RECEIVED
MAY 21 2012
CLERK
SUPREME COURT

FILED
MAY 21 2012
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2011-SC-00271-DG

N.C., A CHILD UNDER EIGHTEEN (18) — APPELLANT

V.

Appeal from Nelson Circuit Court
Hon. Charles C. Simms, Judge
Case No. 10-XX-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

****

BRIEF FOR APPELLANT

****

Respectfully submitted,

Robert K. Strong
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Ste. 302
Frankfort, Kentucky 40601
(502) 564-8006

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of this Brief for Appellant, first class mail, postage prepaid, on May 21, 2012 to Hon. John S. Kelley Jr., Nelson County Attorney, 202 E. Stephen Foster Ave., Bardstown, Kentucky 40004; Hon. Terry Geoghegan, Nelson Commonwealth Attorney, 116 E. Stephen Foster Ave., Bardstown, Kentucky 40004; Hon. Robert Heaton, Judge, Nelson County District Court, Justice Center, 200 County Plaza, Bardstown, KY 40004; Hon. Charles Simms, Judge, Nelson Circuit Court, Courthouse Annex, 209 W. High St., Hodgenville, Kentucky, 40004 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601. I also certify that the record was returned to the Supreme Court of Kentucky.

INTRODUCTION

N.C., a child under eighteen (18), was interrogated at school by an assistant principal and an armed school resource officer without being informed of his *Miranda*[1] rights, that he was free to leave, that he did not have to answer questions, that he had a right to an attorney, or that he could contact his mother (until after his incriminating statements were acquired). At the evidentiary hearing on the motion to suppress the statements, the assistant principal acknowledged that N.C. was not permitted to leave his office. However, the lower court found that N.C. was not in custody and concluded that N.C. was not entitled to the protections guaranteed under the Constitution. To the contrary, the statements were obtained in violation of N.C.'s federal and state constitutional rights. N.C. respectfully asks this Court to vacate the underlying judgment and remand the case to the district court with directions that the court order that N.C.'s statements be suppressed. U.S.Const. Amends V, VI, XIV; Ky.Const. § 2, 10, 11.

STATEMENT CONCERNING ORAL ARGUMENT

N.C. believes that oral argument would be beneficial in this case because of the novelty and complexity of the issues. Juveniles are frequently interrogated in schools across the Commonwealth and the unique science-based vulnerabilities of youth impact the custodial interrogation analysis. The United States Supreme Court recently addressed this impact in J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011). N.C. believes that oral argument would assist this Court to effectuate proper guidance on an issue facing juvenile courts routinely.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

Miranda v. Arizona, 384 U.S. 436, 444, (1966) ..... passim

U.S.Const. Amends. V, VI, XIV i

Ky.Const. § 2, 10, 11. i

STATEMENT CONCERNING ORAL ARGUMENT i

J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011) ..... passim

STATEMENT OF POINTS AND AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 3

N.C. WAS "IN CUSTODY" FOR PURPOSES OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN HE WAS INTERROGATED AT SCHOOL BY AN ASSISTANT PRINCIPAL AND AN ARMED SHERIFF DEPUTY. HIS STATEMENTS WERE THEREFORE INADMISSIBLE AND HIS ADJUDICATION MUST ACCORDINGLY BE REVERSED. 3

RCr 8.09 3

Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998) 3

Ornelas v. United States, 517 U.S. 690 (1996) 3

Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky.2007) 3

Commonwealth v. Neal, 84 S.W.3d 920 (Ky.App. 2002) 3

Welch v. Commonwealth, 149 S.W.3d 407, 410 (Ky. 2004) ..... passim

United States v. D.F., 63 F.3d 671, 683–84 (7th Cir.1995), *vacated and remanded*, 517 U.S. 1231 (1996), *remanded to*, 115 F.3d 413 (1997) 4

Buster v. Commonwealth, --- S.W.3d ----, 2012 WL 1450447, 6 (Ky. 2012) ..... passim

