JTIP Unit VIII: Motions Practice

Lesson 20, Challenging Juvenile Statements

(3 Hours)

BEFORE YOU BEGIN

As trainers prepare for this Lesson, it is essential to read through the Coordinator and Trainer's Guide. The Coordinator and Trainer's Guide has important information, such as recommendations for facilitating sessions, strategies for using the Forensic Exercises, suggestions for organizing group work, tips for offering feedback to participants, and details about how this Lesson fits into the overall JTIP training. Also, it is important to note that this Lesson is written from a general, national perspective. Therefore, it is necessary for trainers to integrate local statutes, rules, and case law into the Lesson in advance and ensure that the Forensic Exercises and Handouts are adjusted as needed. If you have any questions or would like more information on this or other Lessons, please contact NJDC at (202) 452-0010.

Overarching Goal

Juvenile defender will understand the law and strategy of challenging the admissibility of a youth's statement.

Objectives

Juvenile defender will:

- Understand strategic reasons for seeking to suppress the client's statement, whether inculpatory or exculpatory;
- Identify state and federal Constitutional, statutory, rule-based, and common law grounds for suppressing or excluding statements;
- Consider impact of adolescent development on voluntariness of statement and capacity of child to knowingly, intelligently, and voluntarily waive *Miranda* rights;
- Discuss the research on false confessions and strategies for challenging their admission pre–trial and/or their evidentiary value during trial;

- Understand principles of law associated with interrogation in schools;
- Review evidentiary principles governing suppression hearings;
- Identify goals and practice techniques for cross-examination at hearings to suppress a statement;
- Identify and prepare appropriate witnesses and experts to aid defense case at hearings to suppress statements; and
- Prepare oral arguments for suppression hearings.

Training Materials:

- Relevant Jurisdiction Specific Statutory Law (trainer to provide)
- Forensic Exercises: Challenging Juvenile Statements
    - Part 1: Developing a Suppression Theory
    - Part 2: Developing a Cross or Direct Examination
    - Part 3: Arguing in Support of a Motion to Suppress
        - Fact Pattern
        - Case File:
            - Jonathan Lopez Voluntary Statement
            - Jonathan Lopez Client Interview
            - Interview with Jonathan Lopez's Special Education Teacher
        - Blank Suppression Theory Chart

Supplemental Materials:

- Key Case Principles for Statement Suppression and Voluntariness
- Summary of the Reid Interrogation Technique
- Sample Motion to Suppress Based on the Jonathan Lopez Case File
- False Confessions Resources:
    - R.A. Nash & K.A. Wade, *Innocent But Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 Applied Cognitive Psychol., 624-37 (2009).
    - S. M. Kassin & K. L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation,* 7 Psychol. Sci. 125-28 (1996).
    - S. M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations,* 34 Law & Hum. Behav. 3-28 (2010).
    - Brief for The Innocence Network as Amicus Curiae Supporting Defendant-Appellant, Rivera v. Illinois, 556 U.S. _____, 129 S. Ct. 1446 (2009) (No.07-9995).

Trainer's Overview

I. Introduction (10 minutes)

- The trainer should review what a statement is, how to determine what statements the client made and when to challenge them.

  A. Statement Defined (Incriminatory and Non-Incriminatory Statements)

  B. Discovery

II. Grounds for Suppressing a Statement (60 minutes)

- The trainer should engage participants in an in-depth discussion of grounds upon which to challenge statements. The discussion should include all the topics below and should incorporate local law where necessary.

  A. All Possible Grounds for Suppression or Exclusion

  B. *Miranda*

  C. Involuntariness

  D. False Confessions

III. Incorporation of Cognitive Limitations/Adolescent Development and Discussion of Possible Defense Witnesses (10 minutes)

- The trainer should discuss ways in which a youth's cognitive limitations and/or adolescent development may affect admissibility and identify potential defense witnesses who may testify for the defense based on these factors.

  A. Impact on Admissibility of a Youth's Statement

  B. Potential Defense Witnesses

IV. Forensic Exercise: Challenging Juvenile Statements (1 hour 40 minutes (30 minutes for each exercise plus 10 minutes for wrap up discussion))

- There are three parts to this forensic exercise. The trainer should distribute the Fact Pattern and Case File and inform participants that they will be representing 15-year-old Jonathan Lopez, who is charged with Possession with Intent to Distribute Cocaine. Participants should be instructed to read the materials which serve the basis of the three exercises. Detailed instructions are provided in each part of the exercise, but the following is an overview:

Part 1: Developing a Suppression Theory

- After participants have reviewed the materials they should be given 10 minutes to fill out the Blank Suppression Theory Chart by identifying statements to suppress or exclude, as well as the legal and factual theories on which to do so. The trainer will then engage participants in an interactive discussion by asking them to present their results to the group, and then use the Discussion Points (*i.e.*, completed Suppression Chart) to guide the discussion.

Part 2: Developing a Cross or Direct Examination

- Participants will be asked to prepare and execute a portion of a cross or direct examination in support of a Motion to Suppress Statements.

Part 3: Arguing in Support of the Motion to Suppress

- Participants will be asked to develop and present five minutes of an argument in support of a Motion to Suppress.
- After the three parts of the Forensic Exercise have been completed the trainer should conduct a "wrap up." The trainer should distribute the Key Case Principles for Statement Suppression and Voluntariness handout (if not already distributed as part of the Forensic Exercises). The trainer should distribute the Sample Motion to Suppress Based on the Jonathan Lopez Case File and discuss the strategic implications – *i.e.,* defense counsel may not want to be as thorough with the arguments in the pre-trial pleading so as not to give the government a preview of the defense case. However, defense counsel will want to provide enough information to educate the judge.

Trainer Notes

I. Introduction

A. Statement Defined

Note To Trainer

The trainer should engage participants in an interactive discussion by asking, "What do we mean by 'statement' when we talk about suppressing statements by our clients? Should the defender challenge statements that are not incriminating? Why would a defender move to suppress a statement that is not incriminating?" The trainer should then use the following Training Notes to guide the discussion.

- Statement: any words spoken by a defendant or respondent that the government seeks to introduce into evidence.
- A statement may even be an action by the youth if the action conveys information (*e.g.*, pointing).



Practice Tip

Defenders typically challenge statements made as a result of state action (*e.g.,* police interrogation), but the defenders may challenge other statements.

- The defender should generally challenge any statement, even if it is not incriminating.
- Seemingly innocuous or exculpatory statements may be more damaging in the context of trial than the defender can predict.
- When motions to suppress are typically due, the defender does not yet know what the defense theory will be. A client's statement may turn out to be inconsistent with the defense theory.
- Even an exculpatory statement can be used to impeach a client if he or she testifies.
- In addition, a suppression motion may serve the ancillary goals of:
    - Discovery (*e.g.,* When the government is required to file a written response to a defense pleading, the government may reveal important factual information about the case; testimony during the hearing may yield additional facts.); and/or
    - Creating a transcript for use in impeaching prosecution witnesses at trial.

B. Discovery

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "How do we know what statements our client made?" The trainer should then use the following Training Notes to guide the discussion.

- Investigation (*e.g.,* witness interviews)
- Client Interviews
- Formal and Informal Discovery: the government is generally required to disclose in discovery any statements or confessions made by the youth. The defender should object to the admission of any statements not previously disclosed in the discovery process. See local discovery rules. Unfortunately, not all states have these rules.

II. Grounds for Suppressing a Statement

Note To Trainer The trainer should engage participants in an interactive discussion by asking them to brainstorm all possible grounds for excluding or suppressing a youth's statement. The trainer should then use the following Training Notes to guide the discussion.

A. All Possible Grounds for Suppression or Exclusion

- **Fourth Amendment Issues – Fruits of an Unconstitutional Search**
  - Statements that are the "fruits" of a Fourth Amendment violation must be excluded.
  - Statements made in police custody following an unconstitutional arrest or *Terry* stop are inadmissible unless "intervening events break the causal connection between the illegal arrest [or stop] and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Brown v. Illinois*, 422 U.S. 590 (1972) (quoting *Wong Sun v. United States*, 371 U.S. 471 (1963)).
  - The defender should move to suppress pursuant to the Fourth Amendment (or Search and Seizure) provisions of both the State and Federal Constitution.

Note To Trainer Participants often miss the Fourth Amendment grounds for suppressing statements. The trainer should be sure to highlight this ground for suppression.

- **Discovery Violations**

Note To Trainer The trainer should pull and provide participants with citations for any local discovery rules that require the government to disclose statements made by the accused youth.

  - *E.g.*, D.C. Sup. Ct. R. (Juv.) 16(a)(1) and (d)(2)) - statements made by a juvenile respondent shall be disclosed upon request.

- **Violation of Local Court Rules**

Note To Trainer The trainer should pull and emphasize local rules that provide grounds for excluding statements by an accused youth. These rule-based grounds are not often raised by juvenile defenders.

