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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMIRO GONZALES, Defendant and Appellant.	H032866 (Santa Clara County Super. Ct. No. 211111)

I. STATEMENT OF THE CASE

In 2007, the Santa Clara County District Attorney filed a petition to commit defendant Ramiro Gonzales as a sexually violent predator (SVP) under the SVP Act. (Welf. & Inst. Code, § 6600 et seq.)[1] A jury found the defendant qualified as an SVP, and the court ordered defendant committed to the custody of the Department of Mental Health (DMH) for an indeterminate term.

On appeal from the commitment order, defendant claims the trial court erred in releasing psychological records to the prosecution and admitting the testimony of a former therapist. He claims there is insufficient evidence that his circumstances had materially changed since a previous determination that he did not qualify as an SVP. He claims the court erred in refusing to instruct the jury that mental retardation could not be considered a mental disorder in determining whether he qualified as an SVP. He claims

[1] All unspecified statutory references are to the Welfare and Institutions Code.

the indeterminate commitment violates his constitutional rights to equal protection and due process and also the constitutional protections against ex post facto legislation and double jeopardy. Finally, he claims the SVP law, as amended, violates his First Amendment rights.

We conclude that the court committed reversible error in releasing privileged psychotherapeutic records and admitting testimony concerning privileged information. Accordingly, we reverse the commitment order.

II. THE EVIDENCE

Defendant's Background

Defendant was born in 1955 and at the time of the SVP trial in 2008, he was 53 years old. At age seven, he contracted spinal meningitis which resulted in intellectual and developmental disabilities. Thereafter, he attended special education classes for a while but ultimately dropped out of school. He lived at home until he was sent to prison. During that time, he made money collecting cans for recycling and doing yard work. However, he needed help with daily living chores.

Between 1972 and 1974, defendant was convicted numerous times of petty theft. In 1975, at age 20, he was convicted of misdemeanor annoying or molesting a five-year-old girl. The probation report indicated that while he had an erection, defendant hugged the girl and whispered obscenities to her.

In 1977, defendant was convicted of lewd and lascivious conduct with a seven-year-old girl. In that incident, defendant was mowing the lawn at the house where the girl lived. He asked if he could use the phone but once inside faked making a call. The girl's mother got suspicious, called her brother, and waited outside for him, leaving the girl sitting on the couch. When her brother and mother returned, defendant was rubbing the girl's buttocks and crotch area over her clothing. When asked to explain his conduct, defendant said it "looked easy" and he did not know how to "do sex" with women.

In 1981, defendant was convicted of vandalism, and in 1989, he was convicted of battery on a woman whom he pushed down after she threw away a beer that he was drinking. In 1994, defendant was convicted of molesting a four-year-old girl. In that incident, a woman, who was visiting defendant's sister, put her daughter in a bedroom to sleep, and defendant was caught in the room rubbing her vagina.

Because of his impaired mental and intellectual development, defendant was housed at the San Andreas Regional Center, which provides services to those with developmental disabilities. Defendant received 24-hour care, supervision, and skills training.

Defendant was scheduled to be released on parole in the spring of 2004. At that time, the Santa Clara County District Attorney filed a petition seeking to have defendant committed as an SVP, but the jury found the allegations that he was likely to reoffend not true. Thereafter, defendant was released on parole with conditions that barred use of alcohol, contact with sex offenders, contact with minors, and being within 100 feet of places where children congregate, including parks and schools. He was not permitted to live at his mother's residence because it was too close to a school, but he was allowed to visit her. He was also required to wear a tracking device and attend an outpatient psychiatric treatment program. Two different parole officers personally read and explained each of the conditions to defendant, and defendant signed the parole conditions acknowledging them. His second parole officer also drove defendant to his treatment program.

In July 2004, defendant was arrested for missing an outpatient meeting, and he was released in August. In January 2005, defendant violated parole because he was assisting another sex offender who lived in the same motel. Both offenders were reminded of the no-contact condition. In February 2005, defendant was arrested when

parole agents found 20 beer cans in his motel room; he was released in June. In August he was arrested for drinking and released in December 2005.

In April 2006, defendant was fitted with another tracking device and agreed not to have contact with anyone under the age of 18 and to report any such contacts he had with minors, whether accidental or not. In August 2006, defendant's parole agent learned from the tracking device that defendant had loitered in an area with a playground. The next day, the agent called defendant at his mother's house. When the agent heard children's voices in the background, he and other officers immediately went there. They found two children in the driveway, defendant's mother, the children's father, and defendant, who was then arrested.[2] Defendant said that he knew he was not supposed to be near the playground, but he said he just stopped to roll some cigarettes and did not look at any of the children. Defendant also knew he was not supposed to be at the house when children were there and admitted that he had been drinking three times a week for a couple of months. Defendant was arrested for violating parole.

Professional Psychological Testimony

In January 2006, a parole agent took defendant to the Atkinson Assessment Center for outpatient treatment and counseling as a court-ordered condition of parole. Pat Potter McAndrews was defendant's psychotherapist. She testified that she administered an assessment test (the Abel Assessment). Because of his limited intellectual abilities, she carefully explained and rephrased some of the questions and helped record his answers.

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[2] Defendant's sister testified that she, her husband, and her children had moved to her mother's house after they were evicted. Defendant lived in a motel but visited two or three times per week. He would collect empty cans, buy cigarettes, and drink. She never saw him inappropriately touch her children.

Defendant's mother testified that defendant visited her every week after his release on parole. She knew he was not supposed to drink or be in the house when children were present, but he did so anyway, and she felt she could not stop him.

Thereafter, defendant regularly attended his group sessions, and his participation was good.

McAndrews testified that during defendant's initial interview, they discussed his family, medical, social, and criminal history, including the sexual misconduct and his convictions. He told her he had been drinking alcohol regularly since he was 14 years old. She gave him an assessment test, and, in response to one of the questions, defendant told her that between the ages of 14 and 37, he had touched 16 children sexually. Defendant explained that he was very attracted to children, and when he was drinking, he could not really control himself and had an overwhelming desire to touch them.

During the treatment, McAndrews regularly asked defendant if he had been drinking, and he said that he had not done so after his release on parole. McAndrews was particularly concerned about this because alcohol lowered inhibitions and had played a part in defendant prior sexual misconduct. Defendant never told McAndrews that he had been drinking regularly or that his sister and her children had moved into his mother's house, and she was unaware that defendant had violated parole by drinking or that he was visiting his mother's house. McAndrews said these facts would have been very important to have known because they showed that defendant had the opportunity to commit another offense. Had she known, she would have been highly concerned because his drinking around children was a "recipe for a sex offense."

After defendant was arrested at his mother's house, two state-appointed psychologists, Jack Vognsen and Thomas MacSpeiden, evaluated him to determine whether he posed a risk of danger. At the SVP trial, both MacSpeiden and Vognsen testified that defendant met the statutory criteria for an SVP: (1) he had previously been convicted of sexually violent offenses against at least two victims; and (2) he suffered from a diagnosed mental disorder that rendered him dangerous because of a likelihood that he would commit similar offenses. (See § 6600, subd. (a)(1).)

Specifically, both psychologists diagnosed defendant with pedophilia and opined that it impaired his emotional and volitional capacity. MacSpeiden opined that defendant also suffered from alcohol dependency and borderline intellectual functioning. Vognsen opined that defendant suffered from alcohol abuse and mild mental retardation.

The psychologists reviewed defendant's background, history, and available records. They conducted their evaluations and reached their conclusions before reviewing defendant's records from the Atkinson Center. However, at trial, both noted defendant's statement to McAndrews that between the ages of 14 and 37, he had sexually touched 16 children. MacSpeiden testified that this confirmed his analysis and conclusion. Vognsen concurred and found the statement significant.

Both psychologists accepted the jury finding in 2004 that defendant was not likely to reoffend. However, they both felt that defendant's subsequent parole violations reflected a material change in circumstances after 2004 and demonstrated a decreasing ability to control his behavior. MacSpeiden believed that since 2004, defendant's drinking had gotten worse, and his presence in places where children were or might have been manifested his diminished control.

