Supreme Court of Ohio Clerk of Court - Filed July 15, 2015 - Case No. 2014-1560

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2014-1560
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
TYSHAWN BARKER	:	Court of Appeals Case Number C-130214
Defendant-Appellant	:	

MERIT BRIEF OF STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

On October 16, 2011, Cincinnati Police got a 911 call from an eyewitness to a shooting. (T.p. 14).[1] The caller had heard shots, looked out her window, and saw three teenage male blacks wearing dark clothing and white gloves. (T.p. 54). They were laughing and walking southbound on nearby train tracks. (T.p. 14, 52-53). The three briefly came back to a body lying on the tracks, and then walked away again. (T.p. 53).

When police responded to the scene, they found the female victim, who was already dead. (T.p. 14-15). Her clothing had been rifled, as if someone had gone through her pockets. (T.p. 15). The girl had suffered multiple gunshot wounds to her face and head, as well as one wound to her back. (T.p. 16).

A Cincinnati District Four officer who was on scene told the homicide investigators that there had been a shooting two days earlier, and that the victim might have been involved. (T.p. 16). Police had been given a description of a female matching the victim, who was seen fleeing from the shooting two days earlier. (T.p. 17). Police soon confirmed the seventeen-year-old victim was Carrielle Conn. (T.p. 18).

The previous shooting had occurred on October 14, 2011, at the home of Samuel Jefferies on Greenwood Avenue. (T.p. 28). Jefferies was the boyfriend of Lakeshia Prince, who is Dequantez Nixson's mother. (T.p. 28). Prince had recently been arrested for a felonious assault and domestic violence charge after she tried to run Jefferies over with her car. (T.p. 29). Nixson was present during that incident and planned to shoot Jefferies as payback for getting his mother arrested. (T.p. 29-30, 36, 47).

While Nixson and his little brother, Tyshawn Barker, waited in a stairwell, Brendan Washington and Carrielle Conn approached Jefferies' apartment, waited until a man answered

[1] The following references to the transcript are from the Juvenile Court hearing on November 16, 2011.

the door, and shot him. (T.p. 22, 30-31, 36-38, 45-47, 67). Rudell Englemon was a friend of Jefferies, and was at his apartment that day. (T.p. 29). He had answered the door. (T.p. 31-32). As the four teens ran, Nixson saw they had shot the wrong person. (T.p. 31, 36-37).

Later, the group was concerned that Conn was snitching about Englemon's shooting. (T.p. 24, 36, 44). Nixson called Conn and lured her out of her house. (T.p. 34, 44). While walking along some nearby train tracks, Washington shot Conn from behind, then fired more shots while she was on the ground. (T.p. 22, 34). The gun was passed to Nixson and Barker, and they all pulled the trigger. (T.p. 22-23, 34, 69).

In investigating Conn's homicide, police first interviewed Nixson. His mother was present at the Englemon shooting, and had identified Conn. (T.p. 18). Nixson had a red and black cell phone when he was interviewed. (T.p. 20). He had stolen it from Conn during the murder, and switched the SIM card with his own. (T.p. 20-21). Nixson had been the last person to call Conn before she was killed. (T.p. 22). He said the gun did not fire when it was passed to him. (T.p. 23).

Washington's account of the murder was similar to Nixson's and Barker's, but he claimed that Nixson shot Conn in the back, and said when the gun was passed to him, it didn't work. (T.p. 43-44). Washington also admitted he was at the door during the Greenwood murder, but claimed Conn fired the shot. (T.p. 45).

Barker explicitly admitted that he shot Conn while she was on the ground. (T.p. 34-35).

While fleeing into the woods after Conn's murder, the group emptied the shell casings from the gun. (T.p. 25). They wore gloves to avoid leaving fingerprints on the gun, or having gunshot residue on their hands. (T.p. 26, 35). The only physical evidence police recovered were the bullets retrieved from Conn's body. (T.p. 56).

