IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO.: 65,021
S. L. W., a child,)
Respondent.)

PETITIONER'S BRIEF ON THE MERIT

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The parties in this brief will be referred to as follows: The State of Florida, the prosecution in the trial court and the Appellee in the Court of Appeal, First District, is now referred to as the Petitioner; S.L.W., a juvenile, defendant in the trial court and Appellant in the appellate court, is now Respondent and will be referred to by name or as Respondent. (In the Statement of Case and Facts adopted from the district court briefs, S.L.W. is referred to as Appellant).

The record on appeal forwarded by the District Court will consist of a record volume, referred to by the symbol "R" followed by the appropriate page number(s) and a single volume of transcript which contains the trial court proceedings before the Honorable James L. Harrison Circuit Court Judge, Nassau County, Florida. This volume will be referred to by the symbol "T" followed by the appropriate page numbers(s).

The opinion of the Court of Appeal, First District, is appendixed hereto; however, the case is reported as follows:

> S.L.W. v. State, No. AS-175 (Fla. 1st DCA December 9, 1983) [8 FLW 2814] question certified on rehearing (February 27, 1984) [9 FLW 463]

STATEMENT OF THE CASE

The State of Florida accepts the Statement of the Case as presented by Respondent in the Court of Appeal, First District. That Statement is as follows:

> Appellant was charged by petition of delinquency filed November 22, 1982, in the Circuit Court of the Fourth Judicial Circuit, Nassau County, Florida, with one count of burglary (R-97). The petition alleged that appellant on or between October 15th and October 17, 1982, unlawfully entered or remained in a dwelling and various portions thereof, without the consent of Emilio Toro, the owner, with the intent to commit theft therein (R 97).[1]

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[1] The following exception was noted by the State on direct appeal:

> 1. Appellant filed a motion to dismiss the information on December 9, 1982. (R 102) A response was filed by the State on December 28, 1982. (R 101) At the February 17, 1983 hearing on the motion defense counsel indicated an amended motion had been filed with the court. (R 4) Neither the amended motion nor a written order of denial is contained within the appellate record.

On February 17, 1983, appellant proceeded to a non-jury trial before Circuit Judge James L. Harrison (R-1). The trial court adjudicated appellant to be a delinquent child for the offense of burglary (R-74, 95).

On February 24, 1983, appellant filed a motion for new trial alleging several grounds: the court erred in denying appellant's motion to dismiss, the court erred by allowing the state to amend the petition, the court erred in denying appellant's motion for a continuance to defend against the amended petition, the court erred by allowing Dr. Toro to testify to incriminating statements allegedly made by appellant, the court erred in allowing Officer Padgett to testifiy to incriminating statements made by appellant, the court erred in denying defense counsel's motion for continuance to present legal research, the court erred in participating in the questioning of the state's witnesses, the court erred in denying appellant's motions for judgment of acquittal, and the verdict is contrary to the weight of the evidence and the law (R-109-110). After a hearing on the motion, it was denied (R-79-86). Thereafter, appellant was committed to the Department of Health and Rehabilitative Services (R-97, 117).

Notice of appeal was timely filed on March 16, 1983 (R-120) and the Public Defender was appointed to represent appellant on appeal (R-116).

Petitioner emphasizes as it did below that Respondent did not file a pretrial motion to suppress statements.

The Court of Appeal, First District, issued its opinion on December 9, 1983 reversing the conviction for failure to comply with Rule 8.290(d)(4), F.R.Juv.P. This procedural rule requires that a juvenile's out of court waiver of counsel be made in writing with not less than two attesting witnesses. S.L.W. v. State, No. AS-175 (Fla. 1st DCA December 9, 1983) [8 FLW 2814, 2815]. The First District stated that compliance with the procedural rule was mandatory and cited M.L.H. v. State, 399 So.2d 13 (Fla. 1st DCA 1981). See, S.L.W. v. State at 2815.

