IN THE SUPREME COURT OF OHIO

SCT NO.

IN RE: M.H.	:	
Appellant	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals CA: 105742
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT M. H.

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CHILD'S MEMORANDUM IN SUPPORT OF JURISDICTION

"[C]hildren are different," and "'[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J. D. B. v. North Carolina*, 564 U.S. 261, at 274, 131 S.Ct., at 2404, 180 L.Ed.2d 310 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, at 115-116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982))."

Explanation of Why this Case is one of Public or Great General Interest and Involves a Substantial Constitutional Question

When this Court decided *State v. Jackson,* ___ Ohio St. 3d _____, 2018-Ohio-2169, and held that a government social worker's interview of a 31-year-old regarding a suspected crime did not always need to be preceded by Miranda warnings, it was careful to remind lower courts that whether Miranda warnings were required was a case-by-case consideration. Moreover, this Court decided *Jackson* on Fifth and Sixth Amendment grounds, not Fourteenth Amendment/Ohio Constitution, Article I, Section 10, due process grounds.

The Eighth District Court of Appeals has now taken *Jackson* to a place where this Court quite possibly never imagined, and has held that *Jackson* applies in equal ration to a social worker's interview of a 13-year old, without a parent present – that in such circumstances, the child has no protection under the Fifth or Fourteenth Amendments from a one-on-one interview with a never-met-before social worker in a closed room about his sexual history. In the words of the concurring opinion, "no constitutional safeguards need to be implemented to protect" the child's rights in such circumstances in the wake of *Jackson*.

In reaching this decision, the Eighth District has committed two fundamental errors. First, it has expanded *Jackson* beyond its original intentions. Each of the three judges wrote separately to express how troubling each found the treatment of the child, M.H., to be in this case. Judge McCormack, writing for the majority, matter-of-factly wrote, "the totality

of the circumstances of this case [are] troubling…." Slip Opinion at ¶26. Judge Keough felt wrote separately and "agree[ed] with the lead opinion's concerns regarding the relationship between the social worker and law enforcement, and the lack of understanding M.H. and his mother demonstrated regarding the interview process with the social worker." In dissent, Judge Jones concisely and accurately explained how the troubling circumstances of this case violated due process.

This Court, by accepting the first three propositions of law, will address the Eighth District's mistaken interpretation of *Jackson* before other lower courts follow the Eighth District's lead. This Court's failure to accept this case will reverse the trend of recent precedent of this Court and the United States Supreme Court that recognized that children are different and that the "adultification" of children by treating them like adults for purposes of criminal law and procedure was not only unwise but unconstitutional.

The second fundamental mistake of the Opinion Below was to even address the due process issue in this case. While the trial court suppressed the statements of the child solely on the basis of due process, the prosecution never addressed that issue in the briefing leading to the decision in this case. The prosecution chose only to complain on appeal that "the interview did not constitute a custodial interrogation and the social worker was not acting as an agent of law enforcement." Opinion at ¶15. Indeed, the only words written by the prosecution on the topic of due process are confined to four paragraphs contained in its brief in opposition to the child's motion for reconsideration – after the decision was rendered. Despite the prosecution's forfeiture of this issue, the Eighth addressed the due process ruling –without full briefing- and issued an opinion that, even in the due process context, relies on *Jackson*. Proposition of Law IV invites this Court to address the recurring problem of forfeiture of issues by appellants on appeal. Too often, district courts of appeals take the attitude, "so long as we're here, we might as well address it." While the product of

a natural reluctance to avoid cases being decided on procedural default grounds, courts that do this, including the Eighth District in this case, oftentimes produce precedent that is not the product of thoughtful briefing and is not steeped via the adversarial process.

For these reasons, this Court should accept this case.

Statement of the Case and Facts

Ms. Heard never had "an open file" with the Cuyahoga County Department of Children and Family Services ("DCFS"). She was not in system. Imagine her surprise when she received a letter for DCFS in late 2015. This was unchartered territory for the concerned mother. The letter directed Ms. Heard to appear at an already scheduled time for an interview. She was also directed to bring her young son, thirteen year old, M.H. The letter was silent as to the purpose of the interview and Ms. Heard did not know why she was being summoned.

