
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review

v.

MICUS DUANE WARD,

Defendant-Appellant
Petitioner on Review

Washington County Circuit Court
Case No. C132352CR

A163157

S066598 (N008188)

BRIEF ON THE MERITS *AMICI CURIAE*
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION
OREGON JUSTICE RESOURCE CENTER

Petition for review from the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable Rick Knapp, Senior Judge

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Concurring Judges: Armstrong, P.J. and Tookey, J.

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BRIEF ON THE MERITS OF *AMICI CURIAE*
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION
OREGON JUSTICE RESOURCE CENTER

INTRODUCTION

The Oregon Criminal Defense Lawyers Association (OCDLA) is a non-profit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators, and related professionals dedicated to defending individuals who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, and networking. OCDLA is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

The Oregon Justice Resource Center (OJRC) is a Portland-based, nonprofit organization founded in 2011. The OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. The OJRC serves this mission by focusing on the principle that our criminal justice system should be founded on fairness, accountability, and evidence-based practices. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.

Amici wish to be heard by this Court because *amici* agree with defendant that the trial court erred when it denied his motion to suppress statements made on October 9, 2013, in Washington County and this court should reverse and remand for a new trial. *Amici* also agree with defendant that sentencing an intellectually disabled person to life without the possibility of release or parole violates the Eighth and Fourteenth Amendments to the United States Constitution, and, therefore in the alternative, this Court should remand for resentencing.

SUMMARY OF ARGUMENT

Persons with intellectual disabilities (ID) are insufficiently protected by *Miranda* warnings and the traditional voluntariness analysis because their disability renders them less able to understand their *Miranda* rights. Social science indicates that most persons with ID do not understand the *Miranda* warnings and therefore cannot voluntarily waive them. Moreover, those with ID face greater risks throughout the criminal justice process as a result of their inability to understand their rights and the criminal justice system's inability to ensure that they are treated fairly.

In addition, the Eighth Amendment's proscription on cruel and unusual punishment has historically expanded in scope based on society's evolving moral standards. Those standards require a powerful moral justification to impose life without the possibility of parole for any person, for any offense.

But the powerful moral justification that may support such a sentence for an intellectually-able person does not support the same sentence for a person whose intellectual disability weakens the retributive and deterrent purposes of punishment. In those circumstances, life without the possibility of parole is cruel and unusual.

ARGUMENT

I. Individuals with ID have suffered historic discrimination, higher rates of poverty, and lower rates of education and opportunity, all of which render them more likely to be involved in the criminal justice system.

The criteria for establishing whether an individual has an intellectual disability is defined by the *Diagnostic and Statistical Manual of Mental Disorders* (5th ed 2013) (DSM-5). The DSM-5 describes that diagnosis as follows:

D. “Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met [to have an intellectual disability]:

E. “A. Deficits in intellectual functions, such as reasoning, learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

F. “B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. * * *

G. “C. Onset of intellectual and adaptive deficits during the developmental period.”

State v. Agee, 358 Or 325, 349, 364 P3d 971 (2015), *adh’d to as modified on recons*, 358 Or 749, 370 P3d 476 (2016) (quoting DSM-5 at 33).

Those with ID “have been subject to a lengthy and tragic history of segregation and discrimination that can only be called grotesque.” *City of Cleburne v. Cleburne Living Center*, 473 US 432, 461, 105 S Ct 3249, 87 L Ed 2d 313 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (internal quotation marks and citation omitted). The challenges faced by individuals with disabilities include major socioeconomic, educational, and health barriers. According to the American Psychological Association:

H. “Although the Americans with Disabilities Act assures equal opportunities in education and employment for people with disabilities and prohibits discrimination on the basis of disability, people with disabilities remain overrepresented among America’s poor and undereducated. According to the U.S. Department of Labor’s (2017) Office of Disability Employment Policy, the labor force participation rate for people with disabilities (including physical, intellectual and developmental, sensory, and other disability categories) aged 16 and over is 20.1 percent as compared to 68.6 percent for people without disabilities of the same age. Disabilities among children and adults may affect the socioeconomic standings of entire families. In 2015, roughly 38,601,898 people in the United States had a disability (U.S. Census Bureau, 2015).”

American Psychological Association, *Disability & Socioeconomic Status*, available at <https://apa.org/pi/ses/resources/publications/disability> (last visited November 25, 2019)(hereinafter “*Disability and Socioeconomic Status*”). (last visited on 11/25/19).

In addition, disparities in education have existed for generations. In a large study of 65-years-and-older individuals, 20.9 percent of those without a disability failed to complete high school, compared to 25.1 percent and 38.6 percent of individuals with a non-severe or severe disability, respectively, who failed to complete high school. Erika Steinmetz, *Americans with Disabilities: 2002; Current Population Reports 70-107* (2006), available at <https://www.census.gov/prod/2006pubs/p70-107.pdf> (last visited December 6, 2019). Even greater imbalance exists in higher education. According to the 2015 Census, about 15.1 percent of the 25-year-and-over population with a disability have obtained a bachelor’s degree or higher, compared to 33 percent of individuals in the same age category with no disability. *Id. citing U.S. Census Bureau*, 2015.

