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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES SOUSA PEREIRA,

Defendant and Appellant.

H040159

(Santa Clara County

Super. Ct. No. C1351982)

Defendant James Sousa Pereira pleaded no contest to one count of possession of child pornography. (Pen. Code, § 311.11, subd. (a).)¹ The trial court granted a three-year term of probation with the condition that defendant serve six months in county jail. Among other conditions of probation, the court ordered defendant to complete a sex offender management program as mandated by section 1203.067. The court also imposed seven probation conditions requiring defendant: (1) to waive any privilege against self-incrimination and participate in polygraph examinations as part of the sex offender management program under section 1203.067(b)(3); (2) not to purchase or possess any pornographic or sexually explicit material as defined by the probation officer; (3) not to date, socialize with, or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer; (4) not to

¹ Subsequent undesignated statutory references are to the Penal Code.

reside in a home where children under the age of 18 reside; (5) not to frequent, be employed by, or engage in any business where pornographic materials are openly exhibited; (6) not to access the Internet without prior approval of the probation officer; and (7) not to clean or delete Internet browsing activity, but to keep a minimum of four weeks' history.

Defendant challenges the condition requiring a waiver of his privilege against self-incrimination on the ground that it violates his rights under the Fifth Amendment. Second, he challenges the condition requiring him to participate in polygraph examinations as overbroad and in violation of the Fifth Amendment. He also argues that both conditions are unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and that trial counsel was ineffective for failing to object on that basis. Third, defendant challenges the condition that he not purchase or possess pornographic or sexually explicit material as unconstitutionally vague and overbroad. Finally, he challenges the remaining conditions as unconstitutionally vague in the absence of a scienter requirement.

First, we hold that the condition requiring a waiver of the privilege against self-incrimination is prohibited by the Fifth Amendment under *Minnesota v. Murphy* (1984) 465 U.S. 420 (*Murphy*). Accordingly, we will strike the relevant language of that condition. Second, we construe the requirement of participation in polygraph examinations as allowing only questions relating to the successful completion of the sex offender management program, the crime of which defendant was convicted, or related criminal behavior. So construed, we uphold this condition as reasonable under *Lent*, *supra*, 15 Cal.3d 481. As to the remaining probation conditions, we will modify them to include scienter requirements. We will affirm the judgment as modified.

I. FACTUAL AND PROCEDURAL BACKGROUND

The prosecution charged defendant by felony complaint with a single count of possessing matter depicting a person under 18 engaging in or simulating sexual conduct. (§ 311.11, subd. (a).) The record contains no statement of the facts. The parties

stipulated that reports in the case file provided a factual basis for the plea. Defendant pleaded no contest to the alleged count. At sentencing on July 31, 2013, the trial court granted a three-year term of probation with the condition that defendant serve six months in county jail.

The trial court then imposed the probation conditions at issue here. First, the court ordered defendant to participate in an approved sex offender management program certified under section 9003. As required by section 1203.067, the court ordered: “The defendant shall waive any privilege against self-incrimination and participate in polygraphic examinations, which shall be part of the sex offender management program. Defendant shall waive any psychotherapist patient privilege to enable communication between that sex offender management professional and probation officer.” The court further ordered: “The defendant shall not date, socialize with or form any romantic relationship with any person who has physical custody of a minor, unless approved by the probation officer. [¶] The defendant shall not reside in a home where children under the age [of] 18 years reside. [¶] The defendant shall not purchase or possess any pornographic or sexually explicit material as defined by the probation officer. The defendant, [shall not] frequent, be employed by, or engaged [*sic*] in, any business where pornographic material[s] are openly exhibited. The defendant shall not access the Internet or any other online service through use of a computer or other electronic device at any location, including place of employment, without prior approval of the probation officer. And that defendant shall not possess or use any data encryption technique program. [¶] Defendant shall not clean or delete Internet browsing activity and must keep a minimum of four weeks of history.”

Defendant objected to all these conditions. He specifically objected to the waiver of his privilege against self-incrimination and the polygraph requirement as a violation of his Fifth Amendment rights. The court imposed the conditions over defendant’s objections.

II. DISCUSSION

A. Section 1203.067 Waiver and Polygraph Requirement

Defendant challenges the constitutionality of the probation condition mandated by subdivision (b)(3) of section 1203.067. He contends the condition, which requires the waiver of any privilege against self-incrimination and participation in polygraph examinations, violates the Fifth Amendment and is overbroad. He also contends his trial counsel was ineffective for failing to object to this condition as unreasonable under *Lent*, *supra*, 15 Cal.3d 481. The Attorney General argues that defendant's Fifth Amendment claim is not yet ripe because no violation of the privilege against self-incrimination would occur until his statements are used against him in a criminal proceeding. The Attorney General further contends that, in the event we find the claim justiciable, we should modify the condition to cure any constitutional defects.

