IN THE SUPREME COURT OF FLORIDA

D.K.D., A Child,

Petitioner,

v. CASE NO. 64,603

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, D.K.D., was the defendant in the juvenile proceeding below, and the appellant in the District Court of Appeal, First District. The State of Florida was the prosecution and appellee in the courts below. Reference to the parties will be as they appear before this Court.

Petitioner is filing an appendix herewith containing a copy of the decision of the District Court of Appeal. References to the appendix will be by the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Petitioner was charged by petition of delinquency with perjury in an official proceeding. The petition alleged that during an adjudicatory hearing in which another person was charged with battery, petitioner was asked by the trial court if she made a certain telephone call on a certain date; petitioner answered in the negative, knowing that answer to be false; and that the issue was material to matters before the court.

On January 17, 1983, petitioner moved to dismiss the petition pursuant to Florida Rule of Juvenile Procedure 8.130(b)(2) on the ground that there wereno material disputed facts and the undisputed facts did not establish a prima facie case of guilt against petitioner. The motion stated that petitioner was a witness in the adjudicatory hearing; that the state elicited testimony from the victim and then rested; the defense then called witnesses, and petitioner was called as a witness for the first time by the trial judge. After being sworn to tell the truth, petitioner testified in response to questions by Judge Green that she did not make the subject telephone call. The victim's daughter testified that petitioner did make the telephone call, and a police officer, also called to testify by the trial court, testified that petitioner admitted to him that she made the telephone call. The motion to dismiss further alleged that the question of whether or not petitioner made the phone call

was not material to the issue at the adjudicatory hearing, which issue was whether or not a battery had occurred.

The motion to dismiss was denied by written order, and petitioner entered a plea of nolo contendere to the charge of perjury, expressly reserving her right to appeal the denial of the motion.

On February 10, 1983, petitioner filed a timely notice of appeal. On April 4, 1983, the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

On appeal, petitioner argued that the motion to dismiss should have been granted because the state failed to file a traverse denying the allegations in the motion. Specifically petitioner argued that although this was a juvenile proceeding and the rules of juvenile procedure applied, Florida Rule of Juvenile Procedure 8.130(b)(2) incorporates the requirements for a motion to dismiss in Florida Rule of Criminal Procedure 3.190(c) and (d). Rule 3.190(d) provides that when facts alleged in a motion to dismiss are untraversed, they are deemed admitted. If the undisputed facts establish a valid defense, the motion to dismiss must be granted.

On November 3, 1983, the First District Court of Appeal issued an opinion affirming the order denying petitioner's motion to dismiss. D.K.D. v. State, __So.2d__ (Fla. 1st DCA Case No. AR-159, opinion filed November 3, 1983). The court first held that even if Florida Rule of Juvenile

Procedure 8.130(b)(2) encompassed the procedural requirements of a "C(4)" type motion, petitioner's motion stated only a legal conclusion concerning the materiality of her testimony in the prior proceeding and should be denied without regard to any traverse or demurrer by the state. The court further held that the procedural remedy provided for in criminal cases by Florida Rule of Criminal Procedure 3.190(c)(4) is not available in juvenile proceedings, and certified the following question as one of great public importance:

> Is the procedural remedy provided for by Fla.R.Cr.P. 3.190(c)(4) available in juvenile proceedings?

(A-3).

On December 5, 1983, petitioner filed a notice to invoke the discretionary jurisdiction of this Court, on the ground that the decision of the First District Court of Appeal passes upon a question certified to be of great public importance.

III ARGUMENT

ISSUE PRESENTED

WHETHER THE PROCEDURES EMBODIED IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.190(c)(4)ARE AVAILABLE IN A JUVENILE PROCEEDING.

Under the transition rules promulgated by this Court in 1973 to govern juvenile proceedings, Rule of Juvenile Procedure 8.180(a) provided:

> In all cases involving delinquency and/or child in need of supervision, the Florida Rules of Criminal Procedure shall apply, when not in conflict with these rules.

