IN THE SUPREME COURT OF OHIO

STATE OF OHIO, PLAINTIFF-APPELLEE,	:	CASE NO. 2014-1560
vs.	:	ON APPEAL FROM THE HAMILTON COUNTY COURT OF APPEALS
TYSHAWN BARKER, DEFENDANT-APPELLANT.	:	FIRST APPELLATE DISTRICT COA CASE NO. C 1300214

MERIT BRIEF OF APPELLANT TYSHAWN BARKER

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Statement of the Case and Facts

Tyshawn Barker, just 15 at the time of the incident that gave rise to the charges in this case, had a full scale IQ of 69, which placed him in the second percentile for his age group. (Amenability Report, p.1, 5). His word recognition skills were at the third grade level, and his math skills were at the fifth grade level. (Amenability Report, p.6). Tyshawn was often anxious about being bullied, having to fight other kids in school, and he was ridiculed on a daily basis. (Amenability Report, p.4). 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." (Amenability Report, p.3). Tyshawn had two prior adjudications for misdemeanor offenses, but had never been held in detention or in a residential or rehabilitative program. (Amenability Report, p.2).

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. (State's Ex.2(A); Amenability Report, p.2). As a result of those statements, police took Tyshawn into custody, brought him to the Hamilton County Juvenile Detention Center, and began questioning him at 11:57pm. (5/30/2014 T.p.27,29; State's Ex.4(A), p.2). This interview was video recorded. (State's Ex.3(A)).

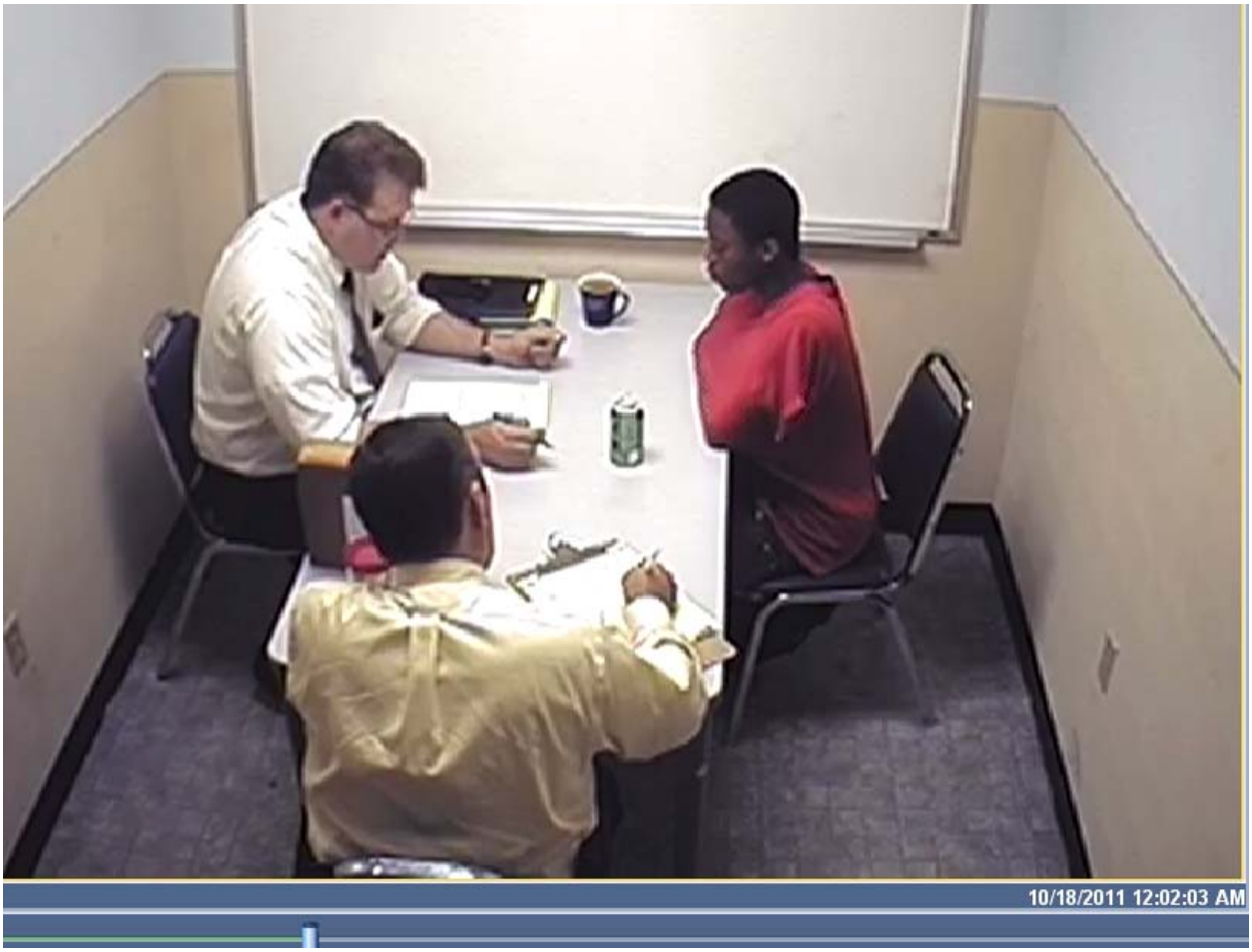
As soon as the detectives entered the interview room with Tyshawn, Detective Ballman told him, "We're going to get some information from you." (State's Ex.3(A) at 11:56pm). The detectives asked Tyshawn for some preliminary information, including his age, his address—although Tyshawn did not know what his zip code was—his phone number, his mother's name, and where he attended school. (State's Ex.4(A), p.4). Then, Detective Ballman told Tyshawn he

had to "ask you a series of dumb questions but they'll sound dumb to you." (State's Ex.4(A), p.5). The Detective asked if Tyshawn had used drugs or alcohol that day, and whether he had any health problems. (State's Ex.4(A), p.5). 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.

(State's Ex.4(A), p.6-7).

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. (State's Ex.3(A) at 12:02am). The following still photograph is from the recording of Detective Ballman reading Tyshawn the form:



(State's Ex.3(A) at 12:02:03AM).

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.

(State's Ex.4(A), p. 8).

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.

(State's Ex.4(A), p.8).

The detectives then began to question Tyshawn regarding what he knew about his co-defendants' shooting of Rudell Engemon and Carrielle Conn. (State's Ex.4(A)). 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." (State's Ex.4(A), T.p.15). He encouraged Tyshawn to "come clean" and tell the story. (State's Ex.4(A), T.p.42). 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. (State's Ex.4(A), T.p.31-33,40).

