No Brothers Allowed: How Expanding a Juvenile's *Miranda* Rights Backfired on a North Carolina Sheriff's Department*

> *"You want to make it as comfortable as you can for [a juvenile suspect] because it's easier to come forth with the information knowing that he has support."*[1]

INTRODUCTION

Imagine watching the nervousness wash over fifteen-year-old Micah.[2] His parents have brought him to the sheriff's office to talk with a female detective about sexual contact he allegedly had with his younger brother Jake. He does not want to talk with the detective alone—it would be embarrassing to talk to a female about this, and talking one-on-one would be intimidating. And there is no way he would allow his parents to be present during the questioning, either—talk about nerve-racking, plus they might actually be more intimidating than the detective since Micah was being questioned about assaulting their youngest son. Micah refuses to talk one-on-one with the investigator, or even with his parents present. Rather, he wants his twenty-one-year-old brother Bill—a Marine, no less—to be present during the questioning. With his brother in the room, Micah would not have to face the investigator alone, plus Bill may not be as judgmental or imposing as his parents.

Here's the problem: Under current North Carolina law, if Micah asks for his older brother to be present, the detective can refuse the request and continue to talk to Micah one-on-one.[3] Indeed, the detective *must* refuse to allow Bill's presence during the questioning

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1. *The First 48* (A&E television broadcast June 3, 2004) (quoting Miami homicide detective Joe Schillaci, referring to a seventeen-year-old suspect who wanted his grandmother present during questioning).

2. The North Carolina Court of Appeals uses pseudonyms for minors in its opinions. To maintain consistency with the court of appeals' opinion, the accused minor in *In re M.L.T.H.* will be referred to as Micah, his younger brother will be referred to as Jake, and his older brother will be referred to as Bill. *In re* M.L.T.H., ___ N.C. App. ___, ___, 685 S.E.2d 117, 124 (2009), *disc. review granted*, 364 N.C. 241, 698 S.E.2d 401 (2010), *and disc. review improvidently allowed by* 364 N.C. 420, 700 S.E.2d 225 (2010).

3. State v. Oglesby, 361 N.C. 550, 555–56, 648 S.E.2d 819, 822 (2007) (holding that a juvenile defendant does not have a *right* to have anybody but a parent, guardian, custodian, or attorney present).

lest it result in Micah's statements being suppressed in court.[4] This confusing set of interrogation rules results from the North Carolina Court of Appeals' odd ruling in *In re M.L.T.H.*,[5] which held that a juvenile could not have anyone present during interrogation except for a parent, guardian, custodian, or attorney.[6]

This Recent Development argues that *In re M.L.T.H.* was wrongly decided. Part I lays out the facts of *In re M.L.T.H.* Part II discusses the North Carolina Court of Appeals' interpretation of the state's juvenile *Miranda* statute. Part III argues that *In re M.L.T.H.* was not based upon a proper interpretation of the juvenile *Miranda* statute nor upon state supreme court precedent. Part IV contends that *In re M.L.T.H.* could have far-reaching negative repercussions because it risks putting future investigators and juveniles at a disadvantage during questioning.[7]

I. MICAH'S CHOICE

The scenario described in the first paragraph of this Recent Development is taken directly from *In re M.L.T.H.*[8] In that case, a sheriff investigator asked fifteen-year-old Micah and his entire family to come down to the sheriff's office.[9] Micah, his parents, and his five siblings—including twenty-one-year-old Bill, who was on leave from the Marines—all arrived voluntarily.[10] The investigator testified as to what happened:

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4. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 125–26. This was precisely the result in *In re M.L.T.H.*; the investigator allowed Bill in the room and Micah's statements were suppressed on appeal. *Id.*

5. *Id.* at ___, 685 S.E.2d at 117.

6. *Id.* at ___, 685 S.E.2d at 126.

7. This Recent Development is not arguing that juveniles should face the same *Miranda* rights as adults. Indeed, the court in *In re M.L.T.H.* cites that juvenile cases are to be given extra care: "Our courts have consistently recognized that '[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.' " *Id.* (quoting *In re* T.E.F., 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) (internal citation omitted)). Juveniles are less likely than adults to understand their *Miranda* rights, especially if the juvenile's intelligence is below average. THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 105 (1981). This is exacerbated by the fact that an "interrogating officer need not explain the *Miranda* rights in any greater detail than what is required by *Miranda*, even when the suspect is a minor." State v. Flowers, 128 N.C. App. 697, 700, 497 S.E.2d 94, 96 (1998).

8. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 119, 121–22.

9. *Id.* at ___, 685 S.E.2d at 119.

10. *Id.* In fact, on appeal to the Supreme Court of North Carolina, the state chose to focus on the court of appeals' summary conclusion that Micah was in custody when he was questioned. Petition for Discretionary Review Under N.C.G.S. § 7A-31 at i, *In re M.L.T.H.*, ___ N.C. App. ___, 685 S.E.2d 117 (No. 08-1569). The court of appeals claimed that its "review of the transcript reveals that the State did not ever argue before the trial

> [W]hen [Micah and I] were in the hallway I asked him if he wanted to speak to me alone. And he seemed sort of, you know, skiddish about that. I said, well, do you want a parent in here? Do you want your parents to come up here? He said, no. I said, do you want your brother to come up to be in the room with you and he said, yes.[11]

Micah proceeded to volunteer incriminating statements to the investigator, which Micah then put into writing.[12] Bill was present during the entire questioning.[13] Bill did not ask any questions or otherwise participate in the questioning besides merely being present.[14] When the case went to court, Micah sought to have his statements excluded, but the district court denied the motion, finding that Micah's rights had not been violated.[15] Micah was found to be delinquent and subjected to twelve-months probation with electronic monitoring.[16]

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court that Micah was not in custody. In addition, the State did not present any evidence which would support a finding that Micah was not subject to a custodial interrogation." *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 124. As such, the court refused to consider the State's argument that Micah was not in custody because it was not argued at the trial level. *Id.* However, the defendant's own brief to the court of appeals included the transcript of the State's closing argument at the suppression hearing, during which the prosecutor did argue that Micah "*still was not in custody*" during questioning. Defendant-Appellant's Brief app. at 27, *In re M.L.T.H.*, ___ N.C. App. ___, 685 S.E.2d 117 (No. 08-1569) [hereinafter "Micah's Brief"] (emphasis added).

11. Micah's Brief, *supra* note 10, app. at 12.

12. *Id.* at 14. Micah admitted to forcibly raping his younger brother nine or ten times in the previous year. Brief for the State at 5–6, *In re M.L.T.H.*, ___ N.C. App. ___, 685 S.E.2d 117 (No. 08-1569).

13. Brief for the State, *supra* note 12, at 5.

14. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d. at 125 ("Bill did not attempt to exercise any authority over Micah, as he did not ask any questions, explain anything to Micah, or intervene in the interrogation in any way.").

15. *Id.* at ___, 685 S.E.2d at 122 (quoting District Court Judge William G. Stewart as saying, "[I]t's my understanding that [Micah] had the opportunity to request his parents to be present. He testified that that was made known to him, that he had that option, that he did not request that option. He did not request any guardian or custodian or other person other than [Bill]. He certainly would have had the right to waive the—due to his age, to waive the presence of any persons. He requested that his brother be with him. That was allowed. I can't find, based on what I've heard, that his rights were violated with regard to this . . . .").

16. *Id.* at ___, 685 S.E.2d at 119. Micah was found delinquent after District Court Judge John Covolo accepted Micah's admission to one count of First Degree Statutory Sexual Offense. Brief for the State, *supra* note 12, at 2.

II. COURT OF APPEALS INTERPRETS THE JUVENILE *MIRANDA* STATUTE

North Carolina's juvenile *Miranda* statute[17] provides one additional right that is not read to anyone over eighteen years of age: you have the right to have your parent, guardian, or custodian present during questioning.[18] There are multiple reasons to provide juveniles with the right to have their parents present. Like adult *Miranda* rights, a primary purpose is to help "dispel the compulsion inherent in custodial surroundings."[19] Another reason is that parents are presumed to be able to advise the juvenile about a proper course of action.[20] Any juvenile who is over fourteen years old can waive his right to have a parent, guardian, custodian, or attorney present and thus choose to face an investigator alone.[21] However, the statute does not discuss whether an investigator may offer the presence of *additional* persons to the juvenile during questioning.[22]

On appeal, the case was not about whether Bill could be considered a parent, guardian, or custodian for purposes of the statute, but whether Micah was in custody and whether he understood what he was doing when he refused to have his parents present during questioning and then chose to have Bill present.[23]

Micah argued that the investigator presented him with the following ultimatum: during the questioning, you can be accompanied either by your parents or by your brother—*but not both*.[24] However, the investigator's testimony clearly shows that the crucial hallway

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17. N.C. GEN. STAT. § 7B-2101 (2009).

