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Empathy, Acceptance of Responsibility, and Compelled Testimony in Juvenile Transfer Hearings: Legal Context and Empirical Evidence

Kirk Heilbrun, Sanjay Shah, Elizabeth Foster, Michael Kessler, & Stephanie Brooks Holliday

There are a number of legal decisions in which the court must decide whether juveniles can be rehabilitated. Such decisions include juvenile adjudication/placement, waiver, and reverse waiver.¹ The criterion used by courts to consider rehabilitation amenability is typically phrased in a way similar to that described under Pennsylvania state law.² In deciding whether a child may be decertified (reverse waived from criminal to juvenile court), the court can consider

whether the child is amenable to treatment, supervision, or rehabilitation as a juvenile. The court may consider the following in determining treatment, supervision, or rehabilitation amenability: (a) age, (b) mental capacity, (c) maturity, (d) degree of criminal sophistication, (e) previous records, (f) nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate, (g) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction, (h) probation or institutional reports, (i) any other relevant factors, and (j) whether there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.³

Empathy for the victims of the defendant's offenses, and acceptance of responsibility for such offenses, may be considered by mental health and justice professionals working with post-adjudicated youth. But rendering an expert opinion that describes the youth's capacity for empathy or acceptance of responsibility, when that opinion is based in part on questions concerning the alleged offense, places the evaluating expert in an awkward position. To what extent can denial of culpability be used to infer limited empathy and acceptance of responsibility? How does the Fifth Amendment right against self-incrimination factor into this consideration?

Some courts have addressed these questions, at least in part. In a recent Pennsylvania decertification case,⁴ the defendant, facing potential adjudication in criminal court, was 11 years old

when charged with shooting and killing his stepmother and her unborn child. The trial court denied a defense motion to decertify the case to the juvenile division, and defense counsel appealed.

In the appeal, defense contended that the trial court committed an error of law in applying a provision of the decertification statute⁵ in a manner that infringed upon the defendant's Fifth Amendment right against self-incrimination. In particular, the psychiatrist retained by the Commonwealth testified that the youth avoided talking about the evidence presented at the preliminary hearing and the factual allegations. The psychiatrist added that such avoidance of taking responsibility complicated rehabilitation, as taking responsibility is a necessary precursor to effective rehabilitation. Thus, he concluded, Jordan Brown could not be rehabilitated.

The trial court decided that the defendant could not be rehabilitated by the age of 21, citing the expert's reasoning that the defendant would not take responsibility for his actions—and thus concluding that rehabilitation was unlikely to be successful. On appeal, however, the appellate court held that the Fifth Amendment applies in decertification proceedings. The appellate court vacated the trial court's order, remanding the case for a new decertification hearing. In the subsequent trial court hearing, without the evidence offered initially by the Commonwealth's expert, the court concluded that Jordan Brown should be decertified.

This Pennsylvania case offers some precedent for legal proceedings in which a juvenile defendant's rehabilitation amenability is at issue. This article will address two questions: (1) To what extent does the Fifth Amendment provide protection from compelled testimony at transfer hearings? and (2) What does the relevant behavioral science evidence suggest concerning the appraisal of a defendant's capacity for empathy and acceptance of responsibility—and to what extent is such an appraisal limited when a mental health expert cannot question the defendant about his/her role in the alleged offense?

Footnotes

1. E.g., GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 471–73 (3d ed. 2007).

2. 42 PA. CONS. STAT. ANN. § 6355 (2000).

3. *Id.*

4. *Commonwealth v. Brown*, 2011 PA Super. 47 (2011).

5. § 6355(a)(4)(iii).

FIFTH AMENDMENT PROTECTION OF JUVENILES FROM COMPELLED TESTIMONY AT TRANSFER HEARINGS

In 1967, the United States Supreme Court established that the Fifth Amendment is broadly applicable to juvenile transfer hearings.⁶ Since that time, some states have more specifically addressed the application of the Fifth Amendment in juvenile transfer hearings with respect to compelled testimony in such hearings. This section will describe jurisdictions in which (a) compelled, self-incriminating testimony is disallowed; (b) such testimony is permitted; and (c) relevant law does not clearly support either (a) or (b). Whenever possible, we focus particularly on the use of such testimony to the question of amenability to rehabilitation rather than other questions (e.g., risk of future offending) that often arise in transfer proceedings.

JURISDICTIONS DISALLOWING COMPELLED SELF-INCRIMINATING TESTIMONY

Alaska. In *R.H. v. State*⁷ the court compelled the juvenile to submit to a psychiatric evaluation and substance abuse screening. Therein, the court sought to avoid the risk of self-incrimination by allowing the defendant's attorney to be present, to screen the report first, and to limit the use of the report beyond the waiver hearing. During the stage of the transfer hearing devoted to determining the juvenile's treatment amenability, the State presented testimony from three experts who had examined the defendant "(t)o establish the probable cause of R.H.'s delinquent behavior and the adequacy of existing facilities to provide treatment to R.H. . . ." ⁸ However, the juvenile did not introduce psychiatric evidence on his own behalf.

On appeal, the defendant claimed infringement on his right to be free from self-incrimination. The State argued that R.H. was protected because "the court restricted the use of the evaluations to the determination of R.H.'s amenability to treatment and precluded their use in subsequent phases of his case. . . ." ⁹ In its ruling, the court noted that "the stakes involved in such proceedings are high"¹⁰ and that the transfer hearing is an adversarial process. The court concluded that this compelled evaluation helped the state to incriminate the defendant, citing *Estelle v. Smith* as authority that "the fifth amendment privilege is not confined to directly inculpatory statements or to any particular type of proceeding."¹¹ The court explained that the prosecution's report helped the court decide to prosecute R.H. as an adult—and, as a result, he faced much more serious punishment.¹² However, the court also noted that *had the juvenile presented psychiatric evidence on his own behalf, this may constitute a waiver of the Fifth Amendment privilege.*¹³ Ultimately, the court

held that "the erroneously admitted evidence did not have an appreciable effect on the court's ultimate decision to waive jurisdiction,"¹⁴ vacating the original order and remanding the case for reconsideration.

Arizona. In one Arizona case in which a juvenile was charged with first-degree murder, the state requested a mental health evaluation. The defense opposed this request because any incriminating statements could be used in both the transfer hearing *and* in any subsequent proceedings (including on the issue of guilt).¹⁵ The court ordered the examination but stated that "the decision whether to submit to [the evaluation] was up to the appellant. No limitation as ordered on the use of the results of the examination."¹⁶ Additionally, the court made clear that it intended to use the juvenile's decision regarding participation in the evaluation when determining his treatment amenability.¹⁷ The appellate court found the juvenile's refusal formed a foundation for the lower court's determination of non-amenability, adding that this issue could be avoided by "placing appropriate limitations on the use of appellant's statements in the court's order granting the request for a mental examination."¹⁸ However, by not limiting the use of the evaluation and then "penalizing the appellant for refusing to cooperate,"¹⁹ the process violated the defendant's Fifth Amendment rights.²⁰

California. In *Ramona R. v. Superior Court*,²¹ the California Supreme Court reviewed a case in which a juvenile defendant, charged with murder, had been held by the trial court as "unfit to be tried in juvenile court" due to the "gravity of her offense" and low treatment amenability.²² After granting appeal, the Supreme Court of California considered whether section 707(c) of the California Welfare and Institutions Code was unconstitutional.²³ The issue was that it appeared to compel a minor to choose between the due-process right to testify and privilege against self-incrimination.²⁴

In its decision, the Supreme Court of California observed that use immunities are important to protect against self-incrimination and that "testimony a minor gives at a fitness hearing or statements he makes to his probation officer may not be used against him at a subsequent trial of the offense."²⁵ According to the court, the defendant should have had "protection against the use at trial of any statements she may make to

"Since [Gault], some states have more specifically addressed compelled testimony [in transfer hearings]."

