NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 27, 2018

LETTER OPINION

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Re: *Commonwealth of Virginia vs. Derek Richard Rhodes*, Case No: FE-2014-393

Dear Counsel:

Before the Court are three allegations that the defendant has violated probation. The defendant has filed a motion asserting that the alleged violations, even if proven, cannot be a basis for revoking the defendant's probation and incarcerating the defendant because to do so would violate the defendant's privilege against self-incrimination under the United States Constitution and the Constitution of the Commonwealth of Virginia.

The question the Court must resolve can be stated as follows:

Is a probationer's privilege against self-incrimination violated if his probation is revoked and a sentence of incarceration imposed based on: (1) lying to his probation officer and treatment provider regarding <u>prior</u> criminal misconduct; (2) admitting to <u>current</u> criminal

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misconduct; and (3) being terminated from a probation-required treatment program based on dishonesty and the admission to current criminal misconduct?

It should also be noted that the defendant does not assert, nor does the record reflect, that he explicitly invoked his Fifth Amendment privilege against self-incrimination. Nevertheless, the defendant contends that he was placed in an "impossible" and "unreasonable" position where he either would "have to lie, incriminate himself, or be punished for his silence." (Def.'s Mem. in Support of Def.'s Denial of Violate of the Terms of his Probation, 3.) The defendant contends that "his failure to disclose information to a probation officer" means that he is, in effect, being "punished for his silence" and that, as a matter of law, a probation requirement that places him in this position is unconstitutional. (*Id.* at 3, 6-7.)

It should also be noted what is not before the Court, i.e., whether the probationer's admissions can be used in a subsequent criminal prosecution. The proceeding now before the Court is not a new criminal case but, rather, a probation revocation hearing.

For the reasons stated below, the Court denies the defendant's motion.

BACKGROUND AND PROCEDURAL POSTURE

On April 21, 2014, the defendant was indicted for feloniously using "a communications system or other electronic means for the purpose of soliciting a minor for activity in violation of § 18.2-361 or § 18.2-370, knowing or having reason to know that such person was a minor," in violation of Virginia Code Section 18.2-374.3. (Indictment for Using a Computer to Solicit a Minor, Apr. 21, 2014.)

On May 5, 2014, the defendant entered a plea of guilty to the charge of the indictment. (*See* Plea of Guilty to a Felony, May 5, 2014.)

On June 27, 2014, this Court sentenced the defendant to a term of incarceration of ten years, suspending all but three years and six months of the sentence for a period of ten years, under the following conditions:

> The Defendant shall be of good behavior for ten (10) years from the Defendant's release from confinement.
>
> The Defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer, for ten (10) years . . . .
>
> The Defendant shall comply with all the rules and requirements set by the Probation Officer.
>
> The Defendant [shall] receive a sex offender evaluation and treatment, to include polygraph testing, at the direction of the Probation Officer.

(Sentencing Order, July 14, 2014.) The defendant was also ordered to register as a sex offender. (*Id.*)

On April 24, 2017, following the defendant's release from custody, he signed the "Conditions of Probation Supervision" as well as the "Sex Offender Special Instructions."

On May 24, 2018, the Court received a "Major Violation Report" regarding the defendant from Manassas Probation and Parole. The report recommended issuance of a bench warrant to replace the PB15 that Probation and Parole had used to take the defendant into custody. (Major Violation Report, May 24, 2018.) The report asserted the following:

> Mr. Rhodes' has presented as externally compliant with instructions from both probation and treatment. Unfortunately, it appears he has been concealing deviant and high risk behavior during the entirety of his supervision period. For this reason, he was terminated from his sex offender treatment group despite repeated efforts to work with him and has resulted in his arrest on a PB15.
>
> On November 27, 2017, Mr. Rhodes admitted to this officer that he was using chat lines for sexual purposes with adult females since July 2017. He also stated one of the females he had conversation with was a cheerleader and may have been a minor. On May 15, 2018, Mr. Rhodes completed a sexual history polygraph where deception was indicated to additional minor victims since he has become an adult. Upon the post polygraph interview, Mr. Rhodes denied additional victims to this officer. Later the same date in his Sex Offender Treatment Group he admitted to his treatment provider there was an addition[al] minor male family member victim who he sexually abused for years. Mr. Rhodes admitted to intentionally and purposely being dishonest in optimism that he would be given permission to have contact with his minor son. On May 22, 2018, Mr. Rhodes admitted to withholding information related to a history of bestiality, frottage, public masturbation, and taking sexual photographs of minors during online video chats. Additionally, he reported he had been peeping on a neighboring home next door in hopes of seeing the occupants in a state of undress or engaging in sexual activity. He stated there was a high school aged female and an infant who reside in the home. Mr. Rhodes reported he had engaged in this voyeurism on a near daily basis throughout his supervision until approximately three weeks prior. He reports he ceased the behavior due to a pending polygraph examination. Mr. Rhodes[']sexual deviant behavior and reoffending is a vital concern for public safety.

(*Id.*) The probation officer asserted that the defendant's conduct constituted three distinct violations of probation.

First, the probation officer asserted that the defendant violated Condition 6 of the Conditions of Probation Supervision which require a probationer to "follow the Probation and Parole Officer's instructions" and to be "truthful, cooperative, and report as instructed." (*Id.*) Specifically, the probation officer asserted the following: "On May 15, 2018, Mr. Rhodes completed a sexual history polygraph where deception was indicated to additional minor victims

since he has become an adult. Upon the post polygraph interview, Mr. Rhodes denied additional victims to this officer. Later that same day in sex offender treatment group he admitted to his treatment provider there was an addition[al] minor male victim." (*Id.*)

Second, the probation officer asserted that the defendant violated Condition 13 of the Sex Offender Special Instructions, with which the defendant was required to comply pursuant to Condition 6 of the Conditions of Probation Supervision. (*Id.*) Condition 13 reads as follows: "Do not own or have in your possession any sexually explicit materials. Do not view visual images or printed materials that act as a stimulus for your abusive cycle or act as a stimulus to arouse you in an abusive fashion." (*Id.*) Specifically, the probation officer asserted the following:

> On May 22, 2018, Mr. Rhodes admitted to his treatment provider and Senior Probation and Parole Officer Rachel Taylor during his Sex Offender Treatment group that he had been actively offending since starting treatment. He admitted to engaging in voyeurism for the past year when peeping into his neighbor's windows in hopes to view them nude. One of his neighbors is a teen age female who he admitted is within his preferred age range.
>
> On May 23, 2018, Mr. Rhodes admitted the same admission to this officer at an office appointment.

(*Id.*)

Third, the probation officer asserted that the defendant violated the requirement of completing sex offender treatment.[1] Specifically, the probation officer asserted the following: "Mr. Rhodes was terminated from Counseling and Forensic Services, Inc., Adult Sex Offender Treatment Program on May 22, 2018." (Major Violation Report, May 24, 2018.) Attached to the Major Violation Report was a termination letter submitted by the treatment provider. It reads in part: "Mr. Rhodes began treatment at Counseling and Forensic Services, Inc. on June 6, 2017 and was subsequently terminated on May 22, 2018 due to his pattern of dishonesty and his admission that he has engaged in offending behaviors throughout his time in treatment." (Sex Offender Treatment Termination Report, May 23, 2018.) The report alleges that "Mr. Rhodes has been caught on two occasions being dishonest with both treatment and probation." (*Id.*) It further alleged that Mr. Rhodes admitted to having been "actively offending since starting treatment." (*Id.*)

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[1] Condition 11 of the Sex Offender Special Instructions states: "Attend and successfully complete a Sex Offender Treatment Program approved by your supervising officer and assume the costs of your treatment as directed by your supervising officer." (Sex Offender Special Instructions, 2.)

