

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No.

In the Interest of
A person under the age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

J (A PERSON UNDER THE AGE OF 17),

Respondent-Appellant.

**ON APPEAL OF A DELINQUENCY ADJUDICATION AND DENIAL OF
POSTDISPOSITION MOTION, ENTERED IN THE MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE FRANCIS T. WASIELEWSKI
PRESIDING**

**NONPARTY BRIEF OF THE CHILDREN AND FAMILY JUSTICE CENTER AT
NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S BLUHM LEGAL
CLINIC AND THE WISCONSIN INNOCENCE PROJECT AT UNIVERSITY OF
WISCONSIN LAW SCHOOL'S FRANK J. REMINGTON CENTER**

Steven A. Drizin
Illinois Attorney No. 15245
Children and Family Justice Center
Northwestern University School of Law
357 E. Chicago Ave.
Chicago, IL. 60611
(312) 503-8576

Keith A. Findley
Wisconsin Bar No. 1012149
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

INTRODUCTION

As of April 2003, 127 wrongly convicted people have been exonerated by DNA evidence. Benjamin N. Cardozo School of Law, *The Innocence Project*, at <http://www.innocenceproject.org>. Of the first 111, 27 involved false confessions or admissions. *Id.* at <http://www.innocenceproject.org/causes/falseconfessions.php>. These cases reveal that current psychological interrogation techniques are a major contributing factor to the false confession problem. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. Crim.L. & Crimin. When these techniques are applied to children, the risk of false, or at least, coerced confessions, is magnified. The Central Park Jogger case in New York, in which five teenage boys falsely confessed to the assault of a female jogger, only to be exonerated thirteen years later by DNA evidence,¹ is only the most recent in a long parade of false confessions involving children which have come to light in recent years.²

¹ See Affirmation of Nancy E. Ryan, Assistant District Attorney, County of New York, in Response to Motion to Vacate Conviction, Indictment No. 4762/89, December 5, 2002, available at <http://www.manhattanda.org/whatsnew/index.htm>.

² In the last five years, for example, at least six Chicago children and teenagers confessed to murders for which they were later exonerated, including the unnamed seven- and-eight-year old boys in the murder of 11-year-old Ryan Harris, Calvin Ollins and Marcellus Bradford, Mario Hayes and Don Olmetti. Summaries of their cases can be found in Steven A. Drizin, *The Problem Of False Confessions in Illinois*, at: <http://www.law.nwu.edu/depts/clinic/cfjc/programs/falseconfessions.htm>. Other false confession cases involving children, include Timothy Brown (Broward County, Florida), see Daniel deVise and Wanda DeMarzo, Behan Judge Backs 'Actual Innocence' Claim, Miami Herald, September 10, 2002, at 1, 2002 WL 24340195; Allen Chesnet (Elkton, County, Md), Del Quentin Wilber, *Teen Tormented by Erroneous Charge of Murder*, Baltimore Sun, April 23, 2001, at 1A, 2001 WL 6157446; Michael Crowe and Joshua Treadway (Escondido, Cal.), Mark Sauer and John Wilkens, *Arrest likely in Crowe slaying*, San Diego Union-Tribune, May 14, 2002, at A1, 2002 WL 4602137; Brenton Butler (Jacksonville, Fla.), Paul Pinkham, *Police Charge Two Men in Killing of Tourists; Fingerprint Surfaces After Butler Acquittal*, Florida Times-Union, March 13, 2001, at A1, 2001 WL 7005542, and Dennis Deonte Green (Prince George's County, Md), April Witt, April Witt, *Police Bend, Suspend Rules; Pr. George's Officers Deny Suspects Lawyers, Observers Say*, Washington Post, June 5, 2001, at A1, 2001 WL 28363464.

The problem of coerced confessions involving children is even more severe. In December 2001, the Chicago Tribune reported that “[s]ince 1991, police from Cook County law enforcement agencies have

Against this backdrop, Amici ask this Court to evaluate the appeal of fourteen-year-old J, who confessed to an armed robbery after being interrogated by Milwaukee detectives. After detectives refused for hours to accept J’s protestations of innocence, after a detective raised his voice and repeatedly confronted him with incriminatory statements of his co-defendants, and after the same detective told him that his confession would be looked upon favorably by his judge, J recognized that he was in over his head. He asked his interrogators several times if he could call his mother or father. Milwaukee Police Department Detective Spano denied J’s requests because, he testified, he “never” grants such requests because they can result in a loss of his “control” over the suspect and might “stop the flow” of his efforts to get a confession.

