In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RAMIRO GONZALES,** **Defendant and Appellant.**

Case No. S191240

Sixth Appellate District, Case No. H032866
Santa Clara County Superior Court, Case No. 211111
The Honorable Alfonso Fernandez, Judge

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General
BRIDGET BILLETER
Deputy Attorney General
State Bar No. 183758
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-1340
Fax: (415) 703-1234
Email: Bridget.Billeter@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ISSUES

1. Does testimony of a psychotherapist regarding the details of records from parole-mandated sex offender psychotherapy in sexually violent predator (SVP) proceedings violate the state psychotherapist-patient privilege?

2. If so, what harmless-error standard applies to a violation of the state psychotherapist-patient privilege in an SVP proceeding?

STATEMENT OF THE CASE

In August 1994, appellant was convicted of lewd and lascivious conduct with a minor and sentenced to prison. (1 RT 115.) Subsequently, the state initiated an SVP proceeding. (Welf. & Inst. Code, § 6000 et seq.) A jury found appellant was not an SVP. In 2004, appellant was released on parole with conditions prohibiting him from drinking alcohol, contacting minor children, or being within 100 feet of places where children congregate. (1 RT 78; 2 RT 381-387.) Appellant was also required to attend outpatient sex-offender psychotherapy treatment, and to inform his parole agent of contacts with any minor, even if accidental. (3 RT 429, 431.)

In January 2006, appellant entered the High Risk Sex Offender Program at the Atkinson Center—pursuant to the psychotherapy treatment condition of parole imposed by the state. (1 CT 135; 3 RT 495, 501.) At intake, the Center administered to appellant the Abel Sex Offender-Specific Questionnaire for Men, in response to which he disclosed the high number of children that he had touched sexually. (3 RT 521; 1 CT 140.) During the psychotherapy treatment, appellant attended both individual and group counseling sessions. (3 RT 497.)

Appellant was required to wear a GPS monitoring device as of April 2006. (3 RT 462.) On August 11, the GPS monitor showed that appellant

had been in a park with a playground the previous day. (3 RT 481.) An alerted parole agent heard children in the background when he called appellant's home to speak to him and immediately went to the house. (3 RT 481- 482.) The agent found appellant's niece and nephew, ages two and seven, in the driveway of the home. (3 RT 483; 5 RT 874.) Appellant told the agent that he had been drinking three beers a week between June and August 2006, that he knew he was not supposed to be near a playground, that he had stopped in the park to roll a cigarette, and that he did not look at the children. (3 RT 482, 490; 4 RT 635-636.)

Appellant was arrested and returned to custody as a parole violator. In an SVP screening in late 2006 before his re-release, Dr. Thomas MacSpeiden and Dr. Jack Vognsen diagnosed appellant as a pedophile whose condition caused impaired emotional and volitional capacity. (1 RT 133; 4 RT 488, 732-734.) Dr. MacSpeiden also diagnosed appellant as alcohol dependent with borderline intellectual functioning. (1 RT 84.) Dr. Vognsen diagnosed appellant with alcohol abuse and mild mental retardation. (1 RT 474.) The doctors found appellant likely to engage in sexually violent predatory criminal acts due to his disorders. (1 RT 174; 4 RT 764-765.)

Based on the evaluations, the Santa Clara County District Attorney filed a petition to commit appellant as an SVP. Prior to trial, the prosecutor subpoenaed appellant's treatment records from the Atkinson Center. Appellant moved to quash the subpoena, arguing that his records were protected by the psychotherapist-patient privilege. (1 RT 3; 1 CT 114-120.) The prosecution replied that, whether or not the privilege attached to the records, the dangerous-patient exception in Evidence Code section 1024 allowed disclosure. The court agreed: "I do find that they are privileged. However, I do think they are relevant and Mr. Gonzales would fall under

the dangerous patient statutory exception, and they will therefore be released given those facts." (1 RT 11.)

At trial, Dr. Pat McAndrews, appellant's therapist at the Atkinson Center, testified regarding appellant's therapy sessions. At appellant's initial assessment, he admitted touching 16 children in a sexual manner. (3 RT 521; 1 CT 140.) According to Dr. McAndrews, appellant did not tell her that his sister and her children were living at his mother's house, and he did not tell her that he was drinking beer. (3 RT 547.) Dr. McAndrews testified that appellant's presence at his mother's house when children were there, combined with appellant's consumption of beer, was a "recipe for a sex offense." (3 RT 549.)

The jury found the petition to be true. The court committed appellant to the Department of Mental Health (DMH) for an indeterminate term. (2 CT 551, 552.)

Appellant appealed. The Court of Appeal for the Sixth Appellate District held that the release of the Atkinson Center records to the state violated appellant's statutory psychotherapist-patient privilege. Relying on *Story v. Superior Court* (2003) 109 Cal.App.4th 1007 and *In re Pedro M.* (2000) 81 Cal.App.4th 550, the court determined that the parole-mandated therapy records in issue—specifically, records of therapy sessions between appellant and his treating psychologist, Dr. McAndrews—were presumptively privileged and that the dangerous-patient exception did not apply. (Slip Opn. at pp. 11-13.) The court distinguished *People v. Lakey* (1980) 102 Cal.App.3d 962 and *People v. Martinez* (2001) 88 Cal.App.4th 465 as holding only that the "psychotherapist-patient privilege does not protect psychological records *of a previous involuntary commitment.*" (Slip Opn. at p. 15.) The court reasoned that parole-mandated therapy is instead ordered "to assist the defendant's rehabilitation; and preserving confidentiality will facilitate that goal." (Slip Opn. at p. 18.)

After finding trial error in releasing appellant's therapy records to the state for use in an SVP commitment proceeding, the Court of Appeal held, for purposes of harmless error analysis, that the violation of appellant's psychotherapist-patient privilege also violated the federal Constitution and required the application of the harmless error test in *Chapman v. California* (1967) 386 U.S. 18, 24.[1] The court stated that "the United States Supreme Court and the California Supreme Court acknowledge a constitutionally protected interest in the privacy or confidentiality of highly personal information" and that the "great weight of authority . . . recognizes a federal constitutional right to informational privacy that protects medical and psychiatric records from unwarranted, unnecessary, and unjustifiable disclosure." (Slip Opn. at p. 20.) The court ruled that appellant had a "reasonable expectation of privacy" in his psychiatric records and that, because the release of the records was not justified under the "dangerous patient" exception, the state had not demonstrated a sufficient compelling interest to outweigh that expectation of privacy. (Slip Opn. at pp. 33-34.) Having thus found the records release violated appellant's federal constitutional rights, the court held that the error was not harmless beyond a reasonable doubt and reversed the judgment. (Slip Opn. at pp. 37-40.)

On April 27, 2011, this court granted the People's petition for review.