Ms. Heard called DCFS and spoke with Ms. Esther Bradley after receiving the letter. Ms. Bradley simply confirmed the time and place of the interview and did not provide any additional details At this point in time, Ms. Heard maintains that no one with DCFS explained that her 13 year old son was the suspected of inappropriately touching his step-sister.

Meanwhile, at DCFS, Bradley knew there was a "strong possibility" that there were going to be criminal charges filed against M.H. Bradley herself "instructed the mother to make the police report." Bradley knew the report was field and that Detective Cottom was assigned to the case in October 2015. Bradley and Cottom had even exchanged voicemails regarding the case.

Ms. Heard met Ms. Bradley upon her arrival at the Jane Edna Building where the interview was scheduled to take place. It was December 2, 2015. Ms. Bradley greeted Ms. Heard then "told us that she would have to take my son away to interview him." Bradley

also assured Ms. Heard the interview would be "private." M.H. was then taken to a reserved room for the interrogation.

Ms. Heard was never told that cooperating with DCFS was optional. She was never told that she had a right to be present when her son was interrogated by Bradley. She was never told that Bradley was attempting to confirm a sexual assault allegation and to obtain an incriminating statement from Ms. Heard's juvenile son. In fact, when the interrogation began in a private room away from Ms. Heard, she was still being held in the dark by the DCFS about the purpose of the interview. When asked, Ms. Heard explained that she stayed behind because "[she] thought [she] couldn't go with him," her young son. On cross-examination by the prosecutor, Mr. Heard explained that she would have "had an attorney present" had she known the nature of the interrogation.

When M.H. returned from the interrogation, his mother found him to be quiet" and "kind of nervous." It was then that Ms. Heard was finally told about the nature of the interrogation and about the serious allegations made against M.H. *after* Bradley completed her interrogation. The news confirmed a suspicion that Ms. Heard had formulated.

Bradley produced an investigative report that included her interrogation of M.H. and provided a copy to Detective Cottom. That report was provided as a matter of policy and in the ordinary course of business. The same report was not given to M.H. or his mother. When asked, "why not?" Bradley pointed-out, "That's against policy. We can't do that."

M.H. was ultimately charged in juvenile court with two counts of gross sexual imposition on August 24, 2016, nearly 9 months after his interview with Bradley. M.H. filed a motion to suppress the un-*Mirandized* statements he made during that interview.

The investigation was carried out, pursuant to state law, by the state's social worker. The Court granted the motion to suppress "not only in light of the child's due process, Constitutional guarantees, but also in light of Evidence Rule 403(A) whereby, although

relevant, the evidence will not be found to be admissible as its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues." Tr. 94.

The state timely appealed and raised a single assignment of error challenging only whether *Miranda* warnings were required at the time M.H. was interrogated. Oral argument was held on November 14, 2017. The following day, the court issued a stay and removed the case from the active docket pending this Court's decision in *State v. Jackson*, Case No. 2017-0145.

This Court released is decision in *State v. Jackon*, 2018-Ohio-2169, on June 7, 2018. This matter was subsequently returned to the active docket. Each party filed supplemental briefs by August 2, 2018.

The court of appeals finally issued its decision on December 6, 2018. M.H. filed a motion for reconsideration and for a hearing en banc. The court of appeals denied each motion on March 20, 2019. This appeal follows.

Argument in Support of M.H.'s Propositions of Law

The Child-Appellant raises 3 propositions of law for this Court's consideration and adoption.

Proposition of Law I:

The statement of a child to a government social worker may be involuntary and violate due process even when the government social worker was not required to give Miranda warnings.

Protection of children against sexual assault should be a priority of law enforcement, and given that victims can be the sole witnesses in sexual assault cases, their claims should be heeded. But such allegations also require investigation that is informed by training and experience, requirements that are especially critical when the accused and accusers are children. In Ohio, those trained investigators are social workers under the Revised Code.

The Supreme Court has repeatedly recognized that children are different than adults, and that the responses of our law enforcement and justice systems must reflect that. See, e.g., *Miller v. Alabama*, 567 U.S. 460, 471, 473, 477-78, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (affirming that children are "constitutionally different" from adults and that the "characteristics" and "incompetencies" of youth, including their lack of sophistication in dealing with the criminal justice system, must be taken into account); *J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (holding that "a child's age properly informs the *Miranda* custody analysis" because it is "beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave"); *Graham v. Florida,* 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (acknowledging "fundamental differences" between adults and youth); *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (consulting scientific studies, among other sources, in recognizing that developmental and environmental differences, such as immaturity and lesser control over their environments, can result in young people being "more vulnerable or susceptible to negative influence").

