

**IT'S NOT POPULAR BUT IT SURE IS RIGHT: THE  
(IN)ADMISSIBILITY OF STATEMENTS MADE  
PURSUANT TO SEXUAL OFFENDER TREATMENT  
PROGRAMS**

**Meghan Gilligan<sup>†</sup>**

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INTRODUCTION

*“What is right is not always popular and what is popular is not always right.”<sup>1</sup>*

Sex offenders are not a sympathetic bunch. Throughout American history, society has imposed on sexual offenders a variety of punishments, from incarceration<sup>2</sup> to castration.<sup>3</sup> In recent years, in

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<sup>†</sup> J.D. Candidate, Syracuse University College of Law, 2012; B.A. English and Political Science, *magna cum laude*, University of Rochester. Thank you to my parents, Kevin and Mary, my brother, Marc, and my grandparents for their love and laughter. I would also like to thank the professors of Syracuse University College of Law for challenging me to think critically and innovatively about our justice system and the people it serves. A very special thank you to Jon for his constant support and encouragement, without which this project would not have been possible. Finally, this note is dedicated to my parents, for teaching me that regardless of its popularity, the right decision is the one that is fair and just.

1. *Albert Einstein*, GOODREADS, <http://www.goodreads.com/quotes/show/67533> (last visited Oct. 11, 2011).

2. *Facts About Adult Sex Offenders*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/facts-about-adult-sex-offenders> (last visited Oct. 11, 2011).

3. *See Anti-Androgen Therapy and Surgical Castration*, ASSOCIATION FOR THE

response to public pressure following several heinous and highly publicized sexual crimes against children, the punishments imposed upon sexual offenders have increased.<sup>4</sup> Many jurisdictions have enacted laws allowing for the indefinite civil confinement of sexual offenders, while others offer surgical castration or require offenders to submit to polygraph<sup>5</sup> or penile plethysmograph tests.<sup>6</sup> Furthermore, both the federal government and many states offer or mandate sexual offender treatment programs which may employ some of the above-mentioned methods of punishment, often with the ultimate goal of rehabilitating the offender.

In deciding the appropriate and just punishment for sexual offenders, society and its elected representatives have struggled to reconcile the tension between the very real threat sexual offenders pose to America and its children, and upholding the basic rights afforded all criminal defendants under the Constitution. While recent conversations surrounding the rights of individuals convicted of sexual offenses have focused on civil confinement,<sup>7</sup> this is not the only punishment practice that implicates the constitutional rights of sexual offenders. The rights of such offenders are also affected by what are commonly known as “sex offender treatment programs” (SOTPs). These programs, administered by the government, are voluntary at the federal level, and may be voluntary or mandatory at the state level. The majority of SOTPs employ a cognitive behavior therapy model and commonly require participants to admit to all past sexual offenses—charged or

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TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/anti-androgen-therapy-and-surgical-castration> (last visited Oct. 22, 2011).

4. Jean Peters-Baker, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis is Lifetime Management*, 66 UMKC L. REV. 629, 631 (1998).

5. See *id.* at 662 (noting that “[t]he polygraph is one method of measuring a sex offender’s level of risk to the community in a laboratory setting” and is frequently used “to determine the offender’s normal and deviant sexual histories”); see also Mary West et al., *Offender Treatment Programs, August 2000: 50 State Survey*, COLO. DEP’T OF CORRECTIONS 20 (Aug. 2000), <http://cospl.coalliance.org/fez/eserv/co:3038/cr11002t712000internet.pdf>. Thirteen states reported using polygraph tests to assess sex offenders’ progress in treatment programs, including Colorado, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Minnesota, New Hampshire, Tennessee, Texas, Vermont, Virginia, and Wisconsin. *Id.* Other states stated an intent to implement the use of polygraphs in the near future, and several more reported the discretionary use of polygraphs, or the use of polygraphs in post-release supervision. *Id.*

6. See Peters-Baker, *supra* note 4, at 663 (explaining that penile plethysmographs are devices used to measure the response of an individual’s penis to audio or visual stimuli); see also FED. BUREAU OF PRISONS, SEX OFFENDER TREATMENT PROGRAM (2002), available at <http://law.wustl.edu/Library/CDROMS/ABAUSG/pdf/sexu2.pdf> (“[a]ll participants will undergo plethysmograph and polygraph examination”).

7. See generally, e.g., *United States v. Comstock*, 130 S. Ct. 1949 (2010).

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uncharged, convicted or not convicted—in order to successfully complete the program.

To this end, the programs are laudable. Based on scientific research showing the efficacy of cognitive-based therapy where the patient takes responsibility for his own wrongdoing, the required admissions to past sexual offenses seem a logical, and indeed necessary, component of rehabilitation. However, the programs are also problematic, implicating participants' constitutional rights because statements made during the course of SOTPs can be used as propensity or character evidence in a pending prosecution for a sexual offense, or as the basis for new charges in a subsequent prosecution.

Take John Doe for example.<sup>8</sup> He was arrested for a sexual molestation offense for the first time in 1982. In the years that followed, Doe was in and out of prison for a variety of sexual offenses. Following his last stint in federal prison on child pornography charges, Doe was ordered to participate in a SOTP as a condition of supervised release. The SOTP required Doe to author an autobiography detailing all sexual abuse that he had suffered and all that he had perpetrated. Doe did so, providing a detailed written account of each of his victims over the past three decades. Shortly thereafter, Doe was released from prison. A few months later, Doe violated the terms of his supervised release by distributing child pornography via the internet. When police searched Doe's house, they found a copy of the autobiography and other materials Doe wrote in the course of the SOTP.

At trial, the government seeks to introduce Doe's autobiography and the other written statements to show his propensity to commit sexual offenses. The government is also considering bringing charges against Doe for the crimes he admitted to but for which he was never charged. At trial, the jury will hear about every single incident of sexual misconduct Doe has ever engaged in because they will have full access to Doe's private writings—the very writings that the government told him he must produce as a term of his supervised release.

This paper will explore the admissibility of such statements against individuals like Doe who make statements detailing prior sexual offenses, charged or uncharged, in the course of their participation in a government-run SOTP. Part I will provide a brief overview of federal and state SOTPs and discuss the judicial proceedings in which such statements might be admitted. Part II will explore the admissibility of

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8. "John Doe" is not based on a real individual but is instead exemplary, used to illustrate a plausible scenario based on existing SOTP practices and case law concerning prosecutions for sexual offenses.

SOTP statements under the Federal Rules of Evidence (FRE) and the constitutionality of such under the Fifth Amendment. Finally, Part III will argue that notwithstanding the evidentiary and constitutional bases for admitting these statements, there are alternative and more compelling evidentiary, constitutional, and policy arguments for not admitting them. First, many of these statements should be protected from compelled disclosure by the therapist-patient privilege. Second, the probative value of such statements does not outweigh the prejudicial effect, and thus the statements should be deemed inadmissible under FRE 403. Finally, such statements violate the Sixth Amendment right to counsel and should be excluded where a defendant is not advised by counsel of the risk of being compelled to make such statements at the time he accepts a guilty plea requiring participation in a SOTP, or where a defendant is sentenced to participate in such a program as part of sentencing, supervised release, or parole.

Ultimately, I argue that it is simply good social policy to exclude statements made during the course of SOTPs. Failure to do so may deter individuals from participating in SOTPs in the first place and prevent offenders from receiving treatment that is critical to decreasing recidivism and to protecting America's children from sexual crimes. The solution, I conclude, is to offer a limited "use immunity"<sup>9</sup> to SOTP participants, prohibiting such statements from being used in a search warrant application or as the basis for a subsequent prosecution for crimes admitted to in the statements.