Later that day, at 6:40pm, 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." (State's Ex.4(C), T.p.2). 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.

(State's Ex.4(C), T.p.3-4).

The detectives asked Tyshawn the name of his attorney, but he did not know her name. (State's Ex.4(C), T.p.4). The detectives read Tyshawn another rights form, had him sign the form, and then asked him to identify a photo of the co-defendant Tyshawn referenced in his prior statement. (State's Ex.4(C), T.p.4-5,6).

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. (10/18/11 Complaint, Case No. 11-10085; 10/24/11 Complaint, Case No. 11-10303). After a joint hearing for the three co-defendants, the juvenile court found

probable cause to support the charges. (11/16/11 Judicial Entries, Case Nos. 11-10085, 11-10303). The juvenile court conducted an amenability hearing for Tyshawn, and ordered him to be transferred to the common pleas court for criminal prosecution. (11/30/11 Judicial Entries, Case Nos. 11-10085, 11-10303). 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. (12/1/11 Indictment, Case No. B 1107595-C).

Tyshawn, through counsel, filed a motion to suppress his statements as obtained in violation of *Miranda v. Arizona*, 385 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, counsel argued that Tyshawn did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. (3/5/12 Motion to Suppress). The trial court conducted a joint hearing for the three co-defendants, because each filed a motion to suppress their statements. (5/30/2012 T.p.1). The State's only witness at that hearing was Officer Kurt Ballman, who testified about the interrogations of all three co-defendants. (5/30/2012 T.pp.5-15). 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?" (5/30/2012 T.p.14). Ballman replied "no." (5/30/2012 T.p.14). Regarding Tyshawn, Ballman knew that Tyshawn had recently turned 15 years old, and admitted that he did not know Tyshawn's reading level or comprehension level. (5/30/2012 T.p.31). Tyshawn did not present any witnesses or evidence at the hearing. The trial court denied Tyshawn's motion to suppress, reasoning that "the statements made by the defendants were voluntarily made by the defendants after being properly—they were voluntarily made after the defendants were properly advised of

their rights which the Court finds they understood." (6/13/12 T.p.3). Tyshawn's defense counsel objected to that finding. (6/13/12 T.p.3).

Tyshawn entered a plea of no contest to aggravated murder with firearm specifications, aggravated robbery with firearm specifications, and tampering with evidence. (3/14/13 Judgment Entry). The trial court sentenced Tyshawn to an aggregate prison term of 25 years to life, and Tyshawn appealed. (3/14/13 Judgment Entry; 4/5/13 Notice of Appeal, Case No. C-1300214). In his merit brief, Tyshawn argued that defense counsel rendered ineffective assistance by failing to present any evidence at his amenability hearing. (1/24/14 Merit Brief). 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 a judgment entry denying the motion to suppress was filed in the trial court or noted on the trial court's docket. (5/16/14 Motion). Thus, counsel had been unaware that a motion to suppress had been litigated. (5/16/14 Motion). The court of appeals permitted Tyshawn to file a supplemental brief assigning error to the trial court's denial of his motion to suppress. (5/20/14 Entry). On appeal, Tyshawn argued that his statements should have been suppressed because he did not waive his *Miranda* rights. (5/29/14 Supplemental Merit Brief).

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. *State v. Barker*, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245.

Argument

Introduction: this case is properly before this Court.

As set forth in the propositions of law below, shifting the burden to a child to prove that statements elicited during a police interrogation are voluntary under R.C. 2933.81(B) violates due process. And, the statutory presumption of voluntariness in R.C. 2933.81(B) has no bearing on whether a *Miranda* waiver is knowing, intelligent, and voluntary. These issues are properly before this Court because they arose from the First District's opinion and reasoning in the case below.

In the trial court, Tyshawn argued that his statements should be suppressed because he did not knowingly, intelligently, and voluntarily waive his rights as required by *Miranda v. Arizona*, 384 U.S. at 479, 86 S.Ct. 1602, 16 L.Ed.2d 694. (3/5/12 Motion to Suppress; 5/30/12 T.p.37). At the suppression hearing, the State argued that the statutory presumption of voluntariness under R.C. 2933.81(B) applied to this case. (5/30/12 T.p.36). However, when the trial court overruled the motion to suppress, it did not apply the statutory presumption of voluntariness set forth in R.C. 2933.81(B). Rather, the court found that "the statements made by the defendants were voluntarily made by the defendants after being properly—they were voluntarily made after the defendants were properly advised of their rights which the Court finds they understood." (6/13/12 T.p.3). The trial court did not apply the statutory presumption of voluntariness, and did not find that the burden had shifted to Tyshawn to prove involuntariness under R.C. 2933.81(B).

On appeal, Tyshawn assigned error to the trial court's finding that he understood his *Miranda* rights, and thus knowingly, intelligently, and voluntarily waived those rights when he provided a statement to police. The First District considered whether Tyshawn waived his

Miranda rights, but applied the statutory presumption of voluntariness in R.C. 2933.81(B), and shifted the burden to Tyshawn to prove that his statement was voluntary, and found that Tyshawn had not met this burden. *Op.* at ¶ 12.

The First District's opinion improperly conflates the statutory presumption of voluntariness with the long-held constitutional requirement that a defendant knowingly, intelligent, and voluntarily waive his *Miranda* rights before his statement may be used against him. *Id.* The due process challenge to R.C. 2933.81(B) as applied to a child was not an issue raised in the court of appeals, because the trial court did not apply R.C. 2933.81 in its holding. Tyshawn raised his claims relating to R.C. 2933.81 at the first opportunity—after the First District merged its analysis of whether Tyshawn knowingly, intelligently, and voluntarily waived his *Miranda* rights, in which it is the State's burden to prove a valid waiver, with the statutory presumption of voluntariness under R.C. 2933.81, which shifts the burden to the defendant to prove voluntariness.

Alternatively, if this Court finds that Tyshawn forfeited these issues, this Court should decline to apply the waiver doctrine it set forth in *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), and elect to consider Tyshawn's claims because the rights and interests at stake warrant consideration. As this Court has stated, "the waiver doctrine announced in *Awan* is discretionary[, and] * * * even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests may warrant it." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). Moreover, the First District application of R.C. 2933.81(B) in this case constitutes plain error because it implicates the constitutional protections of the due process clause as applied to a child, and violates the constitutional protections set forth in *Miranda* and its progeny.

