IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee,	:	
vs.	:	Case No. 14-1560
TYSHAWN BARKER, Defendant-Appellant.	:	On Appeal from the Hamilton County Court of Appeals First Appellate District
		C.A. Case No. C 1300214

Memorandum in Support of Jurisdiction of Defendant-Appellant Tyshawn Barker

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents issues of first impression before this Court, and involves a recent statutory provision which presumes that a murder suspect's statements made during a custodial interrogation are voluntary if they are electronically recorded. R.C. 2933.81(B). This case asks this Court to consider the due process implications of applying that presumption to a child, in light of *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2406, 180 L.Ed.2d 310 (2011).

In this case, Tyshawn Barker ("Tyshawn") had recently turned 15 years old, was cognitively delayed, had no experience with a police interrogation, and was taken into custody and questioned without a parent or guardian present. Without consideration of his specific circumstances, Tyshawn's statements were presumed voluntary merely because they were recorded. R.C. 2933.81(B). But, as the Supreme Court of the United States has long recognized, children require greater protections than adults in interrogations because they are inexperienced, immature, are easily subjected to pressure from authorities, and are often unable to comprehend the consequences of self-incrimination. *In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538, 978 N.E.2d 164, at ¶ 64, O'Connor, C.J. dissenting, quoting *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962).

Further, the statutory presumption of voluntariness set forth in R.C. 2933.81(B) does not change the long-held requirement that a suspect knowingly, intelligently, and voluntarily waive his *Miranda* rights before a custodial statement may be used against him. The statutory concept of "voluntariness" that is addressed in R.C. 2933.81 is unrelated the requirements of *Miranda* and its progeny. But, the First District Court of Appeals improperly applied the statutory presumption of voluntariness to the question of whether Tyshawn knowingly and intelligently

waived his *Miranda* rights before making a statement to police. *State v. Barker*, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245, ¶ 12.

Finally, Tyshawn received constitutionally deficient representation, both in the juvenile court during his transfer proceedings and in the common pleas court at the suppression stage of proceedings. In the juvenile court, despite Tyshawn's facing two aggravated murder charges, defense counsel presented no witnesses, evidence, or mitigating information on Tyshawn's behalf. And, after transfer, at the suppression stage of proceedings in the common pleas court, counsel did not present any evidence regarding Tyshawn's inability to comprehend his *Miranda* rights or to execute a valid waiver. Had counsel provided effective assistance, the result of the proceedings in this case would have been different. This Court should accept this case to protect the constitutional rights of children facing police interrogation, and effective assistance of counsel during and subsequent to transfer proceedings.

STATEMENT OF THE CASE AND FACTS

Tyshawn was 15 years old at the time of the incident that gave rise to the charges. He had a full scale IQ of 69, which placed him in the second percentile for his age group. His word recognition skills were at the third grade level, and his math skills were at the fifth grade level. Tyshawn was often anxious about being bullied, having to fight other kids in school, and he was ridiculed on a daily basis. He was "jumped" and classmates kicked him in the face and head on two separate occasions; and, prior to his placement in alternative school, Tyshawn was harassed daily by the "majority" of his classmates for being "a punk," "lame," and not being "able to fight." Tyshawn had two prior adjudications for misdemeanor offenses, but had never been held in detention or in a residential or rehabilitative program.

