IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 14-1560
Plaintiff-Appellee	:	
	:	On appeal from the Hamilton
vs.	:	County Court of Appeals
	:	First Appellate District
TYSHAWN BARKER,	:	
Defendant-Appellant	:	C.A. Case No. C1300214

BRIEF OF JUVENILE LAW CENTER, NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S CENTER ON WRONGFUL CONVICTIONS OF YOUTH, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF APPELLANT TYSHAWN BARKER

Sheryl Trzaska, (0079915)
Assistant State Public Defender
The Office of the Ohio Public Defender
(Counsel of Record)
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167(Fax)
sheryl.trzaska@opd.ohio.gov
COUNSEL FOR APPELLANT
TYSHAWN BARKER

Joseph T. Deters, (0012084)
Hamilton County Prosecutor
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
(513) 946-3105 (Fax)

COUNSEL FOR THE STATE OF OHIO

Lourdes M. Rosado* (PHV-7381-2015)
(*pro hac vice pending*)
*Counsel of Record
Marsha L. Levick (PHV-1729-2014)
(*pro hac vice pending*)
Juvenile Law Center
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808 (Fax)
lrosado@jlc.org

Steven A. Drizin (PHV-7379-2015)
(*pro hac vice pending*)
Center on Wrongful Convictions of Youth
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576
(312) 503- 8977 (Fax)
s-drizin@law.northwestern.edu
COUNSEL FOR *AMICI CURIAE*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

FIRST PROPOSITION OF LAW: When applied to a child, the statutory presumption that a custodial statement is voluntary under R.C. 2933.81(B) violates due process. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution 4

I. R.C. 2933.81(B)'S PRESUMPTION THAT A RECORDED CUSTODIAL STATEMENT IS *PRIMA FACIE* VOLUNTARY VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT THE GOVERNMENT PROVE VOLUNTARINESS 4

A. R.C. 2933.81(B) is facially invalid under the Fifth and Fourteenth Amendments of the United States Constitution. 5

1. Constitutional jurisprudence places the burden on the government to prove that any statements that it seeks to introduce as evidence against the accused were voluntary, and on the trial court to consider the totality of the circumstances in ruling on the statements' admissibility. 5

2. No other state statute or court rule regarding the electronic recording of interrogations relieves the government of its constitutional duty to prove the voluntariness of statements before such statements can be admitted into evidence. 9

3. The electronic recording of custodial interrogations is not a constitutional proxy for voluntariness and is just one factor the trial court must consider in assessing the totality of the circumstances. 12

B. Fourth Amendment jurisprudence governing searches and seizures further demonstrates why electronic recording cannot be a proxy for voluntariness when assessing the waiver of constitutional rights. 16

II. R.C. 2933.81(B)'S PRESUMPTION THAT A RECORDED CUSTODIAL STATEMENT IS *PRIMA FACIE* VOLUNTARY IS UNCONSTITUTIONAL AS APPLIED TO YOUTH SUCH AS TYSHAWN 21

A. Courts at the highest levels nationwide recognize youths' unique vulnerability in the interrogation room and therefore apply different constitutional standards. 21

B. The law enforcement, social science, and international communities all recognize youths' unique vulnerability when subjected to custodial interrogation. 23

C. Tactics that are known to induce all suspects to involuntarily and falsely confess at a troubling rate are regularly employed against children and teenagers. 25

D. Electronic recording has not deterred police from using tactics known to induce suspects, especially juvenile suspects, to involuntarily and falsely confess. 26

CONCLUSION 32

APPENDIX A-1

TABLE OF AUTHORITIES

Page(s)

Cases

A.M. v. Butler,
360 F.3d 787 (2004).....29

Bruno v. United States,
308 U.S. 287 (1939).....8

In re C.S.,
874 N.E.2d 1177 (Ohio 2007).....21

Cadder v. HM Advocate,
UKSC 43 (Scot. S.C. 2010), *available at*
http://www.bailii.org/uk/cases/UKSC/2010/43.html.....25

Carter v. Kentucky,
450 U.S. 288 (1981).....8, 9

Commonwealth v. Truong,
28 Mass. L.Rptr. 223 (Mass. Super. Ct. 2011) 22, 27

Corley v. U.S.,
556 U.S. 303 (2009).....24, 26

Culombe v. Connecticut,
367 U.S. 568 (1961).....5, 7, 12

Dye v. Kentucky,
411 S.W.3d 227 (Ky. 2013).....27

Florida v. Jimeno,
500 U.S. 248 (1991).....17

Florida v. Royer,
460 U.S. 491 (1983).....17

Gallegos v. Colorado,
370 U.S. 49 (1962).....3, 22

In re Gault,
387 U.S. 1 (1967).....22

Graham v. Florida,
560 U.S. 48 (2010).....23, 24

Griffin v. California,
380 U.S. 609 (1965).....8

Haley v. Ohio,
332 U.S. 596 (1948).....3, 22

In re Harris,
No. 1999AP30013, 2000 WL 748087 (Ohio Ct. App. June 7, 2000).....28

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011).....21, 23, 24

Jackson v. Denno,
378 U.S. 368 (1964).....6

Johnson v. Trigg,
28 F.3d 639 (7th Cir. 1994) 21

Lego v. Twomey,
404 U.S. 477 (1972)..... *passim*

Malloy v. Hogan,
378 U.S. 1 (1964).....8

Miller v. Alabama,
132 S. Ct. 2455 (2012).....23

Missouri v. Seibert,
542 U.S. 600 (2004).....6

People v. N.A.S.,
329 P.3d 285 (Colo. 2014).....15

People v. White,
828 N.W.2d 329 (Mich. 2013).....22

Salduz v. Turkey, European Court of Human Rights, Application No. 36391/02
(27 Nov., 2008) *available at*
¶http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893. 25

