No. 09-1121

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2009

****

J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

MOTION TO PROCEED IN FORMA PAUPERIS

****

The petitioner, J.D.B., by his undersigned counsel, asks leave to file a Petition for Writ of Certiorari without pre-payment of costs and to proceed *In Forma Pauperis* pursuant to Rule 39. Petitioner was found indigent by the North Carolina courts. A declaration of indigency in support of this motion is attached hereto.

This the 28th day of May, 2010.

Respectfully submitted,

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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jonathan Burton, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ n/a	$ 0	$ n/a
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify): Food stamps	$ 120	$	$	$
Total monthly income:	$ 0	$ n/a	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
no job in last 2 years			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
n/a			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
n/a		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. none

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
n/a	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
n/a		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ ~~0~~	$ n/a
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 120	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 5.00	$ n/a
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 125.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I live with my mom. Neither of us have a job.

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

Executed on: May 17, 2010

Jonathon D Boston

(Signature)

No. _____

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OCTOBER TERM 2009

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STATE OF NORTH CAROLINA,

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On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A COURT MAY CONSIDER A JUVENILE'S AGE IN A *MIRANDA* CUSTODY ANALYSIS IN EVALUATING THE TOTALITY OF THE CIRCUMSTANCES AND DETERMINING WHETHER A REASONABLE PERSON IN THE JUVENILE'S POSITION WOULD HAVE FELT HE OR SHE WAS NOT FREE TO TERMINATE POLICE QUESTIONING AND LEAVE?

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The opinion of the Supreme Court of North Carolina is officially reported at 686 S.E.2d 135 (2009) and is reproduced in the Appendix. (App. 1).

JURISDICTION

The judgment of the Supreme Court of North Carolina, affirming Petitioner's adjudication of delinquency and the subsequent disposition, was entered on 31 December 2009.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

U.S. Const., amend XIV: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. INTRODUCTION

On 19 October 2005, two juvenile petitions were filed against J.D.B. in Orange County, North Carolina, each alleging one count of breaking and entering and one count of larceny. On 1 December 2005, J.D.B.'s counsel filed a motion to

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[1] The opinion of the Supreme Court of North Carolina was filed on 11 December 2009. The actual judgment of the Supreme Court of North Carolina was entered on the docket by the clerk 20 days after the date of the filing of the opinion. N.C. R. App. P. 32(b). A copy of the judgment is included in the Appendix. (App. 19).

suppress certain statements and evidence. After a hearing on 13 December 2005, the trial court denied the motion to suppress. The trial court did not make any findings of fact or conclusions of law at that time. On 24 January 2006, J.D.B. admitted all counts alleged in the petitions, but renewed his objection to the denial of his motion to suppress, and the trial court entered an order adjudicating J.D.B. delinquent. J.D.B. appealed the denial of his motion to suppress. The North Carolina Court of Appeals remanded to the trial court for findings of fact supporting its determination that J.D.B. was not in custody at the time he was questioned. *In re J.B.*, 644 S.E.2d 270 (N.C. App. 2007) (unpublished).[2] On remand, the trial court entered an order making findings of fact and conclusions of law in support of its denial of J.D.B.'s motion to suppress. J.D.B. again appealed the denial of his motion to suppress. A divided panel of the North Carolina Court of Appeals affirmed the trial court. *In re J.D.B.*, 674 S.E.2d 795 (N.C. App. 2009). J.D.B. appealed to the North Carolina Supreme Court. In a 4-3 decision, the court affirmed the trial court's denial of J.D.B.'s motion to suppress. App. 5.

B. THE EVIDENCE AT THE HEARING

On the afternoon of 29 September 2005, J.D.B., a thirteen-year-old special-education student in the seventh grade at Smith Middle School in Chapel Hill, North Carolina, was sitting in his social studies class. Tp. 40. Officer Gurley, a uniformed police officer, removed J.D.B. from class. Tpp. 25, 40. Officer

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[2] Although J.D.B.'s first appeal to the North Carolina Court of Appeals was captioned "*In re J.B.*" and his subsequent appeal was captioned "*In re J.D.B.*," both appeals were by the same juvenile.