On October 18, 2011, Cincinnati Homicide Detective Kurt Ballman filed a complaint alleging that Tyshawn Barker was delinquent for committing the aggravated murder of Carrielle Conn, who was then seventeen years old. (11/10085 T.d. 1). Six days later, Ballman filed a complaint alleging that Barker was delinquent for committing the murder of Rudell Englemon. (11/10303 T.d. 1). The State moved to relinquish jurisdiction over both cases. (11/10085 and 11/10303 T.d. 4). On November 16, 2011, after a hearing, the court found probable cause for both charges. (11/10085 T.d. 8; 11/10303 T.d. 10). Four days later, the court held a hearing to determine Barker's amenability to the juvenile system. Finding that the factors in favor of bindover outweighed the factors against bindover, the court transferred the charges for criminal prosecution. (11/10085 T.d. 9; 11/10303 T.d. 11).

On December 1, 2011, a Hamilton County Grand Jury indicted Barker for two counts of aggravated murder with capital non-death specifications, two counts of aggravated murder, and two counts of conspiracy. (T.d. 1). These counts all had witness and firearm specifications attached. The Grand Jury also indicted Barker for two counts of aggravated robbery with firearm specifications, and three counts of tampering with evidence with firearm possession specifications. (T.d. 1).

Barker filed a motion to suppress his statement before the trial court. (T.d. 18). At the motion to suppress, the court heard evidence that Barker was read a rights notification form and signed it before his interview shortly after midnight on October 18, 2011. (T.p. 14;[2] State's Ex. 8). Detective Kurt Ballman testified that he had no reason to believe that Barker did not understand his rights, or that he was not making a voluntary statement. (T.p. 14). Barker's interview was recorded by audio and video, and these recordings were entered into evidence.

[2] All references to the transcript are from the hearing on May 30, 2012, unless otherwise noted.

(T.p. 10; State's Ex. 3A and 3B). Transcripts of the interviews were also admitted at the motion to suppress hearing. (T.p. 12; State's Ex. 4A-4C). The court denied the motion, without entry.

Barker entered a no contest plea to the charges. (T.d. 68). The court found Barker guilty and sentenced him to an aggregate term of twenty-five years' to life incarceration. (T.d. 69, 72).

Barker appealed to the First District Court of Appeals. Originally, he only challenged his bindover for trial as an adult. Eventually though, appellate counsel filed a supplemental brief challenging the court's denial of Barker's motion to suppress. In her brief of Barker's direct appeal, counsel made no claim that the statute challenged herein, R.C. 2933.81, was unconstitutional in any way. (Supplemental Merit Brief of Tyshawn Barker). Counsel merely argued that the presumption created by R.C. 2933.81 only related to whether police have coerced a defendant into making a statement, and that courts still must determine whether one knowingly and intelligently waived his or her rights. (Supplemental Merit Brief of Tyshawn Barker, p.8). Counsel claimed that Barker had not knowingly, voluntarily, and intelligently waived his rights.

In its decision overruling Barker's claim, the First District Court of Appeals did not apply R.C. 2933.81 to avoid considering whether Barker had knowingly, intelligently, and voluntarily waived his *Miranda* rights. The First District noted the presumption that Barker's statement was voluntary, but went on to review the totality of the circumstances surrounding his interrogation by police. The First District concluded that the trial court's finding that Barker had voluntarily, knowingly, and intelligently waived his *Miranda* rights was supported by the record.

In his appeal to this Court, Barker raises two claims: 1) the statutory presumption of voluntariness provided in R.C. 2933.81 violates the due process rights of children, and 2) even if there is a statutory presumption of voluntariness, courts still must determine if the defendant has validly waived his *Miranda* rights. Neither claim is properly before this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: BARKER WAIVED HIS CLAIM THAT THE PRESUMPTION OF VOLUNTARINESS CREATED BY R.C. 2933.81 IS UNCONSTITUTIONAL, AND HIS REQUEST FOR A RULING ON THIS ISSUE BY THE COURT IS MERELY A REQUEST FOR AN ADVISORY OPINION BECAUSE THE STATUTORY PRESUMPTION WAS NOT APPLIED BY THE TRIAL COURT. MOREOVER, THE STATUTORY PRESUMPTION CREATED BY R.C. 2933.81 IS CONSTITUTIONAL.

Barker failed to raise a due process claim in the First District Court of Appeals and cannot pursue it now. Even if Barker's claim is reviewable, his request for this Court to rule on the constitutionality of R.C. 2933.81 is tantamount to a request for an advisory opinion – the trial court never applied the presumption to Barker's statement when it ruled on his motion to suppress, and thus, Barker was not prejudiced by the statutory presumption.

