COURT OF APPEALS
DECISION
DATED AND RELEASED

August 24, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 94-2735

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE INTEREST OF JENNIFER A.J.,
a child under the age of 18:

JENNIFER A.J.,

Appellant,

v.

STATE OF WISCONSIN,

Respondent.

APPEAL from an order of the circuit court for Dane County: GEORGE A.W. NORTHRUP, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Jennifer A.J., a minor, appeals from a dispositional order transferring her legal custody to the Wisconsin Department of Health and Social Services, Division of Youth Services until she reaches the

age of twenty-one.[1] The order was based on Jennifer's entry of an ***Alford*** plea to one count of attempted first-degree intentional homicide, contrary to §§ 940.01(1) and 939.32, STATS., and no contest pleas to one count of physical abuse of a child, contrary to § 948.03(2)(a), STATS., and one count of carrying a concealed weapon, contrary to § 941.23, STATS., in a delinquency petition. Jennifer raises two issues on appeal. First, whether the trial court erred in refusing to suppress inculpatory statements she made to law enforcement officers while in custody. We conclude the trial court properly refused to suppress the statements. Second, whether the trial court erroneously exercised its discretion at the disposition stage. We conclude it did not. Accordingly, we affirm.

BACKGROUND

The pertinent facts are not disputed. Jennifer was arrested and taken into custody by a deputy from the Dane County Sheriff's Department at approximately 2:00 a.m. on October 10, 1993, as a suspect in an attempted homicide. A fifteen-year-old boy had been shot with Jennifer's father's handgun at approximately 1:15 a.m. outside of Jennifer's residence. Jennifer was fifteen years old and in the ninth grade at the time of the arrest. She was taken to a conference room in the Dane County Sheriff's Department and seated at a table. Prior to any questioning, one of the detectives present read Jennifer her rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). After indicating that she understood her rights, Jennifer stated that she was willing to talk about what happened. The interrogation concluded at approximately 7:30 a.m. During the interrogation, Jennifer confessed to the shooting.

A delinquency petition was filed against Jennifer alleging counts of attempted first-degree intentional homicide, physical abuse of a child, and carrying a concealed weapon. Jennifer denied the charges and entered a plea of not responsible by reason of mental disease or defect. She then filed a motion to suppress the statements she made to the detectives during the interrogation. In the motion, Jennifer contended that her waiver of ***Miranda*** rights was not knowing and intelligent.

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[1] Jennifer's motion for a three-judge panel was granted by order of this court dated October 31, 1994.

At the suppression hearing, the detectives involved in the interrogation testified that Jennifer was read her ***Miranda*** rights at approximately 3:00 a.m. These rights were read slowly, taking two minutes to read through. After each right was read, Jennifer replied that she understood that right. The detectives testified that while Jennifer's ***Miranda*** rights were being read, Jennifer maintained eye contact and, on a couple of occasions, nodded her head. At no time did Jennifer turn away, fidget or stare off in any other direction. Jennifer did not indicate that she was tired, and stated that she did not want to see her parents. At the completion of the ***Miranda*** warnings, Jennifer indicated that she was willing to make a statement. The detectives testified that there were no visible signs that Jennifer was not understanding any verbal communications made to her.

A psychologist called by Jennifer, William Merrick, testified that he had examined Jennifer and concluded that Jennifer has a learning disability, referred to as an auditory deficit disorder, which causes her to have difficulty understanding what is being said to her. According to Merrick, Jennifer has "very moderate to severe difficulties in anything having to do with language processing." Merrick testified that Jennifer's verbal I.Q. is 74, which, according to Merrick, is "borderline retarded"; her nonverbal I.Q. is 108, which is in the upper end of normal. Merrick stated that the significance of this low verbal I.Q. is that Jennifer has a "real tough time" with manipulation of language.