The guarantees of the Due Process Clause apply to juveniles and adults alike. *In re Gault,* 387 U.S. 1, 30-31, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Winship, 397* U.S. *358, 362, 90* S.Ct. 1068, 25 L.Ed. 2d 368 (1970). In fact, the role of due process in juvenile proceedings has expanded since the United States Supreme Court's holding in *Gault*.

In *Graham,* the United States Supreme Court held that juvenile brains are less developed than adult brains. *Graham* at 68. As a result, the Court held that juveniles are less culpable than adults for their actions, which might arise from the underdeveloped decision-making portions of the juvenile brain. *Id.* at 69. Additionally, juveniles might not understand the consequences of a juvenile adjudication, making it even more troublesome

that such an adjudication can have the same effect on a later sentence as an actual criminal conviction, *Id.* at 78. And, in *J.D.B. v. North Carolina,* the United States Supreme Court went a step further, holding that every juvenile must ***.

Judge Keough's concurring opinion below holds that when a social worker interrogates a child there are "no constitutional safeguards [that] need to be implemented to protect" the child's rights following *State v. Jackson*, supra. This is not true and is gross misrepresentation of this Court's precedent. The government must still comply with due process even where *Miranda* does not apply. Inherent in due process is that no child shall be involuntarily induced into self-incrimination.

Proposition of Law II:

A child does not feel free to leave when a he is driven to government agency for questioning by a parent and separated from that parent and interrogated in a private interrogation room without being told he is free to leave and free to not cooperate.

Proposition of Law III:

A child-suspect must be provided *Miranda* warnings when that child is interrogated by a social worker who is exercising her statutory duty to investigate child abuse allegations and does so cooperatively with the police on a regular and institutional basis.

A government social worker is not categorically acting as a law enforcement agent when she complies with her statutory duty to investigate an allegation of abuse. However, when that social worker is acting cooperatively with police detectives she is in fact acting as an agent thereof.

Bradley's interview of M.H. was undertaken pursuant to a statutory scheme that directs children's services agencies, law enforcement, and prosecutors to work collaboratively to investigate and prosecute crimes against children. R.C. 2151.421(G)(1) mandates that social workers employed by public children's services agencies do more than merely report instances of child abuse or neglect to law enforcement as required by R.C.

2151.421(A). Rather, they must "investigate * * * to determine the circumstances surrounding the injuries, abuse or neglect, * * * the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible." R.C. 2151.421(G)(1). That "investigation shall be made *in cooperation with* the law enforcement agency." (Emphasis added.) Id.

Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381, 1968-2 C.B. 903 (1968), and *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), are instructive. Mathis involved an Internal Revenue Service ("IRS") agent who questioned an inmate in prison where the inmate was serving a state sentence. The inmate was ultimately charged with and convicted of violations of the federal false-claims statute. On appeal, the Supreme Court concluded that statements and information gathered by the agent should not have been admitted at the defendant's trial because the agent had failed to provide him *Miranda* warnings. Implicit in the court's decision was a determination that the IRS agent was the functional equivalent of law enforcement.

In *Estelle*, the Supreme Court held that *Miranda* applied to a psychiatric examination conducted by a court-appointed psychiatrist, concluding that the fact that the defendant "was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial." Id. at 467. The Supreme Court observed that under these circumstances, the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution." Id. At that point, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." Id.

Similarly, Bradley's interrogation of M.H. exceeded the customary function of a child advocate: to protect the safety and welfare of children. Rather, she was acting as an extension of law enforcement. Bradley went beyond investigating and reporting—whether,

for example, the victim was at risk of exposure to a sexually transmitted disease. Instead, she elicited and ultimately recounted M.H.'s version of events.

A social workers statutory obligations under R.C. 2151.421(G) and related statutory provisions do not categorically transform a children's services investigator into a law-enforcement agent. However, the specific facts here lead to the conclusion that Bradley was acting as the functional equivalent of law enforcement when she compelled M.H.'s mother to bring M.H. for an interview then separated M.H. from his mother and interrogated him in a separate private room.

