No. 15-1086

In the Supreme Court of the United States

JOSEPH H.,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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ARGUMENT

The State of California's initial decision to waive its right to oppose the Petition now makes sense. The State concedes the great significance of the questions presented, Opp. 13, and musters only a handful of unpersuasive "vehicle" arguments. Joseph clearly pressed and preserved his arguments below, including that his *Miranda* waiver was not voluntary, knowing and intelligent in light of his youth. He *could not* present in the state courts the full argument he has presented here, seeking a change in this Court's jurisprudence. And the State's argument that any error was constitutionally harmless is both wrong on the facts and irrelevant.[1] In cases like this one, this Court routinely resolves important substantive issues and leaves any issue of harmless error to the lower courts on remand.

The State's primary argument is that this Court should "await a case that more clearly demonstrates a need for new approaches" such as one involving more coercive police misconduct. Opp. 18. That suggestion completely misses the point, and in fact illustrates why this case is an excellent vehicle for review. The lower courts recognize and understand egregious misconduct or coercion by police interrogators, and do not need guidance on how to resolve easier cases. The thrust of

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[1] The State attempts to divert the Court's attention by reciting a lengthy (and erroneous) version of facts unrelated to the issues in the Petition, in an attempt to show that the State is "doing [its] best to deal sensitively and responsibly with a sad and challenging situation." Opp. 23-24. In doing so, the State presents a one-sided view of the contested proceedings and disposition below despite Joseph's averments of substantial error in the California courts. Pet. App. 25a-40a.

Joseph's Petition is that courts nationwide routinely fail to appreciate how the particular characteristics and incapacities of youth can interfere with a child's ability to give a valid waiver even in circumstances that *would not* be coercive or confusing for an adult suspect. As Justice Liu stated below, "there [may be] an age below which the concept of a voluntary, knowing, and intelligent [*Miranda*] waiver has no meaningful application" without additional safeguards, even if interrogators follow the usual *Miranda* script to the letter. Pet. App. 49a. The impact of a conflicted parent or guardian at a child's custodial interrogation also merits review. The facts of this case vividly illustrate those dangers. A case that *also* presented egregious and conventional misconduct by the police would be a much worse vehicle to explore these issues, not a better one.

The State advances no basis to justify avoiding review of the concededly "importan[t] . . . legal and policy issues identified by [Joseph] and his *amici*." Opp. 13.

1. As noted, the State's main argument is that the Court should "await a case" that demonstrates an "issue concerning the factual reliability of an unwarned confession, and involv[ing] . . . overbearing . . . conduct by the police." Opp. 13, 18. There *are* significant issues here about the factual reliability of Joseph's statements and the coerciveness of his interrogation.[2] But more

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[2] Custodial interrogations are always more coercive for children than for adults. Here, the presence of a conflicted stepparent enhanced the coercive nature of the custodial environment. During the interrogation, Joseph changed his story concerning where he put the gun after he shot his father (*i.e.*, whether he gave it to Krista or hid it) after Detective Hopewell

importantly, the State's argument misses the essential point of the Petition, which is not about identifying and stopping coercive police misconduct *per se*. Instead, the Petition questions whether children Joseph's age — or more generally, whether children under fifteen — have the capacity to make a voluntary, knowing and intelligent waiver of their Fifth Amendment rights without further protections, and suggests that the lower courts need guidance from this Court in applying the established science to the *Miranda* waiver inquiry. Pet. 19.

This Court recently acknowledged in *J.D.B. v. North Carolina* that it has not addressed this issue. 131 S. Ct. 2394, 2401 n.4 (2011). The Court has decided numerous cases involving coerced confessions, some of which involved children. *See, e.g.*, *In re Gault*, 387 U.S. 1, 55-57 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962); *Haley v. Ohio*, 332 U.S. 596, 600-01 (1948) (plurality). Those decisions, however, offer no guidance on the more frequently presented and important question of whether, in light of the modern science of childhood development, additional safeguards are necessary to protect the rights of children even in the absence of misconduct by interrogators. Pet. 20-27. Notably, the State makes no attempt to challenge the reliability of the science cited by the Petition and by *amici*. *See* Opp. 19.

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informed him that his story was "very different" from Krista's statements. Supp. Clerk's Tr., Vol. 1, at 85-87. This is noteworthy because Joseph recounted that he was prodded *by Krista* to shoot his father. Clerk's Tr., Vol. 2, at 427-28. The State acknowledges that Krista was a key witness against Joseph, and yet ignores the effect that her presence had on him during the interrogation. Opp. 8.

Joseph's case is in fact the perfect vehicle to address these issues because it illustrates that many children (like Joseph) are unable to understand their rights even in a typical custodial interrogation and are in desperate need of additional safeguards. During the only two times Joseph attempted to articulate his understanding of his rights, his answers were unintelligible. Pet. 31-32. The detective's attempts to help him understand through leading, follow-up questions may not have been coercive in the usual sense, but also could not reasonably have been effective given his age, disabilities, level of development and demonstrated confusion. *Id.* Yet, the courts below found with ease that Joseph gave a valid *Miranda* waiver, without truly appreciating that children his age have a highly diminished capacity to understand and appreciate their rights. *See* Barry C. Feld, *Kids, Cops, and Confessions: Inside the Interrogation Room* 87 (2013); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice*, 83 N.C. L. Rev. 793, 817 (2005).

