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Criminal Procedure–Juvenile Confessions in Arkansas

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CRIMINAL PROCEDURE—Juvenile Confessions in Arkansas. *State v. Rouw,* 265 Ark. 797, 581 S.W.2d 313 (1979)

Alan Rouw, fourteen, was picked up for questioning by a sheriff's deputy as a suspect in the murder of Lisa Evans. Lisa was a neighbor and schoolmate of Rouw's. On the way to the sheriff's office Rouw asked the deputy if he knew who had killed Lisa. The officer replied that he thought he knew. When Rouw asked him how he knew who had killed Lisa, the officer replied that it was his job to know. Rouw then stated that he had killed Lisa. The deputy warned Rouw not to say anything more until they arrived at the sheriff's office. At the sheriff's office, Rouw again admitted killing Lisa.

No summons was issued for Alan Rouw and his parents were told only that their son was being taken into protective custody. Rouw was not told of his right to remain silent or his right to have counsel present until the following day at eleven a.m. At that time he again confessed to the murder.[1]

Rouw was tried in the Juvenile Court of Carroll County and adjudged a delinquent. Appeal was made to the Carroll County Circuit Court and the judgment was dismissed.[2] He was retried in the Juvenile Court of Carroll County and again found to be a delinquent. A second appeal was made to the Carroll County Circuit Court. Rouw was adjudged a delinquent as a result of the commission of manslaughter and sentenced to the Arkansas State Training School.[3] The Supreme Court of Arkansas reversed Rouw's conviction.[4] The court found that the totality of the circumstances indicated that the state had not met its burden of proving that Rouw had voluntarily and knowingly waived his rights to remain silent and to have counsel present. *Rouw v. State,* 265 Ark. 797, 581 S.W.2d 313 (1979).

In recent years the United States Supreme Court has broadly defined the limits of the protection that the United States Constitution affords juveniles. The Court has held that juveniles are enti-

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1. Rouw v. State, 265 Ark. 797, 581 S.W.2d 313 (1979).
2. *Id.* The case was dismissed because of the state's failure to serve Rouw with a summons pursuant to ARK. STAT. ANN. § 45-425 (1977).
3. Rouw v. State, 265 Ark. 797, 798, 581 S.W.2d 313, 314 (1979).
4. *Id.* at 804, 581 S.W.2d at 317.

tled to the rudiments of due process but are not entitled to the same stringent due process rules that govern adult adjudication.[5] It is the Court's opinion that juveniles are benefitted by expeditious, intimate, and informal proceedings that do not subject juveniles to the trauma and stigma of adult proceedings.[6]

The cornerstone of due process for both adults and juveniles is the fifth amendment to the United States Constitution. It guarantees that no person shall be compelled in a criminal case to be a witness against himself.[7] At common law there existed a rule of evidence which barred confessions obtained by threats or promises.[8] American courts followed the rule[9] and used the "total-

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5. *In re* Gault, 387 U.S. 1 (1967). The defendant was a fifteen-year-old boy committed to the Arizona State Industrial School for the duration of his minority after being found guilty of making an obscene telephone call. His parents were given oral notice of their son's detention after he was taken into custody, but no petition was served to the boy or his parents. Gault was questioned without being told of his right to counsel or his right to remain silent. There was no complainant present at the hearing and there was no sworn testimony given. After Gault was convicted, his parents filed a petition for habeas corpus on the grounds that the Arizona Juvenile Code violated due process because of the lack of a requirement that a juvenile be served with a petition. After denial of the writ, Gault appealed. The United States Supreme Court reversed his conviction. The Court held that juvenile proceedings which may lead to loss of freedom must measure up to those essentials of due process and fair treatment provided for adults. Because due process requires proper notice of charges, the right to counsel, the right against self-incrimination, and the right of confrontation, the Court held that Gault's conviction must be reversed.

6. McKeiver v. Pa., 403 U.S. 528, 545-60 (1971). The Supreme Court determined in *McKeiver* that minors are not constitutionally guaranteed a trial by jury. *Id.* at 545. The Court held in *In re* Winship, 397 U.S. 358, 368 (1970) that the standard of proof in juvenile proceedings is proof beyond a reasonable doubt. For a more detailed discussion *see* S. M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (1974).

7. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. This privilege was held applicable to state actions in Malloy v. Hogan, 378 U.S. 1, 6 (1964) via the fourteenth amendment.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first eight amendments to the United States Constitution were originally construed as limitations only on the power of the federal government. The fourteenth amendment, through the due process and equal protection clauses, makes many of the rights guaranteed by the Bill of Rights applicable to the states. This incorporation of rights from the Bill of Rights is known as selective incorporation. "[P]rinciple[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" will be incorporated. Snyder v. Mass., 291 U.S. 97, 105 (1934).

