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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN DANIEL HERRERA, Defendant and Appellant.	E062184 (Super.Ct.No. SWF1303051) OPINION

APPEAL from the Superior Court of Riverside County. Judith C. Clark, Judge. Affirmed in part; reversed in part.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Respondent.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Christian Daniel Herrera appeals from judgment entered after he pled guilty and was convicted of two counts of unlawful contact and communication with a minor with intent to commit a sexual offense (Pen. Code, § 288.3, subd. (a)[1]). The trial court denied defendant's *Hofsheier*[2] motion challenging sex offender registration under section 290. The court also denied defendant's motion to withdraw his guilty plea based on ineffective representation. Defendant was granted 36 months probation and was committed to 180 days in custody, to be served in a work release program.

Defendant contends he was deprived of effective assistance of counsel because his attorney misled him on the possibility of success of the *Hofsheier* motion. Defendant further argues the trial court abused its discretion in denying his *Hofsheier* motion on the ground he did not establish ineffective assistance of counsel (IAC). In addition, defendant asserts that his probation condition requiring him to waive the privilege against self-incrimination and submit to polygraph testing (probation condition No. 16) violates his Fifth Amendment privilege against self-incrimination. Defendant also argues that his probation condition requiring him to waive the psychotherapist/doctor-patient privilege (probation condition No. 15) violates his state and federal constitutional rights to privacy.

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*).

We conclude defendant has not established prejudicial IAC, and his probation conditions requiring him to submit to polygraph testing and waive self-incrimination and psychotherapist/doctor-patient privileges do not violate defendant's constitutional privilege against self-incrimination and right to privacy. However, we further conclude probation condition No. 16, requiring waiver of defendant's privilege against self-incrimination, violates defendant's Fifth Amendment privilege against self-incrimination. We therefore reverse the judgment solely as to the probation condition requiring waiver of defendant's privilege against self-incrimination. The judgment is affirmed in all other regards.

II

FACTS[3] AND PROCEDURAL BACKGROUND

On August 31, 2013, the mother of 17-year-old Jane Doe reported to the police a message she saw on Jane Doe's Facebook webpage. Mother told the police that defendant had begun contacting Jane Doe on August 4, 2013. Defendant convinced Jane Doe to agree to pay him $50 in rent to live at his home after she turned 18 years old. Defendant then said $50 was not enough but she could earn $100 to be in adult movies. Defendant claimed he had been filming adult movies on and off for years. Defendant requested Jane Doe provide him with a nude photograph of herself and asked if she knew of any other 17- or 18-year old girls who would be interested.

[3] The summary of facts is derived from the facts stated in the presentence probation report.

One of Jane Doe's teachers notified the police that Jane Doe was moving out of her home. The teacher was concerned about Jane Doe's ability to care for herself. An officer spoke to Jane Doe at school. Jane Doe told the officer she planned on moving in with a friend. Jane Doe also told the officer defendant had asked her for nude photographs of herself but she had not communicated with defendant after their Facebook conversation on August 24, 2013.

The officer sent defendant a Facebook message from Jane Doe's account, stating that Jane Doe was having family problems and that she knew of another girl, Heather, who was almost 17 years old, who was having family problems and needed money. Defendant responded by sending his telephone number and stating that Heather could contact him by text message. Defendant asked if Jane Doe and Heather were virgins or sexually experienced. Defendant offered to pay them $40 for oral sex, which he would record on his iPhone camera and would be part of the hiring process. He said that if Jane Doe did well, the video producers would want more videos and Jane Doe would get paid more. Defendant added he would pay $80 for two females having sex with him, $20 to $40 for oral sex, $30 for mutual oral copulation, and an unspecified amount for anal sex. And if she did well, Jane Doe would be invited to perform in the movie room and could make $500 to $1,000 per hour. Defendant asked Jane Doe and Heather to send nude photos of themselves to his cellular phone.

Another officer contacted defendant through Facebook on September 20, 2013. Defendant agreed to meet Heather that day and also asked to meet Jane Doe at the home where she was babysitting that evening. Officers determined from defendant's Facebook

account that he was at a Barnes and Noble store in Temecula. Officers went there, arrested defendant, and took him into custody. After waiving his *Miranda* rights, defendant told the police that he knew Jane Doe was 17 years old when they first met but she was turning 18 that month. He said he knew Jane Doe needed money and he was merely telling her how she could earn it. Defendant conceded watching pornography but denied producing it. Defendant also admitted he had made up some "bullshit lies" to "hook up" with Jane Doe. Defendant and his wife were having marital problems. Defendant said he was "just trying to get laid."

Court Proceedings

The Riverside County District Attorney filed a felony complaint against defendant alleging two counts of unlawful contact and communication with a minor with intent to commit sexual offenses on August 24, 2013, and September 19, 2013 (§ 288.3, subd. (a); counts 1 and 2). The sexual offenses included use of Jane Doe, a minor, to perform prohibited sexual acts in violation of section 311.4, subdivision (c).