We conclude defendant's claim under the Fifth Amendment is ripe for adjudication, and we hold—under *Murphy*, *supra*, 465 U.S. 420—that the waiver condition violates defendant's privilege against self-incrimination. But we also hold that defendant may be required to submit to polygraph examinations and participate in the sex offender management program—even if doing so requires him to make incriminating statements—provided his statements are not used against him in a subsequent criminal proceeding.

1. Statutory Scheme

Under section 1203.067(b)(2), any person placed on formal probation on or after July 1, 2012, for any offense requiring registration under Penal Code sections 290 through 290.023, “shall successfully complete a sex offender management program, following the standards developed pursuant to Penal Code section 9003, as a condition of release from probation.” Section 1203.067(b)(3) requires “Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program.” And section 1203.067 (b)(4) requires

“Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09.”²

The Legislature enacted these provisions in 2010 to amend the Sex Offender Punishment, Control, and Containment Act of 2006 (hereafter, the “Containment Act”). (Stats. 2010, ch. 219, § 17.) The Containment Act created “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, subd. (b), Stats. 2006, ch. 337, § 12.) The Containment Act now requires participation in an “approved sex offender management program” certified by the California Sex Offender Management Board (CASOMB). (§ 9003.)

Under section 9003, CASOMB promulgates standards for certification of sex offender management programs and “sex offender management professionals.” (§ 9003, subds. (a) & (b).) Such programs “shall include treatment, as specified, and dynamic and future violence risk assessments pursuant to Section 290.09.” (§ 9003, subd. (b).) Furthermore, sex offender management programs “shall include polygraph examinations by a certified polygraph examiner, which shall be conducted as needed during the period that the offender is in the sex offender management program.” (*Ibid.*) Section 290.09 specifies that “[t]he certified sex offender management professional shall communicate with the offender’s probation officer or parole agent on a regular basis, but at least once a month, about the offender’s progress in the program and dynamic risk assessment issues, and shall share pertinent information with the certified polygraph examiner as required.” (§ 290.09, subd. (c).)

² These same two waiver conditions apply to parolees. (§ 3008, subds. (d)(3) & (d)(4).)

2. *Waiver of the Privilege Against Self-Incrimination*

By requiring the waiver of “any privilege against self-incrimination,” the plain language of section 1203.067(b)(3) squarely implicates defendant’s rights under the Self-Incrimination Clause of the Fifth Amendment. The “core” right of the Self-Incrimination Clause protects against the use of compelled statements “*in a criminal proceeding* against the person who gave them.” (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1128 (*Maldonado*) [citing *Chavez v. Martinez* (2003) 538 U.S. 760, 766-773 (plur. opn. of Thomas, J.) (*Chavez*)], original italics.) Because the statute requires waiver of *any* privilege against self-incrimination, the probation condition necessarily includes a waiver of the “core” right under the Self-Incrimination Clause. The plain language of the waiver, if left intact, would therefore allow the state to use defendant’s compelled statements against him in a separate criminal proceeding.

The Attorney General nonetheless contends the claim is not ripe. She argues that the Fifth Amendment would only be violated if defendant’s incriminating statements were used against him in a criminal prosecution. Because defendant has not identified any such use of his statements, the Attorney General contends he has no Fifth Amendment claim. But the Attorney General does not explain how defendant could protect his Fifth Amendment rights in a future criminal proceeding after expressly waiving these rights as a condition of probation. As noted by Justice Thomas’ plurality opinion in *Chavez*: “Once an immunity waiver is signed, the signatory is unable to assert a Fifth Amendment objection to the subsequent use of his statements in a criminal case, even if his statements were in fact compelled. A waiver of immunity is therefore a prospective waiver of the core self-incrimination right in any subsequent criminal proceeding” (*Chavez, supra*, 538 U.S. at p. 768, fn. 2 (plur. opn. of Thomas, J.))

Thus, a state-compelled, prospective waiver of the privilege against self-incrimination gives rise to a Fifth Amendment claim *before* a declarant’s incriminating statements are used in a criminal prosecution, regardless of whether the state ever

initiates such a prosecution. The Supreme Court's longstanding "penalty cases" jurisprudence established this rule decades ago. (*Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation* (1968) 392 U.S. 280, 283 [Fifth Amendment violated when state fired public employees for invoking and refusing to waive the privilege against self-incrimination]; *Gardner v. Broderick* (1968) 392 U.S. 273, 276 [Fifth Amendment prohibits state from firing policeman for refusing to waive the privilege against self-incrimination].)