When asked whether he had an opinion to a reasonable professional probability as to whether Jennifer was capable of understanding her ***Miranda*** rights, assuming that the rights were read at 3:00 a.m., that the ***Miranda***-rights card used by the detective was written at an eighth-grade reading level, that Jennifer's emotional state was flat-lined, sullen and reserved, that there were no distractions in the room, that Jennifer maintained eye contact with the detective and did not appear to be distracted, that the questions were read one at a time, that Jennifer replied that she understood each right, and that the whole process took two minutes, Merrick replied:

> She could have a very limited understanding of these rights as read to her. And I'm not sure that she didn't read them herself....

> And at worse [sic], if she were emotional, inattentive, and so on, that she would have a very difficult, if not impossible, time in understanding or appreciating them.

Merrick also testified that Jennifer would not be able to understand or appreciate the meaning of the question on the ***Miranda***-rights card that asks: "Realizing that you have these rights, are you now willing to answer questions or make a statement?"

Jennifer's learning disabilities specialist at McFarland High School, Kathryn McCosky, also testified. According to McCosky, the ***Miranda***-rights card read to Jennifer was written at an eighth-grade reading level.[2] She testified that after reading Jennifer's file, it became evident that Jennifer had an auditory deficit disorder and that "[j]ust hearing something would be the worse [sic] way for her to pick up information." McCosky stated that in the classroom setting, Jennifer would almost always say she understood oral instructions when, in fact, she did not. McCosky testified that Jennifer reads at between a third and fourth-grade level, and that her ability to understand oral information is more impaired than her ability to understand written material.

The State called Jennifer's special education teacher at Indian Mounds Middle School, Carol Stephenson. Stephenson was directly responsible for Jennifer's special education programming for both seventh and eighth grade. During these grades, Stephenson spent approximately four hours a day with Jennifer. According to Stephenson, there were particular behaviors that indicated Jennifer either was not paying attention or was not understanding something. These included a failure to make eye contact, fidgeting, twisting her hair, turning her body away and getting angry. When presented with a copy of the ***Miranda***-rights warning card that was read to Jennifer and asked whether she had an opinion to a reasonable professional probability as to whether Jennifer was capable of understanding the card's words and concepts, Stephenson replied:

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[2] McCosky testified that she performed what she referred to as a "Frye Readability Scale" on the ***Miranda***-rights card used by the Dane County Sheriff's Department.

> Looking at this, based on what I would know about Jennifer, it would pertain a lot to how this was presented to her. For instance, if I was to give an example here, Jennifer has a hard time processing. And a lot of that has to do with speed of presentation of information.
>
> So, you would have to say at a very slow speed, "You have the right to remain silent," stop, pause. I would then ask Jennifer if she understood that. I would maintain eye contact with her and wait for her to answer me yes or no. If she gave me an answer yes, I'd move on to the next one.

When asked whether she had an opinion to a reasonable professional probability as to whether Jennifer was capable of understanding her ***Miranda*** rights, assuming that the rights were read at 3:00 a.m., that while her rights were being read she was maintaining eye contact and nodding her head in an affirmative fashion, that her rights were read one at a time, that she was asked "Do you understand that right?" after each right was read, that she replied affirmatively after each question, that the entire procedure lasted two minutes, and that she was not emotional, Stephenson replied, "If she said yes, I accept the yes."

The trial court denied Jennifer's motion to suppress her statements. Jennifer then entered an ***Alford*** plea to the attempted first-degree intentional homicide count in the delinquency petition and no contest pleas to the remaining counts, and was adjudicated delinquent.

Following a dispositional hearing, the trial court transferred Jennifer's legal custody to the Wisconsin Department of Health and Social Services and committed her to the Lincoln Hills School until her twenty-first birthday. As part of its dispositional discussion, the court noted that in spite of life's pressures, adults and teenagers alike "are accountable for their behavior. They're responsible for their behavior."

