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CRIMINAL LAW—INFANTS: MINOR'S WAIVER OF CONSTITUTIONAL AND STATUTORY RIGHTS CAREFULLY SCRUTINIZED BY NORTH DAKOTA'S COURTS

On the afternoon of November 25, 1987, fifteen-year-old Brandon Ellvanger inspected his trap lines on the farm where he lived with his father, Gregory Ellvanger.[1] At approximately 9:00 p.m. that evening, Brandon visited with his grandfather at a restaurant in Stanley, North Dakota.[2] After a one-half hour conversation, Brandon left to check on his traps again.[3] Instead of checking his traps, however, Brandon met two friends with whom he drove around town and drank beer.[4] Later, the three of them went to a party, where Brandon consumed more alcohol.[5] The next thing Brandon remembered was feeling a pain in his back and being awakened by his father, Gregory Ellvanger.[6]

Gregory Ellvanger returned home from a truck-driving trip early in the morning of November 26 and found Brandon's friends, whom he didn't recognize, sleeping in the car.[7] He went into the house, woke Brandon, and told him to go outside.[8] Gregory then went back outside and woke the driver of the car, James Kyllonen, with whom he began to argue.[9] While Gregory and James were arguing, Brandon came out with a rifle slung over his shoulder.[10] Gregory approached Brandon and yelled at him; in response, Brandon talked about his traps.[11] James also approached Brandon.[12] At that point, Brandon's father had stopped approximately five feet from Brandon with his back turned.[13] Gregory then heard a scuffle behind him and some gunshots.[14] Gregory turned and ran toward Brandon to disarm him.[15] In the course of the struggles, James Kyllonen was killed and Gregory was

1. State v. Ellvanger, 453 N.W.2d 810, 811 (N.D. 1990).
2. *Id.*
3. *Id.*
4. *Id.* at 812. The two friends Brandon met were James Kyllonen and John McGinnity. *Id.*
5. *Id.* Brandon did not remember leaving the party. *Id.*
6. *Id.* Gregory struck Brandon on the back in an attempt to wake him. *Id.*
7. *Ellvanger*, 453 N.W.2d at 812. Gregory unsuccessfully tried to wake the person in the driver's seat. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* The rifle was a .22 semi-automatic. *Id.*
11. *Id.*
12. *Id.*
13. *Ellvanger*, 453 N.W.2d at 812.
14. *Id.* Because Gregory had his back turned, he did not see what had happened. *Id.*
15. *Id.*

wounded.[16]

A jury convicted Brandon of both manslaughter and attempted manslaughter.[17] Brandon appealed the convictions, arguing that his admission of shooting the gun, which was obtained through police questioning following the incident, should have been inadmissible because it was obtained involuntarily.[18] He also argued that there were two other prejudicial errors by the trial court: the trial court's reading of the charging information, and a statement made by the judge that he would " 'end up sentencing him.' "[19] On review, the North Dakota Supreme Court *held* that the the admissions made by Brandon were involuntary and that the reading of the charging information by the trial court was harmless error.[20] *State v. Ellvanger*, 453 N.W.2d 810 (N.D. 1990).

In 1966, the United States Supreme Court decided *Miranda v. Arizona*,[21] which established the standards for protecting a defendant's fifth amendment privileges against self-incrimination.[22] However, a confession can be considered involuntary in

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16. *Id.*

17. *Id.* Pursuant to section 27-20-34 of the North Dakota Century Code, the prosecution transferred the case from juvenile court to adult court. *Id.* Section 27-20-34 allows transfers from juvenile court when the child is fourteen years old or older and has committed a "delinquent act involving the infliction or threat of serious bodily harm" which would require the "child to be placed under legal restraint or discipline" in the interest of the community. N.D. CENT. CODE § 27-20-34 (Supp. 1989).

18. *Ellvanger*, 453 N.W.2d at 812. The trial court had denied Brandon's motion to suppress the statement. *Id.*

19. *Ellvanger*, 453 N.W.2d at 812. The judge made the statement while trying to clear up the error of the trial court's reading the charging information. *Id.* at 815. Brandon contended that this might have prejudiced the jury because it was an indication of guilt. *Id.*

20. *Id.* at 812, 816. The court thought the admission was a result of an ignorance of rights or possibly an admission from Brandon's " 'fantasy, fright or despair.' " *Id.* at 815 (quoting *In re* Gault, 387 U.S. 1, 55 (1967)). The court thought the reading of the charging information did not result in an unfair trial, even though it was not a perfect one. *Id.* at 815. The court did not address the effect of the judge's statement, due to the reversal on other grounds. *Id.* at 816.

21. 384 U.S. 436 (1966).

