"THE FEDERAL CORNER"

The Fifth Amendment and Sexual History Polygraphs

Buck Files

On May 10, 2016, a panel of the United States Court of Appeals for the Tenth Circuit held that a defendant faced some danger of self-incrimination if he was required to answer mandatory questions during a sex offender history polygraph; and, the government's threat to seek revocation of the defendant's supervised release constituted an unconstitutional compulsion to submit to such a polygraph under the Fifth Amendment. [The panel: Circuit Judges Briscoe, Seymour and Lucero (opinion by Seymour)] *United States v. Von Behren*, ___F.3d___, 2016 WL 2641270 (10th Cir. 2016)

A Synopsis of the Facts of the Case

I thought I heard you say, "Hold still little catfish -- all I want to do is gut ya!" That could have been the reaction of Bureau of Prisons inmate Brian Von Behren when he learned that the government had requested several new conditions of supervised release and that one of them would require him to participate *and* successfully complete a sex offender treatment program. At the time that he received this news, Von Behren was close to completing a 121 month sentence for the receipt and distribution of child pornography and faced a term of three years supervised release.

After returning to the free world, Von Behren learned that he was to be assigned to Redirecting Sexual Aggression (RSA), a certified treatment provider mandated by the Colorado Sex Offender Management Board (SOMB). One of the SOMB Guidelines mandated that Von Behren sign a non-negotiable treatment agreement requiring him to complete a non-deceptive sexual history polygraph. A failure to complete this requirement would cause him to be removed from the program. And then there was the cherry on the sundae of the SOMB Guidelines: Von Behren would be required to sign this agreement concerning any crimes committed by him.

> *I hereby instruct RSA, Inc. to report to any appropriate authority or authorities any occurrence or potential occurrence of any sexual offense on my part* regardless of how RSA, 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, probation or parole personnel, victims or potential victims, parents, spouses, school personnel, and employers.

Having had a dose of the federal criminal justice system, Von Behren immediately hired a lawyer to challenge his new conditions of supervised release. United States District Judge Robert E. Blackburn of the District of Colorado reviewed the RSA contract and held that the successful completion of a sex offender treatment program would be a condition of Von

Behren's supervised release; however, he sustained Von Behren's Fifth Amendment objection to any requirement that he admit to any criminal offense other than his offense of conviction.

In spite of Judge Blackburn's order, RSA informed Von Behren that he would either submit to a sexual history polygraph or leave the program. He was advised that the polygraph examination would include four mandatory questions:

- After the age of 18, did you engage in sexual activity with anyone under the age of 15?
- Have you had sexual contact with a family member or relative?
- Have you ever physically forced or threatened anyone to engage in sexual contact with you?
- Have you ever had sexual contact with someone who was physically asleep or unconscious?

Von Behren was also told that a "yes" answer to any one of the questions would cause the examiner to ask a mandatory follow-up question: How many times have you done this? There was, though, a tiny bit of good news. Von Behren could choose any one of the four questions and refuse to answer that question, only.

Von Behren's lawyer believed that RSA was violating Judge Blackburn's order and filed an emergency motion on December 23, 2014, to block the polygraph examination. On January 27, 2015, after reviewing the four questions that would be asked, Judge Blackburn reconsidered his earlier ruling, denied Von Behren's request for relief and ordered him to complete the sexual history polygraph. In his order, Judge Blackburn did not address the Fifth Amendment issue of compulsion, but only noted that Von Behren's answers would not "specify the time, the place, the identity of any victim, or other people involved."

Von Behren's lawyer filed an immediate notice of appeal and requested Judge Blackburn to stay his ruling. RSA scheduled a polygraph for Von Behren for February 11, 2015. On February 4, 2015, in response to Von Behren's motion for a stay, the government advised Judge Blackburn that RSA would remove Von Behren from the treatment program if he failed to take the scheduled polygraph examination. The government also advised Judge Blackburn that it would seek an order remanding Von Behren to prison if he did not successfully complete the sex offender treatment program.

Judge Blackburn issued his order denying Von Behren's motion for a stay on the afternoon of February 10, 2015. Shortly before midnight, Von Behren's lawyer filed a second motion for a stay with the Tenth Circuit, pending a direct appeal. On the following morning, Von Behren was in the polygraph examiner's parking lot when he learned that his emergency stay had been granted.

Judge Seymour's opinion reads, in part, as follows:

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Mr. Von Behren contends the district court erred when it held that one of his conditions of supervised release, a sexual polygraph examination with four mandatory questions, did not violate the Fifth Amendment's privilege against self-incrimination.

* * *

The Fifth Amendment to the United States Constitution states that no person 'shall be compelled in any criminal case to be a witness against himself.' U.S. Const. amend. V. The Fifth Amendment's privilege against self-incrimination applies not only to persons who refuse to testify against themselves at a criminal trial in which they are the defendant, 'but also privileges [them] not to answer official questions put to [them] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [them] in future criminal proceedings.' … Significantly, '[a] defendant does not lose this protection by reason of his conviction of a crime[.]'

'To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.' … There is no doubt that answering questions during a polygraph examination involves a communicative act which is testimonial.

* * *

But the elements of incrimination and compulsion are less certain and, accordingly, are the focus of this case. We address each in turn.

A. Incrimination

To assure an individual is not compelled to produce evidence that may later be used against him in a criminal action, the Supreme Court has always broadly construed the protection afforded by the Fifth Amendment privilege against self-incrimination. … Accordingly, '[t]he protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.'

