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SOUTHERN ILLINOIS UNIVERSITY

NATIONAL HEALTH LAW MOOT COURT COMPETITION

Transcript of Record
Docket No. 15-1576

State of WEST CAROLINA,
Petitioner,

v.

Ruben C. MASON,
Respondent.

COMPETITION PROBLEM

SPONSORED BY:

Center for Health Law and Policy
Southern Illinois University School of Law

Department of Medical Humanities
Southern Illinois University School of Medicine

The American College of Legal Medicine

The American College of Legal Medicine Foundation

IN THE COURT OF APPEALS OF WEST CAROLINA

No. 10-04-8714

Filed: 23 January 2013

Wash County, No. 09CRS95915

STATE OF WEST CAROLINA

v.

RUBEN C. MASON

Appeal by defendant from judgment entered 16 April 2010 by Judge Marilyn L. Robbins in Wash County Superior Court. Heard in the Court of Appeals on 10 September 2012.

OPINION

MAHMUD, Judge.

Defendant, Ruben Mason, appeals his conviction by a jury of the offense of felony aggravated sexual assault of a child. The trial court assessed his punishment at 15 years in the West Carolina Department of Criminal Justice, Institutional Division, in addition to required registration in the West Carolina Sex Offender Registry. Mason argues three points of error on appeal: 1) the trial court erred in admitting his confession made during court-ordered sex offender therapy while incarcerated as a juvenile in violation of his privilege against self-incrimination because it violated his Fifth Amendment privilege against self-incrimination; 2) the trial court erred in admitting the entire record of his participation in the Sex Offender Management program, which included a psychosexual evaluation of an unavailable witness in violation of his Sixth Amendment right to confront witnesses against him; and 3) defense counsel's failure to object on constitutional grounds to the admission of both his confession made in therapy and the psychosexual pre-sentencing report constituted the ineffective assistance of counsel. We affirm the verdict of the jury and find no error in the judgment of the trial court.

BACKGROUND INFORMATION

In 2005, at age 14, Ruben Mason pleaded responsible in District Court to a single charge of felony sex offense against a minor for sexually molesting a young female cousin, an act which occurred when Mason was age 13 and his cousin was age 6.[1] Following a standard plea agreement for this charge, Mason was adjudicated delinquent and ordered into the state juvenile detention center, the Newstone Center, for a period of 24 months, followed by release into community supervision until age 18. He was also ordered to complete recommended mental health treatment as ordered by the court. As a condition of the plea, the State Prosecutor also specifically required a pre-sentencing psychosexual evaluation. Barbara Cohen conducted the evaluation in Newstone's mental health treatment offices. Cohen was a psychology doctoral student from the private institution, Brevemont University, under the supervision of Newstone psychiatrist Dr. George Knowles, MD, who signed off on the assessment report.

According to the record on appeal, Cohen diagnosed Mason as a pedophile with a personality disorder not otherwise specified and recommended that he complete the Juvenile Sex Offender Management (SOM) program at Newstone. She also recommended that Mason receive treatment for posttraumatic stress disorder (PTSD) for his own trauma history as a victim of child abuse. Her report noted that Mason had no known history of criminal behavior prior to this offense, although he had been the subject of several unsubstantiated Department of Family Services child abuse investigations as a suspected victim of physical and sexual abuse by his mother.

The District Court ordered that Mason successfully complete the SOM program while detained at Newstone and receive any other mental health treatment as needed and determined by the Newstone psychiatrist. Should Mason not complete the SOM program, the Court ordered, pursuant to statutory authority, the juvenile detention center had the discretion to reassign him to the general population and extend his release date up to the end of his juvenile term at age 18 in order to provide him with more time to complete the program.[2] The record makes clear and the State concedes that Mason was not informed prior to his plea agreement by counsel or the court

[1] Editor's note: no issues are raised in this problem about whether applicable West Carolina juvenile and adult criminal procedure laws were followed.
[2] Mason does not argue on appeal any assertion of error with respect to the trial court's sentence.

what the SOM program required, other than that it was a "mental health treatment program for juvenile sex offenders."

While attending the SOM program, Mason consistently asserted in group therapy that he had committed no other sex offenses beyond his charged offense. In making these assertions, he failed several mandatory therapeutic polygraphs periodically requiring that he discuss his sexual history. The SOM counselor, Howard Barker, an unlicensed social worker, repeatedly questioned the veracity of his answers and asserted that he would not progress without disclosing his past misconduct. After seven months of treatment, when Mason was age 15, he continued to attend group treatment sessions but refused to discuss his sexual history at all or to participate in polygraph testing. Mason was placed on a waiting list for individual treatment for PTSD and reassessment, but never received such treatment. His record in SOM indicates that he exhibited a steady emotional decline while detained, including increasing symptoms of depression, sleeplessness, non-emergent threats of self-harm, and aggressive acting out behavior with other juvenile inmates.

Three months prior to the date of his conditional release at age 16, the SOM record states that his assigned program counselor, Howard Barker, informed Mason that detention center administrators intended to recommend adjusting his release date and prolonging juvenile detention due to his lack of cooperation with court ordered treatment. In the next session, defendant agreed to cooperate and confessed in a polygraph session with Barker to additional prior sexual activity with his younger sister near the same time as his other offense, which was supported by the polygraph results. After the session, pursuant to the state mandatory child abuse reporting laws, the SOM counselor immediately reported Mason's disclosure of a new offense to detention center staff who then reported it to law enforcement for investigation. The criminal investigation included a child forensic interview with Mason's sister, now age 12, who described in brief terms that she and Mason had engaged in sexual activity for a short period of time when she was age seven or eight.[3] In her follow up second interview, she recanted her disclosure and refused to speak about it any further, insisting nothing had happened. Once

[3] In this jurisdiction there is no statute of limitations for the offense charged.

Mason was informed of the pending investigation, he refused to participate in the SOM program any further and was transferred to the general population of the juvenile detention center.

