No. 09-11121

IN THE
Supreme Court of the United States

J. D. B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a trial court may consider a juvenile's age in a Fifth Amendment *Miranda* custody analysis in evaluating the totality of the objective circumstances and determining whether a reasonable person in the juvenile's position would have felt he or she was free to terminate police questioning and leave?

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The opinion of the North Carolina Supreme Court is officially reported at 363 N.C. 664, 686 S.E.2d 135 (2009), and is reproduced in the Joint Appendix. (J.A. 6a-47a)

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming J.D.B.'s adjudication of delinquency and disposition was entered, pursuant to N.C.R. App. P. 32(b), on 31 December 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person...shall be compelled in any criminal case to be a witness against himself…."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall…deprive any person of life, liberty, or property, without due process of law…."

STATEMENT OF THE CASE

On Saturday, 24 September 2005, two homes in Chapel Hill, North Carolina were broken into. A digital camera, cell phone, jewelry, and other items were taken.

(J.A. 97a, 106a, 112a-113a, 122a) On the day of the break-ins, Chapel Hill Police Officer Ennis stopped and questioned two boys he saw looking into a house. One of the boys, J.D.B., gave Officer Ennis his correct last name and an incorrect first name. Ennis talked to J.D.B's grandmother and aunt, who seemed hostile and resistant and accused Ennis of stopping J.D.B. for racially motivated reasons. (J.A. 107a, 117a, 125a)

On Monday, 26 September 2005, Juvenile Investigator DiCostanzo of the Chapel Hill Police Department was assigned to the case. (J.A. 106a) He spoke to Paula Hemmer, whose house had been broken into. Ms. Hemmer told him that J.D.B. cut her grass in the past, but that she had told J.D.B. that she could not use him for the rest of the year because she had lost her job. (J.A. 107a, 111a) At DiCostanzo's request, Officer Ennis looked through the Smith Middle School yearbook to identify the boys he had stopped. Officer Ennis identified J.D.B., a thirteen-year-old special education student who attended the seventh grade at Smith Middle School. (J.A. 97a-98a, 107a, 124a, 143a)

On Thursday, 29 September 2005, Officer Gurley, a uniformed police officer assigned to Smith Middle School, called Investigator DiCostanzo and told him that a parent had brought a digital camera to school that possibly matched the camera taken in the break-in. (J.A. 107a-108a, 127a) Investigator DiCostanzo went to the middle school, verified J.D.B.'s date of birth, and asked Gurley to double check the address, telephone number, and name of J.D.B.'s legal guardian, his grandmother. (J.A. 124a-126a) Investigator DiCostanzo interviewed two students about the camera and to obtain background

information. (J.A. 110a, 123a) He then met with Officer Gurley, Assistant Principal Lyons, and Lyons' administrative intern Mr. Benson, advised them that he had information implicating J.D.B. in the off-campus break-ins, and discussed questioning J.D.B. (J.A. 108a-109a, 124a) The four decided to interrogate J.D.B. together. DiCostanzo encouraged Assistant Principal Lyons to ask J.D.B. anything he wanted to. (J.A. 116a) Investigator DiCostanzo did not call J.D.B.'s grandmother, his legal guardian, to tell her that J.D.B. would be questioned. (J.A. 98a, 124a, 126a, 132a)

Officer Gurley removed J.D.B. from his social studies class, told J.D.B. that a police officer wanted to talk to him, and escorted J.D.B. to a conference room where DiCostanzo, Lyons, and Benson were waiting. (J.A. 98a, 109a, 126a, 144a) The door to the conference room was then closed. (J.A. 98a, 141a)

Investigator DiCostanzo told J.D.B. that he was a juvenile investigator from the Chapel Hill Police Department. (J.A. 127a) He talked to J.D.B. about being the oldest child in his family and said "it must be hard to be the little man." J.D.B. said that it was. DiCostanzo asked J.D.B. about sports and the two talked about football. DiCostanzo continued making small talk. (J.A. 114a, 127a)

DiCostanzo then told J.D.B. that he wanted to follow up on J.D.B.'s encounter with police officers the previous weekend and asked if J.D.B. would talk about it. (J.A. 110a) Investigator DiCostanzo did not tell J.D.B. that he did not have to talk or that he was free to leave. (J.A. 98a, 112a) J.D.B. responded that "it really wasn't a big

deal," as he had been going around asking if anyone needed their yard mowed, was stopped by police, and then went home. (J.A. 98a, 110a)

Investigator DiCostanzo asked for more details, such as which house J.D.B. went to first. J.D.B. said that he and a boy named Jacob went first to Paula Hemmer's house, who was a regular customer. Ms. Hemmer was not at home. They went to a "bunch" of other houses as well, but did not go inside. He also said that he had previously put out slips offering to walk dogs. (J.A. 110a-111a, 127a, 145a) The information J.D.B. provided supported DiCostanzo's belief that J.D.B. had some involvement in the break-ins. (J.A. 128a-129a)