DiCostanza, a juvenile investigator with the Chapel Hill Police Department, had come to the school to question J.D.B. about two off-campus breaking and enterings. Tpp. 6, 21. Officer Gurley took J.D.B. to a conference room, where three adults – two school officials and Officer DiCostanza – were waiting. Tp. 8. The door to the conference room was then closed. Tp. 37.

Officer DiConstanza knew that J.D.B. was thirteen. Tp. 23. North Carolina's enhanced *Miranda* rights for juveniles require that the juvenile be informed of his *Miranda* rights prior to custodial interrogation and be afforded the right to have a parent or guardian present during questioning. N.C. Gen. Stat. § 7B-2101 (2005). North Carolina law also requires the presence of a parent, guardian, or attorney for custodial questioning of a child under 14. *Id.* None of the police officers attempted to contact J.D.B.'s parent or guardian. Tp. 23. DiCostanza had the impression from other officers who had interacted with J.D.B.'s family that they were "resistan[t]" and "hostil[e]" to the investigation of J.D.B. Tp. 16.

Officer DiCostanzo told J.D.B. that he was an investigator from the Chapel Hill Police Department. Tp. 9. He then engaged in small talk with J.D.B. about sports and being the youngest sibling. Tp. 14. Officer DiCostanza then told J.D.B. that he wanted to follow up with J.D.B. about his encounter the previous weekend with police officers who questioned him about neighborhood break-ins. Tp. 9. DiCostanza asked if J.D.B. would talk to him about this, and J.D.B. said that he would. Tp. 9. Officer DiCostanzo did not tell J.D.B. that he had the right to remain

silent or that he was free to leave. Tp. 14. The interrogation of J.D.B. lasted 30 to 45 minutes. Tpp. 16, 42.

Officer DiCostanzo told J.D.B. that someone had seen him near one of the houses that was broken into. Tp. 10. J.D.B. stated that he had been going around the neighborhood attempting to get lawn-mowing jobs. Tpp. 9-10. Officer DiCostanza asked J.D.B which houses he had gone to and in what order. Tp. 10. J.D.B. answered these questions. Tp. 10. He told Officer DiCostanzo that he had talked to his neighbor, Ms. Hemmer, on the day in question about cutting her grass. Tp. 10. Officer DiCostanzo told J.D.B. that he had spoken to Ms. Hemmer, who said she had told J.D.B. that she was not going to have him cut her grass any more because she had lost her job. Tp. 10. J.D.B. did not respond to DiCostanza. Tp. 10. At that point, Officer DiCostanzo told J.D.B. that he had the camera that was stolen in one of the breaking and enterings. Tp. 10. Officer DiCostanza asked Officer Gurley to hold up the camera to show J.D.B. that they had it. Tp. 15. J.D.B. remained quiet. Tp. 11.

Mr. Lyons, the assistant principal, told J.D.B. that he should "'do the right thing because the truth always comes out in the end.'" Tpp. 11, 42. J.D.B. asked whether he would "'still be in trouble'" if he returned the stolen items. Tp. 11. Officer DiConstanza replied that "it would be helpful," but that "this thing is going to court . . . what's done is done." Tp. 11. DiCostanza told J.D.B. that he should help himself by "making it right." Tp. 11. DiCostanza told J.D.B. that if he was going to continue breaking into people's houses, DiCostanza "would have to look at

getting a secure custody order." Tp. 11. J.D.B. asked what a secure custody order was. Tp. 12. Officer DiCostanza explained that with a secure custody order, "you get sent to juvenile detention before court." Tp. 12. At that point, Officer DiCostanza told J.D.B. that he did not have to talk to him and that he could leave if he wanted to, but that DiCostanza "hoped [J.D.B.] would listen to what I had to say." Tp. 12. J.D.B. confessed to the breaking and enterings and larcenies and wrote a written statement. Tp. 12.

