No.

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP JASON GARRETT, Petitioner

v.

STATE OF KANSAS, Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does law enforcement quasi-legal representations that a truth verification machine is 100% accurate, combined with numerous acts of deception during a police interrogation including minimization of *Miranda* warnings, implied promises of lenience combined with implied threats for not cooperating with law enforcement all made to a suspect that is under stress and fatigued render the resulting confession involuntary under this Court's totality of the circumstances analysis of the Fifth and Fourteenth Amendments?

LIST OF PARTIES

The parties to this case are as stated in the caption, Phillip Garrett, petitioner, and the State of Kansas, respondent. In the courts below, the petitioner was referred to as appellee-defendant and the respondent was referred to as appellant-plaintiff.

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The District Court for Saline County, Kansas granted Phillip J. Garrett's motion to suppress statements after concluding that the statements were obtained involuntarily by the police in violation of the Fifth and Fourteenth Amendments. The state appealed that decision and the Kansas Court of Appeals reversed, holding that the district court placed undue weight on deceptive police practices, while excluding "nearly all other relevant components of the inquiry." *State v. Garrett,* No. 124,329, 2022 WL 12129643 (Kan. App. 2022) (unpublished). The Kansas Supreme Court granted Mr. Garrett's petition for review. The Kansas Supreme Court issued its published opinion reversing the district court's suppression order on September 20, 2024. *State v. Garrett,* 319 Kan. 465 (2024).

STATEMENT OF JURISDICTION

The Kansas Supreme Court is the court of last resort in Kansas. The Kansas Supreme Court rejected Mr. Garrett's claim that the statements he made to law enforcement during interrogation were the product of coercive police interrogation tactics rendering the statements he made involuntary in violation of the Fifth and Fourteenth Amendments, and as result inadmissible at trial. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states the following in relevant part:

> No shall any person ……. be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

Section 1 of the Fourteenth Amendment to the United States Constitution states the following in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Salina police were dispatched to a call concerning the father of L.A. finding something suspicious on her cell phone. See Appendix E (transcript of motion to suppress on January 3, 2020 at 15, "Tr."). During an interview at the Child Advocacy Center, L.A. advised Salina Police Department (SPD) Detective Gregory Jones that her stepfather, Phillip Garrett, touched her multiple times and penetrated her vagina and anus with his fingers. (Tr. at 16-18).

Police interrogated Mr. Garrett at the Salina Police Department on November 20, 2018 at approximately 1:20 PM. (Tr. at 14-15). Officers recorded the interrogation, which began with Detectives Jones and Tim Brown questioning Mr. Garrett. (Tr. at 15). Sergeant Sarah Cox would later join the interrogation to administer a Computer Voice Stress Analysis test. (Tr. at 15)

Detective Jones described Mr. Garrett's appearance as "stressed out" and wanting to know what was going on. (Tr. at 26-27). The interrogation was several hours in length including a significant amount of time that Mr. Garrett spent alone and isolated. See Appendix C (transcript of the district court granting Mr. Garrett's motion to suppress on July 30, 2021 at 4, "Tr. MTS Ruling Two"). The interrogation was conducted by three separate police detectives (i.e., Detective Jones, Detective Brown and Sergeant Cox) at different points. (Tr. MTS Ruling Two at 4). At the time of the interrogation, Mr. Garrett was close to 40

years old, appeared to be of average intellect, and worked at a local grocery store. See Appendix D (transcript of the district court denying Mr. Garrett's motion to suppress on January 27, 2020 at 4-5, "Tr. MTS Ruling One"). Mr. Garrett nearly immediately advised the officers that he had not eaten nor slept since the night before and that he was very upset. (Tr. MTS Ruling Two at 4). Mr. Garrett numerous times throughout the interrogation advised each officer that he was stressed or upset. (Tr. MTS Ruling Two at 4).

At the beginning of the interrogation, Detective Jones immediately began minimizing Mr. Garrett's Miranda warnings by describing these rights as "hoops that he needed to jump through." (Tr. MTS Ruling Two at 4). After minimizing the Miranda warnings, Detective Jones did advise Mr. Garrett of his rights. (Tr. MTS Ruling Two at 4). Mr. Garrett agreed to speak with law enforcement. It was at this point that Detective Jones informed Mr. Garrett that he was there due to allegations that Mr. Garrett had had sexual contact with his step-daughter, L.A. (Tr. MTS Ruling Two at 4). Mr. Garrett immediately denied any type of inappropriate contact between himself and L.A., and he continued to deny the inappropriate contact prior to a "Computer Voice Stress Analysis" ("CVSA") test being administered by Sergeant Cox. (Tr. MTS Ruling Two at 4).