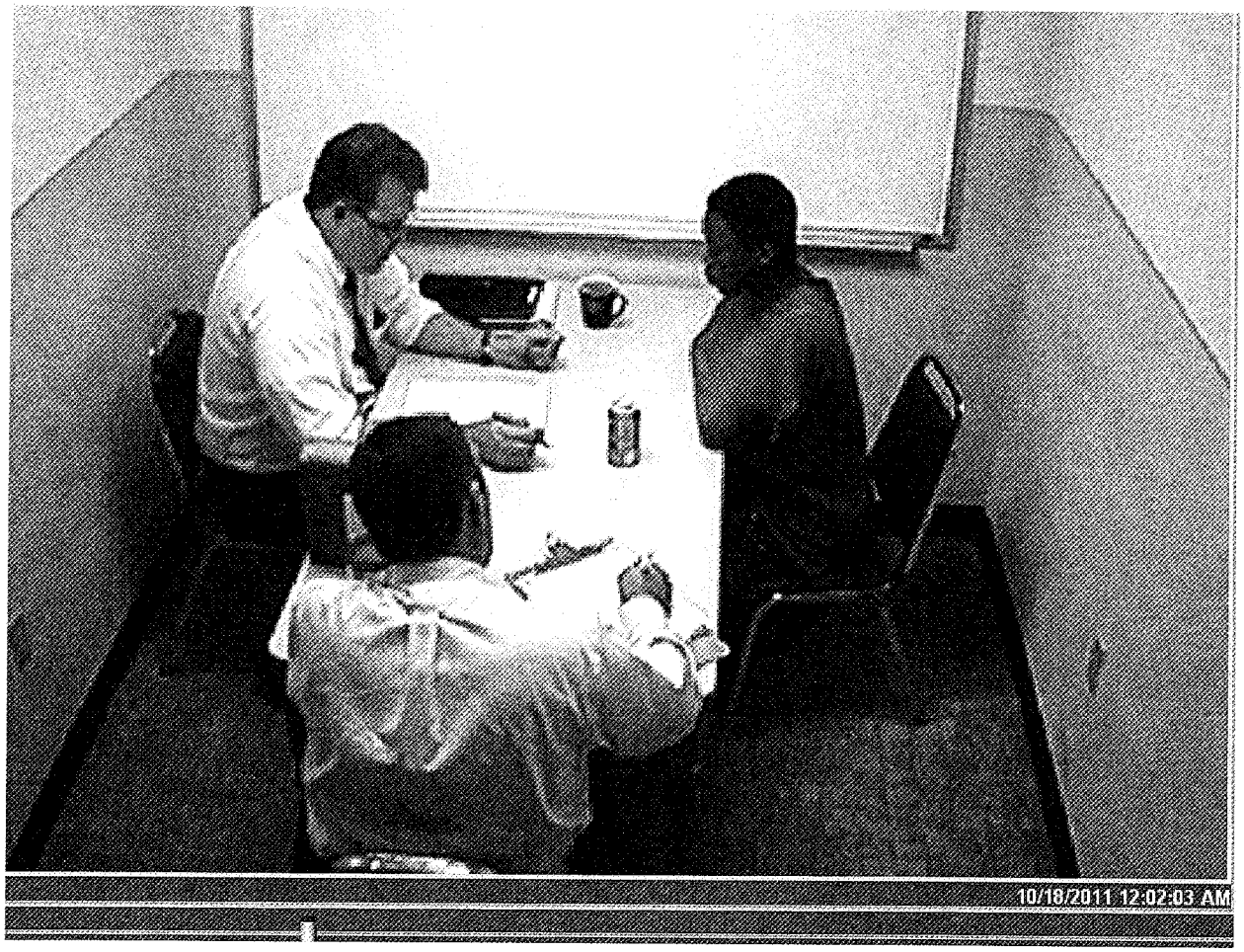
On October 17, 2011 at 10:45pm, Detectives Kurt Ballman and Terry McGuffey interrogated Tyshawn's co-defendant, whom Tyshawn looked up to as a brother. As a result of those statements, police took fifteen-year-old Tyshawn Barker into custody, brought him to the Hamilton County Juvenile Detention Center, and began questioning him at 11:57pm. This interview was video recorded.

As soon as the detectives entered the interview room with Tyshawn, Detective Ballman told him, "We're going to get some information from you." The detectives asked Tyshawn for some preliminary information, including his age, his address—although Tyshawn did not know what his zip code was—his phone number, his mother's name, and where he attends school. Then, Detective Ballman told Tyshawn he had to "ask you a series of dumb questions but they'll sound dumb to you." The Detective asked if Tyshawn had used drugs or alcohol that day, and whether he had any health problems. Then, Officer Ballman told Tyshawn, "I have got to read something to you" as follows:

DETECTIVE BALLMAN:	What I'm going to do is I'm going to read you a notification.
DEFENDANT BARKER:	Um-hmm.
DETECTIVE BALLMAN:	All right. When we are done I'm going to ask you if you understand it.
DEFENDANT BARKER:	Okay.
DETECTIVE BALLMAN:	And then I'm going to ask you to sign it. You're not admitting to anything. I am just telling you it just says that I read you this, okay?
DEFENDANT BARKER:	Okay.

Ballman then began to speak more quickly, and read verbatim from a Cincinnati Police Department Notification of Rights form without stopping, and without asking Tyshawn for any indication of his substantive understanding as the form was read. Ballman read from the form,

and Tyshawn did not have the opportunity to review or read the form himself. The following still photograph is from the recording of Detective Ballman reading Tyshawn the form:



After he finished reading, Ballman asked:

DETECTIVE BALLMAN:	Do you understand this?
DEFENDANT BARKER:	Yes, sir.
DETECTIVE BALLMAN:	Okay. I just need you to sign that I read that to you and that you understand it.
DEFENDANT BARKER:	Right here?
DETECTIVE BALLMAN:	Right where I put "x" where it says sign.

