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"When 22 percent of any child population flees the system which adults have provided to keep them safe, something is wrong."
— Deb Stone

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Juveniles and Their Miranda Rights: A Psychological Perspective

Part II - Voluntariness

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

To be sure, if a waiver is Unknowing and Unintelligent, it is likely that it also will be Involuntary. However, there can be a problem even if there is comprehension. There are instances in which a juvenile can meet criteria for understanding or comprehend-

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U.S. Foster Care: A Flawed Solution That Leads To More Long-Term Problems?

By Deb Stone

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Studies show that abused or neglected children placed in foster care face lifelong challenges greater than children who remain with their families.

In rural Oregon, an 11-year-old girl wearing a pair of plastic sandals walked 13 miles to a local tavern and convinced a

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** Orin D. Bolstad, Ph.D., ABPP is a clinical child psychologist specializing in adolescent clinical and forensic psychological issues. He has been licensed in Oregon as a psychologist since 1978 and is a Diplomate of the American Board of Professional Psychology. He also is a certified Forensic Evaluator (Oregon Health Authority). Dr. Bolstad is an Associate Clinical Professor in Psychiatry at OHSU. Dr. Bolstad has an extensive history in child and mental health services during his 15 year tenure at Morrison Center, the last five of which he served as Executive Director/CEO. He has consulted at Multnomah County Juvenile Department/Detention for 25 years (one day a week) and Oregon Youth Authority for 22 years (1-2 days a week). Dr. Bolstad has engaged in expert testimony for both the state and defense for over 30 years in Oregon, specializing in Miranda, Adjudicative Competency, Criminal Responsibility, Mitigation, Special Needs Youth (DD), PsychoSexual Evaluations and Evaluations for risk of harm to self or others, along with more general, comprehensive psychological evaluations.*

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ing Miranda Warnings ("knowing and intelligent") but still not be able to make a voluntary waiver. Again, voluntariness has to do with "will" and the ability to assert one's will, unconstrained by "intimidation, coercion or deception." Many adolescents have been taught to defer to authority. Many are easily intimidated by authority figures, especially police officers. It requires considerable maturity, courage and confidence for a youth to assert that he or she prefers to remain silent and will only talk to the officers after an attorney has been consulted. It is very tempting for an adolescent to want to defend himself or herself when accused of a crime by a police officer. It may be even more difficult when the police detective states that she "just wants to hear your side of the story."

It is not hard to imagine how difficult it might be for any adolescent to cope with being confronted by a police officer who wants to ask the youth some questions, especially when those questions are accusatory in nature. This would seem difficult for most if not all adolescents (those who are actually guilty and those who might not be guilty). It is not unreasonable to infer that most adolescents, even "normal" and not guilty adolescents, would have a spike in anxiety and experience "fright or despair" when directly confronted by a police officer.

Granted, most adolescents might have difficulty voluntarily relinquishing their due process rights, even normal or typical adolescents. However, it must be recognized that some adolescents are more vulnerable to their will being overborne and will find it harder to assert their rights voluntarily by virtue of one or more psychological deficits or ***vulnerabilities***, including:

1. Low functioning youth; cognitively impaired; neurologically impaired.

2. Highly submissive youth, eager to please; youth taught to respect authority figures and to obey adults.

3. Highly anxious youth who are overly reactive to the presence of police officer(s) who are focusing attention on them in ways that suggest accusation. Children who have the condition of PTSD would be an example of this population, especially those who are hyper-vigilant to perceived threat.

4. Youth who have histories of being depressed and are subject to despair. Such youth might be expected to give up easily and have little energy to challenge authority.

5. Youth who have histories of ADHD. Such adolescents have difficulty paying attention to instructions or recalling more than one step in a multiple step directive.

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Youth, Rights & Justice
401 NE 19TH Ave., Suite 200
Portland, OR 97232
(503) 232-2540
F: (503) 231-4767
www.youthrightsjustice.org

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For such youth, attending to all four of the components at the same time is a challenge. These youth also are inclined to behave or make decisions without thinking in advance. They have little ability to delay gratification, as with wanting the interrogation to be over with as soon as possible.

6. Youth with Autism Spectrum Disorders who have difficulty in comprehending abstract concepts and relating to other people, especially strangers.

7. There may be other psychological conditions which also can render adolescents vulnerable. For instance, some youth appear to be unusually suggestible and easily manipulated.

There is a new psychological measure of suggestibility, the GSS (Gudjonnson Suggestibility Scale) which attempts to measure susceptibility to coercive interrogation methods.

In addition to these personal vulnerabilities, there may be situational ***circumstances*** which mitigate against one's sense of voluntariness, including:

1. Being isolated before interrogation begins, as with having to sit in a police car for an extended period of time or having to sit in a holding cell at the precinct office. This waiting period can seem interminable to an adolescent, especially one with vulnerabilities and may cause increasing anxiety over time.

2. Being removed from parents, surrogates or advocates and confined to a small room with only one or two police detectives, the door closed, and the officers between the accused and the door.

3. Being handcuffed just before the reading of Miranda Rights. Last year, I watched a DVD of a youth in a police precinct who had been chatting with a police officer in a friendly way; he was not cuffed. The interrogating detective entered the room; the friendly officer left. The detective proceeded to hand cuff the youth to a cable bolted to the floor. Then, the detective issued the Miranda warnings. Of course, the youth paid no attention to the Miranda warnings. His focus, quite understandably, was exclusively on the experience of being cuffed to a cable attached to the floor. I also have seen instances in which a youth was Mirandized shortly after

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man she didn't know to drive her two and a half hours north to Long Beach, Wash. She was sick of foster care. She wanted to go home.

A 2011 survey reported that 13 percent of all foster children run away at least once, and another 9 percent abandon their foster homes to live with friends. When 22 percent of any child population flees the system which adults have provided to keep them safe, something is wrong. These youth may have insights the rest of us fail to see. Studies show foster care is a highway to health problems, homelessness, early pregnancy, arrest, incarceration, and sex trafficking. And those are the lucky kids. Foster care alumni are five times more likely to commit suicide and eight times more likely to be hospitalized for a serious psychiatric disorder.

Then again, decades of research show that childhood maltreatment interrupts healthy emotional, behavioral, and cognitive development, so we can chalk up the poor outcomes to abuse that occurred before these children were rescued, right? Maybe not.

In 1983 I was a 23-year-old single mother living in poverty. My twin sons and I ...

-CLICK TO READ FULL ARTICLE-

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being handcuffed and while being walked to the police car—in the presence of school mates. His focus was not on the Miranda warnings.

4. Sometimes, adolescents are interrogated first and then, following the interrogation, the tape recorder is turned on and the youth is Mirandized. Essentially, the youth is asked to repeat his confession(s). Obviously, this process precludes any warning of Miranda Rights prior to the confession. At times, this process seems to have been disguised.

5. Some have advocated that a youth have a parent or surrogate (non-attorney) present when the youth is interrogated. In my experience, this is seldom allowed by police detectives, who often say that is not their policy or procedure or is unnecessary. When I have seen parents allowed to be in the interrogation, it often has worked in a way that contributes to the child not participating voluntarily. More specifically, sometimes parents are used as helpers by the detective to get the truth out; the parent ends up putting pressure on the child in more coercive ways than the police would have used.

6. I have seen cases in which police have arrived at the front door and told the family that their son needed to come to the station with them for an interview. The parent resisted, clarifying that their son would not talk without the assistance of an attorney. The son said in the presence of his parents and to the police officers that he refused to talk without an attorney. Nonetheless, the police took the youth from the front door, cuffed him and drove off with him. In the car, on the way to the station, the police told this developmentally delayed (DD), autistic boy that his parents gave him bad advice. By the time they reached the station, the detectives talked the boy into waiving his rights. This circumstance (isolated in a car with two police officers) combined with a vulnerable DD youth would seem highly questionable. To be sure, a competent youth can change his or her mind and elect to relinquish his legal rights, even after initially requesting a lawyer. However, I am doubtful that most vulnerable youth can make this reversal of positions voluntarily.

7. Some interrogations last a long time, sometimes continuing well into

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Office of Public Defense Services seeks Case Manager Contractors for new Parent Child Representation Program

On August 1, 2014, an Office of Public Defense Services (OPDS) pilot program aimed at improving the quality of representation of parents and children in juvenile court kicked off in Linn and Yamhill Counties. The key components of the program are: a caseload limited to 80 cases, access to independent case managers who, at the direction of the lawyer, work on behalf of clients, additional training for lawyers, including multidisciplinary training, and additional oversight.

Case Managers, independent contractors who work in collaboration with attorneys for parents and children, are an essential component of the Parent Child Representation Program. The primary role of a case manager is to provide support, investigative and advocacy services, at the direction of the attorney, for a parent or child involved in the juvenile delinquency or dependency system.

OPDS is actively seeking proposals for case managers in Linn and Yamhill Counties. The RFP will be posted on the OPDS website beginning September 15.

