The dissent, by contrast, appears more attentive to the healing potential of psychotherapy, and its fragility:

> Without something more than mere unsupported suspicion, disclosure would result in chilling the free discourse required between any treatment provider and her clients and deter clients from seeking help from any other treatment provider. It could irreparably harm the relationship and deprive all such clients of much needed counseling and services (862 A.2d at 1015).

Perhaps the dispute within the court is not solely factual but, more fundamentally, as with the judiciary generally, an underlying philosophical divide over the nature and value of mental health care.

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Court-Ordered Psychotherapy and the Privilege Against Self-Incrimination

Confessions of Past Criminal Activity, Made During Obligatory Inpatient Counseling Pursuant to a Sex Offender Sentence, Are Inadmissible to Prosecute Such Activity

In *Welch v. Kentucky*, 149 S.W.3d 407 (Ky. 2004), the Kentucky Supreme Court held, by a four-to-three margin, that admissions of past criminal acts made by an adjudicated juvenile sex offender during his court-ordered inpatient psychiatric treatment are inadmissible for the prosecution of the acts.

Facts of the Case

Following adjudication as a juvenile sex offender, Christopher Welch was ordered to undergo inpatient sex offender treatment at a state facility.

According to the majority opinion, the treatment is "not voluntary" because, "by court order [participants, including Welch] must follow the rules and procedures of the program, [which] uses group therapy and group dynamics as a means to further the goals of the program. Participants are strongly encouraged, by counselors and other group members, to admit and disclose all prior sexual misconduct." Further, "participation in this part of the program" is "essential to progress toward completion of the program as ordered by the court," and "[p]rogress in the program is required to obtain and keep certain privileges during treatment" (149 S.W.2d at 409). Moreover, though the majority does not say so, the dissent implies (as Welch would reasonably have assumed) that noncooperation would lengthen his confinement.

No notice or warnings were given, before or during any of the treatment sessions, that criminal charges could ensue from any statements made. "During the treatment program, the counselors intensely questioned [Welch], not only about the offense that resulted in the commitment, but also about any other sexual misconduct" (149 S.W.2d at 410). Whether in group or individually (the opinion does not make clear), Welch "disclosed to his counselor several uncharged [and previously unknown] acts of sexual misconduct" (149 S.W.2d at 409), on an identified five-year-old child. Police were promptly notified, confirmed the acts by interviewing the victim, and came to the facility to interrogate Welch, who confessed after a *Miranda* warning.

Charged as an adult on the newly discovered offenses, Welch moved unsuccessfully to have his statements in therapy suppressed, along with his Mirandized confession and the victim's identity and testimony, as "fruit of the poisonous tree " (*Wong Sun v. United States*, 371 U.S. 471 (1963)). He pled guilty conditionally, preserving his right to appeal and was sentenced to 20 years in prison.

Ruling

The court held that Welch's statements emanated from what amounted to a "custodial interrogation" without the requisite warnings and therefore were inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966). His subsequent confession to police and the victim's testimony were thus "fruit of the poisonous tree" under *Wong Sun*. The conviction was reversed.

Reasoning

The court persuasively labeled Welch's admissions in group therapy, under the circumstances of this case, coerced. This does not establish the group therapy as "custodial interrogation" *per se*, requiring *Miranda* warnings, but certainly court-ordered treatment that leads, without some kind of warning, to 20 years in prison raises a question of fundamental fairness under the Due Process clause.

The court agreed with Welch that his confessions to the police should be suppressed because, without the information provided to the police that came from his statements in group, the police would have had no cause to act.

Dissent

The dissenters viewed the group therapy in this case as noncustodial and therefore disagreed that *Miranda* applied. They invoked the six factors set forth in an Eighth Circuit decision for sorting those official encounters with an inmate that are "custodial interrogations" from those that are not. The trouble is, three (and possibly four) of the dissent's six factors support the majority, not the dissent.

More fundamentally, the dissent parted company over the majority's conclusion that Welch found himself in a coercive situation. Over and over, the dissent characterized this court-mandated therapy as "voluntary" and declared: "[Welch] was free to discuss his previous sex offenses, or not . . . . [Welch] was not actually coerced by the counselors to disclose the information about his prior sexual offenses—encouragement does not equal coercion" (149 S.W.2d at 415).

Discussion

The court's reasoning could have been more satisfactory. In the first place, it fused the Fifth Amendment privilege against self-incrimination (barring all unwarned statements, whether voluntary or not), with Fourteenth Amendment Due Process protection (barring coerced statements on a case-by-case basis).

The Supreme Court in *Miranda* placed great emphasis on its understanding of the nature of traditional police interrogation: a suspect is arrested, taken alone to an unfamiliar room in a police station, and questioned relentlessly by means of established psychological maneuvers and various deceits about the particular crime for which the suspect has been arrested. Emphasizing that a specific crime is under investigation, the Court termed such an interrogation "a phase of the adversary system" (384 U.S. at 469).

Hence, on vary rare occasions, questioning by persons other that the police has been held to be "custodial interrogation" under *Miranda*. In *Estelle v. Smith*, 451 U.S. 454 (1981), for example, a court-ordered psychiatric examination for competence to stand trial, clearly "a phase of the adversary system" as it related specifically to the murder for which the defendant was awaiting trial, was subject to *Miranda*. The psychiatrist was held to have overstepped his court mandate to be neutral and to examine only for competence when he testified for the prosecution on substantive issues in the case (including dangerousness at the penalty phase).

Nowhere does the court in this case explain why group therapy, with peers, in an open area, and where no crime is under investigation or even suspected, should fall within the rationale and hence the rule of *Miranda* (or its application in *Smith*) as a "custodial interrogation."

Also, strikingly absent from the court's opinion is any recognition of how topsy-turvy this "treatment" must be if Welch's conviction were sustained. Whatever else might be said for or against the therapy in this case, it surely cannot have been designed to succeed by teaching the patients to lie. Yet Welch's 20-year sentence on the new charges was his reward for complying with his treatment, whereas feigned candor in treatment would have smoothed his path to freedom, teaching the "wisdom" of manipulation.

The precedential import of this case is limited. First, as a state court ruling, it is controlling only in Kentucky. Second, it is a four-to-three decision, seemingly turning on the particular facts of this case. And third, the majority's repeated references to Welch as a juvenile leave in doubt whether the holding may be generalized to adult coerced treatment, such as under sexually violent predator legislation.

The larger issue this case highlights is the core conflict within all forensic psychiatric care. In myriad ways, sometimes at the heart of the therapy, more often on more peripheral issues, the therapist serves two masters, the patient and the state. Forensic clinicians can only strive never to become too comfortable with, let alone numb to, the duality of their role.

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