IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS
WESTERN DISTRICT
CRIMINAL DIVISION

FILED THIS 18 DAY OF Jan
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STATE OF ARKANSAS — PLAINTIFF

VS — NO. CR-93-47

JESSIE LLOYD MISSKELLEY, JR. — DEFENDANT

HEARING BRIEF ON THE LAW IN SUPPORT OF THE DEFENDANT'S MOTION TO SUPPRESS AND AMENDED MOTION TO SUPPRESS

The State has the burden of proving that the alleged confession of the Defendant was voluntary and that the alleged waiver of his rights by the Defendant was legally made as well as knowingly and intelligently made. An in-custody confession is presumed to be involuntary and the burden is on the state to show that the statement was voluntarily made. Smith v. State, 254 Ark. 538, 494 S.W.2d 489 (1973). The United States Supreme Court has stated, "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and we 'do not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In the case of a statement made by an individual under the age of 18 at the time of the statement, the State has an especially "heavy burden." Hall v. State, 421 So.2d 571 (Fla.App. 1982).

The facts and circumstance of the statement of the

defendant in the case now before the Court clearly demonstrates that the statement should be suppressed on several grounds.

I. VOLUNTARINESS OF STATEMENT

First, there is the issue of whether the statement was voluntary. This issue is separate and apart from the issue of whether the Defendant made a knowing and intelligent waiver of his rights. Within the issue of the voluntariness of the statement there are several sub-issues. Many of these issues have generally been "lumped" together by the courts in a "totality of the circumstances" test, however, a few issues, independently, and on there own, will require suppression without a "totality" test.

A. Offer of Reward.

The Arkansas Supreme Court has repeatedly held that a statement obtained by a promise of reward or leniency is not a voluntary statement and must be suppressed. Hamm v. State, 296 Ark. 385, 757 S.W.2d 932 (1988). In the case at Bar, Detective Mike Allen, discussed with the defendant, and his father, the fact that a reward of $30,000 had been offered for information leading to the conviction of the person responsible for the homicides. Testimony at the Suppression Hearing clearly demonstrated this fact. The officer and the defendant had even gone so far as to discuss how the money

would be spent by the Defendant, i.e. the purchase of a new truck. It is important to note that while the officer does not specifically recall this conversation, he does not deny that it took place.

In addition, this discussion took place while the officer was attempting to obtain permission from the defendant's father for a polygraph examination. The $30,000 reward was an obvious inducement for the defendant to give a statement and for his father to give permission for the polygraph test.

When you consider the age and mental capacity of the defendant, which is discussed in the next section of this brief, it becomes even more clear that the offer of reward was a catalyst in obtaining the defendant's statement.

In addition to the offer of a $30,000 reward, the two officers who took the defendant's first recorded statement testified that they had used a diagram consisting of a "Circle" with dots on the inside and dots on the outside. The dots on the inside represented the defendant and his co-defendants and the dots on the outside of the circle represented the police. The officers testified that they asked the defendant if he wanted to come out of the circle and join the police on the outside. The defendant replied to the officers that he "wanted out", and almost

contemporaneously gave his alleged statement. This is clearly an inducement and offer of leniency to the defendant by the officers in order to get him to give a statement.

For purposes of this section of the Brief, it is important for the Court to note that the Defendant's statements do not directly implicate the defendant in the homicides. Although, the State clearly feels that the Defendant has liability as an accomplice, in his statements the defendant states that he was only present at the time of the homicides and in no way did he commit any homicidal act. This fact gives rise to the inference that the defendant, not thinking that he was implicating himself in anyway, gave these statements in hope of receiving a reward of $30,000 and after being invited out of the "Circle" by the Police.

Furthermore, fear of punishment must not be a reason for the statement, or it will be suppressed. In Tatum v. State, 266 Ark. 506, 585 S.W.2d 975 (1979), the Arkansas Supreme Court stated, "there is a presumption that an in-custody confession is involuntarily and the burden is upon the state to show the statement to have been voluntarily, freely and understandably made, without hope of reward or fear of punishment." In Freeman v. State, 527 S.W.2d 909 (Ark. 1975), the Arkansas Supreme Court stated, "In order to be voluntary, a confession must have been made in the absence of

threat of injury or promise of reward and free from the taint of official inducement processing from either hope or fear. When threats of harm or promises of favor or benefits are used to extort a confession, it is attributable to such influence and not voluntary." Freeman, at 912. As far back as 1887 in Corley v. State, 50 Ark. 305, 7 S.W. 255 (1887), the Arkansas Supreme Court stated, "The rule is established in this state-in accordance with the unvarying current of authority elsewhere, that a confession of guilt, to be admissible, must be free from the taint of official inducement proceeding either `from the flattery of hope or the torture of fear.'"

The "Circle" diagram was obviously a psychological ploy used by the officers to elicit a statement from the Defendant. Informing him that he was in a circle, with his two co-defendants, surrounded by police, clearly was a threat of punishment, especially in consideration of the very limited mental capacity of the accused.