18. § 7B-2101(a)(3)

19. *See* Miranda v. Arizona, 384 U.S. 436, 458 (1966); Kimberly Larson, Note, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 654 (2003) ("[D]uring interrogation, an adult should protect the interests of the child by . . . decreasing the coercive atmosphere of the interrogation.").

20. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 125; Barry C. Feld, *Waiver of Legal Rights: Confessions,* Miranda, *and the Right to Counsel*, *in* YOUTH ON TRIAL 105, 116–17 (2000) (Thomas Grisso & Robert G. Schwartz eds., 2000). *But see infra* Part IV (discussing how a lot of these goals are not fulfilled because the parents often are too passive or actively encourage their children to confess).

21. § 7B-2101(b) ("When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney.").

22. § 7B-2101.

23. Neither party contended that Micah was not informed that he had a right to remain silent, that his statements would be used against him, or that he could have an attorney present.

24. Micah's Brief, *supra* note 10, at 15–19.

conversation never included an either/or proposition.[25] Micah refused to talk to the investigator alone or with his parents; *only after* those refusals did he agree to have Bill present.[26] This seriatim question-asking made it practically impossible for Micah to conclude that he could only have Bill present *instead* of his parents. Not surprisingly, the district court judge accepted this version of the facts and ruled in favor of the State at the trial level.[27]

The court of appeals could not perform its own fact-finding because the trial court's version of facts is conclusive on appeal so long as there is any competent evidence to support it.[28] Therefore, the court focused on a question of law, namely whether Micah's incriminating statements should have been suppressed on the grounds that he was "advised incorrectly as to his right to have a person who was not his parent, guardian, or custodian present during his custodial interrogation, and he chose to have his brother Bill present."[29]

The court of appeals concluded that Micah's statements indeed should have been suppressed because the juvenile *Miranda* statute "provides *only* for a parent, guardian, or custodian to be present during questioning"[30] and that Micah's "*only options* were to have a parent, guardian, or custodian present, to have an attorney present, or to talk to [the investigator] alone."[31] The court rationalized this holding by stating that offering anybody but a parent, guardian, custodian, or attorney "could be construed as an effort to make [the juvenile] more willing to make harmful admissions to the law enforcement officer."[32] This reasoning would have prevented Bill's presence even if Micah's parents had also been present.

Thus, the floor of rights provided by the statute was equal to the ceiling of rights: a law enforcement officer may not offer the juvenile the option of having any person present during the questioning except the juvenile's parent, guardian, custodian, or attorney—even if the

25. Brief for the State, *supra* note 12, at 4–5; Micah's Brief, *supra* note 10, app. at 4–5.

26. Brief for the State, *supra* note 12, at 4–5.

27. *In re* M.L.T.H., ___ N.C. App. ___, ___, 685 S.E.2d 117, 122 (2009), *disc. review granted*, 364 N.C. 241, 698 S.E.2d 401 (2010), *and disc. review improvidently allowed by* 364 N.C. 420, 700 S.E.2d 225 (2010).

28. State v. McArn, 159 N.C. App. 209, 211–12, 582 S.E.2d 371, 373–74 (2003) ("[T]he trial court's findings of facts 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " (quoting State v. Buchanan, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001))).

29. *In re M.L.T.H.*, ___ N.C. at ___, 685 S.E.2d at 127.

30. *Id.* at ___, 685 S.E.2d at 124 (emphasis added).

31. *Id.* at ___, 685 S.E.2d at 125 (emphasis added).

32. *Id.* at ___, 685 S.E.2d at 126 (emphasis added).

juvenile has already waived his right to have his parent, guardian, custodian, or attorney present.

III. NO SUPPORT FOR THE COURT'S HOLDING

In *In re M.L.T.H.*, the court of appeals' holding rested primarily upon two sources[33]: (1) the court's interpretation of North Carolina's juvenile *Miranda* statute and (2) the Supreme Court of North Carolina's opinion in *State v. Oglesby*.[34] However, neither of these sources actually provide meaningful support for the holding in *In re M.L.T.H.*

A. The Court Misinterpreted the Juvenile Miranda *Statute*

The court of appeals concluded that North Carolina's juvenile *Miranda* statute "provides only for a parent, guardian, or custodian to be present during questioning."[35] However, there is no reason to believe that the statute provides for anything besides a floor of rights. A juvenile must be informed that, inter alia, he has a right to have a parent, guardian, custodian, or attorney present during questioning.[36] The statute never says or implies that *only* parents, guardians, custodians, and attorneys are allowed to be in the interrogation room. Importantly, the statute is silent on whether the mere presence of other persons is allowable, and the only way to reach the court's conclusion is via an argument of *expressio unius est exclusio alterius*: by listing the people who must be in the interrogation room (if the juvenile requests them), the statute must be excluding all others.