In the arguments that follow, Amici ask this Court to hold that such practices are not acceptable. Not only do these interrogation practices increase the risks of false confessions by preying upon children’s suggestibility and exploiting their natural inclination to comply with adult authority figures, they also contravene mandates of the United States and Wisconsin Supreme Courts requiring that the “greatest care” be taken when interrogating juveniles, ignore psychological studies that demonstrate that 14-year-olds have great difficulty understanding their Miranda warnings and the consequences of waiving them, and disrespect the statutory and constitutional rights of parents to participate in significant, life-altering decisions involving their children. For these reasons, Amici ask this Court to: 1) adopt a “per se rule” excluding statements obtained

obtained at least 71 murder **confessions** from suspects age 16 and under that were so unconvincing or improper that the courts threw them out, prosecutors dropped the charges or the **juveniles** were acquitted at trial.” Ken **Armstrong**, Maurice Possley and Steve Mills, *Officers ignore laws set up to guard kids ; Detectives grill minors without **juvenile** officers, parents present*, Chicago Tribune, Dec. 18, 2001, at 1A, available at 2001 WL 30803197.

from children under age 15 outside the presence of their parents, and 2) require that police officers videotape all custodial interrogations of juvenile suspects.

ARGUMENT

I. THIS COURT SHOULD ADOPT A *PER SE* RULE EXCLUDING STATEMENTS OBTAINED FROM MINORS AGED FIFTEEN AND UNDER WHERE THE CHILD HAS ASKED TO SPEAK WITH HIS/HER PARENTS AND BEEN DENIED ACCESS TO THEM.

Teenagers need adult guidance during police interrogations. Over fifty years ago, in the case of a fifteen-year-old boy, the United States Supreme Court first recognized that a child being interrogated “needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.” Haley v. Ohio, 332 U.S. 596, 599-600 (1948). *Cf.* Gallegos v. Colorado, 370 U.S. 49, 54 (1962)(“[a] fourteen year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police); Fare v. Michael C., 442 U.S. 707, 725 (1979)(confession of 16 1/2-year-old juvenile with an extensive prior record was voluntary, but suggested that courts might find a different result “where the age and experience of a juvenile indicate that his request for ... a parent is, in fact, an invocation of his right to remain silent”).

Nearly thirty years ago, the Wisconsin Supreme Court also recognized the need of children for adult assistance during interrogations. In Therault v. State, 66 Wis.2d 33, 223 N.W.2d 850 (1974), a case involving a 17 1/2-year-old boy who specifically told police he did not want to contact his parents, the Court rejected a “per se rule” excluding statements obtained when parents are absent, instead adopting a “totality of circumstances” voluntariness test.. The Court, however, also cautioned that, if police “fail to call the parents for the purpose of depriving the juvenile of the opportunity to

receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements.” Theriault, 66 Wis.2d at 48. This case, of a 14-year-old boy who asked repeatedly for his parents and was repeatedly rebuffed by police, presents this Court with the opportunity to revisit the rules regarding parental presence in the very case contemplated by the Theriault court.

Theoretically, the “totality of the circumstances” test gives judges the flexibility to weigh a multitude of factors in determining whether a juvenile “knowingly and intelligently” waived his constitutional rights and whether the juvenile’s confession is voluntary. *See, e.g., Fare*, 442 U.S at 725. Practically speaking, however, legal training does not teach judges to assess child development and how to weigh the factors that make children uniquely vulnerable during interrogations. Consequently, courts often fail to take “special care” in evaluating juvenile confessions. Barbara **Kaban &** Ann E. Tobey, *When Police Question Children: Are Protections Adequate?* J.Ctr. for Child. & Cts. 151 (1999). Professor Barry Feld has found that, “when judges apply the totality of the circumstances test, they exclude only the most egregiously obtained confessions and then only haphazardly.” *See* Barry C. Feld, Bad Kids 118-119 (1999). Clear-cut rules are needed to protect children under 15 from their own immaturity, their deficiencies in understanding *Miranda* and the consequences of waiving their rights, and to put them on “less unequal footing” with their interrogators. *See Gallegos*, 370 U.S. at 54.