#### I. OVERVIEW OF SEXUAL OFFENDER TREATMENT PROGRAMS

"Society has struggled for many years with the question of how to deal with sex offenders."<sup>10</sup> Until the 1930s, sexual offenders received no special treatment and were treated the same as all other prisoners.<sup>11</sup> However, in the early twentieth century, which marked "a new rehabilitation-focused era in the U.S.," sexual offenders began to receive therapeutic-based punishments "via indeterminate confinements . . . whose end would be premised on the offender's

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9. Dissenting in *McKune v. Lile*, Justice John Paul Stevens coined the term "use immunity" with regard to statements made pursuant to a SOTP. 536 U.S. 24, 70 (Stevens, J., dissenting).

10. Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 PSYCHOL. PUB. POL'Y & L. 116, 116 (1998).

11. Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 70 (2000).

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demonstrated recovery. . . .”<sup>12</sup> Individuals convicted of sexual offenses were treated as though they had a mental illness; once deemed “cured,” they were released back into the community.<sup>13</sup> Accordingly, many states passed sexual psychopath laws.<sup>14</sup> This trend continued throughout the 1960s.<sup>15</sup>

Society’s approach to treating sexual offenders changed in the 1970s and 1980s when many sexual psychopath laws were repealed and a series of heinous sexual offenses received increased national attention.<sup>16</sup> These trends led to increased popularity and support of “postprison commitment” (now commonly known as “civil confinement”).<sup>17</sup>

The current approach to punishing sexual offenders involves incarceration, civil commitment, and treatment programs. Currently, “there are 1549 sex offender treatment programs in the U.S.[,]” including federal, state, and community-based programs.<sup>18</sup> Since 1990, the federal government has offered a voluntary SOTP to individuals convicted of sexual offenses; the program is often required as a condition of supervised release after an offender completes his term of imprisonment.<sup>19</sup> At the state level, thirty-nine states were conducting formal SOTPs as of 2000.<sup>20</sup> In seven states, the programs have been established by legislation.<sup>21</sup> Other states have formed councils to oversee treatment standards, or have enacted laws specifically targeting registration, notification, and/or civil commitment of sexual offenders.<sup>22</sup> In some states, treatment programs are voluntary,<sup>23</sup> while in twelve states SOTPs are mandatory for offenders the state deems eligible.<sup>24</sup> Sexual offenders may also be required to participate in a SOTP pursuant

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12. *Id.*

13. Becker & Murphy, *supra* note 10.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Facts About Adult Sex Offenders*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/facts-about-adult-sex-offenders> (last visited Oct. 11, 2011).

19. FED. BUREAU OF PRISONS, *supra* note 6.

20. West, *supra* note 5, at 4.

21. *Id.* at 5 (those states include: Colorado, Hawaii, Kentucky, Missouri, Oklahoma, Tennessee, and Texas).

22. *Id.*

23. *Reducing Sexual Abuse Through Treatment and Intervention with Abusers*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/reducing-sexual-abuse-through-treatment-and-intervention-abusers> (last visited Oct. 12, 2011).

24. West, *supra* note 5, at 11.

to a court order in relation to sentencing or as a condition of release from incarceration. In fact, at the state level, “[m]ost of the offenders who engage in treatment are mandated to do so by judicial decisions.”<sup>25</sup>

Treatment for sexual offenders “can occur in a variety of settings and at various stages in the criminal justice system.”<sup>26</sup> “Some states have sentencing options combining a probation sentence, which may or may not include confinement, with community based outpatient treatment.”<sup>27</sup> In those circumstances, the sexual offender “is supervised by corrections’ personnel during the mandated treatment and if the offender does not make satisfactory progress, or is not adhering to the treatment plan, the case may be returned to court, reviewed by the Judge and a prison sentence imposed.”<sup>28</sup> “Following the prison term, a correctional officer supervises and monitors the individual in the community.”<sup>29</sup>

The federal government and all of the thirty-nine states that have formal SOTPs employ cognitive-behavioral group therapy<sup>30</sup> where “relapse prevention [is] the focus of treatment.”<sup>31</sup> The cognitive-behavioral therapy model recognizes that treatment does not cure sexual offenders.<sup>32</sup> Rather, the model assists offenders in “identifying those cognitive and behavioral patterns that are precursors to . . . sexually aggressive behavior . . .”<sup>33</sup> The model also is designed to help offenders develop “self-management techniques” and learn “external management strategies such as supervision by parole or probation officers, family members, or other designated people in the community.”<sup>34</sup> Cognitive behavior therapy SOTP models often utilize group therapy and other techniques “to help offenders . . . challenge

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25. Peters-Baker, *supra* note 4, at 671.

26. *Reducing Sexual Abuse Through Treatment and Intervention with Abusers*, *supra* note 23.

27. *Id.*; see also Peters-Baker, *supra* note 4, at 660 (citing as examples Missouri’s SOTP, which utilizes a group therapy model and is mandatory for all sexual offenders while they are incarcerated, as well as Hawaii’s SOTP, which only treats those offenders who prison officials determine would benefit from treatment).

28. *Reducing Sexual Abuse Through Treatment and Intervention with Abusers*, *supra* note 23.

29. *Id.*

30. FED. BUREAU OF PRISONS, *supra* note 6; West, *supra* note 5, at 4.

31. West, *supra* note 5, at 4; see also Amanda C. Graeber, *McKune v. Lile and the Constriction of Constitutional Protections for Sexual Offenders*, 23 REV. LITIG. 137, 146 (2004) (noting that “[c]ognitive-behavioral therapy provides the most commonly used method for treating sex offenders”).

32. Becker & Murphy, *supra* note 10, at 128.

33. *Id.*

34. *Id.*

their . . . belief systems.”<sup>35</sup> A primary purpose of the treatment is to aid offenders in identifying “*risk factors*, that is, those internal or external precursors to sex offending.”<sup>36</sup> Treatment may also address “social competence deficits,” and nearly all treatment programs “focus on attempts to develop victim empathy . . . .”<sup>37</sup> Cognitive-behavioral therapy is frequently administered in conjunction with “biological therapies,” such as antiandrogen drugs or selective serotonin reuptake inhibitors that control hormones affecting individuals’ sexual drives.<sup>38</sup>

There exists much disagreement and a dearth of information about the efficacy of SOTPs.<sup>39</sup> However, experts in the field agree that certain treatments are effective for particular types of offenders, and that admitting responsibility is critical to the effective rehabilitation of any offender.<sup>40</sup> Specifically, experts concur that “[t]reatment has a substantially better chance of working if the offender takes responsibility for his past and future actions.”<sup>41</sup> The Association for the Treatment of Sexual Abusers<sup>42</sup> has recognized that future crimes of sexual abuse can be prevented “as offenders identify the means of accessing victims and the behaviors antecedent to their sexual acting out.”<sup>43</sup>

Accordingly, “most sex offender programs require the participant to accept responsibility for past crimes either as a prerequisite for participation, or as the first step in the rehabilitation process.”<sup>44</sup> Written

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35. *Id.*

36. *Id.*

37. Becker & Murphy, *supra* note 10, at 128.

38. *Id.* at 129.

39. *Id.*; see also *Facts About Adult Sex Offenders*, *supra* note 2; Brakel & Cavanaugh, *supra* note 11, at 82; West, *supra* note 5, at 5 (reporting that “[o]nly [fourteen] states reported having an internal system for tracking [sex offender treatment] program effectiveness”).

40. *Ten Things You Should Know About Sex Offenders and Treatment*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/ten-things-you-should-know-about-sex-offenders-and-treatment> (last visited Oct. 11, 2011); see also *Facts About Adult Sex Offenders*, *supra* note 2.

