IN THE SUPREME COURT OF OHIO

SCT NO. 2019-0621

STATE OF OHIO	:
Appellee	:
vs.	:
M.H.	:
Appellant	

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The appellee continues to insist that a 13 year old child who is driven by his mother and told to cooperate with a prearranged interrogation at a government agency, would also feel free to thumb his nose at both his mother and the that government agent by refusing to answer her questions. This position ignores the common sense. It ignores a growing body of social science and academic research, and it ignores case law from this Court and the Supreme Court of the United States.

RELEVANT FACTS

The facts of this case are largely undisputed. However, M.H. would like to address a couple of statements made by the appellee and the implications of those statements.

First, the appellee remarks that it is the protocol of Social Worker Bradley to provide a suspect, even one who is a child, with an "opportunity to make a statement." Appellee's Brief at 2. This suggests that M.H. was told upfront that the interview was optional – that he could accept the opportunity to speak or he could turn it down. He was never told that the interview was optional and neither was his mother.

Second, Bradley's claim that the primary purpose of the interview "was to assess the safety of the victim and to determine if a safety plan was necessary" is patently ridiculous. Appellee's Brief at 3. Thirteen year old M.H. would have provided no help in determining whether a safety plan was necessary for J.M. He would be of even less value in assessing the safety of J.M. The undeniable primary purpose of Bradley's interrogation was to elicit incriminating statement from a child under the guise of a safety plan. This fact is supported by Bradley's own admission that her purpose was "to determine whether or not some type of inappropriate sexual behavior happened between the two of them and if anything criminal happened, then I pass that on to law enforcement." Tr. 64.

Next, M.H. takes issue with the insinuation that his mother knew that M.H. was accused of a crime, as opposed to possessing a general concern for her child's welfare, when she complied with

Bradley's request for an interview. Specifically, appellee points to 3 portions of the record and writes:

> Mother testified that she suspected at the time that the interview related to accusations that J.M. made against M.H. Tr. at 23 ("I had my suspicions"); Tr. at 24 ("I knew the situation that was going on."); see also Tr. at 18 (Mother testifying that J.M.'s mother previously told Mother about the crime).

Appellee's Brief at 2. Perhaps in a different context statements such as those attributed to M.H.'s mother could constitute evidence that she knew her young son was accused of a crime. The same is not true on these facts.

The allegation in this case is that a pair of unrelated step-siblings engaged in conduct that arguably falls with the range of developmentally-appropriate sexual behavior.[1] Indeed, this less cynical view of Mother's belief is supported by the record because Bradley told Mother that the interview was going to be "private," creating the false expectation that this was not a criminal investigation and an inducement to cooperate. This fact troubled Judge Keough who wrote:

> I feel compelled … to write separately because this case involves a 13-year-old juvenile who was interviewed outside the presence of his mother. My concern in this case falls on the role of the social worker and what information should be provided to the parent or guardian of a child suspected of child abuse. In this case, the social worker testified that she told M.H.'s mother that the interview would be "private." *** To me, the word "private" indicates that the nature and substance of the interview would not be shared. I believe this was the mother's understanding and find that a reasonable person in mother's situation would not have understood the circumstances surrounding the interview.

In re M.H., 8th Dist. Cuyahoga No. 105742, 2018-Ohio-4848, ¶ 46.

Mother's generalized concern, as opposed to belief that M.H. was accused of a crime, is also underscored by the fact that Mother drove M.H. to interview with the social worker. Indeed, Mother testified, in no uncertain terms, that she would have hired an attorney had she known the true nature of the interrogation. Mother did not understand that the statements her son made could be used

[1] *Age Appropriate Sexual Behaviors in Children and Young People*, 2d Edition, South Eastern Centre Against Sexual Assault & Family Violence (2017). Available at https://www.secasa.com.au/assets/Documents/Age-appropriate-behaviours-book.pdf (last visited November 21, 2019).

against him or would be provided to law enforcement. In fact, the social worker admitted that she intentionally kept the information given to mother "very general." She admitted that at no time did she advise M.H. of the purpose for the interview, never said that the interview was voluntary, that M.H. was free to leave, and that his statements would be given to law enforcement.