DiCostanzo asked J.D.B. to tell him about the time Ms. Hemmer caught him and his brother in her backyard. J.D.B. said that he was only cutting through and that he had asked Ms. Hemmer on that day also whether he could cut her grass. Investigator DiCostanzo informed J.D.B. that Ms. Hemmer told DiCostanzo that she had previously told J.D.B. that she was not going to have him cut her grass anymore because she had lost her job. J.D.B. made no response. DiCostanzo then told J.D.B. that he had the camera that was stolen from one of the houses. (J.A. 111a) J.D.B. again said nothing. (J.A. 112a) DiCostanzo asked Officer Gurley to show J.D.B. the camera and Gurley held the camera up. (J.A. 116a, 146a) It appeared to DiCostanzo that J.D.B. did not know what to say when he was confronted with the camera. (J.A. 112a)

Vice-Principal Lyons told J.D.B. that the two of them had had long conversations in the past and he really

wanted J.D.B. to "do the right thing." Lyons told him that the truth "always comes out in the end." (J.A. 112a) J.D.B. asked "if he got the stuff back was he still gonna be in trouble." DiCostanzo told him that it would help to get the items back, but that "this thing is going to court. What's done is done, [J.D.B.], now you need to help yourself by making it right." DiCostanzo added that given what J.D.B. had already said, he would have to look into getting a secure custody order if he felt that J.D.B. was going to continue breaking into people's houses. J.D.B. asked what that was. DiCostanzo told him that it was when you get sent to juvenile detention before going to court. (J.A. 98a-99a, 112a, 129a-131a, 146a, 148a)

Investigator DiCostanzo then told J.D.B. that he did not have to speak with him and that J.D.B. could get up and leave, but that he hoped that J.D.B. would listen to what DiCostanzo had to say. (J.A. 131a, 147a) J.D.B. started talking rapidly and told DiCostanzo that he had taken a camera and Jacob had taken a cell phone. He said that the breaks-ins were Jacob's idea. DiCostanzo asked about the other house that was broken into. J.D.B. said that Jacob had all of the jewelry. DiCostanzo asked J.D.B. to tell him how they got into the houses. J.D.B. then admitted that he put the jewelry into his pocket. (J.A. 112a-113a) Investigator DiCostanzo asked why they had left more valuable items such as a laptop computer. J.D.B. told him that this was the first time he had broken into a house and he had not known what to take. (J.A. 113a)

Investigator DiCostanzo told J.D.B. that although he had been taking notes, he wanted to be sure he

understood what J.D.B. had said and asked if J.D.B. would write it down. (J.A. 113a) J.D.B. wrote: "Sunday me and Jacob went to Paula's house and stole cell phone and camera and he stole some jewelry. The jewelry was taken out of Paula's house and we went back home and put it in the book bag." After signing this statement, J.D.B. wrote, "I'm gonna get Jacob to give the jewelry back." (J.A. 99a, 113a-114a)

The final school bell rang. Investigator DiCostanzo asked J.D.B. how he usually got home. J.D.B. said that he usually rode the bus. DiCostanzo asked J.D.B. to look him in the eye and promise he would not do this again. J.D.B. promised. DiCostanzo told J.D.B. to leave before he missed the bus and that he would see him at his house in a little while. DiCostanzo let J.D.B. leave the room. (J.A. 114a, 117a, 132a, 150a, 154a) The interrogation had lasted thirty to forty-five minutes. (J.A. 100a, 116a)

Investigator DiCostanzo stayed at the school to finish drafting a search warrant for J.D.B.'s home. Due to the hostility displayed by J.D.B.'s family the previous weekend, DiCostanzo did not know whether the family would consent to a search. (J.A. 117a) After completing the paperwork, DiCostanzo went to the Chapel Hill Police Department. DiCostanzo's supervisor expressed surprise that DiCostanzo had let J.D.B. leave school and wondered what would happen if J.D.B. went home and destroyed the evidence. He said that a police officer needed to be dropped off at the house while the search warrant was obtained. (J.A. 117a-118a, 133a) DiCostanzo drove Investigator Hunter to J.D.B.'s house. No one was at home. The school bus soon arrived and J.D.B. got off the bus. J.D.B. told the officers they could look around the house and he would show them where the

jewelry was. DiCostanzo told J.D.B. that he either needed a warrant or consent to search the house and that J.D.B. could not give consent to search. DiCostanzo left J.D.B. and Hunter standing outside the house while he got the search warrant signed by a magistrate. (J.A. 100a, 118a, 133a, 135a)

Investigator DiCostanzo returned to J.D.B.'s house with the warrant. No adult family member had yet arrived. (J.A. 136a) While standing outside, J.D.B. gave Hunter a ring of Ms. Hemmer's. The three went inside and J.D.B. retrieved more jewelry. (J.A. 118a, 135a) They then walked to a nearby gas station where J.D.B. had thrown some jewelry onto a shed. (J.A. 100a) As they walked back, Investigator DiCostanzo asked J.D.B. if he would mind showing him how J.D.B. had gotten to the back of Ms. Hemmer's house. J.D.B. complied. (J.A. 119a, 138a, 152a) Investigator DiCostanzo told J.D.B. that it would be very helpful if they could get whatever items Jacob had. J.D.B. said that he did not think Jacob would turn the items over to DiCostanzo, but Jacob would probably give them to him. They drove to Jacob's apartment, but no one was home. (J.A. 120a, 139a-140a)

