Golden Gate University Law Review

Volume 21
Issue 3 *Women's Law Forum*

Article 2

January 1991

Learning Disabled Juveniles & Miranda Rights - What Constitutes Voluntary, Knowing, & Intelligent Waiver

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LEARNING DISABLED JUVENILES & *MIRANDA* RIGHTS — WHAT CONSTITUTES VOLUNTARY, KNOWING, & INTELLIGENT WAIVER

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I. INTRODUCTION

In 1986, the United States Supreme Court in *Colorado v. Connelly*[1] held that under a due process analysis,[2] police coercion is a prerequisite to involuntary waiver of *Miranda*[3] rights.[4]

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1. Colorado v. Connelly, 479 U.S. 157 (1986).

2. U.S. CONST. amend. XIV, § 1.

3. Miranda v. Arizona, 384 U.S. 436 (1966).

4. *Connelly*, 479 U.S. 157 (1986) (In *Connelly*, the adult defendant was a chronic schizophrenic, who, while experiencing "command hallucinations," walked up to a police officer, waived his *Miranda* rights, and spontaneously confessed to a murder. He then confessed two more times after being given *Miranda* warnings. The Colorado Supreme Court upheld the trial court determination that due to defendant's mental disorder, his first spontaneous confession was involuntary despite the absence of police coercion because he lacked rational intellect and free will. The Colorado Supreme Court also agreed with the trial court that defendant's Mirandized confessions were also invalid because his waiver was not the result of free and intelligent choice, thus were involuntary. People v. Connelly, 702 P.2d 722, 729 (Colo. 1985). On review, the U.S. Supreme Court reversed the Colorado judgment, holding that voluntariness under the Fourteenth Amendment's Due Process Clause requires only that a confession not be causally related to police coercion. *Connelly*, 479 U.S. at 167. The Court stated that voluntariness inquiries into the

This article explores whether *Connelly* is controlling under federal and California law where a juvenile waives *Miranda* rights, but lacks sufficient cognitive ability to understand those rights and the consequences of waiving them.

The *Connelly* holding leaves unsettled three issues relating to *Miranda* waivers. First, it is unclear under *Connelly* whether a person must have sufficient cognitive abilities to voluntarily waive *Miranda* rights. *Connelly* explicitly holds that police coercion must be causally connected to involuntary waiver under a due process analysis.[5] Yet the majority opinion includes in its voluntariness analysis the determination that the *Connelly* defendant's mental illness did not significantly impair his cognitive abilities, thus he understood his rights when he waived them.[6] *Connelly* may therefore be factually distinguished from a case where the accused lacks sufficient cognitive abilities to understand *Miranda* rights. Thus, juveniles whose cognitive abilities are impaired by learning disabilities may be outside the *Connelly* decision.

The second issue unresolved by *Connelly* is whether the voluntariness standard requiring coercion leaves intact the possibility that a *Miranda* waiver may be invalid if it is not knowing and intelligent.[7] Subsequent decisions[8] and commentary[9] suggest

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defendant's state of mind separate from official coercion should be resolved by state evidence rules relating to reliability; such matters are not governed by the Fourteenth Amendment's Due Process Clause. *Id.* at 166-67).

5. *Id.*

6. *Id.* at 161-62.

7. *Miranda*, 384 U.S. at 444 (waiver must be "made voluntarily, knowingly, intelligently."); Moran v. Burbine, 475 U.S. 412, 421 (1986) (inquiry into *Miranda* waiver has two distinct dimensions.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

(citing Fare v. Michael C., 442 U.S. 707, 725 (1979))).

8. *See* Moran v. Burbine, 475 U.S. 412, 421 (1986); Colorado v. Spring, 479 U.S. 564, 573 (1987); Patterson v. Illinois, 487 U.S. 285, 292 & n.4 (1988); Michigan v. Harvey, 110 S. Ct. 1176, 1179 (1990); Illinois v. Perkins, 110 S. Ct. 2394 (1990); Illinois v. Bernasco,

that the knowing and intelligent requirement remains intact subsequent to *Connelly*. It is also unclear whether the knowing and intelligent requirement, if it survives *Connelly*, is based on Fifth Amendment rights[10] or is dependent solely on state rules of evidence.[11] If the requirement is based on Fifth Amendment rights, states would be required to analyze the validity of *Miranda* waivers in terms of whether the waiver was knowing and intelligent, and, if coercion was present, whether it was voluntary. One court, the Supreme Court of Illinois, has already taken this approach.[12]

The third issue regarding post-*Connelly Miranda* waivers is whether the coercion standard applied to the adult *Connelly* defendant applies with equal force to juvenile offenders. In the 1967 *In re Gault* decision,[13] the Supreme Court defined juvenile waiver standards under the Fifth and Fourteenth Amendments. As a result of the *Gault* holding, courts apply heightened scrutiny when reviewing waivers and confessions by juveniles as compared to adults to ensure that such juvenile waivers and confessions are voluntary.[14]

The specific factual issue addressed in this article is whether the federal waiver standards announced in *Connelly* require California courts, absent police coercion, to admit the confession of a learning disabled juvenile who waives *Miranda*

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138 Ill. 2d 349, 562 N.E.2d 958 (1990).

9. Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1042-54 (1988); Note, *Colorado v. Connelly: The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary*, 33 VILL. L. REV. 895, 920-22 (1988).

10. U.S. CONST. amend. V (in a criminal case, right against self-incrimination, and not be deprived of life, liberty, or property without due process of law).

11. Berger, *supra* note 9, at 1042-54 ("whether a suspect who establishes that he lacks awareness of his *Miranda* rights, despite receiving a full warning, can still execute a valid waiver consistent with the fifth amendment"); *Connelly*, 479 U.S. at 166-67 (1986) (Inquiries into the state of mind of the criminal defendant who has confessed, separate from any coercion brought to bear on the defendant by the state, should be resolved by state laws governing the admission of evidence. The U.S. Constitution creates no standard of its own in this area.).

12. Illinois v. Bernasco, 138 Ill. 2d 349, 562 N.E.2d 958 (1990).

13. *In re* Gault, 387 U.S. 1 (1967).

14. *Id.* at 55 ("We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children." If counsel was not present, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.").

rights yet lacks sufficient cognitive ability to understand the rights and consequences of waiving them. Juveniles are unlikely to understand either the rights waived or the consequences of waiving them.[15] Strong statistical evidence supports the conclusion that a learning disabled juvenile may lack sufficient cognitive abilities to voluntarily, knowingly, and intelligently waive *Miranda* rights.[16] For example, learning disabled juveniles usually have deficient language and communication skills.[17] Consequently, it is plausible that cognitive deficiencies resulting from these deficient language and communication skills would impair effective *Miranda* waivers.[18] In addition, a disproportionate ratio of adjudicated juveniles have been diagnosed as learning disabled.[19] This link between juvenile crime and learning disabilities[20] supports the conclusion that learning disabilities should be a significant factor in determining the validity of juvenile *Miranda* waivers.

II. EVOLUTION OF THE "VOLUNTARINESS" STANDARD FOR WAIVER OF *MIRANDA* RIGHTS UNDER FEDERAL LAW

The United States Supreme Court, in *Brown v. Mississippi*,[21] held for the first time that a coerced confession violated the due process requirements of the Fourteenth Amendment of the United States Constitution.[22] The Court applied the funda-

15. *Id. See, e.g., infra* note 18.

16. *See infra* notes 17-19.

17. *See* Gibbs & Cooper, *Prevalence of Communication Disorders in Students with Learning Disabilities*, 22 J. OF LEARNING DISABILITIES 60 (January 1989); Marge, PRINCIPALS OF CHILDHOOD LANGUAGE DISABILITIES 75-98 (1972); Newcomer & Magee, *The Performance of Learning (Reading) Disabled Children on a Test of Spoken Language*, THE READING TEACHER 899-900 (1977).

18. Even non-learning disabled juveniles are unlikely to knowingly and intelligently waive *Miranda* rights because they do not understand the nature and significance of their rights. *See* Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970); Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980).

19. McKay & Brumback, *Relationship Between Learning Disabilities and Juvenile Delinquency*, 51 PERCEPTUAL & MOTOR SKILLS 1223-26 (1980); Murray, *The Link Between Learning Disabilities and Juvenile Delinquency: Current Theory and Knowledge*, No. 244-819 U. S. GOV'T PRINTING OFFICE (1977).

20. *See infra* note 19.

21. Brown v. Mississippi, 297 U.S. 278 (1936).

22. *Id.* at 287.

mental rights[23] of the Fourteenth Amendment and found that Brown's confession was coerced.[24] Two years later, in *Johnson v. Zerbst*,[25] the Court held that waiver of the right to counsel must reflect an "intentional relinquishment or abandonment of a known right or privilege."[26]

In *Rogers v. Richmond*,[27] the Court expanded on *Brown*, stating that due process requires that a confession must be voluntary[28] as well as uncoerced.[29] The Court continued to define voluntariness standards in *Townsend v. Sain*.[30] The *Townsend* Court stated that a critical factor in determining the voluntariness of a confession is whether the confession resulted from the accused's "free and rational choice."[31] The Supreme Court in *Haynes v. Washington*[32] stated that the voluntariness of a confession must be examined in the totality of the circumstances.[33]

The Fifth Amendment privilege against self-incrimination was made applicable to the States through the Fourteenth Amendment in *Malloy v. Hogan*.[34] Subsequently, the Court in *Miranda v. Arizona*[35] developed warnings[36] to advise an accused of their Sixth Amendment[37] right to counsel and Fifth Amendment right against self-incrimination.[38] The *Miranda* Court held

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23. Palco v. Connecticut, 302 U.S. 319 (1937) (C. J. Cardozo defined fundamental rights as those rights which are implicit in the concept of ordered liberty. *Id.* at 324).

24. *Id.*

25. Johnson v. Zerbst, 304 U.S. 458 (1938).

26. *Id.* at 464.

27. Rogers v. Richmond, 365 U.S. 534 (1961).

28. *Id.* at 540. *See also* Columbe v. Connecticut, 367 U.S. 568 (1961).

29. *Rogers*, 365 U.S. at 540 (1961).

30. Townsend v. Sain, 372 U.S. 293 (1963).

31. *Id.* at 307, 321 (In *Townsend*, police inadvertently gave the suspect a drug for his sickness which also had the effect of a truth serum. The police were unaware of the drug's effects and obtained a confession. The confession was held inadmissible because it was not the product of a free intellect.). *See, e.g.*, Lisenba v. California, 314 U.S. 219 (1941).

