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**Offered in support of  
Senate Bill 0136—Juvenile Interrogation Protection Act**

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My name is Kristin Henning. I am a resident of Takoma Park, Maryland, a Professor of Law and the Director of the Juvenile Justice Clinic & Initiative at Georgetown Law, and the Director of the Mid-Atlantic Juvenile Defender Center. The views expressed are based on my research and experience and not given on behalf of Georgetown University or the Mid-Atlantic Juvenile Defender Center. Thank you for the opportunity to testify today in support of Senate Bill 0136. By ensuring all children consult with an attorney prior to custodial interrogation, Maryland will protect and honor the rights of young people. The need for this safeguard is especially urgent for youth of color, who are even more vulnerable to coercion during custodial interrogation.

***The Need for Young People to Consult with Attorneys Prior to Custodial Interrogation***

Maryland must ensure children have access to attorneys prior to custodial interrogation. The current approach to youth interrogations is out of step with adolescent development, social science, and fundamental fairness. Although most people probably could not describe any of the facts of the Supreme Court case *Miranda v. Arizona*, many people would recognize the warnings that police are supposed to give a person before they start interrogating them from TV shows and movies.<sup>1</sup> The point of these now-familiar warnings is to inform everyone that they have certain rights before they talk to the police.<sup>2</sup> However, merely informing someone of their rights does not mean they actually understand those rights, understand the implications of waiving those rights, or believe they can actually avail themselves of those rights. This is particularly true when it comes to young people being interrogated by police. It is here where current law fails to protect the youth of Maryland, and why it is time to enact the proposed law requiring law enforcement to ensure a child consults with a qualified attorney before custodial interrogation.

The *Miranda* framework of reading a suspect his or her *Miranda* rights and asking for a waiver was designed with *adults* in mind. To understand standard *Miranda* warnings, an individual must have a working memory that allows them to hold all the warnings in their mind

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<sup>1</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>2</sup> See *id.* at 445.

at once, process their meaning, and formulate a response.<sup>3</sup> They have to understand what an attorney is, what kinds of questions the police will be expected to ask, and what it means to have their responses “used” against them (which requires general knowledge of the criminal legal system).<sup>4</sup> Studies have found that some warnings, such as the right to be appointed an attorney and the right to silence, require a post-high school reading ability in order to comprehend.<sup>5</sup> In order to make a knowing, intelligent, and voluntary waiver, an individual has to possess the requisite cognitive ability (if they are under 16 years old), an adequate basis of knowledge, and psycho-social maturity. Even if simpler language is used to convey the *Miranda* warnings, many young people may still be incapable of fully understanding the complex legal concepts and applying them to their particular situation, which requires abstract reasoning, cost-benefit analysis, and the weighing of short and long-term goals.<sup>6</sup> This understanding and analysis is necessary for a child to make a valid waiver of their rights. Adapting the language of *Miranda* warnings to be more child-friendly is insufficient if not paired with access to an attorney for the child.

Merely requiring police to read a *Miranda* script before interrogating a child ignores advancements in our understanding of adolescent development, which demonstrates that young people as a class cannot effectively waive their *Miranda* rights just by being informed of them by the police. In the decades since 1965, when *Miranda* was decided, study after study has confirmed what we have long intuitively understood about children: they are different than adults. The research shows that youth undergo dramatic changes during adolescence. Indeed, we now know that adolescence is the second-most important period of brain development, after the first three years of life.<sup>7</sup> For instance, in adolescence, the limbic system – the part of the brain that controls emotions – develops during the earlier part of adolescence, whereas the prefrontal cortex – which is situated at the front of the brain and controls reasoning, decision-making, and impulse control – does not fully develop until the end of adolescence.<sup>8</sup>

As a result of this differential in the timing of development of the different parts of the brain, youth as a class lack the psycho-social maturity that adults possess. Specifically, adolescents are not as capable of making well-reasoned decisions, especially under intense stress or fear such as in an interrogation setting.<sup>9</sup> Moreover, adolescents tend to focus on short-term rewards rather than long-term risks, which makes them especially vulnerable to waiving their *Miranda* rights without considering the long-term consequences.<sup>10</sup> For example, if an officer tells an adolescent during interrogation that if they waive their rights they can go home, the short-term

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<sup>3</sup> See Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 432 (2006).

<sup>4</sup> See *id.* at 432–33.

