The Court Giveth and the Court Taketh Away: State v. Fernandez - Returning Louisiana's Children to an Adult Standard

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The State of Louisiana has a history of prohibiting juveniles from doing many things. They cannot purchase alcohol until they are twenty-one.1 They cannot buy any form of tobacco products.2 Persons younger than twenty-one cannot gamble in casinos or be exposed to video poker.3 The state prohibits juveniles from driving before the age of sixteen, and even then they cannot drive late at night.4 The Louisiana Legislature created these laws to protect juveniles from the consequences of their own immaturity.5 However, according to the recent Louisiana Supreme Court decision in *State v. Fernandez*,6 they may be mature enough to waive their *Miranda* rights without any consultation from an adult. This decision overruled twenty years of jurisprudence based on *In re Dino*.7 *Dino* was a Louisiana Supreme Court decision holding that juveniles were incapable of effecting a valid waiver of their Constitutional rights without consultation with an adult.

I. INTRODUCTION

In 1966, the United States Supreme Court handed down the landmark decision, *Miranda v. Arizona*,8 which required that a person in a custodial interrogation be informed of his constitutional right to remain silent, to have an attorney, and to be informed that if he waives his right to remain silent, anything he says can be used against him in a court of law. Since this time, courts and scholars have constantly debated how a suspect might waive these rights. Although the Supreme Court has recognized that due process rights apply to juveniles in custody,9 states disagree about how juveniles can waive these rights. More than two decades ago, Louisiana first addressed this issue. In *In re Dino*,10 the Louisiana Supreme Court adopted a strict *per se* approach to decide whether a child had validly waived his rights in an interrogation. Based on empirical evidence and the findings of other jurisdictions, the court determined that a juvenile could not effectively waive his *Miranda* rights without some consultation from an adult.
rights until he consulted with an attorney, parent, or interested adult. However, the
court recently reversed itself in *State v. Fernandez*¹¹ where it held that the totality
of circumstances standard best protects the special needs of juveniles while serving
the interests of society and justice. The court determined that "a prophylactic rule"
imposing the requirement of advice from a parent, counsel, or interested adult is
"not appropriate."¹² Setting forth virtually no guidelines for courts to follow, this
decision returned Louisiana to a highly discretionary standard that is inconsistent
with Louisiana's traditional role of providing minors with increased protection
from their own immaturity.¹³

This paper will look at the different approaches to determining what
constitutes a valid waiver of rights in a juvenile setting, how they were created, and
how courts are applying them. It will criticize each approach, and then explain why
Louisiana should adopt a new, less discretionary approach to this problem.

II. *STATE v. FERNANDEZ*

A. Before Fernandez—In re Dino

In 1978, the Louisiana Supreme Court was asked to determine how a juvenile
could validly waive his Constitutional *Miranda* rights. In *In re Dino*,¹⁴ Dino's
mother took the thirteen-year-old juvenile to the police station, at the insistence of
the police. The police refused to let the mother in the room while they interrogated
the boy. Although the police considered Dino a main suspect, they never informed
his mother of this, nor was she informed of her child's rights. Alone with the
police, Dino read and listened to his rights. Afterwards, he gave an oral statement
confessing to a murder. At trial, the child claimed the officers did not explain his
rights, and he did not understand them.¹⁵ A clinical psychologist testified that the
child was incapable of understanding the standard waiver form that the police
routinely gave to adults.¹⁶

After noting that Louisiana adopted the requirements of *Miranda* in Article I,
section 13 of the 1974 Louisiana Constitution,¹⁷ Justice Dennis, writing for the

¹¹. 712 So. 2d 485 (La. 1998).
¹². Id. at 490.
¹³. See infra notes 198-210 and accompanying text discussing Louisiana's traditional policy of
protecting juveniles.
¹⁵. Id. at 589.
¹⁶. Id.
¹⁷. La. Const. art. I, § 13 provides:
When any person has been arrested or detained in connection with the investigation or
commission of any offense, he shall be advised fully of the reason for his arrest or detention,
his right to remain silent, his right against self incrimination, his right to the assistance of
counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an
accused shall be informed of the nature and cause of the accusation against him. At each
stage of the proceedings, every person is entitled to assistance of counsel of his choice, or
majority, found that the police had taken Dino into custody at the time of the 
interrogation, thus implicating the Miranda protections. This meant the state bore 
the heavy burden of proving that Dino "knowingly and intelligently waived his 
privilege against self-incrimination and his right to retained or appointed 
counsel." The court recognized the split among the circuits on how to determine 
whether a juvenile had validly waived his Miranda rights. At least one circuit had 
adopted the "totality of circumstances" test from West v. United States. However, 
the Dino court rejected this test stating that "exclusive use of the totality of 
circumstances test in relation to waivers by juveniles tends to mire the courts in a 
morass of speculation similar to that from which Miranda was designed to extricate 
them in adult cases." Instead, the majority opted for a per se approach that requires 
the advice of a parent, counsel, or interested adult before the police can 
obtain a valid waiver of the child's rights. Reasons for adoption of the new 
standard were threefold: increased trustworthiness in the interrogations, removal 
of subjective judgment by the police, and efficiency in the judicial process. After 
reviewing other states that used a per se approach, the majority discussed the 
standards set forth by commentators, the ABA Juvenile Justice Project, and the 
Council of Judges of the National Council on Crime and Delinquency, all of which 
recommended that a juvenile's statements to an officer not be admitted into 
evidence in a subsequent proceeding unless they were made after consultation with 
a parent or counsel. The court noted that the majority of states use the totality of 
circumstances test; however, it adopted the per se approach advocated by scholars 
and several courts. The court considered this approach more consistent with the 
state's traditional policy of protecting minors from the consequences of immaturity.

B. The Aftermath of Dino

After the Louisiana Supreme Court's decision in Dino, there was little debate 
over the newly created policy. Initially, the supreme court determined that it would 
be unfair to apply the decision retroactively to statements taken before the Dino
opinion. Then, it was faced with defining the meaning of the word "juvenile" as used in the *Dino* opinion. The age of majority in Louisiana is eighteen; however, the Juvenile Court jurisdiction only extends to children under the age of seventeen. In *State v. Edwards*, the court noted that, "[t]he age at which a teenager is by law construed to have or not have the maturity and competence to knowingly waive his or her constitutional rights is admittedly perhaps an arbitrary line. No doubt in actuality there are sixteen year olds whose knowledge of and ability to comprehend their legal rights surpasses the knowledge of many who are older but less wise." However, the court found that since the age of seventeen was the "line traditionally drawn for criminal responsibility between the juvenile and the adult," that should be the cut off age for the *Dino* requirements.

Therefore, a parent or an interested adult was not needed to obtain a valid confession from a seventeen year old suspect.

The remaining reported cases which cite *Dino* generally demonstrate that the requirement was effective. The cases demonstrate that police officers were following the *Dino* standard with few difficulties. However, two main issues remained. First, there was some initial debate as to who would be considered an "interested adult." The courts had construed this term very broadly, including such persons as the juvenile’s grandparents, a sibling age twenty-one, and a twenty-three-year-old brother, who was also a deputy sheriff at the sheriff’s station where the juvenile was being interrogated. In fact, the only reported case where the court found that the adult did not qualify as an interested adult was *State v. Belton*. There, the juvenile was charged with unauthorized use of a motor vehicle and hit-and-run driving. The police made no effort to contact the child’s only available relative; instead, they asked the child’s probation officer to act as a "concerned adult." The court found that a juvenile probation officer was inappropriate for the role of "interested adult," questioning whether such person could "occupy the position of someone not a part of the adversarial system who can be of impartial guidance to the child in his decision to waive his constitutional rights." Therefore, the court determined that contacting an attorney would be the

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29. *Id.* at 1340.
30. *Id.*
31. *Id.*
32. *In re J.P.*, 550 So. 2d 942 (La. App. 5th Cir. 1989).
35. 525 So. 2d 77 (La. App. 3d Cir. 1988).
36. *Id.* at 80.
only appropriate course of action in a situation where a family member could not be contacted.

The second issue left unresolved after Dino was determining the intent of the court in requiring a "meaningful consultation" between the juvenile and the interested adult. In State v. Hudson, the supreme court was asked to determine if the circumstances of the case constituted a "meaningful consultation" under the Dino standard. The sixteen-year-old defendant was arrested and charged with second-degree murder. Although his parents were present during the reading of the juvenile's rights and during the interrogation, the only opportunity they were given to consult with the child about his decision was during a ten minute break before the taping of the juvenile's confession. In its original opinion, the court simply stated that, "[t]here is no reasonable doubt about the voluntariness, reliability or the probative value of the defendant's inculpatory statement." Only in a footnote did the court really address the defendant's concern that he was not given adequate consultation with his parents, and there the court merely stated that the proper inquiry was not the nature of the advice given by the parent, but whether the parent's presence and consultation lead to a "voluntary and reliable statement." However, on application for rehearing, in a per curiam opinion, the court reaffirmed its holding in Dino, and noted that, "this case barely passes muster on the question of whether the juvenile was given an opportunity to engage in a meaningful consultation with his informed parents...."

