

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 02-3423

In the Interest of Jerrell C. J.,
A person under the age of 17:

STATE OF WISCONSIN,
Petitioner-Respondent,
v.
JERRELL C. J.,
Respondent-Appellant-Petitioner

**NONPARTY BRIEF OF THE CHILDREN AND
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UNIVERSITY SCHOOL OF LAW'S BLUHM LEGAL
CLINIC, PROFESSOR EMERITA MARYGOLD S.
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INTRODUCTION

In the thirty years since this Court's decision in *Theriault v. State*, 66 Wis.2d 33 (1974), the "totality of the circumstances" test has failed to protect Wisconsin's children adequately from the police coercion inherent in custodial interrogations. Amici urge this Court to replace the "totality test" with the rule adopted by the Vermont Supreme Court and cited by the court of appeals in its opinion below. Ct. App. Op. ¶31 (quoting *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982)). This new rule would require that a juvenile's incriminating statements obtained during custodial interrogation are inadmissible unless, prior to questioning, the juvenile was given the opportunity to consult with an interested adult who was completely independent from the prosecution – e.g., a parent, legal guardian, or attorney – and who was informed of the juvenile's constitutional rights. *Id.*

There are at least four reasons why this rule should be adopted. First, numerous studies have shown that juveniles do not adequately understand their *Miranda* rights and the consequences of waiving them and that, in making decisions, they tend to comply with adult authority figures.

Second, new and emerging studies of the teenage brain based on brain scanning technologies which did not exist thirty years ago, demonstrate that the area of the brain which governs decision making, the weighing of risks and rewards, and the exercise of judgment is still developing into the late teen years and early twenties.

Third, in the last ten or fifteen years, largely as a result of new DNA technologies, evidence has emerged suggesting that juveniles may be at a higher risk than adults of falsely confessing when pressured by police. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post DNA Age*, 82 N.C. L. Rev. 891, 944 (2004)(documenting 40 proven juvenile confessions, including five from the infamous Central Park Jogger case). These dangers of

obtaining false confessions from juveniles have even been documented by the leading trainer of law enforcement in psychological interrogation techniques, John E. Reid and Associates. In a recent memo, Reid notes that juveniles “appear with some regularity in false confession cases” and urges graduates of its interrogation training, to “exercise extreme caution and care” when interrogating juveniles and administering their *Miranda* rights. John E. Reid and Associates, *False Confessions – The Issues*, Monthly Investigator’s Tips, available at: <http://www.reid.com/investigatortips.html?serial=1080839438473936>.

Finally, in the past thirty years, Wisconsin police officers and courts have failed to follow and enforce this Court’s warning in *Theriault* that failure “to call the parents for the purposes of depriving the juvenile of the opportunity to receive advice and counsel” will be considered “strong evidence” that coercion was used to elicit the juvenile’s statements. *Id.* at 48.

In light of these new developments, Amici urge this Court to replace the “totality test” with the *per se* rule discussed above. Such a bright-line rule will protect the constitutional rights of juvenile suspects, respect the constitutional rights of parents to participate in life-altering decisions involving their children, and give greater guidance to law enforcement and courts as to what is acceptable in conducting custodial interrogations.

Amici also urge this Court to require that police officers electronically record the entire custodial interrogations of juvenile suspects to prevent and expose false and coerced confessions and to enable fact-finders to make more accurate determinations of the voluntariness and reliability of juvenile statements.

ARGUMENT

I. THIS COURT SHOULD ADOPT A *PER SE* RULE EXCLUDING STATEMENTS OBTAINED FROM MINORS WHEN SUCH STATEMENTS ARE MADE WITHOUT PARENTAL, GUARDIAN, OR ATTORNEY CONSULTATION.

A. Children must have the opportunity to consult with an interested adult before police interrogate them.

Perhaps nowhere is a *per se* rule needed more than in the context of children caught in the maelstrom of a police interrogation. Numerous research studies have demonstrated that children under the age of 16 do not understand their *Miranda* rights as well as adults. Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Juveniles*, 32 Hofstra L. Rev. 463, 528-535 (Winter 2003). Recent studies suggest that children in this age range are less capable than adults of making long-term decisions because they discount the future more than adults do, and weigh more heavily the short-term consequences of decisions. Elizabeth S. Scott & Lawrence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 814-815 (Feb. 2003). Juveniles under 16 are also more likely than adults to make choices that reflect a propensity to comply with adult authority figures, such as confessing to the police rather than remaining silent. Thomas Grisso, Lawrence Steinberg et al, *Juvenile's Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, available online at: <http://www.mac-adoldev-juvjustice.org/page25.html>, at 25, 30.¹

¹Citing *State v. Griffin*, 823 A.2d 419, 431 (Conn. App. 2003), the State questions the reliability of the instrument used by Dr. Thomas Grisso to test whether juveniles understand *Miranda*. St. Br. at 13-15. But the *Griffin* trial and appellate courts ruled without the benefit of extensive evidence related to *Daubert*, including the scientific method on which the instrument is based, the demonstrated reliability and validity of the instrument, its general acceptance, and the fact that it has been

Furthermore, this psychosocial research is buttressed by emerging research into the structure and function of the teenage brain. Using new technologies like magnetic resonance imaging (MRI), scientists have found that the pre-frontal cortex – the area of the brain involved in nearly all “high-level cognitive tasks,” including decision-making and the ability to evaluate future consequences and weigh risks and rewards – does not develop fully until the late teens or early twenties. Elizabeth R. Sowell et al. *Mapping Continued Brain Growth, and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Post-Adolescent Brain Maturation*, 21 *J. Neurosci.* 8819, 8828 (2001).² This is the very part of the brain that juvenile suspects need to make the series of complex decisions, including whether to assert or waive their *Miranda* rights, asked of them during police interrogations.