Detective Jones and Detective Brown explained to Mr. Garrett that they had a truth verifying test, the CVSA, which they could administer to confirm that

he was being truthful. (Tr. MTS Ruling Two at 4). The detectives asked if Mr. Garrett would take the test and Mr. Garrett responded, "I guess." (Tr. MTS Ruling Two at 5). Mr. Garrett told the detectives that he was stressed but would listen to the CVSA examiner (i.e., Sergeant Cox) explanation about how the CVSA worked. (Tr. MTS Ruling Two at 5). After Mr. Garrett again expressed concern that he was stressed and nervous, the detectives told Mr. Garrett that nervousness was not part of the equation for the test. (Tr. MTS Ruling Two at 5). A detective continued the bolster the test by telling Mr. Garrett, "I think it's a fantastic tool, an excellent tool." (Tr. MTS Ruling Two at 5).

After waiting about twenty-five minutes isolated and alone, Mr. Garrett met with Sergeant Cox, the CVSA examiner, in a separate room at the police department. (Tr. MTS Ruling Two at 5). Sergeant Cox began explaining the nature of the CVSA, and how it confirms that a person is lying or telling the truth. During Sergeant Cox's explanation of the nature of the CVSA, she also provided Mr. Garrett with a form with two sections, one section titled "Truth Verification Release Form" and the second section titled "Miranda Rights." (Tr. at 90), also see Appendix F (Truth Verification Release/ Miranda Form provided to Mr. Garrett on November 20, 2018, "Form").

Notably, this form told Mr. Garrett that the examination and its results may be released for the purpose of courtroom testimony. (Tr. at 90). The Truth

Verification Release/ Miranda Warning form was admitted into evidence at the motion to suppress held on January 3, 2020. (Tr. at 90). Mr. Garrett immediately asked Sergeant Cox what the word "coercion" means. (Tr. MTS Ruling Two at 6). Mr. Garrett also advised Sergeant Cox that he was so devastated that some words don't even make sense. (Tr. MTS Ruling Two at 6). Sergeant Cox continued to explain the process of the test and told Mr. Garrett he would have a microphone clipped to his shirt while she asked him questions. (Tr. MTS Ruling Two at 5). Sergeant Cox explained to Mr. Garrett that the CVSA measures frequency of a person's voice in response to a question asked by the examiner to determine if the examinee was lying. (Tr. MTS Ruling Two at 5). Sergeant Cox then explained to Mr. Garrett that the CVSA is 100% effective. (Tr. MTS Ruling Two at 5). Sergeant Cox went so far to tell Mr. Garrett that no matter what, if someone is drunk, high or whatever, the CVSA is 100% effective and accurate. (Tr. MTS Ruling Two at 5-7). In response, Mr. Garrett told Sergeant Cox that he was shaking, nervous and very hyped up and that he was really upset. (Tr. MTS Ruling Two at 5-6). Sergeant Cox continued to bolster the accuracy and effectiveness of the CVSA by telling Mr. Garrett that this alleged truth verification machine is used all over the United States, and is even used by the military. (Tr. MTS Ruling Two at 5-7). Sergeant Cox told Mr. Garrett that, by the end of the test, they would know what the truth was. (Tr. MTS Ruling Two at 7).

Sergeant Cox then asked Mr. Garrett to explain in his own words the allegations against him. (Tr. MTS Ruling Two at 7). Mr. Garrett explained that he was told by the detectives that inappropriate touching was alleged, including touching of L.A.'s genitalia. (Tr. MTS Ruling Two at 7). Sergeant Cox then told Mr. Garrett that she wanted him to pass the test and that he should be completely honest during the test. (Tr. MTS Ruling Two at 7). Sergeant Cox next told Mr. Garrett, specifically, that it was alleged that he penetrated L.A.'s vagina and touched L.A.'s anus. (Tr. MTS Ruling Two at 7). After explaining the specific allegations to Mr. Garrett, Sergeant Cox asked him if there was anything that he wished to disclose. (Tr. MTS Ruling Two at 7). Evincing Mr. Garrett's confusion, he asked Sergeant Cox what she meant by "disclose." Sergeant Cox explained by disclose she was essentially asking Mr. Garrett if he wanted to admit to the sexual allegations. Mr. Garrett continued to deny the inappropriate touching throughout the test. (Tr. MTS Ruling Two at 7).

