Golden Gate University Law Review

Volume 48
Issue 1 *Ninth Circuit Survey*

Article 4

January 2018

Reyes v. Lewis: A Missed Opportunity for Minors and Miranda

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NOTE

REYES V. LEWIS: A MISSED OPPORTUNITY FOR MINORS AND *MIRANDA*

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INTRODUCTION

> "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning. Do you understand each of these rights that I've explained to you? Yeah? OK. Can we talk about the stuff we talked about earlier today? Is that a yes?" Adrian Reyes, who had not previously spoken, answered, "Yeah."[1]

To the average adult suspect, these words are clear and logical. By providing an affirmative answer, an adult confirms his understanding of his *Miranda* rights.[2] Due to the cognitive development of an adult brain, it is probable that an adult's answer is a reliable indicator that he

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[1] Reyes v. Lewis, 833 F.3d 1001, 1022 (9th Cir. 2016) (quoting from the police interrogation of Adrian Reyes at the Riverside police station).

[2] *Miranda* warnings are the notice about constitutional rights that law enforcement must provide to suspects prior to a custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966).

comprehends his *Miranda* rights.[3] What if the suspect is a minor?[4] Is it probable that a 15-year-old boy understands the purpose and significance of his *Miranda* rights? Probably not,[5] and consequently, by answering in the affirmative and continuing to speak to the interrogating officer, Adrian Reyes, 15-years-old at the time of his arrest, unknowingly waived his *Miranda* rights.[6]

Reyes v. Lewis sheds light on an unethical and unconstitutional procedure employed when police officers use a two-step interrogation technique that violates a suspect's constitutional rights.[7] The two-step interrogation method occurs when the police initially interrogate a suspect without *Miranda* rights until the interrogation has produced a confession.[8] After obtaining a confession, which is generally inadmissible because it violates *Miranda*, the next step occurs when the officer reads the suspect his *Miranda* rights and then obtains a second confession.[9] Determining whether a two-step interrogation process violates someone's *Miranda* rights is known as a *Seibert* analysis, originating from the case *Missouri v. Seibert*.[10] Whereas *Seibert* involved an adult, the suspect in *Reyes* was a minor charged and convicted of first-degree murder.[11] The United States Court of Appeals for the Ninth Circuit held that this two-step interrogation process violated Reyes' *Miranda* rights.[12] The court focused on the procedure and the point at which the *Miranda* warnings were provided.[13] However, a critical issue raised by this case that was not addressed in the proceedings is whether Adrian Reyes actually understood his *Miranda* rights.

Children are different from adults and this difference must be applied in the context of *Miranda* rights. In *Reyes v. Lewis*, the Ninth Cir-

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[3] J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) ("Children generally are less mature and responsible than adults . . . often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them . . . [and] are more vulnerable or susceptible to outside pressures than adults.").

[4] CAL. FAM. CODE § 6500 (2017) (defining a minor in California as a person under the age of 18).

[5] Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.").

[6] *Reyes*, 833 F.3d at 1033.

[7] *Id.* at 1027-29.

[8] Missouri v. Seibert, 542 U.S. 600, 604 (2004).

[9] *Id.* at 605-06.

[10] A *Seibert* analysis determines whether a two-step interrogation procedure intentionally chosen to reduce subsequent *Miranda* warnings as ineffective violates a person's *Miranda* warnings. *Id.* at 604.

[11] *Reyes*, 833 F.3d at 1017, 1022.

[12] *Id.* at 1031.

[13] *Id.* at 1031-32.

cuit Court of Appeals should have examined not only the way the *Miranda* warnings were delivered, but also Reyes' understanding of the *Miranda* warnings because Adrian Reyes was a minor. Specifically, the court should have addressed whether Reyes, as a minor, understood his *Miranda* rights and the legal consequences of waiving them.

The controversial debate—whether minors understand the complexity of *Miranda* rights[14]—has prevented lawmakers from producing laws that assist minors in comprehending these warnings.[15] As a protected class, minors should be provided with extra counseling if they are faced with criminal charges in order to save judicial resources and help keep innocent minors out of the criminal justice system.[16] A law mandating that minors consult with a pro tem attorney prior to questioning could reduce the number of cases awaiting adjudication, relieve the court of having to investigate whether the minor was coerced, threatened, intimidated, tricked, or falsely promised,[17] and would create a modified standard for minors and *Miranda* warnings. Like in *Reyes*, this issue is not often addressed as there is a preference to avoid constitutional questions if they can be resolved by non-constitutional application.[18] Due to the reality of the judiciary's prudential doctrine of constitutional avoidance, this Note calls for further legislative action in California to remedy this systemic problem.

Section I provides a general background on juveniles in the criminal justice system and how legal standards for minors continue to narrow. Next, Section II reviews *Reyes v. Lewis* as it traveled from the Riverside

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[14] People v. Lewis, 26 Cal. 4th 334 (2001) (rejecting defendant's argument that his young age and low intelligence prevented him from making a voluntary, knowing, and intelligent waiver of his *Miranda* rights); *In re* Norman H., 64 Cal. App. 3d 997, 1003 (1976) ("Neither a low I.Q. nor any particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood.").

[15] *See In re* Joseph H., 200 Cal. Rptr. 3d 1 (2015) (Liu, J., dissenting) (explaining that *Miranda* waivers by juveniles "present special concerns" and questioning efficacy of *Miranda* warnings to juveniles because of the "differences in mental capabilities between children and adults"); *see also* SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF S.B. 1052 (May 16, 2016) (proposing California legislation in response to Justice Liu's dissenting statement in *In re Joseph R.*—Jerry Brown vetoed the bill on September 30, 2016).

[16] Minors should receive extra counseling for rehabilitation purposes as it relates to the role of the juvenile justice system; however, the functioning of the juvenile justice system is outside the scope of this Note.

[17] *In re* Frank C., 138 Cal. App. 3d 708, 714 (1982).

[18] The constitutional avoidance doctrine is a standard of construction that dictates "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." Jones v. United States, 526 U.S. 227, 239 (1999) (quoting United States *ex rel.* Att'y Gen. v. Del. Hudson Co., 213 U.S. 366, 408 (1909)).

Superior Court to the Ninth Circuit Court of Appeals.[19] Then Section III examines how the Ninth Circuit missed an opportunity to address the issue of minors and *Miranda* warnings, how different courts and states have implemented modern *Miranda* standards for minors, and how the California Legislature has finally passed a law that orders a mandatory consultation with legal counsel before suspects, aged 15 years or younger, are interrogated by police. Lastly, Section IV concludes that, although the Ninth Circuit correctly found a *Seibert* violation, the court should have used the *Seibert* analysis to uncover a *Miranda* violation and introduce a new standard for minors and *Miranda* rights.

I. GENERAL BACKGROUND

In the United States, both civil and criminal law offer special protections for minors.[20] One of these special protections is the juvenile justice system.[21] The juvenile court system started during the "Progressive Era" from 1880 to 1920, when there was a shift in social and structural changes occurring in the United States.[22] Although there were conflicting motivations for creating the juvenile courts, such as the "concern for the welfare of the youth and . . . for the salvation of children of broken homes," as well as being able to control potential criminals, the juvenile courts were ultimately formed to rehabilitate delinquent minors while preventing social disturbances.[23] The underlying philosophy preferred paternal action—the state assumes the responsibility of acting as the parental figure—over penal action.[24] Instead of punitive measures, children would be rehabilitated through clinical procedures.[25] The juvenile court system was implemented in the children's best interests and arose from the belief that, with proper interventions, the youth could be saved.[26]

However, with the United States Supreme Court's landmark decision *In re Gault*,[27] the format of juvenile courts became more like adult

[19] People v. Reyes, No. D047521, 2010 Cal. Ct. App. WL 3026227 (4th Dist. 2010), Reyes v. Lewis, No. ED CV 12-691-GAF E, 2012 WL 3839528 (C.D. Cal. 2012), *rev'd and remanded* 798 F.3d 815 (9th Cir. 2015), and *rev'd and remanded* 833 F.3d 1001 (9th Cir. 2016).

