IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. RAMIRO GONZALES, Defendants and Appellants	)	No. S191240 Court of Appeal No. H032866 Santa Clara County Superior Court No. 211111

APPEAL FROM THE JUDGMENT OF THE
CALIFORNIA SUPERIOR COURT, SANTA CLARA COUNTY

The Honorable Alfonso Fernandez, Judge Presiding

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s):**

State Cases

State Cases (cont.) **Page(s):**

Rules and Statutes

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INTRODUCTION

Appellant Ramiro Gonzales respectfully answers and opposes the petition for review filed by the Attorney General on March 8, 2011.

The Attorney General contends that review is necessary because the Court of Appeal concluded that parole-mandated therapy records are privileged "without exception" in SVP proceedings, but this is not correct. Instead, the Court of Appeal held that there was insufficient evidence to support application of a specific exception to a privilege in this case, and that under the circumstances, the trial court abused its discretion in allowing blanket discovery and privileged information into evidence. (Opn. at p. 13.)

The Attorney also contends that review is necessary because the Court of Appeal found a violation of the federal constitutional right of informational privacy and applied the standard of prejudice enunciated in *Chapman v. California* (1967) 386 U.S. 18. However, the Court of Appeal's finding was well-founded and it should not be disturbed.

FACTUAL BACKGROUND

Appellant Ramiro Gonzales was born in 1955, and at the age of seven he contracted spinal meningitis which resulted in intellectual and developmental disabilities. (Opn. at p. 2.) Mr. Gonzales's history included two offenses which qualified as predicate offenses under Welfare and Institutions Code[1] section 6600, subd. (b).[2] When he was about to be released on parole in 2004, the District Attorney filed a petition to commit Mr. Gonzales under section 6600, but the jury found the allegations in the petition not true. (Opn. at p. 3.)

Mr. Gonzales was released and one of his parole conditions was to participate in an outpatient treatment program. (1 Opn. at p. 3.) Pat Potter McAndrews had a master's degree and worked under the supervision of a psychologist as a therapist at the Atkinson Assessment Center where Mr. Gonzales was referred for treatment. (3 RT 492-493.)[3] As part of their

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[1]All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] In 1977, appellant was convicted of molesting a seven-year-old girl and in 1994, he was convicted of molesting a four-year-old girl. (Opn. At pp. 2-3.) In 1975, appellant was also convicted of a misdemeanor for annoying or molesting a child. (Opn. at p. 2.)

[3]For reasons that are not clear, the Attorney General refers to Ms. McAndrews as a doctor. (Petition for Review at p. 3.)

initial interview, Ms. McAndrews noted that appellant appeared to be someone whose intellectual abilities were limited and she had some concerns that this might pose a problem in treatment. (3 RT 505.) However, once enrolled, appellant participated regularly. (3 RT 511-512.) Ms. McAndrews described her relationship with appellant as a therapeutic one and defined it as "one where the client and you have a relationship where you're building toward trust where you're hoping you will get accurate information. they can interact with you in a meaningful way. In other words, the personalities are compatible, and there's a sense that you work together as a team to do the therapy process." (3 RT 521-522.)

In the context of this relationship, Ms. McAndrews administered an Abel Assessment test. (3 RT 513, 521-522, 527, 550.) The test involved numerous questions and although it was not standard procedure, Ms. McAndrews filled out the answers because she suspected that Mr. Gonzales might not have been able to do so. (3 RT 536, 4 RT 598.) In administering the test, Ms. McAndrews rephrased and explained some of the questions before recording Mr. Gonzales' answers. (3 RT 574, 577-578, 4 RT 611.) Ms. McAndrews did not keep notes of any of Mr. Gonzales' answers, but simply entered what she thought his responses were into the computer. (4 RT 604.) However, on the day of the testing, she made a note stating Mr. Gonzales "[c]ould not grasp concept of instructions with respect to testing." (4 RT 619.) Ms. McAndrews testified that in response to one of the questions, Mr. Gonzales indicated that between the age of 14 and 37, he had touched 16 children sexually. (3 RT 518-521, 527, 550, 4 RT 608.) Throughout the course of their therapeutic relationship, Ms. McAndrews did not see any need to disclose anything Mr. Gonzales said under the "dangerous patient" exception to the patient psychotherapist privilege, and

did not do so. (Opn. at p. 12.)

Because Mr. Gonzales' mother lived in an area that was too close to a school he could not reside with her although he was permitted to visit. (Opn. at 39.) He was required to live in a particular hotel and he befriended and began providing assistance to another resident who had a wheelchair. However, the parole officer learned of this and told them that they were in technical violation of their parole conditions because they were not supposed to associate with other offenders, and this mutually beneficial relationship was dissolved. (3 RT 445-446.)