In 2008, Mason, now age 17, was charged as an adult with two counts of felony aggravated sex offense with a child for sexual acts committed with his younger sister. Applying the discretion granted by the court at sentencing, detention center administrators never released Mason into community supervision, based on his lack of cooperation in SOM and his presumed continued need for sex offender treatment. At age 18, Mason was transferred to adult jail pending trial on the new charge. The State does not dispute the fact that Mason was never informed by counsel, juvenile detention staff, including SOM treatment providers, or anyone else, of his *Miranda* rights while in sex offender treatment.

During Mason's criminal jury trial in superior court, Howard Barker testified as a lay witness against him, providing a general recollection of Mason's disclosure. Mason asserted his right not to testify and neither party called Mason's sister as victim witness to testify.[4] The State admitted into evidence, over objection, Mason's complete SOM treatment record, including detailed disclosures and verbatim quotes by Mason.[5] Defense counsel objected to the admission of the record in its entirety: first, under the state counselor-patient privilege of communications; and second, specifically to the conclusions of Howard Barker and Barbara Cohen, which were incorporated in the report, as inadmissible hearsay under the Rules of Evidence of West Carolina. The court overruled both motions, exercising its discretion in the interests of justice to override the statutory qualified privilege of communications, and asserting that the record was admissible as either a public record under Rule of Evidence 803(8) or a business record under Rule of Evidence 803(6). Mason's counsel did not raise any constitutional objections to admissibility of the SOM treatment record.[6]

Mason was convicted and sentenced to the upper term of 15 years in prison, public sex offender registry status, and, over objection by defense counsel, mandatory periodic

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[4] The transcript of Mason's sister's child medical/forensic interview was admitted by the State as statements for the purpose of medical diagnosis or treatment under Rule of Evidence 803(4), and her subsequent recantation was admitted by defense counsel for the purpose of impeachment. This admissibility of her statement is not contested on appeal.

[5] Authentication of the record is not at issue on appeal.

[6] Mason has not pursued on appeal any argument on the basis of the trial court's evidentiary rulings regarding the confidentiality or the admissibility of hearsay statements with respect to the SOM report.

psychosexual evaluations and participation in the adult sex offender management program while incarcerated. Rather than opt for a post-conviction relief hearing, Mason filed a direct appeal of his conviction as of right, asserting that the trial court erred in admitting his confession in the SOM program. He now argues two constitutional claims: (1) admission of his confession constituted trial court error in violation of his Fifth Amendment privilege against self-incrimination, including the omission of *Miranda* warnings prior to questioning; and (2) admitting the written SOM report violated his Sixth Amendment right to confrontation. He also argues on appeal that his defense counsel's failure to object on constitutional grounds to admission of his confession and the SOM report rendered the assistance of counsel ineffective in violation of the Sixth Amendment. We reject all of these claims and uphold his conviction.

PRIVILEGE AGAINST SELF-INCRIMINATION

We consider Mason's first constitutional point of error, addressing the Fifth Amendment privilege against self-incrimination, under a *de novo* standard of review.[7] *See United States v. Brigham*, 569 F.3d 220, 231 (5th Cir. 2009). Both juvenile and adult criminal defendants have a constitutional right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination. *See Application of Gault*, 387 U.S. 1 (1967). The Fifth and Sixth Amendments are made applicable to the States through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). Mason's first claim asserts his rights under the Fifth Amendment to the United States Constitution which provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Our courts have long considered that the right to remain silent "is the hallmark of our democracy." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (quoting *United States. v. Grunewald*, 233 F.2d 556, 582 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

Whether the trial court erred in admitting Mason's confession of uncharged sexual offending behavior during sex offender treatment depends first on whether he was compelled to speak against his interests by a state agent. Confiding to a therapist in mental health treatment is

[7] Mason has appealed solely on federal constitutional grounds. Although defense counsel did not assert a Fifth Amendment argument, she made other parallel arguments objecting to the admission of Mason's statements in the SOM program, thus preserving error on appeal. (Editor's note: no issues about preservation on appeal are intended to be raised.)

a far cry from the coercive environment of a police station custodial interrogation in *Miranda.* Nevertheless, the expansion of mental health treatment within the criminal justice system, and the specific technique of questioning an inmate in sex offender treatment as to his sexual history for his own wellbeing, warrant analyzing closely the Fifth Amendment rights of an inmate in treatment today. As our state court has not yet addressed applying the privilege against self-incrimination to inmate confessions in sex offender treatment, we look to the federal courts and our sister states.

Some court decisions have avoided the issue of whether the privilege against self-incrimination applies in a medical or mental health setting, because the therapist was merely a private contractor and not a state agent. That is not the question before us as Howard Barker, the SOM program counselor questioning Mason, was a full-time employee of the state juvenile detention center. Also, Barker's role in the detention center as a treatment provider does not automatically exclude him from implicating the Fifth Amendment rights of the juvenile inmates in the SOM program. We agree with our sister jurisdictions that the state agent serving as interrogator need not be a member of law enforcement to implicate the Fifth Amendment privilege against self-incrimination. *See, e.g., Mathis v. United States*, 391 U.S. 1, 4 (1968) (IRS agent). We conclude there was state agency in this case.

In addition to requiring state agency, to qualify for Fifth Amendment protection, "a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 189 (2004). It is beyond question that Mason's admissions in the SOM program were incriminating, as they formed the heart of the subsequent criminal case against him when he admitted in detail to acts of sexual offending against his much younger sister. Although the remainder of the evidence against him is thin, we note that Mason does not appeal based on the insufficiency of the evidence. Because it is not relevant to our resolution of Mason's Fifth Amendment claim, we presume, without deciding, that his admission in treatment was testimonial, based on the formality and weekly structure of the program, although the record is insufficient to examine this point.[8]

[8] The record indicates that the SOM program in which Mason was placed was modeled on the best practices outlined by the Office of Juvenile Justice Delinquency Prevention, U.S. Department of Justice. *See* David Berenson & Lee Underwood, *Juvenile Sex Offender Programming: A Resource Guide* (November 2000), http://cjca.net/attachments/article/133/Sex-Offender-Programming.pdf.