32. Haynes v. Washington, 373 U.S. 503 (1963).

33. *Id.* at 513.

34. Malloy v. Hogan, 378 U.S. 1 (1964).

35. *Miranda*, 384 U.S. 436 (1966).

36. *Id.* at 467-76 (Warnings include the right to remain silent, an explanation that anything said can be used against the accused in court, the right to consult with counsel and to have counsel present during the interrogation, if the accused cannot afford an attorney one will be appointed to represent them, if the accused chooses to answer questions after the warning they may end the interrogation at any time.).

37. U.S. CONST. amend. VI.

38. *Id.*

that the prosecution has a heavy burden to show that waiver of rights contained in the *Miranda* warnings was made voluntarily, knowingly, and intelligently.[39] If the state fails to meet this burden, the waiver is invalid.[40]

The Supreme Court concluded that juveniles are entitled to the same rights to counsel and self-incrimination as adults in *In re Gault*.[41] The *Gault* Court recognized the special vulnerability of juveniles during police interrogations.[42] The *Gault* Court stated that although juveniles can waive their rights, such waivers must be closely examined for voluntariness.[43] After the *Gault* decision, juvenile courts apply additional scrutiny in analyzing the voluntariness of juvenile waivers and confessions as compared to the scrutiny applied to adults.[44]

In *Brewer v. Williams*[45] the Court held that for a waiver of the Sixth Amendment right to counsel to be valid, in addition to understanding the right to counsel, an individual also must intend to relinquish it.[46] Although *Brewer* was decided on Sixth Amendment grounds regarding waiver of the right to counsel,[47] the same test arguably applies in determining the validity of a waiver of Fifth Amendment *Miranda* rights: whether the accused not only understood the right to remain silent, but also intended to relinquish that right.[48] Under the *Brewer* analysis, a

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39. *Id.* at 457.

40. *Id.*

41. *In re* Gault, 387 U.S. 1 (1967).

42. *Id.* at 14-18.

43. *Id.* at 55. *See also* notes 9, 18.

44. *Id.* at 55.

45. Brewer v. Williams, 430 U.S. 387 (1977).

46. *Id.* at 403 (The proper standard in determining the question of waiver as a matter of federal constitutional law is that the State must prove "an intentional relinquishment or abandonment of a known right or privilege." (citing Johnson v. Zerbst, 304 U.S. at 464)).

47. *Brewer*, 430 U.S. 387 (1977).

48. *See* Patterson v. Illinois, 487 U.S. 285, 292 (1988). In *Patterson*, the Court stated: "In the past, this Court has held that a waiver of the Sixth Amendment right to counsel is valid only when it reflects 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* (citing Brewer v. Williams, 430 U.S. at 401, 404 (1977); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) ("In other words, the accused must 'kno[w] what he is doing' so that 'his choice is made with his eyes open.' "). *Id.* (citing Adams v. McCann, 317 U.S. 269, 279 (1942)) ("In a case arising under the Fifth Amendment, we described this requirement as 'a full awareness [of] both the nature of the right being abandoned and the consequences of the decision to abandon it.' "). *Id.* (citing Moran v. Burbine, 475 U.S. 412, 421 (1986)) ("We now find a strong similarity between the level of

juvenile's waiver of the right to remain silent would be invalid if it were shown that the juvenile's learning disability precluded understanding of the right waived.

In *Fare v. Michael C.*[49] the Court considered whether a juvenile had knowingly and voluntarily waived *Miranda* rights.[50] The Court held that the totality of the circumstances determines whether a juvenile voluntarily and knowingly waived *Miranda* rights and therefore the waiver was valid.[51] Factors to be considered when inquiring into the totality of the circumstances surrounding the interrogation include the juvenile's age, experience, education, background, intelligence *and whether they have the capacity to understand the nature of the warnings given him, the nature of their Fifth Amendment rights, and the consequences of waiving those rights.*[52] Thus, the *Fare* court impliedly supports the position that a learning disability, if a significant factor in the totality of the circumstances surrounding the interrogation, may preclude a valid juvenile waiver.

In *Moran v. Burbine*,[53] the Court found the adult defendant's waiver of the right to counsel valid, holding that events occurring without the defendant's knowledge have "no bearing on the capacity to comprehend and knowingly relinquish a con-

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knowledge a defendant must have to waive his Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights."). *Id.* at 298, n.12. (citing Comment, *Constitutional Law - Rights to Counsel*, 49 GEO. WASH. L. REV. 399, 409 (1981)).

49. Fare v. Michael C., 442 U.S. 707 (1979) (In *Fare*, a sixteen and one-half year old juvenile was taken into custody on suspicion of murder. He was Mirandized before questioning. At the outset of questioning, the defendant asked to speak with his probation officer. Police denied his request and defendant agreed to talk with the officers without consulting an attorney. After implicating himself, he was charged in juvenile court with the murder. Defendant claimed his incriminating statements violated *Miranda* because his request to see his probation officer constituted an invocation of his Fifth Amendment right to remain silent. The trial court admitted the statements, holding that defendant waived his right to remain silent notwithstanding his request to see his probation officer. The California Supreme Court reversed, holding defendant's request to see his probation officer was a *per se* invocation of his Fifth Amendment rights in the same way as if he had requested an attorney. The United States Supreme Court reversed, holding that on the totality of the circumstances, defendant voluntarily and knowingly waived his Fifth Amendment rights.).

50. *Id.* at 724 (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)) (In *Butler*, the Court inquired "whether the defendant has knowingly and voluntarily waived the rights delineated in the *Miranda* case.").

51. *Id.* at 725.

52. *Id.* (emphasis added).

53. *Moran*, 475 U.S. 412 (1986).

stitutional right."[54] The *Moran* Court applied the *Miranda* waiver standard first articulated in *Johnson v. Zerbst*,[55] that waiver must be made voluntarily, knowingly, and intelligently.[56] The *Moran* court stated that the waiver inquiry "has two distinct dimensions."[57] First, the waiver must have been "voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[58] The "totality of the circumstances surrounding the interrogation"[59] must reveal "*both* an uncoerced choice and the requisite level of comprehension" for the waiver to have been effective.[60]

Nine months following *Moran*, the Court in *Colorado v. Connelly* held that although the defendant was mentally ill, his waiver was voluntary, thus valid.[61] The *Connelly* Court, seemingly in contradiction to the dual waiver requirements[62] announced in *Moran*, held that a waiver cannot be involuntary under the Due Process Clause of the Fourteenth Amendment absent police coercion.[63] The majority reasoned that the sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion.[64] The Court stated that under a due process analysis, beginning with *Brown v. Mississippi*,[65] all cases deciding the constitutionality of a confession have contained a substantial element of police coercion.[66] The *Connelly* Court

54. *Id.* at 422 (In *Moran*, police did not tell the defendant that a lawyer had been retained for him and was attempting to see him. Police tried to prevent the lawyer from seeing the accused. The Court stated that the facts in *Moran* did not amount to a due process violation. Yet the majority left open the possibility of a due process violation "on facts more egregious than those presented here." *Id.* at 432).

55. Johnson v. Zerbst, 304 U.S. at 464, 475 (1938).

56. *Id.*

57. *Moran*, 475 U.S. at 421 (1986) (citing Edwards v. Arizona, 451 U.S. 477, 482 (1981); Brewer v. Williams, 430 U.S. 387, 404 (1977)).

58. *Id.* at 421.

59. *Id.* (citing Fare v. Michael C., 442 U.S. at 725 (1979); North Carolina v. Butler, 441 U.S. at 374-75 (1979)).

60. *Id.* (emphasis added).

61. *Connelly*, 479 U.S. at 157 (1986).

62. *Moran*, 475 U.S. at 421 (1986). *See infra* notes 56-59 and accompanying text.

63. *E.g.*, *Connelly*, 479 U.S. at 167 (1986).

64. *Id.* at 170.

65. *Brown*, 297 U.S. 278 (1936).

66. *Connelly*, 479 U.S. at 163, 164 (1986) ("Thus the cases considered by this court

stated that it is not the role of the Court to make "sweeping inquiries into the state of mind of a criminal defendant who has confessed" unless there is evidence of police coercion.[67] The majority reasoned that because a psychiatrist testified that Connelly's mental illness did not significantly impair his cognitive abilities, he understood his rights when he waived them.[68] Thus, without evidence of coercive police conduct, his waiver was voluntary.[69]

In 1987, the United States Supreme Court, in *Colorado v. Spring*,[70] continued to state that *Miranda* waivers must be made "voluntarily, knowingly and intelligently."[71] The Court followed the *Moran* approach in analyzing the effectiveness of the *Miranda* waiver in terms of both its coerciveness and whether it was knowingly and intelligently made.[72] Citing *Connelly*,[73] the Court found that defendant's decision to waive his *Miranda* rights did not result from coercive police conduct and therefore was voluntary. The Court then concluded that defendant's waiver was knowingly and intelligently made.[74] Citing *Moran*,[75] the Court stated that "the Constitution does not require that a criminal suspect know and understand every possible conse-

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over the 50 years since *Brown v. Mississippi* have focused upon the crucial element of police overreaching." *Id.* at 163) (The *Connelly* Court cites evidence of coercion in post-*Brown* U.S. Supreme Court due process waiver cases. *Id.* at n.1. The Court concludes: "While each confession case has turned on its own set of facts justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.* at 163-64).

67. *Id.* at 166-67.

68. *Id.* at 161.

69. *Id.* at 167.

70. Colorado v. Spring, 479 U.S. 564 (1987).

71. *Id.* at 572.

72. *Id.* at 573-74 (In *Spring*, the defendant was implicated in a Colorado murder based on information received from an informant regarding the defendant's involvement in interstate transportation of stolen firearms. His arrest resulted from the undercover purchase of stolen firearms from the defendant. After being arrested, defendant waived his *Miranda* rights. While being questioned about the firearms transactions, police asked defendant whether he had shot the murder victim, which he denied. Police again questioned defendant almost two months later. Defendant again waived his *Miranda* rights. He then confessed to the Colorado murder. The United States Supreme Court held that a suspect's awareness of all the crimes about which he could be questioned during interrogation did not invalidate his decision to waive the Fifth Amendment privilege against self-incrimination. Therefore, failure to inform defendant before the second interrogation that they would question him about the murder did not affect his waiver.).

73. *Id.* at 574.

74. *Id.* at 574-75.