Finally, it is true that Detective Cottom may not have directed of requested Bradley to interview the child. However, Cottom did not have to direct Bradley to complete the interview. The statutes of the State of Ohio and the regulations of the Ohio Administrative Code command Bradley to conduct the interview. In fact, Bradley in her role with the CCDFS is the recognized lead investigator unless and until Cottom provides "verbal notification, as soon as practicable, and to follow-up with written notification, when feasible… in cases in which law enforcement agencies prefer sole investigative interviews with a perpetrator(s)." Cuyahoga County Memorandum of Understanding Regarding Child Abuse and Neglect, II(B)6, Responsibilities of Law Enforcement Agencies, OAC 5101:2-36 et seq.

APPLICABLE LAW AND DISCUSSION

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.

It is widely accepted that the voluntariness of a confession presents an issue analytically separate from those issues surrounding custodial interrogations and *Miranda* warnings. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 304, 105 S.Ct. 1285, 84 L. Ed. 2d 222 (1985) ("Prior to *Miranda*, the admissibility of an accused's in custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause."); *State v. Jenkins*, 15 Ohio St.3d 164, 231 (1984) (noting that "due process provisions of the federal Constitution dictate that the state must meet by a preponderance of the evidence its burden of proving that any inculpatory statement was made voluntarily".)

The appellee takes issue with the application of *J.D.B.* outside of the context of *Miranda* warnings. Discounting the application of J.D.B. in its entirety, the appellee argues, "*J.D.B.* held that age is a relevant factor when interpreting *Miranda* custody issues, which is not applicable here since M.H.'s first proposition assumes that a social worker is not required to give *Miranda* warning…." Appellee's Brief at 6. The suggestion is that while age is an appropriate consideration in a Miranda analysis it is irrelevant when interpreting involuntariness. This suggestion should be rejected.

The thrust of Appellant's argument is that Courts must calibrate Constitutional standards to a child's developmental status. This is represented by the Court's decision in *J.D.B.*, supra. More, in *J.D.B.*, the Court relied not only on "common sense," but also on both social science and neuroscience research to conclude that youth are uniquely vulnerable to coercion during interrogations. According to the Court, "[a]lthough citation to social science and cognitive science authorities is unnecessary" to establish children's unique decision-making approaches, "the literature confirms what experience bears out." 564 U.S. at 273 n.5. The Court pointed to "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds" to conclude that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." Id. at 272, 273 n.5 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

This reliance on adolescent development research was not new to the Court; in a series of Eighth Amendment cases, the Court has held that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, 560 U.S. at 76. Thus, age and the "wealth of characteristics and circumstances attendant to it" must be given meaningful consideration in cases involving adolescent defendants. See *Miller*, 567 U.S. at 476; see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016); *Roper v. Simmons*, 543 U.S. 551, 569-70(2005). Building upon the longstanding framework developed in *Gault*, *Haley*, and *Gallegos*,

these cases all emphasize that "children are constitutionally different from adults" and thus are entitled to special protections. See *Miller,* 567 U.S. at 471.

The Court's focus on developmental characteristics when assessing children's constitutional rights extends to other contexts as well. For example, in the First Amendment context, the Court has recognized that exposure to obscenity may be harmful to minors even when it would not harm adults. *Ginsburg v. New York,* 390 U.S. 629, 636 (1968); see also *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC,* 518 U.S. 727, 743 (1996). It has emphasized children's susceptibility to social pressure and immaturity when determining whether prayers at public high school graduation ceremonies violate the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 593 (1992). And, in the Fourth Amendment context, the Court has considered the impact of age when considering the reasonableness of a strip search. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (relying on the unique vulnerability of adolescents to hold a suspicionless school strip search unconstitutional). Indeed, "it is the odd legal rule that does not have some form of exception for children." Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

The appellee relies entirely on the conventional due process test in this case. That test does not provide juveniles, and M.H. specifically, with the "special care" that is constitutionally required. Over the past century, the Court adopted a totality-of-the-circumstances approach to assessing voluntariness of confessions, which examines both the characteristics of the accused and the details of the interrogation. *Withrow v. Williams*, 507 U.S. 680, 693 (1993); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

