

NO. 2011-0215

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM THE COURT OF APPEALS  
FOR CUYAHOGA COUNTY, OHIO  
CASE NO. 94737

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IN RE: M.W.,  
Adjudicated delinquent child

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MEMORANDUM OPPOSING RECONSIDERATION

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## MEMORANDUM OPPOSING RECONSIDERATION

### **I. Introduction and Summary**

This Court accepted the following proposition of law for review:

**APPELLANT’S PROPOSITION OF LAW: A CHILD HAS THE RIGHT TO COUNSEL AT ALL STAGES OF THE PROCEEDINGS AGAINST HIM. BECAUSE OHIO’S GENERAL ASSEMBLY HAS DESIGNATED INTERROGATION AS A STAGE OF THE PROCEEDINGS, A CHILD MUST BE REPRESENTED BY HIS PARENT, GUARDIAN, CUSTODIAN, OR AN ATTORNEY BEFORE THE CHILD CAN WAIVE HIS RIGHT TO COUNSEL PURSUANT TO MIRANDA.**

The motion for reconsideration must be placed into the proper context. M.W. asked not only for a statutory right to counsel during a custodial interrogation but asked this Court to hold that a juvenile could only waive *Miranda* after consulting with a parent or attorney. The State does not propose that juveniles have no right to counsel during a custodial interrogation, because that right is recognized under the United States Constitution. Instead, the State argues that statutory law does not prevent a child from waiving *Miranda* before consulting with a parent or attorney.

The majority held:

The term ‘proceedings’ as used in R.C. 2151.352 means court proceedings, and in the context, a child is statutorily entitled to representation by legal counsel upon the filing of a complaint in juvenile court or upon initial appearance in the juvenile court.

*In re M.W.*, Slip Opinion No. 2012-Ohio-4538, syllabus.

M.W. argues that current legislation being considered in the General Assembly supports his legal interpretation R.C. 2151.352 and urges this Court not to wait until the General Assembly enacts the law. M.W. also argues that the majority’s opinion impermissibly deleted words from the statute and that the majority’s opinion offends due process.

First, M.W. asks this Court to act upon pending legislation. This Court should not act or interpret a bill that was introduced as clarification as to what the General Assembly intended when it originally enacted the provision (or predecessor provision) of R.C. 2151.352. Moreover, while M.W. generally refers to the pending legislation, it is noteworthy that the legislation is in direct conflict with M.W.'s position in the case. The proposed legislation cited by M.W. would still allow for the waiver of the right to counsel during a custodial interrogation and does not require a juvenile to consult with a parent or attorney before waiving that right in certain cases. The only exception is where a juvenile is accused of homicide or certain sexual offenses. M.W. does not fall into the exception.

Second, the majority did not delete or ignore words, but placed it into context within the entire first paragraph of R.C. 2151.352. Moreover, the term interpreted was not "proceedings" or "stages of the proceedings" but the term was "stages of the proceedings under [Chapter 2151] or Chapter 2152 of the Revised Code." A custodial interrogation is not included under either chapter as a *proceeding*. The remainder of R.C. 2151.352 discusses actions taken by a juvenile court should a party to a proceeding, including parents, appear without counsel.

Finally, this Court's opinion does not offend due process. A state statute does not need to exist to afford a juvenile a right that is recognized under the United States Constitution. However, a state statute can extend a juvenile's right beyond what is constitutionally required. The holding that the term "stages of the proceedings under [Chapter 2151] or Chapter 2152 of the Revised Code," as it is used in R.C. 2151.352 does not include a "custodial interrogation" does not offend the dictates of the United States Constitution. The majority rightfully recognized that M.W. has a Fifth Amendment right against self-incrimination but chose not to exercise it.