Assessing whether a defendant's statement was compelled depends on the circumstances of the case, including the setting of the purported interrogation. Here, Mason confessed in a mental health program setting, within a residential system of incarceration. An increasing number of state and federal decisions indicate that a prison setting alone does not render an interrogation objectively custodial for the purpose of a *Miranda* analysis. *See, e.g.*, *United States. v. Menzer*, 29 F.3d 1223, 1231 (7th Cir. 1994) (reasoning "incarceration does not *ipso facto* render an interrogation custodial") (quoting *Leviston v. Black*, 843 F.2d 302, 303 (8th Cir. 1988)). We find the Fourth Circuit's analysis in *U.S. v. Conley* particularly persuasive because it addresses a medical setting within a custodial environment. The Fourth Circuit held that a prison inmate taken to a conference area to await medical treatment was not in custody when he was questioned by prison staff about the murder of a fellow inmate. *United States v. Conley*, 779 F.2d 970, 971 (4th Cir. 1985). As with the inmate in *Conley*, Mason's status as a juvenile inmate did not in and of itself create a coercive environment, and questioning him within the context of the SOM program was not made for the purpose of interrogation and criminal prosecution. Barker's questioning of Mason was for his own benefit for the purpose of successful completion of mental health treatment. Mason was not under arrest, nor even under suspicion, and Barker and the juvenile detention center administrators had little reason to assume that he would confess to additional offenses.

The record does indicate that Barker informed Mason that he would risk delaying his community release date if he did not cooperate more fully with the SOM program. Mason would have us believe that the mere threat by the treatment provider and the detention center officials of a delay of his release provisions was sufficient to create a coercive environment such that his confession was compelled. This is not the case when Mason accepted the terms of his guilty plea, which included compliance with the court-ordered mental health treatment program or a risk of extending confinement.

A defendant may waive his or her Fifth Amendment right to self-incrimination in a custodial or noncustodial setting, provided the waiver is made voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 444, 475-76. At the time of his confession, Mason was a mature minor and his psychological record indicates that he was a young man of average intelligence and cognitive abilities. The Supreme Court has observed that "[v]oluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good,

essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010). This is particularly true with regard to punishing serial sex offenders, who constitute a grave risk to public safety, especially vulnerable children.

Whether Mason agreed to plead guilty was his choice, as it was his choice to fully cooperate when answering questions about his sexual history as a juvenile inmate in the SOM program. We hold that Mason was not compelled to incriminate himself by participating and complying with a sex offender management program subject to the accepted terms of his plea agreement. Therefore, the trial court committed no error by admitting Defendant Mason's statements in a subsequent criminal prosecution, as it did not violate his Fifth Amendment privilege against self-incrimination.

Finally, Mason claims that because admission of his responses to the SOM counselor's questions implicated his Fifth Amendment privilege against self-incrimination, we must examine whether he was in custody, which would then require *Miranda* warnings prior to questioning. *See Miranda*, 384 U.S. at 467. Because we are persuaded that Defendant had already waived his privilege against self-incrimination by pleading guilty and agreeing to the court's sentencing scheme, including participation in a sex offender treatment program, we decline to address his *Miranda* claim.

RIGHT TO CONFRONTATION

With respect to Mason's second point of error, he asserts that the superior court erred in admitting the psychosexual pre-sentencing report drafted by Barbara Cohen for his juvenile district court trial because it violated his Sixth Amendment right to confrontation. We review claims that the state violated a defendant's Sixth Amendment right to confrontation *de novo*. *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002). The State has the burden to show evidence admitted in violation of the Sixth Amendment was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (reasoning that "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless").

The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S.

Const. amend. VI. The Fourteenth Amendment renders the Clause binding on the States. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The United States Supreme Court held in *Crawford v. Washington* that admitting a testimonial hearsay statement against a criminal defendant, which was made by an unavailable witness without a prior opportunity for cross-examination, violates the Confrontation Clause. 541 U.S. 36, 53-54 (2004). There is no dispute between the parties that Cohen had not been deposed and was unavailable to testify at trial in superior court, because she was, by then, deployed overseas. Therefore, the key constitutional question on appeal is whether the statements she made in the report were testimonial. For the reasons set out below, Mason fails to convince us that Cohen's statements in her report were testimonial.[9]

Since *Crawford*, state and federal jurisdictions have struggled with clearly defining the scope of what constitutes a testimonial statement. True to the constitutional plain language, "no right of confrontation exists unless the testifying witness is 'adverse' to the accused." *Chambers v. Mississippi*, 410 U.S. 284, 297 (1973). Although the State required Mason's cooperation with the psychosexual pre-sentencing report as a condition of his juvenile court plea agreement, Cohen, the psychology intern and author of the report, was presumably acting as a neutral professional and was not inherently biased or adverse to the accused. And yet, Mason persuasively argues that the later use of the report as evidence in a criminal trial is what matters. The State offered the report against him for the truth that she diagnosed him as "a pedophile with a personality disorder not otherwise specified" and recommended that he complete the center's Sex Offender Management (SOM) program. We agree that this evidence would have invoked stigma and reflected adversely on the defendant in a criminal trial involving new sex offense charges.

Nevertheless, we find it unconvincing that the report was made by Cohen with an eye toward trial within the meaning of *Crawford*, or that her status as a student intern from a private university raises the same risks attending government interrogations. *See Crawford*, 541 U.S. at 56, n.7 (2004) (suggesting that "[i]nvolvement of government officers in the production of testimony with an eye toward trial" is the constitutional concern). In a subsequent case, the Court briefly noted that "medical reports created for treatment purposes" are not testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312, n.2 (2009). Although Cohen was preparing

[9] In this appeal, Mason abandons any claims as to whether the evidence was admissible under the hearsay exceptions of the West Carolina Rules of Evidence.

the report for judicial review in a sentencing hearing, given her mental health role and the fact that Mason was already adjudicated delinquent, the primary purpose of her statements was not for the purpose of a future prosecution. She did not present the type of risk of prosecutorial abuse equivalent to that of an investigating law enforcement officer.