On 19 October 2005, two juvenile petitions were filed against J.D.B. in Orange County District Court. Each petition alleged juvenile delinquency by one count of breaking and entering and one count of larceny. (J.A. 6a) On 1 December 2005, J.D.B.'s counsel filed a motion to suppress statements and evidence. (J.A. 88a-94a) After hearing testimony from Investigator DiCostanzo and J.D.B., the trial court denied the motion on the basis that J.D.B. was not in custody when he was interrogated at school. (J.A. 95a) On 24 January 2006, J.D.B. admitted the allegations in the petitions and renewed his objection

to the denial of his motion to suppress. The trial court entered an order adjudicating J.D.B. a delinquent and placing J.D.B. on probation. (J.A. 7a)

J.D.B. appealed the denial of his motion to suppress to the North Carolina Court of Appeals. The Court of Appeals remanded the case to the trial court for entry of findings of fact supporting its determination that J.D.B. was not in custody when he was interrogated. *In re J.B.*, 183 N.C. App. 299, 644 S.E.2d 270 (Ct. App. 2007) (unpublished). (J.A. 74a-87a) The trial court entered written findings on 16 October 2007, *nunc pro tunc* to 13 December 2005. (J.A. 97a-102a) On further review, a divided panel of the Court of Appeals affirmed the trial court. *In re J.D.B.*, 196 N.C. App. 234, 674 S.E.2d 795 (Ct. App. 2009). (J.A. 48a-73a) On 11 December 2009, in a 4-3 decision, the North Carolina Supreme Court affirmed the trial court's denial of the motion to suppress. *In re J.D.B.*, 363 N.C. 664, 686 S.E.2d 135 (2009). (J.A. 6a-47a) Judgment entered on 31 December 2009. (J.A. 4a-5a) On 1 November 2010, this Court granted J.D.B.'s petition for writ of certiorari to review the decision of the North Carolina Supreme Court.

SUMMARY OF THE ARGUMENT

In determining if a suspect was in custody when interrogated, such that *Miranda* warnings were required, a court must examine all of the circumstances surrounding the interrogation. "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree

associated with a formal arrest.'" *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

This Court has never excluded any objective circumstance from the custody analysis. As age is an objective circumstance, a court should weigh a juvenile's age in determining if custodial interrogation occurred. A child's age is readily observable and renders a child particularly susceptible to the coercive techniques of police interrogation. Absent consideration of age, a reliable custodial determination cannot be made. The line becomes blurred "between voluntary and involuntary statements," *Dickerson v. United States*, 530 U.S. 428, 435 (2000), and "no statement obtained from [a juvenile could] truly be the product of his free choice." *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

ARGUMENT

A TRIAL COURT MAY CONSIDER A JUVENILE'S AGE IN A FIFTH AMENDMENT *MIRANDA* CUSTODY ANALYSIS IN EVALUATING THE TOTALITY OF THE OBJECTIVE CIRCUMSTANCES AND DETERMINING WHETHER A REASONABLE PERSON IN THE JUVENILE'S POSITION WOULD HAVE FELT HE OR SHE WAS FREE TO TERMINATE POLICE QUESTIONING AND LEAVE.

Investigator DiCostanzo, fully aware that J.D.B. was only thirteen years old, made a series of calculated decisions about how to interrogate him. Having been notified by a police officer at J.D.B.'s middle school that

a camera possibly connected to the off-campus break-ins had been brought to school, Investigator DiCostanzo went to Smith Middle School. DiCostanzo decided to:

- conduct the investigation inside the school, rather than interview potential witnesses and J.D.B. at their homes, at the police station, on the schoolhouse steps, or at any other potential location;

- conduct the interrogation of J.D.B. in the presence and with the participation of uniformed Officer Gurley, Vice-Principal Lyons, and Lyons' administrative intern;

- send Officer Gurley to remove J.D.B. from class, rather than have J.D.B. brought to the interrogation by school personnel or otherwise summoned;

- conduct the interrogation in a conference room, a room which likely lacked the familiarity for a child of a classroom, gymnasium, lunch room, or other common area;

- conduct the interview behind a closed door;

- not initially advise J.D.B. why he was there;

- not initially advise J.D.B. that he was free to leave or free to decline to answer questions;

- begin the interrogation by building rapport;

- confront J.D.B. with Ms. Hemmer's statements contradicting the innocent explanation J.D.B. gave;

- ask Officer Gurley to display the stolen camera;

- permit Vice-Principal Lyons to urge J.D.B. to confess;

- advise J.D.B. that he had a case against him and the case would be going to court;

- threaten J.D.B. with detention at a juvenile facility;

- not advise J.D.B that he did not have to answer questions until after J.D.B. had incriminated himself; and

- tell him to take the school bus home where DiCostanzo would soon join him.