  - *E.g.*, D.C. Sup. Ct. R. (Juv.) 102(c) – The government cannot use statements made by the youth during a juvenile intake interview.
  - *E.g.*, D.C. Sup. Ct. R. (Juv.) 105 E – Law enforcement officers may not interview a youth in detention unless: (a) the youth's parent, guardian or attorney is notified and provides written consent; or (b) the youth is a witness to or a victim of another crime in the facility or in transit to the facility and is not suspected of involvement in the alleged offense.
  - *E.g.*, D.C. Sup. Ct. R. (Juv.) 111 – No statement that was obtained involuntarily from a youth may be admissible against the youth in the government's case-at-chief at trial.

- **Violation of State Statutory Provisions**

Note To Trainer The trainer should pull and emphasize any state statutes that provide grounds for excluding statements by an accused youth. These statutory grounds are not often raised by juvenile defenders.

  - **Videotaping laws:** Some states require that any interview with a youth regarding a crime must be videotaped if it takes place in a police station. If the interview is not recorded, any statement made by the youth during the interview will be presumed involuntary. *See, e.g.,* D.C. Code §5-116.01 (2001) (requiring that all station-house interviews with a suspect regarding a crime of violence be recorded), §5-116.03 (presuming any unrecorded statement obtained in violation of §5-116.01 to be involuntary).
  - **Communication Impaired (deaf or foreign language):** *See, e.g.,* D.C. Code §2-1902(e) (2001) ("No answer, statement, or admission, written or oral, made by a communication-impaired person in reply to a question of a law enforcement officer may be used against that communication-impaired person in any criminal or delinquency proceeding unless the answer, statement or admission was made or elicited through either a qualified interpreter or a qualified interviewer and was made knowingly, voluntarily, and intelligently or, in the case of a waiver, unless the court makes a special finding upon proof by a preponderance of the evidence that the answer, statement or admission made by the communication-impaired person was made knowingly, voluntarily, and intelligently.")
  - **Parents:** In some states, the absence of parents during police interrogation may be grounds for excluding the youth's statement. *See, e.g.,* Conn Gen. Stat. § 46b-137 (2003); Colo Rev. Stat. §19-2-511 (2002).

- **Relevance/ Lacking Probative Value**
  - A youth's statement will not be admissible if it is not relevant or probative of any material fact in the case.

- **Unreliable**
  - Even when the judge concludes that the child's statement is voluntary as a matter of law, the fact-finder (judge or jury) can still conclude that the statement is not sufficiently reliable or voluntary to prove guilt beyond a reasonable doubt.
  - A defender may seek to preclude admission of a false confession on the basis that it is so unreliable that admission would violate due process.
  - In many jurisdictions, expert testimony regarding false confessions is admissible at trial (see section on false confessions below).
- **Statement not corroborated (*e.g.,* by physical evidence)**
- **Violates an Immunity Agreement**
- **Violates the *Miranda* Doctrine**

Note To Trainer The trainer should tell participants that they will return to a more in-depth discussion on *Miranda* shortly.

- **Involuntary Statements**

Note To Trainer The trainer should tell participants that they will return to a more in-depth discussion on involuntariness shortly.

- ***Massiah* Doctrine**
  - *Massiah v. United States*, 377 U.S. 201 (1964): The Sixth Amendment requires exclusion of statements that are "deliberately elicited" by any overt or covert government agent from an accused without a lawyer present at any time after the initiation of adversarial proceedings.
    a. Not limited to situations in which the accused is in custody.
    b. Includes statements that are made to a cooperating government informant/co-defendant.
- **Statements Obtained During a Period of Unnecessary Delay Following Arrest/*McNabb-Mallory* Rule**
  - Confessions obtained from arrested persons who are not promptly brought before a judicial officer for a determination of probable cause must be excluded. *McNabb v. United States,* 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).
  - The *McNabb-Mallory* rule is now understood to exclude confessions obtained during an unreasonably long period between arrest and the preliminary hearing.
  - Some states have statutory guidelines for the *McNabb-Mallory* rule. *See, e.g.,* D.C. Code §16-2305 (2001).

- **Statements Obtained by Eavesdropping on a Conversation between the Client and Defense Counsel**
    - Statements obtained by the government through electronic eavesdropping on conversations between an accused and his or her lawyer must be excluded. *O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam); *Black v. United States*, 385 U.S. 26 (1966) (per curiam).
- **Fabrication/Police Lies**
    - As noted earlier, even if the statement is not excluded before trial, the defender may still challenge its admission at trial.
    - Depending on the evidence, the defender can argue that the police are fabricating and that no statement was ever made by the client.

B. *Miranda*

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "For a quick review, what is the *Miranda* doctrine?" The trainer should then use the following Training Notes to guide the discussion.

- ***Miranda* Doctrine** – *Miranda v. Arizona*, 384 U.S. 436 (1966) excludes any statement made during custodial interrogation by police unless officers advise the suspect of the specified warnings of the client's rights and the client makes an effective waiver of those rights. *Miranda* is a Fifth Amendment doctrine.
    - Two exceptions to the *Miranda* requirement:
        a. Public safety exception. *New York v. Quarles,* 467 U.S. 649, 655-56 (1984) (establishing the public safety exception to the *Miranda* requirement when police officers ask questions of the suspect reasonably prompted by public safety). For example, the officer may generally ask questions like "Where is the gun?" when they first arrive on the scene and have reason to believe a gun is in the vicinity.
        b. Routine booking question exception. *Pennsylvania v. Muniz,* 496 U.S. 582, 600 (1990) (holding that police questions regarding a suspect's name, address, height, weight, eye color, date of birth and current age were not required to be suppressed because suspect had not been given a *Miranda* warning).
- **Custody**

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "How is custody defined?" The trainer should then use the following Training Notes to guide the discussion.

    - *Miranda* applies if a person is in custody "or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 384 U.S. at 444.
    - Custody is evident if the defendant is under arrest.

- The **test** to determine whether or not a person is in custody is: "whether the investigating officer physically deprives the suspect of his freedom of action in any significant way, *or* under the circumstances, leads him to believe, as a reasonable person, that he is so deprived." *Miley v. U.S.*, 477 A.2d 720, 722 (D.C. 1984) (emphasis added).
- *J.D.B. v. North Carolina,* 564 U.S. _____, 131 S.Ct. 2394 (2011) (holding age is a factor to be considered in determining whether suspect was in custody for purposes of the *Miranda* analysis).

Note To Trainer A more comprehensive summary of *J.D.B.* is contained in the "Key Case Principles for Statement Suppression and Voluntariness" handout.

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "What are some factors that suggest custody?" The trainer should then use the following Training Notes to guide the discussion.

- Number of adults present
- Number of uniformed officers
- Location of the interrogation (*e.g.,* no windows, small office, etc.)
- Handcuffs
- Length of interrogation
- Tone of voice
- Persistent interviewing or interrogation after repeated denials by the child
- Positioning of adults in the interview (*e.g.*, adults standing, child seated)
- Presence of weapons (even at the officer's waist)
- School disciplinary procedures that require the students to obey orders from a principal or other school administrators

- **Interrogation**

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "How is interrogation defined?" The trainer should then use the following Training Notes to guide the discussion.

- Interrogation under *Miranda* refers not only to express questioning, but also to any words or action on the part of law enforcement that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)

- **Knowing, Voluntary, and Intelligent Waiver**
  - Under the *Miranda* doctrine, a suspect may waive his or her *Miranda* rights, but only if the waiver is knowing, voluntary and intelligent.

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "What factors will the court look to in determining whether the child made a knowing, voluntary and intelligent waiver?" The trainer should then use the following Training Notes to guide the discussion.

a. Age of the youth

b. Use of force by the police

c. Whether *Miranda* rights were read to the youth or whether the youth read the *Miranda* rights on his or her own

d. Cognitive ability of the youth

e. Deprivation of food, bathroom, water, medicine, etc.

f. Fatigue

g. Absence of parent or neutral adult during the interview

h. Trickery and/or fabrication by the police

i. Time of day

j. Threats against parents/guardians, friends

k. Promises

l. Isolation from family, friends

- Summary on law regarding waiver

a. Waivers can be established without formal or express statements of waiver. An explicit waiver of rights is not required; an implicit waiver is sufficient to admit a suspect's statement into evidence.

b. Waiver may be "implied" through a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." If the state establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's un-coerced statement establishes an implied waiver. *See Berghuis v. Thompkins,* 560 U.S. _____, 130 S. Ct. 2250 (2010) (citing *North Carolina v. Butler,* 441 U.S. 369, 373 (1979)) (overruled 6th Circuit's decision to exclude confession when defendant confessed after three hours of interrogation, during which he had remained mostly silent; finding no reason to differentiate the requirement of an 'unambiguous invocation' of right to counsel standard identified in *Davis v. U.S.,* from the *Miranda* right to silence.)

c. *North Carolina v. Butler*, 441 U.S. at 373 (holding that defendant waived his right to counsel implicitly when he said he understood his rights but refused to sign the form saying that he understood them).

i. **But Note *Miranda* Language:** "A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Thus, it is difficult to establish waiver without an explicit written waiver. *Miranda,* 384 U.S. at 475.

ii. Although *Miranda/Butler* do not invariably require an express waiver of the right to silence or the right to counsel, the government still bears a heavy burden to show that *Miranda* warnings were given, that the accused understood the rights and the statement was not coerced. This is all still good law after *Berghuis.*

iii. **And the facts of *Butler* are distinguishable from most cases:** The suspect in *Butler* said, "I will talk to you, but I am not signing any form." So in *Butler*, there **was** an express waiver, just not one written on the *Miranda* card. *North Carolina v. Butler*, 441 U.S. at 371.