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

7. *R.H. v. State*, 777 P.2d 204 (Alaska Ct. App. 1989).

8. *Id.* at 207.

9. *Id.* at 208.

10. *Id.* at 210.

11. *Id.* at 209 (citing *Estelle v. Smith*, 451 U.S. 454 (1981)).

12. *Id.* at 210.

13. *Id.* at 211–12.

14. *Id.* at 213.

15. *In re Juvenile Action No. J-77027-1*, 679 P.2d 92 (Ariz. Ct. App. 1984) (wherein the juvenile was charged with first-degree murder of his father's girlfriend and the state petitioned to transfer him to

criminal court).

16. *Id.* at 94.

17. *Id.*

18. *Id.* at 96 (citing *Estelle v. Smith*, 451 U.S. 454, 468 (1981)).

19. *Id.*

20. *Id.* at 95–96.

21. *Ramona R. v. Superior Court*, 693 P.2d 789 (Cal. 1985).

22. *Id.* at 790–91.

23. *Id.* at 790.

24. *Id.*

25. *Id.* at 795.

The Kansas court considered whether consent to a psychological evaluation was objectionable absent a *Miranda* advisement.

her probation officer or to the court at her fitness hearing.²⁶ Noting that transfer to criminal court is “the worst punishment the juvenile system is empowered to inflict,” the court described this as a cruel “trilemma” in which the defendant was forced to choose between (1) making a case for herself, but potentially having those statements used against her; (2) risking that invoking the Fifth Amendment would be seen

as an indication that there are no reasons the juvenile should not be tried in criminal court; and (3) giving altogether false testimony.²⁷

The court concluded that such a cruel “trilemma” was not an appropriate set of choices.²⁸ Because the court found that the immunity required by California law was violated, the question of whether it is unconstitutional to place the burden of proving fitness for juvenile court treatment on the minor was not addressed.²⁹

Colorado. In *People in Interest of A.D.G.*, the Colorado Court of Appeals reviewed a case in which a juvenile had been charged with manslaughter and use of a weapon.³⁰ In most of the cases reviewed in this article, transfer appeals are filed by the defense after a juvenile has been transferred to criminal court. In this case, however, the lower court denied the prosecution’s motion to transfer the case to criminal court, retaining the defendant in juvenile court.³¹ Thus, it was the prosecution’s appeal that was addressed in *People in Interest of A.D.G.*³²

In the original case, the prosecution sought a psychological evaluation of the juvenile when it requested the case be transferred to criminal court.³³ The juvenile court “concluded that it could not order a psychological examination over the juvenile’s objection”³⁴ and that a juvenile could not be “compelled to submit to an evaluation because of his Fifth Amendment right against self-incrimination.”³⁵ On review, the Colorado Court of Appeals agreed, holding that a juvenile cannot be compelled to participate in an evaluation under these circumstances.³⁶

Concluding that the trial court was correct in its decision not to compel the evaluation, the appellate court reasoned that the Fifth Amendment clearly applies to transfer hearings because

(1) they are “plainly adverse”³⁷ to the juvenile, and (2) the juvenile risks loss of rehabilitation and is instead subject to adult penalties.³⁸ Finally, the court held that the juvenile’s refusal to be examined by a psychologist could not be considered as part of a transfer decision because a “defendant may not be penalized for the exercise of his Fifth Amendment right to remain silent.”³⁹

People in Interest of A.D.G., however, was later distinguished by *People in Interest of C.Y.*⁴⁰ In this case, the magistrate ordered a psychosexual evaluation as part of a risk management plan after C.Y. was found incompetent to stand trial and could not be restored.⁴¹ The court held that the magistrate’s order did not violate C.Y.’s right to be free from compelled self-incrimination, reasoning that the case did not involve a transfer hearing but instead concerned “the ‘neutral’ issue of competency.”⁴² Further, the court concluded that any statements made during the evaluation would be obtained during treatment related to incompetency, and the juvenile would receive statutory immunity.⁴³

Kansas. In *State v. Davis*, the Supreme Court of Kansas considered whether consent to a psychological evaluation pursuant to a transfer hearing was objectionable when *Miranda* rights had not been read beforehand.⁴⁴ In the original trial, the juvenile defendant had been convicted of first-degree felony murder and related offenses.⁴⁵ Therein, the prosecution had not tried to admit self-incriminating statements at trial—rather, such statements were used only as part of the evaluation.⁴⁶ The trial court insisted that it would not consider any statements about the alleged offense that may establish guilt but would rather use other information in the report.⁴⁷ Upon conviction, the juvenile defendant appealed on a number of grounds, including the circumstances surrounding the court-ordered psychological evaluation.⁴⁸

On appeal, the Supreme Court of Kansas held that a juvenile’s declining to participate in the court-ordered evaluation may not be admitted as evidence against the juvenile.⁴⁹ Under these circumstances, in Kansas, there appears to be two levels of protection against compelled self-incriminating statements: they are not admissible on the issue of guilt, and the defendant may decline participation in a court-ordered evaluation on Fifth Amendment grounds without risking adverse consequences.

Massachusetts. In *Commonwealth v. Wayne W.*, the Supreme Judicial Court of Massachusetts reviewed a case wherein two juvenile defendants were transferred to criminal court.⁵⁰ The

26. *Id.* at 792–93.

27. *Id.* at 794 (citing *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) and *People v. Coleman*, 533 P.2d 1024, 1034 (Cal. 1975), earlier cases in which courts used the “trilemma” language).

28. *Id.*

29. *Id.* at 790.

30. *People in Interest of A.D.G.*, 895 P.2d 1067 (Colo. App. 1994).

31. *Id.*

32. *Id.*

33. *Id.* at 1069.

34. *Id.*

35. *Id.* at 1072.

36. *Id.*

37. *Id.* at 1073 (citing *R. H. v. State*, 777 P.2d 204, 204 (Alaska Ct.

App. 1989).

38. *Id.*

39. *Id.*

40. *People in Interest of C.Y.*, 275 P.3d 762 (2012).

41. *Id.* at 764.

42. *Id.* at 770–71.

43. *Id.* at 770.

44. *State v. Davis*, 998 P.2d 1127 (Kan. 2000).

45. *Id.*

46. *Id.* at 1134.

47. *Id.* at 1131.

48. *Id.* at 1127.

49. *Id.* at 1136.

