IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	NO. S218197
Plaintiff and Respondent,	REPLY BRIEF ON THE MERITS
vs.	
IGNACIO GARCIA, Defendant and Appellant.	

I. THE CANON OF CONSTITUTIONAL AVOIDANCE IS INAPPLICABLE BECAUSE THE LANGUAGE OF THE STATUTE IN QUESTION IS CLEAR AND UNAMBIGUOUS

A. Respondent Has Forfeited the Issue by Failing to Raise it in the Court of Appeal

Respondent asserted the Opinion's rewording of the statute was justified under the canon of "constitutional avoidance." (Answer Brief on the Merits ("ABM") at pp. 5-6, 9-11). However, the Opinion never referred to the "constitutional avoidance" doctrine nor did it cite any of the supporting authority found in Respondent's Answer Brief on the Merits. (See ABM at pp. 6-8; *Associated Builders and Contractors, Inc.* v. *San Francisco Airports Com.* (1999)

21 Cal. 4th 352, 379; *People* v. *Murphy* (2001) 25 Cal.4th 136, 156.) Respondent never raised this issue in the court of appeal.

Appellant contends respondent has forfeited this claim since it failed to raise this issue in the Court of Appeal. (See *Associated Builders, supra,* 21 Cal. 4th 352, 379; *People* v. *Murphy, supra,* 25 Cal.4th at p. 156.)

B. <u>Respondent's Argument Fails on the Merits</u>

Appellant also disagrees on the merits. Respondent failed to address any of the arguments, or authority, regarding appellant's position in this matter. (See OBM 6-8.)

In addition, this Court has stated:

> When a question of statutory interpretation implicates constitutional issues, we are guided by the precept that "[i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, citing *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548; and *People v. Leiva* (2013) 56 Cal.4th 498, 506–507.)

The "canon of constitutional doubt" is a rule that "a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity." (*Gutierrez, ibid.*, italics in original.) Thus the canon applies only to ambiguous statutes. (See *People v. Chandler* (2014) 60 Cal.4th 1354, 1373 (conc. & dis. opn. of Corrigan, J.).) To be considered ambiguous, ". . . the statute must be *realistically*

susceptible of two interpretations . . ." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146, italics in original.)

"When construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body." (*People v. Braxton* (2004) 34 Cal.4th 798, 810.) "'We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.)

Respondent's oft cited (ABM 9-10) authority, *Reidy* v. *City and County of San Francisco* (2004) 123 Cal. App. 4th 580, 591 agrees: "When the words of the statute are clear, the court does not alter or amend them to accomplish a purpose that does not appear on the face of the statute; rather, the court gives effect to the plain meaning of the statute."

The statute in question contains unambiguous language not realistically susceptible of two interpretations, stating: "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: . . . Waiver of any privilege against self-incrimination . . ." (Pen. Code, sec. 1203.067, subd. (b)(3).) The language is not qualified in any way. It mandates a waiver of *any* privilege against self-incrimination.

Respondent's sole response to the lack of ambiguity in the language of the statute is to chide appellant, in a footnote, for failing to quote more of the statute. (ABM 11, fn. 6.) Having done so, respondent not only failed to explain how this additional language changed its meaning, but also left out the key word in the remaining portion of that section – the very simple, yet crucial, word, "and." (*Ibid.*)

> 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:
> . . .
> Waiver of any privilege against self-incrimination *and* participation in polygraph examinations, which shall be part of the sex offender management program. (Pen. Code, § 1203.067, subd. (b)(3) (emphasis added).)

Once the "and" is properly noted, the reference to "part of the sex offender management program clearly refers to "polygraph examinations." Respondent did not, nor cannot, argue otherwise. The Fifth Amendment waiver is not qualified in any way. It mandates a waiver of *any* privilege against self-incrimination. Thus, the canon of constitutional avoidance is inapplicable.

