Section of Litigation Children's Rights Litigation

Investigative Strategies in Confession Cases

By Laura H. Nirider – July 9, 2012

We've all been there. A case comes across your desk involving a child or teen who has confessed to a crime under police interrogation. You review the confession, and it seems plausible enough on its face. What can a juvenile defender do when confronted with such a situation? Is there anything to do, other than to file a motion to suppress—which, of course, may be unavailing—and start planning for the all-too-probable guilty plea?

None of us is wrong to feel challenged by a confession case. The U.S. Supreme Court has long recognized that a "voluntary confession of guilt is among the most effectual proofs in the law" and that "triers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous." Empirical researchers, too, have concluded that confessions can be so prejudicial that they can persuade fact-finders to convict despite the existence of exculpatory physical evidence, contradictory accounts of witnesses, and alibis. Successfully defending a client who has confessed is a tall order for even the most talented litigator.

The persuasive power of confession evidence, however, poses a particularly acute problem for juvenile defenders. Why? Children and teenagers are particularly likely to react to the pressures of police interrogation by making involuntary or false confessions. This reality was first recognized in U.S. Supreme Court jurisprudence 45 years ago in *In re Gault*, which famously noted that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of confessions by children." After decades in the jurisprudential shadows, this reality has surfaced again in the 2011 U.S. Supreme Court case *J.D.B. v. North Carolina*, which concluded that "the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." Even Justice Samuel Alito, writing in dissent, acknowledged in *J.D.B.* that "I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult." While children are particularly likely to falsely or involuntarily confess, however, they appear to be no less likely to be convicted or adjudicated delinquent based on their confessions. The result is an unacceptably high risk that children will be wrongfully convicted.

In difficult cases where your clients have confessed under police interrogation, the best defense is to go on the offense against your client's statement. This means investigating all aspects of the interrogation and confession and, when warranted, letting the judge know early and often that serious problems can arise when police overbear the will of children to obtain evidence.

Classification

In any confession case, a defender should pursue three basic avenues of investigation: classification, coercion, and contamination. *See* Richard A. Leo and Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*. Regarding

More Information

» Children's Rights Litigation Home
» News & Developments
» Articles
» Case Notes
» Programs & Materials
» Related Resources
» Multimedia
» Directory of Children's Law Programs
» Children's Rights Litigation Committee
  • About
  • Join

Publications

Children's Rights Litigation E-Newsletter

» **Fall 2012**

Sound Advice

RECENT SOUND ADVICE »
• Hidden Victimization of Foster Children

SUBSCRIBE RSS

CLE & Events

Joint Committees CLE Seminar

January 31–February 2, 2013
Steamboat Springs, CO

» **View Section Calendar**

Bookstore

Circuit Conflicts in Antitrust Litigation

This practical guide surveys current

classification, you ask why the police classified your client as a suspect who needed to be interrogated. In other words, how did your client end up in the interrogation room? In any case—whether the confession is true or false—the answers to these questions reveal important background information about the way police approached the interrogation. For instance, was your client questioned because he was a known troublemaker in the neighborhood—in other words, a "usual suspect"? If so, police may have intensified the tone and timbre of their interrogation to counteract your client's anticipated street savviness. Was your client interrogated based on a tip from a witness? If that's the case, it will benefit you to know exactly what the police knew—or thought they knew—about the crime before the interrogation began so that you can examine whether your client's confession contains any new information that was not previously known by the police. Did the police become suspicious of your client during an initial interview because of nonverbal cues such as facial expressions and body language—so-called deception indicators on which police are trained to rely when determining whether someone is telling the truth? If so, the police's reliance on this type of junk science may well give you ammunition to attack the entire thrust of the investigation. Typical teenage mannerisms—slouching, failing to make eye contact, and so on—are far too often misinterpreted as exactly the kinds of deception indicators that can lead police to conduct an intense, guilt-presumptive interrogation.

