IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION FIVE

) THE PEOPLE OF THE STATE OF CALIFORNIA, )

)

Plaintiff and Respondent, )

)

v. )

)

MALE CLIENT, )

)

Defendant and Appellant. )

 )

Court of Appeal No. B287803

Los Angeles County Superior Court No. FJ54509

APPELLANT’S OPENING BRIEF

Los Angeles Superior Court Honorable Commissioner

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# TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

INTRODUCTION 12

STATEMENT OF APPEALABILITY 14

STATEMENT OF FACTS 16

I. Background 16

II. The Offense 18

III. The Interrogation 20

IV. The Proceedings 23

ARGUMENT 27

II. THE SUPERIOR COURT ERRED WHEN IT FAILED TO EXCLUDE MALE CLIENT’S CONFESSION BECAUSE THE WEIGHT OF EXISTING LAW AND POLICY COMPELS THE CONCLUSION THAT JUVENILES CANNOT IMPLICITLY WAIVE THEIR *MIRANDA* RIGHTS. 27

a. “De Novo” is the Appropriate Standard of Review. 27

 b. Adults May Implicitly Waive Their *Miranda* Rights. 28

c. MALE CLIENT’s Implicit *Miranda* Wavier was Invalid. 33

d. The Admission of MALE CLIENT’s Confession was Prejudicial

 Under *Chapman*. 36

III. THE SUPERIOR COURT ERRED IN FAILING TO EXCLUDE MALE CLIENT’S CONFESSION BECAUSE MALE CLIENT DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS*.* 37

a. “De Novo” is the Appropriate Standard of Review. 37

b. MALE CLIENT did not Knowingly, Voluntarily, and Intelligently

 Waive his *Miranda* Rights. 37

c. The Admission of MALE CLIENT’s Confession was Prejudicial

 Under *Chapman*. 47

IV. THE SUPERIOR COURT ERRED WHEN IT FAILED TO EXCLUDE MALE CLIENT’S CONFESSION BECAUSE MALE CLIENT’S CONFESSION WAS NOT VOLUNTARY. 49

a. The Appropriate Standard of Review is a Mixed 49

 Question of Fact and Law. 49

b. MALE CLIENT’s Confession was Not Voluntary 49

 c. The Prosecution Cannot Show Harmless Error

 Under *Chapman*. 58

CONCLUSION 60

# TABLE OF AUTHORITIES

**PAGE(S)**

**CASES**

*Arizona v. Fulminante*,

(1991) 499 U.S. 279 47, 60, 73

*Arizona v. Youngblood*,

(1988) 488 U.S. 51 30, 31, 32

*Bellotti v. Beard*,

(1979) 443 U.S. 622 41

*California v. Trombetta*,

(1984) 467 U.S. 479 29, 35

*Chambers v. Maroney*,

(1970) 399 U.S. 42 78, 81

*Chapman v. California*,

(1967) 386 U.S. 18 Passim

*Colorado v. Connelly*,

 (1986) 479 U.S. 158, 176 63

*Davis v. U.S.*,

(1994) 512 U.S. 452 50

*Eddings v. Oklahoma*,

(1982) 455 U.S. 104 40

*Estate of Teed*,

(1952) 112 Cal.App.2d 638 28

Fare v. Michael C.,

(1979) 442 U.S. 707 50

*Fields v. U.S.*,

(D.C. 1984) 484 A.2d 570 81

# TABLE OF AUTHORITIES (Continued)

*Florida v. J.L.*,

(2000) 529 U.S. 266 77

*Graham v. Florida*,

(2010) 560 U.S. 48 Passim

Haley v. Ohio,

(1948) 332 U.S. 596 41

*In re Art T.*,

(2015)234 Cal.App.4th 335 46, 49, 51

*In re Corey*,

(1964) 230 Cal.App.2d 813 Passim

*In re Elias V.*,

(2015) 237 Cal. App. 4th 568 67, 69, 70

*In re Gault*,

(1967) 387 U.S. 1 65

*In re J.G.*,

(2014)228 Cal.App.4th 402 40

*In re John S.*,

(1988) 199 Cal.App.3d 441 63

*In re Sassounian*,

(1995) 9 Cal.4th 535 35

*In re Tony C.*,

(1978)21 Cal. 3d 888 74, 75

*J.D.B. v. North Carolina*,

(2011) 564 U.S. 261 Passim

*Jackson v. Denno*,

(1964) 378 U.S. 368 62, 63

# TABLE OF AUTHORITIES (Continued)

*Lego v. Twomey*,

(1972) 404 U.S. 477 63

*Manson v. Braithwaite*,

(1968) 432 U.S. 98 85

*Miller v. Alabama*,

(2012) 567 U.S. 460 Passim

*Mincey v. Arizona*,

(1978) 437 U.S. 385 63

*Miranda v. Arizona*,

(1966) 384 U.S. 436 38

*Neil v. Biggers*,

(1972) 409 U.S. 188 85

*North Carolina v. Butler*,

(1979) 441 U.S. 369 51

*People v. Alvarez*,

(2014) 229 Cal.App.4th 32, 33

*People v. Chutan*,

(1999) 72 Cal.App.4th 1276 71

*People v. Clark*,

50 Cal.3d 583 87

*People v. Cromer*,

(2001) 24 Cal.4th 889 37, 38

*People v. Cruz*,

(2008) 44 Cal.4th 636 38, 39

*People v. Dykstra*,

(2009) 46 Cal.4th 731 38

# TABLE OF AUTHORITIES (Continued)

*People v. Guerra*,

(2006) 37 Cal.4th 1067 71, 72

*People v. Jones*,

(1998) 17 Cal.4th 279 62

*People v. Kennedy*,

(2005) 36 Cal.4th 595 79

*People v. Lessie*,

(2010) 47 Cal.4th 1152 37, 39, 50

*People v. Leyba*,

(1981) 29 Cal.3d 591 74

*People v. Louis*,

(1986) 42 Cal.3d 969 79

*People v. Maury*,

(2003) 30 Cal.4th 342 70

*People v. Montes*,

(2014) 58 Cal.4th 809 28

*People v. Neal*,

(2003) 31 Cal.4th 63 62

*People v. Nelson*,

(2012) 53 Cal.4th 367 46

*People v. Perrusquia*,

(2007) 150 Cal.App.4th 228 75

*People v. Scott*,

(2011) 52 Cal.4th 452 76

*People v. Sims*,

(1993) 5 Cal.4th 405 49, 61

*People v. Uribe*,

(2011) 199 Cal.App.4th 836 80

# TABLE OF AUTHORITIES (Continued)

*People v. Watson*,

(1956) 46 Cal.2d 818 86, 87

*People v. Wilkins*,

(1986) 186 Cal.App.3d 804 74

*Perry v. New Hampshire*,

(2012) 565 U.S. 228 80

*Roper v. Simmons*,

(2005) 543 U.S. 551 Passim

*Russell v. U.S.*,

(D.C. Cir. 1969) 408 F.2d 1280 81

*Schneckloth v. Bustamonte*,

(1973) 412 U.S. 218 72

*Simmons v. U.S.*,

(1968) 390 U.S. 377 84

*Stovall v. Denno*,

(1967) 388 U.S. 293 79, 80, 84

*U.S. v. Cooper*,

(9th Cir. 1993) 983 F.2d 928 31

*U.S. v. Mendenhall*,

(1980) 446 U.S. 544 74

*U.S. v. Zaragoza-Moreira*,

(9th Cir.2015) 780 F.3d 971 31, 34

*United States v. Cortez*,

(1981) 449 U.S. 411 75

# TABLE OF AUTHORITIES (Continued)

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. IV 64

Cal. Const. art. I, § 13 64

Cal. Const., art. VI, § 13 74

**STATUTES**

Welf. & Inst. Code, § 625.6 38, 39

Welf. & Inst. Code, § 800 12

Welf. & Inst. Code § 782 14, 15, 22

**RULES**

California Rules of Court, Rule 8.406 8

**OTHER AUTHORITIES**

21 Cal. Jur. 3d Criminal Law: Trial § 382 ……..85

2017 California Senate Bill No. 395 …41, 42

Jay D. Aronson, *Neuroscience and Juvenile Justice*,

 42 Akron L. Rev. 917 (2009) …….44

Samantha Buckingham, *A Tale of Two Systems: How Schools and the Juvenile Justice System Are Failing*,

 13 U. Md. L.J. Race, Religion, Gender & Class 179 (2013) ……..57

Samantha Buckingham, *Trauma Informed Juvenile Justice*,

 53 Am. Crim. L. Rev. 641 …….45

Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*,

 34 N. Ky. L. Rev. 257 (2007) ……..69

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 40 J. Am. Acad. Child & Adolescent Psychiatry 1012, 1016 (2001)

# TABLE OF AUTHORITIES (Continued)

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 20 J.L. & Pol’y 117 (2011) …….76

Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*,

 23 Cornell J.L. & Pub. Pol’y 395 (2013) ……..43

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 101 Proc. Nat’l Acad. Sci. 8174, 8177 (2004) ……42

Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*,

 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) Passim

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 USC School of Social Work, 2015 at p. 10. …….43

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 31 Law & Hum. Behav. 381, 389 (2007). …….40

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Zoë Overbeck, *No Match for the Police: An analysis of Miranda's Problematic Application to Juvenile Defendants*,

 38 Hastings Const. L.Q. 1053 (2011) ….69

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 62 Rutgers L. Rev. 943 (2010) …..69

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 32 Behav. Sci. & L. 104 (2014) …53, 54

# INTRODUCTION

“[C]hildren cannot be viewed simply as miniature adults.” (*J.D.B. v. North Carolina* (2011) 564 U.S. 261 [131 S.Ct. 2394, 2396].) Children are afforded greater protection than adults under the Constitutions of the United States and of the State of California. (See *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825], *as modified (July 6, 2010)*; *Miller v. Alabama*(2012) 567 U.S. 460 [132 S.Ct. 2455, 183 L.Ed.2d 407].) The neuroscience and psychology of adolescent development demonstrate how and why children are different from adults: they are more impulsive; they have difficulty accurately predicting long-term consequences, engaging in cost-benefit analysis, and planning; they are vulnerable to trauma and influence; they are susceptible to peer pressure and have difficulty making decisions in the company of other children; they are less sophisticated and thus easily manipulated by adults; and they have potential to grow and learn in ways that cannot be accurately predicted by adults in the criminal justice system. (*Ibid.*) Given these significant differences, children charged with offenses must be treated differently than adults.

Despite these differences, Commissioner held MALE CLIENT[[1]](#footnote-2) to an adult standard in MALE CLIENT’s adjudication proceedings. Accordingly, on appeal, MALE CLIENT requests reversal of the Los Angeles County Superior Court’s dispositional order because: (1) the Superior Court erred in denying the Trombetta/Youngblood motion to dismiss; (2) the Superior Court erred when it failed to exclude MALE CLIENT’s confession because the weight of existing law and policy compels the conclusion that juveniles cannot implicitly waive their Miranda rights; (3) the Superior Court erred in failing to exclude MALE CLIENT’s confession because MALE CLIENT did not knowingly, voluntarily, and intelligently waive his *Miranda* rights; (4) the Superior Court erred when it failed to exclude MALE CLIENT’s confession because MALE CLIENT’s confession was not voluntary; (5) the Superior Court erred when it denied MALE CLIENT’s motion to dismiss because officers violated MALE CLIENT’s fourth amendment rights when they seized him; and (6) the Superior Court violated MALE CLIENT’s due process rights by failing to exclude the show-up identification evidence because the identification procedure was impermissibly suggestive, unnecessary, and unreliable.

# STATEMENT OF APPEALABILITY

MALE CLIENT appeals the Los Angeles Superior Court’s denial of his renewed motion to dismiss entered on September 13, 2018. MALE CLIENT also appeals the Superior Court’s denial of his motion to suppress entered on November 8, 2018.

A judgment in a proceeding under section 602 of the California Welfare and Institutions Code is appealable in the same manner as any other final judgment pursuant to section 800 of the Code. (Welf. & Inst. Code, § 800.) In fact, in a juvenile proceeding, even non-final orders, including denied motions to dismiss and denied motions to suppress, can be appealed as long as those orders affect “the substantial rights of the juvenile irrespective of whether the order declaring a person to be a ward of the juvenile court has become final.” (*In re Corey* (1964) 230 Cal.App.2d 813, 822.) Moreover, Welfare and Institutions Code section 800 specifically states that a ruling on a motion to suppress “shall be reviewed on appeal even if the judgment is predicated upon an admission of the allegations of the petition.” (Welf. & Inst. Code, § 800.) Therefore, the Superior Court’s denials of MALE CLIENT’s motion to dismiss and motion to suppress are appealable here.

The court entered a deferred entry of judgment on November 29, 2017 following MALE CLIENT’s admission and the court’s finding of involved sustaining count 1, attempted second-degree robbery in violation of Penal Code section 664/211. (CT 1.) On January 26, 2018 MALE CLIENT filed his motion to appeal. (*Id.* at 130.) Accordingly, his appeal is timely filed under California Rules of Court, Rule 8.406. (Cal. Rules of Court, 8.406.)

# STATEMENT OF FACTS

## BACKGROUND

### MALE CLIENT’s Childhood Trauma and Depression

MALE CLIENT was a 17-year-old child at the time of his arrest and presentment in juvenile delinquency court and had no prior adjudications. (CT 5.) Because MALE CLIENT’s biological father was absent, MALE CLIENT spent his childhood with his siblings and his single mother, CLIENT’S MOTHER. Throughout his childhood, MALE CLIENT witnessed violence in his home. (*Id.* at p. 13.) For instance, CLIENT’S MOTHER was the victim of domestic violence at the hands of her live-in boyfriend. (*Ibid*.) In addition, a few years prior to his arrest in this case, the Department of Child and Family Services substantiated MALE CLIENT’s older sister’s claims that CLIENT’S MOTHER’s boyfriend had sexually abused her. (*Ibid.*) Then, MALE CLIENT’s disabled brother was removed from the home and MALE CLIENT’s older sister left the house. (§ 782 Motion[[2]](#footnote-3) 2.)

Psychologist Dr. Artha Gillis evaluated MALE CLIENT and determined that he suffers from major depressive disorder that began when he was about 14, at around the same time that DCFS became involved with his family. (§ 782 Motion 5.) MALE CLIENT experienced depressed mood, guilt, hopelessness, sadness, tearfulness, low appetite, and early insomnia. While CLIENT’S MOTHER noticed the onset of these symptoms, there was not much she could offer to help him. (*Ibid.*) Additionally, CLIENT’S MOTHER, who is exceedingly caring and well-meaning, has been working hard to overcome her own issues related to the events that led to the abuse of her daughter, involvement of DCFS in her family, domestic violence she personally suffered, and incarceration of her then boyfriend. (*Id.* at p. 6.) CLIENT’S MOTHER cares for several children, including MALE CLIENT’s brother, who suffers from such extreme developmental disabilities that he now lives in a care facility provided by Regional Center. (*Ibid.*) Until CJLP became involved in his life, MALE CLIENT’s depression went without treatment and he had twice attempted to hurt himself. (*Ibid.*)

### MALE CLIENT’s Learning Disabilities

At the time of the crime and resulting investigation, MALE CLIENT was a special education student who struggled with processing disorders. MALE CLIENT has had an individualized education program (“IEP”) [[3]](#footnote-4) in place since he was about 4 years old. (CT 39.) According to the IEP documents authored just prior to his arrest in this matter, MALE CLIENT needed as an accommodation, “extended time for processing (30-40 seconds)” when teachers read questions to him, and if he still did not understand, then the teacher was required to reword the question. (*Id.* at pp. 39-52.) Additionally, the IEP indicated that, in order to ensure comprehension, MALE CLIENT may have needed to “repeat back questions” while his teachers may have needed to “clarify and repeat directions” or “check for understanding.” (*Id.* at p. 106.)

Because English is MALE CLIENT’s second language, his IEP documents noted that he is an English Language Learner and his most recent California English Language Development Test (“CELDT”) score placed him at the level of Early Intermediate in listening proficiency (i.e. understanding verbal language). (CT 105.)  Early Intermediate listening proficiency is defined thusly: "Students who perform at this level on the CELDT typically understand basic vocabulary and syntax, with frequent errors and limited comprehension. They understand and follow simple multi-step oral directions." (*Id.* at pp. 109-110.)

## THE OFFENSE

Around 12:30am on December 4, 2016, University of Southern California (“USC”) Department of Public Safety (“DPS”) OFFICER 1 received a radio call about an attempted robbery near Vermont and 36th Place near the USC campus. (ART[[4]](#footnote-5) 11.) The complaining witness, WITNESS, claimed that three boys approached him and attempted to take his bicycle. (CT 10.) The boys were unarmed and unsuccessful in their efforts. (*Ibid*.) WITNESS left the brief encounter with all of his property and reported the incident to the police. (*Id.* at p. 12.)

Dispatch described the suspects as, “three males, Hispanic, about 17 years old, wearing hoodies.” (ART 67-68.) Officers OFFICER 1 and OFFICER 2 responded to the call. (*Id.* at p. 89.) OFFICER 2, who was close to the radioed location, directly reported to the scene without investigating any other areas around USC. (*Id.* at p. 99.) While the officers drove towards the area, OPERATOR, a USC DPS CCTV technician, radioed that she observed via closed circuit television three MALE CLIENT Hispanics walking through Century Alley and Cardinal Alley. (*Id.* at p. 6.) Officers located MALE CLIENT and his two teenage companions walking through a gated community near McClintock and Jefferson and detained them. (*Id.* at pp. 68-69.)

After the three officers stopped the three boys, OFFICER 1, in another location, spoke with WITNESS, informing him that officers had detained three boys nearby that matched the description. (ART 343-346.) OFFICER 1 asked WITNESS to go with him in his police car to the location of the detained boys. (*Id.* at p. 346.) OFFICER 1 claimed, in his testimony, that he gave WITNESS an admonishment before the identification procedure; however, OFFICER 1 did not mention the admonishment in his police report. (*Id.* at pp. 343-345.)