In assessing the totality of objective circumstances surrounding the interrogation, the North Carolina Supreme Court refused to consider that J.D.B. was only thirteen years old. Age is an objective factor, the consideration of which protects Fifth Amendment rights and furthers the prophylactic goals of *Miranda* with no undue burden being placed on the police or courts. The decision of the North Carolina Supreme Court was erroneous.

In *Miranda v. Arizona*, 384 U.S. 436, 439 (1966), this Court held as a constitutional matter that procedural safeguards were necessary to ensure that an individual subjected to custodial interrogation is "accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion…cannot be otherwise than under compulsion to speak." *Id.* at 461. The Court required that custodial interrogation commence with an advisement of Fifth Amendment rights and ruled that absent such warnings, the prosecution could "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." *Id.* at 444.

The *Miranda* custody test did not address age when it was announced, as in 1966 only adults were recognized as possessing Fifth Amendment rights.

In *In re Gault*, 387 U.S. 1 (1967), this Court extended Fifth Amendment privileges to juvenile delinquency proceedings, thereby ensuring that children too would not be "exploited for the information necessary to condemn them before the law." *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). The Court noted that it was "frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles." *Gault*, 387 U.S. at 14. Before a self-incriminating statement of a juvenile

could be admitted into evidence, the Court demanded clear and unequivocal "evidence that the admission was made with knowledge that he was not obligated to speak and would not be penalized for remaining silent." *Id.* at 44. Without specifically addressing the application of *Miranda* to juvenile interrogations, the Court nonetheless noted that one purpose of the Fifth Amendment, and consequently of prophylactic measures designed to effectuate the Amendment, was "to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." *Id.* at 47.

This Court's Fifth Amendment discussion in *Gault* was deeply rooted in the Court's Fourteenth Amendment juvenile voluntariness jurisprudence, an arena where age had long been deemed a relevant subject of inquiry in a totality of the circumstances analysis. Prior to its recognition that the Fifth Amendment extended to juveniles, this Court had "emphasized that admissions and confessions of juveniles require special caution." *Id.* at 45. In *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948), the Court observed that children were no "match for the police" in interrogation settings. Similarly, in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), the Court noted that a fourteen-year-old child is "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and…unable to know how to protect his own interests or how to get the benefits of his constitutional rights." The Court recognized that a fourteen-year-old "cannot be compared with an adult

in full possession of his senses and knowledgeable of the consequences of his admissions." *Id.*

After *Gault*, this Court had no immediate opportunity to examine custody in a juvenile setting, as *Miranda* warnings were administered in *Fare v. Michael C.*, 442 U.S. 707 (1979), the sole juvenile case to reach the Court. It fell to state and lower federal courts, as well as state legislatures, to examine whether age had a place in the *Miranda* custody analysis. All jurisdictions that examined the issue concluded that it did, since courts were constitutionally bound to "examine all of the circumstances surrounding the interrogation[.]" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam). *See, e.g., A.M. v. Butler*, 360 F.3d 787, 797 (7th Cir. 2004) (age of juvenile deemed "an important factor" in the totality of the circumstances evaluation); *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (evaluating whether a "reasonable juvenile" would have believed he was not at liberty to terminate interview and leave); *In re Jorge D.*, 202 Ariz. 277, 280-281, 43 P.2d 605, 608-609 (Ct. App. 2002) (objective test included "elements that bear upon a child's perceptions and vulnerability, including the child's age"); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (applying a reasonable eleven-year-old test); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" test); *In re Doe*, 130 Idaho 811, 818, 948 P.2d 166, 173 (Ct. App. 1997) (ruling that objective test for custody determinations must include a child's age); *People v. Braggs*, 209 Ill. 2d 492, 507, 810 N.E.2d 472, 482 (2004) (age is "analytically intertwined" with the reasonable-person prong of the custodial question); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa

1996) (ruling that age is an appropriate consideration in the custody determination); *In re Joshua David C.*, 116 Md. App. 580, 594, 698 A.2d 1155, 1162 (Ct. Spec. App. 1997) (ruling that custody determination must consider a juvenile's age); *Commonwealth v. A Juvenile*, 402 Mass. 275, 277, 521 N.E.2d 1368, 1370 (1988) (custody test is how "a reasonable person in the juvenile's position would have understood his situation"); *Evans v. Montana Eleventh Judicial Dist. Court*, 298 Mont. 279, 284, 995 P.2d 455, 459 (2000) (examining whether "reasonable fourteen-year-old" would have felt free to leave); *In re Robert H.*, 599 N.Y.S.2d 621, 623, 194 A.D.2d 790, 791 (App. Div. 1993) (considering whether "reasonable 15-year-old" would have believed he was free to leave); *In re Loredo*, 125 Ore. App. 390, 394, 865 P.2d 1312, 1315 (Ct. App. 1993) (evaluating "whether a reasonable person in child's position" would have felt that he was in custody); *In re L.M.*, 993 S.W. 2d 276, 288-289 (Tex. App. 1999) (reasonable person standard includes consideration of age); *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350, 353 (Ct. App. 1997) (applying reasonable fourteen-year-old standard).

