S191240

IN THE SUPREME COURT

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

vs.

RAMIRO GONZALES

Defendant and Appellant

REVIEW OF A DECISION OF THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT, CASE NO. H032866

SANTA CLARA SUPERIOR COURT NO. 211111
THE HONORABLE ALFONZO FERNANDEZ, JUDGE PRESIDING

ANSWER BRIEF ON THE MERITS

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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	)	No. S191240 Court of Appeal No. H032866 Santa Clara Superior Court 211111

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
IN AND FOR THE COUNTY OF SANTA CLARA COUNTY

Honorable Alfonzo Fernandez, Judge Presiding

ANSWER BRIEF ON THE MERITS

INTRODUCTION

Appellant Ramiro Gonzales, through his attorney Jean Matulis, respectfully submits this Answer Brief on the Merits, and hereby contends:

(1) Absent a knowing and intelligent waiver, a person on parole retains his state and federal rights to privacy and confidentiality inherent in the patient-psychotherapist privilege, and

(2) Violation of the federal constitutional right to informational privacy requires application of the standard of prejudice enunciated in *Chapman* v. California (1967) 386 U.S. 18.)

SUMMARY OF THE CASE AND FACTS

On January 30, 2007, the District Attorney of Santa Clara County filed a "Petition for Commitment as a Sexually Violent Predator" against appellant Ramiro Gonzales. (1 CT 1.) Previously, a jury had found that a petition alleging that appellant Ramiro Gonzales was a "sexually violent predator" within the meaning of Welfare and Institutions Code section 6600 ("section 6600") was not true. (See Exhibit 1 to Motion to Augment, granted by the Court of Appeal on April 3, 2009.) The evidence at trial showed that Mr. Gonzales was born in 1955, and at the age of seven he contracted spinal meningitis which resulted in intellectual and developmental disabilities. (Opn. at p. 2.) Mr. Gonzales's history included two offenses which qualified as predicate offenses under section 6600 subdivision (b).[1] When he was about to be released on parole in 2004, the District Attorney filed a petition to commit him under section 6600, but the jury found the allegations in the petition not true. (Opn. at p. 3.)

Mr. Gonzales was released and one of his parole conditions was to participate in an outpatient treatment program. (1 Opn. at p. 3.) Pat Potter McAndrews had a master's degree and worked under the supervision of a psychologist as a therapist at the Atkinson Assessment Center where Mr. Gonzales was referred for treatment. (3 RT 492-493.)[2] As part of their initial interview, Ms. McAndrews noted that appellant appeared to be someone whose intellectual abilities were limited and she had some

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

[2]Although Ms. McAndrews testified she had a masters degree and was supervised by a psychologist, respondent repeatedly refers her as "Dr. McAndrews." (RB 3, 10, 17.)

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

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

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[3]Prior to trial, the prosecution filed a "Notice of Motion for Release of Third Party Records Pursuant to CCP § 1985.3" seeking access to appellant's treatment records from the Atkinson Center in San Jose. (1 CT 101-105.) In response, appellant filed an

McAndrews did not see any need to disclose anything Mr. Gonzales said under the "dangerous patient" exception to the patient psychotherapist privilege, and did not do so. (Opn. at p. 12.)

Two psychologists testifying for the prosecution discussed appellant's alleged statement to McAndrews that between the ages of 14 and 35, he had sexually touched 16 children. Both doctors found this statement significant and testified that it confirmed their diagnoses. (Opn. At p. 6.) Another two psychologists testified in favor of the defense, and questioned the validity of the assessment Mr. Gonzales received from the Atkinson Center as well as the methods used by Ms. McAndrews. They also testified that Mr. Gonzales had mental retardation which was not a mental illness. (Opn. at pp. 7-8.)

Because Mr. Gonzales' mother lived in an area that was too close to a school appellant could not reside with her although he was permitted to visit. (Opn. at 39.) He was required to live in a particular hotel and he befriended and began providing assistance to another resident who was in a wheelchair. However, the parole officer learned of this and told them that they were in violation of their parole conditions because they were not

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"Opposition to Release of Privileged Patient-Psychotherapist Records & Motion to Quash Subpoenas." (1 CT 114-122.) At the hearing on the motion, counsel for appellant also requested that testimony of the treatment providers be excluded in light of the privilege. (1 RT 10-11.) The court found that the information was privileged, but granted the motion and issued the Order to Produce Third Party Records to the Atkinson Center, on the basis that the information was relevant and fell under the "dangerous patient" statutory exception to the privilege. (1 CT 86, 1 RT 10-11.) Later, at a hearing on in limine motions, counsel for appellant argued that admission of the testimony of Pat McAndrews, appellant's counselor at the Atkinson Center, would violate the psychotherapist-patient privilege, and requested that it be excluded. (1 RT 23-24.) The court denied the request. (1 RT 23.)

supposed to associate with other offenders, and this mutually beneficial relationship was dissolved. (3 RT 445-446.)

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

A jury returned a verdict finding the commitment petition to be true, and appellant was committed indeterminately. The court of appeal reversed the commitment, concluding that admission of McAndrews' testimony about appellant's alleged statements violated his right to privacy and was admitted in violation of the patient-psychotherapist privilege. The court also found the error prejudicial under the standard established in *Chapman v. California* (1967) 386 U.S. 18. The Attorney General obtained review.