Mr. Gonzales was also required to wear a tracking device and avoid contact with children. (Opn. at p. 3.) On his way home from therapy one afternoon, Mr. Gonzales passed by a large park the size of four football fields and stopped to roll a cigarette. (Opn. at p. 39, 4 RT 642-644.) Although there was no evidence that he stopped anywhere near a play area located within the park or that he saw any children, the parole officer felt "the entire park is considered a violation" (4 RT 644) and contacted Mr. Gonzales at his mother's residence with several officers. (Opn. at pp. 4, 39.) When they arrived there were two children playing in the driveway and Mr. Gonzales was found separated by a wooden fence about 15 to 20 feet away recycling cans. (3 RT 484, 4 RT 652.) Mr. Gonzales's sister had been evicted from her apartment with her children and had begun staying at the mother's house. (Opn. at p. 39, 5 RT 860-861, 876.) Although there was no evidence that Mr. Gonzales had any direct contact with the children, he was found to be in violation of his parole conditions and was taken into custody. (Opn. at p. 39.) Mr. Gonzales also admitted drinking beer which he was not supposed to do. (Opn. at p. 4.) The instant SVP proceedings followed.

REASONS REVIEW IS NOT NECESSARY

I. CONTRARY TO THE ATTORNEY GENERAL'S ASSERTIONS, THE COURT OF APPEAL DID NOT CONCLUDE THAT PAROLE-MANDATED THERAPY RECORDS ARE PRIVILEGED WITHOUT EXCEPTION IN SVP PROCEEDINGS

In the Opinion, the Court of Appeal addressed a ruling by the trial court that although the material sought by the District Attorney's from Atkins Center was privileged, the "dangerous patient" exception to the privilege under Evidence Code section 1024 applied. (1 RT 10-11, Opn. at p. 12-13.) Contrary the Attorney General's assertions, the Court of Appeal did not conclude that such records were "privileged without exception" in SVP cases (see PFR at p. 16), but that the record in this case did not contain sufficient evidence to support the application of the "dangerous patient' exception. (Opn. at 13.) After carefully reviewing all the circumstances involved in the District Attorney's motion the Court of Appeal concluded:

> In short, the record does not contain sufficient evidence to support the application of the "dangerous patient" exception. Moreover, notwithstanding a correct finding that the material sought was privileged, and the mandate to narrowly construe the "dangerous patient" exception, the court granted the district attorney blanket discovery of all records and information about defendant's therapy and implicitly authorized McAndrews to testify about everything and anything concerning the therapy, including what she and defendant said to each other during therapy as well as her advice and diagnosis. Under the circumstances, we conclude that the trial court abused its discretion. (Opn. at p. 13.)

The Court of Appeal noted that on appeal the Attorney General did not challenge the trial court's finding that communications between Mr. Gonzales and Ms. McAndrews were presumptively privileged. (Opn. At p. 12, fn. 4.) The court also rejected the Attorney General's position that

despite the privilege all records are admissible in SVP proceedings stating, "the rules of evidence, including those concerning the psychotherapist-patient privilege and exceptions thereto, apply no less to SVP trials than to criminal trials." (Opn. at p. 19, citing Evid. Code § 300 [unless specified by statute, Evidence Code applies to court proceedings].)

The Attorney General relies erroneously on cases where it has been held that due to the nature of the circumstances under which treatment occurred, no privilege attached in the first place. (PFR at pp. 7-9, see *People v. Martinez* (2001) 88 Cal. App. 4th 465, *People v. Lakey* (1980) 102 Cal. App. 3d. 962.) In *Martinez* and *Lakey*, records generated in the course of commitment under the former Mentally Disordered Offender (MDSO) Law were not privileged because, due to the nature of the commitment, a defendant "could not have expected his communications to be absolutely confidential or otherwise protected by the privilege." (Opn. at p. 15, citing *Martinez, supra,* 88 Cal. App., 4th at 484.) The court explained that "[w]hen those treatment records are being generated, the MDSO or SVP cannot reasonably expect that their therapeutic communications will be absolutely confidential or protected by the privilege at future commitment or recommitment hearings." (Opn.at pp. 15-16.)

Here, as the trial court recognized and as the Attorney General did not dispute on appeal, the privilege did attach. (Opn. at p. 12.) In filing the motion to obtain the Atkins records, even the District Attorney recognized that "[p]ortions of these records may be protected by a right of privacy," but took the position that the initiation of SVP proceedings "obviates any existing privilege or right to privacy." (1 CT 101-102.) However, as the Court of Appeal duly noted, there is no general exception to the Evidence Code in SVP proceedings. (Opn. At p. 19.)

The fact that Mr. Gonzales was on parole at the time confidential communications were exchanged does not change the analysis. Even Ms. McAndrews described the therapeutic relationship as "one where the client and you have a relationship where you're building toward trust where you're hoping you will get accurate information. they can interact with you in a meaningful way." (3 RT 521-522.) In contrast to the defendants in *Lakey* and *Martinez*, Mr. Gonzales had not been committed as an MDSO or an SVP when the communications were generated. In fact, a jury had specifically found that he did not meet the criteria for involuntary commitment and had found the SVP petition not true. (Opn. at p. 3.)