75. *Moran*, 475 U.S. 412 (1986).

quence of a waiver of the Fifth Amendment privilege."[76]

This limitation is also stated in *Connelly*,[77] and represents the Court's legitimate reluctance to analyze the mental process of every defendant who waives *Miranda* rights and later decides to challenge the validity of the waiver in court. However, this limitation does not preclude courts from evaluating juvenile waivers in terms of whether they are knowing and intelligent. Courts need not make "sweeping inquiries into the state of mind"[78] of juvenile offenders (or, for that matter, criminal defendants) to ensure that juveniles have sufficient cognitive skills to knowingly and intelligently waive *Miranda* rights.

Recently, the United States Supreme Court again applied the "dual waiver requirements" announced in *Moran*. The Court in *Patterson v. Illinois*[79] determined the validity of defendant's *Miranda* waiver of the right to counsel in terms of whether the waiver was both voluntary, and knowing and intelligent.[80] The court again recognized the dual requirements[81] that a *Miranda* waiver must be knowing and intelligent[82] as well as voluntary.[83]

In summary, the United States Supreme Court decisions following *Connelly* suggest that the knowing and intelligent requirement remains intact.[84] Arguably, the requirement depends on Fifth Amendment grounds and is not, as stated by the *Connelly* court, solely dependent on States' rules of evidence.[85] The decisions subsequent to *Connelly* deciding a waiver issue reach

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76. *Spring*, 479 U.S. at 574 (1987).

77. *Connelly*, 479 U.S. at 166-67 (1986).

78. *Id.*

79. Patterson v. Illinois, 487 U.S. 285 (1988).

80. *Id.* at 292 & n.4 (In *Patterson*, the Court held that *Miranda* warnings were sufficient to make the defendant aware of his Sixth Amendment right to counsel during post-indictment questioning. The Court concluded that defendant's uncounseled statements were admissible where he knowingly and intelligently chose to communicate with police without assistance of counsel.).

81. *See infra* notes 56-59, 61 and accompanying text.

82. *Id.* at 292 ("The specific issue here is whether this waiver was a 'knowing and intelligent' waiver of his Sixth Amendment right." *Id.* (citing Brewer v. Williams, 430 U.S. at 401, 404 (1977); Johnson v. Zerbst, 304 U.S. at 464-65 (1938))).

83. *Id.* at n.4 ("Of course we also require that any such waiver must be voluntary.").

84. *See* Colorado v. Spring, 479 U.S. 564, 573 (1987); Patterson v. Illinois, 487 U.S. 285, 292 & n.4 (1988); Michigan v. Harvey, 110 S. Ct. 1176, 1179 (1990); Illinois v. Perkins, 110 S. Ct. 2394 (1990).

85. *See infra* note 11.

their holdings with no mention of the applicable States' rules of evidence.[86] Therefore, apparently in some circumstances, as where a learning disabled juvenile lacks sufficient cognitive skills to knowingly and intelligently waive *Miranda* rights, a *Miranda* waiver can be invalid even though police coercion is absent.

III. WAIVER OF *MIRANDA* RIGHTS BY JUVENILES IN CALIFORNIA

California courts have closely paralleled federal standards in determining the validity of a juvenile's waiver of Fifth and Sixth Amendment rights. In a pre-*Miranda* case, *People v. Lara*,[87] the California Supreme Court held that juveniles are competent to waive constitutional rights[88] and to make voluntary confessions.[89] Two California decisions, *In re Anthony J.*[90] and *In re Jessie L.*,[91] parallel the factors set forth in *Fare v. Michael C.*[92] for courts to consider when determining the voluntariness of a juvenile confession. These factors include age, intelligence, education, experience, and ability to comprehend the meaning and effect of statements to police.[93] As in *Fare*, these factors are considered in the totality of the circumstances.[94]

Following the United States Supreme Court *In re Gault* decision,[95] California courts state that the prosecution has an even

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86. *See* note 82.

87. People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967).

88. *Id.* at 378-79, 432 P.2d at 211-12, 62 Cal. Rptr. at 595-96.

89. *Id.* at 383, 432 P.2d at 215, 62 Cal. Rptr. at 599.

90. *In re* Anthony J., 107 Cal. App. 3d 962, 166 Cal. Rptr. 238 (1980) (The court held that a 15 year old defendant with borderline I.Q. is not precluded from intelligently waiving *Miranda* rights.).

91. *In re* Jessie L., 131 Cal. App. 3d 202, 182 Cal. Rptr. 396 (1982) (In *Jessie L.*, a 14 year old was held to have voluntarily waived his *Miranda* rights where a diagnostic study showed he was in the 9th grade and had 5th to 7th grade skills, an 89 I.Q., and average I.Q. potential. The defendant claimed not to have understood the *Miranda* instructions.). *See also In re* Willie T., 71 Cal. App. 3d 345, 139 Cal. Rptr. 439 (1977) (A juvenile with an 85 I.Q. who is far behind in school is not incapable of intelligently waiving *Miranda* rights.).

92. *Fare*, 442 U.S. 707 (1979).

93. *Anthony J.*, 107 Cal. App. 3d 962, 166 Cal. Rptr. 238 (1980); *Jessie L.*, 131 Cal. App. 3d 202, 182 Cal. Rptr. 396 (1982).

94. *Anthony J.*, 107 Cal. App. 3d at 971, 166 Cal. Rptr. at 244 (1980) ("The burden is on the prosecution to establish that an accused's statements are voluntary."); *See, e.g.*, People v. Eduardo N.G., 108 Cal. App. 3d 745, 166 Cal. Rptr. 873 (1980).

95. *Gault*, 387 U.S. 1, 55 (1967).

greater burden to prove the voluntariness of a juvenile waiver than with an adult waiver.[96] California courts look closely at whether the juvenile accused understood the *Miranda* rights prior to waiving them.[97]

The court in *In re Brian W.*[98] held the juvenile's waiver was valid because the police explained his rights in a language he understood.[99] The juvenile changed his mind and waived his rights after initially deciding not to do so.[100] In *In re Frank C.*,[101] the court again closely scrutinized the juvenile's waiver to ensure it was voluntary. In *Frank C.*, the waiver was held valid where the juvenile's actions and words did not suggest a lack of understanding of his rights or the effect of waiver of his rights.[102] In *In re John S.*,[103] the court held that because the juvenile calmly told the police officer he understood his rights and wanted to waive them, the waiver was voluntary.[104] The court also held that there is no requirement that a juvenile must have parental consent for a waiver to be valid.[105]

Analyzing the voluntariness of waivers by learning disabled juveniles is conceptually similar to analyzing waivers by mentally ill adults.[106] The voluntary waiver issue is often presented

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96. *Anthony J.*, 107 Cal. App. 3d at 971, 166 Cal. Rptr. at 244 (The burden to prove the accused's statements are voluntary is greater in the case of a juvenile than the case of an adult.).

97. *Id. See also infra* notes 97-100 and accompanying text.

98. *In re* Brian W., 125 Cal. App. 3d 590, 178 Cal. Rptr. 159; *cert. denied*, 456 U.S. 980 (1981).

99. *Id.*

100. *Id.*

101. *In re* Frank C., 138 Cal. App. 3d 708, 188 Cal. Rptr. 68 (1982).

102. *Id.* at 712-14, 188 Cal. Rptr. at 70-72.

103. *In re* John S., 199 Cal. App. 3d 441, 245 Cal. Rptr. 17 (1988), *cert. denied*, 488 U.S. 928 (1988).

104. *Id.* at 444, 446, 245 Cal. Rptr. at 18-19. (The court also referred to the fact that the defendant did not claim he was unable to make an intelligent and knowing waiver due to any lack of maturity, intelligence, or education. *Id.* at 446, 245 Cal. Rptr. at 19).

105. *Id.* at 446, 245 Cal. Rptr. at 19.

106. A *Miranda* waiver by a mentally ill adult may be similar to a waiver by a learning disabled juvenile in that both waivers may be effectuated by an individual lacking sufficient cognitive skills to voluntarily waive those rights. Such waivers are involuntary if the individual is unable to understand their rights and the consequences of the decision to waive those rights. *See, e.g.*, Brewer v. Williams, 430 U.S. at 403; Johnson v. Zerbst, 304 U.S. at 464; Patterson v. Illinois, 487 U.S. at 292; Adams v. McCann, 317 U.S. at 279; Moran v. Burbine, 475 U.S. at 421. *See also infra* notes 44-47 and accompanying paragraph.

in the context of an adult defendant who, as in *Connelly*, has some form of mental disorder. Sixteen years prior to *Connelly*, the California Supreme Court in *People v. MacPherson*[107] held that a mental condition can render a confession invalid, even absent police coercion.[108] The *MacPherson* Court held that a statement given to police by an adult schizophrenic defendant was involuntary and violated due process.[109] The Court stated that "it is immaterial that the statements were not elicited by law enforcement officials and that defendant's capacity to refrain from making the statements was destroyed by mental disorders beyond anyone's control."[110] The adult's confession violated due process due to the unreliability of the confession and lack of rational choice of the accused.[111]

The *MacPherson* due process analysis left the door open for subsequent courts to apply a similar analysis when deciding whether a waiver by a learning disabled juvenile violated due process. Under this analysis, California courts would be permitted to hold that a juvenile waiver violated due process if a learning disability precluded voluntary waiver. But the United States Supreme Court holding in *Connelly*[112] forced California courts to review waivers under the *Connelly*, as opposed to the *MacPherson*, analysis. As a result, in California (at least where the facts parallel those in *Connelly*), as long as a mentally ill defendant possesses sufficient cognitive skills to waive *Miranda* rights, the waiver and subsequent confession is valid, absent police coercion.

California voters voiced their preference toward limiting

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107. People v. MacPherson, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970).
108. *Id.* at 115, 465 P.2d at 21, 84 Cal. Rptr. at 133.
109. *Id.*
110. *Id.*
111. *Id.* The court stated:

> Under these circumstances, it is immaterial that the statements were not elicited by law enforcement officials and that defendant's capacity to refrain from making the statements was destroyed by mental disorders beyond anyone's control. . .This judgement can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply the strong conviction that our system of law enforcement should not operate to take advantage of a person in this fashion.

112. *Connelly*, 479 U.S. at 166-67 (1986).

rights afforded criminal defendants under the California Constitution by voting in favor of Proposition 8 in 1982 and Proposition 115 in 1990. This preference among California voters to limit rights afforded criminal defendants parallels the recent trend of the United States Supreme Court toward limiting defendant rights. The *Connelly* decision is a clear example of the federal trend.