Although, due to her absence, the record cannot benefit from Cohen's testimony or explanation as to her personal motivations in submitting the report, her subjective views are not necessary here. Her intention from an objective standpoint, based on her role as a mental health clinician, was to determine the immediate future wellbeing of Ruben Mason who was, at that time, 14 years of age and in need of care and about to enter a court-ordered treatment program. Therefore, we hold that admission of Cohen's statements in her psychosexual assessment report did not violate Mason's right to confrontation, despite her unavailability and lack of opportunity for cross-examination, because her statements were not testimonial.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mason's third point of error is that his defense counsel in the superior court trial provided ineffective assistance of counsel by failing to object on constitutional grounds to the admission of defendant's incriminating statements in court-ordered therapy and to the admission of Barbara Cohen's psychosexual evaluation of Mason offered against him. A criminal defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defence." U. S. Const., amend. VI.

We first address Mason's assertion that the failure to object to his therapeutic confession violated his Fifth Amendment rights. On one level, we agree that counsel's failure to object on this basis was questionable, particularly given the longstanding line of related federal and state case law prior to and since *Estelle v. Smith*, 451 U.S. 454 (1981), evaluating the privilege against self-incrimination. The United States Supreme Court held in *Estelle* that, in a capital sentencing hearing, admitting a psychiatrist's damaging testimony regarding defendant's future dangerousness violated defendant's Fifth Amendment privilege against self-incrimination when the psychiatrist failed to provide *Miranda* warnings. *Id.* at 469. Although, as discussed above, the question has not been addressed by our courts of appeal, since *Estelle*, other state and federal jurisdictions have inconsistently determined whether an inmate is in custody, whether a therapist is a state agent, and whether medical and mental health questioning invokes compelled speech for the purpose of Fifth Amendment *Miranda* analysis.

Here, even if defense counsel's lack of objection on Fifth Amendment grounds was made from ignorance or neglect, rather than deliberate strategy, the omission does not rise to the level of ineffective assistance of counsel in violation of the Sixth Amendment. Judicial scrutiny of a defense counsel's performance is highly deferential. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Counsel is unconstitutionally ineffective if his or her performance is both deficient, with errors "so serious" that he or she no longer functions as "counsel," and prejudicial, meaning such errors deprive the defendant of a fair trial, rendering the trial result unreliable. *Id.* at 687. Deficient performance is measured by an objective reasonableness standard, and there must be a reasonable probability the outcome would have been different, but for counsel's unprofessional errors. *Id.* at 688, 694. We note that defense counsel did object to admission of the SOM report containing Mason's confession on evidentiary grounds, arguing that admission was a violation of the privilege of communications and rule against hearsay. Thus, counsel did exhibit some trial strategy in attempting to exclude what was undeniably the most damning evidence against Mason in a case lacking medical evidentiary support or the strong corroboration of eyewitness testimony. Even if diligent legal research would have easily unveiled sound constitutional arguments to exclude the report as a whole and any related testimony, there is no guarantee that the trial court would have found those arguments persuasive in this case, as we do not find them persuasive on appeal.

The standard of proficiency to protect the right to counsel is an objective standard, that of "reasonable competence" rather than "perfect advocacy." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). As it stands, the record merely indicates that counsel failed to assert one of several possible bases to object to the admission of incriminating statements, while choosing the alternative strategy of objecting on other grounds. While far from perfect, counsel did, in fact, demonstrate reasonable efforts and an ineffective, but not unreasonable, strategy to represent defendant's interests in excluding the SOM report and Howard Barker's testimony discussing Mason's admissions.

Defense counsel's failure to assert a Confrontation Clause argument against the admission of Barbara Cohen's psychosexual report statements is more concerning than the failure to object on constitutional grounds to his confession. Since *Crawford*, state and federal jurisdictions have evaluated a plethora of Confrontation Clause claims. It is more than surprising

that defense counsel would not have made such an argument, but such an omission also does not rise to the level of deficient performance and a denial of the right to counsel. It has been less than ten years since the *Crawford* decision, and, as discussed above, its applicability to a medical practitioner is far from set precedent.

We note that a more robust record on appeal may have aided Mason's argument that counsel's representation was ineffective. "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigation or preserving the claim and thus often incomplete or inadequate for this purpose." *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). Had he opted for a post-conviction relief hearing, he may have supplemented the record with testimony from a vigorous cross-examination of counsel; but we recognize his interest in expediting his release by directly appealing his conviction, particularly when the appeal relates to a matter of first impression.[10]

The failure of Mason's counsel to argue that a sex offender treatment provider must Mirandize a juvenile inmate before questioning the youth about uncharged sexual misconduct does not necessarily deprive a defendant of the right to counsel, nor is a failure to assert a *Crawford* Confrontation Clause argument to a medical report. With the record before us, we simply do not find that defense counsel provided objectively deficient representation in this case. Therefore, we hold that Mason's defense attorney was not unconstitutionally ineffective. In turn, we need not, and therefore do not, decide whether the supposed error prejudiced Mason.

CONCLUSION

Based on the foregoing and the entire record in this case, we hold that defendant received a fair trial, free of reversible error. Accordingly, the judgment of the trial court is left undisturbed. NO ERROR.

Judges MARCHANT and KINAN concur.

[10] We should also note that in this jurisdiction, a criminal defendant is not required to exhaust all remedies through post-conviction relief prior to filing a direct appeal. The defendant has the statutory right to strategically choose between post-conviction relief and direct appeal after a criminal conviction.

IN THE SUPREME COURT OF WEST CAROLINA

No. 172A01

Filed July 13, 2015

STATE OF WEST CAROLINA

v.

RUBEN CARL MASON

On discretionary review of a unanimous decision of the Court of Appeals, finding no error after appeal of a judgment entered on 16 April 2010 by Superior Court Judge Marilyn L. Robbins in Wash County. Heard in the Supreme Court on September 25, 2014.

BOLLAND, C.J., delivered the opinion of the Court, in which MALHOIT, J., concurred in part and dissented in part.

This appeal comes to us after the Court of Appeals affirmed the verdict of the jury and found no error in the judgment of the superior court, convicting Appellant Ruben Mason of aggravated felony sexual abuse of a child. As the material facts are not in dispute, we incorporate by reference the background statement of facts and procedural history outlined in the lower court's opinion. *See State v. Mason*, No. 10-04-8714-CR (W. Car. Ct. App. 2013).