Both psychologists administered a standardized risk assessment test designed to evaluate the likelihood that a person would reoffend (Static 99). The test results in each case placed defendant in a very high risk group, and both psychologists testified that in general the test underestimated risk. The psychologists considered a number of other static and dynamic risk factors. Both doctors found that defendant's low intellectual functioning made it difficult for him to learn how to control his impulses. Although defendant had engaged in therapy sessions, the psychologists disagreed concerning whether he was amenable to treatment and could understand how to avoid sexual misconduct. Together, defendant's low intellectual functioning, pedophilia, and alcohol dependence made him dangerous.

Based on their evaluation of defendant, both psychologists concluded that he was likely to engage in sexually violent predatory acts as a result of his diagnosed mental disorders. Vognsen was also concerned that defendant would stay with his mother if released. He noted that when defendant was last arrested, his mother said, " 'I don't see what the problem is. He just comes here, has a few beers with us and watches the kids.' " Vognsen considered it dangerous for defendant to rely on his mother for support because "[S]he's so protective and, one might say, enabling of his bad habits."

Two psychologists, Timothy Joseph Derning and Brian Abbott, testified for the defense.

Derning explained that mental retardation is a disability and not an illness. He opined that because of his disability, defendant was dependent on his mother and family and his routine of visiting her, and, therefore, it would be very difficult for him to alter his habits and develop alternatives to comply with his parole conditions after his sister and her children moved in.

Derning had previously evaluated defendant in 2004. In this case, he reviewed defendant's records, including those from the San Andreas Regional Center, the Department of Corrections, and the Atkinson Center. He also reviewed police, probation, and parole reports; the evaluations by MacSpeiden and Vognsen; and the testing by McAndrews. Because of defendant's disabilities and reading difficulties, he did not think that defendant could understand the test and did not believe its results were valid. Despite defendant's parole violations after 2004, he did not find that defendant's ability to comply with rules and regulations or control his behavior or sexual impulses had deteriorated. He criticized the contrary conclusions by MacSpeiden and Vognsen for failing to adequately address the impact of defendant's mental retardation. He also believed that mental retardation was a more accurate and appropriate diagnosis than pedophilia. According to Derning, that defendant had on occasion explored sex with

little girls could be attributed to his retardation and did not necessarily mean that he had a sexual preference or urge for children or suffered from pedophilia.

Abbott also had evaluated defendant in 2004, and he reviewed defendant's previous and subsequent history and records. He testified that although defendant suffered from mental retardation and alcohol dependence, he did not currently suffer from pedophilia or have any other mental disorder, and he faulted the contrary view because it was based on old behavior and failed to consider mental retardation as a possible explanation for defendant's prior sexual behavior. Abbot characterized defendant's inappropriate behavior with girls to be isolated incidents of sexual experimentation attributable to poor impulse control and bad judgment, both of which are manifestations of his retardation. Apart from these incidents, Abbott believed that defendant appeared to have adequate control over his sexual impulses and feelings. And there was no evidence that he had attempted any inappropriate acts with children since his incarceration in 1994. Since his release on parole, he had properly registered as a sex offender, attended counseling and individual therapy, complied with room searches, and worn his tracking device. Thus, except for resuming his lifelong habit of drinking beer, defendant had demonstrated his ability to comply with rules and regulations. Consequently, he did not find that there had been a material change in defendant's circumstances after his release on parole.

Given defendant's limited verbal skills and retardation, Abbot questioned the validity and reliability of the Abel Assessment, which was not designed to assess those with mental disabilities. He also opined that the Static 99 had inherent design flaws, and he believed the risk of reoffending posed by defendant to be much lower than MacSpeiden or Vognsen had found.

Defendant's Testimony

Defendant recalled that his parole agent had explained the conditions of parole, and he knew he was not supposed to drink or be near children. He admitted drinking beer. He recalled molesting the girl in 1994 and explained that he had been drunk. He said he had similarly molested two other girls. He knew that doing so was wrong. He said that if he were released on parole, he would register with the police department, see his parole officer, and then see his mother.

III. RELEASE OF RECORDS FROM THE ATKINSON CENTER

Background

Before trial, the district attorney subpoenaed defendant's psychological records from the Atkinson Center. Defendant sought to quash the subpoenas and exclude both the records and any testimony from McAndrews, his therapist at the Atkinson Center, on grounds that all of the information was protected by the psychotherapist-patient privilege. (Evid. Code, § 1014.)[3]

At a hearing, the district attorney argued, among other things, that defendant's therapy records and all communications between him and his therapist were admissible under the "dangerous patient" exception to the psychotherapist-patient privilege. (See Evid. Code, § 1024.) In support of this argument, the district attorney made an offer of

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[3] Evidence Code section 1014 provides: "[T]he 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 . . . ."

Evidence Code section 1012 defines " 'confidential communication between patient and psychotherapist' " as "information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship."

proof that "Dr. Atkinson, as well as [defendant's parole agent,] all believe that [defendant] did present a danger and would have indicated as such in their records."

The court found that the materials sought were covered by the psychotherapist-patient privilege, but further found that they were relevant concerning whether defendant currently posed a risk of danger to others and came within the "dangerous patient" exception to privilege.

Evidentiary Error

Defendant contends that the trial court erred in finding that the "dangerous patient" exception applied. We agree.

Our Supreme Court has consistently recognized " 'the public interest in supporting effective treatment of mental illness and . . . the consequent public importance of safeguarding the confidential character of psychotherapeutic communication.' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 555 (*Wharton*), quoting *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 440.)

By its terms the psychotherapist-patient privilege protects " 'confidential communication between patient and psychotherapist.' " (Evid.Code, §§ 1012, 1014.) "The privilege can cover a communication that was never, in fact, 'confidential'—so long as it was made in confidence. The communication need only comprise 'information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, *so far as the patient is aware*, discloses the information' to no 'outside' third person. [Citation.] [¶] Similarly, the privilege can cover a communication that has lost its 'confidential' status. [¶] '[T]he patient . . . has a privilege to refuse to disclose, *and to prevent another from disclosing,* a confidential communication between patient and psychotherapist . . . ' [Citation.]" (*Menendez v. Superior Court* (1992) 3 Cal.4th 435, 447-448 (*Menendez*).) The "privilege to prevent" disclosure to others prevents disclosures not only by a patient's

psychotherapist, but also by any other third person privy to a confidential communication. "In this aspect, the 'privilege to prevent' effectively repudiates the old 'eavesdropper rule,' under which the privilege is defeated whenever any 'outside' 'third person—eavesdropper, finder or interceptor—overhears or otherwise receives the confidential communication . . . .' [Citations.]" (*Id.* at p. 448.)

"Where the psychotherapist-patient privilege is claimed as a bar to disclosure, the claimant has the initial burden of proving the preliminary facts to show the privilege applies." (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014 (*Story*).)

As important as psychotherapeutic confidentiality is, it is not absolute, and its value and the protection of the privilege may be outweighed by other societal interests. (*Story, supra*, 109 Cal.App.4th at p. 1014; *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1091 (*San Diego Trolley*).) Such a determination is expressed in Evidence Code section 1024 which establishes an exception to the privilege, commonly referred to as the "dangerous patient" exception. (*Menendez, supra*, 3 Cal.4th at p. 449.) That section provides, in relevant part, " 'There is no [psychotherapist-patient] privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such a mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." The exception reflects the Legislature's conclusion that "the value of safeguarding confidential psychotherapeutic communications, as great as it is, is outweighed by the public interest in protecting foreseeable victims from physical harm. [Citation.]' " (*San Diego Trolley, supra*, 87 Cal.App.4th at p. 1091, fn. 1, quoting Evid. Code, § 1024.)