50. *Commonwealth v. Wayne W.*, 606 N.E.2d 1323 (Mass. 1993).

defendants appealed on the basis of the Juvenile Court's exclusion of their expert psychiatric witnesses, who would have testified regarding their "amenability to rehabilitation within the juvenile justice system."⁵¹ The judge excluded the experts, however, because the juveniles had refused to participate in an evaluation with the prosecution's psychiatric expert.⁵² They asserted that being evaluated by the prosecution's expert would violate their right against self-incrimination.⁵³

Although the Supreme Judicial Court of Massachusetts held that Fifth Amendment protection applies in transfer hearings and related proceedings, it was careful to limit the scope of that protection.⁵⁴ The court stated that when defendants "voluntarily choose to offer expert psychiatric evidence, [they] can be ordered to participate in an examination by a Commonwealth expert."⁵⁵ The court also noted that "a defendant who speaks on his own behalf thereby gives up his privilege of silence and may be compelled to respond to questions posed by the State on matters reasonably related to the subject matter of his own testimony."⁵⁶ Thus, the court upheld the lower court's transfer decision but explained that its ruling could have been different had the juveniles not sought to introduce their own expert psychiatric testimony.⁵⁷

Minnesota. The Minnesota appellate court has held that, for purposes of certification, a "juvenile is presumed guilty of the alleged offenses."⁵⁸ For presumptive-certification proceedings, the State must demonstrate that the juvenile "was 16 or 17 years old at the time of the offense" and that "the alleged offense carries a presumptive prison sentence."⁵⁹ At that point, the juvenile may rebut the certification by demonstrating that the juvenile system would better serve public safety if the case were not transferred. In the case *In re Welfare of S.J.T.*, defense contended that (1) "Minnesota certification procedure violates the Fifth Amendment by requiring the juvenile to rebut a presumption of certification," and (2) "the Fifth Amendment precludes the district court from compelling the juvenile to submit certain information to the state."⁶⁰ The appellant had retained his own expert but refused to meet with the state's expert.⁶¹ Although he met with a probation officer conducting the certification study and agreed to provide access to medical records, the juvenile then revoked this release of information.⁶²

On review, the appellate court found that although certification proceedings are "not a dispositional procedure," the Fifth Amendment "applies to all proceedings."⁶³ The court also held that although the presumptive certification proceedings offer

the juvenile the opportunity to testify and rebut, "he is not required to do so"⁶⁴—therefore, the statute does not compel him to testify and thus violate the Fifth Amendment. The appellant had argued that his Fifth Amendment rights were violated when he was compelled to "produce certain records . . . without protection to the defendant for any incriminating statements that those records may contain."⁶⁵ However, the

court concluded that because the records were compelled, "the information provided is therefore immune from use in appellant's criminal proceeding."⁶⁶ The appellate court ultimately concluded that the Fifth Amendment does apply to certification and further observed that applicable state statutes protect against the use of any evidence or source of evidence used in a certification study from use in later trials.⁶⁷

Nevada. The Supreme Court of Nevada heard consolidated appeals from two juveniles certified as adults.⁶⁸ In the first case, William M. was charged with "conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon."⁶⁹ The State sought to have him certified as an adult, submitting the court psychologists' evaluation and a certification report written by the juvenile's probation officer, both detailing the defendant's alcohol abuse.⁷⁰ During the certification hearing, defense counsel explained that although there was evidence regarding William's substance abuse, William was "unable to rebut the presumption of adult certification by connecting his substance abuse problem to any actions in the alleged robbery, as he denied being involved in the incident."⁷¹ The trial court responded that "even though William had clearly established an alcohol abuse problem, he had not established a direct nexus between his alcohol abuse and the alleged conduct," thus certifying him to criminal court.⁷²

In the second case, the State again sought to transfer a juvenile with robbery and firearms charges to criminal court.⁷³ The psychological evaluation in the second case described substance abuse as well as behavioral and emotional problems, but the juvenile again denied participation in the offense.⁷⁴ The trial

The Massachusetts court held that Fifth Amendment protection applies in transfer hearings, but it limited the scope of protection.

51. *Id.* at 1324, 1329.

52. *Id.* at 1329.

53. *Id.*

54. *Id.* at 1332.

55. *Id.* at 1329.

56. *Id.* at 1331 (citing *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980) and *Estelle v. Smith*, 451 U.S. 454, 466 (1981)).

57. *Id.*

58. *In re Welfare of S.J.T.*, 736 N.W.2d 341, 353 (Minn. Ct. App. 2007).

59. *Id.*

60. *Id.* at 345.

61. *Id.* at 346.

62. *Id.*

63. *Id.* at 347.

64. *Id.* at 348.

65. *Id.*

66. *Id.* at 351.

67. *Id.* at 349 (citing Minn. R. Juv. Delinq. P. 18.04(5)).

68. *In re William M.*, 196 P.3d 456 (Nev. 2008).

69. *Id.* at 458.

70. *Id.* at 459.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 460.

The New Mexico court held a juvenile does not have to discuss his charges with a psychologist.

court found that because he could not establish “a nexus between his substance abuse or his emotional and behavioral issues and the park robbery, as he denies any involvement in the robbery,”⁷⁵ the court certified him to criminal court.

In the consolidated appeal, the defense argued that requiring juveniles to admit guilt “to rebut the presumption of adult certification” while “failing to prohibit the admission of their incriminating statement in subsequent guilt-determination proceedings”⁷⁶ violated their Fifth Amendment rights. The appellate court agreed, holding that the Fifth Amendment privilege against self-incrimination “applies to inculpatory statements made in juvenile proceedings.”⁷⁷ The court reasoned that requiring juveniles to “establish a direct nexus” between their problems and the criminal conduct forces them to provide inculpatory evidence to rebut the certification presumption.⁷⁸ Because there was no prohibition against using these statements in subsequent proceedings, the appellate court held that “Nevada’s presumption certification provisions . . . violate the Fifth Amendment and therefore are unconstitutional.”⁷⁹

New Mexico. In a recent New Mexico case, a juvenile (Christopher P.) was charged with two counts of first-degree murder and conspiracy to commit first-degree murder.⁸⁰ At a second (amenability) stage of the transfer hearing, the children’s court judge ordered the defendant to submit to a mental health evaluation to help determine his rehabilitation amenability.⁸¹ Although the juvenile’s counsel objected, the court “ordered the child to discuss the alleged delinquent acts with the psychologist conducting the evaluation”⁸² and also ordered that the information about the alleged offenses could be used only for the amenability portion of the transfer hearing.⁸³ The youth was transferred to criminal court and appealed on numerous grounds, including Fifth Amendment infringement “when the children’s court ordered him to discuss the alleged crimes during the psychological evaluation.”⁸⁴

On review, the Supreme Court of New Mexico reversed the transfer, overriding the trial and appellate courts.⁸⁵ The court found that Fifth Amendment rights of the child were violated when he was made to discuss the charges, though the court also

held that ordering a mental health evaluation was not beyond the authority of the trial court.⁸⁶

Oklahoma. In *J.T.P. v. State*, a juvenile was arrested on murder charges and a petition was filed for transfer to criminal court.⁸⁷ After his arrest, the juvenile was questioned, with his father present for some of the questioning.⁸⁸ However, it could not be determined whether the father knew his son was in custody or whether the juvenile ever attempted to assert or waive his constitutional rights.⁸⁹ The juvenile was subsequently transferred to Arkansas for a polygraph test; the father provided permission, and the juvenile was informed of his *Miranda* rights.⁹⁰ The polygraph was administered by a police captain, who was alone in the room with the juvenile, and the juvenile confessed to his part in the murder after the polygraph was administered.⁹¹ In the trial, the juvenile was transferred to criminal court.⁹²

On appeal, the defense contended that this confession was in violation of his Fifth Amendment rights.⁹³ The appellate court agreed and further held that the juvenile court must exclude certification evidence involving “statements of a child, obtained in violation of constitutional or statutory rights” that are inadmissible in delinquency or criminal proceedings.⁹⁴ In the case at hand, the court determined that the statement resulting from the interrogation should not be admitted.⁹⁵ Thereafter, the court saw insufficient evidence that the juvenile could not be rehabilitated (although those two were not necessarily linked).⁹⁶

JURISDICTIONS ALLOWING COMPELLED SELF-INCrimINATING TESTIMONY

Alabama. The 14-year-old juvenile in *Lippold v. State* was charged with murder, but because of his age, the circuit court heard a motion for transfer to juvenile court.⁹⁷ This motion was unsuccessful, and the defendant was tried and convicted in adult criminal court.⁹⁸ In the transfer hearing, the prosecution presented a psychologist’s testimony regarding a court-ordered evaluation.⁹⁹ Although the psychologist provided notification to the juvenile, he was not sure whether the defendant fully understood the potential implications.¹⁰⁰ There was no counselor or parent present, and the defendant described facts relating to the offense.¹⁰¹ Based largely on the evaluation, the defendant was tried in the circuit court as an adult.¹⁰²

On review of this decision, the Court of Criminal Appeals of Alabama observed that “[h]ad the State of Alabama endeavored to use the statement made to Dr. Bitgood as substantive evi-

75. *Id.*

76. *Id.*

77. *Id.* at 461.

