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Novak v. Commonwealth: Are Virginia Courts Providing Special Protection to Virginia's Juvenile Defendants?

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NOVAK V. COMMONWEALTH: ARE VIRGINIA COURTS PROVIDING SPECIAL PROTECTION TO VIRGINIA'S JUVENILE DEFENDANTS?

> *"What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."*
>
> *Justice Douglas*[1]

I. INTRODUCTION

On March 9, 1991, Shawn Paul Novak was charged with the murder of two young boys, Daniel Grier, age nine, and Christopher Weaver, age seven.[2] The boys had disappeared on March 4 and their bodies were found the next day after an extensive search.[3] The police inquiry into the murders led to the questioning of a number of people, including Shawn, then age sixteen.[4] Shawn was questioned on four separate occasions.[5] At no time prior to, during, or after any of these questioning sessions was Shawn read his *Miranda* warnings which specify the rights to which he was entitled under the Constitution. It was during the fifth and final interrogation session that Shawn finally confessed to the murders.[6] After approximately thirty minutes of questioning, the detective persuaded Mrs. Novak to leave the interrogation room.[7] He assured her that her son was

1. Haley v. Ohio, 332 U.S. 596, 599 (1948).
2. Novak v. Commonwealth, 457 S.E.2d 402 (Va. Ct. App. 1995).
3. *Id.* at 405.
4. *Id.*
5. *Id.*
6. *Id.*
7. Brief of Amicus Curiae on Behalf of Youth Advocacy Clinic and Mental Dis-

not a suspect, but that he had "sensitive areas" that needed to be discussed which were in no way related to the murders.[8] Almost two hours later, the Detective said, "Shawn. You can talk to me. Don't be afraid. Get it out. Don't be afraid . . . You killed them, didn't you?"[9] It was not until Shawn answered "yes" that the Detective read him his *Miranda* rights for the first time.[10]

Shawn was seventeen years old when he was transferred from Juvenile and Domestic Relations District Court and convicted in circuit court as an adult in 1992.[11] On May 23, 1995, the Court of Appeals of Virginia affirmed the conviction of Shawn Paul Novak on two counts of capital murder.[12] It was the first time in Virginia's appellate history that a juvenile's conviction based on a confession he gave police without previously receiving a *Miranda* warning, was upheld.[13] In March 1996, the Supreme Court of Virginia denied Shawn's petition to review the Court of Appeals' decision.

For years, the Virginia appellate court system has given lip service to the notion that juveniles require special care and attention from the justice system.[14] However, in the *Novak*

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abilities Clinic University of Richmond Law School at 3, Novak v. Commonwealth, 457 S.E.2d 402 (Va. Ct. App. 1995) (No. 1416-92-1) [hereinafter Brief].

8. Brief, *supra* note 7, at 3.

9. *Id.* at 23.

10. *Novak*, 457 S.E.2d at 405.

11. Brief, *supra* note 7, at 1.

12. *Novak*, 457 S.E.2d 402.

13. *But see* Wansley v. Commonwealth, 171 S.E.2d 678 (Va.), *cert. denied*, 399 U.S. 931 (1970) (holding that *Miranda* does not apply to a situation where confession was freely given by defendant to his mother); Williams v. Commonwealth, 179 S.E.2d 512, 514 (Va. 1971) (upholding *Wansley* because Miranda is "limited to statements resulting from the compelling influences of police interrogation.").

14. *See* Green v. Commonwealth, 292 S.E.2d 605, 608 (Va. 1982) ("[I]t appears the police exercised the greatest care in seeing Green's rights were protected."); Harris v. Commonwealth, 232 S.E.2d 751, 754 (Va. 1977) ("Today, as a result of *Miranda v. Arizona* . . . and *In re Gault*, . . . juveniles are fully advised of their Miranda rights.").

In Grogg v. Commonwealth, 371 S.E.2d 549 (Va. Ct. App. 1988), the Court of Appeals of Virginia noted that:

> Even though the United States Supreme Court and our Supreme Court have adopted the totality of the circumstances approach, many courts have cautioned that greater protection and care may be required when a juvenile is involved. . . .We adhere to the view that it is desirable to have a parent, counsel or some other interested adult or guardian pres-

decision, and the five main cases preceding *Novak*, which all dealt with questionable confessions by juveniles, the Court of Appeals of Virginia and the Supreme Court of Virginia upheld the convictions every time.[15] Those five cases are underscored by two others where the court upheld juvenile convictions based on confessions and admissions made to parents after police interrogation.[16] What is most troubling about this string of cases is that they seem to contradict one of the most significant juvenile law opinions ever written by the United States Supreme Court. In *In re Gault*, the Court stated that when a juvenile confesses, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[17]

This Note discusses the Fifth Amendment right to avoid self-incrimination and how that right applies to the juvenile defendant. Part II examines the United States Supreme Court cases which have had a substantial impact on state court decisions pertaining to confessions by juveniles and the rights to which they are entitled. Part III discusses the Virginia decisions leading up to *Novak*, and Part IV discusses the *Novak* decision itself. Part V provides a general analysis of the reliability of juvenile confessions, and Part VI concludes by addressing the likely outcomes of the juvenile confession cases following *Novak*.

II. THE SUPREME COURT'S TREATMENT OF JUVENILES

In 1966, the Supreme Court decided the landmark case *Miranda v. Arizona*.[18] *Miranda* was a 5-4 response to a question posed twenty-two years earlier by Justice Jackson's dissent

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> ent when the police interrogate a juvenile, and it is even more desirable to have an interested adult present when a juvenile waives fundamental constitutional rights and confesses to a serious crime.

Id. at 556-57.

15. Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992); *Harris*, 232 S.E.2d at 751; Johnson v. Commonwealth, 404 S.E.2d 384 (Va. Ct. App. 1991); Smith v. Commonwealth, 373 S.E.2d 340 (Va. 1988); *Grogg*, 371 S.E.2d at 549.

16. *Williams*, 179 S.E.2d 512; *Wansley*, 171 S.E.2d 678.