Shortly after the test was concluded, Mr. Garrett was brought back to the interrogation room and confronted with the CVSA results by three police officers. (Tr. MTS Ruling Two at 9). The police officers told Mr. Garrett that the CVSA test results indicated that he was experiencing stress and asked why. (Tr. MTS Ruling Two at 9). Mr. Garrett responded that it was because he was stressed. (Tr. MTS Ruling Two at 9). The district court made the finding of fact

that the tone and style of the interrogation post-CVSA was different than the pre-CVSA interrogation. (Tr. MTS Ruling Two at 9). Specifically, the district court found in particular that Detective Brown was more confrontational post-CVSA. (Tr. MTS Ruling Two at 9).

The district court found question 4 asked, "did you put your finger in [L.A.'s] anus" and question 6 asked "did you put your finger in [L.A.'s] vagina. (Tr. MTS Ruling Two at 8). Mr. Garrett said no each time he was asked. (Tr. MTS Ruling Two at 8). Sergeant Cox went so far as to tell Mr. Garrett that question 4 (i.e., did Mr. Garrett put his finger in L.A.'s anus) showed stress when according to the CVSA test results it did not show stress. (Tr. MTS Ruling Two at 10). After lying to Mr. Garrett about question 4, detectives repeatedly told him that the CVSA was 100% accurate and effective and began to ignore Mr. Garrett's denial of wrongdoing. (Tr. MTS Ruling Two at 10). The detectives began telling Mr. Garrett statements to the effect of: "I think you remember it;" "I think you remember what you did;" "I think you did touch her on her vagina and anus;" "this is what she told us occurred;" "this is what we believe to be truth and that this is what you know to be true." (Tr. MTS Ruling Two at 10).

Next, the detective added an additional layer of coercion by telling Mr. Garrett that they would much rather go to the prosecutor and let them know that Mr. Garrett owned up to it, that he cooperated, and that cooperation would

reflect well on him. (Tr. MTS Ruling Two at 10). Despite varied forms of police coercion, Mr. Garrett again denied the allegations of inappropriate sexual touching. (Tr. MTS Ruling Two at 10). In response, Detective Brown told Mr. Garrett that he was simply not believable. (Tr. MTS Ruling Two at 10). Faced with a lose-lose situation (i.e., option 1 - remain silent equating to his guilt or option 2 – admit to guilt to gain the favor of the prosecutor and detectives), Mr. Garrett threw up his hands and acquiesced to the detectives' demands that he admit to inappropriate touching. (Tr. MTS Ruling One at 8).

Mr. Garrett moved to suppress the confession obtained after the CVSA and argued that the resulting statements were involuntarily obtained in violation of the Fifth and Fourteenth Amendments citing many aspects of the interrogation discussed above. The state trial court held a hearing on Mr. Garrett's motion to suppress the confession. (Tr. at 1-123). The recorded interrogation and CVSA testing videos were admitted into evidence during the proceeding and viewed by the district court. (Tr. at 20-25).

At the hearing, Detective Brown, Detective Jones and Sergeant Cox testified consistently with the state trial court's finding above. Of note, Detective Jones acknowledged not advising Mr. Garrett he was the subject of a criminal investigation when issuing the *Miranda* warning. (Tr. at 28). Detective Jones and Detective Brown both testified that they had training in the "Reid Technique" to

cut off denials. (Tr. at 32 and 113). Despite both detectives indicating their "Reid Technique" training, and intentionally cutting off Mr. Garrett's denial of wrongdoing, they essentially testified that they didn't specifically use the Reid Technique on Mr. Garrett. (Tr. at 34 and 113).

Gary Davis testified as an expert for the defense in the field of technology regarding truthfulness. (Tr. at 62). Mr. Davis testified that he was employed as president of Forensic Assessments, Inc. and director of the Marston Polygraph Academy for almost fifty years and is familiar with truth verification technology including the CVSA. (Tr. at 50-51). Mr. Davis used computerized polygraphs, and conducted truth verification examinations for thirty-eight years and trained others to do truth verification examinations, and testified that he was familiar with scientific studies on the CVSA. (Tr. at 51, 53-54).

