

Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court

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INTRODUCTION

Youth in the justice system are at risk of self-incrimination, and the attendant consequence of prosecution, in ways that are distinct from those faced by adult criminal defendants. For example, the current trend to screen and assess court-involved youth (often before the youth are adjudicated delinquent) for mental health and substance abuse problems, using instruments that inquire about a wide range of offending behavior, raises the real possibility that youth will incriminate themselves. Under many states' transfer/waiver processes, juveniles facing prosecution as adults must submit to psychological or psychosocial evaluations in order to sustain their burden of showing that they are amenable to treatment in the juvenile court. Evaluators will typically question the youth about the charged offense(s) as well as their past criminal conduct.

Youth also must submit to such evaluations when the issue of competency to stand trial is raised, a practice that will increase as more states pass juvenile-specific competency statutes. In keeping with the juvenile justice system's rehabilitative and treatment goals, youth who are adjudicated delinquent can be sent to treatment facilities where they undergo various types of counseling and

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therapy. A key aspect of treatment, particularly in programs for sexual offenders, is admittance to the offending behavior—both that for which the youth was adjudicated as well as for other offenses of which the system may not be aware.

Without explicit evidentiary prohibitions on the use of statements elicited in the scenarios above, and absent attentive lawyering, youth are at great risk of prosecution for statements procured for purposes that may on the surface look benign and even beneficial to the youth. (Who could argue, for example, that it would not be helpful for a youth to get treatment for a mental health disorder or substance abuse problem?) This Article offers both legislative and litigation strategies to attorneys representing youth who face potential self-incrimination when undergoing screening and assessment for mental health problems; when involved in transfer/waiver proceedings; those raising competency as an issue; or when participating in court-ordered treatment.

Part I briefly reviews the constitutional right against self-incrimination. Part II of this Article explains how that right is implicated when youth in the justice system are screened and assessed for behavioral health problems, and examines the recent and successful efforts in a half a dozen states to enact statutes that prohibit the admission into evidence of elicited statements. Part III examines the risk of self-incrimination in the transfer/waiver context and discusses recent successful challenges—in Nevada and Pennsylvania—to transfer/waiver processes that violated the right against self-incrimination. Part IV reviews statutes that set forth procedures and criteria for finding that a youth is incompetent to stand trial in order to determine whether these statutory schemes adequately protect youth from the adverse use of such statements. Finally, Part V describes legal strategies for preventing the use of statements made in court-ordered treatment.

I. JUVENILES' RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment of the U.S. Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness

against himself.”¹ The Sixth Amendment further protects those individuals charged with crimes, stating that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence [*sic*].”² Thus, the accused has the right to the advice of an attorney prior to waiving his/her privilege against self-incrimination. The U.S. Supreme Court extended these rights to youth in the seminal case of *In re Gault*.³ In *Gault*, the Court held that juveniles accused of criminal offenses must be afforded many of the same constitutional protections available to adult criminal defendants, including the right against self-incrimination as specified in the Fifth and Sixth Amendments of the U.S. Constitution.⁴ The *Gault* court also noted that “the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.”⁵ The Fifth Amendment privilege against self-incrimination can be asserted in any proceeding “in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding.”⁶

Under the Fifth Amendment, a statement is inadmissible if it was involuntary under the totality of the circumstances.⁷ Because the voluntariness of a confession or a statement is a question of fact, a court must consider the totality of the circumstances, including the characteristics of the accused (such as age and mental capacity) as well as the details of the interrogation.⁸ The Supreme Court has long

1. U.S. CONST. amend. V.

2. *Id.* amend. VI.

3. *In re Gault*, 387 U.S. 1 (1967).

4. *Id.* at 55.

5. *Gault*, 387 U.S. at 49; *see also* *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (an individual has the privilege “not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings”).

6. *United States v. Balsys*, 524 U.S. 666, 672 (1998) (citing *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972)).

7. *See Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973).

8. *Schneckloth*, 412 U.S. at 226. Factors to be considered in determining the voluntariness of a defendant’s confession are the age of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of

recognized that children, as compared to adults, are more easily manipulated by suggestion or coercion because of their unique developmental and situational vulnerabilities.⁹ For that reason, the Court has consistently held that extra care must be taken to ensure that statements by youth are not elicited by coercion or suggestion.¹⁰

Further, a statement is inadmissible if an accused was not advised of his or her privilege against self-incrimination and/or did not make a valid waiver of his or her rights prior to custodial interrogation.¹¹ In *Miranda v. Arizona*, the Court held that before being subjected to a custodial interrogation, the individual must be warned of his or her rights against self-incrimination and his or her right to counsel.¹² Absent these warnings, any statement obtained during a custodial interrogation or without the individual's valid waiver of these rights cannot be used in evidence if it would violate the individual's right against self-incrimination.¹³ A waiver is valid only if it is shown that the individual understood his rights and then knowingly and voluntarily waived them before answering questions.¹⁴

Moreover, statements may not be introduced into evidence if they are deliberately elicited from an accused after the Sixth Amendment right to counsel attaches and the accused has not made a valid waiver of his or her right to counsel.¹⁵ The right to counsel attaches at the initiation of an adversarial judicial proceeding,¹⁶ which is usually at arraignment in the adult criminal system and when the petition is filed in the juvenile justice system. The Supreme Court has reasoned that to deprive the accused of counsel during the critical pre-trial period may be more damaging than denying him or her counsel at the

detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id.* (citations omitted).

9. *See Gault*, 387 U.S. at 45–46; *see also Gallegos v. Colorado*, 370 U.S. 49, 53–55 (1962); *Haley v. Ohio*, 332 U.S. 596, 599–601 (1948).

10. *See Gault*, 387 U.S. 1, 45–55 (1967); *see also Gallegos*, 370 U.S. at 53–55; *Haley*, 332 U.S. at 599–601.

11. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

12. *Id.* at 444.

13. *Id.*

14. *Id.* at 444–45.

15. *Estelle v. Smith*, 451 U.S. 454, 469–71 (1981).

16. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Henry*, 447 U.S. 264, 270 (1980); *Massiah v. United States*, 377 U.S. 201, 205 (1964).

trial itself,¹⁷ and that counsel is particularly important in protecting youth given their inexperience and immaturity.¹⁸

Finally, in addition to the protections found in the U.S. Constitution and established by Supreme Court precedent, almost every state constitution has a provision that affords the right against self-incrimination to individuals arrested or charged with offenses.¹⁹ Several states have expressly extended these state constitutional protections to youth in the juvenile justice system through provisions in state juvenile codes or juvenile court procedural rules.²⁰

II. SCREENING AND ASSESSMENT FOR BEHAVIORAL HEALTH PROBLEMS

A limited number of large-scale, empirical studies “suggest that as many as 65%–75% of the youth involved with the juvenile justice system have one or more diagnosable psychiatric disorders,” including major depressive, anxiety, mood, and substance abuse disorders.²¹ One recent large scale study found that more than 60 percent of youth assessed in three different juvenile justice settings—community-based programs, detention centers, and residential facilities—met diagnostic criteria for three or more disorders and

17. *Moulton*, 474 U.S. at 159–60.

18. *Gallegos v. Colorado*, 370 U.S. 49, 54–55 (1962).

19. See LOURDES M. ROSADO & RIYA S. SHAH, JUVENILE LAW CTR., PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM app. C (2007) [hereinafter ROSADO & SHAH].

20. See, e.g., *id.* at C-6 (Alaska’s juvenile provisions); *id.* at C-8 (Arizona’s juvenile provisions).

21. ROSADO & SHAH, *supra* note 19, at 5–6 (citing JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT’L CTR. FOR MENTAL HEALTH & JUV. JUST., YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 2 (2006); Linda A. Teplin, Karen M. Abram, Gary M. McClennan, Mina K. Dulcan & Amy A. Mericle, *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133–43 (2002); Gail A. Wasserman, Larkin S. McReynolds, Susan J. Ko, Laura M. Katz & Jennifer R. Carpenter, *Gender Differences in Psychiatric Disorders at Juvenile Probation Intake*, 95 AMER. J. PUB. HEALTH 131, 133–34 (2005); Gail A. Wasserman, Larkin S. McReynolds, Christopher P. Lucas, Prudence Fisher & Linda Santos, *The Voice DISC-IV with Incarcerated Male Youth: Prevalence of Disorder*, 41 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 314, 317 (2002)).

“60.8% of the youth with a mental health diagnosis also had a co-occurring substance use disorder.”²²

The high prevalence of youth with mental health and substance abuse disorders poses significant challenges to the juvenile justice system, which has become the last resort for youth in need of treatment but whose needs are not identified and effectively treated by other child-serving, community-based systems.²³ Recent reports indicate that juvenile justice facilities simply do not have the capacity to identify all affected youth and provide them with appropriate services.²⁴ Left untreated, youth suffering from mental health disorders pose a safety risk to themselves and to other youth in juvenile justice facilities. Moreover, court-involved youth with behavioral health disorders who are not identified and appropriately treated face serious obstacles to rehabilitation and ultimate discharge from the juvenile justice system.

States and localities have launched various initiatives to address the needs of this population.²⁵ Jurisdictions are implementing different models and conducting screening and assessment at one or more stages of the juvenile court process. For example, some states and municipalities administer behavioral health screening and assessment instruments at the intake stage (also known as the preliminary interview or inquiry, depending on the state) of juvenile court proceedings, before youth have been adjudicated delinquent.²⁶ Youth are also screened for mental health and substance use disorders, suicide risk factors and behaviors, and other emotional or behavioral problems upon admission to pre-trial detention and post-disposition secure care facilities.²⁷ Youth whose screening scores

22. *Id.* at 5–6.

23. *Id.* at 6–8 (citations omitted).

