IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. IGNACIO GARCIA, Defendant and Appellant.	NO. S218197 COURT OF APPEAL (H039603.) (Santa Clara No.: C1243927.)

APPELLANT'S BRIEF ON THE MERITS

PETITION FROM THE SUPERIOR COURT OF SANTA CLARA COUNTY, THE HONORABLE HECTOR RAMON, JUDGE, PRESIDING

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vs.	]	(H039603.)
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	]	(Santa Clara No.:
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Defendant and Appellant.	]	
	]	

APPELLANT'S BRIEF ON THE MERITS

STATEMENT OF THE ISSUE

By its order dated July 16, 2014, this court has directed that the following issues to be briefed and argued:

> Are the conditions of probation mandated by Penal Code section 1203.067, subdivision (b), for persons convicted of specified felony sex offenses - including waiver of the privilege against self-incrimination, required participation in polygraph examinations, and waiver of the psychotherapist-patient privilege - constitutional?

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STATEMENT

A. The Conviction and the Probation Conditions

On January 15, 2013, Garcia pled no contest to two section 288, subdivision (a) charges. On April 24, 2013, the court suspended the sentence, imposed a one year county jail term which was deemed satisfied, and granted probation for three years. (2RT 22-23.)

The disputed probation conditions were as follows:

Probation condition number 12:

> The defendant shall waive any privilege against self-incrimination and participate in polygraph examinations, which shall be part of the sex offender management program. . . . (2RT 24-25; CT 55.)

Probation condition number 13:

> The defendant shall waive any psychotherapist-patient privilege to enable communication between the sex offender management professional and the Probation Officer. . . . (2RT 25; CT 55.)

B. Court of Appeal Opinion

The Majority Opinion ("Opinion") held the state could require the probationer to answer questions as part of the sex offender management program and polygraph examinations, but the state would be prohibited from using those statements against the probationer in a separate criminal prosecution. (Opinion 5.) The Opinion construed the Fifth Amendment

waiver as only applying "to the probationer's participation in the sex offender management program." (Opinion 5, fn. 6.) The Opinion found that the waiver of the Fifth Amendment privilege, enforced by the threat of the violation of probation created, the "classic" penalty situation, which prevented probationer's statements from being used against him in a criminal proceeding either directly, or through subsequent use of the statement. (Opinion 7, citing *Minnesota v. Murphy* (1984) 465 U.S. 420, 435 & fn. 7; Opinion 12, fn. 9.) Thus, the Opinion found the waiver of the Fifth Amendment right[1] "will never result in a violation of the defendant's Fifth Amendment rights." (Opinion at 17.)

In addition, the Opinion held the "right against self-incrimination" cannot be violated "until statements obtained by compulsion are *used* in criminal proceedings against the person from whom the statements were obtained." (Opinion 13 (emphasis in the original), citing *Spielbauer* v. *County of Santa Clara* (2009) 45 Cal. 4th 704, 727; see also Opinion 9-10; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1120; *Chavez v. Martinez* (2003) 538 U.S. 760, 767-769.)

The Opinion viewed the waiver provision as "critical" because it

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The Opinion linguistically referred to the Fifth Amendment waiver condition as the "subdivision (b)(3) condition." (Opinion at 17.)

prevents a probationer from refusing to answer questions on self-incrimination grounds. (Opinion 17.)

> The Legislature could reasonably conclude that a sex offender who has committed additional unreported sex offenses generally poses a significantly greater risk to the public if he or she is not incarcerated. Similarly, the state has a compelling interest in discovering whether the sex offender is committing additional offenses while on probation. By requiring every sex offender granted probation to make full disclosures and to give up any privilege to refuse to answer the polygraph examiner's questions, the state greatly enhances its ability to manage the serious risks posed by sex offenders who remain free in the community. (Opinion 17.)

The Dissent found that "the Fifth Amendment waiver required by Penal Code section 1203.067, subdivision (b)(3) [is] invalid on its face," and that "the Fifth Amendment does more than permit a defendant to refuse to testify against himself in a criminal trial. It also "'privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" (Dissent at 1-2, citing *Murphy v. Minnesota* (1984) 465 U.S. 420, 426.)

The Dissent would have stricken the words "Waiver of any privilege against self-incrimination and" from subdivision(b)(3). (Dissent at 10.)

SUMMARY OF THE ARGUMENT

Appellant disagrees with the Opinion which upheld the probation

waiver of the Fifth Amendment for five separate reasons. First, the Opinion failed to examine the specific language of the provision, rendering an interpretation directly at odds with the actual words of the statute.

Secondly, a probation condition mandating a waiver of the Fifth Amendment under a threat of a probation violation violated the Fifth Amendment under long standing federal and state law.

Third, the Opinion's rationale centered upon the "core" Fifth Amendment right and not the prophylactic right to assert the privilege, that is, the underlying right which protected the Fifth Amendment right. The authorities relied upon by the Opinion, by contrast, were only directed to claims of a violation of the "core" Fifth Amendment right.

Fourth, and perhaps a subset of the third reason, the Opinion failed to address the significant factual differences between the waiver cases that it cited and the waiver in this case. This statute constitutes a widespread assault on the Fifth Amendment right of probationers to which there is no comparable authority, except *State v. Eccles* (Ariz. 1994) 179 Ariz. 226, 227-228, which is all but identical to the present matter. *Eccles* overturned the waiver, a decision the Opinion did not "accept." (Opinion 9.)

Fifth, as the high court observed in *Murphy*, the Fifth Amendment already allows the state to require a probationer to participate in treatment

and answer questions truthfully. (*Minnesota v. Murphy*, *supra*, 465 U.S. at p. 427.) Thus, the Fifth Amendment waiver was overbroad and unnecessary. (*Ibid.*)

Facial vagueness and overbreadth challenges are reviewed de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) A vague or overbroad probation condition may be stricken or, if possible, modified to lawfully achieve an intended legitimate purpose. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1157; *In re Victor L.* (2010) 182 Cal.App.4th 902, 916, 921.)