These developmental immaturities greatly disadvantage children during police interrogations and underscore their need for adult guidance. Children need adult assistance because they often lack the emotional and mental capability to make fully informed decisions. See *Bellotti v. Baird*, 443 U.S. 622, 640 (1979)(upholding a state law requiring parental consent to a minor’s abortion, in part because a child under 18 will not or cannot make decisions that “take account of both immediate and long term consequences.”) Wisconsin law recognizes that children need such guidance by requiring that parents or guardians should have a say in a variety of significant decisions affecting their children. See Ct. App. Op. at ¶ 29 (citing state laws requiring parental consent for marriage, leasing a car,

extensively subject to peer review. Thomas Grisso, *Scary Law: Commentary on State v. Griffin*, 4 *Juvenile Correctional Mental Health Report* 33 (2004).

² More information about juvenile brain development, is available on the ABA’s Juvenile Justice Center’s website at <http://www.abanet.org/crimjust/juvjus/resources.html#brain>.

changing one's name, and having an abortion.).³ In this way, Wisconsin law not only protects children but respects well-established constitutional rights of parents to direct the care, control, and upbringing of their children. *H.L. v. Matheson*, 450 U.S. 398, 412 (1981)(parental notification abortion statute designed to “protect minors by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.”)

The decision to confess during an interrogation, by its very nature, requires maturity and sound judgment. It is a life-altering decision that carries with it potentially traumatic and permanent consequences. Those who confess, even if the confession is false, are likely to be detained, to face the most serious charges, to be convicted, and to receive the harshest sentences. See Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 472-491.

Because juveniles are less capable of making important decisions with such serious consequences, at least 13 states, according to the Court of Appeals' decision in this case, have adopted some form of a *per se* rule requiring the consultation of a parent or other interested adult. See Ct. App. Op., ¶ 28. Wisconsin should follow suit.

B. A *per se* rule is needed to guide law enforcement officers and lower courts.

The United States Supreme Court has recognized the benefit of bright-line rules to police officers and courts, stating that “*Miranda*’s holding has the virtue of informing

³ For an exhaustive list of similar state and federal laws, see also *Brief of Juvenile Law Center et al. as Amicus Curiae in Support of Respondent in Roper v. Simmons*, No. 03-633, filed in the United States Supreme Court on July 19, 2004, at 6-13, Appendix B1-32, available at: <http://www.abanet.org/crimjust/juvjus/simmons/childad.pdf>.

police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible. *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). These same benefits would follow from a rule guaranteeing children the right to consult with an interested adult during interrogations.

A rule is needed in this case because Wisconsin police officers have failed to heed this Courts' warning that failure to call parents would be seen as "strong evidence of coercion." A review of appellate court decisions suggests that the practice of excluding parents is widespread throughout the state. *See, e.g., In the Interests of C.W.*, 308 N.W.2d 772 (Wis. App. 1981)(Table)(12-year-old from Milwaukee); *State v. Campbell*, 321 N.W.2d 363 (Wis. App. 1982)(Table)(17-year-old from Forest County); *State v. Glotz*, 362 N.W.2d 179 (Wis. App.1984)(17-year-old from Lacrosse County); *R.E.W. v. State*, 397 N.W.2d 157 (Wis. App. 1986)(Table)(14-year-old from Rock County). The instant case is a perfect illustration of this pervasive practice. Here, a detective from the state's largest police department not only repeatedly denied Jerrell's requests, but he testified that in his 12 years he had "never" allowed a juvenile to speak to his parents because it might "stop the flow" and jeopardize his "control" of the interrogation. (55:32; 55:79). The trial court found that the detective's actions seemed to be "consistent with the policy of the Milwaukee Police Department" (52:21; App. 105).

A *per se* rule is also needed to bring clarity and consistency to Wisconsin confession law with regard to presence of parents or other interested adults. In rejecting *per se* rules in the past, courts have argued that the "totality of the circumstances" test gives judges the flexibility to weigh a multitude of factors in determining whether a juvenile "knowingly and intelligently" waived his constitutional rights and whether the juvenile's confession is voluntary. *See, e.g.,*

Fare, 442 U.S. at 725. But legal training does not teach judges to assess child development and how to weigh the factors that make children uniquely vulnerable during interrogations. Consequently, “when judges apply the totality of the circumstances test, they exclude only the most egregiously obtained confessions and then only haphazardly.” See Barry C. Feld, *Bad Kids* 118-119 (1999). See also Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?* 1 J.Ctr. for Child. & Cts. 151 (1999).