22. Miranda v. Arizona, 384 U.S. 436, 440-45 (1966). The *Miranda* Court reviewed four cases in which the defendants were interrogated without being informed of their rights, including the right to remain silent and the right to an attorney. *Id.* All four defendants had made incriminating oral admissions. *Id.* at 445. The Court held that a prosecutor cannot use statements obtained from a defendant if that defendant was not given safeguards against self-incrimination. *Id.* at 444. The Court required the following safeguards, or their equivalent:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not

some circumstances and therefore inadmissible, even if the warning requirements set forth in *Miranda* are satisfied.[23]

One year after *Miranda*, the Supreme Court decided *In re Gault*,[24] in which the Court recognized procedural due process rights for minors.[25] Two of the due process rights recognized for juveniles were the right to counsel[26] and the privilege against self-incrimination.[27] The *In re Gault* decision indicates that the juvenile court is not excluded from the requirements of constitutional protections.[28] Previously, the Court had only narrowly addressed the issue, without coming to this broad conclusion.[29]

Before *In re Gault*, the juvenile court followed the doctrine of *parens patriae*, which meant that the juvenile court was much like a guardian and was, therefore, allowed much discretion in dealing with minors.[30] Juvenile proceedings were based on an

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> deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 444-45. The Court summarized the requirement by stating that the defendant has the right " 'to remain silent' " and that any statement must be made in the " 'unfettered exercise of his own will.' " *Id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

23. *Id.* at 494-97. When the Court was discussing the case of one of the defendants (Westover v. United States, No. 761), they found that even though the FBI had given warnings prior to their interview, the confession was deemed involuntary because the defendant had previously been interrogated by local police for fourteen continuous hours before the FBI interview. *Id.* at 495-96. The Court felt this was similar to informing the defendant of his constitutional rights at the end of the interview, as opposed to the beginning. *Id.* at 496.

24. 387 U.S. 1 (1967).

25. *In re* Gault, 387 U.S. 1, 41 (1967). The Supreme Court was reviewing a holding in which a fifteen-year-old was declared a delinquent by the juvenile court without his parents receiving adequate notice of the delinquency hearing. *Id.* at 34. This was held to be a violation of defendant's due process rights. *Id.* at 33-34.

26. *Id.* at 41.

27. *Id.* at 49-50. The Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 33.

28. *In re Gault*, 387 U.S. at 47. The Court broadly stated, in its discussion of waiver against self-incrimination, that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive." *Id.* at 47.

29. *See e.g.*, Kent v. United States, 383 U.S. 541 (1966) (In *Kent*, a sixteen-year-old raped and robbed a woman. *Id.* at 543. The juvenile court waived its jurisdiction, thereby subjecting the defendant to adult court without providing a hearing or specifying any findings. *Id.* at 546. The Court held that some sort of due process is required, even though it need not be the same as the due process given to adults. *Id.* at 562.); Haley v. Ohio, 332 U.S. 596 (1948) (In *Haley*, a fifteen-year-old was arrested for acting as a lookout in a robbery and murder at a store. *Id.* at 597. The minor was allegedly beaten and later questioned for five hours before confessing, without being informed of his rights. *Id.* at 597-99. The Court stated that the fourteenth amendment forbids confessions from being forced out of either an adult or child. *Id.* at 601.); Gallegos v. Colorado, 370 U.S. 49 (1962) (The Court recognized, as it had in *Haley*, that a minor is entitled to some sort of constitutional rights.).

30. Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534, 535 (1987). A child involved in crimes was not considered to be a criminal who was adverse to society, but was instead a person needing "understanding, guidance and protection." *Id.* at 535. The juvenile court decided how to react in order to

assumption that the juvenile court does not determine whether the minor is a criminal, but whether the child is in need of treatment, reformation, or rehabilitation.[31] *In re Gault* indicates that the juvenile court is truly a court of law as opposed to a mere civil service for the prevention of delinquency.[32]

Though it seems clear that a minor can waive his constitutional rights,[33] the waiver must be made "knowingly and voluntarily."[34] There are important questions as to what circumstances are required for a minor to adequately waive the right to counsel and the privilege against self-incrimination.[35] These questions are especially important because findings suggest that minors normally do not fully understand or utilize their constitutional rights.[36] Two main approaches have evolved for determining the

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further the best interest of the minor, while at the same time considering the interests of the community. *Id.* *See also* Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700, 1709-10 (1967) (discussing whether the interests of society and the juvenile can be reconciled).

31. Comment, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543, 546-47 (1973). The juvenile court was considereed to be in a paternalistic position with the intention of protecting the child from the trauma involved in the criminal process. *Id.* at 547. *See* Holtz, *supra* note 30, at 535 (the atmosphere in the juvenile court was considered to be more like a therapeutic/counseling session than an adversarial adult trial).

