In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **IGNACIO GARCIA,** **Defendant and Appellant.**	Case No. S218197

Sixth Appellate District, Case No. H039603
Santa Clara County Superior Court, Case No. C1243927
The Honorable Hector Ramon, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

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?[1]

INTRODUCTION

Convinced that existing protections established by the United States Supreme Court are inadequate to protect a probationer's privilege against self-incrimination, appellant challenges California's Containment Model for treating and monitoring sex offenders placed on probation. The Court of Appeal rejected the claims, finding appellant's arguments foreclosed by clear precedent from this court and the Supreme Court. This court should do the same.

STATEMENT

A. The Complaint and Probation Conditions

An October 2012 information charged appellant Ignacio Garcia with six counts of committing a lewd act on a child by force (Pen. Code, § 288, subd. (b)(1)).[2] (CT 2-6.) The charges arose from appellant's molestation of his nine-year-old nephew. (CT 49-50.) On at least 10 separate occasions, appellant forced the young boy to orally copulate him, threatening to hurt him if he did not comply, punching him in the arm on one occasion, and

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[1] The same issue is presented in *People v. Friday* (S218288) and *People v. Klatt* (S218755), in which respondent has filed opening briefs with similar legal analysis.

[2] All further statutory references are to the Penal Code unless otherwise specified.

offering to pay the victim another time. (CT 49-50.) When confronted by investigating officers, appellant admitted the crimes. (CT 49-50.)

In January 2013, appellant pleaded no contest to two counts of lewd act on a child (§ 288, subd. (a)). (CT 23-31.) In April 2013, the trial court suspended imposition of sentence, granted probation for three years (with one year in county jail), directed mandatory participation in a sex offender management program, and ordered appellant to register as a sex offender pursuant to section 290. (CT 58; 2 RT 22.) Two of the probation conditions are the subjects of this appeal: (No. 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, pursuant to Section 1203.067(b)(3)" (CT 55,77; 2 RT 24-25); and (No. 13) "The defendant shall waive any psychotherapist-patient privilege to enable communication between the sex offender management professional and the Probation Officer, pursuant to Section 1203.067(b)(4) and Section 290.09 of the Penal Code." (CT 55, 77; 2 RT 25.)[3] Defense counsel objected to these conditions, but the objections were overruled. (2 RT 19-25.)

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[3] Section 1203.067, subdivision (b) provides: "On or after July 1, 2012, the terms of probation for persons placed on formal probation for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive, shall include all of the following: [¶] . . . [¶] (2) Persons placed on formal probation on or after July 1, 2012, shall successfully complete a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation. The length of the period in the program shall be not less than one year, up to the entire period of probation, as determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court. [¶] (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program. [¶] (4) Waiver of any psychotherapist-patient privilege to enable communication between the sex

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B. Court of Appeal Opinion

Garcia appealed. On March 21, 2014, a divided panel of the Sixth District Court of Appeal held that the condition requiring a waiver of the privilege against self-incrimination was not violative of the Fifth Amendment or overbroad. (Typed Opn. at pp. 5, 18.) Citing this court's admonition to "construe a statute to avoid doubts as to its constitutionality" (*People v. Smith* (1983) 34 Cal.3d 251, 259), the panel majority read the "self-incrimination waiver as applying only in the context of the sex offender management program." (*Id.* at p. 5, fn. 6.) Writing for the court, Justice Mihara noted that the 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," nor does it "purport to authorize the *use* of any statements against defendant in a criminal proceeding." (*Id.* p. 5, fn. 6, p.11.) Moreover, "[b]ecause the penalty exception [from *Minnesota v. Murphy* (1984) 465 U.S. 420] will necessarily apply to any statements that defendant makes under the compulsion of the subdivision (b)(3) probation condition, these statements cannot be used against defendant in a criminal proceeding [and] the condition cannot result in any Fifth Amendment violation." (*Id.* at p. 12.)

The court also concluded that the condition was not overbroad, recognizing that "the State has a compelling interest in discovering whether the sex offender is committing additional offenses while on probation." (Typed Opn. at p. 17.) Requiring every sex offender to make full disclosure and give up any right to refuse to answer questions during polygraph examinations and program treatment "greatly enhances [the

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offender management professional and supervising probation officer, pursuant to Section 290.09." (§ 1203.067, subd. (b).)

state's] ability to manage the serious risks posed by sex offenders who remain free in the community." (*Ibid.*) It therefore was reasonable for the Legislature to determine that a waiver of the privilege against self-incrimination is "necessary to reform and rehabilitate the probationer in order to prevent him or her from repeating this pattern and committing future offenses." (*Id.* at p. 19)

With regard to Condition No. 13, the court held that a limited waiver of the psychotherapist-patient privilege as between the therapist and the probation officer does not violate appellant's right to privacy, and is not overbroad, unreasonable, or coerced. (Typed Opn. at pp. 19-21.) Specifically, the court found that the waiver serves "the State's legitimate interest in protecting the public from defendant's sexual misconduct, monitoring his compliance with his probation conditions, and determining whether his treatment is succeeding." (*Id.* at pp. 19-20.)

In a separate opinion, Justice Grover agreed that the limited waiver of the psychotherapist-patient privilege did not violate appellant's constitutional or statutory rights. (Typed Opn. at p. 1 (conc. & dis. opn. of Grover, J.).) However, she viewed the mandated waiver of the privilege against self-incrimination as violative of the Fifth Amendment "on its face," irrespective of any use of an incriminating statement at a later criminal proceeding. (*Id.* at p. 9.)

SUMMARY OF THE ARGUMENT

The Court of Appeal correctly construed section 1203.067, subdivision (b)(3), as a narrow, context-specific waiver of the privilege solely for purposes of probation supervision and treatment. Under the canon of constitutional avoidance, this interpretation obviates the need for a Fifth Amendment analysis.

Moreover, the core right of the Fifth Amendment is not violated until a compelled statement is actually introduced at a criminal trial, and long-

established binding precedent protects sex-offense probationers from such introduction regardless of any waiver of the privilege against self-incrimination.