8. Brown v. Walker, 161 U.S. 591 (1896).

9. The purpose of the rule was to ensure the reliability of confessions, to deter im-

ity of the circumstances" test[10] to determine whether a confession was voluntary or was the product of coercion by law enforcement officials.[11] In 1914, Arkansas adopted the "totality of the circumstances" test for confessions.[12] During the 1960's the United States Supreme Court handed down rules that made the standard for admissible confessions more definite. The most far reaching of these decisions was *Miranda v. Arizona*.[13] *Miranda* held that, in order for any confession obtained during interrogation to be admissible into evidence, the state must inform the suspect before questioning of his right to remain silent, to have counsel present, and to have counsel appointed if he is indigent.[14]

The United States Supreme Court has never expressly held that *Miranda's* exclusionary rule applies to a juvenile taken into custody.[15] However, *In re Gault*[16] held that where juvenile proceedings might result in a loss of liberty, the privilege against self-incrimination applies just as it does to adult proceedings.[17] The Court stated that the presence of counsel was necessary to preserve that right, to help the accused recognize problems of law, to guard against improper procedure, and to raise appropriate defenses.[18]

In *Rouw v. State*[19] the Arkansas Supreme Court overturned the conviction of Rouw, a juvenile, because the state had not met its burden of proving that Rouw had voluntarily waived his constitutional right to silence and counsel in accordance with *Miranda v. Arizona*.[20] Critical considerations cited by Justice Darrell Hickman

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proper police practices, and to ensure that confessions were not made when the free will of the accused was impaired. Miranda v. Ariz., 384 U.S. 436, 466 (1967).

10. Haynes v. Wash., 373 U.S. 503, 513 (1963).

11. The factors considered in determining voluntariness from the totality of the circumstances were: (1) the length of the interrogation; (2) the use of threats or abuse; (3) the length of time the suspect was held incommunicado; and (4) the characteristics of the suspect, such as age. Gallegos v. Colo., 370 U.S. 49, 52-53 (1962). Other considerations were the health of the suspect (Leyra v. Denno, 347 U.S. 556 (1956)) and whether the suspect was advised of his rights to remain silent and have legal counsel (Fay v. Noia, 372 U.S. 391, 414 (1963)).

12. Dewein v. State, 114 Ark. 472, 170 S.W. 582 (1914).

13. 384 U.S. 436. Preceding *Miranda* was Escobedo v. Ill., 378 U.S. 478 (1964). In *Escobedo*, the Supreme Court held that once an investigation begins to focus on a particular suspect who is in custody, he must be advised of his right to counsel. *Id.* at 490-91.

14. Miranda v. Ariz., 384 U.S. 436, 479 (1966).

15. Fare v. Michael C., 442 U.S. 707, 717 (1979).

16. 387 U.S. 1 (1967).

17. *Id.* at 55.

18. *Id.* at 36.

19. 265 Ark. 797, 581 S.W.2d 313 (1979).

20. *Id.* at 804, 581 S.W.2d at 317.

were Rouw's age, the three day period over which the questioning took place, the fact that Rouw's parents were told while Rouw was in jail that he was only in protective custody, and that none of the provisions of the Arkansas Juvenile Code regarding arrests were followed.[21] The court held that the failure by the law enforcement officials to follow the Juvenile Code is not grounds, alone, for automatic reversal, but is a factor to be considered in determining voluntariness.[22]

Justice Fogleman, joined by Justices Smith and Byrd, argued in dissent that by finding Rouw's confession to be coerced, the court distorted the *Miranda* rule so that it barred what in fact was a voluntary confession. The dissent reasoned that because Rouw initiated the discussion of who had killed Lisa, and since the police conduct was not of the type the *Miranda* rule sought to deter, the rule was misapplied.[23] Further, Justice Fogleman stated that it was this type of over-extension of the exclusionary rule that the public anticipated with fear when *Miranda* was decided.[24]

When determining the voluntariness of waivers prior to *Rouw v. State*, the court had refused to apply *Miranda* as broadly as they did in *Rouw*.[25] *Rouw v. State* is significant because the court

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21. *Id.* ARK. STAT. ANN. §§ 45-418, -421, and -425, provide in pertinent part that when a juvenile is arrested he shall immediately be taken before the juvenile court, that he has a right to bond, and that he shall be notified by summons of the charges against him. Pursuant to the United States Supreme Court's decision in *In re Gault* the Arkansas Juvenile Justice Institute drafted a revision of the Arkansas Juvenile Court Act of 1911. It was signed into law as Act 451 of 1975 and became effective on July 1, 1975. G. PASVOGEL, ARKANSAS JUVENILE LAW AND PROCEDURE 7 (1976). The primary purpose and philosophy of the Act was "[t]hat the care, custody, and discipline of juveniles shall approximate as nearly as possible that which should be given them by their parents." 1975 Ark. Acts 451. (Codified in ARK. STAT. ANN. § 45-402 (1977)).

22. Rouw v. State, 265 Ark. 797, 800, 581 S.W.2d 313, 315-16 (1979).

23. *Id.* at 806, 581 S.W.2d at 318. The *Miranda* rule is not intended to bar confessions given voluntarily in the absence of interrogation. Miranda v. Ariz., 384 U.S. 436, 478 (1966). Oregon v. Mathiason, 429 U.S. 492 (1977) explained that *Miranda* applies only to questioning initiated by law enforcement officers.