**II. Proposed legislation "clarifying" right to counsel is inconsistent with M.W.'s position**

***“At the time this Court issued its decision in this case, it did not have any benefit of any public statements made by members of Ohio’s General Assembly [...] Therefore, contrary to the concurring opinion, Ohio need not wait for the legislature to act if it so chooses.”***

*Appellant’s Motion for Reconsideration, pg. 2.*

M.W. urges this Court to reconsider its decision based on a statement made by a State Representative in a news article regarding this Court’s opinion and based on pending legislation. M.W. makes an argument that these actions alone demonstrate that the General Assembly intended “stages of the proceedings” to include custodial interrogation. M.W. urges this Court not to wait until the General Assembly enacts new legislation.

M.W. first cites a news article in which the article reported that State Representative Tracy Maxwell Heard had sought to introduce legislation to “clarify” the legislature’s intent regarding juvenile access to counsel. M.W. also cites to pending legislation in support of reconsideration. M.W. argues that this Court should consider these actions because at the time the opinion was issued, this Court “did not have the benefit of any public statements by members of Ohio’s General Assembly providing insight into their intention to provide a statutory right to counsel at interrogation for children.”<sup>1</sup> However, the proposed legislation is inconsistent with the M.W.’s position. If the proposed legislation was enacted as introduced, the legislation would permit M.W. make a knowing and voluntary waiver of his right to counsel so long as M.W. is informed of certain rights.

It is important to note what the proposed legislation, which is co-sponsored by Representative Heard, if enacted, does and does not do. 129 H.B. No. 597 does not simply “clarify” R.C. 2151.352 by providing a definition for “stages of the proceedings”. H.B. No. 597

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<sup>1</sup> Full news article reported at <http://www.ohio.com/news/ohiocentric/legislator-urges-bill-to-protect-juveniles-legal-rights-1.339789>, last accessed October 23, 2012

instead proposes to enact a new section of the Revised Code, specifically section 2152.05 of the Revised Code.<sup>2</sup>

First, the proposed statute provides a statutory definition for a “child” for the section as an unemancipated person under the age of 18. See H.B. No. 597, 2152.05(A)(1). Second, it provides a definition for “custodial interrogation.” See H.B. No. 597, 2152.05(A)(2). Third, the proposed statute requires law enforcement to notify a child accused of a crime of certain rights and provides instances in which law enforcement are required to halt interrogation. Those rights include notifying the child of: (1) the right to an attorney; (2) the right to an appointed attorney; (3) the right not to make a statement but if a statement is made that statement can be used against the child; (4) the right to speak with a parent or guardian; (5) the right to have reasonable means to speak with an attorney if one is not present. See H.B. No. 597, 2152.05(B)(1)-(5). Fourth, a child cannot be interrogated if the child has indicated: (1) that the child does not wish to be questioned; (2) that the child wishes to speak with a parent or guardian or have the parent or guardian present; and (3) that the child wishes to consult with an attorney. See H.B. No. 597, 2152.05(C). Fifth, the proposed legislation provides that a juvenile may waive the right to counsel (during a custodial interrogation) subject to certain safeguards that do not appear to require the consultation of a parent or attorney. See H.B. No. 597, 2152.05(E). However, for certain crimes such as aggravated murder, murder, involuntary manslaughter, reckless homicide, rape, sexual battery, gross sexual imposition, and sexual imposition, the statute mandates the presence of an attorney throughout the entire custodial interrogation and specifically requires that the right to an attorney in that instance *cannot* be waived. See H.B. No. 597, 2152.05(D).

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<sup>2</sup> Available at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_597\\_I\\_Y.pdf](http://www.legislature.state.oh.us/BillText129/129_HB_597_I_Y.pdf), last accessed October 23, 2012.

The proposed statute, as introduced, would appear not to affect M.W.’s case as he was not charged with either a homicide nor sexual offense. It appears that the legislation as introduced permits a juvenile to waive their *Miranda* rights, without consulting with an attorney. This is contrary to M.W.’s interpretation of R.C. 2151.352, as M.W.’s interpretation and proposition of law would require him to consult with an attorney before waiving *Miranda*. Because the legislative actions are contrary to M.W.’s proposition of law, this Court should deny M.W.’s motion for reconsideration.

