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 OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOHN CHARLES THOMAS
Counsel of Record
HUNTON & WILLIAMS LLP
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8522
jcthomas@hunton.com

MEGAN MILLER
HUNTON & WILLIAMS LLP
101 South Tryon Street
Suite 3500
Charlotte, NC 28280
(704) 378-4713

Counsel for Amicus Curiae
National District Attorneys Association

February 11, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 09-11121

J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National District Attorneys Association ("NDAA") is the largest professional organization representing criminal prosecutors in the world. Its members include district attorneys, state's attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Consent to the filing of the brief was granted by both parties.

in every state and territory of the United States. NDAA was formed in 1950 by local prosecutors to give a focal point to advance their causes and issues at the national level. Among its purposes are to improve and facilitate the administration of justice in the United States and provide to state and local prosecutors the knowledge, skills, and support to ensure that justice is done and the public safety and rights of all are safeguarded.

NDAA urges the Court to uphold the decision of the Supreme Court of North Carolina in *In re J.D.B.*, 363 N.C. 664, 686 S.E.2d 135 (N.C. 2009), *cert. granted*, 131 S. Ct. 502 (2010). On a daily basis, district attorneys around the country interview and question juveniles. The North Carolina Supreme Court correctly concluded that because age is subjective it is not an appropriate consideration in determining whether an individual is in custody for the purposes of issuing *Miranda* warnings. An objective rule provides clear guidance to police officers, prosecutors, and courts, and is crucial to the fair and orderly functioning of the criminal justice system. To abandon the present objective standard would trigger endless litigation over what an interrogating officer should have perceived about a suspect and thus how law enforcement and prosecutors should have treated a particular suspect differently from others. *Miranda* is well known, well understood, and is not in need of change.

SUMMARY OF ARGUMENT

NDAA will demonstrate in this brief that *Miranda v. Arizona*, 384 U.S. 436 (1966) is not implicated in this case because J.D.B. was not in custody. Contrary to Petitioner's suggestion, age does not constitute a restraint on a juvenile's freedom of

movement equivalent to formal arrest. *Miranda* and its progeny have already rejected the use of subjective factors in deciding whether the warning need be given; and though Petitioner contends that age is just another objective factor, as used by Petitioner age is a proxy for intelligence, experience, and knowledge. As applied by Petitioner, age is subjective. But more than that, if age is to be considered in the custody determination, why not gender, race, language proficiency, or any of the many other "objective," "readily observable" characteristics of a defendant? In short, once the door to consideration of a defendant's characteristics is opened there will be no end to the complexity of trying to decide whether a person is in custody so that *Miranda* warnings are required.

ARGUMENT

I. *MIRANDA* WAS AIMED AT THE EVILS OF CUSTODIAL INTERROGATIONS, NOT AT THE KIND OF QUESTIONING THAT HAPPENED IN THIS CASE

Miranda sought to combat the evil of "custodial police interrogation." In the words of Chief Justice Warren, "in the cases before us today . . . we concern ourselves primarily with this interrogation atmosphere and the evils it can bring." *Id*. at 456. The concern was with the tactics that police use when they take control of an individual, remove that person from familiar surroundings, cut them off from family, friends, and supporters then question them at the "unsupervised pleasure of the police." *Id*. at 466.

All the cases decided in *Miranda* involved "incommunicado interrogation of individuals in a police-dominated atmosphere." *Id*. at 445. The Court noted that the key to a successful police interrogation is "privacy – being alone with the person under interrogation," thus creating an "oppressive atmosphere of dogged persistence" in which the police dominate the individual. *Id*. at 449-51. The holding of *Miranda* reflects the concern expressed by the Court: "Accordingly, we hold that *an individual held for interrogation* must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today." *Id*. at 471 (emphasis added).

J.D.B. was not held for interrogation. He was not taken into custody. He was not cut off from his normal environment, placed at the mercy of a policeman, and questioned without surcease. Instead, he was escorted to a conference room at his school by the school resource officer. In the room were the assistant principal of J.D.B.'s school, the assistant principal's intern, and a detective. Once J.D.B. was in the room, the detective mentioned a prior encounter with the police and "asked [J.D.B.] if he would agree to answer questions." *J.D.B*., 363 N.C. at 666, 686 S.E.2d at 136. Near the end of the 30 to 45 minute conversation, the school bell rang and when the detective learned that J.D.B. rode the bus home, he told J.D.B. that he ought to leave so that he would not miss his bus. J.D.B. was then allowed to leave. *Id*. at 667, 686 S.E.2d at 137. Far from the evils that prompted *Miranda*, J.D.B. was not left to the mercies of the police. He was not held in secret or tricked into confessing. *He was not in custody*.

