatedly refer to as a gang of dangerous criminals. The numerous and continuous references to this inadmissible evidence is detailed in *Issue III, infra.*

The Verdict and Sentence

Mr. Stewart and co-defendant Deontea White were tried jointly with separate juries. The third man that participated in the robberies with Mr. White was not apprehended or charged. Mr. Stewart was convicted of three counts of armed robbery, MCL 750.529, one count of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of receiving or concealing stolen property over the value of $1,000, MCL 750.535(3)(a), and one count of felony-firearm, MCL 750.227b. Mr. Stewart was acquitted of the murder of Mr. Foster and of assault with intent to commit murder. (VII, 26-27). Mr. White was convicted on the murder charge, as well as on the other counts, by his separate jury.

Mr. Stewart was sentenced to 23 to 46 years for armed robbery, 5 to 10 years for assault with intent to do great bodily harm less than murder, 1 to 5 years for receiving and concealing, and a consecutive 2-year term for felony-firearm. (ST, 11-12).

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Arguments

I. Mr. Stewart did not validly waive his *Miranda* rights where there is proof he did not understand what he was reading, where police used coercive tactics to obtain the waiver, and where Mr. Stewart's youth and limited intellect made him more susceptible to those tactics.

Mr. Stewart's waiver of his *Miranda* rights was invalid and his subsequent statement was inadmissible. US Const, Ams V, XIV and Const 1963, art 1, §17; *Miranda v Arizona*, 384 US 436(1966).

Two distinct inquiries are necessary to determine an effective waiver: (1) "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and (2) "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v Burbine*, 475 US 412, 421 (1986); *Berghuis v Thompkins*, 506 US 370, 382-383 (2010).

"Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice *and* the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Burbine,* 475 US at 421. (Emphasis added).

When considering the "totality of the circumstances," a court is required to evaluate Mr. Stewart's "age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving them." *People v Dauod,* 462 Mich 621, 634 (2000) quoting *Fare v Michael C.,* 442 US 707, 725 (1979).

Here, Mr. Stewart did not knowingly and intelligently waive his rights and his subsequent statement is inadmissible.

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A. When a person is asked to read their *Miranda* rights aloud to themselves, a valid waiver requires more than establishing that person can read. A valid waiver requires proof of reading comprehension.

A valid and voluntary waiver of *Miranda* rights requires a showing that Mr. Stewart understood the meaning of the rights he was reading and understood the consequences of giving up those rights. *Daoud*, 462 Mich at 640-641; See also *Burbine*, 475 US at 421.

"[T]he evaluation of an individual's reading level and the particular relevant *Miranda* warning sheets are a necessary precursor to evaluating an individual's competency to waive his *Miranda* rights." Kahn, et. al., *Readability of Miranda warnings and waivers: implications for evaluating Miranda comprehension*, 30 Law & Psychol Rev 119, 126–27 (2006). When a suspect is asked to read their *Miranda* rights aloud by themselves, as Mr. Stewart was, a knowing and intelligent waiver requires more than an individual's ability to read the words on the page. It requires an understanding of the meaning of the words; in other words, it requires reading comprehension. "[R]eading comprehension is defined as an individual's ability to derive meaning from printed words." *Id.*

Here, the record establishes only that Mr. Stewart could read, not that he understood the meaning of the words he was reading or their consequences. This Court is implored to watch the beginning of the video in which the "waiver" takes place; the video speaks for itself. (DVD provided under separate cover.)

When he was brought into the interrogation room at 3:30 am with two homicide detectives, 18-year-old Mr. Stewart explained that he could read and write, that he had stopped going to school in 11th grade, he had not yet finished high school, and he was attending an alternative school. (Int., 4). Alternative schools are designed to "meet the needs of children and adolescents who cannot learn effectively in a traditional school environment (i.e., conventional public or parochial schools) due to learning disabilities, certain medical conditions, psychological and

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behavioral issues, or advanced skills."[6] He had also "just got done with cancer." (Int., 76).

The detectives asked no questions about his grades, learning abilities, or reason for being in an alternative school placement.

The detectives introduced his *Miranda* warnings as paperwork, *see Section B, infra*, and Mr. Stewart read the paperwork aloud, stating:

> I understand that I have the right to remain silent and do not have do not have – do not have to answer any questions that – or make any statements. Any statements – this number two – any statement I make or anything I say will used against me in the court of law. I have the right to have an attorney, lawyer *present* during the time I answer my questions or make any statements. [Int., 5 (emphasis added); DVD at 3:38].

Mr. Stewart pronounced "present" as a verb rather than an adjective, changing the meaning of having a right to have a "lawyer present" to mean "to perform" rather than "to appear." Mr. Stewart continued:

> If I cannot afford an attorney, lawyer, one will be appointed for me without cost by the court prior to any questions. I can decide at any time to exercise my rights and not answer any questions or make any statement. I understand that these are my rights under the law. I have not been threatened or promised anything. I am now desiring and agree to answer any questions to put me or to make any statement in the presence of – this supposed to be my name? [Int., 6; DVD at 3:36 - 3:41].

When Mr. Stewart asked, "this supposed to be my name?" Detective MacDonald hurriedly reached over to the form and pointed at the paper and stated, "No, that would be me" and "You just initial – put your

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[6] *Encyclopedia of Children's Health,* available at <http://www.healthofchildren.com/A/Alternative-School.html> (accessed 1/18/21).

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initials here. Your personalized initials." (Int., 6). Mr. Stewart asks, "so what is my charges?" and Detective MacDonald mentions a stolen car. Mr. Stewart asks about other officers he thought were supposed to talk to him about the stolen car and Detective MacDonald responds, "I'm going to talk to you about the – the stolen car." (Int., 6). Mr. Stewart says, "Oh" and Detective MacDonald immediately points to the form and says, "Yeah. So, the initials go right here, next to – your initials just mean you read and you understood it." (3:40:18-3:40:23). (Int., 6-7). Mr. Stewart responds, "Right" and signed and dated the form with further instruction by the officer. (Int., 7; DVD at 3:40:23).