Nevertheless, because the psychotherapist-patient privilege is to be liberally construed in favor of the patient, courts "have an 'obligation to construe narrowly any exception to the psychotherapist-patient privilege: we must apply such an exception only

when the patient's case falls squarely within its ambit.' [Citation.]" (*Wharton, supra,* 53 Cal.3d at p. 554.) Moreover, even when the factual predicate for the exception is shown, it applies *only* to those communications that triggered the psychotherapist's conclusion that disclosure of a communication was needed to prevent harm. (*Ibid*.; *San Diego Trolley, supra,* 87 Cal.App.4th at p. 1091.)

Where a claimant has shown the privilege applies, the burden shifts to the opponent to show that the communications were not confidential, the privilege was waived, or the communications fall within an exception to the privilege. (*Story, supra,* 109 Cal.App.4th at p. 1015.)

With these principles in mind, we turn to the trial court's ruling in this case, and, in particular, its finding that the "dangerous patient" exception applied.[4]

Although the district attorney had the burden to prove the factual predicate for the exception, he presented no evidence that defendant had ever said anything to McAndrews during therapy that led her to believe that he posed a danger to others. Nor did the district attorney present any evidence that McAndrews ever considered it necessary to disclose particular confidential communications in order to prevent defendant from harming someone or that she discussed such a concern with anyone. Indeed, later at trial, McAndrews did not suggest that over the course of therapy, defendant's statements caused her alarm or led her to think he might be dangerous. On the contrary, her testimony implies that she had no such concerns and never thought of disclosing any confidential material except what might be necessary to keep defendant's parole officer apprised of defendant's compliance with his condition of parole. McAndrews did express some concern that certain circumstances constituted a "recipe" for a possible offense. However, that concern was not based on confidential communications during

[4] The Attorney General does not challenge the trial court's finding that communications between defendant and McAndrews were presumptively privileged. Understandably so. It is undisputed that defendant saw McAndrews for psychotherapy.

therapy; it arose because she learned from someone else that defendant had been drinking and was around his sister's children.

The sole basis for the court's ruling was the district attorney's brief, vague, and wholly conclusory offer of proof that the *records* of McAndrews and defendant's parole officer would show that they believed defendant posed a danger. The district attorney did not reveal how, before discovery was authorized, he had come to know what McAndrews thought or what her records might have indicated. Nor did he suggest that he had spoken to McAndrews or defendant's parole officer and that when McAndrews learned about defendant's drinking and his sister's children, she felt that he might pose a danger. In any event, even if she had expressed concern to the district attorney or parole officer, the district attorney's offer still failed to establish that McAndrews felt that it was necessary to disclose confidential communications in order to prevent some harm.

In short, the record does not contain sufficient evidence to support the application of the "dangerous patient" exception. Moreover, notwithstanding a correct finding that the material sought was privileged, and the mandate to narrowly construe the "dangerous patient" exception, the court granted the district attorney blanket discovery of all records and information about defendant's therapy and implicitly authorized McAndrews to testify about everything and anything concerning the therapy, including what she and defendant said to each other during therapy as well as her advice and diagnosis. Under the circumstances, we conclude that the trial court abused its discretion.

In defense of the court's ruling, the Attorney General relies on this court's opinion in *People v. Martinez* (2001) 88 Cal.App.4th 465 (*Martinez*). However, reliance on *Martinez* is misplaced.

To explain *Martinez*, we first discuss *People v. Lakey* (1980) 102 Cal.App.3d 962 (*Lakey*). In *Lakey*, the defendant was involuntarily committed to a state institution as an MDSO (mentally disordered sex offender), where he underwent therapy. At a later

hearing to extend the commitment, two psychologists testified in favor of recommitment, basing their opinions on defendant's treatment history, records, and statements during therapy. (*Id*. at pp. 967-969.)

On appeal, the defendant claimed that this testimony violated the psychotherapist-patient privilege. The court disagreed. It noted that the privilege is not absolute. The court explained that the MDSO commitment was designed to provide the defendant with treatment and to protect society. One purpose of supervised confinement and psychotherapy was to monitor progress and gather information that was relevant to future dangerousness and provide a basis for decisions concerning whether the MDSO should be released. (*Lakey, supra,* 102 Cal.App.3d at pp. 976-977.) The court found no evidence that the Legislature intended to preclude reliance on such information under the psychotherapist-patient privilege. (*Ibid*.)

The court found support in Evidence Code section 1024, noting that the MDSO recommitment proceeding was premised on the treating psychologists' belief that the defendant currently constituted a serious threat to society. Under the circumstances, the court opined that " 'the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.' " (*Lakey, supra,* 102 Cal.App.3d at p. 977, quoting *Tarasoff v. Regents of University of California, supra,* 17 Cal.3d 425, 442.)

In *Martinez, supra,* 88 Cal.App.4th 465, the defendant was convicted of sex offenses and later involuntarily committed to a state institution as an MDSO, where he received psychiatric treatment and therapy. At some point he was released, and years later, he was convicted of failing to register as a sex offender and placed on probation. He violated probation by again failing to register and was incarcerated. Before his term expired, the district attorney initiated an SVP commitment proceeding. At trial, two

psychologists opined that the defendant qualified as an SVP. They testified that they relied on the defendant's *institutional* psychiatric records, including prior psychological evaluations and statements the defendant had made to psychologists, assistants, and technicians *during his previous MDSO commitment*. On appeal, the defendant claimed that the admission of this testimony violated his psychotherapist-patient privilege. This court rejected his claim. (*Id*. at pp. 469-473, 482-483.)

We discussed *Lakey, supra,* 102 Cal.App.3d 962, agreed with its analysis, and applied it in the context of an SVP proceeding. "The SVPA protects the public from sexual predators by detaining them and providing treatment until the mental condition causing their disorder has abated. The determination that a disorder has abated requires a full assessment of the person's current mental condition, including reference to treatment records and progress in therapy." (*Martinez, supra,* 88 Cal.App.4th at p. 484, italics added.) Accordingly, we concluded that the psychotherapist-patient privilege did not preclude later SVP psychologists from considering and testifying about statements defendant had previously made *as a MDSO* because the privilege never attached to his communications with the treatment staff. Indeed, given *Lakey*, his MDSO commitment, the purpose of his initial evaluation and treatment, defendant could not have expected his communications to be absolutely confidential or otherwise protected by the privilege. (*Ibid*.)

Martinez and *Lakey* stand for the proposition that in the context of an MDSO or SVP commitment or recommitment proceeding, the psychotherapist-patient privilege does not protect psychological records *of a previous involuntary commitment*. Those records are generated, in part, as part of an ongoing process designed to treat MDSOs and SVPs and to provide authorities with a professionally informed basis for determining whether it is safe to release such persons upon the expiration of their terms of involuntary commitment. When those treatment records are being generated, the MDSO or SVP

cannot reasonably expect that their therapeutic communications will be absolutely confidential or protected by the privilege at future commitment or recommitment hearings. At such hearings, the public safety purpose and benefit of a full assessment of a MDSO's or SVP's mental condition, including review of institutional psychotherapy records, outweigh the general public policy favoring confidentiality between psychotherapist and institutionalized patient. Under these circumstances, the MDSO's or SVP's records may reasonably be deemed to fall within the "dangerous patient" exception.

The circumstances here are distinguishable from those in *Martinez* and *Lakey*. A defendant who has been released on parole with a therapy condition is not comparable to a person involuntarily committed to a state institution as an MDSO or an SVP in order to protect the public and provide treatment. Moreover, in our view, a parolee participating in therapy as a condition of parole can generally expect communications with a psychotherapist to be confidential and protected by the privilege except insofar as disclosure is necessary to ensure compliance with the parole condition.