Petitioner asserts that because middle school students are always expected to obey authority, (Pet. Br. at 28), J.D.B. was in custody. It is unclear whether Petitioner is proposing that questioning a juvenile at school is *per se* custodial. (*Id*. at 27-28 (asserting that middle school students lack "even the right of liberty in its narrowest sense")). In any event, this Court has already rejected the notion that a coercive environment, standing alone, is sufficient to warrant a determination that the person is in custody. *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977) (holding that a "coercive environment" does not make a non-custodial situation custodial). Thus, the fact that the questioning of J.D.B. occurred in an environment in which juveniles were expected to obey adults is not sufficient to show a restraint on movement indicative of formal arrest.

Moreover, Petitioner asserts that the question presented in this case is whether a reasonable person in J.D.B.'s position would have felt he or she was free to terminate police questioning and leave. (Pet. Br. at *i*). But that is not the question at issue in the custody analysis. In the custody analysis the court considers whether a reasonable person would have perceived a restraint on his or her freedom of movement to the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). While J.D.B. may not have felt that he had the authority to walk out of the conference room, that is an entirely different inquiry from whether he felt that he was effectively, if not actually, under formal arrest.

II. THIS COURT HAS ALREADY RULED IN *YARBOROUGH V. ALVARADO* THAT AGE IS NOT A FACTOR IN THE CUSTODY ANALYSIS

Yarborough v. Alvarado, 541 U.S. 652 (2004) holds the answer to this case. The Petitioner spends a great deal of time trying to minimize the importance of the Court's decision in *Yarborough*. According to Petitioner, we should all simply forget that this Court said there that age has no role to play in the *Miranda* test. But this Court knows what it said and it knows the weight to give its own decisions — particularly one in which the Court opined about the very issue that is here under review.

In *Yarborough,* about a month after the shooting of a truck driver in a shopping mall parking lot, seventeen and a half year old Michael Alvarado was interviewed by police in connection with his role in the murder. *Id*. at 656. A detective left word with Alvarado's mother that she wished to speak to Alvarado. His parents brought him to the police station and waited in the lobby while he was interviewed. The detective took Alvarado to a small room and talked to him for about two hours without any *Miranda* warning. The detective and Alvarado were the only two people in the room and their conversation was recorded. *Id*. Twice the detective asked Alvarado whether he needed to take a break. At the end of the conversation, Alvarado was taken home by his father. *Id*. at 658.

When charged with first-degree murder and attempted robbery, Alvarado moved to suppress his statements. In light of Alvarado's trial testimony that the interview with the detective had been a "pretty friendly conversation" and that he had not

felt "coerced or threatened in any way," the state trial court denied the motion on the grounds that the interview was noncustodial. *Id*. Relying on *Thompson v. Keohane*, 516 U.S. 99 (1995), the California appellate court agreed. Emphasizing the absence of any intense or aggressive tactics, it concluded that a reasonable person would have felt at liberty to leave and thus that Alvarado had not been in custody. *Yarborough*, 541 U.S. at 659. On federal habeas review, the Central District of California also agreed that Alvarado had not been in custody for purposes of *Miranda*. *Id*.

The Court of Appeals for the Ninth Circuit ruled that the California courts had misunderstood *Miranda*. According to the Ninth Circuit, the minor's "youth and inexperience" should have been taken into account in evaluating whether a reasonable person in his position would have felt free to leave the police interview. *Id*. at 659-60. That ruling was grounded on the fact that this Court has considered a defendant's juvenile status when evaluating the voluntariness of confessions and the waiver of the privilege against self-incrimination. *Id*. at 660. According to the Ninth Circuit there was no principled reason why the defendant's age should not also be considered in the custody analysis. *Id*. at 668.