At the hearing, DiCostanza testified that he told J.D.B. that he was free to leave and did not have talk to him before J.D.B. confessed to the break-ins. Tpp. 12, 29. However, the trial court found, in unchallenged findings of fact, that DiCostanza did not advise J.D.B. that he was free to leave until after J.D.B. confessed. App. 16.

After J.D.B. confessed, DiCostanza told him to take the school bus home. Tp. 16. Officer DiCostanza stayed at the school and completed a search warrant for J.D.B.'s residence. Tp. 16. DiCostanza testified that he prepared the search warrant because the initial officers encountered "resistance" and "hostility" from J.D.B.'s family and DiCostanza did not know if the family would cooperate with a search. Tpp. 16, 31-32. After a magistrate signed the search warrant, Officer DiCostanza went back to the police department, where his supervisor advised him to send an officer to J.D.B.'s residence to wait until the warrant could be executed. Tp. 17. An officer was waiting for J.D.B. when he got off the school bus. Tp. 18. When DiCostanza arrived with the warrant, J.D.B. took the officers into his

residence and gave them the stolen items. Tp. 18. No one attempted to contact J.D.B.'s guardian before the search of the home and seizure of the stolen items. Tpp. 30, 33.

C. HOW THIS ISSUE WAS PRESENTED AND DISPOSED OF ON APPEAL

The North Carolina Supreme Court rejected J.D.B.'s argument that he was in custody when Officer DiCostanza interrogated him. The court ruled that because J.D.B. was not in custody, he was not entitled to *Miranda* warnings. The North Carolina court was persuaded by this Court's decision in *Yarborough v. Alvarado,* 541 U.S. 652, 668 (2004), that "'the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics--including age--could be viewed as creating a subjective inquiry.'" App. 5 (quoting *Alvarado*).

In short, the North Carolina court held that it could not consider J.D.B.'s age in determining whether he was in custody for *Miranda* purposes and the court concluded that J.D.B. was not entitled to *Miranda* protections. In its analysis, the court purported to consider "all the circumstances surrounding the interrogation" and to apply "an objective test as to whether a person in the position of the defendant would believe himself to be in custody." App. 4. However, the court refused to consider the objective fact that J.D.B. was a juvenile. As the dissent in *J.D.B.* observed, failure to consider age "would lead to the absurd result that, when required to determine whether a reasonable person in the defendant's situation would consider himself in custody, courts would apply exactly the same analysis,

regardless of whether the individual was eight or thirty-eight." App. 13 (Hudson, J., dissenting) (internal quotation marks and citation omitted).

REASON WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE ALLOWED

THIS COURT HAS NOT SQUARELY DECIDED WHETHER A JUVENILE'S AGE MAY BE CONSIDERED IN MAKING A *MIRANDA* CUSTODY DETERMINATION AND THE NORTH CAROLINA SUPREME COURT'S DECISION ADDS TO THE ONGOING CONFLICT AND CONFUSION AMONG LOWER COURTS REGARDING WHETHER AGE MAY BE CONSIDERED.

Introduction

State and federal courts are divided on whether they may consider a juvenile suspect's age in making a *Miranda* custody determination. Historically, state and federal courts considered age when objectively determining whether a juvenile was in custody for *Miranda* purposes. In 2004, this Court decided *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004), which stated that "consideration of a suspect's individual characteristics--including his age--could be viewed as creating a subjective inquiry." Importantly, *Alvarado* was decided under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and was not a *de novo* review. *Id.* Many courts continue to consider a juvenile's age in the *Miranda* custody analysis, while others have relied on *Alvarado* in concluding that they may not consider a juvenile's age in determining whether he or she was in custody for *Miranda* purposes. These cases depart from this Court's established *Miranda* custody analysis: an evaluation of the totality of the circumstances surrounding the interrogation and a

determination of whether a reasonable person would have felt he was at liberty to terminate the interrogation and leave.

