STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP127-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE DAVID L. BOROWSKI, PRESIDING

PLAINTIFF-RESPONDENT'S REPLY TO NON-PARTY BRIEF FILED BY AMICI CURIAE

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP127-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE DAVID L. BOROWSKI, PRESIDING

PLAINTIFF-RESPONDENT'S REPLY TO NON-PARTY BRIEF FILED BY AMICI CURIAE

The State of Wisconsin replies to the non-party brief filed by the amici curiae, the Wisconsin Innocence Project and Northwestern University School of Law's Center on Wrongful Convictions of Youth, as permitted by this court July 30, 2014.

ARGUMENT

AMICI PRESENT NO VALID REASONS TO CHANGE WISCONSIN LAW, ABANDONING THE "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS IN FAVOR OF *PER SE* RULES.

1. This court should disregard the amici's call for radical changes in Wisconsin law. The amici want this court to adopt a new, inflexible *per se* rule calling for automatic exclusion of all juvenile confessions (regardless of age) where the "minor[]" was "denied an opportunity to meaningfully consult with a parent, guardian, or attorney before interrogation." Amici brief at 3 (capitalization omitted). The amici want this court to adopt yet another inflexible *per se* rule calling for automatic exclusion of all juvenile confessions from adult criminal trials if the juvenile was not told "before obtaining his *Miranda* waiver" that he might be tried in adult court. Amici brief at 13-14 (capitalization omitted).

2. Counsel for Raheem Moore did not seek review in this court to change state law. Moore argued in his petition for review that the trial court and the court of appeals erred in holding that his *Miranda* waiver and subsequent confession were voluntary under the totality of the circumstances. Petition for review at 24-33. Counsel for Moore also sought review on the ground (not discussed in the brief of amici) that police violated Wis. Stat. § 938.195, and *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110, when they turned off the audio recorder during part of the interview. *Id.* at 13-23.[1] *Also see id.*, at 1-3. This court did not in its order granting review ask the parties to discuss whether state law regarding juvenile confessions should be changed in any fashion.

[1] This was, indeed, the lead issue presented by Moore for review.

3. The parties have not raised these issues in their briefs. Had counsel for Mr. Moore raised these new issues for the first time in her reply brief, they would likely not be addressed by this court. *Roy v. St. Lukes Medical Center*, 2007 WI App 218, ¶ 30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256; *State v. Chu*, 2002 WI App 98, ¶ 42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878. *See also Richman v. Security Savings & Loan Assoc.*, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973).

4. The brief of amici is a thinly-disguised advocate's brief on behalf of Mr. Moore, functioning primarily as his second "reply brief." The first two sentences of the brief betray its primary function here. Brief of amici at 1.[2] This court should decline to consider the new arguments raised by amici on Moore's behalf, just as it would have declined to do had those same arguments been raised by counsel for Mr. Moore for the first time in her reply brief.

5. The amici present no compelling reasons for abandoning the time-honored "totality of the circumstances" analysis when determining the voluntariness of a *Miranda* waiver and subsequent confession by a juvenile. Parental access and the potential for adult criminal prosecution are among the many relevant circumstances; the totality of which must be considered by

---

[2] 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.

Brief of amici at 1. *Also see id.* at 17, "Conclusion" (asking that this court find "Moore's *Miranda* waiver invalid, his confession involuntary and the rules that permitted his confession to be used against him infirm.").

a court when determining voluntariness. *Jerrell C.J.*, 283 Wis. 2d 145, ¶¶ 3, 43. *See Fare v. Michael C.*, 442 U.S. 707, 725-27 (1979). There is no need to abandon this approach especially now that courts are better able, after *Jerrell C.J.*, to accurately assess the totality of those circumstances by independently reviewing mandatorily-recorded juvenile interrogations. *Compare Jerrell C.J.*, 283 Wis. 2d 145, ¶ 55 n.13 ("In this case, Detective Spano and Jerrell gave conflicting testimony on many accounts of the [unrecorded] interrogation.").[3]

6. If such major changes in Wisconsin law are to be made, they should await a case where the issues are raised by the parties and presented for review. They were not here.

7. With respect to the parental access issue, Moore never argued that he wanted to speak to his parents, that he asked police to let him speak to his parents, or that he was unaware he could ask to speak to his parents. Moore in fact knew that police had already spoken to his father; they told him. Moore's father never asked to see his son or told police to stop the interview until he, or a lawyer, was present. *Compare Jerrell C.J.*, 283 Wis. 2d 145, ¶¶ 10, 31, 42 (police repeatedly rejected the juvenile's requests during the interview that he be allowed to speak with his parents).

> It is undisputed that "several times" during the interrogation, Jerrell asked "if he could make a phone call to his mother or father." Each time Detective Spano said "no." Detective Spano later

[3] "According to Jerrell, a rule requiring electronic recording would provide courts with the best evidence from which it [sic] can determine, under the totality of the circumstances, whether a juvenile's confession is voluntary. He views the rule as critical to the integrity of the fact-finding process, as it is difficult to accurately recreate weeks or months later in a courtroom what transpired in a lengthy interrogation like his." 283 Wis. 2d 145, ¶ 45. *See id.* ¶¶ 50-58; *id.* ¶ 120 (Butler, J., concurring).

> testified that he "never" in 12 years allowed a juvenile to contact parents during an interrogation because it could stop the flow or jeopardize it altogether.

Id. ¶ 10 (footnote omitted). *See id.* ¶ 42 ("[W]e are troubled by the tactic of ignoring a juvenile's repeated requests for parental contact"). *Also see id.* ¶¶ 121, 130 (Butler, J., concurring). Moore also knew he could stop the interview at any time and demand the presence of a lawyer – or just stop the interview period.

8. With respect to whether a juvenile suspect must be advised before the interview that he could be tried in adult court, Moore never claimed he was unaware he might be tried as an adult for murder. Moore never claimed this factor had any impact whatsoever on the voluntariness of his decision to waive *Miranda* and confess.

9. Finally, if such significant changes in the law are to be made, the state legislature is fully capable of doing so after considering all the relevant testimony, empirical evidence and policy reasons for and against changing the law. Or, this court could do so in its formal rule-making capacity. Wis. Stat. § 751.12(1) and (2). *See Mitchell v. State*, 84 Wis. 2d 325, 334, 267 N.W.2d 349 (1978) ("Though this court has inherent rule-making power, it has refused to modify rules of practice or procedure on an appeal"). Nor is it appropriate for this court to adopt such sweeping changes in the exercise of its supervisory authority over the lower courts. Rather, a change of this magnitude should either proceed through the normal legislative process, or through this court's formal rule-making process. *See E.B. v. State*, 111 Wis. 2d 175, 181-82, 330 N.W.2d 584 (1983).

CONCLUSION

Therefore, for the reasons set forth above and in the state's initial brief, the decision of the court of appeals should be AFFIRMED.

Dated at Madison, Wisconsin, this 12th day of August, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,303 words.

Dated this 12th day of August, 2014.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this 12th day of August, 2014.

_____
DANIEL J. O'BRIEN
Assistant Attorney General