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"Apparently, once a false memory is established, the error cannot easily be reversed through careful questioning or challenge later on. "

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Creating False Memories in Children

By Daniel Reisberg

From Reisberg's The Science of Perception and Memory: A Pragmatic Guide for the Justice System

Claims about children's memory (or any other topic) must be rooted in a broad fabric of evidence. Here is an illustrative study, however, that conveys the pattern of the evidence and highlights a number of crucial points.

Poole and Lindsay have conducted a number of "Mr. Science" studies. In one version of the study, a man ("Mr. Science") visited the children's school and met individually with

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DHS and Immunization

By Caitlin Mitchell, YRJ Attorney

May the Department of Human Services, in its capacity as legal guardian or custodian, immunize children against common childhood diseases over parental objection? In *Dept. of Human Services v. S.M., 355* Or 241 (2014), the Oregon Supreme Court held that, as the children's legal guardian, DHS does possess that authority.

The juvenile court asserted jurisdiction over the parents' eight children, who ranged in age from one to 10 years old, based on the parents' admissions relating to domestic violence,

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Editor's Note: Daniel Reisberg consults widely with the justice system, helping police, attorneys and juries to understand how eyewitness perception and memory function (and can sometimes go wrong). Reisberg is the Patricia & Clifford Lunneborg Professor of Psychology at Reed College, and author of a forthcoming book entitled The Science of Perception and Memory: A Pragmatic Guide for the Justice System. The book, published by Oxford University Press, is carefully rooted in research but written in a way that will make it fully accessible to non-scientists. Early chapters provide an overview of the relevant research and a broad portrait of how perception and memory function. Later chapters offer advice for situations involving eyewitness identifications, remembered conversations, evidence obtained from children, confession evidence, and more.

In this issue and the next, we offer two (lightly edited) excerpts from Reisberg's Chapter 10, entitled "Children's memories." For anyone seeking more, Reisberg's book will be available in the Fall; for more information, click here.

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each child. Mr. Science did a series of four "science demonstrations" with the child (e.g., using two funnels and a rubber tube to make a crude telephone). Then, three months later, the researchers mailed the children's parents a brief "story book," ostensibly describing Mr. Science's visit. The parents were encouraged to read this book with their child three times, much as they would read any story with the child. The book included descriptions of the actually experienced science demonstrations, but also some demonstrations that the child had not experienced. The book also described two events involving body touch that, in truth, had not occurred at all—an event in which Mr. Science put something "yucky" in the child's mouth and one in which Mr. Science touched the child's bare skin, pushing so hard on the child's tummy (to apply a reward sticker) that it hurt.

Importantly, the parents were explicitly warned that they should not accept as factual everything they read in the "story book." Specifically, they were told that not all children had experienced the same demonstrations, and that the story book therefore included some events that their own child had experienced and some that other children had experienced.

Shortly afterward, the children were interviewed by the researchers about the Mr. Science visit. The interview was conducted in a fashion carefully designed not to be leading or suggestive in any fashion.

This overall procedure yielded a rich and textured pattern of results. To highlight just a few points, many children absorbed into their memory the fictitious events described in the story book. As a result, many children offered false reports about the Mr. Science visit when questioned (again, in an entirely nonsuggestive, open-ended manner) at the end of the procedure. And, crucially, many of these false reports included suggested events that—if they had occurred—would have been unpleasant and therefore salient: In an early round of interviews at the study's close, roughly 30–40% of the children in each age group responded "yes" to questions about whether Mr. Science put something yucky in their mouths or hurt their tummies. In follow-up interviews, with slightly more careful questioning, these rates of false acquiescence increased for the three-year-olds (to 53%) and four-year-olds (to 58%), but decreased (to roughly 15%) for the seven- and eight-year-old children in the study.

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A few points deserve special emphasis here: First, no one tried deliberately to put ideas into these children's memories. Indeed, the parents were explicitly put on guard (through an overt warning in the booklet) that some of the elements contained within the booklet were not experienced by their child. Hence, false memories need not result from someone trying to "manipulate" a child. Second, the frequency of false memories is quite high here—with more than half of the children, on some measures, reporting events that never occurred. False memories are not rare. Third, there was no need for pressured or intense interviewing to produce these false memories; instead, the memories arose out of the simple experience of the child's reading through a story book with one of his or her parents just three times.

Fourth, the false memories were detected by the researchers in interviews at the end of the procedure that were neutral and objective; the false memories were often reported in response to open-ended questions. In fact, the actual script for the questioning ran this way: "Do you remember playing with Mr. Science? Good. I want you to tell me everything that happened when you were playing with Mr. Science. I wasn't in the room, so I don't know what happened." Thus, even though open-ended questions are vastly preferable in questioning a child, open-ended questions do not insulate the child from memory contamination.

Fifth, note that, for many children, these errors remained in place even when the memories were challenged ("You know, there might have been some things in the story [that you read with your mom or dad] that you didn't really do, things that were only in the story"). Apparently, once a false memory is established, the error cannot easily be reversed through careful questioning or challenge later on. Once the false memory is established, in other words, we cannot "unring the bell" or "unscramble the egg."

Sixth, let's emphasize that the false memories in this study were not limited to benign events; false memories regularly occurred for events that involved painful skin-to-skin contact (getting hurt when Mr. Science pushed on your tummy) or aversive to the child (something "yucky" in the mouth). ●

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failure to provide adequate shelter and necessities, and educational neglect. The court appointed DHS as the legal custodian and legal guardian for each child.[1] Four months later, DHS and the children's attorney notified the court that the children needed to be vaccinated, for their own safety and for the safety of other children at their school. The parents objected for religious reasons, and because the court had never determined that they were unfit to make medical decisions regarding their children. When asked to explain her religious objection to immunization, the mother stated, "[P]] art of [her] beliefs in regard to [immunization] is (inaudible)and there is a stem cell line that the actual product isn't (audible) but is based on [an] inadvertent [*sic*] fetus from 1970 and stem cells were reproduced over and over and over again." *Id.* at 244. The juvenile court concluded that, because the children were in the care and custody of the state, it would

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allow the children to be immunized as per the decision of the medical provider.

The parents appealed. They argued that DHS lacked statutory authority to make medical decisions, because medical neglect was not one of the factual allegations on which the juvenile court had based jurisdiction. *Id.* at 245. They also argued that, even if DHS did possess the requisite statutory authority, DHS could not exercise that authority unless it established that (1) the parents were unfit to make decisions about immunizations, and that (2) immunizations were necessary for the children's short-term health. The Court of Appeals disagreed with the parents' arguments and affirmed the trial court's judgment. *See Dept. of Human Services v. S.M., 256* OR App 15, 31 (2013). The parents petitioned for review, renewing and expanding on their statutory arguments, and asserting that the court should interpret the statutes at issue consistently with the parents' constitutional due process rights. *See* ORS 419B.090(4) ([T]he provisions of this chapter shall be construed and applied in compliance with federal constitutional limitations."); *Dept. of Human Services v. J.R.F*, 351 Or 570, 578-79 (2012) (applying that principle). The Oregon Supreme Court affirmed the Court of Appeals.

Photo David Mason

The parents' arguments raised a number of provocative questions, although not all were presented to the Oregon Supreme Court in this case. When a juvenile court finds that a parent is unable to safely care for his or her child, that parent loses many of the powers and responsibilities that normally come with parenthood—at least temporarily. To what extent does a parent retain the right to make important decisions about his or her child—here, compounded by what was framed as a religious freedom concern—when those rights conflict with the child's medical needs? Is it true, as the parents' arguments suggest, that the agency's power to make decisions concerning the care, health, and well-being of children in its custody is circumscribed by the bases of jurisdiction, and that the agency cannot make medical decisions unless the parents have admitted to, or the court has made a finding of, medical neglect? Are vaccinations against childhood diseases an element of "ordinary medical care," particularly in Oregon, where parents may opt out of vaccinations for their children? *See* ORS 433.276.

In affirming the Court of Appeals, the Oregon Supreme Court based its decision primarily on the guardianship statutes and found that those statutes authorize DHS to vaccinate the children. Specifically, the court agreed with DHS that the legal guardian's power to "make * * * decisions * * * of substantial legal significance" includes the power to immunize against common childhood disease. *Id.* at 249. "Indeed," the court observed, "immunization is less invasive and more routine than surgery, which DHS specifically may authorize as the wards' legal guardian." *Id.*

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The court noted that although DHS has the power to authorize the immunization, it did not make that decision unilaterally in this case—instead, consistently with its own rules, DHS sought the court's approval, thereby giving the parents the opportunity to voice any objection that they might have.[2] *Id.* at 249. Although the court did not reach the question of DHS' authority to vaccinate as the child's legal custodian, and thus did not address whether vaccinations fall within the category of "ordinary medical care," it noted that medical approval of immunization against common childhood diseases "appears to be a foregone conclusion." *Id.* at 249 n 5.

The court only briefly addressed the constitutional dimension of the parents' claims. It first noted that the parents did not "adequately identif[y]" their due process concern as it related to their statutory construction argument. *Id.* at 253-54. The court then observed that, although a legal custodian or guardian "could make * * * decisions on a child's behalf that potentially could implicate the child's or the parent's constitutional rights[,]" DHS "has been sensitive to those concerns" by promulgating administrative rules directing the agency to consider the impact of a proposed action on the child's welfare, family, and community, and to make efforts to consult with the parents. *Id.* at 253-55. Those rules, the court noted, "provide assurance that DHS' decisions as a ward's legal guardian will take into account the parents' concerns and that DHS, having presented the issue to the juvenile court, will abide by its ruling." *Id.* at 255.

The court's decision in this case clarified that DHS, as legal guardian, is permitted to make medically responsible decisions for the children in its care, and that the agency's ability to care for children is not circumscribed by the bases of jurisdiction. The court was not required to address some of the underlying constitutional concerns suggested by this case. For example, the court states that DHS' administrative rules place "procedural limits" on DHS' power; those rules, however, require only that DHS "consider" the impact of the action on the family and make "reasonable efforts" to consult the child's parent. DHS "may" notify the court and seek the court's concurrence on a proposed action, but it is not required to do so. In another case, where parents are able to make an independent constitutional objection to an action taken by a legal guardian, or where DHS, though not violating its own rules, denies parents an opportunity to be heard, the court might reach a different result.