We find support for our view in *In re Pedro M.* (2000) 81 Cal.App.4th 550 (*Pedro M.*) and *Story, supra*, 109 Cal.App.4th 1007. In *Pedro M.*, the minor committed a sex offense and was placed in a facility for young sex offenders on condition he participate in psychological testing and treatment. When he refused to cooperate, the court sent him to CYA (California Youth Authority) based on testimony from a therapist about the minor's participation and progress. On appeal, the minor claimed the testimony violated the psychotherapist-patient privilege. The court disagreed, explaining that because psychological treatment was ordered, the therapist's testimony was necessary to evaluate the minor's compliance. The court noted that Evidence Code section 1012 expressly provided for the disclosure of confidential communications between patient and psychotherapist to " 'those to whom disclosure is reasonably necessary for . . . the

accomplishment of the purpose for which the psychotherapist is consulted . . . .' " (*Pedro M.* 81 Cal.App.4th at pp. 553-555.) This did not mean that the privilege did not apply at all. The court pointed out that the juvenile court had properly circumscribed the therapist's testimony, limiting it to the issue of compliance with the therapy order so that the therapist would not reveal details of therapeutic sessions, the minor's diagnosis, the therapist's advice, or statements by the minor. (*Id*. at. pp. 554-555.)

In *Story, supra,* 109 Cal.App.4th 1007, the defendant was charged with murder, and the district attorney sought the record of therapy that had previously been ordered as a condition of probation in an unrelated case. This court reversed the order granting discovery, concluding that the records were privileged. (*Id*. at pp. 1010-1019.) In doing so, we rejected a claim, based on *Martinez, supra,* 88 Cal.App.4th 465, that therapy ordered as a condition of probation was the same as therapy provided during an involuntary MDSO or SVP commitment and therefore the therapy records were not protected by the privilege. We found reliance on *Martinez* misplaced because the two therapeutic contexts were distinguishable. In *Martinez* (and *Lakey*), it was appropriate to apply the "dangerous patient" exception to the therapy records of MDSOs and SVPs because there had been a determination that the defendant posed a danger to others before the therapy commenced and the defendant was considered dangerous during his commitment. By contrast, we observed in *Story* that probation is reserved for those who pose a minimal risk of danger. Thus, the rationale of the exception had no application to those released on probation and ordered to participate in therapy, and under such circumstances the public's compelling interest in safety did not outweigh the public policy of confidentiality and the potential benefit conferred to a probationer by protecting the confidentiality of his or her therapy. In this regard, we agreed with *Pedro M., supra*, 81 Cal.App.4th 550 that the psychotherapist-patient privilege attached to the records of

court-ordered therapy except for the limited disclosure of information reasonably necessary to monitor and ensure compliance with the probation condition.

For the purpose of determining whether the privilege applies, we find no meaningful basis to distinguish between therapy ordered as a condition of probation and therapy ordered as a condition of *parole*. (Cf. *D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 204 ["no meaningful distinction between treatment ordered as a condition of probation and treatment ordered as a condition of parole" for purposes of determining whether failure to comply signifies an intractable substance abuse problem].) In both circumstances, the defendant has been conditionally released to the general public subject to supervision because he or she poses a minimal safety risk; therapy is ordered to assist the defendant's rehabilitation; and preserving confidentiality will facilitate that goal.

We acknowledge that in *Story*, the district attorney sought the defendant's therapy records to help in a prosecution for murder; and here, the district attorney sought the records to help in an SVP commitment proceeding that was commenced only after two psychologists—MacSpeiden and Vognsen—had made a preliminary determination that defendant currently suffered from a mental disorder and was likely to commit a sexually violent offense in the future, and only after the trial court found probable cause to believe that defendant qualified for commitment as an SVP. (§§ 6601, subds. (a)(1)-(2), (b), (c), (d), & (i); 6602.) Under such circumstances, one could reasonably argue that the general policy favoring confidentiality between patient and psychotherapist is outweighed by the compelling public interest in protection from SVPs and by the benefit at an SVP trial of having a comprehensive assessment of defendant's mental condition based on all mental health records and relevant testimony, including records of therapy ordered as a condition of probation or parole.

However, in deciding whether to allow discovery of material that is presumptively privileged, the court does not simply determine whether the public benefits of disclosure outweigh the policy behind the privilege. Unquestionably, the rules of evidence, including those concerning the psychotherapist-patient privilege and exceptions thereto, apply no less to SVP trials than to criminal trials. (See Evid. Code, § 300 [unless specified by statute, Evidence Code applies to court proceedings].) For that reason, using a simple balancing test to rule on privileged material, though attractively efficient, is not appropriate. Rather, where the claimant establishes that the privilege is applicable, the opponent must show that the material sought was not confidential, the claimant waived the privilege, or the material comes within a statutory exception. (*Story*, *supra*, 109 Cal.App.4th at p. 1015.) Here, the district attorney failed to satisfy this burden and show that the "dangerous patient" exception applied, and the analyses in *Martinez* and *Lakey* do not support the court's finding that it did.

Federal Constitutional Error

Ordinarily, evidentiary errors are reviewed under the standard announced in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)—i.e., whether it is reasonably probable the defendant would have obtained a more favorable result in the absence of the error (the *Watson* standard). (*Id*. at p. 836; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [evidentiary errors under state rules of evidence evaluated under *Watson* standard].) Defendant claims the release of privileged information was not only error under the Evidence Code but also a violation of his state constitutional right to privacy. (Cal. Const., art. I, § 1 ["[a]ll people" have an "inalienable" right to "privacy"]) That may well be. Unquestionably, the state constitutional guarantee of privacy extends to psychotherapy records. (*Martinez*, *supra*, 88 Cal.App.4th at pp. 474-475.) Moreover, defendant had a legally protected privacy interest and a reasonable expectation that the privilege would protect the confidentiality of his records at the SVP trial; and the

releasing all of the psychotherapy records and the trial testimony of McAndrews constituted a serious invasion of that privacy interest. (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-37, 39-40.) However, regardless of whether the court's ruling was only statutory error or both statutory *and* state constitutional error, our review for prejudice would still be governed by the *Watson* standard. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1190 [*Watson* standard applies to *all* error under state law].)

In addition to his state law claims, defendant asserts that the federal constitutional right to privacy protects privileged psychotherapeutic records from unwarranted and unjustifiable disclosure. Thus, he claims the erroneous disclosure of his records violated this right, making the error reviewable under the more stringent beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman* standard).[5]

As we explain, both the United States Supreme Court and the California Supreme Court acknowledge a constitutionally protected interest in the privacy or confidentiality of highly personal information. Moreover, the great weight of authority from lower federal courts and other state courts recognizes a federal constitutional right to informational privacy that protects medical and psychiatric records from unwarranted, unnecessary, and unjustifiable disclosure.

The United States Supreme Court formally recognized the constitutional right to privacy in *Griswold v. Connecticut* (1965) 381 U.S. 479 (*Griswold*). At that time, the court found it rooted in the "penumbras" of guarantees in the Bill of Rights. (*Id*. at p. 484.) As the court then explained, "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy.

[5] We granted rehearing in this case to address this claim.

The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' " (*Ibid.*)[6]

Later, in *Roe v. Wade* (1973) 410 U.S. 115, the Court located the right to privacy "in the concept of liberty guaranteed by the Fourteenth Amendment." (*Id*. at p. 152; accord, *Whalen v. Roe* (1977) 429 U.S. 589, 598, fn. 23 (*Whalen*); e.g. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 846-853.)[7] The court explained that the Constitution protects "a right of personal privacy" or guarantees "certain areas or zones of privacy," and this right or guarantee covers "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' " (*Roe v. Wade, supra*, 410 U.S. at p. 152.)

Thus, for example, the court has held that the right to privacy protects decisions about marriage, procreation, contraception, family relationships, child rearing, and private sexual conduct from unwarranted, unjustified, and unnecessary state interference. E.g., *Pierce v. Society of the Sisters* (1925) 268 U.S. 510 [Fourteenth Amendment protects privacy concerning decisions about schooling]; *Skinner v. Williamson* (1942)

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[6] *Griswold* validated a dissent written 40 years earlier by Justice Brandeis in *Olmstead v. United States* (1928) 277 U.S. 438, in which he which described the privacy right as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion of the government upon the privacy of an individual . . . must be deemed a [constitutional] violation." (*Id*. at p. 478 (Brandeis, J., dissenting); see *Anderson v. Romero* (7th Cir.1995) 72 F.3d 518, 521-522 [summarizing history of the legal concept of privacy].)

