Florida Law Review

Volume 32 | Issue 2 Article 8

January 1980

# Invocation and Waiver of Fifth Amendment Rights by Juveniles

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law right of indemnity against an employer, the principal case merely makes the right a hollow one.

The instant case will have a major impact on relations between manufacturers and employers in Florida. An increase in leasing arrangements between manufacturers and employers might be the principal result. By leasing his equipment, the manufacturer would have a contractual base upon which indemnity could be predicated.[93] However, in a companion decision[94] the supreme court has indicated that "contracts of indemnification which attempt to indemnify the party against its own wrongful acts are viewed with disfavor in Florida."[95] Therefore, manufacturers will find it difficult to transfer their losses back to the employer and will inevitably pass the burden on to the consumer in the form of higher prices.

By abrogating the employer's immunity, the *Sunspan* court advanced towards the equitable goal of loss-transfer on a comparative fault basis. However, by failing to alter indemnity's traditional prerequisites to account for changes in liability concepts, the instant case has halted this advance. In its quest for purity of form, the court has ignored the equitable background of indemnity. Consequently, by forcing the manufacturer to absorb the loss through his enterprise liability, the court implicitly ratified the manufacturer's subsidization of the worker's compensation system.

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## CONSTITUTIONAL LAW: INVOCATION AND WAIVER OF FIFTH AMENDMENT RIGHTS BY JUVENILES

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

Charged with murder in juvenile court, respondent[1] moved to suppress incriminating evidence obtained during custodial interrogation.[2] Respondent claimed he had invoked his fifth amendment privilege against self-incrimination[3] by requesting the presence of his probation officer during the interroga-

93. Of course, the manufacturer would have to provide a "hold harmless" provision and a clause acknowledging the lessee's responsibility to use the product in a safe and proper manner.

94. Charles Poe Masonry, Inc. v. Spring-Lock Scaffolding Rental Equip. Co., 374 So. 2d 487 (Fla. 1979).

95. *Id.* at 489. The court said that "[s]uch contracts will be enforced only if they express an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms." *Id.*

1. Respondent, M.W.C., was 16 1/2 years old at the time of the offense and had been on probation for over four years. 422 U.S. 707, 710 (1979).

2. Respondent was taken into custody based on a report that a truck registered in his mother's name and a person of his description had been seen in the victim's neighborhood on the night of the murder. Two police officers advised respondent of his constitutional rights under the *Miranda* decision, interrogated him, and obtained inculpatory statements and sketches of the scene of the murder. *Id.* at 710-11.

3. "No person . . . shall be compelled in any criminal case to be a witness against him-

tion.[4] Finding a waiver of respondent's constitutional right to remain silent,[5] the trial court[6] denied the motion. The Court of Appeal unanimously affirmed respondent's commitment to the Youth Authority.[7] In reversing,[8] the California

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self . . . ." U.S. CONST. amend. V. *Accord*, CAL. CONST. art. 1, § 13, cl. 5 which provides: "Persons may not . . . be compelled in a criminal cause to be a witness against themselves. . . ." However, the instant opinion remarks that the California Supreme Court based its decision on federal law. *Id.* at 716-17.

4. The police advised respondent that he was being questioned about a murder and then advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), before beginning the interrogation:

> "Q. [police] . . . Do you understand all of these rights as I have explained them to you?
> "A. [respondent] Yeah.
> "Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
> "A. What murder? I don't know about no murder.
> "Q. I'll explain to you which one it is if you want to talk to us about it.
> "A. Yeah, I might talk to you.
> "Q. Do you want to give up your right to have an attorney present here while we talk about it?
> "A. *Can I have my probation officer here?*
> "Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.
> "A. How I know you guys won't pull no police officer in and tell me he's an attorney?
> "Q. Huh?
> "A. [Repeat of last answer.]
> "Q. Your probation officer is Mr. Christiansen.
> "A. Yeah.
> "Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?
> "A. Yeah.
> "Q. Okay, will you talk to us without an attorney present?
> "A. Yeah I want to talk to you."

21 Cal. 3d 471, 473-74, 579 P.2d 7, 8, 146 Cal. Rptr. 358, 359-60 (1978) (emphasis in original).

5. The trial judge stated that the interpretation of a minor's statement is a factual question to be resolved in each case. *In re* Michael C., 66 Cal. App. 3d 239 (opinion omitted), 135 Cal. Rptr. 762, 765 (1977), *vacated*, 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978). The trial judge noted as one factor in her decision that respondent indicated he might talk to the police before he asked for his probation officer and again after his request. Other factors cited by the judge were respondent's age and previous experience with the court system. The respondent was on probation and had been to a camp for juvenile offenders. *Id.*

The trial court distinguished the instant case from People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), because in the instant case there was no indication of lengthy interrogation. 66 Cal. App. 3d at 239, 135 Cal. Rptr. at 765. In *Burton*, the California Supreme Court held that a juvenile's request for a parent during custodial interrogation constituted an invocation of his fifth amendment right to remain silent. 6 Cal. 3d at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6.