In applying this test, "th[e] Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). Further, the Court has clearly instructed that the propriety of police techniques must be viewed in terms of their effect on the particular suspect in question. See, e.g., *Miller v. Fenton*, 474 U.S. 104, 116 (1985). The Court has

repeatedly recognized that certain categories of suspects are particularly vulnerable to police coercion, including children, see, e.g., *In re Gault*, 387 U.S. 1, 45 (1966), and those with intellectual impairments, see, e.g., *Fikes v. Alabama*, 352 U.S. 191, 196-97 (1957). Indeed, the Court has clearly mandated that "special care" be used in assessing the voluntariness of a juvenile confession. *Gallegos v. Colorado*, 370 U.S. 49, 53 (1962); see also *Gault*, 387 U.S. at 45, 55.

Below, the Court of Appeals expressed that under the conventional totality of circumstances test, a court should consider "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *In Re: M.H.* at ¶39. (Citations omitted). The court went on to reason,

> M.H. was brought to the social services center by his mother, where he was interviewed by a social worker. The interview, which was conducted solely by the social worker, was relatively brief, lasting 40 minutes, and lacked any direct police presence. There is no evidence — or allegations — of any threats, coercion, suggestions, restraints, or physical deprivation or harm to M.H. Nor is there evidence that M.H. told the social worker that he did not wish to speak to her or that he conducted himself in a manner suggesting he did not wish to be interviewed. M.H. provided his statement in answer to Bradley's question regarding whether he was "sexually active." Given the circumstances, we find the evidence demonstrates that M.H.'s will was not overcome by the circumstances surrounding the giving of his statements to the social worker.

In re M.H., at ¶ 40.

Merely acknowledging the conventional totality of the circumstances factors, without paying "close attention to the individual's state of mind and capacity for effective choice," *Miranda v. Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (citing *Gallegos*, 370 U.S. 49), simply does not amount to "special care." More, the court never mentioned M.H.'s tender age or the impact of his youth on the court's totality of the circumstances analysis.

The appellee and the Eighth District both emphasize that "[t]here is no evidence — or allegations — of any threats, coercion, suggestions, restraints, or physical deprivation or harm to M.H. Id. at ¶40, Appellee's Brief at 5. That ignores—or, at best, clearly misapplies—the well-

established law holding "that coercion can be mental as well as physical." *Blackburn*, 361 U.S. at 206; see also *Spano v. New York*, 360 U.S. 315, 321-24 (1959).

The statements taken from M.H. in this case are clearly and undeniably involuntary. M.H. Indeed, the unique facts of this case were never addressed by the court of appeals or appellee in below or before this Honorable Court. Neither the court nor the appellee has addressed the following critical facts:

1. M.H.'s tender age;
2. M.H.'s lack of prior experience with law enforcement;
3. The implications if the filial relationship between mother and son;
4. M.H. did not arrive at the interview voluntarily;
5. The effect of mom's implied directive to cooperate with the interview;
6. The fallout from the lack of candor from the social worker with Mother;
7. The fallout from the lack of candor toward M.H.

The Ohio and federal constitutions provide the foundation for robust constitutional protections for youth during interrogations. Indeed, the rights under each constitution are largely coextensive of one another. See, *State v. Barker*, 149 Ohio St. 3d 1, 2016-Ohio-2708. However, the Ohio Constitution provides greater protection than the federal Due Process Clause and the Fifth Amendment to the United States Constitution. This Court should continue to interpret the Ohio Constitution as an independent document and construe the Ohio constitution as imposing more stringent constraints on government conduct than the U.S. Constitution. This true for each of the three propositions of law.

For the reasons discussed throughout this case, the conventional due process test cannot be applied to children. Social science and common sense dictate that children are not equipped to participate meaningfully in justice system developed for adults. Indeed, in light of the growing body of research in this area, Due Process invites this Court to revisit its holding in *In Re: M.W.*, 133 Ohio

St. 3d 309, 2012-Ohio-4538, as the only way to effectively protect kids against interrogations designed for adults. In that case, this Court considered whether a juvenile has a right to counsel during an interrogation conducted before a complaint was made in juvenile court.

