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Recent Developments

Various Editors

RECENT DEVELOPMENT

CONSTITUTIONAL LAW — CRIMINAL LAW AND PROCEDURE — MINOR'S REQUEST TO SEE PARENTS HELD TO BE AN INVOCATION OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

People v. Burton (Calif. 1971)

In a jury trial[1] the appellant, Bozzie Burton, was found guilty of murder and assault. The jury was allowed to consider the sixteen-year-old minor's confession, which had been made subsequent to a knowing and intelligent waiver of his rights. The trial judge refused to exclude the confession, though it had been obtained after a denial of the minor's request to see his parents.[2] The judge ruled that the People had met their burden of showing that the confession was voluntary, and that it was not coerced or illegally obtained in violation of *Miranda v. Arizona*.[3]

On appeal, the Supreme Court of California reversed, *holding*: (1) that when a minor was subjected to custodial interrogation without the presence of an attorney, his request to see one of his parents, made anytime before or during questioning, must, in the absence of compelling contrary evidence, be construed as an invocation of his fifth amendment privilege; and (2) that where such an invocation was made, a confession obtained by subsequent questioning without granting his request was inadmissible. *People v. Burton,* 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

The privilege against self-incrimination was deemed to be such a significant element in the Framer's notions of liberty that the privilege was specifically protected from infringement by the Constitution. Despite the importance attached to this privilege,[4] it was not originally one of the

1. Since the appellant was a minor, he was subject to the original jurisdiction of the juvenile court (*see* CAL. WELF. & INST'NS CODE §§ 603–07 (West 1972)), which has no provision for a right to a jury trial. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). However, the juvenile court apparently waived jurisdiction (*see* CAL. WELF. & INST'NS CODE § 707 (West 1972)), and the minor was transferred to the adult court, where he received a jury trial. People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

2. It should be noted that, at the trial, counsel for the appellant never specifically asserted that defendant's request to see his parents invoked his fifth amendment privilege under Miranda v. Arizona, 384 U.S. 436 (1966). However, counsel did urge that *Miranda* was ignored as a result of the repeated denials of the minor's request to see his parents. 6 Cal. 3d at 379 & n.1, 491 P.2d at 795 & n.1, 99 Cal. Rptr. at 3 & n.1.

3. 384 U.S. 436 (1966).

4. In writing the majority opinion of the Court in Ullman v. United States, 350 U.S. 422 (1956), Justice Frankfurter stated that the privilege from self-incrimination under the fifth amendment "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.'" *Id.* at 426. *Accord,* Cohen v. Hurley, 366 U.S. 117, 160 (1961) (Brennan, J., dissenting).

safeguards protected from abridgment by the states.[5] By 1964, however, the Supreme Court so interpreted the fourteenth amendment as to curtail state transgressions against this privilege.[6]

While the privilege against self-incrimination was applied in many proceedings,[7] it was not generally accepted as a barrier to coercive police interrogation until *Miranda v. Arizona*.[8] In that case the Supreme Court marked the high water point of the gradual shift in emphasis of legal thinking from the coercion concept, based largely on the due process clause,[9]

5. The United States Supreme Court ruled in 1947 and again in 1961 that the fourteenth amendment did not include the privileges of the fifth amendment so as to protect the people from transgressions of the privilege against self-incrimination by the states. Cohen v. Hurley, 366 U.S. 117 (1961); Adamson v. California, 332 U.S. 46 (1947).

6. U.S. CONST. amend. XIV, § 1. After the adoption of the fourteenth amendment in 1868, there was much controversy as to its effect on state invasion of the rights enumerated in the first eight amendments. Although earlier cases denied the application of these safeguards to the states, the United States Supreme Court has reconsidered many of these earlier decisions. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (protecting from state abridgment the sixth amendment right to counsel in all criminal cases); Robinson v. California, 370 U.S. 660 (1962) (protecting from state abridgment the eighth amendment ban on cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (protecting from state abridgment the fourth amendment right against unreasonable searches and seizures).

Similarly, in Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court reconsidered Cohen v. Hurley, 366 U.S. 117 (1961), and Adamson v. California, 332 U.S. 46 (1947), and extended the fourteenth amendment's umbrella protection to include the fifth amendment privilege against self-incrimination. By so holding, the Supreme Court overruled *Adamson* and partially accepted Justice Brennan's dissent in *Cohen* (although the *Cohen* dissent had called for the entire absorption of the fifth amendment by the fourteenth amendment, *Malloy* incorporated only the self-incirimination clause of the fifth amendment). The *Malloy* decision was expressly affirmed in the following year. Griffin v. California, 380 U.S. 609 (1965).