On May 24, 2018, the Court issued a bench warrant, reflecting the three alleged violations contained in the Major Violation Report submitted by Probation and Parole. (Bench Warrant to Replace PB-15, May 24, 2018.)

On May 27, 2018, the defendant was served with the Bench Warrant. The revocation hearing was initially set for June 22, 2018 but was continued to July 27, 2018 and then August 31, 2018, on motion of the defendant. Over the objection of the defendant, the hearing was continued until September 17, 2018 on motion of the Commonwealth due to the unavailability of a witness. That hearing was limited to the Fifth Amendment issue, which is the subject of this Letter Opinion.

On August 15, 2018, the defendant filed a "Memorandum in Support of Defendant's Denial of Violation of the Terms of His Probation" (hereinafter "Def.'s Mem. in Denial"). On September 6, 2018, the Commonwealth filed "Commonwealth's Memorandum in Opposition to Defendant's Denial of Violation of the Terms of his Probation" (hereinafter "Com.'s Opp'n").

On September 17, 2018, the Court heard argument on the Fifth Amendment issue and took testimony from the probation officer. At the conclusion of the hearing, the Court took the matter under advisement. The matter is now ripe for decision.

ANALYSIS[2]

A. The Defendant's failure to invoke his Fifth Amendment privilege against self-incrimination is fatal to his claims.[3]

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[2] The Commonwealth has not argued and, therefore, the Court has not addressed, whether the defendant's acceptance of the terms of his probation – which included "I will follow the Probation and Parole Officer's instructions and will be truthful, cooperative, and report as instructed" (Conditions of Probation Supervision, April 14, 2017.) and his agreement to "[a]ttend and successfully complete a Sex Offender Treatment Program approved by your supervising officer . . . ." (Sex Offender Special Instructions, 2.) – constitutes a valid waiver of the defendant's Fifth Amendment rights. *See Venable v. Commonwealth*, 48 Va. App. 380, 388, n. 4 (2006) ("[B]ecause neither the Commonwealth nor the trial court disagreed with Venable's contention that admitting his guilt would place him at risk of being prosecuted for perjury, we need not decide this issue . . . [s]imilarly, we need not decide whether, under the circumstances of this case, Venable's acceptance of the terms of his probation constituted a valid waiver of his Fifth Amendment rights.").

[3] The defendant also asserts a violation of his privilege against self-incrimination pursuant to Article I, Section 8 of the Constitution of Virginia. The Court's reference in this opinion to the Fifth Amendment is also meant to apply to Article I, Section 8 of the Constitution of Virginia. *See Zebbs v. Commonwealth*, 66 Va. App. 368, 374, n. 6 (2016) ("Because '[t]he privilege against compelled testimony under Article I, § 8 of the Virginia Constitution is no broader in its

An individual seeking to avail himself of the protections of the Fifth Amendment privilege against self-incrimination must actually "claim it." *See Minn. v. Murphy*, 465 U.S. 420, 427 (1983) (*quoting U.S. v. Monia*, 317 U.S. 424, 427 (1943)) ("'If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment.'");[4] *see also Salinas v. Texas*, 570 U.S. 178, 183 (2013) (Alito, J.) (citations omitted) ("'To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who "desires the protection of the privilege … must claim it" at the time he relies on it.'").

There are several exceptions to this rule, but none apply here.

First, "a criminal defendant need not take the stand and assert the privilege at his own trial." *Id.* at 184. The instant case does not involve such a situation.

Second, "a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Id.* An example of this is custodial interrogation. An individual on probation is not "in custody."[5] *See Murphy*, 465 U.S. at 430-

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application than its counterpart under the federal Constitution,' *Farmer v. Commonwealth*, 12 Va. App. 337, 340, 404 S.E.2d 371, 372, 7 Va. Law Rep. 2425 (1991), we will, for the sake of convenience, refer to his claim as a Fifth Amendment claim.").