32. *See* Ketcham, *supra* note 30, at 1700-01. Ketcham felt that *Gault* was a decision that called for a re-evaluation of the juvenile courts' function in society and thought that these courts ought to be renovated to establish a new role. *Id.* at 1700. Ketcham wanted, however, to clarify that the applicability of the rights discussed in *Gault* were limited to situations in which the juvenile proceeding (1) might result in a determination of delinquency based on the alleged conduct, and (2) is a decision which could result in the curtailment of the juvenile's freedom. *Id.* at 1706-07. Ketcham felt that *Gault* stood for the proposition that since children are involved in increasingly serious crimes leading to serious penalties, they are also entitled to due process and fair treatment. *Id.* at 1707.

33. *See* Fare v. Michael C., 442 U.S. 707, 725 (1979) (In analyzing whether the juvenile waived his *Miranda* rights, the Court used the same approach as used for adults.).

34. North Carolina v. Butler, 441 U.S. 369, 373 (1979). *See* Miranda v. Arizona, 384 U.S. 436 (1966) (discussing the requirements of whether a waiver was made "voluntarily, knowingly and intelligently"). The "knowingly and intelligently" elements are satisfied when a defendant is informed of his rights and the consequences of foregoing the rights and then makes an intelligent decision based on the understanding of these rights. *Miranda*, 384 U.S. at 467-68. The determination of whether the defendant is aware of the privileges is based on all the surrounding circumstances. *Id.* at 468-69. A "voluntary" admission is made without either physical or psychological coercion. *Id.* at 464-65. The psychological coercion was explained by the Court in *Miranda* through a discussion of various tactics used by the police to obtain confessions which, at that time, were in police manuals and texts. *Id.* at 446-56. The Court noted that one of the most effective means of psychological coercion is to isolate the individual from everyone but the interrogators. *Id.* at 449.

35. *See* Note, *Waiver in the Juvenile Court*, 68 COLUM. L. REV. 1149, 1156-64 (1968) (discussing minors' ability to waive right to counsel and the privilege against self-incrimination). *See also* Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HASTINGS L.J. 223, 225-26 (1967) (discussing minors' incompetence at making an effective waiver).

36. Comment, *Pennsylvania Supreme Court Review, 1975*, 49 TEMP. L.Q. 558, 705 (1976). *See* Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53-54 (1970). The study done by Ferguson and Douglas showed that most minors could not waive their constitutional rights knowingly and intelligently. *Id.* This study showed that

effectiveness of a waiver by a minor; namely, the totality approach and the "per se" approach.[37]

Under the totality approach, the determination of whether a confession is voluntary is made by inquiring into the "totality of the circumstances."[38] Under this test, all of the surrounding circumstances will be considered by the court before finding a waiver.[39] The totality approach is based on the Supreme Court's holding in *Haley v. Ohio*[40] and has been formally adopted by most courts.[41] In *Haley*, the Court found that the defendant's confession was involuntary based on a combination of various factors, such as the defendant's age, the duration and the timing of the questioning, the "callous attitude of the police," and the juvenile's lack of adult advice.[42]

Later, in *Fare v. Michael C.*,[43] the Supreme Court formally adopted the "totality of the circumstances" test for determining whether juveniles voluntarily waive their rights during interrogation.[44] Though there are factors that apply to all persons being

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eighty-six out of ninety juveniles waived their rights, while only five out of the eighty-six fully understood their rights. *Id.*

37. *See* Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1134-44 (1980) (discussing the pros and cons of the "totality" approach and the "per se" approach).

38. Grisso, *supra* note 37, at 1138-40.

39. *Id.* at 1135. According to Grisso, the underlying theory of the "totality of the circumstances" test, in the context of juvenile law, is that it is possible for children to understand their constitutional rights. *Id.* at 1138. There are no distinct requirements under this test; therefore, the court has almost total discretion. *Id.* at 1138-39. Basically, under this test, the court considers all the surrounding circumstances in determining whether the waiver was made knowingly and voluntarily. *Id.* at 1138.

40. 332 U.S. 596 (1948). For the facts of the case, see *supra* note 29.

41. Note, *Waiver of Miranda Rights by Juveniles: Is Parental Presence a Necessary Safeguard?*, 21 J. FAM. L. 725, 730 (1982-83) (discussing whether a parent need be present to advise the minor when the minor is waiving a right).

42. Haley v. Ohio, 332 U.S. 596, 600-01 (1948). The Court noted that although a mature man might have withstood the treatment by the police, a fifteen-year-old would be overwhelmed by such treatment. *Id.* at 599-600. The Court felt that without someone to counsel the minor, the admission may have been made out of fear or panic, rather than through a voluntary decision. *Id.* at 599-600. The Court held that the confession was not truly voluntary and should not have been admitted at trial. *Id.* at 601. The murder conviction was therefore reversed. *Id.*

43. 442 U.S. 707 (1979).