7. *See, e.g.*, Brown v. United States, 356 U.S. 148 (1958) (denaturalization proceeding in district court); Emspak v. United States, 349 U.S. 190 (1955) (witness before a legislative committee); ICC v. Brimson, 154 U.S. 447 (1894) (commissioner's hearing); Counselman v. Hitchcock, 142 U.S. 547 (1892) (grand jury investigation); Wood v. United States, 128 F.2d 265, 270–72 (D.C. Cir. 1942) (preliminary hearing before committing magistrate); Graham v. United States, 99 F.2d 746 (9th Cir. 1938) (examination by immigration officers); State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944) (coroner's inquest); Phleps v. Phleps, 133 N.J.Eq. 392, 32 A.2d 81 (Ct. Err. & App. 1943) (deposition); Siegel v. Crawford, 266 App. Div. 878, 42 N.Y.S.2d 837 (1943) (pretrial examination of defendant). *See generally* 8 J. WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961).

8. 384 U.S. 436 (1966). The fifth amendment privilege against self-incrimination had been raised previously as the controlling test for the admissibility of confessions in Bram v. United States, 168 U.S. 532 (1897). However, in that case, the Court used the privilege as the basis for the voluntary test; that is, the confession was admissible if not coerced. *Id.* at 542–43. Wigmore claimed that such a test was unfounded (3 J. WIGMORE, EVIDENCE § 823, at 250 n.5 (3d ed. 1940)) and, despite certain subsequent Supreme Court cases citing the test as dicta (*see, e.g.*, 384 U.S. at 506 n.2), the self-incrimination clause was not used to bar confessions again until Escobedo v. Illinois, 378 U.S. 478 (1964), and *Miranda*. In *Miranda*, it was not used to support the voluntary test — a test which subsequent to *Bram* developed on the basis of the due process clause (*see* note 9 *infra*) — but rather to support an independent test going to the capacity of the accused to understand and relinquish his rights. *See* People v. Lara, 67 Cal. 2d 365, 395, 432 P.2d 202, 223, 62 Cal. Rptr. 586, 607 (1967) (dissenting opinion), *cert. denied*, 392 U.S. 945 (1968).

9. The use of the due process clause to test the admissibility of confessions began in 1936 with Brown v. Mississippi, 297 U.S. 278 (1936), and its "voluntariness test." Under this test the confession was admissible if it was not elicited by overbearing the will of the accused during interrogation, that is, without coercion. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961). For over 25 years the Court never

to that of the capacity of the accused to understand and relinquish his constitutional rights, based on the self-incrimination privilege.[10]

Recently, the California Supreme Court has recognized that the suspect may invoke his fifth amendment privilege against self-incrimination by the slightest indication, either through words or action, that he is unwilling to discuss his case with the police.[11] Prior to the instant case, however, the California Supreme Court had not determined whether a minor's request to see his parents was an invocation of this privilege.

At the outset, the *Burton* court made it clear that the defendant was not claiming that his confession was involuntary. Rather, the claim was that it was illegally obtained in violation of his fifth amendment privilege against self-incrimination.[12] Consequently, the issue was a narrow one pertaining to the protective devices developed in *Miranda,*[13] and not the voluntary test established before *Miranda.*[14]

According to *Miranda,* once the warnings have been administered, the accused exercises his fifth amendment privilege at the point when he indicates that he wishes to remain silent, requiring that the interrogation immediately cease.[15] The California Supreme Court had probed the ra-

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narrowed the voluntary test to a single meaning but infused it with several different values. Consequently, a "totality of circumstances" test developed, making the determination of the voluntariness of a confession a question of fact to be decided upon an examination of all the surrounding circumstances and factors. Haynes v. Washington, 373 U.S. 503, 513 (1963); Culombe v. Connecticut, 367 U.S. 568, 601–02 (1961); *see* Note, *The Confessions of Juveniles,* 5 WILLAMETTE L.J. 66, 76 (1968). *See also* Miranda v. Arizona, 384 U.S. 436, 507–09 (1966) (Harlan, J., dissenting).

10. This concept was first articulated by the Supreme Court in Johnson v. Zerbst, 304 U.S. 458 (1938), later emphasized in Carnley v. Cochran, 369 U.S. 506 (1962), and more clearly expressed in Escobedo v. Illinois, 378 U.S. 478 (1964), and in Mrianda v. Arizona, 384 U.S. 436 (1966). In the latter two cases the confessions would have been admissible under the coercion standard but, nevertheless, were found inadmissible because the defendants had demanded counsel. Interrogation must cease after such a demand is made. *See* People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967) (dissenting opinion).