Had Mr. Stewart understood the meaning of the words he was reading, he would not have thought his own name was supposed to be inserted here: "I am now desiring and agree to answer any questions to put me or to make any statement in the presence of _____." (Int., 6; See DVD at 3:39:45). If Mr. Stewart was at all comprehending what he was reading and what his signature on the form meant, he would have known he was not being asked to agree to give a statement in the presence of himself.

Instead of responding to Mr. Stewart's question in a way that would have ensured he understood what he was reading, the detective hurriedly pushed him to sign the form. (Int., 6). Mr. Stewart was not given a meaningful opportunity to ask questions. The officer did not explain that Mr. Stewart had the choice *not* to sign the form or *not* to initial the form. The officer presented this to Mr. Stewart as it was a foregone conclusion that he had to sign the form if he was able to read the form aloud. *See Section B, infra.*

In *Daoud*, this Court analyzed whether the defendant's *Miranda* waiver was knowingly and intelligently made. There, the Court found a valid waiver, pointing to four independent factors:

1. The detective personally advised the defendant of his rights.

2. The detective had the defendant read along.

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3. The detective "stopped after each warning, asked defendant if he understood, and continued after defendant stated that he in fact understood."

4. After the reading of the rights, the defendant stated, "get on with it," evidencing his "awareness of the events that were transpiring."

Daoud, 462 Mich at 641.

Here, Mr. Stewart did not knowingly and intelligently waive his rights when the opposite occurred.

The detective did not personally advise Mr. Stewart of his rights and instead made him read his rights aloud on his own. Our Supreme Court has not expressly determined whether police must orally advise an individual of their *Miranda* rights. But, our courts have expressed preference that the police give suspects an oral recitation of their rights: "An effective waiver of *Miranda* rights does not require an oral recitation. Although it is not generally encouraged, a written advice-of-rights form may be sufficient. . . The use of a written form becomes more palatable in a case involving a defendant who is hearing-impaired." *People v Brannon*, 194 Mich App 121, 130 (1992) citing *People v Nantelle*, 130 Mich App 51, 52–53 (1992). Mr. Stewart was not hearing-impaired.

Unlike in *Dauod*, the detective did not stop Mr. Stewart after he read each warning, did not ask Mr. Stewart if he understood each warning, and did not ask for confirmation that Mr. Stewart understood each warning, despite clear signs that he did not. Mr. Stewart did not have "a full awareness" of the rights he was waiving or "the requisite level of comprehension" needed to understand the consequences of waiving his rights. *Burbine,* 475 US at 421.

All that was shown during the "waiver" process here was that Mr. Stewart could read. More is required.

B. The police used minimization techniques to treat Mr. Stewart's *Miranda* rights as paperwork rather than fundamental rights protected by the Constitution.

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"The requirement of warnings and waiver of rights is [ ] fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda*, 384 US at 476.

The giving of *Miranda* warnings and the waiver process is a fundamental constitutional right that is not to be treated as a perfunctory process. *Miranda,* 384 US at 476. The waiver is not complete when paperwork is signed. It is completed only when an individual knowingly and voluntarily waives away their rights. *Id.* at 444; See also *Butler,* 441 US at 373. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v Butler*, 441 US 369, 373 (1979).

The Court in *Miranda* held that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda,* 384 US 436. Mr. Stewart was cajoled into waiving his rights by the officer's use of a minimization technique designed to get a waiver.

"Minimization of the *Miranda* rights occurs when the police reduce the meaning of the warnings to a technicality, or otherwise minimize the importance of the warnings." Powell, *Do You Understand Your Rights As I Have Read Them To You? Understanding The Warnings Fifty Years Post Miranda*, 43 N Ky L Rev 435, 447-48 (2016) (internal citations omitted). Police characterize the *Miranda* warnings as "an administrative formality to complete before the suspect can talk. They sometimes referred to it as 'paperwork' to emphasize its bureaucratic quality. A waiver form provides a vehicle to convert *Miranda* into a bureaucratic exercise." Goldstein, et. al., *Waving Good-Bye to Waiver,* NYU Journal of Legislation and Public Policy, Vol. 21:1, p. 37 (2018).

This is done to "trivialize the legal significance of *Miranda* rights to be the 'equivalent to other standardized bureaucratic forms that one signs without reading or giving much thought' and to 'communicate that the interrogator expects the suspect ... to execute the waiver and respond to subsequent questioning.'" *Do you Understand Your Rights* at 447-448.

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Here, when the interrogation began, the detective told Mr. Stewart they were going to "go through some paperwork real quick, Man. There's going to be a couple questions about what happened—about what happened tonight." (Int., 3). Immediately, the officer signaled to Mr. Stewart that his *Miranda* rights were merely bureaucratic paperwork and that inevitably "[t]here's going to be" questions about what happened.

Detective MacDonald then handed Mr. Stewart a certificate of rights form and asked Mr. Stewart to read his rights aloud and directed him to initial the form: "All right. So this is a certificate of your constitutional rights. So all I want you to do is read one through five and then next to each one you's [sic] going to put your initials. And all your initials indicates means you understand what you're reading and then if you have any questions you just ask me." (Int., 5).

Mr. Stewart replied, "Right," and the officer again used a minimization technique to affirm to Mr. Stewart that all he was supposed to do is read and sign the nonconsequential paperwork: "And then what you'll do is you'll sign it here and we'll put the date and then we'll put the time." (Int., 5). At this point, Mr. Stewart might not yet have known what he was about to read, but he did know one thing—when he was done reading the paperwork, he was going to sign and date that form.

"Studies have shown that minimization of the *Miranda* warnings does lead to an increased number of suspects waiving their rights. For example, one study noted a 24% increased waiver rate between those who were told that their *Miranda* rights were important and those where *Miranda* was trivialized." *Do You Understand Your Rights,* at 447-48.

Consistent with the research on the use of the minimization technique to obtain a waiver, the officer here treated Mr. Stewart's "waiver as a foregone conclusion" and "move[d] directly from reading *Miranda* warnings into interrogation without explicitly asking the suspect for a waiver." *Waving Good-Bye* at 36. The officer trivialized his rights as "paperwork," minimized their significance and purpose, failed to clarify instances where it should have been obvious that Mr. Stewart

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may not have fully comprehended the words he was reading, *see Section A, supra,* and led Mr. Stewart to believe he had no choice but to sign the paperwork and to be interrogated.