44. Fare v. Michael C., 442 U.S. 707, 725 (1979). In *Fare*, a sixteen-year-old was arrested on suspicion of murder. *Id.* at 710. When he requested to see his probation officer, the request was denied, and he proceeded to implicate himself in the murder. *Id.* at 710-11. The Court stated that "[t]he totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation." *Id.* at 725. The Court referred to various elements enumerated in North Carolina v. Butler, 441 U.S. 369 (1979), including an evaluation of the juvenile's age, experience, education, background, and intelligence. *Fare*, 442 U.S. at 725. The Court also stated that the inquiry needs to ascertain whether the juvenile "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.*

interrogated,[45] there is a special focus when the confessor is a juvenile.[46] Furthermore, the Court has stated that it requires that great care be taken when a confession is made by a juvenile without the presence of counsel.[47] The prosecution is required to show by a preponderance of the evidence that the waiver was voluntary.[48]

The "per se" approach for determining the effectiveness of a waiver is an extension of the totality approach. Under the "per se" approach, not only must the waiver of constitutional rights be shown to be voluntary in light of all of the surrounding circumstances, the waiver must also be excluded if certain procedural safeguards are not followed.[49] Though the "per se" rule has never been explicitly required by the Supreme Court to fulfill due process rights, dictum in *Gallegos v. Colorado*[50] suggested the usefulness, or possible necessity, of some sort of adult advice when a minor is asked to waive a constitutional right.[51] Regardless of the *Gallegos* dictum, the "per se" rule is the minority position.[52]

In *State v. Ellvanger*,[53] the North Dakota Supreme Court examined whether the admissions made by Brandon Ellvanger in the course of the police investigation of the incident were admissi-

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45. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In *Bustamonte*, the Court listed the factors used in assessing the "totality of circumstances":

> the youth of the accused; his lack of education; his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted.

Id. at 226 (citations and footnotes omitted). The Court also noted its support for a "careful scrutiny of all the surrounding circumstances." *Id.*

46. *Fare*, 442 U.S. at 725.

47. *In re* Gault, 387 U.S. 1, 55 (1967). In determining whether the confession is voluntary, the inquiry is not only whether it was "coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.*

48. Colorado v. Connelly, 479 U.S. 157, 169 (1986). The Court held that the higher burden of proof would not be justified in light of the public interest in getting probative evidence into the trial for the purpose of resolving the case correctly. *Id.*

49. Grisso, *supra* note 37, at 1135. Under the "per se" approach, assistance by an interested parent or guardian is required if the minor doesn't have counsel. *Id.* Waivers of constitutional rights made without this assistance are invalid. *Id.*

50. 370 U.S. 49 (1962).

51. Gallegos v. Colorado, 370 U.S. 49, 54 (1962). The Court stated that a "lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not." *Id.* However, the Court did not use the "per se" approach; it simply used the "totality of the circumstances" test in reaching its decision. *Id.* at 54-55. *See also* Note, *Due Process Reasons for Excluding Juvenile Court Confessions from Criminal Trials*, 50 CALIF. L. REV. 880, 902-09 (1962) (discussing *Gallegos*).

52. Grisso, *supra* note 37, at 1134. *See also* Comment, *supra* note 36, at 709 (discussing Pennsylvania's use of the "per se" approach in requiring counsel or some other friendly adult to be present before a juvenile can waive his or her rights).

53. 453 N.W.2d 810 (N.D. 1990).

ble as evidence.[54] The court analyzed whether Brandon's admission of shooting the gun was voluntary under the "totality of the circumstances."[55] The court's "totality of the circumstances" analysis included a determination of whether the statutory provisions of section 26-20-26 of the North Dakota Century Code were required and thereafter satisfied.[56]

The court first noted that in order for an admission to be admissible in a criminal trial, it must have been made voluntarily.[57] In making the determination of whether the admission was voluntary, the court considered all of the surrounding circumstances.[58] The court then discussed a nonexhaustive list of factors that should be considered when deciding whether a confession is voluntary.[59] The court also explained that the "totality of the circumstances" test includes consideration of "the characteristics and condition of the accused at the time of the confession, as well as the details of the setting in which the confession was obtained . . . ."[60] The court stated that " 'the prosecution must show waiver by at least a preponderance of the evidence.' "[61] Furthermore, the court held that the appropriate standard of review was to determine whether the "voluntariness is manifestly against the

54. State v. Ellvanger, 453 N.W.2d 810, 812 (N.D. 1990).

55. *Id.* at 815.

56. *Id.* at 812-15.

57. *Id.* at 812 (citing State v. Rovang, 325 N.W.2d 276, 279 (N.D. 1982)). In *Rovang*, an adult defendant confessed to a robbery after the alleged victim and some of the victim's friends threatened to use force against him if he did not confess to the crime. *Rovang*, 325 N.W.2d at 278-79. The court held that the "confession must be voluntary in order to be admissible into evidence at a criminal trial" and reversed the trial court's conviction. *Id.* at 279 (citing Jackson v. Denno, 378 U.S. 368, 395-96 (1964)). In *Denno*, The United States Supreme Court established that it was "practical and desirable" to require that "a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence." *Denno*, 378 U.S. at 395.