SUMMARY OF THE ARGUMENT

Disclosure of a patient's records of parole-mandated therapy sessions in SVP cases does not violate the statutory psychotherapist-patient privilege. The release of the records to state authorities for use in SVP trials is reasonably necessary to accomplish the goal of protecting society

---

[1] In an earlier unpublished opinion, the Court of Appeal had found state law error that was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. The court granted rehearing to consider the application of *Chapman v. California*, supra, 386 U.S. 18, 24.

from mentally ill and dangerous individuals in the custody of the state. Therapy for paroled prisoners under the supervision of the Department of Corrections and Rehabilitation is mandated to ensure the parolee's successful reintegration into society. The state's access to the details of the parolee's therapy sessions is not only justifiable, but a necessity, where, as here, the parolee proves to be a substantial and well-founded danger to the community who is unsuccessfully reintegrating into society.

The Court of Appeal's conclusion that release of the therapeutic records in SVP cases would inhibit the successful treatment of parolees ignores the purpose for which parole-mandated therapy is undertaken. Therapy is undertaken to protect society while the parolee is reintegrating into the community, by treating the individual's mental disorder. Thus, in SVP proceedings, the state seeks to protect the society from future harm, the same goal that it pursues in monitoring parolees during the period of parole. Disclosure of the relevant documents to the state is reasonably necessary to effectuate the purpose of parole-mandated therapy.

Even if release of the therapy records violated the psychotherapist-patient privilege, any error should be evaluated under the state law harmless error standard of *People v. Watson*, *supra*, 46 Cal.2d at page 836. Contrary to the holding of the Court of Appeal, the violation of the statutory privilege did not constitute a violation of appellant's federal constitutional right to privacy. Nor does a violation of the state evidentiary privilege involve incursion into a state-created liberty interest of the sort that results in a federal due process violation. Regardless whether a federal right to informational privacy may inhibit the dissemination of parole-mandated therapy records in some circumstances, a conclusion under state law that the psychotherapist-patient privilege precludes a release of records does not implicate such a federal right, let alone establish a violation of it. The state privilege and any federal constitutional informational privacy right are not

coterminous. Further, in SVP cases, the state's compelling interest in protecting the public and ensuring the reliability of its legal proceedings outweighs a parolee's diminished expectation of privacy in his parole-mandated therapy records. The error, thus, did not require harmless error analysis under the federal standard of *Chapman v. California*, *supra*, 386 U.S. at page 24.

Even if appellant could demonstrate a violation of his federal right to informational privacy, evidence of appellant's statements during therapy here turned out to be only minimally relevant to the prosecution's experts. Nor did that evidence even involve the period of parole in dispute at the SVP trial. Thus, any error was harmless beyond a reasonable doubt.

ARGUMENT

I. THE DISCLOSURE TO AND USE BY THE STATE OF PAROLE-MANDATED THERAPY RECORDS IN SVP PROCEEDINGS IS EXEMPT FROM THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BECAUSE IT IS REASONABLY NECESSARY TO ACCOMPLISH THE PUBLIC SAFETY GOAL OF THAT THERAPY

The psychotherapist-patient privilege generally protects communications made during therapy. However, there is an exception to the privilege where disclosure of those communications is reasonably necessary for the purpose for which the therapist is consulted. The goal of parole-mandated therapy is to treat the offender in order to ensure that the parolee successfully reintegrates into society. Where the evidence reflects that the parolee is not successfully reintegrating into society and poses a substantial danger to the community, release of the parole-mandated therapy records to the state is reasonably necessary to ensure the reliability of the SVP proceedings, which are undertaken to protect the public from dangerous individuals.

A. The Statutory Psychotherapist-Patient Privilege

The psychotherapist-patient privilege is codified in the state's Evidence Code. Evidence Code section 1014 provides, in part, that "the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ." This court has acknowledged "the growing importance of the psychiatric profession in our modern, ultracomplex society." (*In re Lifschutz* (1970) 2 Cal.3d 415, 421.) "Thus, for reasons of policy the psychotherapist-patient privilege has been broadly construed in favor of the patient." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) However, the privilege is not absolute. The statutory scheme provides express exceptions to the privilege. (See Evid. Code, §§ 1017-1027.)

"Evidence Code section 1012 codifies an express exception to the psychotherapist-patient privilege that permits disclosure of otherwise privileged communications between patient and psychotherapist to third persons to whom disclosure is reasonably necessary to accomplish the purpose for the which the psychotherapist is consulted." (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 696.)

B. The Purpose of Parole-Mandated Therapy Is To Protect The Public by Ensuring a Parolee's Lawful and Successful Reintegration Into Society

As courts have recognized, the exception in Evidence Code section 1012 to permit disclosure of confidential communications where the purpose of therapy is for the protection of society or particular individuals. This line of authority is pertinent to the situation in this case. Appellant's sex offender treatment at the Atkinson Center constituted state-supervised therapy undertaken for the purpose of providing rehabilitation and monitoring his compliance on parole. Disclosure of appellant's

confidential communications in the course of that therapy was reasonably necessary because there was evidence that he had not been rehabilitated, was not succeeding on parole, and required further mental treatment in the form of an SVP commitment.

An example from this line of authority is *In re Pedro M.*, *supra*, 81 Cal.App.4th 550, which concerned a minor placed on juvenile probation and ordered to attend sex offender therapy. The minor refused to cooperate, and the court held a hearing to determine whether he had violated his probation. The minor's therapist testified that he had failed to comply with the treatment requirements and, on appeal, the minor contended that the testimony should have been excluded as privileged. The appellate court held the evidence was properly admitted:

> Quite obviously, the court's ability to evaluate appellant's compliance with this particular condition of the court's disposition order and its effect on his rehabilitation would be severely diminished in the absence of some type of feedback from the therapist, and it would be unreasonable for appellant to think otherwise. . . . Indeed, Evidence Code section 1012 itself permits the disclosure of a confidential communication between patient and psychotherapist to "those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted . . . ." In our view, this would include the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation. Moreover, the juvenile court carefully sought to circumscribe [the therapist's] testimony "so that the details of the therapeutic session [would] not [be] disclosed." . . . Under the circumstances, therefore, we hold that the psychotherapist-patient privilege did not preclude [the therapist] from testifying at the adjudication of the supplemental petition concerning appellant's participation and progress in the court-ordered treatment plan.

(*Id.* at pp. 554-555.)

Another example, *In re Kristine W.* (2001) 94 Cal.App.4th 521, concerned the juvenile dependency court's removal of the minor from her abusive father's home. During the dependency proceedings, the court ordered therapy sessions for the minor. The minor argued that allowing her therapist to report to the court about her progress in therapy violated her psychotherapist-patient privilege. The court disagreed:

> We conclude the psychotherapist-patient privilege protects Kristine's confidential communications and details of the therapy, but does not preclude her therapist from giving circumscribed information to accomplish the information-gathering goal of therapy. [Citations.] Without information from the therapist, both the court and the Agency would be hampered in their efforts to ensure that Kristine receives services to protect her and enable her to make a successful transition from court-dependent minor to adult.

(94 Cal.App.4th at p. 528.)

These decisions reflect that the purpose of appellant's parole-mandated therapy is significant in considering the application of the privilege in this case. The purpose of the therapy was to ensure appellant's lawful and successful reintegration into society by treating his sexual disorders. The Legislature has specifically found and declared that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. *It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.*" (Pen. Code, § 3000, subd. (a)(1), italics added.) A parolee might be released from prison "based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person," but the parolee's commission

of a crime nevertheless "justifies imposing extensive restrictions on the individual's liberty." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 482, 483.) "Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law." (*Id.* at p. 484.)