One study that Mr. Davis testified about was entitled "Assessing the Validity of Voice Stress Analysis Tools in a Jail Setting" by Kelly R. Damphousse, et. al. of the University of Oklahoma (March 31, 2007). (Tr. at 63). The purpose of the Damphousse study was for "a field-based experiment that incorporates jeopardy and the ability to compare assessed deception with known deception." (Tr. at 54-58). Mr. Davis said the studies do not indicate whether the CVSA is able to rule out general stress from case specific stress. (Tr. at 65). Mr. Davis testified that everyone in an interrogation feels stress and there is no unique

physiological response for deception – there is no lie detector. (Tr. at 65-66). The Damphousse study described an inverted "V" for a truthful response to the CVSA and a plateau for a lying response. (Tr. at 67-68).

The district court noted in its examination of Mr. Davis that the Oklahoma study noted the rate of effectiveness for determining truthfulness as to a relevant question during a CVSA was anywhere from 15 to 50 percent and Mr. Davis testified it was "(n)o better than flipping a coin." (Tr. at 76). Mr. Davis testified there was not one published peer-reviewed study showing the CVSA works. (Tr. at 78). Similarly, the Damphousse study observed it was "unable to find any peer-reviewed and published studies that showed significant support for the effectiveness of VSA software to detect deception." (Tr. at 78).

No evidence was presented at the suppression hearing that Mr. Garrett had any prior contacts or experience with the criminal justice system or law enforcement investigation.

The district court issued two rulings on the Motion To Suppress. The first ruling denied the Motion To Suppress. See Appendix D. (Tr. MTS Ruling One). The second ruling, following reconsideration, granted the Motion To Suppress. See Appendix C. (Tr. MTS Ruling Two).

Both decisions applied a totality of circumstances approach and took into account a nonexclusive list of factors to determine whether the prosecution

proved by a preponderance of evidence that the challenged statement was a product of Mr. Garrett's free and voluntary will. (Tr. MTS Ruling One at 2-3; Tr. MTS Ruling Two at 3). Among the factors the district court considered in each decision were Mr. Garrett's mental condition; the manner and duration of the interrogation, the ability of the accused to communicate with the outside world; Mr. Garrett's age, intellect and background; the fairness of the officers in conducting the interrogation; and Mr. Garrett's fluency with the English language. Tr. MTS Ruling One at 2-3; Tr. MTS Ruling Two at 3).

The prosecution filed an interlocutory appeal of the district court's suppression order with the Kansas Court of Appeals. That court reversed, holding that the district court placed undue weight on deceptive police practices, while excluding "nearly all other relevant components of the inquiry. " *State v. Garrett,* No. 124,329, 2022 WL 12129643 (Kan. App. 2022) (unpublished). Mr. Garrett filed a petition for review, which was granted by the Kansas Supreme Court. On September 20, 2024, a divided Kansas Supreme Court also reversed the district court, albeit on other grounds. The majority of the Kansas Supreme Court recognized that the Fifth and Fourteenth Amendments prohibit involuntary confessions caused by coercive police tactics, but concluded that "law enforcement's actions did not go so far as to constitute misconduct in violation of due process." *State v. Garrett,* 319 Kan. 465, 483 (2024).

REASONS FOR GRANTING THE WRIT

Introduction

The Kansas Supreme Court failed to apply the standard demanded by the Due Process Clause of the Fifth and Fourteenth in light of law enforcement employment of multi-leveled deceptions in this case. *State v. Garrett,* 319 Kan. 465, 483 (2024). In particular, the Kansas Supreme Court's decision demonstrates a split of authority among different jurisdiction and even the Kansas Supreme Court itself on the coercive effect of a ruse by law enforcement officers telling Mr. Garrett that a "scientific test" had absolutely proved his guilt. As described by Justice Rosen in dissent, this case just scratches the surface of coercive possibilities presented by developing technologies:

> the majority's rubber-stamp of the deception in this case paves the way for an onslaught of even more coercive trickery during police interrogations. Hyper-realistic digital impersonation that can be nearly impossible to debunk, or "deep fakes," as they have come to be known, are ever present. Chesney & Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. 1753, 1758 (2019). Advances in technology will continue to make these digital impersonations increasingly convincing. 107 Cal. L. Rev. at 1758. I fear it will not be long before law enforcement tests the limits of creating fabricated images of a detainee at the scene of the crime or artificially create other evidence in order to convince a suspect to forego their right to remain silent or cooperate with an investigation. The majority's blanket endorsement of deceptive police tactics, even in the face of a new and unfamiliar technology like the CVSA, signals this kind of highly concerning deceit is fair game. [*State v. Garrett*, 319 Kan. 465, 488 (2024)].