State legislatures also recognized the need to ensure that juveniles were made aware of their Fifth Amendment rights and, due to their age, assisted in exercising them. This Court had stated in *Gallegos*, 370 U.S. at 54, that a fourteen-year-old

> would have no way of knowing what the consequences of his confession were without advice as to his rights – from someone concerned with securing him those rights – and without the aid of more mature judgment

> as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Legislatures adopted procedures that (1) required that a parent, legal guardian, custodian, or attorney be present during the custodial interrogation of a child, Colo. Rev. Stat. §19-2-511 (2010); Conn. Gen. Stat. §46b-137 (2010); N.C. Gen. Stat. §7B-2101 (2010); W. Va. Code Ann. §49-5-2 (2010); (2) permitted a parent, guardian, or custodian to be present, Me. Rev. Stat. Ann. Tit. 15, §3203-A (2010); Mo. Rev. Stat. §211.059 (2010); (3) required that juveniles be advised of a right to communicate with a parent, legal guardian, custodian, or attorney, Ala. Code §12-15-202 (2010); (4) required parental consent to a custodial interrogation, N.Y. Fam. Ct. Act §305.2 (2010); or (5) required that a parent, guardian, custodian, or attorney concur in a child's decision to waive *Miranda* rights, Ind. Code §31-32-5-1 (2010); Kan. Stat. Ann. §38-2333 (2009); Mont. Code Ann. §41-5-331 (2010); Tex. Fam. Code Ann. §51.09 (2010); Wash. Rev. Code §13.40.140 (2010). Such statutes sought to address vulnerabilities of juveniles in custodial interrogations which were absent from custodial interrogation of adults. Other states required that a parent be notified that his or her child had been taken into custody, *e.g.*, Alaska Stat. §47.12.250(b) (2010); Fla.

Stat. §985.101 (2010); Ga. Code Ann. §15-11-47 (2010); 19 Guam Code Ann. Tit. 19 §5111 (2009); Haw. Rev. Stat. §571-31 (2010); Idaho Code §20-516 (2010); Ky. Rev. Stat. Ann. §610.200 (2010); Md. Code Ann. Cts. & Jud. Proc. §3-814 (2010); Mich. Comp. Laws §712A.14 (2010); Minn. Stat. §260B.176 (2009); Wis. Stat. §938.19 (2009), envisioning that parental notification would "permit, where possible, a parent to confer and counsel with the juvenile before interrogation and confession." *People v. Fuller*, 292 Ill. App. 3d 651, 665, 686 N.E.2d 6, 16 (Ct. App. 1997). *Accord Paxton v. State*, 159 Ga. App. 175, 178, 282 S.E.2d 912, 915 (Ct. App. 1981). Such protective measures were deemed necessary since minors' lack of capacity, which renders them unable to execute a binding contract, convey real property, marry, or purchase alcoholic beverages, compels against placing them "on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to [them] and in an atmosphere most foreign and unfamiliar." *Lewis v. State*, 259 Ind. 431, 437-438, 288 N.E.2d 138, 141-142 (1972), *superseded by statute as stated in Sevion v. State*, 620 N.E.2d 736 (Ind. App. 1993). *Accord Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.").

While this Court had no opportunity to examine the relevancy of age, such was not true of interrogators, who have not ignored age in creating the coercive environment conducive to self-incrimination. Agreeing with this Court that "'[t]hat which would leave a man

cold and unimpressed can overawe and overwhelm a lad in his early teens,'" *Gault*, 387 U.S. at 45 (quoting *Haley,* 332 U.S. at 599), interrogators have been taught to not only use psychological techniques designed to elicit confessions from adult suspects, but also to utilize "theme developments and guidelines particularly applicable to" children. John Inbau, et al., *Criminal Interrogation and Confessions*, 298 (4th ed. 2004). In addition to the adult interrogation techniques of

> directly confronting the suspect about her guilt; developing 'techniques of neutralization' or psychological themes to justify or excuse the crime; interrupting the suspect's attempts at denial; rebuffing the suspect's explanations or assertions of innocence; engaging the suspect if she becomes passive or tunes out; showing sympathy and urging the suspect to tell the truth; offering a face-saving alternative, albeit incriminating, explanation for committing the crime; having the suspect orally relate some incriminating details of the crime; and finally, having the suspect provide a signed written confession,

Barry C. Feld, *Criminology: Police Interrogation of Juveniles: An Empirical Study of Policy and Practice,* 97 J. Crim. L. & Criminology 219, 236-237 (2006) (summarizing the nine-step "Reid Method" of interrogation), experts suggested, as to children, that the interrogator "attempt to learn…whatever information is available regarding the suspect's background," as "[t]he investigator's awareness of such

facts can be of considerable assistance in the interrogation." Inbau, *supra*, at 298. The interrogator has been further taught to advise children of "the grave consequences…of a continuation of relatively minor criminal behavior." *Id.* at 300.