The State moved for rehearing and rehearing en banc. In addition, the State sought certification of the legal issue to this court. On February 27, 1984, the petition for rehearing was denied and the question presented herein was certified as one of great public importance. See p. _____, infra. The First District also noted conflict with the recent opinion of the Fourth District in In the

Interest of H.D., No. 83-678 (Fla. 4th DCA January 4, 1984) [9 FLW 40].[2] Subsequently "express" conflict was noted by the Fourth District in the opinion of State v. Cartwright, No. 83-614 (Fla. 4th DCA February 22, 1984) [9 FLW 442][3]

Petitioner filed Notice to Invoke the jurisdiction of this Court pursuant to Rules 9.030(a)(2)(v), (iv) and 9.120, F.R.App.P., was filed on March 14, 1984. This brief on the merit follows.

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[2] This case is currently pending before this Court. In the Interest of H.D., a child, No. 64,796 (Notice filed January 30, 1984). Jurisdictional briefs have been filed and are pending acceptance.

[3] This case is currently pending before this Court as Cartwright v. State, No. 65,040. (Notice filed March 22, 1984).

STATEMENT OF THE FACTS

The State accepts the Statement of the Facts as presented by Respondent in his brief before the District Court of Appeal. The facts submitted were as follows:

> The evidence presented at the trial revealed that Emilio Toro resided at 2919 Atlantic Avenue, Fernandina Beach, with his wife and his wife's son, appellant (R-15). Mr. Toro described the dwelling as a two-story house: a downstairs consisting of two bedrooms, one and a half bathrooms, living room, dining room, kitchen and utility room; the second floor consisted of one master bedroom with a bathroom and an attic (R-16). Toro testified that he occupies the upstairs bedroom, which contains his property and his wife's property, but, on October 15 through October 18, 1982, he was away from the house (R-16). Toro further stated that no one is to enter his bedroom while he is away from the house (R-16, 20). To secure his bedroom, Toro testified that he placed a padlock on the downstairs door, the only door to the room, that led into the doorway which led to the upstairs room (R-17). The padlock was locked and only Toro and his wife have keys to the lock (R-17).

Toro testified that the bedroom was in order when he left the house and locked the padlock on October 14, 1982 (R-18). Toro returned home on the 18th of October, whereupon he observed that two bottles of his allergy medicine were missing, one or two bottles of valium were missing, some checks from his personal checkbook were missing, the volume control of his stereo was broken, and some tools were missing from the attic (R-19-20). After finding these items missing, Toro questioned appellant about them (R-20). According to Toro, he then became angry and told appellant he could not live there anymore, after which appellant left the residence (R-21-22). Subsequently, Toro filed a police report on the burglary (R-22). A week later Toro found torn pieces of the checks that were missing from his checkbook in the back of the house (R-23). Further, Toro testified that on one occasion when appellant was visiting his mother and Toro, after being ordered out of the house, appellant admitted taking some things, but refused to tell his parents why he took them (R-24-28).

On cross-examination, Toro agreed that appellant did not tell him when he took the items, what he took, or where he took them from (R-28). Toro then testified that appellant had some clothes in the attic (R-29). One could get to the attic by going to Toro's bedroom or by going to the utility room in the back of the house (R-29). Toro further testified that appellant told him that he had some people over during the time while Toro was away (R-29-30).

The state next called Glen Padgett, a Fernandina Beach police officer (R-30). Padgett testified that on October 22, 1982, he received a burglary complaint from Emilio Toro (R-30). Upon investigation, Padgett discovered that the padlock on the downstairs door had been pried up and that there were marks on the piece that holds the lock on the door (R-32). After getting a list of the stolen property, Padgett was given appellant's name as the suspect in the burglary (R-32-33). Padgett located appellant, who was staying with a temporary foster family, and Padgett obtained permission to speak to appellant (R-33). Padgett testified that he then advised appellant of his rights and interviewed him (R-33-35). Defense counsel objected to the

introduction of any statements made by appellant to Padgett on the ground that appellant's alleged waiver of his constitutional rights was not in compliance with the Juvenile Rules of Procedure (R-35-38). The court overruled the objection, holding that Rule 8.290(d)(4), Juvenile Rules of Procedure, was inapplicable to the instant facts (R-38-39).