In criminal court, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." *M.D.* at 151. This Court has applied the plain error analysis from Crim.R. 52(B) to constitutional challenges to statutes on direct appeal when there was no objection made in the trial court. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15. First, there must be an error. *Id.* at ¶ 16. Second, the error must be plain, meaning an "obvious defect" in the trial proceedings. *Id.* Third, the error must affect substantial rights, meaning that the trial court's error must have affected the outcome of the case. "Courts are to notice plain error 'only to prevent a manifest miscarriage of justice.'" *Id.* quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Tyshawn asks this Court to recognize the constitutional violations that arise from the burden shift of R.C. 2933.81(B) when applied to a child, and arise from the First District's interpretation of that statute, which can be relied upon to circumvent the well-established requirement that a defendant knowingly, intelligently, and voluntarily waive his *Miranda* rights before his custodial statements may be used against him. If this Court accepts these constitutional claims, it must necessarily find that the First District's reasoning constitutes plain error. Failing to hold otherwise would result in a manifest miscarriage of justice.

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.

A. The State has the burden of proving that a defendant's statements elicited during interrogation are voluntary.

This Court has recognized that when a defendant challenges the admissibility of his statements to law enforcement, the statements may only be admitted against the defendant if the State meets its burden of proving that those statements were voluntarily given; that is, by showing "that the defendant's will to resist was not overborne by threats or improper inducements." *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978), citing *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). When a confession is challenged by a defendant as involuntary, "he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Lego* at 489. And, "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." *Id.*

Importantly, the Court in *Lego* also stated that "the States are free, pursuant to their own law, to adopt a higher standard." *Id.* The problem in this case is that the First District's decision lowers that standard by removing the burden from the State, and shifting it to the defendant. *See State v. Western*, 2d Dist. Montgomery No. 26058, 2015-Ohio-627, 29 N.E.3d 245, ¶ 17 (stating that while the constitutionality of R.C. 2933.81 was not before the court, "[w]e have some questions about shifting the burden to a defendant."); *see also Brief of Amici Curiae*, pp.5-9, 12-14 (discussing the constitutional implications of shifting the burden of proving the voluntariness of a custodial statement to the defendant). This burden shift is especially problematic for children, because it is well settled that they require greater protections when subject to

interrogation by law enforcement. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 106, quoting *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948).

It is axiomatic that a defendant's statements may only be admitted against the defendant if the interrogation comports with due process; that is, if the State proves that the statements were voluntarily given. *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1963). The traditional due process test for whether a statement is voluntary asks: "Is the confession the product of an essentially free and unconstrained choice by its maker?" *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). "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." *Id.* To determine whether a confession is voluntary, courts take into account both the details of the interrogation and the characteristics of the accused, then weigh "the circumstances of pressure against the power of resistance of the person confessing." *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2410, 180 L.Ed.2d 310 (2011), quoting *Stein v. New York*, 346 U.S. 156, 185, 73 S.Ct. 1977, 97 L.Ed. 1522 (1953) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973). Along with the suspect's particular characteristics, "anything else that might have affected the 'individual's * * * capacity for effective choice,' [a]re relevant in determining whether the confession was coerced or compelled." *J.D.B.* at 2410, quoting *Miranda*, 384 U.S. at 506-507, 86 S.Ct. 1602, 16 L.Ed.2d 694 (Harlan, J., dissenting).

B. There are particular due process considerations at issue when a child is subject to police interrogation.

There are profound differences in the ways that children and adults respond to the pressures of a custodial interrogation, and those differences place children at a distinct

disadvantage. *See Brief of Amici Curiae*, pp.21-26 (discussing empirical evidence regarding the fundamental differences between children and adults during an interrogation). While pressure that overbears the will of an adult may be obvious to an observer, the same is not true of children. The Supreme Court of the United States has long recognized that children require greater protections than adults in interrogations because they are inexperienced, immature, easily subjected to pressure from authorities, and are often unable to comprehend the consequences of self-incrimination. *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). In 1948, the Court held that a 15-year-old's confession was obtained in violation of due process when he was taken into custody and questioned during the night. *Haley*, 332 U.S. at 600, 68 S.Ct. 302, 92 L.Ed. 224. The Court reasoned that the fifteen-year-old was no match for the police. *Id.* "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him." *Id.* The Court further stated:

> [W]e are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements.

Id. at 601.

In *Gallegos*, the Court again found that a child's confession was obtained in violation of due process after he was detained for five days without access to counsel, parent, or juvenile court, and rejected the prosecution's argument that the youth and immaturity of the child, and the five-day detention, were irrelevant because the child confessed as soon as he was arrested. *Gallegos* at 54. The Court reasoned:

> He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. * * * Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Id.

Though *Haley* and *Gallegos* were decided decades ago, the Court relied on both cases when it most recently considered juvenile interrogation, to support its decision that age properly informs a custody analysis for purposes of *Miranda. J.D.B.*, __ U.S. __, 131 S.Ct. at 2404, 180 L.Ed.2d 310. In *J.D.B.*, 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). In *J.D.B.*, the Court relied on a multitude of research regarding children's susceptibility to police pressure during interrogation, which provides empirical support for the "commonsense conclusions" the Court drew in *Haley* and *Gallegos*, cases which long pre-dated the empirical evidence which support interrogation cases today. *J.D.B.* at 2401, 2403.

In the instant case, this Court must consider whether it violates due process for the burden to shift to the child to prove that his statement was voluntary, merely because the interrogation was videotaped. The relevant empirical research demonstrates that children have a particular susceptibility to police pressure, and propensity to succumb to interrogation pressure and admit

to offenses they did not commit. *See Brief of Amici Curiae*, pp.23-30. This clouds the traditional due process test for whether a statement is voluntary, because it is far more difficult to establish that the confession was the product of an essentially free and unconstrained choice by the child. Thus, due process protections are implicated when the burden is removed from the State, and placed on the child who is challenging the statements.

C. Because a child's will is much more easily overborne by police pressure and inducements than an adult, Ohio's statutory burden, which requires a child to prove that his videotaped interrogation is voluntary, violates due process.

Revised Code Section 2933.81 is a relatively new statute, enacted on April 5, 2010 by Senate Bill 77. 2009 Ohio SB 77. The statute provides that 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). While other states have codified requirements that certain interrogations be recorded, or codified recommendations for recording, Ohio appears to be the only state with a statute that presumes a person's statement is voluntary because it is recorded, and shifts the burden to the person to prove that the electronically recorded statement was involuntary. *See* Dep't of Justice, *New Department Policy Concerning Electronic Recording of Statements*, 128 Harv.L.Rev. 1552, 1553 (2014); *see also Brief of Amici Curiae*, pp.9-12 (discussing other state statutes addressing the electronic recording of police interviews).