24. *Id.* at 7 (discussing U.S. H. R. COMM. ON GOV'T REFORM—MINORITY STAFF SPEC. INVESTIGATIONS DIV., INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN THE U.S. 9–12 (July 2004); U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE ACTIVITIES UNDER THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT: FISCAL YEAR 2004 (2005), available at http://www.justice.gov/crt/about/spl/documents/split_cripa04.pdf).

25. See ROSADO & SHAH, *supra* note 19, at 20.

26. *Id.*

27. *Id.* at 20–21. Indeed, numerous organizations and reports recommend—and accrediting organizations such as the American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC) require—that all youth entering

raise red flags as to possible behavioral health needs are often referred for more comprehensive evaluations by clinicians.²⁸

But the very real potential arises for youth in these initiatives to make statements or to provide information that could later be used to adjudicate them delinquent or convict them in adult criminal court. Many screening and assessment instruments can elicit potentially self-incriminating information by asking youth questions concerning a variety of illegal activities including current and past drug use, history of violent or assaultive behaviors, sexual deviancy and sexual offenses, victimization, abuse, and weapons possession.²⁹ Similarly, clinical interviews conducted as part of a more comprehensive evaluation can elicit self-incriminating information from youth by inquiring into the same types of behaviors.³⁰

juvenile detention or correctional facilities be screened for mental health and substance use disorders, suicide risk factors and behaviors, and other emotional or behavioral problems upon admission or very soon thereafter. They further advise that youth who score high on such screening instruments, or who demonstrate suicidal ideation/attempts or symptoms of mental health or substance abuse disorders, be fully evaluated by a mental health clinician. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, PRACTICE PARAMETER FOR THE ASSESSMENT AND TREATMENT OF YOUTH IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 6–9 (2004), available at <http://www.aacap.org/galleries/PracticeParameters/JuvDetCorrectionalFac.pdf>; see also AM. CORR. ASS'N, STANDARDS FOR JUVENILE DETENTION FACILITIES 84 (3d ed. 1991); NAT'L COMM'N ON CORR. HEALTH CARE, STANDARDS FOR SERV. IN JUV. DETENTION AND CONFINEMENT FACILITIES 60–62, 68–69 (2004); Am. Assoc. for Corr. Psychol., *Standards for Psychology Services in Jails, Prisons, Correctional Facilities and Agencies*, 27 CRIM. JUST. BEHAV., 433, 464–66 (Aug. 2000).

28. See ROSADO & SHAH, *supra* note 19, at 19–21.

29. *Id.* at 21–24 (excerpting questions from various screening and assessment instruments administered to juvenile justice youth including the Massachusetts Youth Screening Instrument–Second Version (MAYSI-2), GAIN-Short Screener (GAINS-SS), Child Behavior Checklist (CBCL), Youth Self-Report Form, Millon Adolescent Clinical Inventory (MACI), Comprehensive Adolescent Severity Index (CASI), Problem-Oriented Screening Instrument for Teenagers (POSIT) and Child and Adolescent Needs and Strengths–Juvenile Justice (CANS-JJ)).

30. *Id.* at 21 (citing AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, *supra* note 27, at 10, 12); Am. Assoc. for Corr. Psychol., *supra* note 27, at 466; NAT'L COMM. ON CORR. HEALTH CARE, *supra* note 27, at 68–69). Indeed, one commentator proposes that states enact a pre-adjudication privilege “that is consistent with the rationale for other types of privileges, such as the psychotherapist-patient privilege and social worker-client privilege; retains the rehabilitative purpose of the juvenile court system; and protects children from their self-incriminating statements.” John C. Lore III, *Pretrial Self-Incrimination In Juvenile Court: Why A Comprehensive Pretrial Privilege is Needed to Protect Children and Enhance the Goal of Rehabilitation*, 47 BRANDEIS L.J. 439, 441 (Spring 2009).

A number of states—Arizona, Arkansas, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, New Mexico, North Carolina, South Carolina, and Virginia—have statutory provisions and/or court rules that generally prohibit the admission into evidence of statements made during intakes, preliminary interviews, or preliminary inquiries to court or probation officers at an adjudicatory hearing and/or criminal trial on the issue of guilt.³¹ In addition, courts in at least two states—California and New York—have held that statements made to probation and juvenile court officers at this stage are inadmissible in later proceedings.³² And four states—Alaska, Connecticut, Florida,

31. *See generally* ARIZ. R. EVID. R. 408 (2011) (effective until Jan. 1, 2012); ARIZ. R. EVID. R. 408 (2011) (effective Jan. 1, 2012) (evidence of conduct or statements made in compromised negotiations are not admissible; in practice, the statute protects statements made to intake and/or probation officers); ARK. CODE ANN. § 9-27-321 (2011) (statements inadmissible in any proceeding); D.C. SUP. CT. JUV. R. 111 (2011) (statements shall not be used against the child in a delinquency or in need of supervision case prior to the disposition hearing or in a criminal proceeding prior to conviction); HAW. FAMILY CT. R. 123 (2011) (statements shall be inadmissible at the adjudication hearing and considered only in the disposition of an adjudicated petition); 705 ILL. COMP. STAT. 405/5-305 (2011) (statements made during probation adjustment are inadmissible in delinquency or criminal proceedings until after adjudication); IOWA CODE §§ 232.45(11)(a), 232.47(7)(b) (2011) (statements are inadmissible in case in chief unless court waives jurisdiction and statements were made voluntarily or after the right to remain silent was waived); KY. REV. STAT. ANN. § 630.060(1) (West 2011) (information received prior to filing of petition remains confidential); LA. CHILD. CODE ANN. art. 841(D) (2011) (evaluations performed during the period of an informal adjustment agreement shall not be used against a child in any future court proceedings, adjudication hearing or later criminal trial); ME. REV. STAT. tit. 15, § 3204 (2011) (statements inadmissible at adjudicatory hearing); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-8A-10 (2011) (effective through June 30, 2013), 3-8A-12 (2011) (effective through June 30, 2013) (inadmissible at adjudicatory hearings and criminal trials); MISS. CODE ANN. § 43-21-559 (2011) (no member of youth court staff, including personnel of detention and shelter facilities, may testify as to an admission or confession made to him); MO. REV. STAT. § 211.271 (2010) (statements shall not be used for any purpose whatsoever in any civil or criminal proceedings but may be admitted in juvenile proceedings); N.M. R. EVID. R. 11-509 (2011) (stating that a child has privilege to refuse to disclose and to prevent others from disclosing confidential communications made to probation officer or social worker during preliminary inquiry phase); N.C. GEN. STAT. § 7B-2408 (statements inadmissible prior to disposition); S.C. CODE ANN. § 63-19-1010 (2010) (“statements of the juvenile contained in the department’s files must not be furnished to the solicitor’s office as part of the intake review procedure, and the solicitor’s office must not be privy to these statements in connection with its intake review.”); VA. CODE ANN. § 16.1-261 (2011) (“statements made by a child to the intake officer or probation officer during the intake process or during a mental health screening or assessment . . . prior to a hearing on the merits of the petition filed against the child, shall not be admissible at any stage of the proceedings.”).

32. *See In re Wayne H.*, 596 P.2d 1, 5 (Cal. 1979) (concluding that use of a minor’s statements in subsequent juvenile or criminal proceedings would frustrate the purpose of the

and Tennessee—prohibit the admission of statements made to intake officers and probation officers unless the juvenile has been advised of his or her rights against self-incrimination and has made a valid waiver of those rights.³³

A few states have similar protections for statements made by a child while in detention. Statutes in Illinois and Mississippi, for example, prohibit admission into evidence of statements made during detention.³⁴ Alabama, Connecticut, Tennessee and Texas require that a child in detention be advised of his right against self-incrimination and that they make a valid waiver.³⁵ And courts in Colorado and

statute and therefore such statements are inadmissible as substantive evidence or for impeachment. However statements may be admitted for consideration on the issues of detention and fitness for juvenile treatment); *People v. Humiston*, 20 Cal. App. 4th 460, 475–76 (Cal. Ct. App. 1993) (quoting *Sheila O. v. Superior Court*, 125 Cal. App. 3d 812, 816–17 (Cal. Ct. App. 1981) (holding statements inadmissible at adjudication but admissible for impeachment when defendant testifies inconsistently with statements made to probation officer at intake); *In re Randy G.*, 127 Misc.2d 1079, 1081 (N.Y. Fam. Ct. 1985) (holding juvenile’s statements made at an initial intake with a probation officer are not admissible at a fact-finding proceeding, but may be admitted at the dispositional hearing).

33. ALASKA STAT. § 47.12.040 (2011) (stating that the minor and the minor’s parents or guardian, if present, must be advised that any statement may be used against the minor, and the minor has the rights to have a parent or guardian present at the interview and to remain silent); CONN. GEN. STAT. § 46b-137(a) (2011) (statements are inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement unless made by such child in the presence of his parent or parents or guardian and after the parent or guardian and child have been advised of the child’s right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child’s behalf; the child’s right to refuse to make any statements; and that any statements he makes may be introduced into evidence against him); FLA. STAT. § 985.145(1)(e) (2011) (juvenile probation officer shall inquire at intake as to whether child understands rights against self-incrimination and to counsel); TENN. R. JUV. P. 5(c)(5) (“When a child is brought to the court or placed in detention, a youth services officer or other person designated by the juvenile court judge to serve as an intake officer for the juvenile court shall within a reasonable time inform the child . . . that the child is not required to say anything and anything child says may be used against him.”). *But see* *State v. Ledbetter*, 818 A.2d 1, 4 (Conn. 2003) (confession made by juvenile is admissible in adult criminal court, although it would not be admissible in juvenile court proceedings); *In re Ralph M.*, 559 A.2d 179, 186 (Conn. 1989) (admissible in transfer hearing).

34. 705 ILL. COMP. STAT. 405/5-401.5(b) (1987) (statement made during custodial interrogation or during detention shall be presumed inadmissible in criminal or juvenile proceeding); MISS. CODE ANN. § 43-21-559(2)-(3) (1972) (“[N]o member of youth court staff [including personnel of detention and shelter facilities] may testify as to an admission or confession made to him.”).