6. Michael C., No. 466633 (Cal. Super. Ct. May 10, 1976).

7. *In re* Michael C., 66 Cal. App. 3d 239, 135 Cal. Rptr. 762 (1977). Respondent was adjudicated a ward of the juvenile court pursuant to CAL. WELF. & INST. CODE ANN. §§ 602, 725 (West 1972) for violation of the penal code and was committed to the Youth Authority

Supreme Court held respondent's request to see his probation officer[9] during custodial interrogation constituted an invocation of his fifth amendment right to remain silent. The United States Supreme Court reversed and HELD,[10] a juvenile's request to see his probation officer during custodial interrogation is not a per se invocation of his constitutional privilege against self-incrimination.[11]

The doctrine of *parens patriae*, which postulates that the state is the guardian of the public welfare, is the philosophical and historical origin of the juvenile court system.[12] Originally, minors above the age of criminal responsibility[13] were tried and punished for criminal offenses as adults.[14] With the advent of the humanitarian reform movement in the United States during the

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pursuant to §§ 731, 736. Juvenile court proceedings are not considered criminal proceedings in California. *Id.* § 203 (Supp. 1979). The juvenile court made the finding required by § 202 that long-term commitment was necessary for the best interests of respondent and the protection of the public, and that respondent's parents were incapable of providing the training and supervision required. Record at 9, Fare v. Michael C., 442 U.S. 707 (1979).

8. 21 Cal. 3d 471, 478, 579 P.2d 7, 11, 146 Cal. Rptr. 358, 362 (1978).

9. *Id.* at 477, 579 P.2d at 11, 146 Cal. Rptr. at 362. Relying on the statutory duty of a probation officer in California to represent the interests of the juvenile and that the respondent's probation officer had admonished the juvenile to notify him immediately of any police contact, the California Supreme Court held that respondent's request to see his probation officer was per se an invocation of his fifth amendment rights. The foundation for the decision was the statement in Miranda v. Arizona, 384 U.S. 436 (1966), that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74 (footnote omitted). The California Supreme Court had previously interpreted the *Miranda* statement to support the conclusion that any conduct inconsistent with a present willingness to speak with the police amounts to an invocation of the fifth amendment right to remain silent. *See* People v. Randall, 1 Cal. 3d 948, 956, 464 P.2d 114, 119, 83 Cal. Rptr. 658, 663 (1970) (cited in *In re* Michael C., 21 Cal. 3d 471, 475, 579 P.2d 7, 9, 146 Cal. Rptr. 358, 360 (1978)). A juvenile's request for his father during custodial interrogation was deemed to be the normal reaction of a juvenile suspect seeking advice and therefore rendered the suspect's confession obtained by interrogation after the request had been made as inadmissible. People v. Burton, 6 Cal. 3d 948, 491 P.2d 793, 99 Cal. Rptr. 1 (1971) (cited in *In re* Michael C., 21 Cal. 3d at 475, 579 P.2d at 9, 146 Cal. Rptr. at 360 (1978)).

10. 442 U.S. at 728.

11. *Id.* The Court stated in dictum that the admissibility of statements obtained after a juvenile's request for his probation officer should be determined by review of the totality of the circumstances surrounding the interrogation. *Id.*

12. H. LOU, JUVENILE COURTS IN THE UNITED STATES 4 (1927). Translated literally, *parens patriae* means "father of the country."

13. At common law children below the age of seven were presumed incapable of forming a criminal intent. Children aged seven to fourteen were considered rebuttably incapable, and children over the age of fourteen were treated as adults. W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 1 (1972). The courts of chancery exercising equity powers were the protectors of neglected children. H. LOU, *supra* note 12, at 4-5.

14. "The child was arrested, put into prison, indicated by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act — nothing else — and if it had, then of visiting the punishment of the state upon it." Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909). *See also* H. LOU, *supra* note 12, at 13-14.

nineteenth century,[15] houses of refuge[16] and juvenile courts[17] were established as instruments of reformation rather than retribution.[18] Nevertheless, in separating juveniles from adults[19] and eliminating the features of an adult criminal proceeding, the juvenile courts operated outside the framework of constitutional guarantees.[20] The only checks on the broad discretion afforded juvenile courts were vague notions of fairness and justice.[21]

The United States Supreme Court considered the voluntariness[22] of self-incriminating statements by a juvenile in *Haley v. Ohio*.[23] The fifteen-year-old appellant confessed to murder charges after he was held incommunicado and questioned by relays of police from midnight until 5:00 a.m.[24] In the three days following the signing of the confession, an attorney was twice denied access to the juvenile, and his mother was not allowed to visit.[25] Recognizing that a child is "an easy victim of the law"[26] and "cannot be judged by the more exacting standards of maturity,"[27] the Court held the confession inadmissible.[28] The

15. Among the issues popular in the 19th century were child labor, prison reform, women's suffrage, and the abolition of slavery. H. LOU, *supra* note 12, at 14.

16. The Society for the Reformation of Juvenile Delinquents, largely composed of Quakers, opened the New York House of Refuge in 1825 as the first reformatory in the United States. Juvenile vagrants and criminals were rehabilitated through work, education, and religion. R. PICKETT, HOUSE OF REFUGE 21-85 (1969). *See generally* B. PEIRCE, A HALF CENTURY WITH JUVENILE DELINQUENTS (1869).

17. Although several states, notably Massachusetts, enacted legislation differentiating adult and juvenile offenders, the first comprehensive juvenile court system was the Juvenile Court of Cook County, created by the Illinois legislature in 1899. H. LOU, *supra* note 12, at 16-20. *See* Illinois Juvenile Court Act, 1899 ILL. LAWS ch. 133, § 5.

