STATE OF CALIFORNIA
Court of Appeal
FIRST APPELLATE DISTRICT
DIVISION TWO
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J. ANTHONY KLINE
PRESIDING JUSTICE

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August 17, 2015

Honorable Tani Cantil-Sakauye, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Opposition to Request for Depublication of Opinion in *In re Elias V.* No. A140263

Dear Chief Justice and Associate Justices:

The District Attorney of Alameda seeks depublication of our opinion in *In re Elias V.* (2015) 237 Cal.App.4th 568 (*Elias V.*) on the ground that the opinion erroneously concludes "that trustworthiness is a factor in the determination of voluntariness" and this establishes a new rule of law" that will confuse the bench and bar.

The District Attorney of San Diego seeks depublication of the opinion on the different grounds that it improperly requires that a confession must be corroborated before it may be deemed voluntary, and that a suspect must be interviewed before he or she may be interrogated; and also because our opinion "is based on social science rather than firmly established legal principles" and will not only "cause confusion in the trial courts" but "hamstring police investigation without cause."

The Attorney General, who represents the People in this appeal, has neither filed a petition for review nor requested depublication of our opinion.

This letter, which I write also on behalf of Justices Richman and Miller, who also participated in the appeal, contends that the opinion satisfies standards for certification of an opinion for publication set forth in rule 8.1105(c) of the California Rules of Court, which this court should look to in determining whether to depublish an opinion of the Court of Appeal. The issues raised by those who request depublication—especially the District Attorney of San Diego's objection to our reliance upon a significant body of social science research regarding a matter of public importance—compel us to respond. Depublication of our opinion would have the effect of shielding this research from public attention. It is not the purpose of the depublication rules to suppress the dissemination of

information affecting the public interest. Moreover, as will be seen, it is entirely proper to rely on such factual material in the formulation of a judicial ruling, and courts commonly do so.

1. The opinion does not state or even imply that trustworthiness is a factor in the determination of voluntariness.

Our opinion makes clear at the outset that voluntariness turns on *all* the surrounding circumstances *and it "does not depend on whether the confession is trustworthy*." (*Elias V., supra*, 237 Cal.App.4th at p. 577, italics added, citing *Rogers v. Richmond* (1961) 365 U.S. 534, 543-544.) Later in the opinion, we state that "[t]he false evidence and other deceptive techniques employed in this case to induce a 13-year-old adolescent to incriminate himself create substantial doubt about both the voluntariness of Elias's inculpatory statements and the truth of those statements—*even though Elias need not show they were not trustworthy*." (*Id.* at p. 596, italics added.)

As stated in the opinion, our finding that Elias's statements were involuntary was based on a combination of circumstances and details of the interrogation: (1) Elias's youth, which rendered him " ' "most susceptible to influence" [citation], and "outside pressures," [citation]' (*J.D.B.*[*v. North Carolina* (2011)] 564 U.S. ___, ___ [131 S.Ct. at p. 2405]; (2) the absence of any evidence corroborating Elias's inculpatory statements; and (3) the likelihood that Buchignani's use of deception and overbearing tactics *would induce involuntary and untrustworthy incriminating admissions*." (*Elias V., supra*, 237 Cal.App.4th at pp. 586-587, italics added.) The untrustworthiness of Elias's admissions was clearly not a basis of our finding of involuntariness; and nothing else in the opinion indicates that an admission may be deemed involuntary simply because a court deems it untrustworthy. The fact, which we repeatedly acknowledged, that voluntariness does not depend on trustworthiness certainly does not mean untrustworthiness is an irrelevant subject that may not be judicially discussed.

2. *The opinion does not indicate that an uncorroborated confession may not be deemed voluntary, or that a suspect must be interviewed before he or she may be interrogated; these factors are simply among the "totality of the circumstances" that must be considered in determining the voluntariness of an admission.*

As just noted, the "absence of any evidence corroborating Elias's inculpatory statements" was among the bases upon which we found his statements involuntary. At the commencement of our analysis we reiterated the settled principle that "[t]he admissibility of a confession depends upon the totality of the circumstances existing at

the time the confession was obtained." (*Elias V.*, *supra*, 237 Cal.App.4th at p. 576, citing numerous state and federal authorities.) We also pointed out at the outset that "[v]oluntariness turns on *all* the surrounding circumstances, 'both the characteristics of the accused and *the details of the interrogation.*' " (*Id.* at p. 577, latter italics added, citing *Schneckloth v. Bustamante,* (1975) 412 U.S. 218, 226.) The absence of any evidence corroborating Elias's commission of a criminal offense at the time he was interrogated is manifestly among the "details of the interrogation" carried out in this case; and it would be judicially irresponsible to ignore it. The gist of our opinion is that the false evidence and other deceptive techniques employed in this case to induce a 13-year-old adolescent to incriminate himself created substantial doubt about the voluntariness of his statements, and the absence of any corroborating evidence is among the reasons to resolve those doubts adversely to the prosecution, which has the burden of showing voluntariness.