78. *Id.* at 462.

79. *Id.* at 465.

80. *Christopher P. v. State*, 816 P.2d 485 (N.M. 1991).

81. *Id.* at 486.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *J.T.P. v. State*, 544 P.2d 1270 (Okla. Crim. App. 1975).

88. *Id.* at 1274.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1276.

94. *Id.*

95. *Id.*

96. *Id.* at 1278–79.

97. *Lippold v. State*, 365 So.2d 1015 (Ala. Crim. App. 1978).

98. *Id.*

99. *Id.* at 1020.

100. *Id.*

101. *Id.*

102. *Id.*

dence . . . we would not hesitate to reverse and remand this cause for a new trial.”¹⁰³ However, the State “*did not use* Lip-pold’s inculpatory statements to Dr. Bitgood as evidence at trial.”¹⁰⁴ Instead, they were used only in the transfer hearing, and the appellate court determined that this situation had been “properly handled by the Circuit Court.”¹⁰⁵

Arkansas. In a 2004 case, a 14-year-old juvenile charged with murder was considered for reverse transfer into juvenile court.¹⁰⁶ Testimony was provided from multiple sources, including his paternal grandmother, a DHS supervisor, a social worker, a teacher from juvenile detention, a Youth Services Center facility director, a child and adolescent psychiatrist (who testified about the defendant’s prior hospitalizations), a Division of Youth Services case manager, and an Arkansas Public Defender Commission investigator (who had met with the juvenile).¹⁰⁷ The prosecution also proffered testimony from a state police special agent and a mental health professional who had evaluated the defendant for competence to stand trial.¹⁰⁸

Appealing the decision to try the juvenile defendant in criminal court, defense argued that the defendant’s Fifth Amendment right against self-incrimination was violated because he “was forced to incriminate himself at a transfer hearing.”¹⁰⁹ The prosecution contended—and the Supreme Court of Arkansas agreed—that the statute did not compel the juvenile to testify and that he did not actually “testify” at the hearing.¹¹⁰ By this line of reasoning, therefore, the Fifth Amendment does not seem to prevent Arkansas prosecution from presenting inculpatory evaluation evidence at a transfer hearing.

Louisiana. In *State in the Interest of Bruno*, the juvenile defendant was charged with second-degree murder, and the State sought transfer to criminal court.¹¹¹ Pursuant to that motion, the prosecution sought to have the juvenile submit to a “psychiatric and psychological examination . . . for the purpose of evaluating the child’s ‘amenability’ to the juvenile system.”¹¹² Although defense objected, the trial court held that the applicable state statute did “not prevent a judge from ordering a child in a juvenile transfer proceeding to undergo a psychological evaluation.”¹¹³ As the court explained, a juvenile transfer requires “a full-blown hearing at which the child has a right to an attorney, and which involves the presentation of evidence by both the child and the state.”¹¹⁴

On appeal, the Supreme Court of Louisiana found that a juvenile undergoing such an evaluation is entitled to Fifth

Amendment protections.¹¹⁵ In this case, though, the court explained that the evaluation was not used to determine guilt but rather to simply address the question of amenability to treatment.¹¹⁶ As a result, “it does not violate the child’s right not to be compelled to give evidence against himself.”¹¹⁷ The court also noted, however, that “no statements, either inculpatory or exculpatory, made to the psychologist or psychiatrist during the examination, would be admissible at the trial on the merits of the child’s guilt or innocence.”¹¹⁸

Michigan. In 1993, the Supreme Court of Michigan granted an appeal after a juvenile, charged with possession and delivery of a substance containing cocaine and related charges, was waived for trial in adult criminal court.¹¹⁹ In the hearing, the defendant offered character testimony and his own psychologist.¹²⁰ However, the juvenile was waived following testimony from the probate court psychologist and the arresting police officers.¹²¹ The juvenile appealed this transfer and the appellate court reversed, holding that “the constitutional rights applicable in criminal proceedings extended to . . . the dispositional phase of a waiver hearing.”¹²² The Michigan Supreme Court reversed the appellate court, however, holding that the constitutional rights did not extend to the dispositional phase of a wavier hearing because the best interests of the juveniles and the public are taken under consideration.¹²³

Texas. In *K.W.M. v. State*, the 14th District Court of Civil Appeals of Texas reviewed a case wherein a juvenile, charged with aggravated robbery at age 16, appealed his discretionary transfer to criminal court.¹²⁴ In the state’s petition for transfer, the prosecution submitted a written confession and diagnostic report/evaluation as evidence.¹²⁵ Although the defense objected to these documents’ admission, the court overruled the objection, and the case was ultimately transferred to the adult system.¹²⁶

The juvenile appealed, arguing, *inter alia*, that the psychological report and evaluation—neither requested nor consented to by him or his attorney—should not have been admitted.¹²⁷

The Michigan Supreme Court [held] constitutional rights did not extend to the dispositional phase of a wavier hearing

103. *Id.* at 1021 (noting that this would have been pursuant to the provisions of §12-15-67, Code of Alabama (1975)).

104. *Id.*

105. *Id.*

106. *Otis v. State*, 142 S.W.3d 615 (Ark. 2004).

107. *Id.*

108. *Id.* at 622.

109. *Id.* at 628.

110. *Id.*

111. *State in the Interest of Bruno*, 388 So.2d 784 (La. 1980).

112. *Id.* at 785.

113. *Id.* at 787; *see also* LA. CHILD. CODE ANN. art. 860 (2004).

114. *Bruno*, 388 So.2d at 787.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *People v. Hana*, 504 N.W.2d 166 (Mich. 1993).

120. *Id.* at 169.

121. *Id.*

122. *Id.*

123. *Id.* at 176–77 (explaining that “the full panoply of constitutional rights was never intended to apply to the dispositional phase of a waiver hearing.”).

124. *K.W.M. v. State*, 598 S.W.2d 660 (Tex. Civ. App. 1980).

125. *Id.* at 661.

126. *Id.*

127. *Id.*

Courts are divided on whether confessions are compellable at the transfer stage.