This decision created a split among the circuits as to what was required to show that the adult and child had the opportunity for a meaningful consultation. In State v. Francois, the first circuit determined that in order to have a "meaningful consultation" under Dino, the interested adult and the juvenile must be given an opportunity to consult with each other in private before any waiver of the juvenile's rights. However, the fourth circuit rejected this approach in State v. Johnson stating, "We interpret Dino as requiring an opportunity for a 'meaningful' consultation, be that consultation public or private." Thus, the ten minute time period that the defendant and his mother were afforded while the officers prepared to take the defendant's statement was sufficient to show that the two had an opportunity to consult with each other. The third and fifth circuits followed the fourth circuits' decision in Johnson and set a precedent of considering any opportunity for the child to have a discussion with an interested adult sufficient to meet the Dino requirements.

37. Id.
38. 404 So. 2d 460 (La. 1981).
39. Id. at 464.
40. Id. at 464 n.7.
41. Id. at 466.
42. 411 So. 2d 588 (La. App. 1st Cir. 1982).
43. 508 So. 2d 953 (La. App. 4th Cir. 1987).
44. Id. at 955.
C. Stepping Backwards—The Court's Decision in State v. Fernandez

More than two decades after the Dino decision, the court was again presented with the issue of a juvenile's waiver in State v. Fernandez. There, the defendant was a sixteen-year-old male convicted of armed robbery of a teenage girl. The officer arrived on the scene of the crime, obtained a statement from the victim and drove around the area with the victim looking for the suspect. Shortly thereafter, the victim identified the defendant, who was riding his bicycle in the area, as the suspect. The officer placed the suspect under arrest, advised him of his rights, and placed him into the car (with the victim). The defendant then made this spontaneous statement: "Look, I'm sorry. I want to cooperate with the investigation." After Fernandez promised to give the victim back her items, the officer asked Fernandez to tell him where the weapon and stolen items were located. Fernandez told the officer where he had hidden the items. The officer then drove with the two teenagers to the locations and obtained the items. After obtaining the evidence, the officer asked the defendant his name and age for the report. For the first time, the officer discovered the defendant was a juvenile.

Over the objection of the prosecution, the lower court, basing its ruling on Dino granted the defendant's motion to suppress some of the statements made by the defendant and the evidence obtained from those statements. The Louisiana Fourth Circuit Court of Appeal, in an unpublished opinion, determined that Dino did not apply to the spontaneous statements made by the defendant; however, since the officer obtained the remaining statements and the evidence from answers given in response to an interrogation by the officer, they had to be suppressed under Dino. Despite the arguments of the state, the court found that the questions asked of the defendant by the officer were not for clarification, but intended to obtain information. As such, the officer could not ask these questions until Fernandez had the benefit of advisement from his parent, counsel or interested adult.

In the majority opinion of the Louisiana Supreme Court, Justice Lemmon first determined that the officer's questioning was a custodial interrogation that would have triggered the Dino requirements. The court then considered the continuing "vitality" of the Dino standard. In its evaluation, the court cited the United States Supreme Court decision in Fare v. Michael C., which approved the use of a "totality of circumstances" test in this area. This test required that the courts inquire into all circumstances surrounding a juvenile interrogation including age, experience, education, background, intelligence, and ability to understand his

47. 712 So. 2d 485 (La. 1998).
49. Id. at 11.
50. In fact, when the judge handed down her ruling on the motion, the prosecution noted that he was not even familiar with the Dino ruling. Id. at 41.
rights. Justice Lemmon then stated that the Louisiana Constitution required no more than this type of inquiry. He also noted that the Pennsylvania decision that Dino was modeled after had been overruled to reinstate the totality of circumstances test. Although the court recognized the empirical evidence displaying a failure by juveniles to comprehend the language in standard waiver forms, it agreed with other courts that the totality of circumstances test would meet the special needs of juveniles. Finally, Justice Lemmon, in discussing Dino's public policy grounds, found that in the past twenty years, the state had shifted away from its policy of extending special treatment to juveniles, and that the only public policy references cited by the Dino court were legislative, not judicial, decisions. Therefore, the court held the Dino requirements were not constitutionally or statutorily required and could be overruled.

Justice Johnson dissented. She first noted the recent adoption of the Louisiana Children's Code that recognizes the need for additional protection of minors. Second, she cited the language of the Dino court finding that juveniles are not mature enough to understand their rights. Finally, she criticized the majority for ignoring Louisiana's tradition of providing increased protection for juveniles from their immaturity, citing rules that protect minors from the evils of gambling, purchasing alcohol, and using tobacco products.

III. THE DIFFERENT APPROACHES TO JUVENILE WAIVER

A. The Miranda Standard

When the Supreme Court issued its ruling in Miranda v. Arizona, it provided little guidance as to the application of the new standard it had created. Miranda held that before any person taken into custody could be interrogated, the police must inform the person of his right to remain silent, that any statement made by him may be used as evidence against him, that he has a right to an attorney, and that if he cannot retain an attorney, one will be appointed for him. In order for a waiver of these rights to be effective, the suspect must make the waiver voluntarily, knowingly, and intelligently.

The Miranda standard was created in a case involving an adult in the judicial system. Miranda did not mention procedures dealing with juveniles. The Court referred to the issue of applying Miranda type standards to juveniles the next year

54. Fernandez, 712 So. 2d at 489.
55. Id.
56. Id.
57. Id. at 490.
59. Id. at 444, 86 S. Ct. at 1612 (emphasis added).
in *In re Gault*, where it held that the Due Process Clause of the Fourteenth Amendment applied to juveniles as well as adults. Justice Fortas, writing for the Court, concluded that a juvenile and his parents must be informed of the juvenile’s right to counsel at proceedings to determine delinquency, and that if he could not afford counsel, one would be appointed to represent him. The Court also recognized a juvenile’s privilege against self-incrimination and noted, “[S]pecial problems may arise with respect to waiver of the privilege by or on behalf of children.” However, it did not address these special problems, nor did it set forth any guidelines for lower courts to follow in the future.

B. The Totality of Circumstances Test

Shortly after Gault, the United States Fifth Circuit Court of Appeals, in *West v. United States*, adopted a “totality of circumstances” standard to determine whether a child validly waived his *Miranda* rights. West was a sixteen-year-old male who had been found in possession of a stolen vehicle. Relying upon numerous decisions of the Supreme Court and other federal courts dealing with waiver of *Miranda* rights, the court rejected a standard based solely on the age of the juvenile and articulated guidelines for the totality of circumstances standard. Under this test, one must look at all of the events surrounding the interrogation of the juvenile, focusing specifically on nine factors: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his right to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogation; (7) length of interrogations; (8) whether the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extrajudicial statement at a later date. The court found that West had a tenth grade education and had lived on his own as a working adult for several months; he was fully informed of his rights, and was interrogated only for a short period of time after police had filed formal charges. Looking at the totality of circumstances, the court found that West had voluntarily, knowingly, and intelligently waived his right to remain silent.

Several years later, the United States Supreme Court addressed this specific issue again in *Fare v. Michael*. This case involved a sixteen-year-old juvenile accused of murder in California. The California Supreme Court held that the juvenile’s request to see his probation officer before interrogation was a *per se*
invocation of his right to remain silent and to consult with counsel. In a five-four decision, the United States Supreme Court reversed. Writing for the majority, Justice Blackmun found that a probation officer, not trained in the law, was not in a position to advise the accused as to his rights. Since the probation officer cannot act on behalf of the defendant and the communications of the accused to the probation officer would not be shielded by the lawyer-client privilege, the probation officer was no substitute for Fifth Amendment counsel. Therefore, the majority held, this request did not per se constitute an invocation of the juvenile's Fifth Amendment rights. Furthermore, Justice Blackmun found the "totality of circumstances approach... adequate to determine whether there has been a waiver even where the interrogation of juveniles is involved." The Court found no reason to expand the Miranda requirements any further for juveniles than for adults, stating:

The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

This approach, according to Blackmun, allowed the lower courts the flexibility needed to consider the requests of the child, while refraining from "imposing rigid restraints on police and courts..." After reviewing the standard Miranda created, Justice Marshall discussed the Court's history concerning juveniles in an interrogation setting, relying on Gallegos v. Colorado. In Gallegos, the majority reasoned that a fourteen-year-old could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions... A lawyer or adult relative or friend could have given petitioner the protection which his own immaturity could not." In a separate dissent, Justice Powell discussed what he considered the majority's inconsistency with the Court's prior opinion in In re Gault. Powell noted that, in Gault, the Court had stated, "[C]are must be taken to assure that the admission was voluntary, in the sense not

