Docket No:

UNITED STATES SUPREME COURT

United States,
Plaintiff-Respondent,

v.

BRAIN K. ROGERS,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

1. Are admissions made during a polygraph examination required by sex offender treatment compelled for purposes of the Fifth Amendment when failing the examination results in being suspended from sex offender treatment as required by conditions of supervised release when failure to participate in sex offender treatment results in revocation of supervised release.

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JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Petitioner makes this petition based on the jurisdiction conferred by Article III, Section 1 of the United States Constitution and Rule 10of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question which conflicts with other decisions of the Supreme Court of the United States. This petition has been timely filed within 150 days from February 19, 2021.

Appellate Jurisdiction. The Petitioner takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the district court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on November 1, 2018.

Original Jurisdiction. The indictment in this matter resulted in a single conviction of the Defendant/Appellant with one count in violation of 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256(8)(A). District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231.

PROVISIONS OF LAW

US.CA. Const. Amend. V (West 2018)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

On November 1, 2018, Judge George Z. Singal revoked the supervised release of Brian Rogers and sentenced him to six months to the Bureau of Prisons. Appendix *hereinafter* A at 22. United States Probation sought to revoke Mr. Rogers's supervised release for two reasons: Violation of Special Condition number two that required Mr. Rogers to participate in a computer and internet monitoring program and Special Condition number three that required Mr. Rogers to participate in sex offender treatment. A at 24-25. The District Court reevoked Mr. Rogers's supervised release after it found no compulsion in the use of polygraph examinations that resulted in the evidence that formed the basis of both violations. A at 122.

THE FACTS PRESENTED TO THE COURT OF APPEALS BY MR. ROGERS

The Petition to revoke Mr. Rogers's supervised release detailed two violations. The Petition alleged a violation of Special Condition Number two: The defendant shall comply with the requirements of the Computer and Internet Monitoring Program (which may include partial or full restriction of computer(s), internet/intranet, and/or internet capable devices), and shall pay for services, directly to the monitoring company. The defendant shall submit to periodic unannounced examinations of his/her computer(s), storage media, and/or other electronic or internet capable device(s) performed by the probation officer based on reasonable suspicion of contraband evidence or a violation of supervision. This may include the retrieval and copying of any prohibited data and/or the removal of such system(s) for the purpose of conducting a more thorough inspection. On September 12, 2018, Rogers admitted that he purchased and used a Nintendo 2DS, an internet-

accessible gaming system, from approximately May 2017, until December 2017. Rogers stated he used this device to access the internet. Rogers did not have authorization from the Probation Office to use this device. Therefore, Rogers had unmonitored access to the internet for several months in violation of the computer internet and monitoring program (CIMP). The petition also alleged a violation of Special Condition Three: Defendant shall fully participate in sex offender treatment as directed by the supervising officer. Defendant shall pay/co-pay for services during such treatment to the supervising officer's satisfaction. He/she shall abide by all policies and procedures of that program. On September 11, 2018, Rogers was suspended from sex offender treatment as a result of admitting that he used an unauthorized internet accessible device to access pornography on the internet, using search terms specifically looking for pornography with teenagers. Viewing pornography is a violation of Rogers' sex offender treatment contract. A at 24-25.

This was the second time Mr. Rogers's supervised release had been revoked. United States Probation also sought to revoke Mr. Rogers's supervised release in January of 2017. The previous petition also alleged violations Computer and Internet Monitoring Program and failure to participate in sex offender treatment. Mr. Rogers was sentenced to time served for the previous violation on May 3, 2017. The violations for the first revocation were very similar to the violations alleged in the second petition to revoke Mr. Rogers's supervised release. A at 130-131.

These conditions had been originally imposed on Mr. Rogers through the judgment in his underlying case on May 16, 2012. The Judgment provided the following language special condition 1: "The defendant shall comply with the requirements of the Computer and Internet Monitoring Program (which may include partial or full restriction of computer(s), internet/intranet, and/or internet capable devices), and shall pay for services, directly to the monitoring company. The defendant shall submit to periodic unannounced examinations of his/her computer(s), storage media,

and/or other electronic or internet capable device(s) performed by the probation officer based on reasonable suspicion of contraband evidence or a violation of supervision. This may include the retrieval and copying of any prohibited data and/or the removal of such system(s) for the purpose of conducting a more thorough inspection. The Judgment also provided the following language for Special Condition 3: Defendant shall fully participate in sex offender treatment as directed by the supervising officer. He shall scrupulously abide by all policies and procedures of that program. During sex offender treatment, Defendant shall, if required by the therapeutic program, undergo periodic random polygraph examinations to ensure compliance with the therapeutic program requirements. No violation proceedings will arise solely on Defendant's failure to pass a polygraph examination or on Defendant's refusal to answer polygraph questions based on 5th Amendment grounds. A at 141.