[20] Kathleen Michon, *Juvenile Court: An Overview*, NOLO, http://www.nolo.com/legal-encyclopedia/juvenile-court-overview-32222.html (last visited Aug. 26, 2017).

[21] Alvin W. Cohn, *Juvenile Justice in Transition: Is There a Future?*, 63 FED. PROB. 61 (1999).

[22] Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 100 (2011).

[23] *Id.* at 100-01.

[24] *Id.* at 101.

[25] *Id.*

[26] Cohn, *supra* note 21, at 61, 65.

[27] *In re* Gault, 387 U.S. 1, 57-58 (1967) (modifying the constitutional protections in juvenile court procedures).

criminal trials.[28] Unfortunately, this shift resulted in the Supreme Court beginning to criminalize the juvenile justice system.[29] Between 1992 and 1999, politicians believed that the juvenile courts were too lenient with juvenile offenders who committed violent crimes and supported the idea of "adult time for adult crimes."[30] The public also agreed with the politicians.[31] In a 1993 poll by USA today, 73% of the people surveyed believed that the juvenile courts were too forgiving of juvenile offenders and argued that violent juveniles should be tried as adults.[32] In response to these demands for change, the legislature reformed the laws to treat juvenile offenders more like adults.[33]

Yet in *Roper v. Simmons*[34] and *Graham v. Florida*,[35] the Court, once again, recognized the differences between juvenile offenders and adult offenders.[36] The *Roper* Court specified that juveniles possess "a lack of maturity and underdeveloped sense of responsibility," which causes "impetuous and ill-considered actions and decisions."[37] It then reasoned that minors are vulnerable to negative influences and peer pressure because they have less control over the environments surrounding them.[38] Further, the *Roper* Court stated that the juvenile character is different from that of an adult because the juvenile personality is "more transitory [and] less fixed."[39] The *Roper* Court's analysis and holding that the death penalty cannot be imposed on individuals under the age of

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[28] Neitz, *supra* note 22, at 101 (quoting *In re* Gault, 387 U.S. 1, 78 (1967) (Stewart, J., dissenting)).

[29] *Id.* at 106 (citing Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J., no. 2, 1992, at 7 ("Since the Gault case the criminalization of the juvenile courts has continued.")).

[30] Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 265 (2007).

[31] Randi-Lynn Smallheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 271 (1999).

[32] *Id*. at 289 n.88 (citing Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 St. Louis U. L.J. 629, 629 (1994)).

[33] Neitz, *supra* note 22, at 107 (citing Randi-Lynn Smallheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 272 (1999)).

[34] Roper v. Simmons, 543 U.S. 551 (2005) (finding that the execution of those under the age of 18 violates the Eighth and Fourteenth Amendments).

[35] Graham v. Florida, 560 U.S. 48 (2010) (finding that a life sentence without the possibility of parole imposed on a juvenile for a non-homicide crime violates the Constitution's prohibition against cruel and unusual punishment).

[36] Neitz, *supra* note 22, at 108.

[37] *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[38] *Id.*

[39] *Id.* at 570.

18[40] demonstrated a shift away from the punitive procedures occurring in the juvenile justice system.[41]

Following *Roper*, the *Graham* Court held that juveniles who committed non-homicide crimes could not be sentenced to life without parole.[42] The *Graham* Court found that, since *Roper*, scientific progress in psychology and brain development continued to show fundamental differences in the juvenile and adult minds that require juvenile offenders to receive different treatment than adult offenders.[43] The United States Supreme Court's analysis in both *Roper* and *Graham* highlights the importance of understanding the developmental and psychological issues of juvenile offenders.[44]

To be valid, a suspect's waiver of *Miranda* rights must be "voluntarily, knowingly, and intelligently made."[45] But an adolescent's cognitive development is not advanced enough to satisfy these criteria. As discussed above, in *Roper v. Simmons*, Justice Kennedy, writing for the majority, found that juvenile offenders are inherently less culpable than adults because of their developmental immaturity.[46] Justice Kennedy indicated the three general differences between juveniles under 18 and adult offenders: (1) lack of maturity[47] and increased "reckless behavior";[48] (2) susceptibility to outside pressures;[49] and (3) less formed personality traits.[50] Justice Kennedy illustrated this distinction by pointing out that juveniles are denied many of the legal privileges and benefits of adults because of their age.[51] Nearly every state prohibits juveniles from voting, serving on juries, or marrying without parental consent because they are immature and irresponsible.[52]

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[40] *Id.* at 578.

[41] Neitz, *supra* note 22, at 109 (citing Elisa Poncz, *Rethinking Child Advocacy After* Roper v. Simmons*: "Kids are Just Different" and "Kids are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273 (2008)).

[42] Graham v. Florida, 560 U.S. 48, 74-75 (2010).

[43] *Id.* at 68.

[44] Neitz, *supra* note 22, at 109.

[45] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

[46] Roper v. Simmons, 543 U.S. 551, 571 (2005).

[47] Confirmed by parents and sociological and scientific studies, this lack of maturity includes an underdeveloped awareness of responsibility that leads to impulsive actions and decisions. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982)).

[48] *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)).

[49] *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

[50] *Id.* at 570.

[51] *Id.* at 569.

[52] *Id.*

Various state legislatures use statutes to protect minors faced with custodial interrogations.[53] In California, the Welfare & Institutions Code section 627 (b) states that:

> Immediately after being taken to a place of confinement . . . no later than one hour after he has been taken into custody, the minor shall be advised and has the right to make at least two telephone calls from the place where he is being held, one call completed to his parent or guardian, a responsible relative, or his employer, and another call completed to an attorney. The calls shall be at public expense, if the calls are completed to telephone numbers within the local calling area, and in the presence of a public officer or employee. Any public officer or employee who willfully deprives a minor taken into custody of his right to make such telephone calls is guilty of a misdemeanor.

Even though this statutory duty supposedly helps a minor in legal trouble, problems arise when the minor suspect is unable to contact any parent, attorney, or designated adult. For example, in *People v. Lessie*, a 16-year-old defendant was tried as an adult and convicted of second-degree murder.[54] He challenged the conviction by arguing that the trial court erred when it admitted into evidence the confessions he made during two custodial interrogations.[55] The defendant could not call his father until after the officers completed the routine booking and he was read his *Miranda* warnings because, at the time of his interrogation, he forgot his father's number.[56] The officers continued to question the defendant, and it was not until after he confessed that he was able to call his father; even then, his call went unanswered.[57] As quoted above, the California Welfare & Institutions Code section 627 gives minors the right to telephone calls within an hour of being taken into custody and punishes those intentionally interfering with that right, which implies that the California Legislature acknowledges issues faced by minors in custodial interrogations.[58] But as observed in *Lessie*,[59] this statute is not enough. If

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[53] For example, Colorado, Connecticut, and Maine require the presence of either a parent or an attorney during interrogation; whereas Indiana, Iowa, and New York provide protection to juveniles by requiring that a parent or attorney participate in any waiver of a minor's Fifth Amendment rights. *E.g.*, Colorado (COLO. REV. STAT. § 19–2–511(1) (1999)); Connecticut (CONN. GEN. STAT. § 46b–137(a) (2012)); Indiana (IND. CODE § 31–32–5–1 (1997)); Iowa (IOWA CODE § 232.11, subdivs. 1.a. & 2 (2016)); Maine (ME. REV. STAT., tit.15, § 3203–A, subdiv. 2–A (2013)); New York (N.Y. FAM. CT. ACT. § 305.2, subdiv. 7 (2010)).