[1] The ward's legal custodian has "physical custody and control of the ward" and has a duty to supply the ward with basic necessities. ORS 419B.373(1)-(2). The custodian may also "authorize ordinary medical, dental, psychiatric, psychological, hygienic or other remedial care." ORS 419B.373(4). In an emergency situation, the legal custodian may authorize "surgery or other extraordinary care." A legal guardian has greater decision-making authority than the legal custodian; it can consent to the ward's marriage, authorize the ward to enlist in the armed forces, authorize surgery, and "make other decisions concerning the ward of substantial legal significance." ORS 419B.376. A guardianship that arises as an incident of wardship will not be long-term—if a ward has not been reunited with his or her family within 12 months after coming into care, the court will re-consider the permanent plan for the ward and may, among other options, change the plan for the ward to a long-term permanent or durable guardianship. See ORS 419B.365 (specifying requirements for permanent guardianship); ORS 419B.366(2) (specifying requirements for durable guardianship).

[2] *See* OAR 413-020-0170(4) (providing that DHS may "notify the juvenile court, and/or seek the court's concurrence" for actions taken as a ward's legal guardian). ●

Juveniles and Their Miranda Rights: A Psychological Perspective

By Orin D. Bolstad, Ph.D., ABPP
Psychologist

Fundamentally, we must recognize that juveniles are different from adults. The differences center on maturation, chiefly among the domains of cognitive, social, and emotional development. Juveniles are not just smaller versions of adults.

Because children/adolescents are different from adults, it is important to assure that the due process rights of children/adolescents are protected and clarified. In *Miranda v. Arizona* (1966)[1], the Supreme Court emphasized that the totality of the

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circumstances must demonstrate that the juvenile's waiver was *knowingly, intelligently and voluntarily* made. A waiver is knowing and intelligent when "made with the full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon it." A waiver is voluntary if it "was the product of a free and deliberate choice rather than intimidation, coercion or deception."[2]

In the famous Gault[3] decision of 1967, the Supreme Court emphasized that "admissions and confessions of juveniles require *special caution*." In this decision, reference was made, at some length, to the earlier Haley[4] (1948) decision, noting that "the greatest care must be taken to assure that the admission was voluntary, in the sense 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*." Fantasy, fright or despair may be less relevant when an adult's Miranda waiver is considered but, clearly, the court indicated that these issues are concerning for juveniles. This distinction acknowledges that children are different from adults.

The concepts of "ignorance, adolescent fantasy, fright or despair" are inherently psychological terms, as are the terms "suggestion, intimidation and coercion." As a child/adolescent psychologist, my focus in this paper will be on the psychological meaning of key words and concepts as they pertain to juveniles' understanding of Miranda Rights.

Photo Andy Wilson

From a psychological perspective, "knowing and intelligent" appear different from "voluntary." The first has to do with the comprehension and appreciation of Miranda Rights. The latter has more to do with will and the capacity to assert one's will in terms of exercising one's rights. To be sure, these factors often interact or are co-mingled.

Knowingly and Intelligently Waiving Miranda Rights:

Most adolescents can be expected to have difficulty in waiving their Miranda Rights "knowingly and intelligently." Thomas Grisso, Ph.D. has been the leading research scholar in this area; he is the author of a standardized assessment measure, Assessing, Understanding and Appreciation of Miranda Rights. Grisso has generated normative scores comparing juveniles with adults (adult offenders and adult non-offenders). This measure, as the title of his instrument suggests, measures understanding and appreciation (i.e., "knowingly and intelligently"); it does not include an assessment of voluntariness.

Among Grisso's many findings in his research, he has discovered that only about 21 percent of our nation's juveniles, as compared with 42.3 % of adults, comprehended the meaning and significance of the Miranda warnings (1980). About 55% of all juveniles, as compared with 23% of all adults, did not comprehend at least one of the four components of Miranda Rights. The first component, the right to remain silent, was the most difficult for juveniles. Almost half of the juveniles (44.6%), compared with only 14% of adults failed to understand the warning that they have the right to an attorney before interrogation and during the interrogation. It is important to recognize that the sample of juveniles were "normal" or typical adolescents, not those who have mental health or juvenile justice histories.

There are a number of reasons why juveniles have difficulty with Miranda Warnings, attributable in large

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part to their "immature brains." Child Development psychologists have documented predictable stages of brain development, as reflected by performance in relation to tasks of logic (e.g., which vessel holds the most water, a tall narrow glass or a short, squat glass). This research began with Piaget (1958) and over the last 60 years has shown that abstract reasoning does not develop fully until the mid to late twenties and sometimes, not at all. Developmentalists describe abstract reasoning as:

• Deciphering *meaning* of words and concepts (as with comprehending common metaphors, jokes, nuance, etc.),

• Anticipating the consequences of one's decisions or actions,

• Hypothetical deductive reasoning (what if…?),

• Generating options and weighing the costs and benefits of each option,

• Generalizing or transferring learning from one setting or time period to another.

These aspects of abstract reasoning are fundamental to decision-making and all apply to the issue of comprehending Miranda warnings.

Psychologists have ways of measuring abstract reasoning formally, as with the Wisconsin Card Sort test (See: Monchi et. al., 2001). Asking youth to interpret common proverbs also can be illuminating. For instance, in response to the proverb, "Don't put all your eggs in one basket," I have heard responses such as: "You'll break all the eggs," illustrating a very concrete form of logic. When metaphors, such as proverbs, include legal jargon, youths' responses also can be revealing. For instance, in response to the phrase: "The state has the burden of proof, you are innocent until proven guilty," youth often are flummoxed. Immediately following such phrases, I often have heard adolescents insist that they still have to prove that they are innocent.

Brain Science Confirms that Kids are Different:

More recent research with Structural Magnetic Resonance Imaging of the Adolescent Brain has provided a dramatic expansion of knowledge regarding predictable changes in brain function with age. The amygdala is an almond-shaped area that sits above the brain stem in the center of the brain. It serves as the brain's alarm center for emotional reaction to impending threat (flight or fight center). In an adolescent, the amygdala is more active and developed than the prefrontal cortex, thereby playing a more prominent role in the interpretation of emotional images than it does in adults.

MRI studies point to the gradual development of the prefrontal cortex throughout childhood and even into adulthood; this development is associated with the emergence of executive functioning or judgment. Physical evidence has been well documented showing that gray matter in the prefrontal cortex grows and shrinks in a "use-dependent" fashion. Neurons and neural pathways that are not used are pruned, making the processing of information more efficient.

Analyzing images through MRI testing shows distinct changes in the patterns of gray matter, white matter, and fluid found in brains of children at different ages. These changes correspond to gradual increases in abstract reasoning and logic. Scholars in this area are clear in pointing out how we need to be careful not to assume that adolescents understand complex and abstract issues the same way that adults do (Giedd, et. al., 2004; Sowell, 1999; Steinberg, 2005). In the now famous Roper[5] case, it was made clear that adolescent brain

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Changes in the DSM5

by Roberta T. Ballard, Ph.D.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM5) was released in May 2013. The fifth edition represents the first major DSM update in almost 20 years; its changes are significant and meant to reflect evolving conceptualizations of mental disorders.

Although the American Psychiatric Association predicted a full transition to DSM5 by January 1, 2014, adoption of the DSM5 in practice has been slower than that for two main reasons:

- First, it takes time for clinicians to gain the knowledge and training to responsibly diagnose with new criteria, particularly given the larger scope of changes in this edition,
- Second, the DSM5 has been met with its share of controversy and mental health practitioners have continued using tried and true methods while a certain amount of dust has settled.

Personally, I am still using the DSM-IVTR, with plans to transition to the DSM5 by the end of 2014.

Frequently referred to as the "bible" of psychiatry and psychology, the DSM is more accurately described as the most commonly agreedupon standard for diagnosing mental disorders in the United States. That said, there is plenty of disagreement in the fields of psychiatry and psychology, and controversies around changes in the DSM5 are no exception.

Indepth exploration of these controversies is beyond the scope of this article, though I will mention them as appropriate. The primary purpose of this article is to highlight the diagnostic changes that are most relevant for people working with children and adolescents. One of the biggest changes is in the realm of autistic disorders.

Autism Spectrum Disorder

The DSM5 consolidates several previously separate disorders into a single new disorder, Autism Spectrum Disorder (ASD). Included in this category are DSMIV disorders of autistic disorder, Asperger's disorder, childhood disintegrative disorder, and pervasive developmental disorder not otherwise specified. In the DSM5, a diagnosis of ASD is accompanied by severity specifiers to indicate the level of impairment and how much support the individual requires.

There are concerns about how a form of Asperger's "not existing" as a diagnosis in DSM5 will affect people who have been, or would now be, diagnosed with Asperger's disorder. Asperger's disorder has long been viewed as a high functioning form of autism. For many years, mental health professionals have described patients with Asperger's disorder as being "on the spectrum" and as "high-functioning autistic." In this respect, the incorporation of Asperger's disorder into an autistic spectrum disorder reflects current thinking around the idea that autism presents on a continuum, rather than in distinct categories. However, concerns persist that higher functioning individuals with Asperger's will no longer meet criteria for autism. Therefore, these individuals may lose eligibility for services or consideration in adjudicative matters.

Of some reassurance is the "grandfathering in" of previous autistic disorders into ASD the DSM5 states in its diagnostic criteria for ASD that

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"individuals with a wellestablished DSMIV diagnosis of autistic disorder, Asperger's disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder.

Individuals who have marked deficits in social communication, but whose symptoms do not otherwise meet criteria for autism spectrum disorder, should be evaluated for social (pragmatic) communication disorder." Realistically, most individuals with Asperger's disorder will meet the new criteria for ASD, regardless of whether or not they had been previously diagnosed with Asperger's under the DSMIV criteria.