It would have been easy for the legislature to indicate those are in fact the only persons allowed to be present; the legislature did not do this. Also, as discussed in Part IV, there is no reason to assume that having people in the interrogation room besides parents, guardians, custodians, and attorneys will necessarily be a bad outcome.[37] If Micah were under fourteen, he could not have waived his right to have his parents present, and thus he could not have chosen to talk with just Bill in the room.[38] However, Micah was indeed old enough to waive his right to the presence of his parents,

33. *Id.* at ___, 685 S.E.2d at 124–26.
34. 361 N.C. 550, 648 S.E.2d 819 (2007).
35. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 124.
36. N.C. GEN. STAT. § 7B-2101 (2009).
37. *See infra* Part IV.
38. § 7B-2101.

who were in no position to make him feel at ease or protected.[39] There stands no valid reason to prevent another person from offering Micah comfort or protection just because the other person happens to be a brother instead of a father.

Since the juvenile *Miranda* statute merely provides a list of who must be present if the juvenile requests them, then the statute does not necessarily forbid a fifteen-year-old juvenile from choosing his brother in place of his parents—*so long as the juvenile is still informed that he has a right to have his parents present.*[40] In his testimony, Micah admitted that he knew he had the right to have his parents present.[41] Thus, by the time Micah got into the interrogation room, he had successfully been informed of his right to have his parents present, and he had verbally waived that right.[42]

Indeed, the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NACJJDP), whose goal is "to prevent and respond to juvenile delinquency and victimization,"[43] has published standards to be used when questioning juveniles.[44] The standard *Miranda* form includes the following: "[T]he juvenile 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 substantial ties.*"[45] An older brother like Bill, with whom Micah had spent considerable time[46] and whose background as a Marine would likely have placed him in situations of extreme pressure, would fit perfectly within NACJJDP's recommendation. Bill would not be intimidated by a county investigator and would have an incentive to protect Micah's well-being. The court of appeals

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39. Brief for the State, *supra* note 12, at 4–5 (noting that Micah was fifteen-years-old); Micah's Brief, *supra* note 10, app. at 4 (same).

40. § 7B-2101(a)(3). Recall that anyone over fourteen-years-old can waive his right to have his parents present. § 7B-2101(b).

41. Micah's Brief, *supra* note 10, app. at 21–22.

42. *See id.* A waiver of the *Miranda* rights may be oral, rather in writing. *Cf.* State v. Williams, 314 N.C. 337, 341, 333 S.E.2d 708, 712 (1985) (noting that defendant waived *Miranda* rights orally); State v. Rashidi, 172 N.C. App. 628, 632, 617 S.E.2d 68, 71 (same), *aff'd* 360 N.C. 166, 622 S.E.2d 493 (2005).

43. *Mission Statement*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, http://www.ojjdp.ncjrs.gov/about/missionstatement.html (last visited Dec. 19, 2010).

44. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE § 2.247, at 255 (1980), *available at* http://www.eric.ed.gov:80/ERICWebPortal/detail?accno=ED201923.

45. *Id.*

46. Micah's Brief, *supra* note 10, app. at 18 (noting that Micah and his other brothers would spend weekends with Bill).

should have followed this same line of reasoning and seen that Bill's presence during the questioning was actually beneficial to Micah.

B. Oglesby *Not Apposite*

As the court of appeals noted in *In re M.L.T.H.*,[47] there is no North Carolina precedent dealing with an investigator who offers the juvenile an option of having somebody present other than a parent, guardian, custodian, or attorney.[48] However, in reaching its conclusion that Micah was offered an "improper choice" by the sheriff's department, the court of appeals relied on the Supreme Court of North Carolina's opinion in *Oglesby*.[49] There, a sixteen-year-old juvenile was in custody and asked to speak with his aunt before questioning.[50] The investigator denied the request, and the juvenile subsequently made incriminating statements.[51] He appealed, and the Supreme Court of North Carolina ruled that the statements were admissible because the aunt was "clearly not a statutory person, and [the juvenile] therefore had no *right* to have her present during questioning."[52]