The first revocation Judgment changed the special conditions and made the Computer and Internet Monitoring Program Special Condition number 2 and Participation in Sex Offender Treatment special condition 3 and made polygraph examinations special condition 4. Special condition four provided, "Defendant shall submit to periodic random polygraph examinations as directed by the probation officer to assist in treatment and/or case planning related to behaviors potentially associated with sex offense conduct. No violation proceedings will arise solely on Defendant's failure to pass a polygraph examination or on Defendant's refusal to answer polygraph questions based on 5th Amendment grounds. Such an event could, however, generate a separate investigation. Defendant pay/co-pay for such services to the supervising officer's satisfaction." A at 135.

United States Probation described the problems with Mr. Rogers's compliance with the special conditions of his supervised release. Revocation Report hereinafter. On June 6, 2018,

Rogers participated in a maintenance polygraph examination. During that exam, Rogers was asked if he, "accessed or viewed any X-rated pornography during the last sixteen months." He answered, "No," and the results were determined to be deceptive. He was also asked if he, "viewed the bare sexual organs of any prepubescent minors since [his] last exam." He answered, "No," and the results were determined to be inconclusive. Following that exam, Rogers admitted to the polygraph examiner that he viewed pornography, one time, on his roommate's cellular telephone. On August 27, 2018, Rogers participated in an issue-specific polygraph examination. Prior to that exam, Rogers disclosed to the polygraph examiner that he purchased a Nintendo 2DS in May 2017. He stated he used that device to access the internet, and in August 2017, he began using it to view adult pornography. Rogers denied using this device to view child pornography. He stated he used the following search terms to locate pornography: female teens masturbating, female solo teens, female Asian teens, and female ebony teens. He stated he sold that device in December 2017. During the exam, Rogers was asked if he had, "purposely accessed pre-pubescent minors online since August 2017." He answered, "No," and the results were determined to be deceptive. He was also asked if he, "personally accessed X-rated pornography since January l, 2018," and, "Besides that Nintendo, did [he] personally use another secret internet device to view pornography in the past year." He answered, "No," to both questions, and the results were determined to be inconclusive.

According to United States Probation's description, On August 31, 2018, the Probation Officer contacted the sex offender treatment provider, Shawn Rodgers, to discuss Rogers's behavior to date. Mr. Rodgers stated he wanted to meet with Rogers during their next scheduled treatment session, on September 4, 2018, before making a decision regarding a potential suspension from treatment. He stated his decision would be determined by Rogers'

attitude and behavior during that session. At the next treatment session, Mr. Rodgers reported that he and the group members instructed Rogers to reach out to the undersigned Officer regarding his disclosures made during the polygraph examination and to work with this Officer to address the matter. Mr. Rodgers said that if Rogers contacted the Probation officer prior to the next treatment session and showed some motivation he would be willing to continue to work with him. But if Mr. Rogers did not contact the Probation Officer then Rogers would be suspended from treatment. Rogers failed to contact the Probation Officer and was suspended from treatment on September 11, 2018. According to the report, the Probation Officer spoke with Rogers later that day, and asked him why he did not contact this Officer as he was instructed to do during the previous treatment session. Rogers stated he did not trust Probation, the clinician, or the treatment group. He stated he felt his behaviors did not have any positive impact on his life, and that he would rather be in custody than continue on supervised release. During this conversation, Rogers admitted he used the Nintendo to access the internet and he did not report having this device to Probation. He stated he used the Nintendo to view pornography, but denied seeking or viewing child pornography. He stated using the term "teen" in his searches was not an attempt to view child pornography.

