In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2017-0877
Plaintiff-Appellant,	}	
	}	
v.	}	ON APPEAL FROM THE MONTGOMERY
	}	COUNTY COURT OF APPEALS
L.G.,	}	SECOND APPELLATE DISTRICT
	}	
Defendant-Appellee.	}	COURT OF APPEALS CASE NO. 27296

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE L.G.

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

STATE'S PROPOSITION OF LAW: The protections of the United States Constitution only apply where there is action by the State. The Fifth Amendment protection against self-incrimination does not apply to interviews conducted by private citizens.

DEFENDANT'S PROPOSITION OF LAW: Fifth Amendment protections apply where governmental law enforcement or agents of law enforcement work closely with local police to isolate and interrogate a 13 year old student at an alternative school.

Summary of Argument. The issue in this case is whether L.G. should have been advised of his *Miranda* rights before being interrogated by Dayton Public Schools Executive Director of Safety and Security Jamie Bullens. That issue, in turn, requires resolution of two

questions: (1) Was Security Director Bullens an agent of law enforcement when he conducted the interrogation? (2) Was L.G. in custody or significantly deprived of freedom at the time of the interrogation?[1]

The answer to both questions is yes. Because of his role at the school, and because of his entanglement with the police during this incident, Security Director Bullens was acting as an agent of law enforcement during the course of the interrogation. And the totality of the circumstances clearly indicate that L.G. was in custody at the time of the interrogation, and that accordingly *Miranda* warnings should have been given.

1. Security Officer Bullens was working as an agent of the police during the interrogation of L.G.

A.* Miranda *requires warnings be given by persons who are not police officers, if they are acting as agents of law enforcement. While *Miranda* was understandably focused on the actions of police officers – it was police officers, after all, who questioned Miranda – subsequent decisions have substantially expanded the scope of those required to give warnings before conducting an interrogation, to include those who are acting as agents of law enforcement. Perhaps no decision makes that point better than *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), where the Court held that the State's expert psychiatrist in a capital murder case had to give the defendant *Miranda* warnings before interviewing him, when that interview would serve as the basis of the psychiatrist's testimony against the defendant at the guilt phase of the trial. See also *Matthis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d

[1] While the State's Proposition of Law addresses only the first question, the State does argue in its Brief that even if Security Director Bullens was a state actor, the interrogation was not custodial.

381 (1968) (Internal Revenue Service agent required to give warnings); *United States v. Mata-Abundiz,* 717 F.2d 1277 (9th Cir. 1983) (Immigration and Naturalization Service Agent required to give warnings); *Commonwealth v. Chacko,* 500 Pa. 571, 495 A.2d 311 (1983) (member of internal prison staff who performed custodial interrogation required to give warnings); *People v Jones*, 47 N.Y.2d 528, 393 N.E.2d 443, 419 N.Y.S.2d 447 (1979) (store detective required to give warnings, finding state action when two officers escorted the defendant to the place where he was interrogated by store detectives and awaited the outcome of the questioning).

B. Security Director Bullens was not acting as a private citizen. The State in its Brief analogizes this case to numerous others where the courts held that the interrogator was acting as a private citizen, and thus was not required to give warnings. In *In re Harris*, 5th Dist. Tuscarawas No. 1999AP030013, 2000 Ohio App. LEXIS 2390, the court suppressed statements made by a 12-year-old in response to questions directed at him by law enforcement, but allowed statements made by him in response to questions by his mother. In *State v. Watson*, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971), this Court denied suppression of statements the defendant made to a newspaper reporter in the bullpen. A loss prevention officer questioned a defendant in a shoplifting case, with a police officer standing by; the court in *Cuyahoga Falls v. Robinson*, 9th Dist. Summit No. 15883, 1993 Ohio App. LEXIS 2444, found that the mere presence of the police officer did not make the security officer an agent of the police sufficient to require him to *Mirandize* the defendant. And in *State v. Grant*, 67 Ohio St.3d 465, 620 N.E.2d 50 (1993), this Court held that the warrantless search of a home by private insurance investigators did not constitute a violation of the Fourth Amendment.

But even cursory scrutiny of those cases shows them to be inapposite. Security Director Bullens was not L.G.'s mother, a newspaper reporter, a security guard, or a private arson

investigator. He was the head of 26 school resource officers who were sworn in by the Dayton Police Department as institutional police officers, all of whom had extensive training as police officers, all of whom had firearms training and carried handcuffs, and all of whom had the power to arrest.