Hartsfield v. Commonwealth, 277 S.W.3d 239, 245 (Ky.2009) 4

James v. Commonwealth, 360 S.W.3d 189 (Ky.2012) 4

New Jersey v. TLO, 469 U.S. 325, 336-37 (1985) 5

Wilkerson v. State, 173 S.W.3d 521 (Tex.Crim.App. 2005) 5

Mills v. Commonwealth, 996 S.W.2d 473, 482 (Ky.1999) 7

Padgett v. Commonwealth, 312 S.W.3d 336 (Ky.2010) 7

Seymour v. Walker, 224 F.3d 542, 553-54 (6th Cir. 2000) 7

Missouri v. Seibert, 542 U.S. 600, 617 (2004) 7

Rhode Island v. Innis, 446 U.S. 291, 302 (1980) 7

Stanbury v. California, 511 U.S. 318 (1994) 8

Thompson v. Keohane, 516 U.S. 99, 112 (1995) 9

Yarborough v. Alvarado, 541 U.S. 652, 669 (2004) 9

C.W.C.S. v. Commonwealth, 282 S.W.3d 818, 822 (Ky. App. 2009) ..... passim

Commonwealth v. Bell, --- S.W.3d ----, 2012 WL 1057966 (Ky. App. 2012). 11,16

KRS 630.020 11,13

Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) 12

Bellotti v. Baird, 443 U.S. 622, 635(1979) 12

Roper v. Simmons, 543 U.S. 551, 569 (2005) 12

Johnson v. Texas, 509 U.S. 350, 367 (1993) 12

Graham v. Florida, 130 S.Ct. 2011, 2026 (2010) 12,13

In re Gault, 387 U.S. 1, 45 (1967) 12

Missouri v. Seibert, 542 U.S. 600, 617 (2004) 13

KRS 159.010 13

In re I.J., 906 A.2d 249, 264, n. 13 (D.C.Cir. 2005) 13

In re Killitz, 651 P.2d 1382 (Or. App. 1982) ..... passim

State v. Doe, 948 P.2d 166 (Idaho 1997) 14,16

State v. D.R., 84 930 P.2d 350, 353 (Wash. App. 1997) 14

In re Jorge D., 43 P.3d 605, 608 (Ariz.App. Div. 1 2002) 14

In re Clifford L.H., 597 N.W.2d 775, 775 (Wis.App. 1999) 14

In re W.R., 634 S.E.2d 923 (N.C. 2006) 14

In re W.R., 675 S.E.2d 342 (N.C. 2009) 14

In re T.J.C., 662 N.W.2d 175, 181 (Minn.Ct.App. 2003) 14

In re *D.A.R.*, 73 S.W.3d 505, 512 (Tex.Ct.App. 2002) 15

In re L.M., 993 S.W.2d 276, 290 (Tx.Ct.App. 1999). 15

KRS 600.010 17

KRS 610.200 17

Davidson v. Commonwealth, 613 S.W.2d 431, 435 (Ky.App. 1981) 17

CONCLUSION 18

U.S.Const. Amends. V, XIV 18

Ky.Const. § 2, 10, 11 18

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

School Resource Officer Stephen Campbell filed a petition charging appellant (N.C.) with one count of dispensing/administering/prescribing a controlled substance, first offense (TE II, 1)[2]. N.C. entered a not guilty plea and was appointed counsel (TE II, 10). Subsequently, the juvenile court held a hearing on N.C.'s motion to suppress his statements made at school (TE II, 19). Following briefing, the court denied the motion. N.C. then entered a conditional admission of guilt (TE II, 77-79). The Department of Juvenile Justice (DJJ) filed a predisposition investigation report which recommended forty five (45) days in adult jail and community service and the Nelson County Juvenile Court adopted the recommendation of DJJ. N.C. filed Notice of Appeal and the judgment was stayed pending appeal (TE II, 93). The Nelson County Circuit Court affirmed the lower court decision and N.C. filed a timely Motion for Discretionary Review with the Kentucky Court of Appeals. On April 21, 2011, the Court of Appeals denied discretionary review. N.C. filed for discretionary review with this Court and was granted review on February 15, 2012.

B. THE SUPPRESSION HEARING

On May 4, 2009, the Nelson County Juvenile Court held a suppression hearing. Michael Glass the assistant principal of Nelson County High School testified first. (VR; 5/4/09; 2:36:11). Mr. Glass learned that a teacher found an empty prescription pain pill bottle in the boy's bathroom with N.C.'s name on it (VR; 5/4/09; 2:26:30, 2:27:04). Steven D. Campbell, School Resource Officer from the Nelson County Sheriff's Office and Mr. Glass, escorted N.C. from his classroom to the assistant principal's office to question N.C. about the pill bottle (VR; 5/4/09;

[2] The written record includes two volumes. The record is identified as "VOLUME I" and "Bound Juvenile Case …". N.C. will cite to the written record as "TE I" and "TE II", respectively.

2:40:49, 2:41:22). Mr. Glass conceded that the meeting took place in his office with the door closed with Officer Campbell present (VR; 5/4/09; 2:29:36). He admitted he would not have expected N.C. to leave his office, yet hedged and said that he "guessed" N.C. could have left if he wanted to do so (VR; 5/4/09; 2:30:25). Mr. Glass asked if N.C. had any idea why he was there and at first N.C. said no (VR; 5/4/09; 2:41:22). When Officer Campbell mentioned the pill bottle during the interrogation, N.C. said, "I did something stupid" (TE I, 33).