67. Id. at 719, 99 S. Ct. at 2569.
68. Id.
69. Id. at 725, 99 S. Ct. at 2572.
70. Id.
71. Id. at 725-26, 99 S. Ct. at 2572.
72. Id. at 729, 99 S. Ct. at 2574.
73. 370 U.S. 49, 82 S. Ct. 1209 (1962).
74. Fare, 442 U.S. at 729, 99 S. Ct. at 2574.
75. 384 U.S. 1, 87 S. Ct. 1428 (1967).
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.\textsuperscript{76}

The decision by the Supreme Court in \textit{Fare v. Michael C.}\textsuperscript{77} led most states to stand by the totality of circumstances approach.\textsuperscript{78} It also enticed some states, such as Georgia and Pennsylvania, to dispense with the stricter \textit{per se} approaches they had previously adopted, and return to the more flexible totality approach.\textsuperscript{79} These states generally cite the United States Constitution and the Supreme Court’s decision in \textit{Fare} for the basis of their decision to use the totality approach.\textsuperscript{80}

\section*{C. \textbf{The Per Se Standard}}

Several states have been dissatisfied with the totality of circumstances approach in juvenile cases. Since states are free to go beyond the protections of the United States Constitution and the Court’s decision in \textit{Fare}, many states have turned away from the totality approach and adopted higher standards of protection for juveniles. Recognizing the problems that a high degree of discretion can create in these cases, and noting that empirical research has shown that juveniles have difficulty understanding their rights, many courts opted for a more concrete, simplified \textit{per se} approach.\textsuperscript{81} Some state courts and legislatures began mandating

\begin{itemize}
\item \textsuperscript{76} Id. at 55, 87 S. Ct. at 1458. References to this decision were noticeably absent from the majority opinion in \textit{Fare}.
\item \textsuperscript{77} 442 U.S. 707, 99 S. Ct. 2560 (1979).
that a juvenile be provided the opportunity to consult with a parent, guardian, attorney, or other interested adult before he can waive his *Miranda* rights and be questioned by police. This procedural safeguard is designed to reduce the juvenile's vulnerability and lack of maturity, putting him on more equal footing with the police officer interrogating him.

I. States Adopting the Per Se Approach Through Jurisprudence

At least thirteen states have now adopted some form of *per se* approach.\(^8^2\) One of the leaders of this movement was the Supreme Court of Indiana and its opinion in *Lewis v. State*.\(^8^3\) *Lewis* was a seventeen-year-old convicted of first degree murder.\(^8^4\) In one of the first opinions adopting a *per se* approach, the Indiana court reasoned, "It indeed seems questionable whether any child falling under the legally defined age of a juvenile and confronted in such a setting can be said to be able to voluntarily, and willingly waive those most important rights."\(^8^5\) After noting the legal and social differences between adults and juveniles, the *Lewis* court held that:

a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian, or an attorney representing the juvenile as to whether or not he wishes to waive those rights.\(^8^6\)

Following the *Lewis* structure, several state courts have created a *per se* approach to the juvenile waiver standard. The Supreme Court of Appeals of West Virginia adopted the test in *State v. Taylor*,\(^8^7\) which involved three juveniles of various ages. Citing the *Lewis* court, the West Virginia court noted that there was an "unrebuttable presumption, long memorialized by courts and legislatures, that juveniles lack the capacity to make legally binding decisions."\(^8^8\) Writing for a

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82. *See* sources cited supra note 81.

83. 288 N.E.2d 138 (Ind. 1972). This holding was later codified at Ind. Code § 31-32-5-1 (1999).

84. The police picked Lewis up at his home. They refused to inform him of the charges until they arrived at the police station. At that time, they told him they were investigating a stolen vehicle. Only after Lewis waived his rights did the police inform him they were investigating the injuries to the victim. They did not inform Lewis that the victim had died until after the statement was taken. *Id.* at 139.

85. *Id.* at 141.

86. *Id.* at 142.


88. *Id.* at 203.
unanimous court, the Chief Justice found that under the West Virginia statute, a juvenile could not waive his right to counsel before consulting with an attorney.  

In *In re ETC*, the Vermont Supreme Court instituted a *per se* rule based on the state constitution. ETC was a fourteen-year-old male convicted of breaking into two condominiums. At the time of the arrest, the boy was residing in a state juvenile home. The police only contacted the director of the home. Recognizing the "inability of a juvenile to choose . . . among courses of legal actions," the court set forth three requirements for a valid juvenile waiver: (1) he must be allowed to consult with an adult; (2) the adult must be interested in the general welfare of the child, and not associated with the prosecution; and (3) the adult must be informed of the rights of the juvenile.

New Jersey also has a judicially created *per se* standard. In *In re J.F.*, the New Jersey Superior Court held that police may not interrogate a juvenile without the presence of his parent or guardian unless: (1) the juvenile withholds the name(s) and address(es) of the parent or guardian; (2) a good faith effort to locate them has been made and is unsuccessful; and (3) the parent(s) or guardian refuses to attend the interrogation.

Despite the Louisiana Supreme Court’s statement to the contrary, this “trend towards an interested adult standard” has actually continued. At the same time the Louisiana Supreme Court struck down the *Dino* standard, a court in Hawaii was adopting the rule for the first time in *In re Doe*. The Hawaii Intermediate Court of Appeals discussed the various approaches to this problem by reviewing the most cited cases on the issue. The court reviewed the decision in *Fare*, and noted that the majority of states use the totality approach; however, the Hawaii court found that, under its statute requiring immediate parental notification, a logical interpretation of the statute required police to prohibit custodial interrogation of the child until a parent, guardian, or legal custodian had been given a reasonable opportunity to communicate with the child.

Other jurisdictions have interpreted existing parental notification statutes to require some effort on the part of police to allow for parental consultation before the court will allow a waiver to be valid. In New York, the court in *People v. Castro* found that a New York statute requiring immediate parental notification

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89. *Id.* at 203-04 (citing W. Va. Code § 49-5-8(d) and § 49-5-9(a)(2)).  
90. 449 A.2d 937 (Vt. 1982).  
91. *Id.* at 939-40.  
93. *Id.* at 430.  
96. *Id.* at 714. This case was overruled by the Hawaii Supreme Court subsequent to the completion of this case note. See *In re Doe*, 978 P.2d 684 (Haw. 1999). In its decision, the court determined that the plain language of the Hawaii statute merely required notification to the parents that their child was in custody. After noting that the Louisiana Supreme Court had recently overruled the *Dino* standard in *Fernandez*, the Court reversed the adoption of the *per se* standard and returned to the use of a totality of circumstances test.  
upon taking a child into custody meant that police must use all reasonable efforts to notify parents and await their arrival before conducting any interrogation of the child. If this is not done, the court will automatically exclude the statement of the child. In State v. Ellvanger, the North Dakota Supreme Court reviewed its statute requiring that a child not represented by his parent or guardian must be represented by an attorney at all stages of “custodial proceedings” and determined that the word “proceedings” including investigational interrogations. The court then held that the police have a mandatory duty to provide a child who is not represented by his parent or guardian with an attorney, and the child may not waive this right.

2. States Adopting The Per Se Approach Through Legislation

Shortly after the Indiana Supreme Court issued the Lewis opinion, the Indiana legislature adopted the court’s decision and passed a more stringent per se statute requiring that rights of a juvenile may be waived only by the child’s counsel, parent, guardian, custodian or guardian ad litem. In order for a parent, guardian, custodian, or guardian ad litem to validly effect such waiver, it must be shown that: (1) the waiver was knowing and voluntary; (2) that person has no interest adverse to the child; (3) meaningful consultation has occurred between the person and the child; and (4) the child knowingly and voluntarily joins the waiver.

Other states have also adopted similar statutes. Texas has adopted a statute which prohibits a child from waiving his rights in a juvenile proceeding without the consent of an attorney. Oklahoma requires that no custodial interrogation commence until the child and the “parents, guardian, attorney, adult relative, adult caretaker, or legal custodian of the child have been fully advised of the constitutional and legal rights of the child.” Connecticut’s per se rule states that any “admission, confession or statement, written or oral, made by a child to a police officer . . . shall be inadmissible in any proceeding,” unless it was made in the presence of the child’s parent or guardian and after both the child and the adult have been advised of the child’s rights.