Moreover, "[p]risoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison." (Pen. Code, § 3056.) "The granting of parole does not change his status as a prisoner. The parolee is not discharged but merely serves the remainder of his sentence outside rather than within the prison walls." (*People v. Denne* (1956) 141 Cal.App.2d 499, 508; Pen. Code, § 3000, subd. (a)(1) ["A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, or as otherwise provided in this statute"].).)

Thus, Dr. McAndrews was engaged, by the state, to treat appellant in order to ensure that he continued to function as a law-abiding individual. Access by the service provider (the state) to the therapist's records became necessary to determine whether the parolee actually was conforming to his parole conditions and successfully functioning in the community. That is, the disclosure of confidential communications was needed to ensure both adequate monitoring of appellant's progress on parole and public safety. At least when the release of the appellant's parole-mandated therapy records is made to the state agency tasked with protecting the public, disclosure of information by the parolee in state-mandate therapy does not violate the privilege when that information is needed for public protection. "[W]hile the information remained confidential as between appellant and the world generally, the transmission of the information to the [state for consideration in an SVP proceeding] was proper in order to accomplish [the] purpose" for which the therapist was consulted. (*In re Edward D.* (1976) 61 Cal.App.3d 10, 15.)

C. Based on the Requisite Finding of Future Dangerousness, the Details of Parole-Mandated Therapy Sessions Are Reasonably Necessary to the Proper Adjudication of Civil Commitment Proceedings

The *Pedro M.* proceeding involved whether the minor had violated probation, not whether he posed a future danger due to a diagnosed mental disorder. According to *Pedro M.*, details of the therapeutic sessions were not relevant to the probation violation issue, and thus disclosure of those details was not "reasonably necessary." Recognizing that *Pedro M.* authorized the release of therapy records reasonably necessary to ensure compliance on probation, the Court of Appeal extended that holding to the facts in this case, stating that appellant's records were "protected by the privilege except insofar as disclosure is necessary to ensure compliance with the parole condition." (Slip Opn. at p. 16.) But that gave short shrift to the fact that the details of appellant's therapy sessions were "reasonably necessary" to accomplish the purpose of the original parole-mandated treatment—the protection of society from appellant reoffending.

"[T]he SVPA narrowly targets 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' (Stats. 1995, ch. 763, § 1, p. 5921.)" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "The SVPA contemplates and expressly provides for the disclosure of all relevant records, including medical and psychological records, and their consideration in an SVP commitment proceeding." (*People v. Martinez*, *supra*, 88 Cal.App.4th at pp. 475-476; see also § 6603, subd. (c) ["updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultations with current treating clinicians, and interviews of the person being evaluated . . . ."]; *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807 ["[U]nder newly enacted section 6603(c), in an SVPA proceeding such as the one

before us, the district attorney may obtain access to otherwise confidential treatment information concerning an alleged SVP to the extent such information is contained in an updated mental evaluation"].) The evaluators assigned to evaluate a potential SVP must make an "assessment of diagnosable mental disorder, as well as various factors known to be associated with risk of reoffense among sex offenders." (§ 6601, subd. (c).) Consideration of the information contained in parole-mandated therapy records—responses during the initial interview (see 3 RT 501-506), the results of an IQ test (3 RT 506), the patient's level of participation in therapeutic sessions (see 3 RT 511-512), statements made during group and individual therapy (see, e.g., 3 RT 513-519, 524-525-529, 537-540), and whether the patient is making therapeutic progress (see 3 RT 542-549)—is reasonably necessary to assess whether an individual is likely to reoffend in a sexually violent manner, or whether he is successfully reintegrating into society.

Appellant's parole was revoked and the state instituted SVP proceedings based on evidence that appellant was likely to commit future crimes. Releasing the treatment records was reasonably necessary to determine the extent to which the goals of parole-mandated treatment—preventing a new sexual offense and rehabilitating appellant so that he could function as a law-abiding citizen—had been accomplished. At least as important as rehabilitative monitoring is the state's interest in access to the parole-mandated therapy records themselves in order to evaluate the need for more intensive therapies and more restrictive conditions and placements, including those authorized by the court in civil commitment proceedings. The state has a compelling interest in protecting society from parolees who may not be successfully reintegrating into society and who pose a future danger of reoffending. Thus, while the disclosures in *Pedro M.* and *Kristine W.* were limited to those deemed reasonably necessary for

the court to make a properly informed decision, in SVPA cases disclosure of relevant therapeutic records is reasonably necessary for the state actors—the evaluators, the district attorney, the court, and the jury—to make a properly informed decision about the risk of reoffense.

Invoking the exception to the privilege for state-mandated medical and psychological records is supported by the decisions in *Lakey*, *supra*, 102 Cal.App.3d 962, and *Martinez*, *supra*, 88 Cal.App.4th 465. In *Lakey*, the defendant, a mentally disordered sex offender (MDSO), claimed at his MDSO extension hearing that he had made statements while committed to the state hospital that were privileged. The appellate court rejected the claim, holding that the privilege did not attach to statements made while confined in the state hospital:

> We are aware that "an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy" (*In re Lifschutz* (1970) 2 Cal.3d 415, 422 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1]), and that the effectiveness of the treatment given defendant and others similarly situated probably would be improved if complete confidentiality were accorded every statement made by a person involuntarily confined for the treatment of mental disorders.
>
> However, we recognize that the psychotherapist/patient privilege is legislatively created and is not absolute. Defendant has been confined as an MDSO because he took the life of another human being and is dangerous. The purpose of his confinement is not merely to treat his mental disorder, but to protect society. An important purpose of the close supervision given persons who are confined as MDSOs is to gather information through which it is possible to predict their future behavior. It seems apparent that one legislative purpose in providing psychotherapy for MDSOs is to monitor their progress so that the decision to release the MDSO from confinement may be based upon as much information as possible. We cannot find any legislative intent to exclude testimony such as that presented in this manner because of any psychotherapist/patient privilege.

> We believe our decision is supported by Evidence Code section 1024 which provides as follows: "There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."
>
> The proceeding below was premised upon the belief of defendant's psychotherapist, and the medical staff at Atascadero State Hospital, that defendant constitutes 'a serious threat of substantial harm to the health and safety of others,' as provided in section 6316.2. As the Supreme Court stated in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 442, "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."

(102 Cal.App.3d at pp. 976-977.)

Similarly, in *People v. Martinez*, *supra*, 88 Cal.App.4th 465, the Sixth District Court of Appeal, relying on *Lakey*, held that prior MDSO records were not privileged in subsequent SVP proceedings: "The SVPA protects the public from sexual predators by detaining them and providing treatment until the condition causing their disorder has abated. The determination that a disorder has abated requires a full assessment of the person's current mental condition, including reference to treatment records and progress in therapy." (*Id.* at p. 484.) The court also rejected Martinez's argument that even if the MDSO records were not privileged in the prior MDSO proceedings, they became privileged in the subsequent SVP proceedings.

