

CASENOTES

Probation Officer Interrogation of Probationers in Noncustodial Settings and the Probationer's Privilege Against Self-Incrimination: *Minnesota v. Murphy*¹ The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ."² This portion of the fifth amendment, commonly referred to as the privilege against self-incrimination, protects individuals from having to answer incriminating questions in any civil or criminal proceeding, and from the use of compelled testimony as evidence in a subsequent criminal trial.³ As a general rule, in order to come under the privilege's protection, individuals must affirmatively claim the privilege by refusing to respond to questions on the basis that the answers would tend to be incriminating.⁴ Failure to claim the privilege is excused, however, when a person is "compelled" to give incriminating testimony.⁵

Individuals may object to subsequent use of their statements, and if the reviewing court determines that the statements were compelled, they will be excluded from use in evidence at criminal trial.⁶ When confessions are obtained through police interrogations, courts determine whether the statements should be admitted by applying either the *Miranda* rule or the voluntariness standard. Under the *Miranda* rule, the state must satisfy two conditions before it may use a statement obtained through interrogation in its case in chief. First, the state must show that the suspect was advised of his rights prior

¹ 104 S. Ct. 1136 (1984).

² U.S. CONST. amend. V.

³ The fifth amendment provides individuals with the right to refuse to answer incriminating questions without sanction. See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (a witness protected by the privilege against self-incrimination may refuse to answer incriminating questions unless he is granted immunity from the use of his answers against him).

⁴ The privilege is not self-executing. In most contexts, an individual who desires fifth amendment protection must assert it. See *United States v. Monia*, 317 U.S. 424, 427 (1943) (if a witness "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"). For examples of how an individual can claim the privilege see *infra* note 60. Once the privilege is asserted, an individual may not be compelled to answer potentially incriminating questions. See *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968) (dismissal of government employees because they had asserted the privilege and refused to testify violates fifth amendment). If, however, an individual does not object, and instead makes damaging disclosures in response to questioning, the privilege is forfeited and there is no later right to object to the use of the statements in a subsequent criminal trial. *Rogers v. United States*, 340 U.S. 367, 370-71 (1951) (an individual who testifies before a grand jury without claiming the privilege may not later object to the use of incriminating statements against her).

⁵ *Lisenba v. California*, 314 U.S. 219, 241 (1941) (a confession is deemed compelled when a government official denies an individual the "free choice to admit, to deny, or to refuse to answer"). See, e.g., *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968) (statements resulting from proceeding which presented individuals with a choice between surrendering the privilege against self-incrimination or their jobs inadmissible in subsequent criminal trials); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (statements resulting from questioning initiated by law enforcement officers after a suspect has been taken into custody deemed compelled if the suspect is not warned of his rights prior to questioning).

⁶ The fifth amendment, by its terms, excludes evidence obtained in violation of the privilege against self-incrimination. U.S. CONST. amend. V. Exclusion of the confession means that the individual's admissions cannot be used at trial as direct evidence to convict him of a crime.

to any questioning by police officers.⁷ Second, the state must show that the suspect knowingly, intelligently, and voluntarily waived those rights.⁸ *Miranda*, however, applies only when a confession is obtained during a custodial interrogation of a suspect by law enforcement officials.⁹ In cases when a suspect is not questioned while in custody, courts examine the admissibility of confessions through application of the due process voluntariness standard.¹⁰ Under this standard, confessions may be admitted if after considering the "totality of the circumstances," the court determines that the statements were made voluntarily.¹¹

When the interrogation situation involves probation officers questioning probationers, courts have been in conflict as to whether a probation officer is required to give *Miranda* warnings before questioning the probationer.¹² Some courts have also raised

⁷ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). The suspect must be warned that he has the right to remain silent, that anything he says can be used against him, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed if he so desires. *Id.*

⁸ *Id.* at 475-77, 479. See also *Tague v. Louisiana*, 444 U.S. 469, 470 (1980) (per curiam) (reliance upon a presumption that one given *Miranda* warnings understands the rights involved is inconsistent with the burden placed by *Miranda* to show a knowing, voluntary, and intelligent waiver). The voluntariness of the waiver is determined by considering all surrounding circumstances. *Miranda*, 384 U.S. at 475-76.

⁹ See *California v. Beheler*, 463 U.S. 1121, 1123 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam); *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976).

¹⁰ The fourteenth amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV. Due process requires fundamental fairness and justice in the use of evidence. *Lisenba v. California*, 314 U.S. 219, 236 (1941). According to the United States Supreme Court, "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Id.* As an illustration of this concept, the Court stated that "unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt." *Id.* at 236-37.

¹¹ *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). The due process "voluntariness" standard requires an appellate court to independently examine the entire factual record of each case — the "totality of the circumstances" — to determine how much pressure on the suspect is permissible. *Id.* A confession is involuntary if the individual's will has been overborne by the conduct of the state's law enforcement officials and the confession is not freely self-determined. *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961). For a discussion of the factors involved in assessing the voluntariness of an individual's responses see *infra* notes 71-78 and accompanying text.