Even more significant is Security Director Bullen's interplay with the police, which demonstrated the "entanglement" the lower courts found so troubling. While the persons cited in the State's cases above all had agendas separate from the police, Bullens did not: the evidence indicates he worked hand-in-hand with the police during the entire incident. The very first thing he did upon arrival at the scene was consult with Dayton Police Sgt. Keller, whom Bullens described as the "supervisor" of the investigation. (T.p. 30.) He and Sgt. Keller made the decision "in unison" to use the police dogs to search the school for explosives. (T.p. 31, 32). He consulted with Sgt. Keller before allowing the students back into the gym. *Id.* After the students returned to the gym, Bullens, standing next to a uniformed officer, told the students that Miami Valley Crime Stoppers had offered a reward of $1,000 for information about the bomb threat (T.p. 47, 33); Bullens testified that he was required to get the permission of the Dayton police to do so. (T.p. 33-34.)

The offer of the reward was successful in prompting two students to identify L.G. as the suspect. Bullens then conferred with Dayton Police Sgt. Anderson, Sgt. Buch, and various other members of the Dayton Police Department, and ordered Officer Ivy, one of the officers under his command, to "retrieve" L.G. for interrogation. (T.p. 20, 36). Officer Ivy escorted L.G. to the cafeteria which served as the command center for Bullens and the police, and placed L.G. across the table from Bullens. (T.p. 14.) Bullens then began his interrogation, with Dayton Police Officer Stewart, Sgt. Keller – both armed and in uniform – and other detectives and police

officers standing nearby, some as close as five feet to L.G. (T.p. 14, 30, 38, 49.) At no time during his investigation did Bullens consult with anyone other than the police: not with the principal, the assistant principal, nor any other school official. Bullens' sole role was to assist the police in obtaining a confession.

And he was successful in accomplishing that: L.G. admitted making the bomb threat (T.p. 21, 38), and Dayton Police Officer Stewart took him to the stationhouse and turned him over to Dayton Police Detective Meeker. (T.p. 15-16, 40.)

This was not a mother questioning her son, a reporter talking to a suspect, an arson investigator employed by a private insurance company. Nor was this was a school official investigating an infraction of school policy. This was a school security officer working closely with the police to solve a crime. If Bullens' involvement with the police, and his pursuit of their objectives in compliance with their cooperation and direction, does not make him a state actor, it is difficult to imagine what would.

C. This Court's decision in State v. Jackson *is distinguishable from this case.*

In *State v. Jackson*, Slip Op. 2018-Ohio-2169, a social worker interviewed a defendant charged with sexually abusing a child. The interview was conducted in the jail, without notice to the defendant's attorney and without advising the defendant of his *Miranda* rights.

The court of appeals reversed Jackson's conviction, holding that the statement to the social worker should have been suppressed. *State v. Jackson*, 8th Dist. No. 103957, 2016-Ohio-8144. In doing so, the court relied entirely upon the "systematic procedure" under R.C. §2151.421(F)[2] whereby a children's services agency enters into a "memorandum of

[2] The section has since been renumbered to 2151.421(G).

understanding" with law enforcement to conduct interviews with defendants and to share the results with law enforcement.

This Court rejected this analysis, finding that the statute alone did not "support[] the conclusion that pursuant to it, [the social worker] acted as an agent of law enforcement when she interviewed Jackson." ¶21.

> The only evidence of contact between CCDCFS and law enforcement about the investigation in this matter before Mack interviewed Jackson is Funfgeld's[3] testimony that she contacted law enforcement to coordinate a joint interview of C.H. [the victim], which is consistent with the statutory goal of a memorandum of understanding of eliminating unnecessary interviews of child victims. ¶23.

