NO. 2011-0215

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO NO. 94737

IN RE: M.W.,
Adjudicated delinquent child

MERIT BRIEF OF APPELLEE

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TABLE OF CONTENTS

Appendices

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

There is no disputing that a juvenile, like an adult, has a right against self-incrimination. Nor is there a dispute that age is a factor in determining whether a waiver of *Miranda* rights is knowing and voluntary or a factor in determining whether there was a custodial interrogation. But the right against self-incrimination and the accompanying right to counsel during custodial interrogations can be knowingly and voluntarily waived.

This case is not about a juvenile's constitutional right to counsel but is instead about whether R.C. 2151.352 mandates that a juvenile must consult with an attorney or parent before there can be a waiver of rights. M.W. argues that because a custodial interrogation is encompassed within "all stages of the proceedings" he is entitled to consult with counsel and that he cannot waive that right without first consulting with a parent or attorney. M.W.'s argument expands the term "all stages of the proceedings" beyond its intended meaning.

STATEMENT OF THE CASE AND FACTS

M.W. was charged in Cuyahoga County Juvenile Court ("Juvenile Court") with Aggravated Robbery, R.C. 2911.01(A)(1), with one and three year firearm specifications, R.C. 2941.141 and R.C. 2941.145, on August 22, 2009, resulting from an incident that occurred in the late evening/early morning of August 19-20, 2009 in the vicinity of Tremont and Jefferson Avenue, Cleveland, Ohio. In particular, M.W. acted as the lookout in complicity with A.C. while robbing Matthew Sweeney at gunpoint for his money and/or belongings.

On August 24, 2009 a hearing was held before the magistrate judge. Present were the assistant public defender and M.W.'s mother. At the hearing, it was

acknowledged that M.W. signed the advisement of rights form. The magistrate judge also informed M.W. of M.W.'s right to have a lawyer represent him at every stage of the Court proceeding, as well as informing him of the right to remain silent, and other constitutional rights. M.W. stated he understood his rights. M.W. entered a denial. M.W. was not released that day because he was on probation in another matter. (See Transcripts of August 24, 2009 hearing).

On September 3, 2009 a hearing was held before the judge. M.W.'s mother and attorney noted that M.W. had been diagnosed with autism, epilepsy and asthma. (Sept. 3, 2009 hearing, Tr. 4). The judge noted that this was the first time M.W.'s competency was challenged after ten delinquency cases. (Sept. 3, 2009 hearing, Tr. 6).

On October 7, 2009, the judge held a hearing at Juvenile Court to determine probable cause for purposes of discretionary jurisdictional transfer of the matter to Common Pleas Court pursuant to RC 2152.12. The judge found probable cause. On October 28, 2009, the judge then held an amenability hearing to determine whether M.W. was amenable to the juvenile justice system. The presiding judge found M.W. amenable to Juvenile Court.

On January 8, 2010, a trial was held before the magistrate judge in juvenile court. At trial, the State called Cleveland Police Department 2nd District Detective David Borden ("Detective Borden"). Detective Borden testified that on the late evening/early morning of August 19-20, 2009 in the vicinity of Tremont and Jefferson Avenue, Cleveland, Ohio, Matthew Sweeney was robbed at gunpoint by two black juvenile males. Shortly after this incident, A.C. was arrested and positively identified by Sweeney as one of the individuals who robbed him. (January 8, 2010 hearing, Tr. 11-32).

On August 22, 2009, at approximately 11:45 a.m., M.W. was stopped by law enforcement for driving his mother's vehicle without a valid Ohio driver's license. At the time M.W. was stopped, he told Police that his name was "M.J." But upon further review by law enforcement it was discovered that his real name was "M.W.," that he was 15 years old, and he did not have a valid driver's license. Police then asked "M.W." why he lied about his name and he stated, "Because I thought I could get away with it. And I thought you were stopping me for something else." (January 8, 2010 hearing, Tr. 13-21). M.W. went onto state that he thought he was being stopped for a robbery that occurred in connection with A.C. *Id.* He stated that he heard A.C. "rob someone at gun point on Thursday night 08-19-09 around midnight by his house." *Id.* M.W. further stated that he "watched [A.C.'s] back, I kept anyone from walking up on him or watched for the Police." *Id.* He stated that A.C. had a gun and he and A.C. were supposed to split the money they got from the robbery. *Id.*

Law enforcement transferred M.W. to the local police station and asked if he would be willing to make a written statement of the incident that occurred on August 19, 2009 in connection with Cummings. M.W. agreed.[1] At trial, Detective Borden testified that at approximately 1:30 p.m. M.W. was *Mirandized* and advised of his rights. (T.pp. 14-15) Detective Borden stated he was present for the entire interview with M.W., which lasted approximately 35 minutes from 1:30 p.m. 2:05 p.m. Detective Borden testified that Sergeant Shoulders conducted the interview with M.W. (January 8, 2010 hearing, Tr. 22)

[1] Although the objection was sustained, there was some indication that the mother allowed police to speak with M.W. This was elicited during the probable cause hearing.