ARGUMENT

I. ABSENT A KNOWING AND INTELLIGENT WAIVER, A PERSON ON PAROLE RETAINS HIS STATE AND FEDERAL RIGHTS TO PRIVACY AND CONFIDENTIALITY INHERENT IN THE PATIENT-PSYCHOTHERAPIST PRIVILEGE

A. Introduction

In response to a prosecution motion in the trial court to release third party information from the "Atkins Center" to be used in proceedings to commit appellant under section 6600, the court found that the information was privileged, but granted the motion on the basis that the information was relevant and fell under the "dangerous patient" statutory exception to the patient-psychotherapist privilege pursuant to Evidence Code section 1024.[4] (1 CT 86, 1 RT 10-11.) This exception to the privilege was the focus of the arguments in the Court of Appeal and in the decision of that court. (See Opn. at pp. 10-19, AOB at pp. 25-32, RB at pp. 7-15.) The Court of Appeal concluded:

> In short, the record does not contain sufficient evidence to support the application of the "dangerous patient" exception. Moreover, notwithstanding a correct finding that the material sought was privileged, and the mandate to narrowly construe the "dangerous patient" exception, the [trial] court granted the district attorney blanket discovery of all records and information about defendant's therapy and implicitly authorized McAndrews to testify about everything and anything concerning the therapy, including what she and defendant said to each other during therapy as well as her

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[4]All statutory references are to the Evidence Code unless otherwise indicated. Section 1024 provides: "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."

advice and diagnosis. Under the circumstances, we conclude that the trial court abused its discretion. (Opn. at p. 13.)

In the case before this Court, respondent has shifted focus away from the section 1024 exception and now contends that Evidence Code section 1012 codifies an "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 which the psychotherapist is consulted. (Opening Brief on the Merits (OBM) at p. 7, quoting *In re Christopher M.* (2005) 127 Cal. App. 4th 684, 696.) Respondent reasons that because appellant was on parole, the purpose of the therapy was the protection of society and therefore, section 1012 permitted disclosure of confidential communications. (OBM at pp. 7-17.) Put simply, the Attorney General's position is that a person who receives treatment on parole does not have a privilege. This position is not supported by the record, the law, or sound public policy.

B. The Nature of the Privilege

The patient-psychotherapist privilege is rooted in our state and federal constitutional rights to privacy. In *Griswold v. Connecticut* (1965) 381 U.S. 479, 484, the United States Supreme Court stated: "Specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance. [Citation.] Various guarantees create zones of privacy." The *Griswold* case addressed issues involving the marital relationship. (*Ibid.*) However, the broad rationale of the decision concerned aspects of intimacy in interpersonal relations and communications. (*Palay v. Superior Court* (1993) 18 Cal.

App. 4th 919, 932.) In *In re Lifschutz* (1970) 2 Cal.3d 415, 432, this Court held that the confidentiality of the psychotherapeutic session falls within one such zone [of privacy]. The California Constitution has been amended to include among the inalienable rights of all people the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.) The drive behind the constitutional amendment was acknowledgment that "fundamental to our privacy is the ability to control circulation of information." (*White v. Davis* (1975) 13 Cal.3d 757, 774, italics omitted.) "Fundamental to the privacy of medical information 'is the ability to control [its] circulation. . . .'" (*Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678.)

> The psychotherapist-patient privilege extends to
>
> confidential communication between patient and psychotherapist' means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

(Evid. Code §1012.)

Evidence Code section 1014 provides that the privilege belongs to the patient, and can be claimed by (a) the holder of the privilege, (b) a person who is authorized to claim the privilege by the holder of the privilege, and (c) with some exceptions, the psychotherapist. The "holder of the privilege" is defined as (a) the patient when he has no guardian or conservator (b) a guardian or conservator of the patient when the patient has

a guardian or conservator, or (c) the personal representative of the patient if the patient is dead. (Evid. Code § 1013.)

C. Appellant's Right and Privilege Not to Disclose Confidential Communications with a Therapist at Atkins Center Was Not Waived And There Were No Exceptions Allowing Disclosure

Pursuant to Evidence Code section 912, the psychotherapist-patient privilege can be

> waived with respect to a communication protected by the privilege if any *holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone*. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege. (Emphasis added).)

Such a privilege may only be waived through a clear manifestation of an intent to waive. (*Palay v. Superior Court, supra,* 18 Cal. App. 4th 919, 926, fn. 7.) Here, appellant did not waived his privilege, but aggressively asserted it. (1 CT 114-122, 1 RT 10-11.) Moreover, even when a statutory privilege is waived, "a patient retains the more general right to privacy protected by the state and federal Constitutions." (*San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal. App. 4th 1083, 1092, citing *Jones v. Superior Court* (1981) 119 Cal. App. 3d 534, 551.)