In *Lefkowitz v. Turley* (1973) 414 U.S. 70, licensed architects challenged a New York statute disqualifying contractors for public contracts if they refused to waive their Fifth Amendment immunity. The architects, when called as witnesses before a grand jury, refused to sign waivers of immunity. The state had not charged them with any crimes, nor used their statements against them in any criminal proceeding. Nonetheless, the Supreme Court held that the statutorily compelled waivers violated the Self-Incrimination Clause. The Supreme Court again reaffirmed this principle in *Lefkowitz v. Cunningham* (1977) 431 U.S. 801. There, a New York statute provided that if a political party officer was subpoenaed to testify about the conduct of his office but the officer refused to testify or waive immunity, the officer was barred from holding office for five years. Cunningham, when subpoenaed to testify before a grand jury, refused to sign a waiver of immunity, and he was barred from holding office. The state never threatened or attempted to use Cunningham's statements against him in a criminal prosecution, yet the Supreme Court struck down the statute as a violation of the Self-Incrimination Clause. These cases make clear that a state-compelled, prospective waiver of immunity violates the Self-Incrimination Clause apart from the use of any such compelled statements in any subsequent criminal proceeding.

The Attorney General relies on *Maldonado* for the proposition that the Fifth Amendment is not violated until a defendant's statements are used against him in a criminal proceeding. But this reliance on *Maldonado* ignores the analytical distinction

between a violation of the “core” Fifth Amendment right and a violation of the “prophylactic” protection prohibiting a compelled waiver of immunity as explained in *Maldonado* itself and in *Chavez*.

In *Maldonado*, the California Supreme Court stated that “a ‘core’ Fifth Amendment violation is completed, not merely by official extraction of self-incriminatory answers from one *who has not waived the privilege*, but only if and when those answers are *used in a criminal proceeding* against the person who gave them.” (*Maldonado*, *supra*, 53 Cal.4th at p. 1128, first italics added.) For this principle, the court relied on the plurality opinion in *Chavez*, *supra*, 538 U.S. at pp. 766-773 (plur. opn. of Thomas, J.).

In *Chavez*, the United States Supreme Court considered a civil rights lawsuit under 42 U.S.C. section 1983 by a plaintiff alleging a violation of the Fifth Amendment. Although the plaintiff’s statements were compelled, they were never used against him in a criminal prosecution. (*Chavez*, *supra*, 538 U.S. at pp. 763-764.) Justice Thomas, writing for a plurality of justices, characterized the “core” Fifth Amendment privilege as the right not to be a “witness” against oneself in a “criminal case.” (*Chavez*, at pp. 768-769 (plur. opn. of Thomas, J.).) But a majority of justices also affirmed longstanding “prophylactic” or “complementary” protections under the Fifth Amendment that arise prior to and apart from a criminal proceeding. (*Id.* at p. 770 (plur. opn. of Thomas, J.); *id.* at pp. 777-778 (conc. opn. of Souter, J.).) The rule prohibiting a compelled waiver of immunity is one such protection, and is necessary to protect the “core” right against the use of compelled statements in a prosecution. “By allowing a witness to insist on an immunity agreement *before* being compelled to give incriminating testimony in a noncriminal case, the privilege preserves the core Fifth Amendment right from invasion by the use of that compelled testimony in a subsequent criminal case.” (*Id.* at p. 771 (plur. opn. of Thomas, J.).)

The California Supreme Court in *Maldonado* did not hold otherwise. There, the court considered a discovery rule requiring a defendant who proffered a mental incapacitation defense to submit to examination by the prosecution’s mental health experts. (§ 1054.3, subd. (b)(1).) The court had no occasion to consider a compelled waiver. To the contrary, the court explicitly based its analysis on the uncontroversial premise that the defendant maintained his Fifth Amendment immunity unless and until he voluntarily waived it by introducing his own statements into evidence at trial: “[T]he parties agree that the Fifth Amendment protects petitioner against any direct or derivative use of his statements to the prosecution examiners, except to rebut any mental-state evidence he presents through his own experts.” (*Maldonado*, *supra*, 53 Cal.4th at p. 1129, fn. omitted.) “If he decides to abandon the defense, any self-incriminating results of the examinations cannot be introduced or otherwise used against him.” (*Id.* at p. 1132.)

Nothing in *Maldonado* authorizes a compelled waiver of immunity. To the contrary, the California Supreme Court explicitly recognized the *Chavez* plurality’s affirmation of the so-called “prophylactic rules” under the Fifth Amendment: “The rule allowing a witness to assert the privilege prior to testifying, and to refuse to testify unless granted immunity, Justice Thomas indicated, protects the ‘core’ Fifth Amendment privilege simply *by assuring that the witness has not forfeited the right against self-incriminating use of his or her testimony in later criminal proceedings.*” (*Maldonado*, *supra*, at pp. 1128-1129, italics added.) The court in *Maldonado* also acknowledged its prior holding, set forth at *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 714-730 (*Spielbauer*), that a compelled waiver of immunity could not be required even in the absence of a criminal proceeding. In this regard, the court noted: “[W]e held that in the context of a *noncriminal investigation* by a public employer, the employee could be compelled to answer questions about his performance of duty, even without a formal immunity agreement, *so long as he was not required to surrender the immunity conferred*

by the Fifth Amendment itself against use and derivative use of his statements to prosecute him for a criminal offense.” (*Maldonado, supra*, at p. 1129, italics added.)