In *In re M.L.T.H.*, the court of appeals argued that *Oglesby* helped stand for the proposition that the *only* people who could be present during Micah's questioning were a parent, guardian, custodian, or attorney.[53] However, *Oglesby* clearly deals not with who *may* be allowed in the interrogation room, but who *must* be allowed in the room. This is because *Oglesby* answers the question of who can be defined as a parent, guardian, or custodian[54]—which is not at issue

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47. *In re* M.L.T.H., ___ N.C. App. ___, ___, 685 S.E.2d 117, 124 (2009), *disc. review granted*, 364 N.C. 241, 698 S.E.2d 401 (2010), *and disc. review improvidently allowed by* 364 N.C. 420, 700 S.E.2d 225 (2010) ("Although prior cases have addressed whether a juvenile has a right to have a person other than a parent, guardian, or custodian present, no case has directly addressed whether having a person who does not fall into one of these categories present is adequate.").

48. *Id.* at ___, 685 S.E.2d at 125. In fact, the author surveyed the law in other states and did not find a single previous case dealing with this topic of "improper choice," as the court of appeals termed it. *Id.* at ___, 685 S.E.2d at 125.

49. *Id.*

50. State v. Oglesby, 361 N.C. 550, 552–53, 648 S.E.2d 819, 820 (2007).

51. *Id.* at 552–53, 648 S.E.2d at 820.

52. *Id.* at 556, 648 S.E.2d at 822 (emphasis added).

53. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 124–25.

54. *Oglesby*, 361 N.C. at 552, 648 S.E.2d at 820 (holding that the defendant's aunt was not a "guardian" under North Carolina's juvenile *Miranda* statute). *Oglesby* is not the only case that has dealt with this topic. The United States Supreme Court has ruled that an investigator did not have to grant a juvenile's request that his probation officer be present during questioning. Fare v. Michael C., 442 U.S. 707, 720 n.5 (1979).

in *In re M.L.T.H.* because neither party contends that Bill was actually Micah's parent, guardian, or custodian.[55]

If the aunt in *Oglesby* had actually been allowed into the interrogation room, then it would present the same scenario as in *In re M.L.T.H.*: a juvenile requests the presence of an adult who is not his parent, guardian, or custodian. Yet, the supreme court in *Oglesby* never noted that such a scenario would still violate the juvenile *Miranda* statute. Granted, it was not a required step in the court's analysis because the aunt was never actually present during questioning.[56] However, if *In re M.L.T.H.*'s very narrow construction of the juvenile *Miranda* statute was correct, then it seems like the supreme court in *Oglesby* might have brought up the fact that the prosecutor was lucky that the aunt was *not* present because it actually would have meant the exclusion of the juvenile's statement. Again, after *In re M.L.T.H.*, the floor and the ceiling of a juvenile's rights seem to be one-in-the-same.

IV. A LOSE-LOSE HOLDING?

After *In re M.L.T.H.*, law enforcement departments will likely "play it safe" by eliminating the opportunity for juveniles to have anybody present except a parent, guardian, custodian, or attorney. Any department that still wanted to provide juveniles the opportunity to have another person present would face an impossible task, simply because the presence of those people would risk contaminating any incriminating statements made by the juvenile. The question is whether this is a good outcome—for investigators, or for juveniles.[57]

A. No Help for Juveniles

In the 1948 case of *Haley v. Ohio*,[58] the United States Supreme Court said:

> [A young suspect being questioned] needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering

55. *In re M.L.T.H.*, ___ N.C. App. at ___, 685 S.E.2d at 119.

56. *Oglesby*, 361 N.C. at 552, 648 S.E.2d at 820.

57. This is especially relevant given the changing nature of families today, with many juveniles living with family members who may not qualify under *In re M.L.T.H.* to be present during questioning. *See* Cara Gardner, Recent Development, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation After* State v. Oglesby, 86 N.C. L. REV. 1685, 1696 (2008).

58. 332 U.S. 596 (1948).