After Tyshawn signed the rights form, Detective McGuffey asked Tyshawn if he is familiar with the form, and whether he was aware of his rights:

DETECTIVE MCGUFFEY:	Tyshawn are you familiar with that form? You have heard of *Miranda* rights before?
DEFENDANT BARKER:	No, sir, my first time.
DETECTIVE BALLMAN:	First time you have read, but you have seen it on T.V., right?
DEFENDANT BARKER:	Yes, sir.
DETECTIVE MCGUFFEY:	The whole thing about you have the right to remain silent and all that stuff?
DEFENDANT BARKER:	Yeah.

The detectives then began to question Tyshawn regarding what he knew about his co-defendants' shooting of Rudell Engemon and Carrielle Conn. Detective Ballman intimated that the only way for Tyshawn to get out of trouble was to talk to them, stating "you guys got into this and you've got to get yourselves out and the only way to get out is to start telling the truth." He encouraged Tyshawn to "come clean" and tell the story. Tyshawn told the detectives how his co-defendants shot the victims, but implicated himself by admitting to knowing what the co-defendants planned to do, and participating in the offenses.

Later that day, the detectives returned to the Hamilton County Juvenile Detention Center to ask Tyshawn more questions. Ballman stated "we're going to read him his rights again and we are going to go from there." Tyshawn stopped the detective:

DEFENDANT BARKER:	Could I say something?
DETECTIVE BALLMAN:	Go ahead, sir.
DEFENDANT BARKER:	I seen an attorney—an attorney, whatever that is.
DETECTIVE BALLMAN:	An attorney?
DEFENDANT BARKER:	Yeah.
DETECTIVE BALLMAN:	Okay. You—
DEFENDANT BARKER:	And she told me if you all come up here just to ask for an attorney.
DETECTIVE BALLMAN:	Okay. Do you want to ask for an attorney now or do you want to talk to us? It's your choice.

DETECTIVE MCGUFFEY:	You know why we're—
DEFENDANT BARKER:	I do want to talk to make the situation a little bit more better for you all, but—
* * *	
DETECTIVE BALLMAN:	Are you asking for an attorney?
DEFENDANT BARKER:	Just go on.

The detectives asked Tyshawn the name of his attorney, but he did not know her name. The detectives read Tyshawn another rights form, had him sign the form, and then asked him to identify a person in a photo as the co-defendant about whom Tyshawn referred to in his prior statement.

As a result of statements obtained from the other two boys accused, and Tyshawn, the State charged Tyshawn with one count of murder and one count of aggravated murder in Hamilton County Juvenile Court. After a joint hearing for the three co-defendants, the juvenile court found probable cause to support the charges. The juvenile court conducted an amenability hearing for Tyshawn, and ordered him to be transferred to the common pleas court for criminal prosecution. Tyshawn was indicted in the Hamilton County Court of Common Pleas for aggravated murder with firearm and witness specifications, conspiracy with firearm and witness specifications, aggravated robbery, and tampering with evidence.

Tyshawn, through counsel, filed a motion to suppress his statements. The trial court conducted a joint hearing for the three co-defendants, because each filed a motion to suppress their statements. The State's only witness at that hearing was Officer Kurt Ballman, who testified about the interrogations of all three co-defendants. On direct examination, the State's only question for Ballman regarding the waiver of rights was "Did you have any reason to believe that these individuals did not understand their right or they were not making voluntary statements?" Ballman replied "no." Regarding Tyshawn, Ballman knew that Tyshawn had

recently turned fifteen years old, and admitted that he did not know Tyshawn's reading level or comprehension level. Tyshawn did not present any witnesses or evidence at the hearing. The trial court denied Tyshawn's motion to suppress.

Tyshawn entered a plea of no contest to aggravated murder with firearm specifications, aggravated robbery with firearm specifications, and tampering with evidence. The trial court sentenced Tyshawn to an aggregate prison term of twenty-five years to life, and Tyshawn appealed. In his merit brief, Tyshawn argued that defense counsel rendered ineffective assistance by failing to present any evidence at his amenability hearing. During the pendency of the appeal, Tyshawn's counsel learned that the trial court had conducted a hearing on a motion to suppress Tyshawn's statements to police, but that neither the hearing nor the judgment entry denying the motion to suppress was filed in the trial court or noted on the trial court's docket. Thus, counsel had been unaware that a motion to suppress had been litigated. The court of appeals permitted Tyshawn to file a supplemental brief assigning error to the trial court's denial of his motion to suppress.