<sup>5</sup> Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 14 (2012).

<sup>6</sup> Naomi Goldstein, et al., *Waving Goodbye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 49 (2017).

<sup>7</sup> See Kerstin Konrad, et al., *Brain Development During Adolescence*, 110(25) DEUTSCHES ARZTEBLATT INT'L 425, 426–27.

<sup>8</sup> See Jennifer Woolard, *Adolescent Development*, 19.

<sup>9</sup> Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 9 (2006).

<sup>10</sup> *Id.* at 8–9.

reward of going home can induce an adolescent to waive their *Miranda* rights no matter what the long-term consequences may be.<sup>11</sup> Youth still lack the tools to truly evaluate the impact of that choice on the rest of their life.<sup>12</sup> Thus, the current *Miranda* framework is ineffectual for youth as it is less likely that they can execute a truly knowing, intelligent, and voluntary waiver under the circumstances typical to most custodial interrogation situations.

In addition to adolescents' psycho-social immaturity, there is also the fact that adolescents may lack the cognitive ability to even understand the *Miranda* warnings. In one study, a researcher asked 400 delinquent youth and 200 criminally and non-criminally involved adults a series of questions designed to gauge the participant's understanding of *Miranda* rights. Controlling for age, IQ, and other variables, he found that 55% of youths clearly misunderstood one or more of the *Miranda* warnings, compared to just 23% of adults.<sup>13</sup> Youth in this study misunderstood that the right to remain silent meant they could choose to not speak with the police officer, which was at odds with their experience that they need to talk to adults if asked.<sup>14</sup> Some youth understood that if they have an attorney the attorney is supposed to be "on their side," but also believed that the attorney would help them only if they are innocent.<sup>15</sup> Although adolescents generally have the same cognitive abilities as adults after age 15,<sup>16</sup> because of their lack of familiarity with the *Miranda* rights and psycho-social maturity they still "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."<sup>17</sup>

Ensuring a child has access to an attorney prior to custodial interrogation is also critical as a matter of racial justice. Black youth have their views of police officers and law enforcement shaped by historical police violence and contemporary coverage of police brutality against Black people.<sup>18</sup> Their views are also shaped by their own experiences of police harassment with police officers, as well as those of their friends and families.<sup>19</sup> Too often, Black youth feel compelled to be deferential to police officers to avoid risking more severe harassment, injury, or death.<sup>20</sup> Youth of color experience interactions with police as traumatizing. A study on the effects of police interactions on adolescents found that youth with more exposure to law enforcement officials report more emotional distress during and after each interaction.<sup>21</sup> African American

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<sup>11</sup> Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004).

<sup>12</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011).

<sup>13</sup> Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* at 11–12.

<sup>17</sup> *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

<sup>18</sup> Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. 883, 901 (2020).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Dylan B. Jackson et. al, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 Journal of Adolescent Health 627, 629,

and Latino/a youth experience even greater levels of trauma.<sup>22</sup> Similarly, African American youth who live in neighborhoods with a greater police presence report more trauma and anxiety symptoms.<sup>23</sup> The severity of these symptoms is associated with the number and intrusiveness of their interactions with police.<sup>24</sup> Young Black males living in highly-policed areas who have watched friends, family members, or even complete strangers get searched by police officers report symptoms consistent with secondary trauma.<sup>25</sup> Exposure to these incidents on social media had a similar effect.<sup>26</sup> Further studies have found that these feelings of fear, embarrassment, and helplessness affect how young people develop into young adulthood; injuring their self-concept and permanently damaging their trust in law enforcement.<sup>27</sup>

Black youth also live with the pervasive fear that they are being stereotyped by police, and this fear impacts their ability to understand and assert their rights in custodial interrogation without the assistance of counsel.<sup>28</sup> Researchers found that Black people are significantly more likely than White people to anticipate feeling anxious in police encounters and fear that they will be perceived as guilty when they are actually innocent. Researchers call this phenomenon called “stereotype threat.”<sup>29</sup> Black people are more likely to engage in self-regulatory efforts (such as making eye contact and being hyper-aware of their body language and word choice) to try to counteract police stereotypes about their guilt.<sup>30</sup> Ironically, these self-regulatory efforts are interpreted as suspicious by police.<sup>31</sup> The anxiety, fear, and self-regulatory efforts are mentally taxing and reduce the individual’s cognitive capacity and the ability to think clearly.<sup>32</sup> This creates an additional impediment for youth of color seeking to understand their *Miranda* rights and make knowing, intelligent, and voluntary waiver without consulting with qualified attorneys outside the presence of police.<sup>33</sup>

