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APACHE COUNTY SUPERIOR COURT

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.. to do justly, to love mercy, and to walk humbly with God Micah 6:8

IN THE SUPERIOR COURT, STATE OF ARIZONA
APACHE COUNTY, JUVENILE DIVISION

In the Matter of)	
)	Case No. JV 2008- 065
Christian Ryan Romero)	
)	Motion to Suppress Statements & Request for
)	Voluntariness Hearing
A person under 18 years)	[Hearing Requested, 1 day, or so]
)	

The Juvenile, through counsel and pursuant to the 5th and 6th Amendments to the United States Constitution, the Due Process Clause of the 14th Amendment to the United States Constitution, Art. 2 sections 4 and 10 of the Arizona Constitution, A.R.S. section 13-3988, and applicable case law, moves the Court to suppress all statements made by Christian after he was questioned by law enforcement, while in custody, and prior to being advised of his Miranda warnings. In addition, persons from child protective services interviewed Christian at a later time while he was in the detention facility, without any basis to do so, and acquired additional statements from him, which also must be suppressed as he had appointed counsel who was not contacted prior to the interview, nor was he Mirandized prior to the interview with CPS. In addition, the statements made were not voluntarily provided such that the government should be precluded from using them for any purpose at trial. If the government timely objects in writing an evidentiary hearing is requested and thereafter a ruling by this Court granting the motion and suppressing all the statements made by Christian and precluding their use for any purpose by the government at trial.

CHRISTIAN. Then I saw the door open, I saw Tim right there. And I ran, and I said *Dad, Dad*, and I went upstairs, where I saw him.

AVILA: Then you saw um? Okay, and then what...

CHRISTIAN: And there was blood all over his face, I think. And I think I touched im.

AVILA You think you *did* touch him? What did you do when you *touched* im?

CHRISTIAN: I just kinda, would check whether he was a little bit alive?

AVILA You checked if he was a little bit alive? Okay. And, how did you *do* that?

CHRISTIAN: I kinda, just went like that

AVILA With yer foot?

CHRISTIAN: I think so, yeah

AVILA: Okay. And .

CHRISTIAN: And I didn't hear anything, and I just saw blood and then, I cried fer like thirty minutes, just cryin (unk) to im.

[Transcript of interview with Commander Avila, Detective Neckel and Christian Romero on 11/6/08; pp 4-5]

FACTS

On November 5, 2008 police responded to a residence with two individuals who appeared to have been shot. Police investigated the crime and collected evidence. Det. Avila conducted a brief, unrecorded, interview with Christian, an eight (8) year old boy. The officer indicated that Christian said he arrived at the house and both individuals were already dead

Later that night, Lt. Jones and Sgt. Rodriguez spoke with Tanya Romans, who was advised of the circumstances and statements made by Christian, and indicated she

believed Christian had lied about his involvement as she had heard his voice on a phone call with Tim Romans only minutes before the alleged killings. Based on this information Lt Jones and Sgt. Rodriguez discussed possible scenarios of how events unfolded, one being that Christian had been the shooter. A briefing was held with 10 to 15 law enforcement officers discussing potential options of the case. Lt. Jones mentioned the potential scenario that Christian may have been the shooter and advised the group of the statement by Tanya Romans stating Christian was lying about his involvement in the incident. Law enforcement decided have Christian re-interviewed, knowing this information and mentioned scenarios.

Within 36 hours of Christian seeing his father and father's friend dead in his house and covered in blood he was again questioned by two law enforcement officers. The officers, Detective Neckel from the St. Johns Police Department (who had been a detective for a single day at that point) and Commander Avila of the Apache County Sheriff's Office, went to where Christian was staying, at Liz Romero's home, and indicated their desire to question Christian. The grandfather, Leroy Romero, objected to the officers wanting to question Christian again and stated they could not.

The officers were irritated at the rebuff and left the residence to search for Christian's clothing at his aunt Francine's home (who also works for Apache County Sheriff's Office) only to return within an hour to again ask Mr. Romero if they could question Christian. The officers made numerous promises to Leroy Romero, upon which he relied, regarding conditions for the interview with Christian. Mr. Romero begrudgingly agreed to allow them to question his grandson, again, after the promises of

law enforcement and the prodding of his daughter to allow the officers to continue their investigation and let them re-question Christian.