A. Children must have the opportunity to consult with an informed parent, guardian, or other interested adult before police can begin interrogating them.

Perhaps nowhere is a *per se* rule needed more than in the context of children under 15 caught in the maelstrom of a police interrogation. Children simply do not understand

their *Miranda* rights as well as adults. Thomas Grisso, *Juvenile's Capacities to Understand Miranda Warnings: An Empirical Analysis*, 68 Calif. L.Rev. 1134, 1160 (1980)(“The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared to adults demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.”). More recent empirical studies suggest that children in this age range are less capable than adults of making long-term decisions because “adolescents seem to discount the future more than adults do, and to weigh more heavily short-term consequences of decisions.” Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J.Crim. L. & Criminology 137, 164 (1997). Finally, a recent study found that juveniles under 16 were far more likely than young adults to make choices that reflect a propensity to comply with adult authority figures, such as confessing to the police rather than remaining silent Thomas Grisso, Lawrence Steinberg et al, *Juvenile's Competence to Stand Trial: A Comparison of Adolescents and Adults Capacities as Trial Defendants*, available online at: <http://www.mac-adoldev-juvjustice.org/page25.html>, at 25, 30.

These developmental differences between children and adults greatly disadvantage children during police interrogations and underscore their need for adult guidance. A leading authority has argued that “a parent may be in the best position to help communicate matters in ways that their children can understand or to assist the youth in dealing with decisions that exceed the youth’s own abilities or emotional capacities.” Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 Crim. Just. 4, 11 (Fall 1997). A parent can also “reduce coercive influences,

and provide an independent witness who can testify about the coercive practices that were used.” Barry C. Feld, *Waiver of Legal Rights*, in Youth on Trial 117(Thomas Grisso and Robert C. Schwartz, eds2000).

For these reasons, both courts and legislatures have adopted per se rules ensuring that children have access to their parents or other interested adults during an interrogation. See e.g. Colo. Rev. Stat. §19-2-511 (2003); Conn. Gen. Stat §46b-137 (2003)(a statement given by a juvenile during a custodial interrogation without the presence of a parent or guardian is inadmissible); *In re B.M.B.*, 955 P.2d 1302 (Kan. 1998)(mandating all children under 14 be given an opportunity to consult with a parent, guardian or attorney prior to waiving Fifth Amendment rights), *State v. Piper*, 468 A.2d 554, 556-57 (Vt. 1983)(giving every child under 18 the right to consult an interested adult once in custody). Wisconsin should follow suit.

A *per se* rule excluding statements obtained from children under 15 who were denied access to a parent or other interested adult would serve two important purposes. First, it would serve both the right of the child to the assistance of a concerned adult during the interrogation and parents’ rights to be involved in important decisions made by their children. Second, a bright-line rule would provide clear guidance to police officers and prosecutors engaged in interrogating children.

The United States Supreme Court has acknowledged the benefit of providing such bright-line procedural protections. Analyzing the impact of Miranda, the Court stated that “Miranda’s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not

admissible. This gain in specificity...has been thought to outweigh the burdens that the decision in Miranda imposes on law enforcement agencies.” Fare, 442 U.S. at 718.

These same benefits would follow from a bright-line rule guaranteeing children under 15 the right to consult with a parent or other concerned adult.

B. A *per se* rule requiring parental presence is also necessary to protect and respect the fundamental rights of parents to participate in life-altering decisions involving their children and to protect them from their own immaturity.

Children need the assistance of parents during interrogations because they often lack the emotional and mental capability to make fully informed decisions. *See Bellotti v. Baird*, 443 U.S. 622, 640 (1979)(upholding a restrictive state law requiring minors to obtain parental consent to get an abortion, in part because a child under 18 will not or cannot make decisions that “take account of both immediate and long term consequences.”). But apart from the children’s needs, the Supreme Court has recognized that parents have a right to direct the care, control, and upbringing of their children, including the right to provide advice to their children when they face difficult circumstances. *See, e.g. H.L. v. Matheson*, 450 U.S. 398, 412 (1981)(state statute requiring a physician to notify a minor’s parents or guardian before performing an abortion was “reasonably calculated to protect minors by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.”). *See also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)(striking down various education laws as interfering with a parent’s power to direct a child’s

education); Parham v. J.R., 442 U.S. 584 (1977)(upholding a state law that allowed parents to commit their children to mental hospitals).