Upon OFFICER 1 and WITNESS’s arrival, the officers performed a show-up identification of the suspects. (ART 346.) OFFICER 2 testified that the police car transporting WITNESS pulled up about twenty feet away from the boys. (*Id.* at pp. 90-91.) According to OFFICER 2’s testimony, the three boys stood on the side of the road in handcuffs all together each with a uniformed officer at his side. (*Ibid*.) Then, one at a time, the boys were escorted a few feet over so that they were more directly in the car’s spotlight, still twenty feet away from WITNESS in the police car. (*Id.* at p. 94.) OFFICER 2 was with the suspects as they stood on the sidewalk. (*Id.* at p. 92.) Meanwhile, OFFICER 1 remained in the police car with WITNESS. (*Id.* at p. 91.)

OFFICER 1 testified that he could not be sure whether WITNESS could see the three boys standing together handcuffed as they arrived at the location or later during the identification procedure. (ART 359-360.)

## THE INTERROGATION

Upon their arrest, the three boys cooperated with the police. (ART 71-74.) At the police station, an officer led MALE CLIENT, handcuffed, into the small interrogation room and placed MALE CLIENT in a chair across from DETECTIVE, a large officer who chewed and spat tobacco throughout the interrogation. (1 PEX 2:37:36.[[5]](#footnote-6)) The second officer remained in the small interrogation room with MALE CLIENT and DETECTIVE.

At the beginning of MALE CLIENT’s questioning, DETECTIVE asked MALE CLIENT basic questions: “How old are you?” “Where do you live?” “Who do you live with?” “What is your phone number?” (2 PEX 1-2.) When DETECTIVE asked MALE CLIENT his phone number, MALE CLIENT said that he did not know the number. (*Id*. at p. 2.) DETECTIVE responded incredulously, “You been drinking tonight?....You been snorting?” (*Ibid.*) MALE CLIENT admitted to smoking marijuana earlier that night. (*Ibid.*)

After asking introductory questions, DETECTIVE read MALE CLIENT’s *Miranda* rights, spending a total of only 32 seconds doing so. (1 PEX 2:39:04-2:39:36) For each *Miranda* right, DETECTIVE informed MALE CLIENT of the right and asked if he understood. (*Ibid.*) The Investigative Action Form has a section for an officer to fill out if they seek an express waiver of *Miranda* rights. (3 PEX.) When completing the form, DETECTIVE checked the box on the Investigative Action Form that MALE CLIENT had indeed expressly waived his *Miranda* rights. (ART 332-334.) Further, DETECTIVE wrote “yeah” as the exact words MALE CLIENT used in expressly waiving his rights. (*Id.* at 333.) DETECTIVE completed the form in this manner despite never having asked MALE CLIENT for an express waiver. (2 PEX 3.)

When DETECTIVE asked about the crime, MALE CLIENT maintained that he did not intend to rob WITNESS. (2 PEX 5-6.) He believed, instead, that he and his friends were asking WITNESS for bus money and that WITNESS misunderstood the situation, pulled out from his pocket an object that appeared to be a weapon, and threatened MALE CLIENT with it. (*Ibid.*)

DETECTIVE asked MALE CLIENT questions searching for an explanation for MALE CLIENT’s confusion and clear lack of understanding. (2 PEX 5) More than once, DETECTIVE had to ask MALE CLIENT if he was “following” the conversation. (*Ibid.*) In addition, DETECTIVE had to explain to MALE CLIENT what he meant by “arrest” because MALE CLIENT took that to mean getting in trouble at school or getting a ticket. (*Id.* at p. 9.)

 Ultimately, DETECTIVE employed a variety of coercive tactics to pressure MALE CLIENT to confess. First, DETECTIVE lied to MALE CLIENT about video evidence that existed, a tactic known as a “ruse.” (2 PEX 5) After lying to MALE CLIENT about the state of the evidence, DETECTIVE repeatedly interrupted MALE CLIENT and engaged in power tactics. For instance, DETECTIVE ordered, “put your hat back on.” (2 PEX 11.) DETECTIVE also spat chewing tobacco into a cup throughout the interview. (1 PEX.) At the end of the interrogation, DETECTIVE shot a series of rapid-fire questions at MALE CLIENT, interrupting MALE CLIENT’s answers with further questions. (2 PEX 12.) Finally, DETECTIVE said, “[WITNESS] identified all three of you as someone who tried to rob him….[b]ecause he thought you were gonna try to rob him? Because you were going to?” (*Ibid.*) Worn down and confused, MALE CLIENT assented. (*Ibid.*) MALE CLIENT did not elaborate further in his own words. DETECTIVE abruptly concluded the interrogation. (*Ibid.*)

## THE PROCEEDINGS

On February 7, 2017, MALE CLIENT was arraigned on a Welfare and Institutions Code section 602 petition alleging attempted robbery in violation of Penal Code §664/211 for his purported conduct on December 4, 2016. (CT 11.) The court set the matter for a pre-plea hearing on March 29, 2017 where MALE CLIENT was present and prepared, but the matter was continued because the probation department failed to complete a timely Pre-Plea Report for MALE CLIENT’s co-minor MALE DOE 2 (*Id.* at p. 53.) Despite written requests from MALE CLIENT’s counsel on February 22, April 18, and May 20, 2017, key discovery remained outstanding and the court continued a series of hearings that were originally scheduled for April, May, and June 2017. (§ 782 Motion 2.) Neither MALE CLIENT nor his counsel was responsible for the delay. (*Ibid.*)

The court set a hearing on June 28, 2017 to hear motions to suppress evidence. (CT 86-87) On June 1 and 2, 2017 MALE CLIENT’s counsel filed motions to suppress evidence and to dismiss for the police’s failure to collect and preserve the video evidence from USC DPS. (CT 57-71.) At the June 28, 2017 hearing, after receiving evidence and testimony, the court denied MALE CLIENT’s *Trombetta/Youngblood* motion to dismiss. (CT 86.) On July 11, 2017, MALE CLIENT’s counsel filed a renewal of the *Trombetta/Youngblood* motion offering to produce evidence that Commissioner had previously indicated he would need to grant the motion. (ART 45.)

On July 12, 2017, the court heard testimony related to the motion to suppress evidence and permitted MALE CLIENT’s counsel to re-raise the issue and offer more testimony on the *Trombetta Youngblood* matter. (ART 44-111.)

On September 13, 2017, counsel for MALE CLIENT made an oral motion to dismiss pursuant to Welfare and Institutions Code section 782. (ART 167-168.) In support of the motion, counsel asserted that MALE CLIENT was before the court with this case ongoing for nearly a year, was about to turn 18 on September 15, 2017, and was experiencing a lot of stress due to this case. (*Ibid.*) Counsel then emphasized that the issues and challenges that MALE CLIENT faces can be addressed in the community, without the need to adjudicate him. (*Ibid.*)

Though the court found that the police were sloppy in failing to preserve useful video evidence pertinent to MALE CLIENT’s defense, it, nevertheless, denied MALE CLIENT’s claim for relief. (ART 165-166.) The court then set the case over to continue to receive evidence on the motion to suppress hearing for October 18, 2017. (*Id.* at p. 168.)

MALE CLIENT petitioned this Court for a Writ of Mandate on October 23, 2017. The petition asked this Court to direct the Superior Court to vacate its ruling denying MALE CLIENT’s *Trombetta/Youngblood* motion, and to order the Superior Court to dismiss the indictment. On November 6, 2017, this Court denied the petition for failure to provide an adequate record for review.

On November 7, 2017, Commissioner denied the motion to suppress MALE CLIENT’s statements finding a lack of case law prohibiting DETECTIVE’s method of administering MALE CLIENT’s *Miranda* warning. (ART 625.)

On November 8, 2017, Commissioner denied MALE CLIENT’s motion to suppress evidence, including all statements and identification, finding that MALE CLIENT’s detention was a justified *Terry* stop. The court reasoned that while the radio description was meager, it was sufficient to validate the officer’s stop. (ART 648.) Commissioner also denied MALE CLIENT’s motion to suppress the identification procedure based on Fourteenth Amendment violations finding a lack of law prohibiting the use of in-field show-ups. (*Ibid.*)

On November 29, 2017, MALE CLIENT entered an admission of guilty pursuant to an agreement with the prosecution. As part of the plea deal, the court and the assistant district attorney agreed that MALE CLIENT would retain the right to appeal pretrial decisions. (RT 8.) The court ordered a deferred entry of judgment and placed MALE CLIENT on probation. (RT 4-5.)

On January 26, 2018, MALE CLIENT’s counsel filed a timely notice of appeal. (CT 130-131.)

# ARGUMENT

## THE SUPERIOR COURT ERRED WHEN IT FAILED TO EXCLUDE MALE CLIENT’S CONFESSION BECAUSE THE WEIGHT OF EXISTING LAW AND POLICY COMPELS THE CONCLUSION THAT JUVENILES CANNOT IMPLICITLY WAIVE THEIR *MIRANDA* RIGHTS.

