Discussion

The Sixth Amendment's Confrontation Clause became an issue in this case, because at trial, the prosecutor introduced into evidence psychiatric expert opinions that a nontestifying psychiatrist had previously written in a clinical report. Those out-of-court opinions were offered by the prosecutor to prove a matter of fact in court, but the author of the opinions was not called to testify. Thus, the defendant had no opportunity to confront the witness against him, even though that expert's opinions were offered to undercut the defendant's insanity defense. The Michigan Supreme Court held that *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny bar such out-of-court opinions when they are offered for their truthfulness. Introducing such testimony clearly violates a defendant's right to confront the witnesses against him. Further, the court held that the prosecutor's error was not harmless, and so Mr. Fackelman's conviction was overturned.

What are the implications of the *Fackelman* holding for the practicing clinician? If the case were retried, the prosecutor could call Dr. Shahid to testify at trial where he would be subject to cross-examination. Perhaps his in-court testimony would be less persuasive than the unchallenged opinions contained in his report. He might even demur if asked if he had an opinion concerning Mr. Fackelman's sanity at the time of the crime, perhaps modestly noting that he had not conducted a forensic evaluation and thus had no opinions on forensic matters. Indeed, the prosecutor, anticipating such cross-examination might choose not to call Dr. Shahid or use his out-of-court opinions concerning only clinical matters.

This segues to a central question that *Fackelman* raises for psychiatric practice: whether, or how, the *Fackelman* holding might affect the everyday practice of clinical and forensic psychiatry. Will realizing that under certain circumstances one's written reports will not be admissible as in-court testimony increase the likelihood that the reporter will be called to court to opine and be cross-examined? Would such a concern lead a clinician to alter the everyday contours of an evaluation or otherwise invite attenuating one's usual clinical opinions, thereby lowering the likelihood of being summoned as a witness?

Also, there is potential ambiguity in determining which statements are testimonial. As noted, the *Melendez-Diaz* Court affirmed that medical records for the purpose of treatment are not testimonial. Doubtless, Dr. Shahid did not anticipate that he would be called as a witness, as it has not been customary to call treating psychiatrists to testify at criminal proceedings. The five circumstances identified by the Michigan Supreme Court as making his report testimonial have occurred many times before, and they did not result in the clinician's being called for in-court testimony. However, the Supreme Court is starting to develop guidelines as to what medical/psychiatric records and scientific reports will be regarded as testimonial and therefore will require opportunity for cross-examination as a condition for in court admissibility. (See, for example, *Williams v. Illinois*, 132 S. Ct. 2221 (2012).) One could anticipate, for example, that a psychologist who performs testing that forms the basis of a psychiatric opinion will be required to testify. It is possible that mental health professionals who work in jails will be required to appear and undergo cross-examination far more often than they do now. Certainly, treating psychiatrists will be called upon more frequently than they have been. The judicial determination of what is and is not testimonial will be an ongoing process, but will result in increased court testimony for psychiatrists and other mental health professionals.

Ultimately, the purpose of the Confrontation Clause is to promote truth-finding by allowing defendants the right to face those who testify against them and scrutinize their statements through cross-examination. The *Fackelman* ruling supports that constitutional right. It does place a greater burden on the prosecution, which has the obligation to produce in-court witnesses, rather than merely their out-of-court statements, so that they can be confronted by the defense. It will also place a greater burden on mental health professionals, who will doubtless be required to testify more frequently, provide the basis of their opinions, and have those opinions subjected to cross-examination. The degree to which it will affect psychiatric practice is yet to be determined, but it is an important ruling that clarifies and strengthens defendants' Sixth Amendment rights.

Provision of *Miranda* Warning Is Age Related

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The Triggering Requirement That a *Miranda* Warning Be Given to a Suspect Is Whether a Reasonable-Person Suspect Would Conclude That He Is in Custody; An Objective Test of Such a Conclusion Must Take Account of the Suspect's Youthful Age

In *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), the U.S. Supreme Court held that a child's age properly informs the custody analysis as it pertains to the decision of whether to give a *Miranda* warning. The Court held that ascertaining and considering the suspect's age must be part of the objective test that is applied in custody analysis and that including the suspect's age would not be unduly onerous on law enforcement and would not transform the analysis into an inherently subjective one.

Facts of the Case

During an investigation of several break-ins with stolen property in Chapel Hill, North Carolina, in September 2005, police learned that a 13-year-old young man, J.D.B., whom they had suspected and briefly questioned, had shown off at school a camera similar to one that had been stolen. A police investigator went to the school to question him, and upon arrival, the investigator spoke to a uniformed police officer assigned to the school, who then went and got J.D.B. out of class and took him to a conference room in the same building. Present in the room were J.D.B., the uniformed school officer, the investigator, an assistant principal, and an intern working with the assistant principal. The door was closed but not locked, and the young man was questioned. No parent or guardian was contacted before, during, or after the questioning.