When probed further, N.C. said he brought his medication to school because he had his wisdom teeth out and he was in pain (VR; 5/4/09; 2:27:42). When Mr. Glass asked how many pills he brought; N.C. admitted to possessing three (VR; 5/4/09; 2:28:41). Mr. Glass asked how many N.C. took; N.C. said one (VR; 5/4/09; 2:28:45). N.C. stated that he gave the other two to another student (VR; 5/4/09; 2:29:17). That student was not charged (VR; 5/4/09; 2:29:28). Mr. Glass asked most of the questions and only called N.C.'s mother after obtaining a written statement (VR; 5/4/09; 2:30:45); (TE I, 33). While Mr. Glass discussed possible school consequences with N.C. he did not think he discussed criminal penalties (VR; 5/4/09; 2:32:06). He did not give *Miranda*[3] warnings to N.C. and said that was not his job (VR; 5/4/09; 2:34:15).

Mr. Glass stated he would have let N.C. call his mother if he had asked. However, as far as letting N.C. leave, it would have depended on the reason he gave (VR; 5/4/09; 2:35:50). When the Commonwealth asked him what he would have done if N.C. said he did not want to talk to him, Mr. Glass stated that he would have called N.C.'s mother and kept him in the office pending her arrival (VR; 5/4/09; 2:30:02).

Officer Campbell testified that he always carries a gun and did not recall if he was in uniform or simply wearing his shirt with "Sheriff's Office" on it that day (VR; 5/4/09; 2:44:35, 2:44:53). Officer Campbell said he would not have objected if N.C. had asked to call his mom or

[3] See Miranda v. Arizona, 384 U.S. 436 (1966).

an attorney (VR; 5/4/09; 2:43:25). However, no one told N.C. he could call his mother or an attorney (VR; 5/4/09; 2:46:31, 2:49:02); (TE I, 33). *Miranda* warnings were not given, and Officer Campbell made the decision to file charges (VR; 5/4/09; 2:46:51, 2:48:57, 2:49:02); (TE I, 32).

The defense called no witnesses, and the court set a briefing schedule (VR; 5/4/09; 2:49:32). The court overruled the motion to suppress on November 13, 2009. Thereafter, N.C. entered a conditional plea, reserving the right to appeal the denial of the motion to suppress.

ARGUMENT

N.C. WAS "IN CUSTODY" FOR PURPOSES OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN HE WAS INTERROGATED AT SCHOOL BY AN ASSISTANT PRINCIPAL AND AN ARMED SHERIFF DEPUTY. HIS STATEMENTS WERE THEREFORE INADMISSIBLE AND HIS ADJUDICATION MUST ACCORDINGLY BE REVERSED.

A. Preservation and Standard of Review

Preservation: This issue was properly preserved for appellate review by N.C.'s conditional guilty plea, reserving his right on appeal from the judgment and review of the adverse determination from his motion to suppress his statements pursuant to RCr 8.09. (TE I, 31).

Standard of review: In Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998), this Court adopted the standard of appellate review for a motion to suppress incriminating statements as expressed by the United States Supreme Court in Ornelas v. United States, 517 U.S. 690 (1996). As such, *de novo* review is proper. See Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky.2007); Commonwealth v. Neal, 84 S.W.3d 920 (Ky.App. 2002).

B. Preliminary Matter: State Actor Analysis

The lower court should have concluded that N.C. was in custody pursuant to *Miranda*.[4] However, it appears the circuit court mistakenly distorted the custodial analysis with a misapplication of the "state actor" analysis under *Miranda*. Put simply, the circuit court recognized that the key question was whether N.C. was in custody but it failed to recognize that *any* state actor triggers the protections afforded by *Miranda*. See Welch v. Commonwealth, 149 S.W.3d 407, 410 (Ky. 2004) (recognizing the title or employer of the questioner is not the basis for determining state action for the purposes of *Miranda* warnings). The court's conflated state actor/custody analysis clouded the lower court's review. It inadvertently prevented the court from proper review of the more relevant, custody analysis. As a preliminary matter, this Court's sound reasoning confirms that Mr. Glass was a state actor.[5]

As this Court explained in Welch, the determining inquiry for the court when determining a state actor for *Miranda* is "**whether the interrogation was ... likely [to] result in disclosure of information which would lead to facts that would form the basis for prosecution.** Welch v. Commonwealth, 149 S.W.3d 407, 410 - 11 (Ky. 2004) (citing United States v. D.F., 63 F.3d 671, 683–84 (7th Cir.1995), *vacated and remanded*, 517 U.S. 1231 (1996), *remanded to*, 115 F.3d 413 (1997) (holding that the Fifth Amendment analysis contained in D.F., 63 F.3d 671 was correct) (emphasis added).

Further, non-law enforcement state actors "[are] subject to the same constraints as a police officer" pursuant to the protections granted under *Miranda*. Buster v. Commonwealth, --- S.W.3d ----, 2012 WL 1450447, 6 (Ky. 2012); Hartsfield v. Commonwealth, 277 S.W.3d 239, 245 (Ky.2009) (finding that a SANE nurse's interview was the "functional equivalent of police questioning"); James v. Commonwealth, 360 S.W.3d 189 (Ky.2012).