On March 28, 2014, defendant pled guilty to the two charged counts of violating section 288.3, subdivision (a). Defendant initialed and signed a felony plea form, in which he acknowledged: "I understand that because I am pleading guilty to a qualifying offense, I will be ordered to register with law enforcement as a(n) PC 290 and that if I fail to register or to keep my registration current for any reason, new criminal charges may be filed against me. I understand that registration as a sex offender is a lifelong requirement. Will be argued at time of sentencing."

During the plea hearing, the prosecutor informed the court that it had been agreed that the sentencing judge, Judge Clark, would hear defendant's *Hofsheier* motion to determine whether defendant would be required to register as a sex offender. Defendant acknowledged that Judge Clark made clear that he would not be permitted to withdraw his plea if she denied his motion and required sex offender registration. The prosecutor told the court that Judge Clark "wanted the defendant to be very clear that in the event that she does require him to register as a sex offender, as the People believe would be required, and as Judge Clark tentatively believed would be required, that he would not have the opportunity to withdraw his plea at that time. . . . [S]he totally advised he may, in fact, likely will, in fact, have to register as a sex offender." Both defendant and his attorney agreed that this was accurate. The trial court then took defendant's guilty plea to counts 1 and 2.

On June 2, 2014, defendant filed a *Hofsheier* motion, and the trial court denied it that same day. On June 2, 2014, defendant also filed a motion to withdraw his guilty plea, arguing he was unaware that when he entered his guilty plea, sex offender registration was mandatory under section 290. The trial court continued the motion to withdraw his plea to allow defendant to be represented by another attorney for purposes of the motion. The court concluded that, because the motion was based on IAC, defendant's attorney had a conflict of interest in representing defendant on the motion. After other counsel was appointed for defendant, the trial court heard and denied defendant's motion to withdraw his plea.

III

MOTION TO WITHDRAW PLEA

Defendant contends the trial court abused its discretion when it denied his motion to withdraw his plea based on IAC. Defendant argues his attorney provided ineffective representation when advising defendant on section 290 sexual registration requirements and bringing a *Hofsheier* motion to avoid sex offender registration.

A. Procedural Background

(1) *Hofsheier* Motion

Defendant requested in his *Hofsheier* motion an order relieving him of the mandatory sexual offender registration requirement. Defendant argued that under *Hofsheier*, the section 290 mandatory registration requirement, as applied to defendant, violated the equal protection clause. Section 290 requires a defendant convicted of nonforcible oral copulation of a minor to register as a sex offender but registration is not compulsory for committing unlawful nonforcible sexual intercourse with a minor. The *Hofsheier* court concluded that the remedy for such an equal protection violation was to "hold a hearing to determine whether the defendant should be subject to discretionary registration as a sex offender under subdivision (a)(2)(E) of section 290." (*People v. Garcia* (2008) 161 Cal.App.4th 475, 478-479, citing *Hofsheier, supra,* 37 Cal.4th at pp. 1208-1209.)[4]

[4] In 2015, after the trial court denied defendant's *Hofsheier* motion and motion to withdraw his guilty plea, the California Supreme Court overruled *Hofsheier* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871 (*Johnson*).

Defendant argued in his *Hofsheier* motion that he was entitled to a hearing on discretionary registration under *Hofsheier* and should not be required to register because his charged offenses did not involve actual physical contact between Jane Doe and defendant. There was only electronic communication via Facebook. Defendant asserted that the trial court should exercise its discretion to assess whether he should be required to register as a sex offender under section 290.006, and order that imposition of the registration requirement as to defendant is unconstitutional.

The People filed opposition, arguing sex offender registration was not discretionary as applied to defendant because section 290.006 is inapplicable. Defendant's charged crimes of violating section 288.3 are listed in section 290, subdivision (c), as offenses that require mandatory sex offender registration. The People further argued that *Hofsheier* did not extend to violations of section 288.3 under equal protection principles because defendant was not similarly situated to the defendant in *Hofsheier* and the mandatory sex offender registration requirement for a section 288.3 violation was rationally related to a legitimate governmental interest.

During the hearing on defendant's *Hofsheier* motion, the trial court concluded section 290.006 did not apply because the charged section 288.3 crime is listed in section 290, subdivision (c), as subject to mandatory registration. The court stated that the only exception would be if requiring mandatory registration under section 290 violated defendant's constitutional right to equal protection under *Hofsheier*. The trial court concluded *Hofsheier* was inapplicable because defendant was not similarly situated to the *Hofsheier* defendant.

(2) Motion to Withdraw Guilty Plea

After ruling on defendant's *Hofsheier* motion, the court continued defendant's motion to withdraw his plea on the ground defendant was entitled to have independent counsel argue the motion because his current attorney, Adrian Yeung, had a conflict of interest when arguing the motion based on his own IAC. Defendant argued in his motion to withdraw his guilty plea (motion to withdraw plea) that there was good cause to withdraw his plea under section 1018 because, when he pled guilty, Yeung did not adequately inform him of the meaning of section 290 and defendant did not fully understand the extent of section 290, which requires mandatory lifetime sex offender registration.