Coercion

After getting some answers regarding classification, the next avenue of investigation is coercion. Coercion, of course, refers to the method in which police officers influenced, persuaded, cajoled, or forced a suspect to make a statement. In analyzing coercion, courts around the country examine the tactics used by police and weigh them against the individual ability of the defendant to resist those tactics. The good news is that this balancing framework enables defenders to raise avenues of attack that are particularly relevant to juvenile clients.

The coercion analysis often starts with a close examination of the giving and waiving of *Miranda* warnings. A suspect must be Mirandized, of course, when he or she is interrogated while in custody. Failing to do so—or failing to secure a knowing, intelligent, and voluntary waiver from the suspect—can not only invalidate the confession, but it can also be viewed as an indicator of coercion. As an initial matter, *J.D.B. v. North Carolina* gives the juvenile defender plenty to work with regarding the question of custody. Finding that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go," the *J.D.B.* court held that a child's age is relevant to the custody analysis. This holding enables defenders to argue that children who were interrogated at school, for instance—as J.D.B. himself was—were in custody and should have been Mirandized, even if an adult in a similar position would not have been in custody.

Beyond the question of whether a child should have been Mirandized, defenders should also examine the nature of the child's *Miranda* waiver. Were steps taken to ensure that the child understood his or her rights before the police accepted the waiver? Was the child asked to explain the warnings in his or her own words? Was he or she allowed to consult with a friendly adult before waiving his or her rights? If an adult was consulted—whether it was a parent, guardian, or youth officer—did that adult do anything to ensure that the child understood his or her rights and the consequences of waiver? Many researchers have indicated that such steps are necessary before one can have full confidence that a child understands the *Miranda* warnings and can meaningfully waive them. Failure to take such steps, in turn, could form the basis for a motion to suppress.

Defenders should also investigate statements that were made by police afterMirandizing but beforethe confession. This is obviously easier done with a recorded interrogation, but, at the least, defenders should interview their clients concerning this point. Some courts have found that certain statements made after the *Miranda* warnings effectively negated the warnings. For instance, in *Hart v. Attorney General* (11th Cir. 2003), a 17-year-old's *Miranda* waiver was rejected when a detective assured him that "honesty wouldn't hurt him" shortly after administering *Miranda*. The court concluded that such an assertion was "simply not compatible with the phrase 'anything you say can be used against you in court.'" This innovative argument—which is particularly resonant in cases involving children and teens who may not fully comprehend the *Miranda* warnings—deserves to be applied nationwide.

While the coercion inquiry begins with *Miranda*, it extends far beyond it. Any investigation into coercion also requires an analysis of the client's individual characteristics and the particular interrogation tactics used by police. The client's individual characteristics, of course, can include age, education level, suggestibility, psychological or mental limitations, use of drugs or medications, language ability, and prior experience with law enforcement, among nearly countless other factors. With respect to a juvenile's prior experience with law enforcement, it is worth noting that the Wisconsin Supreme Court held in the 2005 case *State v. Jerrell C.J.* that such experience may actually make juveniles moresusceptible to coercion under certain circumstances. Examining a juvenile who had been arrested on two previous occasions, the court noted that he had admitted involvement and was allowed to go home both times. It found that this experience "may have contributed to his willingness to confess in the case at hand . . . We note the argument of Jerrell's counsel that such an experience may have taught him a dangerous lesson that admitting involvement in an offense

will result in a return home without any significant consequences." Such an argument may well apply in many similar cases across the country.

While information about the client's personal characteristics is discoverable through interviews with the client, family members, educators, mental-health professionals, and others, it can be more difficult to discover information about the interrogation tactics that were used by police—particularly in the absence of a complete electronic recording of the interrogation. When faced with an unrecorded statement, defenders must begin by interviewing their clients as soon as possible after the interrogation occurs to glean an understanding of the types of messages that police sent during interrogation. Beyond this, however, defenders should take a few other investigative steps in the absence of a recording. Investigate whether there were any witnesses to the interrogation or, at least, to the child's arrest. Seek a court order to allow you to view and, if necessary, photograph the interrogation room. Obtain a full set of police reports concerning the interrogation and confession, as well as police reports describing the corroborating evidence on which the state will rely to substantiate the confession. If other witnesses or codefendants gave statements, it is essential to obtain those statements to assess whether their stories differ from your client's story. Get a copy of your client's written statement, if one exists, and evaluate whether it was written in an authentic teen voice or, on the other hand, if it was written in legalese or copspeak. If needed, get an adolescent linguistics expert to weigh in on the question.