The police treated the waiver of *Miranda* rights as a perfunctory process and Mr. Stewart's subsequent waiver was invalid. *Miranda,* 384 US at 476.

C. Mr. Stewart's youth, limited intellect, and limited education made him particularly vulnerable to coercive police tactics.

Mr. Stewart's vulnerability to coercive police tactics was heightened while his ability to comprehend his rights and the consequences of the waiver was severely diminished. His waiver was not voluntary.

"[A]pproximately ninety-four percent of youth ages twelve to nineteen demonstrated less than adequate appreciation of the significance and consequences of waiving their rights. They had the greatest difficulty understanding the implications of waiving the right to silence, with ninety-nine percent demonstrating less than adequate appreciation." *Waving Good-Bye* at 31-32. Mr. Stewart similarly did not demonstrate an understanding of the waiver. He read the form, initialed the form, and signed the form because the officer told him to. This was not a knowing and intelligent waiver and his statement should have been suppressed.

The law recognizes diminished culpability for juveniles age 17 and under, and it affords juveniles special scrutiny when it comes to waiver of *Miranda* rights. *In re Gault,* 387 US 1, 45 (1967); See also *Miller v Alabama*, 567 US 460, 471-72 (2012). Mr. Stewart is not considered a juvenile under the law, but according to science, he should be.

"Today's neuroscientists have bolstered the idea that adolescence does not stop in the teenage years. The prefrontal cortex, considered the seat of executive functioning and responsible for the ability to plan ahead and to resist impulses, typically does not come fully online until the early twenties — or later." Ledford, *Who exactly counts as an adolescent?* Nature, Vol. 554, pp. 429-431 (2018) citing Rubia K. et al.,

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Functional frontalisation with age: mapping neurodevelopmental trajectories with fMRI, Neurosci. Biobehav. Rev. 24, 13–19 (2000). "The frontal lobes are among the last cortical regions to become anatomically and functionally mature, and this developmental process of frontalisation may not be completed until the mid-twenties or even later." *Functional frontalisation* at 13–19.

"[O]ne aspect of [adolescent] overall development that is not fully complete—perhaps until the mid 20's—is a stable, solid capacity to make complex judgments, weigh closely competing alternatives in a balanced and careful way, control impulses and take the longer view." Weinberger, et. al., *The Adolescent Brain: A Work in Progress*, the National Campaign to Prevent Teen Pregnancy, p. ii (2005).

There is "substantial research establishing that children's understanding and appreciation of the *Miranda* warnings are quite limited." *Waving Good-Bye* at 8. "As with other criminal laws, policies, and practices, what constitutes 'voluntary' or 'knowing and intelligent' for a child may not be the same as it is for an adult." *Id.*

Adolescents have "a much stronger tendency . . . to make choices in compliance with the perceived desires of authority figures than do adults. In situations wherein police officers present the waiver decision as an inconsequential formality or imply that waiver is in the youth's best interests, the youth faced with the question may be ill-equipped to independently grasp the significance of waiving rights." *Waving Good-Bye* at 26-27.

Analysis of a young person's waiver of *Miranda* rights requires special consideration because "they are cognitively different from adults and are therefore more vulnerable to the pressures" of interrogation. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions*, Journal of Constitutional Law, Vol. 20:5, p. 1217 (2018). "Although tactics designed to induce waivers may be considered appropriate when used with adult suspects, these tactics are much more likely to be coercive when used with juvenile suspects because of their immaturity and relative susceptibility to persuasion." *Id.* at 37.

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At the time he was being interrogated, Mr. Stewart suffered from the same cognitive and executive functioning deficits as juveniles, and those deficits are relevant to this Court's totality of the circumstances analysis surrounding the waiver of his *Miranda* rights.

As discussed above, there is extensive research proving that young people are at an alarmingly high risk of involuntarily succumbing to the coercive police tactics—the same tactics used against Mr. Stewart to obtain an involuntary and unknowing waiver of his *Miranda* rights. In addition to his youth, Mr. Stewart has other characteristics that make him particularly vulnerable to police coercion: he had not yet graduated from high school, was recovering from a deadly illness, was attending an alternative high school, and as described above, struggled with reading comprehension. See *Dauod,* 462 Mich at 634 quoting *Fare,* 442 US at 725 (1979).

The Court of Appeals held that Mr. Stewart's waiver was valid. *People v Stewart,* unpublished per curiam opinion of the Court of Appeals, issued November 24, 2020 (Docket No. 343755), Appendix B. The court's reasoning is flawed and non-responsive to the arguments raised by Mr. Stewart. Instead, the court reasoned that "[t]he form read aloud by Stewart covered all the rights enumerated in Miranda." *Id.* at 3. The court acknowledged that Mr. Stewart raised issue with the use of "minimization techniques" but the court did not respond to those arguments. The court found that "the officer was not required to stop Stewart after each statement to more thoroughly question his understanding." *Id.* Mr. Stewart never claimed that was required. The court also found that Mr. Stewart "could not benefit from the legal recognition that juveniles have diminished decision-making capacity" given that he is no longer a "juvenile" under the law. *Id.* But the court's job and this Court's job is to bring the law in line with science. As explained above, Mr. Stewart's mental functioning as an 18-year-old is aligned with that of a 17-year-old, and not a grown mature adult.

The court also found that "there is no record evidence that Mr. Stewart suffered from any mental condition that would have prevented him from understanding the warnings." *Id.* Mr. Stewart never claimed he suffered from any mental condition, and that is not a prerequisite for finding that the waiver was not understandingly made. Mr. Stewart did

present evidence from the interrogation video itself that he did not comprehend what he was reading. That should be enough to establish his lack of understanding.

A totality of the circumstances analysis leads to only one conclusion: Mr. Stewart was particularly vulnerable to police pressures designed to overcome his will, he did not understand the meaning of his *Miranda* rights as he read them aloud, and he did not understand the consequences of waiving them. He signed his rights away because the officers forcefully and skillfully told him to.