18. *See* H. LOU, *supra* note 12, at 19-20. *But see* Fox, *Juvenile Justice Reform*, 22 STAN. L. REV. 1187, 1193-1204, 1221-30 (1970). Fox points out that physical punishment and coerced religious practices were mainstays of the institution.

19. "Juvenile" refers to a person below the age of majority. Although the jurisdictional age varies among the states, the youngest maximum age for juvenile court jurisdiction is 16. S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 233-49 (1974).

20. Juvenile courts maintained an atmosphere of informality as opposed to an adversarial setting, did not adhere to rules of evidence, employed social reports extensively, and provided judges with few guidelines for dispositions. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 1-19 (1967).

21. Julian Mack, a juvenile court judge, recognized the potential for autocratic power in the juvenile justice system and recommended that juvenile judges be trained lawyers with a genuine interest in children. Mack, *supra* note 14, at 118-19.

22. This is a reflection of the principle that involuntary confessions are inadmissible into evidence. Bram v. United States, 168 U.S. 532 (1897). The two-fold rationale for excluding involuntary confessions is that the government may not compel anyone to incriminate himself and that coerced confessions are unreliable. *See* Jackson v. Denno, 378 U.S. 368, 385-86 (1964). *See generally* 3 WIGMORE, EVIDENCE §§ 820(b)-(d), 822-823 (Chadbourn rev. ed. 1970) (tracing the Supreme Court's treatment of confessions beginning with Brown v. Mississippi, 297 U.S. 278 (1936), and noting testimonial unreliability and due process guidelines as the rationale for exclusion of confessions from evidence).

23. 332 U.S. 596 (1948).

24. *Id.* at 598.

25. *Id.* at 600. The attorney was retained by the juvenile's mother. *Id.*

26. *Id.* at 599.

27. *Id.*

28. *Id.* at 607.

Court reiterated the *Haley* sentiments in *Gallegos v. Colorado*[29] by stating a juvenile "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admission."[30] In *Gallegos*, a fourteen-year-old admitted to an assault and robbery immediately upon questioning by police.[31] He signed a formal confession after five days of incommunicado detention.[32] The Court discounted the teenager's ability to know and assert his constitutional rights without adult advice[33] and held that, under the totality of the circumstances,[34] the confession was obtained in violation of due process.[35]

The Supreme Court first addressed the procedures used in the juvenile justice system in *Kent v. United States*.[36] Dissatisfied with the District of Columbia juvenile court procedures,[37] the Court held that a juvenile is entitled to a hearing on waiver of jurisdiction[38] conducted pursuant to "essentials of due process and fair treatment."[39] In the landmark decision in *In re Gault*,[40] the Court further delineated due process considerations of juvenile court proceedings. Gerald Gault, a fifteen-year-old probationer accused of making a lewd telephone call, was taken into custody and questioned by the juvenile

29. 370 U.S. 49 (1962).

30. *Id.* at 54.

31. *Id.*

32. *Id.* at 49-50.

33. *Id.* at 54-55. Although *Gallegos* was decided before *Miranda*, the police advised the juvenile of his right to an attorney. The juvenile did not ask either for an attorney or for his parents. The Court felt that the juvenile was incapable of understanding the consequences of answering questions posed by the police and of protecting his own interests because of his youth. *Id.* at 54. The opinion emphasized that a child's immaturity handicaps him in dealing with police interrogators and that adult advice would relieve this disparity. *Id.*

34. *Id.* at 55. "[J]udgment as to legal voluntariness *vel non* under the Due Process Clause is drawn from the totality of the relevant circumstances of a particular situation." Culombe v. Connecticut, 367 U.S. 568, 606 (1961). *See generally* Kamisar, *Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

35. 370 U.S. at 55. "There is no guide to the decision of cases such as this, except the totality of circumstances . . . ." *Id.* In an examination of the totality of the circumstances under which the confession was made to ascertain its voluntariness, the factors the Court found indicative of inherent coercion were the juvenile's age, the length of detention, the failure of the police to send for his parents, the failure of the police to bring him before a juvenile court judge immediately, and lack of adult assistance. *Id.*

36. 383 U.S. 541 (1966).

37. *Id.* at 556. At the root of the Court's dissatisfaction were the facts that children were not entitled to constitutional protections and that the juvenile justice system was ill-equipped to provide effective rehabilitative treatment. *Id.*

38. *Id.* at 561. The Court also found that the juvenile's counsel should have access to the juvenile's social records and that there should be a statement of the court's reasons for the waiver of jurisdiction. *Id.* at 561-63.

39. *Id.* at 552-64. Although the decision turned on construction of D.C. CODE ANN. § 11-914 (1961) (current version at § 11-1553 (1965)), the due process clause clearly was applied.

40. 387 U.S. 1 (1967). *See generally* Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1 (1967) (analysis of impact of *Gault* decision); Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC'Y REV. 491 (1969) (study of implementation of *Gault* in three urban juvenile court systems); Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527 (1967) (effect of extending right to counsel and privilege against self-incrimination to juvenile system).

court judge at two hearings.[41] Neither the juvenile nor his parents received formal notice of the charges, and the only notice of the hearings to the parents or the child was a note from the juvenile's probation officer.[42] The Supreme Court stated that insofar as a finding of delinquency amounted to penal incarceration,[43] the juvenile justice system had failed in its mission of rehabilitation.[44] Accordingly, constitutional due process for juveniles required notice of charges, advisement of the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[45]

Subsequent to *Gault*, the Supreme Court has applied the beyond a reasonable doubt standard of proof[46] and the prohibition against double jeopardy[47] to juvenile proceedings. Although the gap between rights accorded adults and those accorded juveniles in criminal proceedings has narrowed, it has not entirely closed.[48] Constitutional safeguards not expressly extended to juveniles[49]

41. 387 U.S. at 4-7.