[54] People v. Lessie, 47 Cal. 4th 1152, 1157 (2010).

[55] *Id.*

[56] *Id.* at 1158-59.

[57] *Id.* at 1159-60.

[58] *Id.* at 1166.

[59] People v. Lessie, 47 Cal. 4th 1152 (2010).

the call happens after a minor waives his Fifth Amendment rights, it is impossible to know if that call and the conversation would have assisted the minor.[60]

Given an adolescent's cognitive development, it is unlikely that he can voluntarily, knowingly, and intelligently waive his *Miranda* rights without help. The critical issue in *Reyes v. Lewis* is whether Adrian Reyes understood his *Miranda* warnings enough to have voluntarily, knowingly, and intelligently waived them. For Reyes to have made the decision to waive his rights, he must have been able to grasp "the five components of the warning in [his] mind while processing the meaning of the words and the concepts they express and calculating how to answer."[61] When deciding if and how to answer, Reyes would have needed to reason about present and future consequences such as: (1) how a statement could and would be used against him in a court; (2) what is an attorney and how can this attorney help in this situation; (3) what kind of questions could be asked; (4) what does the questioner know or why is the questioner interested in these answers; (5) how should he speak to these adults asking questions; (6) whether his parents will have to pay for the attorney; (7) what does it mean that an attorney will be appointed; and (8) whether he can stop talking if he does not know the answer or does not want to talk anymore.[62] Reyes would have needed to contemplate and process these consequences while under the stress of a custodial interrogation.

Although the Ninth Circuit correctly concluded a *Seibert* violation occurred when the officers performed an unconstitutional two-step interrogation procedure on Reyes, the court should have also determined through the *Seibert* analysis that a *Miranda* violation occurred because Adrian Reyes did not knowingly and intelligently waive his *Miranda* rights.

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[60] The California Supreme Court agreed with the trial court by finding no connection between defendant's request to call his father and his decision to waive his Fifth Amendment rights. The court held that "we see no basis for construing defendant's request to speak with his father as an invocation of his Fifth Amendment rights . . . . [T]he totality of the relevant circumstances supports the trial court's conclusion that defendant knowingly and voluntarily waived his Fifth Amendment privilege." *Id.* at 1170.

[61] 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).

[62] *Id.* at 432-33.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *REYES V. LEWIS*

This section follows the path of *Reyes v. Lewis* from the Riverside County Superior Court to the Ninth Circuit Court of Appeals.[63] Part A provides the factual background and how Reyes' age was exploited,[64] resulting in his confession, arrest, and conviction.[65] Next, Part B addresses the state court of appeal proceedings, describes how the *Seibert* analysis was used, and reviews the habeas denials from the California Court of Appeal for the Fourth District, the California Supreme Court, the United States Supreme Court, and the United States District Court for the Central District of California.[66] Then Part C discusses the Ninth Circuit Court of Appeals' analysis in *Reyes v. Lewis*.

A. THE INCIDENT, THE CONFESSION, THE ARREST, AND THE SENTENCE

On January 11, 2006, Derek Ochoa, a senior at La Sierra High School in Riverside County, was shot three times by a person in a silver Toyota Camry.[67] Ochoa did not survive the shooting.[68] Officers traced the silver Camry to the home of Andres Munoz, an older cousin of Adrian Reyes.[69] Reyes, a freshman at La Sierra, had recently moved from Orange County to the Riverside area.[70] He had just turned 15-years-old less than two months prior to the incident.[71]

The day before the shooting, Reyes was walking home from school when a car full of South Side Riverside 51-50 gang members pulled up to Reyes and asked him where he was from.[72] Reyes answered, "Delhi."[73] In response, one of the gang members punched him in the eye.[74] A few days later, two homicide detectives from the Riverside Police Department questioned Reyes at his aunt's house.[75] Reyes was stay-

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[63] People v. Reyes, No. D047521, 2010 Cal. Ct. App. WL 3026227 (4th Dist. 2010), Reyes v. Lewis, No. ED CV 12-691-GAF E, 2012 WL 3839528 (C.D. Cal. 2012), *rev'd and remanded* 798 F.3d 815 (9th Cir. 2015), and *rev'd and remanded* 833 F.3d 1001 (9th Cir. 2016).

[64] Although the justices disagreed about whether the police officers exploited Reyes' age, this Note will not examine their differing opinions about whether Reyes' age was exploited.

[65] Reyes v. Lewis, 833 F.3d 1001, 1017-23 (9th Cir. 2016).

[66] People v. Reyes, No. D047521, 2010 Cal. Ct. App. WL 3026227 (4th Dist. 2010), Reyes v. Lewis, No. ED CV 12-691-GAF E, 2012 WL 3839528 (C.D. Cal. 2012), *rev'd and remanded* 798 F.3d 815 (9th Cir. 2015), and *rev'd and remanded* 833 F.3d 1001, 1028-29 (9th Cir. 2016).

[67] *Reyes*, 833 F.3d at 1017.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* (explaining Delhi is the name of an Orange County gang).

[74] *Id.*

[75] *Id.*

ing with his aunt because of the assault.[76] During questioning, the detectives asked Reyes about the assault, if he knew Ochoa, one of the teenagers in the car when Reyes was assaulted, and if he knew Delhi was a Santa Ana gang.[77]

On February 9, 2006, at approximately 5:00 a.m., a SWAT team comprised of 15 to 20 officers executed a search warrant for Reyes' aunt's home.[78] The officers handcuffed Reyes and found papers in his bedroom with "Delhi" written in large block letters.[79] Eventually, Reyes was released from the handcuffs and allowed to eat breakfast.[80] A homicide detective explained to Reyes that he was not under arrest at that time and then asked Reyes if he would accompany the detective to the station to answer some questions.[81] Reyes agreed and was driven to the Riverside police station unaccompanied by any family member.[82] After being held at the station for "some time,"[83] the two homicide detectives again questioned Reyes.[84] The detectives failed to read Reyes his *Miranda* warnings.[85] The detectives conducted a two-hour interview[86] after which Reyes consented to take a polygraph examination the following day.[87]

The next day on February 10, 2006, the detectives picked up Adrian Reyes from his mother's house and drove him to the San Bernardino sheriff's station where he was given a polygraph test.[88] According to the detective's testimony at the preliminary hearing and a police report, Reyes' mother provided oral consent "on the phone"[89] for the polygraph examination.[90] There was no evidence of a written consent form signed by an adult, and no family member accompanied[91] Reyes to the station.[92]

At no point before or during the polygraph examination did anyone from the San Bernardino County Sheriff's Department read Reyes his

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1017-19 (establishing that the record neither indicates how long the officers took to initiate the February 9 interview nor the interview's start and stop time).

[84] *Id.* at 1017-18.

[85] *Id.* at 1017.

[86] *Id.* at 1019 (explaining how the "two-hour conversation" was interrupted 33 times by the sound of sniffing).

[87] *Id.* at 1018.

[88] *Id.* at 1019.