35. ALA. CODE § 12-15-202(b) (1975) (upon being placed in custody, a child shall be notified of child’s right against self-incrimination before any questioning); CONN. GEN. STAT. § 46b-137(a) (2011) (a statement is inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement unless made by such

Delaware have prohibited the admission of statements made while in detention.³⁶

The above general protections regarding statements made during intake or while in detention would similarly prohibit the admission into evidence statements made by youth via screening and assessment instruments, or during clinical evaluation interviews.

Certain states have statutes and court rules specifically targeting and protecting statements elicited during screening, assessment, and evaluation for mental health and substance abuse issues. For example, the Texas Human Resources Code requires that juveniles who have been referred to the probation department be screened.³⁷ The statute further provides that “[a]ny statement made by a child and any mental health data obtained from the child during the administration of the mental health screening instrument under this section is not admissible against the child at any other hearing.”³⁸ A Virginia statute similarly provides that pre-hearing statements made by a child to an intake or probation officer, as well as during a mental health screening or assessment conducted when the child is in detention, are not admissible at any stage of the proceeding.³⁹

In the last five years, at least four additional states have enacted provisions specifically protecting statements made during screening, assessment, and/or evaluation for mental health problems. In New Jersey, any statement made by a juvenile in the course of a suicide or

child in the presence of his parent or parents or guardian and after the parent or guardian and child have been advised of: the child’s right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child’s behalf; the child’s right to refuse to make any statements; and that any statements he makes may be introduced into evidence against him); TENN. R. JUV. P. 7(a) (no child placed in detention shall be questioned “concerning an alleged violation of law unless the child intelligently waives in writing the right to remain silent”); TEX. FAM. CODE ANN. §§ 51.095(d)(1), (a)(1)(C), (a)(5)(A) (1997) (in order for statements to be admissible, child in a detention facility or other place of confinement must make a knowing, intelligent, and voluntary waiver of his rights). *But see Ledbetter*, 818 A.2d at 4 (admissible in criminal trial in Connecticut); *In re Ralph M.*, 559 A.2d at 186 (admissible in transfer hearing in Connecticut).

36. *People v. Robledo*, 832 P.2d 249, 250 (Colo. 1992) (statement made to counselor while child was detained prior to charges being filed was suppressed because no *Miranda* warnings given); *Holder v. State*, 692 A.2d 882, 887–88 (Del. Super. Ct. 1997) (statements made to counselor at juvenile detention facility only admissible to impeach absent evidence that statements were made voluntarily).

37. TEX. HUM. RES. CODE ANN. § 221.003(a) (West 2011).

38. *Id.* § 221.003(c).

39. VA. CODE ANN. § 16.1-261 (2003).

mental health screening cannot be provided to the court, prosecutor or law enforcement without the juvenile's consent.⁴⁰ Nor, may the statement be used in any investigation or delinquency or criminal proceeding currently pending or subsequently initiated.⁴¹ In 2007, Indiana passed an even more expansive law. Indiana statute provides that, except for statements directly related to a homicide, any statement communicated to an evaluator during court-ordered or voluntary mental health screening, assessment, evaluation or treatment may not be admitted into evidence on the issue of whether the child committed a delinquent or criminal act.⁴² The Indiana State Bar Association's Civil Rights of Children Committee, with cooperation from an advisory board that established mental health screening, assessment and treatment in Indiana's juvenile detention centers, successfully spearheaded the passage of this law.⁴³ As one attorney involved in the Indiana effort noted, "This law and . . . policies regarding confidentiality and disclosure are important to achieving cooperation among juvenile justice officials so that appropriate services may be obtained for youths who need them while in detention."⁴⁴

Similarly, Pennsylvania amended its Juvenile Act in 2008 to protect statements made in the course of screening and assessment for various behavioral health concerns.⁴⁵ The effort to pass the new law was organized by a state working group of the *Models for Change*, a juvenile justice reform initiative funded by the John D. and Catherine T. MacArthur Foundation.⁴⁶ The working group's charge was to

40. N.J. STAT. ANN. § 2A:4A-60.2 (West 2007). The New Jersey law was passed in 2007 and became effective in 2008.

41. *Id.*

42. IND. CODE ANN. §§ 31-32-2-2.5, 31-37-8-4.5 (West 2008). The statements, however, are admissible in a probation revocation proceeding or to modify a dispositional order. *Id.* For purposes of these provisions, an evaluator is any person responsible for providing mental health screening, evaluation or treatment to a child in connection with a juvenile proceeding. IND. CODE ANN. § 31-9-2-43.8 (West 2008).

43. JauNae M. Hanger, *Screening, Assessment and Treatment: Indiana Addresses Mental Health in Juvenile Detention Centers*, 70 CORRECTIONS TODAY 36, 37-38 (Feb. 2008).

44. *Id.* at 38.

45. Mental Health/Juvenile Justice Collaboration, *Work Highlights*, MODELS FOR CHANGE, <http://www.modelsforchange.net/about/States-for-change/Pennsylvania/Work-highlights0.html> (last visited Jan. 17, 2012).

46. See *Models for Change: Issues for Change Systems Reform in Juvenile Justice, Issues*

overcome barriers in order to effectively identify and treat those youth with behavioral health disorders who come into contact with the justice system.⁴⁷ One such barrier was a gap in Pennsylvania laws such that youth were not adequately protected from potential self-incrimination in the screening and assessment portions of their juvenile court cases.⁴⁸ The group argued that absent such protections, defense counsel, in accordance with their professional and ethical duties, would reasonably advise their youth clients to not participate in screens and assessments because of the consequent risk of self-incrimination. Moreover, clinicians were obligated, under their professional codes of conduct, to advise the youth they assess as to how the information the youth reveals can be used in legal proceedings. Such warnings, however, would inhibit youth from fully disclosing relevant information to mental health professionals, thus undermining the effectiveness of diagnostic and therapeutic interventions.⁴⁹

Consequently, the working group drafted proposed legislation that was endorsed by all the major juvenile justice stakeholders, including juvenile court judges, prosecutors, defense attorneys, and probation officers.⁵⁰ The enacted Pennsylvania statute specifically provides as follows:

(c) Statements and information obtained during screening or assessment.

(1) No statements, admissions or confessions made by or incriminating information obtained from a child in the course of a screening or assessment that is undertaken in conjunction with any proceedings under this chapter, including, but not limited to, that which is court ordered, shall be admitted into evidence against the child on the issue of whether the child

for Change, MODELS FOR CHANGE <http://www.modelsforchange.net/index.html> (last visited Dec. 29, 2011).

47. See Mental Health/Juvenile Justice Work Group of the Models for Change Initiative, *Eliminating Barriers to Rehabilitation: An Overview of Senate Bill 1269 Amending Pennsylvania's Juvenile Act to Protect Youth Against Self-Incrimination in Behavioral Screening, Assessment and Evaluation* (Updated Sept. 16, 2008) (on file with author).

48. *Id.*

49. *Id.*

50. *Id.*

committed a delinquent act under this chapter or on the issue of guilt in any criminal proceeding.

(2) The provisions of paragraph (1) are in addition to and do not override any existing statutory and constitutional prohibition on the admission into evidence in delinquency and criminal proceedings of information obtained during screening, assessment or treatment.⁵¹

Finally, Illinois, also as part of that state's efforts under the *Models for Change* initiative, amended its Juvenile Act in 2010 to provide:

A statement, admission, confession, or incriminating information made by or obtained from a minor related to the instant offense, as part of any behavioral health screening, assessment, evaluation, or treatment, whether or not court-ordered, shall not be admissible as evidence against the minor on the issue of guilt only in the instant juvenile court proceeding.⁵²

But despite this growing trend, a survey showed that there are still a number of states—specifically, Alabama, Colorado, Delaware, Georgia, Idaho, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming—that lack explicit protections in statutory or court rules and case precedents specifying that statements made during screening or assessment at the intake stage/preliminary interview are inadmissible for behavioral

51. 42 PA. CONS. STAT. § 6338(c) (2011). Screening is defined as a “process, regardless of whether it includes the administration of a formal instrument, that is designed to identify a child who is at increased risk of having mental health, substance abuse or co-occurring mental health and substance abuse disorders that warrant immediate attention, intervention or more comprehensive assessment.” 42 PA. CONS. STAT. § 6302 (2011). Assessment is defined as “[a]n individualized examination of a child to determine the child’s psychosocial needs and problems, including the type and extent of any mental health, substance abuse or co-occurring mental health and substance abuse disorders and recommendations for treatment. The term includes, but is not limited to, a drug and alcohol, psychological and psychiatric evaluation, records review, clinical interview and the administration of a formal test and instrument.” *Id.* § 6302; *see also* 42 PA. CONS. STAT. § 6341(b.2) (2011). The information, however, is admissible at disposition. *Id.* § 6341(d)(1)(ii).

52. 705 ILL. COMP. STAT. 405/5-401.5(h) (2011).

health disorders on the issue of guilt. To the extent that screening and assessment projects are already under way in these jurisdictions, and in the absence of such protections, defense attorneys can advise their clients not to participate in the screening and assessment and/or not to answer certain questions that would reveal incriminating information.

But there are drawbacks to this approach. First, as described above, screening and assessment often takes place pre-adjudication and prior to the appointment of counsel; in these instances, it is not feasible for counsel to advise his/her client in advance. Second, pre-trial detention centers need to screen youth for mental health symptoms and suicidal thoughts and substance use so that personnel can develop plans to keep the youth safe and avoid a deterioration of his/her condition while in temporary detention. Third, this tactic forecloses the opportunity to, early on, identify the youth's behavioral health needs and such information can be used, for example, to divert the youth away from further formal court processing and instead into appropriate community-based treatment.

