IN THE SUPREME COURT OF FLORIDA

COREY LYNN COLBERT,,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. **72,244**

FILED
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JUL 21 1988
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DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

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STATEMENT OF THE CASE

On September 17, 1986, the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, filed an information charging the Petitioner, COREY LYNN COLBERT, with kidnapping contrary to Florida Statutes 787.01, and 803.04, two counts of sexual battery contrary to Florida Statute 794.011, and one count of lewd assault on a child contrary to Florida Statute 800.04, all of which allegedly occurred on August 28, 1986 (R1-3). From February 24-27, 1987, Mr. Colbert had a jury trial with the Honorable Carolyn K. Fulmer, Circuit Judge, presiding (R79, 190, 270). On Feburary 27, 1982, the jury deliberated and returned verdicts finding Mr. Colbert guilty of false imprisonment (the court granted a motion for acquittal on the kidnapping charge), one count of sexual battery, and of lewd and lascivious conduct (R378, 408).

On March 9, 1987, Mr. Colbert timely filed a motion for new trial, a motion for judgment of acquittal, and a motion to set aside the verdict on the lewd and lascivious count (R415-419). On May 14, 1987, the trial court granted Mr. Colbert's motion to set aside the verdict on the lewd and lascivious count based on double jeopardy grounds (R464, 465). The trial court then preceeded to sentence Mr. Colbert as follows: on the false imprisonment charge - two years of community control to be followed by three years of probation; and on the sexual battery charge - two years of community control to be followed by four years of probation, a condition of community control being that

Mr. Colbert spend 364 days in the County Jail. Said sentences were to run concurrent, and the sentencing imposed was a departure downwards from the recommended 3 1/2 - 4 1/2 year guidelines range. The trial court did submit written reasons justifying the departure (R471-484, 486-489). On May 28, 1987, the State timely filed a Notice of Appeal (R490); and on June 4, 1987, Mr. Coibert timely filed a cross Notice of Appeal (R504).

The Second District Court of Appeal rendered an opinion in this case on March 1, 1988, rejecting all issues.

STATEMENT OF THE FACTS

On August 28, 1986, seventeen-year-old Corey Colbert went into a bathroom with twelve-year-old M█████ B█████ at which time Mr. Colbert placed two fingers inside of Ms. B█████ vagina. The contested facts in this case centered around whether or not Ms. B█████ went willingly to the bathroom with Mr. Colbert, whether or not she willingly stayed in the bathroom when she got into the bathroom with Mr. Colbert, and whether or not she consented to the sexual acts - which may or may not have included penis insertion as well as digital insertion - with Mr. Colbert.

Ms. B█████ testified that August 28 at about 6:30 p.m. she was talking to two friends, J█████ and D█████ when Mr. Colbert and a friend named Willie approached them (R86-90). Mr. Colbert whispered in her ear that he is going to make her "suck his dick" and then he grabbed her by the arms (R90, 93). According to Ms. B█████ Mr. Colbert then pulled her into the bathroom of the wash house that they were standing in front of (R87, 94). Ms. B█████ stated that Mr. Colbert took her into the bathroom by force, he pulled her pants down, and he placed his fingers in her private part over her protestations (R96-100). At one point her friend D█████ come to the bathroom door and tried to open the door, but Mr. Colbert grabbed the door and closed it (R100, 102). When she began bleeding, Mr. Colbert stopped what he was doing and left the bathroom (R101, 102). Ms. B█████ then pulled up her pants and also left the bathroom (R102). Ms.

B indicated that Mr. Colbert had also placed his penis inside of her; however, she admitted that she never actually felt his penis go inside of her and had told the detective that she wasn't sure if his penis had gone inside of her (R99, 100, 131). Ms. B also admitted that she did not scream or yell when Mr. Colbert was pulling her into the bathroom and she was not afraid of him while he was pulling her into the bathroom (R128, 129).

After Ms. B left the wash house, she told J what happened and the word passed on to Rosa Mae Walden, the lady that Ms. B was staying with (R104, 105, 170, 171, 179). Ms. B was then taken to the hospital where she was examined (R106, 171, 172). At the hospital Ms. B was examined, and the examination revealed bleeding as a result of some tearing in the vaginal area (R201). Lab tests revealed no sperm, but there was a trace amount of acid phosphatase which could have been produced by Ms. B's own blood or as a result of sexual intercourse (R204, 205, 278, 279).