In shaping the contours of interrogation, police officers are aware, as scientific and sociological studies have confirmed, that "'[j]uveniles are not, after all, miniature adults.'" *In re J.D.B.*, 196 N.C. App. 234, 247, 674 S.E.2d 795, 804 (Ct. App. 2009) (Beasley, J., dissenting) (quoting *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting)). Children are "more vulnerable or susceptible" to influence and pressure than adults, *Roper*, 543 U.S. at 569, as "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 176 L. Ed. 2d 825, 841 (2010). Since, as this Court has recognized, "the very fact of custodial interrogation…trades on the weaknesses of individuals[,]" *Miranda*, 384 U.S. at 455, weaknesses could not be more evident than in children, who possess "inferior mental capabilities [which] hamper them from understanding their situations and make them especially susceptible to police interrogation procedures." Tara L. Curtis, Recent Development: *Yarborough v. Alvarado: Self-Incrimination Clause Does Not Require Consideration of Age and Inexperience in the Miranda Custody Context*, 40 Harv. C.R.-C.L. L. Rev. 313, 324 (2005). Their "diminished competence relative to adults increases their susceptibility to interrogation techniques," as the "[s]ocial expectations of obedience to authority and children's lower social status make

them more vulnerable than adults during interrogation." Feld, *supra*, at 230, 244.

Studies have demonstrated that juveniles under the age of sixteen are significantly more likely to comply with adult authority in a legal setting and confess to police. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 353 (2003). "[A]s a group, adolescents are more willing than adults to confess rather than remain silent when confronted by an authority figure such as the police – especially if they believe it will result in an immediate reward, such as going home." Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 Crim. Just. No. 3, 20, 23 (Fall 2003) (referring to the Grisso study, *supra*).

The same study documented that juveniles under the age of fourteen were less able than their older peers to recognize the future consequences of their legal decisions. Grisso, *supra*, at 354. Under conditions of emotional arousal, the psychosocial deficiencies of children "diminish the regulatory effectiveness of the cognitive-control network." Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions Psychol. Sci. 55, 56 (2007).

With courts throughout the country turning to a "reasonable juvenile" standard to assess whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," *Thompson v. Keohane*, 516 U.S. 99, 112 (1995), courts

were also adopting the identical objective standard used in other areas of criminal and civil law. *E.g., United States v. Little*, 18 F.3d 1499, 1505 n.6 (10th Cir. 1994) (en banc) (age is objective factor in determining whether individual has been seized for Fourth Amendment purposes); *J.R. v. State*, 62 P.3d 114 (Alaska Ct. App. 2003) (age considered in determining whether child charged with murder displayed reckless disregard for life); *People v. Stechley*, 225 Ill. 2d 246, 870 N.E.2d 333 (2007) (age is objective circumstance considered in *Crawford v. Washington*, 541 U.S. 36 (2004), analysis of whether reasonable person in child's circumstance would have understood testimonial nature of statement); *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979) (age is objective factor utilized in self-defense analysis), *overruled in part on other grounds, State v. McAvoy*, 331 N.C. 583, 601, 417 S.E.2d 489, 500 (1992); 57B Am. Jur. 2d *Negligence* §872 (2010) (age is factor in reasonably prudent person test under tort law); Restatement (Second) of Contracts, §14 (1981) (age is factor in contracts law); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725 (2004) (age is relevant to duress and mistake defenses because "[a]lthough the reasonable person is an objective abstraction, he or she is not a wholly undifferentiated abstraction").

By including age in the custody analysis, courts also adopted an objective factor long utilized in assessing three of the remaining four prongs of a confession issue: whether an interrogation occurred, *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980), whether the suspect waived his or her *Miranda* rights, *Fare*, 442 U.S. at 725,

and whether the statement was voluntary. *Haley,* 332 U.S. at 599-601. The interrogation test of *Innis*, in particular, was described as "an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know." *Innis*, 446 U.S. at 305 (Marshall, J., dissenting). With law enforcement already attuned to considering age in those three areas of inquiry, no additional burden was deemed by these courts to exist in considering age on the custody question.

Judicial and legislative consideration of age in reasonable person inquiries does not subjectify an objective inquiry since the test neither seeks nor demands a determination of the juvenile's actual beliefs, but only how the hypothetical reasonable person in the juvenile's position would have understood his or her position. "Custody for *Miranda* purposes is a state of mind. When police create a situation in which a suspect reasonably does not believe that he is free to escape their clutches, he is in custody and...entitled to the *Miranda* warnings." *United States v. Slaight*, 620 F.3d 816, 820 (7th Cir. 2010). The custody analysis focuses upon "the way in which suspects experience interrogation," *Missouri v. Seibert*, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting), with all objective circumstances assessed from the perspective of "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Stansbury*, 511 U.S. at 325. When police escort an individual to an interrogation, conduct the interrogation behind closed doors, outnumber the

suspect in the closed environment, fail to convey that the questioning will be brief, confront the suspect with incriminating evidence, urge the futility of protesting innocence, and threaten round-the-clock detention, *cf. Berkemer v. McCarty*, 468 U.S. 420 (1984); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam), all such factors – present in the instant case – must be evaluated from the perspective of whether the reasonable person would deem his or her freedom of action was deprived "in any significant way." *Miranda*, 384 U.S. at 444. The cognitive differences between juveniles and adults, documented by MRI examinations, affect the manner in which the reasonable juvenile experiences such typically coercive interrogation techniques. Jennifer Park, Supreme Court Review: *Yarborough v. Alvarado*: *At the Crossroads of the 'Unreasonable Application' Provision of the Antiterrorism and Effective Death Penalty Act of 1996 and the Consideration of Juvenile Status in Custodial Determinations*, 95 J. Crim. L. & Criminology 871, 900 (2005).