Recent research on disability and healthcare indicates that individuals with a disability experience an increased barrier to obtaining healthcare as a result of accessibility concerns, such as transportation, communication, and insurance barriers. Drainoni, M., Lee-Hood, E., Tobias, C., Bachman, S., Andrew, J., & Maisels, L., *Cross-disability experiences of barriers to health-*

care access: Consumer perspectives, 17 *Journal of Disability Policy Studies* 101-115, (2006), *available at*

<http://dx.doi.org/10.1177/10442073060170020101>. Those disparities lead to poor health outcomes for those with ID, which are often multiplied by other disparities along racial and ethnic lines:

“People with intellectual disabilities are often victims of isolation, marginalization, and increased violence. There is also evidence of significant health disparities for people with intellectual and developmental disabilities that fall along racial and ethnic lines. According to a recent study, ‘Latino and non-Latino black adults with IDD [intellectual developmental disorder] were more likely to be in poor health than their counterparts without IDD.’ They also found ‘evidence of marked racial and ethnic disparities within the population with IDD. Latino and non-Latino Black adults were more likely than white adults with IDD to be in fair or poor health and fair or poor mental health.’”

Licia Carlson, *Intelligence, Disability, and Race: Intersections and Critical Questions*, 43 *Am JL & Med* 257, 260-61 (2017) (quoting Sandra Magaña *et al*, *Racial and Ethnic Health Disparities Among People with Intellectual and Developmental Disabilities*, 54 *Intellectual and Developmental Disabilities* 161, 172 (2016)).

In addition to those socioeconomic, educational, and healthcare barriers, ID renders individuals susceptible to becoming involved in the criminal justice system. Intellectually-able individuals frequently encourage persons with ID to

participate in illegal activities, while an individual with ID may not understand that their involvement is a crime or fully appreciate the consequences. See Joan Petersilia, California Policy Research Center, *Doing Justice?: Criminal Offenders with Developmental Disabilities*, 5 (2000). Researchers attribute this to a strong need to feel accepted, which can lead to a person's agreement to help with criminal activities to gain friendship:

“[M]any offenders with cognitive disabilities may not be so much ‘lawbreakers’ as they are low-functioning citizens who lack education on how to function responsibly in a complex society. Some research suggests they are frequently used by other criminals to assist in law-breaking activities without understanding their involvement in a crime or its consequences. Most people with these disabilities have a deep need to be accepted, and sometimes agree to help with criminal activities in order to gain friendship. They may act as lookouts, transport drugs or other contraband, carry a forged check into a bank, or attempt to sell merchandise stolen by others. In an effort not to feel lonely and isolated from their friends, they may willingly go along with any scheme just to be included. As one Los Angeles police officer put it, ‘they are the last to leave the scene, the first to get arrested, and the first to confess.’”

Id.

In turn, people with ID may unintentionally provide misunderstood responses to police officers, which further increases their potential to be arrested, imprisoned, and possibly even executed. Robert Perske, *Thoughts on the Police Interrogation of Individuals with Mental Retardation*, 32 Mental

Retardation, 377-78 (1994). Individuals with ID do not have the same cognitive or social abilities to navigate the criminal justice process. As a result, the characteristics of ID negatively impact one's ability to have the same protections as cognitively-typical persons at each stage of the criminal process.

Thus, individuals with ID constitute a small but growing percentage of suspects and offenders within the American criminal justice system.¹ The statistics regarding American prisoners who suffer from ID is grim: estimates suggest that individuals with ID comprise only two to three percent of the general population, but they constitute four to 20 percent of the prison population. *See* Petersilia, *Doing Justice?* at 5 (collecting prevalence estimates by state, ranging from three percent in New York to 27 percent in South Carolina); Bronson *et al*, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ

¹ The intellectually highest-functioning classification of intellectual disability is "mild," a category that applies to individuals with IQ scores of roughly 50 to 70 and is the most common level of ID. Cloud *et al*, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U Chi L Rev 495, 510-11 (2002). It can be difficult to identify people with mild ID just by observing them, and, therefore, it is "easy to overestimate their intellectual capacity to understand the meaning and significance of relatively complex concepts, such as the *Miranda* warnings." *Id.* at 511. With appropriate support, individuals with mild ID can usually live successfully in the community. *Id.* As a result, it is often difficult to identify persons with ID during the criminal justice process. In turn, it is difficult to quantify how often those with ID are involved in the criminal justice system. Elizabeth Nevins-Saunders, *Not Guilty As Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 UC Davis L Rev 1419, 1422 (2012).

249151, *Disabilities Among Prison and Jail Inmates, 2011-12*, 3 (2015)

(finding that about two in 10 prisoners and three in 10 jail inmates reported having a cognitive disability, the most common reported disability in each population, while the general population reported the same at a rate of 4.7 percent).