In some cases, the very statements made by the officers are of such a nature that it is not necessary to consider the vulnerability of the accused in determining whether the statement was voluntary. Stone v. State, 43 Ark.App. 203, ___ S.W.2d ___ (1993). On the other hand, the Court at other times must look at a combination of what was said and at the

vulnerability of the accused. Stone, 43 Ark.App. 203. Statements that have been held to be a promise of reward include, "I'll help you any way I can," Tatum v. State, 266 Ark. 506, 585 S.W.2d 975 (1979) and, "I'll help all that I can." Shelton v. State, 251 Ark. 890, 475 S.W.2d 538 (1972). If a statement by an officer has innuendos or subtlies calculated to deceive the accused, the following statement of the defendant will be suppressed. See, Penton v. State, 194 Ark. 503, 109 S.W.2d 131 (1937). It is not necessary for there to be an explicit promise of leniency. If the accused can reasonably believe that the officer is offering him assistance or the statement is made out of fear of possible punishment, it is not voluntary and must be suppressed. See, Freeman v. State, 527 S.W.2d 909 (Ark. 1975).

Other States have ruled similarly. In Hillard v. State, 406 A.2d 415 (Md. 1979), the Maryland Court of Appeals stated, "if an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declaration will be considered to have been involuntarily made and therefore inadmissible."

If the evidence tends to indicate that the defendant was

offered a reward, of leniency or otherwise, or even the innuendo of an offer was made, or that his statement was made out of fear of possible punishment, the statement must be suppressed. Here, in addition the innuendo of leniency, there was also the fact that there was an outstanding reward of $30,000.00 which would be paid if the Defendant gave the correct information to the police. Unquestionably the officers had a heightened duty to negate that impression. Unfortunately, no such effort was made by the authorities.

B. Age and Mental Capacity of Defendant.

Few courts have considered the age of an individual alone in determining the voluntariness of a statement. However, one of those that has considered this issue is the Supreme Court of Indiana. In Lewis v. State, 288 N.E.2d 138 (Ind. 1972), the Indiana court was faced with a statement made by a 17 year-old youth with apparently average intelligence. The issue on appeal was whether the youth had made a voluntary statement. The court first described the situation the minor usually finds himself in. The Court stated:

> In most cases he is aware that he is in trouble. If he is not under formal arrest he is usually being questioned in a police-dominated atmosphere and finds himself in some instances cut off from anything familiar or comforting to him. Many times he faces his accusers alone and without the benefit of either parent or counsel.

The court continued:

> It is in these circumstances that children under eighteen are required to decide whether they wish to give up the intricate, important and long established fifth and sixth amendment rights. It indeed seems questionable whether any child falling under the legally defined age of a juvenile and confronted in such a setting can be said to be able to voluntarily, and willingly waive those most important rights.

The court continued by pointing out that the law commonly establishes different standards for a juvenile than for adults. The court referred to the fact that minors are unable to execute a binding contract, unable to convey real property, unable to marry of their own free will, or even donate blood. The Court then stated, "It would indeed be inconsistent and unjust to hold that one whom the State deems incapable [of doing all of the above listed things] should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign and unfamiliar." The Indiana court then held as a matter of common law (not statutory law) that a statement of a minor could not be use against him unless he and his parent or guardian were informed of his rights and both waived.

The United States Supreme Court has also recognized the problems associated with minor's statements. In Haley v. Ohio, 332 US 596, the Court stated:

"when, as here, a mere child - an easy victim of the law -is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crushes him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour. . . . No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning." Haley, 332 US at 599, 600.

Similarly, in Gallegos v. Colorado, 370 US 965 (1962), the United States Supreme Court stated:

> The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is was accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interest or how to get the benefits of his constitutional rights. Gallegos, 370 US at 618-19.

In the case of In re Lucas F, 68 Md.App 97, 510 A.2d 270 (1986), the Maryland Court of Appeals held that an ordinary ten year old could not, as a matter of law waive his rights without the counseling and guidance of a parent or guardian. The Court stated:

> Did he realize what services an attorney could

preform for him? Did he understand that he was incriminating himself? Is an uncounseled Miranda waiver . . . enough to satisfy due process? Do justice and fundamental fairness require that the child have the benefit of the guidance of a parent or guardian before the child may waive Miranda rights? Those questions and others lead us to believe that Lucas's waiver of Miranda is almost, if not totally, meaningless.
Lucas, 510 A.2d at 274.

Here, we have a 17 year old individual with a very limited education and with an I.Q of 72. Further, at pre-trial hearings, a defense expert has testified that the Defendant is mentally deficient and that the Defendant has the mental reasoning capacity of a 5 to 8 year old child. Without question the defendant did not realize what services an attorney could preform for him, nor did he understand that he was incriminating himself, and was not guided by his parent or an attorney in this most difficult time.

This Court is respectfully requested to hold, as a matter of law, that the statement of this defendant was not voluntary due to his physical and mental age.

