ORIGINAL

No. 09-11121

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009

J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A COURT SHOULD CONSIDER A JUVENILE'S AGE IN DETERMINING WHETHER A PERSON IS IN CUSTODY FOR MIRANDA PURPOSES?

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CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at In re J.D.B., 363 N.C. 664, 686 S.E.2d 135 (2009), and is reproduced in the appendix to the petition.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the Supreme Court of North Carolina.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Procedural History

On 11 September 2009, the Supreme Court of North Carolina issued an opinion finding no error in the denial of petitioner's motion to suppress certain statements and evidence. In re J.D.B., 363 N.C. 664, 686 S.E.2d 135 (2009).

B. Evidence at Hearing

On 26 September 2005, Investigator DiConstanzo was assigned to investigate break-ins that occurred on September 24th in a Chapel Hill neighborhood. On the day of the break-ins, the police department received a report that two juveniles had been seen "peeping" into the back of a residence in the same neighborhood. An officer, who had questioned the two juveniles on the 24th about the reported "peeping," told Investigator DiConstanzo that one of the juveniles said his name was "Jason." Although "Jason" was a fictitious name, a yearbook picture from Smith Middle School

confirmed that "Jason" was actually petitioner J.D.B. One of the victims, Paula Hemmer, had also provided petitioner's name as a possible suspect in this case. Petitioner was a thirteen-year old, special education student at Smith Middle.

On September 29th, Investigator DiConstanzo went to Smith Middle School, after learning in a phone call from a school resource officer ("SRO"), that a stolen camera had been found at the school. When he arrived at the school, Investigator DiConstanzo met with the SRO, the Assistant Principal and the principal's intern. The Assistant Principal, Mr. Lyons, told Investigator DiConstanzo that he wanted to be involved in the interview because a parent found the camera at home and brought it back to the school. So, they decided to interview petitioner, but first, they interviewed two female students who had seen petitioner with the camera; one of whom was the student whose parent had brought the camera back to the school.

After those students were interviewed, the SRO (Officer Gurley)[1] escorted petitioner to the same room for his interview. The room was "a large conference area" that had a table that would seat around twelve people. Inside the room with petitioner were Investigator DiConstanzo, Mr. Lyons, the SRO and the intern. Investigator DiConstanzo, who was wearing a suit jacket, a tie and some slacks, introduced himself as a juvenile investigator. He told petitioner that he "wanted to follow up [on] what happened when [petitioner] met with the police officers last week-end [sic]" and also

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[1] The petition omits the fact that the uniformed officer who removed petitioner from class was a school resource officer (SRO), who was primarily responsible to the school.

asked if petitioner wanted to "talk with [him] about it." Petitioner replied, "sure," and told the officer, "it wasn't a big deal. He mows people's yards and was going around asking anyone if they needed their yard mowed. And then the police stopped him and he went home."

When the officer asked for more details, petitioner indicated that "he and Jacob [] went to Paula Hemmer's house first . . . [because] Paula was a regular customer . . . but she wasn't home." Petitioner said they had gone to several other houses looking for work but only went inside one of those houses because a "dude" told them, "you can wait for my mom to come home." Investigator DiConstanzo then asked petitioner if Ms. Hemmer had caught petitioner and his brother behind her house a few days earlier, and petitioner stated that he was just "cutting through" her yard and that when Ms. Hemmer saw him, he asked if he could mow her lawn.

Investigator DiConstanzo then told petitioner he had the camera that was stolen from the residence where petitioner was seen looking into the back window. At this point, petitioner became quiet, and Mr. Lyons (the Assistant Principal) began encouraging him "to do the right thing because the truth always comes out in the end." Petitioner then asked, "if he got the stuff back was he still gonna be in trouble," and Investigator DiConstanzo replied "that it would help to get the items back but that . . . this thing is going to court." He also informed petitioner that a secure custody order could be obtained, "if [he] felt that [petitioner] was going to go out and break into other people's houses again because [petitioner] really didn't care." Petitioner asked what a secure custody order was, and Investigator DiConstanzo explained "that it's

where you get sent to juvenile detention before court."