Proposition of Law II:
A child does not feel free to leave when he is driven to a 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 free to not cooperate.

This proposition of law straddles the line between the *Miranda* doctrine and the voluntariness doctrine and directly impacts both.

Whether one feels free to leave directly impacts this Court's analysis of both *Miranda* and Due Process. This is true in cases involving adults and particularly acute in cases involving children. Indeed, *Miranda* was born from the recognition that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Accordingly, "the inherently coercive nature of custodial interrogation 'blurs the line between voluntary and involuntary statements.'" *J.D.B.*, 564 U.S. at 269, citing *Dickerson*, 530 U.S. at 435. If a child does not feel free to walk away and put an end to his questioning the line between voluntarily and involuntary statements is similarly blurred. This is true regardless of the interrogatories identity or roll in the greater governmental framework.

The restraint imposed on a suspect's movement need not be physical. Custody may arise where the suspect is "otherwise deprived of his freedom of action in any significant way," including through the imposition of psychological pressures. *United States v. Rogers*, 659 F.3d 74, 77 (1st Cir. 2011) (quoting *Miranda*, 384 U.S. at 444). "Significant deprivation occurs in circumstances carrying a 'badge of intimidation,' or 'inherent compulsions,'" id. (quoting *Miranda*, 384 U.S. at 457, 467).

"[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." *Beheler*, 463 U.S. at 1125, quoting

Mathiason, 429 U.S. at 495). To assist in this task, courts may consider "whether a reasonable person in the circumstances would have felt 'at liberty to terminate the interrogation and leave.'" *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), see also *J. D. B. v. North Carolina*, 131 S. Ct. at 2402. If not, then the follow-up inquiry is "whether those circumstances would have been likely to coerce a suspect to engage in back and forth with the police, as in the paradigm example of traditional questioning." *Berkemer v. McCarty*, 468 U.S. 420, 436-37, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

In *Yarborough v. Alvarado*, 541 U.S. 652, 663, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004), the Supreme Court stated: "Two discrete inquiries are essential . . . : 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." See also *J.D.B.*, 564 U.S. at 264-65 (it is "beyond dispute" that youth often will not feel free to leave interrogations). Here, even if this Court find that *Miranda* warnings were not required, the fact that a child in M.H.'s position would not have felt at liberty to terminate the interrogation and leave underscores the involuntariness of the encounter and his statements to Bradley.

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. <u>Application of *Jackson* to the Interrogation of M.H. Requires Sustaining the Trial Court.</u>

This Court's decision in *State v. Jackson*, infra, is not controlling. 154 Ohio St.3d 542, 2018-Ohio-2169. This is especially important because the Eighth District expressed feeling constrained by *Jackson*. Appellee argues that this "proposition of law is squarely foreclosed by this Court's decision in *State v. Jackson*…." Brief at 9.

In *Jackson*, ibid, this Court answered the limited question of whether, the statutory duty to cooperate and share information with law enforcement was sufficient to demonstrate that a social worker acted at the direction or under the control of law enforcement. Id. at syllabus. In *Jackson*, the intermediate court of appeals held that the "systematic procedure" of the statutory duty to cooperate automatically required social workers to administer *Miranda* warnings. *State v. Jackson*, 2016-Ohio-8144 (8th Dist.).

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 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.

The decision in *Jackson* was fact-driven, and the facts of this case compel a different result. Here, there are three important distinctions between *Jackson* and the instant matter. First, M.H. is a child whereas Mr. Jackson was a grown man in his 30's. Second, the degree of entanglement between law enforcement and the CCFDS investigators in child-victim cases demonstrates an agency relationship. Third, in *Jackson*, Mr. Jackson was previously Mirandized by police and informed of some of his rights by the investigating social worker prior to questioning. In addition, Jackson is undercut by

The first distinction between this case and *Jackson* is M.H.'s tender age. Children are deserving of "special care." The longstanding recognition that courts must apply "special care" in determining whether the police techniques "as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial Means…" *Miller*, 474 U.S. at 116.