The court stated that the Texas Code requires that “prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances

of the alleged offense.”¹²⁸ Defense countered that this violates the Fifth Amendment right against self-incrimination.¹²⁹ The Court of Civil Appeals, however, described the transfer hearing as “not an adjudication of the child’s guilt or innocence” and concluded, therefore, that Fifth Amendment rights did not apply.¹³⁰ Interestingly, the court also noted that the code “does not require the court to order the child to discuss his or her involvement in the alleged crime with the examiner but merely ‘the circumstances of the alleged offense.’”¹³¹ Therefore, a juvenile is not coerced to make self-incriminating statements, and his “Fifth Amendment rights are in no way jeopardized” (even if they did apply).¹³²

Washington. The juvenile in *In re Hegney* was charged with felony murder, tried as an adult, and convicted.¹³³ He appealed the decision, but the Court of Appeals of Washington, Division 2, affirmed the decision.¹³⁴ The defense filed a personal restraint petition, arguing that Washington’s juvenile declination procedure (i.e., a court declining to transfer a juvenile presumptively tried as an adult to juvenile court) violated his Fifth Amendment rights.¹³⁵ The defense contended that the procedure created a circumstance in which “evidence was admitted at the decline hearing, and used against Mr. Hegney, that later the same court determined to be inadmissible.”¹³⁶ The appellate court held, however, that a “decline hearing is not prosecutorial in nature,” and guilt is not in question.¹³⁷ They further stated that “(t)he procedure itself cannot lead to a juvenile’s loss of liberty” and that “even improperly obtained statements by the police are admissible at a decline hearing, even though they would not be admissible at a substantive trial.”¹³⁸

JURISDICTIONS NEITHER ALLOWING NOR DISALLOWING COMPELLED SELF-INCRIMINATING TESTIMONY

West Virginia. In *State v. George Anthony W.*, two juveniles were taken into custody as suspects in a murder, were questioned separately, and confessed.¹³⁹ At the transfer hearing, the juveniles moved to suppress the confessions and evidence, but the court denied this motion and granted the state’s petition to transfer the case to criminal court.¹⁴⁰ The juveniles appealed, arguing that the confession had been obtained in violation of West Virginia law because of the “failure of the authorities to

present them to a judge or other appropriate party for a detention hearing prior to obtaining the statements.”¹⁴¹ The relevant statute indicates that “[a] child in custody must immediately be taken before a referee or judge of the circuit court and in no event shall a delay exceed the next succeeding judicial day. . . .”¹⁴² In an earlier case, the court established that delaying that appearance to obtain a confession violates this code.¹⁴³ The appellate court, applying this “Ellsworth J.R. test,” found that the appellants were held in custody “without being presented before a judicial officer.”¹⁴⁴ The court further concluded that the delay’s purpose was to obtain a confession and accordingly held the confessions to be invalid. Because the transfer decision was based on the invalid confessions, the transfer decision was reversed and remanded by the appellate court.¹⁴⁵ This decision neither clearly affirmed nor rejected the role of the Fifth Amendment in juvenile transfer hearings; although the trial court’s decision was reversed because of its use of an “invalid confession,” the confession was invalid under the Ellsworth J.R. timeliness test, not on Fifth Amendment grounds.

EMPATHY, ACCEPTANCE OF RESPONSIBILITY, REHABILITATION AMENABILITY, AND REOFFENSE RISK

Based on the above review, it appears that courts are divided on whether the Fifth Amendment protects juveniles from compelled confession during pre-adjudicative transfer hearings. Some courts apply those confessions, or lack thereof, to inform the question of whether the youth displays empathy for others (including potential victims) and accepts responsibility for what he or she has (allegedly) done. Courts favoring such compelled confession suggest that the confession indicates empathy and acceptance of responsibility. Those courts further assume that juveniles who, by admission or confession, display empathy and accept responsibility for the alleged offense will be more amenable to rehabilitation efforts in the juvenile system.

But how accurate is this suggestion? What does the relevant behavioral science research indicate about the relationship between empathy for victims, acceptance of responsibility, and juvenile offending? More specifically, how do relevant evidence and contemporary best practices suggest that risk and needs be assessed in juveniles? Finally, and most specifically, what are the roles of empathy and acceptance of responsibility in assessing reoffense risk and risk-relevant needs—and does such assessment require a discussion of the alleged offense? We focus on these questions in this section.

To facilitate this discussion, we will consider empathy and acceptance of responsibility (AR) in the broader context of the leading contemporary model describing risk and needs: the

128. *Id.* (citing TEX. FAM. CODE ANN. § 54.02(d) (West 2013)).

129. *Id.* at 661–62.

130. *Id.* at 662.

131. *Id.*

132. *Id.*

133. *In re Hegney*, 158 P.3d 1193 (Wash. Ct. App. 2007).

134. *Id.* at 1210.

135. *Id.* at 1203.

136. *Id.*

137. *Id.* (citing *State v. Piche*, 442 P.2d 632, 635–36 (Wash. 1968)).

138. *Id.* (citing *In re Harbert*, 538 P.2d 1212 (Wash. 1975)).

139. *State v. George Anthony W.*, 488 S.E.2d 361 (W. Va. 1996).

140. *Id.*

141. *Id.* at 367.

142. See W. VA. CODE § 49-5-8(d).

143. *State v. Ellsworth J.R.*, 331 S.E.2d 503 (W. Va. 1985).

144. *George Anthony W.* at 368.

145. *Id.* at 376.

Risk-Need-Responsivity (RNR) model.¹⁴⁶ While empathy/AR can influence the decision about the presence of some risk factors related to juvenile offending, there are other factors that describe needs and affect risk as well.

EMPIRICAL RESEARCH ON EMPATHY, ACCEPTANCE OF RESPONSIBILITY, AND JUVENILE OFFENDING

Normative development of empathy into adulthood has been shown to relate to prosocial behavior.¹⁴⁷ Conversely, research has established a negative relationship between (1) empathy and (2) aggression and antisocial behavior.¹⁴⁸ One meta-analysis found the empathetic/sympathetic index as measured by self-report questionnaires to be negatively related to aggression and antisocial behavior.¹⁴⁹ It should be noted, however, that only one study analyzed in this meta-analysis specifically involved criminal offending.¹⁵⁰ Cohen and Strayer found empathy was significantly lower in conduct-disordered youth relative to a comparison group when participants viewed videotaped vignettes.¹⁵¹ In addition, lower levels of empathy have been related to an increased risk for engaging in interpersonal violence and aggression.¹⁵² Exhibiting deficits in empathy may fit in the broader context of developmentally delayed moral judgment. A meta-analysis of 50 studies showed a lower stage of moral judgment for juvenile delinquents.¹⁵³ In addition, lower levels of empathy in juveniles have been associated with a lack of “moral judgment maturity” and self-serving cognitive distortions.¹⁵⁴

Empathy has commonly been divided into affective and cognitive components. The affective component is the concordant emotional response (i.e., sharing of emotional state) when observing another’s emotional response.¹⁵⁵ For example, affective empathy would include the capacity to feel sad when observing someone else who is obviously sad. The cognitive component involves understanding another’s emotional state.¹⁵⁶ Cognitive empathy, therefore, involves the capacity to understand that another person who is obviously sad is feeling

that way—and to accurately label this emotion as sadness. In a meta-analysis of studies regarding cognitive and affective empathy of offending, low cognitive empathy was strongly related to offending, while low affective empathy was more weakly related.¹⁵⁷ In the same study, the negative relationship between empathy and offending was stronger with violent offenders compared with sexual offenders, meaning that violent offenders showed more empathy deficits than did sexual offenders. Also, the relationship between empathy and offending was stronger in adolescents than in adults in this meta-analysis. Notably, however, there was no relationship between empathy and offending after taking into account socio-economic status and intelligence. In other words, lower levels of empathy were more likely to be seen in individuals of lower SES and more limited intellectual functioning—and it might be that it was lower SES and lower intelligence rather than empathy that were causally related to offending.

Additionally, in a group of juvenile sexual offenders, emotional empathy was found to have a negative relationship with non-sexual offenses. Within this same group of juveniles, researchers concluded emotional empathy plays a role and influences the relationship between offending and other factors. For example, emotional empathy was found to moderate the relationship between hostile masculinity and offending.¹⁵⁸ It seems clear empathy and offending cannot be viewed in isolation but rather considered within the broader context of potentially related factors.

