

Initial Briefing

I. **Applicable Law**

A district court has discretion in imposing special conditions of supervised release. In exercising this discretion, however, a court is bound by both statutory and constitutional concerns. The following section sets forth these considerations as they relate to Mr. Defendant.

A. **The statutes governing the imposition of supervised release**

The imposition of conditions of supervised release is governed by 18 U.S.C. § 3583(d). That Section provides that the Court may order a special condition of supervised release, provided such condition:

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
- (2) **involves no greater deprivation of liberty than is reasonably necessary** for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a).

18 U.S.C. § 3583(d) (emphasis added). Interpreting this Section, the Tenth Circuit has required “conditions of supervised release to be linked to the offense and be no broader than necessary to rehabilitate the defendant and protect the public.” *See United States v. Smith*, 606 F.3d 1270, 1282 (10th Cir. 2010).

Importantly, it is the district court and not a probation officer (or worse, a third-party treatment provider such as ABC) that must engage in the Section 3583(d) analysis. It is true that probation officers are granted broad authority to “advise and supervise probationers.” *United States v. Mike*, 632 F.3d 686, 695 (10th Cir. 2011)

(citing *United States v. Pruden*, 398 F.3d 241, 250 (3rd Cir. 2005)). But, there are limits to this authority. For example, “Article III prohibits a judge from delegating the duty of imposing the defendant’s punishment to the probation officer.” *Mike*, 632 F.3d at 695.

As the Tenth Circuit has explained:

In determining whether a particular delegation violates this restriction, courts distinguish between those delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and those that allow the officer to decide the nature or extent of the defendant’s punishment. Delegations that do the former are permissible, while those that do the latter are not.

Id. (internal citations omitted).

Allowing a probation officer to impose a condition that affects a significant liberty interest is “tantamount to allowing him to decide the nature or extent of the defendant’s punishment.” *Id.* at 696. The Tenth Circuit has recognized several specific conditions that affect a significant liberty interest, and may therefore only be imposed by the Court. These include requiring participation in residential treatment, requiring penile plethysmographic testing, and the forced administration of psychotropic medication. *Id.*; see also *United States v. Fivaz*, 521 Fed. Appx. 696, 701-02 (10th Cir. April 15, 2013) (unpublished). This list, however, is non-exhaustive. Rather, “any condition that affects a significant liberty interest . . . must be imposed by the district court and supported by particularized findings that it does not constitute a greater deprivation of liberty than reasonably necessary to accomplish sentencing goals.” *Mike*, 632 F.3d at 696.

B. Constitutional concerns

The Fifth Amendment provides, in relevant part, that no person “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.” U.S. Const. amend. V. The instant case presents both compelled self-incrimination and due process concerns.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Supreme Court held that the privilege against self-incrimination applies to probationers’ interviews with probation officers. In *Murphy*, the defendant was placed on probation for a sex-related crime and required, among other things, to participate in a sex offender treatment program and be truthful with his probation officer. *Id.* at 422. Failure to comply with these conditions could result in revocation of probation. *Id.* Mr. Murphy admitted to his counselor and later to his probation officer (after the counselor had disclosed to the probation officer) a rape and murder in 1974. As a result of this admission, Mr. Murphy was indicted for first-degree murder.

The Supreme Court held that the general obligation of a probationer to appear and answer questions truthfully does not convert voluntary statements into compelled ones. *Id.* at 427. But, while a state may require a probationer to appear and discuss matters that affect his probationary status without giving rise to a self-executing privilege:

The result may be different if the questions put to the probationer, however relevant to his probationary status call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer’s answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435. Conditions that require a probationer to “choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent” are

impermissible. *Id.* at 436. Because Mr. Murphy's conditions did not contain such an impermissible choice, the Supreme Court found that his Fifth Amendment privilege was not self-executing and he needed to assert the privilege when questioned by his probation officer.

Eighteen years later, in *McKune v. Lile*, 536 U.S. 24 (2002), the Supreme Court addressed the Fifth Amendment implications of a prison inmate's participation in a sex offender treatment program in which he was not given immunity for the statements made in the course of the program. According to the plurality, the central question was "whether the [contested] program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right" against self-incrimination. *Id.* at 35. Ultimately, the plurality found that the consequences for Mr. McKune, such as moving to a smaller cell or losing television privileges, did not rise to the level of compelling the inmate to self-incriminate. *Id.* at 37-48. The plurality specifically noted that Mr. McKune's refusal to participate in the program would not have extended his term of incarceration. *McKune*, at 37.