I. THE TRIAL COURT'S IMPOSITION OF PROBATION CONDITIONS PURSUANT TO PENAL CODE SECTIONS 1203.067(b)(3) AND (4), SPECIFICALLY 12 AND 13, VIOLATED GARCIA'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE 5th and 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Reviewing Courts Should not Reinterpret Legislative Provisions that are, as Here, Clear and Unambiguous

Subdivision (b)(3) of section 1203.067 requires a "waiver of any privilege against self-incrimination ...." That is as blunt and unambiguous as the English language is capable of being, encompassing a complete waiver of immunity under the Fifth Amendment. By use of the word "any" to modify the term "privilege," its clear meaning precluded any attempts by a probationer, present and future, to seek protection under the self-incrimination clause for compelled statements made during the sex

offender management program. Once the privilege against self-incrimination has been waived, moreover, there is no right to direct or derivative use immunity. (*Chavez* v. *Martinez, supra,* 538 U.S. at p. 769, fn. 2 (plur. opn. of Thomas, J.)["Once an immunity waiver is signed, the signatory is unable to assert a Fifth Amendment objection to the subsequent use of his statements in a criminal case, even if his statements were in fact compelled.")

"If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Schutte & Koerting, Inc.* v. *Regional Water Quality Board* (2007) 158 Cal.App.4th 1373, 1384.) When interpreting statutes, appellate courts "follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law .... If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. [Citations.] If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs.' [Citation.]" (*Stephens* v. *County of Tulare* (2006) 38 Cal.4th 793, 801–802.)

The statute requires a "waiver of any privilege against self-incrimination." (§ 1203.067, subd. (b)(3).) Basic statutory construction requires any interpretation of the phrase "any privilege against

self-incrimination" be in accord with the well-established definition of that privilege as set forth in Fifth Amendment jurisprudence:

> [W]hen a word used in a statute has a well-established legal meaning, it will be given that meaning in construing the statute. This has long been the law of California: 'The rule of construction of statutes is plain. Where they make use of words and phrases of a well-known and definite sense in the law, they are to be received and expounded in the same sense in the statute.'" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19, italics omitted, quoting *Harris v. Reynolds* (1859) 13 Cal. 514, 518.)

The privilege against self-incrimination is well established and definite under the Fifth Amendment. Thus, the plain language of the statute unambiguously includes a waiver of the probationer's rights under the self-incrimination clause for any statement made during the course of the sex offender management program.

B. The Presumption of Statutory Intent Cannot Displace Established Federal and State Constitutional Law

The Opinion never suggested any ambiguity as to the condition's language, but nevertheless made the following finding:

> This probation condition does not purport to prohibit a probationer from exercising his or her privilege against self-incrimination outside of the sex offender management program. "[I]f reasonably possible the courts must construe a statute to avoid doubts as to its constitutionality." (*People* v. *Smith* (1983) 34 Cal.3d 251, 259].) As there could be doubts about the constitutionality of imposing a probation condition requiring an unlimited waiver of a probationer's privilege against self-incrimination, we construe the statute's waiver

> provision, consistent with the language of the entire statute, to be limited to the probationer's participation in the sex offender management program. (Opinion 5, fn. 6.)

First, the Opinion's finding that the provision "does not purport to prohibit a probationer from exercising his or her privilege against self-incrimination outside of the sex offender management program" failed to address the plain language of the statute. (*Ibid.*) Secondly, the Opinion did not refer to any words or phrases "'consistent with the language of the entire statute" to support such a view.

Third, *Smith* was dealing with a provision that *was* ambiguous, whether the provision that "relevant evidence shall not be excluded in any criminal proceeding . . ." applied to cases tried before the enactment of Proposition 8. (*People* v. *Smith, supra,* 34 Cal.3d at p. 257.) Since the statute in *Smith* was silent on this issue, it was "possible" for *Smith* to make a constitutionally viable interpretation. There was no similar ambiguity here – the language was as straightforward and unambiguous as it was possible to be.

Fourth, the Opinion's construction did not address derivative use of any statements, arguing separately that derivative use of these statements could not be utilized later because of the "classic penalty" exception, citing *Murphy, supra,* 465 U.S. at p. 435.) Yet, the Opinion failed to address

sections of *Murphy* which flatly disallowed such Fifth Amendment waivers in a probation context:

> In each of the so-called "penalty" cases, the State not only compelled an individual to appear and testify, but *also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions "capable of forcing the self-incrimination which the Amendment forbids."* (Citation). In most of the cases, the attempt to override the witnesses' privilege proved unsuccessful, and the Court ruled that the State could not constitutionally make good on its prior threat. (Citations). *These cases make clear that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself."* (*Murphy, supra*, 465 U.S. at p. 435 (emphasis added).)

The presumption the legislature intended to follow the law cannot override established constitutional precedent. Since the condition's Fifth Amendment waiver was unambiguous and unconstitutional, the Minority Opinion's remedy should be applied, that this court should strike the words "Waiver of any privilege against self-incrimination and" from the subdivision. (Dissent at pp. 1-2, 10.)

B. The Right to Claim the Fifth Amendment in a Probation Situation was Established by the United States Supreme Court in *Minnesota* v. *Murphy*

The United States Supreme Court has held the protection of the self-incrimination clause, unlike the Fifth Amendment, applies to both prisoners and probationers. "A defendant does not lose this protection by

reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." (*Murphy*, *supra*, 465 U.S. at p. 426.) A blanket waiver of any privilege against self-incrimination would deprive a probationer of the full spectrum of his rights under the self-incrimination clause—even those protections enjoyed by prisoners in custody. (*Baxter* v. *Palmigiano* (1976) 425 U.S. 308, 316 [prison inmates compelled to testify at disciplinary proceedings must be offered immunity and may not be required to waive it]; *McKune v. Lile* (2002) 536 U.S. 24, 36 (plur. opn. of Kennedy, J.) ["The privilege against self-incrimination does not terminate at the jailhouse door ...."].)

In *Murphy*, Marshall Murphy was prosecuted for criminal sexual conduct. He pleaded guilty to false imprisonment and received three years' probation. (*Murphy*, *supra*, 465 U.S. at p. 422.) The terms of Murphy's probation required him to participate in a treatment program for sexual offenders, to report to his probation officer as directed, and to be truthful with the probation officer "'in all matters.'" (*Ibid.*)

In the course of his treatment, Murphy confessed to raping and murdering a teenage girl seven years earlier. (*Id.* at p. 423.) His treatment

counselor gave this information to the probation officer, who then confronted Murphy with it. (*Murphy*, *supra*, 465 U.S. at pp. 423–424.) Murphy confessed to the probation officer as well, who in turn told the police. (*Id.* at p. 424.) Murphy never invoked the Fifth Amendment and was later indicted for first degree murder. (*Id.* at p. 425.)