The issue of waiver of the right to confidentiality in the context of sex offender treatment on parole was addressed in *In re Corona* (2008) 160 Cal. App. 4th 315. In *Corona,* the parolee had agreed to participate in sex offender treatment as a condition of parole, and had agreed to a waiver of

the psychotherapist-patient privilege for the state-reimbursed group therapy program which was a required part of his supervision. (*Id.* at 319.) However, when the parolee was informed by his parole officer that he must also sign a waiver of the privilege to allow his privately retained psychotherapist to communicate with the parole authority, he filed a petition for writ of habeas corpus in the superior court and successfully challenged the condition. (*Id.* at 317.) On appeal, the Attorney General argued that while the parolee may have a right to refuse to sign the waiver, the State had the right to revoke parole for failure to comply with an important component of the sex offender program. (*Id.* at 320.)

The Court of Appeal rejected the contention and found that the demand for the waiver had an effect contrary to the State's goal of reintegrating the parolee into society by discouraging the parolee to obtain additional treatment. (*In re Corona, supra,* 160 Cal. App. 4th 315, 321.) The court also rejected the Attorney General's contention that under Evidence Code sections 1012 and 1024, the State was authorized to require a waiver from the parolee, and found that there is "nothing in the statutory language that lends itself to such an interpretation. (*Id.* at 322.)

The instant case does not involve individual therapy in addition to the parole-mandated treatment. However, *Corona* illuminates key issues in this case. There was no issue in *Corona* of waiver as to the state-reimbursed group therapy program because the parolee had expressly waived his right to confidentiality as to this aspect of this treatment. (*In re Corona, supra,* 160 Cal. App. 4th 315, 319.) The waiver obtained in *Corona* reinforces the notion that a waiver is not automatic, presumed, or unnecessary due simply to one's status of being a parole subject to sex offender treatment conditions. In appellant's case, although there was a

condition to participate in the Parole Outpatient Clinic (POC), there was no waiver of his confidentiality. (1 CT 177-180.)

Corona also stands for the concept that imposition of a waiver of confidentiality can actually have a effect contrary to the goals of parole by having a discouraging effect on meaningful participation in therapy. (*Id.* at 321.) Additionally, *Corona* is significant because it rejects the notion that Evidence Code sections 1012 and 1024 combine to create a general exception to the psychotherapist-patient privilege, absent a specific determination that the person presents a serious danger to another within the meaning of *Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 431. (*Id.* at 322.) In *People v. Clark* (1990) 50 Cal. 3d 583, 618-621, this Court held that once a disclosure of a specific threat to another has been made by a psychotherapist under section 1024, the communication is no longer confidential and is therefore admissible in subsequent legal proceedings Here, the Atkins Program never found it necessary to report appellant for any specific threat or danger on parole. Thus, the alleged communication between appellant and Ms. McAndrews did not lose its confidential character, and was not admissible.

Respondent cites *In re Christopher, supra,* 127 Cal. App. 4th 684, 696, for the notion that "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 which the psychotherapist is consulted." (RB at p. 7.) Respondent extrapolates that because a purpose of the treatment on parole is to protect the public, there is, essentially, no privilege. (*Id.* at 7-17.) However, a review of the context of the statement made in *Christopher M.*

shows that it does not support respondent's position.

In re Christopher M. involved a minor who had been found delinquent under Welfare and Institutions Code section 602 for committing a robbery and a hate crime and was placed on probation. (*Christopher M., supra*, 127 Cal. App. 4th 684, 687.) Two of the conditions required that "all records" relating to Christopher's medical and psychological treatment be made available to the court and the probation officer on request. (*Id.* at 691.) The minor objected to these conditions, but the trial court refused to strike them. (*Id.* at 691-692.) The Court of Appeal affirmed, noting that

> "juvenile conditions may be broader that those pertaining to adult defenders. This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may 'curtail a child's exercise of the constitutional right ... [because a] parent's own constitutionally protected "liberty" includes the right to "bring up children" [citation,] and to "direct the upbringing and education of children." [citation.]' [Citations.]"

(*Id.* at 693, quoting *In re Antonio R.* (2000) 78 Cal. App. 4th 937.) With this caveat, the court concluded that those to whom disclosure is "reasonably necessary" under section 1012 "would included the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a [rehabilitative] program in conjunction with a disposition order placing the minor on probation." (*Id.* at 696, quoting *In re Pedro M.* (2000) 81 Cal. App. 4th 550, 554.)

Appellant does not endorse the notion that such a broad condition of a juvenile's probation is permissible. However, assuming, *arguendo,* that the *Christopher M.* holding is valid, it does not address the issues before

this Court. Obviously, appellant is not a minor, and neither the district attorney nor the superior court that presided over the section 6600 commitment proceedings was standing in the benevolent shoes of a parent. Furthermore, the superior court had no role in supervising appellant's parole, and unlike adult court, juvenile court proceedings are themselves confidential. (Welf. &. Inst. Code § 827.) Thus, the rationale of *Christopher M.* simply does not apply in this case.