Yeung's supporting declaration stated that he fully explained the effects of section 290 to defendant and believed defendant understood. Yeung also explained to defendant that a *Hofsheier* motion could be filed and, if granted, might remove the mandatory registration requirement. Yeung further stated he believed defendant was not fully aware that the *Hofsheier* might not be granted, even though defendant had not had any physical contact with Jane Doe. Yeung believed defendant was ignorant as to the requirements of section 290 and misunderstood the law. Yeung concluded that, had defendant been fully aware of the requirements, he would not have pled guilty. Therefore defendant did not act with free will when pleading guilty.

Defendant's supporting declaration stated that before he entered his guilty plea, his attorney explained the effects of section 290 to him. Defendant believed when he entered his plea that he could file a motion that would eliminate the mandatory registration

requirement. Defendant further stated that he was ignorant of the exact requirements of section 290, including annual registration for life. Defendant asserted that, had he been fully aware of the section 290 requirements, he would not have pled guilty. Defendant believed he was ignorant because he misunderstood what the law required him to do and, had he not been ignorant, he would have proceeded with the preliminary hearing. The People opposed defendant's motion to withdraw plea, arguing there was not good cause to withdraw defendant's plea.

At the continued hearing on defendant's motion to withdraw plea of guilty, defendant was represented by independent counsel, Cheryl Thompson. Yeung testified at the hearing that when defendant pled guilty, Yeung was aware defendant would have to register under section 290, based on defendant's charges. Yeung was "fully educated as to what 290 registration was going to require." Yeung told defendant before he entered his plea that under section 290, registration was mandatory and that defendant would have to register. Yeung discussed with defendant the charges and section 290 registration. Defendant told Yeung he did not want to register for the rest of his life.

Yeung acknowledged that at the previous hearing on June 2, 2014, he stated that he was "'uneducated fully as to what a 290 was going to entail.'" Yeung explained that he was not referring to section 290 and what it entailed, but as to how it related to the *Hofsheier* motion. He meant he had not fully researched and filed a *Hofsheier* motion before defendant's plea. He had researched bringing a *Hofsheier* motion but not fully at that time. Yeung therefore meant when he said he was ignorant of "the exact requirements of 290," that he was ignorant as to whether, under *Hofsheier*, section 290

registration was discretionary as to defendant. Yeung believed there was the possibility the court might grant defendant's *Hofsheier* motion.

Yeung testified that he told defendant that, during an in chambers discussion between Yeung, the prosecutor and the judge, it was determined that it was inconclusive as to whether or not *Hofsheier* applied to defendant. Therefore it was uncertain as to whether defendant would have to register. Yeung explained to defendant the facts of *Hofsheier* and advised him that there was a chance, if he filed a *Hofsheier* motion, that the court would conclude *Hofsheier* applied to him and find registration was discretionary.

Yeung acknowledged defendant stated in the motion to withdraw plea that defendant was not fully aware or informed, and did not understand fully the extent of section 290. Yeung explained that he came to this conclusion after defendant entered his guilty plea. Yeung fully informed defendant of the section 290 requirements at the time of his plea but after defendant entered his plea, Yeung realized defendant had not understood everything he was told. Yeung testified he told defendant that going to trial was an option. Yeung did not discuss filing a motion to withdraw plea until later, after defendant entered his plea, when Yeung concluded defendant had not understood everything Yeung had told him about mandatory registration and filing a *Hofsheier* motion.

Defendant testified at the hearing on his motion to withdraw plea that he never understood until recently that he would be required to register for life if he pled guilty. When Yeung discussed filing a *Hofsheier* motion, Yeung said that, if it was granted,

defendant would not have to register. Defendant had no idea if the court was going to grant it. "[E]verything was always a maybe." After defendant pled guilty and did some research, he learned for the first time that he would have to register for life. Defendant then called Yeung, who suggested filing a *Hofsheier* motion. Yeung said that if it was denied, defendant could file a motion to withdraw plea. Defendant did not want to have to register in part because he lived near a school and feared he would have to move.

Defendant testified that Yeung gave defendant hope he would not have to register. Defendant said he would not have pled guilty had he known the court would deny his *Hofsheier* motion or had he known he would have to register for life. Yeung always told defendant he was uncertain what would happen. Defendant recalled the court stating when he entered his plea that, if the *Hofsheier* motion was not granted, he could not withdraw his plea. Defendant also recalled that when he pled guilty, he initialed a waiver of rights form which stated he understood that because he was pleading guilty, he would be ordered to register for the rest of his life as a sex offender under section 290, and the registration requirement would be argued at sentencing.

After hearing testimony and argument, the trial court concluded defendant had not met his burden of establishing by clear and convincing evidence good cause to grant defendant's motion to withdraw plea. The court noted that, before defendant entered his plea, defendant and Yeung had indicated that they had reviewed the waiver form, and defendant understood and agreed to the waiver provisions and consequences. The court also noted that the prosecutor had stated with specificity the possibilities regarding registration and the judge's intentions regarding registration if the *Hofsheier* motion was

denied. Defendant confirmed at that time that he had listened to what the attorneys had said. The court further stated that when it took defendant's plea, the court was satisfied that defendant knew what he was doing and what the possibilities were. The court therefore denied defendant's motion to withdraw plea on the ground defendant knowingly, intelligently, and voluntarily entered his plea.