[7] The Fourteenth Amendment provides, in pertinent part, "No state shall . . . deprive any person of life, liberty or property without due process of law."

316 U.S. 535 [procreation]; *Loving v. Virginia* (1967) 388 U.S. 1 [marriage]; *Griswold, supra,* 381 U.S. 479 [use of contraceptives]; *Troxel v. Granville* (2000) 530 U.S. 57 [care and custody of children]; *Lawrence v. Texas* (2003) 539 U.S. 558 [private intimate activity]; see also *Nelson v. Nebraska* (1923) 262 U.S. 390, 399.)

In *Whalen, supra,* 429 U.S. 589, the high court explained that it had previously identified at least two distinct types of protected privacy interests: one is the interest in avoiding disclosure of personal matters, commonly referred to as informational privacy; the other interest is in independence in making decisions on fundamental matters. (*Id*. at p. 599; accord, *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 457 ["We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."]; see, e.g., *Aid for Women v. Foulston* (10th Cir.2006) 441 F.3d 1101, 1116 [first *Whalen* interest is " 'informational privacy' "] *Bloch v. Ribar* (6th Cir.1998) 156 F.3d 673, 683 ["informational right to privacy"].)

Whalen involved the interest in informational privacy and addressed the constitutionality of a New York law requiring the state to maintain an informational database of people who had obtained prescriptions for various drugs. The court opined that the statute was a reasonable exercise of police power designed to combat the misuse of prescription drugs. (*Whalen, supra,* 429 U.S. at pp. 597-598.) The court noted that the statute authorized only the collection and storage of information, and it contained security provisions to protect against improper disclosure. The court further observed that there was no evidence that the security provisions would be administered improperly or that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures. (*Id*. at pp. 601-602.)

The court acknowledged that the statute required limited disclosure of the information to authorized personnel but found this disclosure no more invasive or burdensome than those typically made to doctors, hospital personnel, insurance companies, and public health officials. (*Whalen, supra*, 429 U.S. at p. 602.) In short, the court concluded that neither the immediate nor threatened impact of the law was sufficient to constitute an unconstitutional invasion of informational privacy. (*Id*. at pp. 603-604.)

However, the court cautioned, "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data whether intentional or unintentional or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment." (*Whalen, supra*, 429 U.S. at pp. 605-606, fn. omitted, italics added.)

Although the court reached its conclusion without expressly holding that due process included the right to informational privacy, its emphasis on the limited nature and

scope of disclosure under the New York statute and the importance of statutory safeguards controlling further disclosure and its concerns about unwarranted disclosure of personal medical information strongly implied that personal and confidential information was entitled to constitutional protection from unlimited, unjustified, and unnecessary disclosure by the state.

In *United States v. Westinghouse* (3d Cir.1980) 638 F.2d 570 (*Westinghouse*), the court, citing *Whalen*, expressly held that an employee's medical records, which may contain intimate facts of a personal nature, implicated the interest in informational privacy identified in *Whalen* and came "well within the ambit of materials entitled to privacy protection." (*Id*. at p. 577.) In *Westinghouse*, a federal occupational safety agency sought the medical records of a company's employees to facilitate an investigation of health hazards. In holding that the Constitution protected the privacy of those records, the court opined, "Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.' " (*Ibid*., fn. omitted.) The court further explained " 'Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details. For instance, a casual acquaintance may comfortably know that I am sick, but it would violate my privacy if he knew the nature of the illness. Or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my suffering from some symptom which he must know is associated with the disease.' " (*Ibid*., fn. 5, quoting Fried, Privacy, 77 Yale L. J. 475, 483 (1968).)

Since *Whalen* and *Westinghouse*, virtually all federal circuits have recognized a constitutional right to informational privacy. Although there are disagreements

concerning the scope of the right and the types of information it protects, many have specifically found that it protects privileged medical records from unwarranted and unjustified disclosure by the state.[8] Many state courts also have recognized the federal constitutional right to informational privacy.[9]

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[8] E.g., *Vega-Rodriquez v Puerto Rico Telephone Co.* (1st Cir.1997) 110 F.3d 174, 182-183 [right extends to medical, financial, and other intimately personal information]; *Powell v Schriver* (2d Cir.1999) 175 F.3d 107, 111 [medical records protected]; *Doe v. Delie* (3rd Cir.2001) 257 F.3d 309 [same]; *Taylor v Best* (4th Cir.1984) 746 F.2d 220, 225 [right to privacy includes avoiding disclosure of personal facts]; *Zaffuto v City of Hammond* (5th Cir.2002) 308 F.3d 485, 489-491 [disclosure of private, intimate information could violate right]; *Bloch v. Ribar, supra,* 153 F.3d 673, 684 [6th Cir: "a constitutional right to nondisclosure of certain types of private information exists"]; *Jarvis v. Wellman* (6th Cir.1995) 52 F.3d 125, 126 [however, right does not protect medical records]; *Denius v Dunlap* (7th Cir.2000) 209 F.3d 944, 955 [Constitution protects against disclosure of private matters]; *Eagle v. Morgan* (8th Cir.1996) 88 F.3d 620, 624-625 [recognizing constitutional right has covered personal information, including medical records]; *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (9th Cir.1998) 135 F.3d 1260, 1269 [medical information]; *Douglas v. Dobbs* (10th Cir.2005) 419 F.3d 1097, 1102 [same]; *James. v City of Douglas* (11th Cir.1991) 941 F.2d 1539, 1543 [same]; but see *American Federation of Government Employees, AFL-CIO v Department of Housing & Urban Development* (DC Cir.1997) 118 F.3d 786, 791, 793 [expressing "grave doubts as to the existence" of a constitutional right to informational privacy].)

Some courts view the right of privacy narrowly to protect confidential personal information *only* when disclosure would affect those personal rights that are fundamental or implicit in the concept of ordered liberty. (E.g., *Bloch v. Ribar, supra,* 153 F.3d at p. 684; *J.P. v. DeSanti* (6th Cir.1981) 653 F.2d 1080, 1090; *Jarvis v. Wellman, supra,* 52 F.3d 125, 126.) Other courts, however, view the right more broadly to protect confidential information beyond that necessary to the exercise of fundamental liberties (e.g., *Fadjo v. Coon* (5th Cir.1981) 633 F.2d 1172, 1176; *Doe v. Southeastern Pennsylvania Transportation Authority* (3d Cir.1995) 72 F.3d 1133, 1137-1138), although even then, some courts require that the information disclosed involve "highly personal matters representing 'the most intimate aspects of human affairs' " (*Eagle v. Morgan supra,* 88 F.3d at p. 625) or be "either a shocking degradation or an egregious humiliation . . . to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." (*Alexander v. Peffer* (8th Cir.1993) 993 F.2d 1348, 1350.)

It is not clear where the Ninth Circuit stands concerning the scope of the right to informational privacy. In its early decisions, it cited *Westinghouse* and adopted a broad

The California Supreme Court has provided authoritative guidance on this issue. Long before *Whalen* identified the confidentiality of highly personal information as an aspect of privacy, the California Supreme Court in *In re Lifschutz* (1970) 2 Cal.3d 415 (*Lifschutz*) recognized that the federal Constitution protected the privacy of privileged psychotherapeutic records from unwarranted, unjustified, and unnecessary disclosure. (*Id*. at pp. 431-432; see *Roberts v. Superior Court of Butte County* (1973) 9 Cal.3d 330, 337 [compelled disclosure of privileged information potentially encroaches upon constitutional right to privacy]; *People v. Stritzinger* (1983) 34 Cal.3d 505, 511; ["psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy"]; *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 241; *Scull v. Superior Court* (1988) 206 Cal.App.3d 784, 790 ["Communications between the patient and psychotherapist are also protected by the

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view of the right to informational privacy. (E.g., *Doe v. Attorney General of the United States* (9th Cir.1991) 941 F.2d 780, 795-796, disapproved on other grounds in *Lane v. Pena* (1996) 518 U.S. 187; *Roe v. Sherry* (9th Cir.1996) 91 F.3d 1270, 1274; *Norman v. Bloodsaw, supra,* 135 F.3d at p. 1269; *In re Crawford* (9th Cir.1999) 194 F.3d 954, 958, fn. 4.) However, in *Seaton v. Mayberg* (9th Cir.2010) 610 F.3d 530 (*Seaton*), the court adopted the narrower view, opining that some of its prior decisions were consistent with that view. (*Id*. at pp. 537-538.)