For further information please contact Amy Miller, Program Manager, at amy.miller@opds.state.or.us.

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late evenings. Immature adolescents often define "a long time" in dimensions quite unlike adults; they might see "a long time" as 20 minutes. I typically ask the adolescent how long the interrogation lasted and compare this estimate against the DVD recording or the police report notes. When interrogations are viewed as "a long time" by an adolescent, they sometimes become willing to say whatever the detective wants to hear, just to get it over with.

8. When interrogations occur at school or in the home, I have often heard police officers finish their Miranda warnings by adding: "In any event, we just want to talk to you today. You can go back to your class after we are done. We won't be taking you to jail." Of course, the next day, the youth is arrested and taken to detention. Telling the youth he will not be arrested and taken to jail will be interpreted by many youth, especially vulnerable ones, as a sign that there will be no arrest and, that they are not going to be in much trouble. Once the interview begins and the officer says, "We want to help you by hearing your side of the story," the youth may feel reassured that all will be well. The youth's defenses are likely to go down and he or she will be more open. I suspect that in most

 Photo By Vincent

cases, this combination of statements ("You can go back to class; no arrest today," and "We are just here to hear your side of the story.") is intentionally deceptive and simply intended to obtain a confession. Vulnerable youth may be more suggestible to such a manipulation.

Sometimes, youth are interviewed in ways that are pressured or ***coercive*** in nature. This can be especially problematic with vulnerable youth in difficult circumstances. There are two bodies of literature that pertain:

1. Considerable research has been conducted in the last decade on ***coercive or pressured*** interviews in which a defendant's voluntariness (his or her will) is overborne, leading to false confessions. Leaders in this research area include Richard A. Leo, Richard J. Ofshe and Steven Drizin, social psychologists. (See Journal of Criminal Law and Criminology, Winter, 1998: The Consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation; Leo, Richard, Police interrogation and American justice, Hartford Press, 2008). In the research of Drizen & Leo (2004), a population has been identified that had been convicted of serious crimes and then exonerated due to clear and convincing DNA evidence These researchers carefully evaluated the circumstances under which the exonerated parties were interviewed by police when they made false confessions. The authors noted that police interrogation methods:

a. Are designed to break the anticipated resistance of an individual who is presumed guilty,

b. Are intentionally structured to promote isolation, anxiety, fear, powerlessness and hopelessness

c. Employ the use of numerous psychological techniques, primary among them isolation, accusation, attacks on the subject's alibi, cutting off denials, repeatedly insisting that the defendant is lying, insisting that there is incontrovertible evidence against the defendant,

d. Use confrontation with true or false incriminating evidence, including outright deception,

e. Use incentives and or positive inducements, such as one will feel better or benefit legally from a confession or, the interrogation will be over if you cooperate; the use of negative incentives such as there will be more serious consequences for not confessing (the judge will not like you lying), etc.

Also see Leo & Drizen (2012).

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Be aware that it has been argued in court that the Ofshe, Leo, Drizen research is not as scientific as claimed. It has been argued that this research is mostly anecdotal. It also has been argued that most confessions associated with these techniques are not necessarily false; that is, the accused is, in fact, usually guilty of the crime in spite of presumed coercive methods. It has been argued that police need to be able to confront the accused in ways that might lead to a confession; taking away these methods will seriously limit the detective's ability to obtain evidence or a proper confession.

2. Some of the factors described in the Leo, Ofshe and Drizen literature appear in a systematic fashion or a step-wise procedure known as the Reid Technique, by Psychologist John Reid. This is actually a series of interview steps designed to obtain confessions (not necessarily the truth), using sophisticated psychological techniques of persuasion. Even Dr. Reid cautions against the use of the Reid Technique with vulnerable juveniles. See Reid's defense of his Technique entitled "Clarifying Misinformation about the Reid Technique". In this defense, Reid stated that the interviewer should "exercise caution when questioning juveniles or individuals with mental or psychological impairments. [See John E. Reid and Associates for a description of the full 9 steps leading to confessions.] Among the steps in the Reid Technique, briefly summarized:

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1. Begin with an "open" Behavior Analysis Interview. Lead the suspect to understand that the evidence points to the individual as a suspect. Offer the individual the opportunity to explain why the offense took place.

2. Try to shift the blame away from the suspect to some other person or set of circumstances. Develop themes containing reasons that will justify or excuse the crimes.

3. Discourage the accused from denying guilt. From the Reid Technique manual: "The more often a person says 'I didn't do it, the more difficult it is to get a confession."

4. Use the subject's reasons as why he did or did not commit the crime to move toward a confession by examining possible motivations.

5. Reinforce sincerity of the interviewer to ensure that the suspect is receptive, as in "I want to be able to hear your side of the story."

6. Move the discussion toward alternatives explanations as the subject becomes quieter and more open to listening. If the subject begins to cry, point this out as a behavioral sign of guilt. Point out other behavioral signs suggesting guilt (anxiety symptoms, etc.).

7. Pose the "alternative question", giving two options for what happened, one more socially acceptable and the other more criminally severe, such as: "Are you a pedophile or did you just make a little mistake when you touched her." It is assumed that the subject can chose a third option, to wit, that it did not happen at all.

8. Lead the subject to repeat the admission of guilt in front of witnesses and encourage the subject to provide more incriminating details (as with an apology letter).

9. Document the admission with a recorded statement.

There is considerable controversy surrounding the Reid Technique, with some professionals claiming that this technique leads to false confessions. Not surprisingly, the Reid camp argues that this technique is fair and legal, especially after the emergence of the "false confession literature"

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and criticism by scholars in the field, such as Dr. Saul Kassin, a social psychologist at Williams College. Dr. Richard Ofshe has professed that the Reid Technique is consistent with the findings of the Leo, Ofshe and Drizen in their research on false confessions. The Reid camp claims that Dr. Ofshe has misrepresented the Reid Technique in his testimony before the courts. Again, John Reid, in defense of the Reid Technique, claims that his methodology does not include engaging in behavior that the courts have found objectionable, including threatening messages about negative consequences for not making a confession, making promises of leniency for a confession, denying the subject his rights, conducting an excessively long interrogation ("more than four hours"), etc. The interested reader can review arguments on both sides of this controversy in detail, on-line, by googling the Reid Technique and false confessions.

Based on my experience, two points are far less controversial about the Reid Technique. First, detectives trained in the Reid Technique do not always apply it as the manual reads. Some incorporate more coercive techniques as outlined in the Leo, Ofshe, Drizen literature. Again, in Reid's defense of his technique, he allows that "False confessions are not caused by the application of the Reid Technique, they are usually caused by interrogators engaging in improper behavior that is outside of the parameters of the Reid Technique…" As is evident in the controversy, many agree with Reid's defense of his technique, especially those in law enforcement. Those in more scholarly or academic research circles disagree (e.g., Kassin, Drizen, Grisso, Gudjonsson, Leo, and Reclich, 2010).

In my practice, I have observed many DVD's of police detective interrogations. Some recorded interviews are done well, quite professionally and without coercive methods. Others appear quite coercive. The DVD's of coercive interviews leave little doubt, as I will illustrate below.

My second point is that juveniles are more vulnerable than adults to psychologically manipulative techniques, such as the "alternative question," in which only two options are presented. The Reid camp has argued that a subject can always reply with a third option (not given by the detective) by saying that he or she did not commit the crime. As a child psychologist, I do not share this opinion about the third option for juveniles, especially when the alternatives are posed in the form of a "forced choice," leading question and, even more especially, when the accused is mentally or emotionally vulnerable.

I have often observed a familiar sequence of events in detective interviews, as recorded on the DVD's. The sequence I present is admittedly anecdotal and not scientific. Obviously, there are exceptions to this sequence; not all interrogations are in this order; sometimes there are items in this sequence that are omitted. Some of the elements in this sequence are consistent with the Reid Technique, some are not. Some appear similar to the Ofshe, Leo, Drizen literature:

"a. The detective initially attempts to present a friendly image. The detective might offer a soda, talk about sports, etc. The detective offers that he or she is "here to help you tell your side of the story," after the defendant is told that he is being accused of a serious crime. This can be experienced as a compelling, kind offer by many adolescents facing the stress of a criminal accusation.

b. The detective tries to maintain a friendly demeanor but is quick to cut off denials abruptly through direct confrontation with incontrovertible

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Photo By Evgeniy Roginskiy

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"facts." The detective often talks about his long experience with this type of crime, adding that he or she uses evidence such as DNA, fingerprints, even lie detectors given to the victim, hidden cameras, potential eye witnesses, etc. This often is deceptive in that no such evidence has been collected. Sometimes, the detective will introduce the idea of bringing in someone to conduct a polygraph if the accused persists in telling lies. In some cases, the detective collects DNA swabs, even before the Miranda warnings. The detective concludes this discourse by suggesting that he has all the evidence he needs already. The facts are incontrovertible; it is pointless to deny these facts.

c. The detective next switches to a more friendly disposition, saying that the defendant is probably a good kid. Efforts are made to normalize the criminal behavior ["All kids make mistakes; they don't think before they realize they might have done something they now regret; the victim may have contributed to this (e.g., 'She was probably flirty.'); I was a kid once myself and made my share of mistakes."] Justifications are provided, along with excuses.

d. Next, the detective repeats that the facts are absolutely clear but that he or she "just needs some more information and some truthful answers." He or she might add that although the facts are clear, "we still need to know why you did this so we can help you more…so, we need more details."