B. Applicable Law

Section 1018 provides that, upon a defendant filing a motion before judgment, the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. (§ 1018.) "This section shall be liberally construed to effect these objects and to promote justice." (§ 1018.) "'A plea may not be withdrawn simply because the defendant has changed his [or her] mind.' [Citation.] The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. [Citations.] 'A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.' [Citations.] 'Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them.' [Citation.]

"To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. [Citation.] The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake. [Citation.]" (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416.)

Where the defendant argues good cause to withdraw a guilty plea is based on IAC, the defendant must demonstrate (1) his counsel's performance was deficient when measured against the standard of a reasonably competent attorney under prevailing professional norms, and (2) counsel's deficient performance so undermined the proper functioning of the adversarial process that the trial (or plea) cannot be relied on as having produced a just result. The appellate court must presume counsel's conduct fell within the wide range of reasonable professional assistance and accord great deference to counsel's tactical decisions. (*Hill v. Lockhart* (1985) 474 U.S. 52, 59; *People v. Lewis* (2001) 25 Cal.4th 610, 674.)

C. Analysis

Defendant contends he established good cause for withdrawing his plea by demonstrating IAC. He argues that his plea was entered involuntarily because his prior counsel, Yeung, rendered ineffective representation by failing to advise defendant fully and properly on section 290 and regarding filing a *Hofsheier* motion. Defendant asserts that this led to defendant entering a guilty plea based on the belief sex offender registration was discretionary in his case and he might not have to register if he filed and was granted a *Hofsheier* motion. We conclude defendant has not demonstrated IAC. He has not shown that Yeung's representation was both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

The Sex Offender Registration Act (§ 290 et seq.) allows *discretionary* sex offender registration for defendants convicted of unlawful sexual intercourse with a

minor under sections 261.5 and 290.006, but imposes *mandatory* sex offender registration for defendants convicted of crimes involving other types of sexual activity with a minor under section 290, subdivisions (b) and (c). (*Johnson, supra,* 60 Cal.4th at p. 874.) Defendant's sex offense, of contacting a minor with intent to commit a sexual offense (§ 288.3, subd. (a)), is listed in section 290, subdivision (c), as one of the offenses for which lifetime sex offender registration is *mandatory*.

Yeung and defendant's testimony and declarations established that defendant was fully and adequately advised regarding mandatory registration under section 290 and the option of filing a *Hofsheier* motion. Defendant was told that if he pled guilty, he would have to register unless the court granted a *Hofsheier* motion. Even though Yeung told defendant he would file a *Hofsheier* motion, there is nothing in the record establishing that Yeung told defendant the motion would be granted or that there was a high probability of prevailing on the motion. Defendant testified Yeung told him the outcome was uncertain.

Yeung did not commit IAC by telling defendant he could file a *Hofsheier* motion, which might lead to defendant not being required to register, because at that time *Hofsheier* had not been reversed by *Johnson, supra,* 60 Cal.4th 871. As the court in *Johnson* noted, "[a]lthough *Hofsheier* attempted to limit its holding to the factual circumstances before it, the Courts of Appeal have extended its application to additional nonforcible sex offenses covered by section 290." (*Johnson, supra,* 60 Cal.4th at p. 878.) It was therefore uncertain as to how the trial court would rule on defendant's *Hofsheier*

motion. Although the trial court and prosecutor warned defendant it was unlikely the motion would be granted, there was the possibility the motion would be granted.

In addition, the trial court entered defendant's plea, conditional upon defendant being permitted to bring a *Hofsheier* motion challenging mandatory registration. This indicated the trial court recognized there might be a viable argument under *Hofsheier*. It was not unreasonable to file the motion based on the state of the law at that time. The outcome was not certain since there was no case law addressing whether the *Hofsheier* equal protection argument applied to a section 288.3 crime. As to the probability of prevailing, the trial court made it clear before defendant entered his plea that it was not likely the motion would be granted. The prosecutor also stated this. The court further warned defendant that he could not withdraw his plea if the *Hofsheier* motion was denied. Defendant nevertheless knowingly and voluntarily chose to enter his guilty plea.

Defendant argues he would not have pled guilty had he been properly and fully advised regarding section 290 and *Hofsheier*, and had he known his motion would be denied. Although defendant may not have fully understood what he was told or that it was not likely his *Hofsheier* motion would be granted, the court and prosecutor warned defendant it was unlikely the motion would be granted. Defendant and Yeung also both testified Yeung did not tell defendant the motion would be or was likely to be granted. Defendant further acknowledged Yeung told defendant that how the court would rule on the motion was uncertain.

Defendant argues he received IAC because Yeung was unknowledgeable regarding section 290 and *Hofsheier*, and Yeung admitted this. Yeung acknowledged

that at the time of the plea hearing, he had not fully researched bringing a *Hofsheier* motion in defendant's case and therefore may not have been fully aware of what defendant's chances of prevailing were. But there is no evidence in the record Yeung improperly assured defendant that the motion would be granted or that there was a high probability of prevailing. Yeung's representation was therefore neither deficient under prevailing professional norms nor prejudicial. (*Strickland, supra,* 466 U.S. at p. 687.) Since defendant failed to demonstrate IAC, defendant failed to meet his burden of showing by clear and convincing evidence that there was good cause for withdrawal of his guilty plea. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415.)