Padgett continued his testimony and stated that appellant said that he understood his rights (R-40). According to Padgett, appellant appeared to be a relatively bright 14 year old boy who understood the questions Padgett asked (R-40-41).

Upon voir dire examination by defense counsel, Padgett agreed that he did not have any knowledge of appellant's educational background or intelligence (R-42-43). Padgett testified that he explained appellant's rights to him (R-43). After voir diring Padgett, defense counsel objected to the introduction of the statements on the ground that Padgett did not make a determination as to appellant's intelligence and ability to waive his rights (R-43). The court overruled the objection (R-44).

Padgett then testified that appellant admitted that he burglarized the house (R-44). According to Padgett, appellant also named some of the things that were taken in the burglary, appellant stated that he had gone upstairs to use the phone, and appellant stated that he gained entry to the bedroom through an unlocked window (R-45). Padgett transported appellant to the police station, where in the presence of another officer, Sergeant Phillips, Padgett again advised appellant of his rights (R-46-47). Padgett testified that he asked appellant the same questions he had asked appellant earlier (R-47). Defense counsel then renewed his objection on the ground that Padgett did not procure a written waiver of counsel, attested by two witnesses (R-47). The objection was overruled (R-47). According to Padgett, appellant again admitted to the burglary and told the officers where to find some of the tools that were taken (R-48).

Upon cross-examination, Padgett agreed that he did not take a written or a taped statement from appellant (R-50). Padgett further testified that he did not tell appellant he was taking him to detention, but rather, Padgett informed appellant that in all probability he would be

returned to his temporary foster home (R-50-51). Padgett did not notify appellant's natural parents on the 22nd of October to tell them that he was going to talk to appellant about the burglary (R-51). On re-direct, Padgett explained that he could not find appellant's natural father or natural mother (R-52). Then, on recross-examination, Padgett stated that Toro told him that he wanted appellant sent away or taken out of the family home (R-52).

The state's last witness was Beth Wilson Toro, appellant's mother (R-53). Ms. Toro testified that her residence address is 2019 Atlantic Avenue (R-53). Ms. Toro further testified that she has custody of appellant by virtue of a divorce decree and that one of the residences she provides for appellant is at 2019 Atlantic Avenue (R-54). According to Ms. Toro, the downstairs portion of the Atlantic Avenue house is available for appellant's use (R-54). Ms. Toro and her husband have access to the upstairs room (R-55-56). Ms. Toro stated that appellant has permission to go into the upstairs room only when she is there (R-56). Between October 14 and October 18, 1982, Ms. Toro was on a trip with her husband and appellant was at

the house across the street (R-56). Ms. Toro agreed that she did not give appellant permission to use any portion of the upstairs room between the 14th and the 18th; nor did she give appellant permission to remove any articles from that room (R-56).

On cross-examination, Ms. Toro testified that she does not know what articles appellant had in the attic (R-57). Ms. Toro also agreed that one can get in the attic either through the bedroom or through the window (R-57). Ms. Toro further agreed that appellant remained in detention more than 21 days because she would not take him into her home (R-58). Ms. Toro wanted appellant to go live with his natural father, who also would not take him in (R-58). Ms. Toro then agreed that at times there is quite a bit of friction between appellant and his stepfather (R-58-59). Ms. Toro testified that she did not discuss whether to file charges against appellant with her husband but, left the decision up to Mr. Toro (R-59).

Following Ms. Toro's testimony, the state rested (R-61). Defense counsel then moved for a judgment of acquittal on the ground that the state

failed to prove a prima facie case since appellant was a lawful, legal resident at the house in question (R-61). The state responded with the concept from servant-master and hotel guest cases, where it has been held that the breaking and entering does not have to come from outside the house to the inside (R-62). After much discussion, the trial court, conceding that it was a close question, denied the motion for judgment of acquittal (R-64-65).