[89] *Id.*

[90] *Id.*

[91] *See In re* John S., 199 Cal. App. 3d 441, 446 (6th Dist. 1988) (stating that in California, an officer does not need parental consent before he can interrogate a minor).

[92] *Reyes*, 833 F.3d at 1019.

Miranda warnings.[93] Reyes had a difficult time filling out and understanding the polygraph examination forms as well as the written consent form.[94] He was unable to provide his own height, weight, or zip code; he was confused by the words duress, coercion, and immunity.[95] Additionally, Reyes was particularly uncertain about the sentence, "I hereby release the County of San Bernardino, the Sheriff's Department and Examiner administering this examination from any and all claims resulting from, or arising out of, this examination . . . ."[96] The polygraph examiner had to explain to Reyes in simpler terms the forms he asked Reyes to fill out and to sign.[97] The examiner defined the meaning of "release . . . from any and all claims," to which Reyes suggested that it meant the officers would not trick him.[98] The examiner corrected him by saying that the phrase did not mean that the officers would not trick him, but then added, "[Y]ou have my word I won't trick you."[99] Presuming the officers would not trick him, Reyes was apparently informed and signed the consent form.[100]

Upon completing the polygraph test, the examiner told Reyes that he failed; however, there is nothing in the record indicating the actual results of the test.[101] The examiner continued to ask Reyes what happened, but Reyes repeatedly said he did not know and asked if the detectives could come back.[102] Following the polygraph examination, the detectives entered the room and started interviewing Reyes.[103] At no point during this interview did the detectives provide *Miranda* warnings.[104] Early during this post-polygraph interview at the San Bernardino station was the first time Reyes said that he shot Ochoa; yet, the detectives continued to question him at that station, which even included a friendly discussion about Christmas.[105]

After concluding the interview at the San Bernardino sheriff's station, the detectives drove Reyes to the Riverside police station where they placed him in an interview room and locked the door.[106] At that

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1020.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 1021 (explaining that Reyes confessed to shooting Ochoa on page seven of the transcript, but the detectives continued questioning him for 35 more pages).
[106] *Id.*

time, the detectives told Reyes that he could not leave.[107] Finally, one of the detectives read Reyes his *Miranda* rights.[108] After the *Miranda* warnings, the officers asked Reyes to continue their earlier discussion, specifically regarding the shooting of Ochoa.[109] At this point, Reyes provided a second confession.[110] At the end of the interview, Reyes asked if he could call his mom.[111] Then, a detective escorted him to McDonald's for his first meal of the day, a late lunch.[112] Altogether, the police interrogated Reyes for five to six hours.[113]

Both cousins, Adrian Reyes and Andres Munoz, were charged with first-degree murder in the Superior Court of Riverside, an adult court.[114] Although the two defendants had separate trials with different juries, the same judge sat for both cases.[115] Despite the evidence at trial mostly pointing to Reyes' cousin, Munoz, being the shooter and the driver of the car, the trial judge concluded Reyes had provided a voluntary confession following the polygraph examination because the detective had read Reyes' his *Miranda* rights, which made it a warned confession and, therefore, admissible.[116] The trial court judge suppressed the first confession because it came before the *Miranda* warnings.[117] The jury returned a verdict finding Reyes guilty of first-degree murder with gang and firearm enhancements.[118] The Superior Court judge condemned Reyes to a prison sentence of 50 years to life.[119]

B. DENIALS FOR REYES: STATE COURT APPEAL, *SEIBERT*, AND HABEAS PETITION

Reyes appealed to the California Court of Appeal and argued, among other things, that his statements made at the Riverside police station were inadmissible because his preceding statements were coerced and involuntary.[120] Instead of arguing that the police officers deliberately

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[107] *Id.* at 1022.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] This included the estimated three to four hours spent at the San Bernardino sheriff's station for his polygraph test and the post-polygraph interview, plus the 40 minutes to an hour spent at the Riverside police station for the second interview. *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1022-23.
[117] *Id.* at 1022.
[118] *Id.* at 1023.
[119] *Id.*
[120] People v. Reyes, No. D047521, 2010 Cal. Ct. App. WL 3026227, at *10 (4th Dist. 2010).

violated *Miranda*, Reyes claimed that the State "incorrectly characterized *Seibert* as requiring 'coordinated interrogation tactics designed to produce an unwarned[121] confession.'"[122]

In *Seibert*, a police officer performed an unwarned custodial interrogation[123] of Patrice Seibert that induced a confession because it was "systematic, exhaustive, and managed with psychological skill."[124] After the unwarned confession, the officer gave Seibert a 20-minute cigarette and coffee break.[125] Following the break, Seibert was read her *Miranda* warnings and she signed a written waiver of her rights.[126] Then the officer questioned Seibert again and reminded her of the previous unwarned confession.[127] The officer admitted to utilizing this interrogation technique: question first, read the warnings, and then repeat the question until the suspect provides the same answer from the first questioning.[128]

Some courts, including the Ninth Circuit Court of Appeals, hold that Justice Kennedy's concurrence provides the controlling test for the *Seibert* analysis.[129] The concurrence stipulates that given specific facts of a case, when a two-step interview occurs, the admissibility of the postwarning statement depends on whether *Miranda* warnings given in the middle of the interview could be effective.[130] Justice Kennedy narrowed this test by proposing that if the two-step interrogation strategy is used deliberately, then prewarning statements and postwarning statements that are substantively the same must be excluded unless curative measures are provided before the postwarning statement.[131] Curative measures are directions "to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver."[132] An example of these curative measures is cautioning a suspect that his pre-*Miranda* confessions would

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[121] An unwarned statement means that "no warnings of the rights to silence and counsel" are provided to the person being interrogated. If the statement is unwarned then the statement could be inadmissible in a legal proceeding. Missouri v. Seibert, 542 U.S. 600, 604 (2004).

[122] *Reyes*, 833 F.3d at 1006.

[123] "Police questioning of a detained person about the crime that he or she is suspected of having committed. *Miranda* warnings must be given before a custodial interrogation." *Custodial Interrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[124] *Seibert*, 542 U.S. at 616.

[125] *Id.* at 605.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 605-06.

[129] Reyes v. Lewis, 833 F.3d 1001, 1003 (9th Cir. 2016) (finding that Justice Kennedy's concurrence was the controlling test in two-step interrogation cases; and six circuits out of seven have agreed with the Ninth Circuit that the concurrence is the controlling test).

[130] *Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment).

[131] *Id.* at 622.

[132] *Id.*

likely not be used against him.[133] If curative measures are not provided, then the postwarning confession must be omitted.[134]

Similar to *Seibert*, Reyes argued that the trial court erred and should not have admitted his second confession because the detectives elicited his confession using an unlawful two-step interrogation technique.[135] The court rejected this argument and affirmed Reyes' conviction.[136] The California Court of Appeal considered the issue to be whether Reyes' unwarned and custodial post-polygraph statement was voluntary.[137] The California Court of Appeal agreed with the Superior Court judge's suppression of the unwarned post-polygraph statements at the San Bernardino's sheriff's station and dismissed Reyes' *Seibert* argument finding that Reyes' warned confession was voluntary and therefore admissible.[138] Additionally, the California Court of Appeal concluded that, unlike in *Seibert*, Reyes' confession was voluntary because he "retained a choice about continuing to talk" and thus, the confession was admissible.[139]

Reyes filed a state habeas petition[140] at the same time he filed his direct appeal.[141] The California Court of Appeal decided not to merge the petition and the appeal, and denied the petition.[142] Subsequently, the California Supreme Court denied both the direct appeal and the habeas petition, and the United States Supreme Court denied certiorari.[143]

After the California Court of Appeal, the California Supreme Court, and the United States Supreme Court all denied his appeals and state habeas petitions, Reyes filed a petition for a writ of habeas corpus[144] in

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[133] *Id.*

[134] *Id.* at 621-22.