Detective Borden testified that M.W. appeared just like he did in court – "normal." (January 8, 2010 hearing, Tr. 23) Detective Borden stated that M.W. was asked if he was under the influence of drugs or alcohol and M.W. said he smoked marijuana the day before, but was okay today. (January 8, 2010 hearing, Tr. 23) Detective Borden stated that M.W. explained his role in acting as the lookout with A.C. in the robbery of Sweeney, and Sergeant Shoulders wrote M.W.'s statements down. (January 8, 2010 hearing, Tr. 26) Sergeant Shoulders then handed the written statement with the *Miranda* rights to M.W., and told him to read it over. *Id.* Sergeant Shoulders told M.W. to change anything that was incorrect. *Id.* M.W. read over his rights and written statement and acknowledged he understood his rights and wanted to make the written statement. *Id.* M.W. signed his name under both the Miranda warnings and his written statement. (A-1) He also signed three yeses stating that he understood his rights, wanted to make a written statement, and after having read his written statement found it to be true. *Id.*

M.W. then took the stand on his own behalf and voluntarily stated in open court that he knows how to read and could read at the time of the interview. (January 8, 2010 hearing, Tr. 45) M.W. stated that the two signatures and three yeses on his written statement were his. *Id.* M.W. also never stated on direct or cross-examination that he was under duress or any type of police coercion. However, M.W. stated that Detective Borden was lying about what was said the day he signed his written statement. (January 8, 2010 hearing, Tr. 57).

Upon due consideration of all the facts and witnesses, the magistrate judge adjudicated M.W. delinquent of Aggravated Robbery R.C. 2911.01(A)(1), with one and three year firearm specifications, R.C. 2941.141 and R.C. 2941.145, because M.W. aided

or abetted A.C. under the doctrine of complicity in robbing Sweeney at gunpoint. In particular, the magistrate judge found that M.W. admitted that he voluntarily signed his name two times and initiated three yeses on his written statement. (January 8, 2010 hearing, Tr. 83) The magistrate judge stated that M.W. voluntarily admitted while testifying that he could read and that no evidence of police duress was ever presented. *Id.*

The magistrate judge found Detective Borden's testimony credible and M.W.'s written statement consistent with the statement made by the victim relative to what occurred that night. *Id.*

On February 2, 2010, the judge held the Dispositional Hearing on M.W.'s trial. The judge sentenced M.W. to the Ohio Department of Youth Services ("ODYS") for a minimum one year on the three year gun specification and another one year on the underlying felony robbery to be served consecutively for a commitment not to exceed M.W.'s 21st birthday.

M.W. appealed raising three assignments of error:

> The trial court violated [M.W.'s] right to due process when it admitted into evidence the typed statement of [M.W.'s] custodial statements to the police, which were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution and R.C. 2151.352.
>
> The trial court committed plain error and violated [M.W.'s] right to due process when it admitted into evidence the typed statement of [M.W.'s] custodial statements to the police, because those statements were elicited in violation of [M.W.'s] constitutional right against self incrimination.
>
> [M.W.] was denied the effective assistance of counsel as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

The Eighth District overruled M.W.'s assignments of error. *In re M.W.*, Eighth Dist. No. 94737, 2010-Ohio-6362. M.W. filed a memorandum in support of jurisdiction and notice of appeal before this Court raising two propositions of law. This Court accepted jurisdiction to review M.W.'s first proposition of law concerning the meaning of "stages of the proceedings" as it is used in R.C. 2151.352.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW: A CHILD HAS THE RIGHT TO COUNSEL AT ALL STAGES OF THE PROCEEDINGS AGAINST HIM. BECAUSE OHIO'S GENERAL ASSEMBLY HAS DESIGNATED INTERROGATION AS A STAGE OF THE PROCEEDINGS, A CHILD MUST BE REPRESENTED BY HIS PARENT, GUARDIAN, CUSTODIAN, OR AN ATTORNEY BEFORE THE CHILD CAN WAIVE HIS RIGHT TO COUNSEL PURSUANT TO MIRANDA.

I. Question Presented

M.W. voluntarily waived his right to have an attorney present during an investigatory interrogation. M.W. argues the waiver was invalid because R.C. 2151.352 mandates the presence of an attorney. The question for review in this case is whether "stages of the proceedings" as it is used in R.C. 2151.352 includes an investigatory interrogation. The Eighth District correctly held that R.C. 2151.352 does not mandate the presence of an attorney during an investigatory interrogation because it is not a stage of the proceeding. A juvenile proceeding does not commence until the filing of the complaint.

II. Summary of Argument

This Honorable Court should hold:

> Revised Code Chapters 2151 and 2152 do not define a custodial interrogation as a stage of the proceedings. R.C. 2151.352 entitles a juvenile representation by legal counsel at all stages of the proceedings. Given its plain and ordinary meaning, "stage of the proceedings" means court proceedings. Because an interrogation is not a stage of the

proceeding, the juvenile can make a knowing and voluntary waive the right to counsel.

This holding should be adopted because:

- M.W. is a fifteen year old juvenile who could read, had prior experience in the juvenile justice system and knowingly, intelligently and voluntarily waived his rights.

- A juvenile under custody has the same rights as an adult. A juvenile under interrogations must be informed of their *Miranda* rights. As with adults, these rights can be waived.

- The legislative history of R.C. 2151.352 demonstrates that the General Assembly intended the words "stage of the proceedings" to mean judicial proceedings in juvenile court.

- If the Revised Code does not define stages of the proceeding, it must be assigned its plain and ordinary meaning. The plain and ordinary meaning of "stage of the proceeding" is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."

- While "stage of the proceedings" is not expressly defined, statutory indicators demonstrate a "stage of the proceeding" is limited to juvenile court proceedings. Delinquency proceedings do not commence until a complaint is filed or when the juvenile makes the initial appearance before the court.