Absent clarification by this Court, lower courts will continue to apply varying definitions of "totality of the circumstances" and "reasonable person" when evaluating whether a juvenile was in custody for *Miranda* purposes. This uncertainty will undermine one of the purposes of *Miranda*: providing clarity for law enforcement officers. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984). Furthermore, this uncertainty is likely to result in more juveniles being subjected to custodial interrogations without *Miranda* warnings, thus undermining the *Miranda* safeguards for individuals: "to *ensure* that the police do not coerce or trick captive suspects into confessing [and] to 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).

A. This Court has not definitively ruled on whether age may be considered in determining whether a juvenile suspect is in custody for *Miranda* purposes.

This Court has established a two-part test for determining whether a suspect was in custody for *Miranda* purposes: "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." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In making this determination, courts must examine "all of the circumstances

surrounding the interrogation. *Stansbury v. California*, 511 U.S. 318, 325-26 (1994). This Court has repeatedly stressed that the test for *Miranda* custody is an objective one. *See, e.g., Keohane,* 516 U.S. at 112; *Stansbury,* 511 U.S. at 323; *Berkemer*, 486 U.S. at 430. In this objective test, the "relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Alvarado*, 541 U.S. at 662 (quoting *Berkemer*, 468 U.S. at 442).

This Court has never held that juvenile status – an objective fact – may not be a factor when considering "all of the circumstances" surrounding the interrogation or when inquiring how a person "in the suspect's position would have understood his situation." *Alvarado*, 541 U.S. at 673 (Breyer, J., dissenting). In fact, this Court has held that knowledge "concerning the unusual susceptibility of a defendant" may be a factor in the *Miranda* analysis. *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980).

Prior 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. *A.M. v. Butler,* 360 F.3d 787, 797 (7th Cir. 2004) ("age [of juvenile] is an important factor" in totality of the circumstances evaluation); *United States v. Erving L.,* 147 F. 3d 1240, 1248 (10th Cir. 1998) (evaluating whether "reasonable juvenile" would have believed he was not at liberty to terminate interview and leave); *In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002) (objective test must include "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) (en banc) (applying a reasonable 11-year-old test); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to custodial analysis); *In re Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (ruling that objective test for custody determination must include child's age); *People v. Braggs*, 810 N.E.2d 472, 507 (Ill. 2004) (considering age as a factor "analytically intertwined with the reasonable-person prong of the custodial question"); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996) (concluding that age was an appropriate consideration in making custody determination); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) (stating that custody determination must consider juvenile's age); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988) (custody test is how "a reasonable person in the juvenile's position would have understood his situation"); *Evans v. Montana*, 995 P.2d 455, 459 (Mont. 2000) (examining whether "reasonable fourteen-year-old" would have felt free to leave); *In re Robert H.*, 194 A.D.2d 790, 791 (N.Y. App. Div. 1993) (considering whether "reasonable 15-year-old" would have believed he was free to leave); *In re Loredo*, 865 P.2d 1312, 1315 (Ore. 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, 288-89 (Tex. App. 1999) (adopting rule that "expressly provides for consideration of age under the reasonable-person standard"); *State v. D.R.*, 930 P.2d 350, 353 (Wash. Ct. App. 1997) (applying reasonable 14-year-old standard).

In *Alvarado*, this Court reversed the Ninth Circuit's holding that the California state court violated federal law when it failed to consider Alvarado's

juvenile status in its *Miranda* custody analysis. 541 U.S. at 668. This Court concluded that under the AEDPA, it was not an unreasonable application of federal law for the California court not to consider Alvarado's age in its *Miranda* custody analysis. *Id.* This Court concluded that the Ninth Circuit court "subsume[d] a subjective factor into an objective test. . . [when it] styled its inquiry as an objective test by considering what a 'reasonable 17-year-old, with no prior arrests or police interviews,' would perceive." *Id.* at 668. Thus, because such a formulation of the *Miranda* custody analysis might be seen as too subjective, this Court held that the state court "reached a reasonable conclusion." *Id.* at 668-69.