Furthermore, *Christopher M.* involved a requirement that the minor *waive* the right to confidentiality as a condition of probation, which like the *Corona* case, reinforces the notion that a waiver of confidential communications is required before any disclosure can be made. (*Christopher M, supra*, 127 Cal. App. 4th 684, 691; *In re Corona, supra,* 160 Cal. App. 4th 315, 319.) Thus, contrary to the Attorney General's suggestion, the "exception" described in *Christopher M.* that permits disclosure when it is "reasonably necessary to accomplish the purpose for which the psychotherapist is consulted" still requires a waiver. (*Ibid.*)

The California Sex Offender Management Board is a body created by the Legislature in 2006 charged with developing recommendations to improve management and practices of adult sex offenders under supervision in the community, with the goal of improving community safety. (Penal Code §§ sections 9001, 9002, subd. (a)(2).) This Board consists of seventeen members including the Secretary of the Department of Corrections or designee, the Director of Adult Parole Services or designee, the Director of the Department of Mental Health or designee, the Attorney General or designee, a California state judge, three members of law enforcement, a member who represents prosecuting attorneys, a member who represents probation officers, a member who represents

criminal defense attorneys, a member who is a county administrator, a member who is a city manager or designee, two members who are licensed mental health professionals, and two members who are recognized experts in the field of sexual assault. (Penal Code § 9001, subd. (b).) Pursuant to Penal Code section 9003, the Management Board has developed standards for sex offender management programs which are detailed in a publication entitled "Sex Offender Treatment Program Certification Requirements" ("SOTPCR") (See Attachment to Request for Judicial Notice).)[5]

These certification requirements specifically address issues of Informed Consent and Waiver of Confidentiality. (SOTPCR at p. 5.) With respect to Informed Consent it is required that "All approved treatment programs shall have clearly articulated, written statements informing clients of their rights and responsibilities, the limitations and boundaries of the therapeutic relationship, and the nature of the therapeutic relationship." (*Ibid.*) Furthermore, "Clients participating in treatment are required to give informed consent to treatment." (*Ibid.*) It is also required that treatment providers must ensure that the client has the capacity to understand and give informed consent." (*Ibid.*) Treatment providers must also define in written form or another manner which makes it understandable to the client, inter alia, "[a] statement regarding the client's responsibility to maintain the privacy and confidentiality of other persons who are in the treatment program. (*Ibid.*)

> Requirements Pertaining to Waiver of Confidentiality include:
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> Prior to accepting an offender into treatment and as a condition of treatment, *the treatment provider shall obtain a*

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[5]This document may also be located at http://www.casomb.org/docs/Certification_Standards/Certification-Program.pdf.

> *signed waiver of the psychotherapeutic-patient privilege*. If the offender has more than one therapist or treatment provider, the waiver of the privilege shall extend to all therapists treating the offender. The waiver should also include the victim's therapist, if appropriate to the case. The waiver shall include the supervising officer and all members of the Containment Team. A provider shall also notify all clients that there are limits of confidentiality imposed on therapists by other laws, such as the mandatory reporting laws.
>
> A waiver of confidentiality will also be required if the offender by the conditions of probation or parole, and by the treatment provider-client contract. *Treatment providers shall not disclose confidential client information to those for who waivers have not been obtained.*

(See SOTPCR at p. 6 (emphasis added).) The purpose of the above requirements is to facilitate open and ongoing communication between all professionals responsible for assessing, evaluating, treating, supporting, and monitoring sex offenders. (*Ibid.*)

The specific issue of whether it is constitutionally valid to require a waiver the psychotherapist-patient as a condition of probation or parole is not currently before this Court. However, the above standards and requirements are significant because they reflect the collective recognition of the Management Board consisting of experts in mental health, treatment professionals, correctional professionals, as well as judicial and legal professionals, that parole status of a sex offender does not itself strip a person of the rights to privacy and confidentiality, and that a waiver is required. The respondent in this case appears to be out on a limb by insisting that fundamental rights to privacy and confidentiality disappear simply because a person is on parole.

The United States Supreme Court has recognized that "[t]he parolee

has been 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." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 482.) Furthermore, subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. (*Ibid.*) The Court of Appeal was correct in its conclusion that "a parolee participating in therapy as a condition of parole can generally expect communications with a psychotherapist to be confidential and protected by the privilege except insofar as disclosure is necessary to ensure compliance with the parole condition." (Opn. at p. 16, citing *In re Pedro M., supra*, 81 Cal. App. 4th 550, and *Story v. Superior Court* (2003) 109 Cal. App. 4th 1007.) Accordingly, the Court of Appeal decision is sound and should be upheld.

II. APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY WAS VIOLATED, REQUIRING APPLICATION OF THE *CHAPMAN* STANDARD OF PREJUDICE

A. The Federal Constitutional Right to Informational Privacy Protected Appellant's Communications with his Therapist

It has long been recognized that the United States Constitution protects an "individual interest in avoiding disclosure of personal matters." (*In re Crawford* (9th Cir. 1983) 194 F.3d 954, 958.) This interest covers a wide range of personal matters, including medical information. (*Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1269 ["The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality"].) The United States Supreme Court has adopted

the assumption that the federal constitution protects the right privacy, including informational privacy. (*Whalen v. Roe* (1977) 429 U.S. 589, 599-600 and fn. 25, citing *Griswold v. Connecticut* (1965) 381 U.S. 479, 483, *NASA v. Nelson* (2001) 562 U.S. ___, 131 S. Ct. 746, 178 L.Ed. 667.)