The "voluntariness test" is still applicable, along with the additional test concerning the capacity of the accused to understand and relinquish his constitutional rights. 384 U.S. at 478; *see* Note, *supra* note 9, at 77. Similarly, this test is applied when examining confessions introduced for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971).

11. People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970) (suspect's telephone call to his attorney); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (suspect's statement: "Call my parents for my attorney"); People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968) (refusal by a suspect to sign a waiver of his constitutional rights).

12. 6 Cal. 3d at 381, 491 P.2d at 796, 99 Cal. Rptr. at 4.

13. Miranda v. Arizona, 384 U.S. 436 (1966). Mr. Chief Justice Warren announced the need for these protective devices, stating:

> The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless 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.

Id. at 457–58.

14. *See* note 9 *supra.*

15. In the words of the *Miranda* Court:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he

tionale of the protections of *Miranda* in two cases prior to *Burton* — *People v. Ireland*[16] and *People v. Randall*.[17] In the *Ireland* case, the court concluded that one of the primary protective devices envisioned by *Miranda* was that any indication by the suspect that he wished to invoke his privilege would require the termination of all custodial interrogation.[18] Furthermore, the *Randall* court held that "no particular form of words or conduct"[19] was necessary to indicate this wish. In so holding, the court expressed its particular concern that, if the suspect had to invoke his privilege with unmistakable clarity, the prophylactic intent of *Miranda* would be lost. Only those with criminal experience, who had learned to deal with the police, would benefit from such an interpretation, while it would operate most severely on the ignorant and inexperienced suspects — those most susceptible to the custodial interrogation.[20] By avoiding any inclination to establish set ways to invoke the fifth amendment, the California Supreme Court fulfilled what it thought to be the principal objective of *Miranda* — to establish safeguards that would eliminate the need to determine whether the confession was obtained through coercion.[21]

Following the thrust of these cases, the *Burton* court had little difficulty in holding that a minor's request for his parents constituted an invocation of the privilege against self-incrimination. The court drew an analogy between the natural inclination of an adult, no longer under parental guidance, to request an attorney and the natural inclination of a minor to turn to his parents for help.[22] In the *Ireland* and *Randall* cases,

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has shown that he intends to exercise his Fifth Amendment privilege . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

384 U.S. at 473–74.

16. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). The *Ireland* case involved an adult man who killed his wife and was subsequently found guilty of second degree murder. The California Supreme Court reversed on the ground that hearsay evidence was erroneously admitted at the trial level. The court went on to determine that certain extrajudicial statements were obtained in violation of the defendant's constitutional rights, and therefore they should not be admitted upon retrial. *See* note 39 *infra*. This holding was based on the fact that, after being advised of his rights, the defendant replied, "Call my parents for my attorney."

17. 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970). In reversing an adult defendant's conviction for grand theft, the *Randall* court found that the suspect's call to an attorney in and of itself constituted an invocation of his fifth amendment privilege.

18. 70 Cal. 3d at 535, 450 P.2d at 587, 75 Cal. Rptr. at 195.

19. 1 Cal. 3d at 955, 464 P.2d at 118, 83 Cal. Rptr. at 662.

20. *Id.*

21. In People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968), the court emphasized that:

> A principal objective of that decision [*Miranda*] was to establish safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive influences, psychological or physical, had been employed to secure admissions or confessions.

Id. at 717, 441 P.2d at 626, 68 Cal. Rptr. at 818.

In *Fioritto*, a 19-year-old defendant refused to sign a waiver of his rights. He was then confronted with his codefendants, which confrontation precipitated his waiver after he had been once again informed of his rights. The court found that once he refused to sign the waiver he had invoked his fifth amendment privilege and the subsequent confession was inadmissible. 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817.

22. 6 Cal. 3d at 382, 491 P.2d at 797, 99 Cal. Rptr. at 5. Drawing this analogy was significant, since the court held, in effect, that special considerations are necessary to

both of which involved adults, it was sufficient for the adult to ask for his attorney[23] or to call his attorney on the telephone[24] to invoke his privilege against self-incrimination. Following this analogy, the *Burton* court held that a minor could similarly invoke the fifth amendment privilege when he requested to see his parents.[25]

The People advanced two counterarguments. First, they contended that Bozzie Burton's request to see his parents did not clearly give the police notice that he was asserting his fifth amendment privilege.[26] They argued that the request could have been made for several reasons other than the intent to invoke his privilege.