Photo By Thomas Hawk

Questions about more details are asked repetitively with the presumption of guilt having been established. Also, the youth is told repetitively and abruptly that his denials are lies. This step can be protracted, often lasting a long time. This redundancy, in the absence of hope, can lead to a youth feeling "worn down." The detective often says that the youth's side of the story "just makes no sense." I have observed detectives claim that the accused is showing all of the signs that are known to reveal lying, such as looking off to the right, using inconsistent words, showing undue anxiety, crying, etc. Of course, none of these signs are accurate indicators of deception (Kassin and Fong, 1999). The detective simply was being deceptive.

e. Next, the detective might offer comparatively subtle incentives for a confession, such as: "I just want to get you the help you need," or "you will feel better after you tell the truth," or the incentives are offered more forcefully, as with "the court will go easier on you if you just own up to what we already know you did," or "things might be pretty tough for you if I have to tell the judge you kept lying."

f. Typically, the last step (Reid Technique) is to provide a forced choice (only two options). "Was this just a little mistake (even though it is a Measure 11 crime) or, are you a psychopath who likes to hurt people?" (or many such variations on this forced choice dilemma, such as: "Did you just touch this little girl once by mistake or are you the kind of person that has raped hundreds of children," or "Did you hit the victim by accident or were you intending to really hurt him?") I once observed an attorney cross examine a detective who used this Reid Technique by asking him if he beat the confession out of the kid with a rubber hose while sitting him under a hanging light bulb ***or*** did he just exploit a vulnerable youth's fear by using psychological techniques? Many adolescents, after a long, pressured interview, would have a hard time answering "Neither," or appreciating that there can be more than

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just 2 choices. This last step in the Reid Technique can be very powerful, psychologically, especially if the youth feels "worn down" and hopeless about making any further denials. After all, all of his or her previous denials have been dismissed abruptly; denials did not work to end the seemingly endless interrogation. So, it should not surprise anyone if the youth confesses to "a small mistake," just to get the interrogation over with. Once this happens, the interrogation typically continues, flushing out more details about the "small mistake." The youth's will may have been overborne.

Based upon my review of many interrogations by detectives and from the DVD's I have critiqued, it is more than evident that many police officers/detectives have been trained in the Reid Technique. How many have heard of Dr. John Reid's caution about the use of this interrogation procedures with adolescents, much less vulnerable adolescents? Dr. Reid has explained that the Reid Technique does not use incentives for a confession or excessively long interviews. This may be the case; however, in my experience, some detectives include these coercive techniques. I also have observed detectives claim in cross examination, perhaps correctly, that they have never heard of the Reid Technique, even though they used it, suggesting either poor training or officers willing to go beyond the Reid Technique, as John Reid himself has suggested.

Photo By Victor

To be sure, some of the interrogation techniques being used by detectives are sophisticated, psychological strategies intended to obtain the truth or a confession (which may not be the truth). These techniques are not physically challenging or physically threatening. Yet, sometimes, these psychological techniques are powerfully coercive. Sometimes, they may lead to false confessions. It is most unsettling to think that there might be vulnerable adolescents who have made false confessions because of these interrogation techniques and who have spent years in jail for something they never did.

Typically, when I interview an adolescent who made confessions during interrogation, I ask if he felt his confession was truthful or if he felt it was coerced or pressured. When he responds that his confessions were coerced and not true, I follow this up with a series of questions as to why he gave in to the pressure. The most common reason I am given is that he just wanted the interrogation to be over, because it was so aversive. He may report that it seemed pointless to continue to deny the allegations because the detective just "kept asking the same questions over and over; I never thought it would be over." At this point, I usually ask why he did not simply invoke his right to remain silent or insist on having an attorney present. The most common answer I hear is: "Never thought about that." Or, "The detective would have just kept asking me questions." Or, "I felt I had to defend myself." These answers illustrate poor understanding of Miranda Rights and reflect "despair" with respect to one's will being overborne. Late in a coercive interview, it may be very difficult for a vulnerable youth to assert that she wants an attorney or to have the interrogation stop. Even when this happens, I have seen instances in which the detective argues with the accused, wanting to know why the youth wants to stop the interview when all the detective is trying to do get her side of the story. The interrogation often continues, unabated.

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I have seen efforts on the part of juveniles to try to stop the interrogation. In my opinion, it would be the rare, more mature adolescent who could say: "I don't want to talk with you anymore without an attorney." More typically, youth try less direct or less assertive ploys. These often feeble efforts may reflect the poor ability of juveniles to assert themselves before an authority figure. Examples:

- "I want to go home. Can I go home now?"
- "You keep asking me the same questions. When will this end?"
- "I am really tired of this. I want to see my mother."
- "I need some sleep."
- "I don't want to do this anymore."

I have never seen such statements result in the ending of an interrogation. Nor have such statements even elicited a prompt question from the detective, such as: "Are you saying you want to remain silent?" The interrogation just continues. Yet, the above examples, in my opinion, reflect a sentiment that the youth wants the interrogation to be over, even if not said in the direct language of the Miranda Rights.

From a psychological point of view, especially when the totality of circumstances are considered (personal vulnerabilities, situational circumstances, coercive interviewing techniques), these somewhat feeble statements can be interpreted to mean that the youth is trying to invoke his right to remain silent. In some interrogations that I have critiqued, the judge has agreed. In others, not.

Dr. Reid has used the term "caution" in the use of the Reid Technique with juveniles and individuals with mental and intellectual impairments (without mentioning juveniles specifically with mental/intellectual impairments). The term "caution" also has been used in Supreme Court decisions regarding adolescents comprehending their due process rights, knowingly, intelligently and voluntarily. Unfortunately, the term "caution" appears to be largely undefined in the law. Does caution mean that coercive techniques should not be used? Does it mean that all detectives should make absolutely sure that the accused subject fully comprehends each Miranda warning and that "waiving" means that he is choosing to give up his constitutional rights? Does it mean that interrogations with a vulnerable adolescent should be deferred until the youth has an attorney present before and during interrogation? These are questions begging for clarification on both domains, ***intelligently/knowingly and voluntarily*** waiving Miranda Rights.

It has been argued in court that detectives need to have some latitude in conducting their interrogations. Some pressure on the part of detectives for the accused to be honest seems legitimate. Certainly, there is a place for confronting the accused with known facts and, in some cases, even presumed "facts." This argument has merit, in my estimate, especially for adults and, perhaps even for more mature and capable adolescents. How much latitude is permissible for an immature adolescent, one with significant vulnerabilities (cognitive and emotional) in difficult, pressured circumstances and with psychologically sophisticated, coercive interrogation techniques? Clearly, this is a question for the judge to answer. The job of a defense attorney is to make persuasive arguments that the juvenile did not comprehend or appreciate his Miranda Rights or that the juvenile's will or voluntariness was overborne. The job of the prosecutor is to argue that the techniques were not coercive and within the acceptable standard of care for a reasonable police investigation. It is recognized that the court has a history of accepting deception and a significant amount of coerciveness in adult interrogations. Should this be the case with vulnerable adolescents? I would argue not.

In preparing these arguments, I offer the following advice to attorneys from the point of view of a psychologist:

A.Look carefully at the circumstances surrounding the interrogation (time of day, location, length, who is present, timing of the handcuffs being applied, etc.).

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B. Look carefully at the youth in terms of cognitive and emotional vulnerabilities (low functioning, submissive, anxious, etc.). Does the youth seem slow, highly anxious, ADHD? Be aware that sometimes this is difficult to determine based on a short interview, as would be the case for a detective before interrogation begins. Therefore…

C. Obtain any relevant prior records: Prior psychological evaluations, school records (especially, Special Education records), mental health records, hospital records pertaining to head injuries, prior arrest history and response to prior issuing of Miranda warnings.