> Although *Lakey* involved the disclosure of defendant's statements in an MDSO proceeding, they were admissible not because defendant had selectively waived the privilege for that proceeding but because the statements were not privileged in the first place. Defendant cites, and we have found, no authority for the proposition that a nonprivileged communication can become

> privileged in subsequent proceedings. Case law is to the contrary. . . .
>
> Furthermore, we consider it counterintuitive to find that defendant's unprivileged MDSO statements became privileged in the SVP commitment proceeding. . . . [The MDSO] proceeding and the instant SVP proceedings share the same fundamental purpose: to protect the public from those who because of their mental disorder represent a danger to others.

(*Id.* at p. 485.)

Here, the district attorney filed a petition because two independent evaluators concluded that appellant suffered from a diagnosed mental disorder that made it likely he would reoffend upon release, and the trial court found probable cause to believe that appellant posed such a danger. (1 CT 70.) These findings establish "reasonable cause to believe" that appellant "is in such a mental or emotional condition as to be dangerous to himself or to the person or property of another." (Evid. Code, § 1024.)

The Court of Appeal sought to distinguish *Lakey* and *Martinez* on the ground that "[a] defendant who has been released on parole with a therapy condition is not comparable to a person involuntarily committed to a state institution as an MDSO or an SVP in order to protect the public and provide treatment." (Slip Opn. at p. 16.) Contrary to the Court of Appeal's conclusion, however, the records of any and all therapy sessions undertaken for the purpose of protecting society from potential reoffenders are not privileged in subsequent proceedings to protect society. (See *People v. One Ruger .22-Caliber Pistol* (2000) 84 Cal.App.4th 310, 314-315 [Evid. Code, § 1024 applies to proceedings for the seizure and forfeiture of weapons belonging to persons detained under Welf. & Inst. Code, § 5150].) As discussed above, parolees are still under the custody of the Department of Corrections and Rehabilitation (Pen. Code, § 3056), and the purpose of parole-mandated therapy is to protect the public and provide treatment.

Particularly in view of the trial court's finding of probable cause to believe that appellant posed a likelihood of reoffending if free in the community, the disclosure of his therapeutic progress was reasonably necessary to ensure the protection of society from the danger he posed. Thus, like a patient confined to the state hospital, appellant's records were not privileged because they necessarily informed the issue of future dangerousness.

In further attempting to distinguish state hospital confinement from parole custody, the court below mistakenly relied on *Story v. Superior Court*, *supra*, 109 Cal.App.4th 1007. (Slip Opn. at p. 16.) In *Story*, the defendant was charged with murder. (109 Cal.App.4th at p. 1010.) The prosecution subpoenaed the defendant's therapy records from 1975—therapy that was mandated as a condition of probation for a 1974 assault conviction. (*Id.* at p. 1011.) The prosecution sought to use the content of the therapy records as evidence of the defendant's intent, motive, and identity pursuant to Evidence Code section 1108. (*Id.* at p. 1019.) *Story* held that the condition of probation requiring therapy did not remove the therapy records from the state privilege. (*Id.* at p. 1016 ["it is immaterial in the case at bar that defendant may have been motivated to attend psychotherapy . . . as a means of obtaining probation and avoiding incarceration"].) *Story* found the use of the records to prove a historical fact of earlier misconduct or crime was not "reasonably necessary" to the purpose of the probation-mandated therapy.

In an SVP case, however, the issue is quite different. It is whether the defendant poses a threat of *future* harm requiring involuntary commitment due to his current disorder. The threat of future harm makes disclosure "reasonably necessary." (See *id.* at p. 1017 [recognizing confidentiality of psychotherapist-patient communications must yield to public safety in SVP situations].) *Story* does not support the purported distinction between state-

mandated therapy while in the custody of DMH and state-mandated therapy while in the custody of CDCR.

The record here shows that appellant's therapy records were "reasonably necessary" to the ultimate determination of his future dangerousness. Any contrary conclusion would ignore the public safety purpose of parole, the necessary restrictions on parolees to ensure that public safety, and Evidence Code section 1024's "'clear expression of legislative policy concerning the balance between the confidentiality values of the patient and the safety values of his foreseeable victims.' [Citation.]" (*Tarasoff, supra*, 17 Cal.3d at p. 441, fn. 13.) The trial court did not err in allowing the release of the documents for review by the experts, or in admitting the testimony of Dr. McAndrews at trial.

II. ANY VIOLATION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE CONSTITUTED ONLY HARMLESS STATE LAW ERROR; THERE WAS NO VIOLATION OF FEDERAL DUE PROCESS, NOR WAS THERE A VIOLATION OF A FEDERAL RIGHT TO PRIVACY

Even if the state-law psychotherapist-patient privilege applied to the Atkinson Center therapy records, any error occasioned by the disclosure of the records or the testimony of the therapist violated only state evidence law. The applicable standard of harmless error for such a state law violation is the "reasonable probability" of prejudice test of *People v. Watson, supra*, 46 Cal.2d 818, 836. (*People v. John B.* (1987) 192 Cal.App.3d 1073, 1079-1080 [testimony admitted in violation of psychotherapist-patient privilege evaluated under *Watson* standard of review].) The claimed error was harmless in any event.

A. Any State Law Error Did Not Constitute a Federal Due Process Violation

The Court of Appeal erroneously concluded that the applicable standard was the less forgiving "harmless beyond a reasonable doubt" test

for federal constitutional error under *Chapman v. California*, *supra*, 386 U.S. 18, 24. The basis for its conclusion is ambiguous. The decision contains language indicating that the panel believed the trial court's failure to sustain defendant's assertion of the state privilege "further represented a violation of due process." (Slip Opn. at p. 37.) The appellate court was incorrect.

A violation of the state-law privilege does not "establish a separate federal violation of due process." (Slip Opn. at p. 37.) It is an established principle that "'a "mere error of state law" is not a denial of due process.' [Citation.]" (*Swarthout v. Cooke* (2011) __ U.S. __ [178 L.Ed.2d 732, 737]; *Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21 ["We have long recognized that a 'mere error of state law' is not a denial of due process. [Citation.] If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' [Citation.]"]; accord, *People v. Letner* (2010) 50 Cal.4th 99, 195.)

No doubt some state law violations also result in a deprivation of due process. In *Hicks v. Oklahoma* (1980) 447 U.S. 343, the defendant was charged with heroin distribution, and he was alleged to have two prior convictions. (*Id.* at p. 344.) The jury was instructed that based on those prior convictions, it was required to impose a 40-year sentence. (*Id.* at pp. 344-345.) After Hicks's conviction, the portion of the statutory scheme requiring the 40-year sentence was found unconstitutional. (*Id.* at p. 345.) The state appellate court refused to vacate Hicks's sentence, reasoning that the 40-year sentence was within the range of punishment authorized by the lawful sentencing scheme. (*Ibid.*) The United States Supreme Court reversed, holding that the violation of Hicks's state statutory right to have the jury determine his sentence was a violation of his liberty interest protected by the due process clause:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations.] In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

(*Id.* at p. 346.)