17. 387 U.S. 1, 55 (1967).

18. 384 U.S. 436 (1966).

in *Ashcraft v. Tennessee*.[19] In *Ashcraft*, Justice Jackson agreed with the majority that the detention and questioning of a suspect for thirty-six hours is "inherently coercive," but also said, "[s]o is custody and examination for one hour. Arrest itself is inherently coercive and so is detention. . . . But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is 'inherently coercive'?"[20]

In *Miranda*, Jackson's question was finally answered. The Court held that an individual who is subject to custodial interrogation by law enforcement officers must be advised of certain basic rights *before* the interrogation may commence.[21] The purpose of this procedure, the Court stated, is to "assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[22]

"Custodial interrogation" is defined as the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[23] The administration of *Miranda* warnings is not required unless this definition is met.[24] Not every individual questioned by the police is necessarily subject to custodial interrogation.[25] The critical test to determine if custodial interrogation exists is whether a reasonable person in the suspect's position would have understood his situation as being custodial,[26] or in other words, that he was not free to leave.

In *Miranda*, the Court specifically addressed the procedures which law enforcement officers must take when interrogating an individual: "The person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the pres-

19. 322 U.S. 143 (1944).
20. *Id.* at 161.
21. *Miranda*, 384 U.S. at 436.
22. *Id.*
23. *Id.* at 444.
24. *Id.*
25. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).
26. *Id.*

ence of an attorney, either retained or appointed."[27] The Court made it clear that these rights could be waived, but *only* if the waiver is made voluntarily, knowingly and intelligently.[28] In the years following *Miranda*, there has been much debate as to what constitutes a valid waiver of rights.[29] As will be discussed later, this battle still rages in Virginia.

After *Miranda*, the question remained whether the decision applied with respect to the interrogation and subsequent conviction of juveniles.[30] One year later in 1967, the Court decided *In re Gault*,[31] a holding which overturned the Supreme Court of Arizona's decision to commit a fifteen-year-old boy to the State Industrial School for making obscene phone calls to a woman who lived in his neighborhood.[32] The Court began its opinion by discussing the history of the juvenile justice system. "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles."[33] The Court went on to describe the common law view of children's rights.

> The right of the state . . . to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody" . . . [i]f the child is "delinquent" . . . the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.[34]

The Court recognized that the juvenile system was set up without many procedural restraints specifically for the purpose of providing children with more care and compassion than the

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27. *Miranda*, 384 U.S. at 436.

28. *Id.* at 479.

29. *See, e.g.*, Hutto v. Ross, 429 U.S. 28, 30 (1976) (holding that confession made pursuant to a plea bargain was admissible because "[t]he confession [did] not appear to have been the result of . . . any coercion on the part of the prosecution, and was not involuntary.").

30. In *Miranda*, there was no discussion of juvenile case law. 384 U.S. at 436.

31. 387 U.S. 1 (1967).

32. *Id.* at 4.

33. *Id.* at 14.

34. *Id.* at 17.

adult system provides.[35] However, it found that "[t]he absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. . . . Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[36] The Court also reviewed the purpose and necessity of due process of law:

> Failure to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[37]

Although it never decided the precise question of whether a juvenile is entitled to the constitutional guarantee of due process, the Court had emphasized in previous decisions "that 'the basic requirements of due process and fairness' be satisfied in such proceedings . . . [N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[38] The Court felt that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception."[39] From this, the Court concluded that if a juvenile was entitled to the privilege against self-incrimination like an adult, he was also capable of waiving that right.[40]

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35. *Id.* at 15.
36. *Id.* at 18-19.
37. *Id.* at 19-20.
38. *Id.* at 12-13 (quoting Haley v. Ohio, 332 U.S. 596 (1948)).
39. *Id.* at 47.
40. *Id.* at 55-57. The Court also examined the specific question "whether . . . an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent." *Id.* at 44. In addition, the Court considered "whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived." *Id.*

The Court in *In re Gault* "emphasized that admissions and confessions of juveniles require special caution."[41] In previous decisions, the Court noted the peculiar vulnerability of youths.[42] In *Gallegos v. Colorado*, for example, the Court repeated its concern for the juvenile defendant, originally expressed in *Haley*:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.[43]

The *Gault* decision emphasized that the importance of the due process privilege, especially as it related to juveniles is "to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."[44] Since the *In re Gault* decision, it has been presumed in many states, including Virginia, that due process applies to juveniles as well as adults.[45] Therefore, juvenile defendants in Virginia are to be given *Miranda* warnings whenever they are taken into custody as suspects of a crime.[46]

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41. *Id.* at 45.

42. An example of the Court's concern is expressed by Justice Douglas in *Haley v. Ohio*, 332 U.S. 596, 599 (1948), at the beginning of this Note.

43. 370 U.S. 49, 54 (1962).

44. *Gault*, 387 U.S. at 47.

45. *See, e.g.*, Harris v. Commonwealth, 232 S.E.2d 751, 754 (Va. 1977) ("Today, as a result of *Miranda v. Arizona* . . . and *In re Gault* . . . juveniles are fully advised of their Miranda rights. . . ."); Williams v. Commonwealth, 179 S.E.2d 512 (Va. 1971) (upholding previous decision in Wansley v. Commonwealth, 121 S.E.2d at 678 (Va. 1970), that although *Miranda* and its sister cases are not applicable where a juvenile confesses to a third party, *Miranda* is applicable to juvenile confession cases where the statements are made directly to the police).

46. *See* Green v. Commonwealth, 292 S.E.2d 605, 606 (Va. 1982) ("Detectives . . . [arrested] Green, a fifteen year old student. . . . [R]eading from the standard form, [the detective] immediately advised Green of his Miranda rights and told him he was a suspect in a 'purse snatching.'"); Smith v. Commonwealth, 373 S.E.2d 340, 341 (Va. Ct. App. 1988) ("Shortly after the victim's body was found [o]fficers . . . interviewed [Smith] at his home. . . . Immediately upon approaching [Smith], [the officers] . . .