II. THIS COURT SHOULD STRIKE THE FIFTH AMENDMENT WAIVER FROM THE STATUTE

A. Use and Derivative Use Immunity Are Inadequate To Protect The Fifth Amendment Rights under the Statute and its Guidelines

1. The Applicable Law

Respondent asserts this Court should consider declaring a rule of use and derivative use immunity as applying to the statute which, it maintains, would protect probationers from the harm of any incriminating statements made during the

treatment program. (ABM 25-27.) Respondent further quotes an appellate court to the effect that "[s]uch a 'judicially declared rule supplants the Fifth Amendment because the scope of that rule is coextensive with the scope of the Fifth Amendment privilege." (ABM, quoting *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 501.) *Baqleh*, however, applied to a section 1368 competency hearing and its ruling appears to be limited to that situation, not to every imaginable one. (See *People* v. *Jablonski* (2006) 37 Cal. 4th 774, 802; citing *Baqleh, supra,* 100 Cal.App.4th at p. 496.) This court has also stated that use and derivative use protection would be "coextensive with the scope of the Fifth Amendment privilege." (*People* v. *Coleman* (1975) 13 Cal. 3d 867, 892 [where probation revocation hearing relied directly on probationer's statement.].) Neither *Kastigar* nor this court, however, has ever ruled that use and derivative use immunity would be "coextensive" with the Fifth Amendment in every imaginable circumstance. (*Kastigar* v. *United States* (1972) 406 U.S. 449, 453.)

While use and derivative use immunity was adequate to protect Fifth Amendment rights in *Baqleh* and *Coleman*, neither, as discussed more fully below, involved the intricate problems this statute presents. One prominent and obvious difference is that unlike *Kastigar*, *Baqleh* and *Coleman*, the derivative use immunity here is not being applied to statements about a *known* crime which, in most cases, will already have been thoroughly investigated. Rather it enables the prosecution to discover fresh *unknown* crimes, the subsequent investigation of which is likely to have dozens of different entry points. (See OMB 20-30.)

The practical difficulties in enforcing derivative use immunity regarding this statute was anticipated in Justice Marshall's dissent in *Kastigar*. Justice Marshall noted that enforcement of derivative use immunity inevitably depends on the integrity and good faith of the prosecutor because the knowledge necessary to show whether the immunized evidence has been used is wholly controlled by the prosecutor, and the prosecutor can always meet the burden of proof by mere assertion that will be undisputed. (*Kastigar* v. *United States, supra,* 406 U.S. at p. 469 (diss. opn., Marshall, J.) He added:

> Second, even [prosecutorial] good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. (*Ibid.*)

In no conceivable past circumstance has Justice Marshall's concern been more justified than with the Fifth Amendment waiver here.

2. The Myriad Difficulties in Establishing Derivative Use Immunity Here

Any "immunity" against the derivative use of the vast amount of information garnered by this statute would be illusory. Respondent's assertion the statute and guidelines themselves do not require this information be sent to the police is both true and irrelevant. (ABM 15.) The statute was not written in a vacuum. Existing law requires that any evidence of prior sex crimes *must* be reported to the police

pursuant to the Child Abuse and Neglect Reporting Act. (See OBM 28-29; Pen. Code §§ 11165.9, subd. (a)(15), (18), (21) & (34); 11166.) The new statute creates the incriminating information that then must be transferred, due to existing law, to law enforcement.

Respondent emphasized the probationer's confessions, but an equally serious problem emanates from the information it generates about the crime itself. Since there are no limits to these interviews and the probationer is encouraged to divulge everything, it is probable that all the surrounding details of the prior sex crime will have to be divulged as well. (See OMB 20-30.)

These lie detector tests and psychological interviews are likely to span years, entailing numerous encounters. If the probationer has committed any uncharged sexual offenses, every treatment interview, of any kind, that discusses that incident will create "new evidence" that will have to be reported to law enforcement. Consequently, even one such incident will create a continuous stream of information being sent to various law enforcement personnel. (See OMB 20-30; Child Abuse and Neglect Reporting Act; Pen. Code §§ 11165.9, subd. (a)(15), (18), (21) & (34); 11166; Cal. Sex Offender Management Bd., Post-Conviction Sex Offender Polygraph Standards (June 2011) ("Polygraph standards") at pp. 1, 5-6, 9, 11-13, 15-17.)