C. Totality of the Circumstances.

In addition to the above mentioned "per se" rules of exclusion, the courts have developed a "totality of the circumstances" test in determining whether a statement was voluntarily made. Miller v. Fenton, 474 U.S. 104 (1985). Among the circumstance to be examined are the following:

1. The tactics used by the police. United States v.

Rohrabach, 813 F.2d 142, 144 (8th Cir).

2. The details of the interrogation. United States v. Rohrabach, 813 F.2d 142, 144 (8th Cir).

3. Any characteristics of the accused that might cause his will easily to be overborne. United States v. Rohrabach, 813 F.2d 142, 144 (8th Cir).

4. The age of the defendant. Fare v. Michael C., 442 U.S. 707, 725 (1979).

5. The experience of the accused. Fare v. Michael C., 442 U.S. 707, 725 (1979).

6. The education of the accused. Fare v. Michael C., 442 U.S. 707, 725 (1979).

7. The background of the defendant. Fare v. Michael C., 442 U.S. 707, 725 (1979).

8. The intelligence of the accused. Fare v. Michael C., 442 U.S. 707, 725 (1979).

9. The capacity of the accused to understand the warnings given him. Fare v. Michael C., 442 U.S. 707, 725 (1979).

10. The understanding of the accused of the nature of his Fifth Amendment rights. Fare v. Michael C., 442 U.S. 707, 725 (1979).

11. Whether the accused understands the consequences of waiving his rights. Fare v. Michael C., 442 U.S.

707, 725 (1979).

12. Whether the accused is held incommunicado or consults with relatives, friends or an attorney. West v. United States, 399 F.2d 467, 469 (5th Cir. 1968).

13. Whether the accused is interrogated before or after formal charges have been filed. West v. United States, 399 F.2d 467, 469 (5th Cir. 1968).

14. Whether the accused has repudiated an extra judicial statement at a later date. West v. United States, 399 F.2d 467, 469 (5th Cir. 1968).

15. Whether the statement was given in the coercive atmosphere of a station-house setting. Drake v. State, 441 So.2d 1079 (Fla. 1983).

16. Whether the police suggested details of the crime scene. State v. Sawyer, 561 So.2d 278 (Fla.App. 1990).

17. Whether psychological coercion was applied. State v. Sawyer, 561 So.2d 278 (Fla.App. 1990).

18. Whether the Defendant has been shown a picture of the body of a victim. People v. Roberts, 3 Mich App 605, 143 N.W.2d 182 (1966).

19. Whether the police made any threats, promises of leniency, or made statements calculated to delude

the suspect as to his or her true position. Brewer v. State, 386 So.2d 232, 237 (Fla. 1980).

20. Whether the police exerted undue influence or make direct or implied promises of benefits. State v. Sawyer, 561 So.2d 278 (Fla.App. 1990).

There are several opinions of note applying these factors. In Hall v. State, 421 So.2d 571 (Fla.App. 1982), the Florida Court of appeals was faced with a fact situation similar in many ways to the one before the court today (in fact, the facts of Hall are not as compelling as those now before the court.) The relevant facts, as stated by the Court, in Hall, are as follows. The defendant was of subnormal I.Q.; when picked up by the police he was not informed that he was a suspect; no parent was present when he signed the rights form; the defendant originally denied any involvement in the crime and then was given a polygraph test, he confessed shortly thereafter; there were alibi witnesses placing the defendant elsewhere; the defendant believed he could go home if he gave a statement. The Florida Court summarily held that the statement, under the "totality of the circumstances" test, should have been suppressed.

In State v. Sawyer, 561 So.2d 278 (Fla.App. 1990), the Florida Court of Appeals, held the confession of the defendant was a product of psychological pressure and should

be suppressed. The Court, after listing several of the above listed factors, then stated, "Although particular statements or actions considered on an individual basis might not vitiate a confession, when two or more statements or courses of conduct are employed against a suspect, courts have more readily found the confession to be involuntary." Sawyer, 561 So.2d at 281-82. The Court then found that several of the listed factors were present. Notably, the court found that the psychological pressures included: lowering the threshold, trying to get the accused to admit to an "accidental" killing; the police asked leading questions; the police suggested answers; there were promises of leniency; there was fear of punishment on the part of the accused. It is also important to note that the Court found that the defendant was of average intelligence, but still held that he was psychologically pressured into an invalid confession.

In Gallegos v. State, 370 U.S. 49 (1962), the United States Supreme Court applied the totality test and suppressed a confession. In Gallegos, the defendant was a juvenile, he was not allowed to talk with his mother, and he was detained for five days (but the confession occurred almost immediately after he was taken into custody), no other factors were present, yet the court found that the confession had been coerced.