The high court found Murphy had voluntarily waived his right against self-incrimination. (*Id.* at p. 429.) *Murphy* first held that the privilege against self-incrimination applies to probationers. (*Murphy*, *supra*, 465 U.S. at p. 426.) The High Court held that the probation condition requiring Murphy to answer questions truthfully did not, by itself, controvert this right; rather, his obligations were no different from those of any other witness in a proceeding. "The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege." (*Murphy*, *supra*, 465 U.S. at p. 427.)

The court then distinguished Murphy's circumstances from cases in which "the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege ...." (*Id.* at p. 434, quoting *Lefkowitz v. Cunningham* (1977) 431 U.S. 801, 805 ["'a State may not impose substantial penalties because a witness elects to

exercise his Fifth Amendment right not to give incriminating testimony against himself.'"]; see *Sanitation Men v. Sanitation Comm'r* (1968) 392 U.S. 380, 283–284; *Gardner* v. *Broderick* (1968) 392 U.S. 273, 278–279.) "The threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony." (*Murphy*, *supra*, 465 U.S. at p. 435.) Because the state did not punish Murphy for relying on the privilege or induce him to forgo it, the court found no Fifth Amendment violation. (*Murphy*, *supra*, 465 U.S. at p. 436.)

The court also found Murphy could not have reasonably believed that he could be punished for invoking the privilege because the law clearly prohibited such punishment. (*Id.* at p. 438.)

> Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. It is not surprising, then, that neither the state court nor any state officer has suggested otherwise. (*Murphy*, *supra*, 465 U.S. at p. 438.)

Thus, *Murphy* explicitly protects a probationer's right to invoke the Fifth Amendment.

This court, following United States Supreme Court precedent, has also declared that "[o]ne cannot be forced to choose between forfeiting the privilege [against self-incrimination], on the one hand, or asserting it and

suffering a penalty for doing do on the other." (*Spielbauer* v. *County of Santa Clara* (2009) 45 Cal.4th 704, 714, citing *Malloy* v. *Hogan* (1964) 378 U.S. 1, 8.) "[I]ncriminating answers may be ... compelled, without violating the privilege, when the person to be examined receives immunity 'coextensive with the scope of the privilege' – i.e., immunity against both direct and 'derivative' criminal use of the statements.'" (*Spielbauer, supra,* 45 Cal.4th at pp. 714-715, citing *Kastigar v. United States* 1972) 406 U.S. 441, 449-462.)

C. The Issue Presented by this Probation Condition Concerned the Accompanying Prophylactic Rights that Protect the Fifth Amendment

The Opinion relied on language in *Maldonado* v. *Superior Court, supra,* 53 Cal.4th 1112 for the proposition that the Fifth Amendment is not violated until a defendant's statements are used against him in a criminal proceeding. (Opinion 9-10.) The Opinion's reliance on this language ignores the analytical distinction between a violation of the "core" Fifth Amendment right and a violation of the "prophylactic" protection prohibiting a compelled waiver of immunity as explained in *Maldonado* and *Chavez.*

In *Maldonado,* this court stated that "a 'core' Fifth Amendment violation is completed, not merely by official extraction of self-incriminatory answers from one who has not waived the privilege, but

only if and when those answers are *used in a criminal proceeding* against the person who gave them." (*Maldonado*, *supra*, 53 Cal.4th at p. 1128 (emphasis in original).) For this principle, this court relied on *Chavez*, *supra*, 538 U.S. at pp. 766–773 (plur. opn. of Thomas, J.).

In *Chavez*, the United States Supreme Court considered a civil rights lawsuit under 42 United States Code section 1983 by a plaintiff alleging a violation of the Fifth Amendment. Although the plaintiff's statements were compelled, they were never used against him in a criminal prosecution. (*Chavez*, *supra*, 538 U.S. at pp. 763–764.) Justice Thomas, writing for a plurality of justices, characterized the "core" Fifth Amendment privilege as the right not to be a "witness" against oneself in a "criminal case." (*Id.* at pp. 768–769.)

But a majority of justices also affirmed long-standing "prophylactic" or "complementary" protections under the Fifth Amendment that arise prior to and apart from a criminal proceeding. (*Id.* at p. 770 (plur. opn. of Thomas, J.); *id.* at pp. 777–778 (conc. opn. of Souter, J.).) The *Chavez* plurality noted the rule prohibiting a compelled waiver of immunity is one such protection, and is necessary to protect the "core" right against the use of compelled statements in a prosecution.

> [For example,] the *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth

> Amendment itself. (Citation). Among these rules is an evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been immunized from use and derivative use in a future criminal proceeding before it is compelled. (*Chavez, supra,* 538 U.S. at pp. 770-771 (plur. opn. of Thomas, J.), citing *Kastigar v. United States, supra,* 406 U.S. at p. 453; *Maness v. Meyers* (1975) 419 U.S. 449, 461-462.)

"By allowing a witness to insist on an immunity agreement before being compelled to give incriminating testimony in a noncriminal case, the privilege preserves the core Fifth Amendment right from invasion by the use of that compelled testimony in a subsequent criminal case." (*Chavez, supra*, 538 U.S. at p. 771, italics omitted (plur. opn. of Thomas, J.).)

Maldonado did not hold otherwise. There, this court considered a discovery rule requiring a defendant who proffered a mental incapacitation defense to submit to examination by the prosecution's mental health experts. (§ 1054.3, subd. (b)(1).) This court had no occasion to consider a compelled waiver. To the contrary, *Maldonado* explicitly based its analysis on the uncontroversial premise that the defendant maintained his Fifth Amendment immunity unless and until he voluntarily waived it by introducing his own statements into evidence at trial: "[T]he parties agree that the Fifth Amendment protects petitioner against any direct or derivative use of his statements to the prosecution examiners, except to rebut any

mental-state evidence he presents through his own experts." (*Maldonado*, *supra*, 53 Cal.4th at p. 1129, fn. omitted.) "If he decides to abandon the defense, any self-incriminating results of the examinations cannot be introduced or otherwise used against him." (*Id.* at p. 1132.)