58. *Ellvanger*, 453 N.W.2d at 812. *See also* State v. Roquette, 290 N.W.2d 260, 264 (N.D. 1980) (court established the following two criteria for determining whether an admission was made freely and voluntarily under the totality of the circumstances: 1) whether the decision to waive the right to remain silent was voluntarily made; and 2) whether the confession itself was made voluntarily).

59. *Ellvanger*, 453 N.W.2d at 812. The court quoted Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), in presenting the following list: " '[T]he lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.' " *Ellvanger*, 453 N.W.2d at 812 (citations omitted). For the full list, see *Bustamonte*, 412 U.S. at 226.

60. *Ellvanger*, 453 N.W.2d at 812. *See also* State v. Pickar, 453 N.W.2d 783 (N.D. 1990) (The defendant had confessed to driving a car in an accident which resulted in the death of two of defendant's friends, and the North Dakota Supreme Court upheld the lower court's decision to withhold the confession due to Pickar's emotional state, his physical injuries at the time of the confession, and the police conduct). The *Pickar* court stated that a confession is voluntary if it is a "product of the defendant's free choice, rather than a product of coercion." *Id.* at 785.

61. *Ellvanger*, 453 N.W.2d at 812 (quoting State v. Newman, 409 N.W.2d 79, 83-84 (N.D. 1987) (citations omitted)).

weight of the evidence."[62]

The court recognized that this case presented a unique situation because Brandon was a juvenile and was challenging the voluntariness of the admission.[63] The court reasoned that one of the most important issues to examine when determining whether a juvenile's admission was voluntary is whether the youth was able to understand his rights and the consequences of waiving those rights.[64] The court took special notice of that fact, since the admission was made by a juvenile without the help of counsel.[65]

The court's first step in determining if Brandon's admission was voluntary was to inquire whether Brandon had been adequately protected under section 27-20-26 of the North Dakota Century Code.[66] Though the North Dakota Supreme Court has stated that "27-20-26, N.D.C.C. does not preclude the possibility of a waiver, by the child, of his right to counsel,"[67] minors cannot waive this right unless they are adequately represented by a parent, guardian, or custodian.[68] Section 27-20-26(1) of the North

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62. *Id.* at 814. The court also noted that it gives "great deference" to the trial court's holding. *Id.*

63. *Id.* at 813. The court cited to the discussion in Fare v. Michael C., 442 U.S. 707, 725 (1979), in which the Supreme Court had listed special factors to be considered when determining whether a juvenile's admission was voluntary. *Ellvanger*, 453 N.W.2d at 813 (citing *Fare*, 442 U.S. at 725). For a discussion on the elements of determining whether a confession is voluntary, see *supra* notes 42-46 and accompanying text.

64. *Ellvanger*, 453 N.W.2d at 813.

65. *Id.* The court stated:

> If counsel was not present for some permissible reason when [the] 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. (quoting *In re* Gault, 387 U.S. 1, 55 (1967)).

66. *Id.* Section 27-20-26(1) provides as follows:

> 1. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. *Counsel must be provided for a child not represented by his parent, guardian, or custodian.* If the interests of two or more parties conflict separate counsel shall be provided for each of them.

N.D. CENT. CODE § 27-20-26(1) (1974) (emphasis added).

67. *In re* D.S., 263 N.W.2d 114, 120 (N.D. 1978).

68. *See In re* J.D.Z., 431 N.W.2d 272, 276 (N.D. 1988). J.D.Z., a minor, had summoned the police to inform them of his knowledge of a vandalism. *Id.* at 273. When it became apparent that J.D.Z. was lying, the investigation focused on him. *Id.* at 275. J.D.Z. proceeded to confess to the crime upon the insistence of his stepfather (who was held not to be looking out for J.D.Z.'s interests) and without the assistance of counsel. *Id.* at 273-74. The Supreme Court of North Dakota held that the confession was in violation of his statutory rights and, therefore, was properly suppressed. *Id.* at 276.