¹² Most courts have held that probation officers are required to give *Miranda* warnings if a probationer is in custody at the time questioned. See, e.g., *Marrs v. State*, 53 Md. App. 230, 452 A.2d 992 (1982) (in-custody probationers must be warned of their rights prior to questioning because probation officers are law enforcement officers within the meaning of *Miranda*, and probationers are under heavy psychological pressure to answer questions asked by probation officers). See also *United States v. Steele*, 419 F. Supp. 1385, 1386-87 (W.D. Pa. 1976) (statements taken without warnings from probationer who was being transported to jail by probation officer held to be inadmissible); *State v. Magby*, 113 Ariz. 345, 349, 554 P.2d 1272, 1276 (1976) (statements taken without *Miranda* warnings from probationers in jail by probation officers held to be inadmissible); *State v. Lekas*, 201 Kan. 579, 582-84, 442 P.2d 11, 15-16 (1968) (*Miranda* warnings must be given when parole officers investigate the commission of a new crime by a parolee who is in custody).

Other courts have held that *Miranda* is totally inapplicable to the probationary relationship, and thus, warnings were not required even when the probationer was in custody. See *Nettles v. State*, 248 So. 2d 259, 260 (Fla. Dist. Ct. App. 1971) (probationers waive their right to warnings from probation officers when they accept probation); *Connell v. State*, 131 Ga. App. 213, 214, 205 S.E.2d 513, 515 (1974) (probationer already advised of fifth amendment rights when taken into

the issue of whether the probation officer's ability to recommend revocation of probation amounts to a threat of legal sanction which makes the probationer's statements involuntary under the due process voluntariness standard.¹³

In *Minnesota v. Murphy*,¹⁴ the Supreme Court resolved these issues. First, the Court held that *Miranda* warnings are not required to be given by probation officers during noncustodial meetings.¹⁵ Second, the Court ruled that statements made to a probation officer were not involuntary under the due process standard because fear of probation revocation for refusing to answer a probation officer's questions is not reasonable.¹⁶

The respondent in *Minnesota v. Murphy*, Marshall Murphy, was charged with criminal sexual conduct in 1982. After pleading guilty to a reduced offense of false imprisonment, he was placed on probation for three years.¹⁷ The terms of Murphy's probation directed that he attend a treatment program for sexual offenders, report to his probation officer "as directed," and be truthful with that officer "in all matters."¹⁸ Furthermore, he was informed that failure to comply with any of these conditions could result in his probation being revoked.¹⁹ Thereafter, Murphy began a series of regular monthly meetings with his probation officer at her office,²⁰ and also participated in a treatment program at Alpha House, a rehabilitation center for sexual offenders.²¹

During a therapy session, Murphy admitted to an Alpha House counselor that he had committed a rape and murder in 1974.²² The counselor subsequently contacted

custody). See generally Note, *State v. Magby: Application of the Miranda Doctrine to In-Custody Probationers*, 7 CAP. U.L. REV. 103 (1977); Comment, *Probation Officer Interrogation of an In-Custody Probationer: An Analysis of the Applicability of the Miranda Doctrine and the Voluntariness Standard*, 10 U.S.F.L. REV. 441 (1976).

¹³ See *People v. Garcia*, 240 Cal. App. 2d 9, 12-13, 49 Cal. Rptr. 146, 148 (1966) (absent evidence that statements are obtained by threats, or promises or by any sort of pressure, probationers' statements to probation officer are voluntary); *State v. Gallagher*, 38 Ohio St. 2d 291, 297, 313 N.E.2d 396, 400 (1974), *vacated*, 425 U.S. 257 (1976), *on remand*, 46 Ohio St. 2d 225, 227-28, 348 N.E.2d 336, 337-38 (1976) (parolee's awareness that his parole officer has authority to recommend that he return to prison deters him from refusing to answer the parole officer's questions and renders the parolee's statements involuntary).

¹⁴ 104 S. Ct. 1136 (1984).

¹⁵ *Id.* at 1144-46.

¹⁶ *Id.* at 1146-49.

¹⁷ *Id.* at 1140.

¹⁸ *Id.*

¹⁹ *Id.* Murphy knew his probation officer had the power to recommend revocation. See *infra* note 21.

²⁰ *Id.* Murphy would call his probation officer each month to schedule an appointment. The probation officer described the general interview format as follows: "We would discuss any changes that had occurred in his . . . life situation since I had last met with him, [and] his progress [in a treatment program] . . . He discussed his employment quite often, many problems that arose with that, or with personal relationships." Brief of Petitioner, Appendix C at 5-6, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984) [hereinafter cited as *Pet. App. C*].

²¹ 104 S. Ct. at 1140. In July, 1981, Murphy stopped participating in the treatment program. *Id.* His probation officer wrote to Murphy and informed him that failure to contact her promptly to set up a meeting would result in an immediate request for a warrant for his arrest. *Id.* Murphy scheduled a meeting at which the officer agreed not to seek revocation of probation for his non-participation in the treatment program. *Id.* Since Murphy was employed and doing well in other areas, his probation officer did not require him to continue to attend the treatment program. *Id.*

²² *Id.* In 1974, Murphy was twice questioned by the Minneapolis Police concerning the rape and murder of a teenage girl. No charges were then brought. *Id.*

Murphy's probation officer.²³ Although the officer wanted to inform the police, the counselor's information could not be disclosed at that point because of applicable confidentiality laws.²⁴ The probation officer, however, wrote Murphy a letter requesting that he arrange a meeting to discuss treatment for the rest of his time on probation.²⁵ Pursuant to that letter, Murphy contacted the probation officer and arranged to meet with her.²⁶

At the outset of the meeting, the officer confronted Murphy with what she had learned from the Alpha House counselor.²⁷ Murphy became angry and stated that he "felt like calling a lawyer."²⁸ The probation officer responded by indicating that Murphy could not call from her office and would have to settle that problem later.²⁹ She added that her concern was to talk to him about the relationship between the rape-murder and the incident that led to his conviction for false imprisonment.³⁰