Nor is a prophylactic remedy needed to prevent future incursions of the core right. Clearly-established Supreme Court authority *already* provides appellant *Kastigar*[4] immunity for any incriminating statement elicited during the sex offender management program. Nonetheless, if this court believes that binding precedent from the Supreme Court, and the agreement of the Attorney General, do not provide sex-offense probationers adequate assurance that their compelled statements during treatment will not be used against them in a later criminal prosecution, the court can declare a judicial rule of use and derivative use immunity protecting such disclosures. Such a rule—already applied by this court in similar situations—will ensure that sex offenders on conditional release get the treatment they need in a manner consistent with constitutional protections.

Finally, the limited waivers of the privilege against self-incrimination and psychotherapist-patient privilege are not overbroad or unreasonable. Both conditions are limited in scope and duration, and are directly related to the Legislature's twin aims of ensuring public safety and promoting sex offender rehabilitation.

ARGUMENT

I. APPLYING THE CANON OF CONSTITUTIONAL AVOIDANCE, THIS COURT SHOULD ADOPT A REASONABLE CONSTRUCTION OF THE WAIVER THAT AVOIDS THE CONSTITUTIONAL QUESTION

Appellant first claims that the Court of Appeal "failed to examine the specific language of the provision, rendering an interpretation directly at

[4] *Kastigar v. United States* (1972) 406 U.S. 441 (*Kastigar*).

odds with the actual words of the statute." (AOB 5.) In reality, the Court of Appeal followed the dictates of this court and applied a reasonable construction of the waiver provision that avoids any constitutional questions. This application of the canon of constitutional avoidance to effectuate legislative intent should be applauded, not decried.

A. The Waiver at Issue Serves a Critical Role in California's Evidence-Based Containment Model for Treating and Monitoring Sex Offenders

To understand why a narrow, treatment-specific interpretation of the waiver provision furthers legislative intent, a brief discussion of the statute's legislative history is required. The amendments to section 1203.067 resulted from an extensive legislative review of California's treatment and monitoring of sex offenders on probation and parole. That review reflected widespread and manifest failings in the system: prison and supervision officials lacked a standardized model for diagnosing and treating sex offenders; offenders were participating in uncertified programs; programs were underfunded; and polygraph testing and dynamic violence risk assessment instruments were neither required nor regularly used. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended June 2, 2010, pp. A-B, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100628_141315_sen_comm.html> [as of Oct. 9, 2014].) This legislative review of the former system highlighted the need for a "coherent, cohesive or coordinated" sex offender management system to reduce recidivism and protect public safety. (*Id.* at p. A.)

To fill this void, the Legislature established "a standardized, statewide system to identify, assess, monitor and contain known sex offenders for the purpose of reducing the risk of recidivism posed by these offenders, thereby protecting victims and potential victims from future harm." (§ 290.03.) In

adopting this "Containment Model," the Legislature recognized that a grant of probation to a sex offender is a very risky proposition that is appropriate only where those risks can be managed. The two pillars of the model are (1) measures designed to ensure the accuracy and completeness of the information provided by the sex offender to treatment professionals (principally, sexual offense history polygraph examinations), and (2) collaboration and communication between the Containment Team members to allow them to develop an individualized treatment plan and ensure the offender's compliance with the plan. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended June 2, 2010, p. B.)

The mandated waiver of a probationer's privilege against self-incrimination and participation in polygraph examinations supports both pillars of the state's Containment Model. With the breakdown of the mythology that "all sex offenders are the same," treatment professionals have recognized that accurate risk assessment and diagnosis are prerequisites to effective treatment. Before the 2011 amendments to section 1203.067, therapists and probation officers had to rely solely on the offense of conviction and the offender's voluntary disclosures to assess the risk posed by the offender and to design a treatment and monitoring program that would help the probationer and keep the community safe. This presented problems when the offense of conviction was not an accurate representation of the offender's criminal behavior and proclivities. (See *McKune v. Lile* (2002) 536 U.S. 24, 33 (*Lile*) ["an important component of [sex offender] rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct"].) "Denial is generally regarded as a main impediment to successful therapy," and "[t]herapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviours need to be

targeted in therapy." (H. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 Forum on Corrections Research (1991) No. 4, p. 30, quoted in *Lile*, *supra*, 536 U.S. at p. 33.) "Research indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity." (*Lile*, *supra*, 536 U.S. at p. 33, citing B. Maletzky & K. McGovern, Treating the Sexual Offender (1991) pp. 253-255.)

If, for example, prior undisclosed acts involved victims of a different age or gender, or involved different types of abusive contact than the offense of conviction, the treatment and monitoring program developed for that offender might not be adequately tailored to the offender's true risk profile. The mandated waiver in amended section 1203.067 directly addresses this problem by allowing treatment professionals to insist that sex offenders disclose their sex offense histories and to verify the accuracy and completeness of the probationer's responses. (See *People v. Miller* (1989) 208 Cal.App.3d 1311, 1315 (*Miller*) ["polygraphs are commonly used" in sex offender treatment programs and "help[] to monitor compliance" with probation conditions].)[5] The results of these examinations are then used by the treatment team to develop an accurate risk profile and monitoring plan to prevent recidivism and ensure public safety. (See *People v. Gonzalez* (2013) 56 Cal.4th 353, 377 ["The effectiveness of the [C]ontainment

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[5] "In the context of postconviction sexual offender treatment, a polygraph examination is used to obtain a lifetime sexual history of the offender as a part of a comprehensive psychosexual evaluation, monitor compliance with treatment and supervision requirements, and to focus on a specific allegation or behavior." (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 138, fn. 17, citing English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders* (1998) 4 Psychol. Pub. Pol'y & L. 218, 228-230.)

[M]odel of sex offender management depends upon open and ongoing communication between all professionals responsible for supervising, assessing, evaluating, treating, supporting, and monitoring sex offenders"].)