**III. The majority did not ignore words in a statute**

*“the majority opinion necessarily deleted the context provided in R.C. 2151.352 [...]”*

Appellant’s Motion for Reconsideration, pg. 4.

M.W. also asks for reconsideration based on an argument that the majority ignored words in the statute. The majority did not. M.W. provided illustrations and argued that the majority ignored the words of the statutes as follows:

R.C. 2151.352	R.C. 2151.352 as impacted by the majority opinion
“all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code.”	<del>“all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code.”</del>

(See page four of M.W.’s motion for reconsideration.)

M.W. only makes limited reference to R.C. 2151.352. The State argued that “all stages of the proceedings under this chapter or Chapter 2152,” needed to be placed in the context of the entire first paragraph. The entire first paragraph of R.C. 2151.352 states:

R.C. 2151.352 (first paragraph)
A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of

the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

The statute at issue should be liberally interpreted so as to effectuate the purpose of providing “judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.” R.C. 2151.01(B).

The first sentence of R.C. 2151.352 describes the parties who are entitled to the right to counsel. Those parties are a “child”, the “child’s parents or custodian”, or any “other person in loco parentis of the child”. Although *M.W.* focuses his attention on a “child”, the inclusion of “child’s parents or custodian” and “other person in loco parentis of the child” should be considered in interpreting “stages of the proceedings under this chapter or Chapter 2152 of the Revised Code.” Moreover, subsequent sentences in the paragraph describe actions taken by the juvenile court, specifically, the court ascertaining whether the party knows of the right to counsel, continuing the case and appointing counsel. When the entire first paragraph is read together, as a whole, the term “stage of the proceedings under this chapter or Chapter 2152” evokes a sense of “juvenile court proceeding” as Chapter 2151 relates generally to jurisdiction of the juvenile court and Chapter 2152 generally relates to delinquency proceedings. The majority in this case agreed that the context in which the term “proceedings” is used in R.C. 2151.352 revealed that the General Assembly contemplated the term “proceedings” mean court proceedings. See *In re M.W.*, ¶21. When read in conjunction with R.C. 2151.01(B), the

provisions of R.C. 2151.352 should be interpreted to provide the safeguards to ensure that *parties* to a juvenile court proceeding, including parents and children, are assured a fair hearing and their constitutional rights.

Moreover, “proceedings” is not the only word to be interpreted. The entire procedure to be construed is “all stages of the proceedings under [Chapter 2151] or Chapter 2152 of the Revised Code.” M.W. argued that R.C. 2151.311’s inclusion of “interrogation” under “processing purposes” meant that “custodial interrogation” was a proceeding under Chapter 2151 or Chapter 2152. However, as the State argued in its merit brief, the inclusion of “interrogation” under “processing purposes” did not exist when the provisions of R.C. 2151.352 were enacted. Nor did M.W. provide any evidence that the amendment of R.C. 2151.311 to include “interrogation” under “processing purpose,” was done for the purpose of making interrogation a stage of the proceedings. Because a “custodial interrogation” is not a proceeding under Chapter 2151 or Chapter 2152, then it is not a proceeding that is covered in R.C. 2151.352.

### ***III. The majority’s interpretation of the statute does not offend due process***

The interpretation of R.C. 2151.352 in this case is not simply about whether there is a statutory right to counsel. As argued throughout the case, the impact of R.C. 2151.352’s interpretation is whether a juvenile is required to consult with an attorney, before waiving *Miranda* in a pre-indictment or pre-charge police interrogation. It cannot be said that the majority’s opinion offends due process if it is consistent with constitutional requirements.