IV

SELF-INCRIMINATION WAIVER AND POLYGRAPH PROVISION

Defendant contends imposition of the probation condition requiring him to waive his privilege against self-incrimination and participate in periodic polygraph examinations (probation condition No. 16) violates his Fifth Amendment right against self-incrimination.

The probation department recommended probation condition No. 16, requiring defendant to "[w]aive [the] privilege against self-incrimination and participate in periodic polygraph examinations, at offender's expense, as directed by the Probation Officer or treatment provider. Polygraph examiner to provide results to the Probation Officer upon request."

During the sentencing hearing, defense counsel objected to probation condition No. 16 on the ground it was unnecessary because defendant had inappropriate

communications with only one minor, who was an older child. Also, defendant's attorney did not discuss with him that such a condition would be imposed if he pled guilty. The trial court responded that the probation condition was standard in a case where the defendant is required to register as a sex offender. Defense counsel disagreed and added that the condition was not statutorily mandated. Defense counsel requested the condition not be imposed based upon defendant's history and the nature of the crime. The trial court noted that probation condition No. 16 is required under section 1203.067, subdivision (b). Because the condition is required by law, the trial court denied defense counsel's request not to impose it.

Section 1203.067, subdivision (b)(2) and (3), provides that "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 . . . 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."

Defendant relies on *People v. Rebulloza* (2015) 234 Cal.App.4th 1065, 1073, for the proposition probation condition No. 16, mandated by section 1203.067, subdivision

(b)(3)[5] is unconstitutional because it violates his Fifth Amendment privilege against self-incrimination. After defendant filed his appellant's opening brief citing *Rebulloza*, the California Supreme Court granted review of *Rebulloza* and ordered it superseded by *People v. Rebulloza* (2015) 349 P.3d 1066 (review granted June 10, 2015), which states that "Further action in this matter is deferred pending consideration and disposition of a related issue in *People v. Friday* [(2014) 328 P.3d 1034], *People v. Garcia* [(2014) 224 Cal.App.4th 1283], and *People v. Klatt* [(2014) 225 Cal.App.4th 906], or pending further order of the court." *Rebulloza* is therefore no longer binding precedent. Since all the decisions directly addressing the issue raised in the instant case regarding the constitutionality of the section 1203.067(b)(3) probation condition are either up on review before the California Supreme court or are unpublished, there is no binding case law dispositive of the issue.

The People, noting *Rebulloza* does not provide binding authority, cite *Minnesota v. Murphy* (1984) 465 U.S. 420, 435 (*Murphy*), *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1127 (*Maldonado*), *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 725 (*Spielbauer*), and *People v. Miller* (1989) 208 Cal.App.3d 1311, 1315 (*Miller*), for the proposition the section 1203.067(b)(3) probation condition is constitutional. Because there currently is no binding case law directly addressing the constitutionality of the section 1203.067(b)(3) probation condition, we look to such binding federal and state

[5] For ease of reference, section 1203.067, subdivision (b)(3), is referred to throughout this opinion as section 1203.067(b)(3).

case law, which discusses the Fifth Amendment privilege against self-incrimination generally.

In *Murphy*, the United States Supreme Court discusses the admissibility in a criminal trial of statements the defendant (Murphy) made during questioning by his probation officer. The terms of Murphy's probation required, among other things, that he participate in a treatment program for sexual offenders, report to his probation officer as directed, and be truthful with the probation officer "in all matters." Murphy was told failure to comply with these conditions could result in probation revocation. When Murphy's probation officer learned from Murphy's counselor that he had abandoned his treatment program and had admitted to previously committing rape and murder seven years before, the probation officer called Murphy into the office, with the intent of reporting to the police any incriminating statements. (*Murphy, supra,* 465 U.S. at p. 422.)

The court in *Murphy* held that the Fifth and Fourteenth Amendments did not prohibit the introduction into evidence of Murphy's admissions made to the probation officer. The court stated: "We conclude, in summary, that since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations. Because he had not been compelled to incriminate himself, Murphy could not successfully invoke the privilege to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution." (*Murphy, supra,* 465 U.S. at p. 440.)

The court in *Murphy* explained: "The Fifth Amendment, in relevant part, provides that no person 'shall be compelled in any criminal case to be a witness against himself.' It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' [Citation.] In all such proceedings, [¶] 'a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.' [Citation.]" (*Murphy, supra,* 465 U.S. at p. 426.)

The *Murphy* court further noted that "A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted. [Citation.]" (*Murphy, supra,* 465 U.S. at p. 426.) The issue in instant case is not the admissibility of compelled statements made in compliance with probation condition No. 16. Under *Murphy*, such statements, compelled under the section 1203.067(b)(3) probation condition, would be inadmissible in a subsequent criminal trial. Unlike in *Murphy*, here, the issue is whether compelling waiver of defendant's self-incrimination privilege is constitutional. *Murphy* supports the

proposition that a defendant on probation retains the privilege against self-incrimination and cannot be compelled to waive it.