Adult suspects may waive their *Miranda* rights, including the right to remain silent and the right to counsel, private or appointed. In 2010, the California Supreme Court held that juveniles may also implicitly waive their *Miranda* rights. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1165–1166.) However, the U.S. Supreme court has since held that a suspect’s age is a significant factor in custodyanalysis. (*J.D.B. v. North Carolina* (2011) 564 U.S. 261.) Likewise, a suspect’s age is relevant to *Miranda* waiver analysis. Therefore, this Court must reconsider whether juveniles can implicitly waive their *Miranda* rights, given the Court’s ruling in *J.D.B.*

### “De Novo” is the Appropriate Standard of Review.

Questions of pure law are reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893–894.) As *Cromer* states, “The standards of review for questions of pure fact and pure law are well developed and settled. Trial courts and juries are better situated to resolve questions of fact, while appellate courts are more competentto resolve questions of law. Traditionally, therefore, an appellate court reviews findings of fact under a deferential standard (substantial evidence under California law, clearly erroneous under federal law), but it reviews determinations of law under a nondeferential standard, which is independent or de novo review.”  (*Ibid*.) Here, the standard of review is de novo because whether juveniles can implicitly waive their *Miranda* rights is purely a matter of law.

# Adults May Implicitly Waive Their *Miranda* Rights.

Generally, a suspect in custody may waive his or her *Miranda* rights in order to speak with the police. (*Miranda v. Arizona*(1966) 384 U.S. 436, 444 [86 S.Ct. 1602, 1612, 16 L.Ed.2d 694].) The prosecution bears the burden of demonstrating that a challenged waiver is valid by a preponderance of the evidence. (*People v. Dykstra* (2009) 46 Cal.4th 731, 751.) The most obvious way for the prosecution to meet its burden is to proffer an explicit waiver executed by the suspect immediately after the *Miranda* advisement. Here, DETECTIVE did not attempt to obtain MALE CLIENT’s explicit *Miranda* waiver.

Nonetheless, a court may admit the statements of a suspect who willingly speaks with the police after receiving *Miranda* warnings if the court finds an “implicit” or “implied” waiver. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) If the totality of the circumstances surrounding the interrogation demonstrates that the suspect knew of and freely waived his *Miranda* rights, then his statements will be admitted at trial despite no explicit waiver. (*Id*. at p. 668.)

In 2010, the California Supreme Court held that juveniles can implicitly waive *Miranda* rights and that a “totality of the circumstances” test should be applied “to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights.” (*People v. Lessie* (2010) 47 Cal.4th 1152, 1165–1166.) However, the U.S. Supreme Court has since decided *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), the landmark U.S. Supreme Court case on applying *Miranda* to juvenile suspects. As set forth below, because *Lessie* treats juveniles essentially the same as adults for *Miranda* analysis, it cannot be reconciled with *J.D.B*. nor can it be reconciled with recent legislative trends or recent scholarship regarding juvenile confessions.

1. **Because MALE CLIENT is a Juvenile, Recent Case Law, Legislative Trends, and Legal Scholarship Compel this Court to Invalidate MALE CLIENT’s Implicit Waiver.**

1. Case law

The Supreme Court in *J.D.B.* held that the difference between juveniles and adults is relevant in analyzing whether a reasonable person would consider himself in custody for *Miranda* purposes. (*J.D.B. v. North Carolina, supra* 564 U.S. at p. 265.) The Court stressed that “children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave,” prompting it to hold that “a child’s age properly informs the *Miranda* custody analysis.” (*Ibid.*)

Just as a child’s age is relevant to ascertaining whether he reasonably believed he was in custody, MALE CLIENT’s age is likewise relevant to analyzing whether he implicitly waived his Miranda rights. In fact, many courts have indicated that *J.D.B.*’s emphasis on considering how youth impacts the *Miranda* custody analysis should be extended to other legal contexts. For example,*In re J.G.* (2014)228 Cal.App.4th 402 at pages 410-411 expressed support for extending *J.D.B.* to Fourth Amendment questions stating that “extending the holding [of *J.D.B.*] to search-and-seizure cases would not be much of a stretch.”

The U.S. Supreme Court has repeatedly acknowledged juveniles’ special status in the criminal justice system. For instance, the Court recognized that “youth is far more than a chronological fact.” (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.) Moreover, teenagers are “generally less mature and responsible than adults. (*Id.* at pp. 115-116.) They “often lack experience, perspective, and judgment to avoid choices that could be detrimental to them.” (*Bellotti v. Beard* (1979) 443 U.S. 622, 635.) Also, they “are more susceptible to . . . outside pressures” than adults. (*Roper v. Simmons* (2005) 543 U.S. 551, 569.) With specific reference to juvenile confessions, the Court noted that interrogation techniques that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." (Haley v. Ohio (1948) 332 U.S. 596, 599.)

2. Legislative Trends

Recent legislative trends also compel this Court to invalidate MALE CLIENT’s implicit *Miranda* waiver. In October 2017, Governor Brown approved Senate Bill 395 adding section 625.6 to the Welfare and Institutions Code (“section 625.6”). (2017 California Senate Bill No. 395, California 2017-2018 Regular Session.) Essentially, the new law requires, with some exceptions, that, “[p]rior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference.”  (Welf. & Inst. Code, § 625.6.) In addition, the law prohibits a waiver of the consultation. (*Ibid.*)

As justification for the new law, the bill authors noted that “[p]eople under 18 years of age have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver. Additionally, a large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions.”  (2017 California Senate Bill No. 395, California 2017-2018 Regular Session.)

Respondent may argue that the legislature deliberately chose not to apply section 625.6 to juveniles over 15 years old.[[6]](#footnote-7) However, section 625.6 requires counsel’s presence for children 15 years of age or younger. On the other hand, MALE CLIENT does not argue for the state to provide counsel to juveniles over 15 years old. Rather, MALE CLIENT argues that this Court should merely invalidate implied waivers from juveniles under age 18. Contemporary legal scholars agree with MALE CLIENT.

3. Legal Scholarship

Legal scholars, Marsha Levick and Elizabeth-Ann Tierney, recently wrote that *J.D.B.*’s holding—that a juvenile’s age is a factor in the reasonable-person analysis of Fifth Amendment custody—may implicate “other areas of criminal procedure—including voluntariness of waivers of rights and seizure inquiries” and substantive criminal law, such as “blameworthiness of [the subject’s] conduct and/or state of mind.”[[7]](#footnote-8)

When it comes to waiving *Miranda* rights, adolescents waive their rights at a rate of 90 percent.[[8]](#footnote-9) Adults, by contrast, only waive their *Miranda* rights an estimated 68 percent of the time.[[9]](#footnote-10) According to juvenile justice experts:

The greater suggestibility and deference to authority exhibited by youth relative to adults may make them more likely to waive their rights to silence and counsel, regardless of whether they fully comprehend the rights they are forfeiting. That very few children and adolescents invoke their Miranda rights underscores the importance of considering the extent to which youth comprehend their rights before they should be allowed to waive them.[[10]](#footnote-11)

*Miranda* rights are not easy to understand. Research indicates that even youth who have a basic understanding of the words and phrasing of *Miranda* warnings have difficulty grasping the significance of the warnings and comprehending how their rights apply in an interrogation.[[11]](#footnote-12) Indeed, among youth who are between twelve to nineteen, around 94 percent exhibit “less than adequate appreciation of the significance and consequence of waiving their rights.”[[12]](#footnote-13)

### MALE CLIENT’s Implicit *Miranda* Wavier was Invalid.

Here, the Superior Court employed the adult totality of the circumstances test used to analyze whether an adult suspect implicitly waived his *Miranda* rights. The adult test fails to adequately consider juveniles’ unique characteristics and vulnerabilities. The trial judge repeatedly stated that the juvenile in *J.D.B.* was 13 years old, whereas MALE CLIENT was 17 years old. Yet, adolescent brain development is incomplete at age 17.[[13]](#footnote-14) As such the trial court’s focus on this distinction is tantamount to treating a disabled 17-year-old boy as a de facto adult man even though developmentally he is nowhere near adulthood.

Nowhere is the need to honor the uniqueness of childhood in assessing legal issues greater than in a case involving a juvenile who has suffered trauma. “Not only are youth impulsive generally, neuroscience has shown that for those youth who have suffered trauma, brain structures that regulate emotion, behavior and impulsivity are less developed and function irregularly.” (Samantha Buckingham (2016) *Trauma Informed Juvenile Justice*, 53 Am. Crim. L. Rev. 641, 660.) Relevant to the issue of waiver, youth, who like MALE CLIENT, have suffered from trauma are more vulnerable and susceptible to pressure and outside influence.[[14]](#footnote-15) Indeed, “[a]dolescents have ‘a much stronger tendency … to make choices in compliance with the perceived desires of authority figures’ than do adults.”[[15]](#footnote-16)

In this case, DETECTIVE admitted on cross examination that it is his pattern and practice to read *Miranda* rights to youth without obtaining an express waiver. (ART 39-40.) Sadly, this is not the first time that police officers have interrogated a juvenile suspect without even attempting to obtain an express *Miranda* rights waiver. (*See, e.g., In re Art T.* (2015)234 Cal.App.4th 335, 340 [noting that LAPD homicide detective who interrogated a 13-year-old boy “made no attempt to secure an express waiver of rights” before eliciting a confession]; *see also, People v. Nelson* (2012) 53 Cal.4th 367, 375 [police did not obtain an express *Mirand*a waiver prior to questioning a 15-year-old suspect].) This will not be the last time police use implied waiver with children unless this type of inappropriately aggressive tactic is met with a significant sanction.

