

POLYGRAPH AND THE CONTAINMENT MODEL

Executive Summary

Use of the polygraph examination, waiver of the Fifth Amendment privilege for purposes of treatment and supervision, and sex offender-specific treatment for designated sex offenders are required under current law. (Pen. Code, §§ 1203.067, subd. (b); 3008, subd. (d).) This could change after the California Supreme Court reviews the constitutionality of these laws in pending cases. The lead case is *People v. Friday* (S218288.) For now, the law is still in effect. The cases which held the Fifth Amendment waiver component of the Containment Model was unconstitutional have been depublished pending review. Other cases also on review upheld use of the Fifth Amendment waiver to inform treatment and supervision, so there is a conflict among the appellate courts that will be resolved by the high court. Areas of focus are: (1) California law governing waiver of Fifth Amendment privilege; (2) court precedent regarding waiver of privilege and immunity; (3) CASOMB polygrapher certification; and (4) model informed consent forms.

A. Polygraph and Waiver of the Fifth Amendment Privilege Against Self-Incrimination

Registered sex offenders on parole or probation in California are required to participate in sex offender management programs. (Pen. Code, § 290.09.) Chelsea's Law (A.B. 1844) codified a system called the Containment Model, which requires collaboration and communication among a team composed of the sex offender treatment provider, parole or probation officer, and polygraph examiner, using a victim-centered approach. The law required the California Sex Offender Management Board (CASOMB) to develop and post uniform state standards on state certification standards for treatment providers and polygraph examiners. (Pen. Code, § 9003; www.casomb.org.)

The reasons for requiring polygraph examinations are (1) to enable the treatment provider to be more effective by having a fuller understanding of the characteristics of the offender, including risk level, and victim preferential characteristics, and (2) to enable supervising officers in providing appropriate terms and conditions of supervision. The use of polygraph is not intended so much as a fact finding process, but as a tool to encourage truthfulness in the treatment process.

California law requires disclosure solely to facilitate sex offender treatment and supervision based on communication about risk. To that end, polygraph examiners should be trained not to ask questions that would identify prior victims or dates of prior offenses. Rather, the goals are (1) deterring problem behavior among convicted sex offenders by increasing the likelihood that engagement in such behaviors will be brought to the attention of supervision and treatment professionals, and (2) detection of problem behaviors to alert supervision and treatment professionals to any escalation in the threat level to the community or potential victims of sexual abuse.¹

Sex offenders in these sex offender-specific treatment programs are required as a condition of probation or parole to participate in polygraph examinations. They must waive any right not to answer questions based on Fifth Amendment self-incrimination grounds. (Pen. Code, §§ 1203.067, subd. (b)(3); 3008, subd. (d)(3).)² The offender is protected from use of any statements made under polygraph in any future criminal prosecution because United States Supreme Court and California Supreme Court precedent bar the direct or derivate use of officially compelled disclosures to convict or criminally punish the person.³

If an offender invokes the Fifth Amendment and refuses to answer a question about the *current* supervision period, that refusal may be grounds for revocation. It is also grounds for revocation if the offender admits prior to or during the polygraph that he committed a new crime since the supervision period began.

B. U.S. and California Supreme Court Precedent Support Waiver of the Privilege Because Use of the Offender's Statements Cannot Be Used in Future Criminal Prosecutions⁴

¹ *Post-Conviction Sex Offender Polygraph Certification Standards* (June 2011), online at <www.casomb.org>

² The terms of probation or parole shall include "Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program." (Pen. Code, §§ 1203.067, 3008.)

³ Supervision revocation, civil commitment, and civil lawsuits are not criminal proceedings. (See *U.S. v. Locke* (5th Cir. 2007) 482 F.3d 764; *Minnesota v. Murphy* (1984) 465 U.S. 420, 435-436 n.7; see also *United States v. Lee*, 315 F.3d 206, 213 (3d Cir. 2003) ("A probationer may not refuse to answer a question just because his answer would disclose a violation of probation"))

⁴ The issue of whether the waiver of the privilege against self-incrimination required by the Containment Model, used solely to inform treatment and probation or parole supervision, violates the Fifth Amendment is pending in the California Supreme Court. (*People v. Friday*, case number S218288).