Before petitioner made any other statements, Investigator DiConstanzo told petitioner, "you don't have to speak to me; you don't have to talk to me; if you want to get up and leave, you can do so, but that [Diconstanzo] hoped that [petitioner] would listen to what [he] had to say." Investigator DiConstanzo then stated, "do you understand you're not under arrest and you don't have to talk to me about this." Petitioner "nodded his head yes" and then admitted that he and Jacob went into one of the residences and took a camera and a cell phone and took jewelry from the other residence. Petitioner said it was Jacob's idea to break into the residences and that they got in through unlocked doors.

After petitioner finished describing what happened, he wrote the following statement:

> 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. Signed, [J.B.] . . .
>
> I'm gonna get Jacob to give the jewelry back.

The school bell rang, signifying the end of the school day, and petitioner left to ride the bus home.

The interview with petitioner lasted between thirty to forty-five minutes. During the interview, there was no mention of petitioner being under arrest or in custody, and petitioner never mentioned anything about wanting to have a parent present. Petitioner "was surprisingly calm, spoke clearly, asked questions when he

needed to," and did not attempt to leave the room. The other individuals who were present during the interview did not say anything to petitioner or ask him any questions, except for when Mr. Lyons encouraged petitioner to tell the truth.

After speaking with petitioner, Investigator DiConstanzo believed he had enough information to obtain a search warrant for petitioner's residence. When he returned to the police department to get the warrant, his supervisor told him that he should not have let petitioner leave because petitioner might go home and get rid of the evidence. The supervisor also stated that someone needed to inform petitioner's grandmother that a search warrant was being obtained. So, Investigator DiConstanzo took another officer, Investigator Hunter, to petitioner's residence to speak with petitioner's grandmother, so that he could go back to get the warrant signed. When they arrived, petitioner's grandmother, who is also his legal guardian, was not at home.

Around this time, petitioner arrived on the school bus and told the officers they could look around his house and that he would take them to the jewelry. Investigator DiConstanzo informed petitioner that petitioner could not give consent for the officers to search his house and asked if petitioner would stay with Investigator Hunter, while he went back to get a search warrant.

While sitting outside waiting for Investigator DiConstanzo to return, petitioner reached into his pocket, pulled out a ring that belonged to Ms. Hemmer and gave it to Investigator Hunter. When Investigator DiConstanzo returned with the search warrant, Investigator Hunter gave him the ring. There was still no one home, but petitioner took the officers inside and gave them the rest of the stolen jewelry.

Petitioner also took them down the street to a gas station and led them to more jewelry he had hidden on top of a shed. The three of them then walked to Ms. Hemmer's house, and petitioner showed the officers how he and Jacob got into the house.

Petitioner also offered to get the other items back from Jacob, but when the officers drove petitioner to Jacob's apartment, no one answered the door. They drove petitioner back to his residence and left a copy of the search warrant on the living room table for his grandmother. The next day, petitioner's grandmother told Investigator DiConstanzo that Jacob had threatened to "beat [petitioner's] butt," if petitioner didn't help him break into the residences.

REASONS WHY WRIT SHOULD NOT BE GRANTED

THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED, IN ACCORDANCE WITH THIS COURT'S JURISPRUDENCE AND THE VAST MAJORITY OF OTHER COURTS' DECISIONS, THAT AGE SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON IS IN CUSTODY FOR MIRANDA PURPOSES.

Introduction

Petitioner asks this Court to grant certiorari to clarify whether the age of a juvenile suspect must be considered in determining whether that juvenile is in custody for purposes of giving him warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). He contends review should be allowed because: (1) this Court has not definitively ruled on the issue; and (2) state and federal courts are divided on the issue.

Petitioner argues that this Court's decision in Yarborough v. Alvarado, 541 U.S. 652, 158 L. Ed. 2d 938 (2004), has created uncertainty regarding this issue in that many jurisdictions continue to consider age as a factor, while others question whether they may do so, and at least three, including North Carolina, have concluded that consideration of the suspect's age is prohibited. According to petitioner, the jurisdictions which have declined to consider the suspect's age "have modified the established Miranda analysis to exclude an important objective circumstance: the juvenile's age." (Pet. at 15)