Recognizing the need for increased protection of juveniles, the United States Congress adopted a per se rule to be applied to juveniles taken into custody for alleged acts of juvenile delinquency under the Federal Juvenile Delinquency Act. This statute provides that, “Whenever a juvenile is taken into custody for an alleged

98. Id. at 380 (citing N.Y. Fam. Ct. Act § 305.2 (McKinney 1999)).
100. Id. at 813 (citing N.D. Cent. Code § 27-20-26 (Supp. 1999)).
101. Id.
103. Id.
act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in a language comprehensible to a juvenile . . . [and] shall also notify the parents, guardian, or custodian of the rights of the juvenile. . . .”108 In United States v. Nash,109 a federal district court held that notification of parent, guardian, or custodian after a statement had been taken from a juvenile did not satisfy the requirements of the Act. The statute requires notification of the adult prior to the waiver of rights by the juvenile.110

D. The “Rule of Fourteen”—A Variation of the Per Se Standard

Some states that have been wary of adopting a per se approach for older and more experienced juveniles have turned to a lower, age-based per se rule. Massachusetts was one of the first states to adopt this type of rule in Commonwealth v. A Juvenile.111 Here, the court reversed the convictions of two juveniles, ages twelve and thirteen, for breaking and entering. The unanimous court reviewed the studies done by Thomas Grisso112 and Ferguson and Douglas113 which suggested that most juveniles do not understand their rights when given standard warnings. This, along with decisions from other states and legislatures, led the court to find that it needed a per se approach in order to “prevent the warnings from becoming merely a ritualistic recitation wherein the effect of actual comprehension by the juvenile is ignored.”114 The court then held that, for the Commonwealth to demonstrate a juvenile had effected a valid waiver, it should show that the juvenile had the opportunity for meaningful consultation with a parent or interested adult; moreover, in cases of children under the age of fourteen, “no waiver can be effective without this added protection.”115 For juveniles fourteen and over, a totality approach would be used, with great weight placed upon whether the police gave the child an opportunity to consult with an adult prior to interrogation.116

This “Rule of Fourteen” prompted several other states to enact similar standards by statute. North Carolina’s legislature established a “Rule of Fourteen” in its juvenile statutes that provides no admission or confession resulting from an interrogation of a child less than fourteen years of age may be admitted into evidence unless it was made in the presence of the child’s parent, guardian, custodian, or attorney.117 West Virginia’s statute provides that for children less

108. Id.
110. Id. at 1443.
111. 449 N.E.2d 654 (Ma. 1983).
114. A Juvenile, 449 N.E.2d at 656.
115. Id. at 657.
116. The court held that the circumstances should “demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile.” Id.
than fourteen, a waiver may only be made with the consent of an attorney. For all other juveniles, waiver may be effected by the juvenile with consent of either a parent or an attorney. Montana has also adopted a requirement that children under sixteen must seek the advise of their parent or guardian before waiving their rights. If the child and the parent or guardian cannot agree, the child may only waive his rights after consultation with counsel. While not adopting a normal per se approach, New Mexico’s legislature went even further than some states, promulgating a rule that prohibits admission of statements made by children under thirteen in any circumstances. In each of these states, the totality approach is used in cases of juveniles over the per se age.

Most recently, the Supreme Court of Kansas created a “Rule of Fourteen” standard in In re B.M.B. B.M.B. was a ten-year-old male who was accused of raping a four-year-old girl. The interrogating officer questioned the child for more than half an hour without the child ever talking to his mother. The trial judge stated in his denial of the motion to suppress the statements from the interrogation that his decision was based on the length of the interrogation (approximately half an hour) and the fact that the child only cried on the way to the police station, and while at the station stated that he would do his homework, “rather than being described as tearful or overwrought.” The judge also stated, “I know nothing about [the child’s] maturity, other than he obviously can write and has signed the document . . . [and has] dated it appropriately.” Despite his admitted lack of personal knowledge of the child, the judge disregarded the opinion of experts who testified that this interrogation was “at best, incompetent; at [worst] reprehensible,” and admitted the statement.

In reversing the decision of the trial court, the Supreme Court of Kansas reaffirmed the use of the totality of circumstances test in the state; however, they limited its application to juveniles more than fourteen years of age. For children less than fourteen, the parents, guardian or attorney of the child must be given an opportunity to consult with the juvenile before he or she may waive his or her constitutional and legal rights. In making this decision, the court cited the Massachusetts decision in A Juvenile and several of the state statutes discussed above. It also noted the purpose of the Juvenile Offender’s Code was to have the state act as “parens patriae for the best interest and welfare of the child.” Finally, the court noted that this decision was consistent with the state’s commit-
ment to the rehabilitation of juveniles and the law providing that juveniles under fourteen may not be prosecuted as adults.\textsuperscript{126}

\section*{E. The Juvenile Waiver Form Approach}

Rejecting all of the above standards, the New Hampshire court created a different approach which it set forth in \textit{State v. Benoit}.\textsuperscript{127} In that case, the court recognized the findings of empirical studies which determined that juveniles have difficulty understanding standard waiver forms. In response, it created a "Simplified Juvenile Rights Form" which police officers must use when dealing with juveniles less than seventeen years of age. The form sets forth the rights of the child in simplified, explanatory language.\textsuperscript{128} The police must read the form aloud to the child, and then the child must read the form himself before he may sign

\begin{verbatim}
Before I am allowed to ask you any questions, you must understand that you have certain rights, or protections, that have been given to you by law. These rights make sure that you will be treated fairly. You will not be punished for deciding to use these rights. I will read your rights and explain them to you. You may ask questions as we go along so that you can fully understand what your rights are. Do you understand me so far? Yes __ No __

1. You have the right to remain silent. This means that you do not have to say or write anything. You do not have to talk to anyone or answer any questions we ask you. You will not be punished for deciding not to talk to us. Do you understand this right? Yes __ No __

2. Anything you say can and will be used against you in a court. This means that if you do say or write anything, what you say or write will be used in a court to prove that you may have broken the law. Do you understand this? Yes __ No __

3. You have the right to talk to a lawyer before any questioning. You have the right to have the lawyer with you while you are being questioned. The lawyer will help you decide what you should do or say. The things you say to the lawyer cannot be used in court to prove that you may have broken the law. If you decide you want a lawyer, we will not question you until you have been allowed to talk to the lawyer. Do you understand this right? Yes __ No __

4. If you want to talk to a lawyer and you cannot afford one, we will get you a lawyer at no cost to you before any questioning begins. This means that if you want a lawyer and you cannot pay for one, you still may have one. Do you understand this right? Yes __ No __

5. You can refuse to answer any or all questions at any time. You also can ask to have a lawyer with you at any time. This means that if you decide, at any time during questioning, that you do not want to talk, you may tell us to stop and you cannot be asked any more questions. Also, if you decide you would like to talk to a lawyer at any time during questioning, you will not be asked any more questions until a lawyer is with you. Do you understand this right? Yes __ No __

6. (In felony cases only) There is a possibility that you may not be brought to juvenile court but instead will be treated as an adult in criminal court. There you could go to a county jail or the State prison. If you are treated as an adult you will have to go through the adult criminal system, just as if you were 18 years old. If that happens, you will not receive the protections of the juvenile justice system. Do you understand this? Yes __ No __

7. Do you have any questions so far? Yes __ No __
\end{verbatim}
it. A second form must be read and signed if the child agrees to waive his rights.\textsuperscript{129} Unfortunately, failure by the police to use the form is only a rebuttable presumption of inadequacy, not a \textit{per se} invalidation of the waiver.\textsuperscript{130} However, the court noted that, in reality, it would be unlikely that circumstances would arise to justify the failure of police to use the waiver form. Many commentators have suggested the use of such specialized waiver forms,\textsuperscript{131} claiming that such forms could raise the understanding of younger juveniles, obviating the need to have police tailor their presentation to juveniles of different ages and mental abilities. However, no form would be able to assist every child; nor would such a form "diminish the potentially intimidating nature of a police interrogation."\textsuperscript{132}

IV. PROBLEMS WITH THE TOTALITY OF CIRCUMSTANCES APPROACH

Despite the widespread use of the totality of circumstances standard, it remains problematic. Many legislatures, courts and commentators have rejected the approach because they do not believe a juvenile has the mental capacity to waive his \textit{Miranda} rights without any outside assistance.\textsuperscript{133} In his seminal work, \textit{Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis,}\textsuperscript{134} Thomas Grisso surveyed more than four hundred juveniles, including previous offenders and non-offenders, and compared their understanding of standard \textit{Miranda} rights to that of a group of adults. Grisso's first test evaluated the group's understanding of each of the four separate warnings in a standard waiver of rights form by asking

\begin{itemize}
  \item [129.] \textit{Id.} at 307. This form reads in part:
  \begin{quote}
    I can read and understand English. \textbf{Yes} \textbf{No} \textbf{.} I have been read and I have read my rights as listed above. I fully understand what my rights are. I have been asked if I have any questions and I do not have any. I am willing to give up my right to silence and answer questions. I give up my right to have a lawyer present. I do not wish to speak to a lawyer before I answer any questions. No promises or threats or offers of deals have been made to me to make me give up my rights. I understand that I may change my mind at any time and say that I want my rights if I choose. However, if I change my mind, it will not affect what I have already done or said.
  \end{quote}
  \item [130.] \textit{Id.} at 304.
  \item [132.] \textit{Benoit}, 490 A.2d at 307.
  \item [133.] \textit{See} supra Part III.D-E.
  \item [134.] Grisso, \textit{supra} note 112. Grisso's study consisted of several different tests. The first involved the subject's understanding of the four \textit{Miranda} warning statements. For example, the subject was provided with the statement, "You do not have to make a statement and have the right to remain silent." The subject then paraphrased the statement into his own words to show his understanding of the meaning of the statement. Because of the varied nature of the responses, a panel of psychologists and lawyers was formed to group the responses into three categories for scoring. The second test involved a vocabulary test where the subjects were asked to define six specific words from the warnings: consult, attorney, interrogation, appoint, entitled, and right. The third test was a true-false test where the subject was showed two cards, first the correct \textit{Miranda} warning, and then a paraphrased version. The subject was then required to identify by stating true or false whether or not the paraphrased version meant the same thing as the original warning. For a more detailed explanation of the testing process, see Grisso, \textit{supra} note 112, at 1144-47.
\end{itemize}
the subjects to define the rights in their own language. The results determined that 55.3% of the juveniles surveyed failed to understand at least one of their *Miranda* rights. Only 20.9% of juveniles under fifteen understood all four of the warnings provided in a standard *Miranda* waiver, compared with 42.3% of adults surveyed. Most importantly, only 29.3% of the juveniles understood their right to consult with an attorney and have him present at interrogation. Grisso also tested the juveniles' understanding of the function and significance of their *Miranda* rights. This section of the survey reached several notable conclusions:

- 28.6% of the juveniles believed the police were friendly or apologetic;
- 28% assumed lawyers owed a duty to the court which took precedence over the attorney-client privilege;
- 61.8% believed a judge could penalize a juvenile for invoking his right to silence; and,
- 55.3% thought they would be required to explain their criminal involvement in court if questioned by a judge, despite their right to remain silent.

Grisso analyzed all options for evaluating a juvenile's waiver and determined that the best protection for juveniles would be provided when counsel consults with the juvenile before the waiver. After conducting similar studies, the President's Crime Commission, the Institute of Judicial Administration, and American Bar Association Juvenile Justice Standards Project agreed and promulgated recommendations that would make a child's right to counsel at all stages of the juvenile justice process non-waivable.

Similar surveys done by other scholars in this area also conclude that juveniles, especially those under fifteen, and particularly learning disable juveniles, do not have the capacity to understand their *Miranda* rights. One study, cited in the

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135. Id. at 1153-54.
136. Id. at 1153
137. Id. at 1152. The results of survey showed that 8.8% of juveniles did not understand their right to remain silent; 23.9% did not understand that what they said could be used against them in court; 44.8% did not understand their right to consult with an attorney; and 4.9% did not understand their right to have an attorney provided for them. Lack of understanding was shown by obtaining zero points for their responses to being questioned about the meaning of the right. An adequate response received two points.
138. Id. at 1157-59.
139. Id. at 1161-62.
142. See also Robert E. Shepherd Jr. & Barbara A. Zaremba, *Juvenile Justice: When a Disabled Juvenile Confesses to a Crime: Should it be Admissible?*, ABA Criminal Justice, Vol. 9, No. 4, Winter 1995, at 31-35 (citing Barbara A. Zaremba, *Comprehension of Miranda Rights by 14-18 Year Old African-American and Caucasian Males With and Without Learning Disabilities*, Ed.D. Diss., School of Education, College of William & Mary, 1992); Ferguson & Douglas, supra note 24 (this study was cited in *Dino*, finding that 81 of 86 juveniles who had waived their *Miranda* rights "did not consciously and fully understand their rights."); Sam Manoogian, *Factors Affecting Juveniles' Comprehension of*
Brief for the Respondent in *Fernandez*, found that: (1) only one of the 115 juveniles studied understood the concept of a right; (2) only one of the juveniles could correctly identify what a lawyer is and what he does; (3) the majority of juveniles believed that evoking their right to counsel would only entitle them to a lawyer in court; (4) a majority thought that the statement “anything you say can and will be used against you in a court” meant that any disrespectful words to the police would be reported to the judge; (5) a majority of learning disabled juveniles believed that the right to remain silent only meant that they did not have to say anything without being directly asked; and (6) although the majority of learning disabled juveniles replied “yes” when asked whether or not they understood their rights, results showed that only a few of them actually understood.1 Without such understanding, it seems impossible for any court to determine that a juvenile has “voluntarily, knowingly, and intelligently” waived his rights.

Another serious problem with the totality of circumstances approach is the unfettered discretion of the courts. Even the United States Supreme Court recognized in *In re Gault* that “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”144 The totality approach gives judges the latitude to admit all but the most extremely coerced confessions by juveniles. As discussed above, many researchers found that children under most circumstances cannot understand their rights when presented with them. Nevertheless, judges allow most confessions by juveniles into court.145

These cases could be the result of many factors. First, these decisions may be the result of increasing pressure from the public to “crack down” on juvenile

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144. **Gault**, 387 U.S. at 18, 87 S. Ct. at 1439.

145. See, e.g., Paxton v. Jarvis, 735 F.2d 1306 (11th Cir. 1984) (confession of fifteen year old was valid after questioning from 8:30 P.M. to 4:30 A.M. without food, despite inconsistencies and evidence of police yelling accusations and racial slurs at the juvenile); Vance v. Bordenkircher, 692 F.2d 978 (4th Cir. 1982) (fifteen year old with mental age of nine and below normal IQ of 62 can effectuate valid waiver without consultation); Cotton v. U.S., 446 F.2d 107 (8th Cir. 1971) (court found juvenile understood his rights despite showing that the fifteen year old had only attended school for four years, entering first grade at the age of ten, and that he was unable to spell the word “true” on the waiver form and in court even after being told how by the judge); McDonald v. Black, 661 F. Supp. 660 (D. Neb. 1986) (waiver valid for two of three confessions; invalid confession obtained while sixteen year old defendant was sobbing, incoherent, and complaining of chest pains; second, valid confession was given shortly after juvenile was treated in the hospital for acute anxiety; third was given the next morning; all three statements were inconsistent); Parker v. State, 351 So. 2d 927 (Ala. Crim. App. 1977) (confession valid despite fifteen year old with fifth grade reading level being confronted by two police officers who consistently accused him of lying and told him that he would “feel better if he told us the truth and asked for forgiveness”); State v. Jackson, 576 P.2d 129 (Ariz. 1978) (confession valid despite presence of coercive factors); People v. Hester, 237 N.E.2d 466 (Ill. 1968) (confession of a fourteen year old with IQ of 82 was valid); Commonwealth v. Darden, 271 A.2d 257 (Pa. 1970) (confession was found voluntary despite borderline mental retardation of fifteen year old juvenile questioned without parental or attorney consultation).
crime. Without stringent guidelines to follow, elected judges might be less willing to throw out a confession by a child in a serious crime. The totality approach lacks a clear and definite measure against which a court can determine whether a juvenile confession is voluntary. As shown by frequent dissents in totality approach cases, varying interpretations of the same facts can lead to different conclusions of law. At least one commentator believes that such inconsistent applications “can be attributed to the lack of any criteria indicating the weight a court should give to the various circumstances surrounding a custodial interrogation.” In fact, the court in Fernandez did not even specify which factors the lower courts should consider when deciding the totality of circumstances, leaving the courts with virtually no guidance.

More importantly, a determination of voluntariness by a trial court judge should be considered a finding of fact, which an appellate court should not disturb unless it is unsupported by the evidence. This stringent standard of review could be very difficult to meet by a juvenile appealing an adverse ruling on a motion to suppress. Despite the Louisiana Supreme Court’s holding in State v. David that “[t]he State has a burden of proving the voluntariness of a confession beyond a reasonable doubt at a hearing on a Motion to Suppress,” under a totality of circumstances approach, the juvenile must affirmatively prove he either did not understand the warnings administered to him, or did not have the capacity to waive his rights knowingly and intelligently. The Louisiana Supreme Court has held that a court determining the admissibility of a juvenile’s confession must not only consider whether the juvenile was aware of his rights, “but also of the consequences of foregoing them, . . . knew he was faced with a phase of the adversary system, and . . . was aware that he was not in the presence of persons acting solely in his interest.” Many judges may not be aware of the research dealing with this subject and, thus, cannot consider it when making a ruling on a motion to suppress;

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149. The court mentioned in a footnote an “illustrative list of factors” from West which were cited (and rejected) in Dino, but these were not in the body of the opinion, nor were they suggested to be binding on future courts. State v. Fernandez, 712 So. 2d 485, 489 n.5 (La. 1998).


152. 425 So. 2d 1241 (La. 1983).

