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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

ARGUMENT. 1

A TRIAL COURT MAY CONSIDER A JUVENILE'S AGE IN A FIFTH AMENDMENT *MIRANDA* CUSTODY ANALYSIS IN EVALUATING THE TOTALITY OF THE OBJECTIVE CIRCUMSTANCES AND DETERMINING WHETHER A REASONABLE PERSON IN THE JUVENILE'S POSITION WOULD HAVE FELT HE OR SHE WAS FREE TO TERMINATE POLICE QUESTIONING AND LEAVE 1

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Berkemer v. McCarty,
468 U.S. 420 (1984) 3, 4

California v. Beheler,
464 U.S. 1121 (1973) 2, 8

Dickerson v. United States,
530 U.S. 428 (2000) 3, 10, 11

Goss v. Lopez,
419 U.S. 565 (1975) 4

Graham v. Florida,
130 S. Ct. 2011 (2010) 11

In re Appeal in Maricopa County Juvenile Action,
174 Ariz. 599, 852 P.2d 414 (Ct. App. 1993) 10

In re Gault,
387 U.S. 1 (1967) 11

In re J.D.B.,
363 N.C. 664, 686 S.E.2d 135 (2009) 8

In re Loredo,
125 Ore. App. 390, 865 P.2d 1312 (Ct. App. 1993)
. 9

Cited Authorities

Page

In re Robert H.,
194 A.2d 790, 599 N.Y.S.2d 621 (1993) 9

Lee v. State,
988 So. 2d 52 (Fla. Ct. App. 2008)..... 9

Michigan v. Mosley,
423 U.S. 96 (1975) 10

Michigan v. Tucker,
417 U.S. 433 (1974)..... 10, 11

Miranda v. Arizona,
384 U.S. 436 (1966) ..... *passim*

Missouri v. Siebert,
542 U.S. 600 (2004) 1

Moran v. Burbine,
475 U.S. 412 (1986) 11

New York v. Quarles,
467 U.S. 649 (1984) 11

Oregon v. Mathiason,
429 U.S. 492 (1977) 2

People v. Howard,
92 P.3d 445 (Colo. 2004) 9

Cited Authorities

Page

People v. T.C.,
898 P.2d 20 (Colo. 1995) 9

Roper v. Simmons,
543 U.S. 551 (2005) 4

Stansbury v. California,
511 U.S. 318 (1994). 1, 2, 3

State v. D.R.,
84 Wn. App. 832, 930 P.2d 350 (Ct. App. 1997) . . 8

State v. Murray,
796 P.2d 849 (Alaska Ct. App. 1990) 3

State v. Preston,
411 A.2d 402 (Me. 1980) 3

Thompson v. Keohane,
516 U.S. 99 (1995) 2

Thompson v. Oklahoma,
487 U.S. 815 (1988) 4

United States v. Macklin,
900 F.2d 948 (6th Cir. 1990) 10

Yarborough v. Alvarado,
541 U.S. 652 (2004) 2

Page

United States v. Crossley,
224 F.3d 847 (6th Cir. 2000) 8

STATUTES

U.S. Const., amend. V 2, 10, 11

N.C. Gen. Stat. §7B-2101 (2010) 6, 8

N.C. Gen. Stat. §115C-378 (2010) 8

OTHER AUTHORITIES

Reid *et al.*, *Criminal Interrogation and Confessions* (4th ed. 2004) 6

Restatement Second of Torts (1965) 4

Weinstock, M.D., Robert and Thompson, M.D., Christopher, *Commentary: Ethics-Related Implications and Neurobiological Correlates of False Confessions in Juveniles*, 37 Journal of the American Academy of Psychiatry and the Law 344 (2009) 5-6

REPLY BRIEF FOR PETITIONER

In addition to the arguments and authorities presented in his Brief, J.D.B. responds as follows to matters raised in the State's Brief and those of its *amici*:

ARGUMENT

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

Although the State and its *amici* disagree on whether age is an objective factor, it cannot be doubted that one's age is an historical fact. It is an objective circumstance, as it exists apart from thought. In asking this Court to exclude an objective circumstance from the custody inquiry and relegate it to a voluntariness inquiry, the State is asking the Court to partially overrule *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam), and return "to the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance." *Missouri v. Siebert*, 542 U.S. 600, 609 (2004). The true "slippery slope" the State asks this Court to slide down is to begin picking and choosing which objective circumstances to consider, when excluding this

objective circumstance would skew the custody analysis and thereby weaken Fifth Amendment guarantees for juveniles. J.D.B. is not asking this Court to expand *Miranda*. Instead, Respondent is asking this Court to strip *Miranda* of its effectiveness and do so for a segment of society long deemed worthy of protection.