In the 1979 case *Fare v. Michael C.*,[47] the United States Supreme Court came one step closer to confirming that juveniles are entitled to receive *Miranda* warnings before being interrogated by law enforcement officials. *Fare* also confirmed that a juvenile is as capable as an adult of waiving those rights.[48] The test to determine whether an individual has voluntarily waived his Fifth Amendment rights is whether the statement was the "'product of an essentially free and unconstrained choice by its maker,' or . . . whether the maker's will has been overborne and his capacity for self-determination critically impaired."[49] As the Court points out in *Fare*, whether an individual has knowingly and intelligently waived his rights is determined by using the "totality of the circumstances test."[50]

> The totality approach . . . 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.[51]

In *Fare*, the United States Supreme Court confirmed the tests and the factors that the state courts must use in their juvenile decisions.[52] As we shall see in Virginia however, although these tests are used regularly, the protection they provide for juveniles is minimal when compared to the special care and protection the Supreme Court deemed necessary in earlier cases such as *Gault* and *Gallegos*.

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advised him of his 'rights under Miranda' as contained on a card read into evidence."); *see also*, Brief, *supra* note 7, at 7 ("Virginia decisions require compliance with *Miranda* for statements admitted in criminal proceedings after transfer from juvenile court to circuit courts for trial as adults.").

47. 442 U.S. 707 (1979).

48. *Id.* at 725.

49. Stockton v. Commonwealth, 314 S.E.2d 371, 381 (Va. 1984) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

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

51. *Id.* (citing North Carolina v. Butler, 441 U.S. 367 (1979)).

52. *Id.*

III. VIRGINIA'S TREATMENT OF JUVENILES

A. Harris v. Commonwealth

In 1977, seven years after the Supreme Court of Virginia established that *Miranda* applied to juvenile as well as adult suspects,[53] Virginia confronted the first case in which they actually had to determine whether a juvenile confession subject to *Miranda* had been properly admitted into evidence. In *Harris v. Commonwealth,*[54] a juvenile charged with first degree murder and robbery was given his *Miranda* warnings and then confessed to the police.[55] On appeal of his conviction, Harris argued that his confession was not voluntarily given because he was not aware that he would be treated as an adult.[56] Harris argued that, "the mere warning that his statement could be used against him in 'a court of law' was not sufficiently specific to alert a juvenile to the fact that he might be tried as an adult."[57] The court found, however, that under the totality of the circumstances test, Harris had been fully advised of his constitutional rights and had waived those rights freely and voluntarily.[58] Harris was seventeen at the time of questioning;

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53. *See Wansley*, 121 S.E.2d 678 (Va. 1970).

54. Harris v. Commonwealth, 232 S.E.2d 751 (Va. 1977).

55. *Id.* at 753. While en route by bus from juvenile halfway house in Staunton to Beaumont Learning Center near Richmond, Harris escaped in Charlottesville. He broke into his grandfather's house and murdered him. Using the same gun, he later robbed a market in Charlottesville. Before any questioning by the police, Harris signed a waiver of rights form. After he signed the form, "he confessed fully, freely and in detail to the two crimes that he had committed." *Id.*

56. *Id.* The court notes that:

> Harris argues that the voluntariness of his confession is clouded, not by the use of threats or coercion on the part of the police, but because he was laboring under a serious misconception concerning the probable disposition of his case. . . . [H]e had no expectation that he would be treated as an adult.

Id.

57. *Id.*

58. *Id.* at 755.

> The interrogation of defendant was conducted by the police officers in an adversary setting in police headquarters. The defendant knew that the crimes being investigated were murder and armed robbery and that he was a suspect. He had been so advised in writing and the form that he executed prior to questioning clearly set forth his rights to remain silent, to have counsel and to stop answering any questions whenever he so desired. His mother was present. The juvenile authorities were not

he had almost completed the seventh grade in public schools; and he had attended the Hanover School for Boys and the Beaumont Learning Center, two correctional institutions where he had previously been confined. The murder and armed robbery "were but the last two acts in a juvenile delinquent's career which had already precipitated the filing of thirty juvenile petitions against [Harris]."[59] The court felt that because of these circumstances, Harris had accumulated enough experience to know that he could be treated as an adult.[60] The Supreme Court of Virginia upheld his conviction based on the fact that Harris knowingly and voluntarily waived his Fifth Amendment rights.[61]

B. Grogg v. Commonwealth

In 1988, the Virginia courts were again confronted with a confession made by a juvenile after waiving his Fifth Amendment *Miranda* rights.[62] In *Grogg v. Commonwealth*, the Court of Appeals of Virginia upheld the conviction of Thomas Lynn Grogg, a juvenile charged with first degree murder and use of a

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present and did not participate in the interrogation.

Id.

59. *Id.* at 751.

On ten occasions Harris had been found not innocent of charges that would have been felonies if committed by an adult. On thirteen occasions he had been found not innocent of charges that would have been misdemeanors if committed by an adult. On one occasion he had been given a six-month jail sentence. The crimes with which he had been previously charged include statutory burglary, larceny of automobiles, larceny from persons, destruction of private property, assault and battery, impeding a police officer, drunk in public, stabbing with intent to maim and kill, profanely swearing and cursing in public, hit and run, operating a vehicle without an operator's license, reckless driving, and sodomy.

Id.

60. *Id.*

The previous exposure of defendant to Virginia's criminal justice system, as well as the warnings that his statement could and would be used against him in a court of law, clearly conveyed to defendant the possibility of subsequent criminal prosecution. Indeed it would have been naive for one to believe that with this background Harris did not realize that he could be tried in the circuit court and subjected to confinement in a penitentiary.

Id.