[4] In *Minnesota v. Murphy*, the Supreme Court recognized the right of a probationer to legitimately exercise the Fifth Amendment privilege against self-incrimination. But the Court included an important caveat: the legitimate exercise of a Fifth Amendment privilege by a probationer must involve a "realistic threat of incrimination in a *separate criminal proceeding*." *Murphy*, 465 U.S. at 435, n. 7 (emphasis added). In other words, a probationer would not be able to assert a Fifth Amendment privilege in order to avoid making admissions that might only jeopardize the individual's probationary status. "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. 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." *Id.* (citations omitted).

[5] The defendant in the instant case was not in custody at the time he made admissions to the treatment provider or to his probation officer. At the September 17, 2018 hearing, the probation officer, Cheryl L. Scott, testified that based on the representations made by the treatment

31(citations omitted) ("Murphy [, a probationer,] was not 'in custody' for purposes of receiving *Miranda* protection since there was 'no formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest . . . . [T]he probation officer could compel Murphy's attendance and truthful answers. The Minnesota Supreme Court failed to explain how this transformed a routine interview into an inherently coercive setting.").

Moreover, the fact that the defendant also made admissions to his treatment provider did not make his forfeiture of the privilege involuntary. *See Husske v. Commonwealth*, 252 Va. 203, 217 (1996) (citations omitted) (discussing incriminating admissions made by a defendant to his court-ordered mental health treatment provider: "[W]e note that the defendant's obligation to participate in the mental health treatment program did not in itself convert his 'otherwise voluntary statements into compelled ones.' We also observe that the defendant, just as in *Murphy*, was not in custody for purposes of receiving *Miranda* protection when he made his incriminating statements. Here, just as in Murphy, no one required Husske 'to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.' The record before us is devoid of any evidence that the employees of Henrico County Mental Health and Retardation Services coerced the defendant in any manner. There is no evidence of record that anyone forced the defendant to talk or threatened him in any way."[6]).

Third, the Supreme Court of the United States has held "that threats to withdraw a governmental benefit such as public employment sometimes makes exercise of the privilege so costly that it need not be affirmatively asserted." *Salinas*, 570 U.S. at 185 (*quoting Garrity v. N.J.*, 385 U.S. 493, 497, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967)).

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provider, Ms. Scott had determined to issue a PB-15, a document permitting a probation officer to take an individual into custody. She also arranged for a law enforcement officer to be present at the time of the execution of the PB-15. However, there is no evidence before the Court that the defendant had actually been taken into custody at the time he made admissions to the probation officer.

[6] *See also Herron v. Commonwealth*, 55 Va. App. 691, 703-04 (2010) (citations omitted) (involving the question of whether the defendant's Fifth Amendment rights were violated when he was questioned by correctional officials as to whether he was in possession of contraband: "[T]he majority of courts in other jurisdictions have rejected defendants' Fifth Amendment claims with regards to introduction of contraband into a correctional facility. A defendant's decision not to reveal drugs concealed on his person does not 'somehow absolve him of responsibility for his actions on the theory that providing him an opportunity to choose between admitting to possession of the [drug] and being charged with introducing that substance into the jail violates the self-incrimination clause of the Fifth Amendment.' Under the circumstances of this case, we cannot say appellant was compelled to incriminate himself. Rather, appellant made a choice not to disclose the drugs concealed on his person.").

Probation, however, is not a "governmental benefit" but, rather, an "an act of grace on the part of the Commonwealth to one who has been convicted and sentenced to a term of confinement." *Pierce v. Commonwealth*, 48 Va. App. 660, 667 (2006); *see also Davis v. Commonwealth*, No. 0462-07-2, 2008 Va. App. Lexis 122, at *7 (2008) (referring to the defendant's probation as a period of "probationary grace from his 15-year penitentiary sentence.").