Proposition 8,[113] or the "Right to Truth-in-Evidence" provision, amended the California Constitution to state that, except as provided by statute, relevant evidence may not be excluded in any criminal or juvenile proceeding.[114] The provision states, in pertinent part:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court.* Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.[115]

The Truth in Evidence provision has been interpreted by the California Supreme Court in *People v. Markham*[116] as disposing of judicially created exclusionary rules, except as required by the Constitution of the United States.[117] Therefore, under the Cali-

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113. CAL. CONST. art. I, § 28(d) [hereinafter Truth in Evidence Provision].

114. *Id.*

115. *Id.* (emphasis added).

116. People v. Markham, 49 Cal. 3d. 63, 69, 775 P.2d 1042, 1046, 260 Cal. Rptr. 273, 277 (1989).

117. *Id.* at 69, 775 P.2d at 1046, 260 Cal. Rptr. at 277. The *Markham* court stated:

> Given the probable aim of the voters in adopting section 28(d), namely, to dispense with exclusionary rules derived solely from the state Constitution, it is not reasonably likely that the California voters intended to preserve, in the form of a 'statutory' privilege, a judicially created exclusionary rule expressly rejected by the United States Supreme Court under the federal Constitution.

See also In re Lance W., 37 Cal. 3d. 873, 887, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639-

fornia Constitution, waiver admissibility standards regarding the exclusion of evidence are prescribed by the federal Constitution.[118]

This trend among California voters toward limiting rights afforded criminal defendants to those required by the federal Constitution continued in June, 1990, when a majority of Californians voted in favor of Proposition 115,[119] known as the "Crime Victims Justice Reform Act." Section 3 of Proposition 115, which has been struck down by the California Supreme Court in *Raven v. Deukmejian*,[120] would have limited the rights of criminal adult and juvenile defendants to those afforded by the United States Constitution.[121] The provision held unenforceable by the *Raven* court, Section 3, would have amended Section 24, Article I of the California Constitution to read, in pertinent part:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, not to be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. *This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitu-*

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40 (1985) (The *Lance W.* court stated: "The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing those rights except as required by the Constitution of the United States.").

118. *See infra* note 114.

119. 1990 Cal. Adv. Legis. Serv. 115 (West).

120. Raven v. Deukmejian, 52 Cal. 3d 336 (1990) (The *Raven* court stated that the effect of the measure would amount to a revision of the California Constitution, which is beyond the result of the initiative process. The court reasoned that Section 3 of Proposition 115 unduly restricts judicial power in a way which severely limits the independent force and effect of the California Constitution. Therefore, the court held that Section 3 of Proposition 115 may not be enforced.).

121. 1990 Cal. Adv. Legis. Serv. 115 (West).

> *tion of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.*"[122]

Accordingly, if voters had been successful in implementing Section 3 of Proposition 115, federal constitutional standards regarding waiver of *Miranda* rights would have controlled case law in California. Specifically, California courts would have been required to apply the federal *Connelly* holding that mental illness does not in itself render a waiver involuntary.[123] The *Connelly* holding is contrary to the California *MacPherson* holding that a confession by a mentally ill person is involuntary and violates due process.[124]

Section 3 of Proposition 115, if implemented, would have presented another hurdle in addition to Proposition 8 for courts to overcome in order to hold invalid waivers by mentally ill adults or learning disabled juveniles. Yet the *Raven*[125] court overturned Section 3 of the provision restricting state criminal rights to rights under federal law.[126] As a result, Section 3 of Proposition 115 does not prevent California courts from following state constitutional principles relied on in *MacPherson*[127] in order to invalidate a waiver and subsequent confession by a mentally ill person because it violates due process.[128]

The *MacPherson* due process analysis arguably applies to waivers by learning disabled juveniles.[129] Yet Proposition 8 prevents implementing the *MacPherson* due process analysis through the exclusionary rule, unless the court concludes the statement is so inherently unreliable that it may be excluded as nonprobative under California Evidence Code section 352.[130] Al-

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122. *Id.* (emphasis added).

123. *Connelly*, 479 U.S. 157 (1986) (Absent police coercion, waiver cannot be involuntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.).

124. *MacPherson*, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970).

125. Raven v. Deukmejian, 52 Cal. 3d 336 (1990).

126. *Id.*

127. *MacPherson*, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970).

128. *Id.*

129. *See infra* notes 103, 108 and accompanying text.

130. CAL. CONST. art. I, § 28(d); *See also infra* notes 109-11 and accompanying text.

though Section 3 of Proposition 115 was invalidated, the court did not invalidate the remaining provisions of the proposition. The sections of Proposition 115 unaffected by the *Raven* decision are additional examples of the continuing preference among California voters to follow federal law in defining criminal rights under the state constitution.

IV. LEARNING DISABILITIES, COGNITION, AND JUVENILE CRIME - AN OVERVIEW

A. LEARNING DISABILITIES AND COGNITION: DEFINED

It is estimated that 10,000,000 American children have been diagnosed as suffering from learning disabilities.[131] A learning disability is an inability to effectively process oral, written, or visual information.[132] Individuals who are learning disabled are usually average or above average in intelligence, but lack skills necessary for processing sensory information.[133] The former U.S. Department of Health, Education, and Welfare defined specific learning disabilities as disorders in the understanding, or processing of language, including difficulties in listening, thinking, communicating, reading, or math.[134]

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131. 131 CONG. REC. S10,800-01 (1985).

132. Morgan, *Learning Disabilities and Crime: Struggle to Snap the Link*, N.Y. Times, Oct. 31, 1988, § B, at 1, col. 2.

133. *Id. See also* Higbee, Dwinell & Kalivoda, Serving Learning Disabled Students Within & Outside the Classroom (paper presented at the Annual Conference of the American College Personnel Association, Washington, D.C. (March 1989)) (available from Educational Resources Informational Center) (citing definition by the Association of Children and Adults with Learning Disabilities [hereinafter ACLD]. The ACLD is a nonprofit organization of parents and professionals with state and local affiliates throughout the United States.).

134. *Id.* (referring to Federal Register definition, defining specific learning disability as:

> a disorder in one or more of the basic psychological processes involved in understanding and using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, learning or motor handicaps, or mental retardation, or of environmental, cultural or economic disadvantage.).

See also B. OSMAN, LEARNING DISABILITIES - A FAMILY AFFAIR 5, 169 (1985).

A learning disability is defined as "a response pattern in learning situations which is inefficient and which interferes with the student's ability to understand, remember, apply or integrate the material being taught."[135] A specific learning disability is "a chronic condition of neurological origin which selectively interferes with the development, integration, and/or demonstration of verbal and/or non-verbal abilities."[136] The term "specific learning disability" does not include children who have learning problems that result from visual or motor handicaps, or mental retardation.[137]

Learning disabilities are often the manifestation of cognitive problems. Cognition is the act or process of knowing and includes both awareness and judgment.[138] Cognitive problems stem from difficulty organizing or sequencing thoughts or distinguishing between concepts.[139]

B. Relationship Between Language Disorders and Learning Disabilities

For a waiver to be voluntary under a due process analysis, a juvenile must have the cognitive ability both to *understand* the *Miranda* rights and *communicate* a valid waiver.[140] A juvenile is

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135. L. Greene, Kids Who Hate School - A Survival Handbook on Learning Disabilities 41 (1983).

136. Higbee, Dwinell, & Kalivoda, Serving Learning Disabled Students Within & Outside the Classroom (paper presented at the Annual Conference of the American College Personnel Association, Washington, D.C. (March 1989)) (citing ACLD definition). The full text of the ACLD definition of a Specific Learning Disability is:

> a chronic condition of neurological origin which selectively interferes with the development, integration, and/or demonstration of verbal and/or non-verbal abilities. Specific Learning Disabilities exist as a distinct handicapping condition in the presence of average to superior intelligence, adequate sensory and motor systems, and adequate learning opportunities. The condition varies in its manifestations and in degree of severity. Throughout life the condition can affect self-esteem, education, vocation, socialization, and/or daily living activities.

137. *Id.*

138. Webster's Seventh New Collegiate Dictionary 161 (1969).

139. Higbee, Dwinell, & Kalivoda, Serving Learning Disabled Students Within & Outside the Classroom (paper presented at the Annual Conference of the American College Personnel Association, Washington, D.C. (March 1989)).

140. In Fare v. Michael C., the Court stated that a juvenile's capacity to understand the nature of the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights, are factors in determining whether a juvenile has

per se unable to effectuate a valid waiver if, due to a learning disability, there is a lack of sufficient cognitive abilities to understand *Miranda* rights and communicate a valid waiver.[141] Language disorders are the type of learning disability most likely to prevent a valid juvenile waiver.

Two components of a language disorder are deficient decoding[142] and encoding[143] skills. A juvenile with a language disorder that includes deficient decoding skills may be unable to understand the *Miranda* instructions. A juvenile who has deficient encoding skills may be unable to communicate a voluntary *Miranda* waiver. Accordingly, it is crucial to determine if a learning disabled juvenile has deficient decoding and encoding skills when arguing that a waiver or subsequent confession by a learning disabled juvenile violates due process.

Statistical evidence supports the position that because most learning disabled juveniles have language deficits, they are *incapable* of either understanding *Miranda* rights or effectually waiving those rights. A recent study found that of 242 children with learning disabilities, 90.5% of the children had language deficits.[144] One or more communication disorders were detected in 96.2% of the children tested.[145] The study concluded that "for the population studied, a learning disability was practically synonymous with a diagnosis of a communication disorder."[146] This high rate of communication deficits among children with learning disabilities has been noted previously.[147] Earlier studies

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knowingly and voluntarily waived his *Miranda* rights. Fare v. Michael C., 442 U.S. 707 (1979). It is unclear whether the *Connelly* holding governing adult waivers abrogates the juvenile waiver standards set forth in *Fare*.

141. *See infra* notes 9, 16-19 and accompanying text.

142. Decoding is the process of responding to the auditory or visual information. To decode means to perceptually process sensory information, such as spoken language or visual images. L. GREENE, KIDS WHO HATE SCHOOL A SURVIVAL HANDBOOK ON LEARNING DISABILITIES 50 (1983).

143. Encoding is the process of writing or speaking by retrieving the written or spoken information from memory and using those symbols to express oneself. *Id.* at 218.

144. Gibbs & Cooper, *Prevalence of Communication Disorders in Students with Learning Disabilities*, 22 JOURNAL OF LEARNING DISABILITIES 60 (1989) (study was conducted in a school district in Alabama of 242 learning disabled students between ages 8 and 12.).

145. *Id.* at 61.