Acceptance of responsibility has not been empirically studied in the same depth as empathy regarding its relationship to aggression and offending. There is some research, however, on how apologizing may relate to a reduction in future offending

“Empathy has commonly been divided into affective and cognitive components.”

146. See D.A. Andrews et al., *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV. 19 (1990).

147. See, e.g., C. Daniel Batson et al., *Distress and Empathy: Two Qualitatively Distinct Vicarious Emotions with Different Motivational Consequences*, 55 J. PERSONALITY 19, 30 (1987) (table showing a higher proportion of high-empathy versus low-empathy subjects who offered help when escape was easy or difficult).

148. E.g., Raymond A. T. deKemp et al., *Early Adolescent Empathy, Parental Support, and Antisocial Behavior*, 168 J. GENETIC PSYCHOL. 5, 12 (2007) (table showing correlations between several variables including aggression, delinquency, and empathy); Paul A. Miller & Nancy Eisenberg, *The Relation of Empathy to Aggressive and Externalizing/Antisocial Behavior*, 103 PSYCHOL. BULL. 324, 338–41 (1988).

149. Miller & Eisenberg, *supra* note 148, at 338–41.

150. *Id.* at 332 (referencing Christiane M. Hoppe & Robert D. Singer, *Overcontrolled Hostility, Empathy, and Egocentric Balance in Violent and Nonviolent Psychiatric Offenders*, 39 PSYCHOL. REP. 1303, 1305–08 (1976)).

151. Douglas Cohen & Janet Strayer, *Empathy in Conduct-Disordered and Comparison Youth*, 32 DEV. PSYCHOL. 988, 993–95 (1996).

152. E.g., Ari Kaukianinen et al., *The Relationship Between Social Intel-*

ligence, Empathy, and Three Types of Aggression, 25 AGGRESSIVE BEHAV. 81, 87 (1999); Deborah R. Richardson et al., *Empathy as a Cognitive Inhibitor of Interpersonal Aggression*, 20 AGGRESSIVE BEHAV. 275, 278 (1994); Miller & Eisenberg, *supra* note 148, at 328–34.

153. Geert Jan Stams et al., *The Moral Judgment of Juvenile Delinquents: A Meta-Analysis*, 34 J. ABNORMAL CHILD PSYCHOL. 697, 704 (2006).

154. Alvaro Q. Barriga et al., *Moral Cognitive Correlates of Juvenile Delinquents*, 19 CRIM. BEHAV. & MENTAL HEALTH 253, 260 (2009).

155. E.g., Martin L. Hoffman, *Sex Differences in Empathy and Related Behaviors*, 84 PSYCHOL. BULL. 712, 712 (1977).

156. *Id.*

157. Darrick Jolliffe & David P. Farrington, *Empathy and Offending: A Systematic Review and Meta-Analysis*, 9 AGGRESSION & VIOLENT BEHAV. 441, 455 (2004) (finding a medium mean effect size of -0.48 in 21 cognitive empathy studies and small but significant effect size of -0.11 in 14 affective empathy studies).

158. John A. Hunter et al., *Emotional Empathy as a Moderator and Mediator of Non-Sexual Delinquency in Juvenile Sexual Offenders*, 22 J. FAM. VIOLENCE 43 (2007).

“There is some research support... for the relationship between empathy and aggression.”

(the relationship between acceptance of responsibility and apologies is discussed in the following section). In one study conducted in New Zealand, offending youths who did not apologize were found to be three times more likely to recidivate than those who did.¹⁵⁹ An apology may contain a genuine element of remorse or regret,¹⁶⁰ but

it is certainly a formal expression of such. Another study examined the relationship between acceptance of responsibility and engagement with the treatment process.¹⁶¹ The investigators found that youths who accepted responsibility for their behavior and thought there was a good reason for their placement scored high on such scales as readiness to change and engagement in treatment.¹⁶² In contrast, those who shifted responsibility to others and felt there was not a good reason for the placement scored lowest on the measures.¹⁶³

Lack of remorse (e.g., feeling bad or guilty) can be viewed as a component of “callous/unemotional (CU) traits,”¹⁶⁴ which helps to explain the lack of both empathy and acceptance of responsibility. CU traits help distinguish adolescents with a more consistent pattern of antisocial and delinquent behavior.¹⁶⁵ The presence of CU traits in juveniles has been related to past violent offenses in a group of juvenile offenders.¹⁶⁶ Those who exhibit CU traits have been shown to have a greater focus on the positive aspects of aggression while having less focus on negative aspects of such aggression.¹⁶⁷ Empathy was not directly related to the propensity for violent behavior in adolescents.

SUPPORT FOR INFLUENCE OF EMPATHY AND ACCEPTANCE OF RESPONSIBILITY IN PRACTICE LITERATURE

There is some research support, discussed previously, for the relationship between empathy and aggression. The presence of empathy has been viewed as a protective factor, while the lack of empathy has been regarded as a risk factor. Some have suggested that empathy inhibits aggression, as more empathic individuals have the ability to view situations from different perspectives.¹⁶⁸ Aggressors may vicariously experience another’s distressed reaction, which could make it less likely that they would continue to engage in aggressive behavior. Thus, one perspective is that increasing victim empathy decreases self-serving cognitive distortions (e.g., putting one’s own needs over that of others and the community), which also may have the effect of inhibiting aggression and other antisocial behavior.¹⁶⁹

While normative development is associated with an increase in empathy during adolescence, aggressive delinquents have been found to have delayed or arrested development of empathy.¹⁷⁰ One study found a moderate positive relationship between being able to recognize fearful expressions in others and the ability to empathize with emotional experiences.¹⁷¹ On the other hand, it has recently been suggested that empathy may be understood best in relation to one’s experiences and circumstances.¹⁷² That is, whereas empathy deficits may be part of the personality structure in a subgroup of chronic, violent adolescent offenders, other juvenile offenders “may be prone, as any one of us is, to situation-specific empathy failures. . . .”¹⁷³ Peer groups and other environmental factors influence whether and to what extent empathy may be displayed.

Although acceptance of responsibility for offending has not

159. Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, 1 W. CRIMINOLOGY REV. 1 (1998), available at <http://wcr.sonoma.edu/v1n1/morris.html>.

160. Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337, 359 (2002) (stating that “[t]he key components of an apology” are “an expression or remorse or regret, acceptance of responsibility, compensation, and a promise to avoid the behavior in the future . . .”).

161. Christine Englebrecht et al., “It’s Not My Fault”: *Acceptance of Responsibility as a Component of Engagement in Juvenile Residential Treatment*, 30 CHILD. & YOUTH SERVICES REV. 466 (2008).

162. *Id.* at 477.

163. *Id.*

164. See PAUL J. FRICK & ROBERT D. HARE, *ANTISOCIAL PROCESS SCREENING DEVICE* (2001).

165. E.g., Paul J. Frick & Mesha Ellis, *Callous-Unemotional Traits and Subtypes of Conduct Disorder*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 149, 159–60 (1999) (discussion on CU traits designating a severe subtype of childhood-onset conduct disorder).

166. Ivan P. Kruh et al., *Historical and Personality Correlates to the Violence Patterns of Juveniles Tried as Adults*, 32 CRIM. JUST. & BEHAV. 69, 81 (2005) (finding that the Callous/Unemotional Scale, Impulsivity/Conduct Problems Scale, and Antisocial Process Screening Device Total Score were significantly correlated with past violence).