As Justice Marshall pointed out, police officers talk with one another and after any appreciable time has elapsed, it would likely be impossible for the investigating officer to trace the source of his tip regarding the possibility of a crime.

In addition, there is a six year statute of limitations for the most sex crimes (Pen. Code § 800) and, for all practical purposes, no statute of limitations for sexual crimes against a minor until the victim reports it. (See Pen. Code § 803, subd. (f)(1).) By the time the matter is prosecuted, it may be impossible to find proof of the probationer's confessions in the sex offender treatment program, let alone track its journey to the investigative officer.

Once law enforcement obtains information that a crime has occurred, or even may have occurred, as well as the identity and location of the victim, all the police have to do is interview him or her -- they do not necessarily need the probationer's statement. Any subsequent prosecution, moreover, will be against a defendant who already has a preexisting sex crime on his or her record. (See AMB 18, fn. 8.)

Directly utilizing a treatment confession, moreover, will normally not be necessary. As respondent emphasized, the Fifth Amendment waiver – and thus derivative use immunity -- would only apply to statements made during the sex offender treatment program. (AMB 3 [no Fifth Amendment waiver for statements made outside the treatment program], 11 .) As previously noted, no reasonable defendant could be expected to understand that a "[w]aiver of any privilege against self-incrimination" does not actually mean what it says, but instead means that after waiving the privilege, he or she would nonetheless need to invoke it at a later time with respect to statements made under the waiver. (§ 1203.067, subd. (b)(3).) There is nothing in the statute, nor in

respondent's suggested alterations to it, that would advise a probationer of this fact.

Since the major point of therapy is to encourage personal responsibility for the crime, proving the subsequent confession's voluntariness is not likely to be a prosecutorial problem. In short, once the waiver of the Fifth Amendment is established inside the probationer's mind, obtaining a "legitimate" confession outside the program (and its "protection") is all but assured.

In terms of the reasonable expectation of how law enforcement will apply the advantages conferred to it by this recent enactment, appellant agrees with respondent that the best evidence for this emanates from the past history of the waiver of probationers and parolees' Fourth Amendment rights. (AMB 15, 22.)

B. Respondent's Claim that the Utility of the Present Fifth Amendment Waiver is Supported by the History of the Fourth Amendment Waiver is Belied by the Facts

Respondent argued that the experience of previous Fourth Amendment waivers of probationers were "justified" and this logic should be applied to this Fifth Amendment waiver. (AMB 22.) In addition, respondent has emphasized that "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." (AMB 15.)

Appellant agrees with respondent's implied assertion that the past is the best indicator of the future. (AMB 15.) However, this seventeen month period since the act became law, on July 1, 2012, and prior to any definitive judicial decision

regarding it, is useless. It would be the rare prosecutor who would not realize that any action taken prior to a definitive decision on this issue would be ill advised. Even if a prosecutor had already initiated actions against a probationer based upon a prior admission, appellant has no means of learning of such an event until an appellate decision has been rendered. Seventeen months is insufficient time for the probationer to be first sentenced, the probation interviews to begin, the probationer admissions to have occurred, to be discovered by the prosecution, then investigated, a prosecution initiated, and then resolved, and an appellant decision rendered.

Nevertheless, respondent's argument reveals that it does agree with appellant in principle, that the past is the best indicator of how the police will handle the law enforcement advantages of a constitutional waiver. (AMB 15.) Respondent and appellant also agree the best comparison of this Fifth Amendment waiver is with the previous constitutional waiver, the Fourth Amendment waiver that took place 37 years, on July 1, 1977, the precise moment being determined by this court. (AMB 21-22; *People* v. *Burgener* (1986) 41 Cal. 3d 505, 529, citing *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 583-585 as being the case which first rendered this decision.)