41. *Ten Things You Should Know About Sex Offenders and Treatment*, *supra* note 40.

42. The Association for the Treatment of Sexual Abusers is an organization of professionals from a variety of disciplines who work to treat sexual offenders and prevent sexual abuse. *An Overview of ATSA's History*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/overview-atsas-history> (last visited Oct. 11, 2011).

43. *Reducing Sexual Abuse Through Treatment and Intervention with Abusers*, *supra* note 23; see also Seth A. Grossman, *A Thin Line Between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of McKune v. Lile*, 25 CARDOZO L. REV. 1111, 1113 (2004) (“experts almost universally acknowledge [rehabilitation] to be possible only when the offender accepts responsibility for his past crimes”).

44. Grossman, *supra* note 43, at 1116.

or oral admissions of all past sex offenses, charged or uncharged, are one such way sex offenders are required to “admit responsibility” in SOTPs.<sup>45</sup> Many SOTPs require participants to admit every victim and “every separate act performed with each victim,” including “the victim(s)’ names, ages, relationship to the offender, location where the act occurred, and details about each act.”<sup>46</sup> “Such cooperation is considered so crucial to successful treatment that counselors will often not continue a therapeutic program without such an admission.”<sup>47</sup> Such disclosures also allow treatment personnel to closely monitor the offender’s risk of re-offending.<sup>48</sup>

The federal SOTP requires participants “to acquire and demonstrate” both “[r]emorse and guilt” as well as “[c]omplete acceptance of responsibility for the sexual crime(s) . . . committed,” including through written homework assignments.<sup>49</sup> As of 2000, twenty-four of the thirty-nine states with formal SOTPs require sexual offenders to complete a “sexual autobiography” or written prior history (in the form of a journal) admitting to all past sexual abuse in order to satisfactorily complete the program.<sup>50</sup> Only in Wisconsin are SOTP participants given an option as to whether to make such admissions in order to satisfactorily complete the program.<sup>51</sup>

The stakes are high for offenders enrolled in a SOTP. For many, successful completion will reduce their prison sentence. For others,

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45. See West, *supra* note 5, at 11, 60, 73, 101, 114, 128, 144, 186, 214, 221, 229, 238, 247, 258, 261, 270, 282-83, 303, 313, 322-23, 333, 346, 361, 370, 381. Kansas, for example, “forces participants to face their sexual histories fully and frankly” by requiring “participants to sign an ‘Admission of Guilt’ [and] complete an ‘Abbreviated Sexual History Form,’ which requires them to list every victim they ‘have molested or otherwise offended against [sic].’” Graeber, *supra* note 31, at 149-50. Moreover, of the thirty-nine states that administered formal SOTPs as of 2000, twenty-five required similar admissions of guilt or “sexual biographies” as part of individuals’ participation in the SOTP. West, *supra* note 5, at 11, 60, 73, 101, 114, 128, 144, 186, 214, 221, 229, 238, 247, 258, 261, 270, 282-83, 303, 313, 322-23, 333, 346, 361, 370, 381; see also David N. Adair, Jr., *The Privilege Against Self-Incrimination and Supervision*, 63 FED. PROBATION 73, 76 (June 1999).

46. Graeber, *supra* note 31, at 150.

47. Adair, *supra* note 45, at 76.

48. *Reducing Sexual Abuse Through Treatment and Intervention with Abusers*, *supra* note 23.

49. FED. BUREAU OF PRISONS, *supra* note 6.

50. West, *supra* note 5, at 11, 60, 73, 101, 114, 128, 144, 186, 214, 221, 229, 238, 247, 258, 261, 270, 282-83, 303, 313, 322-23, 333, 346, 361, 370, 381 (Those states are: Alaska, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Washington.).

51. *Id.* at 399.



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participation is the only way to remain in compliance with supervised release or parole conditions, and thus failure to complete one aspect of the program, such as the sexual autobiography admitting to all past sexual offenses, will result in revocation of supervised release or parole. For offenders incarcerated or on supervised release or parole, failure to complete any aspect of a SOTP may result in additional prison time.

“Yet offenders are sometimes reluctant to make such admissions because the inappropriate behavior is criminal behavior and they fear that an admission could result in a new prosecution.”<sup>52</sup> And understandably so. The federal government does not offer immunity for statements made pursuant to participation in a SOTP,<sup>53</sup> and few, if any, states do so.<sup>54</sup>

Instead, such statements can be used against the individuals who make them in a variety of judicial proceedings, including in civil commitment proceedings under 18 U.S.C. § 4248, pretrial or presentence evaluations, filed pleadings, substance abuse and other treatment, release planning while the individual is in custody, and during probation or supervised release evaluations or interviews.<sup>55</sup> As discussed in Part II.A, *infra*, the statements are also admissible as propensity evidence in criminal prosecutions for offenses of child molestation, and may be used as the basis for subsequent prosecutions for the uncharged acts admitted to in the statements.

## II. ADMISSIBILITY OF STATEMENTS MADE PURSUANT TO SEXUAL OFFENDER TREATMENT PROGRAMS

Statements made during the course of a SOTP may be admitted under the FRE and have been found to be constitutional under the Fifth Amendment of the Constitution. This section will explore the scope of the admissibility of such statements under the FRE and describe the constitutional basis for eliciting and using such statements in a criminal proceeding. It should be noted that the admissibility of these statements may vary depending on the evidentiary rules in effect in a given state.

### A. Evidentiary Bases for Admitting SOTP Statements

Statements made pursuant to a SOTP may be admitted under Rule

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52. Adair, *supra* note 45, at 76.

53. McKune v. Lile, 536 U.S. 24, 35, 45 (2002).

54. Graeber, *supra* note 31, at 150. Of the twenty-six states requiring an autobiography or written prior history, only Wisconsin explicitly noted that this portion of the treatment was “voluntary.” West, *supra* note 5, at 399.

55. Amy Baron-Evans & Sarah Noonan, *Grid & Bear It*, 32 CHAMPION 58, 59 (2008).

414, which provides that in a criminal case where the defendant is charged with a child molestation offense, evidence that the defendant committed other child molestation offenses “is admissible[] and may be considered for its bearing on any matter to which it is relevant.”<sup>56</sup> Accordingly, courts have admitted such evidence to show, *inter alia*, a defendant’s alleged intent,<sup>57</sup> propensity,<sup>58</sup> and desire<sup>59</sup> to commit the charged offense. Such evidence may also be admitted to refute a defense of mistake or accident.<sup>60</sup>

Rule 414 defines an “offense of child molestation” as a crime under federal or state law that involved:

conduct proscribed by [18 U.S.C. § 109A] committed in relation to a child;

. . . conduct proscribed by [18 U.S.C. § 110];

contact between . . . the defendant’s body or an object and the child’s genitals or anus;

contact between the [defendant’s] genitals or anus . . . and . . . the [child’s body];

deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

an attempt or conspiracy to engage in [the] conduct described in . . . (1)-(5).<sup>61</sup>

“An ‘offense of child molestation’ includes, *inter alia*, the production of child pornography, 18 U.S.C. § 2251(a), as well as the possession, receipt, and distribution of child pornography.”<sup>62</sup> The prior offenses need not have been charged in order for a court to admit evidence of such acts under Rule 414.<sup>63</sup>

For the purposes of Rule 414, a “child” is a person younger than fourteen.<sup>64</sup> Where the witness “would testify to acts of molestation that began before the witness was [fourteen] and continued after that age,

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56. FED. R. EVID. 414(a); *see also* Gutkaiss v. Senkowski, No. 97CV0085FJSGLS, 1999 WL 33504431, at \*4 (N.D.N.Y. Oct. 15, 1999).