Barker Waived Review of R.C. 2933.81's Constitutionality

Barker did not raise the issue of whether R.C. 2933.81 is unconstitutional in the trial court or the court of appeals. (T.d. 18; Supplemental Merit Brief of Tyshawn Barker filed on May 30, 2014). "Since appellant chose not to expand the scope of review in the trial court or in the court of appeals, it is now too late to do so." *Ridgley, Inc. v. Bd. of Zoning Appeals, City of Wadsworth*, 28 Ohio St. 3d 357, 359-60, 503 N.E.2d 1036, 1038 (1986).

Barker's claim is barred by *res judicata* because he did not raise it in the trial court or before the First District Court of Appeals, but could have done so. "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment." *State v. Saxon*, 109 Ohio St.3d 176, 2006–Ohio–1245, 846 N.E.2d 824, ¶16–17, quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *see also State v. Reynolds*, 79 Ohio St.3d 158, 161, 1997-

Ohio-304, 679 N.E.2d 1131. The doctrine of *res judicata* promotes principles of finality and judicial economy by preventing endless relitigation of an issue upon which there was already a full or fair opportunity to be heard. *Saxon* at ¶18. Therefore, where a party had the opportunity to assert specific arguments in an earlier appeal but he or she failed to seize that opportunity, the doctrine of *res judicata* bars that party from asserting those arguments in the current appeal. *State v. Jama*, 10th Dist. No. 11AP–210, 2012-Ohio-2466, ¶45.

<u>This Court Should Not Give an Advisory Opinion</u>

Even if this Court wants to review the constitutionality of R.C. 2933.81, Barker's case does not bring the presumption created by the statute properly before it. The record does not show that the trial court applied R.C. 2933.81 to its review of Barker's statement. In rendering its decision overruling Barker's motion to suppress, the court noted that "based upon the evidence . . .we find that the statements made by the defendants were voluntarily made by the defendants after being properly advised of their rights which the court finds they understood. The statements were completely voluntary and for those reasons the court denies the motion." (June 13, 2012 T.p. 2-3). The trial court applied a totality of the circumstances test, just as Barker claims it should. Barker even acknowledges that the trial court did not apply R.C. 2933.81's presumption in his case. (Merit Brief of Appellant Tyshawn Barker, p.8).

And contrary to Barker's assertion, the First District Court of Appeals did not apply R.C. 2933.81 to avoid considering whether Barker had knowingly, intelligently, and voluntarily waived his *Miranda* rights. Instead, the court used a totality of the circumstances test, saying:

> 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.

State v. Barker, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245, ¶13.

Barker cannot appeal for claimed error that never occurred in his case, and "it is well-settled that this court will not indulge in advisory opinions." *Egan v. Nat'l Distillers & Chem. Corp.*, 25 Ohio St. 3d 176, 178, 495 N.E.2d 904, 906 (1986); *Cascioli v. Cent. Mut. Ins. Co.*, 4 Ohio St. 3d 179, 183, 448 N.E.2d 126, 129 (1983), citing *Armco, Inc. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 401, 406, 433 N.E.2d 923; *see also N. Canton v. Hutchinson*, 75 Ohio St.3d 112, 1996-Ohio-170, 661 N.E.2d 1000. Since R.C. 2933.81 was not applied to the trial court's review of Barker's statement, this Court is "bound not to consider [his] challenge to it." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 84, 116 Ohio St. 3d 468, 485, 880 N.E.2d 420, 439. And Barker cannot rely on *In re: M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), as support for this Court's review – unlike the juvenile M.D., Barker's rights and interests are not at stake, because the presumption of voluntariness was not applied to review his statement.

R.C. 2933.81's Presumption of Voluntariness is Constitutional

In *Dickerson v. U.S.*, the Supreme Court noted that, "[N]o constitutional rule is immutable, and the sort of refinements made by [certain] cases are merely a normal part of constitutional law." *Dickerson v. U.S.,* 530 U.S. 428, 429, 120 S.Ct. 2326, 2328 (2000). And although *Dickerson* seemingly made the *Miranda* rule immutable, the lengthy history of jurisprudence in the area of constitutional law shows that it is not.