In *Maldonado, supra,* 53 Cal.4th 1112, the California Supreme Court addressed the issue of what general limits under the defendant's Fifth and Sixth Amendment rights may properly be imposed on prosecutorial access to court-ordered mental examinations and their results, both before and after the defendant introduces mental-state evidence in a criminal trial. (*Id.* at p. 1117.) In *Maldonado*, the defendant (Maldonado) faced charges of first degree murder with a special circumstance. Maldonado notified the prosecution of his intent to introduce evidence, through designated expert witnesses, that he suffered from neurocognitive deficits. The prosecution obtained an order for examination of Maldonado by a psychiatrist, a psychologist, and a neurologist. In response, Maldonado invoked his Fifth Amendment privilege against self-incrimination and sought various protective orders as conditions of his submission to court-ordered pretrial mental examinations.

The court in *Maldonado* held the Fifth and Sixth Amendments do not require trial courts to impose protective measures when a defendant is ordered examined by the prosecution's proposed expert to rebut the defendant's mental health defense. (*Maldonado, supra,* 53 Cal.4th at p. 1142.) In reaching its holding, the *Maldonado* court reasoned that the Fifth Amendment bars not mere disclosure, but actual use of a declarant's compelled utterances to convict or criminally punish that person. Thus, a defendant's Fifth Amendment rights are adequately safeguarded by the immunity against use, either direct or derivative, of defendant's statements against him. (*Id.* at pp. 1118,

1133, fn. 13, 1134, 1137.) The *Maldonado* court stated: "As we have seen, the 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. Accordingly, nothing in section 1054.6 exempts the results of the prosecution examinations from pretrial discovery." (*Id.* at pp. 1122, 1129, 1134, 1137.)

Here, it is undisputed defendant's statements made in compliance with probation condition No. 16 are compelled and therefore are inadmissible in a criminal trial under the Fifth Amendment privilege against self-incrimination. The issue here is whether a probation condition can compel defendant to waive his privilege against self-incrimination. We think not because "[t]he constitutional guarantee against compelled self-incrimination protects an individual from being forced to testify against himself or herself in a pending criminal proceeding, but it does more than that. It also privileges a person not to answer official questions in any other proceeding, 'civil or criminal, formal or informal,' where he or she reasonably believes the answers might incriminate him or her in a criminal case. [Citations.] *One cannot be forced to choose between forfeiting the privilege, on the one hand, or asserting it and suffering a penalty for doing so on the other*. [Citation.]" (*Spielbauer, supra,* 45 Cal.4th at p. 714, italics added; see *Murphy, supra,* 465 U.S. at p. 426.)

We recognize "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.]' [Citation.]" (*Spielbauer, supra,* 45 Cal.4th at pp. 714-715.) In the instant case, however, defendant is required under the section 1203.067(b)(3) probation condition, not only to respond to questions during polygraph testing, but also to waive his privilege against self-incrimination. By requiring such waiver, defendant loses the Fifth Amendment safeguards of use immunity in a criminal trial.

In *Spielbauer, supra,* 45 Cal.4th 704, the plaintiff, who was a deputy public defender, refused to answer questions by a supervising attorney who was investigating allegations the plaintiff had made deceptive statements to the court while representing a defendant. The plaintiff was told refusal to answer the questions would be deemed insubordination warranting discipline up to and including dismissal. The plaintiff was also told his responses could not be used in a criminal proceeding. The plaintiff declined to answer the questions, invoking his privilege against self-incrimination. The plaintiff was terminated on the grounds of deceptive court conduct and refusal to answer his employer's questions. (*Id.* at p. 709.)

The California Supreme Court in *Spielbauer* concluded that "a public employee may be compelled, by threat of job discipline, to answer questions about the employee's

job performance, so long as the employee is not required, on pain of dismissal, to *waive* the constitutional protection against criminal use of those answers." (*Spielbauer, supra,* 45 Cal.4th at p. 710.) The *Spielbauer* court added that "the constitutional privilege against compelled self-incrimination in a *criminal* case or cause (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15) does not protect against the *nonpenal* adverse use of officially compelled answers. [Citations.]" (*Spielbauer,* at p. 715.) This would include probation revocation proceedings. "Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. [Citations.]" (*Murphy, supra,* 465 U.S. at p. 435, fn. 7.)

Therefore, under *Spielbauer*, probation may be revoked for refusing to answer officially compelled questions in probation proceedings, so long as the defendant is not required to *surrender* his or her right against criminal use of the statements thus obtained. (*Spielbauer, supra,* 45 Cal.4th at p. 725.) In addition, under *Spielbauer*, a formal guarantee of immunity is not required before defendant is required to submit to polygraph testing in compliance with probation condition No. 16, assuming questioning is tailored specifically, directly, and narrowly to compliance with probation conditions and participation in a sex offender management program. (*Id.* at pp. 718, 725.)

Although *Spielbauer* is distinguishable in that the plaintiff was not required to waive the privilege against self-incrimination, as was defendant in the instant case, *Spielbauer* supports the proposition that a probation condition can compel a defendant to answer questions by threat of revocation of probation but cannot require waiver of the privilege against self-incrimination. A defendant cannot be forced to forego the

constitutional protection against criminal use of officially compelled statements in a criminal trial. (*Spielbauer, supra,* 45 Cal.4th at p. 710.) Thus, in the instant case, defendant can be compelled under section 1203.067(b)(3) to submit to polygraph testing, but cannot be forced to waive his constitutional privilege against self-incrimination.