D. Obtain DVD of police interrogation. If one does not exist, prepare your argument for this failure as negligent. Be aware that research shows that professionals who write notes (i.e. police reports) after a sensitive interview have been shown to reflect bias in their recollections and written reports in the direction of their beliefs prior to the interview (Ceci and Bruck, 1995). Recording interviews is a safeguard against such a bias. I also have learned that it is to everyone's advantage to have the DVD recording transcribed by a neutral (presumably unbiased), professional service. Otherwise, there will be arguments about what was really said in the interrogation. The transcript settles those arguments. Finally, the attorney (and the psychologist, separately) should listen to the DVD and not just rely on the transcript. It is important to listen to the tone of the interview. Recently, I read a police report which read as though the juvenile voluntarily and spontaneously confessed to the crime. After viewing the DVD, it became apparent that the police report was quite inaccurate. The youth only assented to leading, pressured questions after 70 minutes of redundant questions. He offered nothing spontaneously and provided no details other than, "OK, I did it." Finally, after listening to the DVD, it became more evident that the interrogation was dominated by the detective, whose time talking occupied 96% of the verbalizations in the entire interrogation and whose voice was quite loud in contrast to the timid voice of the youth.

Photo By Kevin Gebhardt

E. Bring a psychologist into the process early, preferably one who is familiar with Miranda issues. The earlier the defense attorney has information from the psychologist, the better the attorney can prepare a legal strategy. It can take a lot of time for a psychologist to assess for psychological vulnerability and even more time to evaluate the potential coerciveness of the interrogation. Even before these referral questions are asked, the psychologist will need to review relevant documents. These will take time to obtain. Start early.

F. Remain mindful of the possibility that even though the youth might have been vulnerable cognitively and emotionally…and even though the circumstances of the interrogation were difficult…and even though the actual interrogation was coercive… it may still be the case that the accused, in fact, is guilty of the crime. This can be a good, legitimate argument made by the prosecutor. One can still argue, even if the defendant is guilty, the client's guilt does not absolve the detective of failing to show caution in issuing Miranda warnings nor does it justify coercive interviewing. A motion to suppress the admissions may still be in order, even if the client is guilty. "The tree has been poisoned."

What about adults who are vulnerable, adults who are low functioning, submissive, anxious, ADHD, etc.? Are they not vulnerable to poor comprehension of Miranda warnings

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and coercive interviewing? Clearly, Leo, Ofshe, Drizen have demonstrated that some adults do make false confessions under pressured circumstances. In their major study, 125 of the subjects who made false confessions were adults; forty were under the age of 18 at the time of the false confession. Is it fair to assume that adults, just because they are adults, are not subject to some of the same liabilities as youth under 18? This may be a topic for another article.

Conclusion:

Even "normal" or typical adolescents can be expected to have some difficulty comprehending Miranda warnings; the same might be true for "normal" or typical adolescents in terms of being capable of asserting their rights voluntarily. When considering the "totality of circumstances," it must be recognized that a "knowing, intelligent and voluntary" waiver becomes less likely to the extent that those circumstances include:

1. The youth's personal vulnerabilities owing to low cognitive functioning (including low IQ, poor abstraction skills, developmental disabilities such as Autism Spectrum Disorder, etc.)

and mental health issues (including psychosis, ADHD, anxiety, depression, suggestibility, etc.),

2. The circumstances of the total situation in which the Miranda Rights are issued, including the setting in which the Miranda Rights are issued, the preceding events prior to issuing (e.g. being handcuffed), the isolation of the youth from the support of family, etc.), etc.

3. The degree to which the interrogation becomes coercive and manipulative, using isolation, cutting off denials abruptly, increasing anxiety, the use of the "alternative question, etc."

In order to determine the "extent" of these circumstances, it may prove helpful to obtain the services of a qualified psychologist, as early in the process as is possible.

For the interested reader, I refer you to a more complete analysis of these issues from the perspective of a very scholarly attorney, Kenneth King, at Suffolk University Law School, Juvenile Justice Center, near Boston. I had the privilege of co-presenting with Mr. King several years ago at the Juvenile Summit in Portland and was most impressed with his legal command of Miranda issues. His seminal article is worth reading: ***Waiving childhood goodbye: How juvenile courts fail to protect children from unknowing, unintelligent, and involuntary waivers of Miranda Rights****. In the Wisconsin Law Review, Volume 2006, No. 2. Copyright 2005 by The Board of Regents of the University of Wisconsin System*

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Juvenile Law Resource Center

Prison Visitation and the Best Interests of Children

by Caitlin Mitchell, YRJ Attorney

If you work with families in the juvenile dependency system, you have likely encountered parents with open child-welfare cases who also are incarcerated. Over 1.7 million children in the United States have a parent in prison[1], and there is significant overlap between DHS and DOC-involved families.[2]

These families present special challenges for case workers, attorneys, and judges. Incarcerated parents are socially and physically isolated, and their relationships with their children and other family members are often strained. It is well-established that incarceration does not excuse DHS from its obligation to make reasonable efforts to enable children to return to their parents' care;[3] however, we sometimes may assume that an incarcerated parent cannot take an active role in a child welfare case, or that children will be negatively affected by visiting a parent in prison, and that it is therefore reasonable for case workers to direct their limited time and resources elsewhere. Those assumptions can be devastating for individual parents and children, and for entire communities, in light of the high rates of incarceration in the United States and incarceration's disparate effect on people of color.

It is crucial for those of us who work in the juvenile dependency system to develop a nuanced understanding of how an incarcerated parent may maintain a relationship with his/her child, the opportunities available at the institution where s/he is incarcerated, strategies for maintaining contact, and the challenges and barriers that the parent will likely face, among other things. As one of the most important predictors of family reunification, visitation is a particularly important issue to consider.

National data tells us that the majority of incarcerated parents do not receive visits from their children.[4] This can be attributed to a number of factors, many of which are unrelated to the child welfare system. Most prisons are located far away from where families live, making visitation logistically difficult and expensive, and families must comply with numerous rules and regulations and may be turned away for non-compliance. Visitation conditions vary widely and institutions and are not generally family-friendly.[5]

Incarcerated people have little legal recourse in the area of family contact. Although the United States Constitution protects certain familial and associational rights, the U.S. Supreme Court has determined that "freedom of association is among the rights least compatible with incarceration," and that restrictions on

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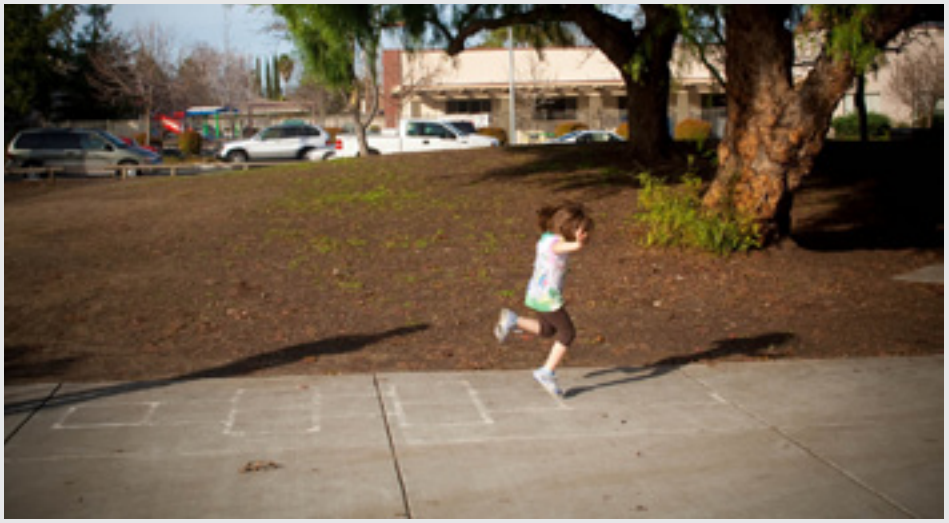

Photo by Charlie F

« *Prison Visitation continued from previous*

visitation must be viewed with "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[6] The Court has held that limitations on visitation will be upheld so long as they bear a rational relation to a legitimate governmental interest—in particular, the government's interest in maintaining safety and security. When families are DHS-involved, the agency or the juvenile court may determine that visitation is contrary to the child's best interests, even if visitation would theoretically be logistically and financially possible.

When *is* visiting an incarcerated parent in a child's best interests? The answer depends on the particular circumstances of the child and family. Advocates around the country are working to dispel the myth that prison visitation is *necessarily* scary and traumatic for children, emphasizing that visits can aid a child's emotional adjustment by helping to repair the trauma of separation and by allowing the child to meet other children with incarcerated parents, so they know they are not alone. That general philosophy also is reflected in the DHS' policies. The rules state that the "paramount concerns" in creating a family-child contact plan are "develop[ing] or enhance[ing] attachment" between the child and the family; "reduc[ing] the trauma" associated with separation from primary attachment figures; and "assur[ing] that the safety and well-being of the child."[7] The same principle applies to children whose parents are incarcerated: "Just like other parents in the child welfare system," DHS' Child Welfare Procedure Manual states, "parents who are incarcerated continue to have the right to be involved in their children's lives," and parents and children "can continue to have relationships that will be of value to both of them."[8] Specifically, visitation "can dispel fears, support attachment, support dealing with reality, and can even provide the opportunity for improving relationships."