---

[4] See Miranda v. Arizona, 384 U.S. 436 (1966).

[5] It is axiomatic that Officer Campbell, acting in his official capacity as a Nelson County Sheriff Deputy (VR; 5/4/09; 2:45:50) is a state actor for the purposes of *Miranda*. See Miranda v. Arizona, 384 U.S. 436 (1966).

And there is little doubt that public school officials are state actors. As the United States Supreme Court explained:

> [Within the] contemporary reality and the teachings of this Court [:] We have held school officials subject to the commands of the First Amendment, *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and the Due Process Clause of the Fourteenth Amendment, *see Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. ... Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. New Jersey v. TLO, 469 U.S. 325, 336-37 (1985).

And with the post-TLO proliferation of the school resource officer,[6] when a non-law enforcement agent "is acting in tandem with police to investigate and gather evidence for a criminal prosecution" *Miranda* warnings are required. Wilkerson v. State, 173 S.W.3d 521 (Tex.Crim.App. 2005).

In this case, in evaluating the custody analysis, the circuit court went to great lengths to attempt to distinguish legal authority that supported N.C.'s right to *Miranda* protections (TE I, 47 - 48). The court opined that "[he] was not entitled to a Miranda warning because the questioning was not initiated by a law enforcement officer" and "that [assistant principal] Glass initiated and asked the questions ... that [School Resource Officer] Campbell appears to have been a witness to the conversation." (TE I, 47). The court opined that precedent from the Kentucky Court of Appeals and other persuasive legal support (concerning custodial interrogations from other jurisdictions) was "distinguishable because each case involves **law enforcement officers** who questioned students about **criminal investigations**." (TE I, 47)

[6] By 2004, high school teachers reported more than sixty percent of schools had armed law enforcement personnel on their campus. Paul Hirschfield, *The Uneven Spread of School Criminalisation in the United States*, 74 CRIM. JUST. MATTERS 28, 28 (2008).

(emphasis **in the original**). However, as this Court has explained, to establish a state actor, the pertinent question was not what title the assistant principal held but rather, whether the interrogation would "likely result in disclosure of information which would lead to facts that would form the basis for prosecution." Welch v. Commonwealth, 149 S.W.3d 407, 410 -11 (Ky. 2004). And as this Court recently explained, the fact that Mr. Glass is an assistant principal "rather than a police officer does not mean that his actions could not violate Appellant's rights under *Miranda* ..." Buster v. Commonwealth, --- S.W.3d ----, 2012 WL 1450447, 6 (Ky. 2012).

It is clear from the record that School Resource Officer Campbell (Officer Campbell) maintained a continual presence and participation throughout the entire interrogation.[7] Officer Campbell, armed, and in Sheriff's attire, escorted N.C. with Assistant Principal Glass (Mr. Glass) to the school office for the interrogation. Mr. Glass conducted an interrogation, in tandem with Officer Campbell.[8] Mr. Glass admitted, "I know how he [Officer Campbell] operates" (VR; 5/4/09; 2:33:10). And this was "not our first go around with this kind of [interrogation]" (VR; 5/4/09; 2:33:30). Mr. Glass was a government actor every bit as much as Officer Campbell. Mr. Glass "was subject to the same constraints as a police officer in what he could do or say to Appellant." Buster, --- S.W.3d ----, 2012 WL 1450447 at 6 (Ky. 2012).

Given the facts of this case, the interrogation was clearly intended to lead to facts to form the basis of a prosecution. Why else would the assistant principal seek the officer's presence?[9] Why else would an armed officer be required to escort a juvenile to the principal's office? And

---

[7] (VR; 5/4/09; 2:29:32, 2:29:39, 2:40:10, and 2:45:58).

[8] See Wilkerson v. State, 173 S.W.3d 521 (Tex.Crim.App. 2005) (holding that when a non-law enforcement agent "is acting in tandem with police to investigate and gather evidence for a criminal prosecution" that *Miranda* warnings are required).

[9] Notably, Nelson County School provides notice to students that it is an agent of law enforcement. Specifically, "**Nelson County High School reports all violations punishable by law.**" Cardinal Character Behavior Code No.10 NCHS Student Handbook, pg. 31 (emphasis **in original**) (available at http://nchs.nelson.kyschools.us/wp-content/uploads/2012/03/SHandbook_11-12.pdf).

why is an assistant principal "question[ing] students about **criminal investigations**[?]"(TE I, 47) (emphasis in original).

Given that Officer Campbell testified that Mr. Glass was aware that N.C. had given some pills away *before* they interrogated him,[10] **the interrogation was ... likely [to] result in disclosure of information which would lead to facts that would form the basis for prosecution**." Welch v. Commonwealth, 149 S.W.3d 407, 410 - 11 (Ky. 2004)(emphasis added). Moreover, it was the Commonwealth's burden to prove that Mr. Glass was not acting as a state actor and it clearly did not. See Miranda v. Arizona, 384 U.S. 436, 444, (1966)(holding that the prosecution carries the burden to establish that the state provided the proper procedural safeguards to insure that the defendant's right against self-incrimination were not violated); See also, Mills v. Commonwealth, 996 S.W.2d 473, 482 (Ky.1999) *overruled in part on other grounds by* Padgett v. Commonwealth, 312 S.W.3d 336 (Ky.2010) (holding same); Seymour v. Walker, 224 F.3d 542, 553-54 (6th Cir. 2000).

Mr. Glass, regardless of his title, was engaged in an interrogation likely to result in the disclosure of information forming the basis of the prosecution and to hold otherwise, encourages strategies implicitly "dedicated to draining the substance out of *Miranda*" and promotes question-first and then *Mirandize* (if at all) tactics that thwart *Miranda*'s purpose. Missouri v. Seibert, 542 U.S. 600, 617 (2004)(plurality).

Moreover, should the Court entertain the notion that Mr. Glass was not a state actor, the officer was still engaged in "words or **actions** on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 302 (1980)(emphasis added). As the United States Supreme Court expressly defined in

[10] (VR; 5/4/09; 2:41:49).

Innis, custodial interrogations can be accomplished by action alone. Id. Officer Campbell's actions included:

- escorting N.C., while armed, from the classroom;
- maintaining his presence during the interrogation;
- actively questioning N.C. during the interrogation; and
- physically confronting N.C. in either his full uniform or a department issued shirt emblazoned with "Sheriff's Office" on it.

Surely, a police officer's presence under these circumstances would factor significantly into the acquisition of an incriminating response of a juvenile.

Nonetheless, applying this Court's sound reasoning in Welch and Buster, Mr. Glass was a state actor. Thus, this Court's guidance removes any attempt to improperly distinguish applicable legal authority to N.C.'s custody analysis.

C. Custody Analysis

A confession must be suppressed where the person is subjected to a custodial interrogation without first being warned that his statements may be used against him in court, and that he has the right to remain silent and to consult with counsel prior to questioning. Miranda v. Arizona, 384 U.S. 436 (1966). To trigger the requirements of *Miranda*, a person must be both "in custody" and "under interrogation" at the time the statement is made. Id. In this case, there is no dispute that N.C. was interrogated, and that he was not given the benefit of *Miranda* warnings. The only issue is whether N.C. was "in custody" at the time of the interrogation, such that those warnings were required.

A person is considered "in custody" when the circumstances would lead a reasonable person to conclude that he was not free to leave. Stanbury v. California, 511 U.S. 318 (1994).

Generally, "the inquiry is simply whether there was . . . restraint on freedom of movement of the degree associated with formal arrest." Id. at 321. As the Supreme Court has explained,

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Thompson v. Keohane, 516 U.S. 99, 112 (1995).

Subsequent to the Court's opinion in Thompson, and without expressly resolving the issue of what role the age of the accused played in resolving the custodial interrogation analysis, Justice O'Conner noted that "there may be cases in which a suspect's age will be relevant to the custody inquiry under Miranda . . .." Yarborough v. Alvarado, 541 U.S. 652, 669 (2004) (O'Conner, J., Concurring). And the Supreme Court confirmed Justice O'Conner's point when it held that a juvenile's age is a factor to be considered within the custodial interrogation analysis. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2406 (2011). As the Supreme Court explained, "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." Id. at 2398-99.

In J.D.B. school and police officials had information that J.D.B., a teenager, may have been involved in delinquent activity. Id. at 2399. An armed School Resource Officer (police officer) and an assistant school principal removed J.D.B. from his social studies classroom and escorted him to a school conference room for questioning. Id. The door to the conference room was closed. Id. And the assistant principal, the School Resource Officer, and an administrative intern were present for the interrogation. Id. Prior to commencing the interrogation, neither the School Resource Officer nor the assistant principal attempted to contact J.D.B.'s guardian. Id. Prior to commencing the interrogation, J.D.B. was not given *Miranda* warnings or the

opportunity to speak to his guardian. Id. And he was not informed that he was free to leave the room. Id. The assistant principal and the School Resource Officer did not inform JDB he could refuse to answer questions and was free to leave until after they extracted inculpatory statements from him. Id. at 2400. After obtaining the inculpatory information, J.D.B. was released to go home and later charged. Id.

Here, in eerily similar fashion to J.D.B., N.C. was removed from class by Mr. Glass and Officer Campbell to discuss information that was likely to form the basis of the underlying prosecution. Like J.D.B., an armed officer and assistant principal escorted N.C. to a remote and secure location. Like J.D.B., the interrogation occurred behind closed doors. Like J.D.B., neither Officer Campbell nor the Mr. Glass attempted to contact his guardian – or to even inform him that he could do so. Like J.D.B., he was not given *Miranda* warnings. Like J.D.B., he was not advised that he did not have to speak to them. Like J.D.B., he was not told he was free to leave. And like J.D.B., N.C.'s transportation home and release was arranged only after obtaining inculpatory statements. There can be little doubt that the N.C.'s circumstances are analogous to J.D.B.[11]

In examining the custody analysis in J.D.B., the Supreme Court stated:

> [T]he effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Id. at 2405.

And prior to J.D.B., the Kentucky Court of Appeals made a cursory review of the effect of the schoolhouse setting on the custody analysis for the failure to provide *Miranda* warnings. See C.W.C.S. v. Commonwealth, 282 S.W.3d 818, 822 (Ky. App. 2009) (not finding a

[11] J.D.B., 131 S.Ct. 2394 (2011).

discernable restriction of a juvenile's freedoms than any other student at the school *when the student was expressly advised he was free to leave and that he did not have to answer questions*). However, since J.D.B., the Kentucky Court of Appeals has had an opportunity to more thoroughly review the coercive circumstances that differentiate a student simply attending classes and a juvenile removed from class and brought into the principal's office for interrogation. Commonwealth v. Bell, --- S.W.3d ----, 2012 WL 1057966 (Ky. App. 2012). As the Court of Appeals expressed:

> A school is not designed or intended to create a coercive environment in which a child's will is entirely subjugated. However, a school shares few of the protective or comforting characteristics a child naturally associates with his home. The fact is a school is where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority. Like it or not, that is the definition of coercion. Every student is expected to be, and to stay, where school authorities place him, be it in a classroom, or gymnasium, or cafeteria, or study hall. **If he is sent to the principal's office, he is not allowed to leave until the principal says so.** Id. at 7 (emphasis added).

Given this coercive nature of the principal's office, failing to advise a juvenile sequestered in such an office that he has a right to remain silent or that he is free to leave can undoubtedly be an effective custodial tactic for police. Common sense explains that juveniles occupy an inferior social status to adults. Juveniles are taught to respect elders and to remain deferential to authority figures in a way that is not required of adults. See KRS 630.020 (beyond control of parent and beyond control of school offenses). Juveniles are taught from an early age that they are expected to answer questions posed by an adult. As the United States Supreme Court acknowledged, children take so seriously the expectation that they are to answer adults' questions that they are even willing to answer such questions falsely at an alarming rate. See J.D.B. v. North Carolina, 131 S.Ct. 2394, 2401 (2011) (citing empirical studies that illustrate the heightened risk of false confessions from juveniles).

This heightened risk of coercion in confessions of juveniles is easily understood when placed in context. As the Court recognized in J.D.B.,[12] juveniles "generally are less mature and responsible than adults," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," Bellotti v. Baird, 443 U.S. 622, 635(1979); and they "are more vulnerable or susceptible to ... outside pressures" than adults, Roper v. Simmons, 543 U.S. 551, 569 (2005). The Court has recognized that science - specifically brain science - shows that juveniles struggle to define their identity and that external pressure impacts them in a significantly greater way than adults. Id. "These qualities often result in impetuous and ill-considered actions and decisions." Id. (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

Put simply, juveniles are "[less] mature" and "more vulnerable [to ...] outside pressures". Graham v. Florida, 130 S.Ct. 2011, 2026 (2010). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." Id. As the brain science that the Court relied on in Roper illustrated, even at the age of sixteen and seventeen, an adolescent's fledgling frontal lobe is very susceptible to stress. See Brief for American Medical Association et al. as Amici Curiae,[13] p. 2 - 6, Roper v. Simmons, 543 U.S. 551, 569 (2005). This vulnerability to stress is amplified by the fact that generally adolescents possess an inadequate understanding of the criminal justice system and how to navigate it. See Graham, 130 S. Ct. at 2032 (2010) (noting that juveniles' limited understanding puts them at a "significant disadvantage in criminal proceedings"). See also, In re Gault, 387 U.S. 1, 45 (1967) (juvenile confessions require "special caution").

---

[12] See J.D.B. v. North Carolina, 131 S.Ct. 2394, 2403- 04 (2011).
[13] 2004 WL 1633549; attached in appendix for the convenience of the Court.

However, no matter how effective and enticing to the officer it may be to leverage the juveniles vulnerabilities, failing to advise the juvenile target of a custodial interrogation of the right to remain silent and that he or she is free to leave is clearly improper. Miranda v. Arizona, 384 U.S. 436 (1966); See also, Missouri v. Seibert, 542 U.S. 600, 617 (2004)(plurality). Moreover, combining the objectively coercive nature of a principal's office; the proven vulnerability of the fledgling adolescent brain; and an absence of proper warnings or parental presence, this type of tactic, "dedicated to draining the substance out of *Miranda*" is impermissible because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted ..." Seibert, 542 U.S. at 617.