In Alvarado, this Court held that a state court had not unreasonably applied clearly established federal law when it failed to consider the age and inexperience of the seventeen-year-old suspect in determining that his interrogation was not custodial. Alvarado, 541 U.S. at 664, 158 L. Ed. 2d at 951. In rejecting the conclusion reached by the Court of Appeals for the Ninth Circuit that the lower court should have considered Alvarado's age and inexperience with law enforcement, this Court strongly emphasized the objective nature of the custody test, stating: "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics -- including his age -- could be viewed as creating a subjective inquiry." Id. at 668, 158 L. Ed. 2d at 954. This Court further noted that "[o]ur opinions applying the Miranda custody test have not mentioned the suspect's age, much less mandated its consideration[and t]he only indications in the Court's opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors." Id. at 666-67, 158 L. Ed. 2d at 953.

Contrary to petitioner's assertions, there is no well-developed conflict among state and federal courts regarding consideration of age as a factor in the objective test for custody as a result of the Alvarado decision. Petitioner cites fifteen cases purporting to establish that "[p]rior to Alvarado, all jurisdictions that had addressed the issue of whether juvenile status may be relevant to the Miranda custody determination held that juvenile status was a proper consideration." (Pet. at 9) However, a careful review of those decisions reveals that only nine out of the fifteen jurisdictions explicitly held that age was a proper factor to consider. Similarly, petitioner cites six cases which purportedly hold that age may still be considered after Alvarado; however, petitioner has misstated the holdings of three of those cases. At best, the petition reveals that since Alvarado was decided, only one state supreme court (Colorado) has held that age is a proper consideration in the Miranda custody analysis, while most courts that have addressed the issue post-Alvarado have declined to do so.

The decision of the Supreme Court of North Carolina in In re J.D.B., 363 N.C. 664, 686 S.E.2d 135 (2009), declining to extend the test for custody to include consideration of a juvenile's age and academic standing is consistent with the clearly established precedent of this Court that custody determinations under Miranda are based on an objective test. Moreover, it is consistent with the majority of jurisdictions that have decided this issue since Alvarado. As such, there is no reason for this Court to grant certiorari to review this case.

A. Alvarado clarified that proper application of the objective Miranda custody analysis does not include consideration of subjective individual characteristics, including age.

In Alvarado, this Court reiterated that the relevant clearly established law strongly emphasizes the objectiveness of the Miranda custody test. This Court described the custody test as requiring two discrete inquiries: "'first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" Alvarado, 541 U.S. at 663, 158 L. Ed. 2d at 951 (quoting Thompson v. Keohane, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995)). However,"'[o]nce 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.'" Id. at 663, 158 L. Ed. 2d at 951 (quoting Thompson, 516 U.S. at 112, 133 L. Ed. 2d at 394) (emphases added).

Rejecting the Ninth Circuit's conclusion that age and experience are relevant to the Miranda custody analysis, this Court explained that "[t]here is an important conceptual difference between the Miranda custody test and the line of cases from other contexts considering age and experience. The Miranda custody inquiry is an objective test." Id. at 667, 158 L. Ed. 2d at 953. This Court stated "that an objective test was preferable to a subjective test in part because it does not 'place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they

question.'" Id. at 662, 158 L. Ed. 2d at 950 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 n.35, 82 L. Ed. 2d 317, 336 n.35 (1984)). Rather, "[t]he objective test furthers 'the clarity of [Miranda's] rule,' . . . ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" Id. at 667, 158 L. Ed. 2d at 950 (quoting Berkemer, 468 U.S. at 430-31, 82 L. Ed. 2d at 328-29).

On the other hand, consideration of a suspect's age and experience would require speculation by police officers as to how such factors would affect the suspect's state of mind, thereby turning the inquiry into a subjective one. Id. at 668-69, 158 L. Ed. 2d at 954 (stating that requiring "police officers to consider these contingent psychological factors when deciding when suspects should be advised of their Miranda rights . . . turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation."). Indeed, although Justice O'Connor wrote in her concurring opinion that "[t]here may be cases in which a suspect's age will be relevant to the Miranda 'custody' inquiry[,]" she acknowledged that "[e]ven 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." Id. at 669, 158 L. Ed. 2d at 955 (O'Connor, J., concurring). Moreover, it would be unreasonable to expect police officers to recognize that a suspect, like seventeen-and-a-half-year-old Alvarado, is a juvenile when he was so close to the age of majority. Id. Given the problems highlighted by Justice O'Connor regarding the consideration of age in the custody test, her concurring opinion simply reaffirms this Court's conclusion that age is not a proper

factor to consider in an objective test.