[135] Reyes v. Lewis, 833 F.3d 1001, 1023 (9th Cir. 2016).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1023-24.

[140] A state habeas petition is utilized where a claim is based partly on facts outside the record of the direct appeal or where the direct appellate review is unavailable for some other reason, and can include state law claims; whereas federal habeas corpus petitions are filed by state prisoners arguing that their detention by state officials violates a federal constitutional right and is used to determine the validity of state's detention of a prisoner. J. Bradley O'Connell, *State Habeas Corpus Update and Practice Tips*, FIRST DIST. APP. PROJECT, 7-8 (March 2004), http://www.fdap.org/downloads/articles_and_outlines/state_habeas_materials_CADC_March_2004.pdf (last visited Sept. 5, 2017).

[141] *Reyes*, 833 F.3d at 1024.

[142] *Id.*

[143] *Id.* at 1004, 1007, 1024.

[144] In federal courts, habeas corpus petitions are filed by state prisoners arguing that their detention by state officials violates a federal constitutional right and is used to determine the validity of the state's detention of a prisoner; whereas, state habeas petitions are utilized where a claim is

federal court under 28 U.S.C. section 2254.[145] Reyes argued that he was convicted in state court because of his confession, which was obtained in violation of *Seibert*.[146] The district court judge relied on the Report and Recommendation compiled by the magistrate judge.[147] In his Report, the magistrate judge focused on whether Reyes' confession at the Riverside police station was coerced.[148] Finding there was no evidence that the police officers deliberately used the two-step interrogation method, the magistrate judge dismissed Reyes' argument in a footnote.[149] Without commenting or correcting, the district court fully adopted the magistrate judge's Report and Recommendation, and then denied and dismissed the habeas petition with prejudice.[150] Reyes then appealed to the Ninth Circuit.[151]

C. THE NINTH CIRCUIT FINDS A *SEIBERT* VIOLATION

The Ninth Circuit Court of Appeals[152] reviewed the district court's decision to deny Reyes' habeas petition de novo.[153] Although Reyes made two arguments,[154] the Ninth Circuit only focused on his second argument that his admitted postwarning confession made at the Riverside station violated *Seibert*.[155] Given the coercive nature of the two-day interrogation of 15-year-old Reyes, the unwarned confession and polygraph examination on day two, and the transport back to the Riverside police station where the detectives obtained a postwarning confession, the Ninth Circuit concluded a *Seibert* analysis was required.[156]

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based partly on facts outside the record of the direct appeal or where the direct appellate review is unavailable for some other reason, and can include state law claims. O'Connell, *supra* at note 139.

[145] *Reyes*, 833 F.3d at 1024.

[146] *Id.* at 1023.

[147] *Id.* at 1024.

[148] *Id.*

[149] *Id.*

[150] Reyes v. Lewis, No. ED CV 12-691-GAF E, 2012 WL 3839528, at *1 (C.D. Cal. 2012), *rev'd and remanded* 798 F.3d 815 (9th Cir. 2015), and *rev'd and remanded* 833 F.3d 1001 (9th Cir. 2016).

[151] *Reyes*, 833 F.3d at 1007.

[152] This case was not heard en banc because it failed to receive a majority vote from the active judges for an en banc consideration; thus, future petitions for rehearing en banc will not be considered. *Id.* at 1002.

[153] *Id.* at 1024.

[154] Reyes' first argument was that his confession made at the Riverside police station was coerced in violation of the Fifth Amendment. *Id.* at 1025.

[155] *Id.*

[156] *Id.* at 1029 ("Under the circumstances of this case—where police interrogated fifteen-year-old Reyes over the course of two days; where on the first day at the Riverside police station they conducted a two-hour unwarned interrogation; where on the second day at the San Bernardino sheriff's station they obtained a confession during an unwarned interrogation following an unwarned custodial polygraph test; and where they transported Reyes back to the Riverside police station and

In its analysis, the Ninth Circuit stated how the California Court of Appeal misunderstood *Seibert*.[157] The established rule in *Seibert* states that if officers deliberately use the two-step interrogation technique and if insufficient curative measures are taken to safeguard subsequent *Miranda* warnings, then any warned statement provided by the suspect must be suppressed, even if it was voluntary.[158] The Ninth Circuit said the state Court of Appeal misconstrued *Seibert* because it failed to address: (1) whether the police officers deliberately used the two-step technique, and (2) if any curative measures were taken to ensure understanding of subsequent *Miranda* rights.[159] The California Court of Appeal found that because Reyes' first confession was voluntary, his second warned statement at the Riverside police station was voluntary as well.[160] Unlike the California Court of Appeal, the Ninth Circuit examined the coerciveness of Reyes' post-polygraph unwarned custodial statement at the San Bernardino sheriff's station.[161] Further, the Ninth Circuit found that the state Court of Appeal's question about the voluntariness of Reyes' postwarning statement was irrelevant under *Seibert*.[162] The Ninth Circuit concluded that as the California Court of Appeal's decision was "contrary to . . . . clearly established Federal law, as determined by the Supreme Court"[163] in *Seibert*, they owed no deference to its decision.[164]

Additionally, the Ninth Circuit determined that both the district court and the magistrate judge erred.[165] The district court erred by entering a judgment based on the magistrate judge's recommendation.[166] Despite the magistrate judge's understanding of the *Seibert* rule, his conclusion failed to analyze whether the police officers deliberately used the two-step interrogation procedure; thus, his conclusion was errone-

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obtained a postwarning confession 'clarifying' what he had stated at the sheriff's station—a *Seibert* analysis was clearly required.").

[157] *Id.* at 1028.

[158] *Id.* at 1029.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] 28 U.S.C. § 2254(d)(1) (2016) (requiring that a writ of habeas corpus application made by someone in custody because of a State court judgment will not be granted if the claim was adjudicated in State court unless the adjudication resulted in a decision that was contrary to "clearly established Federal law, as determined by the Supreme Court of the United States").

[164] *Reyes*, 833 F.3d at 1029.

[165] *Id.* at 1030.

[166] *Id.*

ous.[167] As deliberateness is a factual finding, the Ninth Circuit reviewed this finding to confirm that a mistake was made.[168]

In a *Seibert* analysis, the evidence of deliberateness can be either objective or subjective.[169] Objective evidence includes the timing, the setting, the thoroughness of the prewarning interrogation, the overlapping content between the prewarning and postwarning statements, and the continuity of police officers.[170] Subjective evidence can include an officer's testimony, but since delaying *Miranda* warnings is unlawful, most officers will not admit to this and the court will rely heavily on the objective evidence.[171] In determining whether the interrogator deliberately used a two-step interrogation procedure to impair the *Miranda* warnings, a court should consider objective and subjective evidence, especially if subjective evidence is available.[172] By considering both types of evidence, a court can make a better determination whether an interrogator deliberately used the two-step interrogation procedure.[173]

Based on the objective evidence, the Ninth Circuit found a *Seibert* violation because the officers deliberately employed the two-step interrogation technique.[174] The court concluded that the unwarned interrogations were similar to the *Seibert* interrogation because they were "systematic, exhaustive, and managed with psychological skill."[175] Moreover, all three of the police officers were experienced homicide detectives.[176] The lead investigator employed no curative measures to confirm that Reyes understood the importance and effect of his *Miranda* warnings and waiver.[177] For example, he declined to ask Reyes for the *Miranda* waiver in order to establish that Reyes read and understood his rights.[178] Moreover, the detective minimized the importance of the *Miranda* rights when he read them to Reyes.[179] The Ninth Circuit explained that an experienced detective would know that downplaying the *Miranda*

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[167] *Id.* at 1029-30.