- **Role of Parents in *Miranda***
  - **Factors in Evaluating Validity of Waiver:** The presence and competence of parents are relevant considerations in gauging the validity of a child's waiver of the right to self-incrimination. *See, e.g., Gallegos v. Colorado*, 370 U.S. 49 (1962) (holding that confessions obtained from 14-year-old who had been held for five days without officers sending for his parents, ensuring that he had the advice of a lawyer or an adult friend or bringing him before a judge were obtained in violation of due process); *New Jersey v. Presha,* 748 A.2d 1108, 1110 (2000) ("courts should consider the absence of a parent or legal guardian from the interrogation area as a highly significant fact when determining whether the state has demonstrated that a juvenile's waiver of rights was knowing, intelligent, and voluntary."); *Commonwealth v. Jones*, 328 A.2d 828, 831 (Pa. 1974) ("An important factor, therefore, is whether the juvenile had access to the advice of a parent, attorney or other adult who was primarily interested in his welfare, before making a decision to waive constitutional rights.").
  - **Statutes Requiring Parents' Presence in Interrogation:** Several jurisdictions have statutes mandating parental presence during police interrogation of a youth, which provide a statutory basis for suppressing a youth's statements. *See, e.g.,* Colo Rev. Stat. §19-2-511 (2002); Conn Gen. Stat. §46b-137 (2003).
  - **Parental Notification at Arrest:** Other jurisdictions have statutes requiring that the police notify parents/guardians of a child's arrest. Violation of these notification requirements may provide a basis for suppression of the child's statements.

- **Invocation of Rights**

Note To Trainer The trainer should ask the participants to recite the *Miranda* warnings. The trainer should then use the following Training Notes to guide a discussion about invocation of rights.

Invocation of the Right to Counsel

- The suspect must unambiguously assert his or her right to counsel. The police have no obligation to clarify if the assertion is ambiguous. *Davis v. United States,* 512 U.S. 452, 459-60 (1994) (holding that accused's remark "Maybe I should talk to a lawyer" was not an assertion of his right to counsel).
- Any statement made following a suspect's request for counsel will be presumed involuntary under *Edwards v. Arizona,* 451 U.S. 477 (1981) unless there is a break in custody and the suspect has regained a "sense of control or normalcy" after he or she was first taken into custody.
    a. *Smith v. Illinois,* 469 U.S. 91, 98 (1984) (holding that if an accused invoked his or her right to counsel, courts may admit his or her responses to further questioning only on finding that he or she initiated further discussions with police and knowingly and intelligently waived the right he or she had invoked.)
    b. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (holding that police may reopen questioning of a suspect who has asked for counsel, thereby ending questioning under *Edwards*, if there has been a 14-day or more break in *Miranda* custody.)
- *See also Edwards v. Arizona,* 451 U.S. 477, 482-84 (1981) (holding that a valid waiver of rights cannot be shown simply by the defendant's response to questions after invocation of his or her right to counsel or to remain silent).

Invocation of the Right to Silence

- "If [an] individual indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent" or if he or she "states that he wants an attorney," the interrogation "must cease." *Berghuis v. Thompkins,* 130 S. Ct. at 2268 (citing *Miranda,* 384 U.S. at 473-74).
- Police must "scrupulously" honor an accused's assertion of his or her right to silence. *But see, Michigan v. Mosley,* 423 U.S. 96, 103 (1975) (citing *Miranda,* 384 U.S. at 479) (holding that a suspect's assertion of his or her right to remain silent after being read a *Miranda* warning does not preclude the police from re-*Mirandizing* him or her and questioning him or her about a different crime.); *Fare v. Michael C.,* 442 U.S. 707, 729 (1979) (holding that a youth's request to speak with his or her probation officer was not an invocation of his or her right to counsel or his or her right to remain silent, thus the statements obtained from him or her were voluntary).

- **Statements Tainted by Prior Unlawfully Obtained Statements: The "Cat Out of the Bag" Doctrine**

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "What if the client makes a statement without *Miranda* warnings, then makes a second statement after *Miranda* warnings: is the second statement admissible?" The trainer should then use the following Training Notes to guide the discussion.

- Suppression of the second statement is not automatic, but it may be suppressed if the law enforcement officer has engaged in a deliberate scheme to ask first and *Mirandize* second. *Missouri v. Seibert,* 542 U.S. 600 (2004) (holding that questioning a suspect without *Miranda* warnings and then administering the warnings and re-questioning the suspect for the purpose of obtaining an admissible *Mirandized* statement required suppression of the second statement).

- **Applicability of Adult Court Suppression Doctrines to Juvenile Court Proceedings**

  - The Supreme Court has not expressly held the *Miranda* Doctrine applicable to juvenile delinquency prosecutions, and it has not addressed the procedures or rights that do govern suppression of statements during pre-judicial stages of the juvenile process. *In re Gault,* 387 U.S. 1, 13 (1967). *See also Haley v. Ohio*, 332 U.S. 596 (1948).

  - However, the Court has recognized the logic of extending the safeguards provided in adult court to juvenile confessions and has approvingly cited case law applying adult court doctrines of statement suppression in juvenile court proceedings. *See In re Gault*, 387 U.S. 1 at 49-56.

  - Lower courts uniformly hold these doctrines applicable to juvenile court proceedings.

C. Involuntariness



Practice Tip

Voluntariness is part of the *Miranda* calculus, but it is also a separate and independent ground for suppression. There may be no *Miranda* violation (*e.g.,* the child is not in custody), but still an involuntary statement.

Note To Trainer

The trainer should engage participants in an interactive discussion by asking, "What is the legal basis for a claim of involuntariness? What is the standard for measuring voluntariness? What questions will the court ask in evaluating voluntariness? What are the factors that demonstrate involuntariness?" The trainer should then use the following Training Notes to guide the discussion.

- **Legal Basis for an Involuntariness Challenge**

  - Fifth Amendment Due Process Clause

- **Standard for Evaluating Voluntariness**

  - In evaluating involuntariness of the statement, defense counsel should consider the following questions:

    a. Did the behavior of the police constitute coercive government misconduct? S*ee Colorado v. Connelly,* 479 U.S. 157, 163 (1986).

    b. What were the effects of the police behavior on the accused's psychological state, considering the individual weaknesses and vulnerabilities of the accused? *See Mincey v. Arizona,* 437 U.S. 385, 398 (1978). Was the youth's confession the product of a rational intellect and free will?

c. Is there a tendency for the police behavior to overbear the will of someone in the accused's position and condition? *See Sims v. Georgia,* 389 U.S. 404 (1967) (holding that the State had not rebutted the presumption that a confession was involuntary when the appellant was illiterate, had limited mental capacity and alleged physical abuse, even if the appellant was warned of his rights and still confessed).

- **Factors Based on State Action**

  a. Length of interrogation;

  b. Time of day;

  c. Number of officers;

  d. Withholding of food, bathroom, water or medicine; and/or

  e. Threats against parents/guardians or friends.

     i. **NOTE:** These are the same factors listed in the *Miranda* voluntariness analysis.

- **State Action and Characteristics of the Youth Client Relevant to Voluntariness Determination**

  a. **State Action:** federal constitutional protections are triggered only by 'state action'. As a result, some form of coercive police activity is necessary to find that a confession is not 'voluntary' within the meaning of the Due Process Clause.

  b. A claim of involuntariness for Fourteenth Amendment due process cannot be based solely on the personal frailties of a suspect. *See Colorado v. Connelly,* 479 U.S. 157 (holding that while the defendant's mental condition is a factor to be considered, police coercion is necessary to find that a confession was involuntary within the meaning of the Due Process Clause).

  c. However, in a "totality of the circumstances" approach that determines the voluntariness of a statement, the Supreme Court has recognized that the personal characteristics of a suspect may render him or her particularly vulnerable to coercion.

  d. Examples of these characteristics include:

     i. Youth, *see In re Gault,* 387 U.S. 1 at 45; *Haley v. Ohio,* 332 U.S. 596.

     ii. Mental illness, *see Colorado v. Connelly,* 479 U.S. 157.

     iii. Mental retardation, *see id.*

     iv. Mental condition, *see id.*

     v. Limited intellect, *see Culombe v. Connecticut,* 367 U.S. 568 (1961); *Sims v. Georgia, 3*89 U.S. 404.

     vi. Limited education, *see Fikes v. Alabama,* 352 U.S. 191 (1957).

     vii. Illiteracy, *see Culombe v. Connecticut,* 367 U.S. 568 (1961).

     viii. Prior Experience with Law Enforcement, *see Yarborough v. Alvarado,* 541 U.S. 652, 667-68 (2003).

     ix. Injury, *see Mincey v. Arizona,* 437 U.S. 385.