Roper v. Simmons,
543 U.S. 551 (2005).....23, 24

Schneckloth v. Bustamonte,
412 U.S. 218 (1973)..... *passim*

State v. Doucette,
1987 Me. Super. LEXIS 244.....15

State v. Grey,
907 P.2d 951 (Mont. 1995) 13

State v. Hill,
595 N.E.2d 884 (Ohio 1992) 6

State v. Jenkins,
473 N.E.2d 264 (Ohio 1984) 6

State v. Melchior,
381 N.E.2d 195 (Ohio 1978) 5

State v. Robinette,
685 N.E.2d 762 (Ohio 1997) 17

State v. Western,
29 N.E.3d 245 (Ohio Ct. App. 2015) 7

United States v. IMM,
747 F.3d 754 (9th Cir. 2014) 22

Victor v. Nebraska,
511 U.S. 1 (1994) 8

Wilson v. United States,
149 U.S. 60 (1893) 8

In re Winship,
397 U.S. 358 (1970) 8

Statutes

Cal. Penal Code § 859.5 ..... 9, 12

Colo. Rev. Stat. Ann § 19-2-511 13

Conn. Gen. Stat. Ann. § 54-1o 9, 12

Conn. Gen. Stat. § 46b-137(a) 14

D.C. Code § 5-116.01 10

725 Ill. Comp. Stat. Ann. 5/103-2.1 10

Ind. Code § 31-32-5-1 15

Iowa Code Ann. § 232.11 15

Md. Code Ann., Crim. Proc. § 2-402 10

Me. Rev. Stat. tit. 15, § 3203-A(2-A) 14

Mont. Code Ann. § 41-5-331 15

Mont. Code. Ann. § 46-4-408 10

N.C. Gen. Stat. Ann. § 15A-211 ..... 11, 12

N.C. Gen. Stat. § 7B-2101 14

N.M. Stat. Ann. § 29-1-16 11

Neb. Rev. Stat. § 29-4503 10

Okla. Stat. Ann. tit. 10A § 2-2-301 14

R.C. 2933.81(B) ..... *passim*

Tex. Code Crim. Proc. Ann. art. 38.22 11

Vt. Stat. Ann. tit. 13, § 5585 ..... 11, 12

W. Va. Code § 49-5-2(l) 14

Wis. Stat. Ann. § 968.073 11

Other Authorities

U.S. Const. art. VI, § 2 ..... 2, 4, 7

U.S. Const. amend. IV 16, 18

U.S. Const. amend. V 8

U.S. Const. amend. XIV 2, 4, 5, 17

Ohio Const. art. I, §10 ..... 2, 4

Ark. R. Crim. P. 4.7 9

Ind. R. Evid. 617 ..... 10, 12

N.J. Ct. R. 3:17 10

Tamar Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee Rev. 385 (2008). 23

Kim Brooks and Darlene Kamine, *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio*, American Bar Association (March 2003) 30

Carlos Campbell, Wrongful Convictions of Youth Spotlight, *available at* http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/news/spotlight/ 27

Steven A. Drizin and Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions*?, 34 N. Ky. L. Rev. 257 (2007) 30

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) 24

Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771 (2010) 30

Samuel R. Gross, *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005) 24

Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 Wash. U. J. L. & Pol'y 109 (2012) 23

Fred Inbau *et al.*, *Criminal Interrogation and Confessions* (5th ed. 2013) 26

Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights,* 2006 *Wisconsin Law Review* 431 29

Lauren Kirchner, *How Can We Prevent False Confessions from Kids and Teenagers?*, Pacific Standard, June 17, 2014, *available at* http://www.psmag.com/politics-and-law/preventing-false-confessions-kids-83590 26

Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav. Sc. L. 757 (2007) 25

National Registry of Exonerations, *Anthony Harris, available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3281 28

National Registry of Exonerations, *Lacresha Murray*, *available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3499 28

Allison D. Redlich & Gail S. Goodman, *Taking Responsibility For an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 147 (2003) 24

Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943 (2010).....25

John E. Reid & Associates, Inc., *Investigator Tips* (March-April 2014), *available at* http://www.reid.com/educational_info/r_tips.html?serial=20140301.....23

John E. Reid & Associates, Inc., *Take Special Precautions When Interviewing Juveniles or Individuals With Significant Mental or Psychological Impairments*, *available at* http://www.reid.com/pdfs/20120929d.pdf.....24

N. Dickon Reppucci, Jessica Meyer, & Jessica Kostelnik, *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, in Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations 67-80 (G. Daniel Lassiter & Christian A. Meissner eds. 2010) 26

Self-Awareness To Being Watched And Socially-Desirable Behavior: A Field Experiment On The Effect Of Body-Worn Cameras On Police Use-Of-Force, Police Foundation *available at* http://www.policefoundation.org/content/body-worn-camera 19

Joshua A. Tepfer, Laura H. Nirider, & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887 (2010).....24

The Court in Brief, European Court of Human Rights, *available at* http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited May 22, 2015).....25

Cleveland police officers begin using body cameras on city's East side, Cleveland Plain Dealer, Feb. 4, 2015, *available at* http://www.cleveland.com/cityhall/index.ssf/2015/02/cleveland_police_officers_begi.html 19

Obama wants more cops wearing body cams, Policeone.com, Dec. 1, 2014, *available at* http://www.policeone.com/police-products/body-cameras/articles/7910646-Obama-wants-more-cops-wearing-body-cams/.....18

Bad Confession, Boston Public Radio WBUR, Dec. 7, 2011, *available at* http://www.wbur.org/2011/12/07/worcester-coerced-confession-i 27

Baltimore Mayor Asks DOJ for Civil Rights Probe into City Police Department, CNN, May 7, 2015 *available at* http://www.cnn.com/2015/05/06/politics/baltimore-body-cameras-doj-investigation/index.html.....18

Cincinnati Police to begin testing body cameras, Fox, Aug. 14, 2014, *available at* http://www.fox19.com/story/26271213/fox19-exclusive-cincinnati-police-department-testing-body-cameras.....18

'Shoot me' video caught on officer's own body cam, Cincinnati Enquirer, Apr. 23, 2015, *available at* http://www.cincinnati.com/story/news/2015/04/23/new-richmond-body-camera-officer-shooting/26228455/.....19

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici work on issues of child welfare, juvenile justice, and children's rights.[1] *Amici* have a particular expertise on the interplay between the constitutional rights of children and social science and neuroscientific research on adolescent development, especially with regard to children involved in the juvenile and criminal justice systems. United States Supreme Court case law, as well as the law enforcement, social science, and international communities, all recognize youths' unique vulnerability in custodial interrogations. Greater protections must be accorded children when they are interrogated, and courts must rigorously consider youth in assessing whether a child's statement was voluntary under the totality of the circumstances. *Amici* share a deep concern that R.C. 2933.81(B) violates due process because it creates a statutory presumption of voluntariness for the recorded statements of youth, and places the burden on the youth in the first instance to prove that the statements were involuntary. Moreover, because youth are more likely than adults to make false confessions, *Amici* fear that R.C. 2933.81(B) will undermine the truth-seeking function that proper interrogations fulfill.

[1] A brief description of all *Amici* appears at Appendix A.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt the Statement of Facts set forth by Appellant Tyshawn Barker.

SUMMARY OF ARGUMENT

Amici curiae write in support of the First Proposition of Law that, when applied to a child, the statutory presumption that a custodial statement is voluntary under R.C. 2933.81(B) violates due process under the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 10 of the Ohio Constitution.

First, R.C. 2933.81(B) is unconstitutional on its face because it is contrary to a long line of United States Supreme Court case law which squarely places the burden on the government to establish voluntariness in the first instance. The statute violates due process by lifting the burden from the state and instead requiring the accused to prove involuntariness. This court is bound by the Supremacy Clause, Article VI, Section 2 of the United States Constitution, to enforce the U.S. Supreme Court's holding that "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. The States are free, pursuant to their own law, to adopt a higher standard." *Lego v. Twomey,* 404 U.S. 477, 489 (1972) (emphasis added). R.C. 2933.81(B) is invalid because it creates a lower standard than what is constitutionally required.

A number of states either require or suggest the electronic recording of custodial interrogations in specified circumstances. Ohio is an outlier because it is the only state that creates a presumption that recorded statements elicited during interrogation are *prima facie* voluntary, and because it shifts the burden from the state to the accused to prove that recorded statements were involuntary. The electronic recording of custodial interrogations, like other

prophylactic measures taken to reduce the risk of coercion, is not a constitutional proxy for voluntariness.