Whether law enforcement appropriately utilized the law enforcement advantages conferred by a constitutional waiver of probationers and parolees can be inferred by parole revocation statistics.[1] While *Icenogle* was the first case to uphold

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[1] Appellant was unable to find probation revocation statistics for this time period.

Fourth Amendment waivers of paroles, the legal explanation for upholding such waivers occurred five years earlier regarding Fourth Amendment waivers for probationers in *People v. Mason* (1971) 5 Cal.3d 759, 764. One of the primary reasons for upholding the search was that prior cases had established "that such a condition is reasonable and valid, being 'related to [the probationer's] *reformation and rehabilitation* in the light of the offense of which he was convicted.'" (*Ibid.*; emphasis added.)

Thus, if this law enforcement advantage had been judiciously applied, one might expect a slight increase in parole revocations since it had a law enforcement purpose as well, but certainly not an extreme one. The needs of "reformation and rehabilitation" – purposes claimed by this statute as well – formed an important basis for the constitutional waiver. (*Ibid.*) The exceedingly abrupt rise in parole revocation rates – immediately after the parole/probation search waiver – shows that not only did the Fourth Amendment waiver fail to assist parolee rehabilitation – it essentially destroyed it.

This information is publically available from the Data Analysis Unit of the Estimates and Statistical Analysis Section of the Offender Information Services Branch of the California Department of Corrections, Date January 1999, Table 1. (http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/PVRET2/PVRET2d1998.pdf.) A request for judicial notice is being filed in conjunction with this brief.

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In 1977, the time of the Fourth Amendment waiver, the parole recidivism rate was 14.1%, and the average for the six years available in the chart, that is, from 1972 to 1977, was 15.8%. (18.6 [1972] + 20.5 [1973] + 16.1 [1974] + 10.9 [1975] + 14.6 [1976] + 14.1 [1977] divided by 6 years = 15.8%.)

With a six year average recidivism rate of 15.8%, the police obtained the right to search a parolee at will. The parole recidivism rate promptly doubled in four years, reaching 32.7% in 1981. A mere five years after that, in 1986, the parole recidivism rate had more than doubled again, to 70.9%. Three years later, in 1989, the recidivism rate had reached – a mere twelve years after the Fourth Amendment waiver had been established – 86.9 per cent. This amounted to roughly seven out of eight parolees, with an increase in recidivism having occurred in each of the twelve intervening years. Put differently, prior to the constitutional waiver, only 16 parolees out of a 100 had their parole revoked. Twelve years later, with the constitutional waiver, only 13 parolees out of a 100 did not have their parole revoked.

The past is the best indicator of the future. (AMB 15.) Forcing a probationer or parolee to waive a constitutional right does not lead to rehabilitation, but, rather, retards such rehabilitation.

C. Respondent Was Unable to Provide any Therapeutic Justification for the Waiver of the Fifth Amendment

Appellant is not disputing the right to interrogate, or use polygraph examinations, regarding the facts of the offense[s] of which the probationer has been convicted. All these facts have been judicially determined and no

further prosecution could result. There is no Fifth Amendment right to be waived. As the high court observed in *Murphy*, the Fifth Amendment already allows the state to require a probationer to participate in treatment and answer questions truthfully. (*Minnesota* v. *Murphy* (1984) 465 U.S. 420, 427.)

The Fifth Amendment problem is created when the probationer is forced to divulge crimes of which he, or she, has never been charged, and which law enforcement, presumably, knows nothing about. Respondent's argument for the therapeutic need for the probationer to waive his Fifth Amendment rights does not address this problem.

First, respondent complains that therapists had previously relied only on the facts of the crime and the probationer's voluntary disclosures. (AMB 7.) Respondent provided no authority for this claimed impediment and, in any event, therapist have had the right to question a probationer about the facts of his past convictions for some time. (*Minnesota* v. *Murphy, supra,* 465 U.S. at p. 427.)