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "Who has the burden? And what is the burden of proof in evaluating voluntariness?" The trainer should then use the following Training Notes to guide the discussion.

- **Burden and standard:** If the defense claims that a client's statement was "involuntary" under due process principles, the prosecution bears the burden of proving by a preponderance of the evidence (and, in some jurisdictions, by proof beyond a reasonable doubt) that the statement was voluntary.

- **School Cases: Applicability of the Involuntariness Doctrine to Coercion by School Officials**
  - The Supreme Court has not considered the applicability of the involuntariness doctrine to the school setting, but the logic of the Court's decisions has strongly suggested that the doctrine does apply to coercive action by principals, teachers and other school officials. *See e.g., New Jersey v. T.L.O.,* 469 U.S. 325 (1985) (holding that search of a student's purse after she was caught smoking marijuana on school grounds was reasonable under the Fourth Amendment).

- **Role of Parents in Involuntariness Determination**
  - **Parental Presence:** The assessment of the voluntariness of a juvenile's statement should take into account the presence or absence of the child's parent or other concerned adults during police interrogation. *Gallegos v. Colorado,* 370 U.S. 49 (1962).
  - **Parental Coercion:** Often parents/guardians will pressure the child into confessing to the police. Coercive activity by a private citizen is not 'state action' that will trigger the due process doctrine of involuntariness.
    a. However, if there is evidence that the parent/guardian was used by law enforcement officers or became an agent of law enforcement, then there may still be state action.

- **Statements Tainted by a Prior Statement Taken in Violation of the Due Process Clause**

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "What if the client makes a statement that was involuntary and then makes a second statement that on its face appears voluntary: is the second statement admissible?" The trainer should use the following Training Notes to guide the discussion.

- When a prior statement is actually coerced or obtained through means that raise Fifth Amendment or Due Process violations, "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether the coercion has carried over into the second confession." *Oregon v. Elstad*, 470 U.S. 298 (1985).

D. False Confessions

Note To Trainer

The trainer should engage participants in an interactive discussion by asking, "Are false confessions common? Are juveniles more susceptible to falsely confessing? What factors contribute to false confessions?" The trainer should then use the following Training Notes to guide the discussion.

- **Statistics**
  - A 2010 study found that 31.1% of 103 wrongful juvenile convictions were the result of false confessions. Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth,* 62 Rutgers L. Rev., 587 (Summer 2010)
  - Forty of 250 DNA exonerations involved false confessions. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010)
  - In Illinois, a leader in wrongful convictions, 52.9% of the 104 exonerations were based in whole or part on false confessions. Rob Warden & Ron Fredrickson, *The Role of False Convictions in Illinois Wrongful Conviction Cases,* Northwestern Law, (Mar. 15, 2012), https://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/FalseConfessionsStudy.html
  - Of the 873 exonerations in the United States documented as of March 2012, 16% were the result of false confessions; 76% of false confessions occurred in homicide cases. Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations,* Univ. of Mich. Law (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf
  - In cases resulting in exonerations, juveniles were five times as likely to falsely confess as adults without mental disabilities; adults with mental disabilities were nine times as likely to confess as adults without such disabilities. *Id.*
  - Juveniles have a heightened risk for falsely confessing, as it is estimated that at least 70.4% of youth in the juvenile justice system meet the criteria for at least one mental health disorder. See Jennie L. Shufelt & Joseph J. Cocozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study,* Nat'l Ctr. on Mental Health and Juvenile Justice, (June 2006), http://www.ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf; *see also*, Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C.L. Rev 891 (2004) (noting that juveniles are over-represented in false confession cases).
- **Types and Causes of False Confessions**

  There are three types of false confessions:
  - **Voluntary:** a person confesses absent any type of external pressure; a person may falsely confess for various reasons such as because he or she wants fame, is shielding the guilty party (*e.g.*, older gang member tells juvenile to take the blame) or is mentally ill.
  - **Coerced-compliant:** a suspect confesses in order to escape an adverse situation, secure a promised benefit or avoid a threatened harm.

- **Coerced-internalized:** the subject comes to believe he or she is guilty of a crime (this frequently occurs in cases where the subject is mentally ill or under extreme duress).

- **Interrogation Techniques**
  - Officers use a variety of interrogation techniques. Generally an interrogation involves both "Maximization" and "Minimization."
    a. Maximization is typified by scare tactics used to motivate a suspect to confess, such as: overstating the strength of the case against a suspect; interrupting denials; accusing the suspect of lying; and utilizing false evidence ploys (*e.g.,* "We have talked to numerous witnesses who place you at the crime" or "Your co-defendant is laying this on you.").
    b. Minimization allows the suspect to "save face." Techniques are used to motivate the suspect into confessing by conveying the interrogator's absolute certainty of the suspect's guilt: moral excuse (*e.g.,* stole because hungry) or legal excuse (sex was consensual, crime was impulsive, shot in self-defense, etc.).
       i. Problems: the techniques are coercive; police cannot detect deception, and innocent persons will also confess.
  - **The Reid Interrogation Technique** is used by many law enforcement personnel. Established in 1962, training on the technique began in 1974. Since that time, over 500,000 professionals in law enforcement have been trained to use the Reid Technique over the previous three decades. *See* JOHN E. REID & ASSOC., http://www.reid.com (last visited June 27, 2012).

Note To Trainer Additional information about the Reid Interrogation Technique can be found in the Summary of the Reid Technique handout in the Supplemental Materials.

    a. The Reid Technique involves nine steps.
    b. Attorneys should become familiar with the techniques used and their attendant dangers, as well as the dangers of departing from the technique.
    c. Many police officers will not admit to having been trained in the Reid Technique. However, attorneys can explore whether the officers in fact follow the nine steps through cross-examination.

- **Common Errors in Interrogations:** Experts examining false confessions have identified the following errors made by police in obtaining confessions.
  - **Misclassification errors**
    a. Misclassification of innocent suspect as guilty
    b. Misclassification of non-verbal behaviors: The *truthful suspect* is upright; is open and relaxed; leans forward on occasion; is frontally aligned with the interviewer; adopts a casual posture change. The *deceptive suspect* retreats from the investigator; slouches; has a frozen or barriered posture or non-frontal alignment; engages in erratic and rapid posture changes; slumps his head and body. Critics say that there is no basis for these interpretations.

c. Misclassification of suspect's attitudes: The *truthful suspect* is composed; concerned/realistic; cooperative; direct/spontaneous; open/helpful; sincere; confident. The *deceptive suspect* is overly anxious; unconcerned/unrealistic; uncooperative/defensive; guarded/evasive/hesitant; rationalizing/unhelpful; insincere; defeated. Critics say that there is no basis for these interpretations.

- **Coercion errors:** Police coerce a person into confession. "Low-end" coercion involves appeals to conscience, decency, religion, morality, etc. "High-end" coercion includes promises of leniency/threats of harm. "Middle-end" motivators are systemic inducements ("Put yourself in the shoes of the prosecutor or judge. Who would you rather have in front of you: someone who cooperates or someone who doesn't?"). Coercion errors can also be caused by use of maximization and minimization techniques; false evidence; deprivation of food, water, sleep, bathroom; threats of harm to the suspect or someone the suspect cares about; and physical abuse.

  a. Contamination error can occur when the investigator suggests details to the suspect; uses leading questions; plays on the suspect's memory; shows the suspect the crime scene and/or photos; and/or relies on media facts.

Note To Trainer The trainer should engage participants in an interactive discussion by asking, "Are false confessions admissible? What steps can a lawyer take to challenge a false confession pre-trial and during trial?" The trainer should then use the following Training Notes to guide the discussion.

- **Admissibility of False Confessions**

  - There are no reported cases where a court has held that it violates the Constitution to admit a false confession that is otherwise admissible into evidence.