Nothing in *Maldonado* authorizes a compelled waiver of immunity. To the contrary, this court explicitly recognized the Chavez plurality's affirmation of the so-called "prophylactic rules" (*Chavez*, *supra*, 538 U.S. at pp. 1128–1129), under the Fifth Amendment:

> The rule allowing a witness to assert the privilege prior to testifying, and to refuse to testify unless granted immunity, Justice Thomas indicated, protects the "core" Fifth Amendment privilege simply by assuring that the witness has not forfeited the right against self-incriminating use of his or her testimony in later criminal proceedings. (*Maldonado*, *supra*, 53 Cal.4th at p. 1128.)

Maldonado also acknowledged this court's prior holding, set forth at *Spielbauer*, *supra*, 45 Cal.4th at pages 714–730, that a compelled waiver of immunity could not be required even in the absence of a criminal proceeding. *Maldonado* noted, "[W]e held that in the context of a noncriminal investigation by a public employer, the employee could be compelled to answer questions about his performance of duty, even without a formal immunity agreement, so long as he was not required to surrender the immunity conferred by the Fifth Amendment itself against use and

derivative use of his statements to prosecute him for a criminal offense." (*Maldonado, supra*, 53 Cal.4th at p. 1129.)

Neither *Maldonado* nor *Chavez* purported to overturn the long-standing United States Supreme Court doctrine prohibiting compelled waivers of immunity. Regardless of whether the right against a compelled waiver is characterized as a "core right," a "prophylactic rule," or a "complementary protection," defendant has standing to assert his Fifth Amendment claim here. The *Chavez* plurality stated this explicitly: "That the privilege is a prophylactic one does not alter our penalty cases jurisprudence, which allows such privilege to be asserted prior to, and outside of, criminal proceedings." (*Chavez, supra*, 538 U.S. at p. 772, fn. 3 (plur. opn. of Thomas, J.)

The Opinion dismissed this view because appellant did "not identify any '[c]onstitutionally based prophylactic rules' that might apply here." (Opinion 13, fn. 10.) Technically, this was true since the Opinion did not grant the judicial notice request regarding the rules and regulations discussed in appellant's brief and these rules, accordingly, went unnoticed in the Opinion. (See AOB 4-5.) This court, however, on May 28, 2014, has granted the request to take judicial notice of the California Sex Offender Management Board ("CSOMB") guidelines, specifically the Sex Offender

Treatment Program Certification Requirements and the Post-Conviction Sex Offender Polygraph Standards.

Accordingly, the specific need for "constitutionally based prophylactic rules," which in any event is unchallenged under existing precedent, is properly before this court.

D. The Scope of the Fifth Amendment Waiver is Far Broader Here than in Any of the Authorities Cited in the Opinion

1. The Opinion's Decision Relied on Authorities Which had Not Faced a Fifth Amendment Waiver, Let Alone the Extensive One Here

It is essential to recognize the quantitative difference between the waiver presented in this matter compared to the narrow factual situations presented in the Opinion's supporting authorities. None of the authorities which supported the Opinion were faced with any Fifth Amendment waiver, let alone the extensive version presented here. In *Murphy* the defendant had failed to invoke a Fifth Amendment waiver. (Opinion 6-7; *Murphy*, *supra*, 465 U.S. at pp. 425-429.) In *Maldonado, supra,* 53 Cal.4th 1112, 1120, the defendant was asserting a mental defense which required waiver of the privilege, the only issue being when that waiver occurred. (Opinion 10-11.) In *Chavez, supra,* 538 U.S. 760, 767-769, the issue was whether the plaintiff could sustain a civil suit against the police for violating his Fifth Amendment right for statements never utilized against him. (Opinion 10.)

The only case remotely similar to the all-out assault on Fifth Amendment right here was the striking of a similar provision in Arizona, *State v. Eccles, supra,* 179 Ariz. at pp. 227-228, which the Opinion rejected without addressing its complications, or for that matter, the complications here. (Opinion 9.)

Nevertheless, *Eccles*, as well as this court, was faced with something entirely new in the law, creating problems and complications not present in *Murphy, Maldonado* and *Chavez.*

2. The California Regulations Regarding the Utilization of Polygraph Tests Under Probation Conditions Controlled by Penal Code section 1203.067

Section 1203.067, subdivision (b)(2), requires that any person placed on formal probation under its terms, "shall successfully complete a sex offender management program" that complies with the "standards developed pursuant to Section 9003." Section 1203.067, subdivision (b)(3) requires "Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program." Subdivision (b)(4) requires "Waiver of any psychotherapist-patient privilege" for the purpose of enabling communication between the psychiatrist and probation officer, pursuant to Section 290.09.

Pursuant to section 9003, standards were set for certification of sex

offender management programs and "sex offender management professionals." (Pen. Code § 9003, subds. (a) & (b).) Such programs include treatment of the probationer, but also include "dynamic and future violence risk assessments pursuant to Section 290.09." (§ 9003, subd. (b).) This includes continuous communication with the probation officer or parole agent about the offender's progress and his or her "dynamic risk assessment issues." (§ 290.09, subd. (c).) Section 290.09 further requires the administration of State Authorized Risk Assessment Tools for Sex Offenders (SARATSO) in two forms—the "SARATSO dynamic tool" and the SARATSO "future violence tool"—and to send the scores to the probation officer who will then send it to the Department of Justice, which then makes these scores accessible to law enforcement officials through the department's Web site. (§ 290.09, subd. (b)(2).)

In order for the counselor and polygraph examiner to be certified under section 9003, they must implement a "Containment Model" approach to managing sex offenders. (Cal. Sex Offender Management Bd., Sex Offender Treatment Program Certification Requirements (Jan. 2014) ("Sex Offender Treatment Program" at p. 6.) The model is implemented by a "Containment Team," whose members include the probation officer, the treatment provider, and the polygraph examiner. (*Id.* at p. 2.) These three,

on a regular or as-needed basis, must include other relevant individuals, which "may include" representatives of law enforcement. (Sex Offender Treatment Program at p. 6.)