MIRANDA WAIVER

Jennifer contends that her waiver of rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), was not knowing and intelligent.[3] When seeking admission of statements made during custodial questioning, the State has the burden under ***Miranda*** to show that the individual was advised of his or her constitutional rights,[4] that he or she understood them, and that he or she intelligently waived them. *See* ***State v. Beaver***, 181 Wis.2d 959, 966, 512 N.W.2d 254, 256 (Ct. App. 1994).

The parties dispute the State's burden of proof in establishing that a waiver of ***Miranda*** rights was knowing and intelligent. In ***State v. Jones***, 192 Wis.2d 78, 532 N.W.2d 79 (1995), *amended on denial of reconsideration*, 1995 WL 405686 (Wis. June 29, 1995), the Wisconsin Supreme Court addressed the issue of whether a juvenile's waiver of ***Miranda*** rights was knowing, intelligent and voluntary. On reconsideration, the court stated that the State's burden of proof on the waiver issue is not "beyond a reasonable doubt" as it had earlier stated, but rather "by the preponderance of the evidence." In reaching this conclusion, the court relied on ***State v. Beaver***, 181 Wis.2d 959, 512 N.W.2d 254 (Ct. App. 1994) and ***State v. Lee***, 175 Wis.2d 348, 499 N.W.2d 250 (Ct. App. 1993), both of which held that the State's burden of proving that an individual's waiver of ***Miranda*** rights was knowing and intelligent is by the preponderance of the evidence. ***Jones*** involved a juvenile. Based on ***Jones***, we conclude that the State's burden of proof in establishing that a juvenile's waiver of ***Miranda*** rights was knowing and intelligent is by the preponderance of the evidence.

On review of a denial of a suppression motion, this court will not disturb the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***State v. Mitchell***, 167 Wis.2d 672, 682, 482 N.W.2d 364, 368 (1992). However, the application of constitutional principles to the facts of a case is subject to independent appellate review. ***State v. Esser***, 166 Wis.2d 897, 904, 480 N.W.2d 541, 544 (Ct. App. 1992).

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[3] Jennifer does not contend that her waiver was involuntary.

[4] Under ***Miranda v. Arizona***, 384 U.S. 436 (1966), an in-custody defendant must be warned that he or she has the right to remain silent, that anything he or she says may be used against him or her in court, that he or she has the right to an attorney, and that an attorney will be appointed if he or she cannot afford one.

The general rule is that the State establishes a *prima facie* case of a proper ***Miranda*** waiver where the individual has been advised of all of his or her rights under ***Miranda*** and the individual indicates an understanding of such rights and is willing to make a statement. *See* ***State v. Lee***, 175 Wis.2d 348, 360, 499 N.W.2d 250, 255 (Ct. App. 1993). Once the State has established its *prima facie* case, in the absence of countervailing evidence, the statement should be admitted into evidence. ***Id.*** at 361, 499 N.W.2d at 255.

We conclude the State established a *prima facie* case for admission of Jennifer's statements. It is undisputed that a detective read Jennifer her ***Miranda*** rights and that Jennifer indicated that she understood them and was willing to make a statement.

In considering the countervailing evidence, we must examine the totality of the circumstances. ***Jones***, 192 Wis.2d at 101, 532 N.W.2d at 88. The totality of the circumstances analysis applies even if the individual is a juvenile. ***State v. Woods***, 117 Wis.2d 701, 722, 345 N.W.2d 457, 468 (1984). Relevant factors to consider include the juvenile's age, experience, education, background, intelligence and conduct, as well as the juvenile's capacity to understand the warnings given, the nature of his or her rights and the consequences of waiving those rights. ***Jones***, 192 Wis.2d at 101, 532 N.W.2d at 88; ***Woods***, 117 Wis.2d at 722, 345 N.W.2d at 468.