ID diagnoses also influence defendants' treatment and ultimate punishment. Overall, defendants with ID tend to suffer harsher treatment within the criminal justice system:

I. "While there is some dispute as to the precise rate at which this population is involved in the criminal justice system, there is no question that this group is heavily represented or even overrepresented. Moreover, a defendant with mental retardation tends to be subject to harsher treatment than one without such a condition a virtually every step of the criminal process: a defendant with mental retardation is more likely to be arrested, more likely to be held pending trial, more likely to be convicted, more likely to receive longer sentences, and more likely to be abused during incarceration. This treatment occurs despite the fact that social science and neuroscience research demonstrates—and the Supreme Court has acknowledged—that defendants with mental retardation are categorically less culpable than their peers of average intelligence."

Nevins-Saunders, 45 UC Davis L Rev at 1422-23. (footnotes omitted). The

United Nations Office on Drugs and Crime recognizes this concept:

J. "[T]hose with intellectual disabilities remain among the most neglected, the most 'invisible' members of our communities. * * * This invisibility,

discrimination and lack of access to timely and appropriate care and treatment are even more profound in the prison systems in many countries. Recent research in several jurisdictions has highlighted the large number of prisoners with intellectual disabilities and the extremely inadequate provision for their needs.”

United Nations Office on Drugs and Crime, *Handbook on Prisoners with Special Needs*, 11 (2009); see James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo Wash L Rev 414, 479-80 (1985) (finding insufficient mental retardation rehabilitation programs in prisons).

In summary, ID profoundly impacts a person’s life experiences, including any experiences they have within the criminal justice system. ID renders individuals more likely to face multiple socioeconomic challenges. ID renders individuals more likely to be susceptible to becoming unknowing accessories to criminal activity. ID individuals are more likely to be arrested and prosecuted when they engage in that activity. ID individuals are more likely to face incarceration once prosecuted. And ID renders individuals more likely to face inadequate treatment once incarcerated.

II. *Miranda* warnings do not adequately protect the rights of suspects with ID.

A. *Miranda* warnings are designed to ensure a knowing and voluntary waiver of the right against compulsory self-incrimination.

“The right against compulsory self-incrimination is ‘the mainstay of our adversary system of criminal justice, and one of the great landmarks in man’s

struggle to make himself civilized.”” *United States v. Preston*, 751 F3d 1008, 1015 (9th Cir 2014) (quoting *Michigan v. Tucker*, 417 US 433, 439, 94 S Ct 2357, 41 L Ed 2d 182 (1974)) (ellipsis omitted). Under both the United States and Oregon Constitutions, a suspect’s statements made under custodial interrogation are not admissible unless they are made after a voluntary waiver. *Miranda v. Arizona*, 384 US 436, 479, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (“[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.”); see *Colorado v. Spring*, 479 US 564, 573, 107 S Ct 851, 93 L Ed 2d 954 (1987) (to validly waive, persons must understand the rights that they are giving up and the resulting consequences of doing so); *State v. Vondehn*, 348 Or 462, 468-76, 236 P3d 691 (2010) (Oregon and federal analyses are generally the same). But the provision of *Miranda* warnings “is not a guarantee that statements made after the warnings are voluntary.” *State v. Jackson*, 364 Or 1, 21, 430 P3d 1067 (2018). The prosecution has the burden to prove a valid waiver. *Jackson*, 364 Or at 21; see *Colorado v. Connelly*, 479 US 157, 168, 107 S Ct 515, 93 L Ed 2d 473 (1986).

- B. Those with ID require greater protections to ensure that they have an equal opportunity to maintain their right against self-incrimination.

The set of common psychological characteristics exhibited by individuals with ID makes them particularly vulnerable to the pressures exerted by

custodial interrogation. Consequently, persons with ID must be provided with heightened protections to ensure the protection of their rights. The risks to persons accused of crimes who cannot understand and assert their rights occur before, during, and after the interrogation: the officer's first impression of the suspect, the *Miranda* warnings, the preadmission interrogation, and the post-admission interrogation. As explained below, the circumstances of ID require increased judicial scrutiny in assessing the voluntariness of their post-*Miranda* statements.

1. Police tactics are inherently more coercive when used to interrogate suspects with ID.

“Perhaps the most consequential step of the interrogation process for an individual with intellectual disabilities—and the step that sets intellectual disabilities apart from other vulnerabilities, such as being a child—is the interrogator’s failure to recognize the individual’s disability at the outset.”

Samson J. Schatz, *Interrogated with Intellectual Disabilities*, 70 Stan L Rev 643, 659 (2018). It can be difficult to recognize persons who have mild to moderate intellectual disabilities. *See* Cloud *et al*, 69 U Chi L Rev at 511. But that piece is crucial to adapting the interrogation conditions to allow for individuals with ID to receive the protections that their constitutional rights require.