153. Id. at 1245.

this is especially true in Louisiana where we have had a per se approach for more than two decades, thus making the need for such information minimal. Therefore, the juvenile must often make the court aware of this information himself, and then prove that he, as an individual, did not understand his rights or the consequences of waiving them.\textsuperscript{155}

Furthermore, the lack of specific judicial guidelines has an adverse effect not only on judicial efficiency, but also on police economy. Without some concrete guidelines, police officers have no assurance the statements they obtain in an interrogation will be admissible in a courtroom. The officers do not know at the time of the interrogation which judge will eventually preside in the case, or what factors that particular judge will place more emphasis on when issuing a ruling in a motion to suppress. This makes it "practically impossible" for an officer taking a statement from a juvenile to determine what actions he needs to take in order to assure the statement will be admissible at trial.\textsuperscript{156}

V. PROBLEMS WITH THE PER SE APPROACH

Many courts have rejected the per se approach, criticizing the standard for several reasons. Almost all advocates of the totality approach criticize the failure of per se rules to sufficiently accommodate the interests of society and justice.\textsuperscript{157} As some scholars have noted, the per se approach may not address the interest of society in preventing a guilty offender from being released on a technicality.\textsuperscript{158} Many courts have determined that the per se approach is unnecessary, finding that the totality approach is sufficient to weigh all of the interests involved. In \textit{Quick v. State},\textsuperscript{159} the Alaska Supreme Court rejected the use of the per se approach stating, "The mere fact that a person is under the age of majority does not automatically render him incapable of making a knowing and voluntary waiver. The surrounding circumstances must be considered in each case to determine whether a particular juvenile had sufficient knowledge and maturity to make a reasoned decision."\textsuperscript{160} In affirming its use of the totality approach, the Maine Supreme Judicial Court emphasized, "The framework provided by the totality of the circumstances test is sufficiently flexible so as to accommodate the interests of

\begin{itemize}
\item \textsuperscript{155} For example, in \textit{State v. Fernandez}, the Supplemental Brief for the State, dealing with the issue of overruling \textit{Dino} was only eleven pages long, and referenced almost exclusively to the decision of \textit{Fare}. The Supplemental Brief for the Defendant-Respondent, however, contained thirty-six pages of text, and was 118 pages with the appendices containing research by scholars and commentators. The defendant was required to present the court with all of the empirical evidence supporting his position. However, the court made no mention of this evidence in its opinion.
\item \textsuperscript{157} See \textit{State v. Fernandez}, 712 So. 2d 485, 489 (La. 1998).
\item \textsuperscript{158} See Anthony J. Krastek, Comment, \textit{The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule}, 17 Duq. L. Rev. 659, 684 (1979).
\item \textsuperscript{159} 599 P.2d 712 (Alaska 1979).
\item \textsuperscript{160} \textit{Id.} at 719.
\end{itemize}
both the juvenile and the State.”161 Furthermore, courts adopting the totality approach have rejected a per se approach as being too overprotective of juveniles. In reversing its decision to adopt a per se approach, the Supreme Court of Pennsylvania noted the “lack of wisdom in [the per se approach] which is overly paternalistic, unnecessarily protective and sacrifices too much of the interests of justice.”162

Second, some critics argue that a per se rule actually increases uncertainty and speculation in determining whether a waiver is valid under certain circumstances. Some commentators believe the presence of an adult may not always be in the best interest of the child.163 For example, in Anglin v. State,164 a Florida court found that a juvenile’s confession was valid despite the fact that the mother told the child to confess or she would “clobber him.”165 Parents who do not understand the seriousness of the charges might encourage a child to tell the truth to the officers about the incident.166 A leading scholar on Youth Rights, Lawrence Schlam, has noted that there are several potential problems with involving a parent at the interrogation of his or her child, including: having children make up stories to the parents; creating a conflict of interest if the parent is eventually called to testify against the child involving factual issues such as the child’s alibi; or even parental embarrassment which leads to excess parental influence on the child to confess.167 One commentator found that, “[p]arents, possibly ashamed and/or angered that their child is in custody, may further coerce the child into owning up to the alleged offense, instead of affording the youth shelter.”168 Also, there could be a case where the parent or interested adult’s involvement in the crime may make this person biased. In some instances, the parent either refuses to participate169 or worse, as in Daniels v. State,170 arrives at the police station highly intoxicated and unable to assist the child. Moreover, studies such as Grisso’s demonstrate that many adults do not sufficiently understand their own rights, leading to the inevitable conclusion that some parents will not understand the rights of their children.171 Also, as discussed above, some courts have had difficulty determining

163. See Schlam, supra note 148, at 920.
165. Id. at 752.
166. Id. See also Harden v. State, 576 N.E.2d 590 (Ind. 1991); In re J.D.Z., 431 N.W.2d 272 (N.D. 1988); Schlam, supra note 148, at 920 n.154.
171. See Grisso, supra note 112.
what is actually required by a "meaningful consultation" and who qualifies as an "interested adult." 172

Finally, some critics believe the per se approaches are unconstitutional. 173 They base this belief on the idea that constitutional rights are considered personal to the individual accused. 174 However, most per se rules require the waiver to be effected by a third person: the attorney or interested adult, after consultation and agreement with the juvenile. The child himself cannot waive the right, which critics believe is a violation of the Fifth Amendment.

VI. A RESPONSE TO THE CRITICS OF THE PER SE APPROACH

The criticism that per se approaches are inflexible, prophylactic rules which do not effectively allow judges to consider the interest of society ignores the fact that the rule (Miranda) upon which these standards are based is itself a prophylactic rule which allows a guilty offender to go free if the police have not followed the "technicalities" of the rule. The Supreme Court based its ruling in Miranda on the concept that the interests in preserving a person's basic constitutional rights outweighed the interest of society in not allowing a guilty defendant to go free. 175 The per se approaches seem more consistent with the concept of preserving the basic rights of a child who may be confused and scared when presented with a custodial interrogation. It guarantees that the child will be afforded the opportunity to consult with an adult interested in the best welfare of the child before the child makes a decision that could adversely affect the rest of his future.

There have been instances where the adult who is consulted places more pressure on the child to confess than the police would have done. 176 However, these cases are rare, and if the courts follow the totality approach, we are often faced with a child who is likely not to have the capacity to waive his rights being left on his own to do so. States such as Indiana solve this problem by requiring, if the consultation is with a parent or interested adult, that the adult has "no interest adverse to the child." 177 Therefore, under a strict construction of the statute, if a conflict of interest exists, the interrogation cannot proceed until a qualifying adult is found to participate in the waiver. Montana's statute requires that if the parent and the child cannot agree upon the waiver decision, that decision can then only be

172. See supra notes 32-46 and accompanying text.
173. See Krastek, supra note 158 and Schlam, supra note 148.
176. See In re J.D.Z., 431 N.W.2d 272 (N.D. 1988) (Officer informed ten-year-old child of his right to remain silent at which point the child's stepfather stated that the child "will answer [the officer's] questions and [the child] will tell the truth because [the stepfather] wanted to get to the bottom of this." After that point the stepfather began to interrogate the child until he made several incriminating statements.).
made after the child consults with an attorney.\textsuperscript{178} A similar provision in any \textit{per se} statute would provide the same type of protection.

The final criticism, that such third party waivers are unconstitutional has not been accepted by most courts. The United States Supreme Court has itself recognized this type of third party waiver in \textit{Thompson v. Oklahoma}:\textsuperscript{179}

The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children . . . all retain rights to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principal in mind. . . . [W]e assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with the full benefit of the costs and benefits attending such decisions.\textsuperscript{180}

It is not only constitutional for Louisiana to allow third party waivers, it would be inconsistent for the state not to allow this. Many Louisiana code articles and statutes deny minors the capacity to assert the same rights as adults.\textsuperscript{181} In fact, there are few, if any, binding decisions a child can make without consultation with and approval of an adult. Louisiana Code of Civil Procedure articles 683 and 732 state that an unemancipated minor does not have the capacity to sue or be sued.\textsuperscript{182} These articles provide that a representative brings the minor’s action on his behalf, generally a parent or guardian. It seems ironic that a child cannot assert his right to sue for damages when the police violate his rights, but he can be found to have the capacity to waive these rights when requested to do so by the police. A female minor cannot assert her right to obtain an abortion without parental consent or a court order,\textsuperscript{183} nor can she consent to a private adoption of her child.\textsuperscript{184} A minor may not enter into marriage without parental consent.\textsuperscript{185} Most significantly, a minor has no capacity to contract under Louisiana Civil Code article 1918.\textsuperscript{186} This means that the child cannot assert his right to buy, sell, donate or improve his property without the action of his parent, guardian or the court. These are just a few examples of instances where the state has determined that minors are not mature enough to assert their own rights.