The California Supreme Court will decide the issue of whether the conditions of probation mandated by Penal Code section 1203.067, subdivision (b), for persons convicted of specified sex offenses - including waiver of the privilege against self-incrimination, required participation in polygraph examinations, and waiver of the psychotherapist-patient privilege – are constitutional in *People v. Friday* (S218288). The Supreme Court granted review in *Friday* on July 16, 2014, and the case was fully briefed as of November 18, 2014. Several other cases raising the same issue were also granted review and are being held pending the decision in *Friday*. Historically, the California Supreme Court decides cases two to three years after review is granted. Cases in which review is granted cannot be cited as legal authority or precedent. Some of the opinions pending review found the Fifth Amendment waiver is unconstitutional. However, all cases in which review is granted are depublished, meaning the Containment Model requirements in Penal Code section 1203.067, subdivision (b) remain in effect and are still the law until the decision of the California Supreme Court in *Friday*.

The leading United States Supreme Court case in this area is *Minnesota v. Murphy* (1984) 465 U.S. 420. Murphy was placed on probation and ordered to participate in a treatment program for sex offenders, report to his probation officer as directed, and be truthful with the probation officer “in all matters.” The defendant was told that failure to comply with these conditions could result in a probation revocation. When the probation officer learned the defendant had admitted to an earlier murder and rape during the course of treatment, the probation officer asked defendant to contact her to discuss further treatment. They mutually arranged a meeting at which the defendant admitted committing the murder and rape. The defendant did not refuse to talk but stated he felt like calling a lawyer when he learned about the treatment program’s disclosure. Ultimately, the probation officer told the police about the admissions and the defendant was indicted. The defendant sought to suppress his admissions to the probation officer on grounds his admissions were obtained in violation of the Fifth and Fourteenth Amendments. (Id. at pp. 422-425.)

The United States Supreme Court concluded in *Murphy* that the statements were admissible at the defendant's criminal trial, notwithstanding the officer's failure to advise defendant of his privilege against self-incrimination and even though the statements made were incriminating. (Id. at p. 440.) The court held that, absent certain limited circumstances, in order to suppress a statement, the

defendant must assert his Fifth Amendment privilege and be required to answer questions over a valid claim of privilege.

Specifically, the court “held that the federal Constitution does not compel exclusion from criminal proceedings of a defendant's statement to a probation officer.” The court reasoned that the Fifth Amendment privilege against self-incrimination is not self-executing, but must be affirmatively asserted, except in limited situations involving inherently compelling pressure to speak (e.g., when the declarant is undergoing custodial interrogation), the threat of a penalty for exercising the privilege, or, related to the latter, e.g., a gambler's failure to file a gambling tax return. (*People v. Coffman* (2004) 34 Cal.4th 1, 118, citing *Minnesota v. Murphy* (1984) 465 U.S. 420, 429-430, 434, 439.) The *Murphy* court found the circumstances of the interview did not involve inherently compelling pressure to speak equivalent to a custodial interrogation or result from a threat of penalty for exercising the privilege. (*Id.* at pp. 427-440.)

However, if the offender is told, either expressly or *by implication*, that invocation of the privilege will lead to revocation, it would mean the failure to assert the Fifth Amendment privilege will be excused and the probationer's answers will be deemed compelled and inadmissible in a criminal prosecution. (*Id.* at p. 435; see *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073: Oregon probation condition requiring offender to answer probation inquiry truthfully created the “penalty” situation described in *Murphy*.)