This Court should grant certiorari and resolve this split among the Kansas Supreme Court itself and between the Kansas Supreme Court and other jurisdictions regarding whether the use of "new and unfamiliar technology" crosses any line with regard to voluntariness under the Fifth and Fourteenth Amendments.

Law Enforcement Multi-Leveled Deceptions in Misrepresenting the Effectiveness of the CVSA Exam and Implementing Elements of the Reid Technique

The Kansas Supreme Court majority acknowledged that the officers' misrepresented the accuracy and effectiveness of the CVSA but ultimately determined that the law enforcement deception that the CVSA was 100% accurate and effective was of little significance concluding "as a matter of law, the police did not overreach." *Garrett,* 319 Kan. at 477 (2024).

Divide and conquer or totality of circumstances

The Kansas Supreme Court majority isolated each instance of deception and coercion rather considering the cumulative effects of these deceptive police practices. Justice Wall's dissent acknowledged this reality:

> Under the legal standard, Garrett's custodial statements must be suppressed unless the State proves by a preponderance of evidence that they were voluntary under the totality of the circumstances. *State v. Spencer,* 317 Kan. 295, 297 (2023). The majority opinion fails to analyze voluntariness under this standard.
>
> Instead, the majority, uses a clever analytical device – divide and conquer. It isolates each circumstance that contributed to the environment of

> coercion. Then it points to caselaw suggesting each circumstance falls short of coercion on its own. *State v. Garrett,* 319 Kan. at ---, 553 P.3d at 1124-29. The problem with this approach is that the Constitution requires us to consider the forest, not each tree. And when we do, the State's overreaching is apparent. [*Garrett,* 319 Kan. at 490 (2024).]

Mr. Garrett and the dissent recognized that deceptive police interrogation practices do not automatically constitute a constitutional violation under the due process standard for voluntariness. *Id* at 483, See also, *Frazier v. Cupp,* 394 U.S. 731, 737, 739 (1069) (officer falsely told defendant codefendant implicated him in crime). But, as described by the dissent in the lower court, the cumulative effects of law enforcement misrepresentations and deceptive police practices, including misrepresenting the accuracy of the CVSA and making the quasi-legal representation that the results of the CVSA examination could be used in court for the purpose of testimony was a bridge too far. (Form).

Passing off technology as a "truth verification machine" is inherently coercive

The distinction of how highly coercive misrepresenting the accuracy of a "truth verification machine" is on a suspect is not lost on courts from other jurisdictions, as cited by the dissent in this case. In *State v. Matsumoto,* 145 Hawai'i 313, 314, 452 P.3d 310, 317 (2019), Matsumoto was arrested at a high school wrestling tournament on the island of O'ahu, Hawai'i based on allegation that he had committed a sexual offense at the tournament. Matsumoto was taken to the Honolulu Police Department (HPD) where he was booked into jail. *Id.* The

next day, Matsumoto was interrogated by two detectives of the HPD. *Id.* Matsumoto was given a polygraph examination after being provided his waiver of rights and signing a polygraph waiver form. *Id.* Matsumoto was told that he would be provided with a copy of the results from the polygraph examination. *Id.* He was not provided the results and was never told that the results of the exam showed "inconclusive" rather than a pass/fail result. *Id.* Matsumoto was told that he did not pass the exam. *Id.* Later, a second investigator provided Matsumoto a second waiver of his *Miranda* rights, and interrogated him a second time. Matsumoto eventually confessed to the alleged sexual contact. *Id.* at 316, 452 P.3d at 319.

Before trial, Matsumoto argued that his statements post-test should be suppressed because his statements were only made after law enforcement intentionally led him to falsely believe that he had failed the polygraph. *Id.* After the trial court admitted the statements, the Hawai'i Supreme Court reversed holding:

> providing falsified polygraph test results to a suspect as part of a custodial interrogation is an extrinsic falsehood that poses an unacceptable risk of inducing an untrue statement or influencing an accused to make a confession regardless of guilt. [*Id.* at 324, 452 P.3d at 327.]

The Hawai'i Supreme Court explained that extrinsic factors may include: "…more favorable treatment in the event of a confession and misrepresentations

of legal principles." *Id* at 321, 452 P.3d at 324.