The State fully recognizes that a juvenile, like an adult, must be informed of his or her *Miranda* rights by law enforcement and that any waiver of such rights requires an evaluation of certain factors, including the juvenile’s age. Nor does the State dispute that *In re Gault*, 378 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, guarantees the right to counsel during a court proceeding. The

rights contained in R.C. 2151.352 were first described in a legislative service commission note dated August 21, 1967 which indicates that Am. S.B. 383, as reported by the House Judiciary Committee, “brings Ohio law in line with the recent U.S. Supreme Court decision which extends the protection of the 14<sup>th</sup> amendment of the U.S. Constitution to juveniles, and requires that they be given notice sufficient to permit preparation of defense to charges, be advised of their right to counsel (including assigned counsel) and of their right to remain silent, and be afforded the right of confrontation and cross-examination. In re Gault, 35 LW 4399 (U.S. Supreme Court, May 15, 1967).”

One of the rights recognized in *Gault* was the right to be represented by counsel in a juvenile court proceeding. As it relates to *Miranda*, this Court has recognized that *Miranda* may be voluntarily waived and courts may look at the totality of the circumstances to determine whether the waiver was valid. See *In re Watson*, 47 Ohio St.3d 86, 548 N.E.2d 210 (1989), paragraph one of the syllabus. Although, *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 180 L.Ed.2d 310 highlights the compelling pressures of an interrogation, which may be heightened for a juvenile, *J.D.B.* does not specifically require a juvenile consult with an attorney prior to waiving *Miranda*. Instead, *J.D.B.* holds that the age of a child is considered to determine whether an encounter constitutes a “custodial” interrogation. In Ohio, the age of the person is considered in determining whether the waiver is voluntary. See *In re Watson*. This Court has not ignored the differences between a juvenile or an adult nor did the majority create an absurd result as age is a factor in determining whether a juvenile voluntarily waives *Miranda*. The Eighth District recognized as much when they cited *Watson* and considered M.W.’s age in addition to his prior experiences with the police and prior adjudications. See *In re M.W.*, 8<sup>th</sup> Dist. No. 94737, 2010-Ohio-6362, ¶23. The differences between an adult and a child and the policy reasons for

granting greater protections to a child cannot take “stages of the proceedings under [Chapter 2151] or Chapter 2152 of the Revised Code,” out of the context in which it is used.

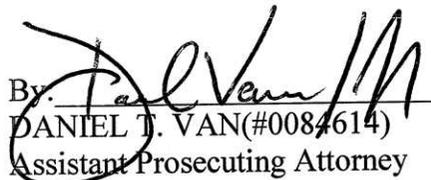
#### IV. Conclusion

The State’s position, as it has been throughout this case, is that R.C. 2151.352 does not require that a juvenile consult with a parent or attorney before waiving *Miranda*. A juvenile who does not wish to waive his or her *Miranda* rights is still afforded the constitutional safeguards against self-incrimination under the Fifth Amendment of the United States Constitution, which includes a right to counsel. After *In re M.W.*, courts will be required to examine the age of a person in determining whether a *Miranda* waiver is valid. This is fully consistent with constitutional requirements.

For these reasons this Court should deny the motion for reconsideration.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Opposition to Reconsideration has been mailed this the 23<sup>rd</sup> day of October 2012 to Amanda J Powell, Office Of The Ohio Public Defender, 250 East Broad St., 14th Fl. Columbus, Ohio 43215.

  
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Assistant Prosecuting Attorney

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## Legislator urges bill to protect juveniles' legal rights

### Court decision spurs effort on legal counsel

By Jim Siegel  
Columbus Dispatch

Published: October 5, 2012 - 11:21 PM

Wasting little time reacting to a Supreme Court ruling this week, a Columbus Democrat wants to ensure that juveniles have access to their parents or legal counsel before answering questions from law enforcement.

The state's high court ruled 4-3 that juvenile criminal suspects are not entitled under state law to be represented by an attorney while being interrogated by officers. The majority said the law permitting juveniles to be represented at "all stages of the proceedings" refers only to court, not to contact with police before charges are filed.