Warren Ferland administered one of the polygraphs that Mr. Rogers failed. Mr. Ferland described the polygraph examination process: “it's a three-phase interview which starts off as a pre-test interview where there's an introduction and a chance to go over the consent form. A at 34. After the consent a very quick suitability to make sure he's medically okay to be tested, and then a brief explanation of how the polygraph works. A at 35. In this particular case, I believe it was his either fifth or sixth polygraph examination so that was very brief. He already -- didn't need to go over that. And we simply just went into the focus of what the polygraph examination was about. Mr. Ferland

testified that, "[t]he entire polygraph examination took three hours and 16 minutes," and two hours and 15 minutes, was the pre-test interview. A at 35.

During this pre-test interview, Mr. Ferland testified that Mr. Rogers made several admissions: "[W]e talked about the reason that he failed his last test, and he made additional [admissions] regarding use of pornography, and he had admitted that he looked at more pornography than what he had told my partner Mike Ranhoff on his prior polygraph, and went on to explain that he had a secret device, I believe it was some sort of Nintendo device that he had had, and he went through a period of about three months of looking at pornography on a regular basis." Mr. Rogers also admitted to Mr. Ferland that he had been using suggestive search terms to find this pornography: "We talked about the types of search terms that he'd used, and he referred to the search terms all -- I've got it written down, but basically teenagers masturbating and different facets of that is what he was using for search terms." Mr. Ferland also expanded on the extent of Mr. Rogers's viewing of pornography: "He admitted that he looked at pornography on other people's devices that had shown him some pornography." A at 40.

During the portion of the polygraph examination, where Mr. Rogers was connected to the polygraph machine that measures various physiological indicators like breathing, blood flow, and electrodermal activity that Mr. Ferland called channels, Mr. Ferland concluded that Mr. Rogers was deceptive. A at 37 During this portion of the examination Mr. Rogers was asked some prepared questions: "The three relevant questions I asked him on the test was: Besides someone showing you, have you personally accessed X-rated pornography since January 1st? The next question was: Besides that Nintendo, did you personally use another secret Internet device to view pornography in the past year? And third question was: Have you purposely accessed prepubescent minors online since August 2017?" Mr. Ferland characterized Mr. Rogers's polygraph examination as a failure:

"Overall his -- he failed this polygraph test, and the question he reacted to the strongest was question three, which is: Have you purposely accessed prepubescent minors online since August of 2017?" These results were reported to Mr. Rogers's Probation Officer. A at 45.

From the polygraph examination report, the Probation Officer learned of Mr. Rogers's failure to comply with both his treatment conditions and his supervision conditions. A at 65. The Probation Officer used this information in assessing what to do with Mr. Rogers: "During the pre-test I learned that Mr. Rogers made the disclosure that in approximately May of 2017 he purchased an Internet-accessible Nintendo and he used that until approximately December 2017. During that window of when he owned that device, for approximately three months he used it to view pornography. The result of that test was also considered a failed test. He had one question that was deceptive and two that were inconclusive." A at 66. This information prompted a discussion with the Probation Officer, the Probation Officer's supervisors, the treatment provider and his supervisors. A at 56.

The discussion about what to do with Mr. Rogers occurred sometime around August 31, 2018. A at 67. The results of this discussion as characterized by the Probation Officer were that they decided to take no formal action because the treatment provider wanted to have the next session with Mr. Rogers which was scheduled for September 4, 2018. A at 67. The plan was to have the treatment provider direct Mr. Rogers if he continued to be unmotivated and unwilling to accept responsibility to try to address that within the group and have Mr. Rogers seek out the help of the probation Officer prior to the following treatment session on September 11, 2018. A at 67. When Mr. Rogers failed to contact the probation officer seeking her help, he was suspended from sex offender treatment and the petition in this case was filed on September 12, 2018. A at 69.

The Sex Offender Treatment Contract had provided Mr. Rogers with a warning about how the information from the polygraph would be used. The warning was provided as part of the sex

offender contract: “It is important for you to know how information that you disclose during the polygraph exam or any time in treatment might be used to increase your supervision level by your PO, suspension or revocation, and can also be used to investigate a crime that you committed but was never disclosed until now or for civil commitment.” Mr. Rogers was aware from the warning that his supervision could be revoked if he failed to comply with the polygraph examination. A at 81-82.