The Fifth Amendment privilege is only properly invoked when the danger of self-incrimination is 'real and appreciable,' as opposed to 'imaginary and unsubstantial,'… and 'this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.' … But we have explained that '[n]ot much is required ... to show an individual faces some authentic danger of self-incrimination, [ ] as the privilege "extends to admissions that may only *tend* to incriminate."' … Accordingly, 'we will uphold an individual's invocation of the privilege against self-incrimination unless it is "perfectly clear, from a careful consideration of all the circumstances in the case," that the witness "is mistaken" and his answers could not "possibly have" a "tendency to incriminate."' … Determining whether an

individual has properly invoked the privilege 'is a question of law, which we review de novo.'

In this case, the district court held that the mandatory questions, along with each of their follow-up questions, do not present a real and appreciable risk of incrimination. It was convinced that the questions would only produce general answers and would not require Mr. Von Behren to specify the time or location of any incident, the identity of any victims, or the names of other people involved, concluding that the four 'questions present at worst, "an extraordinary and barely possible contingency" of incrimination and prosecution.' Rec., vol. 1 at 181 (quoting *Brown*, 161 U.S. at 599). We disagree.

We start with the questions. Three of RSA's mandatory questions ask for the admission of a felony: (1) 'After the age of 18, did you engage in sexual activity with anyone under the age of 15?'; (2) 'Have you ever physically forced or threatened anyone to engage in sexual contact with you?'; and (3) 'Have you ever had sexual contact with someone who was physically asleep or unconscious?' The fourth mandatory question asks about sexual contact with a family member, which acts to limit the possible pool of victims. Given his reluctance to submit to the polygraph, we infer that Mr. Von Behren's answers to these questions would reveal past sex crimes.

An affirmative answer to any one of these questions could not support a conviction on its own, but that is not the test. The Fifth Amendment is triggered when a statement would provide a 'lead' or 'a link in the chain of evidence needed to prosecute the' speaker, … and affirmative answers to these questions would do just that. If there were presently an investigation looking into the commission of a sex crime, and if Mr. Von Behren were a suspect, an affirmative answer to these questions would allow the police to focus the investigation on him. Moreover, investigators would certainly look at Mr. Von Behren differently if they were made aware that he had physically forced someone to engage in sexual relations with him.

* * *

Furthermore, an affirmative answer could potentially be used against Mr. Von Behren if he were ever charged with a sex crime. For instance, if Mr. Von Behren were to answer yes to the underage sex question or the physical force question, those answers could be used against him to show he has a propensity to commit such bad acts. … And while the government argues that a trial court could exclude such evidence under Fed.R.Evid. 403, the evidentiary rule that commands trial courts to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect, we do not think the Fifth Amendment privilege should be submitted to an evidentiary balancing test.

* * *

Notably, there is a provision in Mr. Von Behren's contract with RSA that instructs RSA 'to report to any appropriate authority or authorities any occurrence or

potential occurrence of any sexual offense.' Rec., vol. 1 at 174. This provision, which specifically authorizes his examiner to report his admissions to the police, undoubtedly adds to Mr. Von Behren's apprehension in regard to answering the four questions. Because the answers to the four mandatory questions could focus an investigation—otherwise ignorant of his past sex crimes—on Mr. Von Behren, and also because his confession to these past crimes could potentially be used against him at trial under Fed.R.Evid. 413 and 414, we conclude that Mr. Von Behren faces at least some authentic danger of self-incrimination by answering three of the four mandatory questions in the RSA's sexual history polygraph.

B. Compulsion

{"pageset":"Sf5 After concluding in its final order that RSA's sexual polygraph questions do not pose a real and appreciable risk of incrimination to Mr. Von Behren, the district court saw no need to consider whether there was compulsion. Having disagreed with the district court on the incrimination issue, we turn to the issue of compulsion.

'[T]he touchstone of the Fifth Amendment is compulsion....' … The privilege's prohibition against compulsion prevents the state from threatening to impose 'substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.' … This is so because 'the privilege against compelled self-incrimination could not abide *any "attempt, regardless of its ultimate effectiveness,* to coerce a waiver of the immunity it confers.'" …the district court determined in its initial order finding a risk of incrimination, that the penalty of potential 'revocation of supervised release and concomitant incarceration ... is sufficiently severe to constitute compulsion.' Rec., vol. 1 at 114. We agree with that conclusion.

* * *

As the Supreme Court made clear in *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), '[t]hough the State properly subjects [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.' The Court in *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), has spoken directly on the issue of Fifth Amendment compulsion in the analogous probation context. The Court's decision in *Murphy*, and the prior penalty cases it relies on, leads us to conclude that the government's threat to revoke Mr. Von Behren's supervised release for his failure to answer potentially incriminating questions rises to the level of unconstitutional compulsion.

* * *

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. 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; *see also* *Turley*, 414 U.S. at 84–85 (state may compel waiver of Fifth Amendment privilege only by grant of immunity from prosecution).

* * *

In sum, we hold that the government compelled Mr. Von Behren to be a witness against himself. For the reasons set forth above, we reverse.

My Thoughts

- *Von Behren* causes me significant angst. Over the years, I have had defendants in both federal and state cases who were required to submit to sex offender history polygraphs. Although I have had at least a theoretical concern about what these polygraphs could lead to, I have been lulled into a state of complacency because none of these polygraphs ever resulted in an additional problem for my clients.
- Now, I realize that I should have -- and will in the future -- consider filing what I shall refer to as a *Von Behren* motion in such cases.