Justice O'Connor's concurrence provided the necessary fifth vote in *McKune*, and is therefore viewed as the holding of the Court. See *Searcy v. Simmons*, 299 F.3d 1220, 1225 (10th Cir. 2002). According to Justice O'Connor, the Fifth Amendment analysis centers around the question of "whether the pressure imposed in such situations rises to a level where it is likely to compel a person to be a witness against himself." *McKune*, 536 U.S. at 49 (O'Connor, J., concurring) (internal quotations omitted). With respect to penalties imposed on an individual for failing to incriminate

himself, “some penalties are so great as to compel such testimony, while other do not rise to that level.” *Id.* (internal quotations omitted).

The Ninth Circuit has applied a *McKune* analysis outside of the prison context.¹ In *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005), the Ninth Circuit held that the penalty of additional incarceration faced by a sex offender when he refused to share his sexual history during a sex offender treatment program, without first being offered a guarantee of immunity, rose to the level of unconstitutional compulsion. *Id.* at 1133-41. According to the *Antelope* Court, to establish a Fifth Amendment claim, the supervised individual must prove two things: “(1) that the testimony desired by the government carried the risk of incrimination, and (2) that the penalty he suffered amounted to compulsion.” *Id.* at 1134 (internal quotations omitted). Where both of these prongs have been met, the individual’s Fifth Amendment rights have been violated unless he is first granted immunity consistent with the Supreme Court’s opinion in *Kastigar v. United States*, 406 U.S. 441 (1972). *Antelope*, 395 F.3d at 1139-1141 and n. 5. As a result, this immunity must protect the defendant from both the “use and derivative use” of his compelled admissions. *Id.* at n. 5.

If there is no immunity grant, and the defendant, based on his Fifth Amendment privilege, refuses to provide information - be it to a treatment provider, a polygraph examiner, a plethysmographic technician, or to his probation officer - he cannot be sanctioned because of this refusal. *See Murphy*, 465 U.S. at 438. (“Our decisions have

¹ The Tenth Circuit has held that the loss of prison good time credits for failure to answer sex offender questions does not give rise to a Fifth Amendment violation. *See Searcy*, 299 F.3d at 1226. In doing so, the Tenth Circuit reasoned that the inmate was not entitled to good-time credits. *See id.* Here, however, Mr. Defendant’s refusal to answer incriminating questions would not simply deny him good-time credits, it would lead to a violation of his supervised release and a return to incarceration.

made clear that the State could not constitutionally carry out a threat to revoke probation for a legitimate exercise of the Fifth Amendment privilege.”). This is true despite any legitimate therapeutic or rehabilitative purpose the disclosure might serve: “The irreconcilable constitutional problem . . . is that even though the disclosures sought here may serve a valid rehabilitative purpose, they also may be starkly incriminating, and there is no disputing that the government may seek to use such disclosures for prosecutorial purposes.” *Antelope*, at 1137; see also *United States v. Bahr*, 730 F.3d 963, 966 (9th Cir. 2013) (“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.”). In short, absent a grant of immunity, a probationer cannot be sent to prison for exercising his Fifth Amendment rights.

II. Proposed Conditions to which Mr. Defendant Objects

A. Polygraph Testing

General Program Condition # 8 requires Mr. Defendant, in part, to complete a “non-deceptive sexual history polygraph process,” prior to advancing through the program. If Mr. Defendant fails to make adequate disclosures he may be required to “participate in a higher frequency of sexual history disclosure polygraphs, increased monitoring and containment, and/or staffing with the case management team.” General Program Condition #9 states: “I understand that a pattern of deceptive polygraph (suggesting a lack of honesty with my therapist), whether they are sexual history disclosure polygraphs or monitoring/maintenance polygraphs, may be consideration in a decision as to whether I am unsuccessfully discharged from, or progressed through the

ABC program.” Each polygraph assessment costs the client \$250.00. See Financial Agreement at 2.

1. Fifth Amendment violations

These conditions are vague and not limited to the matters permissible under *Murphy*. Under these conditions, ABC is permitted to put questions to Mr. Defendant that would incriminate him in a pending or later criminal prosecution, which is constitutionally impermissible. *Murphy*, 465 U.S. at 422. Failure to make such potentially incriminating disclosures would prohibit Mr. Defendant from advancing through the program. As a result, he could not successfully complete his sex offender treatment and would be in violation of his supervised release conditions.

Mr. Defendant is thus placed in a constitutionally impermissible Catch-22. He can choose to: (1) waive all Fifth Amendment protections, and advance through the program, or (2) assert his Fifth Amendment rights, be prohibited from advancing through the program (and almost certainly kicked out of ABC), and thereby be in violation of his supervised release. The pressure to waive the Fifth Amendment protections and avoid supervised release violations surely rises to the level contemplated by Justice O'Connor in *McKune*. Clearly, Mr. Defendant's risk of incrimination is “real and appreciable.” *Antelope*, 395 F.3d at 1135.