- Constitutional provisions do not require consultation with an attorney prior to waiving rights. Waivers are valid if they are knowingly, intelligently and voluntarily entered into. A state legislature can provide that juveniles must confer with an attorney before making a voluntary statement to police or restrict the admissibility of statements given by juveniles without the presence of counsel. States which have done so have expressly. Ohio has not expressly provided for one.

III. R.C. 2151.352, Am. Sub. H.B. 66, eff. 9-29-05 and Juvenile Rule 4(A).

The instant case concerns the usage of the tern "all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code" as it is used in R.C. 2152.352. The statute in its entirety reads as follows:

> A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.
>
> Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.
>
> Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodian, or guardian of such child, upon written request prior to any hearing involving such child.

See R.C. 2151.352, Am. Sub. H.B. 66, eff. 9-29-05.

Juvenile Rule 4(A) reiterates the right to counsel:

> Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.[2]

Plainly reading R.C. 2151.352 in conjunction with Juv. R. 4(A) establishes that the right to counsel at all stages of the proceedings under Chapter 2151 or Chapter 2152 is the right to counsel during juvenile court proceedings.

IV. M.W. knowingly, intelligently, and voluntarily waived his *Miranda* right. Constitutional principles do not mandate the presence of an attorney or parent. As a result, the issue in this case is a matter of statutory interpretation.

a. The right to counsel under the Sixth Amendment is a distinct from the right to counsel afforded by the Fifth Amendment's protections against self-incrimination. This principle is reflected in R.C. 2151.352.

As a starting point, the right to counsel afforded under the Sixth Amendment of the United States Constitution should be distinguished by the Fifth Amendment's protection against self-incrimination. As this Court succinctly stated, "[t]he right to counsel contemplated by *Miranda*, which serves to protect an individual's Fifth Amendment right to be free from self-incrimination, is analytically distinct from the Sixth Amendment right to counsel in a criminal prosecution which carries the possibility of incarceration." See *State v. Buchloz* (1984), 11 Ohio St.3d 24, 27, 462 N.E.2d 1222.

The Fifth Amendment's protection against self-incrimination provides for the right of counsel during custodial interrogation. See *Miranda v. Arizona* (1966), 384

[2] The word "party" as used in Juv. R. 4(A) is defined by Juv. R. 2(Y).

U.S. 436, 470, 86, S.Ct. 1602, 1625, 16 L.Ed.2d 694. The Sixth Amendment provides for the right of counsel at post arraignment interrogations as stages of the proceedings have commenced. See *United States v. Gouveia* (1984), 467 U.S. 180, 187, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146. The right to appointed counsel in criminal proceedings in state courts was provided as a result of *Gideon v. Wainwright* (1963) 372 U.S. 335.

The delineation of these rights can be seen within R.C. 2151.352. The first paragraph on R.C. 2151.352 grants a juvenile the right to counsel at all stages of the proceedings under Chapter 2151 or Chapter 2152. The first paragraph also permits the juvenile court to appoint counsel if the juvenile or parent are indigent. The second paragraph of R.C. 2151.352 grants a juvenile under custody the same rights afforded under R.C. 2935.14.

b. R.C. 2151.352 expands upon the constitutional principle that juveniles are entitled to counsel during delinquency proceedings.

The rights afforded through *Miranda* and *Gideon* were not made fully applicable to the juveniles until *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428. The United States Supreme Court in *In re Gault* recognized that juvenile and parent had the right to court appointed counsel during delinquency proceedings if indigent. *In re Gault* also recognized that a juvenile has the right to notice of charges, the right to confront and cross-examination witness, and the right to the privilege against self-incrimination. *In re Gault* delineates the separate right of counsel.

While the United States Supreme Court has recognized that due process requires appointment of counsel where permanent termination of parental rights is at issue, *Lassiter v. Department of Social Services of Durham County, N.C.* (1981), 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640, it has yet to decide whether the right to counsel applies

in other types of juvenile court proceedings. See Gianelli & Salvador, Ohio Juvenile law (2011 Ed.), 220-221, Section 18.2

The right to counsel is limited under federal law. R.C. 2151.352, which codifies the right to counsel during "all stages of the proceedings" under Chapter 2151 and Chapter 2152 expands the right to counsel to not only delinquency proceedings but other juvenile court proceedings. This Court agreed and has recognized that R.C. 2151.352 provides a statutory right to *appointed* counsel that goes beyond constitutional requirements. See *In re Williams* (2004), 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110. As a result of the first paragraph of R.C. 2151.352 parties to juvenile court proceedings are given a right to counsel.

c. Constitutional principles do not require the presence of an attorney or a parent before a juvenile can waive his or her *Miranda* rights.

The second paragraph of R.C. 2151.352 grants a juvenile taken into custody the same rights afforded by R.C. 2935.14. Pursuant to R.C. 2935.14, a person who is arrested is permitted to "communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel."