The police investigator asked J.D.B. if he "would agree to answer" some questions, and the young man agreed. Initially he maintained that he was in the neighborhood where the break-ins had occurred but was uninvolved in the crimes. However, at one point, the assistant principal advised him to "do the right thing" by telling the truth, and the police investigator told him that the police had recovered a camera that was stolen. J.D.B. then asked if he would still be "in trouble" if he gave the stolen items back, and the investigator told him that it would "be helpful" if he did, but advised that the matter would still be referred to the court. J.D.B. then confessed to entering the homes and taking items. After his confession, the police investigator informed him that he was not under arrest, did not have to answer questions, and was free to leave and asked him if he understood these facts. The investigator did not, however, give a *Miranda* warning. J.D.B. "nodded" to indicate that he understood. He then provided more details, including that some of the items were hidden at his grandmother's house. The investigator asked him to provide a written statement and the young man did. Shortly after he completed the statement, the school bell rang, indicating the end of the school day, and he was told he could leave.

Investigators subsequently applied for a search warrant and executed the warrant later at J.D.B.'s grandmother's house. He was present and showed the officers where the items were hidden. In addition, he told the officers that he had secreted some items on the roof of a nearby garage and took the officers there. Here again, his parents were not notified, and he was never given a *Miranda* warning. Subsequently, he was charged with two counts each of breaking and entering and larceny.

In December 2005, J.D.B. filed a motion to suppress the evidence against him on the grounds that he was in custody during the initial interview at the school and therefore should have been given a *Miranda* warning before being questioned. The trial court denied the motion to suppress without offering any finding of facts or conclusions of law. In January 2005, J.D.B. filed a petition wherein he admitted to all four charges but objected to the denial of his motion, pointing out that there had been no finding of facts or conclusions of law offered in the denial. On the same day, the trial court adjudicated him a juvenile delinquent. He appealed the finding.

The North Carolina Court of Appeals remanded the case and urged the lower court to make findings of fact to support its determination that J.D.B. was not in custody at the time of his interrogation. The lower court then made the same finding while putting forth a detailed summary of the facts of the case on which it based its decision. The court did not, however, proffer legal analysis or conclusions. J.D.B. again appealed the lower court's decision. The North Carolina Court of Appeals heard the case again and affirmed the lower court's opinion. The appeals

court made its own legal conclusions, saying that J.D.B. was not in custody, a *Miranda* warning was therefore not necessary, and thus the evidence need not have been excluded.

The opinion of the North Carolina appellate court pointed out that the requirement for giving a *Miranda* warning applies only to custodial settings and concluded that despite being in a separate room in school with police officers and an assistant principal present, J.D.B. was not in custody. The majority interpreted North Carolina statutes and prior North Carolina cases to say that custody was equal to a formal arrest or a restraint of freedom equivalent to a formal arrest. They argued that since all school children are subject to restraint of freedom, in order for custody to exist, the suspect's circumstances must be significantly different than those that are typically encountered in a school setting. They offered as examples a locked door, a uniformed officer standing guard, or handcuffs applied and said that since none of these things was present (the uniformed officer in his case sat at the table and asked few questions, the door was closed but not locked, and handcuffs were never applied), his situation was not different enough to meet the objective test for being in custody and therefore did not require giving him a *Miranda* warning. The dissent pointed out that age should have been considered in the objective custody analysis, but the majority held that age need not be viewed as a factor.

Ruling and Reasoning

J.D.B. appealed to the U.S. Supreme Court and incorporated in the language of the appeal the argument made by the dissent in the North Carolina appeals court that age should have been considered in the custody analysis. In June 2011 the U.S. Supreme Court, in a five-to-four decision, overturned the North Carolina courts' decisions and held that "a child's age properly informs the *Miranda* custody analysis." Writing for the majority, Justice Sotomayor pointed out that there are "very real differences between adults and children" and that never considering age as part of the custody analysis would deprive children of the same due process afforded adults. The majority opinion pointed to previous cases to buttress their opinion, including *Stansbury v. California*, 511 U.S. 318 (1994), in which the Court held that a child's age would have affected his perception of his freedom to leave, and also cited *Yarborough v. Alvarado*, 541 U.S. 652 (2004), in which the Court opined that a child's age "generates commonsense conclusions about behavior and perception." The majority further supported their argument by referring to several areas of law where a child's age is commonly used to show inferior judgment, including voting and marriage rights. Finally, the opinion pointed out that age was an objective factor and did not unnecessarily complicate the analysis that law enforcement must undertake when determining if a *Miranda* warning is necessary.