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II. Mr. Stewart's involuntary waiver led to an involuntary statement that was the product of psychological coercion by two experienced homicide detectives.

If this Court determines Mr. Stewart's waiver was invalid, it need not reach the question of whether his statement was involuntary. If, however, this Court does not find that Mr. Stewart's waiver was invalid, this Court should find that his subsequent statement was invalid and should have been suppressed.

In order to prove his statement was involuntary, Mr. Stewart must show that the statement was the result of coercive police activity. US Const, Ams V, XIV and Const 1963, art 1, §17; *Colorado v Connelly*, 479 US 157 (1986). The voluntariness of a statement can be undermined by threats or by police promises of leniency. *See, e.g., Freeman v State*, 258 Ark 617, 527 SW2d 909 (1975) (implied promise of leniency found when prosecutor said that he could not promise anything but that defendant probably would not get more than 21 years in jail if he confessed); *People v Pineda*, 182 Colo 385, 513 P 2d 452 (1973) (police said that things would go easier for the accused if he testified); *People v Ruegger*, 32 Ill App 3d 765, 336 NE2d 50 (1975) (police conveyed the impression that they would "go to bat" for the accused in getting him probation).

Here, Detective MacDonald repeatedly told Mr. Stewart about a woman suspect he knew of who confessed to him and only got a two year sentence. This woman, according to Detective MacDonald, was also the driver of a car that was involved in a murder—just like Mr. Stewart:

> I just got done doing a homicide trial, Man? This mother fucker shot two people with his sister in the car. . . She did the same shit 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.' 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

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> 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 brother fucking intimated her and fucking go to prison for life. [Int., 109].

Detective MacDonald went on to tell Mr. Stewart that this woman was not scared to testify, unlike Mr. Stewart, and "She doing two years. Soon as you do two years her record is clean." (Int., 109).

The promises of leniency continued and the police made Mr. Stewart believe that if he cooperated and gave a statement, he would come out a winner:

> *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." [Int., 90-91].
>
> *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." [Int., 115].
>
> * * *
>
> *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. They took their control instead of letting somebody bully them or being scared of somebody and let that person control their life. Cause if she'd let that person control her life she'd have got that. But she took her own control and she got this. Because she told her -- what she was responsible for. This was what I did. That's what she testified to. This is what I did. She didn't sit there and shut the fuck up. She said this is what I did. I'm responsible for this. And that's what she got. She got two years. That's why

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> we's here talking to you. What was Joshua Stewart responsible for?" [Int., 116].

Immediately after hearing this, Mr. Stewart said: "Just driving." (Int., 116). Mr. Stewart made that statement because he believed the officer's promise of leniency:

> *Mr. Stewart:* I ain't never did no time, feel me? Period. For my mamma though. Cause ya'll talking about 20 or 2. Who wouldn't take 2. Do you feel me? [Int., 162].
>
> * * *
>
> *Officer MacDonald:* We're not the judge and were' 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. [Int., 163].

The police promised Mr. Stewart that "if you truthful all the way through this yeah it's gonna turn out good for you." (Int., 164). That was a lie. Mr. Stewart is serving concurrent 23 to 46 year sentences for driving a car connected to a murder. Predictably, things did not work out for him as they did for the woman in Detective MacDonald's story.

Here, the Court of Appeals held that Mr. Stewart's statement was voluntary. The court acknowledged that "the officers strongly encouraged Stewart to disclose his role in the crimes and suggested that his punishment would be greater if he did not tell the truth, but would be lesser if [he] did." *Stewart,* unpub at 4. But, the court found that "[e]ven if the officers went too far in implying that the prosecutor would be lenient on Stewart," that alone did not render his statement involuntary. *Id.* The Court of Appeals found it notable that "18-year-old Stewart initially denied any involvement, then admitted to only limited involvement, and still denied knowing of any plans to commit a robbery."

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Id. The court found that this "supports that Stewart was still operating under his own free will." *Id.*

That holding is contrary to United States Supreme Court reasoning. In *Miranda,* the Court held that "the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 384 US at 476. "In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." *Id.*

That reasoning applies here. After nearly two hours of intense degradation by police and being told he needs to "man the fuck up" and "man up to some shit" and "Be 18" (Int., 65, 66, 96, 97), being called a "dummy," (Int., 113), and being told he could potentially get two years if he cooperates with police and "20 to life" if he does not (Int., 84, 108-110, 115-116, 162-163), Mr. Stewart told detectives that he was the driver of the car. (Int., 115). This statement was not voluntary, but was a product of coercion and promises of leniency.

The Supreme Court has long recognized that personal characteristics of a suspect that render him or her particularly vulnerable to coercion – such as youth, limited intellect, and limited education – are significant factors in the "totality of the circumstances" that determine the voluntariness of a statement. See, e.g., *Haley v Ohio,* 332 US 596 (1948) (age of l5); *Culombe v Connecticut,* 367 US 568 (1961) (I.Q. of 64, illiteracy); *Fikes v Alabama,* 352 US 191 (1957). For the same reasons expressed above in the waiver discussion, Mr. Stewart's personal characteristics made him particularly vulnerable to the coercion that took place here. His statement was involuntary and should have been suppressed.

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III. Trial counsel was ineffective for failing to object to the admission of the interrogation video played in full to the jury, and that contained repeated references to Mr. Stewart's prior gun conviction and to accusations that he was affiliated with a gang.

Mr. Stewart has a due process right to a fair trial undeterred by the admission of improper evidence. US Const. Ams V; XIV; Mich Const 1963, art 1, § 17. MRE 404(b)(1), provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

If Mr. Stewart did not present evidence of his good character to a jury, the prosecution may not strike first with evidence to the contrary. *People v Hammond,* 394 Mich 627, 631 (1975). In *Michelson v United States,* 335 US 469, 475-76 (1948), the United States Supreme Court explained the rationale behind this rule: "the inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." In other words, "the fear [is] that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty. . . of the crime charged." *People v Crawford,* 458 Mich 376, 383 (1998).

