IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 65,021

S.L.W., A Child,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, S.L.W., 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 prosecuting authority and appellee in the court below.

References to petitioner's brief on the merits will be by use of the symbol "PB", followed by the appropriate page number in parentheses. Respondent is filing an appendix herewith containing a copy of the petition of The Florida Bar Juvenile Court Rules Committee submitting proposed changes to the Rules of Juvenile Procedure. References to the appendix will be by the symbol "A", followed by the appropriate page number in parentheses.

II ARGUMENT

ISSUE PRESENTED

WHETHER THE FAILURE TO COMPLY WITH FLORIDA RULE OF JUVENILE PROCEDURE 8.290(d)(4) RENDERS INADMISSIBLE INCULPATORY STATEMENTS OBTAINED FROM A CHILD ABSENT A VALID WAIVER OF COUNSEL OBTAINED PURSUANT TO THAT RULE.

This case is before this Court upon the First District Court of Appeal's certification of the above question as one of great public importance. The First District also acknowledged a conflict between S.L.W. v. State, __So.2d__ (Fla. 1st DCA Case No. AS-175, opinion filed December 2, 1983) [8 FLW 2814], on reh'g, (February 27, 1984) [9 FLW 463] and In the Interest of H.D., __So.2d__ (Fla. 4th DCA Case No. 83-678, opinion filed January 4, 1984) [9 FLW 40]. Respondent, for the reasons that follow, agrees with the First District that compliance with the Rule of Juvenile Procedure is mandatory and on the facts of this case, the failure to comply, rendered inadmissible the inculpatory statement made by respondent to the police officer.

There was no common law right to be specially treated as a juvenile delinquent instead of a criminal offender. In re Gault, 387 U.S. 1 (1967). Similarly, there is no inherent or constitutional right to preferred treatment as a juvenile delinquent. Woodward v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977). Under the Florida Constitution, Article I, Section 15(b), when authorized by law, a "child" as therein defined may be charged with a violation of law as an act of

delinquency instead of a crime. State v. Cain, 381 So.2d 1361 (Fla. 1980). Therefore, in Florida, a child has the right to be treated as a juvenile delinquent to the extent provided by the Florida Legislature. Johnson v. State, 314 So.2d 573 (Fla. 1975). The juvenile justice statutory scheme, Chapter 39, Florida Statutes, grants to juveniles a right to be treated differently from adults. State v. Rhoden, __So.2d__ (Fla.S.Ct. Case No. 62,918, opinion filed April 5, 1984) [9 FLW 123].

As noted by petitioner (PB-22), Chapter 39, Florida Statutes, does not address procedures to be followed in obtaining inculpatory statements from juvenile suspects. "Chapter 39 does not purport to govern all relationships between police and juveniles". In Interest of R.L.J., 336 So.2d 132, 136 (Fla. 1st DCA 1977). The First District, therefore, properly rejected petitioner's reliance below on Section 39.03, Florida Statutes (1981) which pertains to taking a child into custody. S.L.W. v. State, 8 FLW at 2814. Chapter 39 does not address juvenile procedure, specifically, waivers of counsel. This subject matter was properly left to this Court which adopted the Florida Rules of Juvenile Procedure as rules of the court. See In Re Transition Rule 11, 270 So.2d 715 (Fla. 1972); In Re Florida Rules of Juvenile Procedure, 345 So.2d 655 (Fla. 1977), and In Re Florida Rules of Juvenile Procedure, 393 So.2d 1077 (Fla. 1980).

Petitioner erroneously asserts that Rule 8.290(d)(4),

Florida Rules of Juvenile Procedure, does not apply to pre-arrest investigatory proceedings, because the rules are court rules which govern procedures in the circuit court (PB-16,24). See Rule 8.010, Florida Rule of Juvenile Procedure. Interestingly, a similar argument was rejected by the Fourth District in State v. Cartwright, __So.2d__ (Fla. 4th DCA Case Nos. 83-614 and 83-615, opinion on rehearing filed February 22, 1984) [9 FLW 442], which reversed the trial court's ruling that the juvenile's confession was involuntary for technical violations, and therefore, inadmissible. There, as in the instant case, the state argued that the rules of juvenile procedure govern only procedures in the circuit court, and that imposition of a rule governing the conduct of law enforcement personnel constitutes a constitutionally impermissible encroachment upon the legislative and/or executive branches by the judiciary. The Fourth District noted:

> [I]t seems reasonably clear that the judicial branch does have the constitutional authority to impose a rule of evidence rendering a waiver of counsel invalid or a confession inadmissible for violation of court imposed rules.