Nor does ABC provide Mr. Defendant with protection for any incriminating statements made in treatment. ABC requires all clients to sign an Acknowledgment of Non-Confidentiality and Waiver of Confidentiality Privilege, and Right of Privacy (“Waiver”). Waiver provision 4 provides:

I hereby **instruct** ABC, Inc. to report to any appropriate authority or authorities any occurrence or potential occurrence of any sexual offense

on my part **regardless of how ABC, Inc. gains knowledge** of such occurrence or potential occurrence. “Appropriate authority or authorities” as used in this and subsequent revisions may include, but is not limited to, County Human Services Departments, **law enforcement agencies, probations or parole personnel**, victims or potential victims, parents, spouses, school personnel, and employers.

Waiver, #4 (emphasis added).

Far from promising *Kastigar* immunity, the Waiver provides explicit instruction to ABC to report any incriminating statements to law enforcement. In the absence of immunity, the requirement to take polygraphs and the companion provision that ABC report any sexual offense, past, present, or future, to authorities, is a clear violation of Mr. Defendant’s Fifth Amendment protections. These provisions, taken separately or together, clearly violate the Fifth Amendment jurisprudence discussed above and are constitutionally impermissible.

2. Greater deprivation of liberty than necessary

As detailed above, the Fifth Amendment problems inherent in the polygraph testing create a greater deprivation of liberty than necessary. This is especially so given the inherent unreliability of such testing. As the Supreme Court has noted, there is simply no scientific consensus that polygraph evidence is reliable. *See United States v. Scheffer*, 523 U.S. 303, 309-12 (1998).

Some courts of appeal have found that polygraph testing can be useful in promoting the treatment of sex offenders because “probationers fear that any false denials of violations will be detected.” *See United States v. Taylor*, 338 F.3d 1280, 1284 n. 2 (11th Cir. 2003). Despite acknowledging the limited usefulness of polygraph testing as a supervision tool, the Tenth Circuit has upheld a district court’s imposition of a

condition of polygraph testing in a supervised release modification. *See United States v. Begay*, 631 F.3d 1168 (10th Cir. 2011).²

Nonetheless, as the First Circuit noted in *United States v. York*, 357 F.3d 14 (2004), another case involving polygraph use in a sex offense treatment program, “we cannot accept on faith that polygraphs are effective at deterring lies, irrespective of their accuracy. The deterrent effect of polygraph testing, after all, is related to the reliability question: [the defendant] will only be deterred from lying if he believes that a polygraph will likely expose his lies.” *Id.* at 23. Given the unreliability of these tests, the Court should modify Mr. Defendant’s conditions of supervised release to eliminate the polygraph requirement. At a minimum, however, given the serious Fifth Amendment concerns, the Court should explicitly hold that Mr. Defendant cannot be punished for asserting his Fifth Amendment rights to any question being asked in the polygraph tests.

2. Arousal Assessments

General Program Condition #5 states “I agree to periodic arousal assessments at a minimum of once per year, **or at a frequency determined by my therapist**, as required to assess my sexual arousal, and to measure my progress with any inappropriate sexual arousal reduction and control.” General Program Condition #5 (emphasis added). For decades the scientific validity and reliability of penile plethysmograph testing has been rightfully brought under scrutiny. The plethysmograph is used to measure inappropriate sexual arousal reduction and control, but as far back

²Mr. Begay only argued that the district court did not have the authority to impose the polygraph condition because there were no changed circumstances warranting a modification, and that the polygraph was unreliable. *See Begay*, at 1170. As a result, the appellate court did not engage in a Fifth Amendment analysis.

as 1988 courts recognized that “the results of the plethysmograph as a predictor of human behavior cannot be considered. . . . [I]t is not only a device with, at best, questionable professional recognition, but whose conceded margin or error is too great” *Dutchess County Dep’t of Soc. Servs. v. Mr. G.*, 534 N.Y.S.2d 64, 71 (1988). In fact, penile plethysmographs often give false results and doubts concerning their use are well-founded. See *Nelson v. Jones*, 781 P.2d 964, 968 (Alaska 1989).

In addition to the reliability concerns, the use of the penile plethysmograph is both highly intrusive and embarrassing. The deprivation of liberty that results from the use of such archaic technology is greater than necessary to achieve the goal of rehabilitation for Mr. Defendant. As a result, the Court should: (1) modify Mr. Defendant’s conditions of release to eliminate this condition, and (2) not require Mr. Defendant to agree to this portion of the Treatment Contract.

