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Why Etan Patz's Convicted Killer Lost His Appeal

By: Joel Cohen and Douglas Nadjari

Recently, Pedro Hernandez – the man convicted of the kidnap/killing of 6-year-old Etan Patz back in 1979 -- was (likely) denied by the Supreme Court, his last chance at getting his conviction tossed. See *McCarthy v. Hernandez*, 608 U.S. __ (2026).

Without even granting him a full appeal and argument, on June 22, the Supreme Court rejected, Hernandez's claim that the police effectively ran an "end run" around the *Miranda* rule. They extracted a confession without *Miranda* warnings and, fearing that he might later "clam up", simply read them to him sometime after his confession. With warnings now on board, Hernandez partially repeating his first "unmirandized" confession.

Involuntary confessions are inherently suspect and may infect all that follow. That is exactly what Hernandez's lawyers claimed up the chain of state and federal appellate courts. For the DA, this "two-step" interrogation was a tactical success.

The reader might be surprised, *but maybe not*, that this strategy was actually part of a formal police interrogation technique designed to secure confessions. Known as the *Reid Technique*, it was employed in various jurisdictions, including Missouri, when the Supreme Court, in *Missouri v. Seibert*, 542 U.S. 600 (2004), held a second (belatedly Mirandized) confession inadmissible as a constitutional matter -- unless curative measures had been taken to ensure that there had been "attenuation" of the second confession from the first.

One might almost naively think that the Missouri "two step" was something you might only expect to see on an outdated *Law & Order* episode where edgy detectives feel the absolute need to solve an exceptionally violent homicide in any way possible. But that is exactly what happened in *Hernandez* and, even though it worked for Seibert in Missouri, his very capable lawyers couldn't pull off the same strategy. Although not so easy to fully comprehend, the Appellate Division of the New York State Supreme Court that heard Hernandez's direct appeal from his conviction decided that the trial judge didn't err when he basically told the jury that it simply wasn't empowered to assess whether the second confession was fatally tainted by his earlier "involuntary," un-Mirandized confession.

Seemingly, Hernandez's Supreme Court decision turns on thorny procedural issues. His was a state conviction and the rules of engagement are different in different states, *e.g.*, Missouri versus New York, and the federal *habeas corpus* proceedings employ different analyses depending upon the law in the state where the trial took place. Hernandez might have been awarded a new trial if he had instead been convicted in Missouri rather than New York, where the law is simply different.

Clearly and to the surprise of some, all of this has nothing whatsoever to do with Hernandez's guilt or innocence; the Supreme Court did not weigh in on that at all. Rather, the opinion was simply about procedure -- highlighting that, at bottom, state

law may ultimately decide a case even when the federal courts later get involved. Indeed, the Second Circuit Court of Appeals had granted Hernandez a new trial before the Supreme Court laid down the law saying so. This may seem troublesome, especially to the layperson who is understandably bothered that the rights one might enjoy are different if the underlying event in question was committed in one state rather than another.

Certainly, rights can indeed vary from state to state and the road to *habeas* relief is often narrow. But is this truly a procedural quirk, or is the Supreme Court exalting finality over justice? *Seibert* turned on the involuntary nature of the confession itself. In contrast, *Hernandez* is perched upon the painfully narrow question of whether the trial court provided adequate or correct instructions to the jury about how to assess a Missouri “two-step” confession taken in a New York prosecution.

The Supreme Court determined that New York juries aren’t responsible for assessing “attenuation” and, therefore, even if the second confession was not sufficiently attenuated from the first, the trial court cannot be second-guessed by a federal *habeas* petition. Indeed, the Court held that “[n]o clearly established federal law required the trial court to instruct the jury about the rule that Justice Kennedy adopted in *Seibert*. ”

This much is clear: in *Seibert*, the U.S. Supreme Court clearly questioned whether the “question first, mirandize later” strategy can ever lead to a truly knowing, voluntary and intelligent waiver where the intentional omission of Miranda warnings was intended to deprive defendant his rights. For that reason, the statements offended the Constitution and were not admissible.

Seibert remains the law of the land; juries in New York may indeed determine whether the extraction of an initial involuntary confession taint statements that follow, however inculpatory. If that is so, why is it constitutionally permissible to allow juries to deliberate in rudderless fashion, as in *Hernandez*, when deciding matters of grave constitutional magnitude? Could it truly be, as the court more than suggests, that the need to deliver such a constitutionally significant instruction is somehow a procedural matter of state law?

The deeper concern raised by *Hernandez* is not whether he deserved a new trial, but whether the constitutional protections recognized in *Miranda* and *Seibert* raise questions that survive a *habeas* challenge. If the “question first, warn later” technique is constitutionally suspect -- as it clearly is -- then it is difficult to reconcile that principle with a rule that vindicates haphazard jury instructions. In the end, *Hernandez* may ultimately be remembered as both a notorious homicide and a reminder of the queasy boundary between procedural finality and true due process.

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