IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE	*	NO: 279390
	*	
VS.	*	
	*	
BRENDAN BARNES	*	DIVISION III

MOTION FOR LEAVE TO FILE BRIEF OF CENTER ON WRONGFUL CONVICTIONS OF YOUTH, VANDERBILT PROFESSOR OF LAW AND MEDICINE TERRY A. MARONEY, *ET AL.* AS AMICI CURIAE

The Center on Wrongful Convictions of Youth, Vanderbilt Professor of Law and Professor of Medicine, Health and Society Terry A. Maroney, *et al.* (collectively "Petitioner") move this Court for leave to file a Brief of *Amici Curiae* in support of Brendan Barnes in the above-captioned manner. Petitioner's proposed amicus brief, accompanying this motion, explains the research showing that young people are uniquely susceptible to the coercive pressures of police interrogation and have less capacity to knowingly, intelligently, and voluntarily waive their *Miranda* rights; it also explains the case law that relies on such research. *Amici* urge that when an interrogator falsely suggests to a juvenile suspect that the death penalty is a possible consequence – as in this case – any subsequent confession must be suppressed. In support of this motion, Petitioner states as follows:

1. Brendan Barnes is charged with the October 2010 stabbing death and aggravated robbery of David Harrison Strong. The statements that sixteen-year-old Brendan made to a police investigator on October 10, 2010 are the subject of his motion to suppress that is pending before this Court.

2. On February 3, 2011, the Honorable Suzanne Bailey of the Juvenile Court of Hamilton County, Tennessee, conducted a hearing and transferred Brendan to stand trial as an adult. On December 14, 2011, Brendan filed a Motion to Suppress Statement. Brendan filed a Brief in Support of Defendant's Motion to Suppress on January 19, 2012. An Amended Motion to Suppress was filed by Brendan on February 21, 2012, and a Supplemental Brief in Support of Defendant's Motion to Suppress (as Amended) has also been filed.

3. Petitioner is unaware of any specific rules governing the filing of amicus briefs in the Criminal Court of Hamilton County, Tennessee. Petitioner notes that it previously has been granted permission from several other trial-level courts from around the country for leave to file amicus briefs on related subjects, including, for example, the Third Judicial Circuit Court of the State of Michigan, in the case of *People v. Davontae Sanford*, No. 07-015018-01-FC, Honorable Brian R. Sullivan, presiding.

4. As described in the attached amicus brief, Petitioner's interest stems from its knowledge and experience that juveniles' immaturity, vulnerability to external pressure, and diminished ability to weigh risks and long-term consequences render them uniquely susceptible to making involuntary and even false confessions when interrogated by police in a custodial setting.

5. Given that Brendan was sixteen years old when he made statements to the police in response to the false suggestion that he might face the death penalty, Petitioner believes an amicus brief concerning the unique effects of custodial interrogation on juvenile suspects is appropriate. The Petitioner does so with the hope that its amicus brief will

assist this Court in reaching what it believes to be the correct conclusion: that Brendan Barnes' motion to suppress his statement should be granted.

Date: January 31, 2013

Respectfully submitted,

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PROPOSED ORDER

The motion of Center on Wrongful Convictions of Youth, Vanderbilt Professor of Law and Medicine Terry A. Maroney, *et al.* for leave to file an amicus brief is ALLOWED.

_____ _____

Presiding Judge Date

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

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BRIEF OF CENTER ON WRONGFUL CONVICTIONS OF YOUTH, VANDERBILT PROFESSOR OF LAW AND MEDICINE TERRY A. MARONEY, *ET AL.* AS AMICI CURIAE

I. INTEREST OF *AMICI CURIAE*

The amicus parties submitting this brief are practitioners, law professors, and researchers who have studied the effects of custodial interrogations on juvenile suspects. *Amici* know from their combined experience that juveniles' immaturity, vulnerability to external pressure, and diminished ability to weigh risks and long-term consequences renders them uniquely susceptible to making involuntary and even false confessions when interrogated by police in a custodial setting. Many of the individuals and organizations submitting this brief have together played leading roles in successful juvenile justice reform efforts, including the abolition of the juvenile death penalty and sentences of mandatory juvenile life imprisonment without the possibility of parole. Currently, our organizations are focused, in part, on ensuring that interrogations from youth result only in voluntary and reliable confessions.

A. Center on Wrongful Convictions of Youth, Northwestern Univ. School of Law
The Center on Wrongful Convictions of Youth's unique mission is to uncover and remedy wrongful convictions of youth, as well as to promote public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the juvenile and criminal justice systems. Since its founding, the CWCY has filed nearly a dozen amicus briefs in jurisdictions ranging from state trial courts to the U.S. Supreme Court.

Much of the CWCY's research and work focuses on how young people react to police interrogation, and children and teenagers' particular vulnerability to making involuntary and false confessions. Attorneys from the CWCY, including the authors on this brief, have published numerous pieces on juvenile false confessions and wrongful convictions. *See, e.g.*, *True Stories of False Confessions* (Steven A. Drizin & Rob Warden eds., 2009); Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887 (2010). The authors also have collaborated and worked with the International Association of Chiefs of Police and the Office of Juvenile Justice and Delinquency Prevention to publish a guide to best practices for questioning youth. *See Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation*, September 2012.[1] The authors know from their experience both researching and litigating these issues that adolescents' and children's immaturity, vulnerability to external pressure, and diminished ability to weigh risks and long-term consequences render them uniquely susceptible to making false confessions or unreliable statements when interrogated in a custodial setting.

The CWCY's founder, Steven A. Drizin, has twice been cited by U.S. Supreme Court as an authority on false confessions and wrongful convictions. *See Corley v. U.S.*, 129 S.Ct. 1558, 1570 (2009) (stating that "there is mounting empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906-07 (2004); *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2401 (2011) (same). The *J.D.B.* majority also specifically cited the CWCY's amicus brief in explaining that the risk of false confession is "all the more acute" when a young person is interrogated. *J.D.B.*, 131 S.Ct. at 2401 (citing Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* at 21–22).

