No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

ANDREW HULEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Petitioner Andrew Hulen was required to complete sexual offender treatment as a condition of his supervised release. Petitioner was forthright with his treatment provider about actions he took that were inconsistent with his treatment regimen. His treatment provider had Petitioner write down his admissions. Those admissions were forwarded to Petitioner's probation officer. As a result of being open with his treatment provider about his prohibited behaviors, Petitioner was terminated from the treatment program. His supervised release was revoked as a result.

Petitioner faced a Hobson's "choice": to incriminate himself during treatment or to say nothing and forestall treatment. Either would lead inextricably to revocation. Against this background, the following question is presented:

> Whether the Ninth Circuit's failure to analyze Petitioner's argument under the classic penalty situation addressed by this Court in *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984), and *Garrity v. State of New Jersey*, 385 U.S. 493 (1967) violates the Self Incrimination Clause of the Fifth Amendment to the United States Constitution.

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Petitioner, Andrew Hulen, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The Opinion of the Ninth Circuit Court of Appeals is reported as *United States v. Hulen*, 879 F.3d 1015 (9th Cir. 2018). A copy is attached in the Appendix to this petition at pages 1-6 of the Appendix.

2. No written decision of the federal district court revoking Petitioner's supervised release on the basis of his compelled admissions exists. Rather, the district court's reasoning is outlined in its sentencing of Petitioner—the pertinent pages of which are attached at pages 9-15 of the Appendix.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's Opinion was filed on January 10, 2018 (Appendix at pages 1-6). Petitioner filed a petition for rehearing and suggestion for rehearing en banc on February 23, 2018, which the Ninth Circuit denied on April 17, 2018 (Appendix page 16). This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on July 16, 2018, within the 90 days for filing under the Rule of this Court (*see* Rule 13, ¶ 1).

UNITED STATES CONSTITUTION

This case involves the Self Incrimination Clause of the Fifth Amendment to the United States Constitution, which provides that no person "shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

STATEMENT OF THE CASE AND FACTS

(A) General case overview.

1. For an offense he committed when he was 18 years old, Petitioner was required to register as a sex offender. He failed to do so. He acknowledged as much. A prison sentence was imposed. Petitioner began sex offender treatment upon his release from custody.

2. The United States Probation Office filed a Petition for Warrant for Offender Under Supervision, alleging Petitioner committed 22 separate violations of his supervised release. The probation office then amended the petition, including one additional violation allegation. All but one of the alleged violations arose from the admissions Petitioner made to his treatment provider during a sex offender treatment session.

3. During that session, Petitioner was forthright with his treatment provider. He told his treatment provider he had acted contrary to lessons learned in the program. Petitioner's treatment provider ordered him to write down all of his unseemly actions. Petitioner complied. The treatment provider conveyed the list to the United States Probation Officer.

4. Based on his admissions, Petitioner's probation officer filed a Second Amended Petition for Warrant for Offender Under Supervision, alleging Petitioner

(1) failed to advise his probation officer in advance of his new employment; (2) failed to make payments toward his Special Assessment fine; and (3) was terminated from sex offender treatment "due to the violations of the treatment program which were outlined in a written admission from the defendant." The original allegations were not re-alleged in the second amended petition.

5. At his final revocation hearing, Petitioner admitted to the three violations contained in the second amended petition. The district court revoked his supervised release and proceeded to sentencing.

6. The government argued a within-guideline sentence was sufficient, indicating Petitioner's "first two violations . . . are not that significant. But the third violation is probably the most important one[.]"

7. Petitioner argued that when he met with his treatment provider for his individual sex offender treatment session on April 21, 2016, he told his treatment provider that he was not doing all that he should to progress in treatment. He wanted to start over and do better. In fact, when Petitioner decided to stop actions that were not advancing with treatment, he sought out his treatment. That was the day he was compelled to confess his wrongdoing.

8. Petitioner argued that compelling his admissions during sex offender treatment and then using those admissions against him was no different than compelling polygraph testing.

(B) The district court's decision on Petitioner's argument regarding his compelled admissions and use of those admissions against him to revoke his supervised release.