[9] E.g., *In re Paternity of K.D.* (Ind.App.2010) 929 N.E.2d 863, 869; *McNiel v. Cooper* (Tenn.Ct.App.2007) 241 S.W.3d 886, 895, 898; *Maryland State Bd. of Physicians v. Eist* (Md.App.2007) 932 A.2d 783, 803-804; *Alpha Medical Clinic v. Anderson* (2006) 280 Kan. 903, 919; *State v. Russo* (2002) 259 Conn. 436, 457-458; *State v. Langley* (2000) 331 Or. 430, 448-449 & fn. 14; *Middlebrooks v. State Bd. of Health* (1998) 710 So.2d 891, 892; *State ex rel. Callahan v. Kinder* (Mo.App. W.D. 1994) 879 S.W.2d 677, 681; *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994) 70 Ohio St.3d 605, 607-608; *McMaster v. Iowa Bd. of Psychology Examiners* (Iowa,1993) 509 N.W.2d 754, 758; *Holbrook v. Weyerhaeuser Co.* (1992) 118 Wash.2d 306, 314; *Hillman v. Columbia County* (1991) 164 Wis.2d 376, 400; *Snyder v. Mekhjian* (1991) 125 N.J. 328, 342; *Tarrant County Hosp. Dist. v. Hughes* (Tex.App.-Fort Worth 1987) 734 S.W.2d 675, 678-679; *Crosby v. Workers Comp. Bd.* (1982) 57 N.Y.2d 305, 311-312; *Martinelli v. District Court In and For City and County of Denver* (1980) 199 Colo. 163, 173-174.

constitutional right of privacy."]; cf. *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 431 [the constitutional right to privacy "protects individuals from government disclosure of personal information"].)

In *Lifschutz,* a psychiatrist was jailed for contempt for refusing to comply with an order to disclose information about a patient under Evidence Code section 1016, which establishes a patient-litigant exception to the psychotherapist-patient privilege where the patient puts his or her mental health in issue.[10] He challenged the statute on the ground that it violated his absolute right to privacy under the federal Constitution. (*Lifschutz, supra,* 2 Cal.3d at pp. 420-422.)

The court observed that most patients seeking psychotherapy have a justifiable expectation of confidentiality. (*Lifschutz, supra*, 2 Cal.3d at p. 431.) " ' "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand." ' " (*Ibid.*, quoting *Taylor v. United States* (D.C. Cir. 1955) 222 F.2d 398, 401; see *Scull v. Superior Court, supra,* 206 Cal.App.3d at p.788.[11])

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[10] Evidence Code section 1016 provides, in relevant part, "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: [¶] (a) The patient . . . ."

[11] " 'The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress. [Citation.]" (*Scull v. Superior Court, supra,* 206 Cal.App.3d at p.788.)

The court opined that a patient's interest in the confidentiality of psychotherapeutic records "draws sustenance from our constitutional heritage." (*Lifschutz, supra*, 2 Cal.3d at p. 431.) More specifically, the court, citing *Griswold v. Connecticut, supra*, 381 U.S. 479, concluded that privileged psychotherapeutic records came within a constitutionally protected zone of privacy. (*Lifschutz, supra*, 2 Cal.3d at p. 431.) The court explained, "Although *Griswold* itself involved only the marital relationship, the open-ended quality of that decision's rationale evidences its far-reaching dimension. [Citation.] Indeed, the decision's concern for valued aspects of individual privacy may ultimately aid in protecting man from the dehumanization of an ever-encroaching technological environment. The retention of a degree of intimacy in interpersonal relations and communications lies at the heart of the broad rationale of *Griswold*; the opinion itself significantly followed the teachings of *NAACP v. Alabama* (1958) 357 U.S. 449, which struck down a state statute requiring an association to disclose its membership list as an unconstitutional impingement upon the members' rights of privacy and anonymity. [Citation.]"[12] (*Lifschutz, supra*, 2 Cal.3d at p. 432 & fn. 12, fn. omitted.)

Although the court concluded that psychotherapeutic records were constitutionally protected, the court rejected the psychiatrist's claim that the right to privacy was absolute and barred all state interference, even in the form of an exception to the psychotherapist-patient privilege. (*Lifschutz, supra*, 2 Cal.3d at p. 432.) Rather, the court opined that the

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[12] The court's citation to *Griswold* and several other United States Supreme Court cases clearly reveals that its analysis was based on a federal right to privacy and not the separate right to privacy in the California constitution. (Cal.Const., art. I, § 1.) Indeed, this is necessarily so because *Lifschutz* was decided in 1970, before the electorate added the right to privacy to the state Constitution. (See *Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th at p. 15 ["The phrase 'and privacy' was added to California Constitution, article I, section 1 by an initiative adopted by the voters on November 7, 1972 (the Privacy Initiative or Amendment)."].)

constitutional right may yield in furtherance of a compelling state interest. To determine whether the statutory exception passed constitutional muster, the court in essence employed a balancing test, analyzing whether the nature, purpose, and scope of the exception outweighed the patient's interest in confidentiality and justified the degree to which disclosure would intrude upon the right of privacy.[13]

In examining the statutory exception, the *Lifschutz* court first noted that it was "carefully tailored to serve the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings," an interest, the court observed, that in other contexts had justified the disclosure of a wide variety of confidential information. (*Lifschutz, supra,* 2 Cal.3d at p. 432.) The court further opined that "since the exception compels disclosure only in cases in which the patient's own action initiates the exposure, 'intrusion' into a patient's privacy remains essentially under the patient's control." (*Id*. at p. 433.)

In this regard, the court observed that the cases involving an analogous exception to the physician-patient privilege "have identified two distinct grounds for the exception. First, the courts have noted that the patient, in raising the issue of a specific ailment or condition in litigation, in effect dispenses with the confidentiality of that ailment and may no longer justifiably seek protection from the humiliation of its exposure. Second, the exception represents a judgment that, in all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters. . . . 'The whole purpose of the [physician-patient] privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses

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[13] The high court in *Whalen, supra,* 429 U.S. 589 also employed a balancing test to determine whether the New York statute impermissibly infringed on privacy interests entitled to constitutional protection. Likewise, the courts in the federal and state cases cited above employed a balancing test to determine whether the challenged state action impermissibly invaded the right to informational privacy.

those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.' " (*Lifschutz, supra,* 2 Cal.3d at pp. 433-434, fns. omitted.)

On the other hand, the court explained that because the statute in effect represents an automatic waiver of the privilege, the scope of the waiver must be limited to only that information necessary to effectuate the purpose of the exception. (*Lifschutz, supra*, 2 Cal.3d at p.435.) Thus, the patient does not waive his or her privilege over all otherwise privileged and confidential psychiatric information; rather, the waiver extends only to those mental conditions that the patient-litigant has disclosed by bringing an action in which those conditions are in issue. (*Ibid*.) "Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be 'relevant' to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." (*Ibid*., fn. omitted.)