In addition or in the alternative, R.C. 2933.81(B) is unconstitutional when applied to youth such as Tyshawn. United States Supreme Court case law, as well as the law enforcement, social science, and international communities, all recognize youths' unique vulnerability in the interrogation room. Indeed, the Court has recognized repeatedly that tactics which may not be coercive when applied to adults are coercive when applied to children. In order to place juvenile suspects on "less unequal footing" with their adult interrogators, the Court has held that due process requires that greater protections and "special care" be taken when children are interrogated. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948). Due process further demands that courts must rigorously consider youth as a potent and pervasive factor in the totality of the circumstances analysis and apply heightened scrutiny in assessing the voluntariness of juvenile statements. R.C. 2933.81(B) eviscerates these constitutionally-guaranteed protections for youth by eliminating the need for courts to conduct a rigorous totality of the circumstances analysis. Inevitably, when R.C. 2933.81(B)'s presumption of voluntariness is applied by a court, youth will not be weighed as a potent factor, special care will not be ensured, and scrutiny of juvenile statements will not be heightened. By shifting the burden of proof to defendants, R.C. 2933.81(B) provides lesser protections to both children and adults than what is constitutionally required. By making the presumption apply equally to both juvenile and adult suspects without regard for the unique vulnerabilities of young suspects that entitle them to greater protections than adults, R.C. 2933.81(B) denies juvenile suspects the "special care" that due process demands.

ARGUMENT

FIRST PROPOSITION OF LAW: When applied to a child, the statutory presumption that a custodial statement is voluntary under R.C. 2933.81(B) violates due process. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

I. R.C. 2933.81(B)'S PRESUMPTION THAT A RECORDED CUSTODIAL STATEMENT IS *PRIMA FACIE* VOLUNTARY VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT THE GOVERNMENT PROVE VOLUNTARINESS

In April 2010, the Ohio legislature added Section 2933.81 to the Ohio Revised Code. The statute provides in pertinent part as follows:

> All statements made by a person who is a suspect of [murder] during a custodial interrogation in a place of detention are presumed to be voluntary if the statements are made by the person are electronically recorded. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary.

R.C. 2933.81(B) (emphasis added). The law creates a statutory presumption of voluntariness for a recorded statement. It further relieves the government of its burden to prove the voluntariness of such statement before seeking to introduce it into evidence against the accused, and shifts the burden to the accused to prove that the statement was involuntary. As discussed in detail *infra*, R.C. 2933.81(B) is unconstitutional on its face because due process requires the state in the first instance to establish the voluntariness of a statement, and for the trial court, after considering the totality of the circumstances, to assess whether the state has met its burden. The Ohio General Assembly simply cannot "legislate away" these constitutional mandates. Moreover, under the Supremacy Clause, U.S. Const., Art. VI., § 2, this court is bound to enforce United States Supreme Court case law holding that the government must establish by the preponderance of the

evidence the voluntariness of any statement elicited from the accused through custodial interrogation.

A. R.C. 2933.81(B) is facially invalid under the Fifth and Fourteenth Amendments of the United States Constitution.

1. Constitutional jurisprudence places the burden on the government to prove that any statements that it seeks to introduce as evidence against the accused were voluntary, and on the trial court to consider the totality of the circumstances in ruling on the statements' admissibility.

The Fifth and Fourteenth amendments of the U.S. Constitution prohibit the admission into evidence of statements that are not "the product of essentially free and unconstrained choice by its maker." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (plurality opinion); *accord Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973); *State v. Melchior*, 381 N.E.2d 195, 201 (Ohio 1978) ("[T]he test in determining whether a confession is voluntary is to determine whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined….") (internal citation and quotations omitted). This "ultimate test … has been the only clearly established test in Anglo-American courts for two hundred years…." *Schneckloth*, 412 U.S. at 225-26.

Statements elicited from the accused during custodial interrogation may only be admitted into evidence if the government can establish that the accused voluntarily made such statements:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

Jackson v. Denno, 378 U.S. 368, 376 (1964) (emphasis added) (internal citations omitted). The United States Supreme Court has held that "the burden of showing admissibility rests, of course, on the prosecution. The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver and the voluntariness of the confession." *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (emphasis added) (citations omitted). *See also Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." (emphasis added). The Ohio Supreme Court has recognized that the United States Constitution mandates that the state prove that a statement was voluntary as a pre-condition for its admissibility. *See State v. Jenkins*, 473 N.E.2d 264, 320 (Ohio 1984) ("In addition to the requirements of *Miranda*, 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 court must determine whether the totality of the circumstances demonstrates that the statements are of the accused's free and rational choice.") (internal citations omitted). *Accord State v. Hill*, 595 N.E.2d 884, 890 (Ohio 1992).

To determine whether the state has met its burden, the court must assess the totality of the factual circumstances surrounding the statement, including the accused's characteristics and details of the interrogation. *Schneckloth*, 412 U.S. at 226. Relevant factors include the youth of the accused, their educational attainment and intelligence level, the length of detention, whether questioning was brief or prolonged, whether there was infliction of physical punishment, and if there was any deprivation of food or sleep. *Id.* at 226 (citations omitted). Due process requires

courts to "determin[e] the factual circumstances surrounding the confession, assess[] the psychological impact on the accused, and evaluate[] the legal significance of how the accused reacted." *Id.*

R.C. 2933.81(B) is unconstitutional on its face because it is contrary to this long line of jurisprudence which squarely places the burden on the government to establish voluntariness. The statute violates due process by lifting this burden from the state and instead requiring the accused to prove involuntariness. The statute also impermissibly relieves the trial court of its constitutional mandate to assess the totality of the circumstances surrounding the accused's statements and rule as admissible only those that are "the product of essentially free and unconstrained choice by its maker." *Culombe*, 367 U.S. at 602. Indeed, at least one Ohio appellate court has raised the question of whether R.C. 2933.81(B)'s statutory presumption of voluntariness is constitutional. *See State v. Western*, 29 N.E.3d 245, 249 (Ohio Ct. App. 2015) ("We have some questions about shifting the burden to a defendant.").

The appellate court in *Western* specifically pointed to the admonition in *Lego v. Twomey* that "'the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary…. [T]he States are free, pursuant to their own law, to adopt a higher standard.'" *Western*, 29 N.E.3d at 249-50 (emphasis added) (quoting *Lego*, 404 U.S. at 489 (1972)). Ohio courts are bound by the Supremacy Clause found in Article VI, Section 2 of the Constitution and therefore must enforce *Lego* and other cases in which the U.S. Supreme Court has articulated the constitutional requirements for admitting into evidence the statements of the accused. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.") *Lego v.*

Twomey and its progeny hold that the burden on the state is the floor that comports with due process. *Lego*, 404 U.S. at 489. R.C. 2933.81(B) is invalid because it goes below this floor to create a lower standard than what is constitutionally required.

The rationale for the government bearing the burden of proof stems, in part, from the interplay between two critical rights of the accused: the right against self-incrimination and the presumption of innocence until proven guilty. *See Carter v. Kentucky*, 450 U.S. 288, 304 (1981) ("Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned."). The United States Constitution affords everyone the presumption of innocence. *Griffin v. California*, 380 U.S. 609, 613 (1965). Due process places the burden on the government to prove the accused is guilty beyond a reasonable doubt, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *In re Winship*, 397 U.S. 358, 361-63 (1970); *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) ("[g]overnments, state and federal, <u>are thus constitutionally compelled to establish guilt</u> by evidence independently and freely secured….") (emphasis added). The rule is based on "our sense of fair play … [that] dictates <u>a fair state-individual balance by requiring the government . . ., in its contest with the individual to shoulder the entire load</u>, . . .;" *Carter*, 450 U.S. at 299 (emphasis added) (citation and internal quotations omitted). Thus, the United States Supreme Court has held that an adverse inference cannot be drawn from a defendant's decision to not testify at trial, *Griffin*, 380 U.S. at 611-13; *Wilson v. United States*, 149 U.S. 60, 65 (1893), and upon request, the trial court has a constitutional obligation to provide a "no adverse inference" instruction to the jury. *Bruno v. United States*, 308 U.S. 287, 292-93 (1939); *Carter*, 450 U.S. at 305. Such a requirement ensures that the accused is truly presumed innocent until the government proves that he or she is guilty beyond a reasonable doubt.