The very diagnostic characteristics of ID have a dramatic influence on how ID suspects respond to police interrogation methods. Seven common characteristics influence an intellectually disabled suspect's response to police interrogation:

“(1) ‘unusual susceptibility to the perceived wishes of authority figures’; (2) ‘a generalized desire to please’; (3) difficulty ‘discerning when they are in an adversarial situation, especially with police officers,’ who they generally are taught exist to provide help; (4) ‘incomplete or immature concepts of blameworthiness and culpability’; (5) ‘deficits in attention or impulse control’; (6) ‘inaccurate views of their own capacities’; and (7) ‘a tendency not to identify themselves as disabled’ and to ‘mask their limitations.’”

Preston, 751 F3d at 1022 (brackets omitted) (quoting Cloud *et al.*, U Chi L Rev at 511–13). Those characteristics influence the answers that persons with ID will give to many questions that police interrogators may ask. For example, many people with intellectual disabilities are predisposed to “biased reporting” or answering affirmatively questions about behaviors that they believe are desirable and answering negatively questions about behaviors that they believe are prohibited. Ellis & Luckasson, 53 Geo Wash L Rev at 428. “The form of a question can also directly affect the likelihood of receiving a biased response, and thus police officers, judges, and lawyers may inadvertently or intentionally cause the susceptible mentally retarded accused person to answer in an inaccurate manner by asking a question in an inappropriate form.” *Id.* (footnote

omitted). In addition, many individuals with ID are also reluctant to refuse to answer questions that are beyond their knowledge or understanding. *Id.*

The Supreme Court, in *Miranda*, recognized that individuals of typical intellectual capacity face serious risks of self-incrimination in the stress-inducing environment of an interrogation. *See* 384 US at 455-56. But individuals with intellectual disabilities are at an even greater disadvantage because of the characteristics of their disability. Individuals with intellectual disabilities are less likely to be capable of handling the stressful environment and isolation of interrogation, because they are often easily overwhelmed by stress and they often lack the psychological resources to endure the same levels of pressure and anxiety as people with typical cognitive abilities. Schatz, 70 Stan L Rev at 666 (citing Richard A. Leo, *Police Interrogation and American Justice*, 233 (2008)).

Many individuals with ID also have trouble recalling memories, particularly if they did not remember certain facts or events as important. Ellis & Luckasson, 53 Geo Wash L Rev at 428. They may not be able to remember and describe the truth with detail enough to convince an interrogating officer of their innocence or actual role in an event. Schatz, 70 Stan L Rev at 671. Those lapses or inconsistencies in memory may be mistaken for lying and result in further pressure from the interrogator. *Id.*

Police interrogation techniques often exacerbate the effects of a person's disability.² For example, police officers often "de-adversarialize" the *Miranda* process by creating the illusion that they "share the same interest" as suspects. Schatz, 70 Stan L Rev at 661. Officers may attempt to "build a relationship and create a favorable climate to confess" by chatting with suspects before issuing *Miranda* warnings, creating a false sense of security within the suspect. *Id.* (brackets and internal quotation marks omitted). Investigators also deemphasize the value of a person's *Miranda* rights by highlighting the routine nature of the *Miranda* warning. *See, e.g., Doody v. Ryan*, 649 F3d 986, 992

² Police training organizations and policy guides have begun including alternatives for working with persons with intellectual disabilities. For example, the International Association of Chiefs of Police's model policy on "Interactions with People with Intellectual and Developmental Disabilities" provides information about common characteristics of individuals with intellectual disabilities and tips for identifying those individuals. Int'l Ass'n of Chiefs of Police, *Law Enf't Pol'y Ctr., Model Policy: Interactions with Individuals with Intellectual and Developmental Disabilities* (2016). The model policy specifically directs officers *not* to employ common interrogation techniques, including suggesting answers, on individuals whom officers believe to have intellectual disabilities because these individuals "are easily manipulated and might also be highly suggestible." *Id.* at 3; *and see* Inbau *et al*, *Criminal Interrogation and Confessions* 352, (5th ed. 2013) (a leading interrogation manual that recommends that officers not introduce fictitious evidence when interrogating a suspect with diminished mental capacity).

Although interrogation manuals and courts have acknowledged the need to modify interrogation techniques for individuals with ID, the interrogating officers must first become aware that the person they are interviewing has an intellectual disability. Without knowing that the person has ID, police cannot appropriately adjust their interrogation and may view the suspect's answers and behavior differently, including assuming that the person is lying or acting suspiciously. Schatz, 70 Stan L Rev at 660.

(9th Cir 2011) (“what I’d like to do is * * * read something to you * * * so that you understand some of the protections and things * * * that you have. It’s not meant to scare you * * * I’m sure you’ve heard this thing * * * on t.v. * * * it’s a little * * * less technical and a little less heavy if you want to put it ah that way * * * we read these things to people on somewhat of a regular basis, whether they’re responsible for doing something or not”) (quoting interrogation transcript) (emphasis omitted).