In *Miranda,* the United States Supreme Court intended to create simple "procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966). The simple test promulgated by the Court required police to warn a defendant before questioning that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Id*. The Court opined that a defendant may

waive these rights if the waiver is knowingly, intelligently made. *Id*. The State bears the burden of proving that a valid waiver has been made before admitting any statement of a defendant. *Id*. at 475, 479, 86 S.Ct. at 1628, 1630.

The concerns of the *Miranda* court revolved around police violence and coercion, which undermined the voluntary nature of a defendant's statement. *Miranda*, at 445, 86 S.Ct. at 1612-1613. The Court noted that "[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado." *Id*. But with the recent advent of videotaped interviews, comprised after advisement of *Miranda* rights, courts can achieve "a proper limitation upon custodial interrogation." *Id*. at 447.

Interrogation no longer really takes place in privacy. *Compare id*. at 448. The video-recorded interview prevents secrecy, and fills the "gap in our knowledge as to what in fact goes on in the interrogation rooms." *Id*. A video recording preserves the opportunity for "impartial observers to guard against intimidation or trickery." *Id*. at 461. With the implementation of R.C. 2933.81, the concerns *Miranda* meant to address are not as great as they once were, and the resulting burden on the State to demonstrate that a defendant's statement was voluntary can be lessened slightly.

With the passage of R.C. 2933.81, the Ohio legislature has attempted to enhance its citizens' Fifth Amendment rights against compelled self-incrimination. As Barker knows, "The benefits of recording custodial interviews are numerous – including increased reliability and efficiency – and largely uncontested today. More importantly, recording makes it easier for judges to identify false confessions by . . .providing judges with a more objective means of assessing the veracity of a defendant's confession." Dep't of Justice, New Department Policy Concerning Electronic Recording of Statements, 128 Harv. L.Rev. 1552, 1556 (2014). As was

noted by S. Michael Lear, "The passage of SB 77 is certainly cause for celebration by the defense bar, as well as by citizens of the State of Ohio." *Ohio's Senate Bill 77: A National Model of Reform*, The Vindicator, Ohio Association of Criminal Defense Lawyers, p.10 (Spring 2011).

In *Miranda*, the Court recognized that there is a need to "maintain a 'fair state-individual balance.'" *Id*. at 460. When police video their entire custodial interrogation of a defendant, thereby providing an avenue for complete scrutiny of their interview technique, they relinquish their previous control of the voluntariness review. And with such videotaping of a defendant's interrogation, the State provides significant evidence for the courts' and the public's review. *See Miranda*, at 475, 86 S.Ct. at 1628. The burden of proof can therefore shift to the defendant to show that his statement is not voluntary without violating due process. "In its most basic definition, due process is the right to be heard in a meaningful fashion." *State ex rel. DeWine v. Special Comm. Convened Pursuant to R.C. 3.16 Concerning Sciortino*, 141 Ohio St. 3d 329, 2014-Ohio-4967, 23 N.E.3d 1171, ¶ 5. Because R.C. 2933.81 only applies a presumption of voluntariness to videotaped statements, defendants who wish to challenge the admission of their statements still can be heard in a meaningful fashion.

When properly conducted, the process espoused in R.C. 2933.81 effectively secures a defendant's privilege against self-incrimination. Nothing in R.C. 2933.81 removes the *Miranda* requirement that police advise defendants of their constitutional rights before custodial interrogation. The very definition of "custodial interrogation" says it begins "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* . . .and subsequent decisions." R.C. 2933.81(A)(1).

From this definition alone, it is clear that the police interrogation process proposed by the legislature assumes that a defendant is advised of his *Miranda* rights before questioning.

In this case, the State presented evidence during the motion to suppress that Barker was advised of his rights, that he appeared to understand his rights, and that his entire interview was video recorded. Once this was shown, shifting the burden of proof at the motion to suppress from the State to the defendant under R.C. 2933.81(B) did not violate Barker's privilege against compelled self-incrimination.