The dissent, written by Justice Alito, asserted that adding age as a consideration would complicate what must be a very clear and easily applicable rule. The dissent argued that to consider age would shift the custody consideration from a simple test to one that required an analysis of individualized characteristics. It also argued that adding the age consideration would open the door to more characteristics being added in the future, which could result in a hopelessly complicated and inherently subjective custody analysis every time an officer had to consider whether to give a *Miranda* warning.

Discussion

Why the trial court dismissed J.D.B.'s motion to suppress cannot be known, because it did not, even after being urged to do so by the appellate court, offer any legal conclusions. One of the more interesting aspects of this case was the role the North Carolina appellate court played, perhaps unwittingly, in contributing to the grounds of the eventually successful appeal. In their initial remand of the case, they merely asked the lower court to address the basis of the appeal: whether J.D.B.'s interrogation was conducted while he was "in custody." When they issued an opinion, however, the dissent argued that age should play a role in the custody analysis, and this issue eventually became the central one before the U.S. Supreme Court.

The Court found ample support for its reasoning in the language of prior cases that it had decided and also in other areas of law where children's rights are abridged (voting, marriage), because of the assumption that a child's judgment is less sound than an adult's. Further support of this latter point could have come from scientific and medical sources if any interested groups had supplied the court with an *amicus* brief. However, unfortunately, none did. The majority may also have cited Chief Justice Rehn-

quist's opinion in *Schall v. Martin*, 467 U.S. 253 (1984):

> The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well (citation omitted). But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody [*Schall*, p 253].

Still, the arguments made by the dissent seemed weak in comparison. It is difficult to view age as a subjective or "individualized" characteristic when countless suspects will be the same age as one another, and their age is easily discernible. The assertion that this decision will "open the doors" to the addition of many more such individualized characteristics suffers the same flaws as any slippery-slope argument.

Jailer's Special Duty of Care in Inmate's Suicide Negligence-Based Claims

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Defendant-Jailer's Special Duty of Care Owed to Inmate Bars Jailer's Use of the Defense of Intervening Proximate Cause or Implied Assumption of Risk in Plaintiff's Claim That Jailer's Negligence Led to the Inmate's Suicide

In *Gregoire v. City of Oak Harbor*, 244 P.3d 924 (Wash. 2010), the Supreme Court of Washington reversed the court of appeals' decision that had affirmed the trial court's verdict that the defendant, although negligent, was not liable for damages related to the inmate-plaintiff's suicide. The supreme court held that the trial judge should not have instructed the jury on assumption of risk, because the jail owes a special, not to be waived duty of care to inmates when they are in the jail's custody. The trial verdict was reversed, and the case was remanded for a new trial.

The issue before the state supreme court was whether the jury instructions were erroneous and whether they led to the jury's being misled concerning the law and thereby being prejudiced against the plaintiff.

Facts of the Case

In December 1995, Edward Gregoire was arrested by State Trooper Harry Nelson on outstanding misdemeanor warrants. Mr. Gregoire was violent during his arrest and transport to jail. On arrival, he momentarily tried to escape, was caught, and was restrained. He reportedly screamed, "Why don't you shoot me?" Eventually he was put in leg restraints and hit to stop him from kicking. He calmed down and was placed in a regular jail cell by himself. His mental and physical condition was not screened by jail officials. He was seen crying within minutes after he was placed in a regular jail cell. Approximately 10 minutes later, he was found hanging from a bed sheet. As soon as the jail officers noticed, they cut him loose and called for help. CPR was performed by paramedics, but he was pronounced dead shortly after getting to the hospital.

In 1998, Ms. Tanya Gregoire, as guardian *ad litem* for Mr. Edward Gregoire's minor child, Brianna Gregoire, brought a suit in the U.S. District Court for the Western District of Washington. She filed claims based on 42 U.S. § 1983, as well as state claims of negligence and wrongful death. The court dismissed all federal claims and did not accept jurisdiction on the remaining state claims.

In 2002, Ms. Gregoire filed suit in the Island County Superior Court for wrongful death, negligence, constitutional violations, and civil rights claims. That court dismissed her state constitutional claims as well as the negligence claims, but agreed to hear the wrongful-death claim. At trial in 2006, the court allowed the city of Oak Harbor (the defendant) to assert the affirmative defenses of assumption of risk and contributory negligence. Over Ms. Gregoire's objection, the jury was instructed on these defenses. The jury found that the city was negligent but was not liable for damages, because its negligence was not the proximate cause of Mr. Gregoire's death. Instead, it found that Mr. Gregoire's own actions were the intervening proximate cause of his death, thus absolving the city of any liability.

Ms. Gregoire appealed to the state court of appeals, arguing that the special relationship between