Murphy responded by denying that he was guilty of the false imprisonment charge.³¹ When the officer questioned Murphy about the rape-murder, Murphy eventually admitted that he had committed the crimes, but explained that further treatment was not necessary because the rape-murder was caused by a drug habit that he had since broken.³² At the end of the conversation, the probation officer told Murphy for the first time that she was obligated to report what she had learned to the police, and encouraged him to turn himself in.³³ Murphy then left the office.³⁴ After talking with an attorney, Murphy

²³ *Id.*

²⁴ *Id.* at 1140 n.1. Alpha House was covered by federal statutes which keep patient records in federally assisted rehabilitation programs confidential. See 21 U.S.C. § 1175; 42 U.S.C. § 4582. The Court noted that the counselor legitimately informed the probation officer of Murphy's admissions. 104 S. Ct. at 1140 n.1. The Court assumed, however, that the counselor could not have provided the information to the police nor could the probation officer have made the information available for use in a criminal trial. *Id.* Thus, had Murphy's probation officer informed the police at that point, the information could not have been used to convict Murphy. *Id.*

²⁵ *Id.* at 1140. The probation officer knew that she would report any incriminating statements which Murphy made at the meeting. *Id.* The Court, however, indicated that there was no evidence that the sole purpose of the meeting was to obtain incriminating statements for the police. *Id.* at 1140 n.2. Moreover, the Court noted that it made no difference if a desire to obtain incriminating statements was the probation officer's sole purpose in calling the meeting. *Id.*

²⁶ *Id.* at 1140.

²⁷ *Id.*

²⁸ *Id.* The Supreme Court accepted the trial court's conclusion that Murphy's statement did not constitute an invocation of the privilege against self-incrimination. *Id.* at 1140 n.3. The trial court found that Murphy had expressed the desire to speak with a lawyer solely in the context of a civil suit for the breach of confidentiality. *Id.* Because the Minnesota Supreme Court did not reach this issue, the Supreme Court did not question the trial court's factual finding. *Id.* The Supreme Court did, however, note that Murphy had no federally protected right to have an attorney present at the meeting because he was not in custody. *Id.* Thus, the Supreme Court concluded Murphy's request for a lawyer was not sufficient to invoke the privilege against self-incrimination. *Id.*

²⁹ *Id.* at 1140-41.

³⁰ *Id.* at 1141.

³¹ *Id.*

³² *Id.* See also Pet. App. C, *supra* note 20, at 17-18.

³³ 104 S. Ct. at 1141.

³⁴ *Id.* The probation officer testified that her door was unlocked and that Murphy was physically free to leave at any time without talking with her. Pet. App. C, *supra* note 20, at 17-18. Murphy testified that he did not feel free to leave because that would have been a violation of his probation. *Id.*

told his probation officer that he had been advised not to turn himself in to the police.³⁵ The probation officer then procured issuance of a warrant for his arrest.³⁶ Subsequently, Murphy was arrested and indicted for first degree murder as a consequence of the testimony given by his probation officer.³⁷

At trial, Murphy moved to suppress the statements he had made to his probation officer on the grounds that they were obtained in violation of his fifth amendment privilege against self-incrimination and his fourteenth amendment right to due process.³⁸ After a hearing, the trial court denied the motion and held the statements admissible.³⁹ After Murphy was convicted of first degree murder, he appealed directly to the Minnesota Supreme Court. The Minnesota Supreme Court reversed, holding the confession inadmissible because the probation officer did not warn Murphy of his privilege against self-incrimination.⁴⁰

After the Supreme Court of the United States granted certiorari,⁴¹ it reversed the Minnesota Supreme Court and held that Murphy's constitutional rights were not violated by the admission at trial of his confession to his probation officer.⁴² The Court noted that there are only a few exceptions to the rule that individuals must affirmatively claim the privilege. The Court added that such exceptions included situations where individuals are interrogated while in custody and where individuals are threatened with penalties for asserting the privilege.⁴³ Because it first determined that Murphy was not placed in an inherently coercive setting akin to custodial interrogation,⁴⁴ the Court

³⁵ 104 S. Ct. at 1141.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Because the trial court found the setting of the interview was not "custodial," it held that *Miranda* was not applicable. *Id.* See *supra* note 9 and cases cited therein. Thus, the fact that no *Miranda* warnings were given to Murphy did not require the exclusion of his statements. After finding *Miranda* inapplicable, the trial court also found that Murphy's statements were voluntary under the due process voluntariness standard. 104 S. Ct. at 1141.

⁴⁰ *State v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982). The court began by recognizing that, as a general rule, individuals must assert their privilege against self-incrimination before they will come under the fifth amendment's protection. *Id.* at 342-43. The court, however, added that Murphy's failure to claim the privilege did not bar his later reliance on the privilege. *Id.* at 344. The court explained that while Murphy was not in custody in the usual sense of being under arrest, his probationary status and the nature of the meeting were sufficiently like custodial interrogation that no affirmative claim of the privilege was required. *Id.* The court stated that Murphy's status as a probationer was analogous to that of an individual being interrogated in police custody because three factors restricted Murphy's freedom of action. The first factor was that Murphy was under legal compulsion to attend meetings. The second factor was that he was under court order to respond truthfully to the probation officer's questions. The final factor was that the probation officer had substantial reason to believe that Murphy's answers were likely to be incriminating. *Id.* According to the Minnesota Supreme Court, these three factors mandated that Murphy be warned by the probation officer of his privilege against self-incrimination before questioning. *Id.* The court concluded that Murphy's statements were barred "as a matter of due process" because Murphy's probation officer failed to give warnings when she had already decided to report his answers to the police. *Id.*

⁴¹ *Minnesota v. Murphy*, 459 U.S. 1145 (1983)(grant of certiorari).