In Re Transition Rule 11, 270 So.2d 715 (Fla. 1972). Rule 8.180(a) provided explicit authority for the application of the criminal procedural rules in juvenile proceedings. When the rules of juvenile procedure were revised by this Court in 1977, In Re Florida Rules of Juvenile Procedure, 345 So. 2d 655 (Fla. 1977), Rule 8.180(a) was deleted. See also, In Re Florida Rules of Juvenile Procedure, 393 So.2d 1077 (Fla. 1980).

The revision of these rules was intended to provide a comprehensive set of rules governing juvenile proceedings, so that former Rule 8.180(a) was deemed unnecessary. However, the committee notes to the new rules clearly reveal the continuing interplay of the criminal and juvenile rules of procedure. In many instances the rules of criminal procedure were adopted and incorporated into the juvenile rules.

See, e.g., Florida Rule of Juvenile Procedure 8.080. In other instances where the committee felt that neither the Florida Rules of Criminal Procedure nor the Florida Rules of Civil Procedure met the peculiar needs of juveniles, specific rules were promulgated to satisfy the special requirements in the juvenile context. See, e.g., Committee Notes, Florida Rules of Juvenile Procedure 8.070 and 8.180. Florida Rule of Juvenile Procedure 8.130(b) falls into the former category.

Rule 8.130(b)(2) provides:

> Motion to Dismiss. All defenses not raised by a plea of not guilty or denial of the allegations of the petition shall be made by a motion to dismiss the petition.

The committee notes to the rule states:

> General provision for all defenses not raised by a guilty plea to be made by a motion to dismiss. [See Fla.R. Crim.P. 3.190(b), (c), and (d)].

It is clear from this note the committee intended that the procedural remedies provided for in Rule 3.190 be available in juvenile proceedings. The counterpart to Rule 8.130(b)(2) is Florida Rule of Criminal Procedure 3.190(b). These are merely generally provisions providing a vehicle for dismissing an indictment, information or delinquency petition. Rule 3.190 (c) and (d) provide the procedures to be followed when a motion to dismiss is filed. If the committee did not intend to incorporate these procedures into a motion to dismiss under Rule 8.130(b)(2), no reference to the procedures would have been

made in the committee note. Moreover, it is unlikely that the rule did not contemplate imposing a burden on the state to place a material issue of fact in dispute or establish a prima facie case when faced with a sufficient motion to dismiss.

In State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979), the juvenile defendant filed a motion to dismiss the delinquency petition on the ground that the undisputed facts did not establish a prima facie case against them. The state filed a traverse, specifically denying the allegations in the motion. The trial court granted the motion to dismiss, and the district court reversed, stating:

> [I]nasmuch as the state filed a traverse specifically denying under oath a material fact alleged in the motion to dismiss, automatic denial of the motion was required. Fla.R.Crim.P. 3.190(d); Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA), cert.denied, 352 So.2d 175 (Fla. 1977); see also State v. Smith, 348 So.2d 637 (Fla. 2d DCA 1977).

373 So.2d at 419. In a footnote the court noted:

> Although, this being a juvenile proceeding, the Florida Rules of Juvenile Procedure are applicable, Rule 8.130(b)(2), Florida Rules of Juvenile Procedure provides only generally for the filing of motions to dismiss and implicitly incorporates Rule 3.190(c) and (d). See Committee Note (b)(2).

Id.

Petitioner submits that Florida Rule of Juvenile Procedure 8.130(b)(2) implicitly incorporates the requirements for a motion to dismiss in Florida Rule of Criminal Procedure 3.190(c) and (d). Therefore, it is respectfully submitted that the certified question should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, D.K.D., 531 S.W. 80th Drive, Gainesville, Florida, this 28th day of December, 1983.

Paula S. Saunders

PAULA S. SAUNDERS