The defense rested without presenting any evidence (R-65). Defense counsel then renewed his motion for judgment of acquittal, which was denied (R-65-66). Following closing arguments by counsel, the court found appellant to be a delinquent child for the offense of burglary.

QUESTION CERTIFIED

The Court of Appeal, First District, certified the following as a question of great public importance pursuant to Rules 9.030 (a)(2)(v) and 9.120 F.R.App.P.

> Whether the failure to comply with Fla.R.Juv. P. 8.290(d)(4) renders inadmissible inculpatory statements obtained from a child absent a valid waiver of counsel obtained pursuant to that rule?

S.L.W. v. State at 9 FLW 463 (on rehearing).

RULE INVOLVED

The procedural rule involved in this appeal is Rule 8.290(d) (4), F.R.Juv.P. which states:

> 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 voluntary execution thereof.

The 1980 Committee Note following the Rule states in toto:

> 1980 Committee Note: This Rule was not intended by the Committee to affect the admissibility of Miranda warnings.

See, footnote 5, infra.

POINT ON APPEAL

WHETHER THE FAILURE TO COMPLY WITH F. RULE 8.290(d)(4), F.R.JUV.P., RENDERS INADMISSIBLE INCULPATORY STATEMENTS OBTAINED FROM A CHILD ABSENT A VALID WAIVER OF COUNSEL OBTAINED PURSUANT TO THAT RULE?

ARGUMENT

It is the State's position that Rule 8.290(d)(4), F.R.Juv.P., does not apply to pre-arrest investigatory proceedings. See, 1980 Committee Note. Such proceedings are governed by the same constitutional prohibitions applicable to adults. State v. Jordan, 334 So.2d 589 (Fla. 1976). Therefore, failure to comply with procedural requirements does not render a statement inadmissible per se. The controlling legal standard is whether the totality of the circumstances renders the statement involuntary.

The facts giving rise to the legal issue presented herein began when police officer Padgett was assigned to investigate a burglary at the Toro residence. The burglary occurred sometime between October 14 and 18, 1982 when the Toros were away from home. The officer was informed by the stepfather that Respondent, the son was the suspect. (T 32-3) The factual circumstances arise from a strained family relationship between parents and child. At the time of the instant offense, the mother and stepfather had experienced sufficient problems with a troublesome and delinquent son which forced them to restrict Respondent's access to their "private" living quarters. The only doorway to their bedroom was padlocked and was locked each time either departed. Only the mother and stepfather

had keys. (T 15-6, 54-55) Respondent understood that he had access to the room only in the presence of his mother. (R 56)

When criminal charges were filed in this case, the Respondent was removed from the home where his stepfather was the complainant, and placed in a temporary foster home. In investigating the case, Officer Padgett went to the temporary foster home and obtained the consent of the foster mother to talk with Respondent. (T 33) Respondent told the officer that his natural mother was living in Hilton Head, South Carolina and the authorities could not find her.[1] (T 52) He also stated that his natural father could not be found. Id.

Padgett told Respondent "that his name had been mentioned with reference to a possible burglary." (T 33, 42) The officer advised Respondent of his rights from a standard Miranda[2] card which the officer carried with him. (T 34-6,43) Further, the officer explained the rights to Respondent rather than "just reading" them. (T 43) Respondent indicated that he understood. (T 40) To the officer, Respondent appeared "to be a relatively bright fourteen-year-old boy. He understood the questions as" they were asked him. Id. Respondent was "extremely composed", "pleasant", appeared to understand and did not ask to consult or talk with anyone. (T 41)

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1 This is inaccurate, the natural mother was in Hilton Head on business, but resided in Fernandina Beach with Respondent up until he was removed from the home.