Because R.C. 2933.81(B) refers to a "person" subject to interrogation, it does not differentiate between the interrogation of a child or an adult. Indeed, law enforcement often do not differentiate between a child and an adult suspect, and are taught to use the same tactics and

tenets of adult interrogation for juvenile suspects. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N.Ky.L.Rev. 257, 273 (2007); quoting Fred E. Inbau, et al., Criminal Interrogation and Confessions (3d ed. 1986), 137. However, the reality is very different. "Juveniles' inferior comprehension of rights, limited language ability, and inadequate decision-making skills increase their susceptibility to interrogation tactics * * *." Drizin & Luloff at 273. Juveniles are "particularly ill-suited to engage in the high-stakes risk-benefit analysis inherent in any police interrogation." 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; Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3-38 (2010); *see also Brief of Amici Curiae*, pp.21-22, 23-26.

Studies of proven false confessions have demonstrated that juveniles are over-represented in false confession cases. One study showed that juveniles comprised 33 percent of a sample of 125 known false confessions. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 944-945 (2004). And, more than half of the juveniles in the study were aged 15 or under, suggesting that the age group may be "particularly vulnerable" to police interrogation. *Id.*; 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). *See also Brief of Amici Curiae*, pp.26-27 (discussing notable, proven false confession cases involving juvenile suspects wherein the interrogations were electronically recorded).

Experts have identified various reasons why juveniles are more susceptible to police tactics during interrogation, and thus over-represented in false confession cases:

- Because juveniles do not have the same life experience to draw upon as adults, they are "more readily influenced by police power, persuasion, or coercion." Drizin & Luloff at 274, quoting Drizin & Leo at 944.

- Children have a reduced ability to cope with a stressful interrogation and are less likely to possess the ability to withstand the rigors of police questioning. Drizin & Luloff at 274.

- The process of interrogation makes children more susceptible to changing their story, and "the stress of an interrogation can actually alter a child's perception of events." Drizin & Luloff at 274, citing Kimberly Larson, *Improving the "Kangaroo Courts": A proposal for Reform in Evaluating Juveniles' Waiver of Miranda*, 48 Vill.L.Rev. 629, 657-658 (2003).

- Juvenile suspects can come to believe a set of events differently from what actually occurred if enough pressure is placed upon them. Drizin & Luloff at 275, citing Larson at 657-658.

- Some interviewing techniques have a "disastrous effect on the accuracy of children's reporting." When children are asked repetitive questions, even innocent children may assume they answered wrong, and might feel pressure to give the "right" answer. This is heightened by children's greater compliance and eagerness to please adult authority figures. Drizin & Luloff at 275, quoting Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, *in* Interrogations, Confessions, and Entrapment 141 (G. Daniel Lassiter ed., 2004).

- Because the adolescent brain is underdeveloped in critical ways, juveniles are not as capable as adults at thinking strategically and understanding the consequences of admissions, and their desire to go home may be a motivating factor in offering a confession. Drizin & Luloff at 275, citing Barry C. Feld, *Competence, Culpability, and Punishment: Implications for Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L.Rev. 463, 534 (2003-2004); Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 Wis.L.Rev. 431, 440 (2006).

- Police are trained to ignore claims to innocence, discount alibis, and present irrefutable evidence of guilt even if no evidence exists. Interrogators are trained to use special psychological themes to induce children to confess, including blaming a youth's environment, parents, or friends. Inbau, et al., 137-138.

The need for special care and protections for a child subject to a custodial interrogation is rooted in the relevant legal precedent pertaining to a confession elicited from a child, and supported by the research and academic conclusions set forth above, as well as in the Brief of Amici Curiae. *See In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 106, quoting *Haley*, 332 U.S. at 599, 68 S.Ct. 302, 92 L.Ed. 224 ("It is now commonly recognized that courts should take 'special care' in scrutinizing a purported confession or waiver by a child."). A child's susceptibility to interrogation pressure and false confession is inextricably linked to the due process implications of presuming that a child's statement is voluntary, simply because it is electronically recorded. Revised Code 2933.81(B) falls short of the due process requirements recognized by this Court and the Supreme Court of the United States, in that it improperly shifts the burden on the child to prove voluntariness.

There are significant differences between children and adults, and research and case law supports that those differences place children at higher risk to provide a confession which is not the product of the child's free and unconstrained choice. And, there is no empirical evidence establishing that a child will understand the consequences of his admission, or be less likely to succumb to pressure of police tactics and interrogation because his interrogation is electronically recorded. The Supreme Court of the United States, and this Court, have long recognized that due process requires greater protections for children who are subject to police interrogation. *See C.S.* at ¶ 106; *Haley* at 599. Revised Code Section 2933.81(B) places an undue burden on a child subject to that provision, by eliminating the requirement that the State prove that the child's statements were provided through a free and unconstrained choice. *Culombe*, 367 U.S. at 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037.

It is imperative that a reviewing court fully consider the voluntariness of a confession by weighing the circumstances of pressure against the power of resistance of the person confessing. *J.D.B.*, __ U.S. __, 131 S.Ct. at 2410, 180 L.Ed.2d 310; *Stein*, 346 U.S. at 185, 73 S.Ct. 1977, 97 L.Ed. 1522; *Schneckloth*, 412 U.S. at 226, 93 S. Ct. 2041, 36 L.Ed.2d 854. When the subject of the interrogation is a child, the perceived pressures are greater, and the resistance is lower. The statutory presumption of voluntariness in R.C. 2933.81(B) excuses law enforcement, the State, and reviewing courts, from complying with the special considerations constitutionally due to children during interrogation. This Court should recognize that the application of R.C. 2933.81(B) to a child subject cannot pass constitutional muster, and hold that R.C. 2933.81(B) violates due process when applied to a child. Accordingly, this Court should reverse and remand this case with instructions for the trial court to conduct a new suppression hearing, at which time the statutory burden of R.C. 2933.81(B) may not be applied to Tyshawn.

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.