The role of polygraph examinations is to overcome the resistance to disclosing information. A at 106. Shawn Rodgers, the treatment provider characterized this function within the treatment model: “Polygraphs are a part of the treatment model we use, which is the containment model. In part they're used to get a sense of what behavior a client may be engaging in that they're not volunteering in treatment to get a sense of whether or not they're engaged in any behaviors of concern, if they're engaging in any sexual deviancy, for instance, if there are any more victims that haven't been disclosed.” A at 106. Mr. Rogers understood that he was trapped and had no choices stating to the Probation Officer that “he didn’t think it would do any good,” when asked why he did not approach the Probation Officer for help. A at 68.

After hearing the evidence Judge Singal found Mr. Rogers violated the terms of his supervised release: “All right, I don't find any compulsion here. The order that I gave that he had to take polygraphs cabined within the U.S. versus York framework I think was perfectly legal. Apparently counsel thought it was legal, too. The compulsion, if any, was directed by me through my order. Counsel and the defendant failed to appear or even object -- appeal or even object to that order. I believe there's a waiver there; but, regardless, I don't believe there's illegal compulsion. In addition, the defendant was given notice that he didn't even have to take the polygraph. He fully consented. There's no issue of compulsion or any evidence of compulsion that he hesitated in any

respect. Defendant is required to be honest with their probation officer. And for the defendant to be dishonest with the probation officer and then say, well, my statements proving my dishonesty can't be used to violate supervised release is in my view silliness. And it represents the type of behavior that is almost contemptuous with my orders with regard to his following the rules of supervised release. What it results in is someone who says yes, I violated the terms of supervised release, what are you going to do about it. That's really where it ends up. And that's not the way the system works. I find that there's nothing illegal about what occurred here, and his statements are certainly usable here. I also find that he violated both special condition 2 with regard to his admission that he used an Internet-capable device and that he accessed the Internet. I also find that he violated his special condition 3 that he fully participate in sex offender treatment." A at 122-123.

THE FACTS FROM THE COURT OF APPEALS OPINION

In 2012, a jury convicted Rogers of one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5) (B), (b)(2). Later that year, the district court sentenced him to sixty months of imprisonment and eight years of supervised release. As special conditions of his release, he was required to "participate and comply with the requirements of the Computer and Internet Monitoring Program" and to "fully participate in sex offender treatment as directed by the supervising officer." Rogers was released in 2013.

In 2017, the court revoked Rogers's supervised release after he admitted to violating the two aforementioned special conditions. The court sentenced him to time served and an additional eight years of supervised release, with the same two special conditions as before. New for Rogers's second term of supervised release, his conditions of release also included a requirement that he "submit to

periodic random polygraph examinations as directed by the probation officer to assist in treatment and/or case planning related to behaviors potentially associated with sex offense conduct." The condition disclaimed that "[n]o violation proceedings will arise solely on the defendant's failure to pass a polygraph examination, or on the defendant's refusal to answer polygraph questions based on 5th amendment grounds," but it added that "[s]uch an event could, however, generate a separate investigation."

Rogers participated in one such polygraph examination on June 2, 2018. The examiner asked whether Rogers had "accessed or viewed any X-rated pornography during the last sixteen months," and Rogers's negative response was determined to be deceptive. The examiner also asked Rogers whether he had viewed pornography featuring prepubescent minors, and Rogers's negative response to this question was deemed inconclusive. In an interview after the polygraph examination, Rogers admitted that he had used his roommate's cellular telephone to view pornography on one occasion.

A professional polygraph examiner performed a follow-up polygraph examination of Rogers on August 27, 2018. The examiner did not verbally tell Rogers that he had a right not to participate, but Rogers signed a consent form that indicated that Rogers "consent[ed] voluntarily" to the examination and understood that he did "not have to take this examination ... and [he could] stop this examination at any time." As part of a preliminary interview lasting over two hours, Rogers told the examiner that he had used an undisclosed internet-enabled Nintendo 2DS video gaming system to view pornography on a regular basis for a period of three months. During the examination proper, the examiner asked Rogers whether "[b]esides someone showing [him]," he "personally accessed X-rated pornography since January 1st"; whether "[b]esides that Nintendo," he "personally use[d] another secret Internet device to view pornography in the past year"; and whether he "purposely accessed prepubescent minors online since August 2017." Rogers answered "No" to all three

questions but was determined to have failed the polygraph examination.