It is true that this Court in Alvarado was not considering the issue under a de novo standard of review but instead under a deferential one pursuant to AEDPA and that this Court did not expressly hold that consideration of age is prohibited. Even so, the message of Alvarado is clear: "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics – – including his age – – could be viewed as creating a subjective inquiry." Id. at 668, 158 L. Ed. 2d at 954.

B. Not every jurisdiction addressing this issue prior to Alvarado considered age to be an appropriate factor in the objective custody test.

Petitioner incorrectly contends that "[p]rior to Alvarado, all jurisdictions that had addressed the issue of whether juvenile status may be relevant to the Miranda custody determination held that juvenile status was a proper consideration." (Pet. at 9) Out of the fifteen cases petitioner cited to support this statement, only nine explicitly considered the juvenile's age as a factor. See A.M. v. Butler, 360 F.3d 787, 797 (7th Cir. 2004) ("At the outset, we note that, in making the objective inquiry, Morgan's age is an important factor."); In re Jorge D., 202 Ariz. 277, 280-81, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002) ("We conclude that the objective test . . . applies also to juvenile interrogations, but with additional 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) (specifically including among the circumstances of the interrogation "the fact that it involved an eleven-year-old"); State v. Doe, 130 Idaho 811, 818, 948

P.2d 166, 173 (Idaho Ct. App. 1997) ("We conclude that the objective test . . . applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age."); People v. Braggs, 209 Ill. 2d 492, 510, 810 N.E.2d 472, 484 (2004) (stating that the custody test for juveniles should be modified to reflect "what a reasonable juvenile would have thought about his or her custodial status"), cert. denied, 543 U.S. 1049, 160 L. Ed. 2d 769 (2005); State v. Smith, 546 N.W.2d 916, 923 (Iowa 1996) (holding that "it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status"); In re Joshua David C., 116 Md. App. 580, 594, 698 A.2d 1155, 1162 (1997) (stating that "in determining whether a juvenile's statement was made while in custody, the court must consider additional factors, such as the juvenile's education, age, and intelligence"); In re L.M., 993 S.W.2d 276, 289 (Tex. App. 1999) ("We believe it appropriate for Texas courts to consider the age of the juvenile in determining whether the juvenile was in custody."); and State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350, 353 ("The sole question is whether a 14-year-old in D.R.'s position would have 'reasonably supposed his freedom of action was curtailed.'"), rev. denied, 132 Wn. 2d 1015, 943 P.2d 662 (1997).

Petitioner misstates the holdings of five other cases, which merely contain the words a "reasonable juvenile" somewhere in the opinion but contain no direct indication that the court actually considered the juvenile's age as one of the circumstances of the interrogation. See United States v. Erving L., 147 F.3d 1240, 1248 (10th Cir. 1998) (holding that "a reasonable juvenile in E.L.'s position would not have believed that the

officers had curtailed his freedom of movement to a degree associated with formal arrest[,]" but specifically declining to modify the custody test for a child); Evans v. Montana, 298 Mont. 279, 284-85, 995 P.2d 455, 458-59 (2000) (holding that Evans was a "youth taken into custody" within the meaning of a state statute based upon six specific factors, not including age, and then separately considering whether his confession was voluntary based upon the totality of the circumstances test, which did include age); Ramirez v. State, 739 So. 2d 568, 574 (Fla. 1999) (holding "that not only a reasonable juvenile, but even a reasonable adult in Ramirez's position, would have believed that he was in custody at the time of the interrogation at the police station[,]" but not including age as one of the specific factors considered), cert. denied, 528 U.S. 1131, 145 L. Ed. 2d 841 (2000); Commonwealth v. A Juvenile, 402 Mass. 275, 277, 521 N.E.2d 1368, 1370 (1988) (stating that "[o]n the question whether the juvenile was in custody, the test is how a reasonable person in the juvenile's position would have understood his situation"); In re Robert H., 194 A.D.2d 790, 791, 599 N.Y.S.2d 621, 623 (N.Y. App. Div.) (holding that a reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene[,]" without any indication that the court considered his age), appeal denied, 82 N.Y. 2d 658, 624 N.E.2d 695 (1993).