Although the federal Constitution contains no explicit reference to a "privacy" right, the Supreme Court in *Griswold* court found "implicit in the Bill of Rights provisions ... 'zones of privacy' emanating from what it called the 'penumbras' of the specific constitutional guarantees." (*Hill v. National Collegiate Assn.* (1994) 7 4th 1, 28, citing *Griswold, supra*, 381 U.S. 479, 484 [finding privacy protections within in the First, Third, Fourth, Fifth, and Ninth Amendments].) In *Lawrence v. Texas* (2003) 539 U.S. 558, 578, the Court determined that the right to private adult conduct was a liberty interest protected by the Due Process clauses of the Fifth and Fourteenth Amendments. (U.S. Const. Amends. V, XIV.)[6]

Cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests: One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. (*Whalen v. Roe, supra,* 429 U.S. 589, 599-600.) This Court has noted that "[t]he former interest is informational or data-based; the latter involves issues of personal freedom of action and autonomy in individual encounters with government." (*Hill v. National Collegiate Assn., supra,*

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[6]In *NASA v. Nelson, supra*, 562 U.S. ___, 31 S. Ct. 746, the High Court assumed the existence of an informational right to privacy, but in a concurring opinion Justice Scalia joined by Justice Thomas opined that there was no protected right to informational privacy under Due Process or other constitutional provision. (NASA v. Nelson, supra, 562 U.S. ___, 31 S. Ct. 746, 764-766; 178 L. Ed. 2d 667, 687-690 (conc. opn. Scalia, J.)

(1994) 7 4th 1, 30.) This Court also noted that "[t]he distinction between the two interests is not sharply drawn – disclosure of information , e.g., information about one's financial affairs, may have impact on personal decisions and relationships between individuals and government." (*Ibid.*, citing *Plante v. Gonzalez* (5th Cir. 1978) 575 F. 2d 1119, 1130.)

With respect to confidential communications between a patient and a psychotherapist this Court has recognized that "a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots that the California statute and draws sustenance from our constitutional heritage." (*In re Lifshutz, supra,* 2 Cal. 3d 415, 431.) Citing *Griswold v. Connecticut, supra*, 381 U.S. 479, 484, this Court held that "'[v]arious guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone." (*Id.* at 431-432 (bracketed portion supplied by this Court).) In *Lifshutz*, this Court did not find a "broad" constitutional privacy right that applies to a psychotherapist regardless of waiver by the patient, but concluded that it is "the depth and intimacy of the patients' revelations that give rise to the concern over compelled disclosure . . . ." (*Lifshutz, supra*, at 423-424, *Hill v. National Collegiate Athletic Assn., supra,* 7 Cal. 4th 1, 31, fn. 10.)[7] In *Caesar v. Mountanos* (9th Cir. 1976) 542 F. 2d 1064, 1068, fn. 9, the court agreed with *Lifshutz* that "the right of privacy encompassing the doctor-patient

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[7]In *Hill*, this Court noted that the "zone of privacy" found "implicit" in the federal constitution was cited in the ballot initiative that create a state constitutional right to privacy, but stated in a footnote that appellate decisions inferring the creation of a "'penumbral' *Griswold*-type state constitutional privacy right from pre-Privacy Initiative cases" represented an "overbroad" reading of the pertinent holdings. (*Hill v. National Collegiate Assn., supra*, 7 4th, 1, 28, 31, fn. 10.)

relationship identified in [numerous United States Supreme Court cases] goes beyond the factual context of those cases, i.e. intimate marital and sexual problems, and extends to psychotherapist-patient communications."

The Attorney General incorrectly claims that "*Jaffe v. Redmond* (1996) 518 U.S. 1, recognized that the psychotherapeutic-patient privilege in federal proceedings 'is not rooted in any constitutional right to privacy but in a public good that overrides the request for relevant evidence.'" (OBM at p. 21, quoting *U.S. v. Glass* (10th Cir. 1998) 133 F. 3d 1356, 1358.) Contrary Attorney General's assertion, the United States Supreme Court did not recognize that the privilege was not rooted in any constitutional right of privacy. The constitutional issue was not even discussed in *Jaffe*. (See *Jaffe v. Redmond, supra,* 518 U.S. 1.) The High Court simply affirmed a federal appellate court decision which had held that the Federal Rules of Evidence contains a psychotherapist privilege and that it applies to social workers as well as psychiatrists. (*Id.* at 18, See *Jaffee v. Redmond* (7th Cir. 1995) 51 F.3d 1346, 1354-1355.)