42. *Id.* at 5-6.

43. *Id.* at 27. For example, Gault, a teenager, was committed to the State Industrial School until he attained majority for making a lewd telephone call. The sentence for an adult committing the same offense was a fine of $5 to $50 or imprisonment not to exceed two months. *Id.* at 29.

44. *Id.* at 22. As support for this conclusion, the opinion cited the high recidivism rate and the high crime rate among juveniles. *Id.* However, the Court stated that implication of constitutional procedures would not impair the benefits of the juvenile court system. *Id.*

45. *Id.* at 31-57. The Court specifically did not rule on the right to appellate review or the right to a transcript of the proceedings. *Id.* at 57-58.

46. *In re* Winship, 397 U.S. 358 (1970). Appellant, a 12-year-old, was adjudicated delinquent in family court for larceny of $112 from a woman's pocketbook. A preponderance of the evidence standard of proof was employed by the trial court. *Id.* at 361. The Court found that constitutional due process required the same standard of proof as would have been applied in an adult criminal proceeding. *Id.* at 367.

47. Breed v. Jones, 421 U.S. 519 (1975). The juvenile court in *Breed* found that respondent had committed an armed robbery and was not a fit subject for treatment by the juvenile justice system. Respondent, aged 17, was then prosecuted as an adult and found guilty of the same offense. *Id.* at 521-26. Because respondent was subject to stigma and loss of liberty as a result of the juvenile adjudicatory hearing, the Court held that he had been exposed to the risk of loss of liberty twice. *Id.* at 530-31.

48. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). McKeiver, 16 years old at the time of the offense, was adjudged a delinquent by the juvenile court and placed on probation for participating with 20-30 youths who chased three young teenagers and took 25 cents from them. *Id.* at 535-36. The Court was reluctant to dispense with the informality of the juvenile court or to abandon the distinctions between the juvenile court and adult proceedings. *Id.* at 551.

49. The right to bail has not been expressly applied to minors by the United States Supreme Court. There is a split of authority among the states as to whether juveniles may be released on bail. *Compare* Estes v. Hopp, 73 Wash. 3d 263, 438 P.2d 205 (1968) (denial of release on bail is not denial of due process and would be adverse to juvenile's best interests) *with* Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960) (commitment to training school is a deprivation of liberty triggering Bill of Rights). The right to counsel at a line-up was prescribed for adults in Gilbert v. California, 388 U.S. 263 (1967) and in United States v. Wade, 388 U.S. 218 (1967). Several courts have applied the right to counsel at a line-up to juvenile proceedings. *See, e.g., In re* Holley, 107 R.I. 615, 268 A.2d 723 (1970) (relied on *Gault*); *In re* Carl T., 1 Cal. App. 3d 344, 81 Cal. Rptr. 655 (1969) (compelled by *Gault* and state law on evidence). *But cf.* Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973) (juvenile proceedings are not criminal proceedings, therefore right to counsel only when juvenile jurisdiction waived).

include the right to a jury trial in criminal juvenile proceedings and the right to in-custody *Miranda* warnings of the constitutional privilege against self-incrimination.[50]

A majority of jurisdictions have followed *Gallegos* and applied the totality of the circumstances test to evaluate the validity of a waiver of fifth amendment rights by juvenile offenders.[51] The factors courts have examined include: age;[52] methods of interrogation;[53] length of interrogations;[54] and whether the accused was held incommunicado or allowed to consult with relatives, friends, or an attorney.[55] Whether an interested adult was present during interrogation

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Mapp v. Ohio, 367 U.S. 643 (1961), spoke to the fourth amendment prohibition against search and seizure for adults. The fourth amendment has been applied by some courts in the juvenile setting. *See, e.g., In re* Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968) (exclusionary rules applicable to the juveniles but search was incident to a lawful arrest); State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907 (1967) (constitutional right of privacy applicable to all persons, exclusionary rule requires fair dealing and instills respect for law and order); *In re* Harvey, 222 Pa. Super. Ct. 222, 295 A.2d 93 (1972) (no state interest in denying juvenile right to be free from unreasonable searches and seizures).

50. 384 U.S. 436 (1966). The Court mandated that a suspect in custody be informed that he has the right to remain silent, that anything he says can be used against him in court, that he has the right to an attorney, and that an attorney will be appointed for him if he cannot afford counsel. *Id.* at 467-73. The Court imposed a heavy burden on the state to prove that a statement made without the presence of counsel was made knowingly and intelligently and without compulsion. The standard for proof of a waiver of any constitutional privilege was established in Johnson v. Zerbst, 304 U.S. 458 (1938), which recognized a presumption against waivers of constitutional rights and determination of the issue based on the circumstances of the case. *Id.* at 464-65. *See generally* Rothblatt & Pitler, *Police Interrogation: Warning and Waivers — Where Do We Go From Here?*, 42 NOTRE DAME LAW. 479 (1967). The instant case is the first United States Supreme Court decision which specifically addresses the pre-adjudicatory stage of juvenile proceedings. Although *Gault* held that the fifth amendment privilege against self-incrimination was applicable to juveniles, the facts of the case confined the issues to procedures of the adjudicatory hearing. 387 U.S. at 13, 43. The Court in the instant case assumed the *Miranda* principles were applicable. 99 S. Ct. at 2568 n.4.