The officers had the family drive Christian to the St. Johns Health Center in St. John's, Arizona to conduct what officers called a "forensic interview." There were four (4) individuals with the Romero family present at the interview site (Liz Castillo, Leroy Romero, Burnadette Kodell (a family friend and principle of a school), and Tiffany Romero)) Each member of the Romero family present requested to be in the room with Christian during the interview. All requests were denied by law enforcement. An additional request was made by Leroy Romero to have a legal representative present, or a child advocate present, for Christian, which was also denied by the officers. Neither officer Neckel nor officer Avila mentioned any of these facts in any of their reports, nor the promises they made to Mr. Leroy Romero.

Two officers, both with guns--Neckel in full uniform and Avila with Sheriff's Office garb--took Christian into a 10 foot by 10 foot room and interrogated him. At that time the officers had probable cause at that time to believe that Christian had committed a violation of A.R.S. section 13-2704 given his previous interview and the statement by Tanya Romans, however did not feel it necessary to Mirandize him. The officers sat in chairs across from Christian in a triangle posture. At no time did any officer advise Christian that he was a suspect in any crime. At no time prior to questioning Christian, or any other time for that matter, did the officers advise him of his Miranda warnings. [The first time Christian heard his Miranda warnings read were at the detention hearing when Judge Roca advised him] At no time did the officers allow him to speak with an attorney, or advise him that he was not required to answer any of their questions. At no

time did the officers advise him that he could have a parent present, in fact they advised all his relatives that they could NOT be present during the interrogation. At no time did the officers advise Christian that he would not be going home with his family after the questioning. At no time did the officers determine, through testing or otherwise, whether Christian could understand what they were asking of him.

During the interrogation the officers admittedly lied to Christian on at least two occasions, in hopes of getting information out of him, after advising him at the beginning of the interrogation of the following:

AVILA: This is the room that we talk to people. And we make a promise to each other that we're only gonna tell the truth.

CHRISTIAN (nods)

AVILA Okay?

CHRISTIAN: 'kay.

AVILA: I have to tell you the truth, I can't lie, Debbie can't lie, and you can't lie to us.

CHRISTIAN: (nods)

AVILA: Is that okay?

CHRISTIAN: Yeah.

AVILA: We're just gonna tell the truth. Okay.

CHRISTIAN: (nods)

AVILA: We're not gonna make anything up, we're just gonna be honest, okay?

CHRISTIAN: (nods)

AVILA: Even if it's bad stuff, okay, we just need ta, talk the truth, just us, in this room. Is that okay?

CHRISTIAN: Yeah.

[Id. at 1]

Commander Avila lied to the 8 year old boy when she said that someone had seen him in the residence at the time of the shootings, which was knowingly false. The officer lied to Christian when she said that all the shell casings matched one weapon, which was not known at that time, or now for that matter. Both officers indicated they are trained that they can lie to *suspects* in order to get them to confess, however both officers indicated they were not trained to lie to victims or witnesses in order to get them to make a statement. Det. Neckel indicated she was not trained to lie to eight (8) year old suspects, witnesses, or victims in order to get them to make statements. The officers' body posture toward Christian changed during the interview, moving closer to him, which both officers indicated is a technique they learned to make suspects feel less comfortable. Lastly, one officer told Christian he would be able to go home with his mother once he answered the questions, a promise that Christian relied upon and was ultimately false.

After Christian was arrested and taken to the detention facility in St. Johns, Ms. Orona, from Child Protective Services, entered the facility and questioned Christian. At no time was Christian Mirandized prior to this questioning. This government agent secured incriminating statements and then quickly provided this information to the Apache County Attorney's Office. These statements were also taken in violation of his Miranda rights and must be suppressed.