For the reasons set forth below, we reverse the judgment of the Court of Appeals and order that Appellant's sentence be vacated and his conviction overturned.

I.

Appellant Mason first seeks to overturn his conviction on the basis that the trial court committed prejudicial error when admitting into evidence a confession that he made in a court-ordered Sex Offender Management (SOM) program, in violation of his Fifth Amendment privilege against self-incrimination. In accord with the Court of Appeals, we will treat the issues as preserved and review legal conclusions of constitutional import under a *de novo* standard of review. *See United States v. Brown*, 364 F.3d 1266, 1268 (11th Cir. 2004).

Under the Fifth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, no person "shall be compelled in any criminal case to be a witness against himself." *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). As set forth in *Miranda v. Arizona*, "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444 (1966). Here, both parties agree that *Miranda* warnings were not provided to Mason prior to being questioned in group SOM sessions and during the administration of polygraphs regarding his sexual history and previously unreported offenses.

The privilege should be "broadly construed." *Maness v. Meyers*, 419 U.S. 449, 461 (1975). It includes not only evidence that may lead to criminal conviction, but other information that provides a link in the evidentiary chain as well as "evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Id.* (internal citations omitted).

The Court of Appeals did not decisively address Mason's *Miranda* argument regarding custodial interrogation because it held that the privilege against self-incrimination in the SOM program was waived when Mason agreed to the conditions of his plea. Because we do not find that he waived his Fifth Amendment rights, we address both parts of his Fifth Amendment claim: (1) that staff member questioning compelling Mason's confession in SOM invoked his privilege against self-incrimination; and (2) that the SOM setting was custodial and therefore required *Miranda* warnings be administered prior to questioning.

With regard to the purported waiver of his Fifth Amendment rights, the Court of Appeals failed to consider Mason's key defining characteristic – his age. At age 14, Ruben Mason, himself a child victim of abuse barely out of primary school, pleaded responsible to a serious felony offense against another child. The State as Appellee concedes, and the record reflects, that in Mason's juvenile delinquency case, neither defense counsel nor the court informed him that the SOM program was not a typical mental health program and would require periodic polygraphs with expectations of disclosures of sexual history. Even before Mason made the confession at issue at age 15 to the state social worker, Mason had expressed discomfort with the program. Whether Mason sensed that disclosure of uncharged misconduct could lead to additional criminal charges is unclear, but unnecessary to determine. Only after Barker conveyed to Mason that he would not be released into community supervision as scheduled,

unless he complied with requested disclosures of sexual history, did Mason then disclose conduct which a superior court jury later found to be a sufficient basis to convict. It is safe to assume that had Mason been informed of the legal risks of disclosing uncharged misconduct in this particular SOM program, he may not have pleaded guilty.

Arguing that the Court of Appeals erred in affirming his conviction, Mason draws this court's attention to the recent United States Supreme Court decision, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), which he points out calls for heightened attention to the developmental stages of minors, based in part on advances in adolescent brain science and behavioral health research. *Id.* at 273 n.5 (emphasizing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.") (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). We agree that *J.D.B.'s* analysis is relevant here. Mason was not a mature minor when he pleaded guilty, as the lower court asserts, and he was also demonstrating symptoms of distress from posttraumatic stress disorder, which, according to the record, were only exacerbated throughout his time in juvenile detention. Applying the added maturity factors in *J.D.B.* to in the context of this case, we find that Mason's young age, lack of maturity, mental health concerns, lack of program information, and his initial and persistent resistance to disclose uncharged behavior foreclose a finding that he voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *See Miranda*, 384 U.S. at 444, 475-76. Therefore, we must next consider whether Mason's confession in the SOM program actually implicated the privilege against self-incrimination and, if so, whether he was in custody for the purposes of *Miranda*.

As the Court of Appeals correctly noted, to implicate the privilege against self-incrimination, the communication at issue must be "testimonial, incriminating, and compelled." *See United States v. Lara-Garcia*, 478 F.3d 1231, 1235 (10th Cir. 2007) (quoting *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 189 (2004)). The State has argued half-heartedly that Mason's disclosures were not incriminating because the SOM staff in the juvenile detention center did not instigate the criminal investigation, but merely intended to use the disclosures to better treat or "manage" Mason. The State additionally asserts that Barker complied with the statutory duty to report child abuse, but had no control over the course of the investigation or whether it would result in criminal charges. We find this argument disingenuous given that, unlike traditional mental health treatment which focuses on behavioral coping

strategies and balanced wellbeing, the SOM program insists on truthful disclosures through polygraphy, more akin to forensic psychiatry or child forensic interviews for the purpose of criminal investigation. Also, the most serious legal risks faced by Mason should he not make the requested disclosures of uncharged misconduct came about in reality. Only after a compelled confession to Barker to sexual offenses against his younger sister was Mason denied release and community supervision, doubling his incarceration time until the maximum age of 18. He was also subject to the "classic penalty situation" with the State's filing of additional criminal charges against him, extending his incarceration and registration on the state sex offender registry for an additional 15 years. *See United States v. Saechao*, 418 F.3d 1073, 1075 (9th Cir. 2005).

Before we address the other *Hiibel* factors related to the communication itself, we must first address the status of the questioner. We agree with the Court of Appeals' assessment that the SOM staff were state agents capable of implicating a juvenile detainee's Fifth Amendment rights. However, we more specifically assert that mental health providers of court-ordered treatment in the criminal justice system, unlike other medical providers not employed by the system, have a greater potential to exert the undue influence that compels disclosure in violation of the Fifth Amendment.

Comparable to the police station interrogation described in *Miranda*, in an isolated prison mental health program office where the inherent techniques of "treatment" involve verbal disclosure of potentially incriminating evidence, there are no "impartial observers to guard against intimidation or trickery." *See Miranda*, 384 U.S. at 461. This is especially true in Mason's circumstances where SOM staff member, Howard Barker, was aware of the statutory mandatory duty to report acts of child abuse to law enforcement, a duty which, in West Carolina and most states, would likely pierce any therapeutic privilege against disclosure of confidential communications.