146. *Id.* at 62.

147. *Id.* at 60 (referring to FEAGANS, CURRENT TOPICS IN LEARNING DISABILITIES 87-118 (1983); Freeman & Perkins, *The Prevalence of Middle Ear Disease Among Learning*

have also confirmed the prevalence of language deficits among learning disabled adults and juveniles with communication disorders (although in smaller percentages).[148]

Research conducted in 1986[149] supports the position impliedly taken by the *Connelly* court: that a juvenile who *has* sufficient cognitive abilities is *capable* of understanding *Miranda* rights and voluntarily waiving them. The research found that of the learning disabled and language-impaired (LD/LI) children tested, the children communicated as effectively as their corresponding age-mates.[150] At least initially, this conclusion seems to contradict the hypothesis that LD/LI children are deficient encoders of new information.[151] Yet the authors were not surprised by the result because the LD/LI children and age-mates tested *possessed similar cognitive levels* and years of worldly experience.[152] Thus, because this research did not compare LD/LI students with dissimilar cognitive abilities, the results do not undermine the position stated (and supported by research) above - deficient encoding skills may preclude a valid juvenile waiver. The premise that learning disabled juveniles may not possess sufficient cognitive abilities to voluntarily waive *Miranda* rights also remains viable.

The threshold inquiry regarding a learning disabled juvenile's ability to communicate a valid waiver should begin with an assessment of cognitive abilities. By establishing that a juvenile lacks sufficient cognitive abilities, the proponent can assert all three arguments proposed in this article:[153]

Impaired Children, 18 CLINICAL PEDIATRICS 205-10 (1979); JOHNSON & MORASKY, LEARNING DISABILITIES (2d ed. 1980); KEOH & MAJOR-KINGSLEY, A SYSTEM OF MARKER VARIABLES FOR THE FIELD OF LEARNING DISABILITIES (1982); MERCER, STUDENTS WITH LEARNING DISABILITIES (2d ed. 1983); SCHOLL, DEVELOPMENTAL THEORY AND RESEARCH IN LEARNING DISABILITIES (1981); WIIG & SEMEL, INTERVENTION FOR THE LEARNING DISABLED (1980)).

148. Gibbs & Cooper, *Prevalence of Communication Disorders in Students with Learning Disabilities*, 22 JOURNAL OF LEARNING DISABILITIES 60 (1989) (referring to MARGE, PRINCIPALS OF CHILDHOOD LANGUAGE DISABILITIES 75-98 (1972); Newcomer & Magee, *The Performance of Learning (Reading) Disabled Children on a Test of Spoken Language*, THE READING TEACHER 899-900 (1977)).

149. Meline, *Referential Communication Skills of Learning Disabled/Language Impaired Children*, 7:2 APPLIED PSYCHOLINGUISTICS 129-40 (1986).

150. *Id.* at 136.

151. *Id.*

152. *Id.*

153. However, it should be kept in mind that a waiver by a learning disabled juvenile who does *not* have deficient cognitive abilities can still be challenged by asserting

1) The *Connelly* coercion standard does not control where a learning disabled juvenile lacks sufficient cognitive ability to voluntarily waive *Miranda* rights.

2) Learning disabled juveniles are especially unlikely to possess sufficient cognitive skills to knowingly and intelligently waive *Miranda* rights.

3) The *Connelly* waiver standard applies to adults and does not control juvenile proceedings.

After establishing the juvenile's cognitive abilities, the proponent should then determine whether specific language deficits exist in areas such as decoding and encoding skills. By following this 2-step process, the proponent establishes both the cognitive deficiency (the effect resulting from the underlying learning disability) and its underlying cause (the specific learning disability).

C. Relationship Between Learning Disabilities and Juvenile Crime

A 1980 journal article refers to previous studies citing statistical information linking juvenile crime with learning disabilities.[154] One statistic cited is that up to 90 per cent of institutionalized or adjudicated juvenile delinquents in 1977 had some form of a learning disability.[155] Most studies show six times more learning disabled delinquent boys than girls.[156]

In the late 1970s, two studies investigated the relationship between learning disabilities and juvenile delinquency.[157] One study was conducted by the Association for Children with Learning Disabilities (ACLD) and the other by the National

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argument #3 above: The *Connelly* holding does not control juvenile proceedings.

154. McKay & Brumback, *Relationship Between Learning Disabilities and Juvenile Delinquency*, 51 Perceptual & Motor Skills 1223-26 (1980).

155. *Id.* at 1224 (referring to Murray, *The Link Between Learning Disabilities and Juvenile Delinquency: Current Theory and Knowledge*, No. 244-819 U. S. Gov't Printing Office (1977)).

156. *Id.* (referring to Mauser, *Learning Disabilities and Delinquent Youth*, 9 Academic Therapy Quarterly 389-402 (1974)).

157. Crawford, *The Link Between Delinquency and Learning Disabilities*, 24 The Judges' Journal 23 (1985).

Center for State Courts. The research revealed the following statistical evidence linking learning disabilities and juvenile delinquency:[158]

1) The chances of being adjudicated were 200 percent greater for juveniles with learning disabilities than for their non-learning disabled peers.

2) The odds of being taken into custody by police were also 200 percent greater for learning disabled juveniles than for non-learning disabled juveniles.

3) 36 percent of adjudicated juveniles were learning disabled.

4) For comparable offenses, learning disabled juveniles had higher probabilities of arrest and adjudication than those without learning disabilities.

The above statistical correlation between learning disabilities and juvenile crime is also referred to in a recent article by Judge Thomas P. McGee.[159] Judge McGee cites additional studies of youths adjudicated by juvenile courts. Of the 40 to 70 percent of juveniles studied who show significant neurodevelopmental abnormalities, language and cognitive abnormalities were common.[160] Judge McGee refers to one hypothesis in the "Link Study"[161] that might account for the high proportion of learning disabilities in the adjudicated juvenile population: differential adjudication caused by poor cognitive and communications skills.[162] Judge McGee states that the learning disabled child may be unable to express himself in court as clearly as the non-learning disabled child.[163] Specific impairments resulting from a

158. *Id.*

159. Hon. T. McGee, *Learning Disabilities and the Juvenile Justice System*, L/D LAW 5-7 (Spring, 1979) (Appellate Division, First Department, Supreme Court of New York; Committee on Juvenile Justice, Dyslexia, and Other Learning Disabilities) (Judge McGee is Chief Judge at Jefferson Parish Juvenile Court in Gretna, Louisiana. He is chairman of the National Council of Juvenile and Family Court Judges Committee on Learning Disabilities and Juvenile Delinquency. Judge McGee is a frequent speaker on the issue of learning disabilities and juvenile justice.).

160. *Id.*

161. *Id.* (referring to the ACLD study as the "Link Study.").

162. *Id.*

163. *Id.*

learning disability may make a juvenile "more susceptible to getting into trouble with the law . . . and less able to extricate himself from the process."[164]

The same argument set forth by Judge McGee to explain the link between learning disabilities and adjudications can be applied where learning disabled juveniles are arrested - that arrested learning disabled juveniles are less able to express themselves and are "less able to extricate [themselves] from the process."[165] A recent journal article discusses hypothetical explanations for the connection between learning disabilities and delinquency.[166] The "differential arrest hypothesis" maintains that learning disabled juveniles have a greater risk of being picked up by the police than do non-learning disabled juveniles.[167] The "differential adjudication hypothesis" posits that once a learning disabled juvenile is charged with an offense, the juvenile is at greater risk of adjudication than with non-learning disabled juveniles.[168]

Congress has recognized the link between learning disabilities and juvenile crime and cites Judge McGee's conclusions regarding the reasons for this connection.[169] The Senate, in its findings, refers to the statistical correlation between learning disabilities and criminal behavior: Although only 15 percent of the United States population is learning disabled, 36 percent of juvenile delinquency cases involve individuals with learning disabilities.[170] Within the typical jail population, at least 40 percent of the inmates are learning disabled.[171] In addition, the Senate acknowledges a Fordham University study that found that

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164. *Id.* at 6.

165. *Id.*

166. Eller, *The Learning Disabled Delinquent*, 11 THE LEARNING CONSULTANT JOURNAL 34-36 (1990).

167. *Id.* at 35.

168. *Id.*

169. 135 CONG. REC. S601-01 (1989); 131 CONG. REC. S10,800-01 (1985); *Proposed Amendment to the Juvenile Justice and Delinquency Prevention Act of 1974 to Authorize Appropriations for Fiscal Years 1985 - 1989: Hearings on H.R. 4971 Before the Committee on Education and Labor of the House of Representatives*, 98th Cong., 2d Sess. 513 (1984) ("There is definitely evidence that LD youth engage in significantly more delinquent behavior than non-LD youth."). *See infra* notes 156-63 and accompanying text.

170. 135 CONG. REC. S601-01 (1989).

171. *Id.*

learning disabled individuals are 220 percent more likely to be adjudicated than those who are not learning disabled.[172]

Congress has authorized the development and implementation of programs relating to juvenile delinquency and learning disabilities.[173] Specifically, Congress has funded training programs to assist juvenile justice personnel in recognizing learning disabled juveniles.[174] Yet the connection between learning disabilities and juvenile crime remains largely unaddressed by the juvenile court system.[175]

The analysis below is intended to help harmonize the *Connelly* decision with juvenile waivers that are neither knowing or intelligent. Research cited below demonstrates that learning disabled juveniles are especially unlikely to effect a knowing and intelligent waiver. At least one state supreme court has harmonized the *Connelly* voluntariness analysis with the knowing and intelligent requirement, holding that the knowing and intelligent requirement is separate from the voluntariness standard prescribed in *Connelly*.[176] That court found the juvenile waiver invalid because it was not knowing and intelligent.[177]

V. ANALYSIS

A. THE *Connelly* COERCION STANDARD DOES NOT CONTROL WHERE A JUVENILE LACKS SUFFICIENT COGNITIVE ABILITY TO VOLUNTARILY WAIVE *Miranda* RIGHTS

In *Connelly*, the Court decided the validity of a *Miranda* waiver by an adult defendant. The Court determined that the defendant possessed sufficient cognitive abilities to understand his rights when he waived them.[178] In contrast, a learning disabled juvenile may lack sufficient cognitive abilities to understand the *Miranda* rights and the consequences of waiving them.

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172. 133 CONG. REC. S7,666-02 (1987).

173. 42 U.S.C.A. § 5665(b)(5) (West 1990).

174. *Id.*; H.R. 1801, 100th Cong., 2d Sess., 134 CONG. REC. S16,156-01 (1988).