The court further pointed out that "[e]ven when the confidential communication is directly relevant to a mental condition tendered by the patient, and is therefore not privileged, the codes provide a variety of protections that remain available to aid in safeguarding the privacy of the patient. When inquiry into the confidential relationship takes place before trial during discovery, as in the instant case, the patient or psychotherapist may apply to the trial court for a protective order to limit the scope of the inquiry or to regulate the procedure of the inquiry so as to best preserve the rights of the patient. . . . [¶] When the questioning of the psychotherapist or patient as to confidential communications occurs at the trial itself, the danger of publicity and embarrassment is

increased. Of course, unless the information sought is directly relevant to the issue as revealed by the evidence at trial, the communication is privileged and no disclosure can be compelled. Moreover, as with any evidence, the court retains discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice . . . . ' [Citation.]" (*Lifschutz, supra,* 2 Cal.3d at p. 435, quoting Evid. Code, § 352.)[14]

Given *Lifschutz* and the weight of federal and state authority cited above, we too find that the notion of substantive due process in general, and the notion of constitutionally protected zones of privacy in particular encompass a right to privacy that independently protects information generated in confidence between a patient and psychotherapist from unwarranted and unjustified intrusions by the government. We further find, however, that the constitutional protection is not absolute but may yield where disclosure serves competing state interests that outweigh the degree of intrusion disclosure would cause. More particularly, *Lifschutz* teaches that compelling the disclosure of otherwise privileged psychotherapy records under an exception does not violate the right to privacy where the exception promotes an important state interest, limits disclosure to what is reasonably necessary to achieve the purpose of the exception, and contains, and/or is subject to, safeguards that protect against the unwarranted and unnecessary disclosure.

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[14] An identical challenge to Evidence Code section 1016 was raised in *Caesar v. Mountanos* (9th Cir.1976) 542 F.2d 1064. The court reviewed and agreed with *Lifschutz* that "the right of privacy encompassing the doctor-patient relationship identified and explained in [numerous United States Supreme Court cases] goes beyond the factual context of those cases, i. e., intimate marital and sexual problems, and extends to psychotherapist-patient communications." (*Id*. at p. 1068, fn. 9.) The court also agreed that the federal right to privacy was not absolute and concluded that the patient-litigant exception, as narrowly construed in *Lifschutz,* struck a reasonable and proper balance between personal privacy and the state's interests and, therefore, did not impermissibly invade a protected sphere of privacy. (*Id*. at pp. 1068-1070.)

Here, the court compelled the disclosure of privileged information under the dangerous-person exception. (Evid. Code, § 1024.) In light of the analysis of patient-litigant exception in *Lifschutz*, our discussion of the dangerous-patient exception—i.e., its purpose, nature, and limited scope—supports a finding that the exception is narrowly focused and justified by a compelling state interest in safety. Therefore, on its face the exception, like the patient-litigant exception, does not appear to violate the right of informational privacy.

However, we are not dealing with a facial challenge to the exception arising from its correct application. Rather, the issue here is whether an incorrect application and the erroneous and intentional disclosure of privileged psychotherapy records violated defendant's right to privacy.[15]

In determining whether there has been a constitutional violation, courts have employed various balancing tests.[16] Our analysis of relevant factors leads us to conclude that the balance tips in favor of finding a constitutional violation in this case.

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[15] We say intentional disclosure because "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." (*Daniels v. Williams* (1986) 474 U.S. 327, 328.)

[16] In *Whalen, supra*, 429 U.S. 589, the Supreme Court considered the following factors: (1) the potential for public disclosure of the information; (2) the extent to which the private information is already disclosed to other individuals or institutions; (3) the similarity of the disclosure in question to disclosures that have already taken place; (4) the potential deterrent effect on the exercise of other constitutional liberties; and (5) the state's interest in the information. (*Id*. at pp. 601-604.)

In *Nixon v. Administrator of General Services, supra*, 433 U.S. 425, the factors considered were: (1) the extent of the intrusion into the individual's privacy; (2) the individual's status as a public figure; (3) the expectation of privacy in the materials in question; (4) the importance of the public interest; (5) the level of difficulty involved in segregating private from non-private materials; and (6) the measures taken to keep private materials from being publicly disseminated or revealed. (*Id*. at p. 465.)

The Third and Ninth Circuits have considered (1) the type of information requested, (2) the potential for harm in any subsequent non-consensual disclosure, (2) the adequacy of safeguards to prevent unauthorized disclosure, (3) the degree of need for

First, defendant had a reasonable expectation of privacy concerning communications during psychotherapy at the Atkinson Center. Not only do such communications fall within a constitutionally protected zone of privacy, as *Lifschutz* found, but also they are protected by the psychotherapist-patient privilege. It is true that psychotherapy was a condition of defendant's parole, and, therefore, he could not have prevented the disclosure of otherwise privileged information that was reasonably necessary to monitor and ensure his compliance with the parole condition. (See *Pedro M., supra,* 81 Cal.App.4th at pp. 553-555; *Story, supra,* 109 Cal.App.4th at pp. 1010-1019.) However, apart from the limited and justifiable disclosure of that information for that purpose, defendant could still expect the content of his therapy sessions, especially his statements to McAndrews, to remain private and confidential. That expectation was not necessarily diminished by the fact that defendant's privacy concerning his history, background, criminal record, and psychological state was lost during the involuntary evaluations performed by MacSpeiden and Vogneson.

Next, we note that the court authorized the pre-trial release of all psychotherapy records, not just those that arguably fell within the dangerous-patient exception. Thus, the loss of confidentiality concerning his psychotherapy was total, and the court's erroneous ruling further led to McAndrews's public disclosure of defendant's highly personal, secret, and revealing statements in therapy.

We next point out that the issue at the SVP trial was, essentially, whether defendant *currently* posed a danger if released. To this end, the state was allowed to have defendant evaluated and tested by psychological professionals. These evaluations were the most relevant and probative evidence concerning current dangerousness and reduced the need for unlimited access to less current psychological records. We note that both

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access, and (4) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. (*Westinghouse, supra,* 638 F.2d at p. 578; *Seaton, supra,* 610 F.3d at pp. 538-541.)

MacSpeiden and Vognsen, the prosecution's experts who evaluated defendant, came to the conclusion that he qualified as an SVP without considering the privileged information from the Atkinson Center.

Finally, we acknowledge that the state has a compelling interest in protecting public safety and that Evidence Code section 1024 reflects the strong public policy favoring disclosure over privilege when reasonably necessary to ensure safety. Thus, when the exception applies, it can be said that the interest in safety outweighs the patient's interest in confidentiality and justifies the loss of privacy. The state's interest in safety is heightened in the context of an SVP trial because its sole purposes are to protect the public from dangerous sexual predators and provide them with treatment.

That said, however, the SVP Act does not include its own special exception to the psychotherapist-patient privilege or otherwise authorize the blanket disclosure of psychotherapy records that, in other contexts, would be privileged and inadmissible. As noted, the regular rules of evidence apply at SVP trials. Thus, at an SVP trial, when the dangerous-patient exception applies, it can be said that the state's interests in public safety and the ascertainment of truth outweigh the inmate's statutory interest in confidentiality and justify the interference with his or her constitutional right of privacy. However, where the dangerous-patient exception does *not* apply, the state's interests in public safety and the ascertainment of truth do not clearly or necessarily outweigh an inmate/patient's privacy interests. (See *Jaffee v. Redmond* (1996) 518 U.S. 1, 9-10 (*Jaffee*) [the federal psychotherapist-patient privilege " 'promotes sufficiently important interests to outweigh the need for probative evidence' "].) And if the state's interests are not strong enough to outweigh the statutory protection for privacy, we do not consider those interests to be sufficiently compelling to outweigh the constitutional protection.

We acknowledge that in *Seaton*, *supra*, 610 F.3d 530, the Ninth Circuit opined that whatever right to informational privacy there may be, it simply does not apply in

SVP proceedings. (*Id.* at p. 539.) There, an inmate was evaluated by two psychologists as a potential SVP. They reviewed his medical records from prison and then prepared reports, which were made available to the district attorney who then had to decide whether to seek a commitment. (See § 6601 [requiring psychological evaluations and making them available to authorities].) The inmate claimed the disclosure of prison records and the psychological reports violated his right to privacy. The court rejected his claim. It concluded that any privacy interests were outweighed by (1) the inmate's reduced expectation of privacy due to his status as a prisoner and sex offender and the involuntary nature and adversary purpose of the evaluations; (2) the need for evaluations and the public safety purpose they served; (3) the limited disclosure of the information; and (4) the safeguards against unwarranted subsequent disclosure. The court also noted that the disclosure did not burden the exercise of any fundamental liberty. (*Id.* at pp. 535-541.)