Those tactics may be particularly successful when used on individuals with intellectual disabilities. First, those with ID tend to want to please authority figures. *Preston*, 751 F3d at 1022. This tendency may follow from fear, respect, and the necessary reliance on authority figures for solutions to what an individual with typical abilities would consider everyday problems. *Perske*, 32 Mental Retardation at 377. That, in turn, can also lead a suspect with ID to watch the interrogator closely for social cues on how to react and indications of what the officer wants to hear. *Id.* at 377-78.

Second, a suspect with ID may have difficulty discerning whether they are in an adversarial situation. *Cloud et al*, 69 U Chi L Rev at 512. That is, a person with an intellectual disability “may be hard put to distinguish between the fact and the appearance of friendliness.” *Ellis & Luckasson*, 53 Geo Wash L Rev at 451 (internal quotation marks omitted). Consequently, a suspect with ID “may not ‘understand that the police detective who appears to be friendly is

really [an] adversary,”” and may have trouble understanding the adversarial nature of the *Miranda* warnings. *Schatz*, 70 Stan L Rev at 661 (quoting Leo, *Police Interrogation and American Justice* at 232). Thus, persons with ID are more likely to self-incriminate, even falsely, because they are unlikely to be able to understand their circumstances during a custodial interrogation and are inclined to please authority figures.

Other interrogation tactics of providing fake evidence or applying minimization techniques put people with ID at further disadvantage. Such tactics are likely to be extremely effective on individuals with ID because they are predisposed to pleasing authority figures. *Id.* (citing Leo, *Police Interrogation and American Justice* at 232). And research demonstrates that people with ID can have “incomplete or immature concepts of blameworthiness and causation.” Ellis & Luckasson, 53 Geo Wash L Rev at 429. Another “common phenomenon is the mental process of ‘cheating to lose,’ that is, accepting blame so that others will not be angry.” Cloud *et al*, U Chi L Rev at 511-12.

Due to the increased pressures of interrogation, suspects with ID face a greater risk of involuntarily and falsely confessing. People with ID tend to be more suggestible—catering their responses to the cues of others in a social interaction—and acquiescent—responding affirmatively to questions, regardless of their content or truth. Ellis & Luckasson, 53 Geo Wash L Rev at

428-29. A suggestible suspect may fall prey to an interrogator who signals, through leading questions or negative feedback, what he or she thinks is the truth or the correct answer to the questions being asked. *Id.* An acquiescent person may simply respond affirmatively to questions about behavior that that person perceives as desirable. *Id.* Combined with weak memory retention and the desire to please, suggestibility and acquiescence may lead a suspect with ID to respond the way she thinks the officer wants her to respond. *See id.* When that happens, it is “easy to get [people with intellectual disabilities] to agree with and repeat back false or misleading statements, even incriminating ones.” Schatz, 70 Stan L Rev at 671 (quoting Leo, *Police Interrogation and American Justice* at 232).

“There is a strong consensus among psychologists, legal scholars, and practitioners” that individuals with ID “are particularly susceptible to false confessions under pressure” and “it is uniformly clear to all parties” that persons with ID “need to be protected in the interrogation room.” Kassin *et al*, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law Hum Behav 3, 30 (2010). In a review of cases in which false confession convictions were overturned by DNA evidence, 43 percent of false confessors had mental disabilities. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan L Rev 1051, 1095 (2010). In another study of 125 proven false confessions, researchers found that nearly 30 percent of the false confessors had at least one

mental disability. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L Rev 891, 970-73 (2004). In the 2012 report by the National Registry of Exonerations, researchers found that 75 percent of exonerees with mental disabilities had confessed. Samuel R. Gross & Michael Schaffer, *Exonerations in the United States, 1989-2012*, 60 (2012).

Once a suspect confesses falsely, the damage is difficult to undo. In one review of 245 false confessors on the National Registry of Exonerations, over 25 percent of those who had falsely confessed in police interrogations pleaded guilty, which makes it extremely difficult for them to later establish their innocence. Schatz, 70 Stan L Rev at 659 n110. That also means that the remaining false confessors, the nearly 75 percent who recanted and went to trial, were convicted of crimes they did not commit.

In conclusion, it is “beyond reasonable dispute * * * that the increased vulnerability of a mentally disabled suspect, and his or her naiveté, ignorance, confusion, suggestibility, delusional beliefs, extraordinary susceptibility to pressure, and similar considerations may make it possible for law enforcement officers to induce an involuntary statement by using techniques that would be acceptable in cases involving mentally typical suspects.” Preston, 751 F3d at 1022 (quoting Cloud *et al*, 69 U Chi L Rev at 509).

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2. *Miranda* does not adequately protect the rights of suspects with ID.

Unfortunately, *Miranda* does not adequately safeguard the rights of ID suspects. That is because individuals with ID simply do not understand the *Miranda* warnings. Cloud *et al*, 69 U Chi L Rev at 538. First, those with ID struggle to understand the abstract concepts of rights and waiving rights. *See* Perske, 32 Mental Retardation at 377.