We are concerned about the proportion of inmates who are receiving mental health services. *See* Olga Khazan, *Most Prisoners Are Mentally Ill*, THE ATLANTIC (April 7, 2015) (citing research identifying 55% of male prisoners and 73% of female prisoners in the United States as having a diagnosable mental illness). Without adequate oversight, such an intersection of social services and criminal justice could tempt fate and transform neutral licensed professionals into the system's most highly trained interrogators. We note, based on the record on appeal, that Howard Barker is not a licensed professional, nor is he bound by the rules of

ethics developed by a licensed profession. Instead, he is trained to merely administer a set program and manual laid out as best practices for juvenile sex offender *management*, rather than treatment. For this reason, we address our concerns specifically to the juvenile detention center's SOM program, rather than to all in-house prison medical or mental health providers.

We also agree to a point with the lower court's determination that incarceration does not necessarily equate to the coercive environment of custody in the context of *Miranda* rights. The lower court failed, however, to acknowledge the United States Supreme Court has recently emphasized that it has "repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial." *Howes v. Fields*, 132 S.Ct. 1181, 1187 (2012). As the Court explained, "standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests" addressed by persons in custodial interrogation in *Miranda* and other cases. *Id*. at 1191. What constitutes "standard conditions" may differ greatly depending on whether or not the inmate is in the general population, in minimum or maximum security, or an adult inmate or a juvenile detainee.

We thus do not find a conclusion of broad application in the Court's suggestion in *Howes* that prisoners are less able to be coerced in prison, simply because prison is their accustomed, normalized place of residence. *See id.* Mason's declining mental health in juvenile detention and his desperation to ensure his conditional release indicate otherwise. We instead narrowly construe the court's de-emphasis of the custodial nature of incarceration in *Howes*, in favor of a reliance on the original precepts of the Fifth Amendment protections for all persons, including inmates.

The Court of Appeals, in treating prisoners' Fifth Amendment rights with less deference, seeks to disregard the conjoined nature of the SOM program and its criminal justice employer. The United States Supreme Court in *Estelle* held that an inmate should have received *Miranda* warnings prior to making admissions in a court-ordered psychiatric assessment, admissions later used against him as evidence of future dangerousness at his capital sentencing hearing. *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981). It is equally coercive when the State here appears as a wolf in sheep's clothing, inviting confession from Mason, as a young adolescent, for the purpose of prosecution, all in the name of beneficent mental health treatment.

Next, we address whether Mason's statements were testimonial in the context of the privilege against self-incrimination. Although the lower court opted to presume, without

deciding, that they were, we directly conclude that they were testimonial. Mason's statements, according to the record, were the product of a set program of questioning, scheduled polygraphy, and attempted fidelity to a best practices manual, implemented over weeks and months. *Estelle* held that an inmate's disclosures to a psychiatrist were testimonial and that the Fifth Amendment "is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination." *Id.* at 464-65.

Here, Mason's disclosure has even greater testimonial weight because it was formally and repeatedly compelled by Barker's repeated questioning during multiple sessions in the course of Mason's participation in SOM. We therefore conclude that the superior court erred in admitting Mason's confession in response to questioning in court-ordered juvenile sex offender management because it was testimonial, incriminating, and compelled in violation of his Fifth Amendment rights.

We also briefly consider whether Mason was in custody, thereby requiring that he be given *Miranda* warnings prior to requested disclosures of past sexual misconduct in the SOM program. We hold that he was. What is in custody for the purpose of *Miranda* is an objective determination, which requires an examination of all of the circumstances surrounding the interrogation, including any circumstance that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury v. California*, 511 U.S. 318, 325 (1994) (per curiam).

Pursuant to *J.D.B.*, a child's age properly informs a *Miranda* custody analysis, so long as the child's age was known or readily apparent to the state agent interrogating the child at the time of the questioning. *J.D.B.*, 564 U.S. at 277. *J.D.B.* requires state and federal courts to recognize that youth is an objective vulnerability factor in identifying a custodial setting for the purpose of *Miranda.* Here, the lower court implies that we should be persuaded by the growing trend of cases that find that a prison inmate is not in custody for the purpose of *Miranda*, while being questioned by police for an unrelated crime, unless the questioning is under circumstances involving an added imposition on defendant's freedom of movement or additional compulsion above and beyond imprisonment. *See, e.g., United States v. Menzer*, 29 F.3d 1223, 1231-32 (7th Cir. 1994). We concede that defendant was not restricted beyond the confines of his sentence when participating in the SOM program, but again assert that *Howes*, and related case law minimizing the custodial nature of incarceration should be read narrowly. When analyzing the

character of compelled disclosures by juvenile detainees, we must strongly favor the importance of the detainee's age. *See J.D.B.*, 564 U.S. at 277.

Not only do we hold that admission of Mason's involuntary confession in response to compelled questioning in the SOM program constituted a violation of his Fifth Amendment privilege against self-incrimination, but the failure to provide him with *Miranda* warnings during his custodial interrogation in the program did as well. Without the admission into evidence of Mason's confession it is patently clear that the State could not have moved forward with the prosecution. We hold, for these reasons, the Court of Appeals decision should be reversed and Mason's conviction vacated.

II.

In his second claim of error on appeal, Mason asserts that the trial court erred in admitting into evidence the pre-sentencing psychosexual assessment report of Barbara Cohen, a doctoral psychology intern, as a violation of his right to confrontation under the Sixth Amendment. The portions of Cohen's report specifically at issue included her diagnosis of Mason as a pedophile with a personality disorder not otherwise specified (NOS) and her recommendation that he complete the juvenile detention center's Sex Offender Management (SOM) program. She also recommended that Mason receive treatment for posttraumatic stress disorder for his own trauma history as a victim of child abuse. The record indicates that the State attempted to subpoena Cohen as a witness several times, but she was, by the time of trial, militarily deployed overseas and therefore unavailable to testify.