The second distinction between this case and *Jackson* is the development of the facts that illustrate the entanglement of CCDFS and Law Enforcement in child-victim cases. The only distinction in this case between Bradley and police officer is that Bradley does not carry a government issued firearm and her government issued badge is plastic as opposed to tin. Police officers accept and memorialize complaints of potential criminal activity. Bradley took and memorialized the initial complaint in this matter. Police officers interview witnesses to alleged crimes. Bradley interviewed all of the important witnesses in this case. Police officers pass along their reports and findings to detectives. Bradley turned over her reports and interviews to Detective Cottom.

More, detectives act as gatekeepers and determine when alleged criminal conduct is presented for charging. The statute that Bradley was operating under in this case makes her the gatekeeper to criminal charges. The record is also clear that Bradley undertook her interrogation of M.H. was an investigative intent knowing full well she had to turn over the fruits of her investigation to Detective Cottom. Bradley purposely hid the truth from M.H. and his mother. M.H. and Mother was never told the interview was voluntary. They were never told the interview would be given to law enforcement. Mother was never told of her right to be present. Bradley stated that her purposes when interviewing M.H. was "to determine whether or not some type of inappropriate sexual behavior happened between the two of them and if anything criminal happened, then I pass that on to law enforcement." Bradley's other purported purpose was to develop a safety plan for the alleged victim.

The third distinction between this case and *Jackson* is the utter failure to inform M.H. or his mother about any other Constitutional Rights. Some may even say that Bradley's manipulation of M.H. and of his mother amounted to gamesmanship is too often associated with "the often competitive enterprise of ferreting out crime," and an inducement to cooperate with Bradley's investigation.

B. *Miranda* Applies to State Initiated Interrogations

This Court's conclusion in *Jackson*, if read to narrowly, conflicts with precedent from the Supreme Court of the United States. Indeed, the government reads *Jackson* to narrow custodial interrogations to scenarios where a law enforcement officer is directly involved. As discussed in appellant's merit brief, this narrow reading would require law enforcement to act as puppet master and that is not supported by practice or case law.

In *Estelle v. Smith*, (1981), 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359, Smith had been ordered by the trial court to undergo a routine psychiatric examination to ensure that he was competent to understand the charges against him and to assist in his defense. But the psychiatrist who conducted the examination went beyond testifying about the neutral and limited issue of the defendant's competency. The psychiatrist also testified for the prosecution, using the court-ordered examination as his basis, during the penalty phase of the trial. The Court first held that, for purposes of the Fifth Amendment privilege against self-incrimination, there was no appreciable difference between the guilt and penalty phases of a criminal trial. The Court then noted that when the psychiatrist went "beyond simply reporting to the court on the issue of competence and testified for the prosecution, *** his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." So the Court concluded that Smith's statements "were not 'given freely and voluntarily without any compelling influences' and, as such, could be used *** only if [Smith] had been apprised of his rights and had knowingly decided to waive them."

But most courts from around the country that have interpreted this decision have concluded that some duty to report to law enforcement officials is required for one to be considered an agent. *Kansas v. Benoit* (1992), 21 Kan. App. 2d 184, 194, 898 P.2d 653, 661; *State v. Robledo*

(Colo.1992), 832 P.2d 249, 251; *Commonwealth v. A Juvenile* (1988), 402 Mass. 275, 278, 521 N.E.2d 1368, 1370; *United States v. D.F.* (C.A.7, 1997), 115 F.3d 413, 420, fn. 10; *Commonwealth v. Chacko* (1983), 500 Pa. 571, 581, 459 A.2d 311, 315, fn. 3; *State v. Tibiatowski* (Minn.1999), 590 N.W.2d 305, 310 ("*Miranda* must be given by all those who use the power of the state to elicit an incriminating response from a suspect, regardless of whether they are law enforcement personnel"). That duty is statutorily created in this matter.

CONCLUSION

Based on the foregoing, appellant-child prays that this Honorable Court will sustain the instant appeal and find that he should have been provided with his Miranda warnings and that his statement to Social Worker Bradley was involuntary.

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief was emailed 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 November 25, 2019.

s/ Paul A. Kuzmins
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