Rep. Tracy Maxwell Heard said she started working a year ago on legislation clarifying the legislature's intent regarding juvenile access to legal counsel and held the bill pending the court's ruling. "The decision is not what I had hoped, but understandable," she said. "It is the judiciary's responsibility to interpret the law as conflicts arise. When the law is interpreted to not protect children, it is a legislator's job to write a law that does."

Heard's proposal would require that minors, unless emancipated, be read in their own language their rights in regard to interrogation. Accused youths also would not be required to answer any questions and would have the right to speak to their parents or legal counsel before answering questions.

Rep. Courtney Combs, R-Hamilton, the chairman of the House Criminal Justice Committee, said he is generally reluctant to take quick action in response to court decisions. "Just to jump out as soon as you hear this and propose legislation, I'm not so sure that's the right thing to do," he said, adding that he also would need to contact the court.

#### Find this article at:

<http://www.ohio.com/news/ohiocentric/legislator-urges-bill-to-protect-juveniles-legal-rights-1.339789>

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**As Introduced**

**129th General Assembly  
Regular Session  
2011-2012**

**H. B. No. 597**

**Representatives Heard, McGregor**

**Cosponsors: Representatives Foley, Ramos, Fedor, Murray, Antonio, Yuko,  
Reece, Huffman**

**A BILL**

To enact section 2152.05 of the Revised Code to  
protect the rights of children before and during  
custodial interrogations.

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**BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:**

**Section 1.** That section 2152.05 of the Revised Code be  
enacted to read as follows:

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**Sec. 2152.05. (A) As used in this section:**

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(1) "Child" means any unemancipated person under the age of  
eighteen, notwithstanding the definition of "child" in section  
2152.02 of the Revised Code.

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(2) "Custodial interrogation" means the questioning of a  
child about an act that was allegedly committed by the child and  
that would be a criminal offense if committed by an adult, which  
questioning occurs while that child is in law enforcement custody  
or is being deprived of freedom of action in any significant way  
by a law enforcement officer, a court employee, or an employee of  
the department of youth services. "Custodial interrogation" does  
not include questioning of a child by a public school  
administrator or teacher if the questioning is not conducted on

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behalf of a law enforcement officer, a court employee, or an 19  
employee of the department of youth services. 20

(B) Before a child is questioned about anything concerning a 21  
charge that the child allegedly committed an act that would be a 22  
criminal offense if committed by an adult and on which the child 23  
was taken into custody or deprived of freedom of action in any 24  
significant way by a law enforcement officer, a court employee, or 25  
an employee of the department of youth services, the person asking 26  
the questions shall inform the child, in the child's own language, 27  
of the following rights: 28

(1) That the child has the right to an attorney; 29

(2) That if the child is unable to pay for an attorney and if 30  
the parent, legal guardian, or legal custodian of the child has 31  
not provided an attorney, one will be appointed; 32

(3) That the child is not required to say anything and that 33  
anything the child says may be used against the child; 34

(4) That the child has a right to communicate with the 35  
child's parent, legal guardian, or legal custodian, whether or not 36  
that person is present and that, if necessary, reasonable means 37  
will be provided for the child to do so; 38

(5) That even if the child's attorney is not present or has 39  
not yet been appointed, the child has the right to communicate 40  
with the child's attorney and that, if necessary, reasonable means 41  
will be provided for the child to do so. 42

(C) No person shall question a child who has been taken into 43  
custody or deprived of freedom of action in any significant way by 44  
a law enforcement officer, a court employee, or an employee of the 45  
department of youth services for an act that would be a criminal 46  
offense if committed by an adult if the child has indicated in any 47  
manner any of the following: 48