D E testified that she was with Ms. B when Ms. B and Mr. Colbert walked towards the bathroom in the wash house (R153, 163). Although Ms. E stated that Mr. Colbert had Ms. B by the arm and she was saying "stop," Ms. E also indicated that Mr. Colbert was not dragging Ms. B into the wash house and Ms. B was not acting scared but was saying stop in a normal manner (R153, 164). While still outside the wash house, Ms. E could hear Ms. B saying "stop, Lynn, stop" from inside the bathroom (R154). When Ms.

E[redacted] walked back towards the bathroom and tried to open the door, Mr. Colbert closed it in her face (R155). Before the door closed, Ms. E[redacted] did see that Ms. E[redacted]s pants were down (R155).

It was noted that Ms. B[redacted] was not living with her mother but was staying with the Walden family; and while she was staying with the Walden family, she was obliged to live by their rules which included not messing around with boys. Ms. had been instructed not to mess around with boys and had been informed that she would be punished if she did mess around with boys (R111, 112, 175, 181, 182).

Mr. Colbert testified that he and Willie Watson approached the three girls in front of the wash house when the girls called over to them (R359, 360). Although he couldn't exactly remember the conversation, Mr. Colbert stated that he never asked M[redacted] B[redacted] to "suck his dick" (R360, 361). As Mr. Colbert started walking towards the back of the wash house where the bathroom was located, Ms. B[redacted] followed him (R361). Although he was going to utilize the facilities, he did not do so when Ms. B[redacted] followed him into the bathroom (R361, 362). When Mr. Colbert asked Ms. B[redacted] if she was "going to suck my thing," she replied no. But then she stated "you know what I want to do" and pulled her pants halfway down (R362). Mr. Colbert stated that he knew she wanted him to mess with her, but he could not because he had caught gonorrhea from another girl he had had sexual relations with (R362). So at that point he approached her

and put his two fingers up inside of her (R362, 363). When he placed his fingers inside her, she jumped a little but did not say anything (R363). When he took his fingers out, he noticed some blood and asked her if she was alright (R363). She said she was okay and pulled her pacts up (R363). The two then left the bathroom (R365). Mr. Colbert stated that he was not aware that his putting of his fingers inside Ms. [redacted] would be a crime called sexual battery or a lewd and lascivious assault and he denied ever pulling his pants down or taking out his penis (R364, 365). Although he remembered a girl trying to open the bathroom door at one point, he admitted shutting it cause he wanted some privacy (R365, 366).

As Mr. Colbert was leaving the wash house area with his friend Willie Watson, Willie asked what had happened in the bathroom (R339, 366). Mr. Colbert informed his friend that he had put his fingers in her and got scaredwhen he saw blood coming out (R340, 344, 366). At that point Mr. Watson told Mr. Colbert that Mr. Colbert could get in trouble for this because the girl was young (R340, 344, 366). Mr. Watson did note that before the two went into the bathroom, he saw Ms. [redacted] walk in with Mr. Colbert and she was not being dragged (R337).

Later that evening after Mr. Colbert had gone to bed, the police arrived at his house and took him down to the police station for questioning about the rape (R366, 367). Although his mother told him not to say anything to the police, Mr. Colbert got scared and agreed to talk to the police after they told him

about all the things that could be done to him such as being tried as an adult and put in jail (R367, 369, 372). Mr. Colbert also noted that when he was told he had the right to an attorney he thought the officer meant a State Attorney who would try to put him in jail (R368).

Ms. Mary Colbert testified that she was Corey Colbert's mother and noted that her son had special problems with learning (R347). Ms. Colbert stated that when her son was very young he was hit in the head by a passing car and was in coma (R347). When Corey went to school, he was put in slow learning disability classes (R347). Ms. Colbert stated that her son had only gotten in trouble once before for throwing something at a passing car that was bothering him, and that resulted in a police officer just talking to her son telling him to stay out of trouble (R348). Although Ms. Colbert was allowed to ride with her son down to the police station, she was not allowed to sit with him while they questioned him (R351).