Similarly, "'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect." *Schneckloth*, 412 U.S. at 224-25. The constitution first places the burden on the state to prove the voluntariness of a statement elicited from the accused because "our sense of fair play … dictates a fair state-individual balance by requiring the government . . ., in its contest with the individual to shoulder the entire load." *Carter*, 450 U.S. at 299. R.C. 2933.81(B) is constitutionally defective because it disturbs the "fair state-individual balance" and instead imposes the burden on the accused to prove that he or she did not voluntarily make the statements at issue.

2. No other state statute or court rule regarding the electronic recording of interrogations relieves the government of its constitutional duty to prove the voluntariness of statements before such statements can be admitted into evidence.

Ohio is an outlier among states that have statutes related to recording of interrogations, because it is the only state that creates a presumption that recorded statements elicited during interrogation are *prima facie* voluntary, and because it shifts the burden from the state to the accused to prove that recorded statements were involuntary.

A number of states either require or suggest the electronic recording of custodial interrogations in specified circumstances. *See, e.g.,* Ark. R. Crim. P. 4.7 (custodial interrogations should be recorded electronically whenever possible); Cal. Penal Code § 859.5 (interrogations of any minor suspected of committing murder should be recorded); Conn. Gen. Stat. Ann. § 54-1o (any oral or written statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless an electronic recording is made of the custodial interrogation, and such recording is substantially accurate and not intentionally altered; if court finds by preponderance

that an interrogation took place in violation of this statute, all statements presumed inadmissible except for impeachment purposes); D.C. Code § 5-116.01 (custodial interrogations of persons suspected of committing a crime of violence should be recorded when feasible; recording shall include the giving of any warnings as to rights required by law, the response of the suspect to such warnings, and the consent, if any, of the suspect to the interrogation); 725 Ill. Comp. Stat. Ann. 5/103-2.1 (an oral, written, or sign language statement of an accused made as a result of a custodial interrogation conducted at a police station or other place of detention shall be presumed to be inadmissible unless accurate recording is made); Ind. R. Evid. 617 (in a felony criminal prosecution, statement made during interrogation shall not be admitted against the person unless an electronic recording of the statement was made, preserved, and is available at trial); Md. Code Ann., Crim. Proc. § 2-402 (a law enforcement unit that regularly utilizes one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving specified offenses whenever possible; if unit does not regularly utilize interrogation room with video, the unit will take necessary measures to make audio recordings for same set of offenses); Mont. Code. Ann. § 46-4-408 (all custodial interrogations must be electronically recorded; recording must contain a peace officer advising the person being interviewed of the person's Miranda rights, a recording of the interview, and a conclusion of the interview); Neb. Rev. Stat. § 29-4503 (all statements relating to crimes resulting in death or felonies involving sexual assault, kidnapping, child abuse, or strangulation [as well as offenses being investigated as part of the same course of conduct] and statements regarding rights or the waiver of such rights made during a custodial interrogation shall be electronically recorded); N.J. Ct. R. 3:17 (barring certain exceptions, all custodial

interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with one of the Rule's listed crimes; if statement is unrecorded, prosecutor must give notice if relying on exceptions and failure to record will be a factor in considering admissibility); N.M. Stat. Ann. § 29-1-16 (custodial interrogation of a person suspected of a felony shall be electronically recorded in its entirety by a method that includes audio or visual or both, if available, and the electronic recording shall include the advice of constitutional rights required by law; officers may not comply for "good cause," which includes unavailability or failure of recording equipment, suspect refusal to be recorded, or that the statement was made in open court or a grand jury proceeding); N.C. Gen. Stat. Ann. § 15A-211 (requirement of electronic recording shall apply to all custodial interrogations of juveniles in criminal investigations conducted at any place of detention, or of person in a criminal investigation conducted at any place of detention if the investigation is related to a list of specified crimes; failure to comply with this statute shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation, and shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible); Tex. Code Crim. Proc. Ann. art. 38.22 (no oral or sign language statement made in custodial interrogation shall be admissible against the accused in a criminal proceeding unless an electronic recording is made, rights are read, voices on recording are identified, and attorney for defendant is provided with copy no less than 20 days before trial); Vt. Stat. Ann. tit. 13, § 5585 (a custodial interrogation that occurs in a place of detention concerning the investigation of homicide or sexual assault shall be recorded in its entirety); and Wis. Stat. Ann. § 968.073 (custodial interrogation of a

person suspected of committing a felony should be recorded unless statutory exceptions apply or good cause is shown for not recording).

Unlike R.C. 2933.81(B), none of these statutes or court rules provide that a recorded statement is presumed voluntary, nor do they shift the burden to the accused to prove that a recorded statement was involuntary. In all these jurisdictions the burden is still on the government to prove the voluntariness of the statements in accordance with the federal constitutional rule. Moreover, some of these states accepted the United States Supreme Court's invitation in *Lego v. Twomey* and "adopt[ed] a higher standard" for the government to establish the admissibility of a statement. For example, in Connecticut and Vermont, the prosecution must prove by a preponderance of the evidence why an exception to the recording requirement applied. Conn. Gen. Stat. Ann. § 54-1o; Vt. Stat. Ann. tit. 13, § 5585. California and Indiana require the government to prove an exception to the recording rule by clear and convincing proof. Cal. Penal Code § 859.5; Ind. R. Evid. 617. Ohio stands out because R.C. 2933.81(B) creates a standard lower than the federal constitutional floor.

3. The electronic recording of custodial interrogations is not a constitutional proxy for voluntariness and is just one factor the trial court must consider in assessing the totality of the circumstances.

The recording of custodial interrogations by law enforcement is a prophylactic measure designed to increase the likelihood that elicited statements are "the product of an essentially free and unconstrained choice by its maker." *Culombe*, 367 U.S. at 602. Recordings may act as a check on coercive police practices in interrogations and protect law enforcement officers from allegations of coercion. *See, e.g.*, N.C. Gen. Stat. Ann. § 15A-211 (electronic record should be created of an entire custodial interrogation "in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and

increasing court efficiency"). Such recordings may also assist the government in executing its constitutional duty to establish the voluntariness of statements elicited during custodial interrogation. The Montana Supreme Court opined such in a decision that preceded that state's enactment of an electronic recording statute:

> It is immeasurably more difficult for the State to sustain its burden to prove the voluntariness of a confession when there is no record of the Miranda warnings other than the officer's testimony that he gave them.
>
> We do not hold that the police must tape record or create an audio-visual record of Miranda warnings and the detainee's waiver, as Grey urges we should and as some jurisdictions have. . . . Although that may be the better practice and would help assure that the accused receives a constitutionally adequate Miranda warning while, at the same time, enhancing the prosecution's ability to meet its burden to prove voluntariness, we leave the imposition of any such procedural requirement to the legislature and to individual law enforcement agencies.

State v. Grey, 907 P.2d 951, 955-56 (Mont. 1995) (emphasis added). The Montana Supreme Court recognized that mandatory recording procedures increase the likelihood of voluntariness, and that the recording assists the prosecution in meeting its burden. The Montana court did not, nor could not, find that electronic recording is a suitable substitute for the state's constitutionally-required burden to prove voluntariness.