The courts have been especially mindful of lies and deception. In Woods v. Clausen, 794 F.2d 293 (7th Cir. 1986), the Seventh Circuit Court of Appeals held a confession was not voluntarily made. While listing several factors the Court felt important in a "totality" test, the Court emphasized the fact that the officers were not truthful to the defendant. The officer held up a wallet of one of the victims and falsely informed the defendant that his fingerprint was on the wallet. The Court also noted that the defendant was 16 and 1/2 years old and the officers showed the defendant pictures of the deceased. The Court stated, "a review of the totality of the facts and circumstances surrounding this case does not leave us with the impression the constitutional principles and values enunciated by the Supreme Court were respected in any manner. The police simply overreached in this case." Woods, 794 F.2d at 297.

Another case dealing with deception by the police is Fields v. State, 402 So.2d 46 (1981), the District Court of Appeals of Florida, First District held that a statement should be suppressed. The only factors listed to show the coercive nature of the statement in the Courts opinion were: that the defendant, when asked if he wanted a lawyer stated, "I can't afford to get one;" that the defendant had a reduced mental capacity; and that the defendant was lied to by the

police and told that there was evidence against him which did not, in truth in fact, exist. Clearly, officers are not at liberty to use deceit and trickery to obtain a confession.

In the case at Bar, the Defendant was given a polygraph examination by Detective Bill Durham of the West Memphis Police Department. After the examination the defendant was told that "he was lying his ass off", and the interrogation pressure was intensified. Officer Durham testified that he graduated from Polygraph School in 1982, and as such, has twelve years of experience as an examiner.

Warren Holmes, with 39 years experience as a polygraph examiner and law enforcement officer, and who has worked on 1200 homicide cases, including the assassination of President Kennedy and Martin Luther King, and who has been a consultant to the FBI, CIA, Royal Canadien Mounted Police, and the Texas Rangers, testified that he had reviewed the results of the polygraph examination given to Jessie Lloyd Misskelley, Jr. on June 3rd, 1993. He concluded that the examination was conducted improperly, and that he could find no evidence that Mr. Misskelley was being deceptive in his responses to questions dealing with the deaths of the three eight year olds. Thus, it is obvious that the police officers incorrectly informed Mr. Misskelley that he had failed the examination. This was a catalyst in obtaining the statements

of the defendant who "confessed" shortly after he was told he was "lying his ass off." Mr. Holmes testified that polygraphs, if not used correctly, can lead to a false confession. Mr. Holmes report, which has been made an exhibit herein states that nothing in the polygraph test of the defendant suggests that he had any knowledge of the homicides. Thus, it is obvious that the West Memphis Police Department used the polygraph as a "tool", in an improper fashion, to elicit a statement from the defendant. Mr. Holmes also testified that his review of the statements of the Defendant themselves, independent of the polygraph, led him to believe that the "confessions" were false. He testified to eleven factors that police should watch for so as to avoid false confessions.

Although the police officers deny the fact that the Defendant asked to go home on several occasions during the interrogation, Officer Ridge admitted that once the Defendant became a "suspect" he was not allowed to see his father despite his father being present at the police station.

There is no doubt that officers of the West Memphis Police Department used psychological coercion in order to get the defendant to make a statement. This, coupled with the limited intelligence of the defendant clearly show the involuntariness of the confession. Inspector Gitchell

testified that he deployed several tactics against the Defendant which resulted in his "confession":

1. Photograph of one of the victims lying in the coroners office;
2. a diagram of a "Circle" representing the defendant inside the circle and the police outside the circle; and
3. an excerpt of a tape recorded statement of a child which provided that "only I know what happened to those boys."

Almost immediately after deploying these psychological tactics against the defendant, he gave his statements to police. Anyone, especially a mentally retarded person, would be absolutely horrified by these tactics. It is clear that these tactics, combined with the other factors set forth herein, caused the defendant to make an involuntary statement.

In the present case, there is evidence in favor of suppression on each and every one of the 20 above listed elements. A statement can be admitted only if the totality of the circumstance show both an uncoerced statement and the requisite level of comprehension. The issue is not whether the evidence tends to show a coerced statement (which the Defendant submits that it unquestionably shows) but whether

by a preponderance of the evidence the State shows that the statement was not coerced. Therefore any question of doubt must be resolved in favor of the Defendant. Under the totality of the circumstances test, the state has failed at meeting its burden of proof, and the defendant has clearly shown that the statement must be suppressed.

II. KNOWING AND INTELLIGENT WAIVER

As previously noted, the test is not simply whether the statement was voluntary, but also whether there was a "knowing and intelligent" waiver of the defendants Miranda rights. In Maupin v. State, 309 Ark 235, 831 S.W.2d 104 (1992), the Arkansas Supreme Court held:

> The inquiry into waiver has two distinct dimensions. Colorado v. Spring, 479 U.S. 564 (1987); Moran v. Burbine, 475 U.S. 412 (1986). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Moran, at 421. "Involuntary confession" jurisprudence is concerned with governmental intimidation, coercion, or deception. Colorado v. Connelly, 479 U.S. 157 (1986). Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Moran at 421.
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> Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran at 421. . . . Thus, a court must look at the totality of the circumstances to see if the State proved that a defendant had the requisite level of comprehension to waive his Fifth and Sixth Amendment rights.