The fact that the absence of corroborating evidence was a factor in this case hardly suggests, as the District Attorney of San Diego seems to contend, that our opinion indicates an admission can *never* be deemed voluntary unless it is corroborated. Corroboration is more important in this case than it usually is due to an unusual combination of factors: the youth of the suspect, the absence of any meaningful preliminary investigation, and the array of sophisticated psychological techniques employed in the interrogation.

Nor does our opinion indicate that a suspect must be interviewed before he or she may be interrogated (although the police manuals referred to in our opinion all emphatically say so). The fact that neither Elias nor anyone else was interviewed by Deputy Buchignani before she interrogated Elias is addressed at the end of our discussion in *Elias V.* The opinion acknowledges the issue does not bear directly on the voluntariness of Elias's statements; but the fact that Elias was interrogated without previously being interviewed certainly constitutes a consequential "detail of the interrogation" within the meaning of *Schneckloth v. Bustamante, supra,* 412 U.S. at page 226.

This section of the opinion was prompted by the police manuals relating to interrogations, particularly the current edition of the manual Chief Justice Warren discussed in detail and quoted in *Miranda v. Arizona* (1966) 384 U.S. 436. The current edition of the manual, which is more influential today than was the first edition discussed in *Miranda*, underscores the significant differences between an "interview" and an "interrogation" and the manner in which interrogation of a suspect not previously interviewed dramatically increases the likelihood of a false confession. These are

significant matters underappreciated by the bench and bar and probably unknown to the public at large. The relevance of these issues to the case, and the educational responsibility of intermediate appellate courts, justify the discussion in the opinion of the different purposes of an "interview" and an "interrogation" that the District Attorney of San Diego disputes. We believe this discussion is among the several reasons our opinion in *Elias V.* should not be depublished.

Another important reason is that this case is among the relatively few in which the waiver of *Miranda* rights is undisputed and the analysis focuses entirely on voluntariness. In other words, this opinion demonstrates that a valid *Miranda* waiver should not end the requisite constitutional inquiry, as it often does. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 608-609.)

3. *The claim that the opinion is based on social science rather than legal principles is uninformed and meritless. Moreover, the social science research described in this opinion is the strongest reason for denying the requests to depublish.*

The use of social science research to support a choice of a rule of law is thought to have begun more than a century ago with the opinion of the United States Supreme Court in *Muller v. Oregon* (1908) 208 U.S. 412, in which then attorney Louis Brandeis assembled a substantial body of medical and social science research showing the debilitating effect of women working long hours, and presented this material to the court in defending Oregon's limitation on the number of hours women could work. The Supreme Court allowed that though these materials "may not be, technically speaking, authorities," they would nonetheless receive "judicial cognizance." (*Id.* at pp. 420-421.) Since then, and particularly after Kenneth Culp Davis's influential article proposing a distinction between "adjudicative facts" and "legislative facts" (Davis, *An Approach to Problems of Evidence in the Administrative Process* (1942) 55 Harv. L.Rev. 364),[1] social

[1] As explained in *City of N.Y. Mun. Broadcasting System v. FCC* (D.C. Cir. 1984) 744 F.2d 827, 840, footnote 17, " 'Adjudicative facts are simply the facts of the particular case. Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, *whether in the formulation of a legal principle or ruling by a judge or court* or in the enactment of a legislative body.' " (Quoting Fed. R. Evid., rule 201(a) advisory committee note, italics added.) The judicial use of legislative facts "has been widely accepted in the federal appellate courts." (*Broz v. Schweiker* (11th Cir. 1982) 677 F.2d 1351, 1357; see also, *Lockhart v. McCree* (1986) 476 U.S. 162, 169, fn. 3; *Concerned Citizens v. Pine Creek Conservancy Dist.* (1977) 429 U.S. 651, 656.)

science research has long been cited and relied upon by the Supreme Court or the members thereof.[2]

Like most state supreme courts (see, e.g., *Goodridge v. Dept. Of Public Health* (Mass. 2003) 798 N.E.2d 941, 965, fn. 30, relying on studies on same-sex parenting and its impact on children), the California Supreme Court has also frequently used social science research as a source of law.

For example, in *People v. McDonald* (1984) 37 Cal.3d 351, which related to the reliability of eyewitness identifications, Justice Mosk, speaking for a unanimous court, emphasized the proliferation and judicial usefulness of empirical studies of the psychological factors affecting eyewitness identifications. "No less than five treatises on the topic have recently been published, citing and discussing literally scores of studies on the pitfalls of such identification." (*Id.* at p. 364.) After citing all of the studies he referred to, Justice Mosk declared that "[t]he consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice." (*Id.* at p. 365.)