9. The district court addressed whether his admissions were unlawfully compelled:

> . . .
>
> And I don't know the answer to this question about forcing people to admit to violations of treatment. I don't know the answer to that. How can we monitor what people are doing in treatment if they – there isn't a requirement that they have to be truthful with their treatment provider? And if they're – and if, as in your case, Mr. Hulen, you're truthful with Mr. Lewis, and then you're doing behaviors that seem to be kind of escalating, and they're sexual behaviors, then that's going to raise a red flag with Mr. Lewis. And it's certainly going to raise a red flag with Ms. Woog [Petitioner's probation officer] when he tells her – "he," being Mr. Lewis, tells her what you're doing. And you have to be honest in order to get meaningful treatment.
>
> Maybe the – you know, are we punishing you for being honest in sex offender treatment? I guess that's one way to look at it. But, on the other hand, I'm punishing you because you didn't comply with the rules of sex offender treatment that you're supposed to comply with.
>
> That's, I think, the flip side of that coin. No one is forcing you to send nude pictures and receive them and all these other pictures, or go to bars,

> or do all this stuff. You're choosing to do that. And that's a violation of your sex offender treatment rules.
>
> . . .

(Appendix at pages 12-13).

10. The district court sentenced Petitioner to six months imprisonment followed by 54 months supervised release.

(C) The Ninth Circuit's decision.

11. Petitioner's supervised release was revoked for violations he admitted to during required sex offender treatment. The treatment provider used the statements necessary to progress in treatment as ammunition which inevitably and unquestionably abrogate sex offender treatment—thereby providing the most serious basis for the government to petition to revoke Petitioner's supervised release. *Hulen*, 879 F.3d at 1018.

12. The Ninth Circuit held use of compelled statements in revoking Petitioner in such a manner did not violate his constitutional right against self-incrimination because a revocation proceeding is not a criminal case so the Fifth Amendment does not apply. *Hulen*, 879 F.3d at 1020.

13. The Ninth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's holding focused on whether a criminal prosecution actually resulted for the probationers. However, such a focus runs afoul of the Ninth Circuit's own case law as well as settled precedent from this Court—the practical effect of which is to chill probationers' freedom to speak during treatment.

According to the Ninth Circuit's holding in *Hulen*, probationers can never commit a new crime by failing to successfully complete sex offender treatment. As a result, the Fifth Amendment is never implicated to protect probationers' statements during treatment.

1. The Self Incrimination Clause of the Fifth Amendment "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Murphy*, 465 U.S. at 426 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

The Ninth Circuit seized on the "future criminal proceeding" language quoted in *Murphy* indicating that a probationer in Petitioner's situation will never have committed a criminal act because unsuccessful completion of sex offender treatment is not, by itself, a crime. Stated differently, the *Hulen* opinion means that if a

probationer is revoked for admissions made while on supervised release, absent a new criminal prosecution, no Fifth Amendment violation exists. Petitioner's right to remain silent is an empty constitutional promise.

2. The *Hulen* decision is contrary to the "penalty" cases addressed by this Court, in which this Court has noted "[o]ccasionally . . . an individual succumb[s] to the pressure placed upon him, fail[s] to assert the privilege, and [later] disclose[s] incriminating information, which the State later . . . use[s] against him in a criminal prosecution." *Murphy*, 465 U.S. at 435. The general rule that the Fifth Amendment privilege must be asserted when self-incrimination is threatened is inapplicable where asserting the privilege "foreclose[s] a free choice to remain silent, and . . . compel[s] . . . incriminating testimony." *Garner v. United States*, 424 U.S. 648, 661 (1976). The question for Mr. Hulen during his treatment became whether he was required to choose between making incriminating statements and jeopardizing his treatment by remaining silent.

Both choices would lead to revocation of his supervised release because both choices terminated him from the treatment program. "[I]f the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would [create] the classic penalty situation." *Murphy*, 465 U.S. at 435. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), petitioners were threatened with

discharge from their employment for exercising their Fifth Amendment rights. This Court held that they had not waived their Fifth Amendment privilege by responding to questions rather than standing on their right to remain silent. *Id.* at 498-499. That followed because petitioners' "choice . . . was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination [wa]s the antithesis of free choice to speak out or to remain silent." *Id.* at 497.

3. In direct contradiction to United States Supreme Court precedent, because of the decision in *Hulen*, now probationers like Petitioner have the option to incriminate themselves—and get terminated from treatment and revoked—or to remain silent—and not actually benefit from the treatment they are court-ordered to attend. And yet, even though these "options" deprive a probationer seeking sex offender treatment of his "free choice to admit, to deny, or to refuse to answer" the questions asked of him (*Lisenba v. People of State of California*, 314 U.S. 219 (1941)), the Ninth Circuit endorsed these "options" as constitutional since a revocation proceeding is not a criminal proceeding. Of note, the petitioners in *Garrity* did not face a criminal proceeding nor was that the focus of the decision.

The focus in *Hulen* presumes that in a probationary context the Fifth Amendment never applies since a revocation proceeding is not a criminal proceeding.