*Miranda* protections afforded to a juvenile suspect should be higher than protection afforded to adult suspects. Even if an adult suspect can implicitly waive his *Miranda* rights, an express *Miranda* waiver should be required of a juvenile suspect in recognition of the very real and constitutionally significant differences between children and adults. (*See J.D.B. v. North Carolina*, *supra* 564 U.S. at p. 272 [holding that a child’s age should be considered in *Miranda* custody analysis in part because “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go”]*; cf., Miller v. Alabama*(2012)567 U.S. 460 (132 S.Ct. 2455, 2458, 183 L.Ed.2d 407) [noting that, in the sentencing context, “children are constitutionally different from adults”].) To the extent that *Lessie* says otherwise, it is inconsistent with and thus abrogated by *J.D.B.*

### The Admission of MALE CLIENT’s Confession was Prejudicial Under *Chapman*.

Since *Miranda* rights are federal constitutional protections, the *Chapman* prejudice standard applies to evaluate whether the *Miranda* violation was harmless error. Under *Chapman*, the People must prove that the error here was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As the Court noted in *Arizona v. Fulminante*, a confession is such compelling evidence that prejudice is easier to find. (*Arizona v. Fulminante*, supra, 499 U.S. at p. 296.) Here, the People only presented two significant evidence sources: (1) MALE CLIENT’s confession, and (2) Castellano’s identification. The confession was essential evidence for the People’s case. Therefore, the People cannot successfully argue that the erroneous admission of the confession was harmless beyond a reasonable doubt.

## THE SUPERIOR COURT ERRED IN FAILING TO EXCLUDE MALE CLIENT’S CONFESSION BECAUSE MALE CLIENT DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS*.*

Even if this Court declines to invalidate implicit juvenile *Miranda* waivers, MALE CLIENT did not knowingly, voluntarily, and intelligently waive his *Miranda* rights here.

### “De Novo” is the Appropriate Standard of Review.

This court should independently review the Superior Court’s decision to validate MALE CLIENT’s implicit Miranda waiver. Typically, when this Court reviews the “trial court's decision on a Miranda issue, [the Court] accept[s] the trial court's determination of disputed facts if supported by substantial evidence, but [it] independently decide[s] whether the challenged statements were obtained in violation of *Miranda.*” (*In re Art T.*, *supra,* 234 Cal.App.4th at p. 348.)

### MALE CLIENT did not Knowingly, Voluntarily, and Intelligently Waive his *Miranda* Rights.

A suspect may not be subjected to custodial interrogation unless he or she “knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent.”  (*People v. Sims* (1993) 5 Cal.4th 405, 440.) The court at a motions hearing to suppress must weigh “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.”[[16]](#footnote-17)

In cases of juvenile interrogations, the court employs a “totality of the circumstances” test to determine whether the accused knowingly, voluntarily, and intelligently “decided to forgo his rights to remain silent and to have the assistance of counsel.”  (*People v. Lessie* (2010) 47 Cal.4th 1152, 1165–1166.) As stated in *Lessie*, “[t]he totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation” including “evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.” (*Id.* 1167.)

In the adult context, police officers have an obligation to stop questioning a suspect if the suspect clearly and unamiguously asserts his or her right to counsel. (*Davis v. U.S.* (1994) 512 U.S. 452, 462 [114 S.Ct. 2350, 2356, 129 L.Ed.2d 362].) However, in *Art T*., a California juvenile case, this Court held that “a court should consider a juvenile's age for purposes of analyzing whether the juvenile has unambiguously invoked his or her right to counsel.”  (*In re Art T., supra* , 234 Cal.App.4th at p. 354.)

 Moreover, in *North Carolina v. Butler*(1979) 441 U.S. 369, 373 [99 S.Ct. 1755, 1757], the Supreme Court held that “courts must presume that a defendant did not waive his rights” and that “the prosecution's burden is great.” (*Ibid.*) No court could, on this record, be convinced that MALE CLIENT could voluntarily, knowingly, and intelligently provide an implied waiver under these circumstances.

 Here, the People did not meet their burden. There are two areas to examine: DETECTIVE’s behavior and MALE CLIENT’s particular characteristics. DETECTIVE used tactics to exert coercion, such as speeding through the *Miranda* warnings, failing to explain the rights, ignoring comprehension issues MALE CLIENT demonstrated, and failing to seek an express waiver. Factors specific to MALE CLIENT include his age, experience, education, background, intelligence, and his limited ability to understand the warnings. Together these factors should have convinced the Superior Court that MALE CLIENT did not knowingly, voluntarily, and intelligently waive his *Miranda* rights.

DETECTIVE read each right and immediately asked MALE CLIENT if he understood and moved on to the next right. There was no explanation, no pausing for MALE CLIENT to relay back what he thought he heard, and no opportunity for questions or clarification. DETECTIVE spent a total of 32 seconds reading the warnings and asking if MALE CLIENT understood. (1 PEX 2:39:04-2:39:36) Moreover, the officer did not emphasize the Miranda rights’ importance. This is a common investigative tactic used by police officers designed to de-emphasize the importance of *Miranda* rights.[[17]](#footnote-18)

In situations wherein police present the waiver decision as an inconsequential formality….the youth faced with the question may be ill-equipped to independently grasp the significance of waiving rights. That youth may also be less able to resist the perceived pressure to submit to the officers’ continued questioning. (Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) at p. 27.)

MALE CLIENT was 17 years old at the time of the interrogation. Researchers have found that with juvenile justice involved youth ages thirteen to seventeen, “even the most sophisticated and mature youth were able to recall only 50 percent of *Miranda* content one minute after the warnings were administered.”[[18]](#footnote-19) Studies of *Miranda* are also conducted in less stressful circumstances than actual interrogation, which are "inherently high-stress.”[[19]](#footnote-20) Further, recent scholarly literature suggests that children who have experienced trauma, like MALE CLIENT, exhibit maturity levels much younger than their chronological age. In fact, “children’s experiences with child maltreatment or other forms of toxic stress, such as domestic violence or disasters, can negatively affect brain development.”[[20]](#footnote-21)

 MALE CLIENT experienced significant childhood trauma. His brother required special needs and had recently been taken from the home. In addition, his mother’s boyfriend was arrested for sexually abusing his sister. MALE CLIENT was exposed to domestic violence in his home with his mother as the victim. This trauma delayed MALE CLIENT’s intellectual and emotional maturity level. The United States Supreme Court has acknowledged that juveniles are “susceptible to influence and to psychological damage” and that courts must consider evidence of “neglectful and violent family background.”  (*Miller v. Alabama* (2012) 567 U.S. 460, 476 [132 S.Ct. 2455, 2467, 183 L.Ed.2d 407].)

The court also had before it information directly relevant to MALE CLIENT’s ability to understand *Miranda* warnings. According to MALE CLIENT’s recent IEP just prior to his arrest in this matter, MALE CLIENT needed as an accommodation, “extended time for processing (30-40 seconds)” when teachers read questions to him (CT 39-52, 106), and if he still did not understand, then the teacher was required to reword the question. (*Id.* at pp. 39-52.) Additionally, the IEP indicated that, in order to ensure comprehension, MALE CLIENT may have needed to “repeat back questions” while his teachers may have needed to “clarify and repeat directions” or “check for understanding.” (*Id.* at p. 106.) DETECTIVE did not explain the rights to MALE CLIENT, he did not rephrase the Miranda rights and re-read them, nor did he check for MALE CLIENT’s comprehension by asking MALE CLIENT to explain back what he understood his rights to be. In addition, because English is MALE CLIENT’s second language, his IEP documents noted that he is as an English Language Learner and his most recent California English Language Development Test (“CELDT”) score placed him at the Early Intermediate level in listening proficiency (i.e. understanding verbal language). (CT 105.)

DETECTIVE noticed MALE CLIENT’s diminished intellectual ability and the outward signs of MALE CLIENT’s difficulty comprehending the interrogation. In fact, DETECTIVE repeatedly asked MALE CLIENT questions searching for an explanation for MALE CLIENT’s confusion and clear lack of understanding.  (2 PEX 5.) More than once, DETECTIVE had to ask MALE CLIENT if he was following the conversation.  (*Ibid.*) This is not surprising given that MALE CLIENT’s IEP indicated that he required repetition of directions, extra time for processing, and checks for understandings.