[168] *Id.* at 1030 (citing United States v. Narvaez-Gomez, 489 F.3d 970, 974 (9th Cir. 2007) (citing Easley v. Cromartie, 532 U.S. 234, 242 (2001))).

[169] *Id.*

[170] *Id.* (quoting United States v. Williams 435 F.3d 1148, 1159 (9th Cir. 2006)).

[171] *Id.* (quoting United States v. Williams 435 F.3d 1148, 1158 (9th Cir. 2006) (quoting United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010))).

[172] *Id.* (quoting United States v. Williams 435 F.3d 1148, 1158 (9th Cir. 2006)).

[173] *Id.* (quoting United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010)).

[174] *Id.* at 1031.

[175] *Id.* (quoting Missouri v. Seibert, 542 U.S. 600, 616 (2004)).

[176] *Id.* ("Inexperience, while not a legitimate excuse for postponing a *Miranda* warning, nevertheless may save a confession from exclusion under *Seibert*.") (quoting United States v. Capers, 627 F.3d 470, 481 (2d Cir. 2010)).

[177] *Id.*

[178] *Id.* at 1032.

[179] *Id.*

warnings and then reading them to a reasonable person with no legal training, especially a 15-year-old high school freshman, would probably conceal the importance of these warnings and how they could be the difference between going home that day and spending his life in prison.[180] Accordingly, the court found the "psychological, spatial, and temporal break" between the unwarned and warned interrogations was not sufficient to fix the *Miranda* violation.[181] The Ninth Circuit determined that instead of providing curative measure to ensure Reyes understood his warnings, the detectives took affirmative steps to guarantee that Reyes was unaware of the importance and the effect of his *Miranda* waiver.[182]

The Ninth Circuit concluded that the two police officers who interrogated Reyes violated *Seibert*, as they deliberately employed the unlawful two-step interrogation technique, and also neglected to take appropriate curative measures.[183] The court held that Reyes' postwarning confession at the Riverside police station should have been suppressed at the trial court.[184] The Ninth Circuit reversed the district court's denial of the petition for a writ of habeas corpus[185] and remanded with instructions to grant the writ of habeas corpus unless Reyes was retried within a reasonable time, which was not to exceed 180 days.[186]

III. THE NINTH CIRCUIT'S MISSED OPPORTUNITY IS A CRITICAL MATTER FOR MINORS

Although the Ninth Circuit correctly held there was a *Seibert* violation, the court missed an opportunity to address whether Reyes understood his *Miranda* rights. The *Seibert* analysis can be separated into two prongs: procedural and substantive.[187] The procedural prong asks if the

[180] *Id.*

[181] *Id.*

[182] *Id.* at 1033.

[183] *Id.* at 1029-30.

[184] *Id.* at 1033.

[185] Following the Ninth Circuit's decision, the United States District Court Judge Dolly M. Gee granted Reyes' conditional writ of habeas corpus and ordered that the respondent discharge Reyes from all the consequences of his conviction unless Reyes is brought to retrial within a reasonable time, not exceeding 180 days. The judgment was ordered on September 26, 2016. Reyes v. Lewis, No. ED CV 12-691-DMG (Sept. 26, 2016), https://docs.justia.com/cases/federal/district-courts/california/cacdce/5:2012cv00691/531580/35 (last visited on Sept. 5, 2017).

[186] *Reyes*, 833 F.3d at 1033.

[187] In Senior District Judge Singleton's concurrence, he described the two prongs as the "Kennedy prong" and the "Souter prong." The "Kennedy prong" focuses on whether the two-step procedure was intentional, and the "Souter prong" asks if the two-step procedure—intentional or not—caused the subsequent warnings to be ineffective. *Id.* at 1034-35 (Singleton, J., concurring).

two-step process is intentional.[188] The substantive prong examines the effectiveness of the *Miranda* warnings.[189] The court could have addressed Reyes' understanding of his *Miranda* rights by focusing on *Seibert's* substantive prong and potential curative measures. Instead, the Ninth Circuit concluded the *Seibert* analysis before fully exploring the second prong and addressing whether Reyes understood the implications and consequences of waiving his *Miranda* rights.[190] The court should have also analyzed if curative measures are even available to a minor who does not comprehend the complexities of the *Miranda* warnings. From a tactical perspective, it is logical for the court to suspend its examination as a matter of judicial prudence. However, from a public policy perspective, this question is a critical one. Investigating this comprehension issue could conserve precious judicial resources and, more importantly, keep minors out of the prison system.

A. Competency of Minors and Minors as a Protected Class

Minors are a protected class because the cognitive functioning of an adolescent is not equivalent to that of an adult.[191] The federal standard determining the validity of a juvenile's waiver of *Miranda* is a "totality of the circumstances" from the 1979 case *Fare v. Michael*,[192] which considers age, prior experiences, education, background, and intelligence.[193]

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[188] *Id.* at 1034 (Singleton, J., concurring).

[189] *Id.* at 1035 (Singleton, J., concurring) (finding that the Souter prong [second prong] asks if the *Miranda* warnings were ineffective because of the two-step process and focuses on "whether the process itself challenged the comprehensibility and effectiveness of the *Miranda* warnings").

[190] *Id.* at 1034-35 (Singleton, J., concurring).

[191] *See* Cal. Penal Code § 26 (2016) ("Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."). *See* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."). *See In re* Michael B., 149 Cal. App. 3d 1073 (1983) (concluding that a *Miranda* waiver by a nine-year-old was invalid).

[192] Fare v. Michael C., 442 U.S. 707, 707-08 (1979) (Michael C. was 16-years-old when he was taken into custody for murder. Before questioned by police, he was read his *Miranda* rights. He requested to see his probation officer—he was on probation to the Juvenile Court—but the police denied this request. The 16-year-old then refused to talk without consulting an attorney. During this exchange, he drew sketches and made statements implicating him in the murder. When he was charged with murder in Juvenile Court, he moved to suppress the statements and sketches arguing that admitting them would be in violation of *Miranda.* The court disagreed and denied the motion. The California Supreme Court reversed and found that his request for his probation officer was an invocation of his Fifth Amendment rights. The United States Supreme Court found that the California Supreme Court erred in finding his request was in violation of *Miranda*. The Court held that the 16-year-old knowingly and voluntarily waived his right and that the statements and sketches could be used against him in Juvenile Court.).

[193] *Id.* at 725.

Although juveniles do not possess the "psychosocial maturity" and "cognitive capacity" to waive their *Miranda* rights,[194] courts continue to apply the totality of the circumstances standard to decide whether a juvenile has the capacity to understand the warnings, his Fifth Amendment rights, and the consequences of waiving those rights.[195] As this law was established 38 years ago,[196] its interpretation and application are dated and ineffective.