9 FLW at 442. However, the appellate court, being of the view that such a rule of inadmissibility per se should emanate from this Court rather than from a district court of appeal, declined to impose such a rule.

Further, petitioner cites a 1980 Committee Note to Rule 8.290 published in a publication of The Florida Bar as authority for its position that Rule 8.290 does not apply to situations

involving police officers. This Committee Note provides:

> 1980 Committee Note: This rule was not intended by the committee to effect the admissibility of the Miranda[1] Warnings.

Respondent is uncertain as to exactly what this committee note means and as to how much authority is afforded committee notes. Apparently this committee note has been unpersuasive with the appellate courts. Respondent notes that the opinions of the Fourth District in State v. Cartwright, supra, and In the Interest of H.D., supra, do not discuss this committee note, but were decided on other grounds. Similarly, the First District failed to address the committee note in its opinion and on rehearing. S.L.W. v. State, supra. Moreover, respondent did not challenge the admissibility of Miranda warnings below. Instead, respondent challenged the waiver of counsel and admissibility of his inculpatory statements which were made in the context of the giving of Miranda warnings and custodial interrogation. This 1980 committee note does not address the admissibility of statements obtained pursuant to the giving of Miranda warnings. The note is therefore inapplicable to the instant facts and petitioner's reliance on it is misplaced.

Respondent clearly had a Sixth Amendment right to counsel at the time of his arrest, even though the petition alleging delinquency had not yet been filed. Escobedo v. Illinois, 378 U.S. 478 (1964). The Miranda warnings implicate the

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

Sixth as well as the Fifth Amendment since they include a warning that an arrestee is entitled to counsel during custodial interrogation. Further, a juvenile may properly waive his Miranda rights, but the state bears a heavier burden in establishing that the waiver was voluntarily, knowingly, and intelligently made. T.B. v. State, 306 So.2d 183 (Fla. 2d DCA 1975); Arnold v. State, 265 So.2d 64 (Fla. 3d DCA 1972), cert.denied, 272 So.2d 817 (Fla. 1973). Here, if appellant waived his right of counsel, it was done at his temporary foster home and at the police station, not in the courtroom, and the waiver was done in the context of the giving of Miranda warnings and custodial interrogation.

Petitioner contends that Rule 8.290(d)(4), addresses the duty of the intake officer, the public defender and the court in providing counsel to a juvenile offender (PB-19). A plain reading of Rule 8.290(d) indicates otherwise. Of course, 8.290(a), (b), and (c) pertain to the duties of the intake officer, the public defender, and the court, respectively, in providing counsel. However, Rule 8.290(d) provides for juvenile waivers of counsel in general, in court and out of court. There is no qualifier limiting the procedure of Rule 8.290(d)(4) to waivers before intake officers, public defenders, and the court.

> (d) Waiver of Counsel.
>
> (1) The failure of a child to request appointment of counsel or his announced intention to plead guilty shall not, in itself, constitute a waiver of

counsel at any stage of the proceedings.

(2) A child shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the child's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.

(3) No waiver shall be accepted where it appears that the party is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

(4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than two attesting witnesses. Said witnesses shall attest the voluntary execution thereof.

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the party appears without counsel. [emphasis supplied].

Rule 8.290(d), Fla.R.Juv.P.

If a statute or rule uses a word without defining it, then its common or ordinary meaning applies. State v. J.H.B., 415 So.2d 814 (Fla. 1st DCA 1982); accord, State v. Cormier, 375 So.2d 852 (Fla. 1979); cf., Carson v. Miller, 370 So.2d 10 (Fla. 1979) (unambiguous statutory language must be accorded its plain meaning). This rule clearly, obviously, and unambiguously sets forth the requirements for an out of court waiver of counsel in a juvenile case. The waiver must be in writing and attested by two witnesses. "The rule applies to

situations involving police officers and therefore to the present case". S.L.W. v. State, 8 FLW at 2814.