Constitutional principles do not require the presence of an attorney or parent or consultation with an attorney or parent before a juvenile can waive his or her *Miranda* rights. As the Eighth District correctly noted:

"Juveniles are entitled both to protection against compulsory self-incrimination under the Fifth Amendment and to *Miranda* warnings where applicable. Any statement made by a suspect may not be used in evidence where those statements were made during a custodial interrogation unless *Miranda* warnings were properly given to

suspect." *In re M.W.*, Eighth Dist. No. 94737, 2010-Ohio-6362, ¶20 citing *In re Forbess*, Third Dist. No. 2-09-20, 2010-Ohio-2826, *In re Gault* (1967), U.S. 1, 54, 87 S.Ct. 1428, 18 L.Ed.2d 527, *Miranda v. Arizona* (1966), 348 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694. A suspect, therefore, may either waive or invoke his Miranda rights, including his Fifth Amendment right to counsel, and, if a request for counsel is made, the interrogation must not recommence until counsel is present. *In re Forbess* at ¶ 28.

The United States Supreme Court recently recognized in *J.D.B. v. North Carolina* (2011), 131 S.Ct. 2394 that age is a factor in the *Miranda* custody analysis. Even though age can be a factor in the *Miranda* custody analysis or be a factor in determining whether a waiver is knowing and voluntary, it is not dispositive of whether the waiver is valid. Constitutional principles recognize that a juvenile can waive rights without the presence of an attorney or parent. M.W. knowingly, intelligently, and voluntarily waived his *Miranda* rights and the Eighth District properly recognized applicable law.

In determining whether a juvenile has properly waived his Miranda rights, the reviewing court must examine the totality of the circumstances surrounding the waiver, " 'including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' " *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 57, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus.

M.W. admitted that he could read. M.W. understood his rights and signed the document indicating that he was informed of his rights and waived them. M.W. only disputes the accuracy. The Eighth District determined that M.W.'s admission was valid

because: "M.W. has had prior experiences with the police and that he has been adjudicated delinquent in other cases. M.W., who was 15 at the time of the interrogation, further exhibited the mental and emotional capacity to voluntarily waive his rights. According to the detective, M.W. acted "normal" and was not under the influence of drugs or alcohol at the time of the interrogation. There was no evidence that M.W. had a diminished understanding, and he openly admitted that he could read. Further, the interrogation lasted only 35 minutes." *In re M.W.*, Eighth Dist. No. 94737, 2010-Ohio-6362.

The Eighth District relied upon *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210 in determining that M.W.'s statement was not rendered involuntary because a parent was not present. In *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210, this Court held that juveniles who were 12 and 14 could voluntarily waive their rights despite the absence of parents or interested adults. This Court rejected the "independent advice/interested adult" standard. See also *State v. Stewart* (1964), 176 Ohio St. 156, 159-160, 27 O.O.2d 42, 44, 198 N.E.2d 439, 442 and *State v. Bell* (1976), 48 Ohio St.2d 270, 276-277 (reversed on other grounds). Constitutional principles in Ohio require, "In deciding whether a juvenile's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; and the existence of physical deprivation or inducement." *In re Watson*, supra. paragraph one of the syllabus.

Long standing constitutional principles do not require the presence of a parent or attorney in order for a juvenile to make a knowing and voluntary waiver of rights.

V. As a matter of statutory interpretation, this Court should hold that the General Assembly did not intend that a "stage of the proceedings" include a "custodial interrogation."

The State submits that as a matter of statutory interpretation, the term "stage of the proceedings" as it is used in the first paragraph of R.C. 2151.352 does not include a "custodial interrogation."

First, the State analyzes R.C. 2151.352 as originally enacted, subsequent amendments and relevant legislative notes as indicators that the General Assembly intended the words "stage of the proceedings" to mean "court proceedings."

Second, the State identifies where "proceeding" or "proceedings" appear in Chapter 2151 and Chapter 2152 to show that the General Assembly has not provided a definition for the words "stage of the proceedings", but how the words "proceeding" or "proceedings" combined with the plain and ordinary meaning of those words strongly indicate that the words refer to court proceedings.

Third, the State looks to statutes from other states. Both M.W. and Amicus Curiae identify other states which have enacted rules requiring the presence of or consultation with a parent or attorney prior to waiving *Miranda*. But it is not enough to identify those states, how those states have enacted those rules are important. A review of laws from other states would show express and unambiguous rules.

When all the above factors are taken together, this Court should hold that the General Assembly did not expressly or implicitly provide that a "custodial interrogation" is a "stage of the proceedings."

a. The legislative history of R.C. 2151.352 indicates the legislative intent that "stage of proceedings" refer to court proceedings and not to custodial interrogations. R.C. 2151.352 separately

provides juveniles taken into custody the same rights afforded to adults.

Statutes Preceding R.C. 2151.352

To provide insight into the General Assembly's intent in using the words "stage of the proceedings" the roots of R.C. 2151.352. Prior to R.C. 2151.352's enactment in 1969, the statute was preceded by R.C. 2151.35 and R.C. 2151.35. The former R.C. 2151.35 was analogous provision in the General Code that did not provide for legal representation.

R.C. 2151.35 which was analogous to General Code 1639-30 related to juvenile court hearings. R.C. 2151.35 did not mention the right to legal counsel until September 14, 1957. The amendment to R.C. 2151.35 added the sentence, "The juvenile court shall permit a child to be represented by an attorney-at-law during, any hearing before such court and shall extend to such child all rights and privileges of section 2935.17 of the Revised Code. Such attorney-at-law, the parents or guardian of such child and any attorney-at-law representing them shall be entitled to visit such child at any reasonable time and to be present at any hearing involving the child and shall be given reasonable notice of such hearing." See Am. H.B. No. 161, 127 Ohio Laws, 547, 549.[3] The former R.C. 2151.35 while granting the right to representation at hearings did not explicitly include the right to court appointed counsel. Notably the right granted under the former R.C. 2151.35 was the right to counsel at any hearing before the juvenile court.