This same haphazard pattern has been followed by Wisconsin courts in *Therault* and the few published decisions on juvenile confessions since *Therault*. Compare *State v. Woods*, 345 N.W.2d 457, 479n.3 (1984)(16-year-old’s statement admitted despite fact that mother went to police station and was refused access to her son until after police obtained statements); *State v. Glotz*, 362 N.W.2d 179 (Wis. App. 1984)(upholding conviction of 17-year-old questioned without parent) with *State v. Bendlin*, 586 N.W.2d 700 (Wis. App. 1998)(affirming suppression of 17-year-old’s statements when detectives interrogated him only after his mother had left his hospital room). This pattern is also apparent when one compares the facts of *Therault* with those in the instant case. In *Therault*, the Court rejected a *per se* rule in a case involving a 17-year-old, who was AWOL from the Army, and who specifically told detectives that he did not want to consult with his grandmother. The instant case, however, involved a 14-year-old boy, who still resided with his parents, and who asked repeatedly to consult with them before confessing. Despite these obvious factual differences, the trial court below admitted Jerrell’s statement and the court of appeals affirmed. As a result of the inconsistent application of the totality test, it is unclear in Wisconsin whether the failure to call parents or other interested adults is “strong” evidence of coercion, “some” evidence of coercion, or no evidence of coercion at all.

As long as Wisconsin's police departments and courts continue to pay lip service to the need of children to consult with interested adults during police interrogations, Wisconsin's children will be in great jeopardy of making uninformed and impulsive decisions concerning their *Miranda* rights during police interrogations and of giving false and coerced confessions.

II. ELECTRONIC RECORDING SHOULD BE MANDATED FOR ALL INTERROGATIONS OF JUVENILES TO INCREASE THE RELIABILITY OF CONFESSIONS, PREVENT FALSE AND COERCED CONFESSIONS, AND TO PROMOTE INFORMED DECISION-MAKING.

Much of the difficulty in assessing the voluntariness of Jerrell's confession stems from the fact that it is impossible to reconstruct accurately the dynamics of what happened during Jerrell's interrogation. The trial judge himself suggested the remedy to this problem when he repeatedly remarked that he wished he had a videotape of the interrogation (50:109; 50:113). This reform is necessary to increase the reliability of children's confessions and is consistent with this Court's duty to ensure that "special care" is taken when children are interrogated.

A recording requirement is especially important for child suspects because psychological research has consistently found that "age is negatively related to accuracy, completeness, and consistency [of a child's statement], and [is] positively related to [a child's] suggestibility." Allison D. Redlich, Melissa Silverman, et al., *The Police Interrogation of Children and Adolescence*, p. 114, in Interrogations, Confessions, and Entrapment (G. Daniel Lassiter, ed. 2004). As children age, they continue to develop cognitive, social and emotional skills leading to "an increased ability to engage in hypothetical and logical decision-making, to reliably remember and report events, to extend their thinking into the future and consider the long-term consequences, and to

engage in advanced social-perspective taking.” *Id.* Juveniles who have yet to develop such faculties may have difficulty remembering and articulating what happened to them during the interrogation.

The extreme suggestibility of children and their eagerness to please adult authority figures also make recording a necessary safeguard against coerced or false confessions. See Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. Tol. L. Rev. 901 (1995). Although even mild insinuations can encourage children to voice what adults want to hear, children are often subjected to more coercive tactics, including interrupting their denials, false evidence ploys, and raised voices. Stephen J. Ceci, *Why Minors Accused of Serious Crimes Cannot Waive Counsel*, Court Review (Winter 2000), at 9. When such tactics -- some of which were used by the detective in this case -- are used to elicit confessions from children, they can produce coerced and false confessions. See A. Redlich & G. Goodman, *Taking responsibility for an act not committed: The influence of age and suggestibility*, 27 Law and Human Behavior 141-156 (April 2003)(in a clinical study, an overwhelming majority of teenagers complied with request to sign false confession when presented with false evidence of guilt).

Finally, the fact that juries treat evidence of a confession as more probative than nearly any other type of evidence, even if the confession is false and uncorroborated, underscores the need for a recording requirement. Drizin & Leo, *supra*, at 921-23, 960-61 (finding that 81% of false confessors who went to trial were wrongfully convicted despite fact that little or no other credible evidence supported their confessions). By allowing factfinders to make a more informed evaluation of the quality of the interrogation and the reliability of a defendant’s confession, recording will also enable them to make a more informed decision about what weight to place on confession evidence. *Id.* at 998.

CONCLUSION

Amici agree with the Court of Appeals' statement that the time has come for this Court "to tackle the false confession issue" and to revisit the merits of a per se rule. Ct. App. ¶ 32. This court should do so by 1) excluding all confessions taken from juvenile suspects where the juvenile was not given the opportunity to consult first with an informed and competent parent, attorney or guardian; and 2) requiring that police officers electronically record all custodial interrogations of juvenile suspects.

Dated this 6th day of August, 2004.

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I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2763 words.

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