  - However, courts have increasingly acknowledged the phenomenon of false confessions. *See Corley v. United States,* 556 U.S. 303, 321 (2009) (noting the "mounting empirical evidence that [] pressures can induce a frighteningly high percentage of people confessing to crimes they never committed."); *J.D.B. v. North Carolina,* 564 U.S. _____, 131 S. Ct. 2394, 2397 (2011) (same and further noting that the risk of false confessions "is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile"; and *Commonwealth v. DiGiambattista,* 813 N.E.2d 516, 524-25 (Mass. 2004) (citing various law review articles on false confessions, in the course of declaring a defendant's confession to have been involuntary under the circumstances).

  - Defenders may attempt to obtain a pre-trial ruling excluding a false confession based on the grounds that admission would violate due process or that the statement is so unreliable that it lacks probative value.

  - The most common challenge to false confessions is through cross-examination and/or presentation of affirmative evidence at trial.

- **False Confession Experts**

  The most common expert in false confession cases is a psychologist. There are two principal approaches taken by these experts:

  - The **Medical Model** involves a psychologist conducting an individualized assessment of a youth through a series of tests and other assessments to determine the youth's vulnerability to coercion and/or suggestion.

  - The **Social Psychologist** will often testify as to how police interrogation tactics can lead to false confessions. While these experts review all records and may conduct interviews, they do not necessarily meet or test the client.

  - Various federal and state courts have accepted expert sociological and psychological testimony regarding false confessions, acknowledging that such evidence is a significant element of any deliberation upon a verdict. For example:

    a. *United States v. Hall*, 93 F.3d 1337, 1341-45 (7th Cir. 1996) (noting that expert testimony on social science topics like the phenomenon of false confessions can potentially demonstrate to jurors that their "commonly held beliefs," such as that a person would not confess to a crime he or she did not commit, "are in error"), *remanded to United States v. Hall*, 974 F. Supp. 1198, 1203-06 (C.D. Ill. 1997) (explicitly noting that the particular field of social psychology involving the coercion techniques used in police interrogations was sufficiently developed to constitute a reliable body of scientific knowledge under the Federal Rules of Evidence);

    b. *People v. Page,* 2 Cal. Rptr. 2d 898, 909-12 (Cal. Ct. App. 1991) (noting that the reason for admission was, as the trial court explained to the jury, because "most of us have not had exposure to …certain investigations that have been made in the behavioral sciences . . . as a background consideration that you can use in evaluating the testimony in this case …");

    c. *Miller v. State,* 770 N.E.2d 763, 770-74 (Ind. 2002) (noting that the psychology of police interrogations and false confessions is a "topic[] outside common knowledge and experience").

  - Reviewing courts have held that exclusion of a false confession expert constituted reversible error. For a list of such cases, see footnote 6 of Innocence Network Amicus Brief in *People v. Juan Rivera*, available at https://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilRiveraSummary.html and included in the Supplemental Materials.

- **Developing corroborating evidence of the false confession**

  - **Investigate the client:** Collect records that show vulnerabilities (*e.g.,* school, mental health, dependency).

  - **Investigate the officers** to determine whether they are alleged to have engaged in misconduct/obtained false confessions in past: subpoena disciplinary file; search criminal cases; search civil records; subpoena/FOIA request training materials and regulations/rules governing interrogations and/or dealing with youth.

  - **Get educated** on police interrogation methods; local police trainings/protocols; local police seminars; and scientific literature.

III. Incorporation of Cognitive Limitations/Adolescent Development and Discussion of Possible Defense Witnesses

A. The Impact on Admissibility of a Youth's Statement

- **Cognitive Limitations:** Adolescents' ability to think and reason is still developing, and their cognitive capacities do not resemble those of adults until around the age of 16. Consequently, for many adolescents, the ability to understand, reason, and appreciate the significance of *Miranda* warnings may be impaired.
    - Grisso's research on adolescents' understanding, reasoning, and appreciation of *Miranda* rights indicates that adolescents, particularly younger adolescents and those with an IQ below 80, are less likely to understand *Miranda* warnings and appreciate the significance of those warnings. *See* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis,* 68 Calif. L. Rev. 1134, 1143-66 (1980). Grisso found:
        a. Adolescents under 15 were significantly less likely to meet the adult norm for comprehension and appreciation of *Miranda* rights when compared with adults.
        b. As a class, 15- and 16-year-olds with an IQ below 80 did not meet the adult standard of comprehension, nor was their comprehension comparable to same-aged peers.
        c. Understanding of *Miranda* warnings was unrelated to a youth's prior justice system experience.
- **Psychosocial Immaturity and Susceptibility:** Other characteristics of youth, apart from the limitations in understanding and reasoning mentioned above, may influence a youth's decision-making and subsequently the extent to which youth are more vulnerable to coercion. This may impact the voluntariness of a *Miranda* waiver, as well as the voluntariness of confessions.
    - Research demonstrates youth tend to be more impulsive and weigh risks differently than adults, more often preferring short-term benefits over consideration of long-term consequences. *See* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28 (2009); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764 (2008).
        a. Youth may be less likely to consider the long-term consequences of a decision to waive *Miranda* or less likely to consider the implications of making a confession to the police.
    - Research demonstrates that younger adolescents may be more susceptible than older adolescents or adults, more compliant with requests from adults and authority figures and more likely to respond cooperatively to negative feedback. *See* Thomas Grisso et al. *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants,* 37 Law & Human Behav. 333 (2003); Gisli Gudjonsson, Psychology of Interrogations and Confessions (2003); *see also* Allison Redlich & Gail Goodman, *Taking Responsibility for an Act not Committed: The Influence of Age and Suggestibility,* 27 Law & Hum. Behav. 141 (2003).
        a. As a result, youth are more vulnerable to coercion when deciding to waive *Miranda* or confess to the police.

Note To Trainer See lesson on *Adolescent Development* for additional insights on how development can impact the delinquency case.

B. Potential Defense Witnesses

- Defense witnesses may testify for the defense, and/or documents may be admitted in support of a suppression theory based on cognitive limitations and/or adolescent development.

Note To Trainer The trainer should engage participants an interactive discussion by asking them to identify any potential defense witnesses who may testify for the defense or any documents that may be admitted for the defense regarding the admissibility of the youth's statement. Participants should pay particular attention to ways in which the youth's cognitive limitations and general theories of adolescent development may affect the admissibility of a youth's statement. The trainer should then use the following Training Notes to guide the discussion.

  - Expert in false confession
  - Special education teacher
  - Counselor/Teacher/Principal who could testify to youth's cognitive limitations
  - Psychologist

IV. Forensic Exercise: Challenging Juvenile Statements

Note To Trainer

There are three parts to this forensic exercise. The trainer should distribute the Fact Pattern and Case File and inform participants that they will be representing 15-year-old Jonathan Lopez, who is charged with Possession with Intent to Distribute Cocaine. Participants should be instructed to read the materials which serve the basis of the three exercises. Detailed instructions are provided in each part of the exercise, but the following is an overview:

Part 1: Developing a Suppression Theory

- After participants have reviewed the materials they should be given 10 minutes to fill out the Blank Suppression Theory Chart by identifying statements to suppress or exclude, as well as the legal and factual theories on which to do so. The trainer will then engage participants in an interactive discussion by asking them to present their results to the group, and then use the Discussion Points (*i.e.,* completed Suppression Chart) to guide the discussion.

Part 2: Developing a Cross or Direct Examination

- Participants will be asked to prepare and execute a portion of a cross or direct examination in support of a Motion to Suppress Statements.

Part 3: Arguing in Support of the Motion to Suppress

- Participants will be asked to develop and present five minutes of an argument in support of a Motion to Suppress.

Note To Trainer

After the three parts of the Forensic Exercise have been completed the trainer should conduct a "wrap up." The trainer should distribute the Key Case Principles for Statement Suppression and Voluntariness handout (if not already distributed as part of the Forensic Exercises). The trainer should distribute the Sample Motion to Suppress Based on the Jonathan Lopez Case File and discuss the strategic implications – *i.e.*, defense counsel may not want to be as thorough with the arguments in the pre-trial pleading so as not to give the government a preview of the defense case. However, defense counsel will want to provide enough information to educate the judge.

FACT PATTERN

Charges: Possession with Intent to Distribute Cocaine

Your investigation has uncovered the following facts:

On April 11, YR-0 someone reported to East High's principal on an anonymous tip line that a male was trying to sell small bags of white powder that appeared to be cocaine under the bleachers in the gym.

During his free period, while standing by the bleachers, your client Jonathan Lopez, a 15-year-old sophomore, was approached by a teacher, the school principal and a uniformed School Resource Officer. The School Resource Officer (Officer Adams), who is employed by the local police department and stationed in the school, demanded that Jonathan empty the contents of his pockets. Jonathan complied. He had a small bag of what appeared to be cocaine in the right pocket of a school gym uniform jacket. The jacket is the same jacket all the students wear during gym class. After taking the bag, Officer Adams told Jonathan to sit on the lowest level of the bleachers. Officer Adams stood directly in front of Jonathan, and the teacher and principal each stood on opposite sides of the officer. Officer Adams told Jonathan that he was investigating the drug problem that had been reported at the school recently, and that given Jonathan's presence by the bleachers and the bag of powder, he may know something about it.