We are satisfied that the totality of the circumstances indicates that Jennifer knowingly and intelligently waived her ***Miranda*** rights. The trial court found that the ***Miranda*** rights were read to Jennifer slowly and carefully; that Jennifer was looking directly and attentively at the detective while her rights were read, and was nodding her head in an affirmative manner; that at no point during the reading of her rights did Jennifer stare off, turn away or appear to be distracted; that after each right was read, Jennifer was asked "Do you understand that right" and Jennifer replied affirmatively; that the procedure took approximately two minutes to complete; and that there were no visible signs that Jennifer did not understand her rights. These findings are not clearly erroneous.

While testimony at the suppression hearing revealed that Jennifer has a learning disability that affects her ability to understand information provided orally, the psychologist and both special education teachers agreed

that Jennifer's ability to understand oral information in a given situation depends significantly on the manner and circumstances in which the information is presented. The special education teacher that the trial court found had the most experience with Jennifer, Carol Stephenson, testified that to a reasonable professional probability, Jennifer would understand her ***Miranda*** rights if they were read slowly and one at a time, if there were no distractions, if Jennifer maintained eye contact and if Jennifer replied that she understood each right. It is undisputed that these were the circumstances in which the ***Miranda*** rights were read to Jennifer.[5]

Although the psychologist testified that Jennifer could have a very limited understanding of the ***Miranda*** rights as read to her, he acknowledged that none of the tests he conducted with Jennifer involved the words or the concepts used in the ***Miranda***-rights warning card and that, prior to the hearing, he was not aware of the manner and circumstances in which Jennifer was read her ***Miranda*** rights.

While Kathryn McCosky did testify that "[j]ust hearing something would be the worse [sic] way for her to pick up information," she did not state that Jennifer would be incapable of understanding her ***Miranda*** rights as read to her. Given the trial court's finding that Stephenson had the most experience with Jennifer, it was within the trial court's discretion to give more weight to Stephenson's testimony than to McCosky's testimony on the issue of Jennifer's ability to understand oral information.

The fact that Jennifer was a minor does not, by itself, mean that her ***Miranda*** waiver could not have been knowing and intelligent. *Cf.* ***In re Shawn B.N.***, 173 Wis.2d 343, 365, 497 N.W.2d 141, 148 (Ct. App. 1992) ("That Shawn was thirteen years old does not prevent his statement from being voluntary, absent coercion"). Moreover, although Jennifer's parents were not present, Jennifer indicated that she did not want her parents to be present. *See* ***Theriault v. State***, 66 Wis.2d 33, 46-48, 223 N.W.2d 850, 857 (1974) (presence of a parent is not required for a minor to waive his or her right to remain silent). Finally, there was nothing to indicate that Jennifer was tired, sleepy or confused despite the fact that the ***Miranda*** waiver occurred at 3:00 a.m. *Cf.* ***State v. Verhasselt***, 83

[5] Jennifer does not contend that the trial court's finding that Carol Stephenson had more experience with Jennifer than Kathryn McCosky is clearly erroneous.

Wis.2d 647, 657-58, 266 N.W.2d 342, 347 (1978) ("Although late night interrogations and a defendant's lack of sleep ordinarily weigh against the voluntariness of a confession ... these concerns are offset ... by the fact that the interrogation took place shortly after commission of the crime and that the defendant did not indicate that he was tired or sleepy").

We conclude that the State met its burden of proving by the preponderance of the evidence that Jennifer's ***Miranda*** waiver was knowing and intelligent.

DISPOSITIONAL ORDER

Jennifer also contends that the trial court erroneously exercised its discretion in taking adult sentencing factors--specifically, accountability and responsibility--into account at a child's dispositional hearing.

A trial court's disposition in a delinquency proceeding will not be reversed on appeal absent an erroneous exercise of discretion. ***In re James P.***, 180 Wis.2d 677, 682, 510 N.W.2d 730, 732 (Ct. App. 1993). Discretion contemplates a process of reasoning which yields a conclusion based on logic and founded upon proper legal standards. ***In re K.K.C.***, 143 Wis.2d 508, 510, 422 N.W.2d 142, 143-44 (Ct. App. 1988). A presumption of reasonableness supports the court's disposition. ***In re James P.***, 180 Wis.2d at 682, 510 N.W.2d at 732.