Scientific advancements have improved understanding about brain development since *Fare* was decided in 1979, revealing that the juvenile brain is significantly less developed than previously understood.[197] The limits of adolescents are recognized socially as they are not allowed to vote, serve on juries, watch movies with adult content, drink alcohol, or enter into contracts.[198] However, minors are generally treated the same as adults when they are arrested, interrogated, and read the standard *Miranda* rights, despite scientific evidence proving the limitations in adolescent cognitive functioning.[199] This equivalency is problematic because it ignores the difference between physical and cognitive maturity as supported by extensive scientific research.[200] Although physical maturity may give the illusion of mental maturity, juveniles "may not appreciate the consequences or weigh information the same way as adults do . . . . [and] their brain may in fact not be mature."[201] The new information about juvenile brain functioning requires that the *Fare* standard be interpreted and applied with a modern requirement addressing the scientifically proven discrepancy. This requirement would better safeguard juveniles and the constitutional protection envisioned by the *Miranda* court.

Adolescents, like Adrian Reyes, are in a vulnerable position when subjected to advanced interrogation techniques because they do not understand the consequences of their answers.[202] This leads to many false

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[194] King, *supra* note 60, at 431.

[195] *Fare*, 442 U.S. at 725.

[196] Fare v. Michael C., 442 U.S. 707 (1979).

[197] Ortiz, Adam, *Cruel and Unusual Punishment: The Juvenile Death Penalty–Adolescence, Brain Development and Legal Culpability*, 2004 A.B.A. SEC. JUV. JUST. CENT., http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

[198] *Id.* at 1.

[199] Albert C. Mendoza, Comment, *SB 1052: Miranda Rights for Minors*, 48 U. PAC. L. REV. 801, 804 (2017) (citing *In re* Joseph H., 200 Cal. Rptr. 3d. 1, 1 (Cal. 2015)). *See* King, *supra* note 60, at 466.

[200] Ortiz, *supra* note 194, at 2.

[201] *Id.*

[202] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004) (presenting demographic data on false confessions by minors). *See* Corley v. United States, 556 U.S. 303 (2009) (explaining that the pressures of custodial

confessions.[203] Research shows that only 21% of children compared to 42% of adults understand the importance and meaning of the *Miranda* warnings.[204] Additionally, this same research determined that 55% of juveniles misunderstood at least one component in the *Miranda* warnings.[205] There is an excessive susceptibility of minors to falsely confess when false evidence is posed against them, evidenced by a study where 78% of 12 to 13-year-olds and 70% of 15 to 16-year-olds falsely confessed when fabricated evidence was presented against them.[206] In the same study, 59% of 18 to 26-year-olds falsely confessed.[207] Comparing these numbers demonstrates the vulnerability of minors whose brains have not fully developed and how it affects their decision-making.[208]

Minors are unlikely to understand the consequences of their confessions if they are not provided guidance about their rights and the significance of those rights. While an adolescent's brain continues to mature and learns how to coordinate emotion, intellect, behavior, and ability, it is also learning about long-term goals and consequences.[209] An adolescent might appear to be able to make adult decisions, but his "sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure" will often cause him to make very different decisions than an adult would make in similar situations.[210] A common reason for teenage false confessions is the belief that by providing a confession, whether it is true or false, they can go home.[211] The Court in *Gallegos* acknowledged that police interrogations subject a juvenile to an intimidating environment when it stated that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will

interrogations are so immense, they cause high percentages of people to falsely confess). *See* Brief for Center on Wrongful Convictions of Youth, et al. as Amici Curiae Supporting Petitioner, J.D.B. v. North Carolina, 564 U.S. 261 (2010) (No. 09-11121) (describing empirical studies that "illustrate the heightened risk of false confession from youth").

[203] Drizin & Leo, *supra* note 199.

[204] Thomas Grisso, *Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1153 (1980) (providing statistics about the differences between adults and juveniles in their understanding of *Miranda* warnings).

[205] *Id.* at 1153-54.

[206] Stephanie Forbes, *Reading, Writing, and Interrogating: Providing Miranda Warnings to Students in Schoolhouse Interrogations*, 47 CT. REV. 68, 70 (2011).

[207] *Id*.

[208] *Id.*

[209] Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69 (2005).

[210] King, *supra* note 60, at 436 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilt by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 Am. Psychologist 1009, 1011-12 (2003)).

[211] Drizin & Leo, *supra* note 199, at 969.

confront him when he is made accessible only to the police."[212] Scientific evidence confirms the urgency of protecting minors involved with the criminal justice system and their need of assistance in criminal proceedings.

Although it appears that in 2011, the United States Supreme Court majority agreed that the *Miranda* standard needed modifying, this position is vulnerable to being reversed.[213] In that case, a policeman removed 13-year-old J.D.B. from his seventh grade classroom and interrogated him about two home break-ins.[214] J.D.B. was not read his *Miranda* warnings and was not told that he could leave the room where he was questioned.[215] The Court in *J.D.B.* held that if a child's age is apparent to an officer at the time of questioning, then it needs to be considered in a juvenile's custodial interrogation analysis.[216] The dissent by Justice Alito, joined by Chief Justice Roberts, and Justices Scalia and Thomas, criticized the majority's "extreme makeover of *Miranda*."[217] The dissenting justices focused on the need to retain the clarity and simplicity of the custodial interrogation analysis, arguing that minors are already protected from coercive interrogation by the constitutional voluntariness standard[218] anchored in the Due Process Clause of the Fifth and Fourteenth Amendments.[219] Yet, as identified above, scientific evidence supports the need to acknowledge the difference between an adolescent's brain and an adult's brain. As more information about differences in cognitive functioning becomes available, there is a critical need to adjust the criminal justice system to support these findings.

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[212] Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (emphasizing the vulnerability of children when they interact with the police). *See also* THE CENTRAL PARK FIVE (PBS 2012) (documenting the struggles of five wrongfully accused and wrongfully convicted adolescents in the New York City's Central Park jogger case).

[213] "The State and its amici contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree . . . . [t]o hold, as the state requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real difference between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults." J.D.B. v. North Carolina, 564 U.S. 261, 271, 281 (2011).

[214] *Id.* at 265.

[215] *Id.* at 266.

[216] *Id.* at 277.

[217] *Id.* at 282-84 (Alito, J., dissenting).

[218] Standard ensuring that incriminating statements are not obtained through coercive means. *Id.* at 282-83 (Alito, J., dissenting).

[219] *Id.* at 284 (Alito, J., dissenting).

B. California Should Provide Additional Protection to Juveniles

The United States Supreme Court has not yet ruled how *Miranda* warnings apply to juveniles in relation to these new scientific developments.[220] Until the United States Supreme Court delegates a change, state courts are responsible for safeguarding their minors in custodial interrogations.[221] The Ninth Circuit should have used *Reyes v. Lewis* to implement change for minors and *Miranda* rights, but it failed to use this case as a platform to change the *Miranda* standard for minors.

Presently, California courts have not established any laws to ensure that minors are informed when they provide *Miranda* waivers and confessions.[222] California courts should refer to states that have addressed the issue in order to develop its own protections for minors. For example, the Supreme Court of Indiana held that juvenile suspects are awarded certain safeguards to ensure that their confessions are voluntary and their waivers are well-informed.[223] *Miranda* waivers are accepted only after the minor is given an opportunity to meet and consult with the minor's parents or guardian, or the minor's attorney.[224] Similarly, the Supreme Court of New Hampshire held that juveniles cannot waive constitutional rights unless they are informed of them in age-appropriate language.[225] The Supreme Judicial Court of Maine found that *Miranda* warnings must be fully explained to ensure a juvenile's comprehension of his *Miranda* rights, which may require additional clarification by police officers.[226] Additionally, New Mexico has introduced a mandate where confessions by children under 13 are simply not admissible in court.[227] For ages 13 to 14, confessions are presumed inadmissible; and for ages 15 and older, courts examine age, custody status, delivery of the rights, circumstances of the questioning, and presence of a parent or attorney.[228] Further, Wisconsin does not admit into court any juvenile confession unrecorded by

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[220] Raymond Chao, *Mirandizing Kids: Not as Simple as A-B-C*, 21 Whittier L. Rev. 521, 524 (2000).