All of the factors previously listed above must be again be considered in determining if there has been a knowing and intelligent waiver. In addition, there is now an added emphasis on the mental capabilities of the defendant. In, Maupin, the Arkansas Supreme Court stated:

> At the suppression hearing, in order to prove by a preponderance of the evidence that the waiver was knowingly and intelligently given, the State called only two witnesses, Buddy Early, the Wynne policeman who was the guard outside the appellant's hospital room on the day he gave the confession, and Dave Parkman, the investigator for the Cross County Sheriff's Office who took the confession. . . . [Policeman Early] was not asked if appellant was already familiar with his rights. He was not asked if the appellant was allowed sufficient time to read the warning form. He was not asked the interval of time that elapsed between his entry into appellant's hospital room and when appellant signed the form. He was not asked about appellant's age, experience, education, background, intelligence, whether he was under sedation for pain at the time, whether he had the requisite capacity to understand the warnings given him, whether he understood his Fifth Amendment rights, or whether he understood the consequences of waiving those rights. He was asked numerous questions going to the issue of voluntariness, but that is not the issue. In summary, he was not asked questions to prove that the appellant possessed the requisite level of comprehension to waive his constitutional rights.

The Court then held that the state had failed to show that the defendant had the required mental capabilities to waive his rights.

Here, we obviously have a mentally deficient juvenile, facing an extreme amount of psychological

pressure, talk of a $30,000 reward if he can give the state information it desires, and all the other factors previously discussed in the above section. Further, the Court has previously heard expert testimony by the defense that the Defendant did not have the mental capabilities to waive his rights. The state has failed to meet its burden to show that the defendant knowingly and intelligently waived his rights.

III. FAILURE OF OFFICERS TO ABIDE BY RULE 2.3 ARCP

Rule 2.3 of the Arkansas Rules of Criminal Procedure states:

> If a law enforcement officer acting pursuant to this rule requests any person to come to or remain at a police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

The Arkansas Supreme Court, in interpreting this language has made it clear that officers have an affirmative duty to so inform individuals who they request to accompany them, or if the duty is not carried out, the statement will be suppressed.

In Burks v. State, 293 Ark. 374, 738 S.W.2d 399 (1987), the Arkansas Supreme Court addressed the issue whether officers had complied with Rule 2.3. The facts showed that a robbery occurred and the owner of the store was shot and killed. A suspect was identified and arrested. A clerk at

the store identified the defendant as being with the suspect at the store immediately before the robbery. The police the proceeded to locate the defendant and "requested" that he come to the station for questioning. At trial, the defendant raised the issue of whether the officers complied with Rule 2.3. The Supreme Court held:

> There is no testimony or other evidence that the appellant was ever told by any of the officers that he was free to leave at any time. In view of appellants uncontradicted testimony the he was never so informed, we conclude that the officers failed to comply with A.C.Cr.P 2.3. . . . Since the officers did not comply with the positive duty prescribed by this rule, and we find no justification for such non-compliance, we conclude that the custodial interrogation of the appellant was not voluntary and constituted a seizure within the meaning of the Fourth Amendment. . .
> Burks, 738 S.W.2d at 401.

Similarly, in Kiefer v. State, 297 Ark. 464, 762 S.W.2d 800 (1989), the Arkansas Supreme Court again held that there had been a violation. In Kiefer, the defendant was accused of the rape of his daughter. The authorities were called to the daughter's school and informed that the defendant's daughter claimed he had raped her. The officer then called the defendant and requested that he come to the station house, which the defendant did. On appeal, the court had no difficulty in finding that there had been a violation, the Court simply stated, "[the officer] conceded he did not inform Kiefer he did not have to come to the office."

Importantly, the Court has required an explicit following of the rule, in Addison v. State, 298 Ark. 1, 765 S.W.2d 566 (1989) the Supreme Court, again addressing the issue of whether there had been a violation held:

> [The defendant's] detention was not in conformity with Ark.R.Crim.P. 2.3. . . . One of the officers testified that he asked Addison if he would mind going down to the station, to which Addison replied that he had "no problem with that." Addison then asked if the officers would take him home later. An officer responded, "after we get through with you." Another officer stated that he told Addison that he was at the station voluntarily. In either event, none of the officers specifically informed him that he had no obligation to be there or that he could leave if he wanted. Clearly, the officers breached the positive duty mandated by Rule 2.3.
> Addison, 765 S.W.2d at 570.

Clearly it is not sufficient for the officers to have asked the defendant to come or to inform him that he is there voluntarily, the officers must specifically inform the defendant that he is free to leave.

Officer Mike Allen was repeatedly asked on cross-examination what, if any rights, he discussed with the Defendant, and/or his father on the day he asked the Defendant to come to the police department for questioning. Officer Allen clearly stated that he did not discuss any rights of the defendant at the time he picked him up for questioning. This was corroborated by the testimony of the Defendant's father who also testified that the officer never

mentioned any of the Defendant's rights. In fact, Officer Allen stated that it was not necessary for him to advise the defendant of any of his rights since he (the Defendant) had agreed to come in voluntarily for questioning. Additionally, Dective Ridge testified that no rights were discussed with the Defendant when he and Officer Allen began the interrogation of the Defendant. He further testified, on direct and cross-examination, as to what rights were in fact discussed. While he indicated that the Miranda rights were discussed, there was no discussion, even at this late time (the defendant had already been at the station for more than one hour), of defendant's rights under Rule 2.3.