Probation or parole may validly insist that the offender answer even incriminating questions as long as the answers cannot be used in a criminal proceeding, and the state can revoke probation for refusal to answer that violates an express condition of probation—again, as long as the questions pose no realistic threat of answers being used in a future criminal proceeding. (*Murphy, supra*, 465 U.S. 420, 435, fn. 7.)

Clearly established Supreme Court authority *already* provides *Kastigar*⁵ immunity for any incriminating statement elicited during the sex offender management program. Nonetheless, the Attorney General asked the California Supreme Court in the pending lead case on this issue, *People v. Friday*, S218288, that if the Court believes that binding precedent from the Supreme Court, and the agreement of the Attorney General, do not provide sex offenders with adequate assurance that their compelled statements during treatment will not be used against them in a later criminal prosecution, the Court declare a judicial rule of use and

⁵ *Kastigar v. United States* (1972) 406 U.S. 411 (*Kastigar*).

derivative use immunity protecting such disclosures. Such a rule—already applied by the Court in similar situations—will ensure that sex offenders on supervised release get the treatment they need in a manner consistent with constitutional protections.

The sexual history polygraph significantly assists the therapist in addressing the needs of the offender in treatment.⁶ Compelling participation in such examinations does not preclude asserting the right against self-incrimination as to specific questions. **However, when participation is compelled, the offender has immunity from prosecution.** (See *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th, 704; note the Attorney General’s opening brief in *Maldonado v. Superior Court*, S183961.)

The Ninth Circuit has held that polygraph testing as a condition of supervised release does not infringe on a defendant’s Fifth Amendment right because defendants retain such rights during polygraph examinations. (*U.S. v. Daniel* (9th Cir. 2008) 541 F.3d 915, 925; *U.S. v. Cope* (9th Cir. 2008) 527 F.3d 944.) Other courts have noted that polygraph examinations do not violate the Fifth Amendment **if the offender is told he is not subject to prosecution for a new crime.** The offender should also know that he is subject to revocation for a probation or parole violation on the current offense when the polygraph exam reveals a violation of the conditions of supervision. (*U.S. v. Locke* (5th Cir. 2007) 482 F.3d 764.) A probationer may not refuse to answer questions just because his answer would disclose a violation of probation. (*Id.* at 767; see *U.S. v. Johnson* (2d Cir. 2006) 446 F.3d 272.) The mere deprivation of prison privileges for refusal to take a polygraph as part of a sexual abuse treatment program in prison did not constitute a deprivation of a protected liberty interest under the Due Process Clause and did not violate the constitutional right not to incriminate oneself. (*McKune v. Lile* (2002) 536 U.S. 24.)

⁶ “In the context of postconviction sexual offender treatment, a polygraph examination is used to obtain a lifetime sexual history of the offender as a part of a comprehensive psychosexual evaluation, to monitor compliance with treatment and supervision requirements, and to focus on a specific allegation or behavior. Although the use of polygraph examination as a psychological aid in that context appears to be accepted in many jurisdictions, the literature distinguishes between a clinical polygraph examination and the more traditional specific issue testing. (See, e.g., English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, *supra*, vol. 4, Nos. 1 & 2, Psychology, Public Policy, and Law, pp. 228–230.)” (*In re Jordan R.* (2012) 205 Cal. App. 4th 111, 129, fn. 17.)

Repeated revocations for invoking the Fifth may be a problem. The Ninth Circuit decision in *U.S. v. Antelope* (9th Cir. 2005) 395 F.3d 1128, involved a situation where a defendant suffered “repeated revocation of his conditional liberty as a result of invoking his Fifth Amendment right.” *Antelope* does not preclude polygraphs but affirms the offender’s right to invoke the privilege as to specific questions which would incriminate him on a new offense.

Similarly, in *People v. Miller* (1989) 208 Cal.App.3d 1311, a polygraph requirement imposed as a condition of probation was upheld because it was related to compliance with probation conditions regarding no contact with minors. The offender had a duty to answer truthfully unless he invoked the privilege to questions showing a realistic threat of self-incrimination, because “the mere requirement of taking the test itself is insufficient to constitute an infringement of the privilege.”