The following conversation took place between Jonathan and the officer while the principal and the teacher looked on:

Jonathan: "I don't know anything about selling no drugs in this school."

Officer Adams: "Who said anything about selling drugs? I'm talking about this bag."

Jonathan: "It's not mine. This is not my jacket. I borrowed it from a friend, because I forgot mine."

Officer Adams: "Your girlfriend seems to be telling us something different."

Jonathan: "We've been fighting. Anything she says, she's lying. It's not mine and I don't deal."

Officer Adams asked Jonathan to come with him to the principal's office and led him there by the shoulder. The principal's office is a small office with two chairs and a desk. When Jonathan entered the office with Officer Adams and the principal, there was a second uniformed School Resource Officer (SRO 2) waiting with Jonathan's girlfriend, Sabrina. Sabrina was apparently very angry and emotional. Officer Adams asked Sabrina if Jonathan was the one who had been selling drugs at the school. Sabrina looked directly at Jonathan and said, "Yes." Jonathan replied with a curse word and yelled at his girlfriend that he "hadn't done anything in months and it was Mark that was the drug dealer."

Officer Adams excused Sabrina (and SRO 2) and told Jonathan that it would be easier for him if he just told the truth because "there will be less trouble that way." Jonathan continued to deny knowledge of the drugs and asked to call his father. Without responding to Jonathan's request, Officer Adams questioned Jonathan for about another hour. The principal remained in the office but did not question Jonathan himself. At the end of the hour, the following exchange occurred:

Officer Adams: "So, son, you need to tell us about these drugs. I am trying to help you."

Jonathan (after some minutes of silence): "I don't want no trouble. I had a small bag of stuff that I was holding for my friend 'till he came back. I wasn't going to do nothing with it."

Officer Adams: "Okay, son. You want anything. A soda, maybe? I think you need a break."

After about 20 minutes, Officer Adams came back in the office and placed Jonathan in handcuffs and led him out of the office. Jonathan again asked if he could use a phone to call his father and let him know what was happening. Officer Adams said they would call his father "soon." Officer Adams placed Jonathan in the back of his squad car and drove him to the police station.

At the station, Officer Adams turned Jonathan over for processing. The booking officer asked Jonathan for his address and phone number. Jonathan repeated his request to call his father since he was supposed to meet him after school, but the booking officer did not respond. A few minutes later, another officer (Officer Jones) came by the booking officer's desk, reviewed the paperwork that the officer had just filled out, and then led Jonathan into an interrogation room for "a talk." Officer Jones asked Jonathan if he could read and then handed Jonathan a *Miranda* rights card. The officer did not ask Jonathan to read out loud. After watching Jonathan look at the form, Officer Jones asked him if he understood his rights. Jonathan did not respond and did not sign the card. A second later, Officer Jones said, "I'm just going to ask you the same questions that the School Resource Officer asked you. Just like before. All you have to do is tell the truth, just like before."

In a short written statement (attached), Jonathan repeated almost exactly what he previously told Officer Adams at the school.

Jonathan then stopped talking and said that he wanted to talk to his father and a lawyer before he talked any more. Officer Jones brought Jonathan the phone and left the room, closing the door behind him. Unbeknownst to Jonathan, Officer Jones turned on an intercom in his room and listened to Jonathan's side of the conversation with his father.

Jonathan: "I swear to you dad…I haven't done any drugs in months. This was just one bag and it wasn't even mine…Yes, they always deal drugs down there. Mark asked me to keep it and sell it, but I wasn't gonna do nothing today!"

Jonathan was detained overnight and brought before the magistrate judge for an arraignment the next morning. You were appointed as Jonathan's counsel. Despite your best efforts, given the recent publicity regarding drugs in the local school system, the judge ordered that Jonathan remain in detention pending his trial date.

Exactly two weeks after Jonathan was detained, Jonathan's pre-trial probation officer (PO Crone) went to meet with him in the detention facility along with a police detective from the youth division (Det. Martin). The detective told Jonathan that he was not there to talk about Jonathan's drug charge, but advised him that his girlfriend had accused him of rape. The detective advised Jonathan of his *Miranda* rights.

Jonathan became visibly upset and dropped his head on the desk. Jonathan did not say a word for the next two and a half hours despite the persistent questions and pestering by the detective and PO. Neither the detective nor the PO called, or offered to call, Jonathan's parents. Jonathan did not ask them to call his parents. The detective told Jonathan that he would never get out of detention if he didn't tell the truth about his girlfriend's accusations. After two and a half hours of trying unsuccessfully to get him to answer questions about the allegation of rape, the detective said, "So your girlfriend has accused you of selling drugs and now of rape. Why would she do that?"

Jonathan looked up and said, "I was selling drugs, but I didn't rape her!"

CASE FILE: JONATHAN LOPEZ VOLUNTARY STATEMENT

Date: April 11, 2011 **Start Time:** 3:42pm **Place:** Sunnydale Police Department

I, the undersigned, Jonathan Lopez am 15 years of age.

WARNING: Before you are asked questions, you must understand your rights.

I, Officer Jones, a person who has identified himself as a Sunnydale officer, warn you that:

1. You have the right to remain silent.
2. Anything you say can be used against you in either juvenile or adult court.
3. You have the right to the presence of an attorney.
4. If you cannot afford an attorney, one will be appointed before questioning.

WAIVER: I have read this statement of my rights and I understand what they are. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

I had some drugz but I not gonna sell em to noone. My freind gave em to me and I was gonna hole em til later.

I have read this statement consisting of 1 page(s) and I affirm that the facts contained therein are true and correct.

This statement was completed at 4:25 am/pm on the 11th day of April , YR-0 .

WITNESSES: Officer Jones

TIME: 4:25 p.m.

PLACE: Sunnydale Police Department

Signature of person giving statement: *Jonathan Lopez*

JONATHAN LOPEZ CLIENT INTERVIEW

MEMORANDUM (PRIVILEGED AND CONFIDENTIAL)

To: J Lopez File

From: Rebecca Smith, Juvenile Defense Attorney

Date: April 28, YR-0

Re: Summary of Client Interviews – JONATHAN LOPEZ – Age: 15, Birthdate: 1/23/YR-15

I have met Jonathan in the Sunnydale Detention Facility on three occasions. The first time I saw him, on April 12, he was visibly upset and kept saying that he didn't deserve to be in the facility because he had done nothing wrong. I saw him again on 4/21 just to check in and update him on the progress of the investigation and the case in general. He had calmed down since the last visit, but was really anxious to get out of detention. The third time I saw him was on April 27, after I learned that the police had visited him in the detention center. He was really upset during this visit. I was accompanied by Brian Sampson on this third visit. This memo summarizes what I learned during these visits.

Client Background

Jonathan lives with his father, who works long hours at a garage in town. Jonathan has no siblings and spends most of his time with his friends and girlfriend. His mother left the country some years ago, and they speak on the phone infrequently. He and his father do not always get along, because he thinks that Jonathan hangs out with bad friends who have gotten Jonathan into trouble at school, including drugs. Jonathan says that sometimes he stays out late with his friends, which makes his father mad. He has no other relatives with whom he is close.

He says he attends school most days, but months ago when he was hanging out with a different group he would always skip school to hang out with his friends. He has routinely gotten detention and has been suspended twice for getting into fights at school with his former friend Mark (more about Mark below). He is a special education student. His grades are below average. Aside from football, he is not involved in any extracurricular activities. He used to work with his father at his garage to help out his dad, but he has not done so since the beginning of the school year.

Jonathan was very defensive and sometimes would not answer my questions. Other times, he gave very limited answers that were hard to make out.

Drug Case

Jonathan says that on April 11, the day he was arrested, he was just standing by the bleachers. He was holding a bag of cocaine that belonged to a boy named Mark who used to be Jonathan's best friend. Recently he has had a contentious relationship with Mark. Mark is upset because Jonathan started dating Mark's ex-girlfriend, Sabrina. On this particular day, Mark had approached Jonathan to say that he wanted them to be cool again after everything that had happened. Jonathan said that Mark is a drug dealer and that he wanted Jonathan to deal for him again. Jonathan refused to deal more drugs, but he wanted to be friends with "his boy" Mark. Mark tried to get him to sell a small bag of what was likely cocaine that day, but Jonathan said that he told Mark he didn't want to deal. However, he did accept the bag Mark gave him to avoid getting into an argument when it seemed like they were working things out. He maintains that he was not doing anything by the bleachers except hanging out.