The relevance of age to the custody inquiry finally reached the Court in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), but not in a procedural posture allowing for *de novo* consideration of the question. The issue before the Court was not whether age bore on the custody determination, but whether "a state court unreasonably applied clearly established law when it held that the respondent was not in custody for *Miranda* purposes." *Id.* at 655. With age never having been previously discussed in this Court's *Miranda* jurisprudence, and age not even pressed by Alvarado's counsel "on direct appeal or in habeas proceedings," *id.* at 666, the majority

of the Court concluded "that the state court's application of our custody standard was reasonable." *Id.* at 665.

While five members of the Court noted that a suspect's prior experience with police had never been considered part of the objective inquiry, since prior experience is a fact which police were unlikely to be aware of and "the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative[,]" *id.* at 668, no consensus existed on the issue of age. Four members of the Court opined that age "could be viewed as creating a subjective inquiry[,]" *id.*, one opined that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry," *id.* at 669 (O'Connor, J., concurring), and four justices opined that "youth is an objective circumstance.... It is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception." *Id.* at 674 (Breyer, J., dissenting).

With consideration of age not foreclosed by *Alvarado*, numerous state courts have continued to look at age in their custody determinations. *E.g. People v. Howard*, 92 P.3d 445 (Colo. 2004) (age one of many factors used in totality of circumstances analysis); *In the Matter of the Welfare of D.S.M.*, 710 N.W.2d 795 (Minn. Ct. App. 2006) ("the determination of whether a juvenile would reasonably believe he or she was in custody must be made from the perspective of the juvenile"); *In the Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009) (fourteen-year-old interrogated by sheriff's officer for

thirty minutes in unlocked conference room at school "would not believe he was at liberty to terminate the interrogation and leave"); *In re D.B.*, 2009 Ohio 6841, 2009 Ohio App. LEXIS 5735 (2009) (twelve-year-old would not believe he was free to leave stationhouse interview); *In re K.Q.M.*, 2005 Pa. Super. 148, 873 A.2d 752 (Super. Ct. 2005) (sixteen-year-old's age considered in custody determination); *In re M.G.*, 2010 Tex. App. LEXIS 6638 (Tex. Ct. App. 2010) (inquiry is whether "a reasonable child of the same age would believe his freedom of movement was significantly restricted"); *In the Interest of Dionicia M.*, __ N.W.2d __, 2010 Wisc. App. LEXIS 678 (Wis. Ct. App. 2010) (a reasonable person, particularly one fifteen-years-old, would not have felt free to leave). Commentators agreed that the inquiry is relevant. J.F. Ghent, Annotation, *What constitutes 'custodial interrogation' within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation*, 31 A.L.R.3d 565, §2(c) (2010); Wayne R. LaFave, et al., 2 *Criminal Procedure*, 731-732 (3rd ed. 2007).

Some jurisdictions, such as North Carolina, recognized that no consensus existed in *Alvarado* on the question of age, but adopted the view that consideration of age could be seen as importing a subjective standard. *In re J.D.B.*, 363 N.C. 664, 672, 672 n.1, 686 S.E.2d 135, 140, 140 n.1 (2009). *Accord People v. Croom*, 379 Ill. App. 3d 341, 351, 883 N.E.2d 681, 689 (2008); *In the Interest of C.S.C.*, 118 P.3d 970, 977-978 (Wyo. 2005). Additional jurisdictions cited *Alvarado* in their custody analyses, but expressly did not determine whether *Alvarado* foreclosed consideration of age. *State*

v. Bogan, 774 N.W.2d 676, 681 n.1 (Iowa 2009); *In re Tyler F.*, 276 Neb. 527, 538-540, 755 N.W.2d 360, 370-372 (2008); *In re J.H.*, 928 A.2d 643, 650 (D.C. 2007).

Courts that continue to include age among the factors in the custody analysis rejected *Alvarado*'s concern that such consideration would impose an undue burden on police of "'anticipating the frailties or idiosyncrasies of every person whom they question.'" *Alvarado*, 541 U.S. at 662 (quoting *Berkemer*, 468 U.S. at 442 n.35) (citation and internal quotation marks omitted). As *Roper* and *Graham* made clear, the frailties of minors are readily apparent and scientifically demonstrable. Juvenile offenders *are* objectively vulnerable. *Roper*, 543 U.S. at 573. These frailties are a matter of "ordinary common sense." *Alvarado,* 541 U.S. at 670 (Breyer, J., dissenting).