Legal Bases to Suppress Evidence

“Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right

against self-incrimination and the Due Process Clause of the Fourteenth Amendment.” *Dickerson*, 530 U.S. at 433, 120 S.Ct. 2326. Whereas the Fifth Amendment by its text safeguards the individual against being “compelled in any criminal case to be a witness against himself,” U.S. CONST., amend. V, the due process protection stems from the principle that “tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment’s guarantee of fundamental fairness,” *Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 88 L Ed.2d 405 (1985); *see also id* at 109, 106 S.Ct. 445 (“[C]onfessions procured by means ‘revolting to the sense of justice’ [can]not be used to secure a conviction” (quoting *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S.Ct. 461, 80 L.Ed. 682 (1936))). See also *Doody v Schriro*, L 4937964, 9 -20 (C.A.9 (C.A.9 (Ariz.),2008).\

Fifth Amendment Right

The Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be compelled in any criminal case to be a witness against himself.” U.S. Const. amend V. The Arizona Constitution includes a similar provision: “No person shall be compelled in any criminal case to give evidence against himself” ARIZ. CONST. art. 2, § 10. In *Miranda*, the Supreme Court held that this privilege against compulsory self-incrimination applies in all custodial interrogations and binds the states. 384 U.S. at 478, 86 S.Ct. 1602; *see also Chavez v. Martinez*, 538 U.S. 760, 772, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (“[T]he Miranda exclusionary rule [is] a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in [a] criminal case of confessions obtained through coercive custodial questioning.”). *In re Andre M.*, 207 Ariz. 482, 88 P.3d 552.

Miranda violation

Miranda applies to “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id*, see also *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985) The triggering event for *Miranda* warnings is custodial interrogation by state law enforcement agents. *Miranda*, 384 U.S. at 444-56, 86 S.Ct. at 1612-13, see *State v Wright*, 161 Ariz. 394, 397, 778 P.2d 1290, 1293 (App.1989). Matter of Navajo County Juvenile Action No. JV91000058, 183 Ariz. 204, 205-206, 901 P.2d 1247, 1248 - 1249 (Ariz.App. Div. 1, 1995). *Miranda* established an irrebuttable “presumption of coercion” for unwarned statements made during custodial interrogations. See *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Christian was in Custody for Purposes of Miranda

The main question that must be answered in this part of the motion is whether Christian was in custody for purposes of *Miranda*. It is clear he was questioned by law enforcement, thereby establishing the interrogation prong. It is clear he was not advised of his *Miranda* warnings at any time during the interrogation. Therefore, if he was in custody a *Miranda* violation occurred and all statement obtained must be suppressed.

The test of “custodial interrogation” is whether reasonable man would feel that he was deprived of his freedom of action in any significant way. State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 (1977) The factors that bear on the issue of whether an adult is in custody, for *Miranda* purposes, also apply to juveniles, but with additional elements that bear upon a juvenile’s perceptions and vulnerability, including the juvenile’s age,

maturity, and experience with law enforcement, and the presence of a parent or other supportive adult. State v. Eggers, 215 Ariz. 472, 160 P.3d 1230 (App. Div.2 2007).

For *Miranda* purposes for adults, factors indicative of custody include: whether objective indicia of arrest were present; site of interrogation; length and form of interrogation; and whether investigation had focused on accused. State v. Stanley, 167 Ariz. 519, 809 P.2d 944, certiorari denied 112 S.Ct. 660, 502 U.S. 1014, 116 L.Ed.2d 751 (1991). In applying these factors to Christian it does not appear the indicia of arrest were present, however two armed and pretty much uniformed officers took Christian away from his family into a 10 by 10 foot room to question him. He knew that his family wanted to be present with him during the questioning and further knew that the officers told the family they could not be present during the questioning. The room had only one door that Avila obstructed with her body during the interview. He was not handcuffed, but was not told he could stop the interview at anytime. Under these circumstances would a reasonable 8 year old feel as though he/she could get up off the couch and walk out the door of the interrogation room without being stopped by the officers? No way in hell.

The site of the interrogation was a medical office, but more importantly a 10 foot by 10 foot room with a single door that was obstructed by an officer during the interrogation. It was not at the police station, but while in the room it was probably difficult to tell that by the surroundings. The single entrance and exit to the room enhanced the inability to freely come and go as one pleases, especially when an officer is sitting in front of that only exit.

The length of the interrogation was approximately one hour. During that time Christian was not offered water (until the end of the interrogation) or food, nor given any offers to use the restroom. One hour for an adult is not unduly long, however for an eight year old it is.