Detective Thomas Luther testified that he read Mr. Colbert Miranda rights and interviewed Mr. Colbert at approximately 1:00 in the morning on the 29th of August (R299). The detective advised Mr. Colbert that he had a right to an attorney as well as other rights, and Mr. Colbert appeared to have no problem understanding (R299, 300). After the rights were read, Mr. Colbert signed a waiver form and made a taped statement (R301, 303, 304). During the taped statement Mr. Colbert stated that Ms. B[redacted] had followed him into the bathroom, shut the

door, and started asking him questions (R305, 306). When Mr. Colbert asked her if she was going to suck his penis, she said she would not do that but pulled her pants down (R306). At that point Mr. Colbert admitted to placing two fingers inside her vagina (R306, 307). When he pulled his fingers out, he noticed blood; and after asking if she was okay, they left the bathroom (R307-309). Mr. Colbert stated that he did not kiss her, he did not touch her breasts, and he did not open his pants (R309). Mr. Colbert denied putting his penis inside of her (R310).

SUMMARY OF THE ARGUMENT

The trial court's giving of a modified Allen charge was per se reversible error In that the trial court did not discuss the giving of this charge with defense counsel prior to the giving of the charge. Also, the Allen charge was not appropriate in that the jury was not deadlocked. This court should also revisit the constitutionality of the Allen charge and all deviations.

In addition, Mr. Colbert attacks the denial of his motion to suppress in that the totality of the circumstances demons-rate that he did not knowingly and intelligently waive his rights. Also, refusing to allow Mr. Colbert's mother to sit in on the interrogation violated Mr. Colbert's rights against self incrimination. Upon request Mrs. Colbert had the right to be present. The court also improperly allowed a State witness to use hearsay evidence in order to demonstrate Mr. Colbert's guilt. In light of the credibility problems and close questions in this case, the error was not harmless.

Last but not least, the trial court erred in sentencing Mr. Colbert as an adult when it did not consider all of the criteria for imposing adult sanctions.

ARGUMENT

ISSUE I

DID THE TRIAL COURT **ERR** IN GIVING THE JURY A MODIFIED **ALLEN** CHARGE?

During jury deliberations the jury notified the trial court that it wanted to have the testimony of Ms. B[redacted] and her friend D[redacted] read back (R395, 396). Because of a change in court reporters, this was impossible; and the trial court informed the jury of this fact (R396, 398, 399). The trial court then asked the jury if a verdict on one or more counts had been reached without the request for rehearing the testimony and the answer was in the affirmative (R399, 400). The trial court, outside the presence of the jury, discussed with counsel the next step (R400). Defense counsel argued that all the counts were interrelated and requested a mistrial on all counts (R396, 402, 403). The prosecutor argued that each count was separate and distinct and verdicts should be rendered on those counts that the jury had already reached verdicts on (R403). The trial court stated that it would follow the prosecutor's reasoning and obtain verdicts on those counts that the jury had decided on. The trial court then stated it would declare a mistrial on the remaining undecided counts (R404).

When the jury was brought back in, however, the trial court added an additional instruction that was not discussed with counsel:

> I'm going to ask the foreman to bring the verdict forms to the courtroom. When I asked the questions of you, and I'm going to go

> over this one more time just to be sure there is no misunderstanding, I understood there to be an indication, really from all six of you, that as to those--that count or those counts that you have already reached a verdict on, that you do not feel--none of you feel that the reading back of this testimony will have any bearing on those verdicts. So, what I'm going to do is ask you to present the verdicts that you have reached, and it would be my intention to declare a mistrial as to those--that count or those counts that you have not reached a verdict on.
>
> Now, knowing that that is what I intend to do, if you wish to continue your deliberations, you may do that. If you do not feel that you could reach a verdict on those matters that you have not reached one on knowing this testimony is not available, then I'm asking you to submit the verdicts that you have to the Court. If you feel that you need to go to the jury room to discuss that, you may do that. (R404, 405--emphasis added)

Defense counsel immediately objected to this instruction that gave the jury the option of reconsidering their undecided verdicts in light of the threat of a mistrial, but the trial court felt that this abbreviated Allen'[1] charge was appropriate (R405, 406). The time of this instruction was about 7:59 p.m. on a Friday night (R405). The jury back with verdicts on all counts at 8:03 p.m. (R406-408).