This argument was similar to one advanced in *Randall,* where the adult defendant made a telephone call to his attorney and the People claimed that the call could have been made for a variety of purposes. In particular, the state claimed that a mere telephone call to an attorney was not as clear an invocation of the fifth amendment privilege as occurred in *Ireland,* where the defendant requested that his parents be called *for his attorney.*[27] The *Randall* court rejected this contention and required the People to show that such a phone call did *not* constitute an invocation of the fifth amendment privilege.[28] Based on this precedent, the *Burton* court concluded that the People had not met their burden of proof in the instant case, since they had failed to show that the defendant's request for a parent was not an invocation of his privilege.[29]

Secondly, the People argued that, since Burton's request occurred before the interrogation and before the *Miranda* warnings were given, it was unlikely the police understood it as an invocation of the privilege. The majority read this as a further elaboration of the People's first argument concerning lack of notice and, therefore, discounted it due to the lack of affirmative proof that the defendant did not intend to assert his privilege.[30]

The majority's holding appears to follow the literal language of *Miranda,* which indicated that the privilege is asserted "if the individual indicates . . . at any time prior to . . . questioning that he wishes to remain silent. . . ."[31] This discussion in *Miranda,* however, was concerned

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determine whether a minor has invoked his fifth amendment privilege. *See* text accompanying notes 46–62 *infra.*

23. People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). *See* note 16 *supra.*

24. People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970). *See* note 18 *supra.*

25. In the terms of the *Randall* court, *Burton* held that "a minor's request to see his parents 'reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time,'" and must be held as an invocation of his fifth amendment privilege. 6 Cal. 3d at 382, 491 P.2d at 797, 99 Cal. Rptr. at 5.

26. *Id.* at 382, 491 P.2d at 798, 99 Cal. Rptr. at 6.

27. *Id.* at 382–83, 491 P.2d at 798, 99 Cal. Rptr. at 6 (emphasis added).

28. 1 Cal. 3d at 957, 464 P.2d at 120, 83 Cal. Rptr. at 664.

29. 6 Cal. 3d at 383, 491 P.2d at 798, 99 Cal. Rptr. at 6.

30. *Id.*

31. 384 U.S. at 473–74. *See* note 15 and accompanying text *supra.*

with the effect of an invocation *after* warnings had been given.[32] The facts of *Burton* suggest, though the court did not discuss it, the issue of whether an invocation of the fifth amendment privilege can be nullified by subsequent *Miranda* warnings and waiver. In *People v. Fioritto,*[33] the majority stated that, in its view, a principal objective of *Miranda* was to establish safeguards which would eliminate the need to determine whether psychological or physical coercion was used to obtain the confession.[34] Hence, once the privilege was asserted, it was presumed that any *further interrogation* was coercive and the confession obtained involuntary. These presumptions would be operable even if the confession was obtained after the *Miranda* warnings and subsequent to a waiver. The instant case followed this view.[35] By asking for his parents, the appellant invoked his fifth amendment privilege, and consequently, when the police thereafter proceeded to give Burton his warnings and elicit a waiver and a confession, they violated the appellant's fifth amendment privilege. Thus, Burton did not have to assert that his confession was involuntary; he only had to assert an invocation of his privilege against self-incrimination.

This view was juxtaposed against Justice Burke's dissenting opinion in *Fioritto* that the objective of *Miranda* was the prevention of in-custody interrogation of suspects "without first advising them of their constitutional rights, affording them an opportunity to exercise them, or securing from them a waiver of such rights."[36] Consistent with this theory, Justice Burke claimed that the police *may* approach the suspect after the invocation of the fifth amendment privilege.[37] Therefore, according to Justice Burke,

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32. Taken in context, the *Miranda* Court said:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

384 U.S. at 473. Both sentences together imply that first the warnings must be given and then any subsequent invocation of the privilege would require the termination of the interrogation.

33. 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968). *See* note 21 *supra.*

34. *Id.* at 717, 441 P.2d at 626, 68 Cal. Rptr. at 818.

35. 6 Cal. 3d at 381–82, 491 P.2d at 796–97, 99 Cal. Rptr. at 45.

36. 68 Cal. 2d at 720, 441 P.2d at 628, 68 Cal. Rptr. at 820. (Burke, J., dissenting).

37. *Id.* at 726–28, 441 P.2d at 631–33, 68 Cal. Rptr. at 823–25. Justice Burke argued that the invocation of the privilege against self-incrimination did not preclude the possibility of a subsequent confession as long as it was preceded by a waiver. While he listed three cases in support of his contention, they were all pre-*Miranda.* In the first of the three cases, Cox v. United States, 373 F.2d 500 (8th Cir. 1967), the defendant refused to speak to certain postal inspectors concerning the burglary of a post office. However, when they revealed that his codefendant had given them the story, he made an incriminating statement which was admitted into evidence. *Cox* can be compared with *Fioritto* which involved similar facts but was decided after *Miranda.* In *Fioritto,* however, the California Supreme Court found the confession inadmissible based upon the *Miranda* holding — that interrogation must cease after any invocation of the fifth amendment privilege. *See* note 21 *supra.* Similarly, it is likely that the Eighth Circuit would have found the confession in the *Cox* case inadmissible if it had been decided after *Miranda.*

In the second of the three cases, People v. Hill, 66 Cal. 2d 536, 426 P.2d 908, 58 Cal. Rptr. 340 (1967), one of the defendants requested the assistance of an attorney after being advised of his rights. Later he indicated that he wished to make a state-

the giving of the *Miranda* warnings after such an invocation, followed by a waiver and a confession, would not amount to coercion per se;[38] rather, he indicated that such a confession could be voluntary.