⁴² 104 S. Ct. at 1149.

⁴³ *Id.* at 1143-48. See *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁴ *Id.* at 1144-46.

concluded that the probationer was not "in custody" and, therefore, had no right to receive the *Miranda* warnings.⁴⁵ Second, the Court determined that Murphy's probation conditions did not contain an impermissible threat which penalized his exercise of the privilege.⁴⁶ Therefore, the Court concluded that Murphy's disclosures were not compelled self-incriminations, and that he could not later invoke the privilege to prevent the information given to the probation officer from being used against him.⁴⁷

The *Murphy* decision is significant in three respects. First, the case is important for holding that *Miranda* warnings are not required to be given to probationers by probation officers during noncustodial interviews.⁴⁸ By so holding, the Court in *Murphy* continued the restrictive approach to *Miranda* protection that has prevailed in its recent decisions.⁴⁹ Second, the *Murphy* opinion demonstrates that the Court is requiring a significant and concrete threat to an individual upon exercise of the privilege against self-incrimination before that individual can successfully object to the use of his confession at a subsequent criminal trial. The implicit threat of probation revocation, according to the *Murphy* Court, is not enough to excuse the failure to affirmatively claim the privilege.⁵⁰ Finally, the decision also has the practical effect of forewarning probationers that they have the constitutional right to refuse to respond to their probation officers' questions if their answers would be incriminating.⁵¹

This casenote will examine and criticize the Supreme Court's decision in *Murphy*. Section one examines the Supreme Court precedent interpreting the privilege against self-incrimination existing prior to the *Murphy* decision. Section two then describes the reasoning of the majority and dissenting opinions in *Murphy*. Section three analyzes these opinions and contends that the Court's analogy of the probationer's situation to that of a witness was not appropriately applied to the circumstances of Murphy's interview. This section will argue that Murphy's interview involved sufficient threat to render his statements involuntary. The final section of this casenote will examine the Court's conclusion that *Miranda* warnings were not necessary in Murphy's situation. It will be maintained

⁴⁵ *Id.* at 1146.

⁴⁶ *Id.* at 1146-48.

⁴⁷ *Id.* at 1149.

⁴⁸ *Id.* at 1146.

⁴⁹ See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (person questioned in police station held not to be in custody); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (statement that is inadmissible in criminal trial as result of a failure to give *Miranda* warnings may be used to impeach defendant's credibility).

⁵⁰ See 104 S. Ct. at 1146-48.

⁵¹ *Id.* at 1147 n.7; see also *id.* at 1150 (Marshall, J., dissenting). According to the Court, a probationer's right to refuse to respond to questions asked by a probation officer depends upon whether the answers would be incriminating in a criminal proceeding or would result in a probation revocation proceeding. *Id.* at 1147 n.7. A probationer has the right to refuse to respond if the answers would be incriminating in a criminal trial. *Id.* However, a probationer must respond to questions relating to his probation status even when the answers might expose him to a probation revocation hearing. *Id.* Therefore, a probationer does not have the right to refuse to respond if the answers reveal that a condition of probation has been violated. *Id.*

In dicta, the Court explained that revocation of probation is not a criminal proceeding within the meaning of the privilege. *Id.* Thus, probationers may be compelled, without violation of the privilege, to answer questions that might result in revocation of probation. *Id.* If, however, the answer to a question might lead both to criminal sanctions and to probation revocation, the probationer may be compelled to respond if the state grants an express guarantee of immunity from criminal liability. *Id.*

that the Court's emphasis on the "custody" requirement rather than the "coercive" atmosphere present in *Murphy* is not in accordance with the spirit of the *Miranda* decision.

1. THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE ADMISSIBILITY OF STATEMENTS: A REVIEW OF PRECEDENT

The fifth amendment provides that a person cannot be compelled to be a witness against himself in any criminal case.⁵² One of the reasons the privilege against self-incrimination was included in the Bill of Rights in 1790 was to protect people from suffering sanctions for refusing to incriminate themselves.⁵³ The framers of the Constitution were aware of the English system at that time which presented a dilemma to individuals faced with incriminating questions. If an individual answered truthfully, the government could use the answer against him.⁵⁴ On the other hand, he could be charged with perjury if he lied.⁵⁵ Moreover, if the individual simply refused to answer, the government could charge him with contempt.⁵⁶ The fifth amendment privilege protects against this dilemma by providing individuals with the right to refuse to respond to incriminating questions posed by government officials in formal or informal proceedings.⁵⁷

In general, the privilege against self-incrimination is not self-executing. That is, the privilege does not protect people from all incriminating statements.⁵⁸ Rather, if an individual desires the protection of the privilege, he must affirmatively assert it or he will not later be considered to have been compelled within the meaning of the fifth amendment.⁵⁹ For example, a person may claim the privilege by stating, "I refuse to

⁵² U.S. CONST. amend. V.

⁵³ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The privilege was elevated to a constitutional right in order to avoid the "cruel dilemma of self-accusation, perjury, or contempt." *Id.* For a discussion of the history of the privilege against self-incrimination see generally E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

⁵⁴ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

⁵⁸ The fifth amendment does not prohibit the government from asking incriminating questions. *United States v. Mandujano*, 425 U.S. 564, 574-75 (1976) (the incriminating nature of a question does not, by itself, excuse the requirement of a timely claim of the privilege); *United States v. Monia*, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting) ("[t]he Constitution does not forbid the asking of criminative questions").

