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Waivers of Counsel in Juvenile Courts: Do Procedures Guard against Invalid Waivers?

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NOTES

WAIVERS OF COUNSEL IN JUVENILE COURTS: DO PROCEDURES GUARD AGAINST INVALID WAIVERS?

Juveniles charged with serious crimes in Minnesota often waive their right to counsel. Unfortunately, current procedural safeguards do not insure that juveniles will make knowing and intelligent waivers. This Note examines the current status of a juvenile's right to counsel in Minnesota, and proposes changes to guarantee that juveniles will receive adequate representation.

INTRODUCTION .............................................. 93
I. THE RIGHT TO COUNSEL ................................... 96
   A. Foundation of the Right to Counsel ...................... 96
   B. A Child's Right to Counsel. .......................... 97
II. THE RIGHT TO COUNSEL AND WAIVER OF COUNSEL IN MINNESOTA ............................................ 99
   A. Current Status of the Right ........................... 99
   B. An Analysis of the Problem ........................... 102
III. JUVENILE COMPETENCE ................................ 105
   A. Legal Competence v. Actual Competence ................ 105
   B. Statistical Studies of Juvenile Competence ............ 107
      1. The San Diego Study ............................. 107
      2. The Grisso Study ................................ 108
IV. EVALUATING A CHILD'S WAIVER OF THE RIGHT TO COUNSEL .............................................. 110
V. SOLUTIONS TO THE PROBLEM .................................. 113
CONCLUSION .................................................. 115

INTRODUCTION

In 1983, approximately forty-seven percent of the juveniles facing delinquency charges in Minnesota counties waived their right to be represented by counsel in juvenile court hearings.\(^1\) Almost one-half of the juveniles who were adjudicated delinquent for the felony-level

\(^1\) Criminal Justice Statistical Analysis Center, How Today's Juvenile Justice Trends Have Affected Policy (1984) (copy on file at the William Mitchell Law Review Office) [hereinafter cited as JUVENILE JUSTICE STUDY]. The study considered 9,165 petitions from all counties in Minnesota except Hennepin County. Id. at 17. Hennepin County handled 3,067 delinquency petitions in 1983, or nearly one-fourth of the petitions filed in Minnesota that year. Interview with Sherri Korder, Program Analyst, Hennepin County Office of Planning and Development, in Minne-
offense of burglary waived their right to counsel prior to adjudication.2

In Minnesota, a juvenile is considered competent to waive the right to counsel when charged with a felony-level offense. This assumption is surprising considering that protection is given to adults charged with equally serious offenses.3 Rule 5 of the Minnesota Rules of Criminal Procedure permits adults to waive their right to counsel with judicial approval.4 The Rule, however, includes a check on this decision for those charged with gross misdemeanor or felony offenses. In these cases, even if the defendant waives the right to counsel and elects to represent himself at trial, counsel shall be appointed and remain available to assist the defendant.5 The present Minnesota Rules for Juvenile Court do not include a similar check on the decision to waive counsel.6

In In re Gault,7 the United States Supreme Court specifically indicated that procedures in delinquency proceedings must satisfy the essentials of due process and fair treatment afforded adults.8 Conse-

2. JUVENILE JUSTICE STUDY, supra note 1, at 17. Burglary is among the most severe offenses handled in juvenile court. Penalties for a first offense of burglary vary from forty-hour unpaid work squad dispositions to six months confinement at juvenile security facilities. In Hennepin County, the average penalty for burglary of an unoccupied building is three weeks in the County Home School Beta program. Depending upon the specific circumstances of the case, the penalty for burglary of an occupied dwelling ranges from six weeks to six months. Crimes which pose a danger or result in harm to people are treated more severely. Interview with Honorable Allen Oleisky, Judge of Hennepin County Juvenile Court, in Minneapolis (Feb. 26, 1985) [hereinafter cited as Oleisky Interview].

3. MINN. R. CRIM. P. 5.02, subd. 1 provides: "If the defendant is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint counsel for him." Id. (emphasis added). The accompanying comment to the Rule provides:

Under Rule 5.02, subd. 1, counsel must be appointed for a defendant financially unable to afford counsel in a felony or gross misdemeanor case even if a defendant exercises his right under Faretta v. California, 422 U.S. 806 (1975), to refuse the assistance of counsel and represent himself. In such a situation the appointed counsel would remain available for assistance and consultation if requested by the defendant.

MINN. R. CRIM. P. 5.08, committee comment (1984).

4. MINN. R. CRIM. P. 5.02, subd. 2. Informal rules now in effect in Hennepin County Juvenile Court require that a juvenile charged with a felony consult with appointed or privately retained counsel prior to admitting an offense. Oleisky Interview, supra note 2. Because of this rule, few juveniles charged with serious offenses appear at felony hearings without counsel. Id.

5. See MINN. R. CRIM. P. 5.02, subd. 2.


8. See id. at 13; see also Rosenberg, The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not so Distant Past, 27 UCLA L. REV. 656 (1980).
quently, the state's efforts to protect juveniles against uninformed waivers of counsel should be as vigorous as its effort to protect adults.9

Empirical studies highlight the need for stringent procedures to prevent uninformed waivers of counsel by juveniles.10 These studies demonstrate that many juveniles fail to understand the privilege against self-incrimination and the function of defense counsel.11 A juvenile who misunderstands the privilege upon which the right to counsel is based, or the function of the attorney whose assistance he rejects, is ill equipped to make an informed, voluntary waiver of counsel.

The Minnesota Rules for Juvenile Court12 and the Minnesota Statutes13 provide juveniles charged with crimes the opportunity to secure legal counsel at public expense. The United States Supreme Court has also held that representation by counsel is an essential element of a fair trial.14 For many juveniles, however, this protection is superficial since the rules and statutes allow them to waive their right

Rosenberg traces developments in juvenile delinquency law from In re Gault, 387 U.S. 1 (1967), to Fare v. Michael C., 442 U.S. 707 (1979). For further discussion of Fare, see infra notes 63, 139. Rosenberg advocates returning to the approach to juvenile rights articulated in Gault. Rosenberg, supra at 719.

9. In Gault, the Court discussed the waiver of the privilege against self-incrimination in a custodial setting (an analogous situation). The Court implicitly stated that a recitation of the Miranda warning (the procedure afforded adults) would not assure truly voluntary waivers. The Court emphasized the age of the child, the possibility of "adolescent fantasy, fright or despair," the presence and competence of parents, and the assistance of counsel in administering the privilege. Gault, 387 U.S. at 55. "The Gault test for waiver of fifth amendment privilege thus requires painstaking scrutiny to assure that a child's waiver is roughly equivalent to the voluntary waiver of an adult charged with a crime." Rosenberg, supra note 8, at 672-73. In Fare, the Court used the totality of circumstances test applied to adults and refused to institute special procedures to compensate for the emotional and intellectual inferiority of juveniles. Fare, 442 U.S. at 725, 728.


11. T. Grisso, supra note 10, at 193-94; see also, San Diego Study, supra note 10, at 54 (concluding that only a small percentage of juveniles are capable of making an informed, intelligent waiver of Miranda rights).