The court of appeals held that defense counsel was not ineffective and that the trial court did not abuse its discretion when it denied Tyshawn's motion to suppress his statements to police. *Barker*, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245. This appeal follows.

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.

When Senate Bill 77 was enacted on April 5, 2010, it added Section 2933.81 to the Ohio Revised Code. 2009 Ohio SB 77. Under this new statute, if a person is suspected of murder and is subject to a custodial interrogation, all statements made by the person during the interrogation

are presumed to be voluntary if the statements were electronically recorded. R.C. 2933.81(B). And, the person who made the statements during the interrogation has the burden of proving that the statements were not voluntary. R.C. 2933.81(B). The Supreme Court of the United States has set forth the test of voluntariness as follows: "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), quoting *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed. 2d 760 (1961).

It is well-settled that children are to be given special care when at the mercy of the justice system. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 106; *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed.224. Regarding the interrogation of a child, "[i]t has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny." *In re Gault*, 387 U.S. 1, 44, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). "[T]he greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 55. No matter how sophisticated, a child who is subject to interrogation cannot be compared to an adult, "in full possession of his senses and knowledgeable of the consequences of his admissions." *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

When the Court most recently considered juvenile interrogation, it held that "a child's age properly informs *Miranda*'s custody analysis." *J.D.B. v. North Carolina*, __ U.S. __, 131

S.Ct. 2394, 2406, 180 L.Ed.2d 310 (2011), at syllabus. In its reasoning, the Court reiterated that "'[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *Id.* at 2404, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-116, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). And, even for an adult, the "pressure of custodial interrogation is so immense that 'it can induce a frighteningly high percentage of people to confess to crimes they never committed.'" *J.D.B.* at 2401, quoting *Corley v. United States*, 556 U.S. 303, 321, 129 S.Ct. 1558, 173 L.Ed. 2d 443 (2009); *see also* Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C.L.Rev. 891, 906-907 (2004).

In *J.D.B.*, the Court considered many recent empirical studies which show that the risk of false confession is more acute when the subject of custodial interrogation is a child, particularly a child with cognitive or intellectual disabilities. *J.D.B.* at 2401; Brief for Center on Wrongful Convictions of Youth et. al. as Amici Curiae Supporting Petitioner, *J.D.B. v. North Carolina*, (No. 09-11121), 2010 U.S. S.Ct. Briefs LEXIS 2391, at 17-28. As the brief sets forth, even standard police tactics pose a particular risk to youthful suspects. *Id.* at 17. Juveniles are "particularly ill-suited to engage in the high-stakes risk-benefit analysis inherent in any police interrogation." *Id.* at 19; Saul M. Kassin et al., *Polic-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3-38 (2010); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adult Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 353-356 (2003) (noting that children fifteen years or younger are more likely than older teenagers to comply with authority and confess to an offense).

Ohio's statutory presumption that any suspect's custodial statement is voluntary simply because the interrogation is videotaped must not be applied to children, as it is inconsistent with the careful and individualized scrutiny required when considering a child's interrogation, and a

child's propensity to comply with authorities against his will. *Gault* at 44; *Gallegos* at 54. A child is at heightened risk to consent to an interrogation because he believes he is required to, and, more troublingly, confess to an offense he did not commit. *J.D.B.* at 2401; Brief for Center on Wrongful Convictions of Youth et. al. as Amici Curiae Supporting Petitioner, *J.D.B. v. North Carolina*, (No. 09-11121), 2010 U.S. S.Ct. Briefs LEXIS 2391, at 17-28. Accordingly, the statutory presumption of voluntariness set forth in R.C. 2933.81(B) offends due process when applied to a child. This Court should accept this case to ensure that law enforcement and courts recognize the special, individualized care that is constitutionally required for children.

SECOND PROPOSITION OF LAW: The statutory presumption of voluntariness created by R.C. 2933.81(B) does not affect a reviewing court's analysis of whether a defendant waived his *Miranda* rights. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

Revised Code 2933.81(B) presumes that electronically recorded statements made by a murder suspect are voluntary, and places the burden on the suspect to prove that the statements were involuntary. The statute ensures that if a statement is electronically recorded, a reviewing court can see whether law enforcement used physical force or coercive tactics to elicit an involuntary confession. However, the statute must not be construed to affect the requirement that a suspect knowingly, intelligently, and voluntarily waive his *Miranda* rights before a custodial statement may be used against him. And, the statutory presumption in R.C. 2933.81(B) has no bearing on the long-held requirement that constitutional rights may not be waived unless "the waiver is made knowingly and intelligently and is an intentional relinquishment of a known right.'" *See State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 24, quoting *Brookhart v. Janis*, 384 U.S.1, 4, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966).