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[2] See, e.g., *Grutter v. Bollinger* (2003) 539 U.S. 306 (relying on numerous studies showing that student body diversity promotes learning outcomes and better prepares students); *United States v. Leon* (1984) 468 U.S. 897 (use of sociological research to support a "good faith" exception to the exclusionary rule); *Barefoot v. Estelle* (1983) 463 U.S. 880, 916 (use by dissenters of psychological and psychiatric research to support the unconstitutionality of a state statute predicating capital punishment on a prediction of continuing violence); *Florida v. Royer* (1983) 460 U.S. 491 (dissenters cited sociological surveys to support use of a "drug courier profile" in establishing reasonable suspicion to support a search); *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718 (sociological surveys used to establish unconstitutionality of statute excluding males from state-supported nursing school); *Ballew v. Georgia* (1978) 435 U.S. 223 (psychological studies cited to establish unconstitutionality of five-member juries in state criminal trials); *United States v. Martinez-Fuerte* (1976) 428 U.S. 543 (epidemiological and demographic research used to support constitutionality of fixed checkpoint stops of vehicles); *Paris Adult Theatre v. Slaton I* (1973) 413 U.S. 49 (use of behavioral studies to support constitutionality of state obscenity statute); *Furman v. Georgia* (1972) 408 U.S. 238, 349-350 (concurring justices relied on studies relating to the deterrent effect of the death penalty); *Brown v. Board of Education* (1954) 347 U.S. 483, 494, fn. 11 (listing seven sociological studies to support overruling of separate but equal principle).

The use of social science research to support a judicial choice of a rule of law is now so well established in American jurisprudence that it is surprising to be called upon to defend it. The legal scholars who have delved into this subject most intensively, John Monahan and Laurens Walker, long ago made the case "that social science has some of the attributes of law, that no conceptual barriers exist [as] to its being considered as law, and that precedent exists for treating similar positive materials as law." (Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law* (1986) 134 U. Pa. L.Rev. 477, 494 (*Social Authority*); see also Walker & Monahan, *Social Facts: Scientific Methodology as Legal Precedent* (1988) 76 Cal. L.Rev. 877, and Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law* (1987) 73 Va. L.Rev. 559.) As these and many other scholars have persuasively shown, "it is jurisprudentially *plausible* for courts to treat social science research as they treat prior judicial decisions under the common law." (*Social Authority*, at p. 494) The long history that began with *Muller v. Oregon*, *supra*, 208 U.S. 412, demonstrates that, as professors Monahan and Walker say, "there is obviously no conceptual barrier to considering social science research as fact, and much precedent for doing so." (*Social Authority*, at p. 494.)

At the time *Miranda* was decided, there was little empirical evidence of the manner in which police interrogations were conducted and the consequences of the conventional ways in which law enforcement officers interrogated suspects, which is why Chief Justice Warren had to rely upon police manuals. However, the mandatory recording of interrogation in many states, together with the spreading practice of recording and videotaping by agencies across the United States, "now make it possible to empirically describe and analyze the process of interrogation and the decision to confess" (Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action* (1997) 74 Denv. U. L.Rev. 979, 982), so that it is no longer necessary to rely on police manuals to learn what happens in police stations across America. The District Attorney of San Diego makes no claim, nor could she, that the social science research and studies whose use she challenges are scientifically or otherwise deficient in any way. Given the obvious relevance of the information, it would be absurd to ignore it. As the Supreme Court said of the social science at issue in *People v. McDonald, supra*, 37 Cal.3d 351, "[t]he consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice." (*Id.* at p. 365.) As stated at the outset of this letter, depublication should not be used to suppress information relating to a matter of public interest on the untenable theory advanced by the District Attorney of San Diego.

We are not aware of any opinion of an American court that sets forth the current social science research on the interrogative practices of law enforcement agencies, and

the consequences of those practices, as extensively as the one you are asked to depublish. This is important information that should be known by lawyers and, above all, judges.

In 1988 the California Bar Association, the California Judges Association, the Attorney General (John Van de Kamp), and local bar associations unsuccessfully asked the Supreme Court to eliminate the automatic depublication rule (a request that, happily, is now being reconsidered). The request began by pointing out that opinions certified for publication by a Court of Appeal—particularly those involving a legal issue of continuing public interest, or which review the development of a common law rule (such as the *Miranda* rule)—are "the ones that are researched and drafted with the greatest care," and depublication "diminishes the important educational function of intermediate appellate courts." Depublication may also diminish the willingness of appellate judges to engage themselves deeply in cases such as this that are likely to interest the Supreme Court. This possibility does not serve the interests of the Supreme Court or our judicial system.

Very truly yours,

KLINE, P.J.

J. Anthony Kline
Presiding Justice

AFFIDAVIT OF TRANSMITTAL

I am a citizen of the United States, over 18 years of age, and not a party to the within action; that my business address is 350 McAllister Street, San Francisco, CA 94102; that I served a copy of the attached material in envelopes addressed to those persons noted below.

That said envelopes were sealed and shipping fees fully paid thereon, and thereafter were sent as indicated via the U.S. Postal Service from San Francisco, CA 94102 or, alternatively, served via inter-office mail.

I certify under penalty of perjury that the foregoing is true and correct.

Diana Herbert, Clerk of the Court

STACY WHEELER

Deputy Clerk

AUG 17 2015

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CASE NUMBER: A140263

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