The first argument in this issue is that the trial court did not discuss her intent to give an abbreviated Allen charge with defense counsel prior to giving the instruction. In Bradley v. State, 513 So.2d 112 at 112, 113 (Fia. 1987), the

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'Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

court reitterated its prior rulings on this issue by stating that *any* communications between a judge and jury under Florida Rule of Criminal Procedure 3.410 without notice to state and defense is per se reversible error:

> In Ivory v. State, 351 So.2d 26, 28 (Fla. 1977), we held that "it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and the defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request." We recently recognized, in Williams v. State, 488 So.2d 62, 64 (Fla. 1986), that the language of Ivory can be expansively read to mean that any communication between the judge and jury without notice to the state and defense is per se reversible error. In reaffirming Ivory, however, we held that violation of Florida Rule of Criminal Procedure 3.410 is per se reversible error, but communications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles. Id.
>
> Rule 3.410 requires:
>
> "After the jurors have retired to consider their verdict, If they request additional instructions or to have any testimony read to them they shall be conducted into the courtoom by the officer who has them in charge and the court may give them such additional instruction or may order such testimony read to them. Such intructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant."

In expounding on its prior decisions, Bradley pointed out that defense counsel merely being pesent is not enough. Defense counsel must be given an opportunity to participate in the discussion of the action to be taken on the jury's request, and

participation includes the right to place objections on the record as well as the right to make full argument as to what the jury should or should not be told.

In this case the trial court started out in the proper manner by discussing the communication from the jury with defense counsel and the prosecutor. Defense counel was able to set forth its arguments as to why a mistrial on the entire case as opposed to on just some counts should be granted. When the trial court spontaneously decided to give an abbreviated Allen charge during the midst of her instruction to the jury, the trial court violated the reasoning in Bradley and the prior Florida Supreme Court cases behind Bradley. The trial court did not discuss the giving or the wording of the abbreviated Allen charge and did not give defense counsel the opportunity to object to it, argue against it, or contribute to the language to be used. As was noted by Judge Schoonover in his dissent to the Second District Court of Appeal's opinion in this case:

> When the jury here asked to have certain testimony read back to it, the court could have, within a proper exercise of its discretion, either recessed until the court reporter who took the testimony was available to read the testimony to the jury or instructed the jurors that the testimony was not available and that they should rely on their memories and continue their deliberations. Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976). Instead, after having informed the attorney that the jury would be instructed to return verdicts on those charges they had already decided and that she was going to declare a mistrial on the remaining charges, the judge gave the modified instruction quoted above without any prior notice to the attorneys of her

> intention to give the modified instruction. This was error because the parties, through their counsel, have the right to be advised of any questions raised by the jury and any proposed responses to said questions. Flowers v. State, 348 So.2d 602 (Fla. 4th DCA 1977). See also, Ivory.

State v. Colbert, 522 So.2d 436 at 439 (Fla. 2d DCA 1988).

In addition to the fact that the trial court committed per se reversible error in giving the modified Allen charge without first consulting defense counsel, the trial court also committed error by giving any sort of Allen charge because the charge was inappropriate in this case. Because the jury had not indicated it was deadlocked, an Allen charge was not proper. This point was also discussed in the dissent:

> I could agree with the majority that the final part of the modified instruction in which the judge gave the jury the option of continuing Its deliberations without having the requested testimony read to it was a proper instruction if the court had followed rule 3.410. See Simmons. The judge erred, however, by preceding that instruction with the statement that she was going to declare a mistrial if the jurors chose not to deliberate further. Since the jury had never announced that it could not reach a verdict nor indicated that It was deadlocked, the giving of what the defendant referred to as a modified "Allen" charge was improper. Warren v. State, 498 So.2d 472 (Fla. 3d DCA 1986), petition for review denied, 503 So.2d 328 (1987). I cannot say that the defendant was not prejudiced as a result of this charge when the jury, who minutes earlier had asked that lengthy testimony be read back to it, decided to proceed, deliberated, signed verdicts, and returned to the courtroom in four minutes. **See** State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Colbert, supra at 439. Not only was the Allen charge

inappropriate and improper in this case, but this court should reconsider its appropriateness in any case.