In *Miller, supra,* 208 Cal.App.3d 1311, the court held that "[t]he trial court did not abuse its discretion by including the polygraph requirement as a condition of probation for the limited use as an investigative tool." (*Id.* at p. 1316.) The defendant in *Miller*, who pled guilty to committing a lewd and lascivious act upon a child (§ 288, subd. (a)), was placed on probation, conditional upon the defendant submitting to polygraph testing at the direction of his probation officer. In reaching its holding, the *Miller* court concluded the polygraph probation condition was reasonable and valid because it assisted in monitoring probation compliance.

The *Miller* court noted that "[t]he polygraph condition is designed to help evaluate the truthfulness of defendant's reports and '[t]he purpose and objectives of probation would be frustrated if a convicted defendant could maintain . . . a right of silence at the time of his ... report to the probation officer . . . .'" (*Miller, supra,* 208 Cal.App.3d at p. 1316.) The *Miller* court further stated the polygraph condition was "aimed at deterring and discovering criminal conduct most likely to occur during unsupervised contact with young females," and therefore was reasonably related to future criminality. (*Id.* at p. 1314.)

The court in *Miller* concluded the polygraph condition was not overbroad because it was limited to questions relating to compliance with probation conditions. Even

though there were no specific limitations on the questions to be asked during polygraph testing, the *Miller* court construed the condition as imposed to monitor the defendant's compliance with the probation condition prohibiting unsupervised contact with young females and therefore any polygraph test administered to the defendant at the direction of his probation officer "necessarily will be limited to questions relevant to compliance with that condition." (*Miller, supra,* 208 Cal.App.3d at p. 1315.) The *Miller* court held the polygraph probation condition did not violate the defendant's privilege against self-incrimination unless the defendant showed a realistic threat of self-incrimination. (*Ibid.*) The court in *Miller* explained: "Although defendant has a duty to answer the polygraph examiner's questions truthfully, unless he invokes the privilege, shows a realistic threat of self-incrimination and nevertheless is required to answer, no violation of his right against self-incrimination is suffered. [Citation.] The mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege." (*Ibid.*)

Miller, decided in 1989, does not address the constitutionality of the section 1203.067(3)(b) probation condition requiring waiver of the self-incrimination privilege because the statute was not enacted until after *Miller* was decided. We nevertheless conclude, based on *Murphy, Maldonado, Spielbauer,* and *Miller*, that probation condition No. 16, premised on section 1203.067(b)(3), is unconstitutional to the extent it mandates defendant waive his privilege against self-incrimination. Such mandated waiver violates defendant's Fifth Amendment privilege against self-incrimination. On the other hand, the probation condition compelling defendant to submit to polygraph testing at the direction of his probation officer, which is narrowly tailored to monitoring compliance

with defendant's probation conditions and participation in his sex offender management program, is constitutional and valid.

V

PSYCHOTHERAPIST/DOCTOR-PATIENT PRIVILEGE

As a condition of probation, the trial court ordered defendant under sections 1203.067, subdivision (b)(4),[6] and 290.09, to "[w]aive any psychotherapist/doctor-patient privilege to enable communication between sex offender management professional and probation officer" (probation condition No. 15). Defendant challenges this probation condition on the ground it violates his constitutional right to privacy.

Waiver of the psychotherapist-patient privilege (Evid. Code, § 1014) is a statutorily mandated probation condition under section 1203.067(b)(4), for anyone placed on formal probation for any offense requiring sex offender registration under sections 290 through 290.023. Evidence Code section 1014, known as the psychotherapist-patient privilege, provides in part that "the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ." For reasons of policy the psychotherapist-patient privilege has been broadly construed in favor of the patient. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511 (*Stritzinger*).)

Confidential communications between psychotherapists and patients are protected in order to encourage those who may pose a threat to themselves or to others, because of

[6] For ease of reference, section 1203.067, subdivision (b)(4), is referred to throughout this opinion as section 1203.067(b)(4).

some mental or emotional disturbance, to seek professional assistance. (*Stritzinger, supra,* 34 Cal.3d at p. 511.) "The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy. [Citations.] It is also well established, however, that the right to privacy is not absolute, but may yield in the furtherance of compelling state interests. [Citations.]" (*Ibid.*) Therefore, all state interference with such confidentiality is not prohibited. (*In re Lifschutz* (1970) 2 Cal.3d 415, 432.) This is because "[t]he 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." (*Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 550 (*Jones*).) The psychotherapist-patient privilege is applied narrowly. (*Stritzinger,* at pp. 511, 513.)