The *Fioritto* court's interpretation of the objective of *Miranda* was accepted in *Burton*. However, the California Supreme Court has also adopted Justice Burke's view that a voluntary confession was admissible, even if made after an invocation of the fifth amendment privilege; yet, his precise definition of voluntary confessions has not received acceptance.[39] In fact, the court has held that a confession could *not* be voluntary within the meaning of *Miranda* where the questioning was renewed[40] or con-

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ment, after again being advised of his rights, he made a statement. The *Hill* court stated:

> [T]here is no reason why once having requested counsel and the request having been recognized by a cessation of interrogation, the accused cannot elect to proceed without counsel if that election is freely, knowingly and intelligently made.

Id. at 553, 426 P.2d at 919, 58 Cal. Rptr. at 351.

From the record it appears that this confession may have been initiated by the defendant himself, rather than by subsequent interrogation, making it a voluntary confession admissible even under the *Miranda* standard. *See* note 39 and accompanying text *infra*.

In the last of these cases, People v. Hunter, 252 Cal. App. 2d 472, 60 Cal. Rptr. 563 (Ct. App. 1967), the fifth amendment privilege was never invoked by any of the defendants. Therefore, it was immaterial that the confession of a codefendant was to obtain admissions from the other codefendants, as the other codefendants did not indicate that they wished to assert their privilege.

38. 68 Cal. 2d at 726, 441 P.2d at 632, 68 Cal. Rptr. at 824 (dissenting opinion). Disputing the majority's contention that the defendant must initiate a voluntary statement and, in particular, that the giving of the *Miranda* warnings and asking the defendant to waive his rights constituted coercion, Justice Burke said:

> Such a request is not interrogation for the purpose of eliciting incriminating statements, but is specifically an inquiry for permission, which may be denied, to conduct such interrogation. Hence, the problem reduces itself into whether such an inquiry (whether defendant desires to waive his rights) is coercive per se. To hold that it is would definitely conflict with former decisions of this and other courts, and in my opinion with *Miranda*.

Id. It is interesting to note that Justice Burke joined with the majority in *Burton*, perhaps, because he accepted the precedent of *Fioritto* or because he considered the situation of minors to be special.

39. *Miranda* specifically stated that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478.

The California Supreme Court recognized the admissibility of voluntary confessions in People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967). The California court's interpretation of the *Miranda* term "voluntary," however, was that the confession be *initiated by the accused*. Hence it was important in *Lara* that the trial judge found that the defendant "made a very sophisticated approach by trying to make a deal with the officers. Both he and the officers agree that *he instituted this*, not the officers." *Id.* at 392, 432 P.2d at 224, 62 Cal. Rptr. at 604 (emphasis added). Consequently, Lara's confession was admissible even though he had invoked his fifth amendment privilege at an earlier time.

40. People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). In that case the defendant invoked his fifth amendment privilege while riding in the police car to the police station. Even though another officer, who did not know about the defendant's request for his lawyer, later informed him of his rights, and the defendant indicated that he wanted to talk, the court held that the confession was inadmissible. In so holding, the court quoted *Fioritto*, stating:

> The form of the *renewed* queries, however subtle or gentle, cannot be considered in determining whether there has been a violation of the stern principles prescribed by the Supreme Court in *Miranda*. (68 Cal. 2d at p. 720, [441 P.2d at 628, 68 Cal. Rptr. at 820].)

Id. at 537, 450 P.2d at 589, 75 Cal. Rptr. at 197 (emphasis added).

tinued[41] after an invocation of the fifth amendment privilege. Thus, in order for a confession made after an invocation of the privilege to be voluntary and admissible, it must be *initiated by the defendant,* solely as a result of his own change of mind.