Dakota Century Code provides that "[c]ounsel *must* be provided for a child not represented by his parent, guardian, or custodian."[69] The court followed an earlier decision, holding that the word "must" imposes a mandatory requirement in clear and unambiguous language.[70] The court found that these requirements assist the minor and protect the minor's interests, as was intended by the North Dakota Legislature.[71]

The court stated further that under section 27-20-26(1) it is necessary that the parent, guardian, or custodian represent the best interests of the minor if counsel for the minor is not present.[72] In a prior case, the court had stated that the "mere presence of a parent does not constitute representation," and if the child is not adequately represented by his parent, guardian, or custodian, the state is required to provide the minor with legal counsel before questioning.[73] The *Ellvanger* court found that Brandon's grandfather was present at the time of the questioning but did nothing to protect Brandon's interests.[74] Thus, the court held that there was not a parent, guardian, custodian, or counsel present at the time of the interview to safeguard Brandon's best interests.[75]

The court next discussed the fact that section 27-20-26 of the North Dakota Century Code requires that counsel or representation by parent, guardian, or custodian needs to be present at *all stages* of the proceedings against a juvenile.[76] North Dakota

69. N.D. CENT. CODE § 27-20-26(1) (1974) (emphasis added). For the text of section 27-20-26(1), see *supra* note 66. *See also* Note, *supra* note 41, at 743 (discussing the opinion that parental presence best satisfies the safeguards required by *Gault* in regard to a waiver by a minor).

70. State v. Ellvanger, 453 N.W.2d 810, 813 (N.D. 1990) (citing *In re* D.S., 263 N.W.2d 114, 120-21 (N.D. 1978)). The language used by the court in *D.S.* was that "[t]he word 'must' cannot be construed to impose or grant a merely directory or nonmandatory duty or right unless the context within which it is used clearly indicates that such was the intent of the Legislature." *D.S.*, 263 N.W.2d at 119.

71. *Ellvanger*, 453 N.W.2d at 813. *See* State v. Grenz, 243 N.W.2d 375, 380 (N.D. 1976). In *Grenz*, the court stated that "it is apparent that the Legislature recognized the necessity for an advocate on behalf of the child to be present to protect the interests of the child in the often-adversary setting of juvenile court proceedings." *Id.*

72. *Ellvanger*, 453 N.W.2d at 815. *See also In re* J.D.Z., 431 N.W.2d 272, 275-76 (N.D. 1988) (in a hearing to determine whether J.D.Z. was a juvenile delinquent, the court found that J.D.Z. had not been represented by a parent, guardian, or custodian; J.D.Z.'s stepfather had asked questions that helped incriminate J.D.Z. and had simply told J.D.Z. to answer them.)

73. *In re* J.D.Z., 431 N.W.2d 272, 276 (N.D. 1988).

74. *Ellvanger*, 453 N.W.2d at 814, 815. When the police began questioning Brandon, his grandfather simply said, " 'If you know anything about this, go ahead and tell him . . . .' " *Id.* at 814.

75. *Id.* at 815.

76. *Id.* at 813. *See* N. D. CENT. CODE § 27-20-26(1) (1974). Section 27-20-26(1) provides, in relevant part, that "a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter . . . ." For full text of section 27-20-26(1), see *supra* note 66.

courts have adopted what could be called a "focus" test to determine what are "stages of any proceeding."[77] Under this test, "stages of any proceeding" are not only events that occur in a courtroom, but also include any "circumstances in which an officer has focused his investigation on a particular suspect and is intent on gathering evidence, not merely investigating a complaint."[78] The court stated that until the investigation focuses on a person, there is no mandatory right to counsel under section 27-20-26 of the North Dakota Century Code.[79]

Though the court found that Brandon had not been provided with the protections required by section 27-20-26,[80] it also stated that the " 'investigation must focus on the individual before the right to counsel applies.' "[81] Therefore, in determining whether there was a violation of the section 27-20-26 of the North Dakota Century Code, the question of when the investigation focused upon Brandon was determinative.[82] However, there was no finding of fact by the trial court as to whether the investigation was focusing on Brandon at the time of the questioning.[83] Through an analysis of the record, the *Ellvanger* court concluded that "it is beyond dispute" that Brandon's statements made to the investigators after he was read his Miranda rights were made after the investigation had focused on him.[84] The court ruled that any other statements that were made after the investigation had focused on Brandon were also inadmissible, due to violations of section 27-20-26.[85]

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77. *In re* J.D.Z., 431 N.W.2d 272, 275 (N.D. 1988). J.D.Z., his mother, his stepfather and a police officer sat down in J.D.Z.'s living room to discuss the vandalism that J.D.Z. said he had witnessed. *Id.* at 273. The officer became suspicious that J.D.Z. was lying. *Id.* The Supreme Court of North Dakota found that once the policeman became aware that J.D.Z. might be involved in the vandalism, the investigation had focused on J.D.Z. and, therefore, at that point in time, J.D.Z was entitled to the protections granted by section 27-20-21. *Id.* at 276.

78. *Id.* at 275.

79. *Ellvanger*, 453 N.W.2d at 813. *See In re* M.D.J., 285 N.W.2d 558, 559-62 (N.D. 1979). In *M.D.J.*, a policeman was called to help some people who were shot. *Id.* at 559. When the policeman asked M.D.J. (a minor) where his parents were, M.D.J. said, " 'They are upstairs' " and " 'I shot them.' " *Id.* at 560. The North Dakota Supreme Court found that this was not an investigation of M.D.J. under section 27-20-06 of the North Dakota Century Code, since the investigation was not focused on M.D.J. at the time. *Id.* at 562. The court, therefore, allowed M.D.J.'s statements to be admitted as evidence. *Id.* at 565-66.