A suspect must be warned that he has the right to remain silent and the right to appointed counsel, which he may exercise prior to, or at any time during questioning. *Miranda v. Arizona*,

384 U.S. 436, 479, 86 S.Ct. 1602 (1966). The State cannot use the custodial statements of a defendant made in response to interrogation by the police, without first advising the defendant of his constitutional rights and obtaining a waiver of those rights. *Id.* at 467. It is well established that a suspect may waive his *Miranda* rights, but, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *State v. Parker*, 44 Ohio St.2d 172, 177, 339 N.E.2d 648 (1975). And, the constitutional protections are heightened when the subject of the interrogation is a child.

In this case, the detectives merely notified Tyshawn that they had to read to him, and that he had to sign the form. After Tyshawn told the officers that he did not know what *Miranda* rights were, and that he was not familiar with the form he had just signed, they asked whether he had seen the rights read "on T.V." and then moved on. They did not ask Tyshawn whether he wanted to proceed with the questioning, but just began the interrogation. The detectives did not ask Tyshawn to demonstrate any understanding of the rights or the potential consequences or implications of proceeding with the questioning. Therefore, Tyshawn did not waive his right against self-incrimination or his right to counsel, either orally or in writing.

The First District Court of Appeals improperly included the voluntariness addressed in R.C. 2933.81 in its analysis of whether Tyshawn knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Barker*, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245 at ¶ 12. Since *Miranda*, custodial statements have not been admissible unless the suspect executes a knowing, intelligent, and voluntary waiver of the right against self-incrimination and the right to counsel. The statutory presumption of voluntariness in a murder case, arising only because the confession is electronically recorded, must not be interpreted as changing that calculus. This

Court should accept this case to protect the vital safeguard of *Miranda* and its progeny, and ensure that courts do not rely upon R.C. 2933.81 to eliminate the requirement that a suspect understand his rights, and knowingly and intelligently waive those rights before a custodial statement may be used against him.

THIRD PROPOSITION OF LAW: Trial counsel renders ineffective assistance by failing to present evidence that would have affected the outcome of the juvenile court amenability proceedings. Sixth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to the effective assistance of counsel. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). The United States Supreme Court has held that counsel is ineffective when it can be shown that "counsel's performance was deficient" and "that deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, trial counsel did not present any evidence at Tyshawn's amenability hearing, and no witnesses testified.

Defense counsel had a duty to present all facts, mitigating evidence, and testimony in support of Tyshawn's amenability to the juvenile system. (*See* National Juvenile Defense Standards, Section 8.4(e)(3). "Counsel should present testimony to present transfer, including testimony by people who can provide insight into the client's character * * * [and from those] with a positive personal or professional view of the juvenile. Counsel must ensure that evidence is presented under oath and as part of the record at the hearing."). Thus, defense counsel should have called the examining psychologist to testify regarding the evaluation he conducted and bindover report he prepared in this case, because he would have testified with specificity regarding the evidence and factors he identified that would "contra-indicate" Tyshawn's transfer.

Indeed, the vast majority of the factors identified in the evaluation favor Tyshawn remaining in the juvenile justice system.

Counsel also failed to retain an independent psychologist or neuropsychologist to evaluate Tyshawn, and testify about how Tyshawn's young age and cognitive impairments limit his culpability. Over the past several years, the Supreme Court has relied on scientific findings establishing that that adolescent brains are structurally immature in the areas of the brain associated with behavior control, planning complex cognitive behaviors, decision making, and moderating social behavior. *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2026, 176 L.Ed.2d 825 (2010); and, *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Court has accepted and applied this scientific research to the legal implications of delinquent behavior. In this case, defense counsel had a duty to present these findings and the related scientific data in Tyshawn's case. (*See* National Juvenile Defense Standards, Section 8.4(e)(3)).[1] Counsel failed to present this information to the juvenile court, either at the amenability hearing or in writing.

Counsel also failed to present evidence of the services and individualized treatment programs that are available to Tyshawn in the juvenile justice system, and failed to argue that Tyshawn should be subject to a SYO disposition, as an alternative to transfer, which would require incarceration in the adult system if he did not successfully complete his juvenile disposition.