2 Miranda v. Arizona, 384 U.S. 436 (1966).

The officer testified that he did nothing to "induce fear" in the boy. Id. As the two talked, Respondent admitted climbing onto the roof and entering his parents bedroom through an unlocked window. (T 45, 44-45) Respondent stated that he had gone upstairs to use the phone and had taken some items. (T 45) Respondent enumerated the items which had been taken. He also admitted to damaging the volume control on the stereo. The officer had not indicated what had been stolen or damaged. (T 45) The items mentioned by Respondent corresponded to those reported by the stepfather. (T 45-6)

Respondent was taken to the police station and processed. (T 46) Several attempts were made during the subsequent questioning and paperwork to contact the Division of Youth Services (DYS) worker assigned to Respondent, but the worker could not be reached. At headquarters, Respondent was readvised and questioned by Padgett in the presence of Sgt. Phillips. (T 47) Respondent's statement to the two officers was virtually identical to that previously given to Officer Padgett. (T 48)

Respondent did not contest the admissibility of the statements pretrial. The challenge was first made at the adjudicatory hearing pursuant to an objection. (T 35-40) On direct appeal, the State argued that Respondent's challenge was untimely and not made pursuant to the proper procedures. Rule 8.130(b)(3), F.R.Juv.P., requires that a motion to suppress be made prior to the adjudicatory hearing unless an opportunity to do so did not exist or the party making the motion was unaware of the grounds prior to the hearing.

(See, the State's answer brief at p. 9) The District Court did not address the waiver argument.

In its opinion, the First District stated that Rule 8.290(d)(4), F.R.Juv.P. "applies to situations involving police officers and therefore to the present case." S.L.W. v. State, No. AS-175 (Fla. 1st DCA December 2, 1983) [8 FLW 2814]. Further, the First District determined that "compliance with the rule is mandatory, see M.L.H. v. State, 399 So.2d 13 (Fla. 1st DCA 1981). The failure to comply in this case renders inadmissible the inculpatory statements. . . ." S.L.W. at 2814. This holding is contrary to the position argued by the State, the 1980 Committee Note to Rule 8.290(d)(4), existing caselaw, and to the opinions of the Court of Appeal, Fourth District, in In the Interest of H.D. No. 83-678 (Fla. 4th DCA January 4, 1984) [9 FLW 40] and State v. Cartwright, No. 83-614 (Fla. 4th DCA February 22, 1984) [9 FLW 442].

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. Subsection (d) of the rule specifies the requirements of a waiver of counsel by these parties. When presented with the argument raised herein, the trial court concluded that Rule 8.290 (d)(4) did not apply under the instant factual circumstances. The trial judge reasoned as follows:

> THE COURT: All right, I am going to hold that the rule is inapplicable to the facts of this case. I do so on my reading of the rule. There seem to be two contemplations -- as a matter of

> fact, Section (a) is the duty of the intake officer, and it speaks of those duties to the child, including the right of counsel.
>
> Subsection (2) says, 'Unless the child waives counsel as hereinafter provided. . .' and that refers you to Subsection (d), which is captioned, 'Waiver of Counsel,' and I note then, just as previously read by Mr. Baker, in Subsection (4) of (d). But then in Section (5), it is provided if a waiver is accepted at any stage of the proceedings, the offers of assistance of counsel shall be renewed by the Court at each subsequent of the proceedings.
>
> Gentlemen, it is my belief that the rules contemplate here a sort of, not a fiduciary relationship, but a relationship between the child and the persons that are involved in the proceedings such as intake counselors and persons in whom might place his conficence as though he were a fiduciary; the intake counselor with the child, in that he would have been asking the child to confide in him and would not have a distinct posture as a police officer.
>
> Mr. Baker, [Defense Counsel] I appreciate your bringing this rule to my attention. I will study the caselaw, and I will certainly give it a great deal of thought. And you are prepared to do whatever is necessary to protect your client's rights after my ruling.
>
> But at this time, I will overrule the objection.

(T 38-39).

A juvenile may be arrested and taken into custody by law enforcement officers pursuant to Florida Statute 39.03(1)(b) and may be taken to a police station or sheriff's office for interrogation. Juveniles have no higher statutory impediments for custodial interrogation than those provisions offered to all citizens through the United States and Florida Constitution. Rule 8.290 does not apply to

this initial interrogation.[3] The safeguards enumerated under the rule apply to procedures occurring after the complaint is filed with juvenile authorities. See In Interest of W.J.N., 350 So.2d 119 (Fla. 4th DCA 1977); In Interest of R.L.J., 336 So.2d 132, 137 (Fla. 3d DCA 1977).