51. Several decisions cite People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), which specified application of the totality of the circumstances test to juveniles. In *Lara*, the California Supreme Court ruled that a minor is capable of making a voluntary confession without the assistance of an adult and that admissibility of a minor's confession is dependent upon his intelligence, age, experience, and ability to understand the consequences of his confession. *Id.* at 383, 432 P.2d at 215, 62 Cal. Rptr. at 599. *See also* United States v. Miller, 453 F.2d 634 (4th Cir. 1972) (each case to be considered separately from the subjective viewpoint of the individual interrogated); Parker v. State, 351 So. 2d 927 (Ala. Ct. App.), *writ quashed*, 351 So. 2d 938 (1977) (evaluating entire list of circumstances surrounding waiver); Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976) (age alone not determinative of validity of waiver); State v. Gullings, 244 Or. 173, 416 P.2d 311 (1966) (waiver is a factual matter to be decided in each case).

52. *See, e.g.*, State v. Carder, 3 Ohio App. 2d 381, 210 N.E.2d 714 (1965) (law provides that a minor may make a voluntary confession).

53. *See, e.g.*, Walker v. State, 12 Md. App. 684, 280 A.2d 260 (1971) (confession inadmissible when 16-year-old kept overnight without food and denied permission to speak to mother).

54. *See, e.g.*, Commonwealth v. Harmon, 440 Pa. 195, 269 A.2d 744 (1970) (confession inadmissible, the court refusing to condone tactics used in daylong interrogation).

55. *See, e.g.*, Commonwealth v. Cain, 361 Mass. 224, 279 N.E.2d 706 (1972) (father at police station but not allowed to see son until confession was made). Other factors included in

of a juvenile was considered by the Court in *Haley*,[56] *Fallegos*,[57] and *Gault*.[58] Several states by statutes[59] or case law[60] require the presence of either legal counsel, parents, or an interested adult to ensure the validity of a juvenile's waiver of constitutional rights. A juvenile held incommunicado is thought less knowledgeable and mature than his adult interrogators. Therefore, the presence of an interested adult may help to decrease this disparity.[61]

In addition to the special factors for determination of waiver of a constitutional right by a juvenile,[62] several courts have considered a relaxed standard for finding a junvenile has invoked his fifth amendment rights. Specifically, a juvenile's request to see his parents during custodial interrogation has been deemed an assertion of the privilege against self-incrimination.[63] In *People v.*

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the totality of the circumstances test are education, knowledge of the charge and of the rights to remain silent and to be represented by counsel, whether the interrogation is before or after the filing of charges, whether the accused had previously refused to give statements, and whether the accused later repudiated an extra-judicial statement. West v. United States, 399 F.2d 467, 469 (5th Cir. 1968).

56. 332 U.S. at 600. "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him." *Id.*

57. 370 U.S. at 55. "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." *Id.*

58. 387 U.S. at 55. "If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.*

59. COLO. REV. STAT. ANN. § 19-2-102(3)(c)(I) (1973); CONN. GEN. STAT. ANN. § 46b-137 (West Supp. 1979); N.M. STAT. ANN. § 13-14-25(A) (Supp. 1975); OKLA. STAT. ANN. tit. 10, § 1109(a) (West Supp. 1979).

60. Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972) (age is a clearly definable standard); State v. Dino, — La. —, 359 So. 2d 586, (1978) (specifically rejects totality of the circumstances as speculative but bases decision on state constitution), *cert. denied*, 439 U.S. 1047 (1978); Commonwealth v. Smith, 472 Pa. 492, 372 A.2d 797 (1977) (juvenile must have opportunity to consult with an informed and interested adult).

61. The adults other than legal counsel or legal guardian which courts have considered as adult friends include a social worker, People v. Maes, 194 Colo. 235, 571 P.2d 305 (1977) (statements suppressed after social worker ruled not to have special interest in child); a sister, *In re* F.D.P., 352 A.2d 378 (D.C. App. 1976) (confession admissible when juvenile confessed between time of requesting sister and her arrival); a grandmother, State v. Tolliver, 561 S.W.2d 407 (Mo. App. 1977) (statements held inadmissible because juvenile was living with his grandmother and police contacted juvenile's mother, who did not appear); a prison counselor, Commonwealth v. Thomas, 481 Pa. Super. Ct. 177, 392 A.2d 820 (1978) (waiver voluntary if made after consultation with adult interested in the juvenile's welfare and informed of juvenile's rights).

62. See notes 58-60 *supra* and accompanying text.

63. *See* People v. Burton, 6 Cal. 3d 375, 384-85, 491 P.2d 793, 798, 99 Cal. Rptr. 1, 6 (1971); Dowst v. State, 336 So. 2d 375, 376 (Fla. 1st D.C.A. 1976). The *Dowst* court held that a minor's request for his parents constitutes an assertion of his privilege against self-incrimination and a subsequent confession is inadmissible if made before the juvenile is allowed to call his parents or before the police have made a good faith effort to notify his parents. *Id. Contra*, Chaney v. Wainwright, 561 F.2d 1129 (5th Cir. 1977), *cert. denied*, 443 U.S. 904 (1979); People v. Riley, 49 Ill. App. 3d 304, 364 N.E.2d 306 (1977), *cert. denied*, 436 U.S. 951 (1978); State v. Young, 220 Kan. 541, 552 P.2d 905 (1976).