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

On the merits of defendant’s claim, we conclude the waiver is prohibited by the Fifth Amendment. The United States Supreme Court has held that a state may not compel a probationer to waive the right to invoke the Fifth Amendment or otherwise punish a probationer for invoking its protections: “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.) This holding was based on the aforementioned “penalty cases” jurisprudence, under which the Fifth Amendment prohibits a compelled, prospective waiver of the Fifth Amendment, even prior to and apart from any criminal proceeding. (*Lefkowitz v. Cunningham, supra*, 431 U.S. 801; *Lefkowitz v. Turley, supra*, 414 U.S. 70; *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, supra*, 392 U.S. 280; *Gardner v. Broderick, supra*, 392 U.S. 273.) And, as noted earlier, a plurality of the court has observed that “[o]nce an immunity waiver is signed, the signatory is unable to assert a Fifth Amendment objection to the subsequent use of his statements in a criminal case, even if his statements were in fact compelled. A waiver of immunity is therefore a prospective waiver of the core self-incrimination right in any subsequent criminal

proceeding” (*Chavez, supra*, 538 U.S. at p. 768, fn. 2 (plur. opn. of Thomas, J.).)

These cases make clear that the probation condition here, by requiring defendant to waive any privilege against self-incrimination, is prohibited under the Fifth Amendment.

We note that without the waiver, the state may still compel defendant to participate in treatment—even if doing so requires him to make incriminating statements—provided he retains immunity from the use of compelled statements in separate criminal proceedings. As the court in *Murphy* observed, “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. Under such circumstances, a probationer’s ‘right to immunity as a result of his compelled testimony would not be at stake,’” (*Murphy, supra*, 465 U.S. at p. 435, fn. 7.)

The California Supreme Court recently reaffirmed this principle as applied to public employees in *Spielbauer, supra*, 45 Cal.4th 704 (public defender could be compelled under threat of discharge to answer questions over his claim of the privilege provided he retained immunity from prosecution). Our high court held: “In many instances, of course, it is necessary or highly desirable to procure citizens’ answers to official questions, including their formal testimony under oath. In such circumstances, an individual’s invocation of the privilege against self-incrimination would frustrate legitimate governmental objectives. 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. [Citations.] In such cases, *refusals to answer are unjustified*, ‘for the grant of immunity has removed the dangers against which the privilege protects. [Citation.]’ ” (*Id.* at pp. 714-715, italics added.) And the court held that where the state’s competing

interests require it, the state need not issue a *formal* prospective grant of immunity. (*Id.* at p. 725.)

The state's interest here is at least as great as those in *Spielbauer*. This is particularly so when that interest is balanced against the rights of a probationer, who generally enjoys less constitutional protection than a public employee who is not convicted of any crime. (See *United States v. Knights* (2001) 534 U.S. 112, 119 [“Inherent in the very nature of probation is that probationers ‘do not enjoy “the absolute liberty to which every citizen is entitled.” ’ ”].) Thus, under *Spielbauer*, a *formal* grant of immunity is not necessary to preserve defendant's rights under the Fifth Amendment during his required participation in the sex offender management program. And, as the cases discussed above make clear, the Fifth Amendment prohibits a compelled, prospective waiver of defendant's privilege against self-incrimination as a condition of probation. Under these principles, no waiver of the privilege against self-incrimination is necessary for participation in the sex offender management program.

For the reasons above, we will strike the waiver of privilege against self-incrimination from the probation condition. The state may still compel defendant to participate in the program and in polygraph examinations as part of the program, even if doing so requires him to make incriminating statements. (*Murphy, supra*, 465 U.S. at p. 435, fn. 7.) However, if defendant claims the privilege against self-incrimination, and the state continues to compel incriminating statements from him, then he will retain immunity from the use and derivative use of his statements in any separate criminal proceeding against him. (*Id.* at p. 435.)

3. *The Dissent's Interpretation of the Penalty Exception*

In *Murphy*, the court held 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, italics added.) The dissent contends this so-called “penalty exception” means the waiver here is constitutional because the probationer’s statements could not be used against him in a criminal proceeding. We respectfully disagree.

First, the dissent ignores the plain language of the waiver under section 1203.067(b)(3). If the waiver is valid, as the dissent asserts, then defendant has waived his ability to assert the Fifth Amendment in a subsequent criminal proceeding, and his statements would be admissible against him.