This case is not the run of the mill juvenile case where a parent is asked to deliver a child to an appointment. Here, M.H.'s mother has an interest separate from the interests of M.H., she arranged for the interview to take place, and she took M.H. to the interview.

This case is also unique in that M.H.'s mother had a stake in cooperating with CCDFS. First, the alleged victim is the daughter of her boyfriend. Second, she has incentive to cooperate with CCDFS because she has other children in her home. This is a double-edged. She has an obligation to ensure her other children are safe and protected, plus she is incentivized to stay in the good graces of CCDFS, an agency that wields a tremendous amount of power an authority. In short: mom was not impartial.

This lack of impartiality was then combined with the M.H.'s duty to comply with his mother's wishes. This duty to comply is the inherent in the mother/child relationship and is a product of the power differential unique to a filial relationship as explained in *State v. Eskridge*, 38 Ohio St. 3d 56 (1988). In circumstances such as this, where a child is under coercion or direction to comply, he is not acting voluntarily as explained in *State v. Evans*, 144 Ohio App. 3d 539.

In *Evans*, supra, the First District Court of Appeals held that Evans, a juvenile, was in the "classic penalty situation" when he made incriminating statements to his counselors

during court-ordered therapy. Evans made the statements while he was involuntarily confined in an ODYS facility. In concluding that the "classic penalty" exception to the *Miranda* procedural safeguards applied, the *Evans* Court explained that "[h]ad Evans failed to participate, he could have been found in violation of the court order that he do so, and he would have risked transfer to a far more restrictive facility." Id. at 547.

Judge Keough highlighted the critical suggestion/promise in this case – the forensic social worker's promise that the interview would be "private." The word "private" "indicates that the nature and substance of the interview would not be shared." Concurring Opinion at ¶46. The number one definition of "private" according to Merriam-Webster Dictionary is: "intended for or restricted to the use of a particular person, group, or class." This definition applies here as M.H.'s mother believed the fruits of the interrogation were for the social worker's use and not intended for dissemination. The conversation was supposed to be "private," not to be known publicly.

M.H. was separated from his mother and taken to an interrogation room. He was not told he was free to leave, he was not informed of his *Miranda* rights, and he was not told that he could refuse to answer questions and walk away at any time. M.H. was psychologically moored to the interrogation room and was not free to leave. He was then subjected to a 40 minute interrogation.

This court through its lead opinion sanctions the 40 minute interrogation of the 13 year old child by the former homicide detective when it minimizes the time period by calling it "relatively brief." While a 40 minute interrogation may be brief for an average adult the same is not true for a 13 year old child. Any person who knows a 13 year boy knows the difficulty in maintaining a 5 minute conversation with the boy, unless the conversation was about Minecraft.

Finally, the ignorance of M.H. and his mother alongside the deceptive tactics used by the forensic social worker weighs heavily in favor of a due process violation. See, *In Re K.C.*, 2015-Ohio-1613 (1st Dist). The social worker never advised M.H. of his *Miranda* rights. M.H.'s mother did not know the nature of the interrogation. Concurring Opinion at ¶47. She did not know she had a right to be present alongside her 13 year old son, or that she had the right to have an attorney present. Id. at ¶48. More, the forensic social worker testified that she purposely kept information "very general" in order to secure the cooperation of M.H.'s mother. Id. Put another way, the social worker purposely withheld information from M.H. and his mother in order to prevent M.H. from making an informed decision.

Proposition of Law IV:

Where a trial court makes alternative findings in support a ruling and each is independently sufficient to use as a basis for its ruling, a court of appeals shall not review a finding that was not challenged on appeal.

In juvenile court, the child-M.H. argued that his un-*Mirandized* statements to a CCDCFS investigator should be suppressed and raised 3 independent grounds for relief. Those grounds are as follows:

(1) under Evid.R. 403 because even if relevant, the statements would be more prejudicial than probative of any disputed fact, DL-16-105732, Mot. to Suppress, 2;

(2) the statements were made without Miranda warning, DL-16-105732, Mot. to Suppress, 3-4; and

(3) the "involuntary statements made during a custodial interrogation must be suppressed on due process grounds completely independent of the Miranda analysis." DL-16-105732, Mot. to Suppress, 5.