Further more, given the defendant's limited mental capabilities, the officers were under an increased burden to explicitly and unequivocally explain to the defendant that he did not have any duty to accompany them to the station.

Clearly, the State did not offer any evidence whatsoever that the Defendant was informed that he had no obligation to accompany the police to the Police Department for questioning or that he was free to leave any time he wanted. It is obvious the officer breached the positive duty mandated by Rule 2.3.

Once it is determined that there has been a violation, the only remaining question is whether the officers had

probable cause for an arrest. If the officers had probable cause for an arrest at the time the suspect was asked to come to the station, then the failure to give the Rule 2.3 warnings are cured. Kiefer v. State, 297 Ark. 464, 762 S.W.2d 800, 801 (1989). As to this issue, the state has made it abundantly clear. Each and every officer testified unequivocally that the defendant was not a suspect when he was taken to the station. In fact, one of the officers testified that the officers had no probable cause for an arrest at the time the defendant was picked up.

Once there has been a determination that there was a violation of Rule 2.3 (which has been clearly shown) and the officers did not have probable cause for an arrest at the time they picked up the defendant (which they clearly did not), then the statement must be suppressed. In Foster v. State, 285 Ark. 363, 687 S.W.2d 829 (1985), the Court held that the defendant had been detained in violation of Rule 2.3 and suppressed her statements. Similarly, in Richardson v. State, 288 Ark. 407, 706 S.W.2d 363 (1986), the Court, after finding a violation of Rule 2.3, suppressed all the physical evidence that was uncovered due to defendant being present at the station in violation of the rule.

IV. VIOLATION OF DUE PROCESS BY NOT RECORDING THE ENTIRE INTERROGATION

It is undisputed that the defendant was interrogated for

an extended length of time. However, only a small portion of this interrogation was recorded and therefor reserved for review by the Courts. Several of the issues now being raised by the defendant could be more certainly resolved if there was a complete record of what transpired. Unfortunately, human memories are not perfect. Only a limited number of Courts have addressed the issue of whether full recordation is required. However, of those that have addressed the issue, they have found that full recordation, when feasible, is preferred.

In Stephen v. Alaska, 711 P.2d 1156 (Alaska 1986), the Supreme Court of Alaska held that an unexecused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process. The Court went on to state, "We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right against self incrimination and, ultimately, his right to a fair trial." Stephen, 711 P.2d at 1158. The Court emphasized that it was not to curb dishonesty, but their main concern was the frailty of human memory. The Court also noted that the police and the public, as well as the accused will benefit from the rule. The Court stated:

> The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interest of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellant courts to ascertain the truth.
> Stephan, 711 P.2d at 1161.

The Court was quick to point out that if there is a satisfactory reason for the failure to record, i.e., a power failure or the accused refuses to be recorded, then the statement will not be suppressed. However, absent justification for the failure to record the entire interrogation, no part of the interrogation can be admitted.

In the case of Florida v. Dupont, 6th Circuit, Pinellas County, the trial court held that it was a violation of Due Process to admit the statement of the accused when neither the interrogation nor the confession was recorded. The court held:

> This Court, like the officers involved, seeks justice. . . . Neither should be afraid to have its actions viewed or reviewed. In a case of this magnitude, it is inconceivable that no record was made of the interrogation. . . . Had there been an audio tape or video tape of what occurred on July 6th and 7th, 1992, there would be no conflict between officers, between officer and defendant, between the facts and the testimony. Everything that occurred would be clearly before the Court for consideration. . . . To

resolve such an issue based solely on human memory is foolhardy and dangerous.

The Court added, "This Court cannot be silent when the failure to meet this due process requirement creates the specter of death for the defendant. . . . It is time that law enforcement be required to protect for others rights which are protected for them - recorded statements."

It is important to note that the defendant requests no greater protection, in terms of recorded interrogations, than are provided to police officers. The Arkansas Legislature has previously enacted, at the urging of police officers, A.C.A. section 14-52-301 et seq., a "Bill of Rights" for law enforcement officers of Arkansas. This "Bill of Rights," provides, among other things, the following rights for officers:

> (4) During the interrogation of the law enforcement officer, questions will be posed by or through only one (1) interrogator at a time.
> (5) Any interrogation of a law enforcement officer in connection with an investigation shall be for a reasonable period of time and shall allow for reasonable periods for the rest and personal necessities of such law enforcement officer.
> (6) No threat, harassment, promise, or reward shall be made to any law enforcement officer in connection with an investigation in order to induce the answering of any questions that the law enforcement officer has a legal right to refrain from answering, but immunity from prosecution may be offered to induce such response.
> (7) All interrogations of a law enforcement officer in connection with an investigation against him or her shall be recorded in full. The law enforcement officer shall be allowed to make his or her own independent recording of his or her interrogation and have one (1) witness of his or her choosing present. The witness must be an attorney or a member of the police department that is

in no way related to the matter under investigation.