Second, the dissent’s argument misconstrues *Murphy*. The Supreme Court held that, under the penalty exception, “the failure to assert the privilege would be excused.” (*Murphy, supra*, 465 U.S. at p. 435.) This is simply an exception to the general rule that the Fifth Amendment must be affirmatively invoked; it does not render a compelled waiver constitutional. Under the penalty exception, Murphy’s statements would have been inadmissible precisely because a threat to revoke his probation for asserting the privilege against self-incrimination *would have violated the Fifth Amendment*. The court in *Murphy* stated this explicitly in holding that “the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege.” (*Id.* at p. 438.) The holding that statements made under the penalty exception are inadmissible is simply an application of the exclusionary rule as required by the Fifth Amendment violation. As pointed out above, the Supreme Court in *Murphy* based this holding on its “penalty cases” jurisprudence. (*Lefkowitz v. Cunningham, supra*, 431 U.S. 801; *Lefkowitz v. Turley, supra*, 414 U.S. 70; *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, supra*, 392 U.S. 280, 283; *Gardner v. Broderick, supra*, 392 U.S. 273, 276.) The dissent does not address any of these earlier cases prohibiting compelled waivers.

The dissent’s position would also introduce a serious practical difficulty. If the waiver were left intact, then a probationer’s incriminating statements would automatically be immunized under the penalty exception, even if the probationer never

invoked the Fifth Amendment. This automatic grant of immunity could complicate future prosecutions, since the prosecution would bear “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” (*Kastigar, supra*, 406 U.S. at pp. 461-462.) By contrast, with the waiver condition stricken, a probationer must affirmatively invoke the Fifth Amendment to enjoy its protections. If defendant makes incriminating statements after failing to invoke the privilege, his statements could be used against him in a criminal prosecution without violating the Fifth Amendment. (*Murphy, supra*, 465 U.S. at p. 440.) If, on the other hand, defendant invokes the Fifth Amendment in response to questioning, the questioner or the probation officer would have the opportunity to consult with the district attorney on the wisdom of compelling further statements and thereby conferring immunity.

The dissent and the Attorney General adopt the position that the Fifth Amendment does not prohibit the state from requiring the probationer to answer questions as part of the treatment program, provided his answers are not used against him in a criminal prosecution. We agree with this conclusion. As we point out above, the Supreme Court has long made clear that requiring the probation to answer questions—even if doing so is incriminating—does not violate the Fifth Amendment, as long as the probationer retains immunity. (*Murphy, supra*, 465 U.S. at p. 435, fn. 7.) Furthermore, if defendant refuses to answer questions posed to him as part of the treatment program, the state can use his 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.*) Nonetheless, the dissent contends the waiver condition is necessary to compel the probationer to provide “*full disclosures*” in connection with the treatment program. (Dissenting opn. at p. 1.) But the dissent does not explain why an express waiver of the Fifth Amendment is necessary if requiring the probationer to answer questions *does not violate the Fifth Amendment in the first place*. In our view, the waiver is not only unconstitutional but unnecessary as well.

For these reasons, we are not persuaded by the dissent's arguments concerning the penalty exception and the necessity of the waiver condition.

4. *Reasonableness of the Polygraph Requirement*

Defendant contends that if the requirement that he submit to polygraph examinations is not unconstitutional under the Fifth Amendment, it must be stricken under *Lent, supra*, 15 Cal.3d 481. He frames his claim as ineffective assistance of counsel based on trial counsel's failure to object specifically on reasonableness grounds. We conclude that trial counsel's objection on overbreadth grounds was sufficient to preserve defendant's claim. But we also conclude that trial counsel's conduct did not constitute deficient performance because the polygraph requirement, when properly construed, is reasonable under *Lent* and *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 320 (*Brown*).

The defendant in *Brown* was convicted of stalking. The trial court imposed a probation condition similar to the condition here, ordering Brown to complete a stalking therapy program and submit to periodic polygraph examinations as conditions of his probation. (*Id.* at pp. 317, 319.) The court of appeal held that mandatory polygraph testing as a condition of probation was reasonably related to the defendant's stalking conviction and to possible future criminality under *Lent, supra*, 15 Cal.3d 481. (*Brown, supra*, 101 Cal.App.4th at p. 319.) But the court further held that the probation condition must be narrowed under *Lent* to "limit the questions allowed to those relating to the successful completion of the stalking therapy program and the crime of which Brown was convicted." (*Id.* at p. 321.)

Application of the *Lent* factors leads us to the same conclusion in this case. Under *Lent*, "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .' [Citation.] Conversely, a condition of probation which requires

or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Lent, supra*, 15 Cal.3d at p. 486, fn. omitted.)