If the Court finds that despite the inherent unreliability of plethysmograph testing, it is both rationally related to a legitimate penological goal and involves no greater deprivation than reasonably necessary, the court may impose the exams. See *Mike*, 632 F.3d at 696. But, this condition touches on a significant liberty interest. As a result, the Court cannot delegate the decision of whether or not to subject Mr. Defendant to penile plethysmograph testing to ABC. *Id.*

Emergency Motion to Stay Polygraph

I. Law and Argument³

In its 8/26/14 Order, the Court noted that “there is little or no basis to conclude all aspects of Mr. Defendant’s sexual history present a risk of incrimination.” [Doc. 79 at 11]. But, the Court recognized that “the requirement that Mr. Defendant reveal a complete sexual history presents a real risk of self-incrimination.” [Doc. 79 at 10]. Here, the Five Specific Questions all request answers that, if answered affirmatively, would incriminate Mr. Defendant.⁴

The Court pointed out two possible ways in which the risk of incrimination might be minimized or eliminated. First, with the advice of counsel, Mr. Defendant might only be required to reveal his sexual history except for those incidents he reasonably believes involve criminal activity. [Doc. 79 at 11]. Second, the Court suggested Mr. Defendant could be granted immunity for any crimes he may reveal. [*Id.*]. Neither of the suggested remedies are available to Mr. Defendant in regard to the January 12, 2014 polygraph test.

A. Mr. Defendant has not been offered immunity

Beginning with the Court’s second alternative, as the Court recognized, “neither ABC nor the probation department may grant immunity.” [Doc. 19 at 11-12]. Moreover,

³ For the sake of brevity and because the Court is familiar with the Fifth Amendment issues raised by the Defendant’s Combined Objection to Incorporation of ABC, Inc. Contract Into Terms of Supervised Release and Motion to Modify Conditions of Supervised Release [Doc. 67] (“Defendant’s Original Motion”), the defense will simply incorporate by reference the arguments raised and caselaw cited in the Defendant’s Original Motion.

⁴ Indeed, many of the Follow-Up Questions, Offense-Specific Questions, and Maintenance Questions may also compel incriminating answers.

as the Court recognized, it may be impractical to attempt to seek immunity from all prosecuting jurisdictions. In any event, Mr. Defendant has not been offered immunity and so the Court's second option is not available.

B. Mr. Defendant has not been given the opportunity, with the assistance of counsel, to assert his Fifth Amendment right to remain silent

Similarly, Mr. Defendant has not been given the opportunity, with the assistance of counsel, to assert his Fifth Amendment right. If Mr. Defendant meaningfully invokes his Fifth Amendment right, he will be unsuccessfully terminated from treatment. Moreover, Mr. Defendant will not be given a meaningful opportunity to consult with counsel prior to answering the polygraph questions. As a result, the Court's first alternative for taking the polygraph test while still protecting Mr. Defendant's Fifth Amendment right is likewise unavailable.

1. If Mr. Defendant meaningfully invokes his Fifth Amendment right, the polygraph examination will be cancelled and Mr. Defendant will be unsuccessfully terminated from ABC

Each of the Five Specific Questions, if answered affirmatively, would be incriminating. Yet, according to Mr. Polygraph Examiner, if Mr. Defendant asserts his Fifth Amendment right to multiple Five Specific Questions, the polygraph examiner will cancel the polygraph exam. Moreover, if Mr. Defendant asserts his Fifth Amendment right in response to the Catch-All Question, the polygraph exam will be terminated. In essence, if Mr. Defendant, when asked whether he has engaged in any criminal activity, asserts the Fifth Amendment right to remain silent recognized by this Court's 8/26/14 Order, the polygraph examiner will terminate the polygraph exam. As a result, Mr.

Defendant will be out the \$250 cost of the exam, will almost certainly be terminated from ABC, and will likely face supervised release revocation proceedings.

Indeed, ABC has taken an even more restrictive approach than Mr. Polygraph Examiner. According to ABC, if Mr. Defendant asserts his Fifth Amendment right to any question and the polygraph examiner deems such an assertion to be a refusal to answer the question, then ABC will unsuccessfully terminate Mr. Defendant. Thus, far from respecting Mr. Defendant's assertion of his Fifth Amendment rights, such an assertion will lead to termination from ABC and almost certain revocation proceedings. Such a result utterly fails to provide the protection contemplated by this Court's 8/26/14 Order.

2. Mr. Defendant cannot meaningfully consult with counsel prior to answering the polygraph questions

Similarly, the polygraph testing procedure will not allow counsel to provide the meaningful assistance contemplated by the Court's 8/26/14 Order. Mr. Polygraph Examiner has provided the Five Specific Questions and counsel can certainly advise Mr. Defendant as to whether he should assert his Fifth Amendment right in response to these questions.⁵ But, counsel will not be provided the Follow-Up Questions, Offense-Specific Questions, or Maintenance Questions and will not be permitted into the polygraph examination room. While Mr. Defendant will be allowed to leave once during the examination to consult with counsel, he will not be permitted to leave on multiple occasions or to consult with counsel before answering each question. As a result,

⁵ Though, as outlined above, doing so on multiple occasions, or in response to the Catch-All Question would result in a termination of the polygraph examination. Moreover, if the polygraph examiner's report states that Mr. Defendant refused to answer a specific question, ABC would terminate Mr. Defendant from treatment.

because counsel will not be provided the Follow-Up Questions, Offense-Specific Questions, or Maintenance Questions and cannot sit and consult with Mr. Defendant while these questions are being asked, counsel cannot meaningfully assist Mr. Defendant in deciding which questions to answer.