Moreover, the fifth amendment does not preclude a person from voluntarily giving incriminating information. In *Miranda*, the Court stated that "[v]olunteered statements of any kind are not barred by the Fifth Amendment . . ." 384 U.S. at 478. See also *United States v. Washington*, 431 U.S. 181, 187 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable [T]he Fifth Amendment proscribes only self-incrimination obtained by a 'genuine compulsion of testimony' Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.").

⁵⁹ *Garner v. United States*, 424 U.S. 648, 653 (1976). The Court has indicated that unless a person objects, the government may assume that it is not eliciting incriminating testimony. *Id.* at 655. According to the Court, only the individual knows whether the disclosure sought may incriminate him, and therefore, the burden lies with him to make a timely assertion of the privilege. *Id.* If, instead, the Court noted, "he discloses the information sought, any incriminations properly are viewed as not compelled." *Id.*

answer on the ground of the fifth amendment privilege against self-incrimination." The Supreme Court has noted that all that is necessary to invoke the privilege is an objection stated in language that can be understood as an attempt to assert the privilege.⁶⁰ The individual forfeits the protection of the privilege if he answers an incriminating question instead of claiming the privilege against self-incrimination.⁶¹

This general rule, however, is subject to exception when the individual is compelled to give incriminating answers. An individual is "compelled" when his free will is overborne by official action and he has been denied the "free choice to admit, to deny, or to refuse to answer."⁶² For example, the Court has held that a confession is compelled in situations where an individual is threatened with a penalty for asserting the privilege,⁶³ or where an individual in custody is not advised of his rights before being interrogated.⁶⁴ There is no requirement that the privilege must be claimed when compulsion is used to procure a confession. Rather, the fifth amendment confers protection by excluding the use of the compelled confession as evidence in a subsequent criminal trial.

This section will examine Supreme Court precedent prior to *Murphy* which dealt with the invocation of the privilege against self-incrimination and the admissibility of confessions in two contexts. The Court's treatment of the privilege and the standards for determining the admissibility of confessions will first be examined in the context of custodial interrogation. Next, because the *Murphy* Court analogized the questioning of probationers to in-court examination of witnesses, the section will review the effect of the fifth amendment privilege on the admissibility of in-court statements.

A. Custodial Interrogation: The Privilege and Standards for the Admissibility of Confessions

Prior to 1964, the sole standard for the admissibility of a confession was its voluntariness under the fourteenth amendment guarantee of due process.⁶⁵ The due process clause limits the type of conduct in which a state may engage to obtain evidence in a criminal investigation.⁶⁶ Under this standard, a court reviews claims of compulsion by examining the particular circumstances of an interrogation in order to determine whether a confession is voluntary.⁶⁷ Precedent suggests that the due process voluntariness standard has three goals. The first goal is to ensure that convictions are based on reliable and trustworthy evidence because compelled confessions are viewed as inherently un-

⁶⁰ *Quinn v. United States*, 349 U.S. 155, 165, 163-65 (1955) (references to "the first and fifth amendment" and "the first amendment to the Constitution, supplemented by the fifth amendment" in refusing to answer questions held sufficient to invoke the privilege's protection). See also *Emspak v. United States*, 349 U.S. 190, 194 (1955) (statement that refusal to answer was based "primarily [on] the first amendment, supplemented by the fifth" held sufficient to invoke the privilege against self-incrimination).

⁶¹ See *supra* note 4 and cases cited therein.

⁶² *Lisenba v. California*, 314 U.S. 219, 241 (1941).

⁶³ See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (statements obtained from police officer who was threatened with removal from police department if he claimed the privilege held to be inadmissible).

⁶⁴ See *Miranda*, 384 U.S. at 478-79 (statements obtained without warning a person in custody of his rights conclusively presumed coerced and held to be inadmissible).

⁶⁵ See *supra* notes 10-11.

⁶⁶ See *supra* notes 10-11.

⁶⁷ See, e.g., *Greenwald v. Wisconsin*, 390 U.S. 519, 520-21 (1968) (per curiam) (statements given in police custody held to be involuntary under the totality of the circumstances).

reliable.⁶⁸ The second possible goal of the voluntariness standard is deterrence of improper police conduct which offends the community's sense of fair play and justice.⁶⁹ The third goal is to assure that a defendant's confession is the product of his free and rational choice.⁷⁰

In assessing whether a confession is voluntary, the United States Supreme Court has traditionally considered the "totality of the circumstances."⁷¹ This analysis involves an evaluation of various factors including the age of the accused,⁷² his level of intelligence,⁷³ whether the accused has been advised of his constitutional rights,⁷⁴ the length of detention,⁷⁵ and the nature of the questioning.⁷⁶ Each of these factors plus all of the surrounding circumstances are relevant in determining the voluntariness of the confession.⁷⁷ If, after reviewing the totality of the circumstances, the Court determined that a confession was involuntary, that confession was excluded from evidence at criminal trial.⁷⁸ For example, in *Greenwald v. Wisconsin*,⁷⁹ the Court held that several factors rendered a confession involuntary under the totality of the circumstances: the accused had a ninth-grade education; while in police custody he was not advised about his rights; he was not provided with counsel despite his request for a lawyer; he was not provided with food or medication; and he was interrogated by several officers in a small room late at night and then again early in the morning.⁸⁰

Apparently dissatisfied with its inability to articulate a clear and predictable definition of voluntariness in the context of police interrogations,⁸¹ the Supreme Court adopted a

⁶⁸ *Ward v. Texas*, 316 U.S. 547, 555 (1942) (the effect of telling a person of threats of mob violence and questioning him continuously would make that person willing to make any statement that the police wanted him to make).

