Vermont Juvenile Defender Newsletter

Summer 2014

Juveniles and Custodial Interrogation

You may have gotten a call from a parent who wants to know what to do when the School Resource Officer or the police have, or want to ask their child a few questions. Advise the child not to speak to the either of them.

When the child is interviewed by the School Resource Officer or the police regarding an alleged act of wrongdoing advise them that the School Resource Officer is an arm of the police. Your juvenile client must be given *Miranda* rights when the child is in custody. Custody can be found when the child is in the principal's office with the School Resource Officer present. There are cases where the juvenile will say whatever they want to hear just to get out of there, without actually knowing they have waived their *Miranda* rights. In J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) the Court held that for *Miranda* purposes police must consider the age of the suspect.

Under In re E.T.C., 141 Vt. 375, 449 A.2d 937 (1982) the child must have the opportunity to consult with a disinterested adult. In re E.T.C. stresses the immaturity and limited capacity of juveniles. The Vermont Supreme Court construes our state constitution to require parental presence and consultation as a prerequisite to voluntary and intelligent waiver of Miranda rights. Decisions employing a voluntariness analysis of the waiver of Miranda rights (under either the Due Process Clause or Miranda) can be squared with the US Supreme Court's insistence in Colorado v. Connelly, 479 U.S. 157 (1986), that any finding of involuntariness must rest upon coercive acts by the police, because a denial of a juvenile's access to his or her parents is a particularly coercive form of incommunicado detention.

Should the parent be present for these interviews? A parent can often hurt the defense case by pressuring their child to admit to wrongdoing, believing it is the "right thing to do". Whether the matter is serious or minor, parents do not typically represent their child's "expressed interest".

They want their child to take responsibility, to apologize, things that in their view are in the child's "best interest".

The downside to parental presence is

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that they do not know the law, and the consequences of a confession are potentially serious. The child needs an objective, disinterested adult, a criminal lawyer, if possible to offer advice and counsel.

If the police request or encourage a parent to exercise a coercive influence over his or her child during police interrogation, the ensuing coercion may properly be attributed to the police. See In the Matter of Raymond W., 44 N. Y.2d 438, 441, 377 N.E.2d 471, 472, 406 N.Y.S.2d 27, 28 (1978) (explaining that "if it be established that . . . [parental] guidance or influence is not exercised by the parent independently but at the behest or on behalf of the prosecutor, such circumstance should weigh heavily to indicate the involuntariness of the child's confession").

In addition to *Miranda* issues, the presence of a foster parent during questioning is one of the issues before the Vermont Supreme Court in In Re E.W., Juvenile. The argument is that "the foster parent is not completely independent and disassociated from the prosecution as the foster parent is licensed by, chosen as a placement home by, and under the control of DCF, a State agency, which is akin to the Department of Corrections (not completely independent from or disassociated from the prosecution) for delinquency adjudications." Appellant's Brief at 16, In re: E.W., Juvenile (No. 2013-441)

If the parent is involved in negotiations for the child's release, assuming doing so is in the juvenile client's expressed interests, the attorney should warn the parents that their conduct and statements to the police can be used against the juvenile client's interest.

Under 33 V.S.A. § 5228, "A child charged with a delinquent act need not be a witness against, nor otherwise incriminate, himself or herself. Any extrajudicial statement, if constitutionally inadmissible in a criminal proceeding, shall not be used against the child. Evidence illegally seized or obtained shall not be used over objection to establish the charge against the child. A confession out of court is insufficient to support an adjudication of delinquency unless corroborated in whole or in part by other substantial evidence."

National Juvenile Defense Standards

So when does your representation start? According to our Defender General, Matt Valerio, some clients (in this case a hospitalized woman was approached by police in a murder investigation) are "[E]ntitled to legal services under our statute at the earliest time that a private citizen would be entitled to those services, and I have no doubt that we should be doing that work for her now. The question of the evaluation really just follows from those rights to legal representation. If we cannot use the tools to preserve her legal defenses, then it renders the legal defenses irrelevant."

This is exactly what is recommended by the National Juvenile Defense Standard 3.1, Representation of the Client Prior to Initial Proceedings. Accordingly "Counsel should seek early appointment. When representing a client prior to his or her initial hearing is possible, counsel must move expeditiously to protect the client's interests by:

a. Protecting the client from making incriminating statements or acting against the client's own interests;

b. Performing a comprehensive initial interview with the client;

c. Negotiating charging alternatives with the prosecutor; and

d. Advocating for the client's release under conditions most favorable and acceptable to the client."

Developmental research demonstrates that youth are less likely than adults to think about the future and anticipate future consequences, generally preferring smaller, immediate rewards to larger, delayed rewards. (See Laurence Steinberg et al., *Examining Differences in Future Orientation and Delay Discounting,* 80 Child Development. 28 (2009) Combined with the suggestibility of youth and their likely compliance with authority figures increases their vulnerability to police coercion.

This brings us to the National Juvenile Defense Standard 3.2, Representation of the Client in Police Custody. Briefly, immediately inform the police that client is represented by counsel, advocate for their release, and when appropriate prevent or end interrogations by police. In a private meeting area explain your role, and instruct the client, in developmentally appropriate language, not to waive rights. Lastly "Counsel must instruct the police to cease attempts to communicate with the client. Counsel must inform police that the client asserts the right to silence, refuses to consent to physical or mental examinations, and requires counsel to be present during any investigative procedures. Counsel must insist that the police notify all other officers of these directions."