Also, DETECTIVE asked MALE CLIENT, “What is your telephone number?” MALE CLIENT responded, “dang, I don’t really know.” DETECTIVE, apparently thinking that it was peculiar for a teenager not to know his own phone number, responded by asking if MALE CLIENT was under the influence of drugs or alcohol. Later in the interview, MALE CLIENT told DETECTIVE that he thought that an “arrest” was “getting tickets.” (2 PEX 10.)

Given MALE CLIENT’s evident lack of understanding, an objectively reasonable police officer would have identified that MALE CLIENT had comprehension issues at the interrogation’s outset, even before the rights were read. Just as an officer would observe the age of a child before him, he would observe the attendant “differentiating characteristics of youth” discussed by the Supreme Court in *J.D.B.* as “commonsense” and “universal.” (*JDB v. North Carolina*, *supra*, 564 U.S. at pp. 272-74.) An objectively reasonable police officer knows that youth in the juvenile justice system suffer from learning disabilities at a higher rate than children in the general population. Nationwide, at least one in three youth who are arrested have a disability, and some researchers estimate that the disability rate amongst juvenile justice involved youth is as high as 70 percent.[[21]](#footnote-22) In Los Angeles, according to a probation outcomes report published in 2015, children detained and attending probation schools in LA County are significantly behind in reading and math.[[22]](#footnote-23) That same study demonstrated that developmental disability and IEPs are prevalent amongst juvenile justice youth in LA County.[[23]](#footnote-24) Once a child becomes a client of the Juvenile Justice Clinic at the Center for Juvenile Law and Policy because of a juvenile delinquency case in Los Angeles, attorneys vet each case for special education services, and in 73 percent of cases education advocacy was needed.[[24]](#footnote-25) An objectively reasonable police officer does not wait for a child to assert that he has a disability; an objectively reasonable police officer knows that children arrested in Los Angeles and across the nation are likely to suffer from learning disabilities. In the circumstances of DETECTIVE’s interrogation of MALE CLIENT, an objectively reasonable police officer should have concluded that MALE CLIENT did not understand his *Miranda* rights and stopped the interview.

Significantly, the Superior Court failed to adequately discount DETECTIVE’s assertion in his testimony that DETECTIVE did not recognize MALE CLIENT’s lack of understanding. (ART 340.) DETECTIVE exaggerated at best, and lied at worst, when describing his own impression of MALE CLIENT’s understanding. When approaching DETECTIVE’s credibility regarding his claim that MALE CLIENT understood what was going on, the fact finder should have looked to DETECTIVE’s comments to MALE CLIENT that he was not following along and considered the extent to which DETECTIVE’s credibility was impeached on the issue of express waiver.

DETECTIVE sat in the courtroom and watched a video of himself interrogating MALE CLIENT. (ART 307.) Immediately following the interrogation video, Assistant District Attorney asked DETECTIVE questions on direct examination. (ART 308.) DETECTIVE stated that he had asked MALE CLIENT to expressly waive his Miranda rights, that MALE CLIENT had indicated that he wished to expressly waive his rights and wished to speak to DETECTIVE, and that MALE CLIENT had specifically said “yeah” in response to the question of whether he wanted to give up his Miranda rights and speak to the officer. (ART 314.) The video of the interrogation, on the other hand, established that DETECTIVE never asked MALE CLIENT if he expressly waived his Miranda rights, never asked MALE CLIENT if he wished to give up his rights, and never asked MALE CLIENT if he wished to speak with the officer. The video footage also revealed that, having never been asked to expressly waive his Miranda rights, MALE CLIENT did not respond to a question about giving up his rights, and did not utter “yeah” in response.

DETECTIVE did not merely misspeak in court, or misremember what happened, rather he falsified a police report on the night of the event by: (1) checking off that MALE CLIENT had expressly waived his rights, (2) indicating that he asked MALE CLIENT if he gave up his rights and wished to speak with the police, and (3) purporting that MALE CLIENT had responded “yeah.” Having been strongly impeached in this manner, DETECTIVE’s testimony should have been afforded zero credibility as to his impression of whether MALE CLIENT understood his rights. DETECTIVE falsified a police report and testified in court both to achieve the same end—to exaggerate the propriety of the waiver.

In light of the weight of relevant factors—MALE CLIENT’s age, experience, education, background, intelligence, and inability to understand the warnings as read to him as well as the speed with which the warnings were read, the lack of explanation, the inattention given the importance of the rights, and the pressure exerted by DETECTIVE—the Superior Court should not have found that the People met their high burden of establishing MALE CLIENT’s *Miranda* waiver.

### The Admission of MALE CLIENT’s Confession was Prejudicial Under *Chapman*.

Since *Miranda* rights are federal constitutional protections, the *Chapman* prejudice standard applies to evaluate whether the violation of *Miranda* was harmless error. Under *Chapman*, the People carry the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As the Court noted in *Arizona v. Fulminante*, a confession is such compelling evidence that prejudice is easier to find. (*Arizona v. Fulminante*, supra, 499 U.S. at p. 296.) Here, the People only presented two significant sources of evidence: (1) MALE CLIENT’s confession, and (2) WITNESS’s identification. The confession was essential evidence for the People’s case, yet statements obtained in violation of *Miranda* are inadmissible to establish guilt. (*People v. Sims*, *supra*,5 Cal.4th at p. 440.) Therefore, the People cannot successfully argue that the erroneous admission of the confession was harmless beyond a reasonable doubt.

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## THE SUPERIOR COURT ERRED WHEN IT FAILED TO EXCLUDE MALE CLIENT’S CONFESSION BECAUSE MALE CLIENT’S CONFESSION WAS NOT VOLUNTARY.

Even if juveniles can implicitly waive their Miranda rights, MALE CLIENT’s confession was not voluntary here. Therefore, MALE CLIENT’s motion to suppress his statements to DETECTIVE should have been granted.

### The Appropriate Standard of Review is a Mixed

### Question of Fact and Law.

According to *People v. Jones* (1998) 17 Cal.4th 279 at p. 296, voluntariness of a confession is typically “a mixed question of law and fact that is nevertheless predominantly legal.” “[T]he trial court’s findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, are reviewed for substantial evidence.” (*Ibid*.) On the other hand, whether a suspect’s statement was voluntary is a question of law and, therefore, is subject to de novo review on appeal. (*Ibid.*)

### MALE CLIENT’s Confession was Not Voluntary

Involuntary statements are to be excluded from trial for all purposes. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-86 (1964); *People v. Neal* (2003) 31 Cal. 4th 63, 79.)

 The prosecution must show that MALE CLIENT’s statements to DETECTIVE and the other officer in the small interrogation room were a product of rational intellect and free will. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The People bear the burden of proving the voluntariness of his statements by a preponderance of the evidence. (See *Lego v. Twomey* (1972) 404 U.S. 477, 489; *Jackson v. Denno* (1964) 378 U.S. 368, 376-77.)

Whether a juvenile’s confession is voluntary depends upon the “totality of the circumstances” that “existed at the time the confession was obtained.” (*In re John S.*(1988) 199 Cal.App.3d 441, 445.) These circumstances include “age, intelligence, education and ability to comprehend the meaning and effect of a confession.”  (*Ibid.*)

In assessing voluntariness, a court should consider the “totality of the circumstances.” (*Colorado v. Connelly* (1986) 479 U.S. 158, 176.) In this case, there are no facts to support a finding that MALE CLIENT’s statements were the product of rational intellect and free will. MALE CLIENT was seventeen years old and a special education student at the time of his interrogation. MALE CLIENT had a reasonable belief that he was required to respond to a police officer’s questions and that failing to respond would create further trouble. The detective’s tactics rose to the level of coercion prohibited by the Fourteenth Amendment. Under such circumstances, MALE CLIENT’s statements could not be the product of a rational intellect and free will.

Recent developments in law and neurological science have confirmed that children are entitled to greater constitutional protections than adults because, among other things, they “generally are less mature and responsible than adults” and “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” (*J.D.B., supra*, 564 U.S. at p. 272.) Children are also “more vulnerable or susceptible to… outside pressures” than adults and “have limited understandings of the criminal justice system and the roles of the institutional actors within it.” (*Ibid.* [citing *Roper v. Simmons* (2005) 543 U.S. 551, 569; *Graham v. Florida* (2010) 560 U.S. 48, 78].)

For over a decade, the Supreme Court has recognized that these qualities make juveniles different from adults at every stage of criminal proceedings against them. (*Roper, supra*, 543 U.S. at p. 568 [barring capital punishment for juveniles]; *Graham*, *supra*,560 U.S. at pp. 74-75 [barring life without the possibility of parole for juvenile offenders who committed non-homicide crimes because “juveniles’ lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions”]; *see also Miller*, *supra*, 567 U.S. 460 at p. 480 [requiring courts to consider a juvenile’s “diminished culpability” before imposing a life without parole sentence].) In the *Roper/Graham/Miller* line of cases, the Supreme Court has recognized that even in the most extreme cases, juveniles are entitled to greater constitutional protections than adults. These holdings were based on the Court’s understanding that juveniles have diminished ability to appreciate the consequences of their actions and avoid harmful choices.