A. Introduction

The United States Constitution "guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty." *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). 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), quoting *Escobedo v. Illinois*, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Miranda* at 475. The *Miranda* protections are constitutional protections, rooted in the Fifth and Fourteenth Amendments to the U.S. Constitution. *Dickerson v. United States*, 530 U.S. 428, 434-444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

In *Miranda*, the Court was concerned with the subtle, psychologically coercive nature of interrogation, which "exacts a heavy toll on individual liberty and trades on the weaknesses of individuals." *Miranda* at 455. These tactics convinced the Court of the constitutional necessity of a rights advisement and valid waiver decades ago, and are still employed by law enforcement today. *Id.* at 448-458; (State's Ex. 4(A), 4(B)). The *Miranda* Court was concerned by interrogation environments that "subjugate the individual to the will of the examiner" and tactics which convince the suspect that the interrogator already has all of the evidence and the suspect's guilt is a known fact; suggesting that if the suspect confesses, he can explain why he did it, and perhaps he has a legal defense. *Id.* The Court reasoned that even without employing physical brutality, the stratagems employed by law enforcement encroach on a suspect's privilege against self-incrimination so significantly that a rights advisement and valid waiver are constitutionally required. *Id.* at 456-457. And as set forth in the First Proposition of Law, these constitutional concerns are heightened when the subject of the interrogation is a child.

In *Miranda*, the Court held that the prosecution has the burden of proving that the accused was given the *Miranda* warnings, that the accused made an "express statement" that he

desired to waive his constitutional rights, and that the accused effected a knowing, intelligent, and voluntary waiver of those rights. *State v. Edwards*, 49 Ohio St.2d 31, 38, 358 N.E.2d 1051 (1976), quoting *Miranda* at 475. In *Edwards*, this Court stated "[t]here are no presumptions to aid the prosecution in its attempt to prove a valid waiver of the right to counsel and the privilege of silence." *Edwards* at 38. And, "[a]t various points in the majority opinion in *Miranda*, the court seizes upon specific factual criteria which it emphatically indicates will not support a presumption of waiver." *Id.*; *Miranda* at 475. "Presuming waiver from a silent record is impermissible[, as t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Id.* at 475, quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

B. *Miranda* is a constitutional holding, and its requirements may not be legislated away.

The Supreme Court has definitively stated that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively." *Dickerson*, 530 U.S. at 444, 120 S.Ct. 2326, 147 L.Ed.2d 405. In *Dickerson*, the Court considered 18 U.S.C. 3501, a 1968 statute which attempted to legislatively eliminate the requirement that a suspect be advised of his rights under *Miranda*, and knowingly, intelligently, and voluntarily waive those rights before his custodial statement may be admitted against him. *Dickerson* at 431. The circuit court had reasoned that *Miranda* was not a constitutional holding, and therefore "Congress could by statute have the final say on the question of admissibility." *Id.* However, the Supreme Court reversed, reasoning that in *Miranda*, the Court "noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. *Miranda* at 445-458. Because police interrogation, by its nature, "isolates and pressures the individual," the Court stated that "even

without employing brutality, the 'third degree' or [other] specific stratagems," custodial interrogation implicates the constitutional protections against self-incrimination. *Id.* at 455. Therefore, the Court "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 442.

While considering whether 18 U.S.C. 3501 was constitutional, the Court reasoned, "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution[, but] may not legislatively supersede our decisions interpreting and applying the Constitution." *Dickerson* at 437. The Court concluded that *Miranda* announced a constitutional rule that could not be superseded legislatively for several reasons: the *Miranda* opinion is "replete with statements indicating that the majority thought it was announcing a constitutional rule;" the Court's ultimate conclusion in *Miranda* was that the unwarned confessions in the cases before it "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege" against self-incrimination found in the Fifth Amendment and incorporated in the Due Process Clause of the Fourteenth Amendment; and opined that "the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were 'at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'" *Dickerson* at 440-441, quoting *Miranda* at 467.

Just as Congress may not pass a statute that curtails the constitutional requirements of *Miranda*, under the Supremacy Clause, the Ohio General Assembly may not pass a state law that interferes with the constitutional protections set forth in *Miranda.* U.S. Constitution, Article VI, Section 2; Fifth and Fourteenth Amendments to the U.S. Constitution; *Cooper v. Aaron*, 358 U.S. 1, 19-20, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (Reasoning that states must follow the Supreme

Court's interpretation of the United States Constitution, and holding that Arkansas could not pass a law excusing it from following the Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)).

C. The First District Court of Appeals has improperly shifted the burden to defendants to prove that they knowingly, intelligently, and voluntarily waived *Miranda*.

In its decision below, the First District applied the following analysis to determine whether Tyshawn waived his rights:

> Whether a defendant has voluntarily, knowingly and intelligently waived his Miranda rights may be inferred from the totality of the circumstances. [Internal citations omitted]. 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. * * * Nothing in the record refutes the presumption that Tyshawn's statements were made voluntarily.

Op. at ¶ 12. The court of appeals improperly applied the presumption from R.C. 2933.81 to the *Miranda* totality of the circumstances test. *Id.*

Since rendering its decision in Tyshawn's case, the First District has issued several other decisions that explicitly show that the court is using R.C. 2933.81(B) as a legislative end around the constitutional requirement that a suspect knowingly, intelligently, and voluntarily waive his *Miranda* rights before a statement may be admitted against him. *State v. Washington*, 1st Dist. Hamilton No. C-130213, 2014-Ohio-4178, ¶ 29; *State v. Bell*, 1st Dist. Hamilton No. C-140345, 2015-Ohio-1711, ¶ 36; *see also In re K.C.*, 1st Dist. Hamilton No. C-140307, 2015-Ohio-1613. In *Bell*, the court stated, "[g]enerally, the state bears the burden to prove by a preponderance of the evidence that the accused knowingly, voluntarily, and intelligently waived his *Miranda* rights. But, under R.C. 2933.81(B), because Bell was suspected of committing a homicide and the interview was both audibly and visually recorded, Bell's statements are presumed to be voluntary. The burden then shifted to him to prove that his statements were not voluntary."

(Citations omitted.) *Bell* at ¶ 36. The court considered several factors about the defendant, and concluded that he "failed to overcome the presumption that his waiver was voluntary" and overruled his assignment of error. *Id.* at ¶ 39. The First District's reasoning that Bell had the burden of proving a knowing, intelligent, and voluntary *Miranda* waiver makes it clear that the court is improperly conflating the voluntariness addressed in R.C. 2933.81(B) with *Miranda.*

Conversely, in *K.C.*, the First District noted that the statutory burden of R.C. 2933.81(B) did not apply, and properly placed the burden on the State to prove a valid *Miranda* wavier, stating "the State bears the burden to prove by a preponderance of the evidence that the accused made a knowing, voluntary, and intelligent waiver" of *Miranda*, and, "[w]e note that R.C. 2933.81(B), which would have shifted the burden to K.C. to show that her statements were not voluntary, does not apply" because the interview was not electronically recorded. *K.C.* at ¶ 25. Notably, the First District supported its decision that the State did not meet its burden of proving that K.C. did not knowingly, intelligently, and voluntarily waive her *Miranda* rights by relying on similar facts that Tyshawn relied upon to support his argument that he did not validly waive his rights. *Id.* at ¶ 27, 28, 30 (Finding that K.C. had no previous criminal justice experience; that nothing in the record showed that she understood the rights form; that she nodded her head when asked if she understood her rights, but the detectives "never asked her to explain what her understanding was."). Had the court properly placed the burden on the State to prove that Tyshawn knowingly, intelligently, and voluntarily waived his rights, the First District's decision would have been the same as in *K.C.*, and his statements would have been suppressed.