The "core elements" of the model include "[a]uthoritative criminal justice system supervision and monitoring ... to exert external control over offenders. Probation and parole agencies apply pressure through clear expectations and through the use or threatened use of sanctions to ensure that the offender complies with supervision conditions, including participation in specialized treatment." (Sex Offender Treatment Program at p. 6.) The standards state that "Invocation of the Fifth Amendment right to not incriminate oneself during a sexual history polygraph cannot legally result in revocation. Invocation of the Fifth during a maintenance polygraph about current terms and conditions of supervision, however could result in revocation for failing to answer." (Sex Offender Treatment Program at p. 7.)

All polygraph examiners must meet CASOMB-promulgated certification standards, published on the CASOMB Web site. (Cal. Sex Offender Management Bd., Post-Conviction Sex Offender Polygraph Standards (June 2011) at ("Polygraph standards") at p. 1.) Examinations should last at least 90 minutes, and a probationer may be tested as

frequently as five times in one day. (Polygraph standards at p. 6.) Examiners should not administer more than four separate examinations to the same probationer in one year, "except where unavoidable or required by law or local regulation. This does not include re-testing due to a lack of resolution during an initial or earlier examination." (*Ibid.*)

Although examiners "should have the final authority and responsibility for the determination of test questions and question language," the examiner should communicate with other team members about what questions to ask. (Polygraph Standards at pp. 9–11.) The results of exams should be provided to other team members. (*Id.* at p. 12.) Furthermore, "Except as provided by law, information from the polygraph examination and test results (outcomes) should be kept confidential and provided only to those involved in the containment approach to the supervision and treatment of sex offenders." (Polygraph Standards at p. 5.) Nevertheless, the next sentence insisted that examiners "should not interfere with or circumvent the efforts of any open or ongoing investigation of a new criminal allegation." (*Id.* at p. 5.)

The types of polygraph examinations include "instant offense exams," "prior-allegation exams," "sexual history disclosure exams," and "sex offense monitoring exams," as well as subcategories of these exams.

(Polygraph Standards at p. 10.) Examiners should make a complete audio-visual or audio recording of all exams. (*Id.* at p. 25.) Furthermore, "Examiners should obtain an examinee's agreement, in writing and/or on the audio/video recording, to a waiver/release statement." The language of this "agreement" should include, among other things, "1) the examinee's voluntary consent to take the test, 2) that the examination may be terminated at any time, ... 4) that all information and results will be released to professional members of the community supervision team, 5) an advisement that admission of involvement in unlawful activities will not be concealed from the referring professionals[,] and 6) a statement regarding the requirement for audio/video recording of each examination." (*Id.* at p. 25.)

The standards advise, "Examiners should exercise caution to ensure they do not violate any rights of examinees regarding answering questions about criminal behaviors." (Polygraph Standards at p. 9.) But the document provides no description of those rights nor any explanation for how an examiner should reconcile this advice with any other standards. There is no mention of any legal training of the examiners.

These exams, moreover, have explicitly investigative components, with the polygraph examinations designed to elicit incriminating information. The polygraph examiners must "investigate and resolve" any

prior uncharged sexual offense, investigate other types of uncharged criminal conduct, and "investigate the possibility of a new offense while under supervision."

Instant offense exams may be used "to test the limits of an examinee's admitted behavior and to search for other behaviors or offenses not included in the allegations made by the victim of the instant offense." (Polygraph Standards at p. 11.) "Examiners, along with the other members of the community supervision team, should select relevant targets from their concerns regarding additional or unreported offense behaviors in the context of the instant offense." (*Ibid.*) Questions about illegal conduct are not limited to sex offenses; they may include, but are not limited to, questions about the use or distribution of illegal drugs or controlled substances. (*Id.* at p. 21.)

The prior-allegation exam is used to probe prior alleged offenses, regardless of whether the probationer was charged with these alleged offenses. "Examiners should use the Prior Allegation Exam (PAE) to investigate and resolve all prior alleged sex offenses (i.e., allegations made prior to the current conviction) before attempting to investigate and resolve an examinee's history of unknown sexual offenses." (Polygraph Standards at p. 12.) Similarly, the sexual history exams should be used "to investigate

the examinee's history of involvement in unknown or unreported offenses and other sexual compulsivity, sexual pre-occupation, or sexual deviancy behaviors." (Polygraph standards at p. 12.)

To discover "unreported victims," examiners should "thoroughly investigate the examinee's lifetime history of sexually victimizing others, including behaviors related to victim selection, victim access, victim impact, and sexual offenses against unreported persons." (Polygraph Standards at p. 13.) The sex offense monitoring exam may be used at the request of other team members "to explore the possibility the examinee may have been involved in unlawful sexual behaviors including a sexual re-offense" during the period of supervision. (*Id.* at p. 22.)

In addition to all of the above, examiners are instructed to do and ask the following:

1. Require the probationer to complete a "written sexual history document." (Polygraph Standards at p. 10, § 8.3.1.)

2. "[T]horoughly investigate the [probationer's] lifetime history of sexually victimizing others" including sexual contact with underage persons and relatives, use of violence in connection with sexual acts, or sexual offenses against incapacitated victims. (*Id.* at p. 13, § 8.3.2.)

3. Investigate the probationer's "lifetime history of sexual deviancy" including voyeurism, indecent exposure, theft of undergarments, and sexual rubbing. (Polygraph Standards at p. 15, § 8.3.3.1.)

4. Investigate other occurrences, such as possession of child pornography, sexual contact with animals, prostitution, coerced sexual contacts, stalking, and masturbation in public places. (*Id.* at p. 16, § 8.3.3.2.)

5. Investigate any prior prostitution activities, "including ever paying anyone or being paid for sexual contact (including erotic massage activities) with money, property, or any special favors. (*Id.* at p. 17, § 8.3.3.2, subd. (C).)

6. Sexual contact, illegal or not, with "unreported persons of any age, . . ." (Polygraph Standards at p. 20, § 8.4.2.3, subd. (A).)

7. Any use of pornography, including the internet and cable television. (*Id.* at p. 20, § 8.4.2.3, subd. (B).)

8. "Masturbation activities and masturbatory fantasies." (*Id.* at p.21, § 8.4.2.3, subd. (C).)

3. There are Numerous and Serious "Prophylactic" Concerns Created by Waiving the Right to the Fifth Amendment Here

The probationer is required to take lie detector tests asking these extraordinarily wide range of questions, delving into the possibility of numerous prior crimes. While the regulations disallow a probation revocation for a Fifth Amendment assertion during a "sexual history polygraph," there was no reference to informing the probationer of this, nor whether other penalties might be assessed for assertion of a Fifth Amendment right. (Sex Offender Treatment Program at p. 7.)