States have introduced other prophylactic measures to reduce the risk of coercion during custodial interrogation. These provisions serve a functionally identical purpose as rules requiring recording of interrogations in that they increase the likelihood that a waiver of crucial due process rights is truly knowing and voluntary. For example, several states have adopted "interested adult" rules that prohibit the admission into evidence of statements made by a juvenile if a parent, guardian or other specified adult was not present during police questioning. *See, e.g.,* Colo. Rev. Stat. Ann § 19-2-511 (no statements or admissions of a juvenile made as a result of custodial interrogation shall be admissible in evidence against such juvenile unless a

parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation except that, if a public defender or counsel representing the juvenile is present at such interrogation, such statements or admissions may be admissible in evidence even though the juvenile's parent, guardian, or legal or physical custodian was not present); Conn. Gen. Stat. § 46b-137(a) (any admission, confession or statement made by a child under the age of sixteen during interrogation shall be in the presence of the child's parent or parents or guardian; if 16 or 17, except in motor vehicle matters and cases transferred from youthful offender or regular criminal dockets, statements shall be inadmissible unless reasonable effort has been made to contact parents and child has been advised of his rights); Me. Rev. Stat. An. tit. 15, § 3203-A(2-A) (when a juvenile is arrested, no law enforcement officer may question that juvenile until parent/guardian is notified of the arrest and is present during the questioning, or gives consent for the questioning to proceed without parent/guardian's presence, or officer has made reasonable effort to contact parent, cannot, and seeks to question juvenile about continuing/imminent criminal activity); N.C. Gen. Stat. § 7B-2101 (when juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney); Okla. Stat. Ann. tit. 10A § 2-2-301 (no statement made by child under 16 in custodial interrogation is admissible without presence of parent/guardian; no interrogation shall commence without parent/guardian being informed of child's rights; noncustodial statements are admissible); and W. Va. Code § 49-5-2(l) (extrajudicial statements made by a juvenile who has not attained sixteen years of age but who is at least fourteen years of age to law-enforcement officers or while in custody, are not admissible unless made in the presence of

the juvenile's counsel or made in the presence of, and with the consent of, the juvenile's parent or custodian)

Other states provide that the minor cannot waive his *Miranda* rights unless a parent, guardian or counsel is present. *See, e.g.*, Ind. Code § 31-32-5-1 (child's rights can only be waived by (1) the child's attorney, if the child knowingly and voluntarily participates in the waiver; or (2) the child's parent, guardian, custodian or guardian *ad litem* if: (a) that person knowingly and voluntarily waives the right; (b) the person has no interest adverse to the child; (c) meaningful consultation has taken place between the person and child; and (d) the child knowingly and voluntarily participates in the waiver; or (3) the child is emancipated and knowingly and voluntarily consents to the waiver); Iowa Code Ann. § 232.11 (child's right to counsel cannot be waived without written consent of parent/guardian if under sixteen, reasonable effort to contact parent/guardian if over sixteen); and Mont. Code Ann. § 41-5-331 (when child under 16 is taken into custody, child can only waive rights with consent of parent/guardian or advisement of counsel).

Notably, states with "interested adult" statutes have not, either in the language of the statute or through case law, attempted to abrogate the state's burden of proof on voluntariness or to lessen the defendants' due process protections. For example, the Colorado Supreme Court in *People v. N.A.S.* still applied a "totality of the circumstances" test to determine the voluntariness of the youth's confession even though the youth's father was present during the questioning. 329 P.3d 285, 291-92 (Colo. 2014). And as the Superior Court of Maine held, "the absence of a parent or interested adult during the interrogation of a juvenile is merely one factor among the totality of circumstances to be considered in evaluating the voluntariness of a waiver." *State v. Doucette*, 1987 Me. Super. LEXIS 244, *16 (emphasis added). Similarly, the fact that an

interrogation is recorded is merely one factor for a court to consider in assessing whether a statement elicited during custodial interrogation was voluntary and thus admissible into evidence.

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the United States Supreme Court examined a long line of confession cases to find guidance in assessing the voluntariness of a person's consent to a law enforcement search of the person's belongings. The Court noted that "[t]he significant fact about all of these [confession] decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Id.* at 226 (emphasis added) (citations omitted). Indeed, "[t]hose cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Id.* at 224 (emphasis added) (citations omitted). Contrary to this constitutional jurisprudence, R.C. 2933.81(B) imposes a "single controlling criterion" – that a statement is electronically recorded – to create a "talismanic definition of `voluntariness', mechanically applicable" to all recorded interrogations such that the court no longer must conduct "a careful scrutiny of all the surrounding circumstances." Such a framework is untenable under our Constitution.

B. Fourth Amendment jurisprudence governing searches and seizures further demonstrates why electronic recording cannot be a proxy for voluntariness when assessing the waiver of constitutional rights.

The United States Supreme Court consistently has held that no one factor can act as a proxy for voluntariness when evaluating the alleged waiver of constitutional rights by a person accused of a crime. This includes waiver of the Fourth Amendment's prohibitions against unreasonable searches and seizures. Case law regarding consent searches further supports a

finding that R.C. 2933.81(B) impermissibly erodes an accused's constitutional rights by creating a statutory presumption of voluntariness.

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted). "It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Id.* (citations omitted). When the government seeks to introduce at trial tangible evidence seized during an allegedly consensual search of the accused's person or property, the government "has the burden of proving that the consent was, in fact, freely and voluntarily given." *Id.* at 222 (emphasis added) (citation omitted). *See also Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) ("Neither is it disputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."); *accord State v. Robinette*, 685 N.E.2d 762, 770 (Ohio 1997).

In assessing an alleged consent search, courts must examine the totality of the circumstances to determine whether the consent was indeed voluntary and not the result of police coercion. *Schneckloth,* 412 U.S. at 227, 229. Various factors -- including youth, lack of education, and police failure to advise the individual that consent can be withheld -- are properly considered under the totality of the circumstances test. *Id.* at 226-27. *Accord State v. Robinette,* 685 N.E.2d 762, 769 (Ohio 1997). Moreover, courts must examine the totality of circumstances of a search through the eyes of a reasonable individual. *Florida v. Jimeno,* 500 U.S. 248, 251

(1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). "[A]ccount [also] must be taken of … the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229. And "courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Id.* at 240 n.29.