The backdrop of police violence against Black people, their own experiences of police harassment, the symptoms of trauma and anxiety they feel during these interactions, the fear that they are being stereotyped by police, and the developmental immaturity of youth previously

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<sup>22</sup> Dylan B. Jackson et. al, *Low self-control and the adolescent police stop: Intrusiveness, emotional response, and psychological well-being*, 66 *Journal of Criminal Justice*, 2020, at 1, 8.

<sup>23</sup> Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 *Am. Journal of Pub. Health* 2321, 2324 (2014).

<sup>24</sup> *Id.*

<sup>25</sup> Nikki Jones, “The Regular Routine”: Proactive Policing and Adolescent Development Among Young, Poor Black Men, in *Pathways to Adulthood for disconnected young men in low-income communities*. *New Directions in Child and Adolescent Development*, 33, 45 (K. Roy & N. Jones 2014).

<sup>26</sup> B.M. Tynes et al., *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 *Journal of Adolescent Health* 371, 376 (2019).

<sup>27</sup> Jones, *supra* at 52.

<sup>28</sup> Henning and Omer, *supra* at 903-904.

<sup>29</sup> *Id.*

<sup>30</sup> Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens’ Experiences of Police Encounters*, 39 *LAW & HUM. BEHAV.* 463, 464 (2015); *see also* Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 *PSYCH. PUB. POL’Y & L.* 562, 566-67 (2011).

<sup>31</sup> Najdowski et al., *supra* at 464; *see also* Najdowski, *supra* at 569-576.

<sup>32</sup> Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision To Confess*, 18 *PSYCH. PUB. POL’Y & L.* 673, 689-90 (2012).

<sup>33</sup> Henning and Omer, *supra* at 904.

described create a powerful force undermining the voluntariness of any *Miranda* waiver Black youths may make. These factors create the perfect storm for children, particularly youth of color, “consenting” to custodial interrogation due to implicit coercion. They may waive their *Miranda* rights just so they could get out of the interrogation room. In this respect, for Black youth *Miranda* warnings do not serve as an effective safeguard against the coerciveness of police interrogation.

A child’s age and race tint every experience they have with police, and youth need additional protections in custodial interrogation. To illustrate the futility of the current *Miranda* practice as it applies to youth, consider the following recent case. A Black teenage boy was taken into the police station and read his *Miranda* rights. When asked if he wanted an attorney, he said that he already had an attorney and that he would like to talk to her. The police told him that this meant they would have to leave, which was true. They then remained in the room, staring at him, until he said he would talk to them. The police continued reading him his rights, and he again said he wanted an attorney. They stopped again and waited again until he had agreed to talk to them. Then, upon being read his *Miranda* rights and invoking his right to silence, he was told by the detective that he marked the wrong box. While on paper, this whole charade may have observed the niceties of the *Miranda* warning and waiver system, in no way could this be a model of justice. This is not just a fault of the police officers that day, but of the system that did not take into consideration the developmental stage of the youth being interrogated and how that affected any waiver he could give.

Maryland must use the advances in adolescent development research over the last 30 years to create a legal framework that is developmentally appropriate for adolescents being interrogated by police officers. The way to do this is to change the law to ensure youth have a meaningful opportunity to confidentially consult with counsel before custodial interrogation. Parents, although they must be informed, are not a substitute for access to an attorney. Parents of youth of color are likely to experience the same fear of police as their children. Studies show that having the opportunity to consult with counsel before making any decision about waiving *Miranda* rights helps adolescents make a more informed choice.<sup>34</sup> Changing Maryland law to ensure youth have access to counsel before they make a waiver decision preserves the rights of children, reduces coerced confessions, and protects the purpose that animated *Miranda* in the first place.

### **Conclusion**

It is critical that Maryland law accounts for the differences between youth and adults in custodial interrogation. Youth must be read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner, and their parents must be notified when they are taken into custody. Most importantly, youth must have the opportunity to consult with counsel before custodial interrogation.

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<sup>34</sup> Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29(6) LAW AND HUMAN BEHAVIOR 723, 737 (2005).