In any event, no reasonable probationer could be expected to understand that a "[w]aiver of any privilege against self-incrimination" does

not actually mean what it says. Likewise it would be the rare probationer who would understand that after waiving the privilege, he or she would nonetheless need to invoke it at a later time when talking with law enforcement regarding with respect to statements made under the waiver. (§ 1203.067, subd. (b)(3).) When "men [or women] of common intelligence must necessarily guess" at a condition's meaning and "differ as to its application," such a condition is vague in violation of due process. (*Connally* v. *General Const. Co.* (1926) 269 U.S. 385, 391.)

Secondly, this information will inevitably be funneled to law enforcement. The statute not only contains no language reflecting any restrictions on providing information to law enforcement officials, but other statutes require such communication. Statements made during polygraph examinations are ordinarily admissible. (Evid. Code, § 351.1, subd. (b).)

Other statutes explicitly require members of the Containment Team to reveal the probationer's statements to law enforcement for further investigation and prosecution. For example, probation officers, psychotherapists, district attorneys and police officers are all "mandated reporters" under the Child Abuse and Neglect Reporting Act. (§ 11165.7, subd. (a)(15), (18), (21) & (34).) If any of these participants acquire knowledge—or even reasonable suspicion—of any child who has been the

victim of child abuse or neglect, the participant is required to report the information to police or other qualified agencies. Failure to do so is a misdemeanor punishable by up to six months' confinement in a county jail or by a fine of $1,000 or by both. (§ 11166.)

Various standards set forth in CASOMB publications, moreover, encourage transferring such evidence to law enforcement officials. Although CASOMB standards for polygraph examiners state that information from polygraph exams "should be kept confidential and provided only to those involved in the containment approach to the supervision and treatment of sex offenders," the standards also make clear that law enforcement officials may be made part of the "Containment Team." (Sex Offender Treatment Program at p. 5.)

This creates a process whereby suspected offenses based on compelled statements—including those unrelated to the underlying offense—are effectively required to be presented to the prosecution. First, the probationer, upon threat of revocation, would be compelled to submit to a polygraph examination. The examiner would then pose a raft of questions purposely designed to ferret out both past and current sexual misconduct. The probationer would be forced to waive his privilege against self-incrimination and answer the questions. The examiner, consistent with

CASOMB standards, would then be required to share the results of the examination with the probation officer or the prosecutor. These participants, in turn, would be compelled to report to the police any information constituting reasonable suspicion that the probationer has committed any one of numerous offenses defined as child abuse and neglect.

Certainly, under these circumstances, the "prophylactic" need for a retained Fifth Amendment privilege could not be more pressing. Even if this court construed the statute in the manner suggested by the Opinion, the protection afforded a probationer would be far less than the Fifth Amendment. The Opinion construed "the statute's waiver provision, consistent with the language of the entire statute, to be limited to the probationer's participation in the sex offender management program." (Opinion 5, fn. 6.) Consequently, the direct "protection" afforded by the Opinion's "classic" penalty situation would only apply when the probationer was speaking inside "the sex offender management program." Direct immunity would not apply to later interviews with law enforcement which would require a renewed assertion of the right.

This would leave only "derivative use" protection. While this might be perceived as a huge barrier to those who prosecute such crimes, it would

be a thin reed indeed to a probationer who has confessed every conceivable crime in order to obtain therapy and probation, and to likewise evince legitimate sorrow for each offense. As a direct result of this cooperation, the probationer would hand over the existence of each crime, and every conceivable particular of it – wrapped in a most thorough confession – to some of the most brilliant legal minds in the state morally assured of their deep and profound duty to prosecute such crimes. Public support for prosecution would likely be overwhelming.

Every law is suffused with exceptions created by clever minds driven by purpose. Societal anger at those who commit sex crimes has never been higher and during such times, especially during such times, the Bill of Rights seems like an impertinent, unnecessary hindrance to the "greater" good. There may never be a more important moment for upholding the prophylactic right to assert the Fifth Amendment than there is now.

E. A Probation Condition Requiring a Waiver of the Privilege Against Self-Incrimination is Unconstitutionally Overbroad

Because the waiver of the privilege against self-incrimination imposes limitations on a probationer's constitutional rights, it must be "closely tailored" to its purposes. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

If the only purpose of the waiver is to compel the probationer to

answer questions and participate in treatment, no waiver is necessary. As the high court observed in *Murphy*, the Fifth Amendment already allows the state to require a probationer to participate in treatment and answer questions truthfully. (*Murphy*, *supra*, 465 U.S. at p. 427.)

Probationers may also be required to undergo polygraph testing, provided the questioning relates to successful completion of the therapy program and the crime for which the defendant is convicted. (*Brown* v. *Superior Court* (2003) 101 Cal.App.4th 313, 321; *People* v. *Miller* (1989) 208 Cal.App.3d 1311, 1315 ["The mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege."].

Thus, there is no conceivable need for such a waiver.

F. Requiring Participation In Polygraph Examinations Without Limitation Violates Garcia's Fifth Amendment Rights as Being Overbroad

Probation conditions requiring participation in polygraph examinations are not per se invalid. (*Brown v. Superior Court, supra,* 101 Cal.App.4th at p. 319.) *Brown* upheld the condition as reasonable because it would aid the probationer in the successful completion of his stalking therapy program. (*Brown v. Superior Court, supra,* 101 Cal.App.4th at p. 319.) The court found no Fifth Amendment violation as long as "the questions put to probationer are relevant to his probation status and pose no realistic threat of incrimination in a separate criminal proceeding." (*Id.* at p.

320.) But the court further held that the probation condition must be narrowed under *Lent* to "limit the questions allowed to those relating to the successful completion of the stalking therapy program and the crime of which Brown was convicted." (*Id.* at p. 321; *People v. Lent* (1975) 15 Cal.3d 481, 486-487; see also *People v. Miller, supra,* 208 Cal.App.3d at p. 1315 [polygraph examination must be limited to questions relevant to compliance with probation].)