There is no common law right to be specially treated as a juvenile delinquent rather than as a criminal offender. In Re Gault, 387 U.S.1 (1967). Likewise, there is no inherent or constitutional right to preferred treatment as a juvenile delinquent. Stokes v. Fair, 581 F.2d 287, 289 (1st Cir. 1978); Woodward v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) rehearing denied, 560 F.2d 1023, cert. denied, 434 U.S. 1088; State v. Cain, 381 So.2d 1361, 1363 (Fla. 1980).

Chapter 39 of the Florida Statutes creates a privilege, a cloak of special protection, which clothes juveniles so that they will not become lost in the sophisticated and sometimes harsh world of the criminal justice system. Clearly, this Act stems from a desire to reach a child while he or she is still maleable in an attempt to help the child through rehabilitation. The statutory provision contemplates humanitarian goals while squarely facing the problem of crime.

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3 On direct appeal, the State argued that Section 39.03 controlled the procedures to be followed when taking a child into custody and was a factor to be considered in determining the voluntariness of a confession or statement. (See, answer brief at pp. 11-12) The District Court declared this interpretation incorrect. S.L.W. v. State, 8 FLW at 2814.

Chapter 39 does not specifically address the standard to be applied in obtaining statements from juvenile suspects.[4] Therefore it appears that the standard is no less than that for adults. The First District contends that Rule 8.290(d)(4) applies to "situations involving police officers". S.L.W. v. State, 8 FLW at 2814. This position is in direct conflict with the 1980 Committee Note and with Rule's caption. The Committee Note following Rule 8.290, F.R.Juv.P., specifically states "the rule is not intended by the committee to affect the admissibility of the Miranda Warning." (See attached Exhibit C from Florida Rules of Juvenile Procedure published by the Florida Bar, effective January 1, 1983, p. 24).[5] The rule has not been altered or modified since the 1980 Committee Note.

There is a paucity of caselaw interpreting the Rule 8.290(d)(4), F.R.Juv.P. Notwithstanding, Fla.R.Crim.P. 3.111(d)(4) is identical to the juvenile rule. The adult rule has been construed by this Court and provides guidance in considering Fla.R.Juv.P. 8.290(d)(4). Interpretation by analogy is consistent with the general rule that absent legislation, juvenile rights are ordinarily similar to

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4 As previously stated Chapter 39.03 addresses the procedures applicable when taking a child into custody.

5 The Committee Note is not reproduced in the West's Desk Copy of the Florida Rules of Court, State and Federal, published by the West Publishing Company, and used by the Attorney General's staff. The Committee Notes are also not contained in West's Florida Statutes Annotated. To the undersigned's knowledge the Committee Note is reprinted only in the Florida Bar publication. This publication is not a part of the undersigned's research library and was unknown and unavailable until shortly before the filing of the petition for rehearing and rehearing en banc.

those of an adult. State v. L.H., 392 So.2d 294 (Fla. 2d DCA 1980), aff'd, 408 So.2d 1039 (Fla. 1982); Johnson v. State, 314 So.2d 573 (Fla. 1975). Indeed in construing other juvenile rules such as speedy trial, appellate courts have looked for guidance to the adult rule when rendering a decision. In the Interest of J.B. v. Korda, 436 So.2d 1109 (Fla. 4th DCA 1983); State v. M.S.S., 436 So.2d 1067, 1069, (Fla. 2d DCA 1983).