Stansbury made clear that a "court must examine *all* of the circumstances surrounding the interrogation…." 511 U.S. at 322 (emphasis added). The players and scene must be accurately set in order "to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' *California v. Beheler*, 464 U.S. 1121, 1125, 77 L.Ed.2d 1275, 103 S.Ct. 3517 (1973) (*per curiam*) (quoting [*Oregon v.*] *Mathiason*, [429 U.S. 492] at 495 [(1977) (*per curiam*)]." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). This inquiry is analyzed from the perspective of "how a reasonable person in the *suspect's* situation would perceive his circumstances." *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (emphasis added). Excluding any objective circumstance, and particularly the one that identifies the player in whose shoes the reasonable person is placed, and which renders him particularly vulnerable to the coercive nature of custodial interrogation, renders the result inaccurate and unreliable.

What varies in the custody equation is not which objective circumstances should be considered, but the effect or weight that any individual circumstance has. Contrary to the State's argument, there is only one circumstance which invariably imposes upon law enforcement the requirement to administer *Miranda* warnings: a police officer informing a suspect that he

is under arrest. Until that point, "some people are free to come and go…." *Stansbury*, 511 U.S. at 325. Beyond informing a suspect that he is under arrest, no "bright line" exists in custody determinations and never has. No one factor is determinative and each factor must be assessed in light of the other factors present. Any individual factor in one fact pattern can contribute to a finding of custody, yet hold little weight in another. *Compare, e.g., State v. Murray*, 796 P.2d 849, 851 (Alaska Ct. App. 1990) (fact that suspect was questioned in a police car did not result in finding of custody) *with State v. Preston*, 411 A.2d 402, 405 (Me. 1980) (fact that suspect was questioned in a police car contributed to finding of custody). Whenever a formal arrest does not occur, a police officer is required to assess all of the objective circumstances and decide whether to advise the suspect of his rights. *Berkemer v. McCarty*, 468 U.S. 420 (1984). The "police and lower courts…occasionally have difficulty in deciding exactly when a suspect has been taken into custody." *Id.* at 441. If the officer miscalculates, the evidentiary loss of the suspect's statements has been deemed an acceptable cost for the benefits that *Miranda* provides. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

The State and its *amici* assert that youth, unlike any other objective circumstance, would necessarily have to be assessed from the subjective perspective of the individual juvenile involved. No explanation is provided as to why that necessarily must be so. This bald assertion would equally suggest that an adult suspect's subjective determination that he was in custody must be taken into account, a proposition expressly rejected by this Court in *Berkemer* and *Stansbury*. An objective analysis does not inquire into the perceptions of the individual suspect, but the likely

understanding of the reasonable person in the suspect's position. *Berkemer*, 468 U.S. at 442. A different analysis is not warranted in order to gauge the impact of youth than to gauge the impact of any objective circumstance that affects the reasonable person's understanding.

All objective circumstances examined in a custody analysis draw meaning from sources extrinsic to the suspect's actual subjective feelings. A suspect's youth likewise has meaning and relevance to the custody analysis based on non-subjective sources, including community experience, common sense, and scientific data. *Cf.* Restatement Second of Torts, §283A Comment b (1965) (the inclusion of age in assessing a reasonably prudent person "arises out of the public interest in [children's] welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is expected of them.") The "experience of mankind, as well as the long history of the law, recogniz[es] that there *are* differences [between children and adults] which must be accommodated in determining the rights and duties of children as compared with those of adults." *Goss v. Lopez*, 419 U.S. 565, 590 (1975) (Powell, J., dissenting), *quoted in Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (emphasis in original). Indeed, "[t]he differences between juvenile and adult offenders are too marked and well understood" to be ignored, *Roper v. Simmons*, 543 U.S. 551, 572 (2005), and go well beyond the psychological differences to which the State and its *amici* confine their arguments.

Common sense and community experience inform police officers and courts of the significance, or lack

thereof, of every objective circumstance as understood from the perspective of the reasonable person, such as whether the door to the interrogation room is open, shut, or locked. Likewise, common sense, community experience, and social, behavioral, and medical science informs interactions between juveniles and law enforcement. Police have already anticipated the "frailty" and factored the objective circumstance of youth into their investigations. Police officers are trained how to initiate and conduct interrogations of children in ways that common sense, community experience, and science document to be effective in "subjugat[ing] the individual to the will of his examiner." *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).[1] Not telling a child that he is free to leave or failing to advise that he is free not to answer questions, for example, is an effective custodial technique precisely because common understanding informs us that children occupy an inferior social status to adults, are generally more deferential to authority figures than adults, and have been taught to answer questions posed by adults. Children take so seriously the lesson that they must answer that they are even willing to answer falsely, as the alarming rate of false confessions by juveniles demonstrates. Robert Weinstock, M.D., and Christopher Thompson, M.D., *Commentary:*