Application of the *Lent* factors should lead to the same conclusion. Under *Lent*, "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality ... .' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People* v. *Lent, supra*, 15 Cal.3d at p. 486, fn. omitted.)

Here, the basic requirement that appellant participate in polygraph examinations does not run afoul of the *Lent* factors *if* the questions posed to him are reasonably related to his successful completion of the sex offender management program, the crime of which he was convicted, or related

criminal behavior, whether past or future. The CASOMB regulations provide examples of many such questions.

As argued above and cited below, submission to a polygraph examination that requires investigation and disclosure of uncharged offenses, however, violates the Fifth Amendment. (*United States v. Antelope* (9th Cir. 2005) 395 F.3d 1128. Here, the probation condition requiring submission to polygraph examinations is similarly unlimited in its scope. As shown above, the polygraph examinations are specifically tailored to elicit incriminating information which could lead to future prosecutions.

There is no requirement that the questions be related to any criminal conduct, whether past, present, or future. Nor is there any requirement that the questions be limited to successful completion of the sex offender management program. Under the probation condition imposed here, a polygraph examiner could ask appellant anything at all, without limitation. For example, a polygraph examiner could question appellant about his medical history or personal financial matters having nothing to do with any criminal conduct. Such questions would have no reasonable connection to the crime for which he was convicted, no bearing on his completion of the treatment program, and no relevance to future criminality. Under the *Lent*

factors, allowing such questions would clearly violate overbreadth principles.

Consequently, the language of section 1203.067, subdivision (b)(3) that mandates that participation in polygraph examinations "shall be part of the sex offender management program," should be limited as required under *Lent* and *Brown*, that appellant should only be questioned about matters relating to the successful completion of the sex offender management program, the crime of which defendant was convicted, or related criminal behavior.

G. A Probation Condition Waiving the Psychotherapist-Patient Privilege is Constitutionally Overbroad and Must Be Stricken or Modified

1. Garcia's State and Federal Constitutional Right to Privacy Was Violated by this Constitutional Provision

The trial court ordered Garcia to ". . . waive any psychotherapist-patient privilege." (2 RT 25; CT 55.) Garcia contends this condition is unconstitutionally overbroad, violates his right to privacy, and should be stricken or modified.

The right to privacy is guaranteed by the Fourteenth Amendment to the United States Constitution as well as article I, section I of the California Constitution. The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy. (Cal. Const., art. I, § 1; *People v. Stritzinger* (1983) 2 Cal.3d 415, 423; *In re Lifschutz* (1970) 2 Cal.3d

415, 421.)

Although probationers have a diminished expectation of privacy than regular citizens, they do not forfeit their right to privacy and any government intrusion must be reasonable. (See, e.g., *People v. Bravo* (1987) 43 Cal.3d 600, 610 ["We do not suggest that searches of probationers may be conducted for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes. A waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons."].)

Garcia concedes the court can require disclosure of medical records concerning court-ordered treatment to the probation officer and to the court, but this does not amount to a complete waiver of the privilege. (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 695-697; *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1018-1019.)

In *In re Pedro M.* (2000) 81 Cal.App.4th 550, 554, the Court permitted the disclosure of a confidential communication between patient and psychotherapist, holding that disclosure was permitted when it was related to accomplishing the rehabilitative purpose. *Pedro M.* ruled the therapist was not precluded by the psychotherapist-patient privilege from testifying with regard to the minor's "participation and progress in the court-ordered treatment plan." (*Id.* at p. 555.)

However, *Pedro M.* also held the trial court properly limited the therapist's testimony to avoid disclosure of the following information; the details of the therapeutic sessions, any specific statements made by the minor; any advice given by the psychotherapist; and the psychotherapist's diagnosis. (*Id.*, at pp. 554-555.) Essentially, *Pedro M.* found that a complete waiver was too broad and the appropriate modification was to limit the waiver only to subjects necessary for the minor's rehabilitation.

A similar ruling was made in *In re Christopher M., supra,* 127 Cal.App.4th 684. There, disclosure to the probation officer of some records concerning court-ordered treatment was required, but the psychotherapist-patient was not entirely waived. (*In re Christopher M., supra,* 127 Cal.App.4th at pp. 695-697.) There, the minor had admitted his offenses and the court had ordered therapy as a condition of his probation. (*Id.* at p. 687.) The minor challenged the condition, arguing that it infringed on the psychotherapist-patient privilege. (*Id.* at p. 695.)

Relying on *In re Kristine W.* (2001) 94 Cal.App.4th 521, 525, *Christopher M.* emphasized the psychotherapist-patient privilege is in place to protect the defendant's right to privacy, but held the condition was valid if it reasonably limited disclosure of otherwise privileged communications to the probation officer and the court, an avoided unnecessary disclosure of those communications. (*In re Christopher M., supra,* 127 Cal.App.4th at pp. 695-696.) *Christopher M.* also held that if the minor later felt that specific disclosures of his psychotherapy

records to the court and probation officer were jeopardizing his rehabilitative progress, the juvenile court in its discretion could review that claim. (*Id.* at p. 696.)

The probation condition requiring a waiver of the psychotherapist-patient privilege is also unreasonable under *Lent* and is subject to the special scrutiny standard because, as the California Supreme Court recently reasserted, there is a federal constitutional protection against government compelled disclosure of confidential communications between a patient and his or her psychotherapist. (See *People* v. *Gonzales* (2013) 56 Cal.4th 353, 384-385.)

2. The Psychotherapist-Patient Privilege is Codified by Statute

The psychotherapist-patient privilege, moreover, is a statutory privilege that applies in both civil and criminal cases. (Evid. Code section 1014; *Story* v. *Superior* Court, supra, 109 Cal.App.4th at p. 1014. Evidence Code section 1014 provides in relevant 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." That section was enacted as a "broad, protective psychotherapist-patient privilege" in 1965, when the Legislature embraced the view "that an environment of confidentiality of treatment is vitally

important to the successful operation of psychotherapy." (*In re Lifschutz, supra,* 2 Cal.3d at p. 422; *Story* v. *Superior Court, supra,* 109 Cal.App.4th at p. 1014.) A probationer who participates in psychotherapy as a condition of probation is entitled to claim the privilege. (*Id.* at p. 1016-1017.)