As the Court of Appeal points out, virtually all federal circuits have recognized a constitutional right to informational privacy. (Opn. at pp. 24-25, fn. 8.)[8] Many circuits in the federal courts of appeals have recognized

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[8]Examples cited by the Court of Appeal include *Vega-Rodriguez v. Puerto Rico* Telephone Co. (1st Cir. 1997) 110 F.3d 174, 182–183 [right extends to medical, financial, and other intimately personal information]; *Powell v. Schriver* (2d Cir. 1999) 175 F.3d 107, 111 [medical records protected]; *Doe v. Delie* (3d Cir. 2001) 257 F.3d 309 [same]; *Taylor v. Best* (4th Cir. 1984) 746 F.2d 220, 225 [right to privacy includes avoiding disclosure of personal facts]; *Zaffuto v. City of Hammond* (5th Cir. 2002) 308 F.3d 485, 489–491 [disclosure of private, intimate information could violate right]; *Bloch v. Ribar*, (6th Cir. 1998) 156 F.3d 673, 684) ["a constitutional right to nondisclosure of certain types of private information exists ..."]; *Jarvis v. Wellman* (6th Cir. 1995) 52 F.3d 125, 126 [however, right does not protect medical records]; *Denius v. Dunlap* (7th Cir. 2000)

a constitutional right to privacy regarding medical records. (See e.g., *Lankford v. City of Hobart* (10th Cir. 1994) 27 F.3d 477, 479, *Doe v. City of N.Y.* (2d Cir. 1994) 15 F. 3d 254, 267, *Pesce v. J. Sterling Morton High School* (7th Cir. 1987) 830 F. 2d 789, 795-798, *United States v. Westinghouse Elec. Corp.* (3d Cir. 1980) 638 F. 2d 570, 577-580.) In *Tucson Woman's Clinic v. Eden* (9th Cir. 2004) 379 F. 3d 531, 551, the Ninth Circuit recognized "a constitutionally protected interest in avoiding disclosure of personal matters including medical information" in the context of a law requiring physicians who performed abortions to allow inspections of their office and access by the state to their patient records. Additionally, many state courts have recognized the federal constitutional right to informational privacy.[9]

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209 F.3d 944, 955 Const. protects against disclosure of private matters]; *Eagle v. Morgan* (8th Cir. 1996) 88 F.3d 620, 624–625 [recognizing constitutional right has covered personal information, including medical records]; *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (9th Cir. 1998) 135 F.3d 1260, 1269 [medical information]; *Douglas v. Dobbs* (10th Cir. 2005) 419 F.3d 1097, 1102 [same]; James v. City of Douglas (11th Cir. 1991) 941 F.2d 1539, 1543 [same].)

[9] Examples of state court decisions recognizing a federal constitutional right to informational privacy include *In re Paternity of K.D.* (Ind.Ct.App. 2010) 929 N.E.2d 863, 869-871 [right applies to medical information and information about sexual abuse] ; *McNiel v. Cooper* (Tenn.Ct.App. 2007) 241 S.W.3d 886, 895, 898 [medical records]; *Alpha Medical Clinic v. Anderson* (2006) 280 Kan. 903, 919 [128 P.3d 364] [medical records]; *State v. Russo* (2002) 259 Conn. 436, 457–458 [790 A.2d 1132] [prescription records]; *State v. Langley* (2000) 331 Or. 430, 448–449 & fn. 14 [16 P.3d 489] [psychotherapist-patient communications]; *Middlebrooks v. State Bd. of Health* (Ala. 1998) 710 So.2d 891, 892 [medical and HIV information]; *State ex rel. Callahan v. Kinder* (Mo.Ct.App. 1994) 879 S.W.2d 677, 681 [medical and HIV information]; *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994) 70 Ohio St.3d 605, 607–608 [1994 Ohio 6, 640 N.E.2d 164] [social security information]; *McMaster v. Iowa Bd. of Psychology Examiners* (Iowa 1993) 509 N.W.2d 754, 758 [professional records of mental health professionals]; *Hillman v. Columbia County* (1991) 164 Wis.2d 376, 400 [474

In *Seaton v. Mayberg* (9th Cir. 2010) 610 F. 3d 530, the Ninth Circuit considered whether disclosure of prison records and contents of evaluations prepared to determine whether a person met the commitment criteria under Welfare and Institutions Code sections 6600 et. seq. violated the person's informational right to privacy under the Due Process Clause.[10] The court analyzed the issue by considering two separate periods of time: (1) the time Seaton was serving his sentence in prison, and (2) the time he was being evaluated for commitment. (*Id.* at 532.) As to the period that Seaton was serving his sentence in prison, the court noted "[a] right to privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." (*Id.* at 534, quoting *Doe v. Delie* (3rd Cir. 2001) 257 F. 3d 309, 311.) The court further noted that "[l]oss of privacy is an 'inherent incident[] of confinement." (*Ibid.*, quoting *Bell v. Wolfish* (1979) 441 U.S. 529, 537.) The court thus concluded that prisons need access to prisoners' medical records to protect prison staff and other prisoners from communicable diseases and violence and to manage rehabilitative efforts, and that a prisoner's expectation of privacy yield to what must be considered the "paramount interest in institutional security." (*Id.* at 534-535, quoting *Hudson v. Palmer* (1984) 468 U.S. 517, 527-528.)

N.W.2d 913] [medical and HIV information]; *Tarrant County Hospital Dist. v. Hughes* (Tex.App. 1987) 734 S.W.2d 675, 678–679 [blood donor's privacy information]; *Martinelli v. District Court of Denver* (1980) 199 Colo. 163, 173–174 [612 P.2d 1083] [personnel files]. (See Opn. at p. 26, fn. 9.)

[10]The plaintiff in *Seaton* raised the issue in the context of a civil rights action under 28 U.S.C. §1983. (*Seaton v. Mayberg, supra,* 610 F. 3d 530, 532.)