The form of the interrogation began with officers ingraining the importance of telling the truth and then quickly entering into the facts. The officers, quite early on, began to point out what they believed were lies Christian was telling and a little later began an accusing tone with their questions of him, challenging his statements with some lies of their own. The investigation clearly had focused on Christian. No matter how it is explained law enforcement believed he had lied to them, a crime in and of itself, and went into the interrogation knowing their goal was to get him to change his story to something they wanted to hear. Whether law enforcement truly believed Christian was the shooter prior to the interview is up for debate, however what is clear is that officers had NOT thrown out the possibility that he was the shooter prior to the interview. Factors going to custody as they apply to an adult are present with the interrogation of Christian.

Applying the aforementioned juvenile factors to Christian will make it clear he was in custody for purposes of Miranda. Christian is an eight (8) year old boy. Christian's level of maturity is minimal at best. Christian has NO prior experience with law enforcement (at least in a professional capacity). Three of Christian's family members (Tiffany Romero-step mother, Leroy Romero-grandfather, and Liz Romero-grandmother) requested that they be present during the interview with Christian. Law enforcement denied all their requests. Because Christian was present during these requests by his family members and rebuffs by law enforcement there was no logical

reason for him to separately request a parent be present. The officers lied to Christian and both indicated that lying to witnesses and victims are not the norm and more likely unheard of when dealing with children this young. The officers indicated they are trained to lie to adult suspects in order to obtain confessions, but denied Christian was a suspect. Even if Christian was a suspect prior to the interview, which law enforcement denies, officers indicated lying to an 8 year old in order to obtain a confession is not something they learned in their interrogation training.

It is clear from the circumstances that Christian's freedom of movement was denied in a significant way, thus triggering the need for him to be advised of his *Miranda* rights. Because this was not done all statements made by Christian after he entered the interrogation room until the detention hearing on 11/8/08 must be suppressed for this violation of the law.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held.

'* * * the prosecution may not use statements, whether *exculpatory* or *inculpatory*, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' 384 U.S. at 444. 86 S.Ct. at 1612, 16 L. Ed.2d at 706. State v. Taylor, 112 Ariz. 68, 537 P.2d 938.

Based on this Supreme Court precedent statements made in violation of *Miranda* need not be only incriminatory and as such ALL statements resulting from questioning or its equivalent must be suppressed.

With no reading of Miranda all statements taken were taken in violation of Miranda and must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Statement Made by Christian Was Not Voluntary

In Arizona, confessions are presumed to be involuntary, and the State must rebut this presumption by a preponderance of the evidence. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990); *State v Jimenez*, 165 Ariz. 444, 448-49, 799 P.2d 785, 789-90 (1990), *Navajo County Juv Action No. JV91000058*, 183 Ariz. 204, 206, 901 P 2d 1247, 1249 (App.1995); *Maricopa County Juv. Action No. JV-501010*, 174 Ariz. 599, 601, 852 P.2d 414, 416 (App.1993). See also *In re Timothy C*, 194 Ariz. 159, 162, 978 P.2d 644, 647 (Ariz.App. Div. 1,1998) When a juvenile confession occurs as a result of police questioning, the greatest care must be taken to assure that the admission was voluntary *State v Huerstel*, 206 Ariz. 93, 75 P 3d 698 (2003). The Supreme Court has long recognized that “admissions and confessions of juveniles require special caution.” *In re Gault*, 387 U.S. 1, 45, 87 S.Ct 1428, 18 L.Ed.2d 527 (1967); *see also Roper v Simmons*, 543 U.S. 551, 569-70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (discussing the unique vulnerabilities of juveniles, citing, *inter alia*, *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) and *Eddings v Oklahoma*, 455 U.S. 104, 115-16, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). *Doody v. Schriro*, L 4937964, 9 -20 (C.A.9 (C.A.9 (Ariz.),2008).

Whether or not a suspect is in custody, all confessions “must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.” *Miller v Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 88 L.Ed.2d

405 (1985); *In re Gault*, 387 U.S. 1, 30-31, 87 S.Ct. 1428, 18 L.Ed 2d 527 (1967) (holding that the guarantees of due process apply to juvenile proceedings); *see also United States v. Bradshaw*, 935 F.2d 295, 299 (D.C.Cir.1991) (“[T]he Constitution requires that a confession be voluntary quite apart from whether or not *Miranda* 's prophylactic procedures are followed.”); *Miller v Dugger*, 838 F.2d 1530, 1535 (11th Cir.1988) (“It is now clear, however, that the requirements of *Miranda* 's prophylactic rules can diverge significantly from the force of the prohibition in the due process clause itself against the introduction of involuntary statements.”). *In re Timothy C* , 194 Ariz. 159, 162, 978 P.2d 644, 647 (Ariz.App. Div. 1,1998).