Counsel's failures cannot be attributed to trial strategy. *See State v. Lett*, 4th Dist. Ross No. 95 CA 2094, 1996 Ohio App. LEXIS 3869, *12 (Sept. 4, 1996) (Holding that trial counsel was ineffective for failing to present evidence or argument at an amenability hearing. "We do

[1] Available at: http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf, p. 139 (accessed September 3, 2014).

not believe that the total absence of evidence or argument can be attributed to 'sound trial strategy."). Here, trial counsel was deficient for failing to investigate and prepare a case to present to the juvenile court to establish that Tyshawn was amenable to rehabilitation in the juvenile justice system. *Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Counsel's deficiency prejudiced Tyshawn because had counsel presented the appropriate witnesses and evidence, the juvenile could would have decided that Tyshawn was amenable to treatment in the juvenile justice system, or alternatively, decided that Tyshawn should have received a blended sentence under the Serious Youthful Offender (SYO) sentencing scheme. This Court should accept this case to ensure that a child facing transfer to the criminal justice system and life in prison receives the representation to which he is entitled.

FOURTH PROPOSITION OF LAW: Trial counsel renders ineffective assistance by failing to present evidence at a suppression hearing that the defendant did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. Sixth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

After Tyshawn's transfer to common pleas court, defense counsel filed a motion to suppress Tyshawn's custodial statements, but did not present any evidence or witnesses at the suppression hearing. As set forth in the amenability evaluation filed in the juvenile court, Tyshawn has documented cognitive impairments, functions in the second percentile for his age group, and his word recognition skills are in the third-grade reading level. Tyshawn could not have understand the general Cincinnati Police Department notification of rights form, because it is not a form intended for children, and is worded at a more difficult comprehension level than third grade.

Defense counsel was deficient for failing to have Tyshawn evaluated regarding his understanding of the notification of rights form in light of his literacy level, for failing to have Tyshawn evaluated with an instrument that measures comprehension of *Miranda* rights, and for

failing to present evidence in that regard.[2] Counsel was also deficient for failing to introduce the results of Tyshawn's intelligence and reading comprehension assessments from his bindover proceedings in juvenile court. Counsel's deficiency prejudiced Tyshawn, because had counsel appropriately advocated and presented evidence on Tyshawn's behalf, the court would have recognized that his waiver was not knowing, intelligent, and voluntary, and ordered his statements suppressed. *Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. This Court's guidance is needed to ensure that a child's statements, elicited during custodial interrogation, are not admitted into evidence unless he has knowingly, intelligently, and voluntarily waived his right against self-incrimination and right to counsel.

CONCLUSION

This Court should accept Tyshawn Barker's appeal because it raises substantial constitutional questions, concerns felony-level offenses, and is of great general interest.

Respectfully submitted,

The Office of the Ohio Public Defender

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Counsel for Tyshawn Barker

[2] *See* http://www.prpress.com/Miranda-Rights-Comprehension-Instruments-MRCI-_p_157.html.

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Defendant-Appellant Tyshawn Barker** was served by ordinary U.S. Mail, postage-prepaid, this 8th day of September, 2014, to Joseph T. Deters, Hamilton County Prosecutor, 230 East 9th Street, Suite 4000, Cincinnati, Ohio 45202.

Sheryl Trzaska #0079915
Assistant State Public Defender

Counsel for Tyshawn Barker

#424400

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee,	:	Case No.
vs.	:	On Appeal from the Hamilton
TYSHAWN BARKER, Defendant-Appellant.	:	County Court of Appeals First Appellate District
		C.A. Case No. C 1300214

Appendix to

Memorandum in Support of Jurisdiction
of Defendant-Appellant Tyshawn Barker

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-130214 TRIAL NO. B-1107595-C
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
TYSHAWN BARKER,	:	
Defendant-Appellant.	:	


D107158598

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on July 25, 2014 per order of the court.

By: _____
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-130214 TRIAL NO. B-1107595-C
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
TYSHAWN BARKER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 25, 2014

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Sheryl A. Trzaska, Assistant State Public Defender, Office of the Ohio Public Defender, for Defendant-Appellant.

DEWINE, Judge.

{¶1} Fifteen-year-old Tyshawn Barker was convicted of two aggravated murders and other related offenses. In this appeal, he contends that he should not have been bound over to the common pleas court from the juvenile court, argues that statements he made to police should have been suppressed and maintains that his counsel was ineffective. We are not persuaded, and affirm the judgment below.