61. *Id.*

62. Grogg v. Commonwealth, 371 S.E.2d 549, 550 (Va. Ct. App. 1988).

firearm in the commission of murder.[63] Grogg was given his *Miranda* warnings on five separate occasions, but argued that his confession was obtained in violation of his Fifth Amendment rights.[64] Grogg argued that, "because his court-appointed attorney was not notified or present and his parents or other neutral adult were not present," his waiver of constitutional rights was not knowing and intelligent.[65] The court used the totality of the circumstances test when it found that, although

> it is desirable to have a parent, counsel or some other interested adult or guardian present when the police interrogate a juvenile, and it is even more desirable to have an interested adult present when a juvenile waives his fundamental constitutional rights and confesses to a serious crime, . . . it is well established that the mere absence of a parent or counsel does not render a waiver invalid.[66]

Rather, the absence of a parent is merely one factor to be considered in the totality of the circumstances.[67] The court found that because no member of Grogg's family was *available* and the fact that no family member was *present* did not render the confession inadmissible.[68] The court also found Grogg's claim that the interrogation atmosphere was coercive was without

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63. *Id.* at 550-51. Grogg was initially arrested in Sarasota, Florida. The Sarasota police were alerted to "an outstanding Virginia warrant charging Grogg with grand larceny of an automobile. At that time, Grogg was nine days shy of his sixteenth birthday." Grogg was taken into custody in Florida as a fugitive from justice. Grogg was advised of his rights under *Miranda*, and then gave a statement to the Sarasota police. Within forty-eight hours, Grogg signed a waiver of extradition and was returned to Virginia. *Id.*

64. *Id.* at 554. Grogg also argued that his Sixth Amendment right to counsel was violated and that "pertinent Florida and Virginia statutes were violated by the police" during the extradition process. *Id.*

65. *Id.* at 557. Grogg also argued that the facility where he was held, an adult facility, "created an atmosphere of coercion and pressure" and that the police who read him his *Miranda* warnings did so "without conducting colloquy to determine whether he fully understood the rights that he ultimately waived." *Id.*

66. *Id.*

67. *Id.* "The absence of a parent or counsel is 'a circumstance that weigh[s] against the admissibility of the confession.'" *Id.* (quoting Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978)).

68. *Id.* at 557. At the time of the confession, Grogg was in Florida and his parents were in Virginia. His mother did not have a phone, and his father could not be reached. Grogg declined the opportunity to contact his sister. *Id.*

merit.[69] Grogg was not handcuffed; the interrogation itself lasted only about one hour; Grogg was calm; no officer threatened him in any way; and "no promises or inducements were made to elicit his confession."[70] The court looked to Grogg's educational experience and found that, at the time of questioning, he had completed the seventh grade and was within one week of his sixteenth birthday.[71] He was in good health and was not using any drugs or alcohol.[72] He had appeared one time previously in juvenile court.[73] He was advised of his *Miranda* warnings on five separate occasions.[74] The waiver and consent form he signed contained simple, easy to understand language.[75] After Grogg was read each right, he was asked generally if he had any questions.[76] The court found no evidence in the record that Grogg failed to understand his *Miranda* rights.[77] Therefore, the court found that under the totality of the circumstances, there was no reason to find Grogg's confession inadmissible.[78]

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* A Wechsler Intelligence test indicated that Grogg's level of cognitive functioning fell within average range. His verbal comprehension ability fell within the low average range, and his perceptual organizational ability fell within the high average range. *Id.* at 553.

73. *Id.* at 557.

74. *Id. at 558.* Grogg was first informed of his *Miranda* rights immediately after he was arrested, and then again approximately three hours later, before the Sarasota police took a statement from him. The judge, at a subsequent advisory proceeding, read Grogg his rights, and his court-appointed attorney also reviewed Grogg's rights with him. Finally, when the Virginia police officers arrived, they also advised Grogg of his rights. *Id.*

75. *Id.* "The waiver and consent form that Grogg signed indicated the officers were investigating [sic] homicide and Officer Hughes specifically asked Grogg if he understood what the word 'homicide' meant. Grogg acknowledged that he did." *Id.*

76. *Id.* "[T]he record discloses that the officers made a conscientious effort to ensure that he understood his rights." *Id.*

77. *Id.* In fact, during cross-examination at a pre-trial hearing, Grogg indicated that at the time he spoke with the police officer, he "knew [he] could say nothing" but he "really wanted to get [it] off [his] chest." *Id.*

78. *Id.* at 559.

> In view of the totality of the circumstances, we believe that Grogg was of sufficient age, intelligence, and experience to understand the rights he was waiving and the consequences of the waiver. Furthermore, it is apparent that the waiver was voluntary because no coercion or threats were implied by the police, and the interrogation was not lengthy.

Id.

C. Smith v. Commonwealth

In the same year *Grogg* was decided, the Court of Appeals of Virginia also heard *Smith v. Commonwealth*.[79] Once again the court decided that under the totality of the circumstances, the confession given by the juvenile was admissible at trial.[80] In *Smith*, a fifteen-year-old boy was charged with first degree murder, aggravated sexual battery, and abduction.[81] Shortly after the victim's body was found, police went to Smith's home to question him.[82] As soon as Smith answered the door, the police read him his *Miranda* rights.[83] When asked if he wished to make a statement to the police, Smith simply responded "prove it."[84] In the car on the way to the station, the officer asked Smith if he understood that he did not have to answer questions or make a statement without a lawyer being present.[85] Smith "indicated that he understood and proceeded to tell [the officer] that after having sex with the victim he struck her with rocks at least twice; that he choked her; that he . . . dragged her down a hill to a ditch; and that when [he] left her

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79. 373 S.E.2d 340 (Va. Ct. App. 1988).

80. *Id.* at 343.

> The record discloses that appellant was advised of his rights several times in different locations and by at least two different officers out of each other's presence. Following each warning, appellant chose to give an account of the cause of the victim's death which clearly proved his guilt of each crime for which he stands convicted. There is no evidence of police intimidation, subtle or otherwise, which could reasonably be said to overcome appellant's free choice. There is no evidence that appellant was "threatened, tricked or cajoled." In fact, appellant declined the police offer to have his parents present when questioned at the sheriff's office. At no time did [Smith] request that an attorney be appointed or present when questioned.

Id.