Because of the important policy behind MRE 404(b) against tainting the jury's fact-finding function through improper character evidence, several factors must exist before such evidence is admissible. In order to use other acts evidence, the prosecutor must (1) offer the other acts evidence under something other than a character to conduct or propensity theory as required by MRE 404(b); (2) the evidence must be

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relevant under MRE 402, as enforced through MRE 104(b) to an issue of fact of consequence at trial; (3) a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under MRE 403; and (4) the trial court, upon request, may provide a limiting instruction under MRE 105. *People v VanderVliet,* 444 Mich 52 (1992); *People v Sabin, (On Remand),* 463 Mich 43, 56 (2000). In addition, the prosecution must provide notice of its intent to use other acts evidence. MRE 404(b)(2).

Here, the prosecution impermissibly, without notice, and without objection introduced prior bad acts evidence against Mr. Stewart through the three-hour interrogation video that was played to the jury in its entirety. Trial counsel was ineffective for failing to object.

Throughout the interrogation, there are extensive references to Mr. Stewart's prior 2014 gun conviction and to his alleged affiliation with a rap group that the officers repeatedly refer to as a gang of dangerous criminals:[7]

Prior Gun Charge Reference

Officer MacDonald: You do dumb shit cause – do you carry – did you get caught with a burner?[8]

Mr. Stewart: Who?

Officer MacDonald: You. You got caught with a burner?

Mr. Stewart: Yes I do. Years ago.

Officer MacDonald: Okay. So you do dumb shit though.

Mr. Stewart: Two years ago I did that.

Officer MacDonald: Why?

[7] The colloquies are shaded gray to differentiate separate conversations.

[8] "Burner" is street slang for a firearm.

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Mr. Stewart: Don't give a fuck when it was.

Officer MacDonald: Well that's some dumb shit.

Mr. Stewart: It was dumb.

Officer MacDonald: That's some dumb shit.

* * *

Detective Lucie: But you did – wanted to emphasize that it was two years ago cause you were juvenile. Like that matters.

Mr. Stewart: I'm not saying that.

Detective Lucie: It still shows your tendencies.

Mr. Stewart: Right.

Detective Lucie: You have the ability to carry a pistol. Don't get it twisted.

Mr. Stewart: What pistol?

Detective Lucie: It was a pistol you got caught with. What you mean what pistol?

Mr. Stewart: Oh you talking about that.

Detective Lucie: So it shows the character that you have.

Mr. Stewart: I don't have that no character.

Detective Lucie: Okay. But you have the ability to carry a pistol.

Mr. Stewart: I got caught with an empty gun.

Detective Lucie: And you got caught with it.

Mr. Stewart: That I found.

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Detective Lucie: Okay. And? I don't care how you got it.

* * *

Officer MacDonald: So, Josh your gun you found. Listen, listen, listen. You found your gun. Let me tell you how you not – how you not manning up – how you not taking on responsibilities. You found the gun. Right? Now you found the mother fucking car shot up? You see what I'm saying? You ain't taking responsible for shit. All you doing is pushing that shit off. Deflecting it. I found that gun. And it wasn't loaded. So that really don't mean nothing. Today I was walking down the street and I found my boy shot up. You always finding shit. When you going to take responsibility for some shit like yeah, that was me. I was carrying that pistol straight up? Not I found this bitch and it was unloaded.

Mr. Stewart: I didn't say none of that.

Officer MacDonald: You just said that. You just said you found the gun. It was unloaded. [Int., 63-66].

Prior Gun Charge and Gang Affiliation References

Officer MacDonald: Who you hang with down that way? When you got caught with that pistol who you hanging with?

Mr. Stewart: What you mean who I was hanging?

Officer MacDonald: I mean—were you with anybody when you got caught with the gun? Or were you by yourself?

Mr. Stewart: By myself.

Officer MacDonald: All right you play with any type of little group over that way? Were you playing with a little group when you got caught with that pistol?

* * *

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Officer MacDonald: Are you sure you're not playing with some little group over there?

Mr. Stewart: Oh. A group? No.

Officer MacDonald: A little gang.

Mr. Stewart: No.

Officer MacDonald: Mother fuckers that call themselves—check my phone – the Bang Bang Pooy Gang. Remember wearing that shirt? Ain't that – that's a little crew over there. That's what the fuck I just asked you. [Int., 70-71].

Prior Gun Charge and Gang Affiliation References

Officer MacDonald: Listen, now you sitting here with the opportunity to fuck around correct these dumb ass decisions you made. Just like you had the opportunity to correct when you had that gun. Just like you had the opportunity to correct hanging with these little Bang Bang Poony Gang mother fuckers. You still affiliated with them?

Mr. Stewart: That's family.

Detective Lucie: And all they do is getting in trouble . . . All they do is hit licks. They steal cars. . . They do B&E's. . . They sell dope. [Int., 74].

Prior Gun Charge and Gang Affiliation References

Officer MacDonald: All right. This is what it is. You got caught with a gun. You – you affiliated with mother fuckers – this little group that do dumb shit. Go around sell dope, rap, carry pistols.

* * *

Officer MacDonald: I didn't – Listen mother – listen. Listen what I said. You are affiliated with a crew or a gang – is what they like to call themselves – or rap group – whatever how you want to label it – that do dumb shit. That carry

guns. That sell dope. Cause I've talked to Krispie Cheese and he said that's what they do. [Int., 75].

Prior Gang Affiliation Reference

Mr. Stewart: I'm just telling you all that's not no gang though.

Detective Lucie: What's the last word of –what's the last word of it? [Int., 77].

Prior Gun Charge and Gang Affiliation References

Officer MacDonald: You can't explain like that gun you had.

Mr. Stewart: What gun did I have?

Officer MacDonald: That you called 2014.

Mr. Stewart: Oh.

Officer MacDonald: You ain't gonna dismiss it like you did that gun. You ain't about to dismiss it like you did with this mother fucking shit you just tried to play with this Pooty Poo bullshit. You ain't gonna dismiss that phone. [Int., 81].