As with statements elicited during custodial interrogation, the trial court may admit into evidence the fruits of an allegedly consensual search only after the court reviews the totality of the circumstances and determines that the government met its burden of establishing that consent was "freely and voluntarily" given. It is especially important to revisit this constitutional principle today given the increasing use of body cameras by law enforcement. In the wake of the police shooting of Michael Brown in Ferguson, Missouri, President Obama proposed a three-year, $263 million spending package for law enforcement that includes $75 million to help pay for 50,000 small, lapel-mounted cameras to record police on patrol. Nedra Pickler, Associated Press (December 1, 2014). *Obama wants more cops wearing body cams.* Available at http://www.policeone.com/police-products/body-cameras/articles/7910646-Obama-wants-more-cops-wearing-body-cams/ . Similarly, after the death of Freddie Gray, Baltimore's mayor promised that the police department will obtain body cameras for its officers by the end of the year. Athena Jones, CNN (May 7, 2015). *Baltimore mayor asks DOJ for civil rights probe into city police department.* Available at http://www.cnn.com/2015/05/06/politics/baltimore-body-cameras-doj-investigation/index.html Locally, the Cincinnati police department conducted a body camera pilot program in 2014, and Cleveland officers began wearing body cameras on patrol earlier this year. Fox 19 Digital Media Staff (August 18, 2014). *Cincinnati Police to*

begin testing body cameras. Available at http://www.fox19.com/story/26271213/fox19-exclusive-cincinnati-police-department-testing-body-cameras; Leila Atassi, Northeast Ohio Media Group (February 04, 2015). *Cleveland police officers begin using body cameras on city's East side.* Available at http://www.cleveland.com/cityhall/index.ssf/2015/02/cleveland_police_officers_begi.html. In fact, some Ohio officers are purchasing and wearing their own body cameras when their departments cannot do so. Dan Sewell, Associated Press (April 23, 2015*). 'Shoot me' video caught on officer's own body cam.* Available at http://www.cincinnati.com/story/news/2015/04/23/new-richmond-body-camera-officer-shooting/26228455/

Advocates reason that this practice will increase accountability and transparency in law enforcement, curb police abuses, and protect officers from baseless allegations. For example, a recent randomized, controlled trial of body-worn video cameras used by police on patrol in California showed a dramatic reduction in use-of-force and complaints against officers. Barak Ariel and Tony Farrar (March 2013). *Self-Awareness To Being Watched And Socially-Desirable Behavior: A Field Experiment On The Effect Of Body-Worn Cameras On Police Use-Of-Force*. Available at http://www.policefoundation.org/content/body-worn-camera In April 2015, a New Richmond, Ohio officer recorded an encounter with a potentially dangerous suspect with a body camera he purchased; the videotape showed the officer reacting with a high level of restraint and professionalism in what could have been a deadly interaction. *See* Sewell, *supra.*

Thus, courts increasingly will be presented with recorded evidence of various police encounters with citizens, including stops and searches on the street. The videotapes will assist courts in determining, among other critical issues, whether the government can prove that

consent for a search was voluntary under the totality of the circumstances. However, Supreme Court case law establishes that videotapes can never supplant the government's burden nor the trial court's mandate with regard to establishing the voluntariness of the waiver of any critical right.

Police body cameras can be an important tool for curbing police abuses in searches and seizures on the street, just as electronic recording of interrogations can reduce the risk of police coercions. But it would absurd to conclude that the accused freely and voluntarily consented to a search simply because the event was captured on videotape, just as it is preposterous to assert that the accused voluntary offered a statement simply because the statement was recorded. More importantly, our constitution forbids such a conclusion. As the Supreme Court has advised,

> [t]he problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved.

Schneckloth, 412 U.S. at 229 (emphasis added). Any legislative attempt to create a single "infallible touchstone" for voluntariness runs afoul of the constitutional rights of the accused and is therefore unsupportable.

II. R.C. 2933.81(B)'S PRESUMPTION THAT A RECORDED CUSTODIAL STATEMENT IS *PRIMA FACIE* VOLUNTARY IS UNCONSTITUTIONAL AS APPLIED TO YOUTH SUCH AS TYSHAWN

The unconstitutionality of R.C. 2933.81(B)'s presumption of voluntariness is amplified when applied to youth such as 15-year-old Tyshawn Barker. The Due Process Clause requires that greater protections be taken when children are interrogated. It further requires courts to rigorously consider youth as a potent and pervasive factor in the totality of the circumstances analysis and scrutinize the voluntariness of juvenile statements. R.C. 2933.81(B)'s presumption that a recorded custodial statement by a juvenile suspect is *prima facie* voluntary flies in the face of this scientifically-founded jurisprudence and cannot survive constitutional scrutiny

A. Courts at the highest levels nationwide recognize youths' unique vulnerability in the interrogation room and therefore apply different constitutional standards.

Courts throughout the United States have long recognized that unique legal and factual issues arise when the suspect being interrogated is a youth. Special care is required when interrogating a juvenile for myriad reasons. An adult may feel free to leave a police encounter where a child would not; certain interrogation tactics may overbear the will of a child where the same used with an adult would not; an adult may understand *Miranda* warnings where a child may not; and ultimately, a child might involuntarily or falsely confess where an adult would not. *See J.D.B. v. North Carolina*, __ U.S. __, 131 S. Ct. 2394, 2398-99, 2401, 180 L.Ed.2d 310 (2011) (explaining that "[i]t 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," and that the "risk [of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile."); *In re C.S.*, 115 Ohio St. 3d 267, 284, 2007-Ohio-4919, 874 N.E.2d 1177 at ¶ 106 (Ohio 2007) recognizing that "special care" is required in scrutinizing a purported confession or waiver by a child); *Johnson v. Trigg*,

28 F.3d 639, 642 (7th Cir. 1994) ("police tactics that might be unexceptionable when employed on an adult may cross the line when employed against the less developed reason of a child"); *Commonwealth v. Truong*, 28 Mass. L.Rptr. 223, at *6 (Mass. Super. Ct. 2011) ("For the Commonwealth to successfully demonstrate a knowing and intelligent waiver by a juvenile. . . , the circumstances should demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile."); *United States v. IMM*, 747 F.3d 754, 767 (9th Cir. 2014) (explaining that forcing the juvenile suspect to choose between "adopting the detective's false account of events as his own [or] calling his own grandfather a liar . . . employed intense psychological coercion of a sort to which juveniles are uniquely vulnerable"); *People v. White*, 828 N.W.2d 329, 354 (Mich. 2013) (Kelly, J., dissenting) (explaining that the investigator "should have recognized that defendant's age made him especially susceptible to subtle compulsive efforts").

The proposition that special care is required when questioning youthful suspects is not new but rather a reinvigoration of long-understood principles. Decades-old U.S. Supreme Court case law recognizes the perils of interrogating a minor in the same way as an adult. *See Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (explaining "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (noting that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police"); *In re Gault*, 387 U.S. 1, 52 (1967) (explaining that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"). The U.S. Supreme Court applied these principles in a recent trilogy of decisions outlawing the imposition of the death penalty and mandatory life without parole sentences on juveniles; indeed, all of these

decisions recognize the fundamental truth that "kids are different" than adults – including in ways that make them uniquely vulnerable during the pressure-cooker of interrogation. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464-65 (2012). *Accord J.D.B.*, 131 S. Ct. at 2403-04 (explaining that youth are more susceptible to pressure, hampered by immature decision-making, and categorically more suggestible and impulsive). Just as the U.S. Supreme Court has found that these characteristics make youth inherently less culpable, these traits also make them more likely to involuntarily and falsely confess during police interrogations. *See J.D.B.*, 131 S. Ct. at 2401. *Accord* Tamar Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee Rev. 385, 406-449 (2008); Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 Wash. U. J. L. & Pol'y 109, 153-54 (2012).

B. The law enforcement, social science, and international communities all recognize youths' unique vulnerability when subjected to custodial interrogation.

Law enforcement agrees that youth are particularly vulnerable to involuntary and false confessions. The International Association of Chiefs of Police, the world's largest police executive membership association, has embraced this principle: "Over the past decade, numerous studies have demonstrated that juveniles are particularly likely to give false information – and even falsely confess – when questioned by law enforcement." *See* IACP Guide, at 1. The top interrogation training firm in the country, John E. Reid & Associates, similarly explains that "[i]t is well accepted that juvenile suspects are more susceptible to falsely confess than adults," John E. Reid & Assoc., Inc., *Investigator Tips*, (March-April 2014), http://www.reid.com/educational_info/r_tips.html?serial=20140301, and warns: "[E]very interrogator must exercise extreme caution and care when interviewing or interrogating a

juvenile." John E. Reid & Associates, Inc., *Take Special Precautions When Interviewing Juveniles or Individuals With Significant Mental or Psychological Impairments*, http://www.reid.com/pdfs/20120929d.pdf.