B. The Canon of Constitutional Avoidance Applies Where a Permissible Construction of the Statute Avoids the Constitutional Question

This court and the United States Supreme Court have frequently held that where "the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*San Francisco Unified Sch. Dist. v. Johnson* (1971) 3 Cal.3d 937, 948.) "The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 509; see also *United States ex rel. Atty. Gen. v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407-408 ["where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"].) Application of the avoidance canon is particularly appropriate when the statute can be saved simply by incorporating binding precedent already in effect when the Legislature enacted the law. (See *Reidy v. City & County of San Francisco* (2004) 123 Cal.App.4th 580, 591 ["courts do not presume the Legislature intended to overthrow long-established principles of law unless it makes its intention to do so clear, either by express declaration or necessary implication"].)

C. The Waiver Provision at Issue Is Best Understood as a Narrow, Context-Specific Waiver Solely for Probation Supervision and Treatment

Here, the "waiver of any privilege against self-incrimination" in amended section 1203.067 can be reasonably interpreted to avoid any constitutional question regarding the admission of compelled statements at a later criminal trial. In fact, the historical context, the plain language, and the positioning of the waiver all indicate that the Legislature intended to limit invocation of the privilege against self-incrimination only in the narrow context of probation supervision and treatment. These factors also show that the Legislature did not purport to strip sex offenders of their privilege against self-incrimination in any other context or to curb their right to object to the admission of compelled statements in later *criminal* proceedings.

First, by the time the Legislature amended section 1203.067 in 2010, over 25 years of unchallenged high court authority held that an arrestee's or probationer's compelled statements could not be introduced against them in a later criminal proceeding. (See *Murphy*, *supra*, 465 U.S. at p. 435.) Nothing in the text of the statute or its legislative history suggests that the Legislature intended to eliminate or limit that well-established federal constitutional protection—a change which a state legislature is powerless to make anyway. Thus, the presumption that the Legislature understood the existing legal framework and did not intend to impliedly overrule established principles of law is fully applicable to amended section 1203.067. (See *Reidy*, *supra*, 123 Cal.App.4th at p. 591.)

Second, the positioning and language of the amendments indicate that the Legislature was focused solely on probation supervision and treatment and did not intend to alter the evidentiary landscape for criminal proceedings or strip probationers of any *trial* rights. To begin, the waiver at issue was added to section 1203, which governs the imposition and management of probation. Moreover, amended section 1203.067 details the creation of a "sex offender management program" and ties each new

requirement for sex-offense probationers to the furtherance of that program. Specifically, the required waiver of the privilege against self-incrimination and participation in polygraph examinations are limited by the qualifying language that they are "part of the sex offender management program." (§ 1203.067, subd. (b)(3).)[6] The statute does not purport to prohibit a probationer from exercising his privilege against self-incrimination *outside* the context of the sex offender management program, nor were amendments made to the Evidence or Penal Codes concerning any evidentiary consequences of the mandated waiver at a later criminal trial.[7] (See *Frost v. City of Los Angeles* (1919) 181 Cal. 22, 30 [in granting citizens a particular cause of action, "it must be presumed that the Legislature did not intend to change in any other respect the principles of equity" relating to that area of law].)

Given the legal backdrop for the amendments to section 1203.067, and the placement and language of the provision, the waiver of any privilege against self-incrimination is best understood as limited to the probation context. Because that narrow interpretation is just as reasonable (if not more so) as appellant's proposed interpretation—which would have the Legislature impliedly stripping federal constitutional rights from probationers—this court should resolve the case through application of the avoidance canon. (See *PDK Labs. Inc. v. DEA* (D.C. Cir. 2004) 362 F.3d 786, 799 (conc. opn. of Roberts, J.) ["This is a sufficient ground for

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[6] In arguing that the Court of Appeal misread the statute by limiting its application to the probation context, appellant uses an ellipsis to remove the phrase "which shall be part of the sex offender management program." (AOB 6.) It goes without saying that statutes must be analyzed as a whole and as actually enacted, rather than as edited or wished to be by appellant.

[7] Parallel language was added in section 3008, subdivision (d), for sex offense parolees. That provision likewise does not contemplate any abandonment of trial or evidentiary rights.

deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further."].) Accordingly, the Court of Appeal's judgment should be affirmed.

II. THE CHALLENGED PROBATION CONDITION HAS NOT, AND WILL NEVER, RESULT IN A FIFTH AMENDMENT VIOLATION

Even if this court chooses to address the constitutional question on the merits, appellant's claim must fail. Because the Fifth Amendment is not violated until a compelled statement is actually introduced at a criminal trial, and long-established binding precedent protects sex-offense probationers from such introduction regardless of any waiver of the privilege against self-incrimination, the mandated waiver does not violate the Fifth Amendment.

A. Merely Eliciting an Incriminating Statement Does Not Violate the Core Fifth Amendment Right

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." However, "[a]s both this court and the United States Supreme Court have made clear, the Fifth Amendment does not directly prohibit the government from *eliciting* self-incriminating disclosures despite the declarant's invocation of the Fifth Amendment privilege." (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1127 (*Maldonado*).) Instead, "this constitutional provision simply bars the direct or derivative *use* of such officially compelled disclosures to convict or criminally punish the person from whom they were obtained." (*Ibid.*)

Chavez v. Martinez (2003) 538 U.S. 760 (*Chavez*) reflects how the rule operates. *Chavez* was a civil action involving the question whether a police officer who allegedly compelled statements from the plaintiff-arrestee could be held liable for violating the plaintiff's Fifth Amendment

rights. Writing for four justices, Justice Thomas rejected the plaintiff's theory, stating that compelled statements "of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." (*Id.* at p. 767.) "[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." (*Id.* at p. 769.) Justice Souter (joined by Justice Breyer) wrote separately, but agreed that it would be "well outside the core of Fifth Amendment protection" to find that "questioning alone" was a "completed violation" of the Fifth Amendment. (*Id.* at p. 777.) Thus, six justices held in *Chavez* that merely extracting compelled statements does not violate the Fifth Amendment because the privilege against self-incrimination is "a fundamental *trial* right of criminal defendants." (*Id.* at p. 767.)