An alternative approach is for defense attorneys to advocate for the legislature or for court rules that strictly limit the potential uses of information gathered during these processes because such provisions are necessary to protect youth's rights against self-incrimination. They can borrow statutory language from the jurisdictions described *supra* and can also draw on those successful efforts to gain support for passage of the measures as models for their own efforts. Key to such an endeavor is to build a diverse coalition of juvenile justice stakeholders who are committed to early identification and treatment of youth with behavioral health disorders and who understand why due process rights cannot be sacrificed in the process.

This approach requires the defense attorney to take a policymaking role to initiate systemic reform. But what can the defense attorney do on an individual case level, when the government seeks to use statements made during pre-adjudicatory screening and assessment to prove the youth's guilt at trial? One possibility is to argue that the admission of these statements as evidence on the issue of guilt would frustrate the purpose for conducting initial intake interviews as set forth in the state's juvenile act. This reasoning was

adopted by the California Supreme Court in *Fare v. Wayne*.⁵³ There, the Supreme Court of California noted:

The primary purpose of the section 628 interview, as the statutes make clear, is not to elicit evidence of guilt—the function of police questioning—but to assist the probation officer in deciding at the outset of the case whether the minor need be further detained pending a court hearing. This approach thereby serves a paramount concern of the Juvenile Court Law—that a minor be treated in the least restrictive means feasible under the circumstances.⁵⁴

The court reasoned that the youth's candor in the interview would assist the probation officer in discharging his duty to find the least restrictive pre-trial setting for the youth, but that it would be unfair to make the minor choose between not being open (and risk being held pre-trial) or freely divulging information (and risk having the statements used against him at trial).⁵⁵ The court went on to hold that statements made to the intake officer “are not admissible as substantive evidence, or for impeachment, in any subsequent proceeding to determine criminal guilt.”⁵⁶ To the extent that screening and assessment is incorporated into the intake interview process, attorneys can similarly argue that the admission of statements at later proceedings would frustrate the purposes of screening for behavioral health problems and would be fundamentally unfair to the youth.

Depending on the individual circumstances, defense counsel may also be able to make traditional suppression arguments that the statements were involuntary and a result of state coercion, and that a youth in custody was not properly *Mirandized* and did not make a valid waiver. Such arguments are discussed in more detail in Parts III and IV.

53. 596 P.2d 1 (Cal. 1979).

54. *Id.* at 4–5 (citations omitted).

55. *Id.*

56. *Id.* at 5. The court further held that the statements may be admitted and considered in hearings on the issues of detention and fitness for juvenile treatment. *Id.*

III. EVALUATIONS IN THE TRANSFER/WAIVER CONTEXT

Courts order forensic evaluations for a variety of purposes—including to aid the court in determining whether a youth should be tried in juvenile versus adult court, or to decide whether the youth is competent to stand trial—prior to an adjudication or conviction. These court-ordered evaluations can elicit information about offending behavior from youth. Guidelines for forensic assessment direct the evaluator to collect information by administering one or more formal instruments and interviewing the accused youth.⁵⁷ As described in Part II *supra*, these instruments typically ask youth about a variety of illegal activities including current and past drug use, history of violent or assaultive behaviors, sexual deviancy and sexual offenses, victimization, abuse, and weapons possession. Moreover, clinical evaluators inquire about the same types of behavior when interviewing youth.

Estelle v. Smith is the key Supreme Court case analyzing the interplay between forensic evaluations and the privilege against self-incrimination.⁵⁸ In *Estelle*, the Court held that statements made to a psychiatrist during a court-ordered examination were inadmissible during both the guilt and penalty phases of a criminal trial.⁵⁹ The defendant in *Estelle* was indicted for murder, and prior to his trial, the judge ordered a psychiatric examination to determine if he was competent to stand trial.⁶⁰ He was deemed competent and was later convicted of murder and subsequently sentenced to death.⁶¹ During the sentencing hearing, the examining psychiatrist testified to disclosures that the defendant made to him, as well as to his own personal conclusions as to the defendant's future dangerousness.⁶²

The Supreme Court found that because the psychiatric examination was ordered by the court to determine the defendant's competence, the psychiatrist was acting as an agent of the state.⁶³

57. THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 152 (Prof'l Res. Press 1998).

58. 451 U.S. 454 (1981).

59. *Id.* at 462–63.

60. *Id.* at 456–57.

61. *Id.* at 457–60.

62. *Id.* at 458–60.

63. *Id.* at 467.

Prior to submitting to the psychiatric exam, the defendant was not read *Miranda* warnings, nor did he make a valid waiver of his rights.⁶⁴ The Court held that the compelled examination of the defendant while in state custody violated his Fifth Amendment privilege against self-incrimination.⁶⁵ Furthermore, the defendant's right to counsel attached prior to the court-ordered evaluation.⁶⁶ Consequently, the Court further held that the defendant's Sixth Amendment right to counsel was violated because his attorney was not advised as to the full scope of the possible uses of the defendant's statements prior to the psychiatric examination.⁶⁷ The *Estelle* holding confirms the right to counsel and the privilege against self-incrimination at both the guilt and penalty phases. Key to the *Estelle* holding was the finding that the defendant was ordered to undergo the evaluation.

But what protections apply when a minor requests a pre-trial forensic evaluation in support of a motion, for example, to seek adjudication in juvenile court? At least twelve states—Alabama, Georgia, Iowa, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Dakota, Tennessee, Virginia, and Wyoming—have enacted statutes or court rules securing youths' rights against self-incrimination when undergoing examinations conducted to aid the court in determining whether a youth should be tried in juvenile or adult court.⁶⁸ For example, the Michigan court rule specifically provides:

64. *Id.* at 466–67.

65. *Id.* at 473.

66. *Id.* at 470.

67. *Id.* at 469–71.

68. ALA. CODE § 15-19-5 (2010) (statements made by the defendant during examination to determine youthful offender status may not be used against defendant until sentencing, after defendant has been found guilty); *see also* ALA. R. EVID. 503(d)(2) (communications made in the course of court-ordered examinations are not privileged with respect to the particular purpose for which the examination is ordered); ALA. R. EVID. 503A(d)(2) (rule also applies to court-ordered examinations conducted by counselors); GA. CODE ANN. § 15-11-30.2(e) (2011) (prohibits using statements made by juvenile in transfer proceedings in later criminal proceedings over the juvenile's objection); IOWA CODE § 232.45(11)(b) (2010) (statements made during intake or waiver hearing are inadmissible in case-in-chief in subsequent criminal proceedings over child's objections); LA. CHILD. CODE ANN. art. 862(C)(2) (2009) (transfer hearing record is not admissible in subsequent criminal proceedings except for impeachment); *see also In re Bruno*, 388 So. 2d 784, 787 (La. 1980) (statements made in court-ordered examination for purposes of waiver hearing, inadmissible at trial on the issue of guilt or

(G) Psychiatric Testimony.

(1) A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent.

(2) The juvenile's consent may only be given:

(a) in the presence of an attorney representing the juvenile or, if no attorney represents the juvenile, in the presence of a parent, guardian, or legal custodian;

(b) after the juvenile has had an opportunity to read the report of the psychiatrist, psychologist, or certified social worker; and

(c) after the waiver decision is rendered.

innocence). MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-12(b)-(c) (West 2010) (statements in court-ordered evaluations are inadmissible at any adjudicatory hearing except on the issue of respondent's competence to participate in such proceedings and responsibility for his conduct, or in a criminal proceeding prior to conviction; statements made at waiver hearing cannot be used in adjudication or criminal trial unless a person is charged with perjury and the statement is relevant to that charge); MICH. COMP. LAWS § 3.950(G)(1) (2010) ("A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent"); *see also* People v. Hana, 504 N.W.2d 166 (Mich. 1993) (codified in MICH. CT. R. 3.950(G)(1)); MISS. CODE ANN. § 43-21-157(7) (West 2010) (testimony at the hearing is not admissible "in any proceeding other than the transfer hearing"); N.J. STAT. ANN. 2A:4A-29 (West 2011) ("No testimony of a juvenile at a hearing [regarding transfer to adult court] shall be admissible . . . to determine delinquency or guilt"); N.D. CENT. CODE § 27-20-34(6) (2009) (statements made by the child at the transfer hearing are not admissible against the child over objection in the criminal proceedings following the transfer except for impeachment); TENN. CODE ANN. § 37-1-134(f)(1) (2010) (statements made by the juvenile at a transfer hearing are not admissible against the child, over objection, in further criminal proceedings); VA. CODE ANN. § 16.1-269.2(A) (2005) ("Statements made by a juvenile at a transfer hearing . . . shall not be admissible against him over objection in any criminal proceedings following the transfer, except for purposes of impeachment"); WYO. STAT. ANN. § 14-6-237(e) (2010) ("Statements made by [a juvenile in] transfer hearing are not admissible against him over objection in a criminal proceeding following the transfer.").