While the Kansas Supreme Court majority downplayed the highly coercive nature of providing falsified results to a defendant, the gravity of the highly coercive conduct was not lost on the dissent. Justice Rosen citing *Matsumoto,* explained:

> The polygraph is a scientific instrument that purports to accurately determine whether the subject of the test is telling the truth. ... An examinee who has not lied does not expect to be given falsified polygraph test results from the police. It is thus not surprising that the presentation of falsified results may have serious and substantial effects on a suspect. '[E]xperiments have shown that ... counterfeit test results ... can substantially alter subjects' ... beliefs, perceptions of other people, behaviors toward other people, emotional states, ... self-assessments, [and] memories for observed and experienced events.' Saul M. Kassin et. al, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3, 17 (2010) (citing studies that have tracked the effects of counterfeit test results, along with other deceptive tactics) (internal citations omitted).
>
> Falsified polygraph results may pressure a suspect into changing the suspect's pre-test narrative. This pressure is intensified when an officer expresses confidence that the suspect is lying and is aggressive in pushing the suspect to confess on the basis of the officer's pre-formed belief of the suspect's guilt. Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 Crim. L. Bull. 293, 293-370 (2001). Falsified polygraph results are geared towards making the suspect believe in one's own guilt or believing that the officer will not stop the interrogation until the suspect confesses guilt. See Klara Stephens, *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations*, 11 Ne. U. L. Rev. 593, 596 (2019) (finding that false polygraph results are 'bad practices' that produce both true and false confessions).
>
> Once a suspect believes that a confession of guilt is inevitable, the individual is cognitively geared to accept, comply with, and even approve

> of that outcome. Kassin et. al., supra, at 17, (citing Elliot Aronson, The Social Animal (1999)) (exploring how human beings cognitively respond once they view an outcome as inevitable). That is, false polygraph results may psychologically prime an innocent suspect to make a confession.
> ....
>
> Extensive scientific literature and numerous documented cases have demonstrated the coercive nature of falsified polygraph test results; they can change a suspect's beliefs, pressure a suspect to confess, and even cause the suspect to believe they committed the crime when they did not." *[Matsumoto*, 145 Haw. at 326-27, 452 P.3d at 329].

The dissent also cited *State v. Valero,* 285 P.3d 1014 (Idaho 2012), for the proposition that "it was highly coercive for an officer to falsely tell a defendant his polygraph results would be admissible in court." The Idaho Supreme Court reasoned that a law enforcement officer telling a suspect that the "polygraph was one hundred percent accurate" was a type of quasi-legal representation could and in fact did result in Valero's will being overborne and his statements involuntary. 285 P.3d at 914.

The Hawai'i Supreme Court's and Idaho Supreme Court's recognition of the overwhelming coercive nature of confronting a suspect with false "scientific" results stands in stark contrast to the Kansas Supreme Court majority's rubber stamp of such tactics.

While the evidence received by the district court did not show that Mr. Garrett was provided false test results, it does show that he was deceived throughout the entire interrogation regarding the 100% accuracy of the CVSA,

and was told that the results would be provided to a court of law for testimonial purposes (i.e., "Truth Verification Release Form indicating exam results would be provided for testimonial purposes.) See Appendix F – (Form). The district court in this case, made similar findings of fact and conclusion of law to the Hawai'i and Idaho Supreme Court in *Matsumoto* and *Valero.* In contrast to Hawai'i and Idaho, the Kansas Supreme Court isolated and then minimized the coercive impact of presenting quasi-factual and quasi-legal misrepresentations to a suspect. This Court should grant review and, like Hawai'i and Idaho, hold that such tactics are inherently coercive and, in combination with the additional circumstances argued below, rendered the statements in this case involuntary under the Fifth and Fourteenth Amendment as a matter of law.

The Officers' Minimization of Mr. Garrett's Miranda Warnings

The Kansas Supreme Court majority only cursorily acknowledged the district court's finding: "[l]aw enforcement minimized the need for *Miranda.*" and "[d]elayed telling him the specific nature of the allegations." (Tr. MTS Ruling Two at 11). The district court highlighted Detective Jones's description of *Miranda* as something he needed to provide in order to "jump through some hoops" because "one could argue that [Mr. Garrett] was detained." (Tr. MTS Ruling Two 4).