A confession is not involuntary merely because the person making it is a juvenile. In determining the admissibility of a juvenile statement, the "totality of circumstances" under which it was made must be examined. T.B. v. State, 306 So.2d 183 (Fla. 2d DCA 1975) citing Gallegos v. Colorado, 370 U.S. 49 (1962). The voluntariness issue raised herein cannot rest solely upon missing the "requisite" number of signatures. See Doerr v. State, 383 So.2d 905 (Fla. 1980); Jordan v. State, 334 So.2d 589 (Fla. 1976); M.L.H. v. State. Under the "totality of the circumstances" argument, the State has sufficiently met its burden of proving voluntariness. See M.L.H. at 14-15, (J. Ervin, dissenting); T.B. v. State; Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980); State v. Francois, 197 So.2d 492 (Fla. 1967); Jordan v. State.

In Jordan, this Court recognized that any waiver of counsel as required by Rule 3.111(d)(4), F.R.Crim.P., by an indigent was a right to counsel arising out of the Sixth Amendment, that is the right to counsel at the actual criminal prosecution--the trial or critical stages thereof as for example arraignment or sentencing. Police

interrogation, prior to the triggering of adversarial judicial criminal proceedings, has never been considered to be a situation which grants a right to counsel in a Sixth Amendment sense. See Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424, 436 (1977); Carter v. State, 408 So.2d 766, 767, n. 2 (Fla. 5th DCA 1982). It is instead a Fifth Amendment consideration.

The discussion of the rule in Jordan reflects that this Court understood the waiver of the right to counsel in a Sixth Amendment context when it held:

> The remedy for [the] . . . violation [of the rule] would be to require a new trial with counsel available to represent the indigent. We do not understand that appellant complains about the lack of quality of his representation in the instant proceedings. [That is, representation in the trial arena].

Jordan at 592. (Check quote)

A review of the rules of juvenile procedure, read in pari materia, reflect that these rules are court rules not applicable to preceding police interrogation situations. For example, Fla. R. Juv.P. 8.010 provides:

> Rule 8.010. Scope and Purpose
>
> These rules shall govern the procedures in the circuit court in the exercise of its jurisdiction under the Florida Juvenile Justice Act.

Likewise, it is obvious that 8.290(d)(1), which states:

> the failure of a child to request . . . counsel . . . shall not . . . constitute a waiver of counsel at any stage of the proceedings,

contemplates proceedings in which there is an interaction between the juvenile and the judiciary. Why else would 8.290(d)(5) require the court to renew the offer of assistance of counsel "at each subsequent stage of the proceedings"?

Indeed the First District's holding, when read in conjunction with the court rules, requires the trial judge to leave the courthouse and go to the defendant wherever he is (i.e. at the detention center, in a subsequent interaction with an intake officer) and personally and individually renew the right to counsel to the juvenile at every stage of the subsequent proceeding. Certainly, the drafters of this rule never intended such a construction.

Consequently because both the adult and juvenile rules, when read in context, contemplate the right to counsel in a Sixth Amendment context, and the case at bar involves an interrogation which contemplates counsel in a Fifth Amendment context, the rule is inapplicable. See 15 FLORIDA JUR.2ND §100(f) Right to Assistance of Counsel, In General (1979.[6]

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[6] ("[Q]uestions . . . relating to the constitutionally protected right of an accused to the assistance of counsel arise in one of two situations: (1) during out-of-court proceedings subject only to the supervision of police officers . . ., and (2) proceedings conducted under judicial surveillance . . . . The right to have counsel present at a custodial interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination.")

Thus, the District Court was in error to reverse the trial court's ruling.

Further, Jordan v. State involved a Miranda waiver in a post-arrest situation. Yet this Court recognized that:

> [T]here is nothing in Rule 3.111 which calls for suppression of evidence, the result appellant seeks to achieve. All rules must be sensibly construed. They are not to be given a strained interpretation or stretched to the limit of every conceivable construction conjured up by fertile imagination of counsel. For the reasons stated, it was not error to admit the confession in evidence.

Jordan v. State at 592.

Historically, a failure to obtain a written waiver has never rendered inadmissible a defendant's statement as long as that statement is voluntarily, knowingly, and intelligently made. North Carolina v. Butler, 441 U.S. 369 (1979); Jones v. State, 440 So.2d 570 (Fla. 1983). In Jones v. State, this Court determined that a statement was properly admitted notwithstanding the absence of a written waiver form foregoing Miranda rights. See also W.B. & G.B.F. v. State, 356 So.2d 884 (Fla. 3rd DCA 1978) in which the statement of the juvenile was admitted even though it was given, not only without two attesting witnesses, but also without Miranda, to an assistant principal in a pre-courtroom investigatory situation.