The Confrontation Clause of the Sixth Amendment, applicable to the States pursuant to the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, the United States Supreme Court abrogated its prior longstanding and more flexible approach in *Ohio v. Roberts*, 448 U.S. 56 (1980), in order to better protect a criminal defendant's right to confrontation. 541 U.S. 36, 59 (2004). The Court held in *Crawford* that to avoid violating a criminal defendant's right to confrontation, out of court statements could be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the declarant]." *Id.* Several related Supreme Court decisions followed *Crawford*, many which involved the admissibility of hearsay statements from unavailable

scientific and forensic witnesses not applicable to this case.[11] *See, e.g., Williams v. Illinois*, 132 S.Ct. 2221, 2244 (2012) (DNA analyst).

Few federal or state cases relying on *Crawford* have directly addressed out of court statements by unavailable witnesses who are medical or mental health professionals. In our state of West Carolina, it is a matter of first impression. We note that the Court held that statements made to 911 operators or to other law enforcement personnel attending to medical emergencies at a crime scene do not implicate the Confrontation Clause because they are not testimonial, lacking the formality and evidentiary purpose of more formalized statements. *Davis v. Washington*, 547 U.S. 813, 827-28 (2006). We agree with the lower court that the dispositive issue for Mason's *Crawford* claim is whether Cohen's psychosexual report was, as a matter of law, testimonial.

A testimonial statement is one which need not be under oath, but which demonstrates sufficient formality and solemnity, such as a declaration or affirmation. *See Michigan v. Bryant*, 562 U.S. 344, 378 (2011) (Thomas, J., concurring). Qualifying "formalized testimonial materials" may include statements from custodial interrogation, depositions, affidavits, and prior testimony, or statements resulting from "formalized dialogue." *Id.* at 379. In the absence of a more defined scope, we decline to adopt a rule which requires actual dialogue or an oath or certification in order to qualify as a testimonial statement. Thus, Cohen's report, prepared at the request of the State in order to psychologically evaluate an adjudicated juvenile detainee awaiting sentencing for a sex offense is not removed from Confrontation Clause analysis because it was a unilateral communication. The report provides indicia of formality in its structure, professionalism, and its preparation for sentencing review.

Crawford also established that a testimonial statement is one offered for the truth of the matter asserted. 541 U.S. at 59, n.9. The parties do not disagree that the diagnosis, facts and conclusions in Cohen's report could only have been offered by the State for the truth of the matter asserted, as her report has no impeachment value and was not provided as the basis of expert testimony.

The lower court cites language in *Crawford* that suggested a narrow purpose test for defining a testimonial statement, i.e., statements obtained with an eye towards trial. *Crawford*,

[11] Howard Barker testified only as a lay witness. His report of Ruben Mason's treatment progress incorporated Barbara Cohen's earlier report from the district court case.

541 U.S. at 56, n.7. However, the lower court failed to note that the Court subsequently refined its analysis to focus on the primary purpose of the interrogation, particularly when statements are made with a hybrid purpose:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006). The last sentence in this quoted portion of the *Davis* primary purpose test would easily encompass a report such as Cohen's. Mason was already in custody when he was evaluated, so there was no ongoing emergency. Moreover, the primary purpose of her evaluation was forensic, a single evaluative incident capable of reaching a medical diagnosis, but not for the purpose of providing mental health treatment. Her status as a student intern does not detract from the fact that she was serving the state under the supervision of state employee, detention center psychiatrist, Dr. Knowles. *See Crawford*, 541 U.S. at 53 (holding that the involvement of government officers increases the risk that a statement is testimonial). We find the wider array of state court decisions helpful in supporting our approach to such collaborative medical-legal contexts under today's Confrontation Clause lens. *See, e.g.*, *State v. Blue*, 717 N.W.2d 558, 564-65 (N.D. 2006) (finding the primary purpose of a multidisciplinary child abuse interview to be more forensic than medical as any ongoing emergency was over).

Thus, we hold that the trial court erred by admitting over objection Barbara Cohen's psychosexual sentencing evaluation of Mason as a juvenile detainee, because it contained the testimonial statements of an unavailable witness offered against him as criminal defendant, thereby violating his Sixth Amendment right to confrontation. Additionally, we hold this error to be prejudicial due to the level of stigma likely to attach to Mason in a sex offense prosecution when formal evidence identified him as a pedophile before the jury. No limiting instruction could have cured this defect.

III.

Mason's third claim of error asserts that defense counsel's failure to object to certain evidence on constitutional grounds deprived him of the effective assistance of counsel under the Sixth Amendment. Specifically, Mason argues that admitting Mason's statements made in court-ordered juvenile sex offender treatment violated his Fifth Amendment privilege against self-incrimination and right to Miranda warnings and admitting Barbara Cohen's conclusions and diagnosis in the SOM report violated his Sixth Amendment rights under the Confrontation Clause. Mason contends that his trial counsel should have raised these issues directly. The Court of Appeals was satisfied that counsel had at least objected to the admission of the confession and SOM report on other grounds, although it expressed concern that under an objective standard of proficiency it was "questionable" practice to fail to recognize and assert Fifth and Sixth Amendment bases on which to object.

Mason's strong resistance to questioning regarding uncharged sexual misconduct in the SOM program and the subsequent coercion exhibited by both Howard Barker, the SOM social worker, and the detention center administration should have alerted counsel to the need to conduct research into the constitutional implications of the state's seeking to admit his incriminating statements. There can be no dispute that the confession formed the very basis of both the investigation and the subsequent proof at trial for the charge against Mason of aggravated felony sexual abuse of a child in adult criminal court. Of particular importance is that there was no physical evidence, the victim witness recanted her cursory disclosure of abuse, and she did not cooperate at trial. This heightens the scrutiny with which we must examine counsel's performance and indicates both deficiency and prejudicial error. It is not enough to simply argue that because counsel made some form of argument, however unsuccessful or lacking in zealous advocacy, that counsel's performance was reasonably proficient.