24. Rouw v. State, 265 Ark. 797, 806, 581 S.W.2d 313, 318 (1979).

25. In Tucker v. State, 261 Ark. 505, 549 S.W.2d 285 (1977), a sixteen-year-old was tried as an adult and convicted of killing his mother. He claimed that he had found her at home, dead, at midnight and called the police. The police came and were at the house with the boy until four a.m. Tucker was then taken to jail. After being questioned for one hour, he confessed at seven a.m. Tucker had been in trouble before and was familiar with the waiver of rights. His confession was upheld, although he was said to be sleepless, uncounselled, and distraught when he confessed.

Justices Fogleman and Holt dissented, finding the confession involuntary after viewing the totality of the circumstances. *Id.* at 521, 549 S.W.2d at 293.

In Loomis v. State, 261 Ark. 803, 551 S.W.2d 546 (1977), the accused, an adult, was told

announced a policy of closer scrutiny of waivers by juveniles of constitutionally-prompted rights. Although the court stated that youth is only one factor to be considered,[26] the decision indicates that Rouw's age was a paramount factor since Rouw readily confessed before questioning began.

In *Rouw* the Arkansas Supreme Court seemed to anticipate the reasoning of the United States Supreme Court in *Fare v. Michael C.*,[27] which was decided after *Rouw*. Both the Arkansas Supreme Court and the United States Supreme Court held that the "totality of the circumstances" test was the proper one for juvenile adjudications.[28] The circumstances considered by both

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several times that he could have a lawyer. He said that he thought he needed one and also that he thought he needed to see a psychiatrist. He then became indecisive and asked the prosecutor if he thought that he (Loomis) should have a lawyer. The prosecutor started to leave but Loomis called him back and asked where he was going. The prosecutor answered that he was going to get Loomis a lawyer, and Loomis said that he did not want the prosecutor to leave. The Arkansas Supreme Court, in an opinion written by Justice Fogleman, held that there "could hardly have been a more thorough waiver." *Id.* at 812, 551 S.W.2d at 551. Justices Smith and Byrd dissented, stating that all questioning should have stopped when Loomis first said that he thought he needed a lawyer. *Id.* at 813, 551 S.W.2d at 552.

In Hammond v. State, 244 Ark. 1113, 428 S.W.2d 639 (1968), the accused, an adult, was arrested and told by the sheriff that he would rather Hammond not say anything. Hammond was put into a police car. On the way to the sheriff's office Hammond indicated that he wanted to talk. The sheriff again said that he did not want to talk about it. Hammond confessed at the sheriff's office when they were searching him shortly after arrival. The Arkansas Supreme Court upheld the confession stating that although there was no evidence that a *Miranda* warning was given, there was sufficient evidence that Hammond's statements were voluntary. *Id.* at 1123, 48 S.W.2d at 645.

26. Rouw v. State, 265 Ark. 797, 799, 581 S.W.2d 313, 315 (1979).

27. In Fare v. Michael C., 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978), the California Supreme Court held that a juvenile's request to see his probation officer before being questioned amounted to a *per se* invocation of his right to silence. Michael C. was a sixteen-year-old who was implicated in murder. He was given the *Miranda* warning at the station house before being questioned. The accused asked to see his probation officer and was refused. He then agreed to answer questions and confessed after interrogation. The California Supreme Court reversed the conviction and stated that a probation officer, although a peace officer, was in a position to be trusted by a juvenile and that, statutorily, he should represent his charge's interest to an extent. Consequently, the court found that a probation officer could protect a minor's fifth amendment rights in the same manner as an attorney.

In Fare v. Michael C., 442 U.S. 707, 723-24 (1979), the United States Supreme Court ruled that the California Supreme Court had overextended *Miranda*, and that a request to see a probation officer by an accused is only a factor to be considered in determining whether a juvenile's confession is voluntary. The court further stated that the "*per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system . . . ." and that "[a] probation officer is not in the same posture . . ." because he is a state employee, bound to seek the interest of the state. *Id.* at 719.

28. Fare v. Michael C., 442 U.S. 707, 724 (1979). Rouw v. State, 265 Ark. 797, 803, 581

courts were the age of the accused,[29] whether the *Miranda* warning was given and understood,[30] and the length of the interrogation.[31] Although the courts reached different results because of the different facts, the cases reaffirm the vitality of the "totality of the circumstances" test in determining the voluntariness of a juvenile confession.

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S.W.2d 313, 317 (1979).

29. Fare v. Michael C., 442 U.S. 707, 725 (1979). Rouw v. State, 265 Ark. 797, 799, 581 S.W.2d 313, 315 (1979).

30. Fare v. Michael C., 442 U.S. 707, 725 (1979). Rouw v. State, 265 Ark. 797, 803, 581 S.W.2d 313, 317 (1979).

31. Fare v. Michael C., 442 U.S. 707, 725 (1979). Rouw v. State, 265 Ark. 797, 800, 581 S.W.2d 313, 315 (1979).