Empirical and laboratory research studies reinforce and corroborate these conclusions. The leading study of 125 proven false confessions, cited by the U.S. Supreme Court in *Corley v. U.S.*, 556 U.S. 303, 321 (2009), and *J.D.B.*, 131 S. Ct. at 2401, found that 63% of false confessors were under the age of twenty-five and 32% were under eighteen. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891,945 (2004). Another respected study of 340 exonerations found that individuals under the age of eighteen were three times as likely to falsely confess as adults. Samuel R. Gross, *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005). A more recent study found that a false confession contributed to almost twice as many wrongful conviction cases when the accused was a youth, rather than an adult. Joshua A. Tepfer, Laura H. Nirider, & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010). And a laboratory study astonishingly found that a *majority* of young participants complied with a request to sign a false confession without uttering a word of protest. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility For an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 147, 150-51 (2003).

As the U.S. Supreme Court has noted, *see Roper*, 543 U.S. at 575-76 and *Graham*, 560 U.S. at 80, universal agreement exists internationally that kids are different and must be treated differently when they are interrogated. In a 2008 decision that ultimately led to a requirement of

counsel for *all* suspects subject to custodial interrogation, the European Court of Human Rights,[2] referencing a number of relevant international law materials, "stress[ed] the fundamental importance of providing access to a lawyer where the person in custody is a minor" because of the increased risk of coerced or false confessions from youth. *Salduz v. Turkey*, European Court of Human Rights, Application No. 36391/02 (27 Nov., 2008), at ¶¶ 32-36, 60, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893. *See also Cadder v. HM Advocate*, [2010] UKSC 43 (Scot. S.C.) ¶ 48, *available at* http://www.bailii.org/uk/cases/UKSC/2010/43.html (applying *Salduz* to a 16-year-old boy who was subject to a custodial interrogation).

C. Tactics that are known to induce all suspects to involuntarily and falsely confess at a troubling rate are regularly employed against children and teenagers.

In spite of universal recognition of, and ample social science supporting the need for, greater protections for juvenile suspects in the interrogation room, police across the country regularly employ identical tactics with children and adolescents as used on adults. *See* Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav. Sc. L. 757, 759-760 (2007); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943, 952 (2010). The most recent study, conducted out of the University of Virginia, reports that "nearly all of the officers surveyed reported frequently using the same interrogation

[2] The European Court of Human Rights is an international court that rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. The Court's judgments are binding on the member States of the Council of Europe and have led governments to alter their legislation and administrative practice in a wide range of areas. The Member States within the Council of Europe and to whom the decisions of the ECHR are applicable include 47 countries around the world. *See The Court in Brief*, European Court of Human Rights, http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited May 22, 2015).

techniques on minors as on adults." Lauren Kirchner, *How Can We Prevent False Confessions from Kids and Teenagers?,* Pacific Standard, June 17, 2014, *available at* http://www.psmag.com/politics-and-law/preventing-false-confessions-kids-83590; *see also* Fred Inbau *et al.*, *Criminal Interrogation and Confessions*, at 419 (5th ed., 2013) (warning the use of "extreme caution and care" when interrogating young people but still ultimately recommending that "the interrogation of juvenile suspects [] be conducted in essentially the same way as for adults"). Individual police officers' awareness of kids' unique vulnerability and suggestibility simply does not change their tactics. *See* N. Dickon Reppucci, Jessica Meyer, & Jessica Kostelnik, *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, in Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations 67-80 (G. Daniel Lassiter & Christian A. Meissner eds. 2010) (demonstrating that surveyed officers generally recognize that juveniles are more vulnerable or suggestible, but in practice do not alter their interrogation methods when interrogating a young suspect to account for the differences). Neither does the "frighteningly" high rate of false confessions that these tactics can and have caused. *See Corley*, 556 U.S. at 321. And neither does electronic recording of interrogations, as evidenced below.

D. Electronic recording has not deterred police from using tactics known to induce suspects, especially juvenile suspects, to involuntarily and falsely confess.

Notably, R.C. 2933.81(B) was passed before the above studies demonstrated that interrogators were not adapting their tactics to protect against the known significant risk of involuntary juvenile confessions. The majority of other states' recording statutes also pre-date these studies. Statutory recording obligations thus have failed to guarantee that interrogators moderate their tactics when questioning children in order to ensure the voluntariness of their statements.

While electronic recording of interrogations increases transparency and enables a more objective analysis of tactics used during an interrogation and the voluntariness of confessions, case law demonstrates that recording does little – and, in many cases, nothing – to deter police interrogators from using tactics known to induce suspects to involuntarily and falsely confess. In particular, recordings of interrogations of young suspects show that electronic recording does not guarantee that juvenile suspects are provided the greater protections and special care they are constitutionally due.

Recorded juvenile interrogations conducted in recent years reveal the sad reality that some police officers still use even the most egregious, over-the-top tactics with juvenile suspects when the cameras or tape machines are rolling. Take the case of 17-year-old Garrett Dye: in an audio-recorded interrogation, four interrogating officers repeatedly threatened teenage Dye with the death penalty – despite the fact that he was constitutionally ineligible for the death penalty as a juvenile – as well as prison rape, unless he confessed to murdering his sister. *Dye v. Kentucky*, 411 S.W.3d 227, 232-34 (Ky. 2013). These threats began early in the interrogation, before Dye made any incriminating statements. *Id.* Or consider the case of Carlos Campbell: 19-year-old Campbell admitted to participating in a series of drive-by shootings only after police warned him he would be gang raped in prison on a daily basis if he did not admit his involvement. *See* Carlos Campbell, Wrongful Convictions of Youth Spotlight, *available at* http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/news/spotlight/. When interrogating young female suspects, interrogators often deploy threats to family members, undeterred by electronic recording. In the case of Nga Truong, a 16-year old-girl, officers threatened to prosecute her as an adult unless she confessed to killing her infant son. *Truong*, 28 Mass. L.Rptr. 223; *see also* David Boeri, *Anatomy of a Bad Confession*, Boston Public Radio

WBUR (Dec. 7, 2011), available at http://www.wbur.org/2011/12/07/worcester-coerced-confession-i (showing videos of the Truong interrogation). Similarly, 11 year-old Lacresha Murray only confessed to murdering a two-year-old after the interrogating officer repeatedly threatened her grandmother and refused to accept her 39 denials during a three hour interrogation. *See Lacresha Murray*, National Registry of Exonerations, available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3499.

All of these interrogations were electronically recorded. And, in most of these cases, the confessions elicited through these extremely coercive tactics were found voluntary by the trial courts. As this litany of judicially condoned coercive police actions illustrates, electronic recording does not necessarily deter the use of improper police interrogation tactics, even with young suspects. Nor does recording ensure that trial and appellate courts will take "special care" to ensure that their confessions are voluntary.