A grant of active probation, as in the instant case, comes with a series of conditions and restrictions, as reflected by the "Conditions of Probation Supervision," which includes this language: "You are being placed on probation supervision subject to the conditions listed below. The Court may revoke or extend your probation supervision and you are subject to arrest upon cause shown by the Court and/or by the Probation Officer." (Conditions of Probation Supervision, April 24, 2017.) Probation is not a "governmental benefit" but a form of "conditional liberty properly dependent on observance of special [probation conditions]." *Murry v. Commonwealth*, 288 Va. 117, 123-24 (2014) (*quoting Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.' Probation is simply one point (or, more accurately, one set of points,) on a continuum of possible punishments . . . ." *Griffin v. Wis.*, 483 U.S. 868, 874 (1987) (citations omitted); *see also Miller v. Commonwealth*, 25 Va. App. 727, 743-45 (1997) (indicating that a probation officer has "supervisory responsibility for [a probationer]'s conduct and treatment" and is "charged by law with defining a probationer's permissible or impermissible conduct."). A "criminal sanction," even when it affords a defendant conditional liberty, is still a sanction, not a "governmental benefit."

In summary, in order to avail himself of the protection of the Fifth Amendment, the defendant needs to have asserted it. He did not, which alone warrants denial of his challenge to the constitutionality of probation revocation.

The defendant argues, however, that there is language in *Murphy*, *supra*, that supports the position that he did not need to assert his Fifth Amendment privilege in order to prevent the Commonwealth from using his admissions in a probation revocation hearing. (*See* Def.'s Mem. in Denial, 6.) The Court disagrees. The language the defendant relies upon from *Murphy* is as follows:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give 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.

Murphy, 465 U.S. at 435 (footnote omitted).[7]

Even if the Court were to assume that the defendant's admissions could give rise to a subsequent prosecution, the language quoted above does not support the defendant's position. There is no evidence before the Court that the Commonwealth "expressly or by implication" asserted that invocation of the privilege would lead to revocation of probation. Indeed, when the probation officer was asked at the evidentiary hearing what would happen if a probationer invoked his Fifth Amendment privilege, she responded by saying that such a situation had never come up and she would have to "staff" it with her supervisor. Nor do the conditions of probation state that invocation of the privilege would lead to revocation of probation.

The Virginia Court of Appeals, in *Zebbs*, *supra*, set forth the requirement for a valid Fifth Amendment claim in a scenario like the instant case:

> First, the admission sought from an individual must carry a risk of incriminating that individual in a future criminal proceeding. Second, the state must use compulsion in its attempt to obtain the admission. Third, because "mere coercion does not violate the text of the Self-Incrimination Clause," there must be "a 'substantial penalty' [imposed] upon [an individual] after he 'elect[ed] to exercise his Fifth Amendment right not to give incriminating testimony against himself. Failure to establish any one of these three prongs defeats a claim that the Fifth Amendment has been violated.

Zebbs, 66 Va. App. at 375 (citations omitted).

Zebbs involved a defendant convicted of various sex crimes and ordered to complete sex offender treatment as a condition of probation. *See id.* at 371. Treatment required the defendant to admit to having "committed the crimes for which he was on probation." *Id.* Zebbs refused and his probation was revoked and the court re-suspended all but one year of his suspended sentence. *See id.* at 371-73. The Court ultimately held that Zebbs did not meet the first criterion listed

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[7] In *Murphy*, the Supreme Court held that a probationer's Fifth Amendment privilege against self-incrimination was not violated when he confessed to his probation officer to having committed a rape and murder and that confession was subsequently used against him at trial. The Court held, *inter alia*, that the fact that the probation officer could compel Murphy's appearance and truthfulness did not excuse the defendant from the obligation to actually claim the privilege in order to subsequently assert it. *Murphy*, 465 U.S. at 440 ("We conclude, in summary, that since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations. Because he had not been compelled to incriminate himself, Murphy could not successfully invoke the privilege to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution.").

above because the Double Jeopardy Clause of the Fifth Amendment would prohibit a new prosecution associated with the conduct that gave rise to his probationary sentence. *See id.* at 376. Further, Zebbs could not face a perjury prosecution by admitting his guilt because he had actually pled guilty to the underlying offenses. *See id.* at 375-76. Thus, Zebbs did not meet the requirement that "the admission sought from an individual must carry a risk of incriminating that individual in a future criminal proceeding." *Id.* at 375.