This Court disagreed and reversed the decision, holding that the Ninth Circuit's erroneous decision stemmed from its considerable and unwarranted reliance on Alvarado's age and inexperience with law enforcement. *Id*. at 666-67. Surveying *Miranda* and its progeny, this Court concluded: "*Our opinions applying the Miranda custody test have not mentioned the suspect's age, much less mandated its consideration. The only indications in the Court's*

opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors." *Id*. (Emphasis added).

Contrary to the rationale of the Ninth Circuit, this Court explained the conceptual difference between the *Miranda* custody test and the situations in which the Court considered age and experience. *Id*. at 667. For example, whether or not a statement was made voluntarily, in the sense that a defendant's will was overborne, logically depends on the characteristics of the accused, that is, age, education, intelligence, and prior experience. *Id*. at 668. But the custody inquiry is different because it focuses on what the police did and said. The goal is to eliminate subjectivity and give the police clear guidance as to what is and is not permissible. Considering characteristics of the suspect like his age "could be viewed as creating a subjective inquiry." *Id.*

Petitioner attempts to discredit *Yarborough* by pointing to the fact that it was not a *de novo* ruling on the age issue. But this Court did not see it that way:

> [R]eliance on Alvarado's prior history with law enforcement was improper not only under the deferential standard of 28 U.S.C. § 2254(d)(1), *but also as a de novo matter.* In most cases, police officers will not know a suspect's interrogation history. *See Berkemer*, *supra*, at 430-431, 104 S.Ct. 3138. Even if they do, 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. . . . We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised

> of their *Miranda* rights. *See Berkemer*, *supra*, at 431-432, 104 S.Ct. 3138. The inquiry turns too much on the suspect's subjective state of mind and not enough on the "objective circumstances of the interrogation." *Stansbury*, 511 U.S., at 323, 114 S.Ct. 1526.

Id. at 668-69 (emphasis added).

Yarborough is the main building block for the disposition of the present case and its holding applies equally here. *Miranda* has always stood for the idea that a defendant may not be compelled by the police to provide incriminating testimony against himself. But an individual's age does not bear on the question whether the defendant was *compelled by the police* to provide incriminating testimony. As is evident in *Yarborough,* it would change the nature of the *Miranda* inquiry to introduce a requirement that interrogating law enforcement officials must get into the minds of suspects and figure out whether they felt like they were not free to leave, and on that basis decide whether or not to give *Miranda* warnings.

III. *MIRANDA* AND ITS PROGENY REJECT THE USE OF SUBJECTIVE FACTORS IN DECIDING WHETHER THE WARNING SHOULD BE GIVEN

The notion that the defendant's characteristics should play a role in deciding whether the *Miranda* warning should be given is not a new idea; it was considered and rejected 45 years ago in *Miranda* because the Court sought to establish a simple, clear, bright line rule:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to

> the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. *Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation;* a warning is a clearcut fact.

384 U.S. at 468-69 (emphasis added).

The attributes of the individual are irrelevant to the purposes of and the need for the warning. Thus, if the person is "in custody" being restrained and cut off from others, then the warning must be given; otherwise, not.

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), Justice Thurgood Marshall wrote at length about the importance of avoiding subjective inquiries when making the *Miranda* custody decision. At issue in *Berkemer* was whether a person pulled over by the police in a traffic stop was entitled to *Miranda* warnings before answering questions posed by the police. *Id*. at 435. Though the facts showed that the police officer intended to arrest the driver, the Court held that *Miranda* warnings were not required. *Id*. at 441-42.

In explaining that the unannounced intent on the part of the officer to arrest the driver did not render the driver in custody, Justice Marshall cited with approval the Sixth Circuit's treatment of that fact:

> [T]he Court of Appeals accorded no significance to the parties' stipulation that respondent's "freedom to leave the scene was terminated" at the moment Trooper Williams formed an intent

> to arrest respondent. The court reasoned that a *"'reasonable man' test," not a subjective standard, should control the determination of when a suspect is taken into custody for the purposes of Miranda*.

Id. at n. 4 (citing *McCarty v. Herdman*, 716 F.2d 361, 362, n. 1 (1983) (quoting *Lowe v. United States*, 407 F.2d 1391, 1397 (9th Cir. 1969))) (emphasis added). The *Miranda* custody analysis has always focused on objective facts, not the subjective views of those involved.