A recent assessment of existing studies regarding parent-child prison visitation suggests a few factors that may be of particular importance in assessing whether visitation with an incarcerated parent will be a positive experience. The assessment found documented, positive outcomes for children when contact occurred as part of a broader program or intervention.[9] It also noted the importance of the caregiver's relationship with both the incarcerated parent and the child—for example, whether the caregiver provided emotional support and reassurance to the child, and whether the parent and the caregiver had frequent communication.[10] Finally, the conditions of the visit, particularly the visiting space itself and whether or not it was child-friendly, will affect the quality of the visitation experience.[11]

Sakhorn38/FreeDigitalPhotos.net

In considering whether visitation is in a child's best interest in a particular case, it is worth exploring each of those factors. First, who would be bringing the child to visit? Is it a caregiver or family member whom the child knows and trusts? What is that person's relationship to the incarcerated family member?

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Attorneys and caseworkers can play an important role in making a visit a more positive experience by helping the child and caregiver prepare for the visit and process emotions afterwards.[12]

A second question to consider is whether there are broader intervention programs available at the prison where the parent is incarcerated. The most comprehensive programs exist at Coffee Creek Correctional Facility, Oregon's women's prison. Those programs include the Family Preservation Project, Early Head Start, and "Through a Child's Eyes" family visiting events, with activities for children and families. The Family Preservation Project provides support groups to mothers, extended, structured visitation days twice a week, supervised phone calls, support for parents in contacting and becoming involved with their children's schools, and counseling, as well as support for the children's caregivers. Many men's facilities also offer special visiting days with activities. Facilities like Santiam Correctional, a men's minimum security releasing facility in Salem, has child-focused visitation every Thursday evening for families preparing for reunification upon release. Oregon's Department of Corrections is working hard to increase the availability and frequency of what they call 'Enhanced Visitation Opportunities' targeted specifically at creating child-friendly environments for healthy bonding.A caseworker or attorney should talk to the parent and/or his/her prison counselor to find out more about what options are currently available for parents.

A final question to consider is the nature of the visitation space available at the institution where the parent is incarcerated—in particular, whether the parent is permitted to have contact visits. Many prisons have child-friendly visiting areas with toys, books, interactive video games and televisions. It may also be

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Visitation Logistics

Anyone who wants to visit an incarcerated person in Oregon's prisons must submit a visitation application, available through DOC's website.[13] If the prospective visitor is a child, DOC then sends a second form to the child's parent or legal guardian requesting that person's consent to allow the child to visit. Visitation paperwork can take time to process—until recently, the average wait was six to eight weeks, although DOC has currently worked hard to reduce the processing time to under three weeks depending on how quickly parental consent is completed. DHS workers who bring children for prison visitation can often schedule visits more quickly, through the "professional visit" route.[14] DOC's rules regarding visitation are outlined in OAR 291-127-0200 through 291-127-0330. [15]

 Photo By Ed Schipul

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possible to request a private visiting room when a child is brought to a visit by a DHS caseworker.

By taking these factors into consideration, those of us who work with families in the juvenile dependency system can come to a clearer understanding as to when visitation may or may not be in a child's best interests.

Footnotes

[1]LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN, 1-2 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.).

[2]J. Mark Eddy and Julie Poehlmann, eds., Children of Incarcerated Parents: A Handbook for Researchers and Practitioners, 268-69 (2010) (although the precise extent of the overlap between the foster care and corrections system in Oregon is unknown, a significant number of families are affected by both systems—a conservative study found that approximately 10% of incarcerated mothers and 6% of incarcerated fathers had at least one child in foster care; subsequent interviews revealed that, for every 100 women incarcerated in Oregon, approximately 38 children were involved in either temporary shelter care or long-term foster care).

[3]State ex rel. Juvenile Dept. v. Williams, 204 Or App 496, 130 P3d 801 (2006).

[4]GLAZE & MARUSCHAK, supra note 1 at 4 (42% of incarcerated parents had received at least one visit).

[5]For a somewhat recent DOC study on visitation conditions in Oregon's prisons, see Department of Corrections Family Visitation Study (2009), available at http://www.oregon.gov/doc/RESRCH/docs/visitation_study_200910.pdf.

[6]See Overton v. Bazetta, 539 U.S. 126 (2003). In that case, the Court upheld the Michigan Department of Correction's visitation policies which, among other things, barred visitation between a child and a parent whose rights had been terminated; restricted children's visitation to immediate family members; and allowed DOC to suspend visitation indefinitely as punishment for disciplinary infractions.

[7]OAR 413-070-0800 (2008).

[8]DHS Child Welfare Procedure Manual, Appendix 4.16, 1, available at http://www.dhs.state.or.us/caf/safety_model/procedure_manual/.

[9]Julie Poehlmann et al., Children's Contact with their Incarcerated Parents: Research Findings and Recommendations, American Psychologist Vol. 65, No. 6, 591 (2010).

[10]Id. at 586-87.

[11]Id. at 579, 585.

[12]There are numerous free, written resources available for care givers. See Children of Prisoners Library, Materials for Caregivers, available at http://nrccfi.camden.rutgers.edu/resources/library/children-of-prisoners-library/; "How to Talk about Jails and Prisons with Children: A Caregiver's Guide," available at http://www.oregon.gov/doc/PUBAFF/pages/oam_booklet.aspx; "Sesame Street Little Children, Big Challenges: Incarceration Toolkit" available at http://www.sesamestreet.org/parents/topicsandactivities/toolkits/incarceration; "Building Bridges: A Workbook for Children with an Incarcerated Parent," available at http://www.law.umich.edu/centersandprograms/pcl/Documents/Building%20Bridges%20workbook.pdf

[13]http://www.oregon.gov/doc/OMR/Pages/Visiting-adults-in-custody.aspx.

[14]http://www.oregon.gov/doc/OPS/PRISON/docs/pdf/osp_professional_visit_guidelines.pdf.

[15]http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_291/291_127.html. ●

CASE SUMMARIES

By Jason Pierson, YRJ Law Clerk

Dept. of Human Services v. W.A.C., 263 Or App ___, ___ P3d ___ (June 4, 2014)

Opinion written by Nakamoto; Out of Washington Co.

Father appealed the trial court's order denying his motion to set aside a 2013 jurisdictional judgment, in which the court found that father's abusive behavior placed the children at risk of harm. That judgment was based on mother's 2012 admissions that she had been subjected to domestic violence by father. At the time that mother made her admissions, all parties agreed to postpone father's contested jurisdictional hearing until after the adjudication of his related criminal case. Shortly thereafter, mother moved to Texas with the children, and the children subsequently were removed from her care by Texas child welfare services. Father remained in Oregon and was acquitted of the related criminal charges. Father argued that (1) the trial court abused its discretion in asserting jurisdiction over his children before providing him with a hearing to challenge the petition allegations in 2012; and (2) the trial court erred in asserting jurisdiction over his children in 2013 because the totality of the circumstances did not demonstrate a current threat of serious loss or injury to the children that was likely to be realized.

Father's motion to set aside the 2012 jurisdictional judgment argued that mother's unilateral admission to allegations relating to both mother and father did not conclusively establish facts sufficient to establish subject matter jurisdiction of the children, where father had no opportunity to contest the facts alleged. Father also argued that "mother's admissions were simply evidence that should have been considered at father's contested hearing to determine whether * * * there was a basis for the court to assert jurisdiction over the children."

In a narrow holding, the Court of Appeals agreed with the father and held that "a juvenile court cannot assert jurisdiction over a child based on the admissions of one parent when the other parent has been served and summoned, appears, and contests the allegations of the petition."

The Court of Appeals then analyzed whether, when viewed in the light most favorable to the juvenile's court disposition, the evidence was legally sufficient to warrant jurisdiction at the 2013 hearing. At the time of the 2013 hearing, mother and father were living in different states and the children were not in the care of mother. Therefore allegations relating to domestic violence between mother and father and father's ability to protect children from mother's mental health issues did not present a risk of harm to the children. The Court of Appeals held that the circumstances were insufficient to prove that there was a current risk of harm to the children that would warrant jurisdiction.

Dept. of Human Services v. S.R.C., 263 Or App 506 (2014)

Opinion written by Egan; Out of Washington Co.

Mother appealed a judgment on an amended petition establishing jurisdiction over her six children, including H. The court had initially found jurisdiction based on allegations related to mother's drug use; approximately one year later, the Department of Human Services filed an amended petition alleging, among other things, that the stepfather's domestic violence had placed the children at risk of harm . At the time of the hearing, H was living with foster parents and both mother

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and stepfather were incarcerated.

Mother argued that the evidence was insufficient to show a current risk of serious loss or injury to H at the time of the hearing, because mother was incarcerated and was not set to be released until 2015, after H's eighteenth birthday.

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The Court of Appeals disagreed in stating that mother's argument was "a cynical one," holding that, when jurisdiction has been previously established and the child has been removed from the parent's care, the parent cannot rely on that fact in an effort to prevent the State from establishing that a child's welfare could be endangered for additional reasons. The court reasoned that the type and extent of efforts that mother and DHS must make for reunification to occur are determined by reference to the bases for jurisdiction, and that the allegations in the amended petition were meant to better identify the risk that mother presents to her child.