The *Miranda* Court could not imagine the potential alternatives for protecting the privilege against self-incrimination, but the Ohio legislature now has. With the advent of technological advances, so must the law adapt. The Court, in *Miranda*, foresaw the crux of the argument in this case when it said:

> [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Miranda, supra, at 467.

R.C. 2933.81 "complies with the requirement that a legislative alternative to *Miranda* be equally as effective in preventing coerced confessions." *See Dickerson v. U.S.,* 530 U.S. 428, 441, 120 S.Ct. 2326, 2335 (2000). The Court must find that R.C. 2933.81 advances the public interest by thoroughly protecting both individual and State rights, and overrule Barker's first proposition of law.

<u>Proposition of Law No. 2</u>: THE PRESUMPTION OF VOLUNTARINESS CREATED BY R.C. 2933.81 IN VIDEOTAPED INTERVIEWS CAN BE OVERCOME BY A JUVENILE DEFENDANT THROUGH PROOF THAT HIS AGE RENDERED HIS WAIVER OF *MIRANDA* RIGHTS INVALID. IF BARKER HAD NOT KNOWINGLY WAIVED HIS *MIRANDA* RIGHTS, THE RESULT IN THIS CASE WOULD HAVE BEEN DIFFERENT.

Barker claims that R.C. 2933.81(B) places an undue burden on a child by eliminating the requirement that the State prove that the child's statement was voluntarily made. But, although R.C. 2933.81(B) creates a presumption that a videotaped custodial interrogation is voluntary, the age of a defendant is still relevant for courts to consider during a motion to suppress.

This Court has previously said that "there 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." *See State v. Edwards*, 49 Ohio St. 2d 31, 39, 358 N.E.2d 1051, 1058 (1976) *cert. granted, judgment vacated sub nom. Edwards v. Ohio,* 438 U.S. 911, 98 S. Ct. 3147, 57 L. Ed. 2d 1155 (1978). But, this does not bar R.C. 2933.81's presumption of voluntariness when police have videotaped a defendant's statement. The inquiries of waiver and voluntariness – each previously using a totality of the circumstances test – are related but distinct. Moreover, R.C. 2933.81 does not require the Court to presume waiver of one's rights from a silent record; as was stated in the first proposition of law, the statute contemplates police properly advising defendants of their *Miranda* rights.

In determining whether a confession was voluntary, the reviewing court must consider the totality of the circumstances, including the defendant's "age, mentality, and prior criminal experience *** the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Edwards*, *supra*, at paragraph two of the syllabus. Courts should also consider whether the accused has received his or her *Miranda* rights. *State v. Evans*, 144 Ohio App.3d 539, 560-561, 760 N.E.2d 909 (1st Dist.

2001). Nothing in R.C. 2933.81 alleviates a court's responsibility to review these same factors when deciding whether the presumption of voluntariness has been overcome by a defendant.

Whether or not police properly advised a defendant of his rights under *Miranda* must be viewed from the totality of the circumstances. *State v. Taylor*, 144 Ohio App.3d 255, 261, 759 N.E.2d 1281, 1285 (2nd Dist. 2001), *citing State v. Clark*, 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 854 (1988). "The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *State v. Ulery*, 4th Dist. Athens No. 07CA28, 2008-Ohio-2452, *quoting Duckwoth v. Eagan*, 492 U.S. 195, 202-203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989).

A statement made after valid *Miranda* warnings is only involuntary if the evidence shows that the suspect's will was overcome due to coercive police conduct. *State v. Dailey*, 53 Ohio St.3d 88, 91-92, 559 N.E.2d 459 (1990), *citing Colorado v. Connelly*, 479 U.S. 157, 170, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). "[I]n order for a confession to be considered involuntary and thus violative of the Due Process Clause, it must have been the product of state action." *State v. Wiles*, 59 Ohio St. 3d 71, 81, 571 N.E.2d 97 (1991), *citing Colorado v. Connelly*, at 165. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. *Colorado v. Connelly*, at 166. Such constitutional violations should also be deterred by the videotaping of police interviews.