However, there are some individuals who would have met DSMIV criteria for Asperger's, but who, by virtue of not presenting with restricted and repetitive patterns of behavior, will no longer be considered autistic under DSM5 criteria. Today, those individuals would most likely be diagnosed with social (pragmatic) communication disorder.

Social communication disorder is a new disorder under DSM5, and it is not known how this diagnosis fares in educational, mental health, or legal settings, compared to a diagnosis of autism. I am hopeful that common sense will prevail in situations involving changes in diagnostic criteria that can have a big impact on decisions affecting the child. It is the same person, after all, who would have been diagnosed with Asperger's disorder two years ago, but who now might be diagnosed with social communication disorder. Assistance from mental health professionals to courts or administrators can help to explain the diagnostic circumstances that would result in a diagnosis of Asperger's disorder under DSMIV, but social communication disorder under DSM5.

One final note about changes to autism diagnoses: an individual who meets criteria for an autistic disorder can now also be diagnosed with ADHD, whereas this dual diagnosis was excluded in DSMIV.

Photo Ashley Rose

AttentionDeficit/Hyperactivity Disorder (ADHD)

Under the new DSM5 criteria, children can be given ADHD diagnoses if they demonstrate certain traits before turning twelve. In the DSMIV, the cut off for ADHD diagnoses was seven. Also, as mentioned above, a diagnosis of ADHD is no longer excluded if an individual also meets criteria for an autistic disorder. The criteria for ADHD has been changed in the DSM5 primarily in an attempt to better address the diagnosis of ADHD in adults. Previous editions of the DSM focused on childhood diagnosis and, although ADHD begins in childhood, it is not always diagnosed until later in life.

All of these changes are expected to result in an increase in diagnoses of ADHD, in both children and adults. The primary controversy surrounding an increase in ADHD diagnosis rates is the extent to which these diagnostic changes were influenced by conflicts of interest for the DSM authors. Many of these psychiatrists have associations with companies in the pharmaceutical industry, and changes in the DSM5 ADHD criteria presumably will expand the market for medications prescribed for ADHD.

Disruptive Mood Dysregulation Disorder (DMDD)

DMDD is a new diagnosis, intended to address concerns about

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potential overdiagnosis and overtreatment of bipolar disorder in children. It was recognized that many children diagnosed with bipolar disorder did not exhibit this disorder in adulthood, suggesting misdiagnosis of childhood bipolar. DMDD criteria includes both persistent irritability and frequent episodes of behavior outbursts three or more times a week for more than a year in children up to age eighteen. These intense outbursts and irritability must go beyond normal temper tantrums.

Mental health professionals have expressed concern that this new diagnosis could be misused to pathologize normal childhood behavior, turning temper tantrums into a mental disorder. Another criticism is that this disorder lacks a wide body of research and the diagnosis was not field-tested prior to publication. Although introduced as an attempt to alleviate overmedication of children previously diagnosed with bipolar disorder, DMDD may or may not have this effect and remains a controversial addition to the DSM.

Disruptive, ImpulseControl, and Conduct Disorders

Gone from the DSM5 is the chapter "Disorders Usually First Diagnosed in Infancy, Childhood, or Adolescence." Instead of having a separate chapter for childhood illness, each chapter of the DSM5 is written in the context of human development, with added or modified criteria for children and adolescents.

Behavior disorders previously listed in the childhood chapter (such as oppositional defiant disorder, conduct disorder, and disruptive behavior disorder not otherwise specified) are in a new chapter in DSM5-- "Disruptive, impulsecontrol, and conduct disorders." These disorders are all characterized by problems in emotional and behavioral self-control. Antisocial personality disorder has dual listing in this chapter (along with the chapter on personality disorders), due to its close association with conduct disorder. ADHD frequently coexists with the disorders in this chapter, but it is listed with the neurodevelopmental disorders. The diagnostic criteria for disorders listed in the disruptive chapter are refined in some areas, but not grossly different than in DSMIV.

Post-Traumatic Stress Disorder (PTSD)

Previously listed in the Anxiety Disorders chapter of DSMIV, PTSD is now included in a new chapter in DSM5-- "Trauma and Stressor-Related Disorders." Diagnostic thresholds for children and adolescents have been lowered in an attempt to make a diagnosis of PTSD more developmentally sensitive. Also, separate criteria have been added for children age 6 years or younger. These changes are expected to result in increased diagnosis of PTSD in children and adolescents.

Disinhibited Social Engagement Disorder

Disinhibited social engagement disorder appears to be a new disorder in the DSM5, but it was previously a sub-type of reactive attachment disorder, which has been split into two separate disorders in the DSM-5: reactive attachment disorder and disinhibited social engagement disorder. Both of these disorders result from neglect or other circumstances that limit a young child's opportunity to form healthy attachments.

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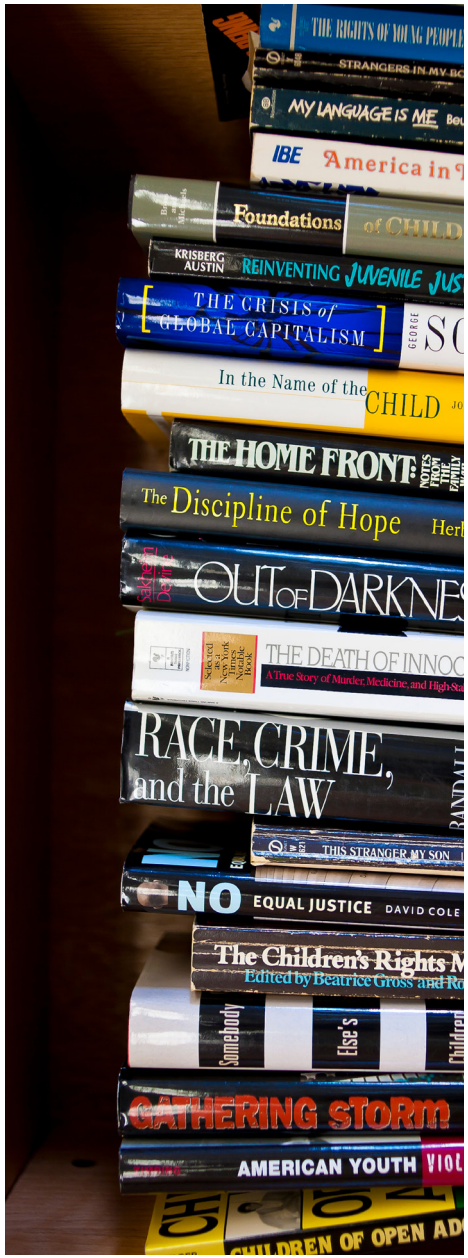

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Although sharing a similar cause, the two disorders differ in enough important ways (including treatment approaches) that they were separated as diagnostic categories. Reactive Attachment Disorder more closely resembles internalizing disorders such as depression. Whereas Disinhibited Social Engagement Disorder more closely resembles ADHD, and can occur in children who do not necessarily lack attachments, and may have even established secure attachments. This structural change to the DSM should result in fewer diagnoses of reactive attachment disorder, with a corresponding increase in the new diagnosis of disinhibited social engagement disorder.

Intellectual Disability (Intellectual developmental disorder)

The diagnosis of intellectual disability (also called intellectual developmental disorder) in DSM5 was termed mental retardation in earlier editions of the DSM. This change reflects that the term mental retardation has fallen out of favor and is now often perceived as pejorative. A federal statute (Public Law 111256, Rosa's Law) replaces the term mental retardation with intellectual disability, and research journals likewise use the term intellectual disability. Interestingly, mental retardation was the neutral term implemented in the mid20th Century, to replace terms that had themselves started out neutral but became pejorative, such as idiot and moron. Thus, revisions of the DSM continue to reflect current cultural trends and acceptable practices.

Diagnostic Format

Perhaps one of the most noticeable changes in the DSM5 is the removal of the five axis model of listing diagnoses. The first three axes are now combined into a diagnosis section, and there are notations for psychosocial and contextual factors and disability factors. The GAF (global assessment of functioning) scale, previously on Axis V, has been completely eliminated due to lack of reliability and validity. Due to these changes, the diagnostic impression section of psychological reports will look different under the DSM5. For example, the following hypothetical individual's diagnoses under DSM-IVTR and DSM5 would appear quite different:

DSMIVTR Diagnosis

Axis I 299.80 Asperger's Disorder
Axis II V71.09 None

Axis III None

Axis IV Peer interaction difficulties

Axis V GAF = 60

DSM5 Diagnosis

299.00 Autism Spectrum Disorder, Level 1, without language impairment

Conclusion

The changes in the DSM5 discussed here are not comprehensive, but they do highlight many of the differences that are most relevant to children and adolescents. How these changes will ultimately influence mental health care and adjudication of juvenile cases will not be understood for several years. ●

Links:

The DMS5 official website:

www.dsm5.org

This website includes many downloadable pdf files outlining the DSM5 and how it differs from the DSMIV.

World Psychiatric Association article "The DSM5: Classification and criteria changes":

www.ncbi.nlm.nih.gov/pmc/articles/PMC3683251/

On controversies in the DSM5:

http://www.medscape.com/viewarticle/804410

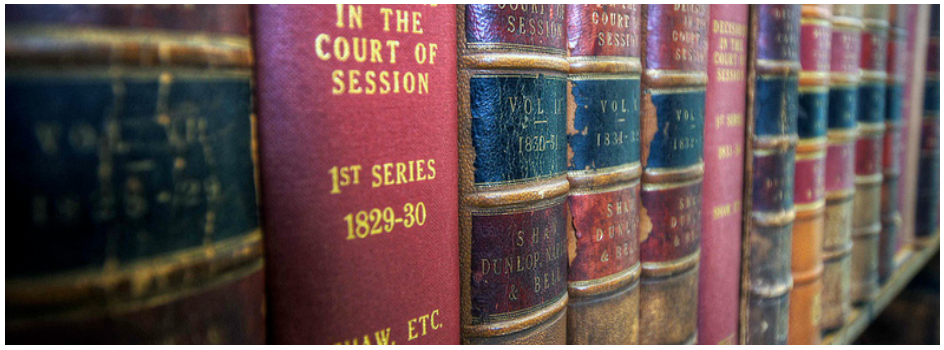

 Photo Mariusz Klusniak

Psychological Assessment of Parental Capacities

Richard Kolbell, Ph.D., ABPP

April, 2014

INTRODUCTION

The right to bear and raise children, while protected under the 14th Amendment, at times comes into conflict with the broader social values and doctrine that recognizes that the State has a strong interest in assuring the health and well-being of children in those circumstances where the parent(s) and/or family are unable to meet the basic physical, mental, and developmental needs of their child or children.