Dept. of Human Srvcs. v. R.B., 263 Or App 735 (2014)

Opinion written by Hadlock; Out of Lincoln Co.

Mother appealed judgments entered at a consolidated permanency hearing and jurisdictional adjudication. The initial bases for jurisdiction were "(1) [mother's] behavior is impulsive or she cannot or will not control her behavior thereby making the * * * children unsafe; and (2) mother's behavior exemplif[ies] her lack of parenting knowledge, skills, and motivation necessary to ensure her children's safety thereby making the children unsafe." Before the permanency hearing, DHS filed a second petition alleging that "mother * * * suffers from a mental illness, emotional illness, or mental impairment that interfere[s] with her ability to safely parent." The trial court held that DHS had presented sufficient evidence to establish the allegation in the amended petition; the court also found that, notwithstanding DHS' reasonable efforts, the parents had failed to make sufficient progress such that the children could be returned to their care, and it changed the plan from return to parent to adoption.

On appeal, mother argued that the alleged bases for jurisdiction were too vague to make a determination as to whether her progress was sufficient; that the evidence was insufficient to support the determination that mother had not made sufficient progress to allow the children to return home; and that the court erred in finding jurisdiction based on the new mental illness allegation. The court summarily rejected each argument, either because mother was not permitted to challenge the original bases of jurisdiction that that time, or because the evidence, viewed in the light most favorable to the trial court's disposition, supported the challenged finding.

Mother also argued that, in determining that she had not made sufficient progress, the juvenile court mistakenly had relied on facts extrinsic to the proven bases for jurisdiction, including the mental illness allegation. The Court of Appeals rejected mother's argument, finding that the trial court had based its permanency decision on the allegations in the original petition. The court further found that mother's mental health problems could be fairly implied from the original jurisdictional judgment, putting mother on notice that she had to address mental health

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« *Case Summaries continued from previous* concerns to be reunified with her children. In particular, the court cited language in the allegations that mother "cannot or will not control her behavior" and mother's lack of "motivation," coupled with the caseworker's concern about mental health and mother's attendance at mental health therapy throughout the case.

State v. AJC, 355 Or 552 (2014)

Opinion written by Baldwin; Out of Washington Co.

Youth appealed the juvenile court's denial of his motion to suppress evidence discovered during a purportedly unconstitutional search. The issue presented was whether the principal's warrantless search of the youth's backpack while at school was permitted under the school-safety exception to the warrant requirement . Under that exception, if a school official reasonably suspects that an individual on school property poses an immediate threat to the safety of others at the school, the official may take reasonable measures in response, including conducting a limited, warrantless search. Youth had communicated with another student via phone calls and text messages that he was going to bring a gun to school and shoot her and other students. The threat was reported to school faculty, including the principal. The principal performed an unfruitful search of the youth's locker. The principal then went to the youth's classroom, picked up the youth's backpack, and had the youth accompany him to the principal's office. The youth was calm and compliant with all requests. The principal stated, "I have to follow through my processes here, so I'm going to search your backpack." The youth did not give consent, but the principal performed the search and located ammunition and a .45 caliber handgun in the youth's bag.

 Photo Mariusz Klusniak

The Oregon Supreme Court examined whether the protective action (i.e. – the limited search of youth's backpack) taken by the principal was reasonable given the particular circumstances presented, and based on specific and articulable facts. The court reasoned that because youth had verified that he and the other student had been involved in a relationship, and because youth had previous discipline issues, the principal was acting based on specific and articulable facts. Further, the court noted that no matter where the gun was located, it presented a danger to the students. Therefore the court held that the principal's search of youth's backpack was reasonable under the circumstances present when he conducted the search.

DHS v. B.A. and B.O., 263 Or App 675 (2014)

Opinion written by Tookey; Out of Jackson County

Mother and father appealed from a jurisdictional judgment over their two-year-old daughter based on allegations that (1) mother had unresolved substance abuse; and (2) father lacked an order granting him sole custody of their daughter. The State sought to dismiss the appeal because the juvenile court had

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dismissed jurisdiction and terminated the wardship. The parents argued that, despite the dismissal of jurisdiction and termination of wardship, which would normally render the appeal moot, the collateral consequences of the jurisdictional judgment make the appeal justiciable. The parents asserted that the collateral consequences included a social stigma associated with a judicial determination of jurisdiction and that a "founded" referral will remain in their record with the Department. The Court of Appeals rejected mother and father's argument and dismissed the appeal. The court reasoned that the underlying jurisdictional judgment did not present collateral effects that represented more than a "mere possibility" of adverse consequences, and therefore the parents did not meet their burden to show sufficient consequences to make the appeal justiciable.

In the Matter of ELT; DHS v. E.M., 263 Or App __, __ P3d __ (July 2, 2014)

Opinion written by Ortega; Out of Lane Co.

Mother appealed a judgment asserting jurisdiction over her daughter, alleging that DHS had failed to show that her substance abuse persisted at the time of the hearing or was likely to lead to a serious threat of loss or injury to her daughter. The Court of Appeals agreed with mother and held that the juvenile court erred in asserting jurisdiction over the child.

The juvenile court found jurisdiction on the basis that (1) "mother's substance abuse interferes with her ability to safely parent the child;" and (2) "father's substance abuse interferes with his ability to safely parent the child." The only evidence that DHS presented regarding mother's drug use was a positive UA six months prior to the jurisdictional hearing, a positive UA four months prior to the hearing, and a single no-show for a UA. Mother also had provided two clean UA's prior to the jurisdictional hearing. Following Dept. of Human Services v. M.Q., 253 Or App 776 (2012), the Court of Appeals reasoned that "jurisdiction cannot be based on speculation that a parent's past problems persist at the time of the jurisdictional hearing in the absence of any evidence that the risk, in fact, remains." The court held that DHS had not presented sufficient evidence that mother was abusing substances or that any substance abuse problem interfered with her ability to safely parent her child.

In light of its recent opinion in Dept. of Human Services v. W.A.C., 263 Or App 382 (2014), the court noted that the fact that father had a substance abuse problem that interfered with his ability to parent did not support jurisdiction, where the child's mother was a fit parent.. In W.A.C., the court had held that "juvenile court jurisdiction is not warranted * * * unless and until DHS proved that neither parent who appeared could safely parent the child." Id. at 394. Therefore, the court concluded that the juvenile court had erred in asserting jurisdiction over the child E.L.T. ●

Erratum. The Summer 2014 JLRC Case Summaries were written by: Sarah Abfalter, Jason Pierson, Tyler Neisch, Kimberly Davis and Arianna Stephano.

 Photo Emmanuel Huybrechts

Detecting False Memories in Children

By Daniel Reisberg

Editor's note: Daniel Reisberg is a professor at Reed College and author of a forthcoming book entitled The Science of Perception and Memory: A Pragmatic Guide for the Justice System. Among other topics, the book offers practical advice for situations involving eyewitness identifications, remembered conversations, evidence obtained from children, confession evidence, and more. In the previous issue, we offered a (lightly edited) excerpt from Reisberg's Chapter 10; here is another. For an expansion on these excerpts (including the book's many scholarly citations to the relevant research), and more information about Reisberg's book, click here.

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

Scientific research allows us to catalog some of the factors that make the suggestion of a false memory easier in some circumstances than in others. This catalog allows us to scrutinize a given case in order to ask whether factors promoting suggestibility are present or absent. If many of these factors are present, concern about suggestibility and false memory has to increase; if few (or none) of the factors are in place, the concern is diminished. ……

Here, then, is a list of a dozen factors that one should keep track of when trying to discern whether a child may have been misled and thus whether the child's report might be an honest, candid instance of confusion, with the child "recalling" events that did not occur. … …

7. Plausibility. We discuss in a later section the sorts of false memories that can, by one means or another, be planted in a child's recall. We should be clear, though, that some suggestions are more likely to succeed than others, and, in children as in adults, a suggestion will be more readily accepted if the suggestion seems plausible from the outset.

…To understand the influence of plausibility, consider two scenarios: In the first, let's say that a child makes an ambiguous remark about being touched by Uncle Fred, and Mom has long suspected that Uncle Fred is a bad man who does bad things. It is easy to imagine that this mother might take her child's remark seriously and pursue it with vigor. Even if her child now insists that nothing has happened, the mother might still press her child, just to make certain. But now, in a second scenario, let's say that a child makes a similarly ambiguous remark about Uncle Joe, but Mom is convinced from the start that this suggestion makes no sense; she firmly believes Joe could not have committed the suggested acts. In this case, the mother might not question her child at all or might question her only in a cursory manner, and she would likely accept the initial denial.