That is a far cry from the situation here. Notably absent in the lower court's decision in this case is any mention of policy or statute as giving rise to Bullens' status as an agent of law enforcement. On the contrary, the court correctly focused on the "totality of the circumstances" to determine that "Bullens was acting in conjunction with law enforcement officers, such that *Miranda* warnings were required." *State v. L.G.*, 2nd Dist. Montgomery No. 27296, 2017-Ohio-2781, ¶22. The juvenile and appellate courts below pointed to the same factors outlined here: virtually all of Bullens' decisions – to have dogs search for explosives, to let the children back into the gym, to offer the Crime Stoppers' reward, to bring L.G. into the gym for questioning – were made after consultation with and approval by the police. And when Bullens conducted the interview with L.G., it was not with some police officer standing in the background, as in *Cuyahoga Falls v. Robinson, supra*. It was with numerous police officers and detectives, all in uniform and all armed, standing near L.G., some within arms' reach of him.

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[3] Tina Funfgeld was a sex abuse intake social worker with Children's Services.

Properly read, this Court's decision in *Jackson* requires more than a mere statute or policy to show interaction between law enforcement and a third party sufficient to make the latter the agent of the former, especially when there is no interaction between the two prior to the interrogation. The record in this case is replete with evidence of the entanglement between Security Director Bullens and the Dayton police, more than sufficient to make Bullens an agent of law enforcement.

2. L.G. was in custody at the time of his interrogation by Security Officer Bullens, requiring that he be given *Miranda* warnings before the interrogation proceeded.

A. The determination of whether a suspect is in custody for Miranda purposes is determined by the totality of the circumstances. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires that a person subjected to a custodial interrogation must be advised of his Fifth and Sixth Amendment rights. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." U.S. at 444. "[T]he ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

The Supreme Court in *J.D.B. v. North Carolina*, 564 U.S. 261, 270, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), spelled out how the courts were to make that determination:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to

> terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."

The touchstone for analysis is the "totality of the circumstances." As this court explained in *City of Cleveland v. Oles*, 2017-Ohio-5834, ¶ 22, 152 Ohio St. 3d 1, 92 N.E.3d 810, "[d]etermining whether the totality of the circumstances in a particular case indicates that a custodial interrogation occurred requires a more exacting inquiry by the courts than the simple application of a bright-line rule of law." See also *In re J.S.*, 3rd Dist. Marion No. 9-15-26, 2016-Ohio-255 (listing nine factors to consider in determining whether the totality of the circumstances demonstrates that the interrogation was custodial); *State v. Smith*, 7th Dist. Belmont No. 15 BE 0064, 2017-Ohio-2708, and *State v. Greeno*, 3rd Dist. No. 13-02-46, 2003-Ohio-3687) (ten factors). Accordingly, similar situations, depending upon other circumstances, can yield different results. *Cf. State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 (interrogation after traffic stop was custodial where officer smelled marijuana in vehicle, searched vehicle, took driver's keys, and had him sit in front seat of police cruiser while being questioned) with *State v. Brocker*, 11th Dist. Portage No. 2014-P-0070, 2015-Ohio-3412 (interrogation after traffic stop was not custodial where detention in cruiser was brief and not intimidating, and the trooper neither took the driver's keys nor searched the driver's vehicle).

B. The suspect's status as a juvenile is a significant factor in determining whether an interrogation is custodial. In *J.D.B. v. North Carolina*, *supra*, the United States Supreme Court recognized that the risk of false confessions produced by coercive custodial interrogations is "all the more acute when the subject of the custodial interrogation is a juvenile." 564 U.S. at 272.

This was not a revelation. As amply set forth in the Brief of Appellant and the other *amici*, the social literature and case law – to say nothing of a simple conversation with virtually any parent – is replete with recognition that children, even (or especially) adolescents, function differently that adults in terms of maturity, responsibility, and judgment, and are "more vulnerable to or susceptible to … outside pressures" than are adults. *J.D.B.* at 277. Indeed, ignoring the differences between an adult and a juvenile in this setting would lead to "absurdity." *Id.* at 275-76.

The Court is respectfully directed to Brief of *Amici* Juvenile Law Center, Ohio Public Defender, and Children's Law Center for a thorough discussion of this subject.

C. The totality of the circumstances in this case clearly support the lower courts' decision that the interrogation of L.G. was custodial. Once again, the State trots out numerous cases to support its contention that L.G. was not in custody at the time of his interrogation by Security Officer Bullens. Once again, the cases miss the mark.