57. United States v. Larson, 112 F.3d 600, 602, 603, 604 (2d Cir. 1997).

58. *See id.* at 602, 604; United States v. Levy, 594 F. Supp. 2d 427, 439, 440 (S.D.N.Y. 2009); Nowlin v. Greene, 467 F. Supp. 2d 375, 380 n.2 (S.D.N.Y. 2006); Morris v. Eversley, No. 00 Civ. 8166DC, 2004 WL 856301, at \*2 (S.D.N.Y. Apr. 20, 2004).

59. Levy, 594 F. Supp. 2d at 440.

60. Nowlin, 467 F. Supp. 2d at 380 n.2.

61. FED. R. EVID. 414(d).

62. Levy, 594 F. Supp. 2d at 439 (citing 18 U.S.C. § 2252A (2010)).

63. Gutkaiss v. Senkowski, No. 97CV0085FJSGLS, 1999 WL 33504431, at \*4 (N.D.N.Y. Oct. 15, 1999); *see also* Morris, 2004 WL 856301, at \*1.

64. FED. R. EVID. 414(d).

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analysis under Rule 404(b) in addition to Rule 414 will be necessary because [Rule 414] authorizes the admission of evidence of molestation only of persons under the age of [fourteen].”<sup>65</sup> There is no “bright-line rule as to how old is too old” for evidence of another child molestation offense to be admitted under Rule 414.<sup>66</sup> Accordingly, courts have admitted evidence of child molestation offenses dating back as far as thirty years.<sup>67</sup>

The breadth of evidence admissible under Rule 414 is thus vast. Not only is evidence of crimes that occurred more than two decades ago admissible,<sup>68</sup> but such evidence may take a variety of forms, including testimony by prior alleged victims or their family members,<sup>69</sup> testimony or reports prepared by law enforcement officers,<sup>70</sup> or physical evidence.<sup>71</sup> Moreover, this evidence may be used as *character* evidence.<sup>72</sup> In justifying the admissibility of such a broad array of evidence of prior crimes, courts have cited the Rule’s legislative history, finding that Congress intended Rule 414’s “temporal scope to be broad”<sup>73</sup> and “to allow admission not only of prior convictions for sexual offenses, but also of uncharged conduct.”<sup>74</sup>

### *B. Constitutional Bases for Admitting SOTP Statements*

In 2002, the Supreme Court held in *McKune v. Lile* that statements

65. *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997).

66. *Id.* at 605; *see also* *United States v. Hawpetoss*, 478 F.3d 820, 824 (7th Cir. 2007); *United States v. Gabe*, 237 F.3d 954, 960 (8th Cir. 2001).

67. *United States v. Meacham*, 115 F.3d 1488, 1490 (10th Cir. 1997) (admitting evidence that defendant “molested two of his stepdaughters more than thirty years [prior to trial]”); *see also Larson*, 112 F.3d at 605 (admitting evidence of Rule 414 acts that occurred more than twenty years ago, as well as evidence of an act that occurred sixteen to twenty years prior to trial); *Nowlin v. Greene*, 467 F. Supp. 2d 375, 377 (S.D.N.Y. 2006) (admitting testimony by two victims who defendant had molested eleven years prior to trial).

68. *See Nowlin*, 467 F. Supp. 2d at 377.

69. *See, e.g., United States v. LeMay*, 260 F.3d 1018, 1024, 1029-30 (9th Cir. 2001); *Gutkaiss*, 1999 WL 33504431, at \*6-7.

70. *See, e.g., Morris v. Eversley*, No. 00 Civ. 8166DC, 2004 WL 856301, at \*3 (S.D.N.Y. Apr. 20, 2004).

71. *See, e.g., United States v. Levy*, 594 F. Supp. 2d 427, 440 (S.D.N.Y. 2009).

72. *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998) (“[Rule 414] allows the prosecution to use evidence of a defendant’s prior acts for the purpose of demonstrating to the jury that the defendant had a disposition of character, or propensity, to commit child molestation. In the cases to which this rule applies, it replaces the restrictive Rule 404(b), which prevents parties from proving their cases through ‘character’ or ‘propensity’ evidence.”).

73. *Larson*, 112 F.3d at 605.

74. *Morris*, 2004 WL 856301, at \*1 (quoting *Johnson v. Elk Lake Sch. Dist.*, 238 F.3d 138, 151 (3d Cir. 2002)).

made during the course of SOTPs do not violate the Fifth Amendment and may be used against a defendant in subsequent criminal proceedings.<sup>75</sup> In *McKune*, the defendant claimed that his Fifth Amendment right against self-incrimination was violated when he was ordered to participate in a Sex Abuse Treatment Program (SATP) and lost prison privileges after refusing to do so.<sup>76</sup> The program “required [participants] to complete and sign an ‘Admission of Responsibility’ form, in which they discuss and accept responsibility for the crime for which they have been sentenced [as well as] a sexual history form, which details all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses.”<sup>77</sup> The information was not privileged and could be used against SATP participants in future criminal proceedings.<sup>78</sup> In accordance with Kansas law, SATP staff administering the treatment would “report any uncharged sexual offenses involving minors to law enforcement authorities.”<sup>79</sup>

A majority in judgment only upheld the program.<sup>80</sup> The plurality opinion, authored by Justice Anthony Kennedy, reasoned that the defendant’s right against self-incrimination was not violated because “[t]he SATP does not compel prisoners to incriminate themselves in violation of the Constitution.”<sup>81</sup> Justice Kennedy noted that “the ‘constitutional guarantee [of the Fifth Amendment] is only that the witness not be *compelled* to give self-incriminating testimony,” and thus held that the consequences the defendant faced for not participating in the program (i.e. loss of certain prison privileges) “are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent.”<sup>82</sup> Justice Kennedy further reasoned that a clinical prison rehabilitation program which “bear[s] a rational relation to a legitimate penological objective[] does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.”<sup>83</sup> Finally, Justice Kennedy determined that states need not offer immunity to individuals who participate in SATPs because:

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75. 536 U.S. 24, 35 (2002).

76. *Id.* at 30-31.

77. *Id.* at 30.

78. *Id.*

79. *Id.*

80. *McKune*, 536 U.S. at 48.

81. *Id.* at 35.

82. *Id.* at 36 (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)).

83. *Id.* at 37-38.

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[i]f the state had to offer immunity, the practical effect would be that serial offenders who are incarcerated for but one violation would be given a windfall for past bad conduct, a result potentially destructive of any public or state support for the program and quite at odds with the dominant goal of acceptance of responsibility.<sup>84</sup>

Though *McKune* may at first glance appear to foreclose the possibility of objecting to the use of statements made during the course of a SOTP on Fifth Amendment grounds, some courts have distinguished *McKune* from those cases in which such statements are used as the basis for subsequent prosecutions or to subject an individual to additional penalties. *United States v. Zehntner* is one such case.<sup>85</sup> There, the defendant pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).<sup>86</sup> Pending sentencing, the court released the defendant subject to conditions including that he participate in a “mental health program.”<sup>87</sup> The defendant participated as required, and a report detailing the defendant’s participation was subsequently sent by the treating mental health practitioner to the U.S. Probation Office, the court, and defense counsel.<sup>88</sup> Fearing that the report would negatively affect the court’s sentencing decision, the defendant moved to preclude the sentencing court from considering the report on the ground that it would violate his Fifth Amendment privilege against self-incrimination.<sup>89</sup> The defendant argued that “because he was released pending sentence upon the condition that he participate in the mental health program, he was placed in a situation where if he invoked his right against self-incrimination and refused to participate in the mental health program, he would violate the terms and conditions of release and face a possible remand . . . .”<sup>90</sup>

Though the court declined to reach the constitutional claim because the government did not object to excluding the report from the court’s sentencing decision, the court noted that “the report should be provided to the Bureau of Prisons, but that Defendant retains the right to assert his Fifth Amendment right if he is subjected to the possibility of

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84. *Id.* at 35, 47 (“[t]he Federal Bureau of Prisons and other States conduct similar sex offender programs and do not offer immunity to the participants”).