This court adopted the *Chavez* construction of the Fifth Amendment in *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, at page 727 (*Spielbauer*), and in *Maldonado*, *supra*, 53 Cal.4th at page 1120. In *Spielbauer*, a former public defender challenged his termination for refusing to answer questions during a disciplinary investigation. (45 Cal.4th at p. 709.) Rejecting the claim that the termination violated his privilege against self-incrimination, this court held that the Fifth Amendment "do[es] not prohibit officially compelled admissions of wrongdoing as such," but instead forbids only "the *criminal use* of such statements against the declarant." (*Id.* at p. 727.) While recognizing that "constitutionally based prophylactic rules" have been adopted in some contexts to protect the core right, this court held that no such additional protection was needed because clearly-established Supreme Court authority barred the use of any compelled statements in a later criminal proceeding. (*Id.* at pp. 715, 727; see also *Chavez*, *supra*, 538 U.S. at p. 768 ["We have also recognized that governments may penalize public employees and

government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use in any criminal case against the speaker"].)

Maldonado applied the *Chavez* formulation to a situation very similar to appellant's. There, the defendant challenged a pretrial court-ordered mental examination by prosecution experts after defendant suggested that he would be offering a mental defense at his murder trial. (*Maldonado*, *supra*, 53 Cal.4th at p. 1120.) While the defendant conceded that the prosecution was entitled to have the examination conducted, he claimed that the prosecution had no right to disclosure of his statements to the examiners until he actually presented his mental state defense at trial. (*Ibid.*) This court rejected the defendant's claim, stating that his argument "misconceives the Fifth Amendment as a guarantee against officially compelled *disclosure* of potentially self-incriminating information. Such is not the case." (*Id.* at p. 1127.) "[T]he Fifth Amendment does not provide a privilege against the compelled 'disclosure' of self-incriminating materials or information, but only precludes the use of such evidence in a criminal prosecution against the person from whom it was compelled." (*Id.* at p. 1134.) Thus, this court held that even a court-ordered examination by prosecution experts in the run-up to trial does not violate the Fifth Amendment unless the compelled disclosures (or evidence derived therefrom) are introduced at trial. (*Id.* at p. 1127; see also *Miller*, *supra*, 208 Cal.App.3d at p. 1315 [sex-offender's Fifth Amendment challenge to mandated polygraph examination rejected because "mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege"]; Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause* (2005) 90 Iowa L. Rev. 1857, 1872 ["The Fifth Amendment prohibits only the use or derivative use of compelled,

incriminating testimonial communications during a criminal prosecution. Therefore, there is no remedy if statements are compelled out of court but the suspect is not prosecuted"].)

As these authorities make clear, the Fifth Amendment is not implicated by requiring appellant to waive his privilege against self-incrimination and participate in polygraph examinations as part of his sex offense management program. The legislative history and text of the provision make clear that the waiver and examinations are focused on treatment not investigation and prosecution. In the course of this litigation, appellant has not identified any instance in which prosecutors have attempted to introduce such a compelled statement (or evidence derived therefrom) against a probationer in a subsequent criminal prosecution.

Appellant identifies instances in the Sex Offender Management Program regulations in which polygraph examiners are instructed to "investigate" various aspects of a probationer's sex offense history. (AOB 26-27, citing Exh. B at pp. 13-17.) However, the context of these instructions makes clear that the "investigation" contemplated by these provisions is solely for purposes of treatment, not a means of gathering evidence for criminal prosecution. In fact, nowhere in the nearly 50 pages of regulations and standards offered by appellant is there *any* authorization, let alone requirement, that a polygraph examiner disclose incriminating statements to prosecutors. Nor is there any suggestion that traditional rules of evidence barring the admission of compelled statements would cease to apply if incriminating statements did make their way to prosecutors. Thus, as explained by the Court of Appeal, there is *no* chance that the probation condition will ever result in the admission at trial of a compelled incriminating statement. (Typed Opn. at p. 12.) Therefore, the waiver provision does not violate the *core* Fifth Amendment right as explained in *Chavez*, *Maldonado*, and *Spielbauer*.

B. No Prophylactic Remedy Is Required to Protect the Core Right

Appellant appears to admit that the waiver does not violate the "core" right of the Fifth Amendment when he argues that the Court of Appeal "ignores the analytical distinction between a violation of the 'core' Fifth Amendment right and a violation of the 'prophylactic' protection." (AOB 14.) However, the Court of Appeal *did* address the doctrine of prophylactic remedies, holding that appellant has not, and cannot, "identify any 'constitutionally based prophylactic rules' that might apply here." (Typed Opn. at p. 13, fn. 10.) This is because, as in *Spielbauer*, clearly-established Supreme Court authority *already* protects appellant from any use or derivative use of a compelled statement in a future criminal proceeding.

In *Murphy*, *supra*, 465 U.S. at page 422, the defendant had been placed on probation for a sexual offense. His probation terms required him to participate in a sex offender treatment program and to be "truthful with the probation officer 'in all matters.'" (*Ibid.*) Acting on a tip from a counselor in Murphy's treatment program, a probation officer confronted Murphy about his involvement in an uncharged rape and murder. (*Id.* at pp. 423-424.) Murphy did not invoke his privilege against self-incrimination, admitted the rape and murder, and was charged with murder. (*Id.* at pp. 424-425.) He sought to suppress his admissions to the probation officer on Fifth Amendment grounds. (*Ibid.*) The Minnesota Supreme Court held that, because Murphy was required to respond truthfully to the probation officer, the officer was required to inform Murphy of his Fifth Amendment rights before questioning him, and the failure to do so merited suppression of his admissions. (*Id.* at p. 425.)

The United States Supreme Court reversed. The court held that the probation officer had no duty to inform Murphy of his Fifth Amendment rights, and the requirement that Murphy truthfully answer his probation

officer's questions alone did not convert his "otherwise voluntary" responses into compelled statements. (*Murphy*, *supra*, 465 U.S. at p. 427.) The court contrasted that condition with one which would trigger the "penalty exception," whereby an incriminating statement would be excluded in a later criminal prosecution even if the declarant *did not* invoke his privilege against self-incrimination at the time of questioning. In illustrating a classic application of the penalty exception, the court described exactly the statutory scheme enacted via section 1203.067:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

(*Murphy*, *supra*, 465 U.S. at p. 435.) Because the penalty exception will always apply in such circumstances, "a state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." (*Id.* at p. 435, fn. 7.)