As to the period in which Seaton was evaluated for commitment under Welfare and Institutions Code section 6600, the court analogized Seaton's claim privacy to medical privacy in other contexts and concluded that the reasons for it did not apply. (*Seaton v. Mayberg, supra,* 610 F. 3d 530, 539.) Specifically, the court noted that "[c]onfidentiality of communications to physicians, and the evidentiary privilege to prevent disclosure, exist for a purpose – enabling patients to disclose what may be highly personal or embarrassing conditions to physicians so that they may obtain treatment, serving both their private interest in and the public interest in their health." (*Ibid.*, citing *Jaffee v. Redmond, supra*, 518 U.S. 1, 10.) The court determined that a person referred for evaluation for civil "has not sought out the evaluation so that he may be treated. Medical evaluation has been imposed, not sought, so there can be no concern that the person might avoid treatment needed for his health." (*Ibid.*)

The grounds for rejecting the privacy claims in *Seaton* do not apply here because in the instant case the circumstances of disclosure did not occur in prison or in the course of evaluation under section 6600. Here, appellant was receiving treatment in the community on parole, in a relationship that Ms. McAndrews herself described as "therapeutic." (3 RT 521.) She described it as "one where the client and you have a relationship where you're building toward trust where you're hoping you will get accurate information. They can interact with you in a meaningful way." (3 RT 521-522.) In contrast, a person who is being evaluated under Welfare and Institutions Code section 6601 is advised that any information he provides during the evaluations can be included in written reports and testimony. (See *People v. Martinez* (2001) 88 Cal. App. 4th 465, 477.) As the Court of Appeal points out in this case, the Attorney General did even

not challenge the trial court's express finding that communications between Mr. Gonzales and Ms. McAndrews were presumptively privileged. (Opn. at p. 12, fn. 4.)

Furthermore, the United States Supreme Court has recognized a firm distinction between a person in prison and a person on parole, stating "[t]he parolee has been 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. (*Morrissey v. Brewer, supra,* 408 U.S. 471, 482.) Subject to the conditions of his parole, the person "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." (*Ibid.*) The *Morrissey* Court emphasized that although the State properly subjects a parolee to many restrictions, the parolee's condition "is very different from that of confinement in a prison." (*Ibid.*) Thus, the rationale that loss of privacy is an "inherent incident of confinement" does not apply.[11]

The Attorney General correctly points out that in *Henry v. Kernan* (9th Cir. 1999) 197 F. 3d 1021, 1041, the court of appeals rejected a habeas petitioner's contention that his federal constitutional rights were violated by the admission at a state trial of privileged information, stating that there was no constitutional psychotherapist-patient privilege. (OBM at p. 21.) However, more recently, the Court of Appeals upheld a grant of habeas corpus by a district court that recognized and applied the *Chapman* standard in a case where a confidential patient-physician communication

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[11]The Court of Appeal notes that *Seaton* is not binding on state courts, and to the extent that *Seaton* suggests that the mere institution of commitment proceedings under section 6600 automatically strips a person of privacy rights and protection under the due process clause, the Court of Appeal correctly refutes it. (Opn. at pp. 35-36.)

had been erroneously presented to the jury in a criminal case in the state court. (*Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922, affirming *Parle v. Runnels* (2006) 448 F. Supp. 2d 1158, 1164-1169.)

In *Parle*, the Attorney General conceded that admission of information obtained in violation of the psychotherapist-patient privilege was reviewable under *Chapman*, but now takes a different position and wishes not to be bound by that concession. (OBM at p. 23, citing *People v. Payton* (1992) 3 Cal. 4th 1050, 1073.) However, it is worth questioning why the Attorney General was willing to concede constitutional error in *Parle* but not here. The fact that *Parle* was a criminal case and section 6600 cases are technically civil should not affect the outcome. In *People v. Hurtado* (2002) 28 Cal. 4th 1179, 1192-1194, this Court held that the *Chapman* standard applies in section 6600 cases despite the civil nature of the commitment because they are

> civil proceedings with consequences comparable to a criminal conviction -- involuntary commitment, often for an indefinite or renewable period, with associated damage to the defendant's name and reputation. The United States Supreme Court and the California courts have pointed to these consequences in cases holding that the ordinary burden of proof in civil cases, preponderance of the evidence, is constitutionally inadequate in cases involving involuntary commitment and, as we shall explain, the California courts have in turn relied on the burden of proof decisions to hold that federal constitutional error in civil commitment proceedings is reversible unless shown to be harmful beyond a reasonable doubt.

(*People v. Hurtado, supra,* 28 Cal. 4th 1179, 1192-1193.) Because the federal constitutional right to privacy protected appellant's confidential communications with his therapist, and the trial court ordered that Atkins Center turn over all their records of appellant's treatment to the District

Attorney and admitted evidence of these communications over appellant's objections, appellant's federal constitutional rights were violated.