3. The fact that the polygraph examiner will not ask specific names does not minimize the risk of self-incrimination or place the procedure in compliance with the Fifth Amendment

In speaking with Mr. Polygraph Examiner, Mr. Polygraph Examiner attempted to minimize the risk of self-incrimination. Mr. Polygraph Examiner stated that he would not ask specific names of individuals with whom Mr. Defendant had sexual contact. Thus, according to Mr. Polygraph Examiner, any incriminating information provided by Mr. Defendant would be unlikely to lead to criminal prosecution; it would simply be too difficult for investigators to connect the dots.⁶

Mr. Polygraph Examiner's position notwithstanding, the fact that the polygraph examiner will not ask for specific names does not protect Mr. Defendant from compelled self-incrimination. Take, for the purpose of example only, question one regarding sexual contact with someone under the age of 15 by someone over the age of 18.⁷ If Mr. Defendant were to answer that question in the affirmative, he would then be asked about his age and the underage party's age at the time of the incident. He might reveal "I was 19 and the other party was 12." Mr. Polygraph Examiner believes that because the polygraph examiner does not ask the underage party's name, there is no risk of

⁶ As detailed in Defendant's Original Motion, the ABC contract requires disclosure of any incriminating sexual disclosures to law enforcement. Defendant's Original Motion at 16.

⁷ This is an example made up by Counsel for illustrative purposes only and in no way reveals anything about Mr. Defendant or his sexual history.

incrimination. But, if a year after the polygraph examination a party comes forward with an accusation against Mr. Defendant, claiming that Mr. Defendant had sexual contact with the alleged victim when the victim was 12 and Mr. Defendant was 19, it is clear Mr. Defendant's statement would be incriminating.

Similarly, take question two, asking whether Mr. Defendant has sexual contact with a relative or family member.⁸ Assume again that Mr. Defendant were to answer that question in the affirmative. It would certainly not be difficult for an investigator to question all of Mr. Defendant's relatives. If any of these relatives made allegations against Mr. Defendant, those allegations, coupled with Mr. Defendant's statements during the polygraph examination, would certainly lead to criminal charges.

III. Conclusion

The polygraph test ABC is requiring Mr. Defendant to take by January 12, 2015 is exactly the kind of mandate that Mr. Defendant objected to and this Court sustained in its 8/26/14 Order. The scope of the polygraph would go far beyond Mr. Defendant's criminal offense and conduct in this case to information that is patently incriminating. The penalty for refusing to comply with the polygraph rises to an impermissible level of compulsion. None of the other participants have provided possible ways to minimize the risk of incrimination or neutralize the penalty. Indeed, the defense's suggestions (having counsel present for the examination, providing counsel in advance with a complete list of all questions that will be asked, allowing Mr. Defendant to assert his Fifth Amendment right to multiple questions including the Catch-All Questions) have all been rejected. Accordingly, the requirement that Mr. Defendant take a polygraph

⁸ Again, this is an example made up by Counsel for illustrative purposes only and in no way reveals anything about Mr. Defendant or his sexual history.

examination by January 12, 2015 violates both the Fifth Amendment right against self-incrimination and this Court's Order.

To protect Mr. Defendant's Fifth Amendment rights, and to avoid the impermissible Catch-22 of forcing Mr. Defendant from choosing between taking the polygraph (and potentially incriminating himself) or not taking the polygraph (and face revocation proceedings), the defense respectfully requests an Order stating that Mr. Defendant is not required to take the sexual history polygraph exam, currently scheduled for January 12, 2015. Mr. Defendant requests this Court rule on this issue before January 12, 2015, or issue a stay of the polygraph examination deadline.

From the Tenth Circuit stay motion

Defendant now asks this court to stay the disputed order, pending resolution of his appeal. To obtain the requested stay, Defendant must show a likelihood of success on the merits. This he can do, satisfying both prongs of the Fifth-Amendment test, incrimination and compulsion. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-05 (1977). He can also establish that his complaint is ripe for review.

To explain why Defendant is likely to succeed on the merits, and solely for the purpose of defending the principles embedded in the Fifth Amendment, it is first necessary to accept an inference drawn by Judge Blackburn: that Defendant has engaged in criminal conduct in the past, crimes that in view of his obligation to be truthful would require him to answer "yes" to the mandatory questions (and provide further information in response to the permitted follow-up questions). See Order at 9. Despite making the inference, Judge Blackburn refused to acknowledge any possibility of incrimination arising from Defendant's predicament because in his view affirmative

responses to the questions would be too general and vague to merit prosecution. It was a mistaken view.