12. MINN. R. JUV. CTS. 6.01, subd. 1(d).

13. MINN. STAT. § 260.155, subd. 2 (1984). The subdivision specifically provides: "The minor, parent, guardian, or custodian have the right to effective assistance of counsel. If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the minor . . . in any other case in which it feels that such an appointment is desirable." Id. The intent of this subdivision is to require the court to appoint counsel when the child, parent, or guardian desire counsel but are unable to afford it. Further, it allows the court to appoint counsel for parent, child, or guardian in any other situation in which it feels this is desirable. MINN. STAT. ANN. § 260.155, Interim Commission Comment 1959, subd. 2 (1982).

to counsel.\footnote{15} If juveniles in Minnesota are to enjoy the benefits of legal representation, certain changes must be made in the current system. This Note analyzes the procedures in the juvenile justice system, and advocates that changes must be implemented in order to provide juveniles with effective procedural safeguards. First, the Note examines the constitutional basis for the right to counsel. Second, procedural waivers of counsel in Minnesota are considered. After discussing studies which evaluate juveniles' understanding of their constitutional rights, the Note evaluates whether the current procedures guarantee constitutionally sound waivers.\footnote{16} Finally, the Note suggests certain procedures that would prevent uninformed, in-court waivers. The suggested procedures include a requirement that juveniles receive legal representation from the arraignment stage onward.

I. THE RIGHT TO COUNSEL

A. Foundation of the Right to Counsel

The right of an accused person to be represented by counsel in federal court is expressly guaranteed by the sixth amendment of the United States Constitution.\footnote{17} In \textit{Powell v. Alabama},\footnote{18} the Supreme Court held that the right to counsel is a fundamental right included within the concept of due process.\footnote{19} The Court, however, did not specifically address the issue of right to counsel in state proceedings.\footnote{20}

\footnote{15. MINN. R. JUV. CTS. 15.02, subd. 1; MINN. STAT. § 260.155, subd. 1, 8 (1984).}
\footnote{16. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court stated that a valid waiver is an “intentional relinquishment or abandonment of a known right or privilege.” \textit{Id.} at 464.}
\footnote{17. U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” \textit{Johnson}, 304 U.S. at 462. For an excellent discussion of constitutional development, see generally W. \textit{LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE} § 11.1, at 473-81 (1985).}
\footnote{18. 287 U.S. 45 (1932). In \textit{Powell}, seven black men were convicted of rape and sentenced to death. \textit{Id.} at 49. The defendants were not given the opportunity to retain counsel nor were they able to consult with family or friends. \textit{Id.} at 52.}
\footnote{19. The Court stated: \textit{In light of the facts . . . the ignorance and illiteracy of the defendants, their youth, the imprisonment, and the surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.}} \textit{Id.} at 71.
\footnote{20. The Court limited the holding to fact situations similar to \textit{Powell}. \textit{Id.} at 73.}
The Supreme Court restricted the Powell holding in *Betts v. Brady*, by stating that the fourteenth amendment only requires states to appoint counsel in "exceptional circumstances." In 1962, the Supreme Court retreated from the *Betts* position. The Court held that "exceptional circumstances" need not be present before the fourteenth amendment requires states to furnish indigents with counsel.

One year later, in *Gideon v. Wainwright*, the Court overruled *Betts*. In *Gideon*, the Supreme Court expressly applied the fourteenth amendment to states to require counsel in noncapital as well as capital cases. The right to counsel, however, had not yet been extended to juveniles.

**B. A Child’s Right to Counsel**

Four years after the Supreme Court decided *Gideon*, the Court in *Gault*, extended the right to appointed counsel to juveniles charged with delinquency. *Gault* prompted the Supreme Court’s thorough reevaluation of the *parens patriae* model of juvenile justice.

21. 316 U.S. 455 (1942). In *Betts*, the defendant was indicted for robbery. When the defendant requested counsel, the judge advised him that the county only supplied counsel in murder and rape prosecutions. *Id.* at 457.

22. The Court reasoned that states should be allowed to distinguish between different crimes in deciding whether to appoint counsel. *Id.* at 473. In *Betts*, the defendant had previous experience with the court system and was of average intelligence. *Id.* at 472. Accordingly, his case did not require counsel to protect his constitutional rights. See *id.*; see also *Foster v. Illinois*, 332 U.S. 134, 139 (1947) (refusing to appoint counsel to assist a defendant making a guilty plea.) The Court stated: "Our duty does not go beyond safeguarding rights essential to a fair hearing.” *Id.*


24. In *Chewning*, the defendant argued that the possibility of legal arguments in his defense required appointment of counsel. *Id.* at 445. The Supreme Court agreed holding that the opportunity to develop legal arguments was sufficient to warrant appointment of counsel. *Id.*


26. *Id.* at 345. The Court noted that twenty-two states filed amicus briefs arguing that *Betts* was "an anachronism when handed down.” *Id.* at 345.

27. The Supreme Court stated:

[T]he Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of the law for deprivation of 'liberty' just as for deprivation of 'life', and there cannot be a difference in the quality of the process based merely on a supposed difference in the sanction involved.

*Id.* at 349.

28. See *Gault*, 387 U.S. at 41 where the United States Supreme Court extended the right to counsel to juveniles charged with delinquency.

29. See *id.*

30. See *id.* In *Gault*, a fifteen-year-old boy had been committed to a state industrial school until he reached the age of majority. He was committed after a court proceeding found him delinquent for making lewd phone calls. *Id.* at 7. The maximum penalty an adult would have received for that offense was a fine of five to fifty
The juvenile justice movement began as a benevolently motivated effort to treat juveniles with care. According to the philosophy of the movement, juvenile courts were to treat and rehabilitate, rather than punish. These lofty goals were to be achieved free of the burdens of constitutional procedure because juvenile court procedures were not adversarial. Instead of being characterized as the child’s adversary, the state was parens patriae, custodian of the child’s person and property.

The absence of rigid procedure, which was thought to be the principle asset of this system, was its principle flaw. The benevolent motives of the juvenile justice movement proved an inadequate substitute for principle and procedure. The unbridled discretion, careless investigative procedures, and severe punishment in Gault illustrated the failures of the parens patriae system. All this was done in the “interest of the child.” The experiment also failed to rehabilitate and prevent recidivism.

The Court in Gault reasoned that benefits enjoyed by juveniles under the parens patriae model did not outweigh the disadvantages associated with the denial of due process. Further, it found that juvenile courts could protect a child’s due process rights without compromising the substantive benefits of the juvenile system. The benefits included the processing and treatment of juveniles separately from adults, avoiding classifying juveniles as criminals, avoiding attaching civil disability to an adjudication of delinquency, and keeping records confidential. Instituting due process procedures
does not compromise these characteristics.42

The Gault Court held that a juvenile should be afforded fundamental due process procedures. These procedures included the notice of charges,43 the right to counsel at trial,44 the right to confront and cross-examine witnesses for the state, and the privilege against self-incrimination.45 Under Gault, these procedures were to be observed in all adjudications for delinquency where the juvenile risked commitment to a state institution.46 In later decisions, protection against double jeopardy47 and the “reasonable doubt” standard of proof48 were extended to delinquency proceedings.