Here, the basic requirement that defendant participate in polygraph examinations does not run afoul of the *Lent* factors, provided the questions posed to him are reasonably related to his successful completion of the sex offender management program, the crime of which he was convicted, or related criminal behavior, whether past or future. For example, questions about the probationer’s sexual pre-occupations or history of sexual deviancy would be reasonably related to future criminality and the circumstances of the underlying offense. The problem, however, is that the plain language of the probation condition places no limits on the types of questions that may be posed to the probationer. There is no requirement that the questions be related to any criminal conduct, whether past, present, or future. Nor is there any requirement that the questions be limited to successful completion of the sex offender management program. Under the probation condition as imposed, a polygraph examiner could ask defendant anything at all, without limitation. For example, a polygraph examiner could question defendant about his medical history or personal financial matters having nothing to do with any criminal conduct. Such questions would have no reasonable connection to the crime for which defendant was convicted, no bearing on his completion of the treatment program, and no relevance to future criminality. Under the *Lent* factors, allowing such questions would violate overbreadth principles.

Because the language of subdivision (b)(3) mandates that participation in polygraph examinations “shall be part of the sex offender management program,” we will construe this part of the condition as imposing the limitations required under *Lent* and *Brown*. Specifically, we construe the requirement of participation in polygraph examinations as allowing only questions relating to the successful completion of the sex offender management program, the crime of which defendant was convicted, or related

criminal behavior. So construed, we uphold this portion of the probation condition as sufficiently narrow to satisfy the requirements of *Lent*.

The Attorney General argues that we should modify the section 1203.067(b)(3) probation condition in several ways to cure any constitutional defects. She suggests, for example, a modification to state that any answers the probationer provides after invoking his or her Fifth Amendment right would not be used in a future prosecution. The Attorney General also suggests that the scope of questioning be limited to questions in furtherance of the successful completion of the sex offender management program, defendant's current probationary period, his sexual history, and assessments of his risk of reoffending. For the reasons above, the language of the statute as properly construed already addresses the Attorney General's concerns, even in the absence of the waiver of the privilege against self-incrimination. No modification is necessary.

B. Prohibition on Purchasing or Possessing Pornography

Defendant contends the condition that he “shall not purchase or possess any pornographic or sexually explicit material as defined by the probation officer” is unconstitutionally vague and overbroad. He argues in the alternative that the condition must be modified to incorporate a scienter requirement. The Attorney General concedes that the condition as written must be modified in accord with the holding of a panel of this court in *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1353 (*Pirali*). We accept the concession.

In *Pirali*, a panel of this court considered a probation condition ordering Pirali “not to purchase or possess any pornographic or sexually explicit material as defined by the probation officer.” (*Pirali, supra*, 217 Cal.App.4th at p. 1344.) The court held: “Materials deemed explicit or pornographic, as defined by the probation officer, is an inherently subjective standard that would not provide defendant with sufficient notice of what items are prohibited.” (*Id.* at p. 1353.) Accordingly, the court modified the condition to order Pirali “not to purchase or possess any pornographic or sexually explicit

material, having been informed by the probation officer that such items are pornographic or sexually explicit.” (*Ibid.*) We agree with the reasoning of *Pirali*, and we will order the trial court to modify the condition accordingly.

C. *Scienter Requirements*

Defendant contends the five remaining probation conditions are unconstitutionally vague in the absence of scienter requirements. On this ground, he challenges the conditions requiring him: (1) not to date, socialize with, or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer; (2) not to reside in a home where children under the age of 18 reside; (3) not to frequent, be employed by, or engage in any business where pornographic materials are openly exhibited; (4) not to access the Internet without prior approval of the probation officer, and not to possess or use any data encryption technique program; and (5) not to clean or delete Internet browsing activity, and to keep a minimum of four weeks’ history. The Attorney General agrees that these conditions are vague in the absence of scienter requirements. We accept the Attorney General’s concessions and will modify the conditions accordingly.

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ ” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness.” (*Ibid.*) That is, the defendant must know in advance when he may be in violation of the condition. “[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a [prohibited item].” (*People v. Freitas* (2009) 179 Cal.App.4th 747, 752 [modifying probation condition to prohibit knowing possession of a firearm or ammunition].) Accordingly, courts have consistently ordered modification of probation conditions to incorporate a scienter requirement where a probationer could unknowingly engage in the

prohibited activity. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 912-913 [modifying probation condition to prohibit knowing presence of weapons or ammunition]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [modifying prohibition on association with gang members to prohibit association with known gang members]; *In re Kacy S.* (1998) 68 Cal.App.4th 704, 713 [modifying probation condition that defendant not associate with any persons not approved by his probation officer]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 629 [modifying probation on displaying gang-related indicia].)

Like the probation conditions in the aforementioned cases, all five conditions challenged by defendant here are susceptible to unknowing violations. He could date, socialize with, or form a romantic relationship with a person without knowing that person has custody of a minor. He could take up residence in a home where he does not know the ages of all the cohabitants. He could visit a business without knowing the business exhibits pornographic materials somewhere on its premises. Or he could visit a business exhibiting materials that are not obviously pornographic but are ultimately determined to be pornographic. He could inadvertently access the Internet through the use of an electronic device—such as an ATM or an automated kiosk—that transmits information over the Internet without his knowledge. Moreover, he could access the Internet through a device or software that uses encryption without his knowledge. And finally, when accessing the Internet with the approval of his probation officer, he could inadvertently delete his Internet browsing history through the use of browser software that does so automatically without informing the user. For these reasons, we will modify these conditions to incorporate scienter requirements.