> presence of the law . . . crush him. No friend stood at the side of this 15-year-old boy . . . .[59]

Even then, the Court recognized that juveniles deserve the protection of having somebody present who will be interested in their well-being. However, studies show that parents are frequently ineffective in protecting their children's right to silence. In one study of how parents and juveniles interact during interrogations, only twenty percent of parents believed that their children should be allowed to withhold information from the police by refusing to answer questions.[60] Additionally, during interrogations, only 8.7 % of juveniles even asked their parents for advice.[61]

The court of appeals in *In re M.L.T.H.* noted that Bill "did not attempt to exercise any authority over Micah [during the questioning], as he did not ask any questions, explain anything to Micah, or intervene in the interrogation in any way."[62] This comment implies that Micah's parents—or at least parents, in general—would have behaved differently.[63] Again, this is dispelled by a study showing that sixty-six percent of parents said nary a single word to their child during questioning,[64] and thirty-five percent told their child to provide the police with any information about the child's involvement.[65] A paltry 5.6% of parents told their child not to talk, while the remaining 94.4% either told the child nothing, told him to make up his own mind, or told him to start talking.[66] The authors of the study concluded that "in general, the figures would suggest that most parents play neither a verbally coercive role nor a helpful one. One might say that they play no role at all . . . ."[67] In reality, if a parent's role is purely one of comfort, it should not matter who is best suited to provide that comfort.

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59. *Id.* at 600.

60. GRISSO, *supra* note 7, at 179.

61. *Id.* at 185 tbl.34.

62. *In re* M.L.T.H., ___ N.C. App. ___, ___, 685 S.E.2d 117, 125 (2009), *disc. review granted*, 364 N.C. 241, 698 S.E.2d 401 (2010), *and disc. review improvidently allowed by* 364 N.C. 420, 700 S.E.2d 225 (2010).

63. Keep in mind that Micah had already validly waived the right to his parents' presence, so this discussion of how they would have behaved during the questioning is merely hypothetical.

64. GRISSO, *supra* note 7, at 185 tbl.34.

65. *Id.* at 180. The Grisso study shows that over 96% of parents who told their children to 'spill the beans' did it for moralistic, responsibility, or strategic reasons. *Id.* at 180 tbl.33.

66. *Id.* at 185 tbl.34.

67. *Id.* at 186.

A parent can provide the illusion of protection. As noted by the Supreme Court of Pennsylvania, "Where the adult is not conversant with the constitutional guarantees that surround a person accused of a crime, his or her presence not only fails to provide the assistance envisioned . . . but might actually frustrate that which is sought to be achieved by having an adult present."[68]

The purpose of showing that parents tend to have an (at best) blasé attitude during interrogations is that it makes one wonder why the court in *In re M.L.T.H.* thought that a juvenile's best interests were protected by refusing to allow a juvenile the presence of an interested adult—one who might not be as pressuring as a parent and who might actually be willing to stick up for the child, or at least serve as a calming presence.[69] A more cynical view might be that Bill could not have done any worse than the typical parent, and he likely allowed Micah to feel more comfortable and free from the pressures of having his parents and the investigator present.

This is not to say that having Bill present is necessarily the *best* scenario. Bill may have been reluctant to help or protect Micah after hearing the details of Micah's conduct toward their younger brother. But one could just as easily make the same argument about Micah's parents. Perhaps there could be a slippery slope here, where police no longer are sure about whom they can allow into the interrogation rooms: how much connection to the juvenile is required?[70] If nothing else, *In re M.L.T.H.* provides the police with a specific list of who is allowed into the room. However, this clarity is outweighed by its myopia. That is, *In re M.L.T.H.* removes the chance that a juvenile could exercise his right to turn down the presence of his parents but then choose an older sibling or even a grandparent or other close relative instead.[71] This is especially problematic when the juvenile

68. Commonwealth v. Starkes, 335 A.2d 698, 702 (Pa. 1975); *see also* Feld, *supra* note 20, at 117 ("Parents' potential conflict of interest with the child, emotional reactions to their child's arrest, or their own intellectual or social limitations may prevent them from playing the supportive role envisioned.")

69. For the importance of having someone—anyone—present during police questioning, see *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948).

70. An easy solution would have been to allow the presence of any relative who is at least eighteen-years-old, resulting in a manageable, objective list. However, this would still prevent a juvenile from requesting the presence of an interested adult who happens not to be legally related.

71. Perhaps the court in *In re M.L.T.H.* should have followed the Oklahoma courts of the 1970s, which faced a statute claiming that statements obtained from a juvenile were not admissible unless a "parent[], guardian, attorney, or the legal custodian of the child" was present at such interrogation. OKLA. STAT. ANN. tit. 10, § 1109(a) (West 1971) (current version at OKLA. STAT. tit. 10A, § 2-2-301(A) (2010)). This statute is practically

makes accusations against his parents. The juvenile must choose to talk to an investigator alone or to accuse his parents while in their presence.[72] By making a bright-line, objective standard, the court is taking the power of choice out of the hands of the one person best suited to make that personal decision: the juvenile.