Recognition that minors are less capable of making life-altering decisions without parental assistance and that parents should have a say in such decisions is also reflected in Wisconsin's statutes. For example, Wisconsin, like many other jurisdictions, has an absolute ban on purchasing alcohol until the age of 21 (Wis. Stat. §125.97); restricts the use or purchase of tobacco products by persons under 18 (Wis. Stat. §134.66); permits marriage of 16- and 17-year olds only with parental consent (Wis. Stat. §765.02), prevents children from purchasing or leasing a car without parental consent (Wis. Stat. §218.0147); bars children under 14 from changing their names without parental consent (Wis. Stat. §786.36), and does not allow girls under 18 to obtain an abortion without parental consent (unless certain exceptions apply)(Wis. Stat. §48.375).

The decision to confess during an interrogation by its very nature requires maturity and sound judgment. It is also a decision with potentially traumatic and permanent consequences. Those who confess, even if the confession is false, are likely to be detained, to face the most serious charges, to be convicted, and to receive harsh sentences. *See* Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Misarrriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 472-491. Requiring parental involvement in a child's decision to assert or waive *Miranda* rights is a logical extension of parents' well-established constitutional right to participate in decisions

affecting their children. Even if this Court finds no need for a *per se* rule to protect children, it should concluded that respect for parents and the family demand such a rule.

II. VIDEOTAPING SHOULD BE MANDATED FOR ALL INTERROGATIONS OF JUVENILES TO INCREASE THE RELIABILITY OF CONFESSIONS, PREVENT FALSE CONFESSIONS, AND TO PROMOTE INFORMED DECISION-MAKING.

Much of the difficulty in assessing the voluntariness of J's confession stems from the fact that it is difficult to reconstruct the dynamics of what went on in the interrogation room. The trial judge himself suggested the remedy to this otherwise intractable problem when he repeatedly remarked that he wished he had a videotape of the interrogations. (50:109; 50:113.) Requiring videotaping of custodial interrogations will give courts a window into the now-shuttered interrogation rooms. It will also increase the reliability of confessions, enable courts to make better-informed decisions, protect suspects from coercive police practices, and protect police officers from false allegations of misconduct. This reform is especially necessary to increase the reliability of children's confessions and is consistent with this Court's duty to ensure that "special care" is taken when children are interrogated.

The extreme suggestibility of children and their eagerness to please adult authority figures make it particularly important that safeguards be created to guard against coerced or false confessions. Although even mild insinuations can encourage children to voice what adults want to hear, children are often subjected to more than just gentle encouragement from the police. By law, interrogators are permitted to lie about evidence, trick, and verbally harass their suspects in order to obtain a confession. James

Wood & Sena Garven, When Children Talk Crime, N.Y. Times, Sept. 12, 1998 at 1.

When tactics designed to elicit confessions from adults are used on children, they can produce coerced and false confessions. See A. Redlich, , & G. Goodman. *Taking responsibility for an act not committed: The influence of age and suggestibility*, 27 Law and Human Behavior 141-156 (April 2003)(in a clinical study, an overwhelming majority of teenagers complied with request to sign false confession when presented with false evidence of guilt).