The Kansas Supreme Court majority determined that a second reading of

Miranda warnings by Sergeant Cox immediately following requesting Mr. Garrett to sign a "Truth Verification Release Form" which released Sergeant Cox, the Salina Police Department and the manufacturer of the Computer Voice Stress Analysis (CVSA) examination from any and all liability resulting from the examination was a sufficient cure to the earlier *Miranda* warning minimization. This is despite the fact that the "Truth Verification Release Form" led Mr. Garrett to believe all his statements would be admissible in the court of law (i.e., the quasi-legal representation that all video/video may be released for testimony). (Tr. at 90), See also Appendix F (Form). The Kansas Supreme Court disregarded the district court's finding of fact that Mr. Garrett was under stress. (Tr. MTS Ruling Two at 11). The district found that Mr. Garrett didn't understand the meaning of the word "coercion." (Tr. MTS Ruling Two at 11). The video admitted into evidence at the suppression hearing showed that Mr. Garrett did not understand the meaning of the word "disclose" in the context of this interrogation without further explanation by Sergeant Cox. (Tr. MTS Ruling Two at 7). The evidence admitted showed that Mr. Garrett told Sergeant Cox that he was so devastated that some of the words "don't even make sense." (Tr. MTS Ruling Two at 6). It was clear from the district court's findings of fact that it believed that law enforcement's minimization of *Miranda* warnings contributed to its finding that Mr. Garrett's free will was overborne and the resulting

confession was involuntary.

The Salina Police Department clearly downplayed the significance of *Miranda*, essentially equating *Miranda* warnings to a bureaucratic checkbox that meant nothing of significance. The Kansas Supreme Court majority did not attribute the appropriate significance that the evidence admitted and the facts found by the district court both supported the proposition that Mr. Garrett was at best stressed and fatigued and at worst confused. This Court has held that it was unwilling to allow "trad[ing] on the weakness of individuals" – in particular, those of "limited intelligence" – that risks "giv[ing] rise to a false confession." *Miranda,* 384 U.S. at 455 (1966). There was nothing to suggest Mr. Garrett was a person of significant intelligence or education.

The Kansas Supreme Court incorrectly isolated and then itself downplayed the importance the minimization of Mr. Garrett's *Miranda* warnings.

Mr. Garrett's Mental State at the time of the Interrogation

Next, the Kansas Supreme Court majority failed to give sufficient weight to the district court's findings of fact regarding Mr. Garrett's mental state at the time of the interrogation. The Kansas Supreme Court majority held that that the "district court made no such findings here [i.e., the defendant seemed confused, unable to understand or unable to remember what occurred], regardless of its observation that Garrett reported not eating or sleeping and was,

understandably, under "stress." *Garrett,* 319 Kan. 465, 478 (2024). These findings were belied by the record of the trial court's findings of fact regarding Mr. Garrett's mental state:

1. "Clearly, the defendant was under stress. He reported not eating or eating. He had difficulty reading the word 'coercion,' and it had to be explained to him. Law enforcement minimized the need for Miranda." (Tr. MTS Ruling Two at 11).
2. The defendant at the time of the interview "informed the officers that he had not eaten or slept and that he was upset." (Tr. MTS Ruling Two at at 4).
3. "He repeatedly informed them [police officers] that he was stressed or upset." (Tr. MTS Ruling Two at 4).
4. "He [Mr. Garrett] told them he was stressed by would at least listen in regards to Sergeant Cox's talking about the CVSA." (Tr. MTS Ruling Two at 5).
5. "Prior to beginning the CVSA exam the defendant again tells Sergeant Cox that he is under stress currently, she said that is normal." (Tr. MTS Ruling Two at 5).
6. The defendant commented, prior to the beginning of the CVSA that "he felt that he was shaking, extremely hyped, etc." (Tr. MTS Ruling Two at 5).
7. After being told again that the CVSA is a "wonderful tool, if you haven't done anything we can move on or past it. The defendant again said he was really upset." (Tr. MTS Ruling Two at 6).
8. The CVSA takes place in another room within the police department and the "defendant informs her [Sgt. Cox] that he is 'so devastated right now that some words don't make sense'." (Tr. MTS Ruling Two at 6).
9. The defendant advised Sgt. Cox that he could not make out the word "coercion." Sgt. Cox pronounced the word for him and then he said he understood. (Tr. MTS Ruling Two at 6).
10. "The defendant again told Sgt. Cox he was devastated and upset." (Tr. MTS Ruling Two at 9).
11. The district court found that Mr. Garrett's mental condition at the

time of the interrogation was stressed. (Tr. MTS Ruling Two at 4).

As opposed to the majority's divide and conquer strategy, Justice Rosen's dissent recognized the cumulative effect of Mr. Garrett's emotional state at the time of interrogation stating:

> [a]ggravating all this deception was Garrett's emotional state. The district court found Garrett had emotional turmoil, intense stress, and had not slept or eaten. It was noticeable because it interfered with his understanding of the CVSA consent form – he did not know the meaning of at least one term, and he attributed his confusion to his emotional and physical state." [*Garrett,* 319 Kan. at 487 (2024).]