The \textit{per se} approach may have critics, but it solves most of the problems found in the totality of circumstances test. Besides ensuring a child receives some adult consultation, the \textit{per se} approach removes police discretion and provides

\begin{footnotes}\footnotetext[178]{\textsuperscript{178} Mont. Code Ann. § 41-5-331 (1999).} \footnotetext[179]{\textsuperscript{179} 487 U.S. 815, 108 S. Ct. 2687 (1988).} \footnotetext[180]{\textsuperscript{180} Id. at 825, 108 S. Ct. at 2693 n.23.} \footnotetext[181]{\textsuperscript{181} See infra notes 198-210 and accompanying text for discussion on limitations of minors rights in Louisiana statutes and codifications.} \footnotetext[182]{\textsuperscript{182} La. Code Civ. P. arts. 683 and 732.} \footnotetext[183]{\textsuperscript{183} La. R.S. 40:1299.35.5 (Supp. 1999).} \footnotetext[184]{\textsuperscript{184} La. Ch.C. art. 1113 (minor must have parental consent or court approval to surrender a child to anyone other than an agency).} \footnotetext[185]{\textsuperscript{185} La. Civ. Code art. 2333.} \footnotetext[186]{\textsuperscript{186} La. Civ. Code art. 1918.}}\end{footnotes}
predictability. It could also increase parental involvement in the procedures their children are facing. The per se rule increases judicial economy while protecting our children from undue influence. It is not too great a burden on a police department, since they have been doing it for twenty years, to find an interested adult before questioning a child.\textsuperscript{187}

VII. CRITIQUE OF THE \textit{Fernandez} Decision

In the \textit{Fernandez} decision, Justice Lemmon cited three reasons for the court’s decision to overturn the \textit{Dino} standard. He first determined that the trend toward the per se standard had not continued, and some courts were turning away from their prior use of per se approaches. Second, the court found that, despite empirical studies, the totality approach adequately addressed the special needs of juveniles. Finally, the justices cited a turn away from Louisiana’s public policy to protect juveniles, stating that, “[t]he treatment accorded juveniles has undergone a sharp shift in the twenty years since \textit{Dino} was decided, as evidenced by the Legislature’s promulgation of the Children’s Code and other changes in our laws.”\textsuperscript{188}

The court in \textit{Fernandez} based a great deal of its reasoning on the fact that most other jurisdictions did not have a per se requirement. However, the court did not conduct a thorough survey of other jurisdictions when making this statement. The court merely noted that the \textit{Dino} court based much of its opinion on the Pennsylvania case of \textit{Commonwealth v. Smith},\textsuperscript{189} which was later overruled.\textsuperscript{190} However, this was not the only case that the \textit{Dino} court had cited; it also cited cases from Georgia\textsuperscript{191} and Indiana.\textsuperscript{192} Although the Georgia Supreme Court has also overruled the decision cited in \textit{Dino},\textsuperscript{193} Indiana has not abandoned its decision. In fact, as noted above, the Indiana legislature adopted the per se approach in a statute.\textsuperscript{194} Furthermore, several other states have adopted the per se approach either through jurisprudence or legislation.\textsuperscript{195} Therefore, the \textit{Fernandez} court should have had more difficulty in concluding that “the principle authority on which the majority relied in \textit{Dino} has now been overruled.”\textsuperscript{196}

\textsuperscript{187} Since \textit{Dino}, relatively few cases have been brought alleging a violation of the standard. Only 85 Louisiana cases have cited \textit{Dino} in the past twenty years, and a many of those cases dealt with the second half of the \textit{Dino} ruling, not applicable here.

\textsuperscript{188} State v. Fernandez, 712 So. 2d 485, 489 (La. 1998).

\textsuperscript{189} 372 A.2d 797 (Pa. 1977).

\textsuperscript{190} See \textit{Commonwealth v. Christmas}, 465 A.2d 989 (Pa. 1983) (holding that the per se standard should be a rebuttable presumption); and \textit{Commonwealth v. Williams}, 475 A.2d 1283 (Pa. 1984) (returning the state to the totality of circumstances standard).

\textsuperscript{191} Freeman v. Wilcox, 167 S.E.2d 163 (Ga. 1969).

\textsuperscript{192} Lewis v. State, 288 N.E.2d 138 (Ind. 1972).


\textsuperscript{194} Ind. Code § 31-6-7-3(a) (1999).

\textsuperscript{195} See supra note 81.

\textsuperscript{196} State v. Fernandez, 712 So. 2d 485, 488 (La. 1998). Although the \textit{Dino} court cited the
In the second section of its opinion, the court recognized the findings of the Ferguson and Douglas study regarding a juvenile's inability to comprehend the significance of waiving his rights; however, the court determined that the special needs of juveniles could still be served under the totality approach. There was no reference to the Grisso work or other studies that were presented to the court in the Brief for the Respondent.\textsuperscript{197} The court ignored the numerous studies and recommendations which supported the previous holding requiring consultation before allowing children to waive their rights. The court's only justification under this section of its analysis seemed to be that the majority of other jurisdictions have agreed that the totality approach sufficiently protects the interest of juveniles. This same justification was rejected in \textit{Dino}. The court cited no new evidence to warrant the \textit{Fernandez} majority's departure from the court's previous findings in this area.

Finally, in a most unusual statement, the \textit{Fernandez} court stated, "The treatment accorded juveniles has undergone a sharp shift in the twenty years since \textit{Dino} was decided. . . ."\textsuperscript{198} This sentence introduced a section of the opinion whereby the court proceeded to imply that Louisiana has lessened the special protections provided for juveniles by the courts and the legislature since the \textit{Dino} decision. The court found that the totality of circumstances test would accommodate any such special needs now, despite the fact that the same court found less than two decades ago that this test was not sufficient.

However, the court did not list one example of the legislature or the courts lessening the protection afforded to juveniles. As the basis for this contention, Justice Lemmon cited only the "Legislature's promulgation of the Children's Code and other changes in our laws."\textsuperscript{199} The court reconciled this by noting the Pennsylvania court two more times than it cited the cases from Georgia and Indiana, it was not the "principal authority" for the court's decision. As noted above, the \textit{Dino} court based its decision on several factors, including research by scholars, heightened protection for juveniles in other areas of Louisiana law, and case law from other states. Each of these factors played an equal role in the \textit{Dino} decision, and they were generally ignored by the court in \textit{Fernandez}.

\textsuperscript{197} Supplemental Reply Brief for Defendant-Respondent at 5-19, State v. Fernandez, 712 So. 2d 485 (La. 1998) (No. 96-KK-2719). Also, numerous studies, including the Grisso article, \textit{supra} note 112, were attached to the brief in the appendix.

\textsuperscript{198} \textit{Fernandez}, 712 So. 2d at 489.

\textsuperscript{199} \textit{Id.} The only "changes in our laws" mentioned was a discussion of "the blurred distinction between juvenile and adult proceedings" from C.B., R. B., T.C., R.C., S.C., 708 So. 2d 391 (La. 1998). Also, Justice Lemmon did not cite any particular provision of the Children's Code which represented a change in Louisiana's protections of juveniles. In fact, the Children's Code Preamble, La. C.Ch. art. 101 states, in part, that, "The people of Louisiana recognize the family as the most fundamental unit of human society; . . . that the relationship between parent and child is preeminent in establishing and maintaining the well-being of the child; . . . that parents should make decisions regarding . . . the discipline of the child." Furthermore, the Children's Code recognizes in its statement of purpose, Article 102, that, "The provisions of this Code shall be liberally construed to the end that each child and parent coming within the jurisdiction of the court shall receive . . . the care, guidance, and control that will be conducive to his welfare." (emphasis added). These statements suggest that the purpose of the Children's Code was not to lessen protections afforded to juveniles, as the \textit{Fernandez} court suggests, but instead, it was meant to maintain the protection of Louisiana's juveniles and assure that the state
provisions cited in Dino were "legislative decisions, while the Dino requirements are not."200 It did not address the list found in the Brief for the Defendant-Respondent of more than 150 constitutional provisions, Civil Code articles, and effective statutes in which the state legislature has made a special exception for or created a special protection for juveniles.201 Moreover, the current increase in juvenile crime indicates that children today have less guidance and education than they did twenty years ago, making them possibly more in need of special protection from the state. If children are so much more sophisticated today, then the laws that the state currently enforces limiting the capacity of juveniles to contract or conduct other adult transactions seem unnecessary.

Courts agree with the legislature that children are not capable of making long term contractual decisions; however, the Fernandez court held that a child does have the capacity to waive a constitutional right which could make the difference between freedom and permanent incarceration. This is a serious inconsistency in Louisiana's treatment of juveniles. The court was correct when it said the legislature did not codify the Dino decision expressly. However, in 1991, the legislature created the first Louisiana Children's Code to arrange pre-existing statutes concerning children into one source, while eliminating inconsistencies and ambiguities. Children's Code article 808 formally recognized the constitutional rights of a child.202 The legislature recognized the incapacity of a juvenile in Article 855, mandating that when a child appears to answer a petition, the court must first "determine that the child is capable of understanding statements about his rights..."203 Furthermore, the legislature did codify the Dino requirements to

used its best efforts to insure parental participation in a child's life, and that its actions continue to be in the best interest of a child in its custody.

200. Id.


202. La. Ch.C. article 808 reads in part:
All rights guaranteed to criminal defendants by the Constitution of the United States or the Constitution of Louisiana, except the right to jury trial, shall be applicable to juvenile court proceedings brought under this Title.