A. Age Is A Subjective Consideration In The Context Of *Miranda* Rights.

Applied objectively, age simply has no bearing on the custody analysis. A sixteen year old is no more or less restrained by the use of handcuffs, for example, than is a sixty year old. Because age cannot tell a court or police whether there has been a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest, Petitioner instead uses age as a proxy for the individual's understanding of his legal rights in the situation and, in particular, how he perceives any restraint on his freedom.

Just what impact an individual's age will have on his perception of his circumstances is speculative at best. *Yarborough*, 541 U.S. at 669 (O'Connor, J., concurring) ("Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave."). Thus, law enforcement officers and courts are left with the task of determining how a thirteen year old would have perceived being questioned for 30 to 45 minutes by a police

officer in a conference room at his school. This subjective inquiry is precisely what Justice Marshall warned against in *Berkemer*:

> [A]n objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the *burden of anticipating the frailties or idiosyncrasies of every person whom they question.*"

Id. at 442, n.35 (citing *People v. P.*, 233 N.E.2d 255, 260 (N.Y. 1967)) (emphasis added).

Yarborough considered whether age constitutes an objective or subjective factor when considered in the context of a *Miranda* custody analysis. 541 U.S. at 668. The Court noted that "the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases." *Id*. at 667. The "objective" custody test applied by the lower court considered whether a "reasonable 17-year-old, with no prior history of arrest or police interviews" would consider himself free to terminate the interrogation. *Id*. As the court grafts on to the reasonable person more and more of the characteristics of the individual defendant, the objective test begins to look like a subjective question of how that defendant perceived his circumstances. "[C]onsideration of a suspect's individual characteristics-including his age-could be viewed as creating a subjective inquiry," which is not what *Miranda* intends. *See id*. at 668.

Petitioner posits that his formulation of the custody analysis is not subjective because the court and police are only required to consider how a

reasonable juvenile, not any particular juvenile, would have perceived his or her situation. (Pet. Br. at 22). But, a fourteen year old may not perceive his situation in the same way that a sixteen year old does, or a seventeen and a half year old. (*Id*. at 20 (noting that juveniles under sixteen are more likely to comply with adults, and those under fourteen are also less likely to recognize future consequences of their decisions)). How much more "susceptible to police interrogation procedures" is a reasonable thirteen year old? (*Id*. at 19). It is "ordinary common sense" that a ten year old is vastly different from a seventeen year old, (*id*. at 26 (quoting Justice Breyer's dissent in *Yarborough*)), and Petitioner's proposed reasonable juvenile standard would have to be recalibrated by the court in each case to account for the individual defendant's age. This type of custody analysis crosses "the line between permissible objective facts and impermissible subjective experiences." *See Yarborough*, 541 U.S. at 667.

B. Consideration Of Subjective Factors Leads To Uncertainty In Police Investigations.

The Court granted certiorari in *Miranda*, in part, "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-42. The central benefit of *Miranda* is that it "inform[s] police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and [] inform[s] courts under what circumstances statements obtained during such interrogation are not admissible." *Fare v. Michael C*., 442 U.S. 707, 718, 725 (1979); *Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("'[O]ne of the principal advantages' of *Miranda* is the ease and clarity of its application.").

Adopting Petitioner's dual reasonable man and reasonable juvenile standards only muddies 45 years of settled precedent. When deciding whether to give *Miranda* warnings, police officers need only ask themselves whether the individual they're about to interrogate is under formal arrest or equivalent restraint. This clarity will be destroyed if officers must also consider how an individual's age might impact the perception of the restraints on freedom.

Additionally, Petitioner claims that police should have had no difficulty recognizing a thirteen year old as a juvenile, particularly since he was interrogated at his middle school. But it is not at all clear that had J.D.B. been approached on the street, his age would have been so "readily observable." Indeed, Alvarado was just five months shy of his eighteenth birthday. "It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority." *Yarborough*, 541 U.S. at 669 (O'Connor, J., concurring). But Petitioner's reasonable juvenile standard would apply regardless of whether the interrogating officer correctly guessed the age of the individual. And, even where officers know the age of the individual, they are still left to speculate as to what effect age will have on the perception of the circumstances. *Miranda*, 384 U.S. at 468-69 (assessments of factors such as age and experience "can never be more than speculation."). Expanding *Miranda* by asking police officers to consider what impact a juvenile's age will play in the analysis of the restraints on the juvenile's freedom of movement is unworkable.