In fact, this was relevant to the facts of *In re M.L.T.H.*, where Micah claimed that the sexual contact with his younger brother was motivated, in part, because their father showed Micah pornography and because their parents often argued and fought.[73] The court in *In re M.L.T.H.* considered that "Micah might have felt more comfortable with Bill present ... [and] he may have been embarrassed or even afraid for a parent to be present, given the subject matter of the questioning."[74] Indeed, Micah's father had been convicted six times of assault and battery,[75] so it is no wonder that Micah would prefer to be accompanied by Bill rather than his father. However, the court turns on its head the seemingly positive act of allowing Bill to be present by claiming that "trying to make Micah

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the same as North Carolina's juvenile *Miranda* statute, perhaps even more restrictive since it specifically says that a statement will be invalid unless one of the listed persons was present. However, the Oklahoma courts have held that a court could properly admit a juvenile's confession when it was made in the presence of his grandmother (Crook v. State, 546 P.2d 648 (Okla. Crim. App. 1976)), grandfather (Lee v. State, 561 P.2d 566 (Okla. Crim. App. 1977)), or stepfather (*In re* Davidson, 564 P.2d 266 (Okla. Crim. App. 1977)). One opinion noted that "[m]any juveniles have no adult with whom they feel they have a 'personal relationship,' and the most this Court can do is try to ensure that a juvenile's constitutional rights are protected." *In re* S.D.S., 574 P.2d 1077, 1079 (Okla. Crim. App. 1978).

72. This conflict of interest has been noted repeatedly as a reason why courts should not grant such deference to confessions obtained when a parent is present. *See* Little v. Arkansas, 435 U.S. 957, 960 (1978) (Marshall, J., dissenting from denial of certiorari) ("[T]o uphold a child's waiver on the ground that she received parental advice is surely questionable when the parent has two obvious conflicts of interest, one arising from the possibility that the parent herself is a suspect, and the other from the fact that she is 'advising' the person accused of killing her spouse."); Andy Clark, Comment, *"Interested Adults" with Conflicts of Interest at Juvenile Interrogations: Applying the Close Relationship Standard of Emotional Distress*, 68 U. CHI. L. REV. 903, 919–28 (2001). Others have argued that the only way around this conflict of interests between the parent and child is to always require the presence of counsel during juvenile questioning. *See, e.g.*, Ellen Marrus, *Can I Talk Now?: Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 516–17 (2006).

73. Brief for the State, *supra* note 12, at 6.

74. *In re* M.L.T.H., __ N.C. App. __, __, 685 S.E.2d 117, 125–26 (2009), *disc. review granted*, 364 N.C. 241, 698 S.E.2d 401 (2010), *and disc. review improvidently allowed by* 364 N.C. 420, 700 S.E.2d 225 (2010).

75. Micah's Brief, *supra* note 10, app. at 20.

more 'comfortable' could be construed as an effort to make him more willing to make harmful admissions."[76]

The court equates "comfort" with a willingness to talk—but would not a comfortable juvenile also feel freer to say "no" during questioning?[77] If Micah's parents were present or especially if he was questioned alone, he likely would have been much more fearful and would not have felt like he could refuse to answer the investigator's questions. Bill, on the other hand, could protect Micah from police intimidation and would not have the same social pressures as his parents face; thus Bill could likely be more protective of Micah's self-interests than even their parents would be.[78]

B. No Help for Investigators

Clearly, the holding in *In re M.L.T.H.* does not help investigators either. It goes without saying that an investigator's purpose is to obtain reliable information about possible crimes and to use that information in delinquency hearings or court proceedings if necessary.

As the United States Supreme Court said in *Miranda*, these prophylactic rules are designed to avoid the intimidation inherent during police questioning.[79] In order to avoid *Miranda* problems, should not investigators try to make juveniles feel comfortable, so that they cannot later claim they were intimidated or pressured into talking? In Micah's case, he was willing to talk so long as Bill was present because Micah felt less intimidated with Bill there.

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76. *In re M.L.T.H.*, __ N.C. App. at __, 685 S.E.2d at 126 . This kind of logic could lead to interesting outcomes where the government tries to comfort a person into answering questions. For instance, some courts allow witnesses, especially juveniles, to hold a leashed dog while testifying because of the dog's "calming presence." Kathleen Gray, *Dogs Help Provide Support in Courtrooms*, USA TODAY, Feb. 23, 2010, at 3A, *available at* http://www.usatoday.com/news/nation/2010-02-22-court-dogs_N.htm. "For a child, having the dog there in court can make a huge difference . . . . The specially trained dogs provide a non-threatening presence for such victims, who may find it difficult to talk to an adult about a violent crime." *Id.* (internal quotations and parentheses omitted). It is interesting to consider the legal implications of a juvenile being questioned outside of court while holding a dog, so that he would feel more comfortable during questioning.