Seaton is consistent with *Lakey, supra*, 102 Cal.App.3d 962 and *Martinez, supra*, 88 Cal.App.4th 465, which we discussed above, in that the initial psychological evaluations conducted are akin to psychological records generated during a commitment for treatment. The involuntary circumstances under which the psychological information is gathered and the purpose for which the information is gathered preclude one from reasonably expecting what he or she says to be private, confidential, and protected by the psychotherapist-patient privilege. On the other hand, *Seaton* is distinguishable from this case because here, defendant had a reasonable expectation of privacy concerning his communications with McAndrews during psychotherapy; the records of his treatment were erroneously released in violation of his statutory privilege; and certain highly personal information was publicly disclosed at his trial.

Seaton is not binding on us (see *People v. Williams* (1997) 16 Cal.4th 153, 190 [decisions of lower federal courts are not binding authority]), and we disagree with the

court's sweeping view that the mere institution of the SVP process automatically strips an inmate of privacy rights and protection under the due process clause. Rather, we believe that for the purposes of an SVP trial, an inmate retains the constitutional protection against the unwarranted and unjustified disclosure of privileged communications with his or her psychotherapist.

In sum, we conclude that the erroneous release and later admission of privileged psychotherapy information at the SVP trial violated defendant's federal constitutional right to informational privacy.

We find support for our conclusion in *Parle v. Runnels* (9th Cir.2008) 505 F.3d 922. That case originated in this court. (*People v. Parle* (July 21, 2000, H017348) [nonpub. opn.].) There, the state trial court committed numerous errors, one of which was a finding that the defendant had waived the psychotherapist-patient privilege. This error, in turn, led to the admission of testimony by the defendant's therapist. On appeal to this court, the Attorney General conceded that that the erroneous ruling on privilege violated the defendant's federal right to privacy, which made the error reviewable under the *Chapman* standard. The defendant sought habeas relief in the federal district court. (*Parle v. Runnels* (N.D.Cal.2006) 448 F.Supp.2d 1158, 1160.) That court noted the Attorney General's concession that the erroneous violation of psychotherapist-patient privilege "had to be reviewed under the [*Chapman* standard] because the privilege was part of petitioner's federal, constitutional right to privacy." (*Id*. at p. 1164.)

On appeal from the district court's judgment, the Ninth Circuit in *Parle v. Runnels, supra,* 505 F.3d 922, agreed that the erroneous admission of psychiatric testimony violated the defendant's federal Constitutional right to privacy in the psychotherapist-patient relationship. (*Id*. at p. 930, fn. 11.) In a footnote the court observed that the right to privacy of a patient's communications with his or her psychotherapist "is grounded in the federal and state constitutions" and cited *Caesar v.*

Mountanos, *supra*, 542 F.2d at pp. 1067-1068 for the proposition that the privacy of such communications arises from the Fourteenth Amendment. (*Ibid.;* see fn. 14, *ante*, discussing *Mountanos*.)

It is true that in *Parle*, the Attorney General conceded the constitutional error. However, as defendant points out, neither this court nor the federal courts were bound to accept that concession. (*Orloff v. Willoughby* (1956) 345 U.S. 83, 87; *Desny v. Wilder* (1956) 46 Cal.2d 715, 729; *Tomlinson v. County of Alameda* (2010) 185 Cal.App.4th 1029, 1045.)

The Attorney General now argues that the violation of defendant's statutory privilege does not establish a separate federal violation of due process. He notes that in *Jaffee, supra,* 518 U.S. 1, the United States Supreme Court recognized a psychotherapist-patient privilege under federal law (*id*. at pp. 8-15); and in *United States v. Glass* (10th Cir. 1998) 133 F.3d 1356, the court opined that *Jaffee* "[m]ade clear" that the federal privilege "is not rooted in any constitutional right of privacy but in the public good which overrides the quest for relevant evidence." (*Id*. at p. 1358.)

The Attorney General's reliance on *Jaffee* and *Glass* is misplaced. Neither case involved the constitutional right of privacy or a claim that a violation of the psychotherapist-patient privilege further represented a violation of due process. Those were, however, the circumstances in *Parle*, and, as noted, the federal courts implicitly agreed with the Attorney General's concession that the trial court's erroneous ruling on privilege constituted federal error reviewable under the *Chapman* standard.

Prejudice

Having concluded that the erroneous release of records and subsequent testimony by McAndrews violated defendant's federal right to informational privacy, we now discuss whether the error was prejudicial.

Despite the release of defendant's records from the Atkinson Center and McAndrews's testimony and the extensive loss of confidentiality, defendant claims prejudice from only one piece of information: his statement to McAndrews that between the ages of 14 and 37, he molested 16 children.

Under the *Chapman* standard, we must reverse "unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, citing *Chapman v. California, supra,* 386 U.S. 18.) "In other words, the alleged error must be 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.]" (*People v. Low* (2010) 49 Cal.4th 372, 392-393.) That can hardly be said in this case.

In light of the undisputed evidence that defendant had convictions for molesting three children, defendant's admission in private to McAndrews that he had molested so many more children and was not caught or punished was inflammatory to say the least and uniquely liable to evoke a strong emotional bias against defendant. This is all the more so because defendant also told McAndrews that he was very attracted to children, and he could not really control himself when he drank.

Next, we note that MacSpeiden and Vognsen did not have the Atkinson Center records when they evaluated defendant, and so they did not base their analyses and conclusions on his admissions to McAndrews. Nevertheless, both learned about defendant's admission at trial, both accepted it, as McAndrews apparently did, and both testified that defendant's admission confirmed their analyses and conclusions that defendant qualified as an SVP. Since the prosecution's experts credited defendant's admission and considered it further evidence of his dangerousness, it is reasonable to assume that the jurors also considered it in rejecting the defense experts' testimony and agreeing with the prosecution's experts.

We further observe that the other evidence that defendant was currently dangerous was not compelling. Indeed, at defendant's previous SVP trial, the jury did not find that he posed a risk of danger to others. The primary evidence at the second trial was defendant's parole violations and the inference that they showed a lack of self-control. As noted, the parole violations were based on loitering near a park that contained a playground and being at his mother's house when his sister's children were there.

Concerning the loitering violation, the evidence was that defendant loitered near HP Pavilion, which is near a park the size of four football fields that somewhere has a children's playground. There is no evidence how close to the playground defendant was or whether there were any children there at the time. Defendant said that he stopped to roll a cigarette.

Concerning the other violation, we note that before he went to prison, defendant lived at home with his mother. After he was released, he could not live there because the house was too close to a school. However, he was permitted to visit her, and he did so every week. In 2006, his sister had to move into their mother's house with her children because she was getting evicted from her apartment, which she could not afford. It was during this time that the violation occurred. However, there is no evidence that defendant had any direct contact with his sister's children. He was simply at the house.

Last, we note that Derning and Abbot, the two defense psychologists, disagreed with MacSpeiden's and Vognsen's conclusion that defendant suffered from pedophilia and criticized their methodology. Instead, they opined that defendant's primary problem was mental retardation, and they concluded that he did not qualify as an SVP.

Under the circumstances, we cannot find beyond a reasonable doubt that defendant's inflammatory admission to McAndrews about molesting so many other children did not contribute to the jury's verdict and was unimportant in comparison with

the other evidence supporting the verdict. Accordingly, we conclude that the commitment order cannot stand.

IV. DISPOSITION[17]

The judgment is reversed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

[17] In light of our conclusion, we need not address defendant's additional claims concerning the sufficiency of evidence and instructional error. Nor need we address his constitutional challenge to the SVP Act as amended.

Trial Court:	Santa Clara County Superior Court No.: 211111
Trial Judge:	The Honorable Alfonso Fernandez
Attorney for Defendant and Appellant Ramiro Gonzales:	Jean Matulis under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People:	Edmund G. Brown, Jr., Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Seth K. Schalit, Supervising Deputy Attorney General Bridget Billeter, Deputy Attorney General