Clearly, police officers, who are quite familiar with the techniques and devices used in interrogation, are provided with greater protection from there own interrogations than are average citizens, especially mentally deficient citizens who have absolutely no knowledge of the procedures that will be employed. This, of course, raises an Equal Protection argument in addition to the Due Process argument. Under both the United States and Arkansas Constitutions, every individual is granted Equal Protection under the law. It is a mockery of justice to grant special protections to the one class of citizens that are in the least need of said protections, while denying the protections to the very people who need them most, mentally deficient individuals.

Here, the states witnesses stated that at the time of the interrogation the West Memphis Police Department, while not have the capability to video tape the interrogation, did have the capability to audio record the entire proceedings.

Full recordation provides benefits to all, the police, the public, the court and the defendant. It is feasible for at least station house interrogations. As the police are already recording a portion of most interrogations, it does not cause any undue burden on the officers to record the

entire interrogation. And, most importantly, full recordation sheds the light of truth and justice on the interrogation process, for the protection of both the officers and the accused.

Full recordation of a custodial statement not only promotes due process, but it also promotes judicial economy in that it would limit baseless attacks on confessions, and of course, appeals.

V. DEFENDANT INDICATED HE DESIRED FOR THE QUESTIONING TO CEASE

It has long been held that any interrogation must cease upon a request by the accused. Miranda v. Arizona, 384 U.S. 436 (1966). In addition, the Arkansas Supreme Court has created Rule 4.5 of the A.R.Cr.P. Rule 4.5 states:

> No law enforcement officer shall question an arrested person if the person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning.

Detective Ridges' notes clearly states that near the very beginning of the 1:30 p.m. interrogation, the defendant starts to answer a question and then states, "I don't want nothing to do with this." Again, immediately after being shown a picture of one of the victims, the defendant, according to the notes of the officers, states that he does not want to be a part of this.

Clearly, from the context and surrounding events of the

first, "I don't want nothing to do with this" statement, the defendant was requesting the questioning to stop. Yet, the officers ignored this request and continued on. Furthermore, after being informed by Officer Durham that he had allegedly failed the polygraph examination, the defendant refused to talk. In the words of officer Durham, "he remained silent." Officer Durham became convinced that the defendant would no longer be interrogated by him. Instead of ending the interrogation or even clarifying with the defendant whether he was invoking his right to remain silent, he was "handed off" to a new set of officers, and the interrogation continued.

The United States and Arkansas Supreme Court have both made it clear that once a defendant request for the questioning to cease, the interrogation must cease and can only be restarted under limited circumstances. Here, there was not even a pause in the questioning. In Wood v. State, 20 Ark. App. 61 (1987), the Arkansas Court of Appeals stated:

> The renewed questioning after a suspect has invoked his right to remain silent which constitutes a violation of the Miranda principle has been dealt with by the United States Supreme Court in Michigan v. Mosley, 423 U.S. 96 (1975), and the Arkansas Supreme Court in Hatley v. State, 289 Ark. 130, 709 S.W.2d 812 (1986). In those cases, it was concluded that the admissibility of statements returned after a person in custody has once decided to remain silent depends upon whether his right to "cut off questioning" has been "scrupulously honored." To scrupulously honor the appellant's right

to cut off questioning simply means that, once he has invoked his right to remain silent, his will to exercise that right should remain undisturbed. There must be no attempt to undermine his will, wear down his resistance, or force him to change his mind, and he must understand at all times that he is under no compulsion to respond to any interrogation. A determination of these questions will, of course, depend upon the facts of each case relative to the conduct of both the police officers and the appellant. Hatley v. State, supra.

If the defendant requested, in any manner, that the questioning stop, whether by stating, "I don't want nothing to do with this," or by requesting to go home, the interrogation should have ceased. It did not, therefore, under Miranda, the statements that followed must be suppressed.

VI. FAILURE OF THE DEFENDANT'S PARENT TO SIGN THE WAIVER

Arkansas Code Annotated Section 9-27-317 states:

(a) Waiver of the right to counsel shall be accepted only upon a finding by the court from clear and convincing evidence, after questioning the juvenile, that:
(1) The juvenile understands the full implications of the right to counsel;
(2) The juvenile freely, voluntarily, and intelligently wishes to waive the right to counsel; and
(3) The parent, guardian, custodian, or counsel for the juvenile has agreed with the juvenile's decision to waive the right to counsel.
(b) The agreement of the parent, guardian, custodian, or attorney shall be accepted by the court only if the court finds:
(1) That such person has freely, voluntarily, and intelligently made the decision to agree with the juvenile's waiver of the right to counsel;
(2) That such person has no interest adverse to the juvenile; and

(3) That such person has consulted with the juvenile in regard to the juvenile's waiver of the right to counsel.