The U.S. Supreme Court has recognized that juveniles are different from adults in the interrogation context long before those recent developments in juvenile law, policy, and neuroscience. (*See, e.g., In re Gault* (1967) 387 U.S. 1, 45 (87 S.Ct. 1428, 1453, 18 L.Ed.2d 527)[“Admissions and confessions of juveniles require special caution.”].) After the *Roper/Graham/Miller* cases, the Court again emphasized in *J.D.B.* that, in “the specific context of police interrogation, [...] events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” (*J.D.B., supra* 564 U.S. at p.272.) MALE CLIENT is one of many juveniles who have been overpowered in a police investigation.

Every aspect of DETECTIVE’s interrogation was geared toward eliciting incriminating statements, not the truth. DETECTIVE exploited vulnerabilities that are typical of any child, such as susceptibility to influence from adults in a position of power and limited understanding of the police interrogation and its consequences. In addition, DETECTIVE exploited MALE CLIENT’s lack of sophistication, ignoring evidence that he could not comprehend or “follow” the officer. The officer took advantage of MALE CLIENT’s specific learning disability and his intoxication. DETECTIVE was aware of MALE CLIENT’s vulnerabilities, limited comprehension abilities, and unsophisticated communication skills from the moment he began the interrogation. Viewed objectively, a reasonable police officer in DETECTIVE’s position would have known that MALE CLIENT was impaired. As it turns out, MALE CLIENT has significant learning disabilities. His IEP indicated specifically that he has processing difficulties and suggests requiring that MALE CLIENT repeat information back to ensure his comprehension. MALE CLIENT has also suffered trauma impacting his maturity. (CT 39-52, 105-110.)

DETECTIVE used a ruse, exaggerations of the evidence, and other coercive tactics despite obvious concerns that MALE CLIENT had trouble understanding the conversation. MALE CLIENT’s statement was involuntary from the outset, coerced by DETECTIVE who took advantage of MALE CLIENT’s particularized vulnerabilities. Even before the reading of Miranda rights, DETECTIVE recognized that MALE CLIENT was mentally amiss. DETECTIVE asked MALE CLIENT questions that he did not ask the co-minors he questioned that night: (1 PEX.)

**DETECTIVE:** “What’s your phone number?”

**MALE CLIENT:** “Dang, I really don’t really know it, it's inside my phone. Cause I had barely got that phone so I got to remember it.

**DETECTIVE:** “You been drinking tonight?”

**MALE CLIENT:** “Huh?”

**DETECTIVE:** “You been snorting?”

**MALE CLIENT:** “Nah, I don’t do that.” (1 PEX 2:38:34-2:38:51.)

As the interrogation continued, the course of the conversation further illuminated MALE CLIENT’s difficulty comprehending and DETECTIVE’s coercive approach.

**DETECTIVE:** “No. Are you following me here?”

**MALE CLIENT:** “Yes sir””

**DETECTIVE:** “Are you with me?”

**MALE CLIENT:** “Yes sir

**DETECTIVE:** “Cuz it doesn’t seem like you are”

**MALE CLIENT:** *takes off his hat* “My bad.”

**DETECTIVE:** “I need you to think real hard cuz you’re in jail right now you realize that?” (1 PEX 2:41:38-2:41:50)

This Court should review the tactics police used against MALE CLIENT in light of the “growing consensus—among the supporters of those techniques, not just the critics—about the need for extreme caution in applying them to juveniles.” (*In re Elias V.* (2015) 237 Cal. App. 4th 568, 587.). First, the officer relied on an implied waiver of *Miranda* and did not even attempt to elicit an express waiver or explain that MALE CLIENT was giving up his *Miranda* rights by speaking to he and his fellow officer. Second, the officer used a ruse and repeatedly insisted to MALE CLIENT that the police possessed incriminating evidence against him, which did not in fact exist, coercing him to admit that he had approached the man with the bike and asked him for money. For example, DETECTIVE said, “I want you to tell me what happened cuz it’s all on camera.” (1 PEX 2:41:53-2:41:55.)

DETECTIVE also used a variety of other subtle coercive tactics. For instance, DETECTIVE ordered MALE CLIENT to put on his hat. DETECTIVE also chewed and spit chewing tobacco throughout the interrogation as a sign of his power. In the middle of the interrogation, DETECTIVE referred to MALE CLIENT being in jail saying, “I need you to think real hard cuz you’re in jail right now you realize that?” (1 PEX 2:41:46-2:41:50.) DETECTIVE also indicated that the co-minors were depending on MALE CLIENT’s confession so that they would not have to go to jail—“So come correct cuz your boy MALE DOE 1, he don’t wanna go to jail.” (1 PEX 2:41:57-2:42:02.)

In addition, DETECTIVE interrupted MALE CLIENT’s protestations of his innocence and attempts to explain what he perceived to be happening as a misunderstanding rather than a crime. For example, DETECTIVE cut MALE CLIENT off and said, “do you think he pulled it out because he thought all three of you were gonna rob him?” 2:45:54-2:45:57.)

When the suspect, like MALE CLIENT, is a *juvenile*, the courts have been more willing to find that certain deceptive interrogation techniques crossed the line, thereby creating a constitutionally impermissible coercion or risk of inducing a false confession. For example, this Court recently held that the use of deceptive interrogation techniques on a juvenile suspect rendered his confession involuntary because such tactics substantially increased the likelihood that a juvenile would give a false confession. (*People v. Elias V*. (2015) 237 Cal.App.4th 568.) In *Elias V.*, a detective falsely told a 13-year-old boy suspected of touching a 3-year-old neighbor’s vagina that the girl’s mother had seen him do it when, in fact, she had not witnessed a touching. The trial judge denied Elias’s motion to suppress his statement as involuntary. On appeal, the panel discussed the extensive social science research[[25]](#footnote-26) indicating that the police use of deceptive tactics against juvenile suspects results in a high rate of false confessions. (*Id.* at p. 577 [noting that the hallmark police manual on interrogation recommends against using police ruses to get a juvenile suspect to confess and stressing that “[r]ecent research has shown that more than one-third (35 percent) of proven false confessions were obtained from suspects under the age of 18”).] Consequently, the panel found that the use of aggressive and deceptive tactics against Elias V. rendered his confession involuntary under the totality of the circumstances. (*Id.* at p. 585.)

In adult criminal cases decided prior to fundamental shift in juvenile justice brought on the *Roper* line of cases, California courts have allowed the police to employ ruses or deceptive tactics to elicit a confession from an adult suspect. (See, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 411 [affirming finding that statement obtained through police deception was nevertheless voluntary and admissible; noting that “police deception does not necessarily invalidate an incriminating statement”].) The focus of the voluntariness analysis of a confession obtained through the use of a police ruse is whether the deception was coercive. The panel in *People v. Chutan* (1999) 72 Cal.App.4th 1276 put it this way:

Police trickery that occurs in the process of a criminal investigation does not, itself, render a confession involuntary and violate the state and federal due process clause. Why? Because subterfuge is not necessarily coercive in nature. And unless the police engage in conduct which coerces a suspect into confessing, no finding of involuntariness can be made. (*Id.* at 1280 [internal citations omitted].)

Other courts have focused their analysis of the voluntariness of a confession obtained through a police ruse on whether the ruse was reasonably likely to elicit a false confession from a suspect.(*See, e.g., People v. Guerra* (2006) 37 Cal.4th 1067, 1097 [“A finding of involuntariness is not warranted if the deception is not of a type reasonably likely to produce a false statement.”].) All of the above-cited cases involved the police use of deceptive tactics during the interrogation of an *adult* suspect. Research has demonstrated that youth are at far greater risk of falsely confessing.

The coercive and deceptive tactics employed in this case raise all the same concerns as in *Elias V.* The totality of the circumstances suggests that MALE CLIENT was highly susceptible to coercion due to his own vulnerabilities and the officer’s exploitation of his frailties and indifference to his disability. MALE CLIENT has a history of exposure to trauma, has processing disorders as a part of his learning disability, and is an English Language Learner with limited comprehension and expression in English further compounding the difficulties posed by his processing disorder. MALE CLIENT felt coerced to assent to the version of event being fed to him by DETECTIVE. MALE CLIENT’s status as a juvenile also means that there was a high likelihood that the use of an inappropriate police ruse mid-way through the interrogation added to the coercion present from the get go and was in fact “reasonably likely to produce a false statement.” (*Guerra*, *supra* 37 Cal.4th at p. 1097.)

# The Prosecution Cannot Show Harmless Error Under *Chapman*.

The admission of an involuntary confession at trial violates federal due process rights. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218.) Therefore, the more rigorous *Chapman* standard of prejudice applies here. (*See Chapman v. California* (1967) 386 U.S. 18 [holding that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”] Under *Chapman*, the conviction must be reversed unless the prosecution can demonstrate beyond a reasonable doubt that the error was not harmless. (*Ibid.*) Here, the prosecution cannot meet that high burden.