As to children like J.D.B., who was far younger than seventeen-and-one-half-year-old Alvarado, "[t]he police should have no difficulty recognizing that their suspect is a juvenile and adjusting their determination whether the suspect would understand his freedom of movement to be constrained accordingly." *Murray v. Earle*, 405 F.3d 278, 287 (5th Cir. 2005). This is particularly true when, as here, a police officer chooses to interview a child at a middle school, since no possible misconception about the child's juvenile status could exist. "Officers questioning students at school are well aware of the students' status as minors. As to elementary and middle-school students, their minority is virtually certain and their susceptibility to coercion great." Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85 (2006). In the instant case,

> the difficulty of guessing defendant's age [was] nonexistent. Investigator DiCostanzo sought out J.D.B. at a middle school, where he knew J.D.B. was a seventh-grade student. All seventh graders are juveniles, roughly between the ages of twelve and fourteen, and as Investigator DiCostanzo testified, he was able to obtain J.D.B.'s exact age from school records. Therefore, defendant's 'frailty' – his youth – was evident from the very location Investigator DiCostanzo selected to conduct the interrogation.

J.D.B., 363 N.C. at 675-676, 686 S.E.2d at 142 (Brady, J., dissenting).

Moreover,

> The decision to interview a student at school could be made to take advantage of the student's minority [age]. Questioning the student at school, the officer not only takes advantage of the student's compulsory presence at school and the background norm of submission to authority, but also chooses to interact with a student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise the youth to refuse to answer the officer's questions.

Holland, *supra*, 52 Loy. L. Rev. at 85 n.175 (quoted in *J.D.B.*, 363 N.C. at 683, 686 S.E.2d at 147 (Hudson, J.,

dissenting)). Middle-school students "lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrowest sense, *i.e.*, the right to come and go at will." *Vernonia Sch. Distr. 47J v. Acton*, 515 U.S. 646, 654 (1995). The age of schoolchildren cannot be ignored in a custody analysis, since objectively children at school are "instructed to obey the requests and directives of adults." *J.D.B.*, 363 N.C. at 677, 686 S.E.2d at 143 (Brady, J., dissenting). "The Student Handbook at Smith Middle School… instruct[ed] students to '[f]ollow directions of all teachers/adults the first time they are given,' '[s]top moving when an adult addresses' them, and '[w]alk away only after the adult has dismissed' them." *Id.* When Investigator DiCostanzo finally told J.D.B. that he was free to leave, he nonetheless did not dismiss him, as DiCostanzo coupled the statement with an entreaty to stay and listen to what he had to say. (J.A. 112a) J.D.B., who had been threatened with secure custody, which "certainly qualifies as an indicium of formal arrest," *id.* at 680, 686 S.E.2d at 145, was released only after Investigator DiCostanzo directed him to go home to await further investigation. *See In re R.H.*, 2008 Ohio 773, 2008 Ohio App. LEXIS 672 (2008) (child's ability to terminate an interview is hampered by clearly limited control over his own presence).

Since *Miranda* was announced forty-four years ago, "law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow v. Williams*, 507 U.S. 680, 695 (1993). Ten years after *Dickerson v. United States*, 530 U.S. 428

(2000), *Miranda* has become even more "embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.* at 443. With police already factoring in age in selecting the setting of the interrogation, the themes pursued, the entreaties made, and the lines uttered, with an eye toward the validity of a waiver and ultimate voluntariness of the statement, ignoring age — while considering every other objective factor present in the encounter — would undermine the purpose of *Miranda* and lead to exploitation of a vulnerable segment of society long deemed to merit "a degree of increased care." Park, *supra*, 95 J. Crim. L. & Criminology at 882.

"Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly…in those types of situations in which the concerns that powered the decision are implicated." *Berkemer*, 468 U.S. at 437. *Accord Seibert*, 542 U.S. at 618-619 (Kennedy, J., concurring). A thirteen-year-old at school escorted by a uniformed police officer to an interrogation, questioned by police officers and school officials in a closed conference room about an off-campus incident, not initially advised that he was free to terminate the encounter, and subjected to interrogation techniques designed to compel an incriminating statement, is a situation that implicates those concerns.

Because the custody determination involves an evaluation of all circumstances, no one circumstance, including age, could be determinative. *J.D.B.*, 196 N.C. App. at 239, 674 S.E.2d at 799; *Howard*, 92 P.3d at 450. Thus, holding that courts, expert in evaluation of juvenile confession issues, *Fare*, 442 U.S. at 725, can weigh age

when evaluating all of the circumstances surrounding an interrogation would not render inadmissible all unwarned juvenile confessions. Even with age factored into the analysis, not all police-juvenile interactions would meet the test for custodial interrogation. It would simply acknowledge the objective fact that a six-year-old is not sixty, *see* N.C. Gen. Stat. §7B-1501(7) (2010) (children younger than six cannot be charged with a crime), "*ensure* that the police do not coerce or trick captive suspects into confessing…[and] relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist." *Berkemer*, 468 U.S. at 433 (internal quotation marks omitted) (emphasis in original).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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