After finding that Burton's request to see his parents did invoke his privilege against self-incrimination and that the People had failed to meet their burden of demonstrating that such a request was not tantamount to an assertion of his privilege, the court held that Burton's subsequent confession was inadmissible and therefore constituted reversible error.[42]

This finding of reversible error followed the opinions of *Randall*[43] and *Fioritto.*[44] In those cases it was held that "the introduction in evidence of a confession obtained from a defendant in violation of constitutional guarantees is prejudicial, per se . . ."[45] and compels a reversal of his conviction.[46]

In holding that a minor's request for his parents invokes his fifth amendment privilege, the *Burton* court protected Bozzie Burton's constitutional rights by a slight expansion of the existing precedents[47] — making allowance for the behavior tendencies of a minor.[48] In light of its interest in safeguarding the constitutional rights of a minor, clearly, the *Burton* court could have gone further than it did. However, the court was not required to decide the issue of whether a minor could, under any circumstances, waive his rights. Nevertheless, it might have set down a stronger doctrine, insisting that his parents, his guardian, or his counsel be present during any questioning. A holding of this nature would have found support from a number of sources, including the California legislature. Recognizing the minor's need for a guiding hand in the legal process, California lawmakers have provided for the immediate notification of the parent or guardian of the minor or for appointment of counsel to represent the minor upon his first appearance in the court system which, in California, is before

41. People v. Fioritto, 68 Cal. 2d 714, 719, 441 P.2d 625, 627, 68 Cal. Rptr. 817, 819 (1968). In that case the court held:

> [W]e prohibit only *continued* questioning after an individual has *once* asserted his constitutional rights. We do not, of course, disapprove of the use of statements, whether admissions or confessions, voluntarily initiated by a suspect.

Id. (emphasis added). *See* note 21 *supra.*

42. 6 Cal. 3d at 383–84, 491 P.2d at 798, 99 Cal. Rptr. at 6.

43. 1 Cal. 3d at 958, 464 P.2d at 120–21, 83 Cal. Rptr. at 664–65.

44. 68 Cal. 2d at 720, 441 P.2d at 628, 68 Cal. Rptr. at 820.

45. 1 Cal. 3d at 958, 464 P.2d at 120–21, 83 Cal. Rptr. at 664–65.

46. In Jackson v. Denno, 378 U.S. 368, 376 (1964), the Supreme Court announced the principle that the introduction of an involuntary confession constituted reversible error and was a deprivation of due process if it had any bearing on the conviction. The *Jackson* Court held the doctrine of reversible error applicable even though there was ample evidence, aside from the confession, to support the conviction.

The Supreme Court of California recognized this doctrine in People v. Powell, 67 Cal. 2d 32, 51–52, 429 P.2d 137, 148, 59 Cal. Rptr. 817, 828 (1967). In *Powell,* the introduction of a confession into court, in violation of the constitutional guarantees, was found prejudicial per se, compelling reversal despite other evidence of guilt.

47. *See* note 11 *supra.*

48. *See* notes 22–25 and accompanying text *supra.*

a magistrate.[49] This insulation of the minor at the magisterial level would be a nullity if it were not extended to the interrogation stage.[50]

Additionally, the judiciary, as well as lawmakers, has recognized the special needs of a minor. The United States Supreme Court recognized the minor's need for a guiding hand in *In re Gault.*[51] Also, in two cases preceding that landmark decision, *Haley v. Ohio*[52] and *Gallegos v. Colorado,*[53] the Court reversed the murder convictions of certain minors, due to the inadmissibility of their confessions. The Court reasoned that confessions and admissions of juveniles required special caution,[54] because a juvenile, "no matter how sophisticated, is unlikely to have any conception of what will confront him" and is "unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[55] Moreover, in *Haley,* the Court stated:

> [A juvenile] 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.[56]

Therefore, the Supreme Court has arguably set forth the postulate that it is unlikely that a minor will be able to withstand police pressures and assert or understand his rights absent the assistance of an adult.[57] In this respect, a juvenile needs a guiding hand during the period of interrogation considerably more than does an adult. The *Gault* Court indicated that counsel should be present and aptly stated that:

> [I]f 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

49. CAL. PENAL CODE § 858 (West 1970).

50. *See* People v. Lara, 67 Cal. 2d 365, 400, 432 P.2d 202, 226, 62 Cal. Rptr. 586, 610 (1967) (dissenting opinion).

51. 387 U.S. 1 (1967).

52. 332 U.S. 596 (1948).

53. 370 U.S. 49 (1962).

54. Justice Douglas, writing for the majority in *Haley,* gave express recognition to the additional factors involved in determining the admissibility of a minor's confession, stating:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. 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.

332 U.S. at 599.

55. Gallegos v. Colorado, 370 U.S. 49, 54 (1962). It should be noted that, in the *Haley* and *Gallegos* cases, the defendant minors were subjected to prolonged questioning or held incommunicado for a substantial period of time. Hence, their confessions, even as adults, would probably have been inadmissible. However, the more significant point of these cases appears to be that the Court was starting to recognize that special considerations must be given minors in such situations.