The right to court appointed counsel was first codified in Am. S.B. 383. The legislation enacted the former R.C. 2151.351 which provided as follows:

> When a child is brought before the juvenile court for hearing to determine whether or not such child is delinquent, dependent, neglected, or a juvenile traffic offender in cases where it appears that such juvenile traffic

[3] The former R.C. 2935.17 was repealed by H.B. 219, 128 Ohio Law 97. The former R.C. 2935.17 became R.C. 2935.14 and 2937.03

> offender may be adjudged delinquent, if he and his parents are indigent, the court may assign counsel to such child and his parents. Such counsel shall not be a partner in the practice of law of any attorney representing any interest adverse to the child.
>
> Counsel so assigned to represent a child and his parents shall be paid for their services by the county, and shall receive therefor such compensation as the juvenile court may approve, not exceeding three hundred dollars and expenses as the trial court may approve.
>
> See R.C. 2151.351, Am. S.B. 383, 132 Ohio Laws, Part I, 916.

A legislative service commission note dated August 21, 1967 indicates that Am. S.B. 383 as reported by the House Judiciary Committee, "brings Ohio law in line with the recent U.S. Supreme Court decision which extends the protection of the 14th amendment of the U.S. Constitution to juveniles, and requires that they be given notice sufficient to permit preparation of defense to charges, be advised of their right to counsel (including assigned counsel) and of their right to remain silent, and be afforded the right of confrontation and cross-examination. In re Gault, 35 LW 4399 (U.S. Supreme Court, May 15, 1967)."

The former R.C. 2151.351 is also significant in that although it recognizes the right to appointed counsel in delinquency proceedings; it does not codify the right to counsel during a custodial interrogation. This is evidenced by the fact that the statute begins by stating, "When a child is brought before the juvenile court for hearing to determine whether or not such child is delinquent..." This would tend to indicate that in 1968, a right to counsel during custodial interrogations was not codified under R.C. 2151.351.

Of equal importance, the right to *appointed* counsel while granted in delinquency proceedings under the former R.C. 2151.351, did not appear to extend to all juvenile court proceedings. A version of R.C. 2151.35 at the time of R.C. 2151.351's enactment

while mentioning the right to representation during juvenile court proceedings did not mention a right for indigents to have appointed counsel. See 130 Ohio Laws 621; 130 Ohio Laws 623 and 132 Ohio Laws , Part I, 914-916.

R.C. 2151.352 as Originally Enacted

The year following R.C. 2151.351's enactment it was repealed and replaced by R.C. 2151.352 which was enacted through Am. Sub. H.B. No. 320. See Am. Sub. H.B. No. 320, 133 Ohio Laws, Part II, 2040, 2062. The law continued existing law that provided the right for a juvenile, his parents, custodian or other person in loco parentis of such juvenile the right to legal representation. Like exiting law, the enactment also codified a separate rule granting a juvenile taken into custody the same rights afforded to adults under R.C. 2935.14. Legislative notes at the time provided that the law was being enacted to:

> [Give] a child taken into custody the same rights as an adult, including visits at any reasonable time with an attorney; gives counsel access to any report prepared by the court as well as notice of any hearing; provides that the child and his parents are entitled to representation by legal counsel at all stages of the proceedings, and, if indigent, are entitled to have counsel provided.

Ohio Legislative Service Commission, Summary of 1969 Enactments, Pg. 20.

At the time of original enactment the statute read as follows:

> A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel by the court if he is an indigent person. The court may continue the case to enable a party to obtain the case to enable a party to obtain counsel and shall provide counsel for an unrepresented indigent person upon his request. The court shall appoint counsel for any parties found to be indigent unless representation is competently and intelligently waived. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of

two or more such parties conflict, separate counsel shall be provided for each of them.

An indigent person is one who, at the time his need is determined, is unable by reason of lack of property or income to provided for the full payment of legal counsel and all other necessary expenses of representation.

Section 2935.14 of the Revised Code shall apply to any child taken into custody. The parties, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodian, or guardian of such child, upon written request prior to any hearing involving such child.

R.C. 2151.352, Am. Sub. H.B. No. 320, 133 Ohio Laws, Book II, 2040, 2062

The first paragraph of R.C. 2151.352 as originally enacted in 1969 contains the term "stage of the proceedings." The entire paragraph discusses actions by "the court." For example, the second sentence of the first paragraph states that "the court shall ascertain whether [the party] knows of his right to counsel and of his right to be provided with counsel." The third sentence of the same paragraph states the court's ability to continue the case. The fourth sentence discusses the court's appointment of counsel for an indigent child unless representation is waived. When the entire first paragraph is read together, it is clear that the subject matter is one that pertains to actions by a juvenile court.

The third paragraph of the former R.C. 2151.352 (now second paragraph) strongly indicates what the General Assembly intended by "stage of the proceedings." M.W. argues that the term "stage of the proceedings" that appears in the first paragraph of R.C. 2151.352 would include a custodial interrogation. But R.C. 2151.352 separately

codifies a child certain rights when taken into custody. The third paragraph specifically grants a child taken into custody the same rights granted to adults under R.C. 2935.14. This is a strong indication that the General Assembly did not intend to include a custodial interrogation under "stage of the proceedings." The General Assembly could have expanded and provided additional rights to a child taken into custody in the third paragraph, but did not.