The due process protection is embodied in a voluntariness inquiry that asks “ ‘whether a defendant's will was overborne’ ” by looking at the “ ‘totality of all the surrounding circumstances.’ ” *Dickerson*, 530 U.S. at 434, 120 S.Ct. 2326(quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L Ed.2d 854 (1973)); *see also Schneckloth*, 412 U.S. at 225-26, 93 S.Ct. 2041 (“ ‘Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.’ ” (quoting *Culombe v Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961))). The assessment of the totality of the circumstances may include education, physical and mental condition of the defendant; and determination of whether the defendant was properly advised of his *Miranda* rights. *Withrow v Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993)(emphasis added). Thus, by its

nature, the voluntariness inquiry requires a case-by-case assessment, leading courts to grapple with the application of voluntariness principles in a variety of circumstances. See *Schneckloth*, 412 U.S. at 224, 93 S.Ct. 2041 (“[Confession] cases yield no talismanic definition of ‘voluntariness,’ mechanically applicable to the host of situations where the question has arisen. ‘The notion of “voluntariness,”’ Mr. Justice Frankfurter once wrote, ‘is itself an amphibian.’” (quoting *Culombe*, 367 U.S. at 604-605, 81 S.Ct. 1860)). See also *Doody v Schriro*, L 4937964, 9 -20 (C.A.9 (Ariz.),2008).

Under the Fifth Amendment to the United States Constitution, confessions may not be obtained by “any direct or implied promises, however slight, nor by the exertion of any improper influence.” *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964); *State v Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986); *State v Blakley*, 204 Ariz. 429, 436, 65 P.3d 77, 84 (Ariz.,2003); see also *Juvenile Action No JV91000058*, 183 Ariz. at 206, 901 P.2d at 1249; *Juvenile Action No JV-501010*, 174 Ariz. at 601, 852 P.2d at 416 (quoting *Malloy v Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)); *In re Timothy C*, 194 Ariz. 159, 163, 978 P.2d 644, 648 (Ariz.App. Div. 1,1998). To be admissible, a statement must be voluntary, not obtained by coercion or improper inducement *Haynes v Washington*, 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L Ed.2d 513 (1963). “Promises of benefits or leniency, whether direct or implied, even if only slight in value, are impermissibly coercive,” and make any confession involuntary. *State v Lopez*, 174 Ariz. 131, 138, 847 P.2d 1078, 1085 (1992); *State v Ellison*, 213 Ariz. 116, 127, 140 P.3d 899, 910 (Ariz ,2006); *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976); see also *State v Amaya-Ruiz*, 166 Ariz.

152, 165, 800 P.2d 1260, 1273 (1990); *State v Davolt*, 207 Ariz 191, 202, 84 P.3d 456, 467 (Ariz.,2004).

When applying the totality of the circumstances analysis to determine the voluntariness of a juvenile's confession, the Supreme Court must consider that juveniles may be more susceptible to certain police tactics than adults and as such their will may be more easily overborne. *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003). Courts consider the juvenile's age, experience, education, background, and intelligence in evaluating the voluntariness of a juvenile's confession. *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003)(emphasis added) *See Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir.2007) (“[T]he absence or presence of a parent or other friendly adult [is an] additional factor[] that bear[s] on the voluntariness of the juvenile's confession. A juvenile's ability to consult with a friendly adult is relevant because, as the Supreme Court explained in *Gallegos v Colorado* [, 370 U.S. 49, 54, 82 S.Ct 1209, 8 L.Ed.2d 325 (1962)], a teenager may not on his own be able to fully appreciate what is at stake when the police seek to question him ...”) (citation omitted); *see also Gallegos*, 370 U.S. at 54, 82 S.Ct. 1209 (considering the absence of a parent or attorney in the voluntariness inquiry, even though the juvenile was advised of the right to an attorney and requested neither a parent nor an attorney)