A Mistaken Identity and Two Murders

{¶2} On October 14, 2011, Tyshawn, Dequantez Nixson, Brendan Washington and Carrielle Conn went to an apartment building intending to shoot Samuel Jeffries. Mr. Jeffries was targeted because he had filed domestic-violence charges against Dequantez's mother. Dequantez and Tyshawn waited in the hallway while Brendan and Carrielle knocked on the apartment door. But instead of Mr. Jeffries, Rudell Englemon answered the door. Carrielle shot Mr. Englemon who later died from his wounds. After the shooting, the group fled the apartment.

{¶3} It didn't take the boys long to turn on their accomplice, Carrielle. According to Tyshawn, Dequantez grew concerned because Carrielle had told Mr. Jeffries about the youths' involvement. Fearing that Carrielle would snitch to the police, Dequantez lured her into the woods with the other two boys. They told Carrielle that they were going to "hit a lick"—or, in other words, commit a robbery. But rather than commit a robbery, the three boys shot Carrielle several times. She suffered multiple gunshot wounds to her face and head and one to her back. Brendan fired the initial shots at Carrielle, and Dequantez and Tyshawn each fired an additional shot. They left her body on a set of abandoned railroad tracks. The body was discovered after a citizen called 911 to report having heard shots and then seeing three teenage boys laughing and walking along the tracks.

{¶4} Dequantez's mother, who was at the apartment where Mr. Englemon was shot, identified Carrielle as one of the individuals involved in Mr. Englemon's shooting. Although his mother denied his involvement in the shooting, Dequantez was brought in for questioning. At that time, police officers discovered that Dequantez had a cellular phone that had belonged to Carrielle. Upon questioning, Dequantez admitted to his involvement in both shootings, and told police officers that Tyshawn and Brendan were also involved.

The Proceedings Below

{¶5} Tyshawn was arrested as a juvenile for charges of murder and aggravated murder. Following a hearing during which the juvenile court found that there was probable cause to believe Tyshawn had committed the crimes, the court conducted a bindover hearing to determine whether it would retain jurisdiction over the case or transfer jurisdiction to the common pleas court. A report assessing Tyshawn's amenability to rehabilitation in the juvenile system was prepared by Dr. Paul Deardorff and presented during the hearing. At the conclusion of the hearing, the juvenile court ordered that Tyshawn be bound over to the common pleas court.

{¶6} The Hamilton County Grand Jury indicted Tyshawn for the aggravated murder of both victims, with firearm and witness specifications, as well as conspiracy, aggravated robbery and tampering with evidence. Tyshawn moved to suppress statements that he made during a police interview following Carrielle's shooting. He argued that he had not voluntarily, knowingly and intelligently waived his *Miranda* rights. The trial court denied the motion to suppress. Tyshawn entered a no-contest plea to the charges against him and was sentenced accordingly.

Transfer of Jurisdiction to the Common Pleas Court

{¶7} Tyshawn contends that the juvenile court abused its discretion in transferring jurisdiction over the case to adult court. Because Tyshawn was 15 years old at the time of the offenses, transfer of the case to common pleas court was

discretionary. R.C. 2152.12(B). R.C. 2152.12(D) delineates factors in favor of transfer for the court to consider, and R.C. 2152.12(E) lists factors that militate against transfer for the court to consider.

{¶8} Here, the court stated that it considered the factors and articulated its findings with respect to several, including the use of a firearm in both offenses, that the second offense was done to silence a potential witness, and Tyshawn's age and mental capacity. The court concluded that the juvenile system was not equipped to rehabilitate Tyshawn within the available time period and that the safety of the community may require adult sanctions. The court's decision was not an abuse of discretion. The assignment of error is overruled.

Waiver of *Miranda* Rights

{¶9} In a supplemental assignment of error, Tyshawn asserts that the trial court erred when it denied his motion to suppress statements made during his interview with police officers.

{¶10} A day after Carrielle's murder, Tyshawn was taken into custody and questioned by Detectives Kurt Ballman and Terry McGuffey. Before asking about the shootings, Detective Ballman read Tyshawn his *Miranda* rights and asked if he understood his rights. Tyshawn stated that he understood the rights and signed the form acknowledging that he had been informed of his rights. Tyshawn now argues that he did not voluntarily, knowingly and intelligently waive his *Miranda* rights.