IV. *MIRANDA* IS CONCERNED WITH THE COMPULSIVE CHARACTERISTICS OF CUSTODIAL INTERROGATION, NOT THE CHARACTERISTICS OF THE PERSON BEING INTERROGATED.

Miranda only applies where there was a "formal arrest or restraint on freedom of movement" akin to a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that . . . the questioning took place in a 'coercive environment.'" *Mathiason*, 429 U.S. at 495. Rather, the reviewing court "must examine all of the circumstances surrounding the interrogation. . . ." (*Stansbury v. California,* 511 U.S. 318, 322 (1994) *(per curiam)*. "An understanding of the nature and setting of this in-custody interrogation is essential . . . ." *Miranda*, 384 U.S. at 445.

Because *Miranda* focuses on actions by the police to compel incriminating testimony, the "circumstances surrounding the interrogation" test has always been about whether the officers used handcuffs, the length of the interrogation, the number of officers in the room, what officers said to the defendant, where officers conducted the interrogation, whether officers allowed the defendant contact with others outside the interrogation room, whether officers were standing guard at the door, and other things of that kind. *See Thompson*, 516 U.S. at 118, (stating that the factors a reviewing court should consider "include, at a minimum, the location, timing, and length of the interview, the nature and tone of the questioning, whether the defendant came to the place of questioning voluntarily, the use of physical

contact or physical restraint, and the demeanor of all of the key players . . . ."). The custody analysis has never concerned itself with the characteristics of the individual being questioned.

This focus on the circumstances of a custodial interrogation is the reason that the Court in *Beckwith v. United States*, 425 U.S. 341, 345 (1976), rejected the argument because police had focused their investigation on Beckwith, he was under "psychological restraints" which rendered him in custody. The Court said that Beckwith's "argument that he was placed in the functional, and, therefore, legal, equivalent of the *Miranda* situation asks us now to ignore completely that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation.'" *Id*. at 346.

For all his efforts, Petitioner has not cited a single case from this Court where the question of custody turned on the individual characteristics of the suspect. And there are none.

V. THERE IS NO COMPELLING REASON TO MODIFY *MIRANDA*

There is "a strong presumption against expanding the *Miranda* rule any further." *United States v. Patane,* 542 U.S. 630, 640 (2004). The Court has only permitted modifications that are consistent with *Miranda's* underlying principles. *Fare v. Michael C*., 442 U.S. 707, 717 (1979). It would change the nature of the *Miranda* inquiry to introduce a requirement that interrogating law enforcement officials must get into the minds of suspects and figure out whether they felt like they were not free to leave and on that basis decide whether or not to give *Miranda* warning.

Petitioner's attempt to expand *Miranda* in this way is antithetical to its underlying principles and should be rejected.

What Petitioner is really saying here is that juveniles are predisposed to confess with only a modicum of encouragement from police. (Pet. Br. at 19 (stating that children are "especially susceptible to police interrogation procedures"); *id*. at 20 ("juveniles . . . are significantly more likely to comply with adult authority in a legal setting and confess" and "less able . . . to recognize the future consequences of their legal decisions."); *id*. at 26 ("Juvenile offenders are objectively vulnerable.")). But, just as *Miranda* does not prevent officers from using non-coercive interrogation techniques, it does not stand in the way of those individuals predisposed to tell the truth. *Miranda,* 440 U.S. at 478 ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."). It *only* precludes confessions resulting from physical and psychological coercion by the police. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). Expanding the custody analysis in an effort to protect juveniles, not from the coercive actions of police, but from their own inclination to tell the truth is inimical to the principles of *Miranda*.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of North Carolina should be upheld.

Respectfully submitted,

JOHN CHARLES THOMAS
Counsel of Record
HUNTON & WILLIAMS LLP
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8522
jcthomas@hunton.com

MEGAN MILLER
HUNTON & WILLIAMS LLP
101 South Tryon Street
Suite 3500
Charlotte, NC 28280
(704) 378-4713

Counsel for Amicus Curiae
National District Attorneys Association

February 11, 2011