Notably, Ohio is not immune from this problem. As a 12-year-old kid, Anthony Harris gave an involuntary and unreliable murder confession to Ohio police after they violated his *Miranda* rights, accused him repeatedly of lying and refused to accept his dozens of denials. *See* National Registry of Exonerations, *Anthony Harris* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3281. Anthony spent years in a juvenile detention facility before he was exonerated, even though his interrogation and confession was electronically recorded. Courts thus cannot rely on the fact of electronic recording to ensure that police will provide the greater protections and "special care" constitutionally guaranteed to youth in the interrogation room. *See, e.g., In re Harris*, No. 1999AP30013, 2000 WL 748087, at *12-13 (Ohio Ct. App. June 7, 2000) (overruling trial court's denial of suppression motion and holding 12-year-old Harris's statements were "the

result of undue coercion" where the interrogator "never gave [Harris] the option of being a person that did not commit the crime," threatened him with a "voice stress test," brought him to tears, fed him facts about the crime that Harris incorporated into his admissions, and gave him "no choice but to be the decent person that for whatever reason committed this crime"). *Amici* explained in section I, *supra*, why it is constitutionally impermissible for electronic recording to serve as a proxy for voluntariness; the case law demonstrates why electronic recording is also an invalid proxy for voluntariness as a practical matter.

Electronic recording also fails to ensure that courts will recognize the coercion at play in the juvenile interrogation setting or appreciate its effect on a vulnerable juvenile suspect. In most of the cases of electronically recorded interrogations described herein, the lower courts readily admitted the juvenile confessions that resulted from extremely coercive tactics. While some of these teenagers were ultimately granted relief by higher courts, most had to remain in prison or juvenile detention for years until a higher court corrected the errors. Although many courts reflexively hold that "special care" must be exercised with juvenile suspects, the reality is that many trial courts only pay "lip service" to such protections. *See, e.g., A.M. v. Butler*, 360 F.3d 787, 796 (2004) (holding confession by an 11-year-old boy involuntary and in violation of his *Miranda* rights, and observing that the trial court only "g[ave] lip service" to the "objective standard[s]" for confession analysis). Indeed, across the country, "the cases reflect grudging, if any, accommodations to the youth of the accused in the interrogation room." Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 *Wisconsin Law Review* 431, 434, 450, 456 (on the basis of a 50 state review of appellate court evaluations of a juvenile's waiver of *Miranda* rights, concluding that "states have largely abdicated their responsibility to

review a juvenile's waiver of rights during interrogation with the 'special caution' required by due process" and that "in most states . . . there is little examination of a child's unique vulnerabilities or nascent psychosocial and brain development").

Amici are also concerned that R.B. 2933.81(B)'s presumption of voluntariness will detrimentally impact the quality of representation of juvenile suspects, specifically that juvenile defense attorneys will be less likely to move to suppress confessions that are recorded. Shifting the burden to the defense will necessarily require more money, resources, and time to litigate a motion to suppress. Across the country, and in Ohio in particular, there is a widespread problem of "substandard legal representation" of juveniles, "[h]igh caseloads, inadequate funding, and insufficient training are common" in juvenile court, and "[a]ttorneys in juvenile court rarely, if ever file pretrial motions." Steven A. Drizin and Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions*?, 34 N. Ky. L. Rev. 257, 299-300 (2007) (finding that only about 30 percent of juvenile attorneys surveyed by the ABA Juvenile Justice Center said they filed pretrial motions and "most were 'boilerplate motions' and standard form pleadings"); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 792-93, 798 (2010) (finding juvenile defenders across the country "do not file pre-trial motions" and that the lack of training endemic to indigent defense programs is "particularly acute in juvenile court). In Ohio in particular, there is overall "little pre-trial or trial advocacy representation" and "little effort on the part of attorneys to make pre-trial motions." Kim Brooks and Darlene Kamine, *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio*, American Bar Association (March 2003), ii, 30. Without increased money

and training to juvenile defenders, R.B. 2933.81(b) virtually guarantees that many viable suppression motions will never get filed.

The grave reality is that trial courts are reluctant to find juvenile confessions involuntary even when faced with egregious violations of constitutional rights. Against this backdrop, *Amici* urge this Court not to ignore the significant risk that R.B. 2933.81(B)'s presumption of voluntariness will increase the likelihood and encourage the admission of involuntary, coerced confessions, particularly from youth. Given that this statute makes it easier for police and the state to meet its burden of proving confessions voluntary, and makes it less likely that juvenile defenders will move to suppress coerced confessions, *Amici* are concerned that allowing the state to simply shift the burden simply by pressing the play button may actually encourage the police to use coercive tactics with youths more often and more liberally.

For all these reasons, *Amici* agree with appellant that the statutory presumption of voluntariness in R.C. 2933.81(B) is irreconcilable with the special considerations constitutionally guaranteed by the due process clause to children who are subject to custodial interrogation.

CONCLUSION

WHEREFORE, for the foregoing reasons and any others that may appear to this court, *Amici Curiae* respectfully request that this Court hold that the court of appeals violated Tyshawn Barker's right to due process of law when it applied R.C. 2933.81(B) to him, hold that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, and reverse the judgment of the court of appeals and remand this case to the trial court for further proceedings.

Respectfully submitted,

/s/ Lourdes Rosado
Lourdes M. Rosado* (PHV-7381-2015)
*Counsel of Record
Marsha L. Levick (PHV-1729-2014)
Juvenile Law Center
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808 (Fax)
lrosado@jlc.org

Steven A. Drizin (PHV-7379-2015)
Center on Wrongful Convictions of Youth
Bluhm Legal Clinic
Northwestern University School of Law
Center on Wrongful Convictions of Youth
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576
(312) 503- 8977 (Fax)
s-drizin@law.northwestern.edu

COUNSEL FOR *AMICI CURIAE*

DATED: May 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2015, I caused copies of the foregoing document to be sent via U.S. Mail to:

Sheryl Trzaska, (0079915)
Assistant State Public Defender
The Office of the Ohio Public Defender
(Counsel of Record)
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167(Fax)
sheryl.trzaska@opd.ohio.gov

COUNSEL FOR APPELLANT TYSHAWN BARKER

Joseph T. Deters, (0012084)
Hamilton County Prosecutor
Rachel Lipman Curran, (0078850)
Assistant Prosecuting Attorney
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
(513) 946-3105 (Fax)

COUNSEL FOR THE STATE OF OHIO

.

Steven A. Drizin (PHV-7379-2015)
Center on Wrongful Convictions of Youth
Bluhm Legal Clinic
Northwestern University School of
Law375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576
(312) 503- 8977 (Fax)
s-drizin@law.northwestern.edu

COUNSEL FOR AMICI CURIAE JUVENILE LAW CENTER, CENTER ON WRONGFUL CONVICTIONS OF YOUTH, ET AL.

/s/ Lourdes Rosado
Lourdes M. Rosado* (PHV-7381-2015)
*Counsel of Record
Marsha L. Levick (PHV-1729-2014)
Juvenile Law Center
1315 Walnut Street
4th Floor
Philadelphia, PA 19107

APPENDIX A

Statements of Interest of *Amici Curiae*

Founded in 1975, **Juvenile Law Center** is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Center on Wrongful Convictions of Youth** ("CWCY") operates under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law. A joint project of the Clinic's Center on Wrongful Convictions and Children and Family Justice Center, the CWCY was founded in 2009 with a unique mission: to uncover and remedy wrongful convictions of youth and promote public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the juvenile justice system. Since its founding, the CWCY has filed amicus briefs in jurisdictions across the country, ranging from state trial courts to the U.S. Supreme Court.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero

tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

The **National Juvenile Defender Center** is a non-profit, non-partisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a permanent and enhanced capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination.