STATE OF WISCONSIN

IN SUPREME COURT
Case No. 2013AP000127 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant-Petitioner.

On Appeal from the Judgment of Conviction
Entered in Milwaukee County Circuit Court, the
Honorable David L. Borowski, Presiding

NON-PARTY BRIEF OF PROPOSED AMICI CURIAE CENTER ON WRONGFUL CONVICTIONS OF YOUTH AND WISCONSIN INNOCENCE PROJECT

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INTRODUCTION

In Amici's view, the police's lengthy interrogation of fifteen-year-old Raheem Moore – conducted by teams of detectives without any guidance from a friendly adult, and rife with deception and implied promises of leniency – was little different than an adult interrogation. Indeed, Amici agree with Raheem that his *Miranda* waiver was unknowing, unintelligent, and involuntary and that his resulting confession was involuntary under the "totality of the circumstances" test. But Amici submit this Brief not simply to urge this Court to exclude Raheem's confession. Rather, we also urge this Court to take this opportunity to enforce two parts of its decision in *Theriault v. State*, 66 Wis.2d 33, 223 N.W.2d 850 (1974), that have lain dormant – and, indeed, have been largely ignored by law enforcement and the lower courts – for the past forty years.

First, this Court held in *Theriault* – and reaffirmed decades later in *In the Interest of Jerrell C.J.***,** 2005 WI 105, 283 Wis.2d 145, 699 N.W. 2d 110 (2005) – that police's failure "to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice

and counsel" should be considered "strong evidence" that coercive tactics were used to obtain the juvenile's confession. *Theriault*, 66 Wis.2d at 48, 223 N.W.2d at 859. Amici now ask this Court to enforce this warning, which has been ignored in this case and in others around Wisconsin, with a per se rule excluding a juvenile's confession when a *Theriault* consultation does not occur. Second, the *Theriault* Court noted with approval Minnesota's practice of warning juveniles before interrogation about the possibility of adult prosecution. *Theriault*, 66 Wis.2d 33 at 52, 223 N.W.2d at 859. Amici now ask this Court to require Wisconsin police to give similar warnings, as several other states have done since *Theriault* but as was not done in Raheem's case. In short, as is plain from *Theriault* and *Jerrell*, this Court has long endorsed greater protections for juveniles in the interrogation room; and its judgment has been confirmed in the intervening years by authorities ranging from the U.S. Supreme Court to leading law enforcement organizations, all of whom have recognized that juveniles need special protections to guard against false and involuntary confessions. It is now time for this Court not

simply to endorse but to enforce these long-recognized and desperately needed protections.

ARGUMENT

I. THIS COURT SHOULD ADOPT A *PER SE* RULE EXCLUDING STATEMENTS OBTAINED FROM MINORS WHERE THE CHILD WAS DENIED AN OPPORTUNITY TO MEANINGFULLY CONSULT WITH A PARENT, GUARDIAN, OR ATTORNEY BEFORE INTERROGATION.

Forty years ago, this Court first considered whether to adopt a per se rule excluding custodial admissions made by juvenile suspects who had not been given an opportunity to consult with an interested adult before interrogation. *Theriault v. State*, 66 Wis.2d 33, 223 N.W.2d 850 (1974). Declining to adopt such a rule, this Court instead issued a stern warning: Law enforcement's failure "to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel" was to be considered "strong evidence" that coercive tactics were used to obtain the juvenile's confession. *Id.* at 48, 223 N.W.2d at 859.

Ten years ago, certain undersigned amici asked this Court to again consider such a per se rule in light of evidence that police officers throughout the State, but

especially in Milwaukee, routinely ignored this Court's warning in *Theriault* – and, moreover, that trial and appellate courts encouraged this behavior by routinely admitting juveniles' uncounseled and unconsulted statements. *See* Brief of Amicus Curiae, *In the Interest of Jerrell C.J.***,** 2005 WI 105, 283 Wis.2d 145, 699 N.W. 2d 110 (2005). A majority of this Court thought such a rule was premature "at this time" and instead simply reissued the *Theriault* warning. *Id.,* at ¶ 43, 283 Wis.2d at 167, 699 N.W.2d at 120.

Chief Justice Abrahamson, however, agreed with amici and provided eight reasons to adopt a per se rule excluding juvenile statements when a *Theriault* consultation does not occur. *See Jerrell C.J.*, 2005 WI 105, ¶¶ 97-117, 283 Wis.2d at 192-202, 699 N.W.2d at 133-138 (Abrahamson, C.J., dissenting in part). The dissent argued that such a rule was needed because: 1) Wisconsin law enforcement officers had not heeded the Court's warning in *Theriault*, and Milwaukee police officers, in particular, had completely ignored it; 2) Wisconsin courts had not heeded the Court's warning in *Theriault* and accorded little, if any, weight to the failure

of police to call parents before interrogating their children; 3) juveniles do not have the decision-making capacity and understanding of adults; 4) such a rule was needed to prevent false confessions; 5) such a rule would protect family and parental values and the liberty interest of parents to direct the care, control, and upbringing of their children; 6) such a rule would bring case law in line with legislative policy requiring parental involvement in life-altering decisions regarding their children; 7) the per se rule has functioned well in other states and in the United Kingdom; 8) and finally, it is the "right, just, and fair way to operate the judicial system." *Jerrell C.J.*, 2005 WI 105, ¶¶ 97-117, 283 Wis.2d at 192-202; 699 N.W.2d at 133-138 (Abrahamson, C.J., dissenting in part).

A decade after *Jerrell*, it is now time for this Court to implement a per se rule. The instant case of fifteen-year-old Raheem Moore shows that – just as Justice Abrahamson predicted – Milwaukee police are still flouting *Theriault*. Despite this Court's repeated instruction, law enforcement made no effort to give Raheem an opportunity to consult with a parent or other interested adult before interrogation. Indeed, when

asked if Raheem was allowed to speak to a parent, the detective responded: "[H]e never asked to call a parent. So I wouldn't have offered for him to call a parent." (93:27-28). Nor, apparently, did police feel any need to tell Raheem's father that he could speak with his son. Indeed, police actually spoke to Raheem's father while Raheem was in custody and still made no effort to connect father and son. (101Ex.6:41; 101Ex.2:31). Viewed as it must be through the lens of *Theriault* and *Jerrell*, this failure is egregious. And, as Justice Abrahamson observed in *Jerrell*, this case demonstrates that lower courts are still overlooking these failures. Despite *Theriault*'s instruction to the contrary, lower courts are certainly not considering the absence of a consultation with a parent, guardian, or attorney to be "strong evidence" of coercion.

Such a rule will also provide much-needed protections to juveniles in the interrogation room. The United States Supreme Court, relying on developmental science and "common sense," has recognized that because juveniles are more susceptible to pressure, more hampered by immature decision-making, and more

suggestible and impulsive than adults, they are more likely to involuntarily and falsely confess during interrogation. *See J.D.B. v. North Carolina,* 131 S.Ct. at 2403-2404 (2011); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Indeed, empirical studies of actual false confessions continue to prove that juveniles are more likely than adults to falsely confess when pressured by the police. *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 553 (2005) (in a study of 340 exonerations, finding that juveniles were three times as likely as adults to falsely confess); Joshua A. Tepfer, Laura H. Nirider, & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010) (false confessions contributed to almost twice as many wrongful conviction cases when the accused was a youth, rather than an adult); Lindsay C. Malloy, et al., *Interrogations, Confessions and Guilty Pleas Among Serious Adolescent Offenders*, 38 LAW & HUM. BEH. 181-193

(2014) (in self-report survey, 35% of juveniles reported making a false admission to authorities). Even in Wisconsin, several juvenile false confessions have come to light in the years since *Jerrell*. *See* Anne Jungen, *Judge Allows Alternate Confession in Hougom Case,* LACROSSE TRIB., August 1, 2012, *available at* http://lacrossetribune.com/news/local/judge-attorney-can-argue--year-old-killed-hougom/article_e505c6cc-db45-11e1-bb0a-001a4bcf887a.html (false confession by a 13-year-old in a murder case); Bruce Vielmetti, *Juveniles Prone to False Confessions, Experts Say,* MIL. J. SENT., September 30, 2013, *available at* http://www.jsonline.com/news/crime/juveniles-prone-to-false-confessions-experts-say-b99110452z1-225905041.html (false confessions by two fifteen-year-olds and a fourteen-year-old in a murder case).

There is also widespread agreement among law enforcement that youth are particularly likely to make false and involuntary confessions. John E. Reid & Associates, Inc., a leading trainer of police interrogation techniques, agrees that "[i]t is well accepted that

juvenile suspects are more susceptible to falsely confess than adults," John E. Reid & Assoc., Inc., Investigator Tips, March-April 2014, *available at* http://www.reid.com /educational_info/r_tips.html?serial=20140301 &print=[print] (last visited June 13, 2014). Indeed, Reid & Associates warns its trainees that "[e]very interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile." John E. Reid & Associates, Inc., *Take Special Precautions When Interviewing Juveniles or Individuals With Significant Mental or Psychological Impairments*, available at http://www.reid.com/pdfs/20120929d.pdf (last visited June 9, 2014). Moreover, the International Association of Chiefs of Police – the world's largest police executive membership association, headquartered in Virginia – also embraces this principle: "Over the past decade, numerous studies have demonstrated that juveniles are particularly likely to give false information – and even falsely confess – when questioned by law enforcement." *See* Int'l Ass'n of Chiefs of Police, *Reducing Risks: An Executive's Guide to Effective*

Juvenile Interview and Interrogation (2012) (hereinafter "IACP Guide"), *available at* http://www.theiacp.org/portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf (last visited July 21, 2014). In fact, the IACP states that "it is essential to involve a 'friendly adult' in the juvenile interrogation process and to allow him or her meaningful opportunities to privately consult with the juvenile." IACP Guide, at 7-8.

For these reasons, several leading scholars have argued that *J.D.B. v. North Carolina* requires even greater protections for juveniles during interrogation, including consultation not only with a parent, but also an attorney. *See* Tamar Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee Rev. 385, 406-449 (2008); Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 Wash. U. J. L. & Pol'y 109, 110, 173-74 (2012) (calling *J.D.B.* a "game changer" and arguing that it reinvigorates historical U.S. Supreme Court jurisprudence

recognizing that children need the assistance of counsel during interrogation); Saul Kassin et al., *Police-Induced False Confessions: Risk Factors and Recommendations,* 34 LAW & HUM. BEH. 3, 30 (2010) ("juveniles – at least those under the age of 16 – should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role"). And this Court's international counterparts agree; the European Court of Human Rights,[1] in a series of decisions, has emphasized the "fundamental importance of providing access to a lawyer" – not merely a parent – where the person in custody is a minor because of the increased risk of coerced or false confessions from youth. *Salduz v. Turkey*, European Court of Human Rights, Application No. 36391/02 (27 Nov. 2008), at ¶¶ 32-36, 60; *see also Cadder v. H.M. Advocate*, [2010] UKSC 43 (Scot. S.C.) & 48 (applying *Salduz* to a 16-year-old boy who was

[1] The European Court of Human Rights is an international court that rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. The Court's judgments are binding on the member States of the Council of Europe and have led governments to alter their legislation and administrative practice in a wide range of areas. The Member States within the Council of Europe and to whom the decisions of the ECtHR are applicable include 47 countries around the world. *See The Court in Brief*, European Court of Human Rights, http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Sep. 21, 2013).

subject to a custodial interrogation). To be clear, Amici do not request a rule requiring counsel for children in the interrogation room at this time. But the reasons behind such a rule, founded as it is on a mountain of empirical data and widespread agreement concerning juvenile false and involuntary confessions – much of which has emerged since *Jerrell C.J.* – should move this Court to give teeth at last to its twice-repeated, oft-ignored *Theriault* warning and adopt a per se rule excluding a juvenile's confession when a *Theriault* consultation with a parent or interested adult does not occur.

II. ALTERNATIVELY, THIS COURT SHOULD HOLD THAT THE FAILURE OF LAW ENFORCEMENT TO FACILITATE SUCH A CONSULTATION CONSTITUTES "STRONG EVIDENCE" THAT THE CHILD'S WAIVER OF HIS MIRANDA RIGHTS WAS NOT "KNOWING AND INTELLIGENT" AND HIS SUBSEQUENT CONFESSION WAS NOT VOLUNTARY.

If this Court is unwilling to adopt a per se rule, there are other less sweeping solutions that still offer greater protection to juveniles. Instead of placing the onus on the child or the parent to ask for a consultation, this Court could require police to ask children if they

would like to consult with parents before they are asked to waive their *Miranda* rights. Similarly, police officers, once they have made contact with parents, should be instructed to tell parents what their children are being questioned about and ask them if they would like to consult with their children.[2] Parents cannot make informed decisions about their children unless they are told what kind of trouble their children are facing. The failure of police to ask these simple questions of parents and children – or, of course, the refusal of police to honor requests for consultation – should be considered "strong evidence" both that the confession was coerced and that the child's waiver of his rights was not knowing, intelligent and voluntary.[3]

III. THE FAILURE OF THE POLICE TO INFORM RAHEEM THAT HE COULD BE TRIED AS AN ADULT BEFORE OBTAINING HIS *MIRANDA* WAIVER SHOULD PRECLUDE THE STATE FROM USING HIS CONFESSION AGAINST HIM IN ADULT CRIMINAL COURT

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[2] The law requiring that police only make a reasonable attempt to contact parents provides insufficient protection for children. In this day and age, when 91% of American parents own cell phones, *see* http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults, police should be expected to contact parents before they interrogate children.

[3] Courts should also consider whether police officers attempted to persuade children and parents not to consult with each other or gave them misinformation to influence their choice.

OR, AT THE VERY LEAST, WEIGH HEAVILY AGAINST THE STATE IN BOTH THE MIRANDA WAIVER ANALYSIS AND THE DETERMINATION OF VOLUNTARINESS.

Amici also urge this Court to enforce another part of *Theriault* that has lain dormant for almost forty years. To ensure that a juvenile knowingly and intelligently waived his or her *Miranda* rights, the *Theriault* Court cited with approval the Minnesota practice of advising a juvenile, when applicable, that he could face adult prosecution. *Theriault*, 66 Wis.2d 33 at 52, 223 N.W.2d at 859 (citing *State v. Loyd*, 297 Minn. 442, 212 N.W.2d 671 (1973)). Since *Theriault*, several states have required police to inform juvenile suspects of this possibility. *See, e.g., State v. Simon*, 680 S.W.2d 346, 353 (Mo. Ct. App. 1984); *State v. Benoit*, 490 A.2d 295, 303 (N.H. 1985). Several others have revised the *Miranda* waiver and voluntariness analyses to include consideration of the police's failure to inform juveniles that they face adult prosecution and that their statements could be used against them in adult criminal court. *See People ex rel. J.M.J.*, 726 N.W.2d 621 (S.D. 2007); *State v. Ouk*, 516 N.W.2d 180, 185 (Minn. 1994) ("[W]e

again strongly encourage law enforcement officers to advise juveniles about the possibility of criminal prosecution as an adult whenever such prosecution is possible in order to protect juveniles from unknowing and unintelligent waivers of their constitutional rights"); *State v. O'Connor*, 346 N.W.2d 8, 10 (Iowa 1984).

Today, Amici urge this Court to follow the example of these other states. Before obtaining a *Miranda* waiver, police should advise juveniles that they could be prosecuted as adults and that any statements could be used against them in adult criminal court. Any police failure to fully inform juveniles of these consequences should result in the exclusion of the juvenile's statements from criminal court or, at the very least, should constitute "strong evidence" that the juvenile's waiver of his rights was not knowing, intelligent, or voluntary. This practice is desperately needed in light of the evidence cited in *J.D.B. v. North Carolina* that children are less capable decision-makers than adults, more vulnerable to police pressure, and more likely to falsely confess than adults.

Indeed, the instant case perfectly illustrates how such a new rule is necessary. Milwaukee detectives knew that as a fifteen-year-old homicide defendant, Raheem would be automatically charged as an adult. But Milwaukee detectives not only failed to inform Raheem that his statements could be used against him in adult criminal court, they also obtained his confession by telling him that his case would be processed "at the Children's Center" (101Ex.6:29) and that as a fifteen-year-old, he was "allowed to make mistakes" (101Ex.2:34), "had his whole life ahead of him" (101Ex.2:35), and would receive a "second chance" if he confessed (101Ex.6:53). These misleading implications of leniency, all of which occurred before Raheem waived his *Miranda* rights for the final time and made his confession, strongly suggest that his *Miranda* waiver was unknowing and unintelligent and that his subsequent confession was involuntary. Police must not be permitted to mislead children so drastically about the consequences of confession. As this case so vividly illustrates, the time has come for this Court to

prevent such occurrences by requiring police to warn juveniles about the possibility of adult prosecution.

CONCLUSION

For the above reasons, Amici Curiae respectfully ask this Court to find Raheem Moore's *Miranda* waiver invalid, his confession involuntary, and the rules that permitted his confession to be used against him infirm. Instead, it is time for this Court to adopt per se rules excluding a juvenile's confession if a *Theriault* consultation did not occur and requiring police to advise juveniles of the possibility of adult prosecution before obtaining *Miranda* waivers.

Respectfully submitted this 22nd day of July, 2014.

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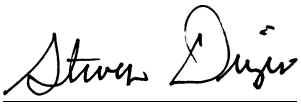

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CERTIFICATION AS TO FORM AND LENGTH

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 2,995 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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