III. DISPOSITION

In light of our holding that the waiver requirement in Penal Code section 1203.067, subdivision (b)(3) is unconstitutional, we strike the language “waive any privilege against self-incrimination and” from the probation condition implementing that subdivision. Defendant’s probation conditions are further modified as follows: (1) the

condition prohibiting purchase or possession of pornographic or sexually explicit materials is modified to state that defendant shall not purchase or possess any pornographic or sexually explicit material, having been informed by the probation officer that such items are pornographic or sexually explicit; (2) the condition that he may not date, socialize or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer is modified to state that he shall not date, socialize or form a romantic relationship with any person who he knows has physical custody of a minor unless approved by the probation officer; (3) the condition that he not reside in a home where children under the age of 18 years reside is modified to state that he shall not reside in a home where he knows children under the age of 18 years reside; (4) the condition that he not frequent, be employed by, or engage in, any business where pornographic materials are openly exhibited is modified to state that he shall not frequent, be employed by, or engage in, any business where he knows pornographic materials are openly exhibited; (5) the condition that he not access the Internet is modified to state that he shall not knowingly access the Internet or any other online service through use of a computer or other electronic device at any location, including place of employment, without prior approval of the probation officer, and he shall not knowingly possess or use any data encryption technique program; and (6) the condition that he shall not clean or delete Internet browsing activity and must keep a minimum of four weeks of history is modified to state that he shall not knowingly clean or delete Internet browsing activity and shall keep a minimum of four weeks of history. As modified, the judgment is affirmed.

Márquez, J.

RUSHING, P.J., Concurring

I agree with the majority opinion that defendant cannot be compelled to waive his immunity against self-incrimination, although he can be compelled to answer potentially incriminating questions, on pain of revocation of probation, so long as his answers cannot be used against him. I diverge somewhat from the majority opinion's approach, however, concerning the effect of defendant's statutorily required waiver of the psychotherapist-patient privilege. I believe California's express guarantee of the right of privacy (Cal. Const., art. I, § 1) compels a rule under which the waiver required by Penal Code section 1203.067, subdivision (b), permits the "sex offender management professional" to report to the probation officer upon the defendant's test scores, attendance, and general cooperativeness in the therapy process, but does not otherwise permit the professional to disclose, to the probation officer or anyone else, the content of any otherwise protected psychotherapeutic communications. To the extent Penal Code section 1203.067 may be understood or intended to require or permit disclosure of such communications, I would hold it violative of our state constitutional guarantee of privacy.

RUSHING, P.J.

ELIA, J., Dissenting

I respectfully disagree with the majority's conclusion that the probation condition requiring defendant to waive the privilege against self-incrimination (Pen. Code, § 1203.067, subdivision (b)(3)) is prohibited by the Fifth Amendment under *Minnesota v. Murphy* (1984) 465 U.S. 420 (*Murphy*), and therefore this court must strike the condition. (Maj. opin. p. 2.)

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." However, the Fifth Amendment does not prohibit the state from requiring a prospective probationer to choose between accepting this waiver and going to prison. This is true because the probation condition requiring defendant to waive the privilege against self-incrimination does not *itself* compel a probationer to be a witness against himself in *a criminal proceeding*. This condition requires only that the probationer provide *full disclosures* in connection with the sex offender management program. Such disclosures are necessary to the success of the program. The waiver provision is critical because it prevents a probationer from refusing to provide such disclosures on self-incrimination grounds.

In *Murphy, supra*, 465 U.S. 420 the defendant, Murphy, 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.'" (*Id.* at p. 422.) A counselor in the treatment program told the probation officer that Murphy had admitted an unrelated rape and murder. (*Id.* at p. 423.) The probation officer confronted Murphy about these admissions. (*Id.* at pp. 423-424.) Again, Murphy admitted the rape and murder. (*Id.* at p. 424.) Thereafter, Murphy was charged with murder, and he sought to suppress his admissions to the probation officer on Fifth Amendment grounds. (*Id.* at pp. 424-425.) The Minnesota Supreme Court held that, because the defendant was required to respond truthfully to the probation officer, the probation officer was required to inform the defendant of his Fifth Amendment rights

before questioning him, and her failure to do so merited suppression of his admissions. (*Id.* at p. 425.)