II. THE RIGHT TO COUNSEL AND WAIVER OF COUNSEL IN MINNESOTA

A. Current Status of the Right to Waive Counsel

The Gault requirement that a juvenile be afforded a right to counsel is present in Minnesota.49 Efforts to improve procedures affording juveniles the right to counsel require an understanding of the right as it exists in the context of established procedures.

In Minnesota, a juvenile’s right to counsel at trial is a personal constitutional right.50 Only the juvenile may waive the right.51 Par-

42. Id. at 24.
43. Id. at 31-34.
44. See generally id. at 34-42.
45. See generally id. at 42-57. See also Haley v. Ohio, 332 U.S. 596, 601 (1948) (advising a fifteen-year-old boy of constitutional rights prior to signing a confession to statements made in five-hour interrogation did not legitimize the confession without benefit of counsel).
47. Breed v. Jones, 421 U.S. 519, 541 (1975) (double jeopardy clause prohibits a state from trying a juvenile in criminal court as an adult if the juvenile had previously been subjected to an adjudicatory hearing on the same charge).
48. In re Winship, 397 U.S. 358, 368 (1970) (reasonable doubt standard was an essential element of due process thereby precluded findings of delinquency in juvenile cases on the basis of a lesser standard of proof).
49. MINN. STAT. § 260.155, subd. 2 (1984). The right to counsel in Minnesota is broader than that required by Gault. The Gault holding was limited to the right of appointed counsel when a delinquent faced incarceration in a state facility. Conversely, under the Minnesota procedure, any juvenile charged in a delinquency petition or cited for a status offense has a right to appointed counsel regardless of the potential for commitment to a state or local rehabilitative institution. See id.
50. See In re S.W.T., 277 N.W.2d 507 (Minn. 1979). The Minnesota Supreme Court held that a juvenile’s parents could not waive the child’s right to counsel. Id. at 512-13. Further, the court stated that the juvenile’s confessions were inadmissible because the totality of circumstances indicated that he did not understand his rights despite nodding in response to questions. Id. at 513.
51. See also id. at 512. The court cited Gault for the proposition that the right “against self-incrimination is as applicable in the case of juveniles as it is in respect to adults.” Id. However, the validity of a juvenile’s waiver is an issue of fact. Id.
ents, guardians, or custodians can neither waive the right for the juvenile, nor prevent a juvenile from exercising the right. A parent’s, guardian’s, or custodian’s role in the waiver decision is only one of the factors to be considered in determining whether the waiver was valid.

The Minnesota Rules for Juvenile Court insure that all juveniles who wish to be represented by counsel have that opportunity. A juvenile who appears in court on a delinquency petition without an attorney must be advised of his right to counsel at or before the hearing. The juvenile is also informed that if he cannot afford counsel, a lawyer will be provided for him. In a majority of cases, a juvenile who requests legal representation cannot afford to obtain private counsel. Thus, counsel must be appointed by the court at public expense.

After being advised of the right to counsel, a juvenile may waive that right. The waiver, however, is valid only if it is knowingly and voluntarily made. In order to determine whether a waiver is knowing and voluntary, the court looks at the “totality of the circumstances.” The circumstances in the analysis include the presence and competence of the juvenile’s parents, guardian, or guardian ad litem, as well as the juvenile’s age, maturity, intelligence, education,

52. See infra notes 61-62 and accompanying text; Id. but see MINN. STAT. § 260.155, subd. 8 (1984) (requiring that parents execute waivers for children under 12 years of age).
53. MINN. R. JUV. CTS. 15.02, subd. 1.
54. Id. 4.01; see id. 15.02, subd. 1 (governing the waiver of counsel by juveniles).
55. Id. 4.01, subd. 2. This rule applies to any petition requiring the child to appear at a hearing.
56. Id. 4.01, subd. 3(A).
58. Rule 15.02 of Minnesota Rules for Juvenile Courts provides: After being advised of the right to counsel, pursuant to Rule 4, a child may waive the right to counsel only if the waiver is voluntarily and intelligently made. In determining whether a child has voluntarily and intelligently waived the right to counsel the court shall look at the totality of the circumstances. These circumstances include but are not limited to: the presence and competence of the child’s parent(s), guardian or guardian ad litem, and child’s age, maturity, intelligence, education, experience and ability to comprehend.
59. Id.
60. See, e.g., In re M.D.S., 345 N.W.2d 723, 731-32 (Minn. 1984) (applying totality of circumstances test to decide whether juvenile’s waiver was knowing and intelligent); In re L.R.B., 373 N.W.2d 394, 397-398 (Minn. Ct. App. 1985) (discussing state’s burden of proof that juvenile’s waiver of right to counsel was knowing and intelligent under the totality of circumstances test).
experience, and ability to comprehend.61 Once a juvenile has waived the right to counsel, he must be readvised of his right by the court at the beginning of each hearing.62

The Minnesota Rules for Juvenile Court, outline the waiver procedure.63 The waiver question is first addressed during arraignment.64 Even if a juvenile waives counsel and denies the charge, the waiver issue will arise again before the start of the trial.65 In contrast, if a juvenile waives counsel and admits to the charge, then the court will

61. The totality of the circumstances test has been used to evaluate waivers of constitutional rights by children for more than ten years in Minnesota. See, e.g., State v. Nunn, 297 N.W.2d 752, 755 (Minn. 1980); S.W.T., 277 N.W.2d at 513; State v. Hogan, 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973); State v. Loyd, 297 Minn. 442, 451, 212 N.W.2d 671, 678 (1973). The United States Supreme Court has also demonstrated its approval of the case-by-case approach evaluating the validity of waivers of constitutional rights by children. Fare, 442 U.S. at 725.

In Fare, the respondent argued that a child’s request to see his probation officer during custodial interrogation is the functional equivalent of an adult’s request to consult with an attorney. See id. at 711-12. The rationale behind this position was that the probation officer was a person the juvenile trusted and a person to whom the juvenile would naturally turn when apprehended by police. Id. at 713. A child unfamiliar with a lawyer would be much less likely to request the assistance of a stranger. Under Miranda v. Arizona, 384 U.S. 436, 473-74 (1966), the child’s request to speak with a probation officer is the functional equivalent of a request to speak with an attorney. A request of this type would prohibit further questioning unless it was initiated by the child. Fare, 442 U.S. at 713. The child’s argument was an attempt to gain additional protection for children in waiver settings; protections that would compensate for the child’s incapacity to understand the choices presented to him. Id.

In Fare, the Supreme Court ruled against the child. Id. at 728. The Court approved of the case-by-case totality of circumstances approach:

This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation.

Id. at 725.

62. The Minnesota Rules for Juvenile Court provide: “After a child waives the right to counsel the child shall be advised of the right to counsel by the court on the record, at the beginning of each hearing at which the child is not represented by counsel. MINN. R. JUV. CTS. 15.02, subd. 2.

63. Id. 15.01. The procedure for the evaluation of waivers during interrogation is beyond the scope of this discussion. See generally Feld, Criminalizing Juvenile Justice: Rules of Procedures for the Juvenile Court, 69 MINN. L. REV. 141, 169-90 (1984).