At most, *Hicks* indicates "*only* that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement." (*Cabana v. Bullock* (1986) 474 U.S. 376, 387, fn. 4, italics added.)

But California's privilege statutes "do not create a liberty interest for the benefit of defendants of the type involved in *Hicks*." (*People v. Rundle* (2008) 43 Cal.4th 76, 136.) The privilege statutes do not implicate the jury's fact-finding or discretionary functions. Instead, they are evidentiary rules directed to courts. When "state standards alone have been violated, the State is free . . . to apply its own state harmless-error rule to such errors of state law." (*Cooper v. California* (1967) 386 U.S. 58, 62.) Even assuming that the court improperly allowed testimony regarding the details of appellant's parole-mandated therapy sessions, the error did not violate his federal due process rights, and any error should be evaluated under the *Watson* standard.

B. Any Evidentiary Privilege Is Not Rooted in the Federal Constitution, and, Thus, the Violation of the Privilege Does Not Establish a Federal Constitutional Violation

The Court of Appeal opinion also might be understood to have found a violation of a federal constitutional psychotherapist-patient privilege that protects the right to privacy. It would be wrong there too.

No breach of any federal constitutional right to informational privacy is established by the state's use of the therapy records to prove appellant's current dangerousness in the SVP proceeding. Although the United States Supreme Court has not definitively established that a federal constitutional right to informational privacy protects against unwarranted disclosures of medical records, the Court has assumed the existence of such a right, as did the Court of Appeal here. (*NASA v. Nelson* (2011) __ U.S. __ [131 S. Ct. 746, 756]; *Whalen v. Roe* (1977) 429 U.S. 589; Slip Opn. at pp. 22-25.)

Neither *Nelson* nor *Whalen* involved attempts to exclude relevant evidence from use at a civil or criminal trial. Both cases involved the attempts of aggrieved individuals to secure injunctions against governmental efforts to collect private medical information. The court balanced the extent of the disclosure and the individual's informational privacy interest in protecting against disclosure against the government's interest in collecting the information. (See *NASA v. Nelson*, *supra*, 131 S.Ct. at pp. 754, 760-763; *Whalen v. Roe*, *supra*, at pp. 591, 599-604.) Similarly, many federal circuit courts have found that an informational privacy right exists. (See *NASA v. Nelson*, *supra*, 131 S.Ct. at p. 756, fn. 9.)

But there appears to be no federal court decision holding that the disclosure to a state agency of psychotherapist-privileged material regarding a citizen of the state for use in a civil commitment proceeding to which that individual is a party, constitutes a per se violation of a federal constitutional right to informational privacy.

Jaffee v. Redmond (1996) 518 U.S. 1 recognized that the psychotherapist-patient privilege in federal proceedings "is not rooted in any constitutional right of privacy but in a public good which overrides the quest for relevant evidence." (*United States v. Glass* (10th Cir. 1998) 133 F.3d 1356, 1358). Similarly, in *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, the court of appeals rejected a defendant's claim that his federal constitutional rights were violated by the admission at a state trial of privileged information. It explained:

> [T]here is no constitutional psychotherapist-patient privilege, only a federal evidentiary one. Although the Supreme Court, in *Jaffee* . . . , recognized a psychotherapist-patient privilege, it looked exclusively to the Federal Rules of Evidence for authorization. Henry has pointed to no Supreme Court or Ninth Circuit case which recognizes a constitutional privilege for psychotherapist-patient communications, nor any cases which use *Jaffee* to support a constitutional psychotherapist-patient privilege. Therefore, at best, Henry's challenge to the admissibility of Dr. Sander's testimony and notes is a challenge to an evidentiary ruling based on state law.

(*Id.* at p. 1031.)

Likewise, courts have refused to suppress evidence gathered in violation of the psychotherapist-patient privilege because the violation was not constiutionally-based. In *United States v. Squillacote* (4th Cir. 2000) 221 F.3d 542 the defendants were convicted of espionage-related charges. (*Id.* at p. 548.) During telephonic surveillance of the defendants, the government intercepted two telephone calls between a defendant and her therapist. (*Id.* at p. 558.) The defendants moved to suppress "any evidence derived from the privileged communications, and requested a hearing to require the government to prove that the evidence it would present at trial was derived from sources independent of the privileged communications." (*Ibid.*) The district court refused to hold the hearing "concluding that such

a hearing was required only when a constitutionally-based privilege was at issue." (*Ibid.*) The circuit court found the district court's ruling proper:

> We agree with the Appellants that Squillacote's conversations with her psychotherapists are privileged.
>
> [¶] . . . [¶]
>
> . . . [B]ecause "testimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence," any such privilege "must be strictly construed." *Trammel v. United States*, 445 U.S. 40, 50, (ellipses in original) (citation and internal quotation marks omitted). Thus, we do not believe that suppression of any evidence derived from the privileged conversations would be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based.
>
> Other circuits have rejected similar arguments under similar circumstances. For example, in *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990), the court concluded that the testimony of the defendant's ex-wife was not barred by the marital communications privilege, and the court therefore declined to address the defendant's argument that all evidence derived from the ex-wife's information and testimony should be suppressed. *See id.* at 731 n.11. The court noted, however, that "no court has ever applied the [fruit-of-the-poisonous-tree] theory to any evidentiary privilege." *Id.* . . .
>
> . . . [B]ecause the privilege at issue here is not a constitutional one, the district court properly refused to suppress any evidence arguably derived from the government's interception of the two conversations with Squillacote's therapists.

(*Id.* at pp. 559-560, parallel citations omitted.)

In a one-sentence effort to distinguish *Jaffee*, supra, 518 U.S. 1, the Court of Appeal below revealed the rootless nature of its constitutional decision. *Jaffee*, as it pointed out, did not involve the constitutional right of privacy or a claim that a violation of the psychotherapist-patient privilege

further represented a violation of due process. (Typed Opn. at p. 37.) *Jaffee* did not involve those doctrines precisely because it recognized the privilege is merely an evidentiary one not rooted in the federal Constitution.

Jaffee recognized the privilege under the Federal Rules of Evidence because it "promotes sufficiently important interests to outweigh the need for probative evidence." (518 U.S. at pp. 9-10.) Its recognition of the privilege, that is, was not based on any belief that a constitutional right to privacy demands that protection. The Court of Appeal, however, incorrectly concluded that a violation of a state law evidentiary privilege necessarily violates such an independent federal constitutional right. (See also *Borucki v. Ryan* (1st Cir. 1987) 827 F.3d 836, 847, fn. 17 ["It appears that Ryan's dissemination of the [plaintiff's psychiatric report] may have been in violation of state law, which provided that court-ordered psychiatric reports were 'private except in the discretion of the court.' [Citation.] Borucki's complaint alleges violation of this state law as one basis for his federal civil rights claim. . . . However, the existence of a state requirement of confidentiality does not indicate the existence of a constitutional right of privacy, and 'officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision'"].)