The State also never really disputes the need for guidance about how the presence of a parent or guardian with an actual or potential conflict of interest should affect the waiver analysis. Pet. 28-30. It quibbles that Joseph's arguments "reflect a distinctively lawyerly perspective on a complex human situation," and that this issue is "more complex than [he] suggests." Opp. 20. Of course one can believe that a parent's conception of a child's best interests is properly broader than a lawyer's would be, and still recognize that a parent with a personal conflict of interest is not in a position to give good parental *or* legal advice. Krista's role in Joseph's interrogation

raises serious constitutional questions because the victim was her husband and she was a potential suspect. Regardless, the difficulty and importance of these issues are exactly why review is needed. Sup. Ct. R. 10(c).

2. The State predictably extols the virtues of state legislative solutions. But the proper standard for assessing whether a *Miranda* waiver was invalid is an issue of federal constitutional law that no legislature can resolve. And as *amici* explain, state legislative efforts aimed at protecting children in interrogations have been inadequate and alarmingly inconsistent. *See* Brief of *Amicus Curiae* Human Rights Watch at 7-15. Thirty-four jurisdictions have no such legislation, and more than seventy-five percent of all juvenile arrests occur in these jurisdictions. *Id.* at 8-9.

In the few states that have enacted legislation providing some protection for children, the prescribed safeguards are inconsistent and too limited. *See, e.g.*, 705 Ill. Comp. Stat. 405/5-170 (protections when children twelve and under are charged with certain crimes). They can be repealed at any time. *See, e.g.*, *Matthews v. State*, 991 S.W.2d 639, 643 (Ark. Ct. App. 1999) (repeal of statutory protection for children's *Miranda* rights). And without firm constitutional grounding, legislation is often subject to varying interpretations undermining the protections offered. For instance, several courts have held that violations of statutes intended to safeguard children in custody do not render a custodial statement inadmissible. *See In re Jimmy D.*, 938 N.E.2d 970, 973 (N.Y. 2010); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 319-20 (Ky. 2008); *Ford v. State*, 138 P.3d 500, 504-05 (Nev. 2006); *People v. Hall*, 643 N.W.2d 253, 266-67 (Mich. Ct.

App. 2002); *State v. Barnaby*, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997).

3. The State incorrectly argues that this Court should not grant review because "any evolution of the law would most likely have no effect on the outcome of th[is] case." Opp. 16. The harmlessness of a constitutional error, however, is a question that this Court "normally leaves . . . to state courts to consider." *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016). This Court has repeatedly emphasized that although it "plainly ha[s] the authority to decide whether . . . a constitutional error was harmless . . . , [it] do[es] so sparingly." *Rose v. Clark*, 478 U.S. 570, 584 (1986) (quotations omitted); *see also Carella v. California*, 491 U.S. 263, 266 (1989) ("The State insists that the error was in any event harmless. As we have in similar cases, we do not decide that issue here.").

Here, no court below considered the harm flowing from the juvenile court's consideration of statements Joseph made *after* his unconstitutional *Miranda* waiver. In *Hurst*, the Florida Supreme Court, like the courts below, had not conducted a harmless error analysis of issues that came up before this Court, 136 S. Ct. at 620-21, although the Florida Supreme Court had conducted that analysis for several other issues, *Hurst v. State*, 147 So. 3d 435, 442 (Fla. 2014); *Hurst v. State*, 819 So. 2d 689, 696 (Fla. 2002). This Court granted review, resolved the substantive issues and deferred any harmless error analysis to the state courts on remand. 136 S. Ct. at 624. Because the Court can, and presumably would, follow the same course here, arguments about harmless error pose no obstacle to resolution of the important issues presented.

In any event, the admission of Joseph's post-*Miranda* statements was *not* harmless. It is the State's burden to show that an error is "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 82 n.7 (2004). This standard is not satisfied if the error "contribute[d] to [Joseph's] conviction." *Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991).

There has never been any question that Joseph pulled the trigger. The entire dispute about criminal liability concerned whether Joseph knew and appreciated the wrongfulness of his conduct, given his "sad, abusive, and traumatic childhood" and the circumstances of the offense, under California Penal Code section 26 ("P.C. 26"). Opp. 4. The juvenile court found Joseph's statements made within the first 24 hours to be the most probative on that key issue. Opp. App. 4a-5a. But, as the State acknowledges, over *one fourth* of those early statements identified and relied upon by the State's expert (Dr. Anna Salter) were infected by the constitutional errors raised in the Petition.[3] Opp. 7-8. Detective Hopewell also testified at trial and the interrogation video was played. R., Vol. 1, at 225-28. Based on these facts alone, there "is a reasonable possibility that the [tainted testimony] might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

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[3] The State incorrectly asserts that only 11 statements were from the interrogation. Dr. Salter's report lists *12 statements* Joseph made to Detective Hopewell. Clerk's Tr., Vol. 1, at 255-57. The State also ignores that the juvenile court relied on additional statements given *before* the *Miranda* warnings. Pet. App. 18a-20a.