That language perfectly tracks the position the Attorney General has maintained throughout appellant's case: any incriminating statements made by appellant during a sex offender management program examination are inadmissible against him in a subsequent criminal prosecution. This promise of use and derivative use immunity—established by high court authority 30 years ago and uncontested by the Legislature and Attorney

General—renders illusory any concerns about future incursions on appellant's Fifth Amendment rights. (See *Kastigar*, *supra*, 406 U.S. at p. 453 ["We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege"]; *Spielbauer*, *supra*, 45 Cal.4th at pp. 714-715 ["In light of the competing interests, it is well established that incriminating answers may be officially 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"].)[8]

As in *Maldonado*, probationers like appellant will be protected by the "well-established framework for resolving 'forbidden fruit' issues at trial," which ultimately requires the prosecution to prove that the evidence it seeks to admit is "untainted" and wholly independent of any compelled disclosure. (*Maldonado*, *supra*, 53 Cal.4th at p. 1138.)[9] Moreover, as in

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[8] It should be noted that this promise of immunity in exchange for waiver of the privilege against self-incrimination does not amount to a "blanket" prohibition on prosecuting sex offenders for past or new crimes based on "independent" evidence. As this court explained in *Maldonado*, *supra*, 53 Cal.4th at page 1130, footnote 11: "Applying this principle, *Kastigar* held that one compelled to testify in a noncriminal proceeding despite invoking the Fifth Amendment privilege is entitled *only* to immunity against use of the compelled statements in a subsequent prosecution, not to complete 'transactional' immunity against prosecution itself. As *Kastigar* explained, use immunity suffices to place the witness in the same position as if he or she had provided no self-incriminating testimony. The Constitution requires no more." (Citing *Kastigar*, *supra*, 406 U.S. at pp. 457, 462.)

[9] It is somewhat curious that appellant devotes several pages of his "prophylactic rights" section to *Maldonado* when this court rejected the need for any prophylactic remedy in that case. (AOB 14-18.) Even more

(continued...)

Lile, there is "no indication that the [sex offender management program] is merely an elaborate ruse to skirt the protections of the privilege against compelled self-incrimination" in order to investigate and prosecute past criminal conduct. (536 U.S. at p. 48 [dismissing civil action based on Fifth Amendment challenge to sexual abuse treatment program that required sex offenders to complete sexual history form, verified through polygraph examination]; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 803 ["His assertion that the prosecution may have gained some nonevidentiary insight . . . is unsupported by citation to the record and exists only in the realm of speculation"].) Instead, the waiver provision provides a practical and lawful means for obtaining the information needed to effectively treat and monitor sex offenders released into our communities.

C. Compelled Statements Can Be Used to Revoke Probation

That compelled statements can be used in probation revocation proceedings does not change the constitutional analysis. In fact, the Supreme Court has expressly held that the Fifth Amendment does not prevent the state from seeking to revoke a sex offender's probation based on either a refusal to answer or a compelled admission of a probation violation:

> Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. Just

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(...continued)
curious is appellant's criticism of the Court of Appeal's denial of appellant's request for judicial notice. (AOB 18.) Other than asserting it as fact, appellant never explains how the agency regulations contained therein provide a "constitutionally based prophylactic rule" of which appellant can avail himself. (AOB 18.) Instead, the regulations support the narrow construction given the waiver by the Court of Appeal as applying only to treatment during the probationary term, not to the introduction of evidence at a subsequent criminal proceeding.

> as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. It follows that whether or not the answer to a question [] is compelled by the threat of revocation, there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings.

(*Murphy*, *supra*, 465 U.S. at p. 435, fn. 7; see also *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782 ["[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution"].)

The *Murphy* court went on to implicitly approve of the probation scheme that California has adopted: "[N]othing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as 'one of a number of factors to be considered by a finder of fact' in deciding whether other conditions of probation have been violated." (*Ibid.*)

Justice Marshall, writing in dissent, acknowledged that "because probation revocation proceedings are not criminal in nature, and because the Fifth-Amendment ban on compelled self-incrimination applies only to criminal proceedings, the possibility that a truthful answer to a question might result in the revocation of his probation does not accord the probationer a constitutional right to refuse to respond." (*Id.* at p. 441 (dis. opn. of Marshall, J.).) Justice Marshall also agreed with the court's holding that if "a truthful response might reveal that [a probationer] has violated a condition of his probation but would not subject him to criminal prosecution, the state may insist that he respond and may penalize him for refusing to do so." (*Ibid.*) Moreover, "if the answer to a question might lead both to criminal sanctions and to probation revocation, the state has the option of insisting that the probationer respond, in return for an express guarantee of immunity from criminal liability." (*Id.* at p. 442.)

Thus, the full *Murphy* court was in agreement that, provided the state agrees to immunize probationers for their statements during treatment, the state can insist on answers to questions about a probationer's sexual offense history and current activities, and can seek to revoke his probation based on either: (1) his refusal to answer those questions, or (2) revelations of *current* offenses that violate the conditions of his release. (See *State v. Gleason* (1990) 154 Vt. 205, 213 [576 A.2d 1246] [special condition of probation requiring probationer to discuss sexual offense history and impulse behavior with a psychologist did not violate privilege against self-incrimination, even if compelled statements could be used to revoke probation].) There is also no suggestion that revocation could be sought solely for the disclosure of a crime that *predated* the sex offender's placement on probation—such a revelation could be used only for assessment and treatment. In fact, as appellant concedes, the regulations promulgated pursuant to section 9003 draw that very distinction between sexual offense history polygraphs and maintenance polygraphs when it comes to revocation. (AOB 22, citing Exh. A at p. 7.)