167. Dustin A. Pardini et al., *Callous/Unemotional Traits and Social-*

Cognitive Processes in Adjudicated Youths, 42 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 364, 369 (2003).

168. David DeMatteo & Geoffrey Marczyk, *Risk Factors, Protective Factors, and the Prevention of Antisocial Behavior Among Juveniles*, in JUVENILE DELINQUENCY 19, 26 (Kirk Heilbrun et al. eds., 2005).

169. See, e.g., Fara McCrady et al., *It’s All About Me: A Brief Report of Incarcerated Adolescent Sex Offenders’ Generic and Sex-Specific Cognitive Distortions*, 20 SEXUAL ABUSE: A J. OF RES. & TREATMENT 261, 266 (2008) (finding that “self-servicing cognitive distortions were correlated with overall lower empathy” in adolescents incarcerated in a state correctional facility for adolescent sexual offenders).

170. Philip L. Ellis, *Empathy: A Factor in Antisocial Behavior*, 10 J. ABNORMAL CHILD PSYCHOL. 123, 130–31 (1982).

171. Mary B. Carr & John A. Lutjemeier, *The Relation of Facial Affect Recognition and Empathy to Delinquency in Youth Offenders*, 40 ADOLESCENCE 601, 611 (2005).

172. Matt Zaitchik, *Questions About the Construct of Empathy in the Treatment of Adolescents in the Juvenile Justice System*, 31 AM. PSYCHOL. L. NEWS 5, 6 (2011) (stating that “[m]aybe it’s long past time we searched for empathy not within the individual, as part of some enduring aspect of their moral sensibility, but as a part of the social landscape where they perform, where empathy is temporarily suspended by group norms, cognitive frameworks and social forces in which the juvenile offender finds himself embedded. . . .”).

173. *Id.*

been widely studied, related concepts have been discussed. For instance, in one classification system, several versions of acceptance—concessions, excuses, justifications, and refusals—are seen as types of “accounts.”¹⁷⁴ Concessions include the notion of apology. Apologies can be viewed as a form of accepting responsibility by acknowledging the violation of a social norm. The mechanism of how this may decrease aggression or reduce the probability of recidivism is unknown. It is possible that an apology can express “moral inferiority,” so if the victim accepts the apology, there is an equalizing of the status between offender and victim.¹⁷⁵ An obvious limitation is that an offender may use an apology solely for self-serving reasons (e.g., to mitigate a sentence), in which case no genuine acceptance of responsibility or remorse is present.¹⁷⁶

ASSESSMENT OF REOFFENSE RISK AND RISK-RELEVANT NEED IN JUVENILES

An important goal of juvenile assessment is to gauge a youth’s risk, needs, and responsivity (RNR) by identifying both risk and protective factors. Risk factors can be defined as “external or internal influences or conditions that are associated with or predictive of a negative outcome.”¹⁷⁷ One commonly used distinction involving risk factors is static versus dynamic.¹⁷⁸ Static risk factors are largely historical and not amenable to change through planned intervention; they include factors such as gender, history of abuse, history of antisocial behavior, and history of offending. Static risk factors contribute important information for accurately gauging reoffense risk, which in turn is relevant to the needed intensity of rehabilitation services (with higher risk individuals needing services of greater intensity).¹⁷⁹ Dynamic risk factors (also called criminogenic needs) can change over time and through planned intervention. Examples include substance abuse, mental health, educational level, peer relations, family dysfunction, and use of leisure time. For instance, if a juvenile has a poor educational history, one appropriate focus of rehabilitation would include improving basic academic skills necessary for responsible living and employment (e.g., reading, basic math).

A risk/needs assessment also may address what factors may decrease the risk of reoffending. In contrast to risk factors, such “protective factors” are generally those “external or internal influences or conditions that decrease the likelihood of a negative outcome or enhance the likelihood of a positive outcome.”¹⁸⁰ Examples of protective factors include existing prosocial involvement, strong social supports, and favorable motivation/attitude toward treatment. Having such protective factors

present may increase a youth’s “responsivity” to treatment. The “responsivity principle” in juvenile and correctional rehabilitation concerns characteristics that affect a youth’s potential response to rehabilitation rather than characteristics directly related to antisocial behavior.¹⁸¹

Risk and protective factors have been extensively studied; some have been shown to be particularly related to reoffense risk or prevention of antisocial behavior.¹⁸² For instance, research has shown that the strongest predictors may include a young age at first contact with the law and young age at commitment.¹⁸³ However, it is important to note that there is *no single factor* that, by itself, is highly predictive of reoffending. As a result, investigators have identified multiple domains that, taken together, show a reasonably strong relationship to reoffense risk. These domains will be summarized in the next paragraph.

Major domains in which risk and protective factors are assessed include the individual, family, academic/vocational, peer relations, and community domains. At the individual level, assessment of intellectual ability, personality, and substance-use history offer potentially useful information for appraising risk. For instance, impulsivity/risk-taking behavior, low IQ, and high levels of negative emotionality (e.g., anger, fear) have been shown to be associated with higher levels of delinquent behavior.¹⁸⁴ An intolerant attitude toward deviant behavior has been shown to have a significant risk-reducing effect in higher risk individuals.¹⁸⁵ The family domain includes familial/parental stability—in particular, whether there is a history of neglect or abuse (physical, sexual, or emotional)—and also the nature and level of parental involvement. This domain may also reveal several protective factors, such as positive adult influences and whether there is a close relationship with at least one supportive adult. In the educational domain, an assessment of achievement and commitment to school should be made. Beyond academic achievement, schooling may help youth adapt to the environment, establish self-esteem, and verbalize conflicts offering alternative methods to deal with disputes or angry feelings. Peer relations may serve as a risk factor not only when there are negative peer relations (e.g., friends with arrest histories, drug abuse histories, risk-taking behaviors) but also if the youth is socially withdrawn. Social withdrawal and isolation

“An important goal of juvenile assessment is to gauge a youth’s risk, needs, and responsivity”

174. Marti Hope Gonzales et al., *Victims as ‘Narrative Critics’: Factors Influencing Rejoinders and Evaluative Responses to Offenders’ Accounts*, 20 SOC. PSYCHOL. BULL. 691, 691 (1994).

175. Petrucci, *supra* note 160, at 340.

176. *Id.* at 350.

177. DeMatteo & Marczyk, *supra* note 168, at 20–21.

178. See D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 374–75 (1990).

179. Andrews et al., *supra* note 146, at 29.

180. DeMatteo & Marczyk, *supra* note 163, at 21.

181. *Id.* at 35.

182. See Cindy C. Cottle et al., *The Prediction of Criminal Recidivism in Juveniles: A Meta-Analysis*, 28 CRIM. JUST. & BEHAV. 367, 369 (2001).

183. *Id.* at 380.

184. Rolf Loeber et al., *The Development of Male Offending: Key Findings From the First Decade of the Pittsburgh Youth Study*, 7 STUD. ON CRIME & CRIME PREVENTION 141, 152–55 (1998).

185. Department of Health and Human Services (DHHS), *Youth Violence: A Report of the Surgeon General* (2001), <http://www.surgeongeneral.gov/library/youthviolence/> (discussion of “Proposed Protective Factors in Childhood and Adolescence” contained in chapter 4).