85. *United States v. Zehntner*, No. 1:06-cr-0219, 2007 WL 201106, at \*1 (N.D.N.Y. Jan. 23, 2007).

86. *Id.* at \*1.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Zehntner*, 2007 WL 201106, at \*1.

penalty,” including, *inter alia*, civil confinement.<sup>91</sup> Thus, defendants seeking to exclude statements made in the course of a SOTP may be successful in doing so where the statement is used in a subsequent criminal proceeding involving an additional penalty.<sup>92</sup> However, there still exists no federal or recorded state guarantee of such a result.<sup>93</sup>

### III. EVIDENTIARY AND CONSTITUTIONAL BASES FOR DEEMING INADMISSIBLE STATEMENTS MADE PURSUANT TO SEXUAL OFFENDER TREATMENT PROGRAMS

Despite the existing evidentiary and constitutional bases for admitting statements made pursuant to participation in a SOTP, such statements should not be admitted into evidence or used in a subsequent prosecution for three reasons. First, such statements should be protected from compelled disclosure by the therapist-patient privilege when they are made to a licensed therapist. Second, SOTP statements should be deemed inadmissible under Rule 403 because the probative value of the statements is not substantially outweighed by the prejudicial effect of such. Finally, where an individual has not had an opportunity to consult with his lawyer in advance of accepting a plea requiring participation in an SOTP, or where such participation is a condition of a sentence, supervised release, or parole, such statements should be found to have violated the individual’s right to counsel under the Sixth Amendment and should therefore be excluded.

#### A. *The Therapist-Patient Privilege*

The Supreme Court first recognized the availability of the therapist-patient privilege under federal law in *Jaffee v. Redmond*.<sup>94</sup> In that case, the Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”<sup>95</sup> Specifically, the privilege shields “against compelled testimony concerning conversations between the patient and the licensed therapist, as well as [the] compelled disclosure of notes taken during their counseling sessions.”<sup>96</sup> The privilege

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91. *Id.*

92. *See id.*

93. *See* McKune v. Lile, 536 U.S. 24, 35, 45 (2002); Graeber, *supra* note 31, at 150-51; *see also infra* CONCLUSION for a discussion of why a limited form of “use immunity” should be offered to individuals participating in SOTPs.

94. 518 U.S. 1, 15 (1996).

95. *Id.*

96. Equal Emp’t Opportunity Comm’n v. Nichols Gas & Oil, Inc., 256 F.R.D. 114,

protects communications between a patient and licensed psychiatrists, psychologists, psychotherapists, and social workers made during the course of psychotherapy.<sup>97</sup> Furthermore, the privilege is absolute: in *Jaffee*, the Court explicitly rejected “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure . . . .”<sup>98</sup> Like other evidentiary privileges, the therapist-patient privilege may be waived by the privilege holder either expressly or impliedly.<sup>99</sup>

Prisoners are not precluded from invoking the therapist-patient privilege merely because they are incarcerated. Indeed, prisoners may assert the privilege to protect communications with licensed psychiatrists, psychologists, or social workers made “in the course of diagnosis or treatment.”<sup>100</sup> Many SOTPs, including the federal program, are administered by licensed therapists.<sup>101</sup> Thus, where offenders have made statements in the course of a SOTP to such a therapist, the statements are protected from compelled disclosure by the therapist-patient privilege.

However, there are several limits on an individual’s ability to rely on the therapist-patient privilege to prevent compelled disclosure of statements made during the course of a SOTP. First, where the SOTP is not led by a licensed therapist, statements made during the treatment program are not protected.<sup>102</sup> Further, given that most SOTPs involve group therapy, wherein statements are also shared with third parties (i.e. other sexual offenders), the privilege may be waived by the presence of such third parties.<sup>103</sup> Moreover, the privilege may not protect written communications that a sexual offender makes in his cell or the privacy of his own home—i.e. “homework assignments”—because those statements are not, strictly speaking, made by the offender to a licensed therapist during a counseling session. Finally, the privilege may only be used to protect such information from compelled disclosure, i.e. it may

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118 (W.D.N.Y. 2009).

97. *Id.*; see also *Sims v. Blot*, 534 F.3d 117, 130 (2d Cir. 2008).

98. *Jaffee*, 518 U.S. at 17.

99. *Sims*, 534 F.3d at 131 (citing *Jaffee*, 518 U.S. at 15 n.14).

100. *Id.* at 130; see also *Muniz v. Goord*, No. 9:04-CV-0479, 2007 WL 2027912, at \*9 (N.D.N.Y. July 11, 2007) (prisoners may invoke the psychiatrist-patient or psychologist-patient privilege).

101. FED. BUREAU OF PRISONS, *supra* note 6.

102. See *Speaker v. Cnty. of San Bernardino*, 82 F. Supp. 2d 1105, 1109-10 (C.D. Cal. 2000).

103. See *id.* at 1116-17 (citing *Barrett v. Vojtas*, 182 F.R.D. 177, 179 (W.D. Pa. 1998)).

only be invoked by a therapist who is being ordered to provide testimony or turn over documents protected by the privilege. Where, as in the case of John Doe, statements made pursuant to a SOTP are found on the offender's person or in his belongings, the therapist-patient privilege will not prevent such statements from being admitted into evidence. Thus, the therapist-patient privilege may provide only very limited protection for SOTP statements.

*B. Federal Rule of Evidence 403*

Though statements made pursuant to participation in a SOTP may be admissible under Rule 414, such evidence still must meet the other requirements of the Federal Rules of Evidence, including the hearsay rules and Rule 403's balancing test.<sup>104</sup> The Rule 403 balancing test requires a court to determine whether the probative value of the evidence in question is "substantially outweighed by its prejudicial effect."<sup>105</sup> In child molestation cases, the presumption is that the "probative value is not outweighed by any risk of prejudice."<sup>106</sup>

In determining whether evidence otherwise admissible under Rule 414 survives the Rule 403 balancing test, many circuits have focused on the similarities between prior child molestation offenses and the current offense, tending to admit evidence of past offenses where the past and present offenses are similar.<sup>107</sup> For example, while the Second Circuit has not explicitly required that the other child molestation offense(s) and the offense on which the current charges are based must be similar for evidence of the former to be admitted under Rule 414, it has discussed such similarities when determining the probative value of the evidence under Rule 403.<sup>108</sup> Similarly, the Ninth Circuit in *LeMay* adopted a non-exclusive five factor test to determine probative value which considers: "(1) 'the similarity of the prior acts to the acts charged,' (2) the 'closeness in time of the prior acts to the acts charged,'

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104. *United States v. Levy*, 594 F. Supp. 2d 427, 439 (S.D.N.Y. 2009); *see also* *Morris v. Eversley*, No. 00 Civ. 8166DC, 2004 WL 856301, at \*2 (S.D.N.Y. Apr. 20, 2004) (holding that evidence admitted under Rule 414 is still subject to the Rule 403 balancing test); *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000) (holding that though "courts must still apply the 'balancing test' of Rule 403," they must do so "in such a way as to allow the new rules their intended effect") (quoting *United States v. Mound*, 149 F.3d 799, 800 (8th Cir. 1998)).

105. *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997) (quoting 140 CONG. REC. 24799 (1994) (statement by Sen. Dole)).