This conclusion is supported by this court's frequent admonitions that the Constitution does not forbid requiring convicted criminal defendants to make hard choices regarding the assertion of their constitutional rights. "Probation is not a right, but a privilege," and "[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*People v. Bravo* (1987) 43 Cal.3d 600, 608.) Accordingly, this court has upheld conditions requiring probationers to waive their Fourth Amendment rights and even consent to suspicionless searches to avoid serving a state prison term, so long as the searches are not undertaken for harassment or arbitrary or capricious reasons. (*Ibid.*; see also *Samson v. California* (2006) 547 U.S. 843, 857 [same for parolees].) These

warrantless searches of probationers are justified because probationers have a significantly-diminished expectation of privacy, and because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. (*United States v. Knights* (2001) 534 U.S. 112, 121; *People v. Mason* (1971) 5 Cal.3d 759, 763-764.)

The logic of these Fourth Amendment cases applies equally to the Fifth Amendment context. As the Supreme Court explained in *Lile*, *supra,* 536 U.S. at page 24, in the criminal process "[i]t is well settled that the government need not make exercise of the Fifth Amendment privilege cost free." (See also *McGautha v. California* (1971) 402 U.S. 183, 213 ["Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose"].) Here, the state has permissibly set the price of conditional release (via a grant of probation) at a narrow waiver of the privilege for purposes of treatment and rehabilitation. Should a sex offender *choose* to refuse to answer questions posed by treatment professionals, and this invocation prevents the probationer from successfully completing a court-ordered sex offender management program, the state is not barred from revoking his probation.

Appellant ignores these clear dictates from the Supreme Court opinion in favor of what might initially appear to be contradictory language later in the *Murphy* opinion. In discussing the prospect of probation revocation, the majority states: "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." (*Murphy*, *supra*, 465 U.S. at p. 438.) However, the court goes on to explain that such a prohibition on revoking probation applies only when the disclosures are *not immunized* and thus could be used in "separate criminal proceedings." (*Ibid.*; see also *id.* at p. 439 ["We have not been advised of any case in which Minnesota

has attempted to revoke probation merely because a probationer refused to make *nonimmunized* disclosures concerning his own criminal conduct"].)

Conversely, here, because all statements elicited during the sex offender management program examinations *are* immunized and thus inadmissible in future criminal proceedings, the statements are, in effect, "not incriminating." Therefore, any invocation of the privilege against self-incrimination would not be a "legitimate exercise of the Fifth Amendment privilege." Moreover, revocation under such circumstances would not be due solely to the invocation of the privilege, but instead because the probationer's refusal to answer questions during a polygraph examination frustrates the sex offender management program upon which his release is conditioned. (See *Murphy*, *supra*, 465 U.S. at p. 435, fn. 7 [legitimate to use "probationer's silence as 'one of a number of factors . . .' in deciding whether other conditions of probation have been violated"].) This use of a probationer's statements or silence is not improper.

Appellant and Justice Grover's dissent rely on cases from the Ninth Circuit and other states to support their position, but these cases are distinguishable. And to the extent they address similar issues, their holdings actually *undercut* appellant's argument.

For example, in *United States v. Antelope* (9th Cir. 2005) 395 F.3d 1128, 1131, the court held that the defendant's Fifth Amendment rights were violated when his probation was revoked based on a refusal to participate in a court-ordered sex offender treatment program. (AOB 34.) However, unlike here, the defendant had been told by his treatment provider that "any past criminal offenses he revealed in the course of the program *could be released to the authorities*." (*Ibid.*) Thus, rather than being assured of use and derivative use immunity (as appellant is here), the probationer in *Antelope* was virtually assured that any incriminating statements made in treatment would lead to a future criminal prosecution.

That degree of compulsion and incrimination is a far cry from what appellant faces here. Even then, the probation condition was not invalidated on a facial challenge like the one brought here; the court merely reversed the order terminating the defendant's probation. (*Id.* at p. 1142.)

Similarly inapplicable, *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073, 1075 involved an attempt to introduce a compelled statement at a subsequent criminal prosecution initiated after the defendant admitted to his probation officer that he owned a gun. (Typed Opn. at pp. 7-8 (conc. & dis. opn. of Grover, J.).) Correctly finding that *Murphy*'s penalty exception applied to an admission compelled by a requirement that the probationer "answer all . . . inquiries," the Ninth Circuit upheld the district court's order suppressing the statement. (*Id.* at pp. 1075-1079.) Thus, *Saechao* actually *supports* our position that the application of the penalty exception for excluding compelled statements would be swift and certain should a prosecutor attempt to introduce an admission in the future. (See also *United States v. Bahr* (9th Cir. 2013) 730 F.3d 963, 965 ["The *use* of compulsory treatment disclosures at sentencing violated Bahr's Fifth Amendment privilege against self-incrimination"].)[10]

Nor does appellant's claim find support in *State v. Eccles* (1994) 179 Ariz. 226 [877 P.2d 799] (*Eccles*). (AOB 5, 20.) In *Eccles*, the trial court had imposed a probation condition far broader than that placed on appellant here. The condition required waiver of "any and all rights against [self-incrimination]," but also stated that any compelled statements made by the sex-offense probationer could be used "for the filing of new charges, and at

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[10] Appellant appears to question California courts' ability to enforce established Supreme Court precedent in arguing that "[public] support for prosecution would likely be overwhelming." (AOB 31.) We are more confident in the commitment and ability of courts in this state to enforce binding authority.

trial, on those new charges." (*Id.* at p. 227.) Given the breadth of the required waiver and the explicit provision for use of compelled statements at a future criminal trial, the Arizona Supreme Court found the probation condition violated the Fifth Amendment. (*Id.* at p. 228.) The condition at issue here is, of course, far narrower and is accompanied by use and derivative use immunity for any compelled statements during treatment examinations. Therefore, *Eccles* stands in stark contrast to appellant's case and provides no support for appellant's claim that the waiver here amounts to an "all-out assault on Fifth Amendment right[s]." (AOB 20.)