Parents are expected fundamentally to provide "minimally adequate parenting," a construct that is widely used although not statutorily defined. At times, evidence arises that a child's fundamental needs are unmet as a result of one or more multiple forms of abuse or neglect, including physical, mental, threat of harm, and so forth. At these points, Child Welfare (DHS – Oregon Department of Human Services) becomes involved; very often and quite rapidly, a wide array of other agencies and individuals, including the courts, become actively involved in the effort to protect the child while ensuring that parental rights are protected.

In many cases, issues regarding a parent's mental health are called into question as it may or may not impact their ability to provide minimally adequate parenting for their children. When this comes to the fore, a psychological assessment of parental capacities may be requested by DHS, the parent's attorney, and/or ordered by the court. Psychological assessments may be requested at one or more points along the continuum of a Child Welfare case, from pre-jurisdiction through petition to terminate parental rights. Regardless of the point at which a psychological evaluation is requested, the fundamental purpose remains the same: to identify a particular parent's psychological, intellectual, and/or neurocognitive status to identify strengths or possible deficits, specifically as these relate to their capacity or ability to provide minimally adequate care, and provide recommendations accordingly.

Those who have worked within this arena, including psychologists, social workers, service providers, and, most certainly, attorneys and judges, very likely have encountered a fairly diverse and varied array of approaches and methods employed by psychologists in conducting these evaluations and ultimately, providing reports of their findings and opinions.

The purpose of this paper is to provide an overview of one approach to parental capacities evaluation, as developed by this author, and based on current available scientific literature, research, and guidelines for practice as established by the American Psychological Association (APA, 2013). This necessarily will be relatively concise, as the landscape is so vast that it is beyond the scope of this paper. The interested reader is referred to several texts (e.g., Budd, K.S., et. al., 2011; Melton, G., et. al., 2007) for an expanded review. I will begin with a discussion of the role of the psychologist, and move on to elements of the psychological evaluation including testing and parent-child interaction, communication of the results and opinions of the psychologist, and follow-up.

ROLE OF THE PSYCHOLOGIST

The primary duty of the psychologist is to provide information and consultation to the referring

party (client), typically DHS or the parent's attorney; this party is then considered the client, who holds the privilege. It is not the job of psychologists to determine the truth of any allegations or findings of fact. The psychologist needs to be keenly aware that this is a forensic context

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and, as such, there are recognized guidelines and standard practices specific to the forensic context (APA, 2013); these emphasize, among other things, the distinction between objectivity and advocacy, integration of information from multiple sources, application of methods grounded in scientific bases, and a reasonable knowledge of applicable laws and procedures relevant to the issues and individuals in a particular case.

Psychologists practicing in this arena must be able to demonstrate, through education, training, supervision, and experience, their competence to provide consultation and conduct these assessments. Against this backdrop, the psychologist's primary responsibility is to respond to specific questions raised by the client in an objective fashion, without investment or advocacy for specific outcomes in any case. The psychologist must keep in mind that any deficits or problems identified are only relevant as they pertain to a parent's potential or actual capacity to provide minimally adequate parenting.

METHODS AND APPROACHES

The psychological evaluation rests on four pillars:

1. Review of all available records. This ideally includes a referral letter from the client providing a brief synopsis of the case and identifying specific questions to be addressed by the psychologist; available DHS records, including assessment summary, Child Welfare case plan, and records of observed visits with the child, as applicable; court reports; reports of assessments and from service providers; other records as relevant (e.g., medical records, law enforcement records, academic records, etc.). In cases where a parent is referred by DHS, I recommend that the parent's attorney also provide any additional information and/or referral questions to assist the psychologist ultimately in providing an objective report of findings that address questions relevant to all parties.

2. Forensic interview. This should be standardized (i.e., the same material content for all examinees), structured, and dynamic or flexible to address specific needs, issues, and characteristics of the parent being evaluated. The process typically takes between 2 and 2.5 hours, and includes: thorough informed consent; inquiry of various topics related to the current case and, more broadly, parenting skills; and additional history and information such as current symptoms or complaints, prior psychiatric history, medical history, alcohol and drug history, legal history, academic history, vocational history, relationship history, psychosocial and developmental history, and current activities and circumstances.

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3. Psychological testing. Parental capacities are best understood as an individual's potential or actual skills and abilities as they relate to providing for their child. As such, there are presently no standardized, normed, scientifically valid and reliable psychological tests that can directly measure a parent's potential or actual skills. Rather, psychological tests andmeasures can only provide information about the parent from which potential or actual parenting skills can be inferred, where such information is reasonably related to parental capacities, and as informed by the professional literature and law.

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Psychological tests that can provide this kind of information include measures of current psychological or emotional functioning, personality characteristics and features, intellectual capacities, and, in many cases, cognitive capacities, including attention, memory, learning, comprehension, judgment, decision-making, and problem-solving. Selection of tests is the purview of the psychologist, and should be chosen based on the nature of the referral questions and the specific historical and clinical aspects of the parent being evaluated.

4. Parenting Assessments. There are currently no standardized instruments or measures that directly assess parental skills in the context of parent-child interactions or, more broadly, the general domain of parenting. Two scientifically validated instruments are available that address historical clinical aspects of a parent that reasonably bear on their risks for physical abuse of their child (CAPI) and/or stress factors known to be affecting child development and parental stress (PSI).

It is important to note that the CAPI – Child Abuse Potential Inventory - is designed to appraise historical and clinical aspects of a parent that are known to be risk factors for physical abuse; however, this instrument's actual predictive value for subsequent child abuse has a high false-positive error rate.

The PSI - Parenting Stress Index - is a valid and reliable measure of factors or variables known to affect child development and impact parental skills although, again, it does not directly address parental skills in the context of the parent-child dynamic.

5. Parent-Child Interaction. There is one approach to observe and quantitatively measure parental skills (PCIT), which is an extremely complex, labor-intensive process that requires specialized facility and recording methods typically well beyond the capacity of most psychologists in current practice settings. There are PCIT agencies within the State of Oregon, although these are designed to provide parents skill training, and the assessments are provided only in the context of a more broad-based parental skills training program.

Another approach that is widely used is psychologist's direct observation of parent-child interaction, typically for 1-1.5 hours in a structured and semi-structured setting, most often occurring on one occasion. While this may yield some useful qualitative information, it does not provide any kind of longitudinal data that encompasses the wide array of parenting skills necessary in a wide array of circumstances over an extended period of time. Again, the ability of a psychologist to provide parent-child observations is limited by a psychologist's training and experience and also may be limited by the physical constraints of the psychologist's office.

In consideration of these limitations, information regarding parent-child interaction, a parent's potential or actual demonstrable skills, over time and different contexts, can be gleaned from a careful review of others' detailed observations during child visitations and/or hands-on parent training. The reliability of this is dependent, in part, on the accuracy and detailed aspects of the observer's record of their observations, and the psychologist's method of interpreting the information contained within these reports.

COMMUNICATION OF FINDINGS

Typically, psychologists are asked to provide their findings and opinion in a written report. The report ideally should be organized in a way that reflects the psychologist's process in the evaluation; this often includes separate sections devoted to the reason for referral, assessment procedures (e.g., review of records, interviews, procedures, and tests used), background information (typically this includes summary of the relevant records provided), forensic interview, test findings, and

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conclusions, recommendations, and responses to specific questions. The value of the report rests not only on its thoroughness, accuracy, and well-grounded conclusions and opinions; it needs to be written in a way that is most useful for the consumer, typically DHS, attorneys, judges, and treatment providers.

Last, reports need to be provided in a timely fashion, such that the reports meet the needs and timelines of all parties, and remain valid and reliable. The more time that elapses between the completion of the examination and the receipt of the report, the more opportunity there is for historical threats to the validity of findings to emerge. There is no hard and fast "shelf life" to an examination; it terms of practical realities, in my experience, most psychologists strive to provide a written report within 3-4 weeks of conclusion of the evaluation. In addition to potential threats to validity as time goes beyond this, interference with due process can also result from excessive delays in the receipt of the report of the psychologist. I strongly encourage all those who are seeking psychological evaluation to clarify and specify with the psychologist specific timelines and dates when the report must be available. It is the responsibility of the psychologist to inform the client if she/he cannot meet those time lines and, thus, should not accept the referral.

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FOLLOW-UP

In my experience, one of the most valuable aspects of the entire process of parental capacities evaluation is the opportunity to review the findings with the parent, most often accompanied by a legal representative and caseworker. During these follow-up or debrief meetings, the emphasis is on reviewing the findings with the parent in a manner that the parent can understand, and which emphasizes the existing strengths and how to capitalize on these, as well as any observed deficits or shortcomings and how to mitigate these. My recommendation is that every parent who completes an evaluation, regardless of the source of the referral, should be given an opportunity to have the findings discussed and interpreted by the examining psychologist, and be provided an opportunity to question, clarify, or correct possible errors or misunderstandings of the psychologist. Anecdotally, the follow-up or debrief has been extremely valuable for the parent, the caseworker, and the attorney; I strongly encourage that anyone who initiates a referral for psychological evaluation request a subsequent follow-up or debrief and feedback session for the parent, after the written report has been received.

REFERENCES

American Psychological Association. (2013). Guidelines for Psychological Evaluations in Child Protection Matters. American Psychologist, 68, 20-30.