Jonathan was insistent that he was just hanging out by the bleachers, but admitted that other people, including Mark, may have been selling stuff there since everyone at school knew that it was the place to go when you wanted to buy or

sell drugs. He said that the School Resource Officer first took him to the school office and then to the station. He said no one else was taken in with him. He said that he was there the whole day. He does not remember much about being at the police station, because he hadn't slept the night before, and he had been drinking behind the bleachers with his friends that morning.

He does not remember the officers at the station reading him his rights or telling him about them. He remembers asking to speak to his father and the officer leaving the room while he did so (on the phone). After speaking to his father, the officer returned to the room, and Jonathan told him about his relationship with Mark and told the officer again that he wasn't doing anything by the bleachers and was just holding the bag for a friend.

I showed Jonathan the statement he wrote. He looked at it and didn't say anything. I read it to him, and he seemed surprised. I don't think he understands or remembers what he wrote or read on the Statement Form. He said that the officers were really convinced that he had been selling drugs, so he just wrote something so that "he could go home."

Sexual Assault Case (3rd interview)
When I met with Jonathan again on April 27, YR-0, he was even more upset than he was in the first interview. Jonathan believes that this is all a part of Mark's effort to get back at him. He said that Mark has befriended Sabrina again and believes that Mark made the anonymous tip that the school received and put his "ex" up to all of these lies.

Jonathan said that the rape charge is completely false. He and Sabrina had sex more than once, but he says that she was the one that wanted to do it, and she was always into it. He just wants to go home and is done with Sabrina.

Jonathan said that after he had been in detention for two weeks, his probation officer came to visit him, along with a detective. This was the first time he was told about the rape charge that his girlfriend filed against him. He reiterated his belief that this whole thing is a set-up by Mark and insisted that none of it is true. He also said that he told some guys in detention about his sexual adventures with Sabrina and guessed that someone might have said something when they got back to school, which would have made Sabrina mad. He said that he worries that everyone will believe Sabrina. He said that the police brought up the drugs again at the end of the interview.

INTERVIEW WITH JONATHAN LOPEZ'S SPECIAL EDUCATION TEACHER

ADA WHITFIELD, JONATHAN'S SPECIAL EDUCATION TEACHER

Because you recognize that Jonathan's cognitive limitations affected his interactions with the police, you collect Jonathan's school records and decide to interview Jonathan's special education teacher. You learn the following:

Ada Whitfield is a teacher with 30 years' experience in both middle and high schools. For the last 12 years, she focused her career on working with special education students. For the last three years, she has served as the Director of East High's Special Education Program, which serves around 30 students with special education needs. The program centers on increased individual attention for the students, and they have a teacher-student ratio of 1:6.

Jonathan Lopez is a 15-year-old sophomore enrolled in East High's Special Education Program. Upon his intake exam, it was determined that he had an IQ of 68 and that he lagged behind his peers considerably in basic reading and writing skills. When Jonathan started school a year and a half ago, his father confirmed that a dyslexia screening test conducted by the Sunnydale School District revealed that Jonathan is dyslexic. Jonathan is currently under-performing in

both Reading and Mathematics and generally completes 50% or less of his class assignments with low accuracy rates of around 25%. He has trouble understanding many of the lessons and assignments in his classes and needs intensive support from school staff on a daily basis.

Jonathan's school attendance has always been spotty, and he has received several detentions for disciplinary problems. He has consistently failed the majority of his classes except physical education, but has always been promoted to a higher grade. He has been suspended twice for getting into fights on school grounds. He has never been involved in any extracurricular activities, except football.

Jonathan usually appears to be frustrated by his dyslexia, and he has trouble relating to his peers because of his lower intellectual functioning. He can sometimes be very defiant and has been known to make inappropriate sexual comments to female members of his class. There have been a few incidents where Jonathan has threatened to hit a member of the Special Education staff. Ms. Whitfield stated that they have tried to manage Jonathan's academic progress and behavior with increased individual attention, incentives and parent conferences, but these have had little-to-no impact on his grades or his behavior. She said that it appears that Jonathan's father is becoming increasingly frustrated by Jonathan's lack of progress.

PART 1: DEVELOPING A SUPPRESSION THEORY

Note To Trainer

After participants have reviewed the materials they should be given 10 minutes to fill out the Blank Suppression Theory Chart by identifying statements to suppress or exclude, as well as the legal and factual theories on which to do so. The trainer will then engage participants in an interactive discussion by asking them to present their results to the group, and then use the Discussion Points (*i.e.*, completed Suppression Chart) to guide the discussion.

DISCUSSION POINTS

Note To Trainer

The trainer should take 15-20 minutes to solicit participant feedback and lead a discussion on legal and factual theories of suppression. During the discussion, the trainer should explore reasons to seek exclusion or suppression of each statement, including exculpatory statements and statements of denial.

If time for the breakout is limited, the trainer should ask the participants to first identify each statement that can be suppressed, but then select only one or two for the more intensive discussion on the reasons for exclusion and subsequent exercises.

SUPPRESSION THEORY CHART

Cursory Answer Grid for Trainer with Suggested Lines of Cross-Examination

Please see written motion to suppress statement for additional law and analysis

Statement	Defense Theory/Arguments	Government Arguments
1. At school: interview by the bleachers. i. "I don't know anything about selling no drugs in this school." ii. "It's not mine." iii. "We've been fighting. Anything she says, she's lying. It's not mine and I don't deal."	• Fourth Amendment violation (No reasonable articulable suspicion to stop based on unreliable anonymous tip) • *Miranda* violation → custodial interrogation: Jonathan's subjective/ objective belief that he was not free to leave, even if on bleachers. • Custody in school context; age considered as a factor. *See, e.g., J.D.B. v. North Carolina,* 564 U.S. _____, 131 S.Ct. 2394 (2011) • Not voluntary (uniformed officers and school officials hovering)	• Non-custodial • Volunteered statements, officer was not interrogating him. • Officers had reasonable grounds to stop in school context - *T.L.O.*

Facts in Support Suggested (but not exclusive!) Lines of Cross/Direct	Potential Witness(es)
• Anonymous tip – no details re: name of alleged seller or caller, age of seller or caller, physical description of alleged seller; no time frame for alleged sales; possibility that tip was a set up ("Mark" is the real seller, etc.); reported site for alleged sales *under* bleachers; • JL *next to* the bleachers, no suggestion that being in the gym is against school rules • JL approached by three authority figures (teacher, principal, SRO) • SRO = police officer • JL searched without consent at beginning of encounter • JL wearing uniform gym jacket identical to that of his peers • JL surrounded by authority figures • JL otherwise alone • JL not told he could leave • SRO standing directly in front of JL • JL interrogated in this environment • JL interrogated w/o *Miranda* warnings or parental consent • SRO told JL girlfriend suggested JL involved with selling drugs • JL informed SRO that girlfriend had a motive to lie	• Officer Adams • Principal • Teacher • Jonathan (rarely will you want to call client at pre-trial hearing)

Statement	Defense Theory/Arguments	Government Arguments
2. At school: interview inside the principal's office with girlfriend present i. "I hadn't done anything in months and it was Mark that was the drug dealer."	• Fourth Amendment Violation • *Miranda* violation →Jonathan still in custody since he is being led at the shoulder by the officer. • *Rhode Island v. Innis* →Should have known that a girlfriend's accusation would elicit a response from JL • Statement involuntary due to youth, limited intellect. The Supreme Court has not considered the applicability of the involuntariness doctrine to the school setting, but the logic of the Court's decisions has strongly suggested that the doctrine does apply to coercive action by principals, teachers, and other school officials. *See e.g., New Jersey v. T.L.O.,* 469 U.S. 325 (1985).	• Jonathan is not being interrogated here. • No custody. • Voluntary statement in response to his girlfriend's answer. • School context requires only reasonable standard, but even if more required, the officers had probable cause after the drugs found in jacket.
3. School: interview in principal's office. i. "I don't want no trouble. I had a small bag of stuff that I was holding for my friend 'til he came back. I wasn't going to do nothing with it."	• Fourth Amendment • *Miranda* violation – no warnings • Involuntary Statement	• No custody

Facts in Support Suggested (but not exclusive!) Lines of Cross/Direct	Potential Witness(es)
• SRO escorted JL to principal's office – w/hand on shoulder • Principal's office is small – two chairs and a desk • At time of second interrogation, JL in office with two SROs, principal and accuser • Accuser = girlfriend • Girlfriend appeared to be in custody, too • Girlfriend's demeanor was angry, emotional • Girlfriend questioned in front of JL (her response was likely to elicit statement from JL) • At the time of his statement, JL's demeanor was angry and emotional (cursed, yelled)	• Officer Adams • SRO 2 • Principal • Sabrina • (Jonathan)
• After girlfriend excused from the office, JL alone with two SROs and principal • SRO continued to interrogate JL for another hour – still no *Miranda* warnings • SRO suggested he was trying to help JL, called him "son" • *After* JL gave the "confession" SRO was looking for, SRO rewarded JL with a break and a soda • JL's two requests to call his father were put off	• Officer Adams • SRO 2 • Principal • Jonathan

Statement	Defense Theory/Arguments	Government Arguments
4. In station: written statement after *Miranda* warnings i. "I don't want no trouble. I had a small bag of stuff that I was holding for my friend 'til he came back. I wasn't going to do nothing with it."	• Fourth Amendment • *Miranda* violation. Never waives. Doesn't sign the form. Repeated request to call parents. • Under *Seibert*, police cannot obtain an inadmissible confession without giving *Miranda* warnings, then issue the warnings, and then obtain a second confession. • Confession was coerced by the officer who told Jonathan that there would be less trouble if he confessed.	• Two separate conversations and in the second, Jonathan was properly *Mirandized*. • Under *Elstad*, there was no coercion in the second statement. Jonathan voluntarily spoke to the officer.
5. Statement overheard while Jonathan was on the phone. i. "I swear to you dad… I haven't done any drugs in months. This was just one bag and it wasn't even mine." … "Yes, they always deal drugs down there. Mark asked me to keep it and sell it but I wasn't gonna do nothing today."	• Right to counsel violation (?) • Trickery, coercion??? • Violates a Fourth Amendment reasonable expectation of privacy **created** by the police	• The police never told JL that no one could hear his conversation. • The police never told JL that his conversation was private.