In a recent federal case, the panel court In United States v. Rey, 811 F.2d 1453 (11th Cir. 1987), heavily attacked any and all versions of the Allen charge. Noting a modern judicial trend against the Allen charge, the court pointed to three federal circuits which have prohibited the charge, four federal circuits which have sharply curtailed its use, eighteen states that have rejected the charge, and the ABA's recommendation against the charge. Although the panel was bound by precedent established by the Fifth Circuit thirteen years ago, the suggestion was strong that the entire Eleventh Circuit should revisit the issue. The decision pointed out that such an instruction discouraged jurors in the minority and pressured them into abandoning their honestly held beliefs for reasons other than consideration regarding the guilt or innocence of the defendant. Noting the extreme pressure a minority juror must already face from the majority jurors, the court stated that "the last thing such a minority holdout juror needs is for the trial judge - cloaked with the full authority of his office - to even hint that holding out will be futile in the long run and that a verdict could be reached if the holdout would just reconsider." Rey, **id.** at 1460. The court concluded its attack on the Allen charge by stating the following:

> [T]he Allen charge interferes with the jurors when they are performing their most important role: determining guilt or innocence in a close case. It unjustifiably increases the

> risk that an innocent person will be convicted as a result of the juror abandoning his honestly-held beliefs.

Id. This same quote is referred to by Justices Marshall, Bennan and Stevens in their dissenting opinion to Lowenfield v. Phelps, __U.S.__, 108 S.Ct. 546 at 558, 98 L.Ed.2d 568 (1988), while noting that many state and federal courts have serious reservations concerning the coercive nature of the Allen charge.

Mr. Colbert concurs with the court in Rey and argues that any form of Allen instruction undermines his constitutional right to an impartial, unanimous jury verdict. The timing of this charge was crucial - 8 p.m. on a Friday night. It is obvious that the jurors were under pressure to reach a verdict after a week-long trial, and the threat of a mistrial pushed the holdouts over the edge. Although this court has approved Alien charges in the past, Kelley v. State, 486 So.2d 578 (Fla. 1986), the Rey case raises the possibility of reconsidering the issue in light of the new trend by courts in other states to reject the charge.

In light of the giving of this modified Allen charge without consulting defense counsel, the trial court committed per *se* reversible error as per Bradley, supra. In the alternative, such an instruction was inappropriate in this particuiar case and unconstitutional. Considering the severe credibility problems and the jury's verdicts in this case, it cannot be said that this instruction had no affect on the jury's verdicts. A new trial is required.

ISSUE II

DID THE **TRIAL** COURT **ERR** IN DENYING
MR. **COLBERT'S** MOTION TO SUPPRESS?

Prior to trial Mr. Colbert filed a motion to suppress his statements as being involuntarily made **(R6,** 7). The hearing on this motion was well as the trial, revealed the following:

i. Mr. Colbert was **17** years old at the time **(R16 ,**
2. Mr. Colbert was rousted out of bed after midnight **(R8,** 31, **350, 366);**
3. Mr. Coibert had suffered a severe head injury as a child **(R347);**
4. Mr. Colbert had spent almost his entire childhood attending special learning disability classes (R28, **29, 347, 348);**
5. Mr. Colbert was slow in understanding and following his mother's instructions **(R30, 352)**;
6. Mr. Colbert had extremely little contact with the police in the past and had never had Miranda rights read to him before **(R30, 37);**
7. Mr. Colbert's mother was not allowed in during the police interrogation even though she was at the station and had requested to be present **(R31, 32, 316, 351);**
8. Mr. Colbert's mother had tried to warn her son not to say anything at the police station **(R31, 39, 367);**
9. Mr. Colbert was read his Miranda rights without deviation from the form and without any explanation (R13, 16, **22, 23, 299, 315);**
10. Mr. Colbert was not told what an "attorney" was and at the time of his confession he was under the mistaken impression that an "attorney" meant a State prosecutor who would put him in jail **(R38, 21, 314, 368);**
11. **Mr.** Colbert was told he was accused of rape and he did not know digital penetration constituted rape **(R20, 367, 369, 374);**
12. Mr. Colbert was told he could be tried as an adult and put in jail, *so* he made his statements after he was told of what could: happen to him and because of his fear of going to jail **(R369, 372);** and
13. Mr. Colbert stated he did not understand what all his rights were **(R40)**.