175. 135 CONG. REC. S601-01 (1989). *But see* People v. Bernasco, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991).

176. *Id. See infra* notes 252-54, 258-60 and accompanying text.

177. *Bernasco*, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991).

178. *Connelly*, 479 U.S. at 161-62 (1986).

If the juvenile lacks sufficient cognitive skills, the waiver and subsequent confession is not voluntary. Therefore, the coercion waiver standard set forth in *Connelly* should not control.

The *Connelly* majority begins its analysis by referring to the preliminary hearing testimony of Dr. Metzner, the psychiatrist who examined Connelly. Dr. Metzner testified that Connelly was a chronic schizophrenic and was experiencing "command hallucinations."[179] The Court stated: "*Dr. Metzner further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, respondent understood the rights he had when Officer Anderson and Detective Antuna advised him that he need not speak.*"[180] Therefore, reasoned the Court, Connelly understood the *Miranda* rights when he confessed.[181]

It is difficult to understand why the majority would cite evidence that Connelly had sufficient cognitive abilities to understand his rights and the consequences of waiving them unless it considered Connelly's cognitive abilities relevant to the analysis.[182] Neither Justice Brennan in his dissent nor the majority opinion considered the factual situation where a defendant *did not in fact possess* the cognitive abilities to *enable* a defendant to voluntarily waive their rights.

The *Connelly* majority distinguishes between the *ability* to understand *Miranda* rights and waiver of those rights, and what *motivates* a person to confess.[183] This distinction is manifested by the Court's understandable reluctance to retrospectively evaluate a defendant's motivation in waiving *Miranda* rights or to subsequently confess. The Court was wary of expanding the "voluntariness" standard by requiring courts to "divine a defendant's motivation for speaking or acting as he did,"[184] or making "sweeping inquiries into the state of mind of a criminal defendant who has confessed"[185] unless the police employed coercion. However, the majority's reluctance to expand the volun-

179. *Id.* at 161 (referring to transcripts from preliminary hearing at 56).

180. *Id.* at 161-62 (emphasis added) (referring to transcripts from preliminary hearing at 56-57).

181. *Id.* at 161-62.

182. *Id.*

183. *Connelly*, 479 U.S. at 166-67 (1986).

184. *Id.*

185. *Id.*

tariness standard does not address a factual scenario where a juvenile, unlike the *Connelly* defendant, lacks the *ability* to understand the *Miranda* rights or the consequences of waiving those rights. Inquiring into a juvenile's cognitive abilities in order to determine whether the juvenile has the *ability* to understand their rights and the consequences of waiving them would not require a court to make the type of sweeping inquiries into what motivated the juvenile to confess that the Court was reluctant to make.

In his dissent in *Connelly*,[186] Justice Brennan refers to the holding in *Moran v. Burbine*,[187] stating that "the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."[188] Justice Brennan argues that under the "totality of the circumstances" approach, a waiver is valid only if the choice to waive *Miranda* rights is uncoerced *and* there is a requisite level of comprehension.[189] Justice Brennan's analysis adheres to the *Moran* dual requirements of both: 1) a knowing and intelligent, and 2) a voluntary waiver.

Although the majority and Justice Brennan differ on the correct approach to determine whether a waiver is valid, both sides could agree that a waiver is invalid where a juvenile is *per se* unable to understand *Miranda* instructions due to a learning disability. In such a case, neither the position taken by the majority nor by Justice Brennan would be mutually exclusive.

B. *Connelly* Does Not Abrogate the Requirement That a Waiver Must Be Knowing and Intelligent In Addition to Being Uncoerced

Beginning with the *Miranda* decision, the United States Supreme Court has stated that waivers of Fifth Amendment rights must be made knowingly, intelligently, and voluntarily.[190] The *Fare* Court stated that *Miranda* waivers are reviewed in the to-

186. *Id.* at 174-88.

187. *Moran*, 475 U.S. at 421 (1986) (decided the same year as *Connelly*).

188. *Connelly*, 479 U.S. 157, 188 (1986) (Brennan, J., dissenting) (citing *Moran*, 475 U.S. at 421 (1986)).

189. *Connelly*, 479 U.S. at 188 (1986) (Brennan, J., dissenting).

190. *Miranda*, 384 U.S. at 444 (1967).

tality of the circumstances surrounding the interrogation.[191] The *Moran* Court stated that there are dual requirements for Miranda waivers: First, the waiver must be voluntary, in the sense that it is not the product of coercion.[192] Second, the waiver must be knowing and intelligent, made with full awareness of both the nature of the right abandoned and a requisite level of comprehension.[193] Yet the *Connelly* holding seems to contradict the dual waiver requirements stated in *Moran*, holding that a waiver cannot be involuntary under the Due Process Clause of the Fourteenth Amendment absent police coercion.[194]

Although research shows that even non-learning disabled juveniles are unlikely to knowingly and intelligently waive *Miranda* rights,[195] California courts follow the *Connelly* approach in analyzing adult waivers only in terms of their voluntariness.[196] California cases concerning juveniles have not commented specifically on the *Connelly* approach at the appellate or supreme court level.[197] One state supreme court subsequent to *Connelly*, the Supreme Court of Illinois, has held a waiver invalid where the juvenile's waiver was voluntary under the *Connelly* analysis, but not knowing and intelligent under *Moran*.[198]

Research on the effectiveness of juvenile waiver indicates that most juveniles lack the capacity to voluntarily and intelli-

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191. *Fare*, 442 U.S. at 725 (1979).

192. *Moran*, 475 U.S. at 421 (1986).

193. *Id.*

194. *Connelly*, 479 U.S. at 167 (1986).

195. *See infra* note 18.

196. *E.g.*, People v. Green, 189 Cal. App. 3d 685, 234 Cal. Rptr. 497 (1987); People v. Sultana, 204 Cal. App. 3d 511, 251 Cal. Rptr. 115 (1988); People v. Markham, 49 Cal. 3d 63, 775 P.2d 1042, 260 Cal. Rptr. 273 (1989); People v. Clark, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990); People v. Cox, 221 Cal. App. 3d 980, 270 Cal. Rptr. 730 (1990); People v. Kelly, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990).

197. At time of publication, the only post-*Connelly* appellate or Supreme Court decision hearing an appeal from a juvenile trial court on a *Miranda* waiver issue is *In re* John S., 199 Cal. App. 3d 441, 245 Cal. Rptr. 17, *cert. denied*, 109 S. Ct. 316 (1988). The *John S.* court held that failure of the authorities to seek the consent of an adult in addition to the juvenile's waiver did not invalidate the subsequent confession. *Id.* at 445, 245 Cal. Rptr. at 19. The court noted there was no claim that, based on his level of maturity, intelligence, or education, the juvenile was unable to make an intelligent and knowing waiver. *Id.* at 446. The *John S.* court concluded that his confession was "freely and voluntarily made after a knowing and intelligent waiver." *Id.* at 447, 245 Cal. Rptr. at 20. The court never reached the *Connelly* voluntariness issue.

198. People v. Bernasco, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991).

gently waive *Miranda* rights.[199] In 1970, a study was conducted[200] wherein juveniles were interviewed using both the standard formal *Miranda* warnings and modified, simplified warnings.[201] The interviews were analyzed to compare the juveniles' understanding of the formal warning compared with the simplified warnings. The researchers concluded that 94 percent of the juveniles who received either the formal or simplified warnings did not intelligently relinquish a known right.[202]

An analysis of two empirical studies on juveniles' capacity to waive *Miranda* rights was the subject of a 1980 law review article.[203] The author concluded that waiver of *Miranda* rights by younger juveniles is not made intelligently, knowingly, and voluntarily because the juveniles tested do not understand the nature and significance of their rights.[204] Juveniles below the age of fifteen answered research questions with the apparent belief they were compelled to confess without an attorney present.[205] The researchers concluded that the vast majority of these juveniles are far less likely than adults to comprehend the na-

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199. *See infra* notes 17-18.

200. Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970). In this study, 90 juveniles were interviewed using formal *Miranda* warnings and simplified warnings. The simplified warnings were:

> You don't have to talk with me at all, now, or later on, it is up to you.
> If you decide to talk to me, I can go to court and repeat what you say, against you.
> If you want a lawyer, an attorney, to help you decide what to do, you can have one free before and during questioning by me now or by anyone else later on.
> Do you want me to explain or repeat anything about what I have just told you?
> Remembering what I've just told you, do you want to talk to me?

Id. at 40.

201. *Id.*

202. *Id.* at 53. *But see Now My Son, You Are a Man: The Judicial Response to Uncounseled Waivers of Miranda Rights by Juveniles in Pennsylvania*, 92 DICK. L. REV. 153, 175 n.138 (1987).

203. Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980) [hereinafter *Juveniles' Capacity to Waive Miranda Rights*].

204. *Id.* at 1166.

205. Grisso & Promicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUMAN BEHAV. 321 (1977). *See also The Judicial Response to Uncounseled Waivers of Miranda Rights by Juveniles in Pennsylvania*, 92 DICK. L. REV. at 176 (1987).

ture and significance of the *Miranda* rights.[206]

The research in *Juveniles' Capacity to Waive Miranda Rights*[207] shows that non-learning disabled juveniles are unlikely to effectively waive *Miranda* rights. Learning disabled juveniles typically have communication disorders that are likely to affect a juvenile's cognitive abilities.[208] After considering this research, it appears that a learning disabled juvenile would be even more unlikely to knowingly and intelligently waive *Miranda* rights.

As stated above, California courts have followed the *Connelly* approach when analyzing adult waivers by ending the waiver analysis if there is no evidence of coercion.[209] The courts above the trial court level which discuss *Miranda* waivers in terms of the *Connelly* holding involve adult, rather than juvenile defendants.[210] One appellate court decision, *In re John S.*,[211] involves a juvenile. Yet because there was no claim the juvenile was unable to make an intelligent and knowing waiver, the *John S.* court reached its holding without discussing *Connelly*.[212] Nevertheless, the adult waiver cases discussed below are instructive as the kind of analysis post-*Connelly* juvenile courts may utilize when reviewing waivers by learning disabled juveniles.

In 1987, two months after *Connelly*, the court in *People v. Green*[213] held that defendant's waiver was uncoerced and therefore voluntary.[214] The court referred to *Connelly* in stating "*Miranda* protects defendants against governmental coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that."[215] The court continued: "We sim-

206. *Juveniles' Capacity to Waive Miranda Rights*, 68 CALIF. L. REV. at 1160.

207. *See infra* note 202.