The *Zebbs* decision relies in part on a very similar case, *Venable*, *supra*. *See id.* at 374-76. Venable, like Zebbs, was a convicted sex offender who, as a condition of sex offender treatment, was required to admit his responsibility for the crime of conviction. *See id.* at 375. Venable refused and explicitly asserted his Fifth Amendment privilege against self-incrimination. *See id.* Venable was found in violation of his probation but was permitted to remain on probation with a different sex offender treatment provider. *See id.* He was not revoked. *See id.* Nevertheless, Venable argued that the finding of a probation violation contravened his Fifth Amendment rights. *See id.* Specifically, he asserted that because he faced "a possible perjury charge" if he admitted to having committed the crime of conviction, he had a right to assert the privilege against self-incrimination. *Id.* He contended that he could not be found in violation of probation on that basis. *See id.*

The *Venable* Court assumed, "for purposes of this appeal only, that Venable's admission of guilt would be self-incriminating." *Venable*, 48 Va. App. at 388, n. 4. Therefore, he met the first criterion. Nevertheless, the Court denied Venable relief because it held that no "substantial penalty" was imposed on Venable based upon his Fifth Amendment privilege assertion. *Id.* at 389.

Zebbs and *Venable* establish the criteria for evaluating a Fifth Amendment claim. In each case, one of the three required criteria was not met. In the instant case, the defendant does not meet two of the criteria, specifically the second or third requirements.

With regard to the first criterion, the Court will assume for purposes of this opinion only that the defendant's disclosures of past and/or current criminal conduct could give rise to prosecution and, therefore, can be termed "incriminating." Thus, the first criterion set forth in *Zebbs* is met.

The second criterion is not met. For the reasons already set out in this opinion, the Court does not find that the Commonwealth used "compulsion" to obtain admissions because the defendant could have invoked his Fifth Amendment privilege yet failed to do so. Even if the defendant "harbor[ed] a belief that his probation might be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable. Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." *Murphy*, 465 U.S. at 438; *see also Venable*, 48 Va. App. at 390 (footnote omitted) ("Even if we were to assume that the Commonwealth 'could not constitutionally *carry out* a threat to revoke probation for the

legitimate exercise of the Fifth Amendment privilege,' *Murphy*, 465 U.S. at 438 (emphasis added), the trial court in this instance did not actually revoke Venable's probation.").

The third criterion also is not met. That criterion requires imposition of a "substantial penalty." Initially, the Court would note the current posture of this case. The Court has not yet held the revocation hearing and, therefore, has not found the defendant to be in violation of his probation or concluded that a "substantial penalty" should be imposed. However, even if one were to assume that the Court had found the defendant to be in violation of his probation, and even if the Court were to further assume that the Court would impose a "substantial penalty" for that violation, the third criterion still would not be met. That is because the third criterion requires the assertion of the privilege. Here, no privilege was asserted. Rather, the Commonwealth alleges that the defendant was dishonest in his disclosures to the treatment provider and to the probation officer and the Commonwealth also alleges that the defendant made disclosures of current criminal conduct. Neither the Commonwealth nor the defendant asserts actual invocation of the defendant's Fifth Amendment privilege.

In summary, the Court finds no Fifth Amendment violation because the defendant never "claimed it." Moreover, there was no exception that would excuse the defendant's failure to invoke the privilege or that would make the privilege self-executing.

B. The terms of probation were not unreasonable.

The defendant also asserts that the terms of probation were unreasonable. He asserts:

> No matter how one looks at this, Mr. Rhodes was put into an impossible situation. He was not asked to speak about the crime of conviction, but rather other past behavior that could result in life altering consequences for him, including incarceration. Therefore, on its face, this condition of probation is unreasonable and this Court may not punish Mr. Rhodes for this behavior.