These recent decisions indicate that at least one Ohio court of appeals interprets R.C. 2933.81(B) as a legislative mechanism that weakens the requirements of *Miranda,* and shifts the burden to the defendant to prove that he knowingly, intelligently, and voluntarily waived his

Miranda rights. However, it is well settled that such legislation is impermissible. "Every state legislator and executive and judicial officer is" bound by the United States Constitution, and the Supreme Court's interpretation of what those constitutional rights entail. *Cooper*, 358 U.S. at 18, 78 S.Ct. 1401, 3 L.Ed.2d 5.

As the Supreme Court has made clear, the pressure of a custodial interrogation implicates a suspect's constitutional protections against self-incrimination, and the burden rests on the State to demonstrate that he was properly advised of his right to remain silent and his right to counsel. *Edwards*, 49 Ohio St.2d at 38, 358 N.E.2d 1051; *Miranda* at 475. If the suspect does not knowingly, intelligently, and voluntarily waive those rights before giving statements to law enforcement, those statements may not be admitted against him. *Miranda* at 498-499. The statutory presumption created by R.C. Section 2933.81(B) does not eliminate or affect those constitutional requirements.

1. It is illogical and unconstitutional for the legislature to draw distinctions in *Miranda* protections based on the charge alleged, or because an interrogation was electronically recorded.

The statutory presumption of voluntariness and burden shift to the defendant applies pursuant to R.C. 2933.81, when a person is suspected of most homicide offenses: aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, and aggravated vehicular homicide; or, when a person is suspected of rape, attempted rape, or sexual battery. R.C. 2933.81(B). There is no constitutional justification for depriving a suspect of the full protections set forth in *Miranda* and its progeny, simply because the person is suspected with committing one offense and not another. Indeed, the gravity of an interrogation should require more careful scrutiny when the allegation is more serious and the potential loss of liberty is more significant.

The four defendants whose cases were consolidated before the Supreme Court in *Miranda* were charged, respectively, with kidnapping and rape; robbery; robbery in violation of federal law; and robbery, rape, and murder. *Miranda* at 491-498. The Court's holding applied to each of the defendants equally. *Id.* A "heavy burden" rests on the State to prove that a suspect knowingly, intelligently, and voluntarily waived his right to counsel and right against self-incrimination, regardless of the charges alleged. *Id.* at 475. These constitutional rights belong to the defendant, and cannot be dependent on the charges.

Similarly, there is no constitutional justification for these distinctions to be drawn simply because the interview is electronically recorded. The suspect may not be advised or aware that his interrogation is recorded, and even if he is aware of the recording, it has no bearing on his understanding of his right to counsel and right against self-incrimination, or whether he knowingly, intelligently, and voluntarily waived those rights. *See Brief of Amici Curiae,* pp.26-29 (discussing how electronic recording has not deterred police from using tactics known to induce suspects to involuntary confess). This Court should not uphold the First District's interpretation of R.C. 2933.81(B), which arbitrarily diminishes for some, the constitutional protections due every defendant.

2. The State did not prove that Tyshawn waived his *Miranda* rights.

On appeal, Tyshawn argued that the trial court should have suppressed his statements because he did not waive his *Miranda* rights, and because there is nothing on the record demonstrating that Tyshawn understood his rights. But, the First District did not conduct its analysis in terms of the State having the burden to prove that Tyshawn knowingly, intelligently, and voluntarily waived his rights and provided a voluntary statement; rather, the court reasoned, "[n]othing in the record refutes the presumption that Tyshawn's statements were made

voluntarily." *Op.* at ¶ 12. *Compare K.C.*, 1st Dist. Hamilton No. C-140307, 2015-Ohio-1613, at ¶ 27, 28, 30 (wherein the First District recognized that it was the State's burden to prove a valid waiver, and found that K.C.'s statements should be suppressed, based on similar facts and circumstances that exist in Tyshawn's case).

Tyshawn moved the trial court to suppress his statements to police because he did not knowingly, intelligently, and voluntarily waive his rights. From the moment the interrogation began, Detective Ballman made it clear to Tyshawn that he had no choice but to answer their questions, stating, "We're going to get some information from you." (State's Ex.3(A) at 11:56pm). The detectives approached Tyshawn's advisement of rights as a notification that they had to read to him, and that he had to sign. (State's Ex.4(A), p.6-7). Detective Ballman read him the notification of rights form, holding it upside down, and immediately handed it to Tyshawn to sign. (State's Ex.3(A) at 12:02-12:04AM). The detective stated, "I just need you to sign that I read that to you and that you understand it." (State's Ex.4(A), p. 8; State's Ex.3(A) at 12:02-12:04AM). Tyshawn signed the form without reviewing or discussing it. (State's Ex.3(A) at 12:02-12:04AM).

Only after Tyshawn signed the notification form did Detective McGuffey ask Tyshawn if he had "heard of" his *Miranda* rights before. (State's Ex.4(A), p.8). 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. (State's Ex.4(A), p.8). They did not ask Tyshawn whether he wanted to proceed with the questioning, but just began the interrogation. At no time did the detectives ask Tyshawn to demonstrate any understanding of the rights, or the potential consequences or implications of

proceeding with the questioning. (State's Ex.4(A), p.6-8). Therefore, Tyshawn did not waive his right against self-incrimination or his right to counsel, either orally or in writing.

At the suppression hearing, the State's only witness was Detective Ballman. The State did not ask Ballman anything regarding if or how he advised Tyshawn of his rights, or whether Ballman ensured that Tyshawn understood those rights and entered a knowing, intelligent, and voluntary waiver. (5/30/2012 T.pp.5-15). The State simply had Detective Ballman identify the State's exhibits of the video recording and transcript of the interrogations. (5/30/2012 T.pp.14). The State's only question for Ballman was "Did you have any reason to believe that these individuals did not understand their rights or they were not making voluntary statements?" (5/30/2012 T.p.14). Ballman answered "no," and the State moved for the exhibits to be entered into evidence and rested "under 2933.81." (5/30/2012 T.pp.14-15; State's Ex.3(A), 3(B), 4(A), 4(B), 4(C)). The State did not meet its burden of proof at the suppression hearing.