The remaining paragraphs in the original statute provide a definition for an indigent person. The second paragraph defines an indigent person while the fourth paragraph provide that a child's attorney must be given any report concerning the child.

The law which preceded R.C. 2151.352, although granting a right to counsel at all hearings before a juvenile court, did not grant the right to appointed counsel at all juvenile court hearings. R.C. 2151.352 when enacted was a continuation of existing law that recognized a right to counsel in juvenile court proceedings but also granted the right of appointed counsel for indigents in all stages of the proceedings under Chapter 2151.

Subsequent amendments to R.C. 2151.352 confirm "stages of the proceedings" is limited to proceedings in the juvenile court.

Subsequent amendments to the R.C. 2151.352 do not change the definition of "stage of the proceedings." R.C. 2151.352 was next amended in 1976. Under Am. Sub. H.B. No. 164, R.C. 2151.352 was amended to allow for the appointment of a public defender. The 1976 amendment also deleted the paragraph defining "an indigent person." The only change to the third paragraph was replacing "Section 2935.14 of the Revised Code shall apply to any child taken into custody," with "Section 2935.14 of the

Revised Code applies to any child taken into custody." R.C. 2151.352, Am. Sub. H.B. No. 164, 136 Ohio Laws, Part I, 1868, 1891.

The statute was next amended in 2002. The 2002 amendment did not make substantial changes, but modified "A child, his parents custodian, or other person in loco parentis of such child is entitled to representation at all stages of the proceedings," to "A child, or the child's parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or chapter 2152 of the Revised Code." R.C. 2151.352, Am. Sub. S.B. 179, 148 Ohio Laws, Part IV, 9447, 9519. This amendment reflected the enactment of Chapter 2152, which was enacted through Am. Sub. S.B. 179. The corresponding final bill analysis indicates:

> The act makes it clear that certain continuing provisions of the Juvenile Code also will apply to new R.C. Chapter 2152. The provisions so expanded include the provision relating to a juvenile court's exercise of powers and jurisdiction (R.C. 2151.07) [...] the right to legal counsel in juvenile court proceedings (R.C. 2151.352) [...].

Am. Sub. S.B. 179 Final Analysis, http://www.legislature.state.oh.us/analyses.cfm?ID=123_SB_179&ACT=As%20Enrolled, last accessed 8/24/2011.

In the most recent amendment, the final bill analysis released by the Legislative Service Commission indicated that with regards to R.C. 2151.352, "[c]ontinuing law gives any child, a child's parents or custodian, or any other person in loco parentis of a child the right to representation by legal counsel *at all stages of proceedings in juvenile courts under* R.C. Chapter 2151 or 2152. See Bill Analysis legislative Service Commission, Am. Sub. H.B. 66, pg. 415.

When reviewing the legislative history of R.C. 2151.352 and the former R.C. 2151.35 and the former R.C. 2151.351, it is clear that the reference to "all stages of the proceedings" codifies the right to counsel in proceedings before a juvenile court.

b. The General Assembly has not defined an interrogation as part of the proceeding. In the absence of an express definition, the plain and ordinary meaning must be assigned.

Words that are not defined in the statute must be given its plain and ordinary meaning. See *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶17 citing *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008. R.C. 1.42 similarly provides that, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." It is the "duty of the court to give effect to the words used and not to insert words not used." *State v. Cargile*, 123 Ohio St.3d 343, 346, 2009-Ohio-4939, at ¶18.

The plain and ordinary meaning of the term "stage of the proceedings" can be derived from the meaning of proceedings. One definition of "proceeding" defines it as "legal action". http://www.merriam-webster.com/dictionary/proceedings, last accessed 8/22/2011. Black's Law Dictionary provides one definition of "proceeding" as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary (9th ed. 2009), proceeding.

Customary usage of the words "all stages of the proceedings" during, when R.C. 2151.352 was first enacted typically refer to the Sixth Amendment's right to

representation at all stages of the proceedings.[4] The customary usage of the word "all stages of the proceedings" indicates that it derives from the Sixth Amendment right to counsel, rather than from any right guaranteed by the Fifth Amendment.

c. Other provisions of the Revised Code and Rules of Juvenile Procedure indicate that a "stage of the proceedings" retain its plain and ordinary meaning.

Revised Code Chapter 2151 refers to juvenile court proceedings while Chapter 2152 refers specifically to delinquency proceedings. While reviewing the usage of the words "proceeding" or "proceedings" in these chapters, it appears that the term "stage of the proceedings" is undefined.

While "stages of the proceedings" is undefined, the word "proceeding" or "proceedings" are used in other contexts.

First, the Juvenile Rules only apply to "all juvenile courts of this state in all proceedings coming within the jurisdiction of such courts." Juv. R. 1. The Juvenile Rules of Procedure also provided for a definition of "court proceeding" which means "all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child." Juv R. 2(G). Even R.C. 2151.352 qualifies a "stage of the proceedings" as proceedings that take place under [Revised Code Chapter 2151] or Chapter 2152. See R.C. 2151.352.