The Court of Appeal also cited *Parle v. Runnels* (9th Cir. 2008) 505 F.3d 922, where this office had conceded that a violation of the psychotherapist-patient privilege was reviewable under *Chapman.* (Slip Opn. at pp. 36-37.) However, we are not bound by a concession made for unstated reasons in another case. (*People v. Payton* (1992) 3 Cal.4th 1050, 1073 [concession by Attorney General during oral argument in another case irrelevant because "[i]t is our duty to decide the issue based on the arguments and record of *this* case, not comments taken out of context in a different case"], original italics.) Nor is the federal court's opinion

accepting that concession entitled to greater consideration than any other circuit opinion. Such an opinion may be less persuasive because it may be less analytically rigorous in light of the concession. In any event, we disagree with *Parle* to the extent that it suggests that a violation of a statutory privilege constitutes a per se federal constitutional violation.

The Court of Appeal also relied extensively on *In re Lifschutz* (1970) 2 Cal.3d 415 to support its conclusion that a violation of a statutory privilege necessarily constitutes a violation of the federal Constitution. In *Lifschutz*, a therapist was jailed for contempt for failing to be deposed in a suit in which his patient was the plaintiff. (*Id.* at pp. 420-421.) Despite the applicability of the patient-litigant exception in Evidence Code section 1016, the therapist claimed that the psychotherapist-patient privilege must be absolute for therapy to be effective. (*Id.* at p. 421.)[2] This Court was called upon to decide "whether the Legislature, in attempting to accommodate the conceded need of confidentiality in the psychotherapeutic

---

[2] Evidence Code section 1016 provides:

> There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:
>
> (a) The patient;
>
> (b) Any party claiming through or under the patient;
>
> (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
>
> (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

process with general societal needs of access to information for the ascertainment of truth in litigation, has unconstitutionally weighted its resolution in favor of disclosure by providing that a psychotherapist may be compelled to reveal relevant confidences of treatment when the patient tenders his mental or emotional condition in issue in litigation." (*Id.* at pp. 422-423.)

This Court first determined that the patient-litigant exception did not infringe upon the psychotherapist's constitutional rights to privacy nor did it impair his constitutional right to the practice of his profession. (2 Cal.3d at pp. 423-427.) This Court then considered whether the therapist could assert the privilege on his patient's behalf. (*Id.* at p. 429.) It concluded that a therapist "may in some circumstances assert the statutory privilege of his patient," but he "cannot assert his patient's privilege if that privilege has been waived or if the communication in question falls within the statutory exceptions to the privilege." (*Id.* at pp. 429-430.) According to the defendant seeking to depose the therapist, *any* communication between the plaintiff and the therapist "lost its privileged status because the plaintiff has filed a personal injury action in which he claims recovery for "mental and emotional distress.'" (*Id.* at pp. 430-431.) Thus, "[t]o avoid the necessity for further contempt proceedings or delaying appellate review in the instant case, [this court] considered whether defendant has accurately identified the proper reach of the patient-litigant exception." (*Id.* at p. 431.)

In concluding that the patient-litigant exception allows only a "limited inquiry" into those matters "directly relevant" to the litigation, this court considered the patient's expectations of confidentiality in therapeutic relationships, against Evidence Code section 1016's "narrowly tailored provision" which "serves the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings." (2 Cal.3d at pp. 431-432.) The Court observed that a

"patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage." (*Id.* at p. 431.)

The Court of Appeal gave undue weight to this observation. Although *Lifschutz* suggests that a therapy patient has a constitutional right to informational privacy, it did not consider whether a violation of an otherwise constitutional state statutory privilege necessarily violates that right to privacy. "'It is axiomatic that cases are not authority for propositions not considered.' [Citation]." (*People v Jennings* (2010) 50 Cal.4th 616, 684.) As discussed above, the erroneous disclosure of statutorily privileged information establishes only a violation of state statutory law, and *Lifschutz* does not contradict that principle. At most, *Lifschutz* suggests that a patient might have a separate constitutional right to privacy that may be violated by the release of private information—regardless of whether that information also falls within a statutory privilege.

The Ninth Circuit has recognized the distinction between private and privileged, holding that medical information may be privileged from introduction as evidence even where there is a duty to disclose it to the state. (*United States v. Chase* (9th Cir. 2003) 340 F.3d 978, 982 ["At the outset, we differentiate two distinct concepts: confidentiality and testimonial privilege. By 'confidentiality,' we refer to the broad blanket of privacy that state laws place over the psychotherapist-patient relationship. By 'privilege,' we mean the specific right of a patient to prevent the psychotherapist from testifying in court"].)

Similarly, in *ACLU v. Mississippi* (5th Cir. 1990) 911 F.2d 1066, the court of appeals recognized a right to privacy in information that was not necessarily covered by an evidentiary privilege. In *ACLU*, the plaintiffs brought a suit to prevent the disclosure of private information gathered by

the Mississippi State Sovereignty Commission, which was the state's secret intelligence arm devoted to the perpetuation of racial segregation. (*Id.* at p. 1068.) Much of the commission's sensitive and personal information about individuals had been gathered in violation of the individuals' constitutional rights to privacy. (*Id.* at p. 1069.) The circuit court used a balancing test to determine whether the disclosure of the private information would further violate those privacy rights. (*Id.* at p. 1070.) However, there was no allegation that the private information necessarily fell into a particular statutory privilege; examples included detailed investigations into individual's family lineage to determine the number of non-White ancestors, as well as reports of those engaging in financial improprieties, and of those with extreme political and religious views. (*Id.* at pp. 1068, fn. 1, 1070; see also *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 371-372 ["Under California law, privileges are strictly statutory. . . . Characterizing information as confidential from public inspection is not the equivalent of establishing a privilege in a legal proceeding"].)

Thus, while the disclosure of certain records may violate a right to privacy but not the privilege, so too may the disclosure of therapeutic records violate a statutory privilege but not necessarily a constitutional right to privacy.

C. The Release of the Records Did Not Violate a Federal Privacy Right Independent of the Statutory Privilege

Whether a violation of the privilege also violates a federal constitutional right to informational privacy can be determined only by balancing the patient's interest in confidential communication with his therapist against the state's compelling interest in protecting the public from sexually violent predators. (See *People v. Martinez*, *supra,* 88 Cal.App.4th at pp 474-485 [separately considering whether release of

psychiatric reports violated state constitutional right to privacy and state statutory privilege].) Most judicial opinions that have recognized or assumed a constitutional right to informational privacy have balanced the government's interest in obtaining the private information against the individual's privacy interest. (See, e.g., *NASA v. Nelson*, *supra*, at pp. 757-760; *Seaton v. Mayberg* (9th Cir. 2010) 610 F.3d 530, 539.) "Various courts have developed slightly different tests to determine whether encroachment upon an individual's right to privacy rises to the level of a constitutional violation. [Citations.] In essence, however, all courts agree that the constitutionality of a government action that encroaches upon the privacy rights of an individual is determined by balancing the nature and extent of the intrusion against the government's interest in obtaining the information it seeks." (*United States v. District of Columbia* (D.C. Dist. 1999) 44 F.Supp.2d 53, 60-61.)