80. *Ellvanger*, 453 N.W.2d at 815. Because Brandon had not been provided with counsel, and since "Brandon was not represented by a parent, guardian, or custodian during his interrogation . . . Brandon was denied his right to counsel under [section] 27-20-26." *Id.*

81. *Id.* at 813 (quoting *In re* M.D.J., 285 N.W.2d 558, 562 (N.D. 1979)).

82. *Id.* at 814-15.

83. *Id.* at 814.

84. *Id.* at 814-15.

85. *Ellvanger*, 453 N.W.2d at 814-15.

Based on the conflicting testimony in the record, the court was unable to determine whether the initial questions directed at Brandon occurred before or after Brandon had become the focus of the investigation.[86] Therefore, the court reversed and remanded the trial court's decision for a determination of whether Brandon was the focus of the police officer's investigation at the time he had first made the incriminating statements.[87]

If there is a violation of section 27-20-26 of the North Dakota Century Code, any confession will be in violation of statutory rights and will therefore be inadmissible.[88] Nevertheless, because it could be found on remand that the investigation had not focused on Brandon during the initial questioning, the court proceeded to make a determination as to whether the waiver of the privilege against self-incrimination was voluntary.[89]

The court began this determination by inquiring into the "totality of the circumstances."[90] The court found that Brandon's admissions made after Halverson's initial question were "the product of ignorance of rights or of adolescent fantasy, fright or despair."[91] The court did not determine whether Brandon's initial statement was voluntary.[92]

The fairness of the trial was also challenged because of a viola-

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86. *Id.* at 816. There were conflicting stories by Floyd Ellvanger, Brandon's grandfather, and the Mountrail County Sheriff, Kenneth Halverson. *Id.* at 814. Floyd had testified that he had told Halverson prior to the time Halverson questioned Brandon that Brandon had shot Gregory, which would mean the investigation had focused on Brandon. *Id.* Halverson contended, however, that he was not initially focusing upon Brandon, but was questioning Brandon simply because he was the only one around. *Id.* Halverson argued that only after Brandon had made the statement that " 'I only shot to scare them,' " did Halverson read Brandon his Miranda rights and focus on Brandon. *Id.*

87. *Id.* at 816.

88. *Id.* at 813. Section 27-20-27(2) of the North Dakota Century Code provides, in relevant part, that "[a]n extra-judicial statement, if obtained in the course of violation of this chapter or which would be constitutionally inadmissible in a criminal proceeding, shall not be used against [the defendant]." N.D. CENT. CODE § 27-20-27(2) (1974).

89. *Ellvanger*, 453 N.W.2d at 814-15. For an example of language indicating an involuntary confession, see State v. Rovang, 325 N.W.2d 276, 279 (N.D. 1982). *See also* Jackson v. Denno, 378 U.S. 368, 385 (1964) ("the Fourteenth Amendment forbids the use of involuntary confessions").

90. *Ellvanger*, 453 N.W.2d at 815. *See also* Grisso, *supra* note 37, at 1138-40 (discussing the totality approach). For a comprehensive discussion of the "totality of the circumstances" test, see *supra* notes 38-48 and accompanying text.

91. *Ellvanger*, 453 N.W.2d at 815 (quoting *In re* Gault, 387 U.S. 1, 55 (1967)). The court noted several important factors in making this decision: Brandon was intoxicated with at least a .21 percent blood alcohol concentration; it was questionable whether Brandon received his Miranda rights; Brandon was repeatedly interrogated; Brandon had little sleep; Brandon was in shock; and Brandon was not represented by counsel, parent, guardian or custodian. *Id.* at 815. The court then held that "the trial court erred in denying [Brandon's] motion to suppress" and therefore reversed the conviction. *Id.*

92. *Id.* Apparently, a determination of whether or not Brandon's initial statement was voluntary would be made on remand after determining when the investigation focused on Brandon. *See id.*

tion of section 29-21-01(1) of the North Dakota Century Code, which requires that the clerk or state's attorney, and not the trial court, read the charging information.[93] The court found that this violation, alone, did not constitute reversible error, because it did not cause an unfair trial for Brandon.[94]

Finally, Brandon claimed that the trial court judge may have created an inference of guilt when he stated that he would "end up sentencing" Brandon.[95] Though this could possibly have amounted to reversible error,[96] the court did not address the issue further because of the reversal on other grounds.[97]

The North Dakota Supreme Court's decision in *Ellvanger* strongly reinforces the interpretation of section 27-20-26 of the North Dakota Century Code as a recognition by the North Dakota Legislature of the necessity for a minor to have an adult advocate present who will protect the interests of the minor.[98] The enact-

93. *Id.* At trial, the judge had read the charging information. *Id.* Section 29-21-01(1) of the North Dakota Century Code provides: "If the information or indictment is for a felony, the clerk or state's attorney must read it, and must state the plea of the defendant to the jury. In all other cases this formality may be dispensed with." N.D. CENT. CODE § 29-21-01(1) (1974).