The Attorney General describes the Court of Appeal decision as "perverse" because although an SVP defendant with therapy records from a prior, involuntary commitment would not be able to assert the privilege, an SVP defendant whose therapy records resulting from a recent mandatory treatment condition could assert the privilege and the state would be denied crucial proof that the parolee meets SVP criteria. (PFR at p. 5.) This is not a fair characterization. Under the Court of Appeal decision, the dangerous patient exception still applies to parole mandated treatment as with any treatment, and if a therapist becomes aware of information that threatens public safety, that information may be disclosed. (Opn. At pp. 12-13.) The therapist would also be free to provide information necessary to evaluate the person's compliance with parole mandated treatment. (Opn. At pp. 16-18, see *In re Pedro M.* (2000) 81 Cal. App. ^{4th} 550, 554-555.) Ironically, the information disclosed in this case did not involve any current or future actions but pertained to alleged incidents that had occurred more than twenty years ago. The Court of Appeal decision is well-founded and review by this Court is not necessary.

II. THE COURT OF APPEAL'S APPLICATION OF THE *CHAPMAN* STANDARD OF PREJUDICE WAS WELL-FOUNDED.

As the Attorney General acknowledges, the United States Supreme Court has repeatedly assumed that the federal constitution protects the right privacy, including informational privacy. (*Roe v. Whalen* (1997) 429 U.S. 589, 599-600 and fn. 25, citing *Griswold v. Connecticut* (1965) 381 U.S. 479, 483, *NASA v. Nelson* (2001) ___ U.S. ___, 131 S. Ct. 746, 178 L.Ed. 667.) However, the Attorney General claims that in *Jaffe v. Redmond* (1996) 518 U.S. 1, the Court recognized that the psychotherapeutic-patient privilege in federal proceedings "is not rooted in any constitutional right to privacy but in a public good that overrides the request for relevant evidence." (PFR at p. 14, quoting *U.S. v. Glass* (10th Cir. 1998) 133 F. 3d 1356, 1358.) Contrary to the Attorney General's assertions, the United States Supreme Court did not recognize that the privilege was not rooted in any constitutional right of privacy, because the constitutional issue was not even discussed. (See *Jaffe v. Redmond, supra,* 518 U.S. 1.) The High Court simply affirmed a federal appellate court decision which had held that the Federal Rules of Evidence contains a psychotherapist privilege and that it applies to social workers as well as psychiatrists. (*Id.* at 18, See *Jaffee v. Redmond* (7th Cir. 1995) 51 F.3d 1346, 1354-1355.)

In *Parle v. Runnels* (2006) 448 F. Supp. 2d 1158, 1164-1169, the court recognized that the *Chapman* standard applied in a case where a confidential patient-physician communication had been erroneously presented to the jury, and rejected the state court's conclusion that there had been no prejudice because the evidence was cumulative to evidence that had been properly admitted (see *People v. Parle*, No. H017348, slip opn.

(Cal. Ct. App. 2000) (unpublished)). The district court's decision to grant the petition for writ of habeas corpus was upheld in *Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922. The Attorney General conceded constitutional error in that case. (*Parle v. Runnels, supra*, 448 F. Supp. 2d at 1164.) It is anomalous that the Attorney General was willing to concede constitutional error in *Parle* but not here. The fact that *Parle* was a criminal case and section 6600 cases are technically civil should not affect the outcome. In *People v. Hurtado* (2002) 28 Cal. 4th 1179, 1192-1194, this Court held that the *Chapman* standard applies in section 6600 cases despite the civil nature of the commitment. The sky is not falling. As in *Parle,* the *Chapman* standard was properly applied, and review is not necessary.

CONCLUSION

The Court of Appeal decision is firmly grounded on well-established principles of law. Due to reversible error, Mr. Gonzales has the right to a new SVP trial without unnecessary delay. The Attorney General has not established that review is necessary under rule 8.500. Therefore, the petition for review must be denied.

Dated: March 26, 2011

Respectfully Submitted,

JEAN MATULIS
Attorney for Appellant
RAMIRO GONZALES

CERTIFICATE OF WORD COUNT

I hereby certify that the answer to petition for review contains 2448 words according to the word count of the WordPerfect computer program used to prepare the document.

Dated: March 26, 2011

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Jean Matulis
Attorney for Appellant

PROOF OF SERVICE BY MAIL

People v. Ramiro Gonzales, No. S191240
California Court of Appeal, Sixth Appellate District, No. H032866
Santa Clara Superior Court No. 211111

I am over eighteen years old, not a party to this action, and a member of the State Bar of California. My business address is P.O. Box 1237, Cambria, CA 93428. On March 28, 2011, I served the following:

Petition for Review

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed at Cambria, CA on March 28, 2011.

_____

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