The U.S. Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302] stressed that, in applying the *Chapman* standard to involuntary confessions, an appellate court should be loath to find harmless error:

A confession is like no other evidence. The defendant’s own confession is probably the most probative and damaging evidence that can be used against him. … In the case of a coerced confession … the risk that a confession is unreliable, coupled with the profound impact the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the confession’s admission was harmless. (*Id.* at p. 296.)

Nor can the prosecution rely on other evidence independent of the confession to demonstrate harmlessness. Given the statement’s importance to the prosecution’s case, its erroneous admission cannot be excused as harmless error under the rigorous *Chapman* standard.

# CONCLUSION

For all the foregoing reasons, the judgment should be reversed.

Dated: Respectfully submitted,

Samantha Buckingham

Attorney for Appellant

WORD COUNT CERTIFICATION

I, Samantha Buckingham, certify that this Appellant’s Opening Brief was prepared on a computer using Microsoft Word, and that, according to that program, this document contains 15,428 words.

Samantha Buckingham

Proof of Service

I, Jonathan Bremen:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 919 Albany Street, Los Angeles, CA 90015. On August 30, 2018, I served the foregoing document described as:

APPELLANT’S OPENING BRIEF

* By placing a copy thereof enclosed in sealed envelopes addressed as follows:

Hon. Commisioner Jackie Lacey

Judge, Los Angeles Superior Court District Attorney of Los Angeles

Department 202 211 W Temple Street #1200

Eastlake Juvenile Courthouse Los Angeles, CA 90012

1600 Eastlake Ave

Los Angeles, CA 90033

Xavier Becerra MALE CLIENT M.

Attorney General, State of California In the care of:

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* BY MAIL:
* I deposited such envelopes in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancelation date or postage meter date is more than one business day after date of deposit for mailing in affidavit.

Executed on August 30, 2018, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Jonathan Bremen

 Signature

1. [↑](#footnote-ref-2)
2. Defense Motion to Dismiss Pursuant to WIC § 782. This document was originally missing from the record on appeal. However, on August 24, 2018 defense counsel sent a letter to the Superior Court pursuant to California Rules of Court section 8.340 requesting that this document be included in the record. [↑](#footnote-ref-3)
3. A child is entitled to special education services and an IEP under the Individuals with Disabilities Education Act (“IDEA”), a federal law incorporated into state law in all fifty states and the District of Columbia. [↑](#footnote-ref-4)
4. Augmented Reporter’s Transcript [↑](#footnote-ref-5)
5. People’s Exhibit One: the police interrogation video. The time noted in the citations to this video refer to the time stamp that appears in the video footage itself. [↑](#footnote-ref-6)
6. When Senate Bill 395 was first introduced in the Senate, it originally applied to youth under 18. (SB 395 introduced 2/15/17.) [↑](#footnote-ref-7)
7. (Marsha L. Levick, Elizabeth-Ann Tierney, The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind? (2012) 47 Harv. C.R.-C.L. L. Rev. 501, 504.) [↑](#footnote-ref-8)
8. Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, 23 Cornell J.L. & Pub. Pol’y 395, 429 (2013). [↑](#footnote-ref-9)
9. Saul M. Kasson et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 Law & Hum. Behab. 381, 389 (2007). [↑](#footnote-ref-10)
10. Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) at 29 (internal citations omitted). [↑](#footnote-ref-11)
11. (*Ibid.*) [↑](#footnote-ref-12)
12. (*Ibid.*) [↑](#footnote-ref-13)
13. SeeJay D. Aronson, *Neuroscience and Juvenile Justice*, 42 Akron L. Rev. 917, 923 (2009) (multiple studies of MRI brain scans showed a clear difference in white matter in brains of 12-16 year olds when compared with 23-30 year olds); Nitin Gogtay, et al., *Dynamic Mapping of Human Cortical Development During Childhood through Adulthood,* 101 Proc. Nat’l Acad. Sci. 8174, 8177 (2004) (discussing findings from MRI scans that revealed that brains of juveniles under age 18 were still developing); see generally, Sarah Durston, et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?,* 40 J. Am. Acad. Child & Adolescent Psychiatry 1012, 1016 (2001) (explaining that observations about adolescent brain development made via MRI images can explain juvenile behavior). [↑](#footnote-ref-14)
14. Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 Am. Crim. L. Rev. 641, 664-5 (2016). [↑](#footnote-ref-15)
15. Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) at 26-27 (internal citations omitted). [↑](#footnote-ref-16)
16. *Fare v. Michael C.,* 442 U.S. 707, 725 (1979). [↑](#footnote-ref-17)
17. Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*, 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) at 36 explaining in part, “Most often, Miranda warnings are delivered without preamble and in a seemingly neutral tone. By doing this, police officers give the impression that they are indifferent to the suspect’s response and that the warnings are a mere formality that do not merit the suspect’s concern.” (internal citations omitted). [↑](#footnote-ref-18)
18. Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights, 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) at p. 33 citing Richard Rogers et al., Mired in Miranda Misconceptions: A Study of Legally Involved Juvenile at Different Levels of Psychosocial Maturity, 32 BEHAV. SCI. & L. 104, 111 (2014). [↑](#footnote-ref-19)
19. Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights, 21 N.Y.U. J. Legis. & Pub. Pol’y 1 (2018) at 33. [↑](#footnote-ref-20)
20. Child Welfare Information Gateway (2015) Understanding the effects of maltreatment on brain development. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau; see also Shonkoff, J. P. (2012). The lifelong effects of early childhood adversity and toxic stress. Pediatrics, 129, e232–e246 [“In addition to short-term changes in observable behavior, toxic stress in young children can lead to less outwardly visible yet permanent changes in brain structure and function.”]. [↑](#footnote-ref-21)
21. Jackie Mader and Sarah Burymowicz, Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children, The Hechinger Report, October 26, 2014 at 2. Available at: https://jjie.org/2014/10/26/pipeline-to-prison-special-education-too-often-leads-to-jail-for-thousands-of-american-children/#. Last visited 8/28/2018. [↑](#footnote-ref-22)
22. Denise C. Herz, Ph.D., Kristine Chan, MSW, Susan K. Lee, Esq., Melissa Nalani Ross, MPP, Jaquelyn McCroskey, DSW, Michelle Newell, MPP, Caneel Fraser, Esq., Los Angeles County Probation Outcomes Study, Advancement Project, Cal State LA, Children’s Defense Fund California, and USC School of Social Work, 2015 at 10, stating in part, “Standardized tests indicate that youth placed in probation camps are, on average, 16.7 years old and therefore are in the 11th grade but are achieving at a fifth grade level in math and Reading.” (internal citation omitted) Id at 71, explaining, “One-fifth of suitable placement males and one-quarter of camp males were identified as developmentally disabled (note: data were not available for female youth). One third of suitable placement youth and just under one-fifth of camp youth, on the other hand, had an Individual Education Plan.” [↑](#footnote-ref-23)
23. *Id.* at p. 71, explaining, “One-fifth of suitable placement males and one-quarter of camp males were identified as developmentally disabled (note: data were not available for female youth). One third of suitable placement youth and just under one-fifth of camp youth, on the other hand, had an Individual Education Plan.” [↑](#footnote-ref-24)
24. Samantha Buckingham, *A Tale of Two Systems: How Schools and the Juvenile Justice System Are Failing Kids*, 13 U. Md. L.J. Race, Religion, Gender & Class 179 (2013), at 205-206, stating in footnote 98, ”Out of the 153 clients our juvenile justice clinic has represented from July 2009 through the end of August 2013, 111 became dual clients of our Youth Justice Education Clinic through this vetting process because they were in need of an educational advocate. Of those 111 clients dually represented for delinquency and education by our clinics, 50 have IEPS. Of the 50 students with IEPs, 21 became eligible for special education due to the representation of our educational advocacy and another three received Section 504 plans to accommodate their disability. Section 504 plans provide critical accommodations for students whose disabilities fall outside the scope of the IDEA. Rehabilitation Act of 1973, Pub. L. No. 93—112, § 504, 87 Stat. 355 (1973); 42 U.S.C.A. § 12204 (1990).” [↑](#footnote-ref-25)
25. Studies consistently show that juveniles are more likely than adults to falsely confess. See Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post–DNA World*, 82 N.C.L.Rev. (2004) (finding that, in a sample of 125 people who had falsely confessed to crimes, juveniles under 18 years old were an overrepresented group comprising approximately 33% of the sample); see also Allison Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943, 952 (2010) (“juveniles are over-represented in proven false confession cases, typically accounting for about one-third of the samples”); see also Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 274-75 (2007) (finding that juveniles are more likely than adults to provide false confessions and yield to police tactics, such as leading and repetitive questioning, due to adolescent brain development, pressure to please authority figures and other factors); see also Zoë Overbeck, *No Match for the Police: An analysis of Miranda's Problematic Application to Juvenile Defendants*, 38 Hastings Const. L.Q. 1053, 1066 (2011) (“in an interrogation setting, when presented with the opportunity to waive her rights or remain silent, a juvenile's method of processing information may negatively impact her ability to fully weigh both options and the long-term consequences thereof”). [↑](#footnote-ref-26)