(3) Consent to testimony by the psychiatrist, psychologist, or certified social worker does not waive the juvenile's privilege against self-incrimination.⁶⁹

Courts in at least nine other states have issued rulings to protect youths' self-incrimination rights in the transfer/waiver context, even where statute or court rule does not explicitly do so.⁷⁰ For example, the Nevada Supreme Court struck down the state's presumptive certification statute on Fifth Amendment grounds.⁷¹ The statute in question in the *In re William M.* appeal created a rebuttal assumption that youth fourteen years of age and older charged with certain offenses are to be tried in adult court.⁷² To rebut the presumption, the juvenile court had to find clear and convincing evidence that the juvenile's criminal actions were substantially influenced by substance abuse or emotional or behavioral problems that may be appropriately

69. MICH. CT. R. 3.950(G).

70. *R.H. v. State*, 777 P.2d 204, 211 (Alaska Ct. App. 1989) (court-ordered psychological evaluation for use in determining amenability to treatment as a minor violates a child's privilege against self-incrimination); *In re Appeal In Pima County, Juvenile Action No. J-77027-1*, 679 P.2d 92, 95-96 (Ariz. Ct. App. 1984) (court's failure to order limits upon use which could be made of juvenile's statements made pursuant to a court-ordered mental evaluation for transfer determination and its penalizing of juvenile for refusing to cooperate in the mental evaluation violated juvenile's privilege against self-incrimination); *Ramona R. v. Superior Court*, 693 P.2d 789, 792 (Cal. 1985) (testimony of minor during fitness hearing, or statements made to probation officers, cannot be used at trial); *In re A.D.G.*, 895 P.2d 1067, 1072-73 (Colo. App. 1994) (cert. denied June 5, 1995) (juvenile cannot be ordered to undergo psychological examination over objection in transfer proceeding because it would infringe on his or her Fifth Amendment right against self-incrimination); *cf. Clemons v. State*, 317 N.E.2d 859, 866 (Ind. Ct. App. 1974), cert. denied, 423 U.S. 859 (1975) (Fifth Amendment privilege against self-incrimination is inapplicable in the juvenile court waiver hearing setting where a confession by the juvenile may not be viewed as inculpatory and where it may not be used in a later criminal or delinquency adjudication); *In re S.J.T.*, 736 N.W.2d 341, 350 (Minn. Ct. App. 2007) (presumptive certification does not violate privilege against self-incrimination because courts can grant transaccational immunity to provide protection against further use of testimony and compelled investigation); *In re William M.*, 196 P.3d 456, 464-65 (Nev. 2008) (court held that statute requiring juveniles to admit to the charged criminal conduct in order to rebut certification to adult court was an unconstitutional violation of the Fifth Amendment); *Christopher P. v. State*, 816 P.2d 485 (N.M. 1991) (privilege against self-incrimination prohibits forcing juveniles to make inculpatory statements during court-ordered evaluations prepared for amenability determinations); *Commonwealth v. Brown*, 26 A.3d 485, 509-10 (Pa. Super. Ct. 2011) (court held that the trial court violated youth's right against self-incrimination when it required youth to admit to the charged offenses in order to demonstrate his amenability to treatment in the juvenile system).

71. *In re William M.*, 196 P.3d 456, 509-10 (Nev. 2008).

72. *Id.* at 457-58.

treated within the juvenile justice system.⁷³ In consolidated appeals, appellants were two juveniles charged, in separate cases, with offenses involving the use of a firearm. In support of their efforts to rebut the presumption in order to be tried in juvenile court, the youth submitted to the trial court behavioral health evaluations detailing substance abuse and mental health disorders.⁷⁴ The evaluations, however, failed to draw any connection between these issues and the charged offenses as the youth asserted their innocence throughout the process.⁷⁵ The juvenile court concluded that neither youth could meet their rebuttal burden of showing a nexus between substance abuse or behavioral problems and the alleged crimes because they had asserted that they were not present at the times the crimes were committed.⁷⁶

The Nevada Supreme Court held that the certification statute violated the Fifth Amendment because it essentially required an admission to the charged conduct in order to overcome the presumption but contained no provision explicitly prohibiting the use of that admission to establish guilt in a later proceeding.⁷⁷ The court found the statute unconstitutional because it put the youth in the untenable position of having to choose either to remain in adult court despite having a substance abuse or emotional or behavioral problem, or to admit guilt at the pre-trial stage, even though the admission could later be used against him in a juvenile or criminal hearing.⁷⁸ The *William M.* court found that the Nevada certification provision was facially invalid.⁷⁹

A Pennsylvania appellate court recently upheld an as-applied challenge to the state's decertification statute. In *Commonwealth v. Brown*, a minor charged in adult criminal court with one count of homicide and one count of homicide of an unborn child, moved to transfer or "decertify" his case to juvenile court.⁸⁰ Pursuant to a

73. *Id.*

74. *Id.* at 459–60.

75. *Id.*

76. *Id.*

77. *Id.* at 464. Moreover, even if the youth made an admission and rebutted the presumption, the juvenile court could still exercise its discretion to certify him to adult court. *Id.* at 463.

78. *Id.* at 457.

79. *Id.* at 464–65.

80. 26 A.3d 485, 489 (Pa. Super. Ct. 2011).

Pennsylvania statute, the minor bears the burden of showing by a preponderance of the evidence that transfer would serve the public interest. Among the six factors that the court must consider is whether the youth is amenable to treatment, rehabilitation or supervision in the juvenile system.⁸¹ In support of his decertification motion, the minor was evaluated by a psychologist and psychiatrist at the request of the Commonwealth.⁸² The minor maintained his innocence during both evaluations.⁸³ At the decertification hearing, the minor's expert psychologist opined, based on his evaluation, that the minor was amenable to treatment in the juvenile court.⁸⁴ By contrast, the Commonwealth expert testified that because the minor asserted his innocence, he could not be rehabilitated because he did not take responsibility for his actions.⁸⁵ The trial court denied the minor's decertification, finding that he was not amenable to rehabilitation; specifically, the court credited the Commonwealth expert's opinion that the "first step towards rehabilitation cannot be taken unless [the minor] would come forward and take responsibility for his actions[.]"⁸⁶ The trial court found "persuasive reasoning from [the commonwealth's expert]" that the minor would not take responsibility for his actions, and thus, that the "prospects of rehabilitation within the juvenile court jurisdiction [was] likely to be unsuccessful."⁸⁷

On appeal, the Pennsylvania Superior Court reversed, holding that the trial court "violated [the minor's] rights against self-incrimination

81. *See id.* at 492 (citing 42 PA. CONS. STAT. § 6355(a)(4)(iii)).

82. *Id.* at 489–90.

83. *Id.*

84. *Id.*

85. *Id.* at 490. The commonwealth's expert specifically stated that the minor "was very avoidant" in talking about "the evidence that was presented at the preliminary hearing" and also "the factual allegations of the offense"; and that the minor

tends to avoid or reacts by avoiding taking responsibility, which, in my opinion, complicates the process of rehabilitation, because . . . in order to be rehabilitated as a result of a conviction for a serious crime, you have to take responsibility for your behavior . . . And [Appellant cannot] make the first step [towards rehabilitation] if [he] . . . doesn't take responsibility for [his] behavior.

Id. (alteration in original).

86. *Id.* (some alterations in original).

87. *Id.* (some alterations in original).

because it effectively required him to admit guilt or accept responsibility to prove that he was amenable to treatment and capable of rehabilitation.”⁸⁸ Such an application of the decertification was unconstitutional because the minor was not granted use and derivative use immunity for statements made during the decertification process, thus exposing him to future prosecution using his statements.⁸⁹ Absent a grant of immunity co-extensive with the privilege, the trial court’s application placed the minor in a classic “penalty” situation—he had to either choose to maintain his innocence and thus remain in adult criminal court where he faced a sentence of life without opportunity of parole, or forfeit his right against self-incrimination in an effort to be tried in juvenile court where he would receive treatment until the age of twenty-one.⁹⁰ The appellate court concluded:

The trial court’s condition, therefore, coercively sought to grant Appellant the possibility of juvenile transfer in return for Appellant’s incriminating statements. As part of the exchange, the Commonwealth could strengthen its case against Appellant, while Appellant would not be guaranteed transfer to the juvenile system. Given the facts of this case, the profound benefits of juvenile transfer are reasonably sufficient to compel Appellant to waive his Fifth Amendment rights and testify against himself. That is, the gross disparity between the potential sentence in the criminal and juvenile divisions operate to exert such pressure on Appellant to “foreclose a free choice to remain silent[] and therefore . . . compel the incriminating testimony.”⁹¹

State statutes provide criteria for trial courts to consider in determining whether youth of a certain age who are alleged to have committed crimes are to be tried as juveniles or as adults. The criteria invariably includes a finding as to the child’s amenability or

88. *Id.* at 493.

89. *Id.* at 499. The court noted that “immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is [also] sufficient to compel testimony over a claim of the privilege.” *Id.* at 500 (alteration in original) (quoting *Commonwealth v. Webster*, 470 A.2d 532, 535 (1983)).

90. *See id.* at 503–04.

91. *Id.* (quoting in part *Garner v. United States*, 424 U.S. 648, 661 (1976)).

likelihood of rehabilitation and treatment in the juvenile system.⁹² But as described above, not all states have statutory prohibitions on the admission of inculpatory statements made during evaluations and hearings used to determine amenability to treatment.

The *Estelle*, *William M.* and *Brown* opinions offer important strategies for attorneys defending youths' right against self-incrimination in transfer/waiver proceedings. Under *Estelle*, defendants in delinquency or criminal trials can move to suppress statements made during compelled evaluations on the grounds that the statements were coerced, they were elicited in violation of the precepts of *Miranda* and/or that their introduction would violate the defendant's right to counsel. The *William M.* and *Brown* cases protect youth when they continue to assert innocence during the transfer/waiver stage and allow the attorney to argue that the court cannot hold this against the youth when assessing his/her chances of rehabilitation in the juvenile system.