Likewise, let's say that Mom does have suspicions about Uncle Fred and preconceptions about what Fred may have done. In this setting, the mother is more likely to ask her child leading questions (in comparison to a mother who enters the conversation with no expectations) in order to ferret out information about Fred's misdeeds. A mother with preconceptions about what may have occurred is also more likely to ask yes/no questions in comparison to a mother without prior suspicions—and, in many cases, the yes/no questions will be phrased with "yes" as the expected answer.

On this logic, it is often helpful to know about the beliefs and expectations of the person who first questioned the child. Information about these points will, in many cases, allow us a plausible reconstruction of how that initial conversation unfolded. The reconstruction, in turn, can provide information about whether the questioning was suggestive or leading, or entirely neutral. We should pause to ask, though: Why a reconstruction? Why not simply ask the adult involved how the conversation unfolded? The answer lies in the likelihood that the adult will be unable to recall the relevant details of the conversation. Thus, an adult's memory seems to provide the most direct means of determining how a conversation unfolded, but, with the memory demonstrably unreliable, this is a circumstance in which we're forced to rely instead on a thoughtful process of reasoning through how the conversation likely proceeded.

What about the other side of this

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issue—the effect of plausibility on the child? Here, let's imagine that little Judy has, in various conversations, overheard adults in her family talking about sexual matters, including various forms of physical contact. Let's also imagine that Judy knows that cousin Sue was abused, and maybe she knows that Sue testified in her abuser's trial. As a result of these experiences, Judy will be familiar with the broad notion of sexual touching, and we earlier discussed the role of familiarity in creating false memories. In addition, Judy will now think it plausible that she might have experienced sexual touching (because, she has learned, this sort of touching does indeed happen). This perspective will make Judy less resistant to suggestions that she, too, has been abused, and hence more vulnerable to outside information suggesting that, yes, she has experienced some form of sexual contact.

8. **Stereotype induction.** A related factor is often dubbed "stereotype induction." Specifically, imagine a sequence in which you tell a child, "You know, Ron is really clumsy. Can you tell me what happened when Ron came to your class yesterday?" Or, equivalently, "I've heard that Sam is sometimes naughty. Do you know anything about Sam?" Sequences like this can lead children to report on Ron's clumsy acts or Sam's misbehavior even though nothing of the sort occurred.

Note that, in cases involving stereotype induction, children are "active partners" in the creation of the false memory. (We should mention, though, that this "activity" is evident in many other settings as well.) Thus, no one has to lay out for the child, "This is the narrative sequence I want you to endorse." Instead, the creation of a false memory often involves someone merely planting a "seed" ("Did grandpa touch you?"), and the seed can sometimes be rather diffuse ("Did grandpa do something bad to you?" or even "You know, grandpa sometimes does bad things."). From that base, the child can then develop a narrative about the (fictitious) event—perhaps on his or her own or perhaps via a "collaborative conversation" with an inquiring adult.

This pattern is certainly in place for stereotype induction but applies more broadly. Suggestions to children often do little more than "launch" the creation of a false memory. The details of the memory are, in many cases, supplied by the children themselves. ●

Book Review

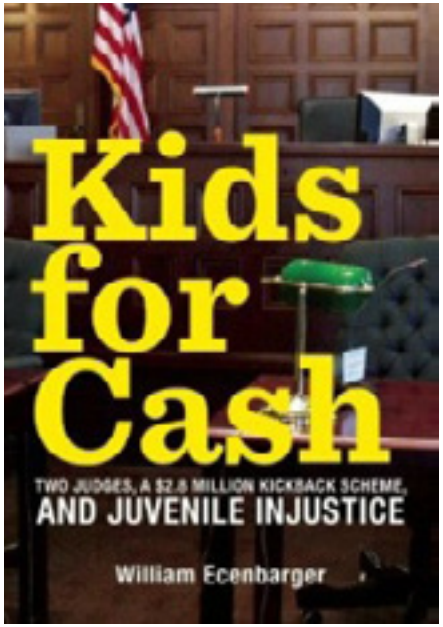
By Paul E. Levy, General Counsel, OPDS

Kids for Cash: Two Judges, Thousands of Children, and a $2.8 Million Kickback by William Ecenbarger

The New Press, 2012

I'm recommending an important and disturbing new book about juvenile justice that may have lessons for how we do things in Oregon. In fact, "Kids for Cash," by William Ecenbarger, is a legal thriller about the waiver of counsel and shackling of youth in delinquency cases. It's a true story about the juvenile court in Luzerne County, Pennsylvania, between the years 2003 and 2007, when the juvenile court judge routinely sent children to a private, for-profit detention facility for such minor offenses as an online parody of the school principal and graffiti to a few stop signs.

The story has become well known as one of the country's biggest



judicial scandals because of the kickbacks received by the juvenile court judge and the presiding judge of the county from the operators of the detention facility, resulting in a federal prosecution and long prison sentences for the judges.

But the real scandal for many is that no one seemed to care what was happening in juvenile court until federal prosecutors began investigating possible money laundering charges as a result of a complaint unrelated to what was happening to the kids who appeared in court.

Continued on next page »

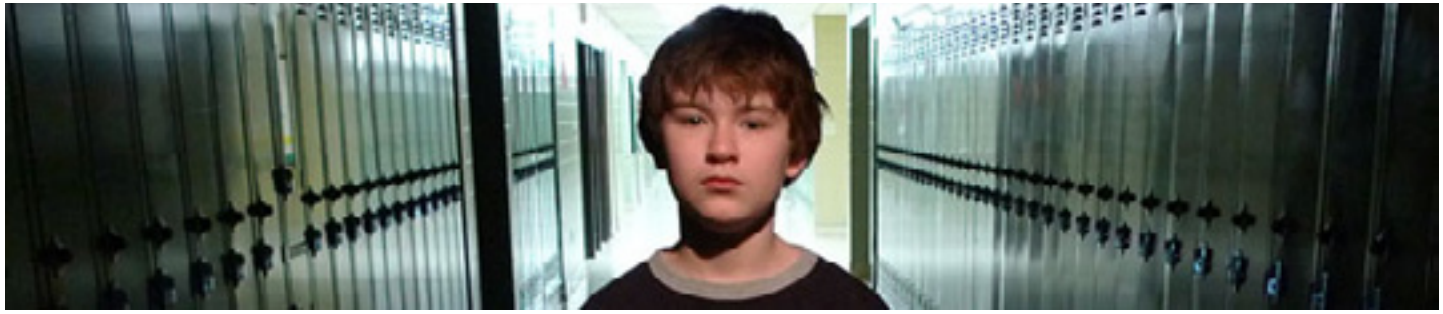
« Book Review continued from previous

The kids routinely appeared in court without lawyers and were dispatched to detention after hearings that typically lasted fewer than five minutes.

This happened with the complicity of the juvenile department, of course, which advised kids and parents that lawyers were unnecessary and would only make matters worse (in fact, in those cases where kids did have lawyers, they nearly always fared much better). The public defenders never raised a concern and, indeed, may not have understood that the practices in Luzerne County were contrary to best practices in delinquency cases and very different from the norm for the rest of Pennsylvania, which otherwise is a fairly progressive state when it comes to juvenile justice. The young prosecutors assigned to "kiddie court" were simply happy to win their cases so easily, while over the years two elected DAs never set foot in juvenile court. And school officials were thrilled to have underperformers and troublemakers sent away.

Except for the bribery and kickbacks involved, which in the end may have had little to do with the juvenile judge's conduct of his court, the ingredients to the massive injustice in Luzerne County—a strong and feared judge, a complicit juvenile department, complacent defense attorneys, indifferent prosecutors and thankful school officials—are not unique to this case. That was the message of Marsha Levick, the legal director of the Juvenile Law Center in Philadelphia, who was critical to obtaining expungements and financial awards for the thousands of children involved in the story and who spoke about the case this past spring at the OCDLA juvenile law seminar.

The book is an engaging and easy read, if a bit florid and overwritten at times. The Sunday New York Times called it "a harrowing tale, lucidly told by a journalist with a good eye for detail." For anyone concerned about juvenile justice, it's a cautionary and informative story. ●



Kids for Cash Film Holds Oregon Premiere

Benefits Youth, Rights & Justice and the Juvenile Law Center

On June 22, a benefit screening at the World Trade Center of SenArt's Kids for Cash documentary raised nearly $5,000 for Youth, Rights & Justice and Philadelphia's Juvenile Law Center.

The following sponsors made the event possible: Tonkon Torp LLP; Holland & Knight; Dunn Carney; Harrang Long Gary Rudnick PC; Global Collaborative Network LLC; and Angeli Ungar Law Group LLC.

Following the screening, a distinguished panel led by Secretary of State Kate Brown discussed the making of the film, the repercussions of the scandal, and the potential lessons for Oregon. The panel included: Robert May, the film's director; Robert Schwartz, the executive director of the Juvenile Law Center; Nan Waller, Multnomah County Circuit Court Judge; and Mark McKechnie, executive director of Youth, Rights & Justice.