106. *Id.* at 604 (quoting 140 CONG. REC. 24799 (statement by Sen. Dole)).

107. *See, e.g., Withorn*, 204 F.3d at 794 (admitting testimony by prior victim of "substantially similar" child molestation).

108. *See Larson*, 112 F.3d at 605.



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(3) ‘the frequency of the prior acts,’ (4) the ‘presence or lack of intervening circumstances,’ and (5) ‘the necessity of the evidence beyond the testimonies already offered at trial.’”<sup>109</sup> Still, other circuits have adopted a more flexible approach, deferring to the district courts and affording them wide discretion to consider “‘innumerable’ factors,” including, inter alia, the *LeMay* factors<sup>110</sup> and whether admitting evidence of other offenses would result in undue delay.<sup>111</sup>

Despite the presumption of admissibility of such evidence in the case of child molestation offenses, courts should be vigilant in determining the prejudicial effect of statements made pursuant to a SOTP, taking into consideration many of the factors cited by the circuit courts. For example, where the offenses are disparate in nature or circumstance, or where decades have passed since the previous offense, courts should be especially scrutinizing in determining whether prior offenses are indeed relevant or whether they are so far removed from the present proceedings as to only have the effect of prejudicing the current administration of justice. Because of the “anger and hostility the public feels about sex offenders,”<sup>112</sup> and sexual crimes against children in particular, there is an increased likelihood that evidence of previous crimes against children will further prejudice the jury against the defendant and cloud jurors’ ability to make fair and impartial decisions. Although this anger and hostility is not unfounded (and is indeed often warranted), it does not have a place in determinations of guilt or innocence in criminal adjudications.<sup>113</sup> Further, the statements may result in a “confusion of the issues” or “mislead[] the jury” and thus be inadmissible under Rule 403 on those grounds.<sup>114</sup>

Moreover, there exists a plethora of alternative evidence that could be admitted to establish an individual’s propensity to commit crimes of child molestation, or serve one of the other recognized purposes under

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109. *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001) (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)).

110. *United States v. Hawpetoss*, 478 F.3d 820, 825-26 (7th Cir. 2007) (recognizing that “the factors articulated in *LeMay* are certainly a helpful guide for a district court in making the discretionary determination on the admissibility of such evidence [under Rule 414],” but adopting a flexible approach allowing district courts to consider factors beyond those identified by the court in *LeMay*).

111. *United States v. LeCompte*, 131 F.3d 767, 769-70 (8th Cir. 1997) (considering the similarity of offenses and lapse of time between offenses in determining admissibility under Rules 414 and 403).

112. *Reducing Sexual Abuse Through Treatment and Intervention with Abusers*, *supra* note 23.

113. *Injuria non excusat injuriam*—that is, one wrong does not justify another.

114. FED. R. EVID. 403.

Rule 414. The government could, for example, introduce testimony by the victim(s) of the prior offenses<sup>115</sup> or relatives of the victim who are familiar with the circumstances of those other crimes.<sup>116</sup> Alternatively, law enforcement personnel who investigated the other offenses could testify or the government could introduce reports assembled in the course of investigating such prior offenses.<sup>117</sup>

Thus, notwithstanding the presumption of admissibility, statements made during the course of a SOTP should be excluded under Rule 403 in light of the highly prejudicial nature of the statements, their ability to confuse or mislead the jury, the relevance (or lack thereof) to the charged crime, and the myriad other evidence available to prosecutors to establish propensity or a similar purpose under Rule 414.

### C. *The Sixth Amendment Right to Counsel*

Finally, statements made during the course of a SOTP should be excluded where the individual in question is not advised by counsel of the risk of being compelled to make such statements at the time he accepts a guilty plea requiring participation in a SOTP, or where the individual is required to participate in such a program as a condition of

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115. See *United States v. Larson*, 112 F.3d 600, 602 (2d Cir. 1997); *Nowlin v. Greene*, 467 F. Supp. 2d 375, 377 (S.D.N.Y. 2006); *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000); *Hawpetoss*, 478 F.3d at 822; *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001); *United States v. Meacham*, 115 F.3d 1488, 1491 (10th Cir. 1997); *United States v. Benally*, 500 F.3d 1085, 1092 (10th Cir. 2007); *United States v. Bentley*, 475 F. Supp. 2d 852, 854-55, 861 (N.D. Iowa 2007).

116. See *Gutkaiss v. Senkowski*, No. 97CV0085FJSGLS, 1999 WL 33504431, at \*6-7 (N.D.N.Y. Oct. 15, 1999) (admitting testimony of two victims and their mother as to the location of the molestation, the touching and oral sex abuse that occurred, defendant's threats to remain silent, what parts of the victims' bodies defendant touched, and identification of pictures of the house where the abuse occurred). See also *United States v. LeMay*, 260 F.3d 1018, 1024, 1029-30 (9th Cir. 2001) (admitting testimony of the victim's mother about "the defendant's abuse of her [daughter] . . . and how she had gotten him to admit to that abuse").

117. *Morris v. Eversley*, No. 00 Civ. 8166DC, 2004 WL 856301, at \*1 (S.D.N.Y. Apr. 20, 2004) (admitting as propensity evidence the defendant's New York State Department of Corrections (DOCS) card, which detailed complaints made against him in his capacity as a DOCS employee; complaint forms filed against the defendant; reports of interviews relating to investigations of such complaints; memorandums relating to complaints of the defendant's sexual misconduct; and testimonies of DOCS employees who investigated allegations against the defendant); see also *United States v. Levy*, 594 F. Supp. 2d 427, 431-32, 440-42 (S.D.N.Y. 2009) (admitting child pornography videos from the defendant's computer; defendant's system for filing child pornography on his computer; transcripts from online chats with an undercover detective during which defendant revealed his desire to have real pictures of himself in the act of molesting a child and admitted to prior sexual abuse of children in order to show the defendant's "sexual interest in children and his propensity or disposition of character to engage in sexual acts involving children").

a sentence, supervised release, or parole. Courts should analogize the serious consequence of participating in a SOTP to the consequence of deportation, a consequence which the Supreme Court has recently held defense counsel must advise clients of in order to provide effective assistance of counsel under the Sixth Amendment. To this end, courts should adopt the rationale of those jurisdictions that have held that defendants participating in drug treatment as an alternative to incarceration, or in a SOTP as a condition of supervised release, do indeed enjoy the right to counsel in the course of the programs.

The Sixth Amendment's right to counsel is necessary "in order to protect the fundamental right to a fair trial."<sup>118</sup> "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."<sup>119</sup> "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command" of the Sixth Amendment.<sup>120</sup> The Sixth Amendment also requires that the counsel be effective.<sup>121</sup>

The right to counsel indisputably exists "[b]efore deciding whether to plead guilty."<sup>122</sup>

Guilty pleas must "'represent an informed choice' so that it is constitutionally 'knowing and voluntary,'" which, in turn, requires that "[c]ounsel . . . be familiar with the facts and the law in order to advise the defendant of the options available."<sup>123</sup> The plea must also be free from coercion, and the defendant must understand the nature of the charges and the consequences of the plea.<sup>124</sup> Thus, "[a] guilty plea is

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118. *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

119. *Id.* at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

120. *Id.*

121. *Id.* at 686. In *Strickland*, the Court set forth a two-prong test to establish effective assistance of counsel before deciding whether to plead guilty. *Id.* at 687. First, a court must determine whether counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Then, the court must ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

122. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

123. *Ortiz v. McNeil*, No. 3:09-CV-563-J-12TEM, 2010 WL 4983599, at \*3 (M.D. Fla. Dec. 2, 2010) (quoting *Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995)) (internal quotation marks omitted).