Review of Voluntariness Factors

1. Length and location of interrogation—refer to earlier discussion in 5th Amendment analysis.
2. Maturity—same as above

3. Education—third grader. Three years of formal school. [See attached exhibit A].
4. Physical and Mental Condition of Juvenile—Within 36 hours of seeing his father and father’s friend dead on the floor and covered in blood he was interrogated by law enforcement. Christian spoke of significant spankings and punishments for perceived misbehaviors Dr. Cady indicates juvenile is not competent to stand trial
5. Miranda rights—Christian was never read his Miranda rights at any time prior to or during the interrogation. Further he was never advised of his Miranda rights by any law enforcement officer, ever in his life.
6. Age—Christian is an 8 year old boy.
7. Experience—Christian had no previous experience with law enforcement, ever.
8. Background—not much time on earth to have a background, but did have a mother who lived in Mississippi who was divorced from his father when he was much younger Recently had a step-mother come into the picture when his father married her two or so months prior to the alleged incident
9. Intelligence—Christian may be intelligent in some areas for an 8 year old, however lacks it in others, according to Dr. Cady’s report.
10. No parent was allowed to be present in interrogation, even after three family members requested to be present
11. Officers lied to Christian to get him to confess. AVILA: “How bout if we had somebody that told us that you mighta shot em”. Id. at 30. NECKEL. “I’m telling ya, that’s what we *heard*. That’s what that person told... We, honey, we, they copy all those, phone calls, okay, we got the phone call, okay, why would Tim *say* that?” Id. at 30. AVILA “Well, something that I can tell you that we know, is that, it was the same bullets, from the one gun, that, that shot yer dad, and shot Tim All the time. Okay, it wasn’t a different gun, okay, they can tell that, okay? So we know that it was the same gun, and that there was more than one, time that it was fired Okay?” Id. at 33.
12. Officers implied promises of leniency and threats to get Christian to confess. Avila tells him that if he tells the truth she will help him, “But there’s times you *really* gotta tell the truth and this is one ‘a those times, okay? Honey, I’m gonna *help* ya, okay, I’m gonna (unk) *in* with ya. I’m gonna help ya, okay, we’ve gotta get, we need ta know, what the truth is.” Id. at 31 AVILA. Even if it’s bad stuff, okay, we just need ta, talk the truth, **just us, in this room**. Is that okay? Id. at 1. [Implied promise that anything he said would stay in the room]. Prior to entering the interview an officer told Christian that he would be able to go home after he

answered the officer's questions, upon which Christian relied. What follow is a threat. Avila: "I need you ta tell us the truth, really, really *bad*, okay, so, so you don't have ta be in bigger trouble, okay?" [Transcript 11/6/08 p 31].

13. Officers made various accusations of Christian during the interrogation. The first beginning on page seven: AVILA: Um, you're *sure* that you weren't home. CHRISTIAN: (nods) Yeah. Yeah. AVILA: You're *sure*. CHRISTIAN. Mm-hm. AVILA Okay, because I heard sumthin, that somebody said that, um, somebody was calling yer name and that *you* weren't answering, at the house. CHRISTIAN: Mmmm, who was calling my *name*? AVILA: Somebody *told* me that. CHRISTIAN. *Who* was calling my name? AVILA: *Nobody* was calling yer name? CHRISTIAN: No. NECKEL: In the house? CHRISTIAN: No NECKEL: Were you calling *Tim's* name? CHRISTIAN: Yeah. I was goin like *T-i-i-m*, are you home? And then I saw him on the ground. And then I ran upstairs. And I, started saying *D-a-a-d*, Dad, and then I saw him. AVILA: Okay, I'm gonna, I need ta, I need ta ask you one more time, okay? *Were you home*, before you said you were home, did you go home right after school? Id. at 7. The second accusation, among others, was as follows: AVILA: After you found Tim, and yer dad, did you pick up any 'a the guns er anything? CHRISTIAN: No. No AVILA And yer *sure* about that? CHRISTIAN: Yeah. AVILA: Cuz let me, I'm, I'm gonna tell you just a *little bit*, okay? Um, whenever, um, they take the guns, and (unk), they're gonna have em checked? There may be fingerprints on them. And, I just want to make sure..." Id. at 24-25. And most pointedly. AVILA: ...like that. What about *Tim*, where was *Tim*? CHRISTIAN: Laying on the *ground* AVILA And how did Tim get on the ground? CHRISTIAN: I think he got shot. NECKEL: You *think* he got shot? Did *you* maybe shoot im by *accident*? CHRISTIAN: *No*. Id at 28-29.