⁶⁹ *Rogers v. Richmond*, 365 U.S. 534, 535 (1961) (police indicated that petitioner's wife would be taken into custody if he did not confess); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936) (defendant beaten until he confessed).

⁷⁰ *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (when an individual's will has been "overborne and his capacity for self-determination critically impaired," the use of his confession offends due process). See also *Lynum v. Illinois*, 372 U.S. 528, 529 (1963) (defendant threatened with deprivation of financial assistance for her minor children and told that they would be taken away from her).

⁷¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-27 (1972).

⁷² *Haley v. Ohio*, 332 U.S. 596, 598 (1947) (for several days police refused request of 15 year old boy to see lawyer or mother).

⁷³ *Fikes v. Alabama*, 352 U.S. 191, 196 (1956) (uneducated person of low mentality or mentally ill).

⁷⁴ *Davis v. North Carolina*, 384 U.S. 737, 739-40 (1966).

⁷⁵ *Chambers v. Florida*, 309 U.S. 227, 230-31 (1939) (black defendants questioned by relays of white officers all week and all of one night).

⁷⁶ *Ashcraft v. Tennessee*, 322 U.S. 143, 148-51 (1943) (petitioner held incommunicado for thirty-six hours, during which time, without sleep or rest, he had been interrogated by relays of officers).

⁷⁷ *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1972) (no single factor is determinative of the voluntariness of a confession).

⁷⁸ *Culombe v. Connecticut*, 367 U.S. 568, 635 (1961) (due process precludes the use of involuntary statements).

⁷⁹ 390 U.S. 519 (1968).

⁸⁰ *Id.* at 519-20.

⁸¹ See Kamisar, *What is an 'Involuntary' Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 *RUTGERS L. REV.* 728 (1963). Under this critique, the voluntariness standard proved to be flexible and elusive: "The real reasons for excluding confessions have too

standardized approach to these interrogations in the 1964 decision of *Miranda v. Arizona*.⁸² In *Miranda*, the Court held that statements elicited by law enforcement officers during "custodial interrogation" were per se inadmissible unless full compliance with certain procedural safeguards to protect the privilege against self-incrimination had been demonstrated.⁸³ In establishing this rule, the *Miranda* Court first observed that coercive practices had often been used by the police in order to elicit confessions.⁸⁴ The Court also recognized that in-custody interrogation itself was an inherently coercive process principally designed to overbear the free will of the accused.⁸⁵ Finding that the due process voluntariness test did not provide adequate protection for the constitutional rights of suspects, the Court concluded that more stringent constitutional safeguards were necessary to neutralize the coercive pressures inherent in custodial interrogation so that suspects would have a "full opportunity to exercise the privilege against self-incrimination."⁸⁶

Accordingly, the *Miranda* Court held that law enforcement officials must inform persons held in custody of their rights prior to interrogation.⁸⁷ The suspect must be warned that he has the right to remain silent, that any statement he makes may be used against him, that he has the right to the presence of an attorney, and if he cannot afford a lawyer, one will be appointed to represent him if he so desires.⁸⁸ If the person is not warned, any resulting statements are inadmissible in a subsequent criminal prosecution regardless of whether they were voluntarily given.⁸⁹ Custodial interrogation is, therefore, one exception to the general rule that the privilege against self-incrimination must be affirmatively claimed.

While *Miranda* required warnings to be given prior to custodial interrogation, the Court was vague in spelling out what amounted to "custody."⁹⁰ In *Miranda*, the Court stated: "[b]y custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁹¹ Aside from this statement, the Court in *Miranda* did

long been obscured by traditional language." *Id.* at 759. "Voluntary" and "involuntary" are words, Kamisar noted, that needlessly obstruct clear thinking. *Id.* Indeed, the Court itself has referred to the "voluntariness" standard as "an amphibian" which "purports at once to describe an internal psychic state and to characterize that state for legal purposes." *Columbe v. Connecticut*, 367 U.S. 568, 604-05 (1961).

⁸² 384 U.S. 436, 444-45 (1964). *Miranda* sought to avoid problems inherent in the voluntariness doctrine by establishing a per se exclusionary rule. See Comment, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188, 190-91 (1975) (*Miranda* replaced subjective standard of admissibility with objective test).

⁸³ 384 U.S. at 444-45. The defendant, accused of kidnapping and rape, had been taken to a police station and interrogated for two hours without prior warnings of his constitutional rights. *Id.* at 491-92. The *Miranda* Court held that use of the confession so obtained violated the privilege against self-incrimination. *Id.* at 492.

⁸⁴ *Id.* at 445-55.

⁸⁵ *Id.* at 455-56.

⁸⁶ *Id.* at 457, 468-69.

⁸⁷ *Id.* at 467-68, 479.

⁸⁸ *Id.* at 467-73, 479.

⁸⁹ *Id.* at 492. The Court noted that no statement would be considered a "product of [an accused's] free choice" without the warnings. *Id.* at 458.

⁹⁰ See generally Comment, *Custodial Interrogation*, 35 TENN. L. REV. 604 (1968) (exploration of factors relevant to determine custody).