Rogers's probation officer was informed of his confessions to the second examiner and of his having failed the polygraph examination. The probation officer discussed how to handle Rogers's confessions with Rogers's treating clinician on August 31, 2018. The confessions and polygraph failures compounded Rogers's already poor performance in sex offender treatment, throughout which he had neglected to share experiences when directed to do so in group sessions, failed to complete assignments in his workbook, reported thoughts about harming another individual, and generally demonstrated a lack of motivation. Rogers's probation officer and his clinician decided that the clinician would discuss Rogers's confessions and polygraph, as well as his overall performance in the treatment program, at his next scheduled appointment on September 4, 2018.

At the appointment, the clinician observed that Rogers "continued to be unmotivated and unwilling to accept responsibility." The clinician directed Rogers to contact his probation officer before Rogers's next treatment session on September 11, 2018, in order to continue sex offender treatment. Rogers failed to do so, and so, after discussion with the probation officer, the clinician suspended Rogers from sex offender treatment. The probation officer then contacted Rogers, and during the resultant conversation, Rogers admitted to her that he had used the Nintendo 2DS to view pornography and "said that he doesn't trust treatment, he doesn't trust probation, and ... he would rather be in custody than on supervision." After that conversation, the probation officer initiated the internal process for filing a petition to revoke Rogers's supervised release.

The probation officer testified that she had used the information gained at Rogers's polygraph examination, as well as the fact that he was suspended from sex offender treatment, to justify filing a petition to revoke his supervised release. She also acknowledged that she had no other evidence that Rogers had used an unmonitored, internet-capable device outside of Rogers's admissions in the

interview conducted as part of the polygraph examinations and in his subsequent conversation with the probation officer. She stated, however, that she had additional evidence of Rogers's failure to fully participate in his sex offender treatment program, citing specifically Rogers's failure to reach out to her when directed to do so by his clinician, as well as Rogers's failure to complete certain assigned activities and avowed lack of motivation to continue participating in treatment.

On November 1, 2018, after an evidentiary hearing, the district court revoked Rogers's supervised release, sentencing him to six months in prison and eight additional years of supervised release. The court based its judgment on Rogers's violations of the special conditions that he abide by the Computer and Internet Monitoring Program and that he fully participate in the sex offender treatment program.

THE DECISION BELOW

The First Circuit interpreted *Minnesota v. Murphy*, 465 U.S. 420 (1984) as creating an exception to the self-executing Fifth Amendment penalty cases. The First Circuit reasoned that the condition requiring polygraph examinations also had a provision that prevented revocation based solely on the assertion of Fifth Amendment Rights not to be a witness against oneself. In the First Circuit's view, this provision provided people subject to the polygraph examination requirement a choice to remain silent.

Having established that the provision providing for no revocation on Fifth Amendment grounds was an exception to the penalty cases, the First Circuit went on to explain that Mr. Rogers had a real choice to remain silent and failed to execute his Fifth Amendment right. The First Circuit interpreted Justice O'Connor's opinion in *McKune v. Lile*, 536 U.S. 24 (2002) to require the penalty

to apply just for the assertion of the Fifth Amendment right to be free of self-incrimination for the Fifth Amendment to be self-executing. The United States Court of Appeals for the First Circuit upheld the District Court's determination that there was no compulsion in Mr. Rogers's case.

ARGUMENT

I. The First Circuit Court of Appeals was incorrect when it concluded that the threat of revocation of supervised release for being expelled from sex offender treatment was not compulsion subject to the penalty exception making the Fifth Amendment right to be free from self-incrimination automatic and thereby creating a circuit split with the Ninth and Tenth Circuits.

The First Circuit has not addressed the implications of the penalty exception to statements made in in the context of sex offender treatment programs until Mr. Rogers's appeal. The First Circuit had, however, previously adopted an interpretation of the Fifth Amendment in the context of sex offender treatment designed to avoid the classic penalty situation:

> Under *Murphy,* if York can assert his Fifth Amendment privilege without risking revocation, he does not face a "classic penalty situation," 465 U.S. at 435 & n. 7, 104 S.Ct. 1136, and his answers will not be considered "compelled" within the meaning of the Fifth Amendment unless he is forced to answer over his valid assertion of privilege, *see id.* at 429, 104 S.Ct. 1136. At oral argument, the government conceded that this is the best interpretation and agreed that it is acceptable; York likewise found it preferable. Construing the order in this way also guarantees that if York and his probation officers dispute whether he refused to answer a question on valid Fifth Amendment grounds, York will be entitled to a hearing before a court before any penalty can be imposed.