American Psychological Association. (2013). Guidelines for Forensic Psychology. American Psychologist, 68, 7-19.

Budd, K.S., Connell, M., & Clark, J. (2011). Evaluation of Parenting Capacity in Child Protection. New York, NY: Oxford.

Melton, G., Petrila, J., Poythress, N., & Slobogin, C. (2007). Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers. New York, NY: Guilford

CASE SUMMARIES

By Sarah Abfalter, YRJ Law Clerk

Dept. of Human Services v. R.S., 261 Or App 815, 322 P.3d 572 (2014)

Mother appealed a judgment of the juvenile court establishing a guardianship over her child, assigning as error the juvenile court's denial of her motion to terminate wardship. A review of the record by the Court of Appeals showed, however, that "mother did not move to terminate the wardship, or otherwise properly place the continuing jurisdiction of the court at issue. Instead, mother used the guardianship hearing to attack the court's initial jurisdictional determination." R.S. 261 Or App at 816.

Because mother did not file a motion to dismiss wardship, nor did she otherwise properly place the juvenile court's continuing jurisdiction at issue, the Court of Appeals affirmed the trial court.

Dept. of Human Services v. I.S., 261 Or App 731 (2014)

Father appealed a judgment of the juvenile court finding jurisdiction over his two children on the basis that father had done nothing to assert legal custody of his children, despite his awareness that mother could not safely parent them. Father argued that a parent's lack of a custody order alone cannot support the establishment of jurisdiction and that DHS was required, but failed, to prove that father's lack of a custody order presented a current risk of harm to the children. The two children involved lived primarily with their mother but mother and father had no formal agreement or judgment governing their custody arrangement. Additionally, mother had a history of substance abuse problems and father had on two occasions removed the children from mother's custody. For a two-year period, the children lived with their father in Nevada. In May 2013, DHS removed the children from mother's custody due to her continuing drug use and filed a petition seeking jurisdiction over the children, as to both mother and father.

DHS requested the court take jurisdiction of the children because father was aware that mother could not safely parent the children, yet had done nothing to assert custody and this condition placed the children under a threat of harm. The juvenile court agreed with DHS. The Court of Appeals reversed, holding that there was insufficient evidence to support a determination that there was a non-speculative, current threat of serious harm or injury to the children due to the father's lack of a custody order. The lack of a custody order alone is an insufficient basis for jurisdiction and DHS failed to prove a reasonable likelihood of harm to the children at the time of the hearing.

Dept. of Human Services v. D.A.S, 261 Or App 538, 323 P. 3d 484 (2014)

Father appealed the juvenile court's permanency judgment assigning error to the continuance of a permanency plan of reunification and denial of his motion to dismiss jurisdiction and terminate wardship. Father was a Washington resident at the time A was removed from the mother's care in February 2012. DHS petitioned the juvenile court to take jurisdiction over A and father stipulated to the court's jurisdiction based on (1) an open DHS case in Douglas county relating to his current wife's children, (2) wife's two children were removed from her care in 2009 due to the condition of her home, domestic violence, and wife's drug use, (3) father had minimal contact with child since splitting with A's mother and needed DHS assistance, and (4) father did not have custody of A and would be unable to protect her from mother's drug use.

In May 2013, the juvenile court held a permanency hearing and DHS requested that the court continue the permanency plan of reunification with father but father argued that he had ameliorated the adjudicated

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bases for jurisdiction and A would no longer be under a threat of serious harm in his care. DHS's primary argument to continue the permanency plan of reunification was that more time was needed to obtain a study of father's home through Washington Department of Social and Health Services due to wife's

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open DHS cases in Douglas County. The juvenile court denied father's motion. The Court of Appeals held that DHS had not presented sufficient evidence to prove that the issues associated with wife's DHS cases in Douglas County persisted and would create a harmful environment for A. The Court also held that the lack of a custody order alone is insufficient to support jurisdiction without any further evidence that the lack of a custody order would expose the child to a reasonable likelihood of harm. The Court found DHS failed to establish a current risk of harm to A on the bases of which continued jurisdiction was warranted and therefore the juvenile court erred in denying father's motion to dismiss.

Dept. of Human Services v. T.L., 262 Or App 623 (2014)

Father appealed the decision to take jurisdiction of his child, S.L. The juvenile court took jurisdiction because it determined that, among other things, father had "engaged in the ongoing behavior of seeking and inviting strangers into the child[ren's] home for the purpose of exchanging sexual favors for money and controlled substances * * *." T.L., 262 Or. App at 625.

Father appealed, arguing first that DHS failed to prove harm to the children due to the prostitution activities because there was no evidence that the children were exposed to any sexual acts. The court rejected that argument, based on lack of preservation.

Father's second claim of error is that a parent has a constitutional right under Santosky v. Kramer, 455 U.S. 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982), to visitation unless that visitation would endanger the health and safety of the child. Father asserted that DHS did not show any evidence that father had behaved in an inappropriate manner or caused a safety risk to the children. Therefore, his visitation should not have been terminated. DHS argued that a juvenile court can deny visitation if in the best interest of the child.

The court denied father's appeal because he did not advance this claim in juvenile court. Therefore, the error was unpreserved. "If father had raised that argument below, DHS would have had an opportunity to counter, and the juvenile court would have had an opportunity to consider, father's proposed test for visitation." T.L., 262 Or. App at 628. However, in the opinion, the Court of Appeals seems to agree with father that the test for parental visitation could be whether or not visits cause a safety risk to the child had the issue been raised below. "The juvenile court might have focused on whether permitting the visits endangered the children, rather than on the different legal question of whether suspending the visits was in their best interests." T.L., 262 Or. App at 628.

The court of appeals affirmed the decision of the juvenile court in taking jurisdiction.

Dept. of Human Services v. J.M., 262 Or App 133 (2014)

Mother and father appealed the juvenile court's decision to switch the permanency plan for C, the child, from reunification to adoption. The case began when C was two months old and was found to have a possible fracture of the tibia. The court took jurisdiction based on the parents' admissions that their lack of parenting skills impaired their ability to

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provide minimally adequate care for C, and that C had "sustained an unexplained physical injury * * * while in the care of mother and father." J.M., 262 Or. App at 135-36.

At the permanency hearing, DHS argued that it was impossible to gauge the parent's progress without knowing how the injury occurred, because the first step of evaluation is a parent taking responsibility for the injury. The juvenile court agreed and changed the plan to adoption because neither parent had taken the first step of accepting responsibility.

Mother and father appealed, claiming that the juvenile court erred in excluding the testimony of a medical expert who would have testified that C's injury could have resulted from infantile rickets rather than abuse. The juvenile court granted DHS's motion to exclude the testimony because, "parents [were] attempting to relitigate the jurisdictional basis at the permanency hearing and were attempting to introduce evidence that was not relevant to the two issues at the permanency hearing." J.M., 262 Or. App at 136.

The Court of Appeals disagreed, stating that, if a fact finder were to believe that the injury was not the product of abuse, the parent's progress would be evaluated in an entirely different way. For example, if the cause of the injury was infantile rickets, DHS might evaluate the case based on whether or not the parents had improved in their ability to notice symptoms. However, if the injury was caused by abuse, progress might be evaluated by determining if the parents had completed anger management or parenting classes.

The court further concluded that the parents were not attempting to relitigate the jurisdictional basis through the introduction of the expert testimony, because the cause of C's tibia injury had never been established by admission, stipulation, or finding.

The court reversed and remanded for the juvenile court to conduct a new permanency hearing where the parents would be allowed to introduce the medical expert's testimony.

Dept. of Human Services v. S.C.P., 262 Or App 373 (2014)

Mother appealed the denial of her motion to set aside the relinquishments of her parental rights as to her two children, arguing that she had relinquished her rights under duress.

"Mother had signed the relinquishments, along with a certificate of irrevocability, at the time set for the trial at which the state sought to terminate mother's rights. However, after mediation between mother and the adoptive parents broke down, mother filed a motion to set aside the relinquishments, stay the adoption proceedings, and request a new trial, asserting that her signature was entered under duress and was not freely, voluntarily, and intelligently given."

At the same time, mother's attorney filed a motion to withdraw as counsel, asserting that (1) a breakdown in the attorney-client relationship had occurred, and (2) he could not proceed as mother's attorney because he would be called as a witness by the district attorney in mother's duress motion.

The juvenile court held a hearing to consider the motions, and began directly questioning mother as to the issue of duress, and read aloud a letter that mother had independently drafted. After rejecting mother's request for a new attorney, the juvenile court rejected mother's assertion of duress, citing the "Release and Surrender" document, which stated, "I have read this document, know and fully understand its contents, and sign it of my own free will, without undue influence from anyone."

The Court of Appeals disagreed. Citing State ex rel Juv. Dept. v. Geist, 310 Or App 176, 187-90, 796 P2d 1193 (1990), the court stated that due process in termination of parental rights proceedings requires a proceeding that is fundamentally fair, and that adequate counsel is required under that standard. The court observed that, in this case, mother had been compelled to proceed with the hearing without representation:

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"Although mother's attorney was present at the hearing on June 17, 2013, the circumstances required her to proceed without attorney representation * * * after reading the letter aloud, the court directly questioned the mother. Her attorney did not intervene, object, or otherwise provide any assistance* * * related to the motion to set aside the relinquishments and her claim of duress."

The court explained that the Geist requirement of adequate counsel applied to mother's motion to set aside her relinquishments, because the relinquishments were done in place of a termination of parental rights trial. Therefore, mother was entitled to adequate counsel in arguing her motion to set aside, and the court's failure to provide mother with counsel deprived her of a fundamentally fair proceeding, violating her due process rights.

The court vacated and remanded the juvenile court's denial of mother's motion to set aside the relinquishments.

Dept. of Human Services v. J.B.V., 262 Or App 745 (2014)

Father appealed the juvenile court's judgment denying his motion to dismiss jurisdiction and changing the permanency plan for his child to adoption, arguing that the court had based that decision in part on inadmissible hearsay evidence.