On a policy level, defense attorneys can advocate for the enactment of explicit provisions prohibiting the use of statements made in transfer/waiver evaluations in future proceedings. The key question is how much immunity must these provisions provide? The *Brown* court noted that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination,

92. See, e.g., ALA. CODE ANN. § 12-15-203(d)(5) (LEXIS 2011); ARK. CODE ANN. § 9-27-318(g) (LEXIS 2011); COLO. REV. STAT. § 19-2-518(4)(b)(IV)-(V) (LEXIS 2011); 10 DEL. CODE ANN. tit. 10, § 1010(a)(2), (c)(1) (LEXIS 2011); D.C. CODE § 16-2307(d)(2)(a), (e) (LEXIS 2011); FLA. STAT. ANN. § 985.556(4)(c)(6), (8) (LEXIS 2011); HAW. REV. STAT. ANN. § 571-22(c)(5), (7) (LEXIS 2011); IDAHO CODE ANN. § 20-508(8)(d), (f) (LEXIS 2011); 705 ILL. COMP. STAT. ANN. 405/5-805(3)(b)(i)-(v), 405/5-805(2)(b)(i)-(v) (LEXIS 2011); KY. REV. STAT. ANN. § 640.010(2)(b)(3), (7) (LEXIS 2011); KAN. STAT. ANN. § 38-2347(e)(6)-(7) (LEXIS 2011); 15 ME. REV. STAT. tit. 15, § 3101(4)(D)(2) (LEXIS 2011); MISS. CODE ANN. § 43-21-157(5) (2011); MO. REV. STAT. § 211.071(6) (2011); NEB. REV. STAT. § 43-276 (LEXIS 2011); N.H. REV. STAT. ANN. § 169-B:24(I)(f), (h) (LEXIS 2011); N.M. STAT. ANN. § 32A-2-20(B)(1), (C)(5) (LEXIS 2011); N.C. GEN. STAT. § 7B-2200(b), 2203(b)(2) (LEXIS 2011); N.D. CENT. CODE § 27-20-34(3) (LEXIS 2011); OHIO REV. CODE ANN. § 2152.12(E) (LEXIS 2011); OKLA. STAT. tit. 10A § 2-5-205(E)(4) (LEXIS 2011); OR. REV. STAT. § 419C.349(4)(a) (LEXIS 2009); 42 PA. CONS. STAT. § 6355(A)(4)(iii)(G) (LEXIS 2011); TEX. FAM. CODE § 54.02(f)(2), (4) (LEXIS 2011); UTAH CODE ANN. § 78A-6-703(3)(e) (LEXIS 2011); W. VA. CODE ANN. § 49-5-10(f)-(g) (LEXIS 2011); WIS. STAT. ANN. § 938.18(5)(a) (LEXIS 2011); WYO. STAT. ANN. § 14-6-237(b)(v)-(vii) (2011); VT. STAT. ANN. tit. 33, § 5204(d)(1) (LEXIS 2011); VA. CODE ANN. § 16.1-26969.1(A)(3) (LEXIS 2011); see also Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (2006).

and therefore is [also] sufficient to compel testimony over a claim of the privilege.”⁹³ Arguably, only statutory provisions that provide both use and derivative use immunity for statements made in court-ordered evaluations are constitutionally sufficient to overcome the privilege. However, most statutes and court rules identified in this Article only provide use immunity.

IV. EVALUATIONS IN THE COMPETENCY CONTEXT

As with evaluations conducted to aid the judge in determining whether a youth should be tried in juvenile or adult court, competency examinations take place prior to an adjudication or conviction. Competency is not unique to juvenile court as it has been raised in adult criminal court since the Supreme Court’s 1960 ruling in *Dusky v. United States*.⁹⁴ But, it is still a relatively new phenomenon for competency issues to be litigated in juvenile court. As the Vermont legislature noted in enacting a juvenile competency court rule in 2006:

Though there have been relatively few instances of the need for such determinations in Vermont, there is increasing concern in the state, and in a developing body of national literature, that juvenile and other courts be aware of the specific competency issues that may arise depending on the juvenile’s maturity as well as mental ability. . . . In the absence of a rule, there is also a lack of uniformity among the Family Court judges in the procedure for competency determinations.⁹⁵

93. *Brown*, 26 A.3d at 500 (citing *Commonwealth v. Webster*, 470 A.2d 532, 535 (1983)).

94. 362 U.S. 402, 402–03 (1960).

95. VT. R. FAM. P. 1 reporter’s Notes (2006 Amendment) (adding VT. V.R. FAM. F.P. 1(i)). The legislature cited to the then emerging literature on juvenile competence, including Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3–32 (1997); Marty Beyer, *What’s Behind Behavior Matters: The Effects of Disabilities, Trauma, and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRAC. 2 (2001); RICHARD E. REDDING, INST. OF LAW, PSYCHIATRY & PUB. POLICY, ADJUDICATIVE COMPETENCE IN JUVENILES: LEGAL AND CLINICAL ISSUES, JUVENILE FORENSIC FACT SHEET (2000); see also Note, *Statutory Reform in the Georgia Juvenile Court System: Juvenile Competency Issues Finally Addressed*, 15 GA. ST. U. L. REV. 879, 879 (1999) (noting that as of 1999, only a handful of states had a codified structure for juvenile competency hearings).

Similarly, Louisiana enacted 2004 amendments to its juvenile competency statute in recognition of “the need to refine the unique process by which a *child* is determined to be capable of standing trial in the juvenile court” as contrasted to an adult in criminal court.⁹⁶ Citing to the MacArthur Juvenile Adjudicative Competence Study, the commentary to the 2004 amendments emphasized the importance of employing evaluators with expertise in child development in assessing capacity, as “[d]eficiencies in risk perception, as well as immature attitudes toward authority figures, may undermine competent decision making in ways that standard assessments of competence to stand trial do not capture.”⁹⁷

A survey identified juvenile competency statutes and/or rules currently in effect in twenty-one jurisdictions—Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Ohio, Texas, Vermont and Virginia.⁹⁸ These juvenile competency statutes and court rules typically set forth a variation of the standard for adult competence articulated by the Supreme Court in *Dusky v. United States*: a defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”⁹⁹ Some provisions also provide the courts with criteria to consider in determining whether a youth satisfies the two-prong *Dusky* test to ensure that “evaluations of a particular juvenile’s

96. LA. CHILD CODE ANN. art. 832 Comments 2004 (emphasis added).

97. *Id.* (citing Grisso et al., *Juveniles’ and Adults’ Competence as Trial Defendants*, 27 L. & HUM. BEHAV. 33 (2002)).

98. ARIZ. REV. STAT. ANN. § 8-291.02 (2007); ARK. CODE ANN. § 9-27-502 (LEXIS 2011) (applicable to juveniles under thirteen years of age charged with capital murder or murder in the first degree); CAL. WELF. & INST. CODE § 709; Colo. Rev. Stat. § 19-2-1301 (2011); Conn. R. P. 31a-14; D.C. CODE § 16-2315(b-1) (2011); FLA. STAT. § 985.19 (2007); Fla. R. Juv. P. 8.095; GA. CODE ANN. §§ 15-11-150, -153 (2011); IDAHO CODE ANN. § 20-519A; KAN. STAT. ANN. § 38-2348(a); LA. CHILD. CODE ANN. art. 832-835 (2011); MD. CODE ANN., Cts. & Jud. Proc. § 3-8A-17.4 (LEXIS 2011); MINN. R. JUV. DEL. P. 20.01 Subd.; MO. S. CT. R. 117.01; NEB. REV. STAT. § 43-258 (2011); N.H. REV. STAT. ANN. § 169-B:20 (2011); N.M. CHILD. CT. R. 10-242; OHIO JUV. R. 32(A); TEX. FAM. CODE ANN. § 55.31 (2011); VT. R. FAM. P. 1(i); VA. CODE ANN. § 16.1-356 (2011).

99. 362 U.S. 402, 402 (1960).

competency are . . . made with regard to juvenile norms.”¹⁰⁰ For example, in Vermont, an examiner is to consider, inter alia, the youth’s developmental maturity with respect to thought, sense of identity and moral reasoning, any history of developmental delays or disabilities, as well as the impact of any past or present trauma on the youth’s capacity.¹⁰¹ Arkansas’ statute similarly provides a detailed list of issues that the examiner must consider with respect to capabilities and developmental level, including whether the juvenile has logical decision-making abilities, an ability to realistically appraise likely outcomes, and reason through available options and weigh their consequences.¹⁰²

As in the transfer/waiver context, and as was demonstrated in *Estelle v. Smith*, *supra*, competency evaluations can elicit incriminating information from the youth. Arkansas’ juvenile competency statute, for example, directs the examiner to provide an opinion as to whether, developmentally, the youth has, inter alia, an ability “to disclose to an attorney a reasonably coherent description of facts pertaining to the charges” and “to articulate his or her motives.”¹⁰³ Similarly, in Florida, the evaluator must opine as to whether the child has the capacity to disclose facts pertinent to the charges to his or her counsel.¹⁰⁴ Even without making these specific inquiries, the competence evaluator is likely to elicit statements or information about the circumstances surrounding the alleged offenses.

In fact, a number of the juvenile competency statutes/court rules cited above contemplate such an outcome as these provisions incorporate explicit protections against self-incrimination. Specifically, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Kansas, Maryland, Missouri, Ohio, Vermont and Virginia include provisions restricting the use of any statements made in the course of a competency evaluation in future proceedings.¹⁰⁵ By

100. *In re J.M.*, 769 A.2d 656, 662 (Vt. 2001).

101. VT. R. Fam. P.1(i) reporter’s notes (2006 Amendment).

102. ARK. CODE ANN. § 9-27-502(b)(7)(C)(ix)(b).

103. *Id.* § 9-27-502(b)(7)(C)(ix)(b)(2)(E)-(F).