The United States Supreme Court granted certiorari to decide “whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding.” (*Murphy, supra*, 465 U.S. at p. 425.) The Supreme Court concluded that the “general rule” is that the Fifth Amendment privilege against self-incrimination is not “self-executing.” (*Id.* at p. 434.) A privilege that is not “self-executing” applies only where it has been invoked. (*Ibid.*) Murphy had not invoked the privilege because he did not “assert the privilege rather than answer” the probation officer’s questions. (*Id.* at p. 429.) The court rejected Murphy’s claim that his obligation under the terms of his probation to truthfully answer his probation officer’s questions alone converted his “otherwise voluntary” responses into compelled statements. (*Id.* at p. 427.) Analogizing Murphy’s situation to that of a subpoenaed witness who testifies on pain of contempt, the court observed that “[t]he answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.” (*Ibid.*) “If he asserts the privilege, he ‘may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him’ in a subsequent criminal proceeding. [Citation.] But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so.” (*Id.* at p. 429.)

In *Murphy*, the United States Supreme Court considered the applicability of the “penalty exception” to the general rule that the Fifth Amendment is not “self-executing.” The penalty exception applies where the state not only compelled the person’s statements but also “sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions ‘capable of forcing the self-incrimination which the

Amendment forbids.’ ” (*Murphy, supra*, 465 U.S. at p. 434.) “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.” (*Id.* at p. 435.) Yet even in the “classic penalty situation,” the probationer’s compelled statements would still be admissible in a probation revocation hearing, as that is not a criminal proceeding and the Fifth Amendment is therefore inapplicable. (*Ibid.*, & fn. 7.) Murphy’s statements did not fall within the penalty exception. “On its face, Murphy’s probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution.” (*Id.* at p. 437.) Hence, his statements to the probation officer were admissible against him in a criminal prosecution.

In *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1127 (*Maldonado*), the California Supreme Court rejected the defendant’s claim that the Fifth Amendment provided “a guarantee against officially compelled *disclosure* of potentially self-incriminating information.” The *Maldonado* court based its holding on the rule that the Fifth Amendment applies only to *use* of a defendant’s incriminating statements; the Fifth Amendment does not bar the government from compelling those statements. “[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.” (*Maldonado, supra*, at p. 1134.) “[T]he Fifth Amendment privilege against self-incrimination does not target the mere compelled *disclosure* of privileged information, but the ultimate *use* of any such disclosure in aid of a criminal prosecution against the person from whom such information was elicited.” (*Id.* at p. 1137.)

The California Supreme Court’s decision in *Maldonado* relied on the United States Supreme Court’s decision in *Chavez v. Martinez* (2003) 538 U.S. 760 (*Chavez*). *Chavez* was a civil action involving qualified immunity in which the issue was whether a police officer who allegedly compelled statements from the plaintiff could be held liable for violating the plaintiff’s civil rights. The plaintiff claimed that the police officer had violated the Fifth Amendment. The United States Supreme Court produced a plurality opinion and multiple separate opinions rejecting the plaintiff’s theory. Justice Thomas wrote the lead opinion. In a section of his opinion joined by three other justices, Justice Thomas stated that compelled statements “of course may not be used against a defendant at trial, [citation], 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.) Writing separately, Justice Souter acknowledged 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 and declined to extend the Fifth Amendment to such a claim. (*Id.* at p. 777.) Thus, in *Chavez*, five justices held that the Fifth Amendment is not violated by the extraction of compelled statements.

As applied to this case, *Murphy* establishes that defendant’s Fifth Amendment rights are not violated by the probation condition requiring him to waive the privilege against self-incrimination as to questions asked during the sex offender management program. The state has, “by implication, assert[ed] that invocation of the privilege” in

response to such incriminating questions “would lead to revocation” of probation. (See *Murphy, supra*, 465 U.S. at p. 435.) Thus, if defendant makes any statements in response to questions posed to him during the sex offender management program, those statements will be deemed compelled under the Fifth Amendment and thus involuntary and inadmissible in a criminal prosecution. (*Ibid.*) In short, since such statements will necessarily fall within the penalty exception, they will not be available for use at a criminal prosecution, and defendant’s Fifth Amendment rights have not been violated. (See *Chavez, supra*, 538 U.S. at p. 769 [plur. opn. of Thomas, J.] [the Fifth Amendment is not violated absent use of the compelled statements in a criminal case against the witness]; *id.* at pp. 777[conc. opn. of Souter, J.])

In sum, I believe that we are bound by *Maldonado* and *Chavez* (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and they hold that the mere extraction of compelled statements does not violate the Fifth Amendment. Since the challenged probation condition does not purport to authorize the *use* of any statements against defendant in a criminal proceeding, it does not violate the Fifth Amendment.

Simply put, because the penalty exception will apply necessarily to statements that defendant makes in response to questions asked as part of the sex offender management program under compulsion of the Penal Code section 1203.067, subdivision (b)(3) probation condition, the condition itself does not violate the Fifth Amendment.

ELIA, J.