The corpus delicti rule does not apply at probation revocation hearings. (*People v. Monette* (1994) 25 Cal.App.4th 1572, 1575.) Thus, the offender’s statement alone can meet the preponderance of the evidence standard. However, there are some other considerations. If the polygrapher, or supervising officer, asks questions that call for answers that might incriminate the offender later, and the offender is told that invocation of a Fifth Amendment privilege would lead to revocation of probation or parole, the answers may be deemed compelled and thus involuntary and inadmissible in a criminal prosecution. But if the questions put to the offender are relevant to his probation or parole status and pose no realistic threat of incrimination in separate criminal proceedings, the Fifth Amendment privilege is not available and the offender must answer truthfully. (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321.)

The *Brown* court held that polygraph questions must relate to the successful completion of the treatment program and the crime of which the offender was convicted. **Thus, the term or condition of probation or parole must state that periodic polygraph examinations will be conducted “in furtherance of the offender’s sex offender treatment program.”** Stated this way, polygraph is a **valid condition of probation or parole because it is reasonably related to the crime and future criminality.** (*Ibid.*)

The court in *Brown* also held there is no right to counsel in a probation interview or therapy session. (*Id.* at p. 320.) Finally, in *Brown* the court said that failure to pay for required polygraph exams could only be enforced by probation through a civil action, and not by probation revocation.

The offender is not entitled to a *Miranda* warning before taking the polygraph exam. (*People v. Miller, supra*, at pp. 1315-1316.) Ethical considerations require a treatment provider to fully inform a client of the possible consequences of the examination.⁷

C. CASOMB Established Polygrapher Certification Requirements

CASOMB adopted the American Polygraph Association Model Policy for Post-Conviction Sex Offender Testing (Model Policy) as the certification standard for polygraphers. The Model Policy provides, “Polygraph testing and polygraph test results should not supplant or replace the need for professional expertise and judgment. Polygraph test results should not be used as the sole basis for revocation of any individual from court supervision or termination of sex offense specific treatment.” (Model Policy at § 4.1.)

Regarding sexual history exams, the Model Policy states, “Examiners should use two basic types of Sexual History examinations to investigate the examinee's history of involvement in unknown or unreported offenses and other sexual compulsivity, sexual preoccupation, or sexual deviancy behaviors. Information and results from these examinations should be provided to the professional members of the supervision and treatment team to add incremental validity to decisions pertaining to risk assessment, risk management and treatment planning.” (Model Policy at § 8.1.) When asking questions about prior offenses, examiners are told they “should exercise caution to ensure they do not violate any rights of an examinee regarding answering questions about criminal behaviors.” (Id. at § 8.2.) To that end, questions asked in both the pre-polygraph questionnaire and in the examination are about victim age and profile, victim selection, control and access, and victim silencing behaviors—not about victim names or dates offenses occurred.⁸

D. CASOMB Informed Consent Forms

Treatment providers should use waiver forms to fully inform clients in Containment Model treatment programs of the possible consequences of disclosures. Model waiver forms developed by CASOMB are posted online.⁹

⁷ See model Informed Consent and Release forms for Sexual History Polygraph, Instant Offense Polygraph, and Maintenance Polygraph, posted online at <www.casomb.org>

⁸ Model Policy at § 8.3.2, found online at <www.casomb.org>

⁹ See model Informed Consent and Release forms for Sexual History Polygraph, Instant Offense Polygraph, and Maintenance Polygraph, posted online at <www.casomb.org>

CASOMB has developed informed consent and release forms for the sexual history polygraph, instant offense polygraph, and maintenance polygraph. CASOMB encourages use of these forms in the Containment Model treatment programs. (Available at <www.casomb.org>, under Certification).