In another case petitioner cites, In re Loredo, 125 Ore. App. 390, 393-94, 865 P.2d 1312, 1314-15 (1993), the Oregon court did consider age, but the only question before that court was whether the juvenile's interview took place in a setting that was "compelling" within the meaning of the state constitution. The Oregon court specifically noted that federal law required application of a different standard to

determine whether a person was "in custody"for purposes of Miranda. Id. at 395 n.6, 865 P.2d at 1315 n.6.

In any event, it is apparent that prior to Alvarado, lower courts had no clear guidance on whether age was a proper factor to consider in the objective custody analysis. Consequently, the few jurisdictions that included age as a factor in the objective test did so based on this Court's consideration of age in other contexts, such as determining the voluntariness of a juvenile's statement or waiver of rights. See, e.g., A.M., 360 F.3d at 797 (holding that consideration of age in the objective custody test "is consistent with the inquiry in determining whether a confession or a waiver of a constitutional right was voluntary"); Doe, 130 Idaho at 816-17, 948 P.2d at 171-72 (holding that age must be considered in the objective custody test because this Court's precedent establishes that age is relevant in evaluating the voluntariness of a juvenile's confession); Smith, 546 N.W.2d at 923 (holding that "it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status" based upon language in Haley v. Ohio, 332 U.S. 596, 92 L. Ed. 224 (1948), which addressed Fourteenth Amendment due process requirements).

Amici similarly point to this Court's treatment of juveniles in other contexts to show that this Court has consistently recognized the developmental differences between juveniles and adults which make them more susceptible to coercion. See Graham v. Florida, ___ U.S. ___, 176 L. Ed. 2d 825 (2010) (holding that Eighth Amendment prohibits life imprisonment without parole for a juvenile offender who commits a non-homicide offense); Roper v. Simmons, 543 U.S. 551, 161 L. Ed. 2d 1

(2005) (holding that Eighth Amendment prohibits the death penalty for juvenile offenders under the age of eighteen); Gallegos v. Colorado, 370 U.S. 49, 8 L. Ed. 2d 325 (1962) (holding that the totality of the circumstances test for evaluating the voluntariness of a confession must account for a suspect's youth and immaturity); Haley, 332 U.S. 596, 92 L. Ed. 224 (holding that courts must take special care in examining the voluntariness of a child's confession under the Fourteenth Amendment).

However, in Alvarado, this Court clarified that the Miranda custody test is conceptually "different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do consider a suspect's age and experience." Alvarado, 541 U.S. at 667, 158 L. Ed. 2d at 954. For example, this Court explained that certain inquiries, such as determining the voluntariness of a statement, "logically can depend on the characteristics of the accused." Id. at 668, 158 L. Ed. 2d at 954 (quotation marks omitted). Those characteristics "can include the suspect's age, education, and intelligence . . . as well as a suspect's prior experience with law enforcement[.]" Id. at 668, 158 L. Ed. 2d at 954. On the other hand, "'the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.'" Id. at 663, 158 L. Ed. 2d at 950 (quoting Stansbury v. California, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 298 (1994)). Thus, while juveniles may be developmentally different than adults, those differences are wholly irrelevant to the issue of custody.

C. Since Alvarado was decided, most courts addressing this issue have held that age is not a proper factor to consider in the objective custody test.