Respondent then quoted research that "offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment." (AMB 8.) Again, since the probationers will be forced to confront the crimes of which they were convicted, this does not create a need to waive the Fifth Amendment for unknown crimes. Then, respondent suggested a possible problem with an offender who had committed "different types of abusive contact" – for which, again, no authority is provided – and

then solved this imaginary problem by requiring a waiver of the Fifth Amendment. (AMB 8.) Respondent's factual arguments regarding the alleged therapeutic need for the waiver are devoid of substance.

Respondent's primary reliance in this regard, *McKune v. Lisle* (2002) 536 U.S. 24, is unavailing. (AMB 7-8.) *Lile* dealt with whether an *incarcerated prisoner* could refuse to respond to questions in the Sexual Abuse Treatment Program ordered by the state of Kansas. *Lile* is inapposite in that it relied upon this prison context, stating "The consequence in question here -- a transfer to another prison where television sets are not placed in each inmate's cell, where exercise facilities are not readily available, and where work and wage opportunities are more limited -- are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent. The fact that these consequences are imposed on prisoners, rather than ordinary citizens, moreover, is important in weighing [the] constitutional claim." (*Lile, supra,* 536 U.S. at p. 36.) The Court observed that "[a] broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction." (*Ibid.*)

This is not a case where appellant is incarcerated in state prison, or where the consequences he faces are the loss of television privileges. The potential consequences to him are severe, since the statute compels him to not only waive any privilege against self-incrimination, but also to make statements that will incriminate him. Respondent's reliance on *Lile* is misplaced.

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D. The Dissent's Determination Should Prevail, the Fifth Amendment Waiver Should Be Stricken

The Fifth Amendment waiver here is not only unconstitutional, but has no discernible therapeutic need for its existence. The need for this constitutional waiver, as forthrightly put in the Opinion, is to assist law enforcement:

> One of the risks is that the sex offender's full history of sex offenses may not be known when he or she is granted probation. The Legislature could reasonably conclude that a sex offender who has committed additional unreported sex offenses generally poses a significantly greater risk to the public if he or she is not incarcerated. (Typed Opn. 17.)

Incarceration has existed for a long time, certainly during the time that the Bill of Rights was enacted. Those people were not unlike ourselves; they worried about what unknown crimes a prisoner might have done and what he might do when he was released. Every single day in the 223 years since its ratification, people have worried about this. Nothing has changed, except of course, our respect for the wisdom contained in the Bill of Rights.

One of the principles behind the constitution, and its Bill of Rights, is that citizens will inevitably become inflamed over different issues from time to time. Our country needed an anchor of fundamental human principles to prevent rash, quick fix solutions based upon the passion of the moment. This state has been down the road of waiving constitutional rights for parolees and probationers before. The results, as Exhibit C showed, are clear and unmistakable. It is strongly urged that this court does not take this path again.

Appellant submits this court should follow the dissent's opinion and strike

the words "Waiver of any privilege against self incrimination and" from Penal Code section 1203.067, subdivision (b)(3). (Typed Opn. at p. 10 (conc. & dis opn of Grover, J.))

III. CONCLUSION

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

Dated: December 4, 2014

Respectfully submitted,

David Martin, Attorney for
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VERIFICATION OF NUMBER OF WORDS

I, David Martin, the Attorney for Ignacio Garcia, Appellate Case No. S218197, and the attorney who prepared the Reply Brief on the Merits in this case, certifies that the number of words used in this Reply Brief on the Merits, excluding the table of contents, was 3,840 words.

I declare under penalty of perjury under the laws of the United States of California that the forgoing is true and correct and that this was executed on December 4, 2014, Alameda, California.

David Martin

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action. My business address is 10 Sanderling Court, Sacramento, CA 95833. On December 4, 2014, I served the **Reply Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and placed in the United States mail addressed as follows:

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