(c) In determining whether a juvenile's waiver of the right to counsel was made freely, voluntarily, and intelligently, the court shall consider all the circumstances of the waiver, including:

(1) The juvenile's physical, mental, and emotional maturity;

(2) Whether the juvenile and his parent, guardian, custodian, or guardian ad litem understood the consequences of the waiver;

(3) Whether the juvenile and his parent, guardian, or custodian were informed of the alleged delinquent act;

(4) Whether the waiver of the right to counsel was the result of any coercion, force, or inducement;

(5) Whether the juvenile and his parent, guardian, custodian, or guardian ad litem had been advised of the juvenile's right to remain silent and to the appointment of counsel.

(d) No waiver of the right to counsel shall be accepted in any case in which the parent, guardian, or custodian, has filed a petition against the juvenile, initiated the filing of a petition against the juvenile, or requested the removal of the juvenile from the home.

(e) No waiver of the right to counsel shall be accepted in any case where counsel was appointed due to the likelihood of the juvenile's commitment to an institution under 9-27-316(d).

(f) All waivers of the right to counsel shall be in writing and signed by the juvenile and his parent, guardian, or custodian.

The Defendant is well aware of the recent Arkansas Supreme Court opinion of Boyd v. State, 313 Ark. 171, 853 S.W.2d 263 (1993). However, the defendant respectfully request this court to reconsider this issue. First and foremost, the Defendant points out that the defendant in Boyd did not raise any issue as to Equal Protection. As

previously noted, both the Arkansas and United States constitutions guarantees to all citizen equal treatment under the law.

First, it must be determined who is a juvenile. This issue is clear under Arkansas law. In the juvenile code and else where Arkansas law without fail defines a juvenile as anyone under the age of 18. Furthermore, it is undisputed that the Defendant was 17 at the time of the offense and at the time he allegedly waived his rights.

If Boyd is followed, then a juvenile who is facing only misdemeanor charges will receive the full benefit of A.C.A. 9-27-317, however, a juvenile who is facing felony charges will not have that benefit if the prosecutor choses to bring the charges in Circuit Court as opposed to Juvenile Court. Further, a juvenile whose rights have been violated by the ignoring of A.C.A. 9-27-317, will most certainly face charges in Circuit Court, as that will be the only manner the prosecutor will be able to "salvage" the statement. Such a system will invariably cause unequal treatment based on the arresting offices decision of whether or not to follow the law.

Unquestionably, such a system creates separate classes of juveniles: one class who can only waiver their rights in the event a parent or guarding signs, and another class who

can waive their rights without this added protection. As juveniles have never been considered a "suspect" classification, the issue then becomes is there a rational basis for this separate treatment. The answer is simply that there is no rational basis.

The law normally affords those charged with more serious offenses to have greater protection than those charged with less serious offenses. For example, if no jail time is being requested, a defendant can be tried without an attorney, even if he desires one and cannot afford one. If one is charged with a misdemeanor offense, one can be tried without a jury, even if the defendant request one. However, as the seriousness of the offense rises, so does the level of protection afforded. It is illogical, and further there is no rational basis to reduce the protections provided to an individual as the seriousness of the offense and the seriousness of the possible punishment escalates. Such a rule is similar to maintaining that a person charged with a class "D" felony has the right to remain silent, but a person charged with a class "Y" felony does not have such a right.

Clearly, the law under Boyd creates two classes of juveniles. Equally clear, there is no rational basis for the unequal treatment of the two classes.

It should be pointed out that the State has introduced

several previous waiver of Miranda forms. In each case, the officer did obtain the signature of a parent. Yet here, at a time when defendant is charged with a much more serious offense, the officers failed to even attempt to obtain the signature of the parent. This is true even though several officers testified that they were aware that the law required the signature of a parent to effectuate a valid waiver. This, coupled with the unjustifiable failure to obtain the defendant's father's signature on the rights waiver form at the same time they obtained the defendant's father's permission on the polygraph release form, clearly demonstrates the officers contempt for both the spirit and the letter of the law. Further, one officer even testified that he had been advised by the prosecuting attorney's office that it was not necessary to obtain the parent's consent in serious cases. This tactic clearly increases the odds of a juvenile defendant failing to understand and exercise his Constitutional rights. Such a course of conduct by the prosecuting attorney's office clearly demonstrates that the rights of a juvenile defendant do not depend on the provisions of the law, but upon the whim of the police officers and the prosecuting attorney. This clearly demonstrates, that for the necessity of justice, and for the promotion of equal protection under the law, the Supreme

Court's decision in Boyd should be revisited.

CONCLUSION

For all of the above reasons the Defendant respectfully request that the statements given by him on June 3rd, 1993 be suppressed.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has this 14 day of Jan, 1994 mailed a copy of the foregoing pleading to the attorneys of record for all other parties in this action by placing same properly addressed in the U.S. Mail with sufficient postage to insure delivery.

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