81. *Id.* at 341. The victim was a twelve-year old girl who was found dead in the woods near her home. She was only "partially clothed, her 'bottom bare.' . . . The cause of death was trauma associated with a skull fracture." *Id.*

82. *Id.* Police were alerted to Smith's involvement in the murder by the victim's grandmother who saw Smith running away from the scene. *Id.*

83. *Id.* at 341-42.

84. *Id.* at 342. After accompanying Smith upstairs so that he could get dressed, the police officers handcuffed him and drove him to the police station. Before they left, the police explained to Smith's parents that he was under arrest for murder and they could be present when he was interrogated. Neither parent chose to follow the police to the precinct. *Id.*

85. *Id.*

she was dead."[86] The court found that the totality of the circumstances indicated that Smith was read his *Miranda* rights on a number of occasions by a number of different people.[87] Each time he chose to give a statement to the police.[88] The court ultimately held "that viewing the totality of the circumstances and particular facts disclosed by this record, the evidence is sufficient to support the trial court's judgment that appellant was fully advised of his rights and by his conduct and statements waived his privilege against self-incrimination."[89]

D. Johnson v. Commonwealth

In 1991, the Court of Appeals of Virginia was again faced with a case involving a juvenile confession given after *Miranda* rights were read. In *Johnson v. Commonwealth,*[90] a fifteen-year-old male was charged with murder.[91] Using the totality of the circumstances test, the court held that Johnson's confession to the police was freely and voluntarily made. Johnson was capable of reading and writing at a seventh grade level and suffered from no physical or mental disabilities.[92] Before the police began questioning him, Johnson was advised of his *Miranda* rights.[93] Both Johnson and his father indicated that they understood the warnings, and that they were both willing

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86. *Id.*

87. *Id.* at 342. Once he reached the police station, Smith was once again reminded of his *Miranda* rights. The officer asked Smith if he wished to make a statement and Smith replied, "No, sir." But shortly thereafter, he began repeating the same story he had told in the car. Next, Smith was placed in the custody of two other law enforcement officers. He was again read his rights, and after indicating that he understood those rights, he retold the entire story. *Id.*

88. *Id.* at 343. The court held that Smith's response "prove it" was "simply a non-responsive exclamation that was insufficient to cut-off further questioning." With regard to Smith's answer, "no sir" when asked after giving the story in the car whether he would like to make a statement, the court held that "[i]n view of appellant's prior admissions, the trial court reasonably interpreted the latter question as one of clarification." *Id.*

89. *Id.*

90. 404 S.E.2d 384 (Va. Ct. App. 1991).

91. *Id.* at 385. The defendant arrived at the police station accompanied by his father, an ordained minister. Earlier in the day, defendant told his cousin that he had killed the victim using a .22 caliber weapon while attempting to rob him. *Id.*

92. *Id.* Johnson was described by his former teacher as the best student in her class. *Id.*

93. *Id.*

to answer questions regarding the murder.[94] Johnson was not overly sleepy nor did he show signs of being under the influence of any drugs or alcohol.[95] The court found no evidence in the record of threats, force or display of weapons by the police.[96] The only questionable conduct by the police occurred when "[o]ne officer was less than truthful when he led appellant to believe that he had obtained incriminating fingerprints."[97] The court held that "[w]hile we do not condone conduct wherein false representations are made, the statement made by the officer did not constitute reversible error."[98] Rather the court felt that misconduct on the part of the police is one factor to be considered in the totality of the circumstances.[99] The court held that because of the juvenile defendant's age, background, experience and conduct, the trial court was correct in finding his confession admissible.[100]

E. Thomas v. Commonwealth

Most recently, in 1992, the Supreme Court of Virginia was called upon to decide whether the confession of a juvenile defendant was admissible under the totality of the circumstances. In *Thomas v. Commonwealth*,[101] the court reviewed the conviction of a seventeen year old male for the murder of his girlfriend's parents.[102] On appeal, Thomas argued that an examination of the totality of the circumstances indicated that his

94. *Id.* at 385-86. Initially, Johnson denied that he was involved in the murder, but later he asked to speak with one of the officers alone. While he was talking with that officer, Johnson confessed to the murder. Later, Johnson corroborated his oral confession in a handwritten statement. *Id.*

95. *Id.* at 386.

96. *Id.*

97. *Id.*

98. *Id.* at 386 n.1.

99. *Id.* at 386.

100. *Id.* at 394.

101. 419 S.E.2d 606 (Va. 1992).

102. *Id.* Defendant was romantically involved with a fourteen-year-old girl named Jessica. Jessica's parents were threatening to break up the relationship for some time, and Jessica was heard to say that she wished to get rid of her parents. Thomas and Jessica formulated a plan. On the night of the murders, Thomas entered Jessica's bedroom window at midnight, went to her parent's room and fired a shotgun at them twice. Thomas returned home and was later questioned by the police regarding his involvement in the murders. *Id.*

confession was involuntary. First, he was only seventeen at the time of the offense and was a high school dropout.[103] More importantly, he argued, he had slept only two of the forty hours preceding his interrogation.[104] He indicated that he felt pressure from people he thought were very angry with him.[105] In addition, because the police initiated all conversations, Thomas "felt surrounded by authorities who obviously wanted him to confess."[106] Also, according to the testimony of a clinical psychologist, Thomas was unable to make an informed decision about waiving his *Miranda* rights.[107] The doctor felt that Thomas was "unable to make decisions at an adult level" due to the fact that he was "at the lower end" of the "average range of intellectual function" and was sleep-deprived.[108] Thomas argued, "it [was] unreasonable to believe that under these circumstances [his] confession . . . was obtained by anything other than coercion and duress."[109]

The court disagreed with Thomas' analysis of the situation. Chief Justice Carrico, writing for the majority, examined the totality of the circumstances.[110] Justice Carrico first noted that before interrogation commenced, Thomas was read his *Miranda* rights "very slow[ly] and very deliberate[ly]."[111] Thomas indicated that "he understood his rights, took time to read the waiver form for himself, and then signed it."[112] Justice Carrico noted that on the day of questioning, Thomas was, "[v]ery alert and very calm."[113] The court also noted that Thomas' "guardian was present during the entire interview except for a few seconds when she went to the kitchen to get a drink."[114] Fi-