At the dispositional hearing, the trial court correctly stated that in a delinquency disposition, the juvenile's best interests are the paramount consideration. *See* § 48.01(2), STATS. The court concluded that the seriousness of the offenses required Jennifer's commitment to the juvenile correctional system, stating that she was a danger to the public and in need of restrictive custodial treatment, not residential treatment. While the court did state that teenagers "are accountable for their behavior ... [t]hey're responsible for their behavior", the Wisconsin Supreme Court has stated that accountability and responsibility are not irrelevant in juvenile cases. ***In re R.W.S.***, 162 Wis.2d 862, 875-76, 471 N.W.2d 16, 21-22 (1991).

Jennifer offers no other reason to reverse the dispositional order and no other reason is apparent from the record. We conclude the trial court did not erroneously exercise its discretion in the disposition.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*dissenting*). This case presents an opportunity to resolve some troublesome questions as to police interrogation of children of tender years and cognitive deficiencies. At the time of her arrest and interrogation, Jennifer was fifteen years old. She had no previous contact with the police. She has a verbal IQ of 74, which is considered "borderline retarded." She is enrolled in special education classes. According to expert medical testimony, Jennifer has "very moderate to severe difficulties in anything having to do with language processing," and suffers from an auditory deficit disorder (ADD) which inhibits her ability to understand what is said to her. One of Jennifer's learning disabilities specialists testified that because of Jennifer's ADD, "[j]ust hearing something would be the wors[t] way for her to pick up information." The specialist also testified that Jennifer reads at somewhere between a third- and fourth-grade reading level.[6] Finally, the specialist stated that at school, Jennifer would almost always claim she understood instructions when she did not.

The police arrested Jennifer at approximately 2:00 a.m. on a charge of attempted homicide. At approximately 3:00 a.m., one of the officers read Jennifer the ***Miranda***[7] warnings; she stated that she understood the rights she was giving up. The police officers then questioned her until approximately 7:30 a.m. The police did not inform Jennifer's parents that they had her in custody, although they asked her whether she wanted them to call her parents, which she declined.

I first address the burden of proof. There is no dispute that the State must establish a juvenile's guilt beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358 (1970). However, the admission of a confession or inculpatory statement is an evidentiary matter.

I also emphasize that analysis of a claimed ***Miranda*** waiver has two components. First, was the waiver voluntary? Second, was the waiver knowing and intelligent? In ***State v. Lee***, 175 Wis.2d 348, 359, 499 N.W.2d 250, 255 (Ct. App. 1993), we stated that even though a ***Miranda*** waiver may be

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[6] The specialist also testified that the ***Miranda*** warning card, which the police read to Jennifer, was written at an eighth-grade reading level.

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

voluntary because of lack of police coercion, we must examine the additional waiver requirement of knowing intelligence. We must also recognize that what may not be coercive to an adult may be coercive to a child of tender years. Also, the fact that the State may show by a mere preponderance of the evidence that the waiver of an adult was voluntary does not mean that that is the appropriate burden to determine whether the waiver of a child was voluntary, knowing, and intelligent.

On reconsideration of ***State v. Jones***, 192 Wis.2d 78, 532 N.W.2d 79 (1995) *amended on denial of reconsideration*, 1995 WL 405686 (June 29, 1995), the court substituted the "preponderance of the evidence" burden for the "beyond a reasonable doubt" burden which it had assumed from its past precedents was the correct burden. The court accepted the burden of proof adopted by the United States Supreme Court in ***Colorado v. Connelly***, 479 U.S. 157 (1986). However, ***Connelly*** did not involve a child and did not involve the issue of whether defendant's waiver was knowing and intelligent. In ***Connelly***, the defendant claimed that he was coerced by "voices" which told him to confess to the murder of a young girl he killed in Denver sometime during November 1982. ***Connelly***, 479 U.S. at 160-62. The Court held that the coercion which makes a confession involuntary is coercion by the state, not God.