(Def.'s Mem. in Denial, 3.) The Court disagrees.

First, a requirement of sex offender treatment for a sex offender is certainly not unreasonable. *See, e.g., McKune v. Lile*, 536 U.S. 24 (2002) (plurality opinion); *Davis v. Commonwealth*, No. 0462-07-2, 2008 Va. App. Lexis 122 (2008).

Second, the defendant's situation was not "impossible." As stated above, the defendant could have, but did not, assert the privilege against self-incrimination.

Third, "the nature of probation is such that probationers should expect to be questioned on a wide range of topic relating to their past criminality." *Murphy*, 465 U.S. at 432. This is no less true when a defendant, like this defendant, has been convicted of a sex crime. *See McCune*, 536 U.S. at 33 (citations omitted) ("Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce

recidivism. An important component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct.").[8]

C. The Fifth Amendment is not a privilege to lie.

The Commonwealth alleges that the defendant was dishonest both to his sex offender treatment provider and his probation officer. This is asserted both as a Condition 6 violation ("I will follow the Probation and Parole Officer's instructions and will be truthful, cooperative, and report as instructed." (Conditions of Probation Supervision, April 14, 2017.)) and as one of the grounds for terminating the defendant from sex offender treatment. (Major Violation Report, May 24, 2018.)

The defendant argues that his alleged dishonesty cannot be used as a basis for revocation because "a person must not be placed in a situation where he would have to lie, incriminate himself, or be punished for his silence." (Def.'s Mem. in Denial, 3.) The Court disagrees.

First, the Court takes issue with the assumption that the defendant was in fact placed in the situation described above. The defendant assumes that the defendant would be "punished for his silence" (*Id.*) but there is no indication that the Commonwealth would have sought to revoke the defendant's probation for the legitimate exercise of the Fifth Amendment privilege against self-incrimination.

Moreover, the Fifth Amendment does not provide an option to lie as an alternative to the assertion of the privilege. *See Herron*, 55 Va. App. at 702:

> Although the Fifth Amendment provides a shield against compelled self-incrimination, "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. 'Proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.'" *Brogan v. United States*, 522 U.S. 398, 404-05, 118 S.Ct. 805, 139 L.Ed. 2d 830 (1998) (*quoting United States v. Apfelbaum*, 445 U.S. 115, 117, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980).).

Herron, 55 Va. App. at 702. Therefore, the defendant may not assert the Fifth Amendment as a shield to protect himself from alleged dishonesty.

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[8] In *McCune*, the respondent was convicted of rape and related crimes. Prior to his release from prison he was required to participate in a Sexual Abuse Treatment Program which required disclosure of all prior sexual activity, including uncharged criminal offenses. Any information disclosed was not privileged and a participant was potentially subject to prosecution based on his disclosures. A refusal to participate in the program resulted in a reduction of prison privileges and transfer to a maximum security unit. In a plurality decision, the Court held that the reduction of privileges and transfer to a maximum security unit did not constitute unconstitutional compulsion in violation of the Fifth Amendment.

D. Conclusion

For the reasons stated in this opinion, the Defendant's denial of probation violation based on asserted violations of the Fifth Amendment and the Virginia Constitution and also based on a contention that the terms of probation were unreasonable, is DENIED. An Order in accordance with this opinion shall issue today.

Sincerely,

[redacted]

Randy I. Bellows
Circuit Court Judge

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER FE-2014-393**
VERSUS	)	
DEREK RICHARD RHODES	)	**INDICTMENT - USING A COMPUTER TO SOLICIT A MINOR (Violation of Probation)**

ORDER

For the reasons stated in the Letter Opinion issued this date, the Defendant's denial of probation violation based upon asserted violations of the Fifth Amendment and the Virginia Constitution and also based on a contention that the terms of probation were unreasonable is **denied**.

Entered on September 27, 2018.

[redacted]

JUDGE RANDY I. BELLOWS

RIB/ccs
FE-2014-393