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103. *Id.* at 613.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* The psychologist diagnosed Thomas as being "developmentally immature." *Id.*
108. *Id.* at 613.
109. *Id.*
110. *Id.* at 614.
111. *Id.* The record indicates that Special Agent Johnson, who took Thomas' confession, gave Thomas his Miranda warnings at approximately 2:00 p.m. on the afternoon after the murders. *Id.* at 613.
112. *Id.* at 614.
113. *Id.* at 613-14. He "appeared alert and responsive, had no odor of alcohol about him . . . and had not taken any drugs." *Id.*
114. *Id.*

nally, the court noted that the Commonwealth's expert witness, a clinical psychologist, felt that Thomas was capable of knowingly, intelligently, and voluntarily waiving his *Miranda* rights.[115] The trial court was completely within its discretion when it rejected the testimony of the defense expert in favor of the Commonwealth's expert.[116] Because the evidence in the record sufficiently supported the trial court's conclusion that Thomas' confession was admissible, the Supreme Court of Virginia upheld Thomas' conviction.[117]

It becomes disturbingly obvious after a quick glance at each of these Virginia cases that all of the juveniles involved were young people with serious problems in need of serious help. They were all convicted of heinous crimes. Many had previous experience with the juvenile justice system. They were not typical kids. However, the fact remains that they were still juveniles, still entitled to the extra care and protection discussed in *In re Gault* and *Fare v. Michael C.* Although few would disagree that these juveniles deserved to be punished in some way, most would agree that our nation's children need all the protective devices our system can offer. In every one of the previous Virginia cases, the juvenile had been read his *Miranda* rights. And in every one, the totality of the circumstances test provided a strong, if not conclusive, argument in favor of upholding the conviction based on the juvenile's waiver of his Fifth Amendment rights. *Novak v. Commonwealth*, on the other hand, presents an entirely different situation.[118]

IV. *NOVAK V. COMMONWEALTH*

A. *An Analysis of the Facts*

Unlike most of the defendants in the cases above, when Shawn Paul Novak was convicted of murder in 1992, he had no previous experience with the criminal justice system.[119] He

115. *Id.* at 614.

116. *Id.*

117. *Id.* "[T]he evidence amply supports the trial court's finding that Thomas' 'rights were fully protected and that he made an effective, voluntary decision to make the statement he did.'" *Id.*

118. 457 S.E.2d 402 (Va. Ct. App. 1995).

119. Brief, *supra* note 7, at 23. (Shawn had no previous contact with the juvenile

suffered from severe mood swings and growing depression.[120] He was known to exhibit bizarre behavior in his classes at school.[121] For instance, he talked to tennis balls, golf balls, blades of grass, and an imaginary friend he called "Kender."[122] One of Shawn's teachers relayed the fact that as Shawn became more withdrawn, his mood swings would become more severe, and he could often be found standing in a trash can in a dark classroom.[123] Shawn's teacher also indicated that he was an overly obedient boy with respect to authority.[124] A defense psychiatrist testified that Shawn was likely to be overly agreeable and would try to please authority figures.[125] Both the defense and prosecutorial psychiatrists agreed that Shawn was extremely immature and suffered from low self-esteem.[126] Both also indicated that Shawn's verbal interaction was often "grossly inappropriate" to the circumstances surrounding him.[127]

B. *An Analysis of the Court's Reasoning*

Also unlike any of the defendants discussed in the cases above, Shawn's confession was given to the police *before* his *Miranda* warnings were read to him.[128] The prosecution argued that this was due to the fact that Shawn was not yet subject to custodial interrogation.[129] As noted in *Berkemer v. McCarty*, the test to determine whether custodial interrogation

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justice system, the police, or the courts). *Id. But see supra*, part III where all but two of the juveniles in those cases had some sort of previous contact with the criminal justice system.

120. *Id.* at 5. The only other juvenile defendant to offer evidence of emotional instability in the cases discussed above was the defendant in Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992).

121. Brief, *supra* note 7, at 5.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Brief, *supra* note 7, at 5, 6.

127. *Id.* at 6. In none of the preceding five cases was similar behavior by the defendant observed.

128. *Novak*, 457 S.E.2d at 405; *see* Thomas v. Commonwealth, 419 S.E.2d 606, 614 (Va. 1992); Harris v. Commonwealth, 232 S.E.2d 751, 753 (Va. 1977); Johnson v. Commonwealth, 404 S.E.2d 384, 385-86 (Va. Ct. App. 1991); Smith v. Commonwealth, 373 S.E.2d 340, 341-42 (Va. Ct. App. 1988); Grogg v. Commonwealth, 371 S.E.2d 549, 551 (Va. Ct. App. 1988).

129. *Novak*, 457 S.E.2d at 407-08.

exists is whether a reasonable person in the suspect's position would have understood his situation to be custodial.[130] Therefore, the Court of Appeals of Virginia had to "determine how a reasonable child of Novak's age would have understood his predicament and acted in a manner consistent with that understanding."[131] The court once again used the totality of the circumstances test: "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the 'ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"[132]

The circumstances the court took into consideration were Shawn's age, intelligence, background, and experience with the criminal justice system, the police conduct, surroundings, physical restraint, length and character of the interrogation, and the focus of police suspicion.[133] The key factor to the outcome of the appeal however, was the fact that the appellate court had to review the evidence in the light most favorable to the prevailing party in the court below.[134] Therefore, so long as there was any evidence to support a verdict in favor of the Commonwealth, the trial court's findings had to be upheld.[135]

The evidence surrounding Shawn's confession was substantial.[136] Unfortunately for Shawn, that evidence could be

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130. Berkemer v. McCarty, 468 U.S. 420, 422 (1984).

131. Brief, *supra* note 7, at 7.

132. *Novak*, 457 S.E.2d at 407 (quoting Stansbury v. California, 114 S. Ct. 1526, 1528 (1994) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983))).

133. *Novak*, 457 S.E.2d at 408.