64. MINN. R. JUV. CTS 4.01, subd. 2. The subdivision states that, “A child not represented by counsel shall be advised orally by counsel, who shall not be the County Attorney, or orally by the court on the record of the right to counsel at or before any hearing on a petition.” Id.

65. See id. 15.02, subd. 2. After the juvenile waives counsel, he will be advised of the right to counsel by the court on the record at the beginning of each hearing. See supra note 62 and accompanying text.
enter a finding and make a disposition.66 A juvenile who waives counsel at arraignment or immediately preceding trial must make the decision without the advice of counsel. In both cases, once the waiver is made and a finding is entered, it is unlikely that the issue will come to the attention of the defense counsel. Thus, an in-court waiver contains no subsequent check on the juvenile's decision.67

The juvenile, his parents, the county attorney, and the judge or referee are present during the waiver evaluation.68 The rules, however, do not require that anyone advise the juvenile of the consequences of his decision.69 Furthermore, the judge must evaluate the juvenile's waiver under the totality of circumstances test with little information regarding his background. The judge's decision is based on a short conversation with the juvenile and his parents.70 Unfortunately, a person familiar with both the juvenile's background and factors relevant to the validity of the waiver is not present.71 Because the juvenile makes this waiver without benefit of counsel, and since there is no formal check on the waiver decision,72 the competence of the juvenile and his parents becomes critically important.

B. An Analysis of the Problem

A recent study by the Minnesota State Planning Agency73 casts doubt on the competence of juveniles to make the decision to waive counsel. The study indicates that a surprising number of juveniles charged with delinquency in Minnesota juvenile courts waived their right to counsel.74 Twenty percent of all juveniles whom the state...
moved to refer to district court for trial as adults waived their right to counsel at the reference hearing. The consequences faced by a juvenile in a reference hearing are comparable to the most severe consequences faced by an adult in district court. A juvenile in this situation has usually committed a felony-level offense, has a history of prior contacts with juvenile court, and is thought to be unsuitable for treatment in the juvenile court system.

The issues litigated in a reference hearing are also very complex. Expert testimony may be introduced on a juvenile's suitability for treatment in institutions under juvenile court jurisdiction. In light of the severe consequences facing a juvenile and the complexity of the issues litigated, no juvenile should enter a reference hearing lacking competent counsel.

Twenty-eight percent of all juveniles who risked placement in state or local correctional facilities appeared at their delinquency hearing after waiving their right to counsel. In addition, forty-five percent of all juveniles charged with burglary and appearing on delinquency petitions did so after waiving their right to representation. A juvenile guilty of burglary is frequently committed to a state or local institution.

The study also found that forty-eight percent of all juveniles appearing at hearings on delinquency petitions did so without representation.

75. Id. at 18. This large figure may be explained in part by certain practices in rural counties. In rural counties, juveniles are frequently referred on drinking-related traffic offenses and for "deer shining." Oleisky Interview, supra note 2. In Hennepin County, no child is permitted to proceed in a reference hearing without counsel. Id.

76. The reference hearing is a "critically important" proceeding. Kent v. United States, 383 U.S. 541, 556 (1966). In Kent, the Supreme Court held that procedural regularity sufficient to satisfy due process was required where the court decides the "critically important" question of whether a child will be referred to adult court and will be deprived of the protections of juvenile court. Id.

77. MINN. STAT. § 260.125 (1984). See also In re J.F.K., 316 N.W.2d 563 (Minn. 1982) (state need not prove that juvenile is unamenable to treatment in juvenile court system when public safety considerations override); In re J.R.D., 342 N.W.2d 162 (Minn. Ct. App. 1984) (applying factors necessary to move a juvenile to adult court).

78. See Feld, supra note 63, at 167.

79. This contention is supported by Hennepin County Juvenile Court Policy. Oleisky Interview, supra note 2.

80. JUVENILE JUSTICE STUDY, supra note 1, at 18.

81. Id.

82. A finding that a child has committed burglary will have severe consequences even where the child is not institutionalized. It would increase the penalties for subsequent findings of delinquency. Id. The finding of burglary would also increase penalties for crimes committed after the child becomes an adult. The Minnesota Sentencing Guidelines provide:

The offender is assigned one criminal history point for every two offenses
sentation. 83 Sixty-eight percent of those appearing on citations or petitions for status offenses did so without an attorney. 84

Each juvenile who waived the right to counsel was in the presence of a judge or referee. The waiver was made on the record. 85 The judge examined the totality of the circumstances to determine whether the juvenile was mature enough to understand the importance of the decision. 86

These alarming statistics raise two questions. The most obvious question is whether juveniles waiving their right to counsel understand the ramifications of their decisions. Statistics also raise the question of whether the totality of circumstances test is an adequate check on an uninformed waiver of counsel. In response to the latter question, the United States Supreme Court, 87 the Minnesota Supreme Court, 88 and the Minnesota Legislature 89 endorse the “totality” approach as an effective method to reveal those waivers of counsel that are not knowingly and voluntarily made. As to the former question of whether juveniles are competent to understand the function of legal counsel and the serious consequences of their deci-

committed and prosecuted as a juvenile that would have been felonies if committed by an adult, provided that:
    a. Findings were made by the juvenile court pursuant to an admission in court or after trial;
    b. Each offense represented a separate behavioral incident or involved separate victims in a single behavioral incident;
    c. The juvenile offenses occurred after the offender’s sixteenth birthday;
    d. The offender had not attained the age of twenty-one at the time the felony was committed for which he or she is currently sentenced; and
    e. No offender may receive more than one point for offenses committed and prosecuted as a juvenile.


84. Id. This statistic may be dismissed at first because of the relative severity of status offenses. However, a House Research report by Kerry Fine, Legislative Analyst, discovered that large numbers of status offenders are also taken into custody by the state. Fine, supra note 57, at 53. The institutionalizing of status offenders is explained, in part, by the fact that many of the offenders are juveniles who have run away or have absented from juvenile court placements. Oleisky Interview, supra note 2. In addition, the status offenses of truancy, incorrigibility, and absenting frequently indicate problems of neglect in the family. Out-of-home placements for juveniles cited for other offenses is a response to inadequate family support. Id.

85. Minn. R. Juv. Cts. 15.

86. Id.

87. Fare, 442 U.S. 707 at 725.

88. See, e.g., Hogan, 297 Minn. at 440, 212 N.W.2d at 671 (listing factors to be considered when deciding whether a juvenile’s waiver is voluntarily and intelligently made).

89. Minn. Stat. § 260.155, subd. 8 (permitting express intelligent waiver of rights after the child has been fully and effectively informed of the right being waived).
sion to waive counsel, there is cause for concern. 90

III. JUVENILE COMPETENCE

A. Legal Competence v. Actual Competence

It is beyond dispute that juveniles are legally capable of waiving their sixth amendment right to counsel at trial. 91 The Supreme Court established this principle in Gault 92 by applying the procedural safeguards set forth in Miranda v. Arizona 93 to juveniles. A juvenile's intellectual competence to waive constitutional rights, however, is less clear. The test for a valid waiver of a constitutionally protected right by an adult or juvenile is whether it is an "intentional relinquishment or abandonment of a known right or privilege." 94 The Court recognized there is a minimum level of understanding "below which a free and voluntary waiver cannot be said to be an intelligent relinquishment of a known right." 95 An effective waiver assumes a lack of ignorance, intimidation, and fear. 96 The question of whether juveniles charged with delinquency are intellectually competent to waive their constitutional rights has been the focus of numerous scholarly discussions. 97

90. See generally infra notes 91-132 and accompanying text.
91. Cf. Fare, 442 U.S. at 725 (totality of the circumstances test is sufficient to determine the validity of the defendant's waiver of his fifth and sixth amendment rights).
92. See supra notes 29-46 and accompanying text.
A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id.