Second, and more alarmingly, those with ID have been shown to not understand the words of the *Miranda* warning or the meaning of those words together. Cloud *et al*, 69 U Chi L Rev at 538. In fact, the single most determinative factor in whether a person is able to understand and waive their *Miranda* rights is whether the person has ID. *Id.* at 538. In the study, researchers tested a group of individuals with varying levels of ID and compared the results to the results obtained from conducting the same tests with cognitively-typical persons. *Id.* at 500. The study concluded that no individual with any level of ID was able to understand the legal rights and concepts that are part of the *Miranda* warnings: “Virtually all of the disabled subjects failed to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing, the meaning of the sentences that comprise the warnings, or even the individual operative words used to construct the warnings.” *Id.* at 501. On the other hand, the control

group of nondisabled subjects understood the words, the complete warnings, and their significance. *Id.* The study found that the level of disability that must exist to impair a person's ability to understand the *Miranda* warnings is low: individuals with mild ID, and even some with IQs over 70, were unable to understand the warnings. *Id.*

Furthermore, most of the common totality-of-the-circumstances factors that courts use to assess the validity of a person's waiver—age, education, prior experience with the criminal justice system, and prior reception of the *Miranda* warnings—did not correlate with greater comprehension among subjects with ID. *Id.* at 567. In fact, no factor allowed ID defendants to compensate for their diagnosis to understand the *Miranda* warnings. *Id.* at 538. People with ID simply do not understand their *Miranda* rights. *Id.* at 501, 538. The study suggests that the “totalities” analysis employed by the courts is “incapable of identifying suspects competent to understand the *Miranda* warnings.” *Id.* at 501.

“With th[o]se findings, the judicial inquiry into the *Miranda* waiver of a suspect with intellectual disabilities is called into serious question.” Schatz, 70 Stan L Rev at 676. Because individuals with ID are unable to understand their *Miranda* rights and there are insufficient mechanisms to ensure a valid waiver, the constitutional requirement of the *Miranda* warning may simply provide protection in form only and even cause greater risk to this group of people due

to the assumption that they will understand their rights and knowingly waive them. *Id.*

Police interrogation tactics, which are known to elicit false confessions from typical suspects, pose heightened risks for individuals with these disabilities. *Id.* at 645. There are few safeguards for these vulnerable suspects in the confines of custodial interrogation. *Id.* And the principal means of judicial oversight into whether statements were unlawfully obtained and should be suppressed—assessment of the provision of *Miranda* warnings and analysis of whether those rights were knowingly and voluntarily waived—are inadequate to protect the rights of suspects with ID.

- C. To protect the rights of persons with ID and prevent involuntary and false confessions by ID defendants, courts must carefully assess the suspect’s individual characteristics to determine whether a defendant voluntarily waived the right to self-incrimination.

Miranda carries a heavy load in ensuring procedural fairness, because confessions are uniquely powerful evidence. Factfinders “accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.” *Connelly*, 479 US at 182 (Brennan, J., dissenting). For example, studies show that mock jurors found confession evidence more incriminating than other types of evidence. *See e.g.*, Saul M. Kassin & Katherine Neumann, *On the Power of Confession*

Evidence: An Experimental Test of the Fundamental Difference Hypothesis, 21 Law & Hum Behav 469, 482 (1997).

Even when the jurors viewed the confessions as coerced, they nevertheless believed them to be true. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 Law & Hum Behav 27, 42 (1997); Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J Psychiatry & L 9, 25 (2010) (“Most Americans simply accept confession evidence at face value.”). Judges are no exception: they tend to presume that confessors are guilty, and they only rarely suppress confession evidence. Leo & Davis, 38 J Psychiatry & L at 24-25.

The Court’s holding in *Miranda*—that the warnings are required to ensure the confession’s voluntariness—rests on the assumption that these warnings will be an effective safeguard for suspects’ rights during custodial interrogations. *See Miranda*, 384 US at 444 (warnings are required “unless *other* fully effective means are devised to inform accused persons of their right[s]” (emphasis added)). It is clear that the Court intended *Miranda* to be effective for everyone, including those who are intellectually disabled; the Court specifically mentioned the example of a person “of limited intelligence [who] confessed to two brutal murders and a rape which he had not committed.” *Id.* at 455 n 24. Unfortunately, this assumption has been seriously

undermined in general, and it is especially doubtful in the context of individuals with ID. *See* Cloud, 69 U Chi L Rev at 522.

A minority of federal courts consider the suspect's mental state as a factor in lowering the threshold of police coercion required to find the confession involuntary. Schatz, 70 Stan L Rev at 678-79. Those courts have concluded that interrogation techniques that are non-coercive for a suspect with typical intellectual abilities may be deemed coercive, and thus a violation of due process, when employed on individuals with lower cognitive abilities or other mental disorders. *Id.* at 679.