On June 23, Robert Schwartz and Julie McFarlane, YRJ Supervising Attorney, presented a second screening as part of a CLE on access to justice and ethics.

The film Kids for Cash is currently academy award eligible and will be available on blue ray and dvd near the first of the year. ●

Youth, Rights & Justice ATTORNEYS AT LAW

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CASE SUMMARY

By Jason Pierson, YRJ Law Clerk

United States v. JDT, Juvenile Male, __ F.3d __, 2014 WL 3906767 (9th Cir. August 12, 2014).

Defendant, JDT, a ten year-old male, was charged with six counts of aggravated sexual abuse of five boys between the ages of five and six years old. JDT claimed that (1) the district court did not have jurisdiction over the delinquency matter because the Government failed to present a valid certification; (2) that §2241 is unconstitutionally vague and ambiguous because it fails to address situations where the offender and victim are under the age of twelve; (3) that he was unable to achieve the mens rea required by §2241 regarding sexual intent because of his young age and lack of testosterone; and (4) that the Government failed to provide sufficient evidence to prove beyond a reasonable doubt that JDT violated §2241 because the district court incorrectly admitted hearsay testimony from a social worker, because the trial court found that the social worker's interview was for medical purposes.

The Court of Appeals held that that a certification of juvenile delinquency filed by a United States Attorney is presumed accurate, unless circumstances calling its accuracy or validity are identified. Next, the Court of Appeals held that §2241 did not violate principles of notice within due process since the statute clearly defines what conduct is prohibited and delineates who can be charged with such conduct, including offenders under the age of 12. The Court of Appeals also held that the mens rea term of "knowingly" in §2241 did not require a heightened understanding of JDT's action, but rather simply an understanding of the facts underlying the offense. Finally, after the Court of Appeals determined that the trial court identified the correct legal rule regarding the social worker's hearsay testimony, it determined that the trial court's application of the legal standard was not illogical, implausible, or without support. Therefore, the social worker's testimony was properly admitted, and when viewing the evidence in the light most favorable to the prosecution a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

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RESOURCES

By Tyler Neish

Law & Order for Juveniles: U.Va. Study Urges Altering Police Interrogations

Even though research shows that interrogation techniques used to obtain confessions from adults are inappropriate for use on children and adolescents, they are still widely used by police departments across the nation. An ongoing University of Virginia study conducted by Todd Warner has found that the risk for false confessions when these interrogation techniques are used is higher in juvenile suspects.

The study points to techniques such as, leading questions, presentation of false evidence, and heightening anxiety during interviews as some of the most troublesome. These techniques are more troublesome in juvenile suspects because their brains are still developing, which makes them more impressionable. As part of the study, Warner has interviewed 178 police officers to determine what role the age of the suspect plays in interrogation.

Some key findings included:

- "90% of juvenile suspects waive their Miranda rights and begin talking after an arrest."
- Only 20% of police officers receive any training on adolescent brain development

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- Less than half of the officers had training on how to assess a suspect's Miranda comprehension

- "Nearly all of the officers surveyed reported frequently using the same interrogation techniques on minors as on adults."

Based on his findings thus far, Warner has many recommendations to improve the accuracy of juvenile interrogations, including: 1) Officers must receive formal training in adolescent brain development; 2) Deceptive techniques such as fabricated evidence should not be used on juvenile suspects; 3) Social scientists must do more than be critical of current methods, and instead, they must work with law enforcement to improve interrogations of juvenile suspects.

To access the article on the ongoing study go to:

http://news.virginia.edu/content/law-order-juveniles-uva-study-urges-altering-police-interrogations

RAD Replaced by Multnomah A&E

Multnomah County's Residential Alcohol and Drug program, which was housed in the Multnomah County Juvenile Detention Facility has been closed. Replacing it in the same space is the Multnomah Assessment and Evaluation Program. This program is a short term residential program designed to provide temporary structure, stabilization and treatment readiness. The goal of the program is to provide a safe place where youth quickly enter and begin receiving services while longer term plans are made for the youth.

Noncitizen Youth in the Juvenile Justice System

Research shows that the juvenile justice system is serving significantly more noncitizen youth than in the past. The Annie E. Casey Foundation, working with Legal Services for Children and the Immigrant Legal Resource Center, prepared a guide outlining juvenile detention reform as it relates to noncitizen youth. This guide, "Noncitizen Youth in the Juvenile Justice System" is a useful tool for delinquency attorneys, who are trying to determine what their responsibilities are when they have a noncitizen youth client.

The guide provides readers with various juvenile court practices that may unfairly prejudice noncitizen youth, while also providing an introduction to key immigration concepts. The guide is comprised of three main parts: a profile of noncitizen youth in the U.S., the relevance of a youth's immigration status, and whether or not juvenile justice personnel are required to assist ICE officials. Additionally, the guide also examines the practices of various states and how they comply/assist with federal immigration law enforcement.

Key findings and recommendations included:

•Noncitizen youth involved in the juvenile justice system need access to an experienced attorney who can affirmatively advise the youth as to potential immigration penalties as well as possible immigration relief (i.e. SJIS, U Visa, etc…);

•Immigration status should not be included as a factor in a Risk Assessment Instrument (RAI) analysis;

•Even neutral policies can have a disproportionate impact on noncitizen youth. For example, the flight risk criteria require a verifiable local address which noncitizen youth may decline to disclose for fear of deportation of parents;

•Lack of culturally or linguistically competent services and personnel increases unnecessary detention;

•If the status of a youth is needed to determine eligibility for services, counsel and the court should consult an immigration expert;

•Local juvenile justice personnel are not required to assist with enforcement of federal immigration laws. However, some states have voluntarily adopted laws to report noncitizens in some cases, and

•Reporting noncitizen youth to federal immigration authorities undermines the fundamental goals of the juvenile justice system such as, confidentiality and reunification.

The guide can be found at: http://www.aecf.org/resources/noncitizen-youth-in-the-juvenile-justice-system/ •

Save the Date

2014 Juvenile Law Training Academy

Outside the Box: Practical Strategies for Juvenile Practitioners in Increasingly Complicated Cases

October 20–21, 2014

Eugene Hilton

This seminar is for all juvenile court lawyers, including both state's attorneys and attorneys for children and parents, and for Guardians Ad Litem and CASAs. Register Here

Sixth Annual Wine and Chocolate Extravaganza

Benefiting Youth, Rights & Justice

November 8th, 2104

Oregon Convention Center, Portland, OR

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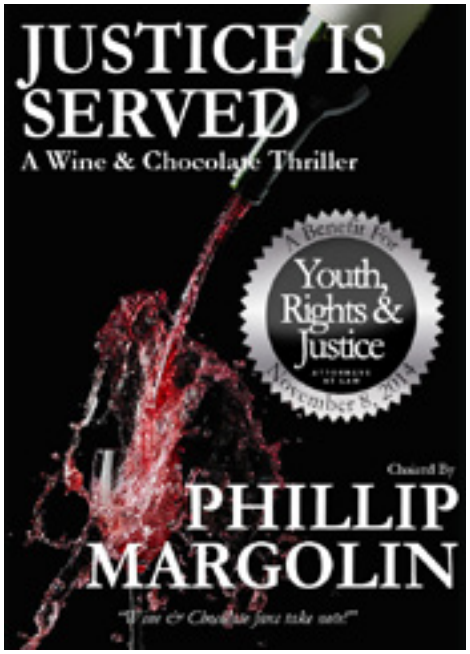


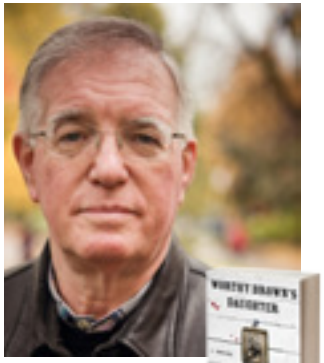
Presented By

TONKON TORP LLP ATTORNEYS

Join Youth, Rights and Justice for its 6th Annual Wine & Chocolate Extravaganza to raise critical funds for its advocacy and programs. This year over 300 local kids will need YRJ's expert advocacy to stay in school and succeed. Thousands of children statewide will benefit from YRJ's legislative work in Salem. Offer your support buy purchasing tickets or making a donation.

Purchase Tickets

Make A Donation



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Dinner with Phillip Margolin, New York Times bestselling author of *Worthy Brown's Daughter* • Alaska Airlines Getaway • United Airlines Tickets • Costa Rica Adventure at Tambor Tropical Resort • Island getaways to Antigua, Panama and Barbados • Instant Wine Cellar • Getaways to the Oregon Coast and Ashland • A Date Night Every Month for a Year • *Portlandia* Memorabilia • Casino Adventures at Wildhorse and Chinook Winds • Portland Spirit Cruise • Tastings at Eastside Distillery and World Class Wines • A fabulous Portland Staycation • Disneyland Adventure *and more!*

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