Because ***Jones*** involved a juvenile, that case is now precedential on the State's burden to show "voluntariness" of a juvenile's confession. However, neither ***Connelly*** nor ***Jones*** is precedential on the State's burden to show that a child's confession was knowing and intelligent. ***Jones*** is not precedential on this point because the court simply adopted the holding of ***Connelly*** that "preponderance of the evidence" was the appropriate standard to apply to the question of "voluntariness." The State has a higher burden when it must show that a child's confession was knowing and intelligent.

It is important that we achieve congruence with the Seventh Circuit Court of Appeals on the state's burden to show that a child's confession was knowing and intelligent. In the absence of that congruence, decisions by Wisconsin state courts on these matters may be for naught if the defendant can be assured that the Seventh Circuit will set him or her free on *habeas*. This happened in ***State v. Woods***, 117 Wis.2d 701, 345 N.W.2d 457 (1984). In ***Woods v. Clusen***, 794 F.2d 293 (7th Cir. 1986), the Seventh Circuit Court of Appeals affirmed the district court's grant of *habeas corpus* relief to Woods, who was a

juvenile. ***Woods/Clusen*** was a "voluntariness" case. The federal courts found that the police in interrogating Woods "overreached," with the result that Woods's confession was involuntary. The court said that police tactics violated the Fourteenth Amendment's guarantee of fundamental fairness. 794 F.2d at 298. The court of appeals did not rule on the state's burden of proof argument because the court concluded that under either standard advanced by the state, affirmance of the district court ruling was in order. ***Id***. at 299 n.8.

I believe that Jennifer's confession was coerced. I do not suggest that the police "overreached" as they did in ***Woods***; however, police interrogation is inherently coercive. I submit that when the police interrogate a child of tender years from 3:00 a.m. to 7:30 a.m. without a parent, counsel or friend to stand at the child's side, coerciveness is established which renders a confession involuntary. *See* ***Gallegos v. Colorado***, 370 U.S. 49, 53-54 (1962). What the ***Gallegos*** court stated is particularly apt when applied to this case:

> There is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend--all these combine to make us conclude that the formal confession on which this conviction may have rested ... was obtained in violation of due process.

370 U.S. at 55 (citation omitted).

I would hold that Jennifer's confession was involuntary, under either standard of proof. However, I also conclude that Jennifer did not knowingly and intelligently waive her constitutional rights. Regardless of the verdict on voluntariness, I conclude that the state failed to show beyond a reasonable doubt that Jennifer's waiver of her constitutional rights was knowing and intelligent.

The United States Supreme Court has approved the totality-of-the-circumstances approach for police interrogation of juveniles:

> Th[e] totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved.... The totality approach ... includes evaluation of the juvenile's age, experience, education, background, and intelligence, and [inquiry] into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, *and the consequences of waiving those rights*.

Fare v. Michael C., 442 U.S. 707, 725 (1979) (emphasis added). The totality-of-the-circumstances test shows that Jennifer did not knowingly and intelligently waive her rights.

Police officers arrested Jennifer at approximately 2:00 a.m. on the charge of attempted homicide. The officers took Jennifer to an interrogation room at the Dane County Sheriff's Department. There, at approximately 3:00 a.m., one of the officers read Jennifer the ***Miranda*** warnings; she stated that she understood the rights she was giving up. The police officers then questioned her until approximately 7:30 a.m.

Jennifer argues that her ***Miranda*** waiver was neither knowingly nor intelligently made. I agree. The totality of the circumstances which I have detailed shows that Jennifer was incapable of understanding the rights she was giving up or the consequences of conviction of the possible charges against her.