For example, in *Preston*, the defendant—an 18-year-old with intellectual disabilities and an IQ of 65—was questioned by two FBI officers in front of his house. 751 F3d at 1010. The officers “quickly became aware of [the defendant's] mental disability,” but they continued to question him. *Id.* at 1012. After about 20 minutes, the officers were able to convince the defendant to agree that he was home on a particular date, which he was not. *Id.* at 1013. After 40 minutes, the defendant signed a confession to allegations of child molestation. *Id.* at 1015.

In an *en banc* decision reviewing the voluntariness of the defendant's statements, the Ninth Circuit rejected the two-step voluntariness inquiry that requires an initial finding that the police acted coercively. *Id.* at 1017-20. Instead, the Court held that the defendant's reduced mental capacity was

directly relevant to due process voluntariness because it rendered him more vulnerable to forms of psychological coercion. *Id.* at 1021-22.

Failing to protect the rights of suspects with ID during an interrogation limits that person's rights and options at each following step of the criminal process. Once a suspect with ID has confessed or made otherwise incriminating statements without understanding the rights that he or she has, the prosecution has increased leverage to force a plea deal or persuasive evidence to use at trial. Defendants with ID are disadvantaged at every step of the custodial interrogation, and they face heightened risks of both confessing and falsely confessing without the benefit of understanding their constitutional rights. Moreover, the principal judicial safeguards against false confessions—assessing a suspect's *Miranda* waiver and determining whether a confession was voluntarily given within the bounds of the Fourteenth Amendment's Due Process Clause—provide little protection for the those with intellectual disabilities. Thus, courts must more carefully assess a defendant's individual characteristics, including whether he has ID, to determine the voluntariness of his *Miranda* rights waiver. In this case, the trial court failed to do so. Therefore, this court should reverse defendant's conviction.

III. A sentence of life without the possibility of parole for a defendant with ID is cruel and unusual considering the diminished culpability of this class of defendants and the punitive purposes of punishment.

Evolving standards of decency and greater developments and understanding into intellectual disabilities and neurology have led the United States Supreme Court to invalidate the death penalty for intellectually disabled persons, eliminate the death penalty for juveniles, and to conclude that the Eighth Amendment prohibits a mandatory-LWOP sentencing scheme for juvenile homicide offenders or an LWOP sentence for all but the most rare and irreparably corrupted youth. The growing consensus of case law and social science supports the conclusion that permanently incarcerating an ID defendant is unconstitutional.

The United States Supreme Court has recognized that a sentence of LWOP is “the second most severe sentence” available in the United States and that this most serious of criminal sanctions shares characteristics with the death penalty because it “alters the offender’s life by a forfeiture that is irrevocable.” *Graham v. Florida*, 560 US 48, 69-70, 130 S Ct 2011, 176 L Ed 2d 825 (2010). Recent Supreme Court decisions have forged a path to protect ID defendants who are less morally culpable for their conduct and who can be rehabilitated. The Court adopted this reasoning in the context of intellectually disabled defendants sentenced to the death penalty. *Hall v. Florida*, 572 US 701, 709,

134 S Ct 1986, 188 L Ed 2d 1007 (2014); *Atkins v. Virginia*, 536 US 304, 318, 122 S Ct 2242, 153 L Ed 2d 335 (2002).

In *Atkins*, the Supreme Court concluded that defendants with ID have are less morally culpable than defendants without ID, yet they are more disadvantaged in the criminal justice system. 536 US at 306-07. The Court reasoned that defendants who suffer from ID should be viewed as less culpable than other defendants:

“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they 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. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”

Id. at 318. On that basis, *Atkins* unambiguously held that executing defendants with ID is unconstitutional. *Id.* at 304.

In *Hall*, the Supreme Court unanimously rejected a bright-line cutoff for a defendant’s IQ score in assessing a defendant’s intellectual disabilities as a bar to capital punishment. 572 US 701. In doing so, the Court explicitly aimed

to avoid the risk that those with ID, though less culpable, faced a greater likelihood of a wrongful conviction:

“A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face a special risk of wrongful execution” because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. This is not to say that under current law persons with intellectual disability who meet the law’s requirements for criminal responsibility may not be tried and punished. They may not, however, receive the law’s most severe sentence.”

Id. at 709 (internal quotation marks and citations omitted). Thus, in *Atkins* and *Hall*, the Court fashioned a rule that acknowledges the twin concerns presented by ID within the criminal justice system: decreased culpability and increased risk.

Life without parole may be less severe than death, but it is comparably extreme. *Graham*, 560 US at 69. As a result, like the death penalty, it requires a justification of corresponding strength. But as the Court accepted in *Atkins*, for any intellectually disabled person, retribution and deterrence provide weaker penological justification. *Atkins*, 536 US at 318-19.