Prior Gun Charge and Gang Affiliation References

Officer MacDonald: Every time we bring something up you –you sit here and you push it off like you got an excuse for it. You had an excuse for the gun you caught in 2014. You got an excuse of why you affiliated yourself with these knuckleheads. You got an excuse for everything. I ain't heard you one time go 'yeah, that's me. Yeah, I hang with the mother fuckers. A'ight. Yeah, I had that burner. Yeah.

Mr. Stewart: I didn't have no burner.

Officer MacDonald: 2014 gun, Bro. God damn. I ain't put no gun in your hand, tonight.

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Mr. Stewart: Right.

Officer MacDonald: So get off that shit. I ain't putting that gun in your hand. I know Prophet had the pistol. A'ight? I know he shot and killed that boy. I know that. Fucking man the fuck up. [Int., 95-96].

Prior Gun Charge Reference

Mr. Stewart: I got caught with a gun before yeah. All right. [Int. 127].

These are not just passing off-handed references about a prior gun charge and about the officers believing that Mr. Stewart is affiliated with a gang. That would have been bad enough. But what happened here was much more than that. The jury heard multiple and repeated in-depth conversations about inadmissible and prejudicial prior bad acts. And the officers use these prior bad acts to prove Mr. Stewart is a bad person—the exact evil our courts seek to prevent: "It still shows your tendencies." (Int., 64). "So it shows the character that you have." (Int., 65). "[Y]ou have the ability to carry a pistol." (Int., 65).

The officers further accuse Mr. Stewart of being involved in a criminal gang, due to his involvement in a rap group called the "Bang Bang Poonie Gang." (Int., 71). The officers bring this up multiple times and refuse to accept Mr. Stewart's explanation that it is not a gang. The officers tell Mr. Stewart they know about all the crime this gang commits and know other members of the gang who have provided corroboration. This evidence was extremely prejudicial and should never have been admitted at Mr. Stewart's trial.

The Court of Appeals agreed that the information in the interrogation video "was possibly untrue and was completely irrelevant" and that there could be no strategic reason for allowing the admission of evidence that "was contrary to the theory of the defense." *Stewart,* unpub at 6. Still, the court determined Mr. Stewart suffered no prejudice, even after finding that "[b]y failing to seek redaction of the interrogation video, defense counsel unnecessarily exposed Stewart to

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the risk that the jury could conclude that he committed the charged crimes because he was acting in conformity with typical gang activity." *Id. c*iting *People v Bynum*, 496 Mich 610 (2014). The Court of Appeals' holding that this was not prejudicial was erroneous.

The admission of this evidence caused undue prejudice to Mr. Stewart without offering any meaningful probative value to the jury. In deciding whether an error is outcome determinative, "a court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Musser,* 494 Mich 337, 348 (2013). The object of this inquiry is to determine if it affirmatively appears that the error asserted "undermine[s] the reliability of the verdict." *People v Lukity,* 460 Mich 484, 495 (1999).

Admission of this evidence risked encouraging the jury to convict Mr. Stewart for being a generally lawless and immoral person who habitually breaks the law and has a predisposition for engaging in lawless conduct. This effect has long been condemned by Michigan courts: "Finding a person guilty … is not a pleasant or easy assignment for a representative group of twelve people. It is much easier to conclude that a person is bad than that he did something bad. Hence the appetite for more knowledge of the defendant's background." *People v Jones,* 228 Mich App 191, 201 (1998). As the Michigan Supreme Court noted in *People v Allen,* 429 Mich 558, 568-59 (1988), this creates three types of impropriety:

> First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished.
>
> Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment.
>
> Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged.

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The guilt or innocence of an accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing. *Allen,* 429 Mich at 568-559. Mr. Stewart was not afforded that protection.

Mr. Stewart was denied his constitutional right to the effective assistance of counsel when his attorney failed to object to the admission of this prejudicial evidence. US Const, amends VI, XIV; Const 1963, art 1, §§ 17, 20; *Strickland v Washington*, 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298, 310-11 (1994). By "failing to render 'adequate legal assistance,'" a defendant's attorney can undermine the adversarial process counsel is appointed to protect, resulting in a conviction that "cannot be relied on as having produced a just result." *Id.* at 688. To establish ineffectiveness, Mr. Stewart must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland*, 466 US at 687; *Pickens,* 446 Mich at 338. To show prejudice, Mr. Stewart must demonstrate a "reasonable probability" that the result of the proceeding would have been different absent counsel's errors. *Strickland*, 466 US at 694; *People v Carbin,* 463 Mich 590, 599-600 (2001).

Mr. Stewart agrees with the Court of Appeals that no reasonable attorney would have allowed the admission of such prejudicial evidence at trial. *Stewart,* unpub at 6. Trial counsel's decision not to object and to require a redacted interrogation video amounts to deficient performance. *Id.* As discussed in the prior analysis, this failure resulted in prejudice to Mr. Stewart where it was allowed to consider prejudicial and irrelevant evidence in determining his guilt.

Given the centrality of the interrogation video to the case, and the impermissible express conclusions the police invited the jury to draw from them, the erroneous admission of the videos was outcome determinative and prejudiced Mr. Stewart. This Court should grant Mr. Stewart a new trial, free of evidence of his prior criminal history or his alleged gang affiliation.

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IV. Mr. Stewart's within guideline sentence is disproportionate and is subject to review by an appellate court.

This Court should grant leave to appeal and undertake proportionality review of Mr. Stewart's sentence. He acknowledges that his 23 year minimum sentence (276 months) falls within the controlling guidelines range for armed robbery (171 to 285 months). He further acknowledges this Court's determination that MCL 769.34(10) bars resentencing absent a showing that the trial court erred in scoring the guidelines variables or otherwise relied upon inaccurate information. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). Mr. Stewart submits, however, that neither *Schrauben* nor any other decision of this Court addresses whether MCL 769.34(10) survives our Supreme Court's ruling in *People v Lockridge*, 498 Mich 358, 392 (2015). For the reasons discussed below, this Court should hold that it does not. Further, this Court may undertake a proportionality review of Mr. Stewart's sentence.