Mr. Colbert's pretrial and trial motions to suppress were denied by the trial court (R64, 301, 302).

The Florida and United States Supreme Courts have held that a "totality-of-the-circumstance-approach" is to be used in determining whether juveniles knowingly waived their rights prior to making statements. All circumstances surrounding the interrogation must be examined, including: the juvenile's age, experience, education, background, and intelligence. An examination of these areas are to be made in order to determine if the juvenile had the capacity to understand the warnings, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. State v. S.L.W., 465 So.2d 1231 (Fla. 1985); and Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). It has also been noted that even though a juvenile may waive his Miranda rights, the State bears a heavy burden in proving that the waiver was intelligently made. T.B. v. State, 306 So.2d 183 (Fia. 2d DCA 1975). See also Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981).

In Fields, id., testimony revealed that the juvenile/defendant had reduced mental ability and would have trouble understanding his Miranda rights as they were read to him. The defendant, even though he expressly waived his Miranda rights, had stated he could not afford a lawyer when asked if he wanted one. These two factors demonstrated to the court that the defendant did not inteiligently comprehend the meaning of his rights to counsel; therefore, the waiver was not a voluntary,

intelligent and knowing waiver. The statements were suppressed. In the Interest of K.H., a child, 418 So.2d 1080 (Fla. 4th DCA 1982), dealt with promises made to the defendant to have the charges dropped if the defendant confessed. Although the promise was withdrawn before the statements were made, the court noted that the youth was not very bright and that it was consistent with any child's upbringing to suppose he could escape punishment by truthfulness and candor. The court held the confession was involuntary and had to be suppressed.

The fact that the defendant is a juvenile instead of an adult does not alter the type of test to be applied in examining voluntariness of a confession. S.L.W., supra. How a juvenile is treated when taken into custody, however, is different from that of an adult. Florida Statute 39.03 sets forth the criteria to be used when taking a child into custody to include making a reasonable effort to immediately notify the parents of the child. This section demonstrates a legislative intent to treat juveniles differently from other suspects in a criminal matter. In J.E.S. v. State, 366 So.2d 538 (Fla. 1st DCA 1979), the court noted that Florida Statute 39.03(3)a, (1977), required tht the parents be notified immediately if a child was to be detained.[2] The court then stated that if the parents then requested to be present, it would be error to proceed in questioning the juvenile and

[2] Although the statute has undergone changes since 1977, the present statute requires that a reasonable effort be made to immediately notify the parents of the child. This change does not alter the basic intent of contacting the parents if at all possible immediately upon taking the child into custody.

statements would be suppressed.

In Mr. Colbert's case the totality of the circumstances show an involuntary statement. Mr. Colbert was young and had mental problems, he had never experienced an arrest proceeding with Miranda rights before this, he was taken from his bed in the middle of the night, he was threatened with adult sanctions, he was spoken to with words he did not fully understand, and he was confused as to the word "attorney" thinking it to mean "prosecutor." Having been told he had raped a young girl, Mr. Colbert confessed to digital insertion incorrectly believing that only penal insertion constituted a rape. Even then, Mr. Colbert's confession only came after being frightened with statements about adult sanctions and jail. As in Fields Mr. Colbert demonstrated an inability to understand his Miranda rights and voluntarily waive them; and as in K.H. Mr. Colbert made his statements believing honesty would enable him to escape the horrors of adult sanctions. The State failed to meet its heavy burden in this case by failing to establish an intelligently made waiver.

In addition, keeping Mrs. Colbert from her son during the interrogation denied Mr. Colbert his rights against self-incrimination. Mrs. Colbert knew her son was not very bright and she wanted him to have a lawyer before he said anything. She tried to warn her son, but her attempts failed. She wanted to be present during the interrogation and under J.E.S., supra, she had a right to be present if she was available and made the request.

Once this request was made, the questioning should have stopped or, at the least, proceeded with Mrs. Colbert present and with the ability to counsel her son. The statements should have been suppressed.