208. *See infra* notes 17-19 and accompanying text.

209. *See infra* note 195.

210. *Id.*

211. *In re* John S., 199 Cal. App. 3d 441, 245 Cal. Rptr. 17, *cert. denied*, 109 S. Ct. 316 (1988).

212. *Id.* at 446, 245 Cal. Rptr. at 19-20.

213. People v. Green, 189 Cal. App. 3d 685, 234 Cal. Rptr. 497 (1987).

214. *Id.* at 691, 234 Cal. Rptr. at 499, 500. (In *Green*, defendant appealed his manslaughter conviction claiming his waiver was invalid because he honestly, yet mistakenly believed that he could go home after being interrogated. The court stated that defendant's mistaken belief he would be allowed to go home after the interrogation "does not render his waiver of his right to counsel invalid in the absence of any evidence demonstrating that he was induced by the police to harbor this belief.").

215. *Id.* at 693, 234 Cal. Rptr. at 500 (citing *Connelly*, 107 S. Ct. at 524 (1986)).

ply cannot conclude that there is evidence of governmental coercion in this case."[216] Although claiming to follow *Connelly*, the court stated California waiver standards in terms that included the knowing and intelligent requirement as well as being voluntary.[217]

In upholding a manslaughter conviction, the California Supreme Court in *People v. Sultana*[218] also cited the *Connelly* coercion prerequisite for a waiver or confession to violate the Fifth Amendment.[219] The Court stated that under *Connelly*, "a confession cannot be 'involuntary' within the meaning of the Due Process Clause of the Fourteenth Amendment unless there is coercive police activity."[220] The court, in following *Connelly*, noted that under the California Constitution coercive police activity is not a prerequisite for a confession to be involuntary.[221]

In 1989, the California Supreme Court in *People v. Markham*[222] held that under Proposition 8,[223] the state must follow the federal constitution in proving the voluntariness of defendant's confession only by a preponderance of the evidence, and not beyond a reasonable doubt.[224] Although the *Markham* court affirmed the lower court's determination that defendant's waiver was knowing and intelligent,[225] the court only analyzes the

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216. *Id.* at 693, 234 Cal. Rptr. at 500.

217. *Id.* at 691, 234 Cal. Rptr. at 499. (The *Green* Court stated: "In California, before a confession can be used against a defendant, the prosecution has the burden of proving that it was voluntary and not the result of any form of compulsion or promise or reward. . .The totality of the circumstances must be examined to determine whether the confession was the product of a *rational intellect* and free will." *Id.* (emphasis added)).

218. People v. Sultana, 204 Cal. App. 3d 511, 251 Cal. Rptr. 115 (1988) *cert. denied*, 109 S. Ct. 1323 (1989).

219. *Id.* (" 'The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion,' " citing *Connelly*, 107 S. Ct. at 523 (1986)).

220. *Id.* at 522, 251 Cal. Rptr. at 120.

221. *Id.* at n.5. *See, e.g.*, People v. MacPherson, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970). *See also infra* notes 106-09 and accompanying text.

222. People v. Markham, 49 Cal. 3d 63, 775 P.2d 1042, 260 Cal. Rptr. 273 (1989).

223. CAL. CONST. art. I, § 28(d) [hereinafter Truth in Evidence provision]. *See infra* notes 111-16 and accompanying text.

224. *Markham*, 49 Cal. 3d at 65 n.2, 775 P.2d at 1043 n.2, 260 Cal. Rptr. at 274 n.2 (1989) (The *Markham* court stated that the federal preponderance of the evidence standard "applies both to a determination of voluntariness in the "traditional sense" (i.e., whether a confession was "coerced" by improper acts or overreaching on the part of the police) - and to a determination of whether a defendant's waiver of *Miranda* rights was voluntary." (citing *Connelly*, 479 U.S. at 168-69 (1986))).

225. *Id.* at 66, 70, 775 P.2d at 1044, 1047, 260 Cal. Rptr. at 275, 279.

waiver in terms of its voluntariness.[226] The court upheld the determination by the trial court and magistrate that the defendant's waiver had been knowing, intelligent, and voluntary.[227]

Markham focuses on the relationship between state and federal standards of review for voluntariness. The Court's discussion of voluntariness reflects the confusion surrounding the term "voluntary" as used in *Connelly*.[228] The decision also reflects the trend toward applying federal constitutional standards governing rights afforded criminal defendants to those rights afforded under the California Constitution.[229] In summarizing previous decisions in which the court applied Proposition 8, the court restated the intention of California voters for Proposition 8 to abrogate "judicial decisions which had required the exclusion of relevant evidence solely to deter police misconduct in violation of a suspect's constitutional rights under the state constitution, while preserving legislatively created rules of privilege."[230] The court, in citing *In re Lance W.*, concluded that California voters believe, as shown by Proposition 8, that "the exclusion of evidence is not an acceptable means of implementing those rights, except as required by the Constitution of the United States."[231] The *Markham* court's analysis of the exclusion of evidence under Proposition 8 shows how difficult it would be for California courts to vary from the federal waiver standard contained in *Connelly*.

Justice Mosk, in his concurring opinion in *Markham*, revealed judicial dissatisfaction with the voter trend toward limit-

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226. *Id.* at 70, 775 P.2d at 1046, 260 Cal. Rptr. at 278. *See also infra* note 223.

227. *Id.* at 66, 70, 775 P.2d at 1044, 1047, 260 Cal. Rptr. at 275, 278.

228. *See infra* note 223.

229. *See infra* notes 229-32 and accompanying text.

230. *Id.* (citing People v. May, 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988)) (In *May*, the Court held that the rule announced in People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), which held that a statement obtained in violation of a suspect's privilege against self incrimination cannot be used for impeachment under state law, did not fall under the exception in Proposition 8 for existing statutory rules of evidence relating to privilege. At issue was California Evidence Code section 940, which states: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may incriminate him." CAL. EVID. CODE § 940 (West 1991)).

231. *Markham*, 49 Cal. 3d at 69, 775 P.2d at 1042, 260 Cal. Rptr. at 277 (citing *In re* Lance W., 37 Cal. 3d 873, 887, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639-40 (1985)).

ing individual rights in California.[232] Justice Mosk cited federal authority allowing states to expand individual rights beyond those conferred in the Federal Constitution.[233] Justice Mosk stated: "The blame for the sorry situation in which we find ourselves must be placed squarely on Proposition 8. That ill-conceived measure has struck down California precedents on individual rights as it has encountered them in its path of destruction."[234] As shown by Justice Mosk's concurrence, at least one member of the California Supreme Court is reluctant to restrict state rights to those afforded by the Federal Constitution.

In *People v. Clark*,[235] the California Supreme Court noted the trial court's determination that the defendant was mentally competent to make a voluntary and intelligent waiver of counsel.[236] While the court stated it was unnecessary to decide the waiver issue to resolve the case, the court noted that under *Connelly*, there must be evidence of police coercion for there to be a violation of the Fifth Amendment.[237] Although the court follows *Connelly* in requiring coercion for a Fifth Amendment violation,[238] the *Clark* defendant, as in *Connelly*, did not lack the cognitive abilities to effectively waive his rights.[239] This leaves open the possibility that, as discussed above, *Connelly* does not control where an individual *lacks sufficient cognitive abilities* to effectively waive *Miranda* rights.

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232. *Markham*, 49 Cal. 3d at 71, 775 P.2d at 1048, 260 Cal. Rptr. at 279 (Mosk, J., concurring).

233. *Id.* (citing Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980), which states that federal court decisions do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

234. *Markham*, 49 Cal. 3d 63, 71, 775 P.2d 1042, 1048, 260 Cal. Rptr. 273, 280 (1989).

235. People v. Clark, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

236. *Id.* at 614, 789 P.2d at 147, 268 Cal. Rptr. at 419.

237. *Id.* at 620 n.30, 789 P.2d at 152 n.30, 268 Cal. Rptr. at 424 n.30 (The *Clark* court stated: "Defendant seeks to rely on his right against self-incrimination as an independent basis for exclusion of his statements. Since there was no state involvement or compulsion in eliciting his statements, no violation of his privilege against self-incrimination occurred." (citing *Connelly*, 479 U.S. at 164 (1986))).

238. *Id.*

239. *Id.* at 614, 789 P.2d at 147, 268 Cal. Rptr. at 419 ("The [lower] court noted that defendant was *mentally competent* to represent himself and *to make a voluntary and intelligent waiver of counsel.*") (emphasis added).

The appellate court in *People v. Cox*[240] rejected a claim that a statement should be excluded because defendant's mental condition precluded knowledgeable and voluntary waiver. The court rejected this argument because it was impermissibly based on Fifth Amendment grounds.[241] The court interpreted *Connelly* as explicitly rejecting the proposition that a mental condition can preclude knowledgeable and voluntary waiver of Fifth Amendment rights.[242] The *Cox* court concluded that under the progeny of cases interpreting Proposition 8, it is "obliged to follow federal precedent in determining admissibility of confessions or admission dependant upon the factor of voluntariness.[243] We therefore follow *Colorado v. Connelly* and affirm the trial court's ruling of admissibility."[244] Yet *Cox* acknowledges that California may still exclude evidence under Proposition 8, even though under *Connelly* the admission is not coerced.[245] Therefore, a confession may be excluded if, for example, it is inherently unreliable or unfairly prejudicial under California evidentiary law. Confessions by learning disabled juveniles could thus be excluded in this manner.

The California Supreme Court held that a learning disabled defendant's *Miranda* waiver was voluntary in *People v. Kelly.*[246]

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240. People v. Cox, 221 Cal. App. 3d 980, 270 Cal. Rptr. 730 (1990).

241. *Id.* at 986, 270 Cal. Rptr. at 733.

242. *Id.*

243. *Id.* at 986-87, 270 Cal. Rptr. at 734 (referring to People v. MacPherson, 2 Cal. 3d 109, 115, 465 P.2d 17, 21, 84 Cal. Rptr. 129, 133 (1970); People v. Sultana, 204 Cal. App. 3d 511, 522 n.5, 251 Cal. Rptr. 115, 121 n.5 (1988); People v. Markham, 49 Cal. 3d 63, 67 n.3, 68, 775 P.2d 1042, 1044 n.3, 1045, 260 Cal. Rptr. 273, 275 n.3, 276 (1989); *In re* Lance W., 37 Cal. 3d 873, 888-89, 694 P.2d 744, 753-54, 210 Cal. Rptr. 631, 641 (1985)).