This Court should recognize that Tyshawn did not knowingly, intelligently, and voluntarily waive his *Miranda* rights before he provided statements to law enforcement during his custodial interrogation, and that the First District improperly conflated its *Miranda* analysis with the presumption and burden shift contained in R.C. 2933.81(B). That Tyshawn's interrogation was electronically recorded has no bearing on the fact that his statements are inadmissible under *Miranda*, and should have been suppressed. This Court must hold that the General Assembly cannot enact a law that alters the long-settled constitutional requirement that a suspect in a custodial interrogation be properly advised of his *Miranda* rights, and that the State has the burden to prove that he knowingly, intelligently, and voluntarily waived those rights before the statements may be used against him. U.S. Constitution, Article VI, Section 2; Fifth and Fourteenth Amendments to the U.S. Constitution *Edwards* at 38; *Miranda* at 475.

Conclusion

The statutory presumption of voluntariness in R.C. 2933.81(B) is unconstitutional because it denies the special considerations constitutionally due to children during interrogation. This Court should recognize that the application of R.C. 2933.81(B) to a child subject cannot pass constitutional muster, and hold that R.C. 2933.81(B) violates due process when applied to a child. Additionally, R.C. 2933.81(B) does not affect the constitutional requirement that a suspect knowingly, intelligently, and voluntarily waive his *Miranda* rights before his custodial statements may be used against him. Accordingly, this Court should 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,

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Certificate of Service

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT TYSHAWN BARKER was forwarded by regular U.S. Mail this 26th day of May, 2015 to the office of Rachel L. Curran, Assistant Hamilton County Prosecutor, 230 East 9th Street, Suite 4000 Cincinnati, Ohio 45202.

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Assistant State Public Defender

Counsel for Tyshawn Barker

#441568

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, PLAINTIFF-APPELLEE,	:	Case No. 2014-1560
vs.	:	ON APPEAL from the Hamilton County Court of Appeals
TYSHAWN BARKER, DEFENDANT-APPELLANT.	:	First Appellate District C.A. Case No. C 1300214

APPENDIX TO MERIT BRIEF OF APPELLANT TYSHAWN BARKER

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

TYSHAWN BARKER,
Defendant-Appellant.

Case No. 14-1560

On Appeal from the Hamilton County Court of Appeals
First Appellate District

C.A. Case No. C 1300214

Notice of Appeal of Defendant-Appellant Tyshawn Barker

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Notice of Appeal of Defendant-Appellant Tyshawn Barker

Tyshawn Barker hereby gives notice of appeal to the Supreme Court of Ohio from the Journal Entry and Opinion of the Hamilton County Court of Appeals, First Appellate District, entered in the Court of Appeals Case No. C 1300214 on July 25, 2014.

This case involves a felony-level offense, a substantial constitutional question, and is of public or great general interest.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing **Notice of Appeal 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.

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Counsel for Tyshawn Barker

#426016

ENTERED
JUL 25 2014

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,	:	
vs.	:	*JUDGMENT ENTRY.*
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.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

ENTERED
MAR 14 2013

date: 02/27/2013
code: GJEI
judge: 109

Judge: NORBERT A NADEL

NO: B 1107595-C

STATE OF OHIO
VS.
TYSHAWN BARKER

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **PETER ROSENWALD** on the **27th** day of **February 2013** for sentence.
The court informed the defendant that, as the defendant well knew, the defendant on a plea of no contest had been found guilty of the offense(s) of:
count 1: AGGRAVATED MURDER WITH SPECS #6 & #7 (SPEC #1 NOLLIED RPA), 2903-01A/ORCN,SF
count 2: AGGRAVATED MURDER WITH SPECS #6 & #7 (SPEC #1 NOLLIED RPA), 2903-01B/ORCN,SF
count 4: AGGRAVATED MURDER WITH SPEC #9 (SPEC #10 DISMISSED) (SPECS #2 & #8 NOLLIED RPA), 2903-01A/ORCN,SF
count 5: AGGRAVATED MURDER WITH SPEC #10 (SPEC #11 DISMISSED) (SPECS #2 & #9 NOLLIED RPA), 2903-01B/ORCN,SF
count 7: AGGRAVATED ROBBERY WITH SPECS #5 & #6, 2911-01A1/ORCN,F1
count 8: AGGRAVATED ROBBERY WITH SPEC #5 (SPEC #6 DISMISSED), 2911-01A1/ORCN,F1
count 9: TAMPERING WITH EVIDENCE WITH SPEC #3, 2921-12A1/ORCN,F3
count 10: TAMPERING WITH EVIDENCE WITH SPEC #3, 2921-12A1/ORCN,F3
count 12: TAMPERING WITH EVIDENCE WITH SPEC #3, 2921-12A1/ORCN,F3
count 3: CONSPIRACY WITH SPECIFICATIONS, 2923-01A2/ORCN, DISMISSAL/NOLLE RPA
count 6: CONSPIRACY WITH SPECIFICATIONS, 2923-01A2/ORCN, DISMISSAL/NOLLE RPA

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

D101304413

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 02/27/2013
code: GJEI
judge: 109

Judge: NORBERT A NADEL

NO: B 1107595-C

STATE OF OHIO
VS.
TYSHAWN BARKER

JUDGMENT ENTRY: SENTENCE: INCARCERATION

count 1: CONFINEMENT: LIFE IMPRISONMENT IN THE DEPARTMENT OF CORRECTIONS WITH PAROLE ELIGIBILITY AFTER SERVING TWENTY (20) YEARS OF IMPRISONMENT
CONFINEMENT ON SPECIFICATION #7: 3 Yrs DEPARTMENT OF CORRECTIONS
TO BE SERVED CONSECUTIVELY AND PRIOR TO THE SENTENCE IMPOSED IN UNDERLYING OFFENSE IN COUNT #1.

count 4: CONFINEMENT: LIFE IMPRISONMENT IN THE DEPARTMENT OF CORRECTIONS WITH PAROLE ELIGIBILITY AFTER SERVING TWENTY (20) YEARS OF IMPRISONMENT
CONFINEMENT ON SPECIFICATION #9: 1 Yrs DEPARTMENT OF CORRECTIONS
TO BE SERVED CONSECUTIVELY AND PRIOR TO THE SENTENCE IMPOSED IN UNDERLYING OFFENSE IN COUNT #4.

count 7: CONFINEMENT: 3 Yrs DEPARTMENT OF CORRECTIONS
count 8: CONFINEMENT: 3 Yrs DEPARTMENT OF CORRECTIONS
count 9: CONFINEMENT: 1 Yrs DEPARTMENT OF CORRECTIONS
count 10: CONFINEMENT: 1 Yrs DEPARTMENT OF CORRECTIONS
count 12: CONFINEMENT: 1 Yrs DEPARTMENT OF CORRECTIONS

SPECIFICATION #6 TO COUNT #1 IS MERGED WITH SPECIFICATION #7 TO COUNT #1 FOR THE PURPOSE OF SENTENCING.