Further support for respondent's position that Rule 8.290(d)(4) pertains to pre-arrest custodial interrogation is evidenced by the proposed changes to the rules of juvenile procedure submitted to this Court on April 2, 1984, by the Juvenile Court Rules Committee of The Florida Bar (A-1). The committee deleted all sections of Rule 8.290 which pertained to matters occurring outside the courtroom. In this regard, Rule 8.290(d)(4) was deleted in its entirety (A-6). Thus, the proposed rule changes would eliminate any future conflict between the courts of this state as to the application of the present Rule 8.290(d)(4) to pre-arrest custodial interrogation.

In M.L.H. v. State, 393 So.2d 13 (Fla. 1st DCA 1981), the First District interpreted Rule 8.290(d)(4) as a mandate from this Court that two witnesses attest to the voluntary execution of a juvenile's waiver of his right to counsel. There, during questioning, the juvenile made certain imcriminating oral statements and gave what was purported to be a written statement. The arresting officer was the only person to witness the juvenile's signature on the waiver of rights form. Additionally, the juvenile could neither read nor write except to sign his name. The First District held that the failure to comply with the rules of juvenile procedure, along with the juvenile's inability to read or write invalidated

his confession. Respondent notes that Judge Ervin, who dissented in M.L.H., based on this Court's decisions in Doerr v. State, 383 So.2d 905 (Fla. 1980) and Jordan v. State, 334 So.2d 589 (Fla. 1976), was on the First District's panel in S.L.W. v. State, supra, and concurred in the instant decision.

Sub judice, a written waiver of counsel was never procured and executed by respondent with two attesting witnesses; no constitutional rights form was signed by respondent. The only evidence relied on by the state to prove that respondent validly waived his right to counsel prior to making the purported oral confession was the testimony of one officer, Glen Padgett. It is obvious that the intent of Rule 8.290 (d)(4) is to safeguard the rights of juveniles and to insure that waivers of counsel made out of court in juvenile cases are, in fact, voluntary, in light of the fact that juveniles are more susceptible than adults to the pressures of custodial interrogation made without counsel.

Acknowledging the paucity of case law interpreting Rule 8.290(d)(4), petitioner relies on Florida Rule of Criminal Procedure 3.111(d)(4), and Jordan v. State, supra, which interpreted the adult rule, thus reasoning that a juvenile's rights are ordinarily similar to an adult's rights (PB-22-23). "Neither the Rules of Juvenile Procedure nor the Rules of Criminal Procedure provide that the criminal procedure rules are applicable in juvenile proceedings". D.K.D. v. State,

440 So.2d 468,469 (Fla. 1st DCA 1983). For example, the appellate courts have interpreted the juvenile speedy trial rule and statute as being unambiguous and mandatory, thereby limiting the method required to extend time for speedy trial solely to the provisions of the juvenile rule and statute. J.J.S. v. State, 440 So.2d 465 (Fla. 1st DCA 1983); In the Interest of K.L.H., 407 So.2d 297 (Fla. 4th DCA 1981). See also L.G. v. State, 405 So.2d 252 (Fla. 3d DCA 1981) (because of the mandatory requirements of the juvenile rules and the obvious statutory distinctions which the rules reflect regarding adults and juveniles, the appellate court rejected the holding of an adult case pertaining to the adult attorney-client relationship). Likewise, compliance with Rule 8.290(d)(4), Florida Rule of Juvenile Procedure, is mandatory, the adult rules notwithstanding. M.L.H. v. State, supra.