Individuals with intellectual developmental disabilities have a less criminal culpability for their crimes. That is, “clinical definitions of [intellectual disabilities] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-

care, and self-direction that” manifest in youth. *Id.* at 318. Further, because of their cognitive impairments, people with ID “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.” *Id.* And while there is no proof that persons with intellectual disabilities are more likely to engage in criminal conduct than others, “there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.” *Id.*

Several courts have erroneously limited the holdings in *Atkins* and *Miller*, relying on the false assumption that persons with ID lack the capacity for rehabilitation because their overarching condition cannot change. *See Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012); *also see, e.g., Martinez v. State*, No. 08-14-00130-CR, 2016 WL 4447660, at *15-16 (Tex. App. Aug. 24, 2016), *cert. denied*, 137 S. Ct. 2170, 198 L. Ed. 2d 241 (2017) (“no showing that [] prospect for improvement applies to intellectual disabilities”); *Turner v. Coleman*, No. CV 13-1787, 2016 WL 3999837, at *8 (W.D. Pa. July 26, 2016) (same). That approach oversimplifies the issue and misses a central tenant from *Miller*. In *Miller*, the Court did not deem the condition of youth to mean that in all circumstances an offender will reform. *Miller*, 567 US at 475 (“our precedents . . . demand[] individualized

sentencing . . .”). Rather, *Miller* acknowledged that the “condition” of youth carries certain hallmark characteristics that, if disregarded, can result in disproportionate punishment. *Id.* at 476.

Historically, society has “widely endorsed negative stereotypes” about persons with ID, including that their characteristics are immutable and that they “lack [the] potential to change.” Katrina Scior, *Intellectual Disability and Stigma: Stepping out from the Margins* 5 (2016) (internal citations omitted). These stereotypes have been refuted by decades of substantial scientific data and academic research attesting that individuals with ID are capable of behavioral change and improvement.

A substantial body of scientific evidence confirms that persons with intellectual disabilities can grow, learn, and reform, and that problem behaviors can be addressed with appropriate support. For example, research has identified “strategies that greatly impact the frequency and severity of aggression emitted by persons with [intellectual disabilities].” Peter Sturmey, *Evidence-Based Practice and Intellectual Disabilities* 103 (2014). “Mixed treatment packages,” which involve the use of multiple behavioral interventions, “are clearly effective in eliminating and significantly reducing aggression, and this has been reported by 17 experiments conducted by independent researchers.” *Id.* at 114-15 (internal citations omitted). Another type of support, called “non-function-based interventions,” has shown positive results: three studies reported the

elimination of aggressive behaviors; one reported reduced aggression to near-zero levels; and five others reported reduced rates of aggression. *Id.* Yet another study determined that positive behavioral support “has evolved as an effective and socially acceptable means of helping prevent and reduce challenging behavior” in persons with ID. Paul Wehman, *et al.*, *Intellectual and Developmental Disabilities: Toward Full Community Inclusion* 407 (Pro-Ed, 2005). Indeed, “[Intellectual disability] is no longer considered an absolute, invariant trait of the person,” and focusing on “individualized supports” can play a crucial role “in enhancing individual functioning.” Robert L. Schalock and Ruth Luckasson, *What’s at Stake in the Lives of People with Intellectual Disability? Part I: The Power of Naming, Defining, Diagnosing, Classifying, and Planning Supports*, 51 *Intellectual and Developmental Disabilities* 86-93 (Issue 2, Apr 2013).

The American Association on Intellectual and Developmental Disabilities (AAIDD) has similarly reported that “[m]any people with significantly limited intellectual functioning and adaptable behavior may be competent learners in some supported settings in which learning is strategically and formally designed and appropriate supports are provided, especially in settings with regular routines.” Schalock, Robert L. *et al.* *Intellectual Disability—Definition Classification and Systems of Supports*, 162 (11th ed 2010). Given the proper support, even individuals with severe ID have the

capacity to reform, which, in turn, lessens the penological justification of an LWOP sentence. Science therefore disproves the outmoded stereotype that ID and its attendant characteristics are inherently immutable, and thus not subject to reform or rehabilitation.

Thus, any attempt to distinguish *Miller* and *Atkins* based on the purported inability of persons with intellectual disabilities to “reform” is fundamentally wrong. Failing to look deeper at the individual traits of defendants with intellectual disabilities is inconsistent with *Miller*, which calls for an individualized assessment based on each defendant’s unique circumstances. *See* 567 US at 476-78. “In imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.” *Id.* The same is no less true where courts treat every person with ID as an average adult.

For a defendant with ID, the penological justifications for a sentence of life without parole cannot match the sentence’s extreme severity. As with the death penalty, the Eighth Amendment prohibits an LWOP sentence for intellectually disabled defendants.

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CONCLUSION

This Court should reverse and remand for a new trial because the trial court erred in denying Defendant's motion to suppress his statements. Due to Defendant's intellectual disabilities, this Court should reverse the decision of the Court of Appeals sentencing the Petitioner to life without the possibility of parole or early release, and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE
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Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,488 words.

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/s/ Rosalind M. Lee

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 6, 2019, I filed Brief of Amici Curiae to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

I further certify that counsel for the petitioner, Bear Wilner-Nugent, and respondent, Patrick Ebbett, will be served via the efilings system.

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