In its holding, the Court of Appeals found that it was not permitted to review Mr. Stewart's sentence for reasonableness because a "within-guidelines sentence based on accurately scored guidelines is deemed proportionate and must be affirmed." *Stewart,* unpub at 5 citing *People v Jackson,* 320 Mich App 514 (2017).

In his concurring opinion in this case, Judge Shapiro urged this Court to take action to address this issue, left unanswered in *People v Ames,* 504 Mich 899 (2019). In *Ames,* this Court granted leave to appeal on this same question of whether a within guideline sentence was subject to appellate review. After briefing and oral argument, this Court denied leave to appeal and did not decide the issue. The question remains: "How then can it be constitutional to mandate that appellate courts affirm any sentence that falls within the guidelines?" *Stewart,* (SHAPIRO, J., concurring), unpub op at 1. "A sentence cannot be both only *presumptively* proportionate and yet beyond review. And it is unconstitutional for the guidelines, now merely advisory, to bind a court, including appellate courts." *Id*. at 2.

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Judge Shapiro "respectfully suggest[ed] that it would be helpful to both bench and bar for the Court to issue a full opinion on the question in this or some future case." *Id.*

This Court should grant leave to appeal and hold that within guideline sentences are reviewable for proportionality by appellate courts.

A. Historically, *Milbourn* review has always included a mechanism for allowing defendants to rebut the presumption that a sentence within the controlling guidelines range is proportionate.

Before this Court's decision in *People v Lockridge*, the legislative sentencing guidelines were binding upon trial judges. *Lockridge*, 498 Mich at 387 (citing MCL 769.34(2)). *Lockridge* held unconstitutional that portion of the guidelines that made them mandatory and replaced it within an advisory scheme. *Id.* at 364, 387-389, 391-392. After *Lockridge*, sentencing courts still "must determine the applicable guidelines range and take it into account when imposing sentence." *Id.* at 365. But courts need not articulate substantial and compelling reasons for departing above or below that range; rather, the sentence only has to be "reasonable." *Id.* at 392.

Even after *Lockridge*, a sentencing court must "justify" its sentence in order to facilitate appellate review. *Id.* Appellate courts would then review for "reasonableness." *Lockridge,* 498 Mich at 392. Although *Lockridge* limited its discussion of this "reasonableness" standard to departures from the guidelines range, there was no qualifier to the Court's subsequent statement that "[r]esentencing will be required when a sentence is determined to be unreasonable." *Id.*

The *Lockridge* Court did not clarify a framework for considering the reasonableness of a departure. This Court, however, has adopted the "principle of proportionality" test that once applied to departures from the judicial sentencing guidelines. *People v Steanhouse*, 313 Mich App 1, 47-48 (2015), aff'd in part, rev'd in part by *People v Steanhouse,* 500 Mich 453 (2017). "[A] sentence that fulfills the principle of

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proportionality under *Milbourn* and its progeny constitutes a reasonable sentence under *Lockridge*." *Steanhouse*, 313 Mich App at 47-48; *Steanhouse,* 500 Mich 453 (2017).

B. MCL 769.34(10) violates the rule of *Lockridge* by precluding individuals from challenging disproportionate sentences that happen to fall within a guidelines range calculated through the use of facts found by a judge, not a jury.

This Court should conclude as an initial matter that the first sentence of MCL 769.34(10) is no longer valid. That statutory subsection begins: "If a minimum sentence is within the appropriate sentence guidelines range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the sentence." Because *Lockridge* declared the legislative sentencing guidelines to be advisory rather than mandatory, there can be no mandatory presumption of reasonableness. Rather, there must be a mechanism for rebutting the presumption—similar to the one that existed in the *Milbourn* era and to the one that continues to function in federal court. See *People v Sharp*, 192 Mich App 501, 505-506; *Rita v United States*, 551 US 338, 347 (2007) (discussed *infra*).

To cure the constitutional defect found in the mandatory sentencing guidelines, *Lockridge* "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Lockridge*, 498 Mich at 391. It further recognized that other portions of MCL 769.34 might need to be severed in the future: "To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Id.* at 2 and n 1. Indeed, this Court has already relied upon this holding to strike down that part of MCL 769.34(4) that made intermediate sanctions mandatory whenever the top end of the range equaled 18 months or less. *Schrauben*, 314 Mich App at 195.

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The *Schrauben* Court did not address whether MCL 769.34(10) contained mandatory language of the same type that was fatal to the subsection addressed to intermediate sanctions. It simply assumed without analysis that sentences within the controlling guidelines range "must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Id.* at 196 citing MCL 769.34(10). Consequently, a mandatory, non-rebuttable presumption of proportionality—fashioned by the Legislature to fit a scheme in which adherence to the guidelines was mandatory—continues even though this Court has held that the guidelines, to pass constitutional muster, must now be treated as advisory.

This is far different than the approach used in the federal sentencing scheme which inspired the *Lockridge* remedy. In *Rita*, *supra*, the United States Supreme Court examined the reasonableness of a federal sentence imposed after the federal guidelines were declared advisory in *United States v Booker*, 543 US 220, 261-263 (2005). The *Rita* Court held that "[a] *nonbinding* appellate presumption that a Guidelines sentence is reasonable" does not violate the Sixth Amendment principles underlying *Booker*. *Rita*, 551 US at 352-353 (emphasis added). After all, "*presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable." *Rita*, 551 US at 366 (Stevens, J., concurring) (emphasis in original).

A non-rebuttable presumption, on the other hand, raises Sixth Amendment problems. Even after *Lockridge*, sentencing courts must continue to score the guidelines using facts found by the judge by a preponderance of the evidence. *Lockridge*, 498 Mich at 365. By imposing a mandatory presumption, MCL 769.34(10) ensures that "some sentences . . . will be upheld as reasonable only because of the existence of judge-found facts." *Rita*, 551 US at 373 (Scalia, J., concurring in part and concurring in the judgment). This Court should therefore determine that MCL 769.34(10) is incompatible with *Lockridge*.