95. San Diego Study, supra note 10, at 53. The San Diego Study awarded the juveniles in the study points for various levels of understanding of constitutional rights. See text and accompanying notes 108-10. The study found that a small percentage of subjects had full conscious understanding of the Miranda warning. See infra note 112. A large percentage of the children did not possess the “quantum of understanding” necessary to render a valid waiver. San Diego Study, supra note 10, at 54.

96. See generally Note, Waiver of Constitutional Rights by Minors: A Question of Law or Fact?, 19 HAST. L.J. 223 (1967). This Note discusses whether the validity of a child’s waiver of constitutional rights should be a question of fact or a question of law. If it is a question of fact, the court would consider each case under a totality of the circumstances evaluation. If a question of law, waivers by minors would be invalid per se based on the belief that children are not competent to make such a decision. The Note concludes that a judicial rule nullifying all juvenile waivers of constitutional rights is perhaps essential to the preservation of minors' constitutional rights. Id. at 231.

97. See generally T. Grisso, supra note 10; Bailey & Soderling, Born to Lose—Waiver
These discussions focus on the juvenile's waiver of rights at the time of interrogation.98 Many of these commentaries, however, reach conclusions on juvenile competence relevant to this discussion. When rights are waived during interrogation, the voluntariness of the waiver and the juvenile's understanding of his rights are suspect.99 However, in the case of an in-court waiver, the coercive environment characteristic of interrogation is largely absent.100 Therefore, the only question remaining is the juvenile's ability to understand the rights waived.

Commentators generally agree that the majority of juveniles processed through the judicial system should be legally competent before making a truly knowing and intelligent waiver of their rights.101 The rationale behind this conclusion is that juveniles are "generally regarded as unable to enter legal transactions and are presumed to lack the requisite intelligence to make a valid waiver."102 Thus, juveniles are considered legally incompetent in most civil matters. For example, they cannot vote,103 cannot enter into a binding contract,104 cannot make a valid will,105 and cannot marry without parental consent.106 Based on their inability to understand the ramifications of their actions, juveniles would be legally incapable of executing a valid waiver.107
B. Statistical Studies of Juvenile Competence

1. The San Diego Study

Two commentators have conducted studies to test juveniles' ability to understand the concepts underlying the constitutional privilege against self-incrimination, and the right to counsel.¹⁰⁸ One study was conducted in San Diego in response to a recommendation that police give the Miranda¹⁰⁹ warning in terms that reflect the language and experience of today's juveniles.¹¹⁰ The study drafted and tested a modified warning which was more easily understood by juveniles. The purpose of the study was to measure juveniles' subjective understanding of the elements of the Miranda warning.¹¹¹ The San Diego study was based upon a sample of ninety juveniles. In addition, one-half of the juveniles in the study had been adjudicated delinquent. Fifty percent of the juveniles were given the simplified warning¹¹² and the remainder were given the formal Miranda warning. The results indicated that ninety-six percent failed to fully understand¹¹³ the Miranda warnings although they had voluntarily waived their rights. Furthermore, the juveniles showed no appreciable increased understanding of the simplified version. The right to

¹⁰⁸. See generally San Diego Study, supra note 10, at 44. For a discussion of the Thomas Grisso study, see infra notes 115-32 and accompanying text.
¹¹⁰. San Diego Study, supra note 10, at 44.
¹¹¹. The elements of the warning are:
(1) the right to remain silent;
(2) the right to an attorney;
(3) the right to an attorney before interrogation;
(4) the appointment of an attorney if unable to afford.
See Miranda, 384 U.S. at 472-74.
¹¹². The simplified warning, devised for the purpose of the study, contained the following:
You don’t have to talk to me at all, now or later on, it is up to you.
If you decide to talk to me, I can go to court and repeat what you say, against you.
If you want a lawyer, an attorney, to help you to decide what to do, you can have one free before and during questioning by me now or by anyone else later on.
Do you want me to explain or repeat anything about what I have just told you?
Remembering what I’ve just told you, do you want to talk to me?
San Diego Study, supra note 10, at 40.
¹¹³. Of 90 fourteen-year-olds surveyed, 86 waived their rights. Id. at 53. Of the 86, only five fully understood either the simplified or the formal warning. Id. For each of the five elements a score of two was awarded for conscious understanding (ability to repeat and explain concept). A score of one was awarded for latent understanding. Latent understanding was indicated by a child’s ability to correctly answer a question about an element of the warning (i.e., Did I say when you could have an attorney or a lawyer?). Id. at 43. A score of ten indicated full conscious understanding. Id. at 54.
counsel before and during questioning was the least understood element by all juveniles.114

2. The Grisso Study

A study by Thomas Grisso115 is the most thorough study of juveniles' competence to waive constitutional rights. A portion of the study focused on the distinction between a juvenile's knowledge of a given right and his ability to understand the function of the right.116 Grisso also performed two studies relevant to in-court waivers of counsel. One evaluated a juvenile's understanding of the right to counsel.117 The other study evaluated a juvenile's understanding of the privilege against self-incrimination.118

The first of these studies proposed that knowledge of the right to counsel was of little consequence unless accompanied by an understanding of an attorney's role.119 The juvenile must understand that an attorney is his defender, a person who will offer friendly legal advice, and even argue for the least restrictive penalty if the juvenile is found guilty.120 The second study was based on a belief that a juvenile who knew about the privilege against self-incrimination would be unlikely to exercise it unless he understood that the privilege was absolute.121 A juvenile who knew that an offense had been committed would find little use for an attorney if he believed that a judge could force him to confess by revoking the privilege against self-incrimination.122

The Grisso studies reached three major conclusions relevant to this discussion. First, Grisso concluded that juveniles were significantly less aware of the importance of their rights in the context of

114. Id.
115. See generally T. Grisso, supra note 10, at 110. The Grisso study was based on a group of 160 juvenile offenders who had been detained after arrest. They were questioned between 24 hours and 72 hours after arrest. The group also included 39 juveniles who had been incarcerated in juvenile rehabilitation facilities. The adults in the study included 203 offenders and 57 non-offenders. Id. at 111. The study did not assess most of the children's level of competence at the stage where they would make in-court waivers of counsel. Nevertheless, the study approximates a child's level of understanding at those later stages. Id. at 111. The juveniles affected by in-court waiver provisions appear at arraignment without counsel and have seldom had benefit of counsel between arrest and arraignment. Oleisky Interview, supra note 2.
116. See generally T. Grisso, supra note 10, at 107-28. A juvenile who knows that he has the right to counsel may not understand the benefit to be derived from the aid of counsel. Id. at 109.
117. See id. at 115.
118. See id. at 120.
119. Id. at 111.
120. Id. at 115.
121. See id. at 121.
122. See id.
This conclusion was true of all juveniles age ten through sixteen and was particularly true of juveniles with IQ scores below ninety. The exception to this conclusion was found among juveniles who had been referred to court on felony charges on three or more occasions. This "experienced" group of juveniles exhibited a higher level of understanding of their rights than did others in the study. The level was equivalent to that exhibited by adult non-offenders.

