

Mental Health Screening and Self Incrimination

Note: This is a resource which was featured on our previous Collaborative for Change website. The Collaborative for Change website has been retired but we have housed this resource as a PDF document. The document will remain as is and is no longer being updated as of September 2016.

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Mental Health Screening and Self Incrimination

Research suggests that 65 to 75 percent of youth involved with the juvenile justice system have one or more diagnosable mental health disorders.¹ Many recent system improvement efforts have incorporated the use of behavioral health screening, assessment, and treatment in order to address the high prevalence of mental health and substance use disorders among justice-involved youth. Many of these efforts are structured to divert youth entirely from the juvenile justice system before the need for court processing or, if not diverted, to ensure that youth quickly receive the services necessary to keep them safe and improve their wellness.

Early use of behavioral health screening, assessment, and treatment can offer youth a host of benefits, including:

- Diversion out of the court process and into appropriate services;
- Identification of youth in need of safety planning, treatment, and specialized monitoring in pretrial detention facilities;
- Retention of youth in the community at disposition, through service plans fashioned to address the needs of the youth; and
- Reduction in the likelihood of continued system involvement that can often result from a series of failed placements that do not address behavioral health needs.

At the same time, screening, assessment, and treatment often inquire about potential criminal behaviors. For example, screening and assessment instruments commonly ask youth whether they have engaged in substance use or assaultive behavior. While admissions to these kinds of criminal behavior are protected in the context of behavioral health counseling, behavioral health screening instruments are often administered prior to adjudication by juvenile justice professionals such as probation and detention center staff. Absent express protection, information revealed in that context may not necessarily be shielded from use in the subsequent adjudication of young people.

Many efforts to provide justice-involved youth effective behavioral health interventions are also rooted in information sharing across systems. This kind of cross-systems collaboration supports comprehensive case management, targeted interventions, informed decision making, and a reduction in the duplication of efforts among system stakeholders and for the youth themselves. At the same time, information sharing also raises the risk that self-incriminating information provided by the youth—which is to say, information that implicates the youth in a crime—may make its way into a youth’s probation or court file. Unlike the files of mental health and substance use providers, these justice-related files often may not carry the same confidentiality protections that would protect youth against the use of that self-incriminating information in a court proceeding.

Therefore, without explicit protections, behavioral health screening, assessment, and treatment can expose youth to the risk of self-incrimination. This risk can compromise a youth’s

willingness to honestly answer screening questions and engage in behavioral health services and runs the risk of pushing youth further into the justice system.

It is therefore critical to ensure that youth are protected from self-incrimination when they participate in behavioral health screening, assessment and treatment in the context of juvenile justice system involvement. A comprehensive review completed by the [Juvenile Law Center](#) found that there are several strategies that have been successfully used to protect youth against self-incrimination as a result of information revealed during behavioral health screening, assessment, and treatment, including:

- state statutes – laws;
- case law – decisions issued by courts; and
- strategies for defense attorneys – such as efforts to keep self-incriminating statements from consideration by the court.

Statutes that Protect Against Self-Incrimination

Some states have enacted laws to specifically protect youth against the use of any self-incriminating information provided by youth during behavioral health screening and assessment in subsequent judicial proceedings. This strategy provides the strongest protection for youth, bringing uniformity across jurisdictions and providing the strongest possible legal protection for youth.

Examples of these statutory protections include the following examples from Indiana, Pennsylvania, and Texas.

- Indiana law offers protection against using information provided during mental health screening, assessment, evaluation, or treatment. The statute prevents use of information provided in that context as evidence against the child on the issue of whether the child committed a delinquent act or a crime. See Ind. Code § 31-32-2-2.5 and [Ind. Code § 31-37-8-4.5](#).
- Pennsylvania law protects youth from the use of any information obtained during screening or assessment as evidence against the child as to whether that child committed a delinquent act. See [42 Pa. Cons. Stat. § 6338 \(c\)](#).
- Texas law requires juvenile probation departments to use a designated mental health screening instrument and provides that any statement made by the child during that screening is not admissible at any other hearing. See [Tex. Human Resources Code § 141.042](#).