To date, Alaska and Minnesota are the only two states that require all custodial interrogations be recorded. See Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985)(under the state due process clause “the recording of custodial interrogations is now a reasonable and necessary safeguard, essential to the adequate protection of the accused’s right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.”); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994)(requiring electronic recording of all custodial interrogations under state constitution and exercise of judicial supervisory power). Based on review of recorded interrogations, Minnesota courts have held that police may not use deception or stress-inducing interrogation techniques in obtaining a juvenile’s confession.⁴ and have suppressed confessions where police lied to juveniles; made express or implied promises to juveniles; implied that it was in juvenile’s “best interests” to confess and failed to back up promises of leniency with documentable proof; suggested they have influence with the county attorney and that they would exercise that influence to obtain counseling or a reduced charge; suggested that the county attorney would proceed based on the officer’s assessment of the case and that if the defendant told "truth" he could go home; and implied that they had stronger evidence

⁴ [State v. Garner](#), 294 N.W.2d 725, 727 (Minn.1980)

than they had. See In re D.B.X., 638 N.W.2d 449 (Minn App. 2002) (and cases cited therein). Some of these techniques were used by Detective Spano in this case. A videotape of the interrogation might have revealed others.

Recent revelations about the scope of the problem of wrongful convictions based on false confessions are leading other states and local jurisdictions to take a new look at videotaping interrogations as well. In Illinois, for example, a parade of false confessions, including several from children and teenagers⁵ led the Illinois legislature to pass by an overwhelming margin a bill mandating that custodial interrogations in homicide cases be recorded. In New York, the recent DNA exonerations of five teenagers who falsely confessed to the beating and assault of a female jogger in Central Park in 1989 has led to calls for taping of interrogations.⁷ False confession scandals in Prince Georges County, Maryland,⁸ and Broward County, Florida,⁹ led authorities there to adopt new policies of taping custodial interrogations of suspects. Even in Milwaukee, last year's false confession case of Katrina French, led Milwaukee District Attorney E. Michael McCann to suggest that the Milwaukee police should tape interrogations. David Doege,

⁵ In December 2002, the Chicago Tribune reported that “[s]ince 1991, police from Cook County law enforcement agencies have obtained at least 71 murder **confessions** from suspects age 16 and under that were so unconvincing or improper that the courts threw them out, prosecutors dropped the charges or the **juveniles** were acquitted at trial.” Ken **Armstrong**, Maurice Possley and Steve Mills, *Officers ignore laws set up to guard kids ; Detectives grill minors without **juvenile** officers, parents present*, Chicago Tribune, Dec. 18, 2001, at 1A, available at 2001 WL 30803197. Many of these cases can be found online in Steven A. Drizin, *The Problem of False Confessions in Illinois*, at <http://www.law.nwu.edu/depts/clinic/cfjc/programs/falseconfessions.htm>

⁷ Frank Lombardi, *Pol Pushes Cops to Go to Videotape*, New York Daily News, January 10, 2003, at 4, available at 2003 WL 4061710.

⁸ April Witt, *Prince George's Police to Install Video Cameras*, Washington Post, Feb. 1, 2002, at B4, available at 2002 WL 10945147.

⁹ Wanda DeMarzo and Daniel DeVise, *Judge Overturns Conviction in Murder of Broward deputy*, Miami Herald, March 20, 2003, at 1A, available at 2003 WL 13346781.

Prosecutor backs taping interrogations, Milwaukee Journal Sentinel, May, 6, 2002,
available online at: <http://www.jsonline.com/news/Metro/may02/41209.asp>

A videotaping requirement is particularly important in custodial interrogations of children, at least those under age 15, and is a logical extension of this Court's duty to take the "greatest care" to ensure that confessions of juveniles are not coerced. Videotaping of children's interrogations is also supported by the great weight of social science research and will promote the search for truth. See Stephen J. Ceci, *Why Minors Accused of Serious Crimes Cannot Waive Counsel*, Court Review (Winter 2000), at 9; Lawrence **Schlamm**, [*Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*](#), 26 U. Tol. L. Rev. 901 (1995).

For these and the others reasons discussed above, it is time for Wisconsin to recognize that videotaping interrogations and confessions is essential to the pursuit of justice, especially for children.

CONCLUSION

For these reasons, this court should: 1) adopt a "per se rule" excluding statements obtained from children under 15 outside the presence of their parents, and 2) require that police officers videotape all custodial interrogations of juvenile suspects.

Dated this 16th day of May, 2003.

Respectfully submitted,

Steven A. Drizin
Illinois Attorney No. 15245
Children and Family Justice Center
Northwestern University School of Law
357 E. Chicago Ave.

Chicago, IL. 60611
(312) 503-8576

Keith A. Findley
Wisconsin Bar No. 1012149
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763