The State argues that its expert found that Jennifer could have understood the constitutional rights she was waiving because the police gave her the warning "nice and easy," taking two minutes to read through. The possibility that Jennifer could have understood constitutional rights which mature, intelligent adults may not understand, does not satisfy the State's burden of proof. The record does not show that the police explained to Jennifer the meaning or consequences of her waiver.

In applying the totality-of-the-circumstances test to juveniles, certain factors take on great significance. For example, when the juvenile is as young as Jennifer, age is a factor which weighs heavily against finding a knowing and intelligent waiver. In ***Haley v. Ohio***, 332 U.S. 596, 601 (1948), the Supreme Court considered the alleged voluntary confession of a fifteen-year-old boy:

> But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

In another case, ***Gallegos v. Colorado***, the Court stated:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made 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 interests or how to get the benefits of his constitutional rights.

370 U.S. at 54.[8] Empirical studies show that juveniles younger than fifteen do not understand at least some of their constitutional rights; for instance, they fail to sense the legal protection inherent in the right to remain silent. *See, e.g.,* Grisso, *Juveniles Capacity to Waive Miranda Rights: An Empirical Analysis,* 68 CAL. L. REV. 1134, 1159 (1980).

If fourteen- and fifteen-year-olds with at least average intelligence do not have the capacity to comprehend the formal recitation of ***Miranda*** rights, a borderline retarded fifteen-year-old with ADD certainly does not have such capacity. More than a mere recitation of these constitutional rights is required -- no matter how "nice and easy" they are read.

In addition, to have an effective waiver of rights, those rights must be clearly understood. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938).

The Supreme Court has taken a narrow view of "intelligent" waiver in cases involving juveniles. Prior to the ***Miranda*** decision, Justice Frankfurter stated: "[T]he terrible engine of the criminal law [interrogation] is not to be used to overreach individuals who stand helpless against it." ***Columbe v. Connecticut***, 367 U.S. 568, 581 (1961). The Court has specifically stated that "admissions and confessions of juveniles require *special caution*." ***In re Gault***, 387 U.S. 1, 45 (1967) (emphasis added).

At the December 10, 1993 hearing on Jennifer's motion to withdraw her NGI plea, her counsel informed the court that he had spent approximately two hours with Jennifer and her parents discussing all of the elements of the various offenses. Counsel also discussed with Jennifer the constitutional rights that she had as an alleged delinquent child. The State does not claim that the interrogators explained the elements of the offenses with which she was charged or the statutory rights she had as a child. She repeatedly asserted that she did not intend to kill the alleged victim. The State does not claim that the police informed Jennifer that lack of intent was a defense to the possible charges against her.

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[8] Although these two cases were decided prior to ***Miranda***, they remain good law.

Counsel also informed the court that the concept he found most difficult to explain to Jennifer was the meaning of reasonable doubt. The trial court recognized the difficulty of any suspect understanding what constitutional rights he or she has when arrested by the police. The court stated to Jennifer:

> [W]hen you were first in court on this, you were given a written copy and an explanation of your legal rights. Some of that language is awkward for anybody. Some of it is difficult for anybody, because it's written in the language of the law.

Jennifer had neither age nor experience to assist her in understanding the constitutional (and statutory) rights she was waiving.

After many years and countless judicial decisions, the ***Miranda*** warning against self-incrimination has been distinguished and diluted so that it's purpose has been all but forgotten. The ***Miranda*** Court concluded that, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." ***Miranda v. Arizona***, 384 U.S. 436, 458 (1966).