14. The officers exerted improper influence on Christian to obtain statements. In addition to the above mentioned items, the officers changed their body posture during the interrogation, moving closer to Christian, which is a technique they learned to heighten the discomfort of the suspect and make him talk.

The Court in *Doody* stated, "Doody's vulnerability because of his youth was enhanced by the fact that he had never been arrested before and, as he told the officers, had never heard of *Miranda* rights" See *United States ex rel Lewis v. Henderson*, 520 F.2d 896, 901 (2d Cir.1975) (noting that the twenty-two-year-old suspect had "little prior experience with police methods, thus rendering him particularly susceptible to police pressure"). In the present case we have an eight year old who had never been arrested and

had never heard his Miranda rights read before. Clearly the vulnerability of an 8 year old makes him much more susceptible to police pressure than that of a 17 year old

THREAT OR PROMISE

In State v. Toney, 113 Ariz. 404, 555 P 2d 650 (1976) the Court held:

Testimony that juvenile was read his rights at least twice, that he understood them, that he had completed the tenth grade in school, that he had at least normal intelligence, that he had prior contact with Miranda warnings because of previous arrests, that he had at least seven hours of sleep before the morning when he was arrested, that he was advised that, because of the type of crime he was arrested for, he could be sent to adult court, and that he began to talk quickly and cooperatively after being informed of his rights sustained finding that juvenile freely and intelligently waived his privilege against self-incrimination.

State v. Toney, 113 Ariz. 404, 555 P 2d 650 (1976).

This is not the case with young Christian. Nor is Christian's situation similar to the following cases involving whether juveniles' statements were voluntarily given. See *State v. Scholtz*, 164 Ariz. 187, 791 P.2d 1070, review denied (App. Div.2 1990); *State v Wright*, 161 Ariz. 394, 778 P.2d 1290 (App. Div.1 1989); *Matter of Appeal in Pinal County Juvenile Action No J-985*, 155 Ariz. 249, 745 P.2d 996 (App. Div.2 1987), *State v. Jimenez*, 165 Ariz. 444, 799 P.2d 785 (1990).

A somewhat similar situation, however with some stark differences of that in the present case, was presented in *Woods v Clusen*, 794 F.2d 293 (7th Cir.1986). In *Woods*, a sixteen-year-old, after receiving *Miranda* warnings, was interrogated for two consecutive sessions of about twenty minutes each. During one session, the police officers "suggested things would 'be better' or 'go easier' " if Woods answered the questions. *Id* at 295 At the second session, the officers deceptively told Woods that they had found his fingerprints on the victim's wallet Woods answered only one question during these

sessions, before eventually confessing to the crime. *Id.* at 295-96 The Seventh Circuit

found his confession involuntary, noting:

Woods' confession ended the second interrogation after approximately one-half hour, yet one wonders how long the attempt to squeeze a confession from Woods could have lasted? Certainly, Woods must have wondered if and when the inquisition would ever cease.

Id. at 298 (footnote omitted); compare *Fare v Michael C*, 442 U.S. 707, 726-27, 99 S.Ct. 2560, 61 L.Ed 2d 197 (1979) (holding the confession of a sixteen-year-old “with considerable experience with the police” voluntary where “[h]e was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit”).

In the present case we have a boy half the age of the individual in *Woods*. We have officers telling Christian he will get in less trouble if he tells the truth. Avila tells Christian that if he tells the truth she will help him.

AVILA: “But there’s times you *really* gotta tell the truth and this is one ‘a those times, okay? Honey, I’m gonna *help* ya, okay, I’m gonna (unk) *in* with ya. I’m gonna help ya, okay, we’ve gotta get, we need ta know, what the truth is.” [Transcript 11/6/08 p. 31].

We have officers telling Christian that he will get into “bigger” trouble if he does not tell the truth, which assumes he is already in some trouble.

AVILA: “I need you ta tell us the truth, really, really *bad*, okay, so, so you don’t have ta be in bigger trouble, okay?” *Id.* at 31.

The officers lie to Christian to get him to confess.