The State emphasizes that other statements made within the first 24 hours were made outside the interrogation context. Opp. 10. But most of those statements were irrelevant to the critical *mens rea* issue under P.C. 26. For instance, Joseph told an officer shortly after the incident that his dad "abused him and other members of the family repeatedly, and that the previous night, his father had threatened to remove all the smoke detectors and burn the house down, while the family slept." Pet. App. 6a. This and other similar statements demonstrate that Joseph was scared. *See* Clerk's Tr., Vol. 1, at 255-57 ("He's mean sometimes . . . I feel a little unsafe . . . I feel the need to feel safe."). They do not demonstrate that Joseph appreciated the wrongfulness of his actions — even giving the State the benefit of all reasonable inferences.[4] The statements made to Detective Hopewell, however, went directly to the P.C. 26 issue. Pet. 7. There is no dispute that the juvenile court gave great weight to those statements, given that court's decision to emphasize Joseph's statements made within the first 24 hours. *See, e.g.*, Opp. App. 5a; *see also Yates v. Evatt*, 500 U.S. 391, 404 (1991) (harmless error analysis requires the court to "ask what evidence . . . [was] *actually considered*" (emphasis added)).[5]

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[4] The same goes for the manner in which the offense was committed. Joseph disclosed where the gun was located, indicating he was not trying to conceal anything. Pet. App. 6a.

[5] The lower court's harmless error analysis was legally incorrect, as it focused on whether there was "substantial evidence" to support the juvenile court's finding. Pet. App. 29a-32a; *see Fahy*, 375 U.S. at 86-87 ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").

4. Joseph's constitutional claims were pressed and passed upon below, and more than sufficiently preserved. It certainly is no barrier to review that he has argued in this Court for a slightly broader rule, and has submitted more extensive citations to the social science literature.

Joseph has argued at all stages of this case that his waiver was constitutionally invalid, due to his age, disabilities and obvious lack of understanding. In the juvenile court, Joseph argued that there was not "a clear waiver or . . . indicat[ion] that he clearly understood what was going on," citing, *inter alia*, this Court's decision in *J.D.B.* concerning the incapacities of youth and the fact that the detective suggested Krista (who had a conflict "problem") could affect his waiver decision. Pet. App. 70a-78a. Joseph likewise spent over ten pages of his opening brief to the California Court of Appeal arguing that all his statements "were obtained in violation of his rights under *Miranda*," including because he had a "fundamental misunderstanding of the nature of *Miranda*," and because Krista's presence tainted the waiver. *See* Opening Br. at 17-27, *In re J.H.*, 237 Cal. App. 4th 517 (Cal. Ct. App. 2015) (No. E059942). The Court of Appeal resolved those issues on the merits. Pet. App. 23a-25a.

The State suggests that Joseph somehow failed to preserve these arguments because he did not present the equivalent of a Brandeis Brief on the social science in the lower courts. Opp. 19. As noted, Joseph did cite this Court's case law including *J.D.B.*, which rests on the same science cited here. Regardless, briefing always becomes more nuanced on appeal and the citation of additional authorities never indicates

waiver. This Court routinely considers new sources, including particularly scientific literature, not presented below. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). Social science assists this Court's general consideration of the appropriate constitutional standard; it is not evidence about the historical facts disputed in a particular case, and therefore need not be litigated at all stages, admissible under the Rules of Evidence, and the like. *See McCleskey v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985) ("[The] Supreme Court has simply recognized . . . social science research in making certain decisions, without such studies being subject to the rigors of an evidentiary hearing." (collecting cases)).

Nor is it surprising or problematic that in the state courts Joseph argued his case under the existing "totality of the circumstances" framework, whereas in this Court Joseph has argued for a more categorical rule. The California courts *had no power* to adopt a new approach to assessing *Miranda* waivers by juveniles, such as Joseph has advocated here. Even if the state courts thought that this Court's recent juvenile justice decisions, such as *J.D.B.*, supported a new direction, the totality of the circumstances test was the law — and this Court has warned the lower courts repeatedly to "leav[e] to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). In addition, the California courts are precluded from adopting any exclusionary rule that *this Court* has not imposed. Cal. Const., art I, § 28(f)(2). Litigants are never required to press arguments when doing so would be futile.

Moreover, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Petitioners always have "the ability to frame the question to be decided in any way [they] choose[], without being limited to the manner in which the question was framed below." *Id.* at 535; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties."). Joseph argued below that his waiver was invalid. The State does not deny that. Arguing for the same relief under a somewhat broader legal theory and citing additional case law and academic studies have never been considered waiver issues in this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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