1. Incrimination

Recall the controlling legal standard by which this court will review Judge Blackburn's ruling (obviously that review will be *de novo*). The Supreme Court has long held to the "link in the chain" definition of incrimination. "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," the Court said more than a half century ago. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "Not much is required," this court has reminded district courts, to show a danger of self-incrimination, "as the privilege extends to admissions that may only tend to incriminate." *United States v. Rivas-Macias*, 537 F.3d 1271, 1278 (10th Cir. 2008). The Tenth Circuit, to state it differently, will uphold an assertion of the privilege "unless it is perfectly clear" that the target is mistaken, that her "answers could not possibly have a tendency to incriminate" her. *Id.* at 1278–79 (quotations omitted).

The low bar explains why the privilege may be asserted whenever information responsive to a question asked by state actors provides even a small morsel pointing an investigator toward evidence of criminal conduct. "Indeed, it is enough if the responses would merely provide a lead or clue to evidence having a tendency to incriminate." *United States v. Troescher*, 99 F.3d 933, 935 (9th Cir. 1996) (abrogated on other grounds). And it readily explains why some courts have already sided with Defendant on the very type of questions at issue here: "A witness risks a real danger of

prosecution if an answer to a question, *on its face*, calls for the admission of a crime,” they have said. See, e.g., *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983) (emphasis added).

Nobody claims, certainly not Defendant, that his affirmative response to the question, say, “have you sexually assaulted a minor in the past?” would alone be sufficient to sustain a conviction in a prosecution for having done so. But that is not the relevant test. Rather, as stated above, the Fifth Amendment asks only whether Defendant’s (posited) responses to the mandatory questions would furnish just a lead or clue needed to prosecute him, or whether any of those questions on their “face” call for him to admit a crime.

Three of the four mandatory questions do exactly the latter: Questions 1, 3 & 4 each demand that Defendant confess a crime. (For this reason alone, there is a strong likelihood that he will succeed on the merits.) As for the former, that is, as to whether Defendant’s would-be admissions offer leads or clues toward a future prosecution, the admission of a prior crime instantiates as few other statements do a lead or a clue that the speaker is, if nothing else, worthy of investigation. It is more than an indication that delving into the speaker’s past conduct will pay dividends for a criminal investigator; it is confirmation that delving into his past will profit the investigator. At the very least, it makes him, the confessor, look quite different from the set of all other possible suspects.

Right now the government knows neither the existence of a crime in Defendant’s past nor the identity of his victim(s). After February 11, fully one half of its ignorance will disappear, leaving only the task of interviewing his acquaintances and family members

to locate the victim(s). It is hard to imagine a better clue that a given person has committed a crime than his admission that he has in fact committed a crime. If that's not a chain in the link of evidence, then nothing is.

No less troubling is Judge Blackburn's suggestion that Defendant need not worry about any prosecution, since the polygraph examiner has administered tens of thousands of exams without being contacted by law enforcement. "[T]he examiner is not acting as a criminal investigator," said Judge Blackburn. "Rather, [he] is conducting the examination for the limited and specific purpose of gathering relevant information to serve the goal of sex offender treatment." See Order at 4. This line of reasoning prompts a fundamental objection. Unenforceable assurances about future enforcement cannot rescue a constitutionally infirm condition of probation. The Fifth Amendment is stronger than that; it does not leave us at the mercy of prosecutorial discretion. The Supreme Court put it best: "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

In any event, even if the examiner has administered thousands of polygraphs without a subsequent visit from a law-enforcement official, Judge Blackburn's reliance on the past proves too much. Two facts suggest the examiner's run may be about to end. First, the government, which insists on the polygraph, refuses to grant Defendant immunity. Second, as Judge Blackburn himself recognized, the sharp command contained in Defendant's contract with the treatment provider means that the examiner cannot wait for law-enforcement investigators to arrive at his doorstep. By virtue of the

rules governing his agency, the examiner is “instruct[ed]” to report Defendant’s admissions of sex crimes “to any appropriate authority or authorities.” See Order at 5.

2. Compulsion

Because he saw no risk of incrimination, Judge Blackburn said “it is not necessary to consider the issue of compulsion,” any threat of which, he added, is “of no moment absent a risk of incrimination.” See Order at 14. There is a strong likelihood, however, that this court will reach the question of compulsion, and that it will conclude that a seminal Supreme Court case, *Minnesota v. Murphy*, augurs relief in favor of Defendant. 465 U.S. 420 (1984).

During an interview with his probation officer, defendant Murphy revealed that he had committed a murder, without invoking his privilege. Charged with that murder, he argued that his failure to assert the Fifth Amendment was excused, because the privilege is self-executing. The Court disagreed, holding that the privilege wasn’t self-executing under the circumstances. Importantly, the reason for Murphy’s failure to find relief in the Fifth Amendment explains exactly why Defendant does find protection there.