AVILA: “How bout if we had somebody that told us that you mighta shot em”. *Id.* at 30 NECKEL: “I’m telling ya, that’s what we *heard*. That’s what that person told... We, honey, we, they copy all those, phone calls, okay, we got the phone call, okay, why would Tim *say* that?” *Id.* at 30.

There is no witness that saw Christian shoot anyone. That statement is completely untrue. In addition, counsel has not received any recordings of phone conversations, which Neckel indicates she has when talking to Christian. Below is another lie used to get Christian to confess.

AVILA: "Well, something that I can tell you that we know, is that, it was the same bullets, from the one gun, that, that shot yer dad, and shot Tim. All the time. Okay, it wasn't a different gun, okay, they can tell that, okay? So we know that it was the same gun, and that there was more than one, time that it was fired. Okay?" Id. at 33

Counsel has been provide with nothing demonstrating that all the shell casings came from the same gun. In addition, Avila certainly did not know this at the time of the interrogation and indicated she had lied when she interviewed with defense counsel.

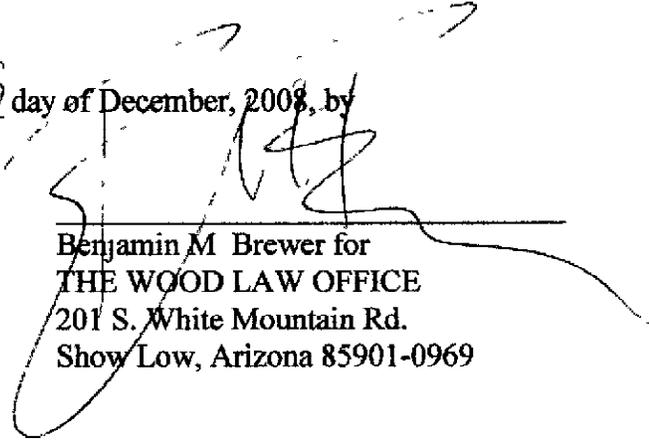
The last factor was that the interrogation of Christian was an hour long. These facts are much more egregious than those in *Woods*, where the Court held the confession involuntary, and this Court should do the same in the present case.

Conclusion

The statements, alleged to have been made by Christian after he was placed in custody but prior to being advised of his Miranda warnings, must be suppressed. In addition, any statements made to CPS personnel must be suppressed as the interview occurred while he was in juvenile detention, not advised of his Miranda rights, and questioned by a government official. Lastly, because Christian's statements were not voluntarily made they must be suppressed and not be allowed to be used by the government for any purpose. If the government timely objects in writing a hearing is

requested otherwise the Court should grant the motion and suppress all statements alleged to have been made by Christian.

Respectfully Submitted this 23 day of December, 2008, by



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Copies mailed this 23 day of
December, 2008, to:
Judge M. Roca
Mr Carlyon, Apache County Attorney

Exhibit A

[List of some educational standards for third graders]

Math.

counting by 1's to 1,000, skip counting by 2's, 5's and 10's to 100 - basic measurement with the American equivalencies and the metric, knows equivalency of basic measurements (i.e. inches in a foot, pennies in a quarter, days in a week, etc. -counting and identifying coins of all denominations (except the half dollar), identifying basic geometric shapes and lines, quick recall of basic addition facts and subtraction facts, reading clocks to the 5 minute interval, calendars, dates, thermometers, graphs and tally marks - adding two digit plus two digit numbers with carrying- understanding of the processes of multiplication basic fact families 0, 1, 2, 5, 10's - strategies for solving word problems with two steps and with unnecessary numbers.

Reading:

Third graders are no longer struggling to "sound out" every word, moving to oral fluency where they can read through a complete sentence at a normal speed and can retell the information they just read in their own words-comprehension. Third graders are beginning to read small chapter books and more complicated picture books. They can read for information

Language:

Third graders have learned the basic capitalization and punctuation rules (especially that all sentences begin with a capital and end with proper punctuation.) They can write an intelligent sentence with a subject and an action. They have experience with contractions, plurals, and possessive forms of words, and understand correct word usage such as using the correct word for a and an, may and an, set, sit, sat and teach and learn. They know how to put words in ABC order up to the second and third letter. They have used a dictionary and they have learned the parts of a friendly letter.