C. Mr. Stewart's 23-year minimum sentence is disproportionate to him and to the offense.

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Under the sentencing guidelines system, in relation to the most serious conviction against him in the case (armed robbery), Mr. Stewart was scored into the D-VI range. (Sentencing Information Report, Appendix E). He was assessed a total of 40 points under the prior record variables, including 20 points under PRV 7 due to the multiple convictions in this case. He was assessed a total of 175 points under the offense variables. 100 of those total points were assessed under OV 4, based on the fact that Mr. Foster died from the wounds inflicted on him by Mr. White. While Mr. Stewart was charged with being an accessory to the felony-murder charge, his jury totally acquitted him of any culpability for Mr. Foster's death. It is not disputed that under Michigan law, the scoring of these 100 points for the sentencing on the armed robbery conviction was permissible, given that Mr. Stewart was not convicted of any charge in which the death of a victim is an essential element. See *People v Laider*, 491 Mich 339 (2012). When reviewing the reasonableness of the sentence for armed robbery, the appellate court should consider that Mr. Stewart neither fired any shots nor was convicted in relation to the death of Mr. Foster.

These scorings, which were not objected to at the sentencing, and are not being challenged in this appeal,[9] resulted in a recommended range

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[9] It does appear that Mr. Stewart was misscored as to two variables. He received 10 points under PRV 6, presumably based on the statement in the presentence report (which is being provided to this Court under separate cover) that he was on Holmes Youthful Training Act status on the date of these offenses (see No. 3 of 3 reference to his prior conviction record). However, the references to his two prior convictions appear to show that his probationary sentences as to both had been discharged prior to the May 6, 2016 date of the current charges. He also was scored 15 points under OV 2. That scoring would have been proper only if his co-participants had been armed with "an incendiary device, an explosive device, or a fully automatic weapon." There was no evidence in the case that either of the weapons used by Mr. White or the third man were fully automatic. Instead, Mr. Stewart should have only been assessed 5 points, for his co-defendant's use or possession of a rifle. However, neither error would have resulted in a reduced level under the PRVs or

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for the minimum sentence of 171 to 285 months (14.25 to 23.75 years) for this Class A offense. Mr. Stewart's actual minimum sentence of 276 months (23 years) is thus only eight months beneath the top of that recommended range.

That minimum sentence, while within the guidelines range, was an abuse of discretion as it is disproportionate to the circumstances of this case, both as to Mr. Stewart's prior record and as to the facts of the incident. The "key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Milbourn,* 435 Mich at 661. Here, given the expanse of the recommended range under this scoring, the fact that the actual sentence falls within (and close to the top) of that extensive range does not and should not insulate the sentence from this Court's review under the *Steanhouse* and *Milbourn* standards.

While the facts of the charges in this case are certainly serious, there are some mitigating facts as they relate to Mr. Stewart, as compared to Mr. White and the other, unnamed individual in the case. It is beyond dispute that in neither instance did Mr. Stewart leave the car, brandish any weapon, or personally cause any injuries, including the death of Mr. Foster. While he eventually admitted to the police that he was the driver of the car in both instances, he was obviously convicted as an accessory to the most serious charges in the case. His jury held that he was not criminally responsible for Mr. Foster's death. Even though his participation in these incidents cannot be excused, his relative culpability, as compared to that of Mr. White and the third man, should not call for a minimum sentence nearly at the top of the guidelines range.

On these facts, as serious as they are, a sentence near the top of the extensive guidelines range is disproportionate and excessive. This was not the most nor near the most egregious example of armed robbery that can be envisioned, particularly when it is considered that Mr. Stewart

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OVs, or a lower guidelines range, with the erroneous points deducted, and thus Mr. Stewart would not be entitled to a resentencing due to either or both errors. See *People v Francisco*, 474 Mich 82 (2006).

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was convicted as an accessory to the robbery. Even though Mr. Stewart's decision to drive the car that day while his associates committed these offenses does not excuse or justify his role in these events, his culpability was not as direct or unacceptable as that of his co-participants. Accordingly, the minimum sentence in the case, to be proportionate and reasonable given the facts, should have been closer to the bottom of the guidelines range rather than to the top.

A review of Mr. Stewart's prior record does not support the 23-year minimum sentence. He has two prior low severity felony convictions – one for an attempted carrying a concealed weapon and one for a larceny in a building.[10] The fact that Mr. Stewart received probationary sentences for both of these convictions indicates that while serious, the underlying facts of the cases did not require the imposition of any prison sentence.

This record, while certainly not laudable, does not show that Mr. Stewart has ever before been either charged or convicted of any behavior that involved actual physical violence or the infliction of personal injury.

This Court should find, if the convictions are otherwise upheld, that the 23 to 46 year sentences imposed for the armed robbery convictions are disproportionate and unreasonable, given all the relevant facts of the case, and should remand the matter to the trial court for resentencing. *Milbourn, supra, Steanhouse, supra.*

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[10] While the presentence report initially showed that he was charged with a felony sexual assault in the case that resulted in the larceny in a building conviction, at sentencing, Mr. Stewart's counsel objected to the accuracy of that report, stating that no such charge was brought against him, and Judge Callahan sustained that objection and stated this reference to a sexual assault charge would be stricken from the report. (ST, 4-5).

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Conclusion and Relief Requested

Under a totality of the circumstances analysis, this Court should grant leave on the question of whether Mr. Stewart's waiver of his *Miranda* rights and subsequent statement were voluntarily, knowingly, or intelligently made. Mr. Stewart's waiver and subsequent statement were the result of coercive police officers who took advantage of an 18-year-old alternative high school student who had not yet graduated and who had just recovered from a deadly illness.

This case is a vehicle to address multiple areas of jurisprudentially significant legal questions around *Miranda*, diminished culpability of youth, and accountability of police.

Additionally, this Court should grant leave on the question of trial counsel's ineffectiveness for allowing the admission of highly problematic evidence against Mr. Stewart. The three-hour interrogation video played to the jury contained repeated questions by police about Mr. Stewart's prior gun conviction and unfounded allegations that he was in a gang. The admission of this evidence prejudiced Mr. Stewart and he is entitled to a new trial.

Lastly, this Court should grant leave to issue an opinion holding that within guideline sentences are reviewable for proportionality by appellate courts.

Respectfully submitted,

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