In *F.E.R. v. Valdez* (10th Cir. 1995) 58 F.3d 1530, patients of a psychiatrist investigated for Medicaid fraud instituted a civil rights action against the state, alleging that the state improperly seized their medical records during the service of a search warrant in violation of their privacy rights. (*Id.* at p. 1532.) In determining whether the plaintiffs had established a constitutional violation the court considered: "(1) whether the Patients have a legitimate expectation of privacy in their psychiatric records, (2) whether disclosure of this information served a compelling state interest, and (3) whether the state could have achieved its objectives in a less intrusive manner." (*Id.* at p. 1535; see also *NASA v. Nelson*, *supra*, at pp. 757-760; *Seaton v. Mayberg* (9th Cir. 2010) 610 F.3d 530, 539.)[3]

---

[3] Similarly, to prove a violation of the state constitutional right to privacy, "one must establish a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct

(continued...)

Although appellant might have an expectation of privacy in his therapeutic records, as a parolee his reasonable expectation of privacy was diminished for the particular records generated as part of parole-mandated therapy. Appellant was aware, at the very least, that his psychiatrist would be permitted to report as reasonably necessary to his parole officer, so that the parole officer could monitor his compliance with his parole conditions. (*People v. Smith* (2009) 172 Cal. App. 4th 1354, 1361 ["In California, a parolee remains in the legal custody of the Department of Corrections and Rehabilitation through the balance of his sentence and must comply with all of the terms and conditions of parole . . . . He is on notice that his activities are being routinely and closely monitored, and indeed, that his own conduct gave rise to the compelling need for such supervision. [Citation.] His expectation of privacy, therefore, is 'severely diminished.' [Citations]".)

This severely diminished expectation of privacy must be balanced against two compelling state interests—protecting the public from dangerous predators, and insuring "that truth is ascertained in legal proceedings in its courts of law." (*Caesar v. Mountanos* (9th Cir. 1976) 542 F.2d 1064, 1069.) "The problem targeted by the [SVPA] is acute, and the state interests—protection of the public and mental health treatment—are compelling." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20.)

The Court of Appeal in effect rejected this compelling state interest, stating that, because in its view appellant's therapeutic records did not fall

---

(...continued)
constituting a serious invasion of the privacy interest. [Citation.] . . . [E]ven if one establishes these elements, a constitutional violation may still not be found where the invasion is justified by competing or countervailing privacy and nonprivacy interests." (*People v. Martinez*, *supra*, 88 Cal.App.4th at p. 474, citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-40.)

within an exception to the privilege, the state's compelling interest in prosecuting SVP cases could not outweigh appellant's privacy rights. (Slip Opn. at p. 34 ["And if the state's interests are not strong enough to outweigh the statutory protection for privacy, we do not consider those interests to be sufficiently compelling to outweigh the constitutional protection"].) That analysis improperly conflates two issues—whether there was a violation of the privilege and whether there is inherent in the SVP scheme a compelling state interest. "The privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206.) However, the fact that the Legislature has not yet created a more specific exception for the challenged records does not diminish its compelling state interest in prosecuting SVPs generally, nor does it suggest that in striking a constitutional balance, the compelling state interest must be found in the legislatively mandated privileges. Indeed, the Court of Appeal recognized, in determining whether the privilege had been violated, that

> one could reasonably argue that the general policy favoring confidentiality between patient and psychotherapist is outweighed by the compelling public interest in protection from SVPs and by the benefit at an SVP trial of having a comprehensive assessment of defendant's mental condition based on all mental health records and relevant testimony, including records of therapy ordered as a condition of probation or parole. However, in deciding whether to allow discovery of material that is presumptively privileged, the court does not simply determine whether the public benefits of disclosure outweigh the policy behind the privilege. . . . [W]here the claimant establishes that the privilege is applicable, the opponent must show that the material sought was not confidential, the claimant waived the privilege, or the material comes within a statutory exception.

(Slip Opn. at pp. 18-19.)

The Court of Appeal recognized that the state's compelling interest in committing dangerous individuals might outweigh appellant's need for privacy, but that it could not use such a balancing test to create implied exceptions to the privilege. However, when it subsequently recognized that a balancing test was appropriate to determine whether there was a federal constitutional violation (slip opn. at p. 32), it found no compelling interest because the privilege did not apply. Such circular reasoning negates the constitutional balancing test entirely.

Instead, given the state's compelling interest in protecting the public and maintaining confidence in the results of its legal proceedings and appellant's severely diminished privacy interest in his parole-mandated therapy records, the constitutional balance tips sharply in the state's favor.

Moreover, the state could not have gathered the information in a less intrusive manner. The experts in SVP cases are tasked with diagnosing a defendant's mental disorder and predictions about his likelihood of reoffense. To make those determinations, the experts need as much information about a defendant's history—personal, criminal, psychological, institutional—as possible. Each piece of information considered by the experts increases the reliability of their opinions. Moreover, the jury must assess the credibility of those expert opinions, and the more information it can consider regarding the basis for the experts' opinions—including the defendant's history and his personal statements to a therapist—the more reliable its verdict. The release of the entirety of parole-mandated therapeutic records increases the reliability of the SVP verdict, and thus, more limited disclosure impinges the state's interests in correctly confining only those individuals who pose a substantial danger to the community.

The Court of Appeal suggested that, because the issue at the SVP trial was whether the defendant *currently* posed a danger if released, the experts' SVP evaluations "were the most relevant and probative evidence

concerning current dangerousness and reduced the need for unlimited access to less current psychological records." (Slip Opn. at p. 33.) As previously discussed, however, an expert's opinion that a defendant currently poses a danger is based on evaluations of a patient's *entire* history, from the most recent to the distant past. In general, the more information provided to the experts, the more reliable their conclusions.

In sum, even if a federal right to informational privacy otherwise protected appellant from unjustified and arbitrary disseminations of his state-mandated therapy records, the state's compelling interest in protecting the public and ensuring the reliability of verdicts in its legal proceedings outweighed appellant's diminished expectation of privacy in those records. Accordingly, the proper standard of review for the purported violation of the state law privilege is the state-law test articulated in *Watson*.

D. Any Error Was Harmless Under Either Standard of Review

Even if a federal constitutional violation resulted from the admission of privileged therapeutic information through the testimony of Dr. Atkinson, the error was harmless under *Chapman* as regards the issues decided by the jury at the SVP trial.

The jury was required to find that appellant suffered from a diagnosed mental disorder, that he was likely to reoffend, and that materially changed circumstances arose after the earlier finding that he was not an SVP. (8 RT 1466.) Ignoring the testimony of Dr. Atkinson, the remaining evidence demonstrated that in April 1975, appellant was working as a gardener. (1 RT 101.) He was mowing the lawn at a home where a five-year-old girl lived. (1 RT 101.) While there, appellant was seen hugging the girl, and when he let go, he was observed with an erection. (1 RT 101.) According to the girl, appellant was whispering obscenities in her ear while he was

hugging her. (1 RT 101.) Appellant was convicted of soliciting a lewd act with a minor. (1 RT 101.)