Interestingly, this Court explicitly held that even under a *de novo* review, consideration of a suspect's past law enforcement history would be improper because it would be too subjective and too difficult for police to know beforehand. *Id.* at 668. In contrast, this Court did not say whether consideration of a juvenile's age in a *Miranda* custody analysis would be improper under a *de novo* review. *Id.* at 665, 668.

Justice O'Connor concurred with the majority to state her belief 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). Because this Court's opinion in *Alvarado* was split 5-4, Justice O'Connor's concurrence created additional doubt regarding whether *Alvarado* precluded consideration of age in a *Miranda* custody analysis. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may

be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193 (1977).

B. The law is currently uncertain and unpredictable because state and federal courts are in conflict regarding whether, and how, age may be considered in the *Miranda* custody analysis.

In the years since this Court decided *Alvarado,* some courts have continued to consider age, either as a factor in the "totality of the circumstances" review or by analyzing whether a "reasonable juvenile" would have felt free to terminate the interview. Colorado, Nebraska, Ohio, Tennessee, and Texas, as well as the Fifth Circuit Court of Appeals, have explicitly considered age a relevant factor in the *Miranda* custody analysis. *See Murray v. Earle,* 405 F.3d 278, 287 (5th Cir. 2005) (holding that 11-year-old was in custody and distinguishing case from *Alvarado*: "[t]he case of an eleven-year-old is different. The police should have no difficulty recognizing that their suspect is a juvenile"); *People v. Howard,* 92 P.3d 445, 450 (Colo. 2004) (court considered age because "a juvenile suspect . . . confronted with police questioning without the presence of a responsible adult . . . may not understand that he is not required to respond"); *In re C.H.,* 763 N.W.2d 708, 716 (Neb. 2009) (concluding that a 14-year-old interrogated at school by a police officer was in custody); *In re W.B. II,* No. 08CA18, 2009 Ohio App. LEXIS 1438, at *18 (Ct. App. 2009) ("a reasonable juvenile in W.B.'s position would not have understood that he was not in custody"); *In re R.H.,* No. 22352, 2008 Ohio App. LEXIS 672, at *11 (Ct. App. 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"); *R.D.S. v. State*, 245 S.W.3d 356, 364 (Tenn. 2008) (affirming appeals court that considered juvenile's age in its custodial analysis).

After *Alvarado* was decided, two jurisdictions have questioned whether they may continue their historical practice of considering age in evaluating whether a juvenile was in custody. The Supreme Court of Iowa concluded that *Alvarado* called its prior practice into question. *State v. Bogan*, 774 N.W.2d 676, 681 (Iowa 2009) ("Previously, we . . . use[d] age as part of the analysis in determining a defendant's custodial status. However, subsequent[ly] . . . the Supreme Court decided *Yarborough v. Alvarado*, which questions whether age is a factor to consider under a federal constitutional analysis") (internal citations omitted). The Illinois Appellate Court has also departed from its practice of considering age in a custodial analysis. *People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008) (given the "emphasis on objectiveness" in *Alvarado*, the court "declined to consider defendant's age [16] when determining whether he was in custody").

In addition to the Supreme Court of North Carolina, the Supreme Court of Wyoming and the District of Columbia Court of Appeals have concluded that *Alvarado* prohibits consideration of a juvenile suspect's age in a *Miranda* custody analysis. *In re J.F.* 987 A.2d 1168, 1175-76 (D.C. 2010) (analyzing whether a 14-year-old interrogated at the police station for three hours was in custody, the court stated: "the suspect's age or experience is [not] relevant to the *Miranda* custody analysis"); *In re J.H.*, 928 A.2d 643, 650 (D.C. 2007) (declining to consider age in custody analysis of twelve-year-old interrogated by police at school); *United States*

v. Little, 851 A.2d 1280, 1285-86 (D.C. 2004) (citing *Alvarado,* the court conducted custody analysis "without regard to the fact that Little was a sixteen-year-old juvenile with no prior arrest record"); *In re C.S.C.*, 118 P.3d 970, 978 (Wyo. 2005) (citing *Alvarado,* the court concluded that it could not consider age in analyzing whether a 16-year-old was in custody when police interrogated him at school about an off-campus sexual assault).