ISSUE III

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE IMPERMISSIBLE HEARSAY EVIDENCE?

While Ms. S[redacted] was on the stand, she was allowed to testify - over objection - that she heard Mr. Colbert's friend Willie Watson tell Mr. Colbert that he (Willie) would 'watch Colbert's back' (R167-169). This statement referred to keeping a lookout while Colbert was in the bathroom with Ms. B[redacted]. The prosecutor argued that this statement constituted an exception to the hearsay rule in that it was "not offered to prove the truth" of the matter (R167). Mr. Watson took the stand on behalf of the defense and denied making any such statement in addition to denying knowing in advance what Mr. colbert and Ms. S[redacted] were doing in the bathroom (R337, 338).

As pointed out in Beatty v. State, 486 So.2d 53 (Fla. 4th DCA 1986), the hearsay rule which allows hearsay when the inquiry is directed not to the truth of the words spoken, is a much overworked exception. The question in Beatty, as in this case, is whether the testimony presented by the State allows the conclusion that the testimony was introduced for any purpose other than the truth in order to connect the defendant to the crime. For, as noted in Postell v. State, 398 So.2d 851 at 854 (Fla. 3d DCA 1981), "where...the inescapable inference from the testimony is that a non-testifying witness has furnished...evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is

defeated... .

In Williams v. State, 510 So.2d 656 (Fla. 2d DCA 1987), the court reversed for a new trial when inadmissible hearsay was used to impeach the defendant's statement that he never had sex with anyone but his wife. The hearsay statement alluded to an affair with his sister-in-law--an affair that the defendant, the defendant's wife, and his sister-in-law denied on the stand. Because the defendant's credibility was critical to his defense, this court could not find harmless error beyond a reasonable doubt as per State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

In Mr. Colbert's case the defense was consent on three counts and denial on one count. The trial court found no evidence to support a kidnapping charge and reduced it to false imprisonment before giving it to the jury (R378). The jury had obvious problems with Ms. B[redacted]s testimony as to being dragged into the bathroom as evidenced by the question on false imprisonment--"if [victim] went willingly but was restrained after getting into the bathroom, is this false imprisonment?" (R394, 395). The jury also rejected Ms. B[redacted] accusation on penis insertion when it found Mr. Colbert not guilty on that count. Mr. Colbert's credibility was of the utmost importance in this case, and the last remaining counts got down to Mr. Colbert's word versus Ms. B[redacted]s word. The jury had already discounted two important aspects of Ms. B[redacted]'s testimony (being dragged into the bathroom and raped by penis insertion), so it would not have been unreasonable to assume that the jury would

have also rejected Ms. B[redacted]'s claims of being forced had it not been told about Willie's alleged statement to **Mr.** Colbert on keeping a lookout as the two went to the bathroom. Such a statement directly conflicted with Mr. Colbert's version. The answer in this case to the question raised in Beatty, supra, is the same one reached in Beatty - it is impossible to see how this statement could have been used **for** any purpose other than for the truth.

Because **Mr.** Colbert's credibility and that of his witness was critical to his defense, it cannot be said that the error is harmless beyond a reasonable doubt. Williams, supra, and DiGuilio, supra. Had the jury not heard this evidence, **Mr.** Colbert might have been convicted of only lewd and lascivious conduct instead of sexual battery and may not have been convicted of false imprisonment. **Mr.** Colbert is entitled to a new trial.

ISSUE IV

DID THE TRIAL COURT ERR IN SENTENCING MR. COLBERT AS AN ADULT?

When the trial court decided to impose adult sanctions instead of juvenile sanctions, it considered four out of the six criteria listed in Florida Statute 39.111(7)(c) and ignored subsections four and five (R495). According to Florida Statute 39.111(7)(d), "any decision to impose adult sanctions shall be in writing and it shall be in conformity with each of the above critera." (Emphasis added.) Addressing four out of six criteria in a written order is not adequate. See Walker v. State, 483 So.2d 825 (Fla. 3d DCA 1986). The trial court's order in this case is inadequate in that it fails to address all the criteria. Reversal is required in order that 39.111(7) be fully complied with by the trial court.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, by mail on this 19th day of July, 1988.

DEBORAH K. BRUECKHEIMER