B. Terry A. Maroney, Professor of Law and Professor of Medicine, Health and Society, Vanderbilt University

Professor Maroney has taught and written extensively about both juvenile justice and wrongful convictions, with a particular expertise in developmental and social psychology. She has participated as an amicus party in a number of juvenile-justice and wrongful-conviction cases, including before the U.S. Supreme Court.

C. Kimberly Brown, Ph.D., Assistant Professor in Psychiatry and Director of the Forensic Evaluation Team, Vanderbilt University

Dr. Brown is a licensed forensic psychologist who primarily conducts criminal pretrial forensic mental health evaluations on juveniles and adults. She has testified as an expert witness numerous times in both state and federal court. She also supervises and teaches trainees in conducting forensic evaluations.

[1] An abstract is available at http://www.theiacp.org/PublicationsGuides/ResearchCenter/Publications/tabid/299/Default.aspx?v=1&id=1891.

D. Children and Family Justice Center

The Children and Family Justice Center (CFJC) is a comprehensive children's law center that has represented young people in conflict with the law for over twenty years. In addition to its direct representation of youth and families in matters relating to delinquency and crime, school discipline, immigration/asylum and fair sentencing practices, the CFJC also collaborates with community members and other advocacy organizations to develop fair and effective strategies for systems reform.

E. Children's Law Center

The Children's Law Center, Inc. was established in 1989 in Kentucky to protect and enhance the right of children through quality legal representation, changes in public policy and practice, and training and education. The Center works in Kentucky and Ohio on a variety of juvenile justice issues, and has a regional and national reputation for advancing indigent defense reforms, institutional reforms in juvenile corrections, and special education advocacy. It serves as the regional affiliate office of the National Juvenile Defender Center as well, providing training, technical assistance and resource development in Ohio, Kentucky, Indiana, Missouri, Arkansas, Kansas, and Tennessee.

F. Colorado Juvenile Defender Coalition (CJDC)

The Colorado Juvenile Defender Coalition is a nonprofit organization dedicated to ensuring excellence in juvenile defense and advocacy and justice for all children and youth in Colorado. CJDC strives to elevate the practice of juvenile defense and advocacy by holding up juvenile defense as a skilled specialty practice, presenting continuing legal education seminars, developing resources and materials for juvenile defenders and advocates, and by supporting indigent defense through ongoing litigation support and assistance. CJDC seeks to protect the rights and improve the treatment of children and youth in the juvenile justice system through public advocacy, community organizing, non-partisan research, and policy development.

G. Juvenile Law Center (JLC)

The Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children sent to residential facilities or adult prisons, or children in placement with specialized service needs. JLC works to ensure that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

H. National Juvenile Defender Center (NJDC)

The National Juvenile Defender Center was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and

quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

I. Rutgers Urban Legal Clinic, Rutgers School of Law – Newark

The Urban Law Clinic (ULC) is a program of Rutgers Law School – Newark, established more than thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section, taught by Clinical Professor Laura Cohen, provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of out-of-state organizations on a range of juvenile justice practice and policy issues. Additionally, the ULC is a team leader of the New Jersey Juvenile Indigent Defense Action Network, an initiative of the John D. and Catherine T. MacArthur Foundation that, among other efforts, seeks to provide post-dispositional legal representation to young people committed to the New Jersey Juvenile Justice Commission. The ULC has appeared as amicus curiae in numerous matters before the U.S. Supreme Court, as well as before the Supreme Courts of New Jersey and several other states.

J. The University of Minnesota Child Advocacy and Juvenile Justice Clinic

The University of Minnesota Child Advocacy and Juvenile Justice Clinic trains law students to represent clients in juvenile delinquency and child welfare matters before juvenile courts in Minnesota. The Clinic assists low-income youth in a variety of misdemeanor, traffic, truancy and runaway matters, and as a component of that practice works with clients to seal their juvenile records. The Clinic is also working on two Minnesota cases involving individuals sentenced as juveniles to life in prison without the possibility of parole.

K. University of North Carolina Juvenile Justice Clinic

The University of North Carolina Juvenile Justice Clinic trains third-year law students to represent children accused of crimes and supervises such representation. Our cases principally involve the defense of juveniles in delinquency and undisciplined proceedings in Durham and Orange Counties in North Carolina. In this context, students handle a wide variety of misdemeanor and felony cases, ranging from

disorderly conduct to assault and drug distribution. Students also represent children alleged to be truant, beyond the disciplinary control of their parents, and runaways, as well as sixteen and seventeen year olds who have petitioned for emancipation.

L. Andrew K. Block, Jr., Director, Child Advocacy Clinic, and Assistant Professor of Law, University of Virginia School of Law

Professor Block has represented youth in the juvenile justice system for eighteen years - as a public defender, as the founder and director of the JustChildren Program of the Legal Aid Justice Center in Charlottesville, Virginia, and as the Director of the Child Advocacy Clinic at the University of Virginia School of Law. He has also worked extensively on policy reform through legislative advocacy and training. His work has been recognized nationally, and he has received American Bar Association's Young Lawyers Division Child Advocacy Award. He is the editor of *Juvenile Law and Practice in Virginia* (CLE). His relationship with the University of Virginia is listed for affiliation purposes only.

II. INTRODUCTION

Defendant Brendan Barnes was sixteen years old when he made the statements that are the subject of his motion to suppress. During the part of his interrogation that was recorded with audio equipment, Brendan clearly stated that he was making a statement because his interrogator threatened the death penalty, a claim his interrogator does not deny but rather says is why the police needed Brendan's "cooperation." The following is the relevant exchange:

Officer:	Alright Why did you lie about the first (1st) [story you told me]?
Brendan:	Just .. uh.. I wadn't trying. I'd be no snitching.. it ain't be it my life.
Officer:	Okay.
Brendan:	In my life and then you told me the death penalty.
Officer:	Well I mean that.. that is definitely an option. Any time we're discussing a ..uh.. a murder.
Brendan:	Yeah.
Officer:	The death penalty is.. is one of the options.
Brendan:	Yeah.
Officer:	Yes, I mean it can go anywhere from, you know, I've seen people in crimes of passion get probation all the way up to, you know, the death penalty so that definitely is an option and that's something that ..uh.. you know, that we need your cooperation period.
Brendan:	Yes sir.
Officer:	For.. for the prosecution of this, for.. for your own benefit, for our benefit, so.. and also because this is a terrible thing.

(Statement of Brendan Barnes, 17-18).

The officer's statement that the death penalty was "one of the options" for sixteen-year-old Brendan was untrue, as the U.S. Supreme Court in 2005 outlawed the death penalty for any individual under the age of eighteen. *See Roper v. Simmons*, 543 U.S. 551 (2005). The above transcript clearly confirms, however, that Brendan – whose IQ has been measured at 62 – was unaware that the officer was lying. While an explicit threat of the specter of capital punishment as a consequence of non-cooperation in a custodial interrogation would be highly questionable even were an adult suspect involved, that false claim to a vulnerable juvenile like Brendan is inherently, and extraordinarily, coercive.

Amici submit this brief in order to explain why juveniles are—and should be—treated differently than adults during custodial interrogation. Development psychology, including adolescent brain science, helps explain the disproportionately high rate of both involuntary and false confessions among juveniles. Simply put, juveniles are more susceptible to coercive police practices during interrogations, a fact the U.S. Supreme Court has repeatedly recognized. *Amici* are deeply troubled by the tactics used during the interrogation in this case—as well as in at least one other known Tennessee case, in which law enforcement officers similarly (and falsely) suggested to a juvenile suspect that the death penalty was a possible punishment for his alleged crime.

Because of its inherent coercive effect, *Amici* assert that any mention of the death penalty as a potential punishment during a custodial police interrogation of a juvenile should result in the *per se* suppression of any subsequent statement, admission, or confession. In the alternative, based on the totality of factors in this case, *Amici* believe that sixteen-year-old Brendan Barnes'

statement was involuntary and that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights.

III. THREATENING A JUVENILE WITH THE DEATH PENALTY SHOULD RESULT IN A *PER SE* EXCLUSION OF THE JUVENILE'S SUBSEQUENT CONFESSION AS INVOLUNTARY.

A. The U.S. Supreme Court has long recognized the common-sense truth that juveniles are different than adults.

1. *The Court has repeatedly acknowledged that children are more susceptible than adults to coercive police interrogation tactics.*

Going on seven decades now, the U.S. Supreme Court has recognized that juveniles experience police interrogations differently than adults. In *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948), the Court suppressed a fifteen-year-old boy's confession because a youth—an "easy victim of the law"—could easily succumb to coercion during the police interrogation process if he were left without adequate protections. The Court emphasized: "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Id.* at 599. Fourteen years later, in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), the Court again suppressed a boy's confession, this one given almost immediately after he had been taken into custody, explaining that "a 14-year-old boy, no matter how sophisticated, is . . . a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." *Id.* "He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." *Id.*

Five years later, in the landmark decision of *In re Gault*, the Court affirmed that the privilege against self-incrimination protects children in juvenile court, explaining that "common observation and expert opinion" both compel the conclusion that one should "distrust" the

interrogation-induced confessions of children "from an early age through adolescence." 387 U.S. 1, 48 (citing 3 Wigmore, Evidence § 822 (3d ed. 1940)). Indeed, the Court plainly stated that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children," including teenagers like Gault. *Id.* at 52. The Court went on to admonish that if counsel was not present during interrogation, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 55.

2. *In four recent cases, the Court has reaffirmed that juveniles require special protections within the criminal justice system.*

More recent precedent from the Supreme Court only reinforces the conclusion that young people are uniquely susceptible to making statements that are either involuntary, unreliable, or both during the pressure-cooker of police interrogation. In light of the developmental and cognitive differences between youth and adults, the Court first outlawed the death penalty for juveniles, and then outlawed mandatory life without parole for all individuals who were under the age of eighteen at the time of their crimes. *See Roper*, 543 U.S. 551 (abolishing the death penalty for all youth); *Graham v. Florida*, 130 S.Ct. 2011 (2010) (outlawing life without parole for juveniles who committed nonhomicide offenses); *Miller v. Alabama*, 132 S.Ct. 2455 at 2469 (2012) (barring the mandatory imposition for life without parole for all juveniles). In so holding, the Court repeatedly explained that children are more vulnerable than adults to the application of external pressure; they are suggestible, impulsive, eager to please authority figures, and hampered by immature decision-making. *Miller*, 132 S.Ct. at 2464-68; *Graham*, 130 S. Ct. at 2026, 2032; *Roper*, 543 U.S. at 569. These same traits make young people particularly ill-suited to engage in the high-stakes risk-benefit analysis inherent in any police interrogation. Saul M.

Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3-38 (2010); *see also Miller*, 132 S.Ct. at 2468 (citing *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2400-01 (2011)) (noting that "the incompetencies associated with youth" put children at a significant disadvantage in the criminal justice system).

Indeed, two years ago, building on its decisions in the Eighth Amendment context, the Court issued an opinion that was founded squarely on the principle that children and teenagers are particularly likely to make involuntary and false confessions. In *J.D.B.*, 131 S.Ct. at 2398, the Court held that a child's age is properly considered during a *Miranda* custody analysis, because "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." The Court reiterated that custodial interrogation can induce false confessions—even from adults—at an alarming rate, and it emphasized that this problem is "all the more acute" with youth because young people are "most susceptible to influence and outside pressures." *Id.* at 2401, 2405 (citing Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* at 21-22). The Court noted that these "conclusions about behavior and perception . . . apply broadly to children as a class." *Id.* at 2403. Even the four dissenting Justices explained that they "do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult." *Id.* at 2413 (Alito, J., dissenting). Ultimately, *J.D.B.* stands for the proposition that certain interrogation tactics that may withstand constitutional scrutiny for an adult will not withstand such scrutiny when used with a juvenile.

B. Because juveniles are much more vulnerable than adults to the pressures of police interrogation, juveniles are more likely to falsely confess.

Studies of false confessions and wrongful convictions unanimously confirm the point made explicit in *J.D.B.* The leading study of 125 proven false confessions, cited by the Supreme

Court in *Corley v. U.S.*, 129 S.Ct. 1558, 1570 (2009) and *J.D.B.*, 131 S.Ct. at 2401, found that 63% of false confessors were under the age of twenty-five and 32% were under eighteen. *Drizin & Leo*, 82 N.C. L. Rev. at 945. By way of comparison, juveniles make up only 8% of the individuals arrested for murder and 16% of the individuals arrested for rape in the United States. *See* H. Snyder, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Juvenile Arrests 2004* (2006).

In another respected study of 340 exonerations that have taken place since 1989, researchers found that youth under the age of eighteen were three times as likely to falsely confess as adults; a full 42% of juvenile exonerees had falsely confessed, compared to only 13% of wrongfully convicted adults. *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 544-45 (2005). Brandon L. Garrett's detailed examination of the first 250 DNA exonerations identified forty cases involving a defendant's own false confession, and 33% of those involved youth. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 38 (2011). And an examination of 103 wrongful convictions of factually innocent teenagers and children found that a false confession contributed to 31.1% of the juvenile cases studied, as compared against only 17.8% of adult wrongful convictions. *Tepfer et al.*, 62 Rutgers L. Rev. at 904. The study similarly found that youth are also particularly likely to respond to the pressures of interrogation by offering false information against another person; in over half of the cases studied, a demonstrably false statement made by a youth contributed to the ultimate wrongful conviction, whether that statement implicated himself or another person. *Id.* at 905-10.

Controlled experiments yield similarly disturbing results. One laboratory study revealed that children between the ages of twelve and sixteen were far more likely to falsely confess than

young adults between the ages of eighteen and twenty-six; astonishingly, a majority of the youth in that study complied with a request to sign a false confession without uttering a word of protest. *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 150-51 (2003).

C. Leading members of the law enforcement community recognize that juveniles' unique vulnerabilities require that they should be treated differently during interrogations.

The marketers of the Reid Technique—the leading interrogation method employed by law enforcement—have explained that young people are at higher risk for involuntary and false confessions than adults. They caution that "every interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile."[2] Another developer of the Reid Technique, Fred E. Inbau, wrote that "special protections must be afforded to juveniles and to all other persons of below-average intelligence, to minimize the risk of untruthful admissions due to their vulnerability to suggestive questioning." Fred E. Inbau, *Miranda's Immunization of Low Intelligence Offenders*, Prosecutor: J. Nat'l District Att'ys Ass'n, Spring 1991, at 9-10.

The Reid Technique marketers also recognize the significant danger associated with threatening a suspect with the death penalty. Calling the possibility of a death sentence "the most potent threat possible," they describe it as "much more powerful" even than "threats of physical harm, isolation, or deprivation of biological needs."[3] They go on to state flatly that "threatening a suspect with inevitable consequences has no place in a properly conducted interrogation."[4]

Therefore, according to the architects of the leading model for custodial interrogation, this case presents the most potent (yet false) threat of inevitable consequences (i.e., the death

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[2] *See* John E. Reid & Associates, Inc., Critics Corner, http://www.reid.com/educational_info/criticfalseconf.html.
[3] *See* John E. Reid & Associates, Inc., Investigator Tips, http://www.reid.com/educational_info/r_tips.html?serial=1299080308558447.
[4] *See* John E. Reid & Associates, Inc., Investigator Tips, http://www.reid.com/educational_info/r_tips.html?serial=1299080308558447.

penalty) utilized on one of the most vulnerable types of suspects (i.e., a juvenile). It is clear that Reid would condemn the tactics used in this case.

Other law enforcement leaders would agree. The International Association of Chiefs of Police (IACP), with support from the Office of Juvenile Justice and Delinquency Prevention, recently published a juvenile interrogation guide, co-authored by attorneys from co-amici counsel from the CWCY. Entitled *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation*, this law enforcement guide explains that "an ever-growing body of research . . . demonstrates that young people are particularly vulnerable to making false or involuntary statements when subjected to pressure-filled questioning tactics." *Reducing Risks*, at 15.[5] As the IACP guide goes on to explain, portions of the brain that are essential to mature judgment, problem-solving, and decision-making undergo significant development over the course of adolescence. *Id.* at 4. Behavioral data are consistent with what we know about such brain maturation. For example, children and adolescents tend to place more emphasis on immediate rewards rather than long-term consequences, have more difficulty assessing risks, and are more vulnerable to external pressures than adults. *Id.* The IACP guide explains that "[t]hese traits also make adolescents particularly likely to respond to the fear and stress of interrogation by making involuntary or false statements." *Id.* The IACP guide therefore recommends that juvenile interrogators carefully avoid the use of deception, promises of leniency, and threats. *Id.* at 8-9.

Despite this judicial, medical, psychological, social science, and even law enforcement consensus on juveniles' unique vulnerability, in practice police officers routinely fail to take these differences into account in the interrogation room. *See, e.g.*, Jessica R. Meyer & N. Dickon

[5] The guide is on file with CWCY Amici. It is available for download at http://www.theiacp.org/PublicationsGuides/ResearchCenter/Publications/tabid/299/Default.aspx?v=1&id=1891, where an abstract is included.

Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav. Sci. & L. 757 (2007). Indeed, officers generally interrogate juveniles using the same tactics that are used on adults. *See* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943, 952 (2010). Unless and until police interrogators adjust their tactics, juveniles will remain particularly at risk of making false or involuntary statements.

D. Threats of the death penalty have contributed to false confessions, even where the suspects were adults.

The coercive nature of a death-penalty threat is not speculative. Many known false confessions occurred after the interrogators told the suspect that he could face the death penalty. Twenty-two-year-old Christopher Ochoa, for example, spent more than twelve years in prison for a crime he did not commit after he falsely confessed to the rape and murder of a twenty-year-old woman in Texas. Welsh S. White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 1009-11 (2003). One of the tactics used by Ochoa's interrogators was to raise the possibility that he could face the death penalty if he did not confess. *Id.* at 1009.

In a Maryland rape and murder case, Anthony Gray spent seven years in prison for a crime to which he had falsely confessed but that he did not commit. *Id.* at 1011-12. His interrogators had told him that if he confessed, pleaded guilty, and testified against others, he would avoid the death penalty. *Id.*

In the Nebraska case known as the Beatrice Six, no fewer than six people were convicted for the murder of a sixty-eight-year-old woman, a crime that none of them committed. Paul Hammel, *Psychologist had Dual Role in Confessions of Beatrice 6: Types of False Confessions*, Omaha Herald-World, at 1A. Five of the six defendants falsely confessed, and the threat of the death penalty played a role in causing each of those false confessions. *See* Paul Hammel, *What*

Were the Stories of the Beatrice 6?, Omaha World-Herald, November 29, 2008, at 2B; Affidavit of Dr. Richard A. Leo, Ph.D. at ¶¶ 42, 45, *Dean. v. Smith*, 805 F.Supp.2d 750 (D. Neb. 2011), *aff'd in part, rev'd in part and remanded sub nom. Winslow v. Smith*, 696 F.3d 716 (8th Cir. 2012) (No. 4:09 CW 3144), 2010 WL 8609818.

In another Nebraska case, twenty-eight year-old Matthew Livers' videotaped confession to the murder of his aunt and uncle reveals that his interrogators explicitly threatened him with the death penalty. *See* Julie E. Bear & Scott A. Bresler, *Overshadowing Innocence: Evaluating and Challenging the False Confession*, The Champion, Dec. 31, 2007, at 16; Cara Pesek, *Sides Split Over Suspects' Jail Time*, Lincoln Journal Star, Dec. 10, 2006 at A1. Two months after Livers gave a confession implicating himself and his cousin, DNA testing of crime scene evidence linked two other people to the crime. *Id.* Six months after the exculpatory DNA evidence came to light, prosecutors dropped the charges against Livers. Pesek at A1.

In Louisiana, Damon Thibodeaux was released last year after spending fifteen years on death row for a crime he did not commit. Ed Pilkington, *Louisiana Death Row Inmate Freed After 15 Years—With a Little Help From DNA*, Guardian (UK), Dec. 7, 2012, at 37. Mr. Thibodeaux had falsely confessed after his interrogators raised the possibility of a death sentence. *Id.*

All of the false confessors described above were adults when police threatened them with the death penalty during their interrogations. If such threats were sufficient to cause an adult to falsely confess, the case law, research, and common sense all dictate that a juvenile would be even more susceptible to having his will overborne by this coercive tactic.

E. Because of the unacceptably high risk that a juvenile will falsely or involuntarily confess when threatened with the possibility of the death penalty, any juvenile confession following such a threat must be suppressed.

The partial audio recording of Brendan Barnes' interrogation makes clear that Brendan confessed because of the interrogator's false claim that he could face the death penalty. Statement of Brendan Barnes, 17. Professor Welsh S. White of the University of Pittsburgh posits that "[i]n determining whether a threat or promise produced a confession, the focus should be on whether the threat or promise played any part in precipitating the confession. Barring unusual circumstances, a confession following a threat or promise relating to whether the death penalty will be imposed should be viewed as induced by the threat or promise and therefore inadmissible." White, 2003 U. Ill. L. Rev. at 1013 n.294. Professor White advocates that "police-induced confessions produced by any threat or promise relating to whether the suspect will be sentenced to death or executed should be automatically inadmissible." *Id.* 1013. Based on the long history of treating juveniles differently as a category, strongly supported by research showing that juveniles are more vulnerable than adults during interrogations, all juvenile confessions following a threat of the possibility of facing the death penalty should be deemed *per se* inadmissible.

There are particular reasons why the Tennessee courts should adopt a *per se* rule. First, Brendan Barnes is not the only Tennessee juvenile who has been told during custodial interrogation that he might face the death penalty. Codey Miller, a seventeen-year-old from Johnson City, stands accused of murdering his mother. Criminal Court Judge Robert Cupp recently suppressed the entirety of Codey's confession based, in part, on the fact that the interrogating officer told him he could receive the death penalty. *See* Becky Campbell, *Judge Tosses Confession from Teen Accused of Killing Mom, Having Sex with Corpse*, Johnson City

Press, Dec. 1, 2011.[6] According to Judge Cupp, the threat can be heard clearly on the recording of the interrogation, and its effect on the young suspect was obvious. Codey had denied involvement in his mother's murder dozens of times prior to the mention of the death penalty, but made his first admission within minutes of hearing of the possibility of a death sentence. *Id.*

The recorded interrogations of seventeen-year-old Codey Miller and sixteen-year-old Brendan Barnes suggest a troubling pattern and practice by Tennessee law enforcement personnel. Other factors suggest that these two cases are not the only ones in which Tennessee juveniles have been subject to this false threat. Unlike more than a dozen other states,[7] Tennessee has no rules mandating the electronic recording of interrogations.[8] Absent a requirement to record custodial interrogations in their entirety, the interrogator can turn on a recording device after already getting the suspect to confess, in which case the recording can serve to "paper over" everything that came before, or can choose never to turn it on at all. In Brendan's case, his interrogator started recording at least an hour and thirty-seven minutes into the interrogation. *See* Forensic Evaluation of Brendan Barnes by Dr. Pamela Auble, 13. It is only because Brendan,

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[6] An online link to this article is currently accompanied with video excerpts of Judge Cupp reading his decision. In this video, Judge Cupp explains that his rationale for suppressing the confession was based, in part, on the threat of the death penalty. *See* http://www.johnsoncitypress.com/News/article.php?id=96320.

[7] The following states have rules or laws mandating the electronic recording of at least some custodial interrogations: *Stephan v. State*, 711 P.2d 1156, 1162-65 (Alaska 1985); 705 Ill. Comp. Stat. Ann. §405/5-401.5 (minors), 725 Ill. Comp. Stat. Ann. §5/103-2.1 (adults) (Illinois);IN Evidence Rule 617 (Indiana); Maine Rev. Stat. Ann., Title 25, §2803-B(1)(K) (Maine); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); Mo. Rev. Stat. ch. 590.700.1 (2009) (Missouri); Mont. Code Ann. §46-4-406-410 (2009) (Montana); Neb. Rev. Stat. Ann. §§29-4501-4508 (2008) (Nebraska); NJ Rule of Court, Rule 3:17 (New Jersey); N.M. Stat. Ann. §29-1-16 (2006) (New Mexico); N.C. Gen. Stat. §15A-211 (North Carolina); Or. Rev. Stat. §133.400 (2010) (Oregon); Wisc. Stat. Ann. §§968.073 and 972.115 (2005) (Wisconsin).

Two other states have enacted similar laws that will be effective soon: Public Act No. 11-174 (2011) (eff. Jan. 1, 2014) (Connecticut); Public Act No. 479 (2012) (eff. March 28, 2013) (Michigan).

Several other states have laws that strongly encourage electronic recording: *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006); MD Code, Criminal Procedure § 2-402 (Maryland); Com. v. DiGiambattista, 813 N.E.2d 516, 533-34 (2004) (Massachusetts); *State v. Barnett*, 789 A.2d 629, 633 (2001) (New Hampshire);

[8] *See* H.B. 596, An Act to Amend Tennessee Code Annotated, Title 40, Chapter 7, Relative to the Electronic Recording of Certain Custodial Interrogations, www.capitol.tn.gov/Bills/106/Bill/HB0596.pdfhttp://www.capitol.tn.gov/Bills/106/Bill/HB0596.pdf. The Tennessee General Assembly never voted on the bill. *See* Tennessee General Assembly, Bill Information for HB0596, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0596&ga=106.

after the tape recorder was turned on, mentioned his interrogator's previous mention of the death penalty and explained that he confessed in response to that frightening possibility, that this information came to light. Similarly, we know of the Codey Miller case only because the police chose to videotape that interrogation.

From *Amici's* collective experience, it is rare that law enforcement officers are brazen enough to threaten a suspect – especially a juvenile – with the possibility of the death penalty on a recording. The fact that it has now clearly happened in two recent Tennessee cases involving juvenile suspects raises serious questions about how often the threat is utilized in unrecorded and partially recorded interrogations in Tennessee.

This potential pattern and practice in Tennessee juvenile interrogations is particularly disturbing because the illegality of the juvenile death penalty in Tennessee is nothing new. Tennessee has not sentenced a juvenile to death since at least 1967. *See* Lynn Cothern, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, *Juveniles and the Death Penalty*,[9] Nov. 2000, at 2, 7. Furthermore, in 1989 the U.S. Supreme Court cited Tennessee as one of twelve states that prohibited the juvenile death penalty. *See Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005). Therefore, the *Roper* decision did not even change the law in Tennessee—and yet, seven years after *Roper,* interrogators are still telling Tennessean youth that they could receive the death penalty.

The illegality of the juvenile death penalty has not stopped law enforcement from threatening Tennessee children with that penalty during custodial interrogation. A categorical rule—making clear that any juvenile confession following the false suggestion that death is an option will be suppressed—would do so.

[9] This report is available at https://www.ncjrs.gov/pdffiles1/ojjdp/184748.pdf.

IV. ALTERNATIVELY, THREATENING A JUVENILE WITH THE DEATH PENALTY SHOULD BE GIVEN GREAT WEIGHT IN THE VOLUNTARINESS ANALYSIS OF THAT JUVENILE'S SUBSEQUENT CONFESSION. WEIGHING THE TOTALITY OF THE FACTORS IN THIS CASE, BRENDAN BARNES' CONFESSION WAS INVOLUNTARY.

Even if this Court declines to adopt a *per se* rule establishing that a juvenile confession that follows a death penalty threat is involuntary, such a threat should be given great weight in the traditional totality of the circumstances analysis. Under such a weighted analysis, Brendan's confession clearly was involuntary.

The Tennessee Supreme Court, in *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996), set forth the test for determining whether a confession is voluntary. *Smith* relied on Article I, Section 9 of the Tennessee Constitution, which "is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." First, "coercive police activity is a necessary predicate to finding that a confession is not voluntary." *Id.* In finding that the particular confession before it was voluntary because the interrogators' statements "were on the line, but did not cross it," *Id.* at 458, the *Smith* Court agreed with the Fourth Circuit that "*truthful* statements about a defendant's predicament are not the type of coercion that threatens to render a statement involuntary." *Id.* at 456 (emphasis added, internal quotation marks and alterations omitted). Because the interrogator questioning Brendan made a *false* statement about Brendan's "predicament," that aspect of his interrogation satisfies the predicate established by *Smith*. Telling a juvenile that he could receive the death penalty, even though *no* juvenile can be subjected to that penalty, is coercive police activity.

The second part of the *Smith* Court's voluntariness test is "[t]he critical question [of] whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." *Id.* at 455-56 (internal

quotation marks omitted). This factor involves weighing not only the tactics used by law enforcement but also the characteristics of the suspect against whom those tactics are used.

As discussed above, adolescents are more susceptible that adults to the pressure of police interrogations. The will of a juvenile suspect is more easily overborne by adult interrogators. *See Johnson v. Trigg*, 28 F.3d 639, 642 (7th Cir. 1994) (explaining that "police tactics that might be unexceptionable when employed on an adult may cross the line when employed against the less developed reason of a child"); *In re Jerrell C.J.*, 283 Wis.2d 145 (2005) (youth are "uncommonly susceptible to police pressures"). Individuals with low intelligence, such as those with developmental disabilities, are similarly vulnerable to the pressures of police interrogation. *See Drizin & Leo*, 82 N.C. L. Rev. at 919-20; *see also Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (explaining that cognitively impaired individuals "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"). Juveniles with low intelligence are thus particularly disadvantaged in the interrogation room.

Brendan falls into this category of "double vulnerability." He was only sixteen years old and has a full-scale IQ of only 62—easily low enough to satisfy the intellectual-deficit portion of a developmental disability diagnosis, *see* Paul T. Hourihan, Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1491 (1995) ("General intellectual functioning is measured by an intelligence quotient (IQ), with significantly subaverage usually defined as an IQ of 70 or below.") (internal quotation marks, citations, and alterations omitted)—when he isn't taking his medication for his diagnosed attention deficit/hyperactivity disorder (ADHD). Brendan had not taken that medication for several

months prior to his interrogation. *See* Evaluation, 17, 21, 24. Nothing in Brendan's life indicates a level of support and structure sufficient to ameliorate his immaturity and intellectual-functioning deficits. His schooling, the most structured aspect of most children's lives, was chaotic. Between 1999 and 2010, Brendan was suspended or expelled at least eighteen times. Evaluation at 4-12. He attended at least ten different schools over that time period, not including his stints in juvenile detention or group homes while in the custody of the Department of Children's Services. *Id.* Brendan also has a history of special education classes. *Id.* at 5, 9, 10. Although Brendan's mother testified that her son was in the ordinary grade for his age, Transcript of Transfer Hearing, *State v. Barnes*, No. 240209, 240210, Feb. 3, 2011, at 71, he had failed all of his ninth grade classes, and all of his second-semester tenth grade classes except art. *Id.* at 11-12.

Young and cognitively impaired, Brendan was no match for a threat of the death penalty, which he had no idea was false. Evaluation at 26. What's worse, the interrogator coupled the threat of death eligibility with the prospect of leniency in exchange for a confession. Brendan's interrogator told him the death penalty "is definitely an option," and followed up immediately by saying that he could get anywhere from probation to the death penalty and that "we need your cooperation." The officer reiterated that cooperation – in the form of a statement – would be "for your benefit." Statement of Brendan Barnes, at 17-18. By coupling the threat of the death penalty with the implied promise of leniency through cooperation, the interrogator was essentially telling Brendan that he needed to confess to avoid the death penalty and that if he confessed he might get probation.

Even the authors of the Reid Technique interrogation manual agree that it is an "improper" interrogation technique when a "promise [of leniency] is coupled with a threat." Fred

E. Inbau et al., *Criminal Interrogation and Confessions* 344 (5th ed. 2013). Similarly, the IACP guide recommends that interrogators avoid threats of harm and direct and indirect promises of leniency when questioning juvenile suspects, because that combination unacceptably raises the risk of false or involuntary confessions. *Reducing Risks*, at 9. *Accord* Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 Nw. U. L. Rev. 971, 983, 989-90 (2005) (relying on precedent and developmental science to conclude that courts should bar the admission of all juvenile confessions where officers have used deceptive interrogation tactics, including false promises of leniency). All of these factors compel the conclusion that Brendan's confession was not freely self-determined.

Courts in other states applying the totality of the circumstances test have found that confessions following mention of the death penalty are involuntary. For example, in *People v. Flores*, 144 Cal. App. 3d 459, 470-71 (5th Dist. 1983), the California appellate court found the defendant's confession to be involuntary when made after a threat of the death penalty and a promise of leniency. In *Green v. State*, 605 A.2d 1001 (Md. Ct. Spec. App. 1992), the court found that an interrogator's lie to a juvenile suspect about the possibility of receiving the death penalty rendered the confession inadmissible. The Maryland appellate court reasoned that "[i]t is obvious that the threat of a death penalty would be terrifying, particularly to a minor." *Green*, 605 A.2d at 1005.

Other state courts reached that conclusion even before *Roper* completely abolished the juvenile death penalty. The falsity of the threat in this case only makes the case for involuntariness stronger. Instructively, some courts have found that informing adult defendants of "*realistic* penalties, including the death penalty, does not make the confession involuntary" in

all instances, White, *Confessions in Capital Cases*, *supra*, at 1013 n.296 (citing *Nelson v. State*, 688 So. 2d 971 (Fla. Dist. Ct. App. 1997) and *Dixon v. State*, 174 S.E.2d 683 (N.C. Ct. App. 1970) as examples) (emphasis added). In Brendan's case, however, the threat of the death penalty was not realistic. Death was not a penalty he could ever actually face. Material falsity matters: many courts "around the country have held that the giving of false advice as to the possible penalties is a factor affecting the voluntariness determination." *Baynor v. State*, 355 Md. 726, 750, 736 A.2d 325, 337-38 (1999) (Rake, J. dissenting) (citing *United States v. Duvall,* 537 F.2d 15, 24–25 (2d Cir. 1976) (holding statement involuntary where prosecutor stated that defendant faced 100 years, under circumstances in which no prosecutor would seek, nor would any judge impose, such a sentence); *People v. Nicholas,* 112 Cal. App. 3d 249, 169 Cal. Rptr. 497, 506 (1980) (holding statement involuntary where detectives falsely implied to defendant that he faced the death penalty where it did not have retroactive effect and therefore did not apply to his case); *State v. Nelson,* 63 N.M. 428, 321 P.2d 202, 206–207 (1958) (holding statement involuntary where defendant was falsely told he could not face the death penalty if he confessed)). Other courts have found that "the threat of harsh punishment is an important factor in assessing voluntariness." *Baynor*, 355 Md. at 750 (Rake, J. dissenting) (citing *People v. Hinds,* 154 Cal. App. 3d 222, 201 Cal. Rptr. 104, 114 (1984) (holding statement involuntary where appellant was told that if he did not tell the truth and explain certain facts, he might get the death penalty)).