Defendant objected during sentencing to imposition of probation condition No. 15 on the ground it was unwarranted based on the nature of defendant's crime and his history. Defendant also argued he was not told the probation condition would be imposed if he pled guilty. The trial court responded that it was a standard probation condition, required by law for defendants who are required to register as a sex offender, and it was too late to withdraw his plea. The constitutionality of the psychotherapist-patient privilege is currently before the California Supreme Court in the cases of *People v. Friday, supra,* 225 Cal.App.4th 8, *People v. Garcia, supra,* 224 Cal.App.4th 1283, *People v. Klatt, supra,* 225 Cal.App.4th 906, and *People v. Rebulloza, supra,* 349 P.3d 1066.

The trial court has "broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. (Pen. Code, § 1203 et seq.) A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486.)

"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. [Citation.] But intrusion upon constitutionally protected areas of privacy requires a 'balancing of the juxtaposed rights, and the finding of a compelling state interest.' [Citations.]" (*Jones, supra,* 119 Cal.App.3d at p. 550.) Defendant's privacy interests must be carefully weighed against the legitimate state interests in enhancing public safety and reducing the risk of recidivism by sex offenders. (*Ibid.*; § 290.03, subd. (a).)

Section 1203.067, subpart (b)(2) and (4) mandates that the terms of probation for persons placed on formal probation for an offense that requires sex offender registration under sections 290 to 290.023, shall include: "[(2)] . . . successfully complet[ing] a sex offender management program . . . 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. . . . [¶]. . . [¶] (4) Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09."

As defendant notes, section 1203.067(b)(4) does not mention waiver of the doctor-patient privilege (Evid. Code, § 994), which is included in defendant's probation condition No. 15, along with waiver of the psychotherapist-patient privilege. We recognize application of the two privileges may differ because of a greater degree of confidentiality required as to psychotherapeutic treatment than legally afforded other medical treatment (*In re Lifschutz, supra,* 2 Cal.3d at pp. 433-434, fn. 20), including the doctor-patient privilege. Nevertheless, here, waiver in probation condition No. 15 is permissible based on the same grounds applicable to the psychotherapist-patient privilege, which encompasses communications with physicians who practice psychiatry. (Evid. Code, § 1010 ["As used in this article, 'psychotherapist' means a person who is, or is reasonably believed by the patient to be: [¶] (a) A person authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry."]

As stated in section 1203.067(b)(4), the purpose of the probation condition requiring waiver of the psychotherapist-patient privilege is to enable communication between the supervising probation officer and the sex offender management professional,

which may include a psychiatrist or other doctor. (§ 1203.067(b)(4).) Such communication is an important part of implementing the sex offender management program which all sex offenders placed on formal probation are statutorily mandated to complete. (§§ 1203.067, subd. (b)(2), 290.09, subd. (c) [sex offender management professional must communicate with the probation officer about the probationer's "progress in the program and dynamic risk assessment issues"].) The state's interest in furthering such communication is therefore legitimate and substantial, and the psychotherapist/doctor-patient privilege waiver supports the compelling state interest in "enhanc[ing] public safety and reduc[ing] the risk of recidivism posed by [sex] offenders." (§ 290.03, subd. (a).)

Defendant argues probation condition No. 15, requiring waiver of psychotherapist/doctor-patient privileges, is overbroad and should not be construed to permit psychotherapists and doctors to disclose the content of any otherwise protected communications. Defendant asserts probation condition No. 15 exceeds the privilege mandated in section 1203.067(b)(4), because probation condition No. 15 includes the doctor-patient privilege, as well as the psychotherapist-patient privilege, and there is no limitation on the subject matter of the communication or the level of risk to public safety absent disclosure. Probation condition No. 15 contains broad language requiring the waiver of "*any* psychotherapist/doctor-patient privilege." But this broad language is followed by the phrase, "to enable communication between the sex offender management professional and probation officer." This additional language sufficiently limits the scope and use of the probationer's communications.

Probation condition No. 15 can be reasonably construed as requiring a sufficiently narrow waiver of the psychotherapist/doctor-patient privilege, limited "to enable communication between the sex offender management professional and supervising probation officer, . . ." (§ 1203.067(b)(4).) This would include permitting defendant's treatment team to discuss defendant's disclosures regarding his sexual offense history, with the objective of crafting and monitoring a treatment plan that prevents defendant from reoffending. Under the probation condition, the supervising probation officer may also communicate defendant's scores on the state-authorized risk assessment tool for sex offenders to the Department of Justice, so that the information may be made accessible to law enforcement as required under section 290.09, subdivision (b)(2). (§§ 290.04, 290.09, subd. (b)(2).)

This narrow interpretation of section 1203.067(b)(4) and probation condition No. 15 allows psychotherapists, including psychiatrists and other physicians involved in sex offender management of defendant, to communicate with defendant's probation officer as necessary, thereby furthering the purposes of section 1203.067(b)(4). Such limited application of the psychotherapist/doctor-patient privilege waiver in probation condition No. 15 is constitutional and leaves intact defendant's privacy rights.

VI

DISPOSITION

The judgment is reversed only insofar as the trial court held constitutional probation condition No. 16, premised on section 1203.067(b)(3), requiring defendant to waive his Fifth Amendment privilege against self-incrimination. This probation

condition, only as to waiver of defendant's privilege against self-incrimination (not as to polygraph testing), is ordered stricken. The judgment is affirmed in all other respects, including the probation condition requiring defendant to submit to polygraph testing.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.