134. *Id.* "In our review of this issue, we again consider 'the evidence in the light most favorable to the prevailing party' below, the Commonwealth in this instance, . . . and 'are bound by the trial court's subsidiary factual findings unless those findings are plainly wrong.'" *Id.* (quoting Wilson v. Commonwealth, 413 S.E.2d 655, 656 (Va. Ct. App. 1992)).

135. *Id.* at 408-09.

> Here, the trial court found the defendant "highly intelligent" and "articulate in his answers to the questions." He noted from the video tape of the interview that defendant was "smoking cigarettes," "taking refreshment," "smiling," and "obviously in complete control of himself," "with a full understanding of the interview process and what was being said and why he was there." . . . [These findings are] well supported by the record.

Id.

136. *Id.*

viewed and analyzed in a number of ways.[137] For instance, the defense argued that Shawn had no previous experience with the criminal justice system, because he had no previous petitions filed against him.[138] The court however, viewed the four prior questioning sessions with the police as "previous experience with the legal system."[139] While the defense argued that Shawn was extremely immature and suffered from emotional problems, the court analyzed his educational background which indicated a solid tenth grade education.[140]

The defense pointed out that on a number of occasions, the police officer investigating the murders lied to Shawn and his mother about facts surrounding the murders.[141]

> Detective Hoffman admitted that . . . he lied to Shawn about police observations on the day of the search; he lied . . . about the presence of a witness who saw [Shawn] walking with the two victims; and he lied when he indicated . . . that the police had a new laser technology which enabled them to secure fingerprints from cloth and that Shawn's prints were on the boys' clothing.[142]

In response, the court merely reiterated its holding in *Johnson v. Commonwealth* by stating that:

> While a deliberate falsehood by a police officer in the course of his duties may undermine the respect that significant segments of the public may have for law enforcement and the system of justice, a lie on the part of an interrogating police officer does not, in and of itself, require a finding that a resulting confession was involuntary. Nothing in this record suggests that deception by Hoffman compelled defendant's . . . confession, against his will and without choice.[143]

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137. *Id.*

138. Brief, *supra* note 7, at 23.

139. *Novak*, 457 S.E.2d at 408.

140. *Brief, supra* note 7, at 5. *But cf. Novak*, 457 S.E.2d at 408-09. It is important to note that a tenth grade education is substantially higher than any of the education levels seen in the previous five cases. *Id.*

141. Brief, *supra* note 7, at 21.

142. *Id.* at 4.

143. *Novak*, 457 S.E.2d at 409.

The defense also argued that Shawn's surroundings were inherently coercive.[144] He was questioned at the police station three out of five times, often without the presence of his mother.[145] During his final interrogation, Detective Hoffman persuaded Mrs. Novak to leave the room by lying to her about the questions he intended to ask Shawn.[146] After she left, the officer positioned himself between Shawn and the door and moved close enough to Shawn so that their knees were almost touching.[147] The defense felt that this movement was enough to make Shawn feel trapped and intimidated, and therefore it was coercive.[148] The defense continued by arguing that Shawn was increasingly the focus of the murder investigation with the passage of each day.[149] The court, however, felt that because the "interview was conducted in a carpeted room, approximately ten-by-twelve, furnished with a table and several chairs," there was no coercion involved.[150] The court noted that Shawn appeared calm and comfortable, and that "until the confession, [he] was permitted to move about the building and was free to leave at anytime."[151]

The court concluded that "[t]his evidence, considered with the entire record, including a video tape of the interview in issue, provided abundant support for the trial court's determination that defendant was not in custody at the time of his initial admission of guilt and prior *Miranda* warnings were, thus, unnecessary."[152]

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144. *Brief, supra* note 7, at 10.

145. *Id.*

146. *Id.* at 3.

147. *Id.* at 4. At this time, Detective Hoffman began questioning Shawn more intently. Hoffman stated: "Shawn. You can talk to me. Don't be afraid. Get it out. Don't be afraid . . . You killed them, didn't you?" *Id.* at 23.

148. *Id.* at 10.

149. *Id.* Shawn was initially questioned on Wednesday, March 6, 1991. He was first questioned at his house in the afternoon. Later that same evening, he was questioned at the police station. Shawn was questioned again at his home on Thursday afternoon and then again in the evening. During the questioning, inconsistencies developed between what Shawn said and the information gathered from other witnesses. Therefore, Shawn and his mother were asked to come to the police station for further questioning on Saturday morning. It was at this session that Shawn confessed. *Id.* at 2.

150. *Novak*, 457 S.E.2d at 408.

151. *Id.*

152. *Id.*

The circumstances surrounding Shawn's confession included multiple factors from the previous Virginia cases discussed above; factors which in those cases, standing by themselves, were not enough to overturn the defendant's conviction. It would seem from Shawn's case that even multiple factors within a single case are not enough to overturn a juvenile's conviction. It is for this reason that Shawn's case represents the closest a Virginia appellate court has come to completely eliminating the "special caution" required under *In re Gault*.

V. THE RELIABILITY OF JUVENILE CONFESSIONS

Whether one agrees or disagrees that Shawn was not yet in custodial interrogation, and therefore not entitled to *Miranda* warnings, his case provides a perfect example of the many questions that surround the questioning of juvenile defendants and the confessions given by them. Many scholars believe that a bright line standard should be adopted to govern questioning of juveniles like Shawn by police and other law enforcement personnel.[153] Several empirical studies of juveniles' understanding of their constitutional rights during police interrogation reveal that a great majority of juveniles are incapable of understanding, let alone waiving, their Constitutional rights.

One study conducted in Virginia examined the ability of 115 learning disabled and non-learning disabled youths from five high schools in four eastern Virginia school districts.[154] In this study, "[t]he teenagers had special problems in understanding the role [of] and time for intervention by a lawyer if asserting their right to an attorney."[155] "Some youths believed that the admonition that anything said could be used against them meant that any disrespectful words directed to the police would

153. *See* Brief, *supra* note 7, at 24. "Standards promulgated by various national bodies have universally recommend[ed] the adoption of a bright line standard to govern such police questioning." *Id.*

154. *See* Brief, *supra* note 7, at 28 (reporting on Barbara A. Zaremba, Comprehension of Miranda Rights by 14-18 Year Old African-American and Caucasian Males With and Without Learning Disabilities (1992) (unpublished Ph.D. dissertation, School of Education, College of William and Mary)).