Regarding the Fifth Amendment privilege against self-incrimination, we do agree with the State and the lower court that requiring defense counsel to object to unwarned statements made in court-ordered treatment programs has not achieved universal acceptance in state or federal jurisdictions. *See, e.g.*, *Burton v. Thaler*, 863 F.Supp.2d 639, 656 (S.D. Tex. 2012) (holding no ineffective assistance of counsel occurred where the law was too unsettled). But universal acceptance is more than is constitutionally required. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *See*

Strickland v. Washington, 466 U.S. 668, 688 (1984). Of course, deficiency is not the only consideration and Mason must also prove prejudicial error. The question is whether considering the totality of the evidence, "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. Due to the weight of the evidence at issue, we hold that it would have.

In addition, we hold that failure to object on the basis of the Confrontation Clause to Barbara Cohen's report and conclusions, identifying him as a pedophile without the opportunity for cross-examination, was prejudicial error. Contrary to the lower court's reasoning, there is no time stamp on when precedent is clearly set. Here, the State cannot reasonably argue that *Crawford* has not received active attention at every state and federal level of court. Thus, we find that effective assistance of counsel requires the argument of colorable Confrontation Clause claims against such highly inflammatory evidence.

Finally, it is important to make clear that we generally decline to review ineffective assistance claims on direct appeal, except in the rare occurrence where the limited record allows the court to fairly assess the merits of the claim. *Accord United States v. Kizzee*, 150 F.3d 497, 502 (5th Cir. 1998). This is one of those rare occurrences where the probative value of the evidence and the clarity of precedent justifies our holding that Mason has met his burden to prove prejudicial error on the basis of ineffective assistance of counsel. Thus the Appellant was deprived of his Sixth Amendment right to counsel.

IV

For the reasons stated above, we REVERSE the judgment of the Court of Appeals and VACATE Appellant's sentence and conviction.

MALHOIT, J., concurring in part and dissenting in part.

I write briefly in concurrence with the majority opinion to identify a significant gap in its analysis with respect to Mason's privilege against self-incrimination and *Miranda* claims. I dissent with respect to the majority's holding that Mason received ineffective assistance of counsel.

Pursuant to the Fifth Amendment, I would agree, under an objective examination of the totality of the circumstances in this case, that the coercive state action demonstrated on the record warrants a finding that Mason's purported waiver of the privilege against self-incrimination was involuntary. The most egregious evidence of this is the detention center's authorization of Howard Barker's repeated questioning of Mason, while Mason was in detention, an isolated and vulnerable young offender suffering from mental illness from past trauma purportedly due to intrafamilial physical and sexual abuse. Nevertheless, as much as this case elicits my sympathy for Mason and other youth in his position across our state who deserve real rehabilitative care rather than excessively punitive sanctions, I cannot join the majority opinion.

The majority dangerously overreaches in its application of *J.D.B. v. North Carolina*, 564 U.S. 261 (2011). Today, our state's highest court opens the door to clouding the waters of an already muddy custodial analysis under *Miranda*. I find persuasive Justice Alito's dissenting opinion in *J.D.B.*, which strongly emphasizes that clarity in the custodial analysis requires a strict adherence to the reasonable person test for determining whether a person must be given *Miranda* warnings prior to interrogation. *J.D.B.*, 564 U.S. at 282 (Alito, J., dissenting). As stated by Justice Alito, "the *Miranda* custody standard has never accounted for the personal characteristics of these or any other individual defendants." *Id.* at 289. He aptly warns that injecting a subjective factor, such as age and maturity, into the custodial analysis will open the door to a

myriad of other factors of vulnerability. Our case is a case in point, demonstrating many more aspects of vulnerability in Mason than age alone, including multiple serious symptoms of a declining mental health while incarcerated.

If we undermine the objective nature of the test, or create a subjective-objective test, we will invite inconsistency and judicial bias in the implementation of our custody analysis. The majority forgets that Mason is more sympathetic than some young offenders, despite his history of sex offending as a child. It generously applies *J.D.B.*'s focus on age not only to a custodial analysis, but to a waiver analysis, which the United States Supreme Court did not do, nor did it need to. Age and other subjective factors have long been acceptable subjects for assessing the voluntariness of a waiver of a criminal defendant's privilege against self-incrimination. *See Maryland v. Shatzer*, 559 U.S. 98 (2010).

The majority forgets that such a broad expansion of the definition of custody and the requirement of *Miranda* warnings could also arbitrarily decrease public safety, releasing more frequently very mature and very dangerous young recidivist offenders, offenders who most often perpetrate against other young children. As stated by the Court in *Graham v. Florida*, a sister case to *J.D.B.* also focusing on the need for leniency for minors caught in the criminal justice system:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that [i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.

Graham v. Florida, 560 U.S. 48, 68 (2010) (internal citations and quotation marks omitted)

Therefore, I do not join the majority's holding with respect to its determination on whether Mason was in custody for the purpose of *Miranda*. This is an issue that would have been better left to the trial court on remand to address whether Mason was in custody and therefore was owed *Miranda* warnings prior to questioning. However, because I would hold that Mason's privilege against self-incrimination under the Fifth Amendment was violated by the admission of his compelled involuntary confession, I would concur with the judgment of the majority on this point. That is, I would hold that the trial court did commit prejudicial error sufficient to warrant reversing the judgment of the Court of Appeals and vacating Mason's conviction.

Finally, I dissent with respect to the majority opinion's holding on the third claim for ineffective assistance of counsel. The record is not so clear as to deem the omission of defense counsel's objections on constitutional grounds as a deprivation of Mason's right to counsel.

SUPREME COURT OF THE UNITED STATES

WEST CAROLINA, PETITIONER

V.

RUBEN C. MASON, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF WEST CAROLINA

No. 15-1576 August 3, 2016

The petition for a writ of certiorari is granted, limited to the following questions:

(1) Does admission into evidence of the unwarned statements of a juvenile detainee in a sex offender management program violate the Self-Incrimination Clause of the Fifth Amendment?

(2) Does admission of a written psychosexual evaluation report produced for a prior juvenile sentencing hearing by a now unavailable witness violate the Confrontation Clause of the Sixth Amendment?

(3) Was appellant deprived of the effective assistance of counsel when defense counsel neglected to object to the admission of evidence on Fifth and Sixth Amendment grounds?