If you do have a recording, then the next step is to examine what police said during the interrogation to extract a statement from your client. Identify any promises of leniency and threats of harm—both direct and implied. Such promises and threats can be strong evidence of coercion and, in turn, form the basis of a motion to suppress on voluntariness grounds. In *Commonwealth v. Truong* (Mass. Sup. Ct. 2011), a trial court suppressed a 16-year-old girl's confession to murder after the interrogation transcript revealed that officers implied that her confession would result in her being sent to foster care, rather than prison. In suppressing the confession, the court noted that such implied promises prevented her from understanding "the implications of her statements." In the 2012 case *State v. Polk*, moreover, the Iowa Supreme Court suppressed a 20-year-old's confession when police told him that prosecutors are "much more likely to work with an individual that is cooperating with police than somebody who sits here and says I didn't do it." And in the 2009 case *Ramirez v. State*, a Florida appellate court suppressed a young man's confession when his interrogator stated that he would help him if he confessed, but failed to explain the limits of his ability and authority to do so.

It is similarly important to assess whether an interrogator lied to your client about the evidence against him or her—in other words, whether the interrogation included false-evidence ploys. John E. Reid & Associates, the leading interrogation training firm in the country, has publicly stated on its website that interrogators should not use false-evidence ploys while interrogating young children. Even with older children and adults, moreover, Reid & Associates has cautioned against interrogations that combine false-evidence ploys with promises of leniency or threats of harm. By showing a court that the interrogators in your case flouted these basic principles of interrogation, you may be able to convince a judge that your client's case deserves a more careful look.

In raising these types of arguments, moreover, no juvenile defender should be dissuaded by adult criminal case law indicating that certain types of promises, threats, false-evidence ploys, or other interrogation tactics can be permissible. As long ago as 1994, the Seventh Circuit recognized in *Johnson v. Trigg* that "police tactics that might be unexceptionable when employed on an adult may cross the line when employed against the less developed reason of a child." Since then, *J.D.B.* has enshrined this reality in Supreme Court jurisprudence, while researcher upon researcher has confirmed it through empirical evidence. Cases involving adult defendants should not be considered dispositive when it comes to assessing the coercive impact of police interrogation tactics on children.

Contamination

The third avenue of investigation in confession cases is contamination—a factor that goes directly to the confession's reliability. An ever-increasing number of confessions are proven false every day; the Innocence Project reports that, to date, 291 individuals have been exonerated by DNA evidence and approximately one-quarter of them falsely confessed to the crimes for which they were convicted. Similarly, the just-launched National Registry of Exonerations, which, to date, has catalogued 890 wrongful convictions, reports that 135 of those convictions were caused at least in part by false confessions. Children and teens, moreover, are even more likely than adults to falsely confess during police interrogation. But how does a child know what to say when making a false confession? How can any person, for that matter, plausibly claim to have committed a crime about which they should, by rights, know nothing? The answer is contamination.

Contamination occurs when important facts about a crime are disclosed to a suspect before or during an interrogation. This information can come from several different sources. Police interrogators, for example, may inadvertently disclose information to suspects during interrogation. In 2008, District of Columbia Homicide Detective Jim Trainum wrote compellingly in the *L.A. Times* about how he induced a suspect to falsely confess when, "to demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time." Even

when an interrogator does not show the suspect pieces of evidence, the mere use of leading questions during interrogation—"Who shot the victim in the head?"—can educate the suspect about the facts of the crime. Beyond police, other sources of contaminating information can include the media, community gossip, and even the suspect's own previous familiarity with persons or places involved in the crime.