Following a hearing, the Juvenile Court granted the Motion to Suppress "in light of Evidence Rule 403 and the due process of the alleged delinquent." DL-16-105732, Journal Entry, April 25, 2017. The juvenile court's journal entry does not suggest that *Miranda* was a factor in the court's decision, but it does state that the due process rights of M.H., along with Evid.R. 403, were the basis upon which the court made its ruling.

Despite the Juvenile Court's stated reasons for granting the motion, the State raised only one issue on appeal:

> Whether the trial court erred when it suppressed the statements made by M.H. during an interview with a social worker because the interview was not conducted as part of a custodial interrogation and because the social worker who conducted the interview was not acting as an agent of the police.

The lead opinion in this case acknowledges that the M.H. asked the Court affirm the juvenile court because "the state failed to address these arguments." Opinion at ¶36. This Court then discredits and refuses to give meaning to the plain language of the trial court's oral and written rulings. It its oral ruling, the juvenile court ruled:

> THE COURT: Noted. For purposes of the record upon due consideration of the testimony and evidence the motion to suppress is granted not only in light of the child's due process, Constitutional guarantees, but also in light of Evidence Rule 403(A) whereby, although relevant, the evidence will not be found to be admissible as its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. The Court did not hear that the alleged delinquent was incompetent. The Court did not hear that the alleged victim is incompetent.
>
> Understanding the relationship between Children & Family Services as well as the State it's a little close for comfort. The motion is granted. I'll give you your trial date. We're off the record.
>
> (Hearing concluded at 2:36 p.m.)

The relevant part of the juvenile court's journal entry reads:

> Whereupon the court heard testimony and accepted evidence.
>
> Upon due consideration of the evidence presented, the Court finds that the motion to suppress is well taken in light of Evidence Rule 403 and the due process of the alleged delinquent.
>
> It is therefore ordered that the motion to suppress is granted. The State's motion in limine is denied. The motions of CCDCFS to quash subpoena and for protective order are denied.

The juvenile court never mentions the Fifth Amendment. It never mentions *Miranda v. Arizona*, and it never mentions the two critical terms – custodial interrogation or agent of law enforcement –associated with *Miranda*. Nevertheless, the lead opinion in this case found that the trial court must have ruled solely on *Miranda* and Fifth Amendment because the trial court stated that the relationship between Children and Family Services and the State is "a little close for comfort." This conclusion is simply not supported by the record in this case. Yet, it was a necessary finding if the Court was to go ahead and rule in favor of the government because the government never challenged the "due process, Constitutional guarantees" found to have been violated by the trial court.

Here, the government never challenged the juvenile's court's ruling on due process grounds. As noted by the Court in the Slip Opinion, "The Due Process Clause requires an inquiry, separate from the custody considerations, concerning whether a [child's] will was overborne by the circumstances surrounding the giving of his confession." (Citations omitted) Slip Opinion at ¶39.

There is a bedrock principle in appellate jurisprudence that a court of appeals should not consider a claimed error which was not raised and assigned as error. *Foran v. Fisher Foods*, Inc., 17 Ohio St. 3d 193, 194 (1985), *State v. Williams* (1977), 51 Ohio St. 2d 112, 117 (1977), vacated on other grounds (1978), 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1156, see

also, *In Re Langford*, 2005-Ohio-2304 (8th Dist.), ¶¶17-18, see also, *In the Matter of Canterucci Children*, 2006-Ohio-4969 (8th Dist.), ¶18.

This bedrock principle was ignored or purposefully abandoned in this case. Uniformity on this critical issue is necessary in order maintain the court's role as impartial arbitrator and in order to avoid the appearance of favoritism or impropriety toward or against one party of the other.

Conclusion

Based on the foregoing, all three judges expressed concern in this case. Each labeled the conduct of the government troubling. These findings are precisely what the due process clause is intended to deter and prohibit. By failing to act, this Court sanctions the precise conduct that it is offends its conscience. M.H. asks that this Honorable Court withhold constitutional imprimatur and accept this matter for full briefing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was hand delivered upon Michael O'Malley, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this May 6, 2019.

s/ Paul A. Kuzmins
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