<u>(1) That the child does not wish to be questioned;</u>	49
<u>(2) That the child wishes to speak with the child's custodial parent, guardian, or custodian or to have that person present;</u>	50 51
<u>(3) That the child wishes to consult an attorney before submitting to any questioning.</u>	52 53
<u>(D)(1) A child who is alleged to have committed an act that is a violation of section 2903.01, 2903.02, 2903.04, 2904.041, 2907.02, 2907.03, 2907.05, or 2907.06 of the Revised Code shall be represented by an attorney during the entire period of any custodial interrogation of the child. The child may not waive this right to counsel.</u>	54 55 56 57 58 59
<u>(2) No admission or confession resulting from a custodial interrogation of a child may be admitted into evidence against the child unless the confession or admission was made in the presence of the child's parent, guardian, custodian, or attorney. If an attorney was not present, no such admission or confession may be admitted into evidence against the child unless the parent, guardian, or custodian as well as the child was advised of the child's rights set forth in division (B) of this section. A parent, guardian, or custodian of a child may not waive any right on behalf of the child.</u>	60 61 62 63 64 65 66 67 68 69
<u>(E)(1) If a child waives any of the rights set forth in division (B) of this section, a court may admit into evidence against the child any statement made by the child during a custodial interrogation if the court finds that the child knowingly, willingly, and understandingly waived the child's rights. In determining whether a child knowingly and voluntarily waived any of the child's rights, the court shall consider all of the circumstances of the waiver, including the following:</u>	70 71 72 73 74 75 76 77
<u>(a) The child's physical, mental, and emotional maturity;</u>	78
<u>(b) Whether the child or the child's parent, guardian,</u>	79

custodian, or attorney understood the consequences of the child's statement; 80  
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(c) Whether the child and the child's parent, guardian, or custodian had been informed of the act with which the child was charged or of which the child was suspected; 82  
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(d) The length of time the child was held in custody before consulting with the child's parent, guardian, or custodian; 85  
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(e) Whether there was any coercion, force, or inducement used in obtaining the statement; 87  
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(f) Whether the child and the child's parent, guardian, or custodian had been advised of the child's right to remain silent and to the appointment of counsel. 89  
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(2) Any information gained from noncustodial questioning of a child by a public school administrator or teacher concerning a wrongful act committed on public school property shall be admissible into evidence against the child. 92  
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(3) When a parent is the alleged victim or alleged codefendant of an act of a child that would be a criminal offense if committed by an adult, no admission or confession of the child resulting from a custodial investigation may be admitted into evidence unless the child made the admission or confession following a consultation between the child and an attorney or a parent who is not involved in the investigation of the act as to whether the child will waive the right to an attorney and the right against self-incrimination. The law enforcement agency that has taken the child into custody or the facility to which the child has been delivered shall immediately make reasonable efforts to contact a parent who is not involved in the investigation of the act. 96  
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(F) (1) Subject to division (F) (2) of this section, a law enforcement agency shall make an audio or audio and visual 109  
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recording of any custodial interrogation of a child that is 111  
conducted at a place of detention and, if feasible, shall make an 112  
audio or audio and visual recording of any custodial interrogation 113  
of a child that is conducted at a place other than a place of 114  
detention. 115

(2) A law enforcement agency is not required to make an audio 116  
or audio and visual recording of a custodial interrogation of a 117  
child if any of the following applies: 118

(a) The child refuses to respond or cooperate in the 119  
custodial interrogation, and a law enforcement officer or agent of 120  
a law enforcement agency made a contemporaneous audio or audio and 121  
visual recording or written record of the child's refusal. 122

(b) The child made the statement in response to a question 123  
asked as part of the routine processing after the child was taken 124  
into custody. 125

(c) The law enforcement officer or agent of a law enforcement 126  
agency conducting the interrogation in good faith failed to make 127  
an audio or audio and visual recording of the interrogation, 128  
because the recording equipment did not function, the officer or 129  
agent inadvertently failed to operate the equipment properly, or 130  
the equipment malfunctioned or stopped operating without the 131  
officer's or agent's knowledge. 132

(d) The child made the statement spontaneously and not in 133  
response to a question by a law enforcement officer or agent of a 134  
law enforcement agency. 135

(e) Exigent public safety circumstances existed that 136  
prevented the making of an audio or audio and visual recording or 137  
rendered the making of such a recording infeasible. 138