In addition, the Juvenile Law Center developed the following model statutory language to provide comprehensive protection for youth against self-incrimination as a result of information revealed during behavioral health screening, assessment, or treatment:

No statements, admissions or confessions made by, or incriminating information obtained from, a child in the course of any screening that is undertaken in conjunction with proceedings under this chapter, including but not limited to that which is court-ordered, shall be admitted into evidence in any civil or criminal proceeding. Moreover, no statements, admissions or

confessions made by, or incriminating information obtained from, a child in the course of any assessment or evaluation, or any treatment provided by or at the direction of a clinician or health care professional, that is undertaken in conjunction with 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 committed a delinquent act in any juvenile court proceeding, or on the issue of guilt in any criminal proceeding

Case Law that Protects Against Self-Incrimination

Courts have sometimes found a right against self-incrimination for youth absent an explicit statutory protection. While clear statutes provide the strongest protection for youth, case law that establishes a right against self-incrimination as a result of statements made in the course of behavioral health screening, assessment, and treatment can provide some protection in the absence of such a statute. Creation of these protections through case law require attorneys to raise and litigate the issue and courts to issue clear decisions as a result of that litigation.

Protections against self-incrimination through case law are also likely to be narrowly tailored in response to a specific legal question in a specific case. For example, the case of *In re Wayne H* (596 P.2d, Cal. 1979) in California established protection of statements made to probation officers in the course of an initial assessment of a youth following arrest. There the court held:

We conclude that the subsequent use of statements made by a juvenile to a probation officer in a section 628 interview would frustrate important purposes of that statute, and of the Juvenile Court Law generally. We therefore hold that such statements are not admissible as substantive evidence, or for impeachment, in any subsequent proceeding to determine criminal guilt, whether juvenile or adult.

Courts in Colorado established protection against self-incrimination for youth in the context of statements made to a counselor in the juvenile detention setting. In the case of *People v. Robledo* (832 P.2d Colo. 1992), the court held that statements made during conversation with a counselor at a juvenile detention center were not admissible against him because the youth had a right to receive Miranda warnings (detailing that the information he provided could be used against him and that he had a right to an attorney) prior to making his statements.

These kinds of protections against self-incrimination establish clear guidelines around the use of admissions to criminal acts in the specific contexts in which they arise. While they can be helpful to protect youth from self-incrimination, they are generally narrower than the protection that a statute can afford and they can only be established through a lengthy litigation process.

Defense Counsel Strategies to Protect Against Self-Incrimination

In the absence of settled law, in the form of statutes or case law, on the use of information provided during behavioral health screening, assessment, or treatment in subsequent court

proceedings, defense attorneys have the capacity to utilize strategies to help their young clients avoid the pitfalls of self-incrimination. While clear and settled law provides substantially more protection than the use of legal strategies within the context of a particular case, defense attorneys should be aware of strategies to protect their clients against self-incrimination if they are practicing in states without that kind of settled law.

The first option for defense attorneys practicing in jurisdictions that do not protect youth against self-incrimination that may result from behavioral health screening, assessment, or treatment, is to consider advising clients not to participate in those services or not to answer any potentially self-incriminating questions in the context of those services. While a youth's refusal to participate in these services may protect them from self-incrimination, it could also have drawbacks for the youth. Behavioral health screening and assessment are often used early in the juvenile justice system to either identify youth for diversion services or to ensure that youth receive the services and supports necessary to keep them safe in juvenile detention centers. Failure to participate in screening and assessment could therefore put youth at-risk of missing an opportunity for diversion from court processing or of danger in the juvenile detention setting.

Defense attorneys can also consider making motions to suppress incriminating statements that youth have made in the context of behavioral health screening, assessment, and treatment. This is a strategy that attorneys can use in the course of litigation when self-incriminating statements are used to support the culpability of the youth. Attorneys can move to suppress self-incriminating statements made by youth, on grounds that those statements were coerced, or that the statements were elicited in violation of a youth's Miranda rights.

While case-by-case strategies employed by defense attorneys bring promise of protecting particular youth against the use of self-incriminating information provided during screening, assessment, and treatment, strong statutes provide the best protections for all youth in a state. Defense attorneys should therefore also consider engaging in public policy advocacy to ensure the strongest protections against self-incrimination.

¹ 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).

All Resources: Mental Health Screening and Self Incrimination

CRITICAL RESOURCES

Lourdes M. Rosado, Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court, 38 Wash. U. J. L. & Pol'y 177 (2012),
http://openscholarship.wustl.edu/law_journal_law_policy/vol38/iss1/6

Innovation Brief: Mental Health Needs and Due Process Rights: Finding the Balance, available at
<http://www.modelsforchange.net/publications/355>

Protecting Youth from Self-Incrimination When Undergoing Screening, Assessment and Treatment Within the Juvenile Justice System, available at <http://www.jlc.org/resources/publications/protecting-youth-self-incrimination-when-undergoing-screening-assessment-and->

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