It is well established that a child N.C.'s age is required to attend school, cannot leave the premises voluntarily, and is required to follow school policies while he is on school grounds. KRS 159.010 (compulsory attendance); KRS 630.020(2) and (3) (authorizing the juvenile court to take action against the child for habitual truancy, or for being beyond the control of the school). Not surprisingly, many courts nationwide have found that kids who are in the custody of their school are also in custody for *Miranda* purposes. See In re I.J., 906 A.2d 249, 264, n. 13 (D.C.Cir. 2005)(collecting cases).

One of the earliest cases to discuss *Miranda* in the context of an interview at school is In re Killitz, 651 P.2d 1382 (Or. App. 1982). There, the child was taken by a member of the principal's staff to the principal's office, where he was interrogated by the principal and a uniformed officer. The court in that case held that the interrogation was custodial, based on the following factors:

> *First*, defendant was not free to leave during the interrogation. He was in school during regular hours, where his movements were controlled to a great extent by school personnel. Defendant was interrogated by an armed, uniformed police officer in the principal's office with the principal present. Neither the police

> officer nor the principal said or did anything to dispel the clear impression communicated to defendant that he was not free to leave. *Second*, the fact that another student had implicated defendant in the burglary indicates that he was being questioned as a suspect rather than as a witness. *Third*, defendant cannot be said to have come voluntarily to the place of questioning. He would likely have been subject to the usual school disciplinary procedures had he not complied with the principal's request that he come to the office. In addition, defendant did not know that a police officer awaited him at the principal's office. He can hardly be said to have come voluntarily to the place of police questioning when he had no idea a police officer would be present. Id., 651 P.2d at 1383-84

Subsequently, in State v. Doe, 948 P.2d 166 (Idaho 1997), the Idaho Supreme Court reviewed Killitz and a similar case, State v. D.R., 84 930 P.2d 350, 353 (Wash. App. 1997), while considering a case involving allegations of sexual misconduct against a 10-year-old defendant. Based on that authority, the Idaho court articulated the following test for evaluating whether a child was in custody for *Miranda* purposes:

> We conclude that the objective test for determining whether an adult was in custody for purposes of Miranda, giving attention to such factors as the time and place of the interrogation, police conduct, and the content and style of the questioning, applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult. In applying this standard to the facts before us, we ask whether a ten-year-old in Doe's position would have reasonably considered his freedom of action to be curtailed in a significant way, i.e., to a degree associated with a formal arrest. State v. Doe, 948 P.2d 166, 173 (Idaho 1997).

Several states have expressly followed Doe. In re Jorge D., 43 P.3d 605, 608 (Ariz.App. Div. 1 2002); In re Clifford L.H., 597 N.W.2d 775, 775 (Wis.App. 1999)(Table, text in Westlaw). Other states have applied the same principles in analyzing a confession made by a child who was interviewed at school. See e.g., In re W.R., 634 S.E.2d 923 (N.C. 2006) *reversed on other grounds* In re W.R., 675 S.E.2d 342 (N.C. 2009); In re T.J.C., 662 N.W.2d 175, 181 (Minn.Ct.App. 2003), *vacated on other grounds* 667 N.W.2d 108 (Minn. 2003), *decision*

reinstated 670 N.W.2d 629 (Minn.App. 2003); *In re D.A.R.*, 73 S.W.3d 505, 512 (Tex.Ct.App. 2002); In re L.M., 993 S.W.2d 276, 290 (Tx.Ct.App. 1999).

In Killitz, the court found that the interrogation was custodial, based on the following factors:

- The interview occurred in a closed room with which the child was not familiar (i.e., not a classroom or in the hallway);
- The child was summoned to the interview by school officials;
- The interview was conducted, at least in part, by a police officer who was either armed, in uniform, or both;
- The nature of the conversation was consistent with the interview of a suspect, rather than a witness, e.g., the child was confronted with the evidence against him as part of the interview;
- The child was not told he was free to leave.

Cases since Killitz have continued to rely on these factors, though not always requiring that all be present.