155. *Id.* at 28-29. "Many [of the teenagers] equated an attorney with a social worker, and some believed that their invocation of the right to counsel would entitle them to a lawyer 'when I go to court.'" *Id.*

be reported to the judge."[156] This study also revealed that age was not a significant factor in improving the students' comprehension of their constitutional rights.[157] Also, the presence of a learning disability did not make a large impact on the level of understanding: even "non-learning disabled students performed below the acceptable level of comprehension."[158]

Earlier research corroborates these results. In 1969, a study in San Diego tested ninety youths and scored their ability to understand and then knowingly and intelligently waive their *Miranda* rights.[159] In the study, "eighty-six of ninety juveniles freely and voluntarily waived their constitutional rights."[160] Of those eighty-six, only five received an understanding score of ten.[161] In other words, eighty-one of the youths who freely waived their rights "did not consciously and fully understand [those] rights."[162]

A third study on this subject was completed in 1981.[163] After extensive investigation of juveniles' level of understanding of their *Miranda* rights, the author concluded:

> [T]he great majority of juveniles who are 14 years of age or younger were seen in this project to lack the competence to waive rights to silence and counsel. The results also indicate that the competence of juveniles who are 15-16 years of age should be questioned when the juvenile is black and of lower socioeconomic status, or has had little contact with police in relation to felony charges, or might manifest intellectual functioning which is well below average on an intelligence test (that is, an IQ of less than 80).[164]

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156. Brief, *supra* note 7, at 29.
157. *Id.*
158. *Id.*
159. A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970).
160. *Id.* at 53.
161. *Id.*
162. *Id.*
163. GRISSO, JUVENILE'S WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 8 (1981) (the purpose of the test was "to provide empirical information with which police, lawyers, judges, and legislative lawmakers could address the question of juvenile's competence to waive *Miranda* rights.").
164. *Id.* at 203-04.

The results of each of these studies lead to the inevitable conclusion "that juveniles [should] be extended far greater protections than those customarily accorded to adults in interrogation settings."[165] In fact, various national bodies with considerable experience in juvenile justice matters have promulgated standards designed to afford that level of special protection. For example, the Task Force on Juvenile Justice and Delinquency Prevention of the National Advisory Committee on Criminal Justice Standards and Goals recommends the following:

> When police are conducting a custodial investigation of an individual who is legally a juvenile, they should take care not to allow that juvenile to waive the right against self-incrimination without the advice of counsel. During interviews or interrogations, as in all police procedures, police officers must be sensitive to and respect the basic constitutional rights and personal dignity of both juveniles and adults. Police officers must scrupulously avoid practices that could be described as inherently coercive in the sense that a person may cooperate or confess to unlawful conduct as a result of induced fear.[166]

The National Advisory Committee for Juvenile Justice and Delinquency Prevention of the United States Department of Justice also developed a standard for the questioning and interrogation of juveniles.[167] This standard includes the following:

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165. Brief, *supra* note 7, at 29.

> Juveniles are deemed to lack the legal capacity to make wills, enter into contracts enforceable against them, marry without parental permission, or engage in any number of important activities. And yet they are presumed capable of waiving important constitutional rights during a police interrogation which may, as in [Shawn Novak's case], expose a sixteen-year-old youth to the awful possibility of execution in Virginia's electric chair.

Id.

166. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE, TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARD 5.8: GUIDELINES FOR INTERROGATION AND WAIVER OF THE RIGHT AGAINST SELF-INCRIMINATION 212 (1976).

167. NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION OF THE UNITED STATES DEPARTMENT OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE, STANDARD 2.247 (1980).

> Juveniles accused of committing a delinquent offense or engaging in noncriminal misbehavior should not be questioned regarding such offenses or such conduct, and formal oral or written statements by those juveniles should not be accepted, unless [*Miranda* warnings have] been explained

> No statement made by any juvenile while in the custody of a law enforcement officer shall be admissible against the juvenile as part of the government's case-in-chief, unless such statement was made either in the presence of a parent or other adult . . . or in the presence of the juvenile's attorney.[168]

It is clear from these standards, promulgated by experts in the field of juvenile justice, that there is still a need for the "special caution" mandated by the Supreme Court in *In re Gault*. Bright line standards such as these would help to protect the rights of juveniles, while also helping to lessen the amount of confusing and frustrating litigation surrounding this issue.

VI. CONCLUSION

Until standards like those discussed above are adopted and enforced in Virginia, cases like *Novak* will continue to frustrate those who are concerned with the process of interrogating juveniles. If the Supreme Court of Virginia continues down the same path it began in *Harris* and *Thomas*, there seems to be little chance for reversal in a case dealing with a juvenile confession. Without a bright line rule to rely upon, the courts are simply unable to overturn a trial court conviction when there is evidence in the record which supports the fact that a juvenile defendant waived his *Miranda* rights. This inability to reverse exists even when the juvenile was never read his rights in the first place. Therefore, in future cases similar to those discussed above, the best argument remains to convince the court of the distinguishable circumstances surrounding each case from its counterparts. The court must be convinced that the totality of the circumstances indicates that the juvenile was, in fact, engaged in custodial interrogation with the police. If the court finds that the police fully complied with *Miranda*, then the

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> in language understandable by the juvenile. . . . [T]he juvenile [also] has a right to have present his/her parent, guardian, or primary caretaker, or another adult who is within a reasonable distance and with whom the juvenile has significant ties.

Id.

168. *Id.*

juvenile's only hope is to convince the court that his confession was not voluntary. This involves once again the use of the totality of the circumstances test; a test which the appellate courts of Virginia have not frequently used for the purpose of protecting juveniles in the manner prescribed in *In re Gault.*

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