Second, the study on juveniles' understanding of their right to counsel concluded that nearly one-third of the juveniles with either few felony referrals or no referrals believed that defense attorneys will represent the interests of only the innocent. Waiver of the right to counsel by a juvenile with this misconception falls short of the standard for a valid waiver. Finally, the study on the privilege against self-incrimination concluded that most juveniles fail to understand the legal protection behind that privilege. Many juveniles even believed that the judge could revoke the right to silence during any appearance in court. A majority of the juveniles in this study believed that a defendant who had chosen to remain silent would also have to discuss the alleged offense if the judge ordered him to do so. This belief was held by the subjects regardless of their age, IQ, or race.

123. Id. at 128. The Grisso study concluded that juveniles age fourteen and below are incompetent to waive their rights to silence and legal counsel. This conclusion is supported by measures of understanding and perception in relation to normative adult standards. Id. at 193. Juveniles age fifteen and sixteen who have an IQ below 80 lack the necessary competence to waive their rights to silence or counsel. Id. Moreover, approximately one-third to one-half of fifteen and sixteen-year-olds with IQs above 80 lack competence to waive their rights when competence is defined by absolute standards. However, this group demonstrates a level of understanding similar to seventeen to twenty-one-year old adults who are presumed competent to waive their rights. Id. at 193-94.

124. Id. at 128. Adults with IQs below 90 were far more knowledgeable about the attorney-client relationship and the function of the right to silence than were juveniles possessing this IQ level. Id. Most children referred to juvenile courts manifest this subaverage level of intellectual functioning. Id.

125. Id.

126. Id.

127. Id. at 129.

128. See Johnson, 304 U.S. at 464.

129. T. Grisso, supra note 10, at 129. The study also found that nearly three-quarters of the adult nonoffenders failed to understand the privilege against self-incrimination. Id. at 130.

130. See id. at 129.

131. Id. at 124.

132. Id. In addition, a majority of adult nonoffenders also held the same belief. Id. Many adults and juveniles believed that the judge makes the law and has the power to assess penalties for those who do not comply with it. See id. Several juveniles felt that the sole purpose of the hearing was to obtain a confession. For this reason, those
IV. EVALUATING A CHILD’S WAIVER OF THE RIGHT TO COUNSEL

An evaluation of the procedures by which juveniles in Minnesota accomplish in-court waiver of their right to counsel and the studies on juvenile competence raise two questions. First, should a juvenile in Minnesota be permitted to forego his right to be represented by an attorney at arraignment and throughout trial? If so, is the totality of circumstances test sufficiently structured to allow a searching inquiry into a juvenile’s ability to understand the ramifications of his decision?

The Grisso study and the San Diego study both illustrate the inability of juveniles to understand the role of legal counsel, and the privilege against self-incrimination. The right to counsel is of little value to a juvenile who believes that defense lawyers only help the innocent. A juvenile under this misconception who believes he is guilty is likely to waive his right to counsel. In this situation, the waiver would not be valid because the juvenile lacks full understanding of the protections counsel could provide. The right to counsel is also of little value to juveniles believing that the privilege against self-incrimination can be revoked by a judge. If the juvenile knew that he committed the offense and believed that the judge could force a confession, then the juvenile would also believe that an attorney’s role in the process was dubious.

If juveniles harbor these misconceptions, then they are incompetent to make a knowing and intelligent waiver of their right to be represented by counsel at arraignment or at trial. If the proposition that juveniles are per se incompetent to waive their right to counsel is rejected, then the totality of circumstances test must be reevaluated. The United States Supreme Court and the Minnesota Supreme Court believe that the “totality” approach is an effective

same juveniles thought that asserting the right to silence would be unlawful. Id. Many also thought that refusal to talk about illegal activities would amount to perjury. As one put it, “If I’m in court, I have to tell the truth, the whole truth and nothing but the truth. So when the judge asks what you done, you got to tell him even if you don’t want to.” Id.

133. T. Grisso, supra note 10, at 125.
134. See supra notes 112-16 and accompanying text.
135. See T. Grisso, supra note 10, at 129.
136. Id.
137. Courts have rejected the proposition that children are per se incompetent to waive their right to counsel. See, e.g., Fare, 442 U.S. at 707 (discussing the waiver of constitutional rights during interrogation); McLemore v. Cubley, 569 F.2d 940, 944 (5th Cir. 1978) (rejecting the argument that prior advice and assistance of counsel was constitutionally required before a juvenile can intelligently and competently waive his right to counsel); People v. Lara, 67 Cal. 2d 365, 368, 432 P.2d 202, 205, 62 Cal. Rptr. 586, 590 (1967), cert. denied, 392 U.S. 945 (1968) (applying the totality of the circumstances test of which age is only one important factor).
138. See, e.g., State v. Linder, 268 N.W.2d 734, 736 (1978) (applying the totality of
method to reveal waivers of rights that are not knowingly and voluntarily made. Despite this assumption, a careful analysis of the "totality" approach reveals that it is a very loosely structured method of evaluating a juvenile's competence.\footnote{139}

The totality test currently used in Minnesota to evaluate in-court waivers of counsel provides the trial court little guidance in administering the test.\footnote{140} Rule 15 of the Rules for Juvenile Court includes a list of seven non-exclusive factors.\footnote{141} The Rule, however, does not specify the weight afforded the various factors. As a result, it is difficult for a judge to evaluate a juvenile's waiver according to these factors. Furthermore, the Grisso study found that judges often apply the variables without empirical knowledge of the ways in which certain characteristics of juveniles influence their ability to make a knowing and intelligent waiver.\footnote{142} Even when a judge possesses empirical data, he would not, in most cases, have sufficient information on the juvenile's background during arraignment, or prior to a pro se trial, to know whether the juvenile possessed those characteristics. Some courts have examined intelligence test scores to answer this question. Courts, however, have done so without a thorough understanding of the relationship between the validity of the waiver and the intelligence of a given juvenile.\footnote{143}

The current "totality" evaluation is not a satisfactory check on invalid in-court waivers. Traditionally, the totality of the circumstances test has been employed when courts retrospectively evaluate the waiver of a constitutional right.\footnote{144} In this context, the court has the benefit of information presented by counsel for the state and for

\footnote{139} T. Grisso, supra note 10, at 8; American Bar Association Institute of Judicial Administration, Juvenile Justice Standards Project: Standards Relating to Pretrial Court Proceedings 92 (1980). "The 'totality' test by which most courts judge the validity of waivers is difficult to administer, and invites uncertainty at all stages of the proceedings." Id. (cited in R. Lawrence, The Role of Legal Counsel in Juvenile's Understanding of Their Rights, Juv. & Fam. Ct. J. Winter 1983-84, at 49-50).