[221] U.S. Const. amend. X (mandating that any power not given to the federal government is given to the people of the states).

[222] *In re* Joseph H. 237 Cal. App. 4th 517 (2015) (applying the totality of the circumstances test to determine a valid waiver of *Miranda* rights even where a minor is involved in the interrogation).

[223] Lewis v. State, 259 Ind. 431, 439 (1972).

[224] *Id.*

[225] State v. Benoit, 126 N.H. 6, 19 (1985).

[226] State v. Nicholas S., 444 A.2d 373, 378-80 (Me. 1982).

[227] Lorelei Laird, *Police Routinely Read Juveniles Their Miranda Rights, But Do Kids Really Understand Them?*, ABA J., June 2016.

[228] *Id.*

the police.[229] Likewise, Illinois courts refuse to admit juvenile confessions unless an attorney was present at the time of the confession.[230]

Although the Ninth Circuit missed an opportunity to address minors and *Miranda* warnings, the judiciary is not the only branch of government that can respond to *Miranda* issues. State legislatures can also modify how minors receive their *Miranda* warnings.[231] In fact, multiple jurisdictions are responding to the *Miranda* problem in different ways through legislation. Recently in New York, Senator Michael Gianaris introduced a bill mandating the use of simpler language when law enforcement Mirandize juveniles.[232] Other states that require a parent, attorney, or custodian present for custodial interrogations include Colorado,[233] Connecticut,[234] and Maine.[235] Similarly, the following states require a parent or attorney to participate in any waiver of Fifth Amendment rights: Indiana,[236] Iowa,[237] and New York.[238] The number of states that legislatively acknowledge this urgency to modify how minors are Mirandized shows that there is a disparity with the conventional *Miranda* warnings when they are read to minors.

The California Legislature has also recognized the minor and *Miranda* issue. In 2016, the California Senate tried to pass Senate Bill 1052 that would have enacted section 625.6 subdivision (a) of the Welfare & Institutions Code, requiring minors to meet with counsel prior to a custodial interrogation.[239] SB 1052 would have "require[d] that a youth under 18 years of age consult with legal counsel in person, by telephone, or by video conference prior to a custodial interrogation and before waiving any of [his or her] rights."[240] The bill also specified that the required consultation with legal counsel could not be waived.[241] Governor Brown vetoed[242] the bill on September 30, 2016, stating that he was not pre-

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[229] *Id.*

[230] *Id.*

[231] *Legislature*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the legislature as "the branch of government responsible for making or changing statutory laws" including state legislatures).

[232] Laird, *supra* note 223.

[233] COLO. REV. STAT. §19–2–511(1) (2017).

[234] CONN. GEN. STAT. § 46b–137(a) (2017).

[235] ME. REV. STAT., tit.15, § 3203–A., subdiv. 2–A (2017).

[236] IND. CODE § 31–32–5–1 (2017).

[237] IOWA CODE § 232.11 (2016).

[238] N.Y. FAM. CT. ACT. § 305.2, subdiv. 7 (2010).

[239] S.B. 1052, 2016 Leg., 2015-2016 Sess. (Cal. 2016) (enrolled and presented to the Governor on Sept. 8, 2016, vetoed on Sept. 30, 2016).

[240] *Id.*

[241] *Id.*

[242] Custodial Interrogation: Juveniles, S.B. 1052, Leg. 2016, 2015-2016 Sess. (Cal. 2016), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1052 (last visited Oct. 30, 2017).

pared to put this law into practice because of the potential ramifications.[243] The Governor justified his veto by stating concerns such as: sanctions for failing to follow SB 1052; frustration of the criminal justice system by doubting confessions introduced at trial; costly expenses; and potential inefficiency as defense attorneys would need to be present when officers take juveniles into custody.[244]

In response to the veto of SB 1052, Democratic State Senators Holly Mitchell and Ricardo Lara introduced Senate Bill 395 on February 15, 2017.[245] Similar to SB 1052, this bill proposed to reform section 625.6 of the Welfare & Institutions Code as it relates to minors by protecting them against the consequences of unknowingly waiving their *Miranda* rights.[246] On October 11, 2017, SB 395 successfully passed through the California Legislature with the Governor's approval.[247] SB 395 requires that prior to a custodial interrogation and before minors can waive their *Miranda* rights, those minors—aged 15 years or younger—must consult with legal counsel by phone, in person, or by video conference.[248] By requiring a mandatory consultation with legal counsel,[249] this bill will hopefully ensure that juveniles within this age group can understand the warnings and if they so choose can not only voluntarily, but also knowingly and intelligently waive their *Miranda* rights. With the passage of SB 395, the California Legislature recognizes the complexity of *Miranda* warnings as applied to minors. However, whereas this bill is a step in the right direction, it only affects minors that are 15-years-old and younger. In order to protect the rights of all California minors who find themselves ensnared in a custodial interrogation, further action is still required.

IV. CONCLUSION

Although the Ninth Circuit correctly concluded that experienced officers committed a *Seibert* violation when they utilized a two-step interrogation procedure against 15-year-old Adrian Reyes, the court missed an opportunity to address whether Reyes, as a minor, understood his *Miranda* rights. The court should have further analyzed the second prong of the *Seibert* analysis to determine whether Reyes understood the implica-

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[243] ASSEMB. COMM. ON PUB. SAFETY, COMM. ANALYSIS OF S.B. 1052, at 14-16 (June 28, 2016).

[244] *Id.*

[245] S.B. 395, 2017 Leg., Reg. Sess. (Cal. 2017) (enrolled and presented to the Governor on Sept. 22, 2017, approved on Oct. 11, 2017, and chaptered by Secretary of State on Oct. 11, 2017).

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

tions and consequences of waiving his *Miranda* rights as well as analyzing if curative measures would benefit a minor who does not comprehend the complexities of the *Miranda* warnings. Although judicial prudence asks for a narrow interpretation of the Constitution, the court should have examined this issue in the interest of protecting the constitutional rights of minors.

Modern scientific evidence has affirmatively established that minors do not have the cognitive abilities of adults. Yet, the minors and *Miranda* controversy continues to frustrate the legal system. There are many recommendations advising how to assist juveniles involved in interrogation proceedings and how to ensure that their constitutional rights are not violated. As explained above, the California Legislature has experienced obstacles in its pursuit to amend minors' *Miranda* rights and has only recently successfully passed a law remedying some of these differences.

Although the passage of SB 395 will safeguard some of California's minors—at least those aged 15 years and younger—against facing custodial interrogations alone, the *Miranda* warnings should be revised when applied to all minors. The Ninth Circuit should have used *Reyes v. Lewis* to develop a modern standard for minors' *Miranda* warnings. By recognizing there was not only a *Seibert* violation, but also a *Miranda* violation, the court should have established that there is a constitutional violation when minors are expected to understand the consequences of waiving their *Miranda* rights without the help of a parent, custodian, or attorney. The Ninth Circuit Court of Appeals should have determined that legal counsel must be present to guarantee that any aged minor can voluntarily, knowingly, and intelligently waive his privileges. If such an attorney could have assisted Adrian Reyes, it is likely that Adrian would have never seen a day in court.