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[4] A search of the term "all stages of the proceedings" during 1969 across all state and federal jurisdictions yields 48 results. Almost all reference the right to counsel during all stages of the proceedings in criminal cases. See for example: *People v. Marsh* (1969), 270 Cal. App. 2d 365, 75 Cal.Rptr. 814 (used in the context of "I advised him that he had the right to have an attorney present through all stages of the proceedings."); *Goodwin v. Page* (E.D. Okla 1969), 296 F.Supp. 1205 ("The law in Oklahoma has long been that accused is entitled to counsel at all stages in criminal proceedings..."); *Arbuckle v. Turner* (1969) 306 F.Supp. 825 ("Do you understand you are entitled to be represented by counsel at all stages of the proceedings?")

A search indicates that the word "proceeding" or "proceedings" appears in eight sections of Chapter 2152. See R.C. 2152.01, R.C. 2152.03, R.C. 2152.12, R.C. 2152.13, R.C. 2152.17, R.C. 2152.61, R.C. 2152.81, R.C. 2152.811. The word "proceeding" or "proceedings" as it is used in Chapter 2152 highly suggests that "proceedings" mean a court proceeding. Revised Code Chapter 2152.03 states the transfer of proceedings from the court of common pleas to the juvenile court. The word "proceedings" appears twice in R.C. 2152.12 and is used in the context of proceedings being transferred to the court of common pleas or cases in which the juvenile is apprehended after turning 21 originating in the court of common pleas. As used in R.C. 2152.13(C)(1), proceedings is used in the context of "transcript of the proceedings." R.C. 2152.17 uses "proceeding" to refer to a "criminal proceeding." R.C. 2152.61 refers to "proceeding" as a "proceeding in which a child has been adjudicated a delinquent child or a juvenile traffic offender." R.C. 2152.81 refers to juvenile sex offender registration and uses proceeding throughout the section to refer to court proceedings. R.C. 2152.811 also uses the word "proceeding" to refer to certain proceedings in juvenile court.

A search also indicates that the word "proceeding" or "proceedings" also appears in 26 sections of Chapter 2151. See R.C. 2151.211, R.C. 2151.23, R.C.2151.231, R.C. 2151.232, R.C. 2151.271, R.C. 2151.28, R.C. 2151.281, R.C. 2151.31, R.C. 2151.314, R.C. 2151.33, R.C. 2151.34, R.C. 2151.35, R.C. 2151.352, R.C. 2151.353, R.C. 2151.356, R.C. 2151.357, R.C. 2151.358, R.C. 2151.359, R.C. 2151.40, R.C. 2151.412, R.C. 2151.414, R.C. 2151.421, R.C. 2151.424, R.C. 2151.50, R.C. 2151.56, R.C. 2151.85. The usage of "proceeding" or "proceedings" in these sections do not show any indication that a custodial interrogation is a "stage of the proceedings."

"Proceeding" is not defined in Chapter 2151 or Chapter 2152 of the Revised Code. The plain and ordinary meaning of proceeding must be assigned.

The usage of the words "proceeding" or "proceedings" throughout Chapters 2151 and 2152, seamlessly refer to proceedings as judicial ones. It makes sense that the usage of proceedings in the term "stage of the proceedings" as it is used in R.C. 2151.352 would also refer to judicial proceedings.

In the case below, the Eighth District relied in part on the Third District's decision in *In re Forbess*, Third Dist. No. 02-09-20, 2010-Ohio-2826. In that case N.F. was adjudicated a delinquent child on one count of gross sexual imposition. On appeal N.F. argued that the juvenile court erred in admitting custodial statements. As in this case, N.F. argued that R.C. 2151.352 entitled him to counsel during the custodial interrogation, which could not be waived.

In addressing, N.F.'s argument, the Third District held:

> The statutory section provides this right "at all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code." R.C. 2151.352. Chapter 2152 of the Ohio Revised Code specifically deals with juvenile offenses, with the commencement of juvenile delinquency proceedings beginning with the filing of a complaint. *Wright v. State* (1990), 69 Ohio App.3d 775, 781, 591 N.E.2d 1279. See, also, Juv.R. [2](G) (defining "court proceeding" as "all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child").

In re Forbess, Third Dist. No. 2-09-20, 2010-Ohio-2826, ¶29.

Since the term "stage of the proceedings" is undefined, the words "proceeding" or "proceedings" must be given its plain and ordinary meaning. Both the Eighth District and Third District applied the proper meaning to the term "stage of the proceedings."

d. States which have enacted laws that mandate the presence of an attorney or parent present during a child's interrogation,

expressly and specifically provide for it unlike the Ohio Revised Code.

M.W. and amicus curiae have identified a number of states that have adopted per se rules requiring an adult to be present during an interrogation. Some of the states identified were: Colorado, Connecticut, Indiana, Massachusetts, Iowa, Kansas, Montana, North Carolina, Oklahoma, West Virginia and Vermont. But this does not mean "stages of the proceedings" in Ohio includes a custodial interrogation. If the term "stages of the proceedings" was universally understood to include a custodial interrogation then other states would not have had to enact laws restricting the usage of statements made by juveniles.

The statutes or rules from the other states must be critically analyzed. The majority of states that have enacted a rule requiring the presence of a parent have done so in the form or enacting a rule regarding admissibility. Another common theme among the states that have enacted rules is that different rules apply depending on the age of the juvenile. For example: Colorado, Illinois, Iowa, Kansas, Montana, North Carolina and Oklahoma do not require the presence of an attorney for juveniles above a certain age.[5]

Colorado may be the most stringent by limiting the admissibility of a statement made by a juvenile unless made in the presence of a parent or attorney. See Colorado Revised Statutes Annotated §19-2-511.