United States v. York, 357 F.3d 14, 25 (1st Cir. 2004). Because the incriminating statements had not yet been elicited in *York*, it was not necessary to resolve how the penalty cases might affect the outcome. The *York* panel chose to interpret the polygraph condition of Mr. York's supervised release to mean that polygraph statements could not be used in subsequent revocation proceedings. This case is distinguished from those facts. Mr. Rogers had already admitted the possession of an

electronic device that was not subject to monitoring in violation of the supervision conditions imposed on him by the Court. While the Court might be tempted to apply note 7 of *Murphy* summarily, that does not resolve the incriminating nature of the admission or the compulsion used to extract the admission. Mr. Rogers asserts that polygraph examination in the context of sex offender treatment programs is a form of compulsion so severe that it renders any statement made during such an exam involuntary and inadmissible in any proceeding.

The Court of Appeals for the Ninth Circuit has been more direct in its treatment of the Fifth Amendment in the context of sex offender treatment programs. The penalty of revocation of supervised release amounts to compulsion:

> Justice O'Connor made clear in her *McKune* concurrence that she would not have found a penalty of "longer incarceration" such as that here to be constitutionally permissible. *Id.* at 52, 122 S.Ct. 2017. The strength of Justice O'Connor's opinion as precedent is reinforced because it seems certain that the four dissenters in *McKune,* who argued that a loss of discretionary privileges and a transfer to less desirable living quarters under similar circumstances were sufficiently compulsive to violate Lile's privilege against self-incrimination, would find a Fifth Amendment violation where the district court revoked Antelope's conditional liberty and sentenced him to an additional ten months in prison. On the basis of *McKune,* we hold that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with SABER's disclosure requirements.

United States v. Antelope, 395 F.3d 1128, 1138 (9th Cir. 2005). *Antelope* held that longer prison sentences based on the revocation of supervised release violated the petitioner's Fifth Amendment rights. The privilege is not premised on his conviction status but on the compulsion imposed on him by his sex offender treatment. The fact that he refused to incriminate himself is not relevant to the Fifth Amendment analysis in the context of revocation of supervised release.

The Ninth Circuit has adopted a rule that conflicts with the rule adopted in Mr. Rogers's case for the use of statements gained through a treatment program required by conditions of supervised release. The Ninth Circuit holds that statements gained through sex offender treatment are

compelled:

> Although Bahr did not assert his Fifth Amendment right against self-incrimination at the time of the disclosures, that right is self-executing where its assertion "is penalized so as to foreclose a free choice." Minnesota v. Murphy, 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (internal quotation and alteration omitted). When the government conditions continued supervised release on compliance with a treatment program requiring full disclosure of past sexual misconduct, with no provision of immunity for disclosed conduct, it unconstitutionally compels self-incrimination. Antelope, 395 F.3d at 1133–39. Revocation of supervised release is not necessary to violate the right; the threat of revocation is itself sufficient to violate the privilege and make the resultant statements inadmissible.

United States v. Bahr, 730 F.3d 963, 966 (9th Cir. 2013). The Ninth Circuit's analysis is exactly the analysis Mr. Rogers presented to the First Circuit. Mr. Rogers asserted that the threat of revocation alone was sufficient to compel the statements and that it did not matter whether the revocation was based on failing the polygraph examination or expulsion from the treatment program. Either situation forced the same conclusion.