The petition reveals that most state courts which have addressed this issue post-Alvarado have held that the suspect's age is not a relevant consideration in the Miranda custody analysis. See, e.g., In re J.F., 987 A.2d 1168, 1175 (D.C. 2010) (declining to consider the juvenile's age because "the Supreme Court has not held that a suspect's age or experience is relevant to the Miranda custody analysis, 'much less mandated its consideration'"); People v. Croom, 379 Ill. App. 3d 341, 351, 883 N.E.2d 681, 689 ("Given the Supreme Court's emphasis on objectiveness, we decline to consider defendant's age when determining whether he was in custody for Miranda purposes."), appeal denied, 228 Ill. 2d 539, 889 N.E.2d 1118 (2008); State v. Bogan, 774 N.W.2d 676, 681 n.1 (Iowa 2009) (determining that a fourteen-year-old juvenile was in custody without consideration of his age because this Court questioned "whether age is a factor to consider under a federal constitutional analysis"); In re C.H., 277 Neb. 565, 574, 763 N.W.2d 708, 715 (2009) (determining that a fourteen-year-old was in custody based upon three specific objective factors but without consideration of the juvenile's age); In re Tyler F., 276 Neb. 527, 539, 755 N.W.2d 360, 371 (Neb. 2008) (declining to modify the custody test for juveniles because "it would be difficult to take a suspect's age into account in any principled manner"); In re W.B. II, 2009 Ohio 1707, at P23 (Ohio Ct. App., 4th Dist. 2009) (stating that prior to Alvarado, the court considered factors "that are prone to result in a subjective analysis, i.e. the age, mentality and prior criminal experience of the accused . . . [but] we now renounce the

subjective factors that we identified in Boyd and Sturm and restrict our analysis to an objective test."); R.D.S. v. State, 245 S.W.3d 356, 364 (Tenn. 2008) (affirming the lower court's decision that the juvenile was not in custody without consideration of the juvenile's age but specifically identifying several relevant objective factors); CSC v. State, 118 P.3d 970, 977-78 (Wyo. 2005) ("We cannot overstate the importance of having an objective test to guide the police in determining a suspect's custodial status. . . . It would be a great handicap to law enforcement to require them to speculate about the suspect's state of mind before deciding how they may interrogate him.").

Nonetheless, in an effort to establish that there is "confusion" and "uncertainty" among state and federal jurisdictions, petitioner misstates the holdings of certain cases to purportedly show that "Colorado, Nebraska, Ohio, Tennessee, and Texas, as well as the Fifth Circuit Court of Appeals" (Pet. at 12), have explicitly considered age as a factor despite Alvarado's emphasis on objectiveness. Petitioner correctly asserts that the highest court in Colorado has explicitly held that age is still a relevant factor. See People v. Howard, 92 P.3d 445, 450 (2004) (Colo. 2004) (stating that the totality of the circumstances test may include other factors in cases involving juveniles, including age, although age is not the determinative factor in a finding of custody). However, it is not so clear that any of the other jurisdictions cited by petitioner have explicitly considered age as a factor in determining whether a person is in custody for Miranda purposes.

Despite the Fifth Circuit's statement that a Texas appellate court -- prior to this Court deciding Alvarado -- had applied a "reasonable child" standard to determine the issue of custody, that court ultimately concluded in an appeal from a civil action against prosecutors and others that "even if we were to ignore [juvenile's] age at the time of her interrogation, we would still conclude that a reasonable individual of any age who is removed involuntarily from his home, housed by the State for three days, not informed that he is free to leave, and questioned by two police detectives in a closed interrogation room, would believe that his liberty was constrained to the degree associated with formal arrest." Murray v. Earle, 405 F.3d 278, 287 (5th Cir.) (citing In re L.M., 993 S.W.2d 276 (Tex. App. 1999)), cert. denied, 546 U.S. 1033, 163 L. Ed. 2d 573 (2005). Moreover, the court's observations that "[t]he case of an eleven-year-old is different" and that in such cases, "[t]he police should have no difficulty recognizing that their suspect is a juvenile[,]" were mere dicta not relevant to the court's decision. Id. at 287. Thus, Murray does not constitute an explicit ruling by the Fifth Circuit that age is a relevant consideration in the Miranda custody test. Nor does its reliance on a pre-Alvarado decision of a Texas appellate court mean in any way that Texas post-Alvarado would consider age as a factor in a custody determination.

Additionally, the cases petitioner cites from Nebraska and Tennessee do not explicitly hold that age is a relevant consideration. In C.H., the Supreme Court of Nebraska identified three, specific factors relevant to its custody determination, and age was not one of them. C.H., 277 Neb. at 574, 763 N.W.2d at 715. Moreover, in a case petitioner did not cite, the Supreme Court of Nebraska specifically declined to

extend the custody test to include consideration of the suspect's age in light of Alvarado. See Tyler F., 276 Neb. at 539, 755 N.W.2d at 371. Similarly, in R.D.S., the Supreme Court of Tennessee did not identify age as one of the numerous circumstances it outlined in the opinion as supporting the lower court's conclusion regarding custody. R.D.S., 245 S.W.3d at 364.