At trial, the court admitted various exhibits containing hearsay evidence, including a psychological evaluation of father, a police report, counseling records, and some of the children's medical records pursuant to ORS 419B.325(2), which provides for the admission of evidence without regard to competency or relevancy under the rules of evidence for the purpose of determining the "disposition of the ward[.]" The juvenile court considered father's two motions simultaneously. Therefore, the parties did not specify the purpose for which the exhibits were introduced.

On appeal, the parties disagreed over the meaning of "disposition" as it applied to the jurisdictional and permanency judgments in this case. As to the determination of jurisdiction, father argued that ORS 419B.325(2) does not apply because disposition refers only to the juvenile court's ultimate decision of placement, care and supervision, not the initial taking of a child into custody. DHS responded that disposition should be given its natural meaning, which includes administration, control, and management.

Father's second claim on appeal pertained to permanency hearings. Father argued that although the statutes that guide the process of permanency hearings explicitly incorporate the ORS 419B.325(2) exception, permanency hearings are in fact a two-phase process. Phase one, the determination of DHS's efforts and the parent's progress, and phase two, the court's determination of the permanency plan. Father argued that the exception applied only to the second phase, and therefore the exhibits should not have been considered in changing the plan to adoption. DHS responded that everything about a permanency hearing is dispositional, and ORS 419B.325(2) applies to the entire hearing.

The Court of Appeals agreed with father that, for the purposes of ruling on father's motion to dismiss, the juvenile court's admission and consideration of the challenged exhibits was in error.

First, the court pointed to other uses of the word "disposition" in the juvenile code. For example, ORS 419B.117(1)(c) states that notice must be provided to a parent of their right to "appeal a decision on jurisdiction or disposition."

Second, the court pointed to the statutory requirement in ORS 419B.100(1) that facts alleged in the petition describing jurisdiction must be proven by a preponderance of competent evidence. The court determined that there is no difference factually or legally between establishing jurisdiction and withstanding a jurisdictional challenge. Furthermore, legislature explicitly

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incorporated ORS 419B.325 when they wanted it to apply in juvenile court settings. For example, ORS 419B.449(2) states that in a review hearing the court can review reports "as provided in ORS 419B.325."

However, the Court of Appeals rejected father's second claim of error pertaining to permanency hearings.

The Court of Appeals held that the trial court had not erred in admitting and considering the disputed evidence for the purposes of changing the permanent plan to adoption. First, the court pointed to the fact that none of the statutes that govern permanency hearings (ORS 419B.470 – 419B.476) divide them into two phases. Additionally, while it is true that the "competent evidence" standard is incorporated, this is defeated by the explicit incorporation of ORS 419B.325, "an incorporation that does not admit of any exception or qualification." J.B.V., 262 Or. App at 753.

Second, the court described that the entire purpose of a permanency hearing is to determine the appropriate disposition of the child. The court acknowledged that the reports the juvenile court may receive per ORS 419B.325 may have little connection to DHS's efforts to reunify, or to a specific parent's progress. However, the reports do inform the court as to whether or not the child can safely return home because the child's health and safety are "paramount concerns".

The court vacated and remanded the juvenile court's denial of father's motion to dismiss jurisdiction, while affirming the rest of the juvenile court's orders.

In the Matter of I.N.; Dept of Human Services v. G.N., 263 Or App __, __ P3d __ (May 29, 2014)

Father appealed from a judgment that changed the permanency plan for his 10 year-old daughter from reunification to another planned permanent living arrangement (APPLA). Father contended that DHS had not make reasonable efforts in the following ways: (1) the agency delayed offering to pay for father's ADHD medication for 22 months; (2) the agency delayed starting family counseling for 22 months; (3) the agency unreasonably discontinued family counseling after one negative session between father and child; and (4) the agency limited father's visits with his child to only one hour per week. Father also contended that the trial court erred in holding that he had not made sufficient progress toward reunification.

At the first permanency hearing in March 2013, the court ordered that father participate and make progress in "intensive family counseling." Father did participate in individual counseling, but after an incident in the first family session, where father was dismissive of a request of one of the stepchildren, the counselor discontinued treatment because she believed the sessions would be harmful to the children. Father's individual therapist agreed. Father also was prescribed medication for his ADHD symptoms, which he took for one month but then ceased because he could not afford to continue it.

The trial court determined that DHS's efforts had been reasonable and that father's progress in ameliorating the jurisdictional issues insufficient. Further, the court found a compelling reason not to terminate parental rights and changed the permanency plan from reunification to APPLA. On appeal, DHS argued that even though father completed some of the services offered, he had not "internalized" the information provided. The Court of Appeals agreed with father that the sufficient progress analysis depends not on what the parent believes, but what the parent is likely to do. However, the court held that the record in this case, viewed in the light most favorable to the juvenile court's disposition, included adequate evidence that father was exhibiting behavior that could be harmful to his child, and therefore affirmed the trial court. ●

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development research should be a factor in considering a youth's capacity to make judgments.

This more recent brain research supports the guidance offered in the Gault decision in 1967 urging caution to ensure that juveniles understand their rights and that admissions or confessions are made knowingly, intelligently and voluntarily. Unfortunately, these cautions are not always exercised when juveniles are read their Miranda rights and interrogated.

The tasks of deciding to talk or remain silent or to ask for an attorney versus going it alone can be daunting for any adolescent. I have found that one of the most pressing concerns for an adolescent who has just been Mirandized is the issue of "What will it take to go home?"

It will be the rare adolescent who takes into consideration how what he or she says may determine potential outcomes, such as probation, electronic monitoring, detention and possibly prison, expulsion from school, deportation for the family, loss of family housing benefits, etc. This reasoning process requires the ability to hold all four of the components of Miranda Rights in one's head simultaneously while weighing the costs and benefits of a decision to talk or remain silent, to ask for an attorney or not. Such a reasoning process requires a level of maturity and brain development that most adolescents simply do not yet possess. Often, I have found that many adolescents ignore most of these considerations in the expectation that if he or she just cooperates, he or she will be able to go home ("adolescent fantasy" at least in some cases).

When Youth Meet Law Enforcement:

Based on my experience, I have found wide discrepancies in Oregon and even within the same counties in the way Miranda Rights are issued by police or police detectives. Sometimes, Miranda Rights are not issued at all. Some jurisdictions use different language or less complete language in the Miranda warnings. For instance, the right to an attorney is sometimes mentioned without reference to the right to consult with an attorney before interrogation. Sometimes, Miranda Rights are issued orally by the detective from memory. Sometimes, the officer reads them aloud. Sometimes, the youth is asked to read them aloud. Typically, after issuing of Miranda warnings, the youth is asked if he or she understands them and then is asked to sign a "waiver" form. The youth is seldom asked, verbally, if he or she is willing to "waive" his or her rights. If he or she says "Yes" to the question of "Do you understand these rights?" the interrogation typically begins.

From a psychological perspective, there are a number of problems with this "Yes" answer. First, children with developmental disabilities or cognitive deficits are inclined to say "Yes" whenever questioned about their understanding of anything, as they do not want to appear "stupid." Second, saying that one understands the Miranda Warnings, even if understood, is not the same question as "Do you *waive* these rights?" Some juveniles might be cognitively capable of comprehending their rights but not able to appreciate them in the moment, due to anxiety or concentration difficulties attributable to stress (being confronted by police officers). Or, a youth might understand his or her rights but not be capable of asserting these rights for a variety of reasons related to voluntariness, which will be addressed below. Granted, the waiver document that the juvenile signs will say that he or she is agreeing to "waiving" Miranda Rights. Most adolescents, in my experience, will sign this document, even though they do not fully appreciate that they are giving up their due process rights.

Many, if not most, adults commonly sign documents or contracts without reading or understanding what they are signing. Not many youth attend to the issue of knowingly and intelligently waiving these rights when asked to sign the waiver document, in large part because they do not comprehend the legal term, "waiving." The legal term "waive" is not a familiar term among adolescents, other than to "wave" hello or goodbye. This is an example of legal language and common psychological understanding of words being at odds.

How much responsibility should we expect from a police officer or detective to assure that a juvenile truly comprehends his or her Miranda Rights? It would appear from the

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Supreme Court decisions cited above that extra caution should be exercised by the officers. To the credit of some jurisdictions (more evident in the Multnomah County/Portland area, especially in the last year or so), I have found that some detectives have begun asking juveniles to state, in their own words, what each component of the Miranda warnings mean. I have even seen instances in which the officer has inquired about any history of Special Education or Learning problems. I commend this improvement in the Miranda issuing process, although it is my no means consistently applied. Even when such cautions are instituted, problems can remain.

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For instance, when the youth restates each component of Miranda "in his or her own words," sometimes the youth's response is quite inaccurate. In some cases, the officer will correct this misunderstanding with instruction; however, there seldom is any follow up to see if the youth now "gets it." Again, I have never seen an instance in which the detective asks the youth if he or she knows what the word, "waiving" means, as in giving up one's rights.

I refer the reader to the model waiver colloquy developed for judges in Oregon and approved by the Chief Justice to help assure that juvenile defendants truly understand their rights while in court. The theme of this colloquy is a process that makes sure the juvenile understands her rights and understands the decision that is being made when the juvenile elects to waive. A colloquy should be developed for detectives conducting interrogations that includes many of the same principles.

I will be offering examples of poorly issued Miranda Rights to illustrate my concerns. However, I do want to point out that many detectives do a good job with Miranda Rights and interrogate the accused in respectful, professional ways. Regrettably, this is not always the case. The most serious examples of poor Miranda process and interrogation, in my experience, seem to occur in the area of juveniles accused of sexual offenses. No doubt, this is because other evidence may not be sufficient, often depending only on the self-report of very young children. In such cases, detectives often place great effort into obtaining a confession from the accused.

How might detectives (and attorneys) make sure that a juvenile is capable of providing an intelligent and knowing waiver of his or her rights? As discussed above, *most* adolescents can be expected to have some difficulty understanding Miranda Rights. For instance, the "right" to remain silent is an abstract concept with several layers of meaning. Not many adolescents appreciate the concept of "self-incrimination" which underlies this right. Not many "immature brain" adolescents will be able to comprehend this concept on their own, not even "normal" or typical adolescents. However, adolescents that have cognitive deficits will find this challenge even more difficult, especially those who tend toward concrete logic.