The Tenth Circuit has similarly adopted a rule that conflicts with the First Circuit's holding in Mr. Rogers's case. Like the Ninth Circuit, the Tenth Circuit finds the threat of revocation of supervised release to amount to compulsion to which the penalty cases apply:

> Murphy makes this case an easy one. It recognizes that a threat to revoke one's probation for properly invoking his Fifth Amendment privilege is the type of compulsion the state may not constitutionally impose. 465 U.S. at 426, 104 S.Ct. 1136. The government asserted here that it would seek Mr. Von Behren's remand to prison if he refused to answer incriminating sexual polygraph questions because that refusal would (and did) ultimately result in his termination from the sex offender treatment program. The government's threat constituted unconstitutional compulsion within the meaning of the Fifth Amendment. See United States v. York, 357 F.3d 14, 24–25 (1st Cir.2004) (recognizing it "would be constitutionally problematic" if supervised release provision requiring sex offender treatment "require[d] York to submit to polygraph testing ... so that York's refusal to answer any questions—even on valid Fifth Amendment grounds—could constitute a basis for revocation"). The solution to this problem was suggested in Murphy over thirty years ago: "[A] state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of

> incrimination." Id. at 435 n. 7, 104 S.Ct. 1136; see also Turley, 414 U.S. at 84–85, 94 S.Ct. 316 (state may compel waiver of Fifth Amendment privilege only by grant of immunity from prosecution).

United States v. Von Behren, 822 F.3d 1139, 1150 (8th Cir. 2016). Mr. Rogers also presented the same analysis used by the Tenth Circuit. The Tenth Circuit directly addressed the theory proposed by Mr. Rogers that it did not matter if the statements themselves were used as the basis for a violation or that the statements were used to justify termination from sex offender treatment. Again, the same precedent was used to come to a different result in the First Circuit.

II. The Fifth Amendment prohibits the use of Mr. Rogers's statements made during his polygraph examination because of the compulsion caused by the threat of an additional term of prison to either revoke his supervised release or terminate him from the treatment program require by his conditions of supervised release.

In *McKune v. Lile*, Justice Kennedy's plurality opinion created uncertainty over the use of incriminating statements made as part of sex offender treatment programs. At the root of this uncertainty, was the due process principle of compulsion:

> The State, however, does not offer immunity. So the central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form; and the alternatives, as will be discussed, defeat the program's objectives.

McKune v. Lile, 536 U.S. 24, 35 (2002). Inherent in the Court's proposition that compulsion could not be a part of a constitutionally permissible rehabilitation program is the principle that due process does not allow the use of involuntary statements. *McKune* does not, by itself, resolve the tension between Fifth Amendment principles and the use of compelled testimony during revocation of supervised release proceedings (or their analogous probation revocation proceedings in the states). It does, however, call into question under what circumstances statements that are the result of compulsion may be used. *McKune* suggests that compulsion is incompatible with due process, and

that where a program results in compulsion, that program should not survive due process scrutiny. Mr. Rogers asserts that statements made during a polygraph examination required as part of sex offender treatment are the result of compulsion and therefore involuntary.

The precedent is not without conflict in these circumstances. The Supreme Court long ago suggested that the Fifth Amendment was beyond the reach of convicted persons suspected of probation violations by their supervising officers:

> The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. If, 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. Hence, a claim of the Fifth Amendment privilege in response to questions relating to a residential condition could not validly rest on the ground that the answer might be used to incriminate if the probationer was tried for another crime. Neither, in our view, would the privilege be available on the ground that answering such questions might reveal a violation of the residential requirement and result in the termination of probation. Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. *Gagnon* v. *Scarpelli,* 411 U.S. 778, 782 (1973); *United States* v. *Johnson,* 455 F.2d 932, 933 (CA5), cert. denied, 409 U.S. 856 (1972). Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. It follows that whether or not the answer to a question about a residential requirement is compelled by the threat of revocation, there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings.

Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984). It seems unlikely that the Supreme Court meant to establish a probation exception for compelled statements no matter what coercion was used to obtain the statements. This conclusion is supported by the fact that the Court insists that "a revocation proceeding must comport with the requirements of due process." *Murphy* itself maintains the vitality of the classic penalty situation, a fact not lost on either the First Circuit's or the Ninth Circuit's treatment of the Fifth Amendment in the context of sex offender treatment programs. *Murphy*, though, does little to explain its relationship to the penalty cases: although the self-

executing privilege applied in *Garrity v. New Jersey,* 385 U.S. 493 (1967) is mentioned, *Murphy* never explains the distinction.

