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ISSUES TO DEVELOP AT TRIAL

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This ITD is a follow up to our Practice Update in the January 2023 issue addressing the interplay between the Fifth Amendment and SORA. In that update, we highlighted the First Department's recent decision in People v. Krull, 208 A.D.3d 163 (1st Dep't 2022), which held that it violates a potential SORA registrant's Fifth Amendment rights to assess points for "failure to accept responsibility" when their direct appeal has not yet been perfected or decided. While the First Department wasn't the first New York appeals court to reach this conclusion, it offered the lengthiest analysis of the Fifth Amendment considerations. As a result, we recommended advising clients convicted of sex offenses of this development so that they could invoke their Fifth Amendment rights during DOCCS-mandated sex offender treatment.

In this issue, we discuss the broader implications of the analysis in Krull for our clients and propose ways to use this decision outside of the SORA context.

In short, the First Department's analysis stands for the broad principle that, if your client's direct appeal has not been decided, they cannot be forced to admit their guilt to the underlying crime in order to avoid a substantial penalty.

Legal Background

"You have the right to remain silent. Anything you say can and will be used against you . . ." We all know the basics of the Fifth Amendment. It's one of the most ubiquitous criminal law concepts in pop culture, and we are familiar with its operation on arrested suspects and our clients at trial. How, though, can we make that work for our clients after they've been found guilty?

First, some background. The Fifth Amendment prevents a person from being compelled to give testimony against themselves. This right contains two elements: the statements have to be *incriminating* and they have to be *compelled*. To be incriminating, the answers must present "substantial and real, and not merely trifling or imaginary hazards, of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968). To constitute compulsion, the penalty that follows from the failure to self-incriminate has to be sufficiently severe; "not all pressure necessarily 'compels' incriminating statements." *McKune v. Lile*, 536 U.S. 24, 49 (2002) (O'Connor, J., concurring).

It's easy to see how incriminating statements made before a conviction could pose a "substantial" risk, but what about after a conviction? Here's where *People v. Krull* comes into

play. In that case, the client had maintained his innocence throughout—he testified at trial, asserted his innocence in his presentence interview, and declined to admit guilt in the DOCCS-mandated Sex Offender Counseling and Treatment Program ("SOCTP"). The First Department explained that his risk of incrimination continued even after the trial conviction, ***so long as the direct appeal of that conviction was not exhausted***, because there was a real risk that incriminating statements could be used against him in any retrial following an appellate win.

When evaluating whether someone is being compelled to incriminate themselves, the Supreme Court has explained that there can be a range of consequences for invoking the Fifth Amendment, not all of which are severe enough to create unconstitutional compulsion. Check out O'Connor's concurrence in *McKune* for a good discussion of examples. In *Krull*, the First Department explained that assessing SORA points—and the implications those points have for determining SORA registration level and the attendant supervision, housing restrictions, and community notification requirements—was substantial enough to be a penalty that would compel someone to incriminate themselves.

Implications for Practice

Krull's application of Fifth Amendment protections where a person convicted of a sex offense declined to admit guilt in SOCTP, finding they should not be compelled to abandon their assertions of innocence in order to avoid the substantial penalty of a points assessment, opens avenues for further challenge.

We propose lodging a Fifth Amendment objection and citing *Krull* where your client confronts these scenarios, but only if their direct appeal is not exhausted:

- **SORA – Given *Krull's* direct acknowledgement that a points assessment is a substantial penalty that could compel incriminating statements, the most obvious forum for applying *Krull* is within the SORA context.**
    - Points shouldn't be imposed for failure to accept responsibility at any stage, not just SOCTP.
    - If your client is assessed points for maintaining his innocence at any stage, object that *Krull* bars this and that the assessment violates your client's Fifth Amendment rights.

- **Trial Context – Non-SORA clients may a face substantial penalty by way of an increased sentence for continued assertions of innocence. Argue that *Krull* bars this. A sentencing enhancement is a substantial penalty. The Supreme Court has held that even a single day in prison may be unconstitutional. *See Solem v. Helm*, 463 U.S. 277, 290 (1983). And our complex recidivist sentencing procedures reflect the legislature's determination that sentences should not be increased lightly. Here are contexts where you can consider making and preserving the *Krull* argument:**

- *Probation Interview (PSI)/Sentencing* – If your client maintains his or her innocence to the Probation Department or at the sentencing proceeding, and the court makes comments suggesting that your client's continued assertions of innocence is factoring into the sentence imposed, object that *Krull* bars forcing your client to abandon his or her assertions of innocence and admit guilt in order to avoid a harsher sentence. Make clear that your client will be appealing and should not have to face the risk of any admissions of guilt being used against them should the case be reversed on appeal.

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- *Lack of remorse* – A client who does not express remorse at sentencing after being found guilty at trial is effectively continuing to assert their innocence—why would an innocent person express remorse or apologize for something they didn't do? Yet courts sometimes mention lack of remorse as an aggravating factor contributing to the sentence. If this happens, object that your client's refusal to express remorse is consistent with their assertion of their innocence and is a protected expression of innocence under *Krull*. Your client should not have to make statements apologizing for their wrongdoing in order to win the court's favor at sentencing, at the risk of those statements being used against them in some way should the case be reversed on appeal.

Caveat: These arguments are not available if your client pleaded guilty. Once your client pleads guilty, the court can (and, as many of you know, absolutely will) condition the agreed-upon sentence on your client not claiming innocence to the Probation Department and can (and will) enhance the sentence if your client does so.

See our September 2021 ITD for ideas on framing a challenge to the related issue of "trial penalty" – where the court imposes a sentence after trial that deviates so substantially from pre-trial plea offers as to invite constitutional challenge.