94. *Ellvanger*, 453 N.W.2d at 815. *See also* State v. Allen, 237 N.W.2d 154 (N.D. 1975). In *Allen*, the court explained:

> As an appellate court, we disregard error which does not affect substantial rights (harmless error), while we must consider errors objected to at trial that were prejudicial (reversible error) and errors 'so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time' (obvious error).

Id. at 162 (quoting N.D.R. CRIM. P. 52 commentary). The court said there must be a consideration of the error with all of the evidence to determine whether substantial injury to the person's rights had resulted. *Id.* The court further declared that "a defendant is entitled to a fair trial, but not necessarily a perfect trial." *Id.* at 162.

95. *Ellvanger*, 453 N.W.2d at 815. The statements in question occurred when the trial judge tried to correct the error of the court's reading of the charging information. *Id.* The court stated to the jury:

> 'Incidentally, at the outset, well, when I gave you the preliminary instructions, I read to you the Information. The mere fact that I did that doesn't mean to infer that I feel one way or the other about the guilt or the innocence of this young man of any of these charges—crimes charged. You folks are the trier of the facts. That's your decision to make. I'll give you the law and I'll end up sentencing him, but it's your job to decide that issue. Okay. Thank you.'

Id. at 815 (quoting trial judge).

96. *Id.* at 816. *See also* State v. Yodsnukis, 281 N.W.2d 255, 262 (N.D. 1979) (court noted that jurors are often influenced by the judge's opinions, which may create a prejudicial effect on the defendant).

97. *Ellvanger*, 453 N.W.2d at 816. *See also* Hospital Services v. Brooks, 229 N.W.2d 69, 71 (N.D. 1975) (court explained that questions do not need to be considered, when they do not affect the determination of the case).

98. *Ellvanger*, 453 N.W.2d at 813. *See In re* D.S., 263 N.W.2d 114, 120 (N.D. 1978) (the court held that it is mandatory for children to have counsel during all stages of an interrogation if they are not represented by a parent, guardian, or custodian). *See also* State v. Grenz, 243 N.W.2d 375, 380 (1976) (where the court recognized the need of an adult advocate to act on behalf of the minor in juvenile court proceedings). For the text of section 27-20-26 of the North Dakota Century Code, see *supra* note 66.

ment of section 27-20-26 appears to indicate that North Dakota has adopted the "per se" approach in regard to minors' ability to waive their constitutional and statutory rights.[99]

In *Ellvanger*, the court established that the right for a minor to have an adult present is absolute, and transfer from juvenile court to the adult court will not eliminate the protections provided by the Code.[100] It appears that in North Dakota there is simply a mandate that any questioning that may incriminate a minor requires adult guidance as set forth in section 27-20-26 of the North Dakota Century Code.[101] Therefore, any admission made by a minor will be inadmissible as evidence if any of the procedural safeguards provided by the statute are not followed.[102]

Even if the statutory safeguards are followed, courts in North Dakota will carefully scrutinize all of the surrounding circumstances to determine whether the waiver was voluntary.[103] *Ellvanger* makes it clear that factors which are inherent in youth will be weighed heavily in this determination.[104] Therefore, every precaution should be taken when interrogating a minor.

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99. For a discussion of the "per se" approach, see notes 49-52 and accompanying text.

100. *Ellvanger*, 453 N.W.2d at 813. The court stated that the transfer under section 27-20-34 of the North Dakota Century Code is only a termination of jurisdiction, not a process to "retroactively revoke any other right." *Id.*

101. The relevant text states that "[c]ounsel must be provided for a child not represented by his parent, guardian, or custodian." N.D. CENT. CODE § 27-20-26 (1974).

102. *See generally* Grisso, *supra* note 37, at 1135 ("per se" approach requires exclusion of a waiver without minor being provided with the required safeguards). Section 27-20-27(2) of the North Dakota Century Code provides:

> A child charged with a delinquent act need not be a witness against or otherwise incriminate himself. An extra-judicial statement, if obtained in the course of violation of this chapter or which would be constitutionally inadmissible in a criminal proceeding, shall not be used against him.

N.D. CENT. CODE § 27-20-27(2) (1974).

103. For a discussion on the "totality of the circumstances" test, see *supra* notes 38-48 and accompanying text.

104. *Ellvanger*, 453 N.W.2d at 813. The court focused on age, experience, intelligence, education, background, and, especially, ability to understand. *Id.* (citing Fare v. Michael C., 442 U.S. 707, 725 (1979)).