D. This Court Can Judicially Declare a Rule of Use and Derivative Use Immunity If It Deems Existing Protections Inadequate

The swift and certain application of *Murphy*'s exclusionary rule renders illusory any concerns appellant has regarding introduction of compelled statements against a sex offender in a future criminal prosecution. Nonetheless, if this court believes that binding precedent from the Supreme Court, and the agreement of the Attorney General, does not provide sex-offense probationers adequate assurance that their compelled statements during treatment will not be used against them in a later criminal prosecution, this court can declare a rule of use and derivative use immunity protecting such disclosures. As this court held in a similar circumstance:

> To the extent petitioner and other criminal defendants are entitled, as a prophylactic protection of their Fifth Amendment privilege, to decline to submit to court-ordered mental examinations until they receive advance assurance of immunity against overbroad direct and derivative use of their responses to the examiners, we may, and we do, *judicially declare* such an immunity as "reasonably to be implied" from the statutory provision allowing the prosecution to obtain such examinations for the limited purpose of rebutting anticipated mental-state defenses. (*People v. Arcega* (1982) 32 Cal.3d 504, 520 (*Arcega*) [confirming judicial immunity against use, in prosecution's

case-in-chief, of accused's compelled statements to court-ordered competency examiners].)

(*Maldonado, supra*, 53 Cal.4th at p. 1129, fn. 10.) Such a "judicially declared rule supplants the Fifth Amendment, because the scope of that rule is coextensive with the scope of the Fifth Amendment privilege." (*Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 501.)

The Wisconsin Supreme Court applied just such a rule of immunity in *State v. Evans* (1977) 77 Wis.2d 225, 235-236 [252 N.W.2d 664] (*Evans*).) In *Evans*, which predated *Murphy*, the court held that compelled admissions about particular instances of criminal activity by a probationer in response to questions by a probation officer are inadmissible against the probationer in a subsequent criminal proceeding. (*Ibid.*) However, to fulfill the monitoring and therapeutic aims of probation, the court created a rule of use and derivative use immunity for the situation, and required that a probationer be advised that his otherwise self-incriminating statements are "inadmissible against the probationer or parolee during subsequent proceedings on related criminal charges." (*Id.* at p. 235.) This rule of immunity, coupled with the advisement, removed any threat of criminal consequences for the probationer's compelled admissions, and thus foreclosed any Fifth Amendment claim.

Similarly, here, a grant of use and derivative use immunity is "reasonably to be implied" from the legislative background and text of section 1203.067, and will further the statute's aim of treating and monitoring sex offenders more effectively.[11] As this court stated in

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[11] This court could also order the Sex Offender Management Board to include an advisement in the informed consent instructions given before treatment examinations telling probationers that no statement made during these examinations can be used against them in a subsequent criminal prosecution.

recognizing such a rule for court-ordered mental competency examinations: "The rule [] fosters honesty and lack of restraint on the accused's part at the examination and thus promotes accuracy in the [] evaluation." (*Arcega*, *supra*, 32 Cal.3d at p. 522.) It is of critical importance to the Containment Model that sex-offense probationers be open and honest with treatment professionals in the risk assessment and monitoring stages of the sex offender management program. Depriving the treatment staff of the ability to insist on answers to their treatment questions undercuts this core pillar of the model. Therefore, to the extent this court believes that existing protections are not adequate to protect probationers' rights, this court should declare a rule of use and derivative use immunity for incriminating disclosures made during compelled treatment examinations.

III. THE LIMITED WAIVER AND REQUIRED PARTICIPATION IN POLYGRAPH EXAMINATIONS ARE NOT OVERBROAD

Appellant also argues that the requirements that he waive the privilege against self-incrimination and participate in polygraph examinations are overbroad. (AOB 31-32.) Because both requirements further the state's compelling interest in rehabilitating sex offenders and ensuring they do not reoffend while on conditional release, the conditions are valid.

A. Trial Courts Have Broad Discretion to Impose Probation Conditions

Penal Code section 1203.1 grants trial courts broad discretion to impose probation conditions they deem appropriate to rehabilitate and reform probationers and protect society. (§ 1203.1, subd. (j).) 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." (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted.) Thus, a provision which "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. Lindsey* (1992) 10 Cal.App.4th 1642, 1644.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

B. Any Restriction on Appellant's Fifth Amendment Rights Is Closely Tailored to the Statute's Purpose and Is Reasonable

For the reasons expressed above, the limited waiver contemplated by section 1203.067, subdivision (b)(3), will never result in a violation of appellant's Fifth Amendment rights. However, to the extent that this condition results in any restriction on appellant's Fifth Amendment rights, it *is* closely tailored to the purpose of the condition

In enacting section 1203.067, the Legislature recognized that granting probation to sex offenders is "a very risky proposition that is appropriate only where those risks can be managed." (Typed Opn. at p. 17.) One of the biggest risks is that the sex offender's full offense history may not be known when he is granted probation, and so the diagnosis and treatment plan may not accurately reflect the offender's true risk profile. Because a sex offender with numerous unreported sex offenses can pose a greater risk to public safety, the state has a compelling interest in discovering whether the sex offender is committing additional offenses while on probation or has committed additional unreported offenses in the past. "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." (*Ibid.*)

In arguing that "there is no conceivable need for such a waiver," appellant claims that, even absent a waiver, probationers can be forced to "answer questions and participate in treatment" under *Murphy*, *supra*, 465 U.S. at page 427. (AOB 32.) This is only half right. While *Murphy* did hold that a requirement to answer questions "truthfully" did not amount to a compelled waiver, there is a difference between requiring honesty when the probationer chooses to answer a question and requiring the probationer to answer *every* question asked. Without the waiver, the probationer could selectively decide which questions he wants to answer and simply refuse to respond to the rest. Thus, the limited waiver plays a critical role by ensuring that probationers cannot remain silent in the face of important questions. This helps therapists gather complete diagnostic information—a necessary predicate for effective treatment.

Appellant's reliance on *Brown v. Superior Court* (2003) 101 Cal.App.4th 313, to challenge the polygraph requirement is also misplaced. (AOB 32.) In *Brown*, the defendant was ordered to undergo polygraph testing as a condition of probation, but no purpose for the testing was provided by the trial court or by statute. (*Id.* at p. 321.) Accordingly, the Court of Appeal limited the testing to questions "relating to the successful completion of the stalking therapy program and the crime of which Brown was convicted." (*Ibid.*) Here, on the other hand, the polygraph testing condition was expressly linked—by both the trial court and section 1203.067—to appellant's participation in, and successful completion of, the sex offender management program. Because the condition is already limited in the manner suggested by *Brown*, and is directly related to both the crime of conviction and to the prevention of future criminality, appellant's *Lent* challenge must fail.