To hold that the Rule 8.290(d)(4) mandates a written waiver as the First District has done in this case is to give the procedural rule strained construction disapproved by this Court in Jordan v. State. Most importantly, the First District has placed an interpretation far beyond any construction of Miranda to date.

The State submits that even if the rule is applicable, the failure to conform to the technical niceties does not render the statement/ confession per se inadmissible. Such a failure is merely a factor when examining the totality of the circumstances to determine whether the confession was voluntary. Noncompliance with the technicalities does not render a confession involuntary and inadmissible per se. In Doerr v. State, this Court refused to find that a confession was inadmissible merely because the police officer did not notify the juvenile's parents pursuant to section 39.03. See also State v. Cartwright at 442; In the Interest of H.D.; Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981); State v. Cobb, 387 So.2d 526 (Fla. 4th DCA 1980). The statutory requirement of notification has nothing to do with interrogation. Doerr at 908. Again and again the caselaw teaches that the admissibility of a juvenile's confession depends upon the "totality of the circumstances," not technical compliance with the rules. Gallegos v. Colorado; Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981); T.B. v. State.

Here the factual circumstances do not require suppression of Respondent's statement. Respondent is a "relatively bright fourteen year old boy". (T 40) He understood the questions asked by the police officer. He responded and offered information not expected

from a boy of his age. The pre-disposition report contained in the record describes the boy as fairly intelligent. Based upon the report, it is safe to assume that Respondent has an upper middle class background. His stepfather has a doctorate in education and teaches at a local university; his natural father is chief air traffic controller at a small Jacksonville airport; his mother is a shopowner. Respondent is not new to the criminal justice system; he has a juvenile record of several years standing. According to the police officer, Respondent was composed and left a clear impression with the officer, based on his responses and observations, that a voluntary and knowing waiver had taken place. (T 30-52)

Not so in the case of M.L.H. v. State which the First District deemed controlling. M.L.H. was illiterate; he could neither read nor write. The police officer could not decipher his written statement it was unintelligible. Evenso, the officer did not read the form to the child, but explained it and allowed M.L.H. to read it for himself. Under the "totality of the circumstances" test, these factors are of utmost importance in arriving at the conclusion reached in M.L.H. v. State.

The State emphasizes once again that in this case, unlike M.L.H. v. State, Respondent has never advanced an argument predicated upon lack of knowledge, misunderstanding, confusion or coersion. Instead he relies on the procedural technicality of Rule 8.290(d)(4), F.R.Juv.P.

The State submits the court rule does not apply in a police interrogation situation. If it were applicable, failure to conform to the technicalities does not dictate exclusion per se. A statement voluntarily made by Appellant after advisement, but during non-custodial interrogation, is not inadmissible because the juvenile did not waive his right to counsel in writing. Rule 8.290(d)(4), F.R.Juv.P., does not govern until later in the judicial process. The trial court correctly admitted Respondent's statements and the opinion of the Court of Appeal, First District, is in error. The State of Florida urges this Court to quash the opinion in S.L.W. v. State, thereby affirming the decision of the trial court and the opinions of the Fourth District in In the Interest of H.D. and State v. Cartwright.

CONCLUSION

The record contains substantial competent evidence to support the trial court's finding and Petitioner, the State of Florida, respectfully requests that this Honorable Court affirm Respondent's conviction thereby quashing the opinion of the First District and affirming the opinion of the trial court and of the court of Appeal, Fourth District, in In the Interest of H.D and State v. Cartwright

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Charlene V. Edwards, Assistant Public Defender, 2nd Judicial Circuit, P. O. Box 671, Tallahassee 32302, this 10 day of April, 1984.

Barbara Ann Butler
Assistant Attorney General

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