The Ninth Circuit failed to consider the consequence of what Petitioner was forced to say–i.e., the classic penalty situation. That type of focus was not the analysis this Court directed in *Murphy* or *Garrity*. Likewise, it cannot be the focus when treatment is involved. People attend treatment to speak freely about their problems. Probationers like Mr. Hulen, however, now cannot speak freely. Doing so places them at risk of revocation and imprisonment.

4. This Court in *Murphy* indicated that "[i]f, for example, a residential restriction were imposed as a condition of probation, it would appear unlikely that a violation of that condition would be a criminal act." *Murphy*, 465 U.S. at 435, n.7. The defendant in *Murphy* was on probation. He was required to participate in a sex offender treatment program, report to his probation officer, and be truthful to his probation officer "in all matters." *Id.* at 422.

After several months of compliance, the defendant met with his probation officer and told his probation officer that, during sex offender treatment, he had admitted to two past crimes. *Id.* at 423. Of note, the sex offender treatment provider never told the probation officer about what the defendant had disclosed until the probation officer asked the treatment provider about those statements upon the defendant's actual disclosure to the probation officer. *Id.* at 423-424.

This Court held that the probation officer's failure to inform the defendant of his Fifth Amendment right against self-incrimination did not bar use of his admissions at trial. *Id.* at 431. In so holding, this Court indicated it was dispositive that the nature of the defendant's "probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality." *Id.* at 432. Therefore, probationers who reveal incriminating information to their probation officers cannot be said to have been compelled to do so in violation of their Fifth Amendment rights. *Id.* at 440.

This Court's opinion in *Murphy* centered on whether the defendant's statement to his probation officer without *Miranda* warnings was admissible in a subsequent criminal proceeding. *Id.* at 425. Petitioner does not disagree with the contention in *Murphy* that a probation officer may ask a defendant questions about compliance with his conditions–be it a residential requirement (as in *Murphy*) or sex offender treatment (as in *Hulen*).

This Court in *Murphy*, however, did not discuss answers provided by probationers during treatment posed by a third party, and therein lies the error the Ninth Circuit made in applying *Murphy*'s decision on Petitioner's facts.

5. Moreover, the Ninth Circuit is not abiding by its own precedent with the *Hulen* decision. The probationers in *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) and *United States v. Saechao*, 418 F.3d 1073 (9th Cir. 2005), for example, faced revocation proceedings. The court's focus was not on the type of proceeding they faced, but rather on the type of information the probationers were being compelled to disclose as addressed in a classic penalty analysis. *See United States v. Bahr*, 730 F.3d 963, 965 (9th Cir. 2013) (citing *Saechao*, 418 F.3d at 1081) ("Revocation of supervised release is not necessary to violate the right [against self-incrimination]; the threat of revocation is itself sufficient to violate the [Fifth Amendment] privilege and make the resultant statements inadmissible.").

In *Antelope*, in particular, the probationer three times faced revocations for failing to disclose information during treatment. *Antelope*, 395 F.3d at 1130. Yet, the Ninth Circuit still held the probationer's successful participation in the sex offender treatment program "triggered a real danger of self-incrimination, not simply a remote or speculative threat" because without the probationer's disclosure he faced being sent to prison. *Id.* at 1135.

6. Petitioner was ordered by the district court to successfully complete sex offender treatment, which means that Petitioner had no other choice—except additional prison time—but to do what he was ordered to do. That is the essence of

compulsion. It was not the probation officer who asked Petitioner questions. It was Petitioner's treatment provider who knew what actions Petitioner had taken because Petitioner went to treatment expecting to talk to his treatment provider. Unlike *Murphy*, however, admissions to a third party are critically different since a person attending treatment does not expect to have the information provided during treatment used against him.

The short-sighted logic of *Hulen* fails to recognize that a person "need not incriminate himself in order to invoke the privilege." *McCoy v. Commissioner*, 696 F.2d 1234, 1236 (9th Cir. 1983). *Murphy* directs that a court when determining whether a probationer is subject to a penalty situation "inquire whether [his] probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went farther" by taking "the extra, impermissible step" of requiring him "to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Murphy*, 465 U.S. at 436. That is precisely what occurred in Petitioner's case.

CONCLUSION

The treatment setting should not be a place of silence, nor should it be a venue for probation officers to obtain adverse information. The *Hulen* decision has

sanctioned both. Now, scores of probationers seeking sex offender treatment will face jail instead.

WHEREFORE, the Court should grant this petition and set the case down for full briefing and argument to return the focus of the Ninth Circuit's analysis to the classic penalty situation discussed in *Murphy*, *Garrity*, and *Antelope*. Without such a return, the Fifth Amendment becomes an empty vessel.

Respectfully submitted,

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July 16, 2018