Taking Disability into Consideration:

Low cognitive functioning youth, especially those with IQ's below 70 will have more difficulty understanding Miranda Rights, although there may be exceptions. Every Miranda evaluation by a psychologist will need to include an intelligence test, preferably the complete Wechsler IQ test and not abbreviated tests for IQ.

Most low cognitive functioning

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youth (IQ's less than 80, Borderline or Mentally Retarded) are concrete thinkers. Concrete logic is quite simple, based largely on trial and error learning, prior experience and "black and white" rules. Comprehending "rights," especially abstract ones (right to remain silent) will be most difficult for low functioning, concrete thinking youth.

Most children/adolescents with Developmental Disabilities (DD) also are quite linear and concrete in their logic. Moreover, they are quick to defer to adults (an issue of Voluntariness, to be covered below). One might assume that all children with Average IQ's or above average IQ's will be able to reason more abstractly. This turns out to be true, to a greater or lesser degree, but is not true with some specific conditions, as with certain Learning Disabilities (e.g., Expressive and Receptive Communication Disorders) and Autism Spectrum Disorders. For instance, some Asperger's children actually have reasonably high IQ's but remain quite concrete in their logic.

Another cognitive deficit that can interfere with an intelligent and knowing waiver is Attention Deficit Hyperactivity (ADHD) disorder. Although an ADHD youth may be intellectually capable in terms of IQ, he or she may not be able to apply this intelligence in a stressful, complex situation. He or she might be easily distracted or may not be able to pay attention to all four components of Miranda warnings, much less weigh them in a decision-making context. Most ADHD youth cannot manage more than "two step" instructions. ADHD youth also are prone to making impulsive decisions without thinking before they act or decide.

Children with anxiety disorders also may be more prone to poor understanding of Miranda warnings in the stressful moment of being confronted by police officers. Depressed children lack energy and are quick to give up, rendering them more likely to be agreeable when asked if they understand.

Therefore, when a detective inquires about any history of Special Education or Learning Disabilities, the detective is showing appropriate caution. What if a detective or officer were to discover that there is a profound cognitive disability that likely will interfere with a knowing and intelligent waiver? It would only seem to make sense that the officer should defer the interrogation until the youth is assisted by legal representation. I have never seen this done.

From a psychological point of view, deferring the interrogation makes good sense. Even when an officer, untrained in child development but with the best of intentions, tries to explain what a particular, poorly understood component of Miranda actually means, such an explanation or clarification still may not be comprehended by the cognitively impaired youth. In court, I have often heard detectives or police officers state confidently that the youth appeared to comprehend the Miranda Warnings. I am dubious that police detectives have the qualifications to advance such an opinion. Unfortunately, many children/adolescents will say they understand their Miranda Rights when they do not comprehend. That is, their waiver is the "product of ignorance of their rights."

Another concerning population for comprehending Miranda Rights are youth who are not facile in English and who do not have a qualified interpreter available. Often, such youth will say that they understand their Miranda Rights when they never did.

Psychological Assessment and Testing:

Thomas Grisso's Assessing Comprehension and Appreciation of Miranda Rights[6] is a psychological, standardized instrument designed to assess a youth's knowledge of his rights. It is an instrument that is administered in response to a referral question as to whether a youth understood his Miranda Rights. It is important to understand that this measure assesses understanding and appreciation at the time of the psychological evaluation, not necessarily at the time that the Miranda Rights were issued by the police officer.

Often, considerable time has taken place between these two events and may include time during which the youth has been advised by his or her attorney to "remain silent" about the charges to anyone other than the attorney. During this interval, the youth may have discovered that she should not have talked to the officer

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without an attorney, based on the advice of parents or other youth. As such, the Grisso measure may not be an accurate assessment of the youth's understanding of Miranda at the time of the police officer's issuing of these warnings.

On the other hand, if at the time of the psychological evaluation as to comprehending Miranda, the youth still demonstrates poor understanding (and is not malingering poor understanding), then it is more clear that the youth's ignorance of rights is confirmed. It is far less clear when the youth seems to comprehend at the time of the psychological evaluation but may not have at the time of the police issuing of the Miranda Rights.

The Grisso Miranda instrument is divided into four sections, the first three address comprehension and the fourth, appreciation (understanding the Function of Rights):

1. Comprehension of Miranda Rights (CMR): the youth is asked to state in his or her own words what each component means. The psychologist rates each response as either "0": no comprehension; "1": partial comprehension; or "2": full comprehension.

2. Comprehension of Miranda Rights - Recognition (CMR-R). In this measure, the youth is asked to compare two sentences about specific components and asked if these sentences mean the Same thing or Different. For instance, the youth may be asked if these two statements are the same or different: 1.) You have the right to remain silent, and 2.) You should not say anything until the police ask you questions. A correct response would be "Different."

3. Comprehension of Miranda Rights -Vocabulary (CMR-V). The youth is asked to define specific words used in the Miranda Warnings. Definitions are rated 0, 1 or 2. Words to be defined include: attorney, consult, appoint, right. I often add the word, "remain" as I have found that some low functioning youth cannot define this word.

4. Function of Rights in Interrogation (FRI). The FRI measures the degree to which the youth can apply his or her knowledge of rights to hypothetical situations involving examples of other youth in situations such as: first being confronted by a police officer, consulting with an attorney before and during interrogation and being present in court.

All of these measures have standardized scores, comparing "normal" adolescents against adults (offenders and non-offenders).

By way of illustration, full Comprehension of Miranda Rights (CMR) for the first component, the Right to Remain Silent, (with a rating of "2") would be, for example: "It means that you don't have to talk to the police unless you want to." (Follow up question: "Why might you not want to?") "Because you might say something that you will regret later." A partially correct response (a rating of "1") might be, for example, the same initial response as in the example above but with an answer to the follow up question of: "I have no idea." I will list examples of "No comprehension" or "O" rated responses from my experience:

- "You have to stand there and just listen. I can't say anything until he (police officer) is finished." ("Does it mean anything else?") "No."
- "You shouldn't talk until you are spoken to, or something like that."
- "He was telling me to shut up." ("Why would he be telling you that?"). I don't know. Makes no sense because he kept asking me questions."
- "It means 'Silence', like when your teacher says 'Silence!' You are supposed to shut up."
- "I don't know. I wasn't paying attention."
- "All I was thinking about was that he just cuffed me. The cuffs hurt. I was just thinking he was going to take me to jail. What would my parents think?"

Generally, I find that most adolescents do better with the second right which is more of an admonition: "Anything you say can and will be used in a court of law." Often, when

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asked to put this in their own words, they simply restate or paraphrase the exact words they were told. Therefore, follow up questions are important. Here is a recent example of an answer to a follow up question from an Asperger's Disorder youth: "Means if you plea the 5th, it can be held against you in a court of law." ("What is the 5th?") "I have no idea. Someone in detention just said that to me."

Even more problems occur with the third right, the Right to an Attorney. I have met many youth who do not know what an attorney is or have only the vaguest idea of the role of an attorney. For instance, in the CMR-V, some youth simply cannot define the word, "attorney." In this component, the youth also is informed that he or she has the right to consult with his attorney before the interrogation begins. I have found this instruction to be most confusing for the youth in the moment of the issuing. For instance, in the CMR, I have heard:

- "But I didn't have an attorney." (Follow up question: "When did you think you would get an attorney?") "When you go to court."
- "How's an attorney going to get here in time. Besides, it was late at night."
- "I never met an attorney until I got here in detention."

On the CMR-Vocabulary, I have found that many youth simply cannot define the word "Right" in this context. For instance, when asked to define the word, "right", I have heard: "Like right or wrong." The word "remain" also can be difficult for some. One youth told me this as a definition: "Means you should remain in your seat." He could not apply this word to "remain" silent, showing only a puzzled look. "Appoint" is another word that can be difficult for some to define.

On the CMR-Recognition, it often becomes evident that the youth has some ability to recognize the words used in Miranda but cannot apply them in a meaningful way. That is, when the words are mixed up and the youth has to put them in a correct context (Same or Different meaning), they fail to appreciate the true meaning. For instance, I am surprised by how often youth say that the following two statements are the same: 1.) "Anything you say can and will be used against you in a court of law," and 2.) "If you won't talk to the police, then that will be used against you in court."

The right to have an attorney appointed if one cannot afford an attorney appears to be the easiest right to comprehend, as it is the most concrete.

The most challenging part of the Grisso instrument is the Function of Rights in Interrogation (FRI). The FRI requires the ability to apply knowledge to specific hypotheticals. Even though the hypotheticals are quite simple, many youth cannot make this functional application. For instance, "If the judge finds out that Greg (in this hypothetical) wouldn't talk to the police, then what should happen?" It is not uncommon to hear replies such as: "Make punishment worse" or, "Think he is guilty" or, "Judge will make him talk."

One of the most common areas of confusion is in the extension of the right to remain silent into the courtroom. Another example: "Greg (in this same hypothetical) did not tell the police anything about what he did. Here in court (he is shown a picture of the courtroom scene with Greg), if he is told to talk about what he did that was wrong, will he have to talk about it?" Many youth, at this point, say "Then you have to tell the judge." I suspect that this failure to apply the right to remain silent is more related to the issue of Voluntariness than Comprehension, given that most youth would feel that they would have to defer to an authority figure as imposing as a judge. At times, it is difficult to tease out the contribution of Intelligent and Knowing from Voluntary.

Part II of this article will appear in the Autumn 2014 issue of the Juvenile Law Reader.