Petitioner's reliance on Jordan v. State, supra, is misplaced. In Jordan, the defendant relied on Rule 3.111(d)(4), Florida Rules of Criminal Procedure, as providing a ground for making his confession inadmissible. This Court determined that Rule 3.111(d)(4) was inapplicable to the Jordan facts. First, this Court, after examining Rule 3.111 in its entirety, determined that the waiver of counsel provision related to the subject indicated in the title of the rule: "Providing counsel to indigents". Second, this Court reasoned that there was nothing in Rule 3.111 which provided for suppression of evidence.

Although Rule 8.290(d), Florida Rules of Juvenile Procedure, is identical to Rule 3.111(d), Florida Rules of Criminal Procedure, the remaining provisions of the rules are dissimilar. Applying the analysis used in Jordan, an examination of Rule 8.290 in its entirety does not clearly establish that the waiver of counsel provision pertains only to providing counsel to parties in post-arrest situations. Rule 8.290(d) does not provide for the suppression of evidence. Nevertheless, the legal remedy for a violation of the Sixth Amendment right to counsel, which is implicated in the Miranda warnings (right to counsel during custodial interrogation), is the exclusion of the evidence. See Escobedo v. Illinois, supra (the accused in a state prosecution is denied the assistance of counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment, and no pre-trial statement elicited by the police during interrogation may be used against him at a criminal trial, where the police investigation, conducted prior to indictment, is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect). Respondent, therefore, submits that the interpretation of Rule 3.111(d)(4), as announced in Jordan v. State, supra, is inapplicable to Rule 8.290(d)(4) since the respective rules, read in total, differ substantially. Moreover, considering the policy of this state, to treat juvenile suspects differently than adult suspects, State v. Rhoden, supra, the interpretation employed in Jordan v. State, supra, should be limited to the adult rules

of criminal procedure. The coerciveness of the custodial setting where a juvenile is under investigation has been recognized consistently and it is of heightened concern. Haley v. Ohio, 332 U.S. 596 (1948).

Respondent submits that Doerr v. State, supra, is likewise, of little guidance in deciding the issue at bar. There, this Court construed Section 39.03(3)(a), Florida Statutes (1975), and determined that it is not required that every confession by a juvenile after he is taken into custody be automatically rendered inadmissible if it were given prior to notification of the juvenile's parents or legal guardians. The purpose of Section 39.03(3)(a) is simply to assure that a juvenile's parents are advised of the juvenile's whereabouts when a juvenile is kept beyond the period of the statutory definition of custody. Villar v. State, 441 So.2d 1181 (Fla. 4th DCA 1983). "...[T]he statutory requirement of notification has nothing to do with interrogation". Doerr, 383 So.2d at 907.

As previously stated, Section 39.03(3)(a), Florida Statutes, does not pertain to waivers of counsel in juvenile proceedings. Such waivers are governed by Rule 8.290(d), Florida Rules of Juvenile Procedure, which is mandatory. The purpose of Rule 8.290(d)(4) is to safeguard the rights of the juvenile and to assist the state in showing the voluntariness of waivers of counsel. M.L.H. v. State, supra. This rule obviously pertains to interrogation, wherein the constitutional right to counsel is implicated in the giving

of Miranda warnings. There is a grave distinction between a waiver of a fundamental constitutional right to counsel and a statutorily imposed requirement of notification, which has nothing to do with interrogation.

The First District correctly determined that Rule 8.290(d)(4) pertains to situations involving police officers. Moreover, compliance with the rule is mandatory and renders inadmissible inculpatory statements obtained from a child absent a valid waiver of counsel obtained pursuant to Rule 8.290(d)(4), Florida Rules of Juvenile Procedure. Therefore, the First District properly reversed the trial court's ruling admitting respondent's inculpatory statements into evidence.

Respondent submits that even if this Court determines that failure to conform to Rule 8.290(d)(4) does not render the statement per se inadmissible, based on the totality of the circumstances, see Gallegos v. Colorado, 370 U.S. 49 (1962), respondent's statements were otherwise involuntary and inadmissible.

In T.B. v. State, 306 So.2d 183, 185 (Fla. 2d DCA 1975), the Second District, quoting from People v. Lara, 432 P.2d 202, 215 (Cal. 1967), set out the general rule regarding juvenile confessions.