When a suspect's confession has been recorded, the defender must screen it for contamination. This screening process is essential because on first glance, the confession may look well-corroborated and reliable. The suspect may have described the crime scene accurately, for instance. But when that accuracy is attributable to contamination—when the police educated the suspect about the crime scene by using leading questions or showing photographs—then that corroboration is meaningless, and the confession, in turn, is worthless. Importantly, this is not a position held only by criminal-defense attorneys. In its interrogation manual, Reid & Associates instructs interrogators to "hold back information about the details of how the crime was committed" and warns that admissions "only become useful as evidence if they are corroborated by (1) information about the crime the suspect provides which was purposefully withheld from the suspect, and/or (2) information not known by the police until after the confession which is subsequently verified."

When screening a confession for contamination, it is essential for such a screening to be done systematically. First, identify each detail in the confession, large and small. What did the crime scene look like? What time did the crime occur? Who was with the suspect? What was the victim wearing? Where did the suspect hide incriminating evidence? What happened right before and right after the crime? For each detail, note whether your client got it right. Can the detail be corroborated by objective evidence that stands independent of the confession? Then, isolate the details that your client appears to have gotten right and ask whether his or her knowledge of those details could be attributable to contamination. Were those details fed to your client by police during the interrogation? Were they widely known due to news media coverage or community rumors? Could your client have some innocent explanation for his or her knowledge of certain aspects of the crime? Could he or she have simply guessed correctly with respect to certain details?

By conducting such a rigorous analysis, you may end up with a range of results. If your client was able to identify at least some details about the crime accurately without contamination, you may not be able to mount a strong reliability challenge. But if your client was not able to get anything right about the crime absent the guiding hand of contamination, such a result is a red flag. You may be dealing with an unreliable or downright false confession.

Using Your Investigative Results in Court

After conducting an investigation into classification, coercion, and contamination, a defender will be armed with an arsenal of information about his or her client's confession. The question becomes: What is the best way to present this information in court?

Information about coercion, of course, is best presented in a pretrial motion to suppress a confession on voluntariness grounds and, if necessary, repeated in full at trial. However, if you believe that your client has given a contaminated or false confession, such information should not be saved for later. Argue that police fact-feeding, for instance, rendered your client's interrogation coercive. Several courts across the country have suppressed confessions on those grounds, including courts in Nevada (*Passama v. Nevada*, 1987), West Virginia (*State v. Randle*, 1988), and Utah (*State v. Rettenberger*, 1999). Even if your judge may not be likely to take such a step, the pretrial motion to suppress provides an opportunity to plant the idea of unreliability.

Even outside the context of a voluntariness motion, there are still ways to raise unreliability before trial, as outlined by Richard A. Leo et al. in the 2006 *Wisconsin Law Review* article "Bringing Reliability Back In." If you believe your client may have falsely confessed, for example, consider filing a pretrial motion to suppress under the state-law equivalent of Federal Rule of Evidence 403, which excludes evidence if its prejudicial effect substantially outweighs its probative value. Such a strategy has been foreshadowed by the Seventh Circuit, which noted in 2011's *Aleman v. Village of Hanover Park* that "a trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its voluntariness is conceded." It also finds some support in the 2011 case *People v. Juan Rivera*, in which the Illinois Appellate Court decided that the state has the burden to prove beyond a reasonable doubt that a confession was not the product of contamination.

In sum, the mere fact that your client has confessed should not render his or her conviction a fait accompli. The creative litigator has many avenues of investigation to pursue—and many legal strategies to deploy—when confronted with a confession case. It is to be hoped that these strategies, combined with dedicated representation of the type shown by many juvenile defenders in courtrooms every day, will advance the representation of juvenile clients who have confessed during police interrogation and result in increased protections for juveniles across the country.

Keywords: litigation, children's rights, false confessions, contamination, coercion, classification

Laura H. Nirider is project co-director of the Center on Wrongful Convictions of Youth at Northwestern University School of Law.