In fact, the State does not look at the *totality* of the circumstances, but examines individual factors in an attempt to deconstruct the situation here. Yes, a library might not be an intimidating setting for a student, as the court found in *In Re Johnson*, 5th Dist. Morgan No. CA-95-13, 1996 Ohio App. LEXIS 2972. Yes, as the court in *State v. Spahr*, 2d Dist. Miami Nos. 2008 CA 21, 2008 CA 22, 2009-Ohio-4609, determined, an interview at a school is not inherently coercive. Yes, a short interview might be viewed as less coercive, as the courts concluded in *In re J.S.*, 3rd Dist. Marion No. 9-15-26, 2016-Ohio-255, and *In re B.J.*, 11th Dist. Lake No. 2013-L-091, 2014-Ohio-5701. Yes, even a nine-year-old's statement can be deemed non-coerced, as the court determined in *In re R.L.*, 2nd Dist. Montgomery No. 26232, 2014-Ohio-5065.

The first problem with the State's analysis is that it looks at one circumstance, to the exclusion of others. The questioning in *R.L.* took place on the street, a short distance from the juvenile's home; the child's mother had consented to the conversation, was present when it occurred, and was permitted to enter it when she sought to do so. After the conversation, the child was permitted to return home. The court accordingly found that "[t]here was no basis to conclude that R.L. had been taken into custody or otherwise deprived of his freedom during the conversation."

In *B.J.*, the court found several factors weighing in favor of a custodial interrogation, but determined that other factors weighed against it, notably that the juvenile's father was present during the questioning, and "was insistent that appellant give a statement to the officer about the incidents in question." ¶19. Even more important was that "B.J.'s age weighs against a finding that the interview was custodial. At the time of the interview, B.J was 17 years old and, by all accounts, a mature and intelligent individual." *Id.*

In *Morgan*, the court upheld the admission of a statement made to a probation officer, relying heavily on the Supreme Court's decision in *Minnesota v. Murphy*, 465 U.S.420, 104 S.Ct. 1136. 79 L.Ed.2d 409 (1984), which had held a probation officer was not required to give *Miranda* warnings to a probationee before questioning him. Perhaps the best indication of the non-coercive nature of the questioning was that during the juvenile's testimony, he referred to both the probation officer and the police officer who was present by their first names.

J.S. is also easily distinguishable: the interview was conducted at the juvenile's house, with his father, brother, uncle, and two cousins present. *Spahr's* applicability to this case is a mystery; Spahr was an adult teacher, accused of having an improper sexual relationship with a student. Present at his interview were the principal and assistant principal, and a deputy police

officer who advised Spahr that he was not under arrest, that his cooperation was voluntary, and that he could leave at any time. And, in fact, at the end of the interview, Spahr went home.

All this is a not remotely analogous to what happened here. The totality of the circumstances here shows that L.G. was a thirteen-year-old boy who was in an alternative school for children with academic or psychological difficulties. He was brought into an auditorium where he witnessed the school security officer, standing with police officers, and announcing that a reward would be offered for information leading to the apprehension of the person who called in the bomb threat. He was then led out of the auditorium, only to have a school resource officer, having the power to arrest, bring him back into the cafeteria to be questioned by Security Officer Bullens. Whatever familiarity L.G. might have had with those surroundings was more than offset by the fact that he was questioned with armed police officers standing near him; not only were his parents or any family members not present, neither were any school officials with whom he might have been familiar. He was not told that he could refuse to answer questions, or that he was could leave at any time.

Under these circumstances, the assertion that a reasonable person of L.G.s age, with his limitations and in that situation, would have felt free to get up and walk out of the cafeteria is the height of absurdity. As the juvenile court found here, "given the circumstances surrounding the investigation, no reasonable thirteen (13) year old child would feel he or she was at liberty to terminate the interrogation and leave." ¶18.

The appellate court below was careful to spell out that "[w]e are not holding, or even suggesting, that *Miranda* warnings are required whenever a teenager is questioned by school personnel; that it not the law and that is not what happened here." *Id.* Adoption of the State's proposition of law would basically require this Court to hold the converse: that virtually any

questioning of a student, no matter the age of the child and his abilities, and no matter the circumstances surrounding his interrogation, would not be deemed custodial.

The lower courts carefully analyzed the specific facts below, and carefully applied the appropriate law to those facts to conclude that the totality of the circumstances showed that the interrogation of L.G. was custodial. This Court should affirm that determination.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to affirm the decision of the Montgomery County Court of Appeals.

Respectfully submitted,

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