In Mr. Garrett's case, it was clear that from the beginning of the interview he was sleep deprived, food deprived, and mentally stressed. The district court correctly found that Mr. Garrett's mental state at the time of the interrogation weighed in favor of suppression, and that his free will was overborne.

Implied Promises of Leniency and Threats

The district court made a finding of fact that "…law enforcement asserted to the defendant that they would much rather go to the prosecutor and let them know the defendant owned up to it, that he cooperated, that it reflects well on you." (Tr. MTS Ruling Two at 10).

The Kansas Supreme Court majority again minimized the coercive tactics that the detectives employed by suggesting that they did not explicitly *promise* leniency. *Garrett,* 319 Kan. at 478. The dissent recognized that, due to officers'

statements indicating to Mr. Garrett that his agreement to the take the test would be relayed to the prosecutor as "cooperation," Mr. Garrett was left in an untenable position. *Id* at 484, 555 P.3d at 1129-30. Justice Rosen explained that the officer's actions put Mr. Garrett in a position that, if he chose to remain silent, that it would equate to his guilt, or as Justice Rosen characterized it the officers employed a "psychological rubber hose". *Id.*

The concept that a statement obtained from a suspect as a result of a promise of lenience or threat violates the Fifth Amendment due process is deeply rooted in case law. In *Bram v. United*, 168 U.S. 532, 542-43 (1897), the Court expressed concern regarding confessions, "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by exertion of any improper influence." Over fifty years later, in *Leyra v. Denno*, 347 U.S. 556, 560 (1954), the Court held confessions obtained through coercion and promises of lenience are involuntary. And finally, in *Doyle v. Ohio,* 426 U.S. 610, 618 (1976), this Court held, "…[w]hile it is true that *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."

The detectives did imply a promise of lenience by telling Mr. Garrett on four separate occasions that they wanted to tell the prosecutor that he was cooperative, and not a monster preying on children. It is unclear what other

meaning such statements could have. Mr. Garrett was a novice of the criminal justice system and had never been questioned by law enforcement. The implied promise of cooperating combined with the implied threat of not cooperating overbore Mr. Garrett's free and independent will was thus involuntary.

Need to grant certiorari

In *Rogers v. Richmond,* 365 U.S. 534, 540-41 (1961), this Court held,

> Under the Due Process Clause the Court's decision have made it clear that convictions following the admission of evidence of confession which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand.

This Court should grant certiorari to resolve a dispute among the Kansas Supreme Court and other jurisdictions and within the Kansas Supreme Court itself regarding whether the use of multi-leveled deceptions including a ruse by law enforcement officers telling a suspect that a "scientific test" had absolutely proved his guilt crosses any line as it relates to voluntariness under the Fifth and Fourteenth Amendments. Justice Rosen highlighted the need for quick resolution of this question presaging the increasing use of technology to confront suspects with various forms of deepfake "evidence." This Court should grant certiorari to provide guidance to courts across this country regarding whether the use of such "evidence" is permitted, as held by the Kansas Supreme Court, or whether it is inherently coercive, as held by the Hawai'i and Idaho Supreme Courts.

The Kansas Supreme Court simply failed to apply the totality of the

circumstances analysis under the Due Process Clause of the Fifth and Fourteenth Amendment correctly by failing, using Justice Wall's words to "…[c]onsider the forest, not just the tree." *Garrett,* 319 Kan. at 490.

CONCLUSION

The petition for a writ of certiorari should be granted. In particular, this Court should grant certiorari to signal that, while some deception by law enforcement may be tolerated, law enforcement quasi-legal representations that a truth verification machine is 100% accurate, combined with numerous acts of deception cannot. Without this Court granting certiorari, the Kansas Supreme Court's decision to "rubber-stamp … deception … paves the way for an onslaught of even more coercive trickery during police interrogations," both in Kansas and around the country. *Garrett*, 319 Kan. at 488.

As presaged by Justice Rosen, with the advancement of artificial intelligence and other new and unfamiliar technologies it:

> will not be long before law enforcement tests the limits of creating fabricated images of a detainee at the scene of the crime or artificially create some other evidence in order to convince a suspect to forego their right to remain silent or cooperate with an investigation. [*Id.*]

Respectfully submitted,

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