1. For example, the International Association of Chiefs of Police, in conjunction with the United State Department of Justice, Office of Juvenile Justice and Delinquency Prevention, and Office of Justice Programs, sponsored a three-day training program on 31 January-2 February 2011 for law enforcement and school officials in "criminal investigation skills, tactics, and procedures necessary to effectively interview and interrogate juveniles/youth." *See* http://www.theiacp.org/About/WhatsNew?id=1383&v=1 ("IACP No Cost Training! Juvenile Interview and Interrogation Techniques, Phoenix, AZ")

Ethics-Related Implications and Neurobiological Correlates of False Confessions in Juveniles, 37 Journal of the American Academy of Psychiatry and the Law 344, 346-347 (2009).

Considering age in the custody analysis was not foreclosed by *Miranda* itself, as the State asserted. (Resp. Brief, 28) Rather, this Court cautioned that law enforcement and courts could not excuse a failure to warn premised on supposition that the suspect, based on factors such as age, already knew what his rights were. 384 U.S. at 468-469. Nor would considering age insert a new consideration into the custody or interrogation context, since, as a practical matter, it has long been a law enforcement consideration. Police officers are taught that effective interrogation is based on knowing beforehand personal background information about the suspect, including the suspect's age. Reid et al., *Criminal Interrogation and Confessions*, 20 (4th ed. 2004). They are taught "themes specifically applicable to juveniles…." *Id.* at 301. An obligation to ascertain age often independently derives from state or federal statute. *E.g.*, N.C. Gen. Stat. §7B-2101 (2010). If the case is assigned to a juvenile investigator, the fact that the suspect is a minor has already been determined. That a suspect is a child is often obvious from his or her appearance, from the location chosen for the interrogation, or from interaction with parents. Since police officers utilize a suspect's youth in such contexts as selection of the site of the interrogation, creation of the isolated coercive atmosphere, and selection of the themes of interrogation, excluding age from the calculus makes no sense.

Although the State and its *amici* warn that floodgates will open if youth is considered in the custody analysis, such has not proven to be the case in the multitude of states which have long considered age. Counsel has been unable to locate any cases in jurisdictions that have long weighed age that expand the analysis to include the factors the State predicts will be included. None of the suggested factors identify a comparable cognizable segment of society who share the unique attributes of children or who are subject to physical restraints which cannot be placed on free adults. Nor has the fact that some courts have broken down the analysis into age-specific inquiries (*e.g.*, the "reasonable thirteen-year-old") proven unworkable in those jurisdictions, as such standards have been in place for decades and not abandoned in favor of a different standard.

J.D.B.'s juvenile status was evident the moment this investigation began. Officer Ennis' report recounted that he stopped two juveniles peeping into a residence. (J.A. 107a) The case was assigned to a juvenile investigator. (J.A. 127a) After reading the police report, the first action Investigator DiCostanzo took was to show Officer Ennis the Smith Middle School yearbook in order to obtain an identification. (J.A. 107a) Officer Ennis' identification of J.D.B. from the yearbook confirmed that the suspect was a juvenile. (J.A. 107a)

With the investigation having immediately focused upon a child, state law forbade Investigator DiCostanzo from conducting a custodial interrogation of J.D.B. in the absence of a parent, guardian, custodian, or attorney and required, if an attorney was not present, that J.D.B. and his parent, guardian, or custodian be advised of his

rights. N.C. Gen. Stat. §7B-2101(b). The Chapel Hill Police Department policy in force when J.D.B. was interrogated further recommended that a *Miranda* rights waiver be obtained whenever a juvenile was interrogated and that, if no written waiver was obtained, the interrogating officer advise the juvenile *before* commencing interrogation that he was not under arrest and was free to leave any time. *In re J.D.B.*, 363 N.C. 664, 676, 686 S.E.2d 135, 142 (2009).