COUNT #2 IS MERGED WITH COUNT #1 FOR THE PURPOSE OF SENTENCING.

SPECIFICATIONS #6 AND #7 TO COUNT #2 ARE MERGED WITH SPECIFICATION #7 TO COUNT #1 FOR THE PURPOSE OF SENTENCING.

COUNT #5 IS MERGED WITH COUNT #4 FOR THE PURPOSE OF SENTENCING.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 02/27/2013
code: GJEI
judge: 109

Judge: NORBERT A NADEL

NO: B 1107595-C

STATE OF OHIO
VS.
TYSHAWN BARKER

JUDGMENT ENTRY: SENTENCE: INCARCERATION

SPECIFICATION #10 TO COUNT #5 IS MERGED WITH SPECIFICATION #9 TO COUNT #4 FOR THE PURPOSE OF SENTENCING.

SPECIFICATIONS #5 AND #6 TO COUNT #7 ARE MERGED WITH SPECIFICATION #7 TO COUNT #1 FOR THE PURPOSE OF SENTENCING.

SPECIFICATION #5 TO COUNT #8, SPECIFICATION #3 TO COUNT #9, SPECIFICATION #3 TO COUNT #10, AND SPECIFICATION #3 TO COUNT #12 ARE MERGED WITH SPECIFICATION #9 TO COUNT #4 FOR THE PURPOSE OF SENTENCING.

THE SENTENCE IN SPECIFICATION #9 TO COUNT #4 IS TO THE SERVED CONSECUTIVELY TO THE SENTENCE IMPOSED IN SPECIFICATION #7 TO COUNT #1.

THE SENTENCES IN COUNTS #1, #4, #7, #8, #10, AND #12 ARE TO BE SERVED CONCURRENTLY WITH EACH OTHER.

THE SENTENCE IN COUNT #9 IS TO BE SERVED CONSECUTIVELY TO THE SENTENCES IMPOSED IN COUNTS #1, #4, #7, #8, #10, AND #12.

THE TOTAL AGGREGATE SENTENCE IS TWENTY FIVE (25) YEARS TO LIFE IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR FIVE HUNDRED ONE (501) DAYS TIME SERVED.

THE DEFENDANT IS TO PAY THE COURT COSTS.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 02/27/2013
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STATE OF OHIO
VS.
TYSHAWN BARKER

JUDGMENT ENTRY: SENTENCE: INCARCERATION

INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE UNITED STATES OF AMERICA
ARTICLE VI. MISCELLANEOUS PROVISIONS

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USCS Const. Art. VI, Cl 2

Cl 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

*** Current through PL 114-11, approved 4/30/15 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II. CRIMINAL PROCEDURE
CHAPTER 223. WITNESSES AND EVIDENCE

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18 USCS § 3501

§ 3501. Admissibility of confessions [Caution: In Dickerson v United States (2000, US) 530 US 428, 147 L Ed 2d 405, 120 S Ct 2326, 2000 US LEXIS 4305, 68 USLW 4566, the Supreme Court held that Congress did not have constitutional authority to supersede Miranda v. Arizona (1966, US) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 1966 US LEXIS 2817, by enactment of subsections (a) and (b) this section.]

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall

not be inadmissible solely because of delay in bringing such person before a magistrate [magistrate judge] or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 5 (HB 47)

Title 29: Crimes -- Procedure
Chapter 2933: Peace Warrants; Search Warrants
Miscellaneous

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ORC Ann. 2933.81 (2015)

§ 2933.81 Electronic recording of custodial interrogations; presumption that recorded statements are voluntary.

(A) As used in this section:

(1) "Custodial interrogation" means any interrogation involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider self to be in custody, beginning when a person should have been advised of the person's right to counsel and right to remain silent and of the fact that anything the person says could be used against the person, as specified by the United States supreme court in *Miranda v. Arizona(1966), 384 U.S. 436,* and subsequent decisions, and ending when the questioning has completely finished.

(2) "Detention facility" has the same meaning as in *section 2921.01 of the Revised Code.*

(3) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation.

(4) "Law enforcement agency" has the same meaning as in *section 109.573 of the Revised Code.*

(5) "Law enforcement vehicle" means a vehicle primarily used by a law enforcement agency or by an employee of a law enforcement agency for official law enforcement purposes.

(6) "Local correctional facility" has the same meaning as in *section 2903.13 of the Revised Code.*

(7) "Place of detention" means a jail, police or sheriff's station, holding cell, state correctional institution, local correctional facility, detention facility, or department of youth services facility. "Place of detention" does not include a law enforcement vehicle.

(8) "State correctional institution" has the same meaning as in *section 2967.01 of the Revised Code.*

(9) "Statement" means an oral, written, sign language, or nonverbal communication.

(B) All statements made by a person who is the suspect of a violation of or possible violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03, or an attempt to commit a violation of *section 2907.02 of the Revised Code* during a custodial interrogation in a place of detention are presumed to be voluntary if the statements 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. There shall be no penalty against the law enforcement agency that employs a law enforcement officer if the law enforcement officer fails to electronically record as required by this division a custodial interrogation. A law enforcement officer's failure to electronically record a custodial interrogation does not create a private cause of action against that law enforcement officer.

(C) A failure to electronically record a statement as required by this section shall not provide the basis to exclude or suppress the statement in any criminal proceeding, delinquent child proceeding, or other legal proceeding.

(D) **(1)** Law enforcement personnel shall clearly identify and catalog every electronic recording of a custodial interrogation that is recorded pursuant to this section.

(2) If a criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded, law enforcement personnel shall preserve the recording until the later of when all appeals, post-conviction relief proceedings, and habeas corpus proceedings are final and concluded or the expiration of the period of time within which such appeals and proceedings must be brought.

(3) Upon motion by the defendant in a criminal proceeding or the alleged delinquent child in a delinquent child proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the person be preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and habeas corpus proceedings.

(4) If no criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded pursuant to this section, law enforcement personnel are not required to preserve the related recording.