Finally, although petitioner contends that Ohio has explicitly held that a suspect's age is a relevant consideration in custody determinations, he cites two conflicting lower appellate court decisions to support this contention. See In re R.H., 2008 Ohio 773, P21 (Ohio Ct. App., 2nd Dist. 2008) ("It is virtually impossible to conclude that a child of such tender years, 11, would appreciate the fact that he was simply free to leave and terminate the interview"); but see In re W.B. II, 2009 Ohio 1707, at P23 (Ohio Ct. App., 4th Dist. 2009) ("[W]e now renounce the subjective factors that we identified in Boyd and Sturm and restrict our analysis to an objective test."). Because the Supreme Court of Ohio has yet to address this precise question, that state's position on the consideration of age in the Miranda custody test remains unclear.

Simply put, the fact that since Alvarado one state supreme court and one lower appellate court have held that age is a proper factor to consider in the objective custody analysis does not establish a well-developed conflict among state and federal courts sufficient to warrant certiorari in this case. It is apparent that most state courts have adhered to the views expressed by this Court in Alvarado regarding the objectiveness of the custody test by declining to consider the suspect's age. As such, there is no

immediate need for this Court to address any conflict on this issue.

D. There is no principled way to account for a suspect's age in the objective custody test without turning the inquiry into a subjective one.

Although petitioner and amici strongly advocate for the consideration of age in the Miranda custody analysis, they have failed to provide any response to this Court's admonition in Alvarado that modifying the custody test based upon juvenile status would create a subjective inquiry. Instead, they simply argue that age, if known by the police, is an objective factor, citing Justice Breyer's dissenting opinion in Alvarado. See Alvarado, 541 U.S. at 674 (Breyer, J., dissenting). However, as Justice O'Connor observed, "[e]ven 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." Id. at 669, 158 L. Ed. 2d at 955 (O'Connor, J., concurring).

The Supreme Court of Nebraska has further emphasized the difficulty of accounting for age in any principled manner, stating: "What, for example, is an officer to make of the difference between a reasonable 16-year-old suspect and a reasonable 13-year-old suspect?" Tyler F., 276 Neb. at 539, 755 N.W.2d at 371. Moreover, "if a suspect's age is to be taken into account, why not include other objective circumstances that . . . are [also] relevant to the way a person would understand his situation, such as the suspect's education and intelligence?" Id. at 539, 755 N.W.2d at 371 (footnote omitted). In essence, the Nebraska court was stating that it is not possible to consider the suspect's age as a factor in the custody test without making the inquiry wholly subjective. Thus, "such a standard may offer more in theory than it does in practice."

Id. at 539, 755 N.W.2d at 371.

In sum, consideration of a suspect's age in the custody test eliminates two principal advantages of the Miranda rule: (1) "informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation"; and (2) "informing courts under what circumstances statements obtained during such interrogation are not admissible." Berkemer, 468 U.S. at 430, 82 L. Ed. 2d at 328.

The decision of the Supreme Court of North Carolina in J.D.B. declining to consider age in its objective test preserves the clarity of the Miranda rule and is consistent with the clearly established precedent of this Court. Furthermore, its conclusion that the juvenile was not in custody based on the circumstances of the interrogation was correct. After providing consent, J.D.B. was interviewed by a police officer in an unlocked conference room at his school in the presence of three school officials, who did not participate in the questioning. After a brief thirty-minute interview, during which J.D.B. was not restrained in any way and was informed that he was free to leave, he left school without hindrance. See J.D.B., 363 N.C. at 670, 686 S.E.2d at 139.

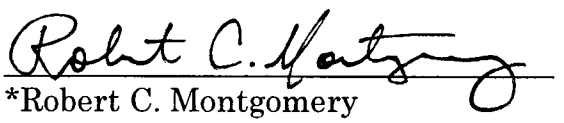
Petitioner here has failed to show any reason why this Court should grant certiorari in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted, this the 29th day of September, 2010.

ROY COOPER
ATTORNEY GENERAL



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