Investigator DiCostanzo, however, made no effort to contact J.D.B.'s legal guardian. (J.A. 137a) He did not go to J.D.B.'s home. Instead, Investigator DiCostanzo decided to interrogate J.D.B. at school. (J.A. 108a-109a) He did not call J.D.B.'s guardian before having J.D.B. pulled out of class. (J.A. 124a)

No location, not even a station house, is coercive *per se*. *Beheler*, 463 U.S. at 1125. For a child, however, a school is "a naturally coercive environment." *State v. D.R.*, 84 Wn. App. 832, 838, 930 P.2d 350, 353 (Ct. App. 1997). Though adults retain freedom of movement in the workplace and would unreasonably conclude they were in custody if questioned at work about a non-work-related matter, *United States v. Crossley*, 224 F.3d 847, 862 (6th Cir. 2000), such an analogy does not ring true in the case of a child at school. Children are legally required to be at school during school hours. N.C. Gen. Stat. §115C-378 (2010). By Smith Middle School policy, children are required to obey all directives of adults.

Having selected an environment which gave him a unique tactical advantage by virtue of J.D.B.'s youth, Investigator DiCostanzo did not release J.D.B. after J.D.B. answered the initial round of questions. Without

having informed J.D.B. that he was free to leave or free to decline to answer, Investigator DiCostanzo told J.D.B. that he needed "to help [him]self by making it right." (J.A. 112a) The import of not being told that he was free to leave and not being told he was free to refuse to answer questions is again age-related.

> An interview that would not be 'compelling' for an adult might nonetheless frighten a child into believing that he or she was required to answer an officer's questions. Accordingly, special precautions should be taken to ensure that children understand that they are not required to stay or answer questions asked of them by a police officer.

In re Loredo, 125 Ore. App. 390, 865 P.2d 1312 (Ct. App. 1993) (custody not found in school interrogation as officer at outset advised child that he was not under arrest, was free to leave, and was free not to answer questions and interview conducted without presence of other authority figures).

Contrary to the State's and its *amici's* positions, however, consideration of youth is not confined simply to the school setting, but to every law enforcement-juvenile encounter. Whether police question a juvenile on the street, *In re Robert H.*, 194 A.D.2d 790, 599 N.Y.S.2d 621 (1993), at the station house, *People v. T.C.*, 898 P.2d 20 (Colo. 1995), inside the juvenile's home, *Lee v. State*, 988 So.2d 52 (Fla. Ct. App. 2008), outside the home, *People v. Howard*, 92 P.3d 445 (Colo. 2004), or other locale, age, like any objective circumstance, is a factor. That custody has not invariably been found demonstrates that it has

not become the determinative factor, but merely one circumstance considered in light of all circumstances present. *Miranda* warnings are not required simply because it seems the fair tack to take. *See United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1990) (law enforcement not required to *Mirandize* mildly mentally retarded suspects in the absence of any indicia of custody); *In re Appeal in Maricopa County Juvenile Action*, 174 Ariz. 599, 601, 852 P.2d 414, 416 (Ct. App. 1993) (warnings not required if juvenile not in custody). If police restrict freedom of movement to the degree associated with an arrest, *Miranda* warnings must be given.

The State and its *amici* urge the Court to strip juveniles of Fifth Amendment protections by relegating age to the "vagaries of the traditional voluntariness test." *Michigan v. Mosley*, 423 U.S. 96, 113 (1975) (Brennan, J., dissenting).

> In *Miranda*, the Court noted the reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, 384 U.S. at 457, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.

Dickerson, 530 U.S. at 442. *Miranda* established that "the privilege against compulsory self-incrimination," not due process, stands "as the principal protection for a person facing police interrogation." *Michigan v. Tucker*, 417 U.S. 433, 441-442 (1974). The State seeks to turn back the clock

by returning to a test that proved even "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444. *Accord New York v. Quarles*, 467 U.S. 649, 683 (1984) (O'Connor, J., dissenting) (voluntariness has proven an "exceedingly difficult" test for courts to apply); *Tucker*, 417 U.S. at 442-443 (*Miranda* offered "a more comprehensive and less subjective protection" than the due process test). It makes that request in the absence of any data that would cause this Court to reconsider its assessment "about the nature of juveniles." *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010).

Relying solely on voluntariness creates an unacceptable risk that a person would not be "accorded his privilege under the Fifth Amendment…not to be compelled to incriminate himself." *Miranda*, 384 U.S. at 439. Since children possess Fifth Amendment rights, *In re Gault*, 387 U.S. 1 (1967), they are constitutionally due protective measures to ensure that their rights are effectuated. *Dickerson*, 530 U.S. at 438. The availability of only a voluntariness inquiry does not provide that protection, since youth can be a relevant factor contributing to a finding of custody.

The State asks this Court to allow law enforcement to continue to take advantage of the unique and long-recognized susceptibilities of minors to create custodial situations without doing the one thing -- advising minors of their rights -- designed to give "the *defendant* the power to exert some control over the course of the interrogation." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (emphasis in original). This the Court should not do.

CONCLUSION

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

Respectfully submitted,

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