\footnote{140} See T. Grisso, supra note 10, at 8 (discussing the problems of applying the variables of the totality of the circumstances test).

\footnote{141} Minn. R. Juv. Cts. 15. "These circumstances include but are not limited to the presence and competence of the child's parent(s), guardian or guardian ad litem, the child's age, maturity, intelligence, education, experience, and ability to comprehend." Id. at 15.02.

\footnote{142} T. Grisso, supra note 10, at 8.

\footnote{143} Id.

\footnote{144} See, e.g., Fare, 442 U.S. at 707 (evaluating the validity of a confession in retrospect).
the defendant. The adversarial process enables the court to make an informed decision.

The "totality" evaluation of in-court waivers, however, is quite different. In this context, the court looks at a totality of circumstances to decide whether a juvenile who waives his right to counsel is doing so knowingly and voluntarily. Individuals who are familiar with both the juvenile's background and the factors relevant to the validity of the juvenile's waiver are absent from this procedure. The court lacks the information it would gain if the issue was decided in an adversarial setting.

The use of the "totality" evaluation in this context creates a presumption that the waiver is valid. The judge must make the decision whether to accept the waiver promptly with little background information. Under these circumstances, a judge cannot determine whether the juvenile fully understands the ramifications of the decision to proceed without counsel. The judge can deny only waivers of juveniles who suffer from obvious intellectual disabilities. For example, if the juvenile does not understand the charges or that he is entitled to a lawyer, the disability will be obvious. If the juvenile understands the right to an attorney, but believes that an attorney cannot help because he is guilty, the misunderstanding would not be noticed by the judge. The judge's failure to perceive this misunderstanding would result in an invalid waiver. As a result, only obvious invalid waivers are detected through the totality evaluation. The present system presumes waivers are valid. Under this system it is unlikely that a juvenile is capable of protecting his own interests in juvenile court. Studies support this premise.

Application of the totality rule to juvenile court waivers of counsel is inappropriate. General rules are designed to protect the majority interest at the expense of a few who are not in need of protection.

145. See generally supra notes 60-74 and accompanying text.
146. See generally supra notes 117-47 and accompanying text. The judge can inform the juvenile of the right to an attorney. If the juvenile does not understand the importance of an attorney, or the legal protection behind the privilege against self-incrimination, the waiver would be invalid. See supra notes 128-32 and accompanying text.
147. Grisso found this misconception pervasive among juveniles in his study. T. GRISSO, supra note 10, at 124-30.
149. See supra notes 95-136 and accompanying text.
150. See Note, supra note 105, at 224. An example of this proposition is the requirement that individuals arrested be given the Miranda warning. Statements made in the absence of the warning should be per se inadmissible. Some arrestees do not need to be given the warning. The law should presume the need for the warning, however, to protect the majority of arrestees from errors caused by their ignorance.

Another example of the proposition at work is the law which makes contracts of minors voidable. See generally J. CALAMARI & J. PERILLO, CONTRACTS § 8, at 291-33
The totality test, in this context, is a general rule which fails to ensure protection required by the majority. The test's only virtues are its cost and its simplicity.

V. Solutions to the Problem

Because the "totality" test does not guarantee that juveniles validly waive their right to legal representation in court, an alternative must be adopted. Alternatives to the totality test are costly and would clog juvenile court calendars. If the objective is protection of juveniles' constitutional rights, however, cost should not be the paramount concern.

One solution is to require that waivers of counsel be made only after consulting with an attorney. This practice is followed in a number of jurisdictions. It is also followed in Hennepin County with respect to juveniles charged with felonies. A lawyer is more effective than a judge in informing the juvenile of the benefits of counsel. An attorney recognizing a strong case against the juvenile could negotiate a settlement on the juvenile's behalf. The attorney is in a position to advise the juvenile on the course of action that is in the juvenile's best interests.

A system requiring an attorney to assist in the decision to waive counsel strikes a balance between the current system and the adult court requirement that counsel be present during trial even if not requested. This proposal places discretion with the juvenile's attorney, usually a public defender, to evaluate the merits of the case and the severity of the penalty at risk.

A second approach to the waiver problem is advocated by the Minnesota Juvenile Code Revision Task Force. The Task Force drafted a bill which was introduced in the Minnesota Legislature during the 1985 session. The bill, however, has not been enacted. The pro-

Surely all minors are not intellectually incompetent to contract, but most contracts made by a person under 18 years of age are voidable. The law presumes that minors are incompetent in order to protect the majority of minors from errors caused by their ignorance. Id. at 232.

151. See, e.g., State v. Doe, 95 N.M. 302, 304, 621 P.2d 519, 521 (N.M. Ct. App. 1980) (all children must be represented by counsel at least at the first appearance); In re Dominick F., 74 A.D.2d 485, 486, 428 N.Y.S.2d 113, 114 (1980) (construing a state statute that presumes juveniles do not have the requisite knowledge and maturity to waive the right to counsel).

152. See Oleisky Interview, supra note 2.

153. The bill drafted by the Juvenile Code Revision Task Force was introduced both in the Minnesota House and Senate. H.F. No. 774, S.F. No. 753, 74th Minn. Leg., 1985 Sess. (copy on file at the William Mitchell Law Review Office) [hereinafter cited as H.F. No. 774]. At the writing of this Note, the bill was being reviewed by the House Committee on Crime and Family Law and the Senate Judiciary Committee.
posed bill requires juveniles charged with delinquency to be represented by counsel at all stages of court proceedings, except under limited circumstances.\textsuperscript{154} With this proposal, a juvenile could ask to represent himself at any stage in the proceedings.\textsuperscript{155} The court, however, must refuse a juvenile’s request to proceed pro se unless it appears from a totality of the circumstances that the request is made voluntarily and intelligently, and that the juvenile is competent to represent himself.\textsuperscript{156}

Notwithstanding the juvenile’s decision to represent himself, the court must designate counsel to be present at all hearings to assist and counsel the juvenile.\textsuperscript{157} This proposal mirrors Rule 5 of the Minnesota Rules of Criminal Procedure.\textsuperscript{158} Thus, the proposal requires appointed counsel even after a juvenile waives that right. Although the proposal employs the “totality” evaluation, it shifts the presumption. Rather than presume a valid waiver, as in the current rule, this proposal presumes an invalid waiver.\textsuperscript{159} Before a judge accepts a waiver, he must find that the juvenile’s waiver was made voluntarily, and that the juvenile is competent to represent himself.\textsuperscript{160}

\begin{quote}
\textit{See} 1985 \textsc{Minn. H.J.} 566 (unbound supp.); 1985 \textsc{Minn. S.J.} 434 (unbound supp.). Section 46 subdivision 4(b) of the proposed bill provides, “A child against whom a delinquency petition has been filed must be represented by counsel at all stages of the court proceedings, except as otherwise provided in subdivision 5.” \textit{Id.} H.F. No. 774, \textit{supra}, § 46, subd. 4(b). Subdivision 5 of the proposed bill places the following restrictions on a juvenile’s right to pro se representation:

\begin{enumerate}
  \item[(a)] A child against whom a delinquency petition has been filed may ask that the court permit him or her to represent himself or herself at any or all stages of the court proceedings. The court shall refuse the child’s request to proceed pro se unless it appears from the totality of the circumstances that the request is made voluntarily and intelligently and that the child is competent to represent himself or herself.
  \item[(b)] If a child chooses to represent himself or herself at court proceedings and the court approves the child’s request the court shall advise the child on the record of the right to counsel at the beginning of each hearing at which the child is not represented by counsel.
  \item[(c)] Notwithstanding a child’s decision to represent himself or herself at the court’s proceedings, the court shall designate counsel to be present at all hearings to assist and consult with the child.
\end{enumerate}

\textit{Id.} at § 46, subd. 5.