“[W]e must inquire whether Murphy’s probation conditions merely required him to appear and give testimony about matters relevant to his probationary status,” said the Supreme Court, “or whether they went farther and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.” *Id.* at 436. “Because we conclude that Minnesota did not attempt to take the extra, impermissible step,” reasoned the Court, “we hold that Murphy’s Fifth Amendment privilege was not self-executing,” and instead had to be asserted. *Id.* The

Court emphasized that nothing prevented or deterred Murphy from invoking the privilege, not least given that he lacked any basis for fearing adverse consequences from his silence. “[W]e cannot conclude that Murphy was deterred from claiming the privilege by a reasonably perceived threat of revocation,” said the Court. *Id.* at 439.

In direct contrast, the authorities here have indeed gone “farther.” They are forcing Defendant “to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.” The government has “affirmed that [the treatment provider] will terminate Mr. Defendant from treatment if he refuses to take the polygraph currently scheduled for February 11, 2015,” an outcome that will unavoidably lead to the loss of his conditional liberty, that is, the revocation of his supervised release. See “Gov’t Response to Defendant’s Motion for Order Staying . . . Polygraph,” dated February 2, 2015, at 6 & n.2 (dock. no. 104). The government says there is no choice in the matter. If Defendant invokes the privilege at the imminent polygraph, he will be cast out of the treatment required as part of his supervised release, compelling the government to move to revoke his term of supervision. Otherwise, says the government, treatment “for sex offenders as we know it will come to a grinding halt.” *Id.* at 6. The Hobson’s Choice confronting Defendant is stark: waive your privilege or go to jail.

The lesson from Murphy is clear. The Fifth Amendment prohibits a government actor from deterring a person in the exercise of his or her privilege against self-incrimination. While the circumstances present in *Minnesota v. Murphy* didn’t deter Murphy from asserting his privilege—he experienced no “reasonably perceived threat of revocation”—it is very different here. The specter of revocation is not just real, it is a

near certainty. Unlike Murphy, Defendant has every reason to believe that the cost of invoking his Fifth-Amendment privilege will be the loss of his freedom. His is actual compulsion, not theoretical, exactly the sort the Fifth Amendment forbids.

3. Ripeness

Defendant's complaint is timely and ripe, notwithstanding the fact that he has not yet been compelled to make any incriminating statement. The text of the Constitution says: "No person shall be . . . compelled in any criminal case to be a witness against himself." It is a forward-looking phrase initiated by a verb conjugated in the future tense. It does not say: "If, after a person is compelled to make statements, those statements turn out to be self-incriminating, we will try our best to put the genie back in the bottle." The Fifth Amendment prevents the act of compulsion in the first place; it is not merely a backward-looking remedy designed to repair harm after compulsion has occurred.

Although Judge Blackburn did not question the ripeness of Defendant's complaint, the government did, resting in part on this court's decision in *United States v. Mike*, 632 F.3d 686 (10th Cir. 2011). See, e.g., Gov't Response to Defendant's Motion for Order Staying . . . Polygraph at 4 (dock. no. 104). *Mike* does not present a bar to review.

In *Mike*, the government maintained that defendant Mike's objections to his conditions of supervision—among them sex-offender treatment and testing, as well as a no-contact-with-children order—were "not ripe for review." *United States v. Mike*, 632 F.3d at 692. "[T]he Government's contentions are erroneous," said *Mike*, for "Mike has completed his term of imprisonment and is currently subject to enforcement of the terms

of his supervised release.” *Id.* Just so here. Defendant has completed his term of imprisonment and is currently subject to enforcement of the terms of his supervised release.

Granted, *Mike* also indicated that the defendant’s Fifth-Amendment argument was premature because he “had yet to make any incriminating statements . . . [and] [b]ecause no incriminating statements had been made, the Fifth Amendment was not implicated.” *See id.* at 697. But it did so to defeat a very different threat to the Fifth Amendment than the one here. This text from *Mike* appears in a section of the opinion addressing a condition of supervised release that had nothing to do with polygraph exams, and only a marginal connection to the Fifth Amendment. Defendant Mike challenged a condition that required him (1) to have no contact with children; and if he did have contact with children (2) to report the contact to police immediately. *See id.* at 690 & 696. In a section of its opinion captioned “Prohibition on Contact with Children Condition,” the *Mike* court quite properly said the defendant’s challenge was premature, not yet ripe, for the reason that Mike might never encounter the events necessary to trigger the challenged condition and its compulsory statements: he might well avoid contact with children.

In contrast, Defendant’s confrontation with compulsion is inevitable. He cannot avoid the situation in which he must either invoke the Fifth Amendment or make compulsory statements. *See United States v. Bahr*, 780 F.3d 963, 966 (9th Cir. 2013) (“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.

Revocation of supervised release is not necessary to violate the right; the threat of revocation is itself sufficient to violate the privilege . . .”).