Under Evidence Code section 912, the privilege can be waived so long as the waiver is not "coerced." (Evid. Code § 912.) If the privileged documents or communications are disclosed in response to the request of a government agency, no waiver occurs if the holder of the privilege takes reasonable steps under the circumstances to prevent the disclosure. (*Regents of the Univ. of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683.)

In *Regents*, the appellate court considered whether disclosure of privileged communications was free of "coercion" when, as a matter of policy, the Department of Justice advised corporations under criminal and regulatory investigation that they might avoid indictment or regulatory sanctions if they fully cooperated in the government's investigation and waived the attorney-client and work-product privileges. (*Regents, supra,* 165 Cal.App.4th at p. 683.) *Regents* held the communications remained privileged because the prior "waiver" was "coerced." The "coercion" was the Department of Justice's policy of considering a corporation's willingness

to waive the attorney-client and work product privileges when determining whether to file criminal charges against the corporation for its agents' wrongdoing. (*Regents, supra,* 165 Cal.App.4th at pp. 683-684.)

Here, a prospective probationer is coerced into waiving his or her psychotherapist-patient privilege or face being sent to state prison on a felony or county jail on a misdemeanor. In *Regents*, the holders of the privilege were merely threatened with possible criminal charges unless they agreed to waive their attorney-client and work-product privileges. In this case, the holder of the privilege (the probationer) will be further incarcerated either by a denial of probation or suffer a violation of probation unless he or she agrees to waive the psychotherapist-patient privilege. Because any purported waiver would be coerced, the condition is invalid.

3. The Policy of Reforming and Rehabilitating its Probationers Is Thwarted, Not Aided, by the Waiver of the Psychotherapist-Patient Privilege

Third, while it is recognized the state does have an interest in reforming and rehabilitating its probationers, this probation condition acts contrary to that expressed intent. (See *People* v. *Olguin* (2008) 45 Cal.4th 375, 379; Pen. Code § 1203.1(j).) Ostensibly to that end, the state is seeking a waiver of the psychotherapist-patient privilege so the probation officer may freely communicate with the psychotherapist in the

probationer's mandated sex offender treatment program. However, when considering reformation and rehabilitation and public safety, it is far more important that there be *confidential* psychotherapy to ensure that the probationer is receiving meaningful treatment so as not to reoffend.

As previously noted, the California Supreme Court recently reasserted the federal constitutional privacy protection against government compelled disclosure of confidential communications between a patient and his or her psychotherapist. (See *People* v. *Gonzales, supra,* 56 Cal.4th at pp. 384-385.) In so doing, it summarized the reasoning behind confidential psychotherapy:

> This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege. [¶] ... [¶] Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends. [¶] The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community... [T]he interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected. (*People* v. *Gonzales*, *supra*, 56 Cal.4th at pp. 371-372, citing the Law Revision Commission comment accompanying

Evidence Code section 1014, internal quotations omitted.)

Similarly, in *In re Corona* (2008) 160 Cal.App.4th 736, the appellate court held that parole could not compel a parolee to waive his psychotherapist patient privilege when the parolee was seeking private therapy. The court found that:

> While psychotherapy bears no relationship to the commission of [defendant's] crime, it is related to the requirement of treatment imposed by the parole department. However, the department's demand for a waiver has the reverse effect—to discourage a parolee from obtaining additional treatment. It is clearly contrary to the State's goal of reintegrating the parolee into society. The asserted special parole condition is unreasonable and unnecessary. The People's speculations about what [defendant] might reveal or withhold in private therapy is irrelevant to our analysis. [¶] We find disturbing the People's assertion that it may revoke parole if [defendant] refuses to sign the waiver. This implicates his constitutional right to due process. (*Id.* at p. 740.)

In short, the state also has a compelling interest in promoting confidential communication between the patient and his or her psychotherapist in hope that meaningful discussions will result in rehabilitation and reformation of the probationer, and thereby promote public safety.

Finally, the state has no need for a broad waiver of the psychotherapist-patient privilege. Probation officers can obtain progress and participation reports from the psychotherapist without violating the

privilege. For example, the psychotherapist would be permitted to discuss with probation whether the probationer was (1) regularly attending sessions (see, e.g., *People* v. *Gonzales*, *supra*, 56 Cal.4th at p. 375, fn. 7.), (2) cooperating in therapy (see, e.g., *In re Pedro M., supra,* 81 Cal.App.4th at pp. 554-555, (3) or participating and progressing in therapy (see, e.g., *Story v. Superior Court*, *supra*, 109 Cal.App.4th at p. 1019). Such non-privileged communications between the psychotherapist and the probation officer would sufficiently achieve the state's interest in reformation and rehabilitation and does not infringe on the defendant's constitutional right to privacy in his or her privileged communications with the psychotherapist.

Therefore, Penal Code section 1203.067(b)(4), which requires a waiver of the psychotherapist-patient privilege, is invalid both under state law and federal constitutional law.

II. CONCLUSION

For all of the foregoing reasons, Garcia respectfully requests this court to strike the conditions requiring him to waive any privilege against self-incrimination and participate in polygraph examinations, or that he waive any psychotherapist-patient privilege, or in the alternative, to modify them to cure the constitutional

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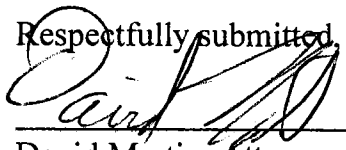
infirmities demonstrated above.

Dated: September 29, 2014

Respectfully submitted,



David Martin, Attorney for
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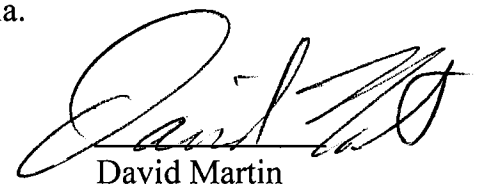
VERIFICATION OF NUMBER OF WORDS

I, David Martin, the Attorney for Ignacio Garcia, Appellate Case No. S218197, and the attorney who prepared the Brief on the Merits in this case, certifies that the number of words used in this Briefs on the Merits, excluding the table of contents, was 9,090 words.

I declare under penalty of perjury under the laws of the United States of California that the forgoing is true and correct and that this was executed on September 29, 2014, Alameda, California.



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action. My business address is 10 Sanderling Court, Sacramento, CA 95833. On September 29, 2014, I served the **Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and placed in the United States mail addressed as follows:

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