\textsuperscript{154} H.F. No. 774, \textit{supra} note 153, § 46, subd. 5(a).
\textsuperscript{155} Id.
\textsuperscript{156} Id. Subdivision 1 provides that the “‘totality of circumstances’ includes but is not limited to the child’s age, maturity, intelligence, education, experience, and ability to comprehend, and the presence and competence of the child’s parents, guardian, or guardian ad litem.” \textit{Id.}, subd. 1(1).
\textsuperscript{157} \textit{Id.}, subd. (5)(a).
\textsuperscript{158} \textit{See} \textit{supra} note 3.
\textsuperscript{159} The proposed bill would require assessment of the waiver at each stage of the proceedings. H.F. No. 774, \textit{supra} note 153, § 46, subd. 5(b); \textit{see supra} note 153 and accompanying text.
\textsuperscript{160} H.F. No. 774, \textit{supra} note 153, § 46, subd. 5(b).
The alternative proposals to the totality of circumstances test better serve the juvenile's interests. The alternative proposals recognize an adversarial relationship. In contrast, under the totality test, courts were paternalistic and juveniles were encouraged to admit wrongdoing. Fortunately, the Supreme Court has approved of the adversarial approach. Gault rejected the position that a compromised procedure is "in the interest of the juvenile." As recently as 1979, the United States Supreme Court in Fare v. Michael C. restated its view that the arrest and trial of a juvenile is no less adversarial than an adult's. The majority in Fare rejected the notion that a probation officer's job was to represent the interests of the juvenile. The majority instead concluded that the probation officer was in no position to represent the juvenile. The Court placed heavy emphasis on the probation officer's duty to the state seeking to prosecute the juvenile and on the probation officer as peace officer in an adversarial system. In this respect, Fare echoes Gault in finding that the juvenile justice system is an adversarial system in which juveniles require the same constitutional protections afforded adults.

The Minnesota State Planning Agency study, as well as the Grisso and San Diego studies, conclude that uninformed waivers of the right to counsel by juveniles occur daily in Minnesota and in other jurisdictions. The problem may be solved by the state legislature by enacting an adversarial approach.

CONCLUSION

In Gault, the Supreme Court held that the due process clause of the fourteenth amendment entitles a juvenile to the right to ap-

163. See id. at 721.
164. Id. at 722. Justice Powell agreed with this proposition but dissented for other reasons. Id. at 732.
165. The Court stated the following regarding a probation officer's duty to the state:

It cannot be said that the probation officer is able to offer the type of independent advice that an accused would expect from a lawyer retained or assigned to assist him during questioning. Indeed, the probation officer's duty to his employer, in many, if not most, cases would conflict sharply with the interests of the juvenile.

Id. at 721.
166. See T. Grisso, supra note 10, at 207-10.
169. Researchers in the San Diego Study found that only five of 86 fourteen-year-old subjects fully understood the constitutional rights read them in the Miranda warning. San Diego Study, supra note 10, at 53.
pointed counsel in delinquency matters which may result in commitment to a state institution.\textsuperscript{170} The Minnesota Legislature has extended that right to all juveniles charged with delinquency or status offenses.\textsuperscript{171} Furthermore, the Supreme Court has developed a standard by which a waiver of a constitutional right must be judged. The standard requires that such a waiver constitute an "intentional relinquishment or abandonment of a known right or privilege."\textsuperscript{172}

Approximately forty-seven percent of the juveniles in Minnesota who were charged with delinquency waived their right to counsel in 1983.\textsuperscript{173} This evidence indicates that juveniles are intellectually incompetent to perform a waiver comporting with established constitutional standards. Consequently, many juveniles in Minnesota waive their right to counsel without fully understanding the ramifications of their decision.

Certain Minnesota counties have responded to this problem by instituting policies which largely prevent uncounseled admissions by juveniles. While these practices on an \textit{ad hoc} basis are commendable, the problem of invalid in-court waivers of the right to counsel is one that must be dealt with on a statewide basis. The protection of constitutional rights must not be left to the discretion of the various district courts.

The appropriate solution to this problem is the legislation drafted by the Juvenile Code Revision Task Force. The Task Force's legislation requires that counsel be present at all hearings on delinquency matters. Even though the bill allows a juvenile to waive the right to counsel and proceed to trial pro se, the bill requires that counsel be present during all hearings to assist the juvenile.

The protections in the legislation eliminate the problem addressed by this discussion, since the legislation requires representation by counsel from the arraignment stage onward. Any decision to admit an offense would be made with the assistance of counsel. No decision would be the product of "ignorance of rights or adolescent fright, fantasy or despair."\textsuperscript{174}

These procedures would undoubtedly increase the cost of juvenile court operation in Minnesota. The protection of constitutional rights, however, is an activity not subject to cost-benefit analysis.\textsuperscript{175}

\textsuperscript{170} Id. at 41.
\textsuperscript{171} See supra note 50.
\textsuperscript{172} \textit{Johnson}, 304 U.S. at 464.
\textsuperscript{173} \textit{Juvenile Justice Study}, supra note 1, at 17. The study did not include data from Hennepin County.
\textsuperscript{174} \textit{Gault}, 387 U.S. at 55.
\textsuperscript{175} In the area of fundamental rights, the Supreme Court has spoken directly to the issue of cost benefit analysis as a justification of the abridgement of constitutional rights. In \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969), the Supreme Court directly addressed an argument by the Connecticut State Welfare Board that a residency re-
Constitutional protections must be observed. Thus, is the duty of the Minnesota Legislature to enact legislation which prevents the uninformed in-court waiver of legal counsel by juveniles. To be effective, that legislation should comport with the proposal endorsed above.

Ross Quaintance†

requirement for receipt of welfare benefits was justified on fiscal grounds. Holding the state statute unconstitutional as a violation of the right to interstate travel, the Court stated:

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of citizens. In the case before us, appellants must do more than show that denying welfare to new residents saves money. Id at 633. Right to counsel, where it applies, should be afforded the same type of protection from abridgement on the basis of fiscal grounds.

† Ross Quaintance graduated from William Mitchell College of Law in June of 1985. While returning from a vacation in the Canadian Rockies, Ross was critically injured in an automobile accident. He died eighteen days after the accident at the age of 27.

The idea of dying after spending three grueling years in law school seems particularly cruel. However, unlike many of us, Ross did not let law school get in the way of his growth as a person. He will be missed, not only for the kind of person he was, but for who he was going to be.