124. *Hurtado-Paz v. United States*, Nos. 10-21893-CIV-MIDDLEBROOKS, 06-20139-CR-MIDDLEBROOKS, 2010 WL 5575547, at \*3 (S.D. Fla. Dec. 10, 2010) (citing *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005)), *report and*

open to attack on the ground that counsel did not provide the defendant with reasonably competent advice.”<sup>125</sup> An attorney’s “failure . . . to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis . . . as such an omission cannot be said to fall within the wide range of professionally competent assistance demanded by the Sixth Amendment.”<sup>126</sup> The right to counsel “extends to the sentencing hearing, which has been called a ‘critical stage’ of the criminal proceeding”<sup>127</sup> because “[t]he presence of counsel is essential to guide the sentencing court in the exercise of its power and discretion, and to protect the rights and interests of the defendant.”<sup>128</sup>

The Supreme Court’s recent decision in *Padilla v. Kentucky* is instructive for determining how courts should decide what constitutes “effective assistance of counsel” in the context of a prosecution for a child molestation offense.<sup>129</sup> There, the defendant pleaded guilty to transporting marijuana, a charge “that made his deportation virtually mandatory.”<sup>130</sup> In so pleading, the defendant relied on defense counsel’s “erroneous advice” that the defendant “did not have to worry about immigration status since he had been in the country so long.”<sup>131</sup> In fact, shortly after entering a guilty plea, deportation proceedings were initiated against the defendant.<sup>132</sup> On appeal to the Supreme Court, the defendant contended that he would not have pleaded guilty “if he had not received incorrect advice from his attorney.”<sup>133</sup>

The Court ultimately found in favor of the defendant, holding that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.”<sup>134</sup> The Court announced a bright line rule that “advice regarding deportation is not categorically removed from the ambit of the

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*recommendation adopted*, Nos. 10-2183-CIV, 06-20139-CR, 2011 WL 121888 (S.D. Fla. Jan. 13, 2011).

125. *Ortiz*, 2010 WL 4983599, at \*3 (quoting *Finch*, 67 F.3d at 916) (internal quotation marks omitted).

126. *Id.*

127. *United States v. Rex*, No. CRIM A. CR203-019, 2006 WL 2327516, at \*1 (S.D. Ga. Aug. 9, 2006) (quoting *United States v. Ruiz-Rodriguez*, 277 F.3d 1281, 1291 (11th Cir. 2002)).

128. *Id.* (quoting *Golden v. Newsome*, 755 F.2d 1478, 1483 n.9 (11th Cir. 1985)).

129. 130 S. Ct. 1473, 1480-1481 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

130. *Id.* 1477-78.

131. *Id.* at 1478 (quoting *Kentucky v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)).

132. *Id.* at 1477.

133. *Id.* at 1478.

134. *Padilla*, 130 S. Ct. at 1478.

Sixth Amendment right to counsel.”<sup>135</sup> Though the Supreme Court of Kentucky had rejected the defendant’s claim “on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.* those matters not within the sentencing authority of the state trial court[.]” the Court rejected the notion that an attorney need not provide advice about collateral consequences of pleading guilty in order to provide constitutionally effective counsel under the Sixth Amendment.<sup>136</sup> Rather, the Court held that “we . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.”<sup>137</sup> The Court declined to address the distinction between direct and collateral consequences “because of the unique nature of deportation,” finding instead that “[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.”<sup>138</sup> Therefore, “[t]he collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.”<sup>139</sup>

In finding that defense counsel’s failure to disclose the consequence of deportation to a client pleading guilty to a deportable offense constituted ineffective assistance of counsel, the Court cited as relevant the fact that “deportation is a particularly severe ‘penalty,’” though the Court recognized that it was “not, in a strict sense, a criminal sanction.”<sup>140</sup> Nevertheless, the Court found that deportation is “intimately related to the criminal process.”<sup>141</sup> The Court further reasoned that “[our] law has enmeshed criminal convictions and the

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135. *Id.* at 1482.

136. *Id.* at 1481 (citing *Padilla*, 253 S.W.3d at 483-84).

137. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

138. *Id.* at 1481, 1482.

139. *Padilla*, 130 S. Ct. at 1482. In the wake of *Padilla*, several other courts have recognized that failure to inform a defendant about the consequence of deportation as a result of a guilty plea violates the Sixth Amendment right to effective assistance of counsel. *See, e.g.*, *United States v. Chaidez*, 730 F. Supp. 2d 896, 901 n.5 (N.D. Ill. 2010), *rev’d other grounds* No. 10-3623, 2011 WL 3705173 (7th Cir. Aug. 23, 2011); *Martin v. United States*, No. 09-1387, 2010 WL 3463949, at \*3 (C.D. Ill. Aug. 25, 2010); *Chhabra v. United States*, No. 09-CV-1028(LAP), 2010 WL 4455822, at \*5 (S.D.N.Y. Nov. 3, 2010) (distinguishing the case at bar from *Padilla* where the defendant was “referred to competent immigration counsel who provided adequate advice on the potential collateral consequences of [the defendant’s] conviction prior to . . . ultimate acceptance of [the defendant’s] guilty plea”).

140. *Padilla*, 130 S. Ct. at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

141. *Id.*

penalty of deportation for nearly a century . . . [a]nd . . . recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”<sup>142</sup> Therefore, the Court held that it is “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”<sup>143</sup>

*Padilla* should guide courts in determining what constitutes effective assistance of counsel where an attorney’s client is charged with a child molestation offense, and where counsel fails to advise an individual pleading guilty to such a crime about the consequences of participation in a SOTP, or the possibility of being forced to do so as a condition of a sentence, supervised release, or parole. Like deportation, participation in a SOTP may constitute a “severe penalty” with consequences including admitting to all past offenses, which admissions will further the likelihood of prosecution in a pending case, or potentially serve as the basis for a new, subsequent prosecution. Moreover, like deportation, participation in SOTPs is frequently part of a plea bargain or sentence and, unbeknownst to many defendants, may be required as a condition of supervised release. SOTPs are thus “intimately related to the criminal process [because] [o]ur law has enmeshed criminal convictions and the penalty” of participation in a SOTP for several decades.<sup>144</sup> It is indeed “nearly an automatic result for a broad class” of offenders.<sup>145</sup> Thus, just like deportation, participation in a SOTP is “‘most difficult’ to divorce . . . from the conviction” for a sexual offense.<sup>146</sup> As such, the Constitution’s guarantee of effective assistance of counsel under the Sixth Amendment demands no less than that defendants have the assistance of counsel prior to accepting a plea wherein participation in a SOTP is a condition of the plea agreement, or where such participation will or is likely to be required as a condition of supervised release.

The right to counsel has been recognized in similar circumstances. For example, following completion of his sentence for possession of child pornography, the defendant in *Rex* “met with [a] probation officer as required by the terms of his supervised release.”<sup>147</sup> At that time, the defendant was notified that a “condition of supervised release for sexual

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142. *Id.*

143. *Id.* (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982), *abrogated* by *Padilla*, 130 S. Ct. 1473).

144. *Id.* at 1481.

145. *Padilla*, 130 S. Ct. at 1481.

146. *Id.* (quoting *Russell*, 686 F.2d at 38).

147. *United States v. Rex*, No. CRIM A. CR203-019, 2006 WL 2327516, at \*1 (S.D. Ga. Aug. 9, 2006).