104. FLA. STAT. § 985.19(f)(4).

105. ARIZ. REV. STAT. ANN. § 8-291.06(B) (stating that any statement made during a competence examination, or any evidence resulting from such statement, is not admissible in

way of example, Arizona law provides both use and derivative use immunity for statements made during a competency examination:

- (A) The privilege against self-incrimination applies to any examination or to any statement that is made to restoration personnel during the course and scope of a court ordered restoration program.
- (B) Any evidence or statement that is obtained during an examination or any evidence or statement that is made to

any proceeding to determine the juvenile's guilt or innocence unless the juvenile presents evidence to rebut presumption of sanity); ARK. CODE ANN. § 9-27-502 (citing ARK. CODE ANN. § 5-2-301; ARK. CODE ANN. § 5-2-307) (statements made during examination are only admissible if admissible under rules of evidence and constitutionally admissible); *see also* ARK. R. EVID. 503(b), (d) (statements in court ordered evaluations admissible only for purpose ordered); COLO. REV. STAT. § 19-2-1305(3) (2011) ("Evidence obtained during a competency evaluation or during treatment related to the juvenile's competency or incompetency and the determination as to the juvenile's competency or incompetency is not admissible on the issues raised by a plea of not guilty."); CONN. R. P. 31a-14 (information obtained during mental health screening or assessment shall be used solely for planning and treatment purposes; information is confidential and may only be disclosed for any court ordered evaluation of treatment; such information not subject to subpoena or court process); D.C. CODE § 16-2315(e)(4), (6) (results of mental or physical examination not admissible as evidence at the juvenile fact-finding hearing or in any criminal proceeding); FLA. R. JUV. P. 8.095(d)(5) (information learned in court ordered competency evaluations only for the limited purpose of competency to proceed); KAN. STAT. ANN. § 38-2348(a)(2) (no statement made, whether examination with or without the minor's consent, shall be admitted in evidence against the juvenile in any hearing); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.10(b)(1) (any statement made or information elicited may be admitted in evidence in any proceeding except the competency proceeding); MO. REV. STAT. § 552.020 (14) (no statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt); OHIO JUV. R. 32(B) ("[A]ny social history, physical examination or mental examination ordered pursuant to subdivision (A) Shall be utilized only for the limited purposes therein specified. The person preparing a social history or making a physical or mental examination shall not testify about the history or examination or information received in its preparation in any juvenile traffic offender, delinquency, or unruly child adjudicatory hearing, except as may be required. . . ."); VT. R. FAM. P. 1(i)(4) ("No statement made in the course of an examination by the child examined, whether or not the child has consented to, or obtained, the examination, shall be admitted as evidence in the delinquency proceedings for the purpose of proving the delinquency alleged or for the purpose of impeaching the testimony of the child examined."); VA. CODE ANN. § 16.1-360 (1999) ("No statement or disclosure by the juvenile concerning the alleged offense made during a competency evaluation ordered pursuant to § 16.1-356, or services ordered pursuant to § 16.1-357, may be used against the juvenile at the adjudication or disposition hearings as evidence or as a basis for such evidence.").

restoration personnel during the course and scope of a restoration program is not admissible in any proceeding to determine the juvenile's guilt or innocence unless the juvenile presents evidence that is intended to rebut the presumption of sanity.

(C) Any statement that a juvenile makes during any examination, any statement that a juvenile makes to restoration personnel during the course and scope of a restoration program or any evidence resulting from the statement concerning any other event or transaction is not admissible in any proceeding to determine the juvenile's guilt or innocence of any other charges that are based on those events or transactions.¹⁰⁶

By contrast, no explicit provisions were found in California,¹⁰⁷ Georgia, Idaho,¹⁰⁸ Louisiana, Minnesota, Nebraska, New Hampshire, New Mexico and Texas that restrict the admissibility of statements made during competency evaluations, despite the fact that these states have juvenile competency statutes/court rules.

As described in Part II *supra*, attorneys can defend a youth's right against self-incrimination in competency proceedings. First, the attorney can request that the court include language in the order for a competency evaluation that provides for immunity for any self-incriminating statements during the evaluation. Defendants in delinquency or criminal trials can always move to suppress statements made during compelled evaluations on the grounds that the statements were coerced, they were elicited in violation of the precepts of *Miranda* and/or their introduction would violate the defendant's right to counsel. Outside the context of individual cases, the bar can urge that immunity provisions be incorporated into juvenile competence statutes and court rules as these are enacted.

106. ARIZ. REV. STAT. § 8-291.06 (2007).

107. *But see* Baqleh v. Superior Court, 100 Cal. App. 4th 478, 122 Cal. Rptr. 2d 673 (Cal. Ct. App. 2002) (holding statements in court ordered evaluations to determine competency inadmissible at guilt and sentencing stages).

108. "No statements of the juvenile relating to the alleged offense shall be included in the report unless such statements are relevant to the examiner or evaluation committee's opinion regarding competency." IDAHO CODE ANN. § 20-519A(6)(f) (2011). However, on its face, this statute does not prohibit the admission in future proceedings of relevant statements that are included in the examiner's report.

V. COURT ORDERED TREATMENT

Another situation in which youth may be compelled to divulge information about offending behavior is during treatment that they undergo pursuant to a court's disposition order. Rehabilitation and treatment are two fundamental missions of the juvenile court. Juvenile courts can and often do order youth to complete various types of mental health, substance abuse and other treatment programs as part of their post-adjudication dispositions. Some state juvenile correctional systems offer a wide array of behavioral health services to youth, such as individual, group and family psychotherapy, substance abuse treatment and sex offender treatment. For example, Ohio, Texas and Florida offer intensive mental health services within designated correctional facilities.¹⁰⁹ When publicly-run correctional settings do not offer appropriate treatment, courts can send youth to specialized, privately-run residential treatment facilities as part of their dispositions. The Office of Juvenile Justice and Delinquency Prevention reports that in 2009, 32 percent of all juvenile offenders in out-of-home placements were held in residential treatment facilities that "frequently offer a combination of substance abuse and mental health treatment programs, such as psychoanalytic therapy, psychoeducational counseling, special education, behavioral management, group counseling, family therapy, and medication management, along with 24-hour supervision in a highly structured (often staff-secure) environment."¹¹⁰

Services to treat behavioral health disorders such as individual and group psychotherapy specifically elicit self-incriminating information from youth. In fact, professionals treating youth in the juvenile justice system may focus on trying to get the youth to admit to misbehavior—including conduct that was not the basis of the

109. Kathleen R. Skowyra & Joseph J. Coccozza, National Center for Mental Health and Juvenile Justice, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System* 58 (2007) (citing Lee Underwood, W. Mullan & C. Walte, *We Built Them and They Came: New Insights for Managing Ohio's Aggressive Juvenile Offenders with Mental Illness*, 1 CORRECTIONS MANAGEMENT QUARTERLY 19–27 (Fall 1997).

110. Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Model Programs Guide, Residential Treatment Centers*, OJJDP <http://www.ojjdp.gov/mpg/progTypesResidentialTreatment.aspx> (last visited Dec. 29, 2011).

delinquency adjudication that led to their placement in the program—as they believe that such admissions are an important part of the rehabilitative process. This is certainly a risk in many sex offender programs, which emphasize such disclosures, indeed even mandate them, as part of the therapeutic process.¹¹¹

A survey yielded five jurisdictions—the District of Columbia, Illinois, Indiana, Wisconsin, and Wyoming—with either statutes or court rules explicitly prohibiting the use of statements made in court-ordered treatment to determine guilt in juvenile delinquency and criminal proceedings.¹¹² The Illinois rule also excludes statements

111. Jill Levenson & David D'Amora, *An Ethical Paradigm for Sex Offender Treatment: Response to Glaser*, 6 W. CRIMINOLOGY REV. 145, 149 (2005); Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOLOGY REV. 143, 146 (2003); Jessica Wilen Berg, Note, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court Ordered Therapy Programs*, 79 CORNELL L. REV. 700, 702 (1994); see also *Welch v. Kentucky*, 149 S.W.3d 407, 409 (Ky. 2004) (noting that court-ordered participants in sex offender treatment programs are strongly encouraged by counselors to disclose all prior sexual misconduct because such disclosure is necessary to obtain and keep certain privileges during treatment and to demonstrate successful program completion to the court).

112. D.C. CODE § 24-531.10 (2005) (“Any statement that is obtained during a court-ordered examination, evaluation, or treatment, or any evidence resulting from that statement, is not admissible at any proceeding to determine a defendant’s guilt or innocence or to determine an appropriate sentence, except when the defendant puts his competence or mental health at issue in the proceeding.”); 705 ILL. COMP. STAT. 405/5-401.5(h) (“A statement, admission, confession, or incriminating information made by or obtained from a minor . . . as part of any behavioral health screening, assessment, evaluation, or treatment, whether or not court-ordered, shall not be admissible as evidence against the minor on the issue of guilt only in the instant juvenile court proceeding.”); IND. CODE ANN. (2007) §§ 31-32-2-2.5, 31-37-8-4.5 (statements by juveniles in court-ordered treatment are inadmissible as to guilt, except as to homicide); see also *Sims v. State*, 601 N.E.2d 344, 345–46 (Ind. 1992) (statements during court-ordered treatment protected by right against self-incrimination). *But see* *Watson v. State*, 784 N.E.2d 515, 520 (Ind. 2003) (right against self-incrimination in court-ordered treatment waived when defendant put mental state at issue); WIS. STAT. § 971.18 (2011) (“A statement made by a person subjected to psychiatric examination or treatment . . . shall not be admissible in evidence against the person in any criminal proceeding on any issue other than that of the person’s mental condition.”); see also *State v. Todd*, F.M., 506 N.W.2d 427 (Wis. 1993) (upholding suppression of statement made by juvenile in treatment while in custody of residential treatment facility pursuant to delinquency adjudication). *But see* *Moore v. State*, 265 N.W.2d 540 (Wis. 1978) (statute does not preclude consideration of a psychiatric report at the sentencing stage); WY. JUV. PROC. R. 9 (stating that juvenile’s admissions or incriminating statements made to a professional in the course of court-ordered treatment shall not, without the juvenile’s consent, be admitted into evidence in any criminal or juvenile delinquency case brought against the juvenile, except that the privilege shall not apply to statements regarding future misconduct).

made when the youth voluntarily participates in treatment as part of his court case.¹¹³

Absent explicit prohibitions to admissibility in statutes or rules, some courts—including those in Kentucky, Ohio, and Oregon—have applied traditional Fifth Amendment jurisprudence to suppress statements made by individuals in court-ordered treatment programs in subsequent delinquency hearings or criminal trials.¹¹⁴ For example, in *Welch v. Commonwealth*, the Virginia supreme court held that a juvenile's incriminating statements to counselors at a sex offender treatment program were inadmissible because they were elicited from the juvenile absent *Miranda* warnings and a valid waiver of his rights, and were involuntary.¹¹⁵ Upon conviction for a sex offense, the juvenile was committed to a facility where he was ordered to undergo sex offender treatment.¹¹⁶ A critical component of the involuntary treatment was to participate in group therapy and disclose all prior sexual misconduct; failure to do so meant that the juvenile could not successfully complete the court ordered program and return home.¹¹⁷ The juvenile subsequently disclosed to counselors prior uncharged sexual offenses without prior notice or warning from counselors that his disclosures could be used to prosecute him.¹¹⁸ The facility then notified law enforcement officers, who came to the facility, administered *Miranda* warnings and further questioned the juvenile, who again disclosed that he had committed sexual offenses against a child.¹¹⁹ New charges were brought against the juvenile based on these admissions.¹²⁰

The *Welch* court first held that the juvenile was subjected to custodial interrogation for purposes of *Miranda*.¹²¹ The juvenile was

113. 705 ILL. COMP. STAT. 405/5-401.5(h) (2011).