{¶11} In our review of the denial of Tyshawn's motion to suppress, we defer to the trial court's factual findings, but review de novo the court's application of the law to those facts. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶12} Whether a defendant has voluntarily, knowingly and intelligently waived his *Miranda* rights may be inferred from the totality of the circumstances. *State v. Lather*, 110 Ohio St.3d 270, 2006-Ohio-4477, 853 N.E.2d 279, ¶ 9, citing *State v. Clark*, 38 Ohio St.3d 252, 261, 527 N.E.2d 844 (1988), and *State v. Gapen*, 104 Ohio St.3d 358,

2004-Ohio-6548, 819 N.E.2d 1047. Where, as here, the interrogation of the defendant is recorded electronically, the statements made are presumed to have been made voluntarily. R.C. 2933.81. As Tyshawn asserts, he had no choice but to answer the detectives' questions because he was told by Detective Ballman that the officers were "going to get some information from [him]." We conclude that this statement by Detective Ballman, made before the detective asked for the spelling of Tyshawn's name, his birthdate, address and telephone number, did not act to coerce Tyshawn into making a statement. Nothing in the record refutes the presumption that Tyshawn's statements were made voluntarily.

{¶13} Tyshawn contends that the detectives should have ensured that he substantively understood his rights, particularly because Tyshawn was a low-functioning, 15-year-old child with a third-grade reading level and no prior experience with police interrogation. "[A]n individual's low intellect does not necessarily render him * * * incapable of waiving *Miranda* rights." *State v. Lynn*, 7th Dist. Belmont No. 11 BE 18, 2011-Ohio-6404, ¶ 14. "Rather, the suspect's intelligence must be considered in light of the interrogation's other circumstances, including the suspect's own conduct and representations during the interrogation." *State v. Kirk*, 3d Dist. Crawford No. 3-12-09, 2013-Ohio-1941, ¶ 30. A review of the recording of the interview demonstrates that Tyshawn had a calm demeanor, understood the questions posed to him and was able to answer coherently. Tyshawn's conduct and representations to the detectives during the interrogation indicate nothing other than a knowing waiver of his *Miranda* rights. Based on our review of the recording, we conclude that the trial court's finding that Tyshawn had voluntarily, knowingly and intelligently waived his *Miranda* rights was supported by the record. The court properly denied the motion to suppress. The supplemental assignment of error is overruled.

Counsel Was Not Ineffective

{¶14} Tyshawn asserts that he was deprived of the effective assistance of counsel based upon his trial counsel's performance during the bindover hearing and during the hearing on the motion to suppress. To succeed on this claim, Tyshawn must show that his counsel's performance was deficient, and that, absent his counsel's errors, the result of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Tyshawn has not made such a showing.

{¶15} Tyshawn maintains that his trial counsel was ineffective during the bindover hearing because he did not present case law and scientific studies that addressed the developmental differences between adolescents and adults. But at issue in the hearing was not whether there is a difference in the mental development of adolescents and adults. The issue was whether, based on the factors listed in R.C. 2152.12(D) and (E), Tyshawn was amenable to rehabilitation in the juvenile system. Tyshawn's attorney tailored his argument to the specific case at hand, emphasizing Tyshawn's low intelligence, his limited participation in the offenses, and the lack of services that he had received to date during earlier contacts with the juvenile court system.

{¶16} Tyshawn also suggests that his attorney should have called Dr. Deardorff as a witness to question him about his amenability evaluation, retained an independent psychologist to evaluate Tyshawn, and educated the court about the programs that were available to Tyshawn in the juvenile system. Missing from Tyshawn's suggestions is any indication that Dr. Deardorff's testimony or an independent evaluation would have led to a different result in the proceedings. Dr. Deardorff's report clearly laid out Tyshawn's limited mental capacity and intelligence. Further, there is no indication that the juvenile court was ignorant

about the services offered by the juvenile justice system. We will not second guess an attorney's strategic trial decisions. *See State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4, 739 N.E.2d 749. We conclude that Tyshawn has not demonstrated that his attorney's performance was deficient with respect to the amenability hearing.

{¶17} Likewise, we conclude that Tyshawn's counsel was not ineffective during the motion-to-suppress hearing. Tyshawn contends that the result of the hearing would have been different had counsel presented evidence of Tyshawn's limited intelligence and reading comprehension because the evidence would have indicated that he could not have voluntarily, knowingly and intelligently waived his *Miranda* rights. Further, Tyshawn argues that counsel should have had him evaluated regarding his understanding of the rights form. Having reviewed the record, including the recording of the interview, we are unable to conclude that such evidence would have changed the result of the motion-to-suppress hearing. The court was able to review the recording that was made of the interview and determine whether Tyshawn voluntarily, knowingly and intelligently waived his *Miranda* rights. The assignment of error is overruled.

{¶18} We therefore affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and **HENDON, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.