Appeal No. 2018AP1897-CR

IN THE WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MORGAN E. GEYSER,
Defendant-Appellant.

On Appeal from the February 1, 2018, Order of Commitment, Filed in the Waukesha County Circuit Court, the Honorable Michael O. Bohren, Presiding.
Waukesha County Case No. 2014CF596

NON-PARTY BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, CENTER FOR JUVENILE LAW & POLICY, AND CENTER ON WRONGFUL CONVICTIONS OF YOUTH IN SUPPORT OF DEFENDANT-APPELLANT MORGAN GEYSER

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INTEREST OF AMICI CURIAE

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

The Center for Juvenile Law and Policy ("CJLP") is a non-profit advocacy organization housed at Loyola Law School in Los Angeles, California. The CJLP is a non-profit organization that fosters systemic reform of the Los Angeles juvenile and criminal justice systems through individual client representation, policy advocacy, education of law students, research, and community engagement.

The Center on Wrongful Convictions of Youth ("CWCY") is part of Northwestern University School of Law's Bluhm Legal Clinic and is a joint project of two of the Clinic's highly acclaimed Centers: the Children and Family Justice Center and the Center on Wrongful Convictions. The CWCY'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 justice system.

SUMMARY OF THE ARGUMENT

The "greatest care" must be taken when questioning children to ensure their confessions are voluntary. *In re Gault*, 387 U.S. 1, 45, 55 (1967). *See also Haley v. Ohio*, 332 U.S. 596, 599-600 (1948); *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011). This caution extends to ensuring *Miranda* waivers are made knowingly, intelligently, and voluntarily. *State v. Lee*, 175 Wis. 2d 348, 357, 499 N.W.2d 250, 254 (Ct. App. 1993). *Amici* write to underscore the importance of decades of Supreme Court case law protecting vulnerable youth from coercion and supported by social science research.

The lower court's ruling that Morgan Geyser, a twelve-year-old child suffering from hallucinations at the time she spoke to police, voluntarily, intelligently, and knowingly waived her *Miranda* rights failed to appropriately account for her young age. *Amici* urge this Court to clarify the appropriate standards for assessing whether a twelve-year-old can knowingly and intelligently waive her *Miranda* rights.

ARGUMENT

I. COURTS MUST CONSIDER ADOLESCENT DEVELOPMENT WHEN EVALUATING THE VALIDITY OF A *MIRANDA* WAIVER AND THE VOLUNTARINESS OF A CONFESSION

The United States Supreme Court has repeatedly recognized that childhood development is relevant to criminal procedure. Adolescents lack maturity and have an "underdeveloped sense of responsibility" that can lead to "impetuous and ill-considered actions and decisions." *Roper v. Simmons*, 543 U.S. 551, 569 (2005);

see also Graham v. Florida, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.") This immaturity and impetuosity make youth particularly vulnerable in decisions to waive their *Miranda* rights.

More specifically, the Supreme Court has repeatedly affirmed the importance of heightened protections for adolescents during interrogations. *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) ("[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an adult subject). Most recently in *J.D.B. v. North Carolina*, the Court concluded that the defendant's age is relevant to the *Miranda* custody analysis. 564 U.S. 261 (2011). The Court rooted its conclusion in emerging research, clarifying that "the [social science] literature confirms what experience bears out," *id.* at 273 n.5, and thus that developmental attributes of children must be considered in examining how a child will experience custodial interrogation. *See id.* at 274-75. Justice Sotomayor emphasized that "[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *Id.* at 273.

The Supreme Court has also instructed that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, 560 U.S. at 76. Thus, age and the "wealth of characteristics and circumstances attendant to it" must be given meaningful consideration in cases involving adolescent defendants. *See Miller v. Alabama*, 567 U.S. 460, 476 (2012); *see also Montgomery*

v. Louisiana, 136 S. Ct. 718, 733 (2016); *Roper*, 543 U.S. at 569-70. Building upon the longstanding framework of *Haley*, *Gallegos*, and *J.D.B.*, these cases emphasize that "children are constitutionally different from adults" and thus are entitled to special protections. *See Miller*, 567 U.S. at 471.

Social science confirms that youth face unique disadvantages in police interrogations and *Miranda* waivers. Indeed, adolescents waive their *Miranda* rights at an astounding rate of 90 percent. Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 429 (2013). Even youth who have a basic understanding of *Miranda* warning vocabulary have difficulty grasping the significance of the warnings and comprehending how their rights apply. Naomi Goldstein et al., *Waving Good-bye to Waiver: A Developmental Argument Against Youths' Waiver of* Miranda *Rights*, 21 N.Y.U.J. LEG. & PUBLIC POL. 1, 31 (2018). Around 94 percent of youth between ages twelve and nineteen exhibit "less than adequate appreciation of the significance and consequence of waiving their rights." *Id.*[1] Youth subject to interrogation are also grossly overrepresented among proven cases of false confession – further underscoring their vulnerability in these high stress situations. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004). The unique vulnerability of youth during

[1] Difficulties focusing can create further challenges in the *Miranda* waiver context. Goldstein et al., *Waving Good-bye to Waiver, supra*, at 24.

interrogations and *Miranda* waivers is grounded in developmental differences between youth and adults. Youth are impulsive with a tendency to over-emphasize short-term gains over possible long-term consequences, susceptible to coercion, and lack the ability to focus. Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 VICTIMS & OFFENDERS 428, 432-37 (2012). Moreover, "[a] significant body of developmental research indicates that, on average, youths under the age of fourteen differ significantly from adolescents sixteen to eighteen years of age in their level of psychological development." Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice*, 83 N.C. L. REV. 793, 817 (2005).

Researchers have identified stark differences in youth and adult decision-making in stressful situations such as custodial interrogations. During emotionally arousing situations, "adolescents are more prone to act emotionally and impulsively, without the controlled influence of a formal decision-making process" and "have difficulty relying on objective information to make rational decisions." Goldstein et al., *Waving Good-bye to Waiver, supra*, at 23. This affects their ability to manage decisions effectively regarding "what questions to answer, what information to reveal, to whom they should speak, and whether to invoke the right to silence or counsel at a later stage in questioning." *Id.* at 25-26.

Youth are also uniquely vulnerable to coercion during interrogation. "[J]uveniles are more vulnerable or susceptible to negative influences and outside

pressures" in part because they "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). Social science research confirms that "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures" when being interrogated by the police. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 357 (2003); *see also* LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES 172-73 (1984).

II. MORGAN'S WAIVER WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT

A. Given Morgan's Youthfulness And Inexperience With Law Enforcement, She Could Not Provide A Valid *Miranda* Waiver

The state has the burden of showing Morgan's *Miranda* waiver was knowing, voluntary, and intelligent. *State v. Lee*, 175 Wis. 2d 348, 359, 499 N.W.2d 250, 255 (Ct. App. 1993). Specifically, the court should analyze the "juvenile's age, experience, education, background, intelligence, and the capacity to understand the warnings given, the nature of his fifth amendment rights, and the consequences of waiving those rights." *State v. Woods*, 117 Wis. 2d 701, 722, 345 N.W.2d 457, 468 (1984). For the reasons set forth in Section I, Morgan's young age should have been central to the court's assessment of her waiver. Even during the explicit *Miranda*

waiver, Morgan made clear she did not understand its implications by asking why she had to sign the waiver. (NERI at 34:17.) Rather than answering, the detective indicated that her initials merely meant that she "sort of understood it." (*Id.* at 34:20.) During the brief verbal *Miranda* warnings when police first apprehended her, Morgan did not even have the opportunity for this level of exchange. (Geyser's Br. at 5-6.) Yet the lower court concluded that she "understood the proceedings; she understood what was read to her; she understood what she was doing; [and] she understood that she was giving up her right to remain silent." (R.345:28.)

B. Twelve-year-old Morgan Could Not Waive Her *Miranda* Rights Knowingly, Voluntarily, And Intelligently Absent A Meaningful Opportunity To Consult With Counsel

That Morgan was not able to consult with counsel further underscores that her wavier was not knowing, voluntary, and intelligent. A youth like Morgan, who hasn't even reached her teen years, is particularly in need of counsel during interrogation. In *Haley*, the Court explained that an adolescent during interrogation:

> needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Haley, 332 U.S. at 600. Without the support of an attorney, Haley was an "easy victim of the law" and a "ready victim of [police] inquisition." *Id.* at 599. The Supreme Court reinforced this point in *Gallegos*, explaining that a 14-year-old needs a lawyer or adult friend to provide him with "adult advice" so that he would be on "less unequal footing with his interrogators." 370 U.S. at 54; *see also In re*

Gault, 387 U.S. 1, 36 (1967) (footnote omitted) (holding that the Fourteenth Amendment entitles children to counsel in delinquency adjudications, and noting that "The child requires the guiding hand of counsel at every step in the proceedings against him.").

The psychiatric and psychological communities have similarly recognized that youth cannot validly waive *Miranda* rights without the assistance of counsel. "A suspect may understand that she has a right to speak with an attorney, . . . but she might not grasp the significance of being able to speak with an attorney (for example, might not know what an attorney is or does) and therefore be unable to 'intelligently' decide to claim or waive the right." Thomas Grisso, Evaluating Competencies: Forensic Assessments and Instruments 152 (2d ed. 2003). The American Academy of Child and Adolescent Psychiatry has therefore concluded that "juveniles should have an attorney present during questioning by police or other law enforcement agencies." American Academy of Child & Adolescent Psychiatry, Policy Statement on Interviewing and Interrogating Juvenile Suspects (Mar. 7, 2013), *available at* https://www.aacap.org/aacap/policy_statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx. Scholars agree. *See*, *e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 LAW & HUM. BEHAV. 3, 30 (2010) (calling for attorney presence during interrogation of youth under 16); Naomi E. Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 368

(2003) (calling for attorney presence for youth under 15); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1166 (1980) (advocating for per se exclusion of waivers made without legal counsel). Twelve-year-old Morgan did not have counsel at any point when she was given her *Miranda* warnings and thus could not understand fully what rights she was waiving.

III. MORGAN'S STATEMENTS WERE INVOLUNTRARY

A. Morgan's Age, Psychological Condition, And Lack Of Experience With Law Enforcement Demonstrate Her Confession Was Not Voluntary

Even if the State has established a *Miranda* waiver was knowing, intelligent, and voluntary, it must also establish that Morgan's statements were voluntary. *See, e.g.*, *Lee*, 175 Wis. 2d at 359; *State v. Mitchell*, 167 Wis. 2d 672, 696, 482 N.W.2d 364, 374 (1992).

In *In re Jerrell C.J.*, a fourteen-year old boy was taken into custody, transported to the police station, left alone in an interrogation room for two hours, and then interrogated for five and a half hours, after which he signed a prepared statement. 2005 WI 105, ¶ 5-11, 283 Wis. 2d 145, 699 N.W.2d 110. Applying a totality of the circumstances analysis, Jerrell's educational attainment (eighth grade) and limited experience with law enforcement weighed against a finding of voluntariness. *See id.* ¶ 20 (citing *State v. Hoppe*, 2003 WI 43, ¶ 38, 261 Wis. 2d 294, 661 N.W.2d 407). While not dispositive, Jerrell's youth was "a critical factor" in the Court's analysis. *Id.* ¶ 26. The Court wrote, "the younger the child the more

carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession." *Id.* (citation omitted).

Here, Morgan had *just* turned twelve years old at the time of the interrogation, (Geyser's Brief at 5), two years younger than the juvenile in *Jerrell C.J.* For all the reasons set forth in Section I, her youth heightened her vulnerability during the coercion. As described in Appellant's brief, these vulnerabilities were heightened still further because Morgan was also suffering from an undiagnosed and untreated mental illness. (Geyser's Brief at 4.) She had no prior experience with the criminal justice system and even needed tutoring three weeks after the interrogation to understand how various legal concepts applied to her situation. (*Id.* at 8.) Under the totality of circumstances, the confession was not voluntary.

B. Denying Morgan Access To Her Parents Is Strong Evidence of Coercion

The Wisconsin Supreme Court has long recognized that "[i]f the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements." *Theriault v. State*, 66 Wis. 2d 33, 48, 223 N.W.2d 850, 857 (1974). Here, the interrogating detective conceded Morgan was never offered an opportunity to talk to her parents nor would such an offer be made. (*See* Geyser's Brief at 6.) This intentional decision to deprive Morgan access to her parents must be understood as a strong indication of coercive behavior. This

is just the latest in a long line of cases in which police officers have not heeded the Court's warning in *Theriault* and intentionally interrogated children outside the presence of their parents. *See Jerrell C.J.*, 2005 WI 105, ¶ 97 (Abrahamson, C.J., concurring).[2]

C. The Police Used Inappropriately Coercive Practices In The Interrogation

The officer interrogating Morgan used coercive tactics to extract an involuntary confession.

> [P]olice conduct need not be egregious or outrageous in order to be coercive. 'Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures.'

Jerrell, C.J., 2005 WI 105, ¶ 19-21 (internal citations omitted) (noting the "need to exercise 'special caution' when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult.").

Police policies and social science research emphasize that making promises or suggesting leniency inappropriately influences youth. The International Association of Chiefs of Police and the Office of Juvenile Justice and Delinquency

[2] Reaffirming that the intentional deprivation of parental guidance to a child during interrogations is strong evidence of police coercion also reaffirms the importance of the fundamental and time-honored liberty interest of parents to direct the care, control and upbringing of their children, especially when it comes to life-altering decisions with potentially traumatic consequences for children like waiving a child's *Miranda* rights. *See id.* ¶ 109-10 (Abrahamson, C.J., concurring).

Protection both recommend that police should use less coercive interrogation methods when interrogating youth. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE & OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION, 7-12 (Sept. 2012) [hereinafter REDUCING RISKS] at https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf; INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INTERVIEWING AND INTERROGATING JUVENILES MODEL POLICY (2012). Specifically, investigators should not make any suggestion they will help the youth, "even when trying to express sympathy or understanding." REDUCING RISKS, *supra*, at 10. Another manual specifically instructs its interrogators to "avoid interrogations centered on "helping" the suspect because some courts have interpreted such statements as implied promises of leniency, as happened here. Fred E. Inbau et al., CRIMINAL INTERROGATIONS AND CONFESSIONS 331 (JONES AND BARTLETT, 5TH ED. 2013).

When Morgan asked: "Will I regret giving you this information later?" (NERI at 58:19), the detective responded, "This information will be used to try to get you some help." (*Id.* at 58:24.) Morgan responds, "Okay." (*Id.* at 58:31.) By misleading Morgan about the consequences of her statements, the police inappropriately coerced Morgan's confession.

CONCLUSION

For these reasons, *Amici* respectfully request that this Court conclude Morgan's waiver of *Miranda* was not knowing, intelligent, nor voluntary and that her statements to police were involuntary.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 2,948 words.

I further certify that I have submitted an electronic copy of this brief, excluding any appendix, which complies with the requirements of Section 809.19(12). I certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties to this matter.

Dated this 20th day of May, 2019.

Marsha L. Levick (*pro hac vice*)