*Burton*,[64] the California Supreme Court held a minor subjected to custodial interrogation without an attorney invokes his fifth amendment right to remain silent when he requests his parents' presence at the interrogation.[65] In *Burton*, a sixteen-year old charged with two counts of first degree murder asked to see his parents. His request was denied although his father was present at the police station. The police advised the minor of his *Miranda* rights and commenced an interrogation which resulted in a full confession.[66] The court posited that a minor in custody would not normally call an attorney but would seek assistance from a parent or guardian.[67] Therefore, a juvenile's request for his parents reflects a desire for assistance and an unwillingness to proceed with interrogation.[68]

In the instant case, the Supreme Court reversed the California Supreme Court decision that a juvenile's request to see his probation officer during custodial interrogation constitutes a per se invocation of the right to remain silent.[69] The Court endorsed *Miranda's* "rigid rule" that all interrogation must cease upon the suspect's request for an attorney because that rule specifically informs police, prosecutors, and courts of the point at which a statement becomes inadmissible.[70] However, the Court noted the *Miranda* decision was premised on the unique role of the attorney in the criminal justice system.[71] After lengthy examination of the probation officer's role in the juvenile context, the majority of the Court concluded a probation officer is incapable of serving the function of an attorney for a juvenile suspect during custodial interrogation.[72] A probation officer may be untrained in law and advocacy, does not have the power to act on behalf of the juvenile probationer, and cannot safeguard any confidence the juvenile relates to him.[73] As a state-employed peace officer, a conflict exists between the probation officer's obligation to the state and the protection of the juvenile defendant's rights.[74] The Court did not

64. 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

65. *Id.* at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6-7.

66. *Id.* at 379-80, 491 P.2d at 796, 99 Cal. Rptr. at 4.

67. *Id.* at 382, 491 P.2d at 797-98, 99 Cal. Rptr. at 5.

68. *Id.* at 383, 491 P.2d at 798, 99 Cal. Rptr. at 6.

69. 442 U.S. 707, 728 (1979). The Court has also been reluctant to extend *Miranda* in other situations. *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975) (inculpatory statements made after request for attorney admissible for impeachment purposes); Michigan v. Tucker, 417 U.S. 433 (1974) (testimony of witness whose identity was revealed by interrogation without full *Miranda* warnings ruled admissible); Harris v. New York, 401 U.S. 222 (1971) (admissions inadmissible in case in chief may be used for impeachment purposes).

70. 442 U.S. at 718. This virtue is thought to outweigh the burden on law enforcement and prosecution of excluding some confessions. *Id.* The instant case is one illustration of this burden; the Court of Appeal remarked that without respondent's confession the evidence was insufficient to sustain his conviction. *In re* Michael C., 66 Cal. App. 3d 239 (opinion ommitted), 135 Cal. Rptr. at 763 n.1.

71. 442 U.S. at 719. An attorney is trained to protect his client's constitutional rights by preventing the police from using improper techniques and ensuring the accuracy of statements admitted at trial. *Id.*

72. *Id.* at 721.

73. *Id.* at 719-20.

74. A California probation officer for juveniles is charged with representation of the interests of the juvenile and is also granted the powers of a peace officer. CAL. WELF. & INST.

find a probation officer the equivalent of an attorney despite the statutory duty to represent the juvenile's interests[75] and the close relationship between the probation officer and juvenile.[76] Thus, the Court concluded that an extension of *Miranda* to the probation officer context did not afford greater protection for the juvenile's rights and therefore unjustified.[77]

The instant Court advocated a case-by-case determination of the validity of a waiver of constitutional rights made by a juvenile defendant utilizing the totality of the circumstances test.[78] The Court reasoned use of the totality of the circumstances approach by juvenile courts is appropriate because those courts possess a "special expertise" in handling juvenile matters.[79] Applying the totality of the circumstances test to the instant case, the Court concluded respondent voluntarily and knowingly waived his fifth amendment right to remain silent.[80] The factors the Court examined and relied upon to reach this conclusion included the respondent's age and prior experience with the juvenile court system, the finding that the interrogation was neither lengthy nor improperly conducted, and the lack of evidence of coercion in the interrogation transcript.[81]

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CODE ANN. §§ 280, 283 (West Supp. 1978); CAL. PENAL CODE ANN. § 830.5 (West Supp. 1978). The instant Court cited a separate concurring opinion to the California Supreme Court decision that a probation officer must counsel the juvenile to cooperate with the police. 99 S. Ct. at 2570 (quoting *In re* Michael C., 21 Cal. 3d 471, 479, 579 P.2d 7, 11, 146 Cal. Rptr. 358, 363 (1978) (Bird, C. J., Mosk, J., concurring)).

75. See note 74 *supra.*

76. 442 U.S. at 720-21. In the instant case, the probation officer had counseled respondent about family problems and had previously reprimanded the respondent for not informing him immediately of a contact with the police. Record at 27-28, Fare v. Michael C., 442 U.S. 707 (1979).