It is advantageous to have multiple, collateral interviews and a youth's self-report.

may result in increased violent behavior.¹⁸⁶ Finally, the environment provides another domain in which risk and protective factors may be found, namely socioeconomic status (SES). Low-income and high-crime neighborhoods are risk factors because of the potential exposure to crime and violence. An evaluation of the community

may also reveal formal or informal support systems beyond the family.¹⁸⁷

The evaluation of these domains and their respective risk and protective factors is accomplished through examining records (e.g., school records, juvenile records), the youth's self-report, the report of collaterals, and the results of formal testing. Collaterals typically include parents but could also include school administrators, coaches, ministers, case managers, or other individuals that are highly familiar with the youth's history. The major advantage of having multiple collateral interviews, in conjunction with the youth's self-report, is to broaden the picture of the youth and assess consistency of reports across sources. Other areas can be assessed through formal testing of intellectual abilities, academic achievement, and personality. Once data are collected, the assessment report summarizes relevant risk and protective factors and offers areas that are amenable to treatment.

ROLES OF EMPATHY AND ACCEPTANCE OF RESPONSIBILITY IN ASSESSING REOFFENSE RISK AND RISK-RELEVANT NEEDS IN JUVENILES

Specialized risk/needs tools are commonly used to organize risk factors and protective factors and to promote empirically supported risk classification. These tools facilitate structured, informed decision making that is less subject to idiosyncratic judgment and individual biases.¹⁸⁸ Two such instruments include the Youth Level of Service/Case Management Inventory¹⁸⁹ and the Structured Assessment of Risk Violence in Youth.¹⁹⁰ The YLS/CMI is a standardized instrument that generally assists in assessing risk, needs, and responsibility in youths to help formulate a case plan. The SAVRY is a structured risk assessment tool for use with adolescents that helps in gauging an adolescent's risk for future violent behavior. Both tools specify a series of factors, based on the best available research, to be assessed. The evaluator rates the severity of each factor, and the overall risk and needs are determined in light of all the information about these relevant factors.

Risk/needs tools are effective because they identify patterns of behavior and traits that have been present over an extended

period in an individual's life. Regarding empathy and acceptance of responsibility, an evaluator should consider whether an apparent lack of empathy relates to a single instance (e.g., the current offense) or whether the deficit is apparent more broadly. While both are important considerations, the latter has greater implications regarding one's future risk for aggressive behavior or recidivism (see discussion of empirical literature that follows). In addition, many domains on specialized measures such as the SAVRY are independent of the circumstances of the instant offense. This means that much risk-relevant information can be gathered—and rehabilitative interventions implemented—even when acknowledgment or acceptance of responsibility in the instant offense is not made. In a related vein, the presence of a single risk factor (e.g., lack of empathy on the SAVRY) in the absence of others would most often lead to the conclusion that the individual was at low risk for future offending.

The presence of empathy or acceptance of responsibility would affect a number of items on the YLS/CMI in the Personality/Behavior and Attitudes/Orientation domains. In particular, "Inadequate Guilt Feelings" in the Personality/Behavior domain is defined as feeling no remorse when behavior has caused harm to another, not accepting responsibility for actions, and offering excuses.¹⁹¹ In the Attitudes/Orientation Domain, the "Callous, Little Concern for Others" item is closest to "empathy"; the assessor would consider evidence of little concern for the feelings or welfare of others. Other items in this domain may also be affected by empathy and acceptance of responsibility. These include "Antisocial/Procriminal Attitudes," in which the values, beliefs, and rationalizations concerning the crime and victim are taken into account. The items "Not Seeking Help" and "Actively Rejecting Help" would be influenced by the youth's failure to recognize the need for help and resistance to interventions.

In the SAVRY, empathy plays a direct role in the "Low Empathy/Remorse" risk factor in the broader Individual/Clinical domain. This is one of a total of 24 risk factors on this measure. The manual defines empathy as "the identification, understanding, and sharing of another person's thoughts, feelings, and intentions."¹⁹² Remorse is defined as "distress arising from repentance for behavior that has hurt another."¹⁹³ Both empathy and acceptance of responsibility would be rated by considering the broad patterns in the individual's life. The individual's description of the alleged offense could serve as one element within this broader pattern but would not offer an adequate basis for rating either empathy or acceptance of responsibility in the absence of broader (non-offense-related) behavior and capacities.

Although empathy and acceptance of responsibility (as reflected by remorse) are limited to one of 24 items on the SAVRY, these constructs may be related to other items. For

186. *Id.* (discussion "Risk Factors in Childhood" and "Risk Factors in Adolescence" contained in chapter 4).

187. Melton et al., *supra* note 1, at 486–87.

188. Robert D. Hoge, *Standardized Instruments for Assessing Risk and Need in Youthful Offenders*, 29 CRIM. JUST. & BEHAV. 380, 387 (2002).

189. ROBERT D. HOGE & D.A. ANDREWS, THE YOUTH LEVEL OF SER-

VICE/CASE MANAGEMENT INVENTORY MANUAL AND SCORING KEY (2002).

190. RANDY BORUM ET AL., STRUCTURED ASSESSMENT OF VIOLENCE RISK IN YOUTH (2002).

191. Hoge & Andrews, *supra* note 189.

192. Borum, *supra* note 190, at 46.

193. *Id.*

instance one item is “Negative Attitudes.” Here, an examiner may look for indications of attitudes and values that condone violence, or misperceiving the actions of others as being hostile or aggressive. Another item in which empathy/acceptance of responsibility may be reflected is “Poor Compliance.” A high rating on this item may indicate that the youth does not believe he or she is at risk and cannot appreciate the need for intervention. Having a positive attitude toward intervention is also a protective factor on the SAVRY and may indicate an acceptance of responsibility.

Several important conclusions may be drawn regarding these specialized (empirically supported) measures and their incorporation of empathy and acceptance of responsibility. First, the measures consider multiple domains in yielding final conclusions about risk and needs. These two items are included within the overall number of items and domains but are sufficiently small in number so that, by themselves, they would not usually yield a conclusion that an individual was at high risk even if they reflected significant deficits. Second, both empathy and acceptance of responsibility are assessed using information from the person’s life broadly. Their description of the offense is one aspect from which judgments regarding these items can be drawn. However, a more stable and accurate estimate would draw upon information regarding the person’s functioning over time, across situations, and with different people.¹⁹⁴ Third, deficits in empathy and acceptance of responsibility are often related to other risk-relevant deficits in an individual. When this occurs, the broader pattern of deficits becomes apparent, the rated risk of reoffending is higher, and the risk-relevant needs are more extensive.

CONCLUSION

The law is unsettled and inconsistent on the issue of compelled self-incrimination for the purpose of assessing risk and needs in the context of juvenile transfer. Empirical behavioral-science evidence suggests that empathy and acceptance of responsibility are modestly related to both risk and needs and should be assessed as part of forensic mental health evaluations of juveniles being considered for transfer. Taken together, however, empathy and acceptance of responsibility constitute only part of the evidence relevant to assessing need and amenability to intervention. Moreover, information about empathy and acceptance of responsibility related directly to the circumstances and behavior involved in the alleged offense are an even smaller piece of the puzzle, as both can be assessed as broader capacities independent of the alleged offense. Accordingly, the harm to the assessment’s relevance and reliability from not discussing the alleged offense appears minimal—while the prejudicial harm to the defendant stemming from compelled self-incrimination in this context may be considerable.



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194. When there is a legal justification for an individual’s declining to talk about the offense, such as that individual’s being so advised by counsel on a pretrial or continuing appeal basis, then their declining to discuss the offense or denying culpability should not form the basis for a mental health professional’s conclusion

that such an individual lacks empathy or does not accept responsibility. The two influences are inextricably intertwined and simply cannot be separated until there is no longer a legal strategic justification for the individual’s declining to discuss the offense.