The threat of the death penalty is enough to make some adults confess, even to crimes they did not commit. In the case of sixteen-year-old Brendan Barnes, with an IQ of 62, the false statement that he could be put to death – especially when coupled with a promise of leniency in

exchange for the confession – should be given great, if not dispositive weight. Because it was involuntary under the totality of the circumstances, Brendan's confession should be suppressed.

V. THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING BRENDAN BARNES' CONFESSION SUGGESTS THAT HE DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS.

Separate and apart from the voluntariness of Brendan's statement, the totality of the circumstances also demonstrate that he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights. Prior to a custodial interrogation, the police must inform the accused of his constitutional rights to silence and to an attorney. *Miranda v. Arizona*, 384 U.S. 436 (1966). Where an interrogation is conducted without an attorney present and the suspect gives a statement, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. In considering whether a juvenile, or any other person, knowingly, intelligently, and voluntarily waived his *Miranda* rights prior to a custodial interrogation, the court must consider the "totality of the circumstances." *Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979); *State v. Callahan*, 979 S.W.2d 577, 581 (Tenn. 1998). Many of the same factors used in determining whether the confession was voluntary also apply to whether the suspect's waiver of his rights was voluntary.

In *Callahan*, 979 S.W.2d at 583, the Tennessee Supreme Court set forth the totality of circumstances for courts to use when evaluating a juvenile's *Miranda* waiver:

> (1) consideration of all circumstances surrounding the interrogation including the juvenile's age, experience, education, and intelligence;
> (2) the juvenile's capacity to understand the *Miranda* warnings and the consequences of the waiver;
> (3) the juvenile's familiarity with *Miranda* warnings or the ability to read and write in the language used to give the warnings;

(4) any intoxication;
(5) any mental disease, disorder, or retardation; and
(6) the presence of a parent, guardian, or interested adult.

The Tennessee Supreme Court reasoned that "[t]hese factors are sufficiently capacious to encompass coercive tactics such as threatening a juvenile with adult prosecution or promising leniency," adding that "[w]hile courts shall exercise special care in scrutinizing purported waivers by juvenile suspects, no single factor such as mental condition or education should by itself render a confession unconstitutional *absent* coercive police activity." *Id.* (emphasis added).

The process by which police obtained Brendan's purported *Miranda* waiver was not recorded. The fact that (as the transcript reveals) at some point in the unrecorded portion of the police-juvenile dialogue the interrogators falsely threatened the death penalty, and raised the prospect of leniency in exchange for Brendan's confession, means that there is good reason to believe that his waiver may have been obtained in a similarly heavy-handed manner. There is also good reason to believe that Brendan was incapable of understanding his rights, or the implications of waiver, no matter what tactics were used. Brendan's cognitive impairments are well-documented by the psychological evaluation conducted by Dr. Auble. According to that evaluation, Brendan's word reading skills ranked in the second percentile for his age; his sentence comprehension skills ranked in the sixth percentile; his spelling ranked in the twelfth percentile; his IQ was 62 overall when he wasn't medicated (as he was not at the time of interrogation); and his *Miranda* comprehension was in the tenth percentile for juveniles. Evaluation at 22.

Based on these factors, Dr. Auble strongly suggested that Brendan did not understand his *Miranda* rights. Such a conclusion is only reinforced by the relevant research into the level of comprehension an individual need to understand *Miranda*, research indicating that Brendan fell

well below that threshold. "Many of the words used in typical *Miranda* warnings require at least a tenth-grade reading level." D. Christopher Dearborn, "*You Have the Right to an Attorney," but Not Right Now: Combating Miranda's Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 Suffolk U. L. Rev. 359, 374-75 (2011). *Accord* Richard Rogers et al., Miranda *Rights . . . and Wrongs: Myths, Methods, and Model Solutions*, 23 Crim. Just. 4, Summer 2008, at 6 ("Many legal terms (e.g., 'waive,' 'exercise,' 'appointed,' and 'counsel') typically require the equivalent of a tenth or even twelfth grade education."); Anthony J. Domanico et al., *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 Idaho L. Rev. 1, 3, 20 (2012) (finding that the "Miranda warning used by the interrogators required a tenth-grade reading level overall—which is well beyond that possessed by most suspects—and two of the warnings' prongs [about the right to an appointed lawyer and the right to stop questioning at any time] required college-or graduate-level reading ability"). Brendan, in contrast, consistently failed his ninth-and-tenth-grade classes. His language skills are so far below those of the typical tenth-grader as to suggest not even the barest possibility of meaningful *Miranda* comprehension.

Based on the totality of these circumstances, this Court should conclude that the state has not met its "heavy burden" of proving that Brendan knowingly, intelligently, and voluntarily waived his *Miranda* rights.

VI. CONCLUSION

Brendan Barnes, sixteen years old, cognitively impaired, and accused of stabbing a local pastor to death, didn't stand a chance in the interrogation room. His interrogator, a seasoned detective of the Chattanooga Police Department, wrongly led Brendan to believe that he could

face the death penalty if he didn't talk and strongly suggested that he would receive leniency if he did. Brendan's only source of support during the unrecorded portion of the interrogation, when those threats and implied promises were made, was his mother—but she was the one who had called the police to have him taken into custody, and she then left him alone with the police prior to the recorded interrogation. Lacking the cognitive ability to understand his rights or even what was happening to him – and having no attorney present to advise him – Brendan's supposed "choice" to waive his rights and give a statement was no choice at all. All Brendan can be expected to have understood was that if he didn't help himself by talking, he might die.

If the constitutional protections during custodial interrogation afforded by the Fifth and Fourteenth Amendments are to mean anything at all, they must be applied in a situation like this one. *Amici* strongly support Brendan Barnes' motion to suppress his statement.

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