For a review of Article 808, see generally, Jan Kirby Byland, Comment, Louisiana's Children Code Article 808: A Positive Step on behalf of Louisiana's Children, 52 La. L. Rev. 1141 (1992).

203. La. Ch.C. art. 855 states:
A. When the child appears to answer the petition, the court shall first determine that the child is capable of understanding statements about his rights under this Code.
B. If the child is capable, the court shall then advise the child of the following items in terms understandable to the child:
(1) The nature of this delinquency proceeding.
(2) The nature of the allegations of the petition.
(3) His right to an adjudication hearing.
(4) His right to be represented by an attorney, his right to have counsel appointed as provided in Article 809, and his right in certain circumstances authorized by Article 810 to waive counsel.
(5) His privilege against self-incrimination.
(6) The range of responses authorized under Article 856.
the extent it provided that a judge cannot allow a child to waive his right to counsel without first determining that the child has "consulted with an attorney or other adult interested in the child's welfare..." This demonstrates the legislature's recognition of a child's inability to understand at least one of his constitutional rights without adult assistance.

It is also important to note that Louisiana has codified a "Rule of Fourteen" in regards to allowing juveniles to be prosecuted as adults. Louisiana Children's Code article 857 allows a court to transfer a juvenile to a court of criminal jurisdiction only if the child is fourteen years of age or older at the time of the offense, and then, only under limited circumstances.

Although the Children's Code contains hundreds of instances in which the state has made special protections available to juveniles, it is not the only place where the state has provided such protections. Numerous laws currently in effect protect children from their immaturity. Children are not allowed to purchase tobacco products, weapons, or sexually explicit materials, including magazine,

(7) The possible consequences of his admission that the allegations are true, including the maximum and minimal dispositions which the court might impose pursuant to Articles 897 through 900.

204. La. Ch.C. art. 810 provides in part:
A. The court may allow a child to waive the assistance of counsel if the court determines that all of the following exists:
   (1) The child has consulted with an attorney or other adult interested in the child's welfare.
   (2) That both the child and the adult advisor have been instructed by the court about the child's rights and the possible consequences of waiver.
   (3) That the child is voluntarily waiving his right to counsel.
   (emphasis added in text and footnote).

205. La. Ch.C. art. 857 states:
A. The court on its own motion or on motion of the district attorney may conduct a hearing to consider whether to transfer a child for prosecution to the appropriate court exercising criminal jurisdiction if a delinquency petition has been filed which alleges that a child who is fourteen years of age or older at the time of the commission of the alleged offense but is not otherwise subject to the original jurisdiction of a court exercising criminal jurisdiction has committed any one or more of the following crimes:
   (1) First degree murder.
   (2) Second degree murder.
   (3) Aggravated kidnapping.
   (4) Aggravated rape.
   (5) Aggravated battery when committed by the discharge of a firearm.
   (6) Armed robbery when committed with a firearm.
   (7) Aggravated oral sexual battery.
   (8) Forcible rape if the rape is committed upon a child at least two years younger than the rapist.
B. Notwithstanding any other provision of law to the contrary, a fourteen-year-old who is transferred pursuant to this Article and subsequently convicted shall not be confined for such conviction beyond his thirty-first birthday.

books, videos, or musical recordings. In the past two years, two important statutes have been amended to protect minors. In 1996, the legislature enacted Louisiana Revised Statutes 14:93.11 that placed an absolute prohibition on the sale of alcohol to anyone under the age of twenty-one. In 1997, it amended the motor vehicles statutes to allow only persons sixteen and older to obtain a driver’s licence, and only upon completion of a driver’s education course and after obtaining parental consent. These statutes demonstrate that the Fernandez majority was incorrect when it stated there has been a turn away from Louisiana’s public policy of protecting juveniles.

It must also be noted that a review of the reported cases dealing with the Dino decision did not show that the courts were having serious problems applying the standard. Most of the ambiguities that the court left in the Dino decision actually gave the courts great flexibility in allowing juvenile confessions. In the aftermath of the Dino decision, the courts limited the ruling to juveniles under the age of seventeen, and used the “interested adult” language to allow a variety of persons to qualify as appropriate advisors for the juveniles. Furthermore, the majority of the circuits construed the “meaningful consultation” requirement so broadly that essentially, all that was needed to meet that requirement was the mere presence of the adult at the time the waiver form is read and during the interrogation. Consequently, the per se approach, at least as it seems it was being applied in Louisiana, was not an inflexible, “prophylactic rule” whereby juvenile delinquents were being released based upon mere “technicalities.” The supreme court’s
reconsideration of the *Dino* policy was unnecessary. This was not a rule that was causing an enormous amount of conflicting litigation to the detriment of society.\(^{214}\)

**VIII. Conclusion**

Without the protection of the *Dino* requirements, the state's children are subject to an outdated, unpredictable, discretionary standard by which courts will determine their futures. The court's ruling in *Fernandez* could have a detrimental impact on the rights of children in Louisiana. Before *Fernandez*, commentators and other courts consistently cited Louisiana approvingly as one of the few states in the nation willing to recognize the need for heightened protection of juveniles. With this decision, the Louisiana Supreme Court has returned Louisiana to one of the majority of states which chose to ignore the strong evidence that children should be afforded greater protection than adults.

The totality of circumstances test is problematic and will inevitably lead to inconsistent results. The state legislature should amend the Louisiana Children's Code to include a *per se* requirement by which the courts will determine the effectiveness of a juvenile's waiver of rights, effectively overruling the Louisiana Supreme Court's decision in *Fernandez*. This provision should include the three basic requirements of the *Dino* standard: (1) before a juvenile may effect a waiver of rights, he or she must consult with an attorney, parent, guardian, or other interested adult; (2) the adult advisor and the child must both be informed of the child's constitutional rights; and (3) the adult advisor must have no interest adverse to the child.

Of all the criticisms of the *per se* approach, the only one which continues to have substantial merit is the argument that the requirement can be too stringent in cases of older, more mature juveniles. Instances arise where an otherwise valid confession would be inadmissible due to a violation of the *per se* requirement. For example, a near seventeen-year-old who has extensive experience with the judicial system and an above normal level of intelligence is probably as competent as most adults to make a valid waiver of his rights. However, under the traditional *per se* approach, this waiver would be invalid without consultation with an adult. These cases are among those limited circumstances where the interest of the state in justice may outweigh the benefits of such a requirement. However, a "Rule of Fourteen" or similar standard would solve this difficulty. It would allow the courts to use a more appropriate totality approach in this case, while maintaining increased protection for a less mature class of juveniles. Such a rule would also be consistent with Louisiana's requirement that children under fourteen cannot be prosecuted as adults.\(^{215}\) If they cannot be prosecuted as an adult, why should they be subject to the same treatment as adults when they are being interrogated? This

\(^{214}\) In fact, as noted above, there were only 85 reported Louisiana cases which even mentioned the *Dino* opinion. Of those, only a small few resulted in the suppression of the juvenile's confession.

\(^{215}\) La. Ch.C. art. 857.
has been an argument of several states adopting a “Rule of Fourteen” standard, and it applies equally in Louisiana.

Also, concern remains that the children would still not be properly advised in some cases, even under the per se approach. The studies by scholars such as Grisso show that many adults do not understand their own Miranda rights; therefore, how can they properly advise their children? This is a valid concern. In response, the legislature’s statute should require that if there is evidence that the available adult has an interest contrary to that of the child, or if the child and the parent cannot agree on the waiver decision, there must be a mandatory consultation with an attorney. Since the Children’s Code already requires that a juvenile be represented by counsel at all juvenile proceedings unless they have effected a valid waiver, it would not be much of an additional burden for the police to withhold interrogation until the child can obtain such counsel. The child has a right to remain silent, which if invoked, would prohibit police from interrogating the child at any time; it should be required that any such interrogation be postponed until a child can understand the ramifications of waiving this right. Furthermore, an attorney could actually increase the efficiency of interrogations by helping the child to provide clear and concise answers to difficult and confusing questions.

The current standard, however, is not acceptable. It is untenable to believe with the volumes of current research and data that a child could fully comprehend the gravity of his decision to waive his right to remain silent in a police interrogation. Parents teach young children to respect the authority of police officers and other adults; they are easily frightened and influenced. Their first instinct will generally be to offer information to the officer questioning them. Research shows that they are not likely to admit that they do not understand what is happening to them. It is no secret that police officers are seeking to obtain confessions from suspects in custody, not to warn children of reasons why speaking to the officer would be disadvantageous to the child. Without the requirements of Dino, there is no guarantee that the child will fully understand the ramifications of making a statement to the officer. Such decisions should not be left to an officer and a judge’s discretion. It should be proscribed by law.

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216. As noted above, such a waiver can only be effected after consultation with an attorney or interested adult, which is already a heightened standard. La. Ch.C. arts. 809-10.

217. See generally Grisso, supra note 112; see also Ferguson & Douglas, supra note 24.

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