Justice O'Connor would describe this very problem in the concurrence that established the plurality in *McKune*. In her view, *Murphy* did nothing to resolve the problem with the penalty line of cases:

> The first three of these so-called "penalty cases" involved the potential loss of one's livelihood, either through the loss of employment, loss of a professional license essential to employment, or loss of business through government contracts. In *Lefkowitz,* we held that the loss of government contracts was constitutionally equivalent to the loss of a profession because "[a government contractor] lives off his contracting fees just as surely as a state employee lives off his salary." 414 U. S., at 83; contra, *post,* at 68, n. 11. To support oneself in one's chosen profession is one of the most important abilities a person can have. A choice between incriminating oneself and being deprived of one's livelihood is the very sort of choice that is likely to compel someone to be a witness against himself. The choice presented in the last case, *Cunningham,* implicated not only political influence and prestige, but also the First Amendment right to run for office and to participate in political associations. 431 U. S., at 807–808. In holding that the penalties in that case constituted compulsion for Fifth Amendment purposes, we properly referred to those consequences as "grave." *Id.,* at 807.

McKune v. Lile, 536 U.S. 24, 50 (2002) (Justice O'Connor concurring). Justice O'Connor specifically criticized the notion that conviction made a difference in the use of compelled testimony. Instead, she suggested that the real issue was the compulsion itself, calling any penalty that compelled a person to be a witness against themselves illegitimate. Mr. Rogers urges the Court to apply *Garrity v. New Jersey* to the statements made during his polygraph examination, which was a mandatory part of his sex offender treatment program, and in so doing resolve the circuit conflict created by the First Circuit.

Mr. Rogers's request is based on the remedial action taken in the penalty cases. Mr. Rogers asserts that the compulsion justifies a self-executing privilege:

> The choice given petitioners 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 is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona,* 384 U. S. 436, 384 U. S. 464-465, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

Garrity v. New Jersey, 385 U.S. 493, 497-498 (1967). This Court applied the privilege despite the fact that no claim was made based on compulsion. If anything, there is more compulsion inherent in the sex offender treatment program and its polygraph requirement than there is in the loss of a job because of the penalty of prison. The fact that Mr. Rogers actually made a statement that also can be used to revoke his supervised release, rather than asserting a privilege, is not relevant to the analysis of whether that statement was voluntary.

III. The United States Supreme Court should grant the Petition for a Writ of Certiorari to resolve the significant issues that surround this mature and significant split among the circuits and states.

The Court should take this opportunity to resolve this mature circuit split. The First, Ninth, Tenth, Circuits have now ruled on this issue. The First Circuit have adopted one means of resolving the issue with the Ninth, Tenth circuits deciding the issue in another. The validity of the search should not depend on geography and the happenstance of living in Maine versus California.

Moreover, this issue continues to cause difficulty in the administration of sex offender treatment. This difficulty is apparent in a very recent decision from the Eighth Circuit:

> At the revocation hearing, the parties disputed what evidence was admissible under the special condition stating "[t]he results of polygraph examinations will not be used for the purpose of revocation of supervised release." The government argued that the condition required only the exclusion of the results of the polygraph examination. Trimble interpreted the condition more broadly, arguing it operated to exclude not only the polygrapher's detection of deception but also Trimble's statements during the polygraph examinations and interviews, and all evidence derived from his statements

> during the polygraph examinations, including his subsequent admissions to his probation officer related to contact with the minor and the grandmother's corroborating statements. According to Trimble, the condition granted him "immunity" coextensive with the Fifth Amendment because otherwise the requirement to participate in polygraph examinations would violate his Fifth Amendment right against self-incrimination.

United States v. Trimble, --F.4th-- (8th Cir 2021) 2021 WL 2603177 Slip at 1. The use of polygraph examinations to monitor sex offenders is ubiquitous across the country. It is present in all federally mandated sex offender treatment but also all state programs. Until the Court provides guidance this problem will persist.

The most significant reason the Court should resolve this circuit split is importance of Fifth Amendment protection, and limits placed on our Government by the Founders. While monitoring people who are widely considered to represent a threat to others is important it cannot be done in this manner consistent the Court's precedent. The right not to incriminate oneself should remain a strong protection against unjustifiable governmental intrusion.

CONCLUSION

The Supreme Court Should review the conclusion of the United States Court of Appeals for the First Circuit and Grant this petition for writ of certiorari.

Dated at Portland, Maine this 16th day of July 2021.

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