Killitz and this case are indistinguishable. Of course, in this case the key authority on which both parties and the trial court relied was C.W.C.S. v. Commonwealth, 282 S.W.3d 818 (Ky. App. 2009). While the trial court cited C.W.C.S. in its findings of fact, conclusions of law, and order, it did not address one crucial distinguishing factor between N.C.'s case and C.W.C.S – **N.C. was not told that he was free to leave the office, and in fact would not have been allowed to do so if he had tried**. The Court of Appeals made it clear that its decision that C.W.C.S. was not "in custody" for *Miranda* purposes was based primarily on the child having

been explicitly informed that he did not have to speak with law enforcement and was free to leave and return to class. C.W.C.S., 282 S.W.3d at 820-821. The Court reasoned as follows:

> We do not see how C.W.C.S.'s freedoms were any more restricted than any other student at the school. Detective Gibbs directly stated that C.W.C.S. did not have to speak with them, that he was free to return to class, and that the officers would leave the school premises if he so chose. Thus, he was told that he was voluntarily speaking with them, and it was clear he was not in police custody at this time. Since his movements were not restricted in a degree associated with his arrest, C.W.C.S. was simply not in custody for Miranda purposes. Id at 822; bold supplied.

It then concluded:

> **Because C.W.C.S. was told he was free to leave and not required to discuss the sexual misconduct allegations, we hold that he was not in custody** and no Miranda warnings were required. Thus, the district court properly denied C.W.C.S.'s motion to suppress his incriminating statements made during the school interview. Id. (emphasis added).

Not only was N.C. never advised he was free to leave the principal's office, Mr. Glass acknowledged **he would not have expected N.C. to leave**[14] and stated he would not have allowed him to leave if he had said he did not want to talk but instead would have called his mother and required him to stay.[15] C.W.C.S. is thus distinguishable. N.C. was certainly "in custody" in Glass's office. See Commonwealth v. Bell, --- S.W.3d ----, 2012 WL 1057966 (Ky. App. 2012) (recognizing objectively that if a juvenile is sent to the principal's office, he is not allowed to leave until the principal says so).

.The analysis required by Killitz, Doe and its progeny was never undertaken. Conducting that analysis now, it is evident that the interrogation was custodial. First, the child was not a voluntary participant in the interview, but had to be summoned to the office and escorted by the armed School Resource Officer and an assistant principal. Second, the interview was conducted in a closed and confined setting – a principal's office, which a reasonable child would understand

[14] (VR; 5/4/09; 2:30:20).
[15] (VR; 5/4/09; 2:36:00).

to be a setting where full disclosure was expected.[16] Third, the interview was conducted by an identified police officer who had a gun and clothing identifying his occupation to the child during questioning. Fourth, the nature of the questioning was as a suspect, rather than as a witness. Fifth, the child was not told he was free to leave, and in fact was not free to leave.

In addition to the glaring similarities of N.C.'s interrogation to both J.D.B. and Killitz, it is no small matter that N.C. was not permitted to speak to his mom until *after* they extracted their confession. The Kentucky General Assembly drafted the Juvenile Code with intent to protect juveniles from their own lack of maturity and vulnerability. See KRS 600.010(2)(a)(emphasizing the interest in the protection of children and the encouragement of family). And that protection includes notice to parents when an officer takes a juvenile into custody. See KRS 610.200. "[I]t is apparent that our legislature was concerned with the protection of the rights of accused juveniles when they come in contact with our law enforcement agencies." Davidson v. Commonwealth, 613 S.W.2d 431, 435 (Ky.App. 1981) (suppressing a juvenile's confession where "nothing in the evidence [showed] any reason why Officer Cissell could not have taken the perhaps five minutes necessary to explain to [the guardian] what their constitutional rights were.").

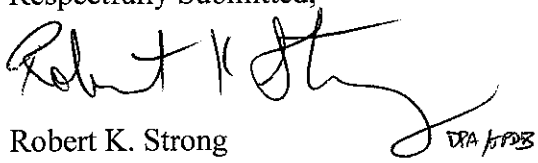
Under these circumstances, the interrogation should have been regarded as custodial. And as *Miranda* warnings were never given, N.C.'s statement should have been suppressed.

[16] See Commonwealth v. Bell, --- S.W.3d ----, 7, 2012 WL 1057966 (Ky. App. 2012) (stating that every student is expected to stay where school authorities place him and if he is sent to the principal's office he is not allowed to leave until the principal says so.).

CONCLUSION

N.C. was "in custody" for purposes of the Fifth Amendment to the United States Constitution during his interrogation and was not provided *Miranda* warnings. His statements were inadmissible and his adjudication should be reversed. N.C. requests this Court to vacate the judgment herein, and remand the case to the district court with directions that the court order that appellant's statement be suppressed. U.S.Const. Amends V, XIV; Ky.Const. § 2, 10, 11.

Respectfully Submitted,



Robert K. Strong

APPENDIX

Tab Number	Item Description
1	Court of Appeals Order Denying Discretionary Review
2	Opinion and Order of the Nelson Circuit Court
3	Final Judgment of the Nelson District Court
4	Findings of Fact, Conclusions of Law and Order Nelson District Court
5	Defendant's Waiver of Rights and Plea of Guilty
6	Brief for American Medical Association et al. as Amici Curiae, Roper v. Simmons, 543 U.S. 551 (2005).