In April 1977, appellant was mowing the lawn at a home where seven-year-old Tina lived. (1 RT 104.) After finishing the lawn, Tina's mother invited appellant to come inside and give her his telephone number so she could pay him later. (1 RT 105.) Once inside, appellant asked to use the telephone. (1 RT 105.) Appellant pretended to make a telephone call, making Tina's mother suspicious. (1 RT 105.) Tina's mother called her brother to come help her and went outside to wait for him. (1 RT 105.) When she returned she found appellant on the couch touching Tina's buttocks and vaginal area over her clothes. (1 RT 105-106.) Appellant was convicted of lewd and lascivious conduct with a minor. (1 RT 102.)

In August 1994, appellant was at his sister's house for a family gathering. (1 RT 115.) Sometime during the party, a friend of appellant's sister put her four-year-old daughter to sleep in one of the bedrooms. (1 RT 115.) Appellant was subsequently found in the bedroom rubbing the child's vagina while she slept. (1 RT 115.) He was convicted of lewd and lascivious conduct with a minor. (1 RT 115.)

Appellant's parole was twice violated for alcohol consumption. (3 RT 447-453.) His parole was also violated because he had been near a playground, and had been at his mother's house when his sister's children were present. (3 RT 462-488.)

Dr. Thomas MacSpeiden and Dr. Jack Vognsen evaluated appellant in late 2006. Both doctors diagnosed appellant with pedophilia, and believed that the disorder impaired his emotional and volitional capacity. (1 RT 133; 4 RT 732-734.) Dr. MacSpeiden also diagnosed appellant with alcohol dependence and borderline intellectual functioning. (1 RT 84.) Dr. Vognsen diagnosed appellant with alcohol abuse and mild mental retardation. (1 RT 474.)

Both doctors believed that appellant was likely to engage in sexually violent predatory criminal acts as a result of his diagnosed mental disorders. (1 RT 174; 4 RT 764-765.) They each evaluated appellant's risk of reoffense using an actuarial risk formula: the Static 99. (1 RT 181; 4 RT 755-756.) Appellant received a score of seven on the Static 99. (1 RT 181; 4 RT 755-756.) A score of six or above on the Static 99 represents a 39 percent risk of reconviction within five years, a 45 percent risk of reconviction within 10 years, and a 52 percent risk of reconviction within 15 years. (2 RT 219-220; 4 RT 756.)

Those doctors testified that the Static 99 was only one instrument for assessing the likelihood of reoffense, and that the Static 99 underestimates the risk of reoffense, because it only provides the likelihood of reconviction. (1 RT 180, 184; 4 RT 757-758.) The doctors considered other static and dynamic factors which affect appellant's risk of reoffense. (2 RT 245-260; 4 RT 757-758.) Both doctors pointed out that appellant's low intellectual functioning, when combined with the pedophilia, makes him more dangerous because appellant has trouble learning what he needs to learn in order to control his urges. (1 RT 145; 4 RT 731.)

Both doctors also accepted as true, based on the prior jury verdict, that appellant was not likely to reoffend in 2004 when he was released on parole, and found appellant's behavior on parole to constitute significantly changed circumstances in determining his likelihood of reoffense. (1 RT 78-79; 4 RT 734-735.) Both doctors believed that appellant's four parole violations since 2004 demonstrated his decreasing control over his behavior. (1 RT 162; 4 RT 740.) Dr. Vognsen was also concerned that appellant's mother would be appellant's main support if he were out of custody, and appellant's mother enabled appellant's bad habits. (4 RT 745.) When appellant was arrested by his parole agent, his mother said, "I

don't see what the problem is. He just comes here, has a few beers with us and watches the kids." (4 RT 745.)

At trial, appellant admitted that he committed his prior sexual offenses, and testified that it was bad to touch the girls in the way he did. (4 RT 669, 671.) He admitted that he knew he was not supposed to drink alcohol while on parole, because it would "give him visions of little kids." (4 RT 667.) He also knew he was not supposed to be near playgrounds or in a house with children. (4 RT 667-668.)

Dr. MacSpeiden specifically stated that he did not review any of the records from the Atkinson Center before he completed his evaluation. (1 RT 168.) Thus, even without reviewing the records he believed that appellant met the SVP criteria. The records from the Atkinson Center simply "corroborat[ed]" his opinion. (1 RT 170.) Similarly, Dr. Vognsen completed his report in which he concluded appellant was an SVP on October 25, 2006, nearly a year before the court released appellant's parole-mandated therapy records. (4 RT 704.) Even without the records, Dr. Vognsen believed that appellant met the SVP criteria.

As the Court of Appeal pointed out, appellant claims that he was prejudiced primarily "by only one piece of information: his statement to McAndrews that between the ages of 14 and 37, he molested 16 children." (Slip Opn. at p. 38.) Any potential for prejudice from that statement was severely diminished by the fact that appellant had been previously convicted of molesting children on three occasions, and both prosecution experts testified that these types of sex crimes are often underreported. (1 RT 183; 4 RT 757.) The jury was fully aware that appellant was a repeat child molester—whether he molested children three times or 16 times, such a pattern was a manifestation of his mental disorder, and increased his risk of reoffending if released. Indeed, both Vognsen and MacSpeiden found

appellant to qualify as an SVP based on the three known molestations, without having known about his admission to McAndrews.

Moreover, there was extensive cross-examination on the reliability of appellant's statements made on the Abel questionnaire. (See e.g. 2 RT 314-338; 4 RT 597-615.) One defense expert, Dr. Derning, testified appellant's low IQ made it unlikely that he understood the questions posed in the Abel test or the question that produced the statement he had molested 16 different children. (6 RT 1075-1077.) Similarly, defense expert, Dr. Abbott, testified that appellant did not have the "verbal skills to understand or comprehend" any of the tests given at the Atkinson Center. (7 RT 1201-1205.)

In sum, the one statement made to Dr. McAndrews was unnecessary to the experts' conclusions, and was extensively attacked as unreliable at trial. Much of the remaining evidence was undisputed—the evidence of appellant's prior convictions, the prior finding that he was not an SVP, and his subsequent failure to comply with parole conditions. Two defense experts provided "innocent" explanations of the parole violations. (See 6 RT 1035-1037, 1088, 1101; 7 RT 1178-1197.) The jury assessed the credibility of that testimony and adopted the opinion of the prosecution experts that the parole violations were material changes in the circumstances that demonstrated an increased likelihood of reoffense. (See *Turner v. Superior Court* (2003) 105 Cal.App.4th 1046, 1060.)

The primary disputed issue was the experts' interpretation of the importance of the parole violations. It is clear beyond a reasonable doubt that one statement regarding appellant's pre-parole activities did not contribute to the jury's verdict. Any error was harmless under either the *Chapman* or the *Watson* standard.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: June 23, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General

BRIDGET BILLETER
Deputy Attorney General
Attorneys for Respondent

SF2011200819
10706145.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,007 words.

Dated: June 23, 2011

KAMALA D. HARRIS
Attorney General of California

BRIDGET BILLETER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Ramiro Gonzales***
No.: **S191240**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 23, 2011, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Jean F. Matulis
Attorney at Law
P.O. Box 1237
Cambria, CA 93428
(2 copies)

Attn: Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 23, 2011, at San Francisco, California.

Tan Nguyen
Declarant

Signature

SF2011200819
20476246.doc