⁹¹ 384 U.S. at 444. The Court utilized similar phraseology in three additional places in discussing when the right to be warned arises. *Id.* at 467, 477, 478.

not further define situations when a person is entitled to warnings.⁹² In a series of subsequent cases, therefore, the Court has had to determine whether an interrogation situation was "custodial" for purposes of receiving *Miranda* protection.⁹³

In two early cases, the Court demonstrated that *Miranda* was not limited in application to police station interrogations. In the 1968 case of *Mathis v. United States*,⁹⁴ a federal tax investigator questioned an individual who was in prison on other charges.⁹⁵ The Court indicated that a person does not have to be "in custody" in connection with the case under investigation in order to qualify for protection under *Miranda*.⁹⁶ The Court found that the appellant, Mathis, was in custody when questioned by the tax investigator because he was in jail.⁹⁷ Tax investigators are required to give *Miranda* warnings, the Court held, when the person under investigation is "in custody." Because the privilege against self-incrimination had been infringed upon by the failure to give warnings, the Court held that Mathis' statements were inadmissible at his criminal trial.⁹⁸

A year later in the case of *Orozco v. Texas*,⁹⁹ police officers questioned a suspect in his bedroom at four o'clock in the morning about a murder without giving *Miranda* warnings.¹⁰⁰ The Court determined that although Orozco was interrogated in familiar surroundings, he was not free to leave when he was questioned.¹⁰¹ The Court held that because his freedom of action was significantly restricted, the use of Orozco's admissions obtained without prior *Miranda* warnings was a violation of the fifth amendment.¹⁰²

Subsequent cases demonstrated that the Court was making "custody," as defined in *Miranda*, the sole determinant of when the right to receive warnings accrued. In the 1976 case of *Beckwith v. United States*,¹⁰³ the Court held that *Miranda* warnings are not required if an investigation has merely "focused" on a suspect.¹⁰⁴ Beckwith, the appellant in the case, answered the questions of two IRS agents in his home and was later charged with income tax evasion.¹⁰⁵ Although at the time of the interview the investigation had "focused" on Beckwith, the Court noted that *Miranda* was not premised upon that factor

⁹² *Miranda* and its companion cases all involved interrogation in a police dominated atmosphere. As these settings easily qualified as custody, no detailed analysis of being deprived of one's freedom of action in a significant way was necessary.

⁹³ For a review of the Court's post-*Miranda* interpretation of what constitutes custody see Comment, *Miranda v. Arizona: The Emerging Pattern*, 12 U. RICH. L. REV. 409, 420 (1978).

⁹⁴ 391 U.S. 1 (1968).

⁹⁵ *Id.* at 2.

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 4-5.

⁹⁸ *Id.* at 5.

⁹⁹ 394 U.S. 324 (1969).

¹⁰⁰ *Id.* at 325.

¹⁰¹ *Id.* at 327. The Court noted that although Orozco was interrogated in familiar surroundings, the interrogation was coercive:

At about 4 a.m., four police officers arrived at petitioner's boardinghouse, were admitted by an unidentified woman, and were told that petitioner was asleep in the bedroom. All four officers entered the bedroom and began to question petitioner. From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was "under arrest."

Id. at 325.

¹⁰² *Id.* at 327.

¹⁰³ 425 U.S. 341 (1976).

¹⁰⁴ *Id.* at 347.

¹⁰⁵ *Id.* at 343.

alone.¹⁰⁶ The Court recognized that the *Miranda* Court's primary concern was with the compulsive nature of custodial interrogation.¹⁰⁷ In the absence of custody, as was the case with the IRS investigation at issue in *Beckwith*, the Court held that no warnings were necessary.¹⁰⁸

The Supreme Court continued its literal construction of "custodial interrogation" one year later in *Oregon v. Mathiason*.¹⁰⁹ The defendant, Mathiason, had been named as a prime burglary suspect.¹¹⁰ At the request of state police officers, Mathiason went to the state patrol office.¹¹¹ During a closed door interview, the police officer told Mathiason that he believed him to be guilty of the burglary and falsely informed him that his fingerprints had been found at the scene.¹¹² Mathiason confessed and then was allowed to leave.¹¹³

In a per curiam opinion, the Court overturned the ruling of the Oregon Supreme Court which had determined that Mathiason was questioned in the "coercive environment" of a police station and therefore was in "custody."¹¹⁴ The Court pointed out that a custodial situation within the meaning of *Miranda* is not created merely because the questioning takes place in the normally coercive environment of a police station.¹¹⁵ According to the Court, because there was not a formal arrest or any restraint on freedom of movement of the degree associated with formal arrest, the traditional coercive atmosphere of a police station was lacking.¹¹⁶ Therefore, the Court concluded, no *Miranda* warnings were required.

As the cases summarized above demonstrate,¹¹⁷ while the Supreme Court originally took a flexible approach in determining when an interrogation by law enforcement officials is custodial for purposes of receiving *Miranda* protection, in recent years the Court has developed a "literal approach" to this issue. The Court has required actual arrest or restraint on freedom of movement of the degree associated with formal arrest before *Miranda* warnings are necessary. Where individuals questioned by the police are not in custody, the admissibility of statements is determined by the pre-*Miranda* voluntariness standard.

¹⁰⁶ *Id.* at 344.

¹⁰⁷ *Id.* at 345-47.

¹⁰⁸ *Id.* at 348. The Court found that Beckwith was not in custody because he was not under arrest and was interviewed in a friendly environment. *Id.*

¹⁰⁹ 429 U.S. 492 (1977) (per curiam).

¹¹⁰ *Id.* at 493.