Facts in Support Suggested (but not exclusive!) Lines of Cross/Direct	Potential Witness(es)
• JL put in handcuffs • JL taken to police station in a police car (backseat) • JL "booked" at police station • JL's 3rd request to call father ignored • JL brought to interrogation room • JL alone with police officer in interrogation room • JL had already given three statements about the incident • JL given *Miranda* warnings for the first time in interrogation room • No evidence JL can read rights card • No evidence JL can comprehend rights card • JL instructed to tell the same story he told before he was *Mirandized* • JL complied with officer's instruction • JL asked to speak with his father *and a lawyer before he talked anymore* • JL's 4th request to speak w/his father granted after four interrogations by police • Police officer chose father, did not provide access to a lawyer	• Officer Adams • Booking Officer • Officer Jones • (Jonathan)
• Police officer created suggestion of privacy: leaves room, closes door • PO did not inform JL call is being monitored • PO did not inform JL's father that call is being monitored • PO did not inform JL's father that JL has asked for a lawyer	• Officer Jones • Mr. Lopez • (Jonathan)

Statement	Defense Theory/Arguments	Government Arguments
6. Statement made after request for a lawyer, two weeks after arraignment on drugs i. "I was selling drugs, but I didn't rape her."	• Violation of Jonathan's invocation of his right to counsel; explicit assertion – *Burbine, Davis, Mosley* • 5th Amendment right to counsel • Under *Shatzer*, Jonathan was still in *Miranda* custody (even though returned to general population) • Statement inadmissible under *Massiah* (6th Amendment right to counsel) because JL had been arraigned on drug case.	• Under *Shatzer's* 14-day rule, Jonathan's invocation of his right to counsel had expired. • As in *Berghuis*, Jonathan did not explicitly tell police that he wanted to remain silent.
7. General arguments	• Jonathan's parent or guardian not present, so statements were involuntary or presumed involuntary (depending on the state rule) • Everything involuntary because of cognitive limitations, dyslexia, age, etc.	• Jonathan voluntarily gave all statements: there was no coercion and the police did not overbear Jonathan's will. At 15, youth is not so much a factor for involuntariness.

Facts in Support Suggested (but not exclusive!) Lines of Cross/Direct	Potential Witness(es)
• JL detained *in this case* from time of request for lawyer until interrogation in detention • PO *initially stated* he was not at detention facility to talk about the drug charges, but later explicitly did so. • JL visibly upset at onset of interview • Interrogation lasted for three hours – JL silent for three hours • No lawyer present • No parent present • PO advised JL of *Miranda* rights, but again, no evidence JL comprehended them • JL says nothing in interview until interrogated about drug case	• Probation Officer Crone • Det. Martin • (Jonathan)
• JL is 15 years old. • JL has not previously been charged with a crime. • JL is in the special ed program at East High, is dyslexic, has an IQ of 68, and requires intensive support from school staff on a daily basis. • JL has trouble relating to his peers. • JL never read any documents aloud during encounters w/ police. • JL never accompanied by parent during encounters w/police. • JL only questioned by police during encounters w/ police.	• All officers • Probation officer • Principal • Ada Whitfield • Mr. Lopez

PART 2: DEVELOPING A CROSS OR DIRECT EXAMINATION

The trainer should divide the participants into small groups to develop a cross-examination of School Resource Officer (SRO) Adams. Each participant will assist in cross-examining Officer Adams, who should be played by a second trainer (if available) or another participant.

Small group participants should spend 10 minutes discussing the goals they seek to achieve in cross-examination (*i.e.,* what are the lines/goals of cross-examination that should be developed) in order to draw out the information needed to support the theories and grounds for excluding or suppressing each statement.

Note To Trainer

Participants should assign areas of cross within the group (*e.g.,* one person develops questions to show that a resource officer is in fact a police officer; another develops questions aimed at proving custody; another on the failure to notify parent, etc.).

Over the next 20 minutes, each participant should execute at least one line of cross-examination and the trainer should provide feedback.

Time permitting, the trainer might also assign cross/direct examinations of other witnesses. The trainer should try to ensure that each participant has an opportunity to conduct a portion of an examination.

If time is limited, the trainer should select only one or two statements to serve as the basis of the exercise.

DISCUSSION POINTS

A sample cross-examination directed to establish that Officer Adams was in fact acting in the capacity of a police officer at the school is provided below. The trainer should look to the completed Suppression Theory Chart provided in the Discussion Points of Part 1 of the exercise for more lines of cross-examination that can be fleshed out.

Note To Trainer

The cross-examinations should be developed one goal at a time, with short, concise, leading questions that develop one fact at a time. The trainer should encourage participants to use the cross not just to elicit facts, but also to advance their theory. For example, in crossing the officer on his failure to call Jonathan's father, the attorney can ask questions aimed at demonstrating why it might be a good idea have a parent present during police questioning (especially if there is a statute requiring it).

Sample Cross on Issue #1: School Resource Officer = Police Officer

Officer, your title is School Resource *Officer*, correct?

You are employed by the Sunnydale Police Department …

Sunnydale Police Department assigned you to East High …

You were assigned to East High in 2010

On April 11, 2010

As the School Resource Officer, you wear a uniform

You were wearing a uniform on April 11, 2010…

The uniform assigned to you by SPD …

Your uniform is the same as the uniforms worn by other police officers

Even other police officers NOT assigned to East High …

For example, your uniform is the same as the uniforms worn by patrol officers …

You drive a marked squad car

Same kind of car driven by officers on the street

One of your duties at East High is to investigate crime …

If you determine that a crime has been committed, you have the authority to detain a person

To detain the person you believe committed the crime …

You have the authority to use physical force to do so

You also have the authority to arrest a person

To arrest a person you believe committed a crime …

On April 11, 2010, you were investigating a report

A report of a crime

At East High

You went to the gym

To investigate the report of a crime …

You questioned Jonathan

You took the lead in questioning Jonathan …

You put handcuffs on Jonathan

On April 11, 2010

You placed Jonathan under arrest on April 11, 2010

You placed Jonathan in a marked squad car

You drove him to the station

You instructed a booking officer to begin the formal booking process

PART 3: ARGUING IN SUPPORT OF THE MOTION TO SUPPRESS

Each participant will conduct a portion of the oral argument on the motion to suppress, articulating the legal theories of suppression or exclusion they developed in the first exercise and using the facts they developed on direct or cross-examination in the second exercise. The trainer should give participants 10-15 minutes to prepare, and then take 15-20 minutes to hear and critique arguments.

Note To Trainer

- The trainer should ask participants to return to their small 4-6 person breakout groups to divide up sections of the argument according to statement and/or issue. Participants should take into consideration the factual and legal complexity when dividing up tasks. For example, one person can probably address the statement at the bleachers (Jonathan was in custody and was not *Mirandized*), but the statement in the police station can likely be divided into several parts (taint of prior illegally obtained statements; Jonathan could/did not make a knowing and intelligent waiver; statement was involuntary). Alternatively, the trainer can assign statements/issues to each group/participant.
- The trainer should assign one or more of the participants to play the role of prosecutor. The prosecutor should zealously argue for the admissibility of the statement.
- If necessary to help participants prepare their arguments, the trainer should distribute the Key Case Principles for Statement Suppression and Voluntariness handout (and allow time for reading).

DISCUSSION POINTS

- When listening to the arguments, the trainer should make sure participants
  - Understand and refer to key case law related to each legal ground for suppression;
  - Apply the facts of their case to the law; and
  - Address "bad facts" and explain why they are not fatal to the argument.