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REFERENCES:

Ceci, S.J & Bruck, M. (1995) JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY, APA, Washington, DC, pp 247-248

Drizin, S.A. and Leo, R.A. (2004), The problem of false confessions in the post DNA World, 82 N.C.L. REVIEW, 891, 944

Geidd, J. N. (2004) Structural magnetic resonance imaging of the adolescent brain, 1021 Annals N.Y. ACAD. SCI, 77, 77

Grisso, T. (1980) Juveniles' capacities to waive Miranda Rights: An empirical analysis, 68 CAL L REV. 1134, 1153

Kassin, S. & Fong, C. (1999) I'm innocent!: Effects of training on judgments of truth and deception in the interrogation room. LAW AND HUMAN BEHAVIOR, 23, (5), 499-516.

Kassin, S., Drizen, S.A., Grisso, T., Gudjonsson, G., Leo, R.A., Redlich, A. D. (2010) Police-induced confessions: Risk factors and recommendations, LAW AND HUMAN BEHAVIOR, 34:3-38

Leo, R.A. and Drizen, S.A. (2012) The three errors: Pathways to false confession and wrongful conviction. In University of San Francisco LAW Research Paper,No. 2012-04

Monchi, O., Petrides, M. Petrie, V, Worsely, K. & Dagher, A. (2001) Wisconsin Card Sorting Revisited. Distinct neural circuits participating in different stages of the task identified as event-related on F MRI. J of NEUROSCIENCE, 21 (19), 7733-7741

Piaget, J. (1958) The growth of logical thinking from childhood to adolescence. AMC, 10, 12

Sowell, E. et. al. (1999) In vivo evidence for post-adolescent brain maturation in frontal and striatal regions, 2 NATURE NEUROSCIENCE 859, 859

Steinberg, L. (2009) Cognitive and affective development in adolescence, 9 TRENDS IN COGNITIVE SCIENCE, 69

 Photo Don Sutherland

CASE SUMMARIES

By Kim Davis, YRJ Law Clerk

State v. Goetzinger, 262 Or App 220 (2014).

http://www.publications.ojd.state.or.us/docs/A149163.pdf

Defendant appealed her conviction for criminal mistreatment in the second degree. The charges arose from her failure to provide medical care to her infant daughter after the infant sustained deep bruising from being grabbed by defendant's husband. The trial court found that the defendant "did not really . . . do anything . . . to try to take the child to see a doctor," and that by failing to do so, defendant "withheld both 'necessary and adequate' physical care and medical attention." Defendant appeals on the grounds that the state had insufficient evidence that she withheld "necessary and adequate physical care" or "medical attention" from her infant daughter, and therefore the trial court erred in denying her motion for a judgment of acquittal.

The state argued sufficient evidence was presented in that medical attention was "necessary." Stating an examination would identify any potential internal injuries. Conversely, defendant argues that medical attention is "'necessary' only if withholding it causes or will cause serious pain or injury or, at minimum, a significant risk of such harm." The Court of Appeals agreed with the state that the statute focuses on the withholding of care, and not of its consequences. However, the court went on to state that withheld medical attention must have been "'necessary' to alleviate or prevent serious physical pain or injury[,]" and "depends on the nature of the pain or injury, including the intensity, duration, and consequences of the pain or injury."

The state presented pictures of the bruises and offered reactions of various witnesses as evidence that medical attention was necessary. Defendant countered with medical testimony stating, there was "no evidence of any injury . . . that were to any degree serious or certainly not anywhere near life threatening."

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The Court reasoned that the presence of bruises could evidence some discomfort or pain, but that the state did not present sufficient evidence to show that professional medical attention was "necessary," further stating there was "no evidence presented that the infant was crying, acting abnormally, or that her bruises were worsening." Accordingly, the Court held the presence of bruising was not a condition warranting "necessary" medical attention under ORS 163.200, and reversed the juvenile court's denial of defendant's motion for a judgment of acquittal.

By Jason Pierson, YRJ Law Clerk

United States v. I.M.M., Juvenile Male, 747 F.3d 754 (9th Cir. 2014)

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/31/11-10317.pdf

Juvenile defendant appealed his conviction of aggravated sexual abuse of his six year-old cousin arguing that the government lacked jurisdiction because of a deficient §5032 certification, that the district court erred in refusing to suppress statements he gave during an interrogation, that the district court erred in determining a seven year-old witness was competent to testify as a witness, and that the evidence was insufficient to support a conviction. The court ultimately reversed and remanded the case because the defendant was not properly given Miranda rights before police questioning, and statements made during that questioning should have been suppressed.

Under §5032, for a federal court to hear a juvenile delinquency matter the government must certify:

(1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony...and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

Looking at the plain text and legislative history of §5032 the court determined that the substantial federal interest requirement only applies to the third category and is not a separate requirement for each category of the statute, and therefore rejected the defendant's argument that the government lacked jurisdiction.

The court then reviewed whether the defendant was "in custody" when he was questioned regarding the incident and whether he was properly Mirandized during the questioning. In the court's evaluation, they used the non-exhaustive list of five factors delineated in United States v. Kim: "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual." 292 F.3d at 974.

The court noted that when applying the particular facts of this and any case that involves a child, "so long as the child's age was known to the officer at the time of the police questioning, or would have been objectively apparent to any reasonable officer" the child's age, "unique characteristics and vulnerabilities of children" must be taken into account in the analysis. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2404-06 (2012).

Applying the Kim factors and analyzing the specific facts of the interrogation including IMM's age, unique characteristics, and vulnerabilities the court held that each factor weighed in favor of determining that IMM was "in custody" during police questioning where an armed detective arrived at his house, drove him and his mother more than 30 minutes to a police station, he was questioned in a closed room using deceptive tactics, and questioning lasted for more than an hour without his mother present.

The court then held that Miranda warnings are a formalistic requirement and that the reading of a "Parental Consent to Interview a Juvenile Form" to the mother in the presence of IMM was not sufficient to give notice of his right to remain silent, his right to an attorney, or if he wished to waive any of his rights.

The court then turned to the question of whether the alleged victim's seven year-old brother was competent to testify as a witness two years after the incident took place. The trial court engaged in extensive

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questioning of the child witness, allowing both the prosecution and defense attorneys an opportunity to question him. Under 18 U.S.C. §3509(c), a child witness is presumed to be competent. When examining the competence of a child, the court may only assess the ability of the child to understand and answer simple questions. The court reasoned, "[T]he hearing tested the child's ability to understand and answer simple questions, his understanding of the difference between truth and falsity, and his comprehension of the importance of telling the truth." Giving the trial court substantial deference, the court held that the child understood the difference between truth and falsity and was a competent witness.

By Arianna DeSteffano, YRJ Law Clerk

United States v. Preston, 11-10511, 2014 WL 1876269 (9th Cir. May 12, 2014)

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/05/12/11-10511.pdf

Tymond Preston ("Preston") was charged in federal district court with aggravated sexual abuse of a minor in violation of 18 U.S.C. 224(c), for which the mandatory minimum sentence is 30 years, for allegedly sodomizing and molesting a child. At trial, the district court denied Preston's motion to suppress his confession and Preston was convicted of the lesser offense of abusive contact. The Court of Appeals affirmed. The Ninth Circuit then granted a rehearing en banc.

Because of interweaving factual, legal and judgmental considerations, the voluntariness review was de novo using the clearly erroneous test. Preston is an intellectually disabled eighteen-year-old with an IQ of 65. Psychological evaluations conducted during the course of litigation showed that Preston had "exceptionally limited linguistic ability," and "significant problems with verbal communication and comprehension." After the alleged victim came forward, police officers sought to question Preston.

Immediately after questioning began, officers inquired further to determine whether Preston had a mental disability. At that time, Preston did not understand the meaning of the term 'disability,' and had to have the definition explained to him. The questioning, which was audio recorded, continued for

Photo © Helene Souza

forty minutes. In order to elicit the confession, the police employed a number of tactics, including: repeatedly presenting Preston with the choice of confessing to a heinous crime or a less heinous one; rejecting his denials of guilt; instructing him on acceptable responses; and feeding him details of the crime to which they wanted him to confess.

The Court found that it was not necessary to first conclude that the police conduct was coercive before examining defendant's individual characteristics (overruling Derrick v. Peterson, 924 F.2d 813 and any subsequent opinions that have relied upon it). Instead, the Court found that it is necessary to consider the totality of the circumstances – including the defendant's" age, intellectual disability, and lack of sophistication, and the interrogation techniques used" – in order to determine whether there was coercive police action which overbore a defendant's will and renders his confession involuntary.

While an individual being of unusually low intelligence does not definitively make their confession involuntary, it is relevant in establishing the setting in which police coercion may overcome the will of the suspect. In light of the totality of the circumstances, including Preston's individual characteristics, the Court found his confession was involuntary. The Court declined to accept Preston's argument on appeal that the evidence was constitutionally insufficient to establish the essential elements of the crime charged. As such, the Double Jeopardy Clause of the Fifth Amendment does not prevent Preston's retrial. ●

Resources

SAMHSA Releases Guide for Helping Families Support Their LGBT Children

The Substance Abuse and Mental Health Services Administration (SAMHSA) has released "A Practitioner's Resource Guide: Helping Families to Support Their LGBT Children" to assist healthcare and social service practitioners in engaging with and helping families support their lesbian, gay, bisexual, and transgender (LGBT) children. This guide describes the early ages of self-awareness and the coming out process for LGBT youth and discusses the critical role of families in reducing the risks and promoting the well-being of LGBT children.

View and download the free resource guide.

View and download SAMHSA's free publication, "Top Health Issues for LGBT Populations Information & Resource Kit."

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Save the Date

National Council of Juvenile and Family Court Judges

77th Annual Conference: Surviving to Thriving

July 13-16, 2014

Palmer House Hilton Hotel, Chicago, IL

http://www.ncjfcj.org/77th-annual-conference

37th National Child Welfare, Juvenile & Family Law Conference

August 17-20, 2104

Hyatt Regency Denver at the Colorado Convention Center

http://www.nacchildlaw.org/?page=National_Conference ●

Sixth Annual Wine and Chocolate Extravaganza

Benefiting Youth, Rights & Justice

November 8th, 2104

Oregon Convention Center, Portland, OR

www.youthrightjustice.org