244. *Cox*, 221 Cal. App. 3d at 987, 270 Cal. Rptr. at 734 (1990).

245. *Id.* at 986 n.3, 270 Cal. Rptr. at 733 n.3 (citing *Connelly*, 479 U.S. at 166-67) (The *Cox* court cited *Connelly* which states, in discussing inquiries into the state of mind of a criminal defendant who has confessed,

> "We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary rules of the forum, (cite) and not by the Due Process Clause of the Fourteenth Amendment.").

246. People v. Kelly, 51 Cal. 3d 931, 950-51, 275 Cal. Rptr. 160, 171-72 (1990) (In *Kelly*, the court held that the defendant, in asking "How do I proceed?", was seeking clarification as to how to waive his rights, and was not expressing confusion about the nature of his rights. The court concluded that defendant's waiver was knowing, intelligent, and uncoerced. Evidence showed that defendant's I.Q. was in the low-normal to

The court stated "the litmus test of a valid waiver or confession is voluntariness."[247] The Court cited *Moran* as its authority for its voluntariness litmus test: "The relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception."[248] Yet there is no reference to the second, equally important *Moran* requirement - that "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[249] *Moran* states that the "totality of the circumstances surrounding the interrogation"[250] must reveal "*both* an uncoerced choice and the requisite level of comprehension" for the waiver to have been effective.[251] Although the *Kelly* court discusses the waiver only in terms of its voluntariness, the court refers to both *Moran* requirements - that the totality of the circumstances determines whether the defendant knowingly and voluntarily waived *Miranda* rights.[252] Thus, it appears that the California Supreme Court does not consider the knowing and intelligent requirement as having vitality separate from the voluntariness analysis. The court ends its analysis with the voluntariness test prescribed in *Connelly*. Thus, under *Kelly*, a waiver by a learning disabled juvenile could only be invalidated if held to be involuntary due to insufficient cognitive abilities, as discussed above in section (A) of the analysis. The court would not engage in any analysis of whether the waiver was knowing or intelligent unless there was evidence of coercion.

Recently, the Illinois Supreme Court, in *People v. Bernasco*,[253] stated that a valid *Miranda* waiver must be knowing and intelligent in addition to being voluntary.[254] The

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borderline range, CAT-scans revealed atrophy of brain tissue, and had learning disabilities and attention-deficit disorder. None of this evidence was presented at the suppression hearing. The court stated that "standing alone such evidence does not establish that the waiver was involuntary absent coercion." *Id.* at 951, 275 Cal. Rptr. at 172).

247. *Id.* at 950, 275 Cal. Rptr. at 171.

248. *Id.* (citing *Moran*, 475 U.S. at 421 (1986)).

249. *Moran*, 475 U.S. at 421 (1986).

250. *Id.* (citing Fare v. Michael C., 442 U.S. at 725 (1979); North Carolina v. Butler, 441 U.S. at 374-75 (1979)).

251. *Id.* (emphasis added).

252. *Id.* (citing North Carolina v. Butler, 441 U.S. at 373 (1979)).

253. People v. Bernasco, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991).

254. *Id. See also* Nat'l L. J., Dec. 24, 1990, at 25, col. 4.

Bernasco court includes in its analysis the second *Moran* requirement to its waiver analysis omitted by the California Supreme Court in *Kelly* - "The waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."[255] The court embarks on an extensive judicial analysis of the conflicting signals regarding the knowing and intelligent requirement contained in *Connelly* and the United States Supreme Court waiver decisions thereafter.[256] The court's analysis helps explain why *Connelly* strongly implies that the only appropriate place for the knowing and intelligent requirement is in terms of state evidentiary rules,[257] yet post-*Connelly* United States Supreme Court cases deciding the waiver issue continue to speak in terms of "knowing and intelligent" waiver.[258]

The *Bernasco* court stated that "*Connelly* merely means that, in general, issues of intelligent knowledge are separate issues from issues of voluntariness."[259] The court noted that *Connelly* did not overrule *Moran*'s requirement that a *Miranda* waiver be knowing and intelligent as well as voluntary. The *Bernasco* court reasoned that *Connelly* merely analyzed the constitutional voluntariness component of a confession's admissibility and of a waiver's validity.[260] The *Bernasco* court concluded that where a confession is given in situations not requiring *Miranda* warnings (as in the first confession in *Connelly*), only voluntariness, rather than intelligent knowledge need be shown to satisfy the federal constitution. Yet where a defendant confesses after being given *Miranda* warnings (as in the subsequent confessions in *Connelly*), both intelligent knowledge and voluntariness remain as separate requirements.[261]

In *Bernasco*, the juvenile accused had many traits in com-

255. *Id.* at 782 (citing *Moran*, 475 U.S. at 420 (1986)).

256. Moran v. Burbine, 475 U.S. 412 (1986); Patterson v. Illinois, 487 U.S. 285 (1988); Colorado v. Spring, 479 U.S. 564 (1987).

257. *Connelly*, 479 U.S. at 166-67 (1986) (Voluntariness inquiries into a defendant's state of mind separate from any police coercion should be resolved by state evidentiary rules pertaining to reliability; such matters are not governed by the Fourteenth Amendment's Due Process Clause).

258. *See, e.g., infra* notes 69-75, 244 and accompanying text.

259. *Bernasco*, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991) (page numbers were not yet available when this article was published.).

260. *Id.* (citing *Connelly*, 479 U.S. at 167, 170 (1986)).

261. *Id.*

mon with a learning disabled juvenile. He had an I.Q. of 80, and was reading and comprehending at the fourth grade level. A psychologist testified at trial that the juvenile did not have the ability to understand the legal terms contained in the *Miranda* waiver form he signed.[262] The trial court noted he had substantial difficulty in understanding routine questions and was unable to understand simple concepts while testifying.[263] The Court upheld the trial court's determination that the juvenile's lack of cognitive abilities precluded knowing and intelligent waiver.[264]

C. THE *Connelly* ADULT COERCION STANDARD DOES NOT APPLY TO JUVENILE PROCEEDINGS

As discussed above, the *Connelly* majority finds it inappropriate for the Supreme Court to make "sweeping inquiries into the state of mind of a *criminal defendant* who has confessed" unless the police use coercion in obtaining the confession.[265] Yet the *Connelly* Court considered the voluntariness of a waiver by

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262. People v. Bernasco, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991); People v. Bernasco, 185 Ill. App. 3d 480, 541 N.E.2d 774, 776 (1989).

263. People v. Bernasco, 185 Ill. App. 3d 480, 541 N.E.2d 774, 776 (1989).

264. *Bernasco*, 138 Ill. 2d 349, 562 N.E.2d 958 (1990), *cert. denied*, 111 S. Ct. 2052 (1991).

> If intelligent knowledge in the *Miranda* sense means anything, it means the ability to understand the very words used in the warnings. . .To waive rights knowingly and intelligently, one must at least understand basically what those rights encompass and minimally what their waiver will entail. Here, defendant was found not to understand fundamental terms contained in the *Miranda* warnings of his rights, not to have been able to form an intent to waive those rights, and not to have a normal ability to understand questions and concepts. Such findings, if borne out by the evidence, are sufficient to warrant the conclusion that defendant did not waive his *Miranda* rights knowingly and intelligently and hence to justify suppressing his confession.

The court cited as additional authority: Note, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants*, 14 AM. J.L. MED. 431, 432-33, 440-44 (1989); Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534, 536-37, 546-56 (1987); Note, *Now My Son, You Are a Man: The Judicial Response to Uncounseled Waivers of Miranda Rights by Juveniles in Pennsylvania*, 92 DICK. L. REV. 153, 168-171, 175-84 (1987); Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1018-19, 1042-54 (1988); Note, *Colorado v. Connelly: The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary*, 33 VILL. L. REV. 895, 907, 920-22 (1988)).

265. *Connelly*, 479 U.S. at 166-67 (1986) (emphasis added).

an adult, not a juvenile.

It is unclear whether the holding abrogates the heightened scrutiny traditionally afforded juvenile waiver inquiries by courts prior to *Connelly*.[266] If the traditional protection afforded juveniles under federal case law is unchanged by *Connelly*, then waiver by juvenile offenders may be involuntary even absent police coercion. If the *Connelly* holding does not control juvenile waiver determinations, then subsequently, California courts would be free to follow *MacPherson*[267] and consider a learning disability as a factor in determining the voluntariness of a juvenile waiver.[268]

Juvenile courts in California have not expressly commented on whether the *Connelly* holding governs juvenile proceedings.[269] Yet juvenile courts may look toward criminal courts for guidance on this issue. Criminal courts have narrowly followed *Connelly* on the waiver issue. Yet both federal and California courts have consistently applied heightened scrutiny when analyzing juvenile waivers.[270] No court has yet held that *Connelly* abrogates this heightened scrutiny.

VI. CONCLUSION

Learning disabled juveniles are likely to lack sufficient cognitive abilities to effectively waive *Miranda* rights. Their lack of cognitive abilities can preclude either voluntary or knowing and intelligent waiver. The heightened protection afforded juvenile waivers provides additional strength to the argument that in the totality of the circumstances, a learning disability is a significant factor in determining the validity of juvenile waivers.

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266. *See, e.g., In re* Gault, 387 U.S. 1 (1967); People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 596 (1967); *In re* Anthony J., 107 Cal. App. 3d 962, 166 Cal. Rptr. 238 (1980); *See also infra* note 14.

267. *MacPherson*, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970).

268. People v. Sultana, 204 Cal. App. 3d 511 n.5, 251 Cal. Rptr. 115 n.5 (1988) ("It appears that under California Constitutional standards *coercive police activity is not a necessary predicate to finding that a confession was involuntary.*" *Id.* (emphasis added) (citing, *e.g.*, People v, MacPherson 2 Cal. 3d 109, 115, 465 P.2d 17, 21, 84 Cal. Rptr. 129, 133 (1970))).

269. *See infra* notes 210-11.

270. *See infra* note 14 and accompanying text.

The *Connelly* decision is a significant departure from the original protections afforded an accused by the *Miranda* Court. California voters have used the ballot proposition process to further restrict criminal defendants' rights under the state constitution. Yet some courts are beginning to recognize the relationship between learning disabilities and juvenile *Miranda* waivers. The Supreme Court of Illinois in the *Bernasco* decision is an excellent example of judicial recognition of this relationship and of harmonizing it with the *Connelly* coercion requirement. If the *Bernasco* interpretation of *Connelly* remains unchallenged by the United States Supreme Court, other courts may perceive an avenue toward arriving at similar interpretations.