> . . . [A] minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience,

> and ability to comprehend the meaning and effect of his statement. . . ." 62 Cal. Rptr. at 599, 432 P.2d at 215.
>
> To these considerations must be added the requirement that, if the statement stems from custodial interrogation, the accused must be given his rights under Miranda and must voluntarily, knowingly and intelligently waive those rights. Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.
>
> A juvenile may waive his rights under Miranda, but the state bears a heavy burden in establishing that the waiver was intelligently made. Arnold v. State, Fla. App.3rd, 1972, 265 So.2d 64, cert.den., Fla. 1973, 272 So.2d 817.

Despite petitioner's assertion to the contrary (PB-28), respondent argued in the District Court of Appeal (see Initial Brief of Appellant at pages 19-20) and maintains before this Court, that respondent's statements were otherwise inadmissible because his waiver of counsel was involuntarily and unintelligently made. In addition to failing to comply with Juvenile Rule 8.290(d)(4), the record indicates that Padgett did not make any further inquiry as to whether respondent, a 14 year old juvenile, fully understood and comprehended the consequences of his waiver. Padgett did not inquire as to the extent of respondent's educational background or intelligence, nor did Padgett contact respondent's natural parents prior to talking with respondent. Padgett merely read respondent his rights on a Miranda card. After reading from the card, Padgett asked respondent if he understood the rights, to which, according to Padgett, respondent answered yes. Initially, respondent denied having any knowledge of

the alleged burglary. However, due to the coerciveness of the interrogational setting, after a few minutes, respondent confessed to the burglary.

Indeed, Officer Padgett questioned a 14 year old juvenile after advising the juvenile that, "...in all probability he would be returned to 807 North 15th [respondent's temporary foster home]; I just needed to get this cleared up". (R-50). Additionally, the pre-disposition report and letters which are contained in the record on appeal indicate that respondent had previously exhibited bizarre behavior demonstrative of someone with a psychological disorder and that respondent had been referred for mental health counseling. Certainly, a 14 year old juvenile with a mental disorder who is advised that he will be returned to his foster home could not understand the seriousness of an interrogation and intelligently, knowingly, and voluntarily waive his right to counsel.

Subsequently, at the police station, as testified by Padgett, he again, gave respondent the Miranda warnings and re-questioned respondent in the presence of another officer, Sergeant Phillips. As with the first questioning, Padgett did not procure a written waiver of counsel and did not have a written waiver attested to by two witnesses. There was no taped statement. Additionally, Sergeant Phillips was not called by the state to testify to this alleged

confession. Respondent had no adult who was friendly towards him present during either of these questionings.

In Gallegos v. Colorado, supra, at 54, the United States Supreme Court observed that a 14 year old suspect could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions". The juvenile defendant, in that Court's view, required:

> The aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not.

Id. Similarly, in In re Gault, supra, at 55, the Court admonished that "the greatest care must be taken to assure that [a minor's] admission was voluntary".

Respondent contends that a perfunctory reading of Miranda rights is not sufficient to enable a 14 year old juvenile to make an intelligent and voluntary waiver. This involuntariness coupled with the officer's failure to comply with the rules of juvenile procedure, as in M.L.H., supra, undoubtedly, rendered respondent's purported inculpatory statements invalid. The First District Court of Appeal correctly reversed the trial court's ruling admitting respondent's statements into evidence. Respondent urges this Court to affirm the opinion in S.L.W. v. State, supra.

III CONCLUSION

WHEREFORE, based upon the foregoing argument, reasoning and citation of authority, respondent respectfully requests that this Honorable Court affirm the decision of the First District Court of Appeal, which reversed the trial court's ruling admitting respondent's inculpatory statements into evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by mail to Ms. Barbara Butler, Assistant Attorney General, Duval County Courthouse, Suite 513, Jacksonville, Florida, 32202, Attorney for Petitioner; and, a copy has been mailed to respondent, Mr. Scottie L. Wilson, c/o Mrs. Beth Toro, 2019 Atlantic Avenue, Fernandina Beach, Florida, 32034, this 3rd day of May, 1984.

Charlene V. Edwards
CHARLENE V. EDWARDS