B. Appellant's Expectation of Privacy was Not Outweighed By Competing Interests

No uniform balancing test has been adopted to weigh the individual's right and expectation to privacy against the government's interest in obtaining the information. However, courts have recognized that the constitutionality of a government action that encroaches on an individual right to privacy is determined by balancing the nature and extent of the intrusion against the government's interest in obtaining the information. (See e.g. *NASA v. Nelson, supra*, 562 U.S. ___, 131 S. Ct. 746, 757-760; *Whalen v. Roe, supra*, 429 U.S. 589, 601-604.) The Court of Appeal correctly determined that appellant had a reasonable expectation of privacy concerning his communications during psychotherapy at the Atkinson Center, and that the state's interest in public safety did not outweigh this privacy interest in the absence of a properly applied "dangerous-patient" exception. (Opn. at pp. 33-34.)

Respondent contends that although appellant might have had 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,"and that "[a]ppellant 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." (OBM at p. 29.) However, as the Court of Appeal explained, apart from the limited disclosure of information necessary to monitor compliance with such

conditions (see *In re Pedro M., supra,* 81 Cal. App, 4th 550, 553-555; *Story v. Superior Court, supra,* 109 Cal. App. 4th 1007, 101-1019), appellant "could still expect the content of his therapy sessions, especially his statements to McAndrews, to remain private and confidential." (Opn. at p. 33.) Furthermore, it would be highly beneficial to society to encourage open and meaningful communication between a patient and therapist, especially when the patient has a history of committing offenses against other people. (*In re Corona, supra,* 160 Cal. App. 4th 315, 321.)

As previously discussed, section 1024 provides for a "dangerous patient exception" to the psychotherapist-patient privilege, and serves to protect the public safety. If a parolee, for example, were to say something that caused a therapist to become concerned that the person presented a danger to another within the meaning of *Tarasoff v. Regents of University of California, supra,* 17 Cal. 3d 425, 431, the therapist would be required to disclose it. (*In re Corona, supra,* 160 Cal. App. 4th 315, 322.) Here, appellant did not say anything that caused McAndrews or any other therapist at Atkins Center to invoke this exception. The alleged disclosure by appellant pertained to events many years in the past, and did not necessitate violation of his privacy to protect public safety.

C. Appellant was Prejudiced and Reversal is Required

Due to the constitutionally protected right to privacy implicated in the improper admission of appellant's confidential communications in this case, the standard of prejudice established in *Chapman v. California* (1967) 386 U.S. 18, which places the burden on the government to establish absence of prejudice beyond a reasonable doubt, applies.

However, regardless of the standard employed, appellant was prejudiced. One indication of prejudice is that the evidence was close. (See *People v. Rains* (1999) 75 Cal. App. 4th 1165, 1171.) Here appellant had the same number of experts in his support as did the prosecution, and multiple other witnesses. The only significant development between the first jury trial where appellant was found not to meet the commitment criteria and the second trial was the highly prejudicial and inflammatory disclosure obtained by questionable means at the Atkins Center and improperly admitted by the trial court.

The evidence showed that appellant was not someone who went out and committed bad acts after the first jury determined that he did not meet the section 6600 commitment criteria. He was rigorous and earnest in attending his counseling sessions and there is no evidence that his brief stop in a large city park was within any proximity to the relatively small play area within the park or was for any reason other than to roll a cigarette. (3 RT 488, 457-458, 4 RT 642-643.) Even one of the prosecution's own witness, Dr. Vognsen, described Mr. Gonzales as having the quality of "guilessness" (4 RT 727) Unable to live with his mother because of the location of her home, appellant was kept isolated at the hotel by his parole conditions and was not even permitted to befriend a wheelchair-bound neighbor who needed his help due to the person's status as a former offender. (3 RT 445-446.) Appellant had been permitted to visit his mother, but when his sister had recently been evicted and had begun to stay with the mother, it did not occur to appellant to immediately report this new development. (5 RT 860-851, 876.) Still, when the parole officer contacted him, he was not inside the house with the children but was outdoors separated by a wooden fence several yards away, recycling

cans. (3 RT 484, 4 RT 652.) Appellant's drinking pattern was not new. (7 RT 1188.) It is hard to look at all these facts and conclude that Mr. Gonzales was not prejudiced.

It is noteworthy that in *Jaffee v. Redmond, supra,* 51 F.3d 1346, 1354-1355, once the Court of Appeals found there had been a violation of the psychotherapist-patient privilege which had not been abrogated by a greater compelling interest, the court reversed the judgment and ordered a new trial without further consideration. (*Id.* at 1357-1358.) This reversal was upheld by the Supreme Court. (*Jaffe v. Redmond, supra,* 518 U.S. at 18.) Appellant respectfully contends that regardless of the standard employed, reversal of the trial court judgment was required, and thus, the Court of Appeal decision should be upheld.

CONCLUSION

For all the reasons stated above, the decision of the Court of Appeal must be affirmed.

Dated: October 24, 2011

Respectfully submitted,

/s/

JEAN MATULIS
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RAMIRO GONZALES

CERTIFICATE OF WORD COUNT

I hereby certify that the Answer Brief on the Merits contains 8159 words according to the word count of the WordPerfect computer program used to prepare the document.

Dated: October 24, 2011

/s/

Jean Matulis
Attorney for Appellant
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PROOF OF SERVICE BY MAIL

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

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed at Cambria, CA on October 24, 2011.

/s/

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