56. 332 U.S. at 600.

57. *Cf.* Note, *supra* note 9, at 78.

> coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[58]

In this manner *Gault* indicated that a higher standard of safeguards is needed when dealing with an adolescent.

In response to this need for a higher standard, many commentators have indicated that a juvenile is not capable of waiving his constitutional rights and have suggested potential avenues along which the *Burton* court might have proceeded.[59] While it is arguable that these commentators dealt only with the waiver question and not with the invocation of the privilege against self-incrimination, in all practicality, the two issues are merely opposite sides of the same coin. Once the minor is confronted by the authorities, he can either invoke his privilege against self-incrimination or he can waive his rights. If he is incompetent to make an effective waiver, certainly he is incompetent to know that he should assert his fifth amendment privilege. In this regard, it is of some significance that at least one judge on the California Supreme Court has advanced the proposition that no minor may waive his constitutional rights unless he has had the advice and counsel of a friendly adult.[60] Similarly, a rule requiring the presence of a parent, guardian or attorney for the child in order to make admissible any confessions made by him, has been advanced in the National Crime Commission Report[61] and by the Council of Judges of the

58. 387 U.S. at 55 (footnotes omitted). It should be pointed out that both *Haley* and *Gallegos* were criminal cases, while *Gault* was a juvenile court case. However, all dealt with the special considerations needed when considering the admission of a minor's extrajudicial statements.

59. Some courts have held that a minor, seventeen years old, is incapable of waiving his constitutional and statutory rights in a criminal action, unless it appears beyond all doubt that the minor defendant fully understands the effects and the results growing out of such a waiver. *See, e.g.,* Bell v. State, 381 P.2d 167 (Okla. Crim. App. 1962); Olivera v. State, 354 P.2d 792 (Okla. Crim. App. 1960).

A lower standard was not sufficient for Judge Edgerton, who, in writing the majority opinion in Williams v. Huff, 142 F.2d 91, 92 (D.C. Cir. 1944), stated that, in his *personal opinion,* as a matter of law, a boy of seventeen could not competently waive his right to counsel in a criminal case. While this view was not literally accepted, the standards and inference against an effective waiver noted in the court's second opinion (146 F.2d 867 (1945)), have been generally accepted. *See, e.g.,* Moore v. Michigan, 355 U.S. 155 (1957); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

A leading authority in the field has also rejected the idea that a fourteen-year-old could waive his rights without the advice of counsel. *See* Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 562 (1957).

Perhaps the most interesting rejection of the idea that a minor should be allowed to waive his rights is Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 WIS. L. REV. 7, 33–34. This commentator placed the community interest, in not allowing a waiver, above that of the adolescent or the parents as they conceive the merits of the situation. Basically, the community interest is in protecting the minor's rights which, Professor Handler indicates, can be accomplished only by making these rights mandatory.

60. *See* People v. Lara, 67 Cal. 2d 365, 396–97, 432 P.2d 202, 223, 62 Cal. Rptr. 586, 607 (1967) (Peters, J., dissenting).

61. The National Crime Commission Report recommended that:

> Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86–87 (1967).

National Council of Crimes and Delinquency.[62] One judge has gone even further and has indicated that he would refuse to admit, as evidence, *any* statement obtained from a juvenile while in custody.[63]

Furthermore, it is instructive to note that the need for the presence of a parent during custodial interrogation is not merely abstract conjecture but has been held to be critical in some instances.[64] Such results stem from the requirement that a minor's waiver must be tested in light of the "totality of the circumstances surrounding the confession."[65] The Supreme Court of New Jersey held that the parents' absence during a police interrogation was a possible reason, in itself, to hold a confession inadmissible, even though the minor did not wish to see his parents.[66] The court reasoned that:

> [B]oys of 13 and 15 lack the judgment to appreciate the seriousness of the situation and the harm which they may do themselves by yielding to the pressures of insistent police questioning.[67]

Moreover, the New Jersey court stated that eminent authorities on juveniles were in accord that parents should be present during any interrogation of minors which concerned acts of delinquency.[68]

It seems unlikely that the legal process would be overburdened by requiring the presence of a minor's parent, guardian, or counsel during any custodial interrogation. Although such a requirement might make it more difficult to obtain confessions from minors, it is posited that confessions obtained from custodial interrogations without the presence of the minor's parent or counsel are, more often than not, untrustworthy. It has been stated:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.[69]

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62. COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS Rule 25 (proposed final draft 1968).

63. Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisals,* 53 VA. L. REV. 1700, 1714 n.40 (1967).

64. *See* Note, *supra* note 9, at 80.