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offenders was participation in a sex offender treatment program,” and he was presented “with a written consent and/or waiver form” indicating that the defendant agreed to this sentence modification.<sup>148</sup> The defendant signed the form, believing that “refusal was futile” because the probation officer told the defendant that if he refused to sign the form, “there would be a hearing before the Court and Defendant would ‘likely’ be required to sign it at that time.”<sup>149</sup>

On appeal, the defendant argued that his Sixth Amendment right to counsel was violated.<sup>150</sup> The court found in his favor, holding that the defendant’s right to counsel was violated because “[t]here [wa]s no evidence in the record, either on the waiver form itself or in the testimony offered at the hearing, that Defendant was advised of either the nature of the sex offender treatment program or of his right to seek advice of counsel before signing the waiver form.”<sup>151</sup> Because “the Court had discretion as to whether to condition Defendant’s release on participation in the sex offender treatment program,” the court held that the defendant was entitled to counsel at this point in the criminal proceeding.<sup>152</sup> Moreover, the court found that the defendant did not intentionally “relinquish or abandon his right to a hearing and the assistance of counsel” because the “[d]efendant inquired as to the consequences if he did not immediately sign the waiver form,” and agreed to sign only because, based on the probation officer’s comments, he believed refusal to be futile.<sup>153</sup> The court found that this error was not harmless because it was “clear that Defendant’s incriminating statements to his counselor would not have occurred were it not for the violation of his constitutional rights.”<sup>154</sup>

Similarly, in *Hanas v. Inner City Christian Outreach, Inc.*, the court held that the defendant’s right to counsel was violated so as to assert a valid claim under 42 U.S.C. § 1983 where the defendant pleaded guilty to a drug charge, was faced with the choice of “going to prison or entering a faith-based rehabilitation program[,]” and rehabilitation program administrators “prevented Hanas from seeing his attorney [while he] was a criminal defendant who was being monitored by the Drug Court to see whether he would have to go to prison.”<sup>155</sup>

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148. *Id.*

149. *Id.*

150. *Id.* at \*1-2.

151. *Id.* at \*2.

152. *Rex*, 2006 WL 2327516, at \*1.

153. *Id.* at \*2.

154. *Id.*

155. 542 F. Supp. 2d 683, 688, 695 (E.D. Mich. 2008).

The court held that the administrators, acting under the color of state law, violated the defendant's right to counsel.<sup>156</sup> Thus, criminal defendants participating in a drug treatment program subject to monitoring by the state are entitled to exercise their Sixth Amendment right to counsel during the course of the program. SOTP participants similarly situated should be treated no differently.

As with all other constitutional rights, the availability and integrity of the right to counsel demands the cognizance and vigilance of defense attorneys, the courts, and the government. As part of their constitutional and professional ethical duty to provide effective representation, defense attorneys should make it a practice to inform clients that they have a right to request the advice of counsel before agreeing to participate in a SOTP as part of a plea bargain, sentence, or as a condition of supervised release or parole. Courts should recognize that the right to effective assistance of counsel afforded by the Constitution demands that defendants be informed of the consequence of participation in a SOTP prior to accepting a plea bargain, sentence, or supervised release or parole arrangement mandating such participation. Further, it is incumbent upon courts to remind defense counsel of their obligation to inform their clients of the consequences of SOTP participation. Where defendants are denied such effective representation, courts should take appropriate remedial action, including excluding evidence procured in the course of the SOTP. Finally, even prosecutors should raise the issue of the defendant's right to counsel in situations where defense counsel or the court fails to do so. It is in the government's best interest to address the issue, as putting on the record that the defendant has been advised of this right will decrease the chances of such an issue being successfully appealed.

#### CONCLUSION

There is no doubt that sexual offenders pose a threat to America and its children. Because of the high recidivism rates of most sexual offenders, this threat is very real. Accordingly, offenders must be punished, and the community must be protected.

However, any such punishment scheme must operate within the confines of the Constitution. As the Court noted in *Berger v. United States*, "[the prosecutor's] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."<sup>157</sup> Justice requires no less than a fair and impartial process where all actors play

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156. *Id.* at 688, 693, 695.

157. 295 U.S. 78, 88 (1935).



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by the rules and the guarantees of our revolutionary Constitution are honored. At the very least, individuals convicted of sexual offenses must receive representation by competent counsel in accordance with the promises of the Sixth Amendment at all “critical stages” of criminal proceedings.<sup>158</sup> This requires no less than ensuring that an individual is afforded the opportunity to confer with counsel prior to accepting participation in a SOTP as a condition of a guilty plea, sentence, or supervised release or parole.

But further action is needed. Courts should recognize a limited “use immunity” for individuals who make incriminating statements during the course of a SOTP. Such immunity would prohibit prosecutors from using admissions made pursuant to a SOTP to obtain a search warrant for evidence related to the uncharged crime(s), or as the basis for a subsequent prosecution for any such uncharged crimes admitted to in the statement(s). This would not mean that a defendant could never be prosecuted for crimes admitted to during a SOTP. Rather, the government simply would not be able to use state-compelled admissions in “autobiographies” or sexual history journals to establish probable cause to obtain a warrant to look for evidence of the crimes detailed in the admissions, or as the basis for a subsequent prosecution for the uncharged crimes.<sup>159</sup> If the government obtained independent evidence of the uncharged crimes—e.g. testimony from a victim or a videotape of the defendant’s molestation—such evidence could be used to charge and prosecute the crime.

Moreover, it is simply good social policy to grant a limited “use immunity” to individuals who participate in SOTPs. While research concerning the efficacy of SOTPs is limited, this much is clear: “[t]reatment has a substantially better chance of working if the offender takes responsibility for his past and future actions.”<sup>160</sup> Thus, to achieve rehabilitation—a primary goal of SOTPs and the American criminal justice system—offenders who participate in SOTPs must be able to do so freely and honestly, without fear that such statements will be used against them in a current or future criminal proceeding. The current state of affairs, where such statements are admissible without restriction, *undermines* the goal of rehabilitation by discouraging

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158. *United States v. Ash*, 413 U.S. 300, 310-11 (1973) (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

159. As Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, pointed out in *McKune* in dissent: “[g]ranted use immunity does not preclude prosecution; it merely prevents the State from using an inmate’s own words, and the fruits thereof, against him in a subsequent prosecution.” *McKune v. Lile*, 536 U.S. 24, 70 (Stevens, J., dissenting).

160. *Ten Things You Should Know About Sex Offenders and Treatment*, *supra* note 40.

participants from fully and honestly engaging in treatment, and ultimately prevents offenders from receiving the treatment they so desperately need and that is critical to protecting America's children from sexual crimes.

It is true that the limited "use immunity" I propose above is not a perfect solution and may raise additional moral and legal quandaries. For example, once a prosecutor has knowledge of another crime, particularly a crime against a minor, she may be legally and/or morally obligated to seek evidence of that crime, e.g. interviewing the suspected victim. While the actual admissions made during the course of the SOTP would not be used to obtain a warrant or as evidence, the knowledge the government gained from being privy to such admissions would still be used against the defendant in so far as it would be used to secure independent, admissible evidence. There is a strong argument to be made that such a "use" is the type of "fruit" of "an inmate's own words" which Justice Stevens in *McKune* argued should be prohibited as unconstitutional.<sup>161</sup> However, there is a valid and important competing societal interest in prosecuting sexual crimes, particularly given the high rates of recidivism among sexual offenders. Thus, a limited "use immunity" prohibiting use of SOTP statements as the basis for a search warrant or a new, subsequent prosecution is the best way to accommodate the two important competing societal interests at issue: the protection of children and society from sexual exploitation and abuse, and the constitutional rights of individuals charged with crimes.

While it may not be popular to protect the Constitutional rights of these offenders in such a way, it is certainly right.

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161. See *McKune*, 536 U.S. at 70 (Stevens, J., dissenting).