This Court has repeatedly stressed the need for clarity regarding when *Miranda* warnings must be issued. *See, e.g., Berkemer*, 468 U.S. at 430-31. Although "totality of the circumstances" and "reasonable person" tests will always be fact-specific rather than "bright-line," the tests must provide guiding principles which law enforcement and trial courts can follow. Currently, in many jurisdictions, it would be seemingly impossible for law enforcement or trial courts to understand what the law is regarding which factors contribute to whether a juvenile is in custody. In short, neither of the purposes of the *Miranda* warnings – clarity for law enforcement and protection for individuals from coercion – is being achieved under the lower courts' current interpretations of *Alvarado.* Without clarification by this Court, the confusion and departure from established law will continue.

C. Failing to consider age in the *Miranda* custody analysis results in a skewed evaluation of the totality of the circumstances and whether a reasonable person would feel free to leave. Age is an objective fact and children are not the same as adults.

Juveniles are more susceptible to police coercion than adults. Over forty years ago, this Court "emphasized that admissions and confessions of juveniles

require special caution." *In re Gault*, 387 U.S. 1, 45 (1967). The Court noted that when

> a mere child -- an easy victim of the law -- is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad . . . is a ready victim of the inquisition. Mature men possibly might stand the ordeal . . . [b]ut we cannot believe that a lad of tender years is a match for the police in such a contest.

Id. (quoting *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948)). Recent research indicates that children under the age of fifteen are substantially more likely to be intimidated by authority than are older adolescents and young adults. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: a Comparison of Adolescents' and Adults' Capacities as Trial Defendants,* 27 Law & Hum. Behav. 333, 363 (2003). Furthermore, because juveniles are "intensely oriented to the present," they are likely to experience interrogation "as a terminal point, something from which they will not be able to escape, even if an older individual subjected to the same circumstances might readily appreciate the transitory nature of the situation." Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse,* 52 Loy. L. Rev. 39, 86 (2006).

The three jurisdictions that have held that age is not an appropriate consideration have modified the established *Miranda* analysis to exclude an important objective circumstance: the juvenile's age. These courts are applying the "reasonable person" standard without consideration that the person is a juvenile.

As the dissent in *J.D.B.* noted, what a reasonable 8-year-old perceives about whether he is free to terminate police questioning cannot be the same as what a reasonable 38-year-old under similar circumstances would believe. App. 13. However, applying an age-blind test dictates such an analysis.

Ignoring a juvenile's age in making the custody determination undermines the *Miranda* goal of protecting individuals from police coercion. This is especially true when a juvenile is interrogated at school. As the dissent in *J.D.B.* observed:

> In the school environment, where juveniles are faced with a variety of negative consequences -- including potential criminal charges -- for refusing to comply with the requests or commands of authority figures, the circumstances are inherently more coercive and require more, not less careful protection of the rights of juveniles.

App. 11. Additionally, at school 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, at 85 n.175.

If courts are allowed to ignore the juvenile's age in determining whether he or she was in custody, juveniles will receive less protection under *Miranda* than adults do. In *Gault*, this Court recognized that Fifth Amendment rights apply equally to children. 387 U.S. at 55. Without guidance from this Court, lower courts may continue to erode the *Miranda* rights of juveniles, as the courts in North Carolina, Wyoming, and the District of Columbia have shown.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court issue a writ of certiorari to review the decision of the Supreme Court of North Carolina.

Respectfully submitted, this the 28th day of May, 2010.

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