77. 442 U.S. at 723. The burden created by the inflexible per se rule of *Miranda* was accepted because it afforded increased protection for the constitutional rights of a suspect undergoing custodial interrogation. *Id.* at 717-18. The central concern expressed in the brief amici curiae is that effective law enforcement is hampered by the inflexibility of the per se rule of *Miranda* and that any extension is unacceptable. Brief Amici Curiae in support of the Petitioner. *Id.* at 8-10, 17.

78. *Id.* at 724-25. The totality of the circumstances test has long been used to evaluate waivers of constitutional rights by adults. See note 34 *supra.*

79. 99 S. Ct. at 725. Indeed, the Court noted that a juvenile court might find that the circumstances of a case in which the juvenile requested his probation officer or his parents warranted the determination of an invocation of the right to remain silent. *Id.* See text accompanying notes 96-97 *infra.*

80. 442 U.S. at 726. In a separate dissent, Justice Powell applied the totality of the circumstances test with the "greatest care" reserved for juveniles and came to an opposite conclusion. The factors which entered into his application of the test were respondent's age, the length of the interrogation, and respondent's immaturity, despite his previous experience with the juvenile justice system. According to Justice Powell, the transcript of the interrogation revealed the limited understanding of the respondent in his remark about a police officer impersonating an attorney, and the trial court judge noted that respondent was crying during the interrogation. *Id.* at 733 & n.2 (Powell, J., dissenting). Justice Powell also found persuasive the probation officer's instructions to the respondent to call the officer in the event of police contact. *Id.* at 733-34. He concluded that the continuation of the interrogation after denial of respondent's request for his probation officer was inconsistent with the special handling due juveniles in order to assure voluntary statements. *Id.*

81. *Id* at 726-27.

The dissent authored by Justice Marshall advocated a broad construction of the *Miranda* decision.[82] By advising the accused of his rights and entitling him to the presence of an attorney during interrogation, *Miranda* attempted to counteract the coercion inherent in custodial interrogation.[83] The dissent agreed with the *Burton* rationale that a juvenile in custody would secure an attorney through his parents, and therefore a juvenile's desire for adult assistance indicates a desire to remain silent.[84] Because juveniles are particularly vulnerable to police tactics due to immaturity and inexperience,[85] the dissent reasoned a juvenile's request for an adult obligated to represent the juvenile's interests consonant with the per se invocation delineated in *Miranda*.[86] Accepting the California Supreme Court's assessment of the duty of California probation officers to represent the juvenile's interests,[87] the dissent found that in California, a juvenile's request for his probation officer would fulfill the function of an invocation of fifth amendment rights, because the juvenile is seeking legal assistance or intimates an unwillingness to speak with police.[88]

Although the Supreme Court's decision in the instant case addressed only the effect of a juvenile's request for his probation officer, the rationale employed by the Court has implications for a juvenile's request for any adult other than an attorney. Other individuals have no duty to represent the juvenile's interests[89] and without legal training cannot fulfill the role of attorney for a juvenile during custodial interrogation.[90] However, the effect of a juvenile's request for a parent remains clouded.[91] Parents, just as probation officers, lack legal training and may have interests conflicting with those of the juvenile.[92] Parents

82. *Id.* at 728 (Marshall, Brennan, Stevens, JJ., dissenting).

83. *Id.* at 728-29.

84. *See* People v. Burton, 6 Cal. 3d 375, 382, 491 P.2d 793, 797-98, 99 Cal. Rptr. 1, 5-6 (1971). The California Supreme Court found it normal that a minor seeking assistance in dealing with the police would ask to see his parents. The court considered it unduly restrictive to limit the form of a minor's request for adult assistance to a request for an attorney. *Id.*

85. *See In re* Gault, 387 U.S. 1, 48 (1967); Gallegos v. Colorado, 370 U.S. 49, 53-54 (1962); Haley v. Ohio, 332 U.S. 596, 599-600 (1948).

86. 442 U.S. at 729-30 (Marshall, Brennan, Stevens, JJ., dissenting). See text accompanying notes 64-68 *supra.*

87. In addition to the statutory duty discussed in note 74 *supra*, California courts have dealt with the close relationship between a minor and his probation officer. *See, e.g.*, Bryan v. Superior Ct., 7 Cal. 3d 575, 587, 498 P.2d 1079, 1087, 102 Cal. Rptr. 831, 839 (1972) (admissions made by juvenile to probation officer excluded in criminal prosecution to further the protective and rehabilitative rationale of the juvenile justice system); *In re* Gladys R., 1 Cal. 3d 855, 860 & n.7, 464 P.2d 127, 131 & n.7, 83 Cal. Rptr. 671, 675 & n.7 (1970) (judge should not review probation officer's report before jurisdictional hearings to avoid jeopardizing important and close relationship between juvenile and probation officer).

88. 442 U.S. at 732.

89. See note 73 *supra.*

90. The California Supreme Court distinguished clergymen, football coaches, and music teachers from probation officers by the existence of a statutory duty imposed on probation officers to represent the child's interests. 21 Cal. 3d 471, 477, 579 P.2d 7, 10, 146 Cal. Rptr. 358, 361 (1978).