65. Gallegos v. Colorado, 370 U.S. 49, 55 (1962), in which the "totality of circumstances" test involved a consideration of the petitioner's age, length of detention, failure to send for his parents, failure to immediately bring him before the juvenile court judge, and failure to insure that he had the advice of a lawyer or a friend. *See* Glen, *Interrogation of Children: When Are Their Admissions Admissible?* 2 FAMILY L.Q. 280, 281 (1968).

66. *In re* Carlo, 48 N.J. 224, 225 A.2d 110 (1966).

67. *Id.* at 241, 225 A.2d at 119.

68. *Id.* at 240, 225 A.2d at 119.

69. Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) (footnotes omitted).

Moreover, special criminal law safeguards for the minor appear more appropriate in considering that the minor has enjoyed a privileged status in the civil law for many years.[70]

While the instant case was decided in the criminal court, its impact should extend into the juvenile courts as well. Since *In re Gault*,[71] it has been recognized that most of the constitutional safeguards in criminal court are available to the minor in juvenile court.[72] Although the Court limited its holding in *Gault* to the adjudicatory stage, its safeguards appear applicable to pre-trial interrogation.[73] Otherwise, the privilege against self-incrimination and other constitutional rights, accorded minors at the juvenile hearing stage, would be virtually meaningless. Future Bozzie Burtons, whether tried in the criminal court or the juvenile court, should be able to assert the privilege against self-incrimination.

Even though the impact of *Burton* is broadened by the possible application of its principles to the juvenile court, its practical effect has necessarily been lessened by the recent Supreme Court decision in *Harris v. New York*,[74] which allowed less than total exclusion of objectionable confessions. The emphasis in *Burton* was that the fifth amendment privilege against self-incrimination imposed a stricter test as to the admissibility of confessions than the due process test under the fourteenth amendment (the voluntariness test).[75] The Supreme Court, however, diminished the impact of this fifth amendment application by allowing impeachment of the defendant who takes the stand by use of a confession garnered under the fourteenth amendment standard alone.[76] Thus, it appears that the exclusionary remedy in *Burton* is not as effective as the court might have contemplated, because, under *Harris*, a minor's confession given after an ineffective waiver, might be introduced to impeach his later denial of guilt.

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70. For a general discussion of the privilege status of the minor in civil law, *see* People v. Lara, 67 Cal. 2d 365, 379 & n.6, 397–98, 432 P.2d 202, 212 & n.6, 224, 62 Cal. Rptr. 586, 596 & n.6, 608 (1967) (citations are to both the majority and dissenting opinions).

71. 387 U.S. 1 (1967).

72. The *Gault* Court held that a minor in juvenile court has the following basic rights: (1) right to notice of the charges; (2) right to counsel; (3) right to confrontation and cross-examination; (4) *privilege against self-incrimination;* (5) right to a transcript of the proceedings; and (6) right to appellate review. *Id.* Since *Gault*, the only right that the Supreme Court has denied a juvenile is the right to a jury trial. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

73. *See* Note, *supra* note 9, at 69–70.

74. 401 U.S. 222 (1971). The *Harris* case involved a defendant who was indicted for selling heroin twice to an undercover police officer. When he elected to take the stand, he was subsequently impeached by his own confession. Although the confession had been obtained without granting him his procedural safeguards under *Miranda*, there was no assertion by the defendant that the statements had been coerced or made involuntarily. Mr. Chief Justice Burger, writing the majority opinion, simply indicated that the "privilege [to testify] cannot be construed to include the right to commit perjury." *Id.* at 225.

75. *See* notes 9–12 *supra.*

76. 401 U.S. at 225.

Nevertheless, the *Burton* case remains significant in that the general admissibility of confessions is still subject to both the fifth and the fourteenth amendment tests. The fourteenth amendment provides the exclusive test of admissibility *only* for impeachment purposes when the defendant takes the stand. More importantly, *Harris* does not lessen *Burton's* significance in the latter's recognition of the need for a greater sensitivity to the problems of a minor when confronted with the criminal process.

In conclusion, the Supreme Court of California has recognized that a minor may indicate his unwillingness to discuss his case with the police simply by requesting to see his parents. Such a request is an invocation of the minor's fifth amendment privilege, and a subsequent confession, even if preceded by an intelligent and knowing waiver, constitutes reversible error upon its admission as evidence for other than impeachment purposes. With the growing realization of the need to safeguard a minor's constitutional rights and with the increasing awareness of the special considerations necessary to fulfill this task, especially as compared to an adult, the courts may eventually go further and hold that a child, alone, does not have adequate knowledge to protect his interests, to invoke his privilege against self-incrimination, or to make an intelligent waiver.

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