IV. THE PROBATION CONDITION REQUIRING APPELLANT TO WAIVE HIS PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT VIOLATE HIS CONSTITUTIONAL OR STATUTORY RIGHTS

Finally, appellant claims that the probation condition requiring him to waive his psychotherapist-patient privilege transgresses his constitutional right to privacy and improperly and unreasonably coerces waiver of his statutory privilege. (AOB 35-43.) Because the waiver provision is narrowly tailored and reasonably related to the state's compelling interest in reforming and rehabilitating sex offenders, appellant's claim is meritless.

A. The Psychotherapist-Patient Privilege Is Not Absolute

"The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) "It is also well established, however, that the right to privacy is not absolute, but may yield in the furtherance of compelling state interests." (*Ibid.*) In *In re Lifschutz* (1970) 2 Cal.3d 415, this court observed, "Even though a patient's interest in the confidentiality of the psychotherapist-patient relationship rests, in part, on constitutional underpinnings, all state 'interference' with such confidentiality is not prohibited." (*Id.* at p. 432.) Similarly, in *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 550, the Court of Appeal concluded that "The constitutional right [to privacy] is by no means absolute. The state's interest in facilitating the ascertainment of truth in connection with legal proceedings is substantial enough to compel disclosure of a great variety of confidential material, including even communications between a psychotherapist and his patient." Furthermore, this court has routinely observed that "probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights." (*People v. Olguin* (2008) 45 Cal.4th 375, 384.)

B. The Limited Waiver Is Valid

Here, waiver of the psychotherapist-patient privilege is reasonably related and closely tailored to the state's compelling interest in rehabilitating sex offenders like appellant. The condition's waiver requirement is limited in both scope and duration, as it "enable[s] communication [only] between the sex offender management professional and supervising probation officer," and applies only while appellant is participating in the sex offender management program. (§ 1203.067, subd. (b)(4).) This limited waiver allows treatment providers and probation officers to work together to assess appellant's problems and risk profile, and to design and implement an effective treatment strategy. This court recognized as much last year when it noted: "The effectiveness of the [C]ontainment [M]odel of sex offender management depends upon open and ongoing communication between all professionals responsible for supervising, assessing, evaluating, treating, supporting, and monitoring sex offenders. The absence of open and ongoing communication between these professionals and other involved persons compromises the purpose of the containment team approach and may jeopardize the safety of the community." (*People v. Gonzales*, *supra*, 56 Cal.4th at p. 377.) Thus, the Legislature reasonably and correctly determined that mandated waiver of the privilege as between the therapist and probation officer supports the broader, compelling state interests of "enhance[ing] public safety and reduc[ing] the risk of recidivism posed by [sex] offenders." (§ 290.03.)[12]

Appellant cites *In re Pedro M.* (2000) 81 Cal.App.4th 550 and *In re Christopher M.* (2005) 127 Cal.App.4th 684 in support of his argument.

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[12] The Court of Appeal panels in *Friday*, *Klatt*, and *Garcia* all *agreed* on this point and upheld the limited waiver of the psychotherapist-patient privilege.

However, those cases are readily distinguishable because they relied on Evidence Code section 1012 to pierce the psychotherapist-patient privilege, not section 1203.067. (*Pedro*, *supra*, at pp. 554-555; *Christopher*, *supra*, at pp. 695-696.) Appellant also claims support in *In re Corona* (2008) 160 Cal.App.4th 315. (AOB 26-27.) In *Corona*, the court found that a condition which required a parolee to waive his privilege over voluntary treatment sessions with a *privately retained* therapist was unreasonable because requiring waiver could have the perverse result of discouraging offenders from seeking treatment. (*Id.* at pp. 317, 321.) But the rationale underlying *Corona* has no application here where the statutory scheme *mandates* participation in a sex offender treatment program, including sessions with a psychotherapist. Similarly, the nature and means of prosecutorial "coercion" in *Regents of Univ. of California v. Superior Court* (2008) 165 Cal.App.4th 672, bear no resemblance to the means of influence employed here. As the Court of Appeal noted, appellant was "free to decline the grant of probation, burdened as it was with this condition, but he chose to accept it." (Typed Opn. at p. 21.) More generally, all of these cases predate the Legislature's enactment of section 1203.067, and its adoption of the Containment Model as the appropriate treatment regime for sex offenders. Accordingly, they fail to support appellant's claim that the disputed condition violates his constitutional and statutory rights.[13]

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[13] Appellant's assertion that "the policy of reforming and rehabilitating its probationers is thwarted, not aided, by the waiver" is better directed at the Legislature. (See Typed Opn. at p. 22, quoting *Strickland v. Foster* (1985) 165 Cal.App.3d 114, 119 ["Criticisms of policy, wisdom or technique inherent in any legislative enactment 'are matters with which the courts have no concern, such arguments being proper ones to address to the legislature for its determination'"].) In enacting section 1203.067, the Legislature balanced the relevant interests and determined that the twin goals of public safety and offender rehabilitation were best

(continued...)

CONCLUSION

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

Dated: November 14, 2014 Respectfully submitted,

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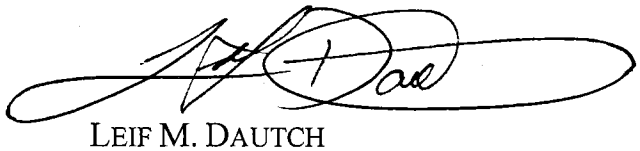

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(...continued)
served by requiring a limited waiver of the privilege. It is not for appellant or a court to second-guess that policy determination.

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,753 words.

Dated: November 14, 2014

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Ignacio Garcia***

No.: **S218197**

I declare:

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

On November 14, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 14, 2014, at San Francisco, California.

M. T. Otanes
Declarant

Signature

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