Collateral Consequences

Under Act 181, after January 1, 2016 the Court shall be required to inform individuals of the various penalties and disqualifications that they face as a consequence of conviction, which includes adjudication for delinquency. Before the Court can accept a plea of guilty or nolo contendere from an individual, the Court will have to confirm that the individual received notice and had an opportunity to discuss the notice with counsel, if represented, and that the individual understands that there may be collateral consequences to a conviction. A collection of citations to Vermont's Constitution, statutes and administrative rules which impose a mandatory sanction or authorize the imposition of a discretionary disqualification, and any provision of law that may afford relief from a collateral consequence shall be made available and annually updated by the Attorney General.

Incarcerated Parents

A recent case from New Jersey, In re T.G. 2014 WL 2440978 (N.J.) 217 N.J. 527, 90 A.3d 1258 N.J., 2014 is instructive. The New Jersey Supreme Court reinstated the trial court opinion denying the petition to terminate parental rights of the father, finding that it was inappropriate based on incarceration alone. The state did not prove the four statutory requirements for termination. First the child's safety and health had to be endangered by the parental relationship. Second, the parent is unwilling or unable to provide a safe home and the delay of permanency will add to the harm. Third reasonable efforts were made to help the parent correct the conditions and fourth, that the termination will not do more harm than good.

The child was living with the maternal grandmother, and after the mother's rights were terminated, the father wanted to maintain his relationship with the child and keep his visitation rights. He spoke often on the phone with the child, but the department did little to help the grandmother with the calling expenses. Nor did the department do much to prepare the father to parent the child upon his release from prison. When the mother's rights were terminated, the father increased his level of contact with the child. The Court found that he was imprisoned for charges that lacked a sufficient bearing on his fitness to parent. The father approved of the child remaining in the grandparent's home, but the Court found that this could not be seen as a lack of willingness to reunify.

Act No. 168 is related to the rights of children of arrested and incarcerated parents. It is a first step as this issue will be studied and recommendations will be made in a report to the legislature on or before January 15, 2014. The report should include what existing services are available and the need for additional services to "develop child and family centered tools or strategies that can be used throughout the criminal justice system to mitigate unintended consequences on children" of incarcerated parents.

Additionally the report should address the issue of what the "mechanism [will be] to ensure that coordinated services are provided to children of incarcerated parents by the Department for Children and Families and the Department of Corrections."

Minor Guardianships

As of September 1, 2014 under Act No. 170 (H.581) a new statute will provide a comprehensive substantive and procedural structure for minor guardianship proceedings in Title 14 §§2621 -2634. Where DCF is involved, their policy should be that "[W]hen a child must be removed from his or her home to ensure the child's safety, the Division will pursue a CHINS procedure promptly if there are sufficient grounds under 33 V.S.A. § 5102." 14 V.S.A. § 2634(1) Under 14 V.S.A. § 2634 (2) it should be the policy of DCF that no recommendations regarding whether a family should pursue a minor guardianship be made, although referrals may be made to community-based resources for information regarding minor guardianships. "If a minor guardianship is established during the time that the Family Services Division has an open case involving the minor, the social worker shall inform the guardian and the parents about services and supports available to them in the community and shall close the case within a reasonable time unless a specific safety risk is identified." 14 V.S.A. § 2634(4)

Education Matters

Stability

VT-FUTRES partnered with the College of St. Joseph's STEPS program and the Vermont Youth Development Program to explore the experiences and opinions of transitioning and former youth in custody about their educational experiences. The resulting survey confirmed the importance of school stability. The findings concluded that:

- The number of home placements is significantly correlated with the number of school placements a child in care will attend. National studies reveal that with each change in school placement, a

child loses 6 months of educational progress
- Higher numbers of home and school placement are associated with lower ratings of teacher-student relationships
- Participants who were in college reported attending 3 fewer schools (6 vs 9) and reported 10 fewer placements (6 vs 16) on average than students who dropped out of school.

Nationally, nearly half of youth in foster care do not complete high school by age 18. Of the 100 youth who completed this survey 13% are attending college. See website for more information: http://vtfutres.org/legal-community/

Undiagnosed and Misdiagnosed Disabilities

Your juvenile client may have undiagnosed disabilities. Juvenile attorneys need to be trained to recognize the signs and symptoms of learning disabilities in the youth they represent. The semi-annual trainings we offer often focus on recognizing signs of disabilities and wrong diagnoses.

A gifted child may be misdirected to special education leading to their acting out. A child may get to juvenile court without ever having their needs appropriately assessed. An accurate evaluation can make a difference in the child's life. Common disabilities such as autism, traumatic brain injury and post-traumatic stress disorder (PTSD) can throw the child off course and, if left undiagnosed, or misdiagnosed, the child can fall through the cracks. The attorney is often the child's last resort in overcoming these hurdles. The attorney can pave the road to arranging for supports such as therapy and help with developing social skills for the child.

It is important for the child's attorney not to assume that the child doesn't need additional supports in school because the parents, for whatever reason, may have refused to have testing done, as it is their right to refuse. The attorney can emphasize the importance of the evaluation to the parents to try to get them to agree to testing, or use the court process to get the evaluation to happen, especially where the child is truant or delinquent. In the case of a delinquent child, the attorney can arrange for testing privately, and decide later whether to share the results with the other parties. Where DCF is requesting the evaluation of your delinquent juvenile client, try to make sure they are using a good professional trained in child psychology. Also, arrange to be present at the evaluation to advise your client when it might be best not to respond to avoid any admissions that might be later used against him or her. (See cover story of Child Law Practice, July 2014 Vol. 33 No. 7)