C. The Threat of Irreparable Harm to Defendant

Turn now to the harm-balancing question, beginning with the threat of irreparable harm to Defendant in the event a stay is denied.

In its briefing opposing a stay in the district court, the government took the position that Defendant would suffer no harm, none whatsoever, were a stay to be denied. After all, if he truly fears incriminating himself at the polygraph, he need only rest on his lawyers' advice and invoke the Fifth Amendment when asked the mandatory questions. See Gov't Response to Motion for Order Staying . . . Polygraph at 5 (dock. no. 104). The result—his termination from treatment and subsequent revocation and reincarceration—doesn't count as harm in the government's view. An obvious defect weakens the argument: going to prison is a harm.

To his credit, Judge Blackburn saw the threat of real harm to Defendant, but he suggested he could minimize it. In his order denying a stay, he indicated that in the near-certain event that the government initiates proceedings to revoke Defendant's supervised release, “[t]o a great extent, the consequences suffered by Mr. Defendant in those proceedings can be managed by the court to minimize the harm suffered by Mr. Defendant pending appeal.” Order Denying Motion for Stay at 5 (dock. no. 114). His suggestion, however, presents Defendant with absolutely no guarantee of protection from the threat of irreparable harm. This is so for two reasons.

First, Judge Blackburn's remark is not a guarantee, but a suggestion, and a limited one at that. There is no mechanism for enforcement, and even if there were, the

speculated relief extends only so far to “minimize” harm—not to avoid it altogether. Moreover, it is far from clear what the court might view as “minimiz[ing]” harm—it could have a meaning as varied as delaying the revocation hearing until resolution of the appeal to revoking his supervised release, softened by imposing a bottom-of-the-guidelines sentence. Without any specificity, this speculative remedy provides no protection to the threatened harm to which Defendant is exposed.

Second, even if the statement could be interpreted as a promise to avoid revoking Defendant’s supervised release while his appeal is pending, the threat of harm is still present. For example, the court’s view could change over time or even as a result of the nature of disclosures Defendant is compelled to make. Nor is it guaranteed that Defendant’s supervised-release revocation would necessarily take place before Judge Blackburn. Cases can be reassigned to different judges under a variety of scenarios, including for reasons as simple as illness and workload balance.

Accordingly, insofar as Judge Blackburn suggested he could mitigate any immediate and irreparable harm to Defendant, that suggestion does not provide a basis for this court to deny the stay.

D. Absence of Harm to the Opposing Party and Risk to Public

The government told Judge Blackburn that a stay, if granted, will wreak unimaginable harm to prosecutors and federal judges in Colorado, now burdened by the need to revoke and imprison not just Defendant but all other offenders similarly enrolled in state-approved treatment programs. It also warned of the risk to the public, “which will have to deal with” sex offenders who have “not received state-mandated, effective treatment.” Gov’t Response to Defendant’s Motion for Order Staying . . . Polygraph at 7

(dock. no. 104). (Some offenders evidently will escape the clutches of the overburdened prosecutors and courts and be loosed on the public, untreated.) In a nutshell, said the government, “at least on the federal side, the supervised release treatment program for sex offenders as we know it will come to a grinding halt.” *Id.* at 6.

As Judge Blackburn recognized, this tale of total collapse amounted to hyperbole. “I am doubtful that the broad swath of consequences described by the government truly would come to pass if a stay were imposed,” he said. Order Denying Motion for Stay at 5. “Still,” he went on, “a stay would interrupt the sex offender treatment of Mr. Defendant and may disrupt the sex offender treatment of other defendants, especially those on supervised release. That harm is of some consequence.” *Id.* He added that the public, too, would be ill served by delaying or foreclosing Defendant’s treatment. *Id.* at 6.

Judge Blackburn overlooked something important. Between August of last year, when he sustained Defendant’s objection to the polygraph (indeed, he said the exam was unconstitutional), and late January of this year, when he reversed his ruling, Defendant remained under treatment, excused from just one of its components, the temporarily halted polygraph requirement. Meanwhile, treatment for other sex offenders in Colorado continued as before, seemingly unaffected by Defendant’s 5-month hiatus from polygraph testing.

Indeed, it is worth pausing to consider the claim, recently asserted by the government and adopted (though with less intensity) by Judge Blackburn, that an interruption in the polygraph-testing protocol compels the termination of treatment for the offender. The claim is that Defendant, or any other offender for that matter, will be

automatically terminated from treatment if he refuses to complete the polygraph, or if a federal court grants the stay. This marks a dramatic turnabout. As noted above, for the five months during which Judge Blackburn regarded the polygraph as a violation of Defendant's constitutional rights, officials somehow found a way to avoid terminating him from treatment. If nothing else, it seems a tad farfetched to suggest, as Judge Blackburn appeared to accept, that an approved treatment provider will lose its certification for not giving polygraph exams, even if a federal court has enjoined the exam.