¹¹¹ *Id.*

¹¹² *Id.* The Court held that the officer's false statement was not relevant for evaluating whether custody was present for *Miranda* purposes. *Id.* at 496.

¹¹³ *Id.* at 493-94.

¹¹⁴ *See id.* at 494.

¹¹⁵ *Id.* at 495. The Court noted that:

[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment" *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody". It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Id.

¹¹⁶ *Id.*

¹¹⁷ *See supra* notes 94-116 and accompanying text.

B. The Privilege and Witnesses

Besides custodial interrogation, another exception to the general rule that the privilege against self-incrimination must be claimed exists where the state threatens a witness with a penalty for the exercise of the privilege. The Supreme Court has indicated that the ordinary witness¹¹⁸ does not have an absolute right to refuse to testify.¹¹⁹ The prosecution may freely interrogate a witness even on potentially incriminating matters.¹²⁰ The Court has emphasized that the witness must assert the privilege and show that he faces a realistic threat of self-incrimination.¹²¹ If a witness under legal compulsion to testify makes disclosures instead of claiming the privilege, the Court has consistently stated that the government has not compelled him to incriminate himself.¹²² In the 1977 decision of *United States v. Washington*,¹²³ for example, the Supreme Court held that a witness called to testify before a grand jury was not compelled where he did not claim the privilege against self-incrimination.¹²⁴ The respondent in the case, Washington, testified before a grand jury investigating a motorcycle theft in which he was implicated.¹²⁵ Later, he was indicted for grand larceny.¹²⁶ The Court held that Washington's decision not to assert the privilege was voluntary even though the grand jury room might have exerted some pressure on him.¹²⁷ The Court reasoned that the situation contained other safeguards to offset the environment.¹²⁸ For example, Washington was

¹¹⁸ An ordinary witness is a person who gives evidence and testimony under oath in a judicial proceeding. BLACK'S LAW DICTIONARY 1438 (5th ed. 1979).

¹¹⁹ *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (the privilege against self-incrimination is the only substantial right afforded a witness before a grand jury who, once subpoenaed, has a duty to appear and testify); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964) (White, J., concurring) (the government has broad power to compel citizens to testify in court or before grand juries).

¹²⁰ *United States v. Monia*, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting) ("[t]he Constitution does not forbid the asking of criminative questions").

¹²¹ *Maness v. Meyers*, 419 U.S. 449, 473 (1976) (White, J., concurring) (a witness may not be required to answer a question if there is some rational basis for believing that it will incriminate him); *Lefkowitz v. Turley*, 414 U.S. 70, 78-79 (1973) (a witness protected by the privilege may refuse to answer unless he is granted immunity from the use of his answers against him).

¹²² *United States v. Kordel*, 397 U.S. 1, 7-10 (1970) (witnesses who give incriminating testimony instead of asserting the privilege have not been compelled to answer in violation of the fifth amendment); *United States v. Monia*, 317 U.S. 424, 427 (1943) ("The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. 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.").

¹²³ 431 U.S. 181 (1977).

¹²⁴ *Id.* at 188.

¹²⁵ *Id.* at 183. A stolen motorcycle was found in the rear of defendant's van after the police stopped the van for a traffic offense. *Id.* The van was being driven by two of defendant's friends. *Id.* The defendant told the grand jury that the motorcycle was in his van because he had stopped to assist an unknown motorcyclist. *Id.* After he put the motorcycle in his van to take it for repairs, the defendant testified, the van stalled and he went to a gas station to call his friends for help leaving the unknown motorcyclist with the van. *Id.* The defendant said he waited at the gas station and when he returned to the spot where he had left the van, the van was not there. *Id.* The defendant testified that he assumed his friends had repaired the van and driven it away. *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 187-88.

¹²⁸ *Id.* at 188.

advised of his right to remain silent at the outset of the proceeding.¹²⁹ The Court indicated, however, that warnings were not required to be given to a grand jury witness even if the witness was a potential defendant.¹³⁰

The Court has held, however, that unless the state has granted "use immunity,"¹³¹ it may not compel testimony by imposing sanctions upon a witness for electing to exercise his fifth amendment privilege against self-incrimination.¹³² For example, the Court in *Lefkowitz v. Turley*¹³³ held that the state of New York could not penalize government contractors for claiming the privilege in grand jury proceedings by cancelling their contracts with the state.¹³⁴ In *Turley*, two state architects refused to waive the privilege when testifying before a grand jury.¹³⁵ State law provided that if contractors refused to waive the privilege against self-incrimination, their existing state contracts would be cancelled, and they would be barred from future state contracts for five years.¹³⁶ The statute was unconstitutional, the Court held, because that state sought to compel testimony by imposing a sanction as the price of asserting the privilege.¹³⁷ Thus, if the state presents a witness with the choice of incriminating himself or suffering a penalty, and the witness refuses to respond, the state cannot constitutionally carry out its threat to penalize him.¹³⁸ Likewise, the use of testimony compelled by the threat of punishment for reliance on the privilege has also been prohibited by the Court. In *Garrity v. New Jersey*,¹³⁹ a police officer was expressly informed during a grand jury investigation that an assertion of the privilege would lead to his removal from the police department.¹⁴⁰ The officer answered the questions and his admissions were used against him in a subsequent criminal prosecution.¹⁴¹ The Court held that the choice given Garrity either to forfeit his job or to incriminate himself constituted coercion.¹⁴² Because the testimony was compelled, the statements were inadmissible as evidence in a subsequent criminal trial.¹⁴³

Thus, although the Supreme Court