Application of R.C. 2933.81 to Juveniles and Barker

Barker fails to show that that he is in need of greater protection against coercion than R.C. 2933.81 affords him due to his membership in the juvenile class. Nothing about Barker's age shows that he was *per se* coerced when he was interviewed by police. Moreover, the concerns raised by Barker in his brief should be apparent in any videotaped interview of any

child. That a juvenile has limited language ability, does not understand his or her rights, or possesses inadequate decision-making skills should be more discernible by a judge with the aid of a video recording of his or her interview. Likewise, a juvenile's overwhelming willingness to comply with authority and perhaps author a false confession should be far more apparent to a fact-finder who can view the juvenile's demeanor, and hear his or her tone of voice on a video recording. The "special care" required for scrutinizing a juvenile's confession should be furthered by R.C. 2933.81, not hindered by it.

Moreover, nothing in the record shows that Barker's statement was "the product of ignorance of rights or of adolescent fantasy, fright or despair." *See In re: Gault*, 387 U.S. 1, 55, 87 S.Ct. 1428 (1967). On direct appeal, Barker claimed that he did not waive his *Miranda* rights because he did not possess the intellect to sufficiently understand them. But "evidence of low mental aptitude does not render a suspect incapable of waiving his *Miranda* rights and is only one factor to be considered." *State v. Bell*, 1st Dist. Hamilton No. C-140345, 2015-Ohio-1711, ¶ 38, citing *State v. Hill,* 64 Ohio St.3d 313, 318, 595 N.E.2d 884 (1992), also citing *Barker* at ¶ 13. And, although Barker complains that police did not ask him to demonstrate understanding of his rights, this is not required by *Miranda*. *See Edwards*, *supra*, at 39.

Regardless of which party bears the burden of proof in a motion to suppress, this Court should find that Barker's statement was knowingly, intelligently, and voluntarily given. Barker was advised of his *Miranda* rights, waived those rights, and was not coerced by police. His entire interview was video recorded, and reviewed by the trial court.

Here, suppressing Barker's statements serves no constitutional purpose. Barker has never alleged that he was coerced by police, and nothing in the record shows that he was coerced in any way. The court properly found that Barker's statements were voluntary. Barker was a

student in the tenth grade. (T.p. 30). He could read and write. (T.p. 31). When Barker was arrested, before his interview, he was with his family. (T.p. 33). Nothing in the record shows whether his parents advised Barker about the police or whether they attempted to accompany him into his interview. Although Barker was a juvenile, he was fifteen years old when interviewed. (T.p. 33). And, in this case, the court had the opportunity to review the recording of Barker's entire interview. (Transcript of June 13, 2012, p. 2).

Additionally, Barker was not incompetent – he understood police when he was questioned and understood the judge during his plea hearing. (Nov. 16, 2011 T.p. 63; Feb. 4, 2013 T.p. 15). From review of Barker's amenability report, it appears that his mental health was good, and that he possessed borderline intelligence. (Bindover Evaluation, p.6-7). He appeared to understand the purpose of Dr. Deardorff's examination. (Bindover Evaluation, p.5). Based on the entire record before the court, including the recordings admitted at the motion to suppress, it appears that Barker understood his *Miranda* rights.

Barker's statement was voluntarily made, even considering that he was a juvenile. The presumption of R.C. 2933.81 was not applied in this case, as the trial court applied a totality of the circumstances test to evaluate the voluntariness of Barker's statement. Moreover, the presumption of voluntariness does not violate due process when it is applied to juveniles.

CONCLUSION

Barker waived review of R.C. 2933.81's constitutionality, and *Miranda* does not prevent the legislature from devising new effective means of protecting individuals' Fifth Amendment rights against compelled self-incrimination. Because the court still can, and in this case did, consider the age of a juvenile in review of the voluntariness of a defendant's statement, R.C. 2933.81 does not violate due process. No matter how this Court rules on Barker's two propositions of law, the outcome of his proceedings will be the same. For all of these reasons, the judgement below should be affirmed.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief, by United States mail, addressed to Sheryl A. Trzaska, The Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel of record, and Lourdes M. Rosado and Marsha L. Levick, Juvenile Law Center, 1315 Walnut Street, 4th Floor, Philadelphia, PA 19107, and Steven A. Drizin, Center on Wrongful Convictions of Youth, Bluhm Legal Clinic, Northwestern University School of Law, 375 East Chicago Ave., Chicago, IL 60611, counsel for Amici Curiae, this __15th___ day of July, 2015.

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