91. See text accompanying notes 64-68 *supra.*

92. *See, e.g.*, Commonwealth v. Smith, 472 Pa. 492, 372 A.2d 797 (1977) (father declined to accompany juvenile to police station); *In re* Williams, 265 S.C. 295, 217 S.E.2d 719 (1975) (child allegedly accompanied father while breaking and entering, father escaped).

often are the complainants in juvenile cases or induce the child to make incriminating statements.[93] The instant Court recognized that juveniles in trouble normally turn to parents for help and consequently included a juvenile's request for his parents or probation officer as a factor to be considered in applying the totality of the circumstances test.[94] The Court's refusal to recognize such a request as a per se invocation of the juvenile's fifth amendment rights ignores the fact that juveniles may be unable to understand the value of legal counsel or unable to retain an attorney.[95]

In prescribing the totality of the circumstances test, the Court commended the flexibility that approach affords judges and police in handling juvenile offenders.[96] However, while flexibility allows the individualized treatment essential to a scheme of rehabilitation, it also allows the excessive judicial discretion in the juvenile system lamented in *Gault*.[97] Furthermore, such a flexible standard for waiver of a constitutional right results in a loss of the prophylactic value achieved by specific rules.[98] The totality of the circumstances test must be applied by judges after the interrogation has yielded a confession. Police and prosecutors are left without specific guidelines for the interrogation of juveniles.[99] *Haley* and *Gallegos*, however, indicate that prophylactic rules seem particularly desirable in the juvenile setting due to the special condition of youth.[100]

Despite the shortcomings of a totality of the circumstances approach in the juvenile setting, the instant decision is a logical extension of existing case law. The instant case reiterates *Gault's* recognition that juveniles possess due process rights requiring safeguarding.[101] Furthermore, consistent with *McKeiver*, the

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93. *See, e.g.*, Anglin v. State, 259 So. 2d 752 (Fla. 1st D.C.A. 1972) (mother threatened to hit child if he did not tell the truth); Daniels v. State, 226 Ga. 269, 174 S.E.2d 422 (1970) (mother intoxicated); Buchanan v. State, 268 Ind. 503, 376 N.E.2d 1131 (1978) (father urged child to tell the truth). *Cf. In re* L.B., 33 Colo. App. 1, 513 P.2d 1069 (1973) (father incarcerated and subject to police pressure).

94. See notes 78-80 and accompanying text, *supra*.

95. *See* Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970). A simplified warning was read to 90 juveniles aged 13 to 17, and they were interviewed and scored as to understanding. The simplified warning was: "You don't have to talk to me at all, now or later on, it is up to you. If you decide to talk to me, I can go to court and repeat what you say, against you. If you want a lawyer, an attorney, to help you to decide what to do, you can have one free before and during questioning by me now or by anyone else later on. Do you want me to explain or repeat anything about what I have just told you? Remembering what I've just told you, do you want to talk to me?" *Id.* at 40. The conclusions were that only a small percentage of juveniles were capable of making an intelligent waiver of their constitutional rights and that the simplified form failed to increase understanding significantly. *Id.* at 54.

96. 442 U.S. at 725-26.

97. 387 U.S. 1, 19-20 (1967). See notes 40-45 and accompanying text, *supra*.

98. 442 U.S. at 718. See note 70 and accompanying text, *supra*.

99. 442 U.S. at 725-26. The opinion approves a lack of rigid restraints enabling police and courts to deal with older juveniles who do make a valid waiver of constitutional rights. *Id.*

100. Gallegos v. Colorado, 370 U.S. at 55; Haley v. Ohio, 332 U.S. at 600. See notes 56-57 *supra*.

101. *In re* Gault, 387 U.S. at 13. *Gault* also anticipated special problems with waiver of constitutional rights by juveniles. The Court stated that different techniques may prove

Court emphasized the traditional flexibility demanded throughout the juvenile justice system.[102] Simultaneous recognition of juveniles' constitutional rights and prescription of a flexible standard for waiver of those rights underscores the tension inherent in the juvenile justice system when the state acts as both guardian and prosecutor.[103] Juveniles are rehabilitated for the sake of the individual and incarcerated for the safety of the community. Under the instant decision, juvenile court judges will resolve the imbalance between *parens patriae* and due process.

If juveniles possess constitutional rights equivalent to those of adults, greater safeguards are required. The special treatment juveniles derive from the totality of the circumstances approach results in inconsistency due to a case-by-case, judge-by-judge application. If juveniles' rights are to be afforded greater procedural protection,[104] the best opportunity is through ameliorative measures promulgated by the states.

SUSAN HUSSEY FREEMON

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necessary but that the principles behind the privilege against self-incrimination were the same as for adults. *Id.* at 55.

102. See note 20 and accompanying text, *supra*; note 48 *supra*.

103. See note 12 and accompanying text, *supra*.

104. Many writers have advocated special protection for juveniles' constitutional rights. *See, e.g.*, Note, *Preadjudicatory Confessions and Consent Searches: Placing the Juvenile on the Same Footing as an Adult*, 57 B.U.L. REV. 778 (1977) (favors per se rule for parents' presence); Note, *Waiver in the Juvenile Court*, 68 COLUM. L. REV. 1149 (1968) (concluding parents are best suited to advise a minor suspect); Note, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543 (1973) (parent should be accessible if juvenile so desires). Several authoritative bodies also have recommended additional protection of juveniles' constitutional rights. *See, e.g.*, INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO POLICE HANDLING OF JUVENILE PROBLEMS 69 (10th ed. 1977); UNIFORM JUVENILE COURT ACT § 27(b) (1968); MODEL FAMILY COURT ACT §§ 26, 28 (1975).