77. *Cf.* GRISSO, *supra* note 7, at 179, 185 tbl.34 (noting how parents did not want their children to withhold information about their involvement in a crime and that parents rarely told their child to remain silent); Larson, *supra* note 19, at 654 ("[T]he presence of an interested adult may not help the child and may actually hurt the child's chances of understanding and asserting his or her rights.").

78. *See* GRISSO, *supra* note 7, at 167 (noting how parents try to get their child to talk because the parents want to avoid inconvenience or embarrassment, they want to save money by not hiring a lawyer, or they want the child to take responsibility).

79. *See* Miranda v. Arizona, 384 U.S. 436, 458 (1966).

Investigators may see their job as a Morton's fork: if I offer the juvenile his brother, he will argue I subtly coerced him into talking; if I do not offer his brother, he will argue he faced a coercive atmosphere because the questioning either took place with his parents present or was one-on-one with me. By allowing Bill in the room after Micah had clearly declined his right to have his parents present, the investigator was able to quickly get an accurate set of facts. She did not do it by coercion,[80] promises,[81] or threats,[82] but rather by giving Micah the right to feel comfortable to talk.[83] Questioning by the police is inherently intimidating, particularly to juveniles. But the investigator in *In re M.L.T.H.* reduced Micah's intimidation as much as possible by allowing Bill to be present during the questioning. If Micah is willing to confess but wants his brother there, then courts should not suppress the confession merely because the investigator acquiesces.

The purpose of *Miranda* rights is not to keep people from incriminating themselves, but to keep people from being *coerced by the government* into incriminating themselves.[84] Granting Micah additional rights was not a coercive move by the investigator, and his statements were the product of a knowing waiver.[85] If anything, Bill was the most impartial adult available to Micah. Indeed, *In re M.L.T.H.* seems to be a lose-lose decision.

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80. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 282, 287 (1936) (finding a violation of due process where suspects were whipped until they confessed).

81. *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 532, 537 (1963) (finding a violation of due process where the interrogating officer promised leniency to the suspect if she confessed).

82. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 504, 513 (1963) (finding a violation of due process where police refused to let a suspect call his attorney or wife until he confessed).

83. Unsurprisingly, a listing of the twenty-eight most frequently used interrogation methods did not include the stratagem of "offering additional rights" to the suspect. *See* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 262 tbl.3, 277 tbl.4 (2006).

84. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that, where a defendant claimed he was told by God to confess, there was no valid argument that the confession was coerced because "coercive *police activity* is a necessary predicate to the finding that a confession is not 'voluntary' ") (emphasis added).

85. A listing of the twenty-eight most frequently used interrogation methods showed that confusing the suspect, as the court argues happened in *In re M.L.T.H.*, was tied with the legendary good cop/bad cop routine for the least frequently used method. *See* Feld, *supra* note 83, at 262 tbl.3, 277.

CONCLUSION

As the prosecutor aptly said in her closing arguments of the suppression hearing, "[I]f anything law enforcement went above and beyond in allowing [Micah] to have his brother present for his own comfort."[86] Allowing the presence of an interested adult, around whom the juvenile can feel comfortable, can frequently ease the interrogation, and North Carolina's juvenile *Miranda* statute did not foreclose this possibility—until *In re M.L.T.H.*, that is.

To play it safe after *In re M.L.T.H.*, investigators will undoubtedly restrict their policies to allow only parents, guardians, custodians, and attorneys to be present. This could be a lose-lose scenario: a juvenile will have to choose between talking alone to an investigator, or having his parents force him to "fess up." And investigators could lose valuable confessions in cases just like *In re M.L.T.H.*, where the investigator *and* the juvenile both want a third party present who will make the juvenile free from intimidation (either by the investigator or his parents) while allowing the sheriff to get the facts. Until the Supreme Court of North Carolina or the legislature correct *In re M.L.T.H.*'s broad prohibitions on whom a juvenile can request to be present during questioning, the case will sit "like a loaded weapon,"[87] waiting to be used by a juvenile defendant who wants to suppress inculpatory statements made after an investigator offered the juvenile more rights than the law required.

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86. Micah's Brief, *supra* note 10, app. at 28.
87. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).