Indiana does not appear to have a rule regarding admissibility but instead allows a parent to waive the right of a juvenile after meaningful consultation between the

[5] See General Statutes of Connecticut §46b-137; 705 Illinois Compiled Statutes 405/5-170; Iowa Code Annotated § 232.11(2); Kansas Statutes Annotated 38-2333; Montana Code Annotated 41-5-331; North Carolina General Statutes §7B-2101(b); 10A Okl. St.Ann. § 2-2-301; W. Va. Code § 49-5-2(l).

parent and juvenile. Indiana law also allows for an emancipated juvenile to knowingly and voluntarily waive any rights without the presence of a parent. See Indiana Code 31-32-5-1.

Indeed, some states have enacted laws which provide greater protection to juveniles. But these rules are clear and express. Only a few of these states have bright-line rules that apply to all juveniles. Other states give different degrees of protection depending on the age of the juvenile. Many of the statutes in question directly provide rules regarding statements made during custodial interrogations. Ohio has not enacted such a rule. Instead, M.W. relies upon extending "stage of the proceedings" beyond its intended meaning.

VI. This Court's decision in *In re. C.S.* does not support the conclusion that a "stages of the proceedings" includes an interrogation.

M.W. makes the argument that he cannot waive the right to counsel without first consulting with an attorney or parent. M.W. supports this argument by relying on *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919.

But this Court limited the holding of *In re C.S.* to a discussion of the constitutional right to counsel during delinquency proceedings. M.W. selects a single sentence out of the Court's decision, "If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *In re C.S.*, ¶98. The full paragraph; however, makes clear that this Court was referring to delinquency proceedings. The syllabus of the paragraph confirms that this Court was referring to delinquency proceedings.

The Eighth District rejected M.W.'s reliance on *In re C.S.*. In rejecting this argument, the Eighth District held:

> Second, we find M.W.'s application of *In re C.S.* misplaced. In that case, the Ohio Supreme Court held that "in a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards articulated below, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *In re C.S.* at ¶ 98. The Court's holding, therefore, is limited to a "delinquency proceeding"; it has no bearing on a juvenile's waiver of Miranda rights during a police interrogation prior to the commencement of a delinquency proceeding.

In re M.W., Eighth Dist. NO. 94737, 2010-Ohio-6362, ¶19-23.

M.W. also relies on R.C. 2152.311. The word "interrogating" appears in R.C. 2151.311. The words "interrogate" or "interrogation" do not appear anywhere in Chapters 2151 or 2152. M.W. argues that because R.C. 2151.311 provides that a juvenile may be subject to interrogation under R.C. 2151.311, that it is a stage of the proceedings. This argument assumes that the term "stages of the proceedings" under Chapter 2151 and 2152 of the Revised Code would encompass any provision of Chapter 2151 or Chapter 2152.

Of the most significance is that R.C. 2151.311, when originally enacted in 1969 along with R.C. 2151.352 under Am. Sub. H.B. 320, did not include the provisions including an interrogation as part of "processing purposes". R.C. 2151.311 was instead amended to include those provisions in 1996 under Am. Sub. H.B. 480. This provision, which M.W. deems significant, was non-existent at the time the General Assembly originally wrote the words "stages of the proceedings". Nor does the inclusion of that provision in 1996 transform the definition of "stages of the proceedings". Had the General Assembly intended an "interrogation" to be a "stages of the proceedings" under Chapter 2151 or Chapter 2152 they would have done so explicitly. Instead the word "interrogation" under R.C. 2151.311 is included under "processing purposes" as that

word is used in division (C) of the section. R.C. 2151.311(C) serves as a limitation to the amount of time a juvenile can be held and limits who has contact with the juvenile. The General Assembly only included "interrogation" under "processing purposes" to limit the conditions of a custodial interrogation.

M.W.'s arguments ignore the second paragraph of R.C. 2151.352. A juvenile taken into custody is entitled the same right an arrested adult has to communicate with an attorney. R.C. 2935.14 provides that right to adults and the same right is afforded a juvenile under R.C. 2151.352. If the General Assembly truly intended a "stages of the proceedings" to begin when the juvenile is taken into custody then the second paragraph of R.C. 2151.352 would be unnecessary.

CONCLUSION

The judgment of the Eighth District should be affirmed and this Court should hold that:

> Revised Code Chapters 2151 and 2152 do not define a custodial interrogation as a stages of the proceedings. R.C. 2151.352 entitles a juvenile representation by legal counsel at all stages of the proceedings. Given its plain and ordinary meaning, "stages of the proceedings" means court proceedings. Because an interrogation is not a stage of the proceeding, the juvenile can make a knowing and voluntary waive the right to counsel.

This holding should be adopted over M.W.'s proposition of law because it recognizes the plain and ordinary meaning of "stage of the proceedings" and reflects the General Assembly's intent in enacting R.C. 2151.352.

Ohio precedent recognizes that a juvenile can knowingly and voluntarily waive Miranda rights. Although, other states have enacted statutes which plainly limit the admissibility of statements made by juveniles or plainly require parental consultation

prior to waiving *Miranda* rights. Until the General Assembly enacts a clear mandate, this Court should not expand the definition of "stages of the proceedings" as it is used in R.C. 2151.352 beyond its intended meaning.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

+ 2 Appendix (OTV1 #0084614)

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