114. *Welch v. Com. of Kentucky*, 149 S.W.3d 407, 412 (Ky. 2004); *State v. Evans*, 760 N.E.2d 909, 914 (Ohio Ct. App. 2001); *State v. Gaither*, 100 P.3d 768, 772 (Or. Ct. App. 2004) (holding that statements made by defendant to probation officer were involuntary where a failure to disclose list of victims to officer or face probation revocation).

115. 149 S.W.3d 407, 410–12 (2004).

116. *Id.* at 408.

117. *Id.* at 409.

118. *Id.* at 408–09.

119. *Id.*

120. *Id.* at 409.

121. *Id.* at 411.

in state custody, his participation in the treatment program involuntary, and he was intensely questioned by counselors as to his sexual misconduct as it was a prerequisite for successful completion of the program. On this evidence, the court concluded that his subsequent statements were the result of coercion.¹²² Moreover, the court specifically found that although not law enforcement officers, the counselors engaged in state action because their “interrogation was such as to likely result in disclosure of information which would lead to facts that would form the basis for prosecution.”¹²³ The court also found that the statements made in treatment were involuntary and further held that the juvenile’s subsequent statements to law enforcement were fruit of a poisonous tree and likewise must be suppressed.¹²⁴

An Ohio appellate court similarly found that statements made by a juvenile in the course of court-ordered therapy in a juvenile court-operated facility were the product of coercion.¹²⁵ The Ohio court also found that the juvenile was in custody, the treatment was involuntary, he was interrogated by the facility staff, and that he would be in violation of a court order and risked transfer to a more restrictive facility if he failed to answer their questions.¹²⁶ It concluded however, that *Miranda* warnings were not required because there was no evidence that the staff had a duty to report to law enforcement.¹²⁷ Nevertheless, the court held that the juvenile’s statements to facility staff were properly suppressed by the trial court because “[b]y procuring two incriminating statements as a condition of court-ordered therapy and under threat of substantial penalty, [the facility] placed [the juvenile] in the ‘classic penalty’ situation.”¹²⁸ The court first found that the facility counselors exercised state power when they questioned the juvenile, stating that this analysis under the voluntariness test is distinct and broader than the inquiry of whether

122. *Id.* at 410.

123. *Id.* at 411.

124. *Id.* at 411–12.

125. *State v. Evans*, 760 N.E.2d 909, 914–15 (Ohio Ct. App. 2001).

126. *Id.* at 919, 924.

127. *Id.* at 920–22 (distinguishing *Estelle v. Smith*, 451 U.S. 454 (1981)).

128. *Id.* at 922.

they were law enforcement agents for *Miranda* purposes.¹²⁹ The court went on to note that the facility counselors engaged in

[interrogation of] grinding duration and inevitability. [The juvenile] was warned when he arrived at [the facility] that he must divulge incriminating information. It was not a question of whether [the facility] would get the information; it was only a question of when [the juvenile] would succumb, as had all those who had preceded him. [Facility] counselors institutionally and effectively employed both inducements and threats to insure that [the juvenile] would eventually give them what they wanted and thereby incriminate himself.¹³⁰

Another group of state courts—including those in Hawaii, Idaho, Minnesota, Montana, New Jersey, North Carolina, and Washington—found a violation when the defendant’s probation was revoked or he was penalized in some other way for failing to “cooperate” with treatment.¹³¹ Illustrative of these “classic penalty” situations is the

129. *Id.* at 927.

130. *Id.* at 928. The court, however, held that a subsequent statement made to a counselor in response to the general question of “how he got into so much trouble?” was voluntary. *Id.* It is unclear why the court did not apply a fruit of the poisonous tree analysis to this later statement.

131. *State v. Reyes*, 2 P.3d 725, 733 (Haw. Ct. App. 2000) (vacating and remanding probation revocation because defendant had not “inexcusably failed to comply” with condition of court order when he continued to deny charged sex crimes); *cf.* *State v. Jones*, 926 P.2d 1318 (Idaho Ct. App. 1996) (upholding probation revocation because defendant had immunity from further prosecution as per plea agreement); *State v. Kaquatosh*, 600 N.W.2d 153, 158 (Minn. Ct. App. 1999) (finding that it was a violation of a probationer’s Fifth Amendment right against self-incrimination to revoke his probation for failing to complete a court-ordered sex-offender treatment program where the failure was due to his refusal to admit facts underlying a conviction from which he was appealing); *State v. Imlay*, 813 P.2d 979 (Mont. 1991) (“[W]e believe that the better reasoned decisions are those decisions which protect the defendant’s constitutional right against self-incrimination, and which prohibit augmenting a defendant’s sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination.”); *Bender v. New Jersey Dep’t of Corr.*, 812 A.2d 1154, 1162 (N.J. Super. Ct. App. Div. 2003) (finding that denial of good time and work credits for inmate’s refusal to answer incriminatory questions about criminal history violated right against compelled self-incrimination); *Linberry*, 572 S.E.2d 229, 236 (N.C. App. 2002) (holding that penalizing a youth who refuses to admit guilt in court-ordered sex offender treatment violated right against self-incrimination); *State v. Warner*, 889 P.2d 479, 484 (Wash. 1995) (suggesting that statements made during court-ordered treatment pursuant to delinquency adjudication are inadmissible in a criminal trial where compelled by threat of penalty); *cf.* *Beaver v. State*, 933 P.2d 1178, 1186 (Ala. Ct. App. 1997) (holding admission of statements made by defendant

Hawaii case *State v. Reyes*, in which the court ordered a convicted defendant to participate in a sex-offender treatment program which required participants to admit their acts.¹³² The *Reyes* defendant refused to disclose any past acts and was deemed to have failed to complete the program, which consequently led the trial court to revoke his probation.¹³³ On appeal, the court held that the requirement of admission violated the defendant's privilege against self-incrimination, and his refusal to admit guilt was not a valid reason to revoke his probation.¹³⁴

Finally, a few courts have suggested that information divulged in court-ordered treatment is protected by a physician-patient or psychotherapist privilege and therefore inadmissible on issues of guilt.¹³⁵

As described *supra*, when the government seeks to introduce statements made in court-ordered treatment as evidence on the issue of guilt in subsequent prosecutions, defense attorneys can argue for suppression on the grounds that the statements were not voluntary and/or were elicited absent a valid waiver of *Miranda* rights. But clearly an explicit prohibition in statute or court rule is a safer and

during sex offender treatment at sentencing did not violate right against self-incrimination where defendant's participation in treatment was completely voluntary).

132. *Reyes*, 2 P.3d at 727–28.

133. *Id.* at 730–31.

134. *Id.* at 733.

135. See, e.g., *Sims v. State*, 601 N.E.2d 344, 346 (Ind. 1992) (“[Statements during court-ordered treatment] should be protected. As is the case with the physician-patient relationship, the purpose of protecting such communications is to insure that persons communicate fully and completely with their counselors in order to promote successful treatment.”); cf. *Watson v. State*, 784 N.E.2d 515, 520 (Ind. 2003) (physician-patient privilege in court-ordered treatment waived when defendant put mental state at issue); *In re Ashley M.*, 683 N.Y.S.2d 304 (N.Y. App. Div. 3d 1998) (finding that required admissions during court-ordered treatment do not violate right against self-incrimination because statutory psychologist-patient privilege precludes use of statements in criminal prosecutions); *Commonwealth v. Carter*, 821 A.2d 601 (Pa. Super. Ct. 2003) (finding that records of court-ordered treatment in delinquency adjudication are protected by psychologist-patient privilege if made for treatment purposes and are inadmissible unless defendant informed/waived *Miranda* rights). But see *Commonwealth v. Smith*, Pa. D. & C.4th 311 (Pa. Com. Pl. 2004) (holding that *Miranda* warnings were not required but statements may be inadmissible if not voluntary under totality of circumstances); *In re Todd F.M.*, 506 N.W.2d 427, at *6 (Wis. Ct. App. 1993) (unpublished decision) (upholding suppression of statement made by juvenile in treatment while in custody of residential treatment facility pursuant to delinquency adjudication; statements were protected by statutory privilege applicable to communications made by those being treated under the direction of a physician or psychologist).

more reliable route for securing the youth's right against self-incrimination. Because one of the major goals of the juvenile court is to treat and rehabilitate youth so that they may re-enter society, there is a strong societal interest in providing these protections.

CONCLUSION

One of the major challenges that a youth's defense attorney faces is to maximize the benefits that a youth can reap in the processes described in this Article—e.g., treatment for a substance abuse problem and trial in juvenile instead of adult court—while minimizing a youth's potential exposure to self-incrimination. The most risk averse approach is for counsel to advise his or her client not to participate in these processes and thus avoid potential self-incrimination altogether. However, the cost to the youth of foregoing, for example, trial in juvenile court, will usually greatly outweigh the benefit of preventing exposure to self-incrimination. This Article first gives defense attorneys strategies to employ once the "cat is out of the bag" and a statement has already been made. But in the longer run, it is advisable for the bar to take a more global approach and advocate for the passage of statutes and court rules that provide youth defendants with the necessary immunities so that these situations do not occur in the first place.