In ***Fare v. Michael C.***, a sixteen-and-one-half-year- old juvenile asked if he could have his probation officer present during interrogation. 442 U.S. at 710. He claimed that his request invoked his right to silence. The Supreme Court disagreed. However, the Court held that the California court should have inquired into the totality of the circumstances surrounding the interrogation to determine whether the juvenile knowingly and voluntarily waived his rights to remain silent and to have the assistance of counsel. ***Id***. at 725-26. The Court concluded that a transcript of the interrogation revealed that the police took care to ensure that the juvenile understood his rights. The Court found no indication in the record of the interrogation that the juvenile failed to understand what the officers told him. The Court stated:

> Further, no special factors indicate that [the juvenile] was unable to understand the nature of his actions. He was a 16 1/2-year-old juvenile with considerable

> experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.

Id. at 726-27.

Special factors are present in this case and indicate that Jennifer was unable to understand the rights she was waiving, or what the consequences of waiver would be.

The United States Supreme Court has held that special rules apply to the interrogation of a child. In ***Gallegos v. Colorado***, the Court said:

> [The petitioner, a child of fourteen,] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights--from someone concerned with securing him those rights--and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

370 U.S. at 55.

In ***Haley v. Ohio***, the Court said as to a fifteen-year-old boy:

> [W]hen 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. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, and then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

332 U.S. at 599-600.

Just as in ***Haley***, no friend stood at the side of this fifteen-year-old girl as the police questioned her from 3 a.m. to 7:30 a.m. No lawyer stood guard to make sure that Jennifer did not become the victim of coercion. Neither her parents nor counsel nor friend was called during the critical hours of questioning. "[N]ot even a gesture towards getting a lawyer ... was ever made." ***Id***. at 600. The Court called the ***Haley*** interrogation a "disregard of the standards of decency." ***Id***.

The State does not claim that Jennifer's family was not known to the police. The failure of the police to inform Jennifer's parents as to where she was from 2 a.m. to 7:30 a.m. disregards the standards of decency of our society. Jennifer should not have had to request that her parents be called. The

standards of our society require that the police do not hold a child of tender years incommunicado when the child's parents are near at hand.

I believe that Jennifer's statement or confession cannot be held to be voluntary or intelligent in these circumstances.[9]

Therefore, I respectfully dissent.

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[9] Courts from other jurisdictions have held "waivers" ineffective under similar facts. *See, e.g.,* ***Cooper v. Griffin***, 455 F.2d 1142 (5th Cir. 1972) (ruling that fifteen- and sixteen-year-olds with I.Q.'s between sixty and sixty-seven were incapable of knowingly and intelligently waiving their ***Miranda*** rights); ***Eddings v. State***, 443 So. 2d 1308 (Ala. Crim. App. 1983) (determining minor defendant's confession inadmissible where he had I.Q. of 49 making it impossible for him to understand his ***Miranda*** rights); ***Watson v. State***, 501 S.W.2d 609 (Ark. 1973) (holding waiver by seventeen-year-old was ineffective where defendant had limited intelligence, was assigned to special education classes, and only obtained a third-grade reading level); ***Tennell v. State***, 348 So. 2d 937 (Fla. Dist. Ct. App. 1977) (holding that fourteen-year-old defendant failed to knowingly and intelligently waive rights where defendant had below average intelligence, had a first-grade reading level, and had difficulty understanding normal speech); ***Crawford v. State***, 240 S.E.2d 824 (Ga. 1977) (ruling that sixteen-year-old failed to make knowing waiver where, *inter alia*, she had an I.Q. of 56 and was borderline mentally retarded); ***People v. Redmon***, 468 N.E.2d 1310 (Ill. Ct. App. 1984) (determining that sixteen-year-old defendant was incapable of giving knowing and intelligent waiver where he had I.Q. of seventy, had borderline mental deficiency, and was unable to understand rights which were read to him); ***Commonwealth v. Jones***, 328 A.2d 828 (Pa. 1974) (holding that fifteen-year-old failed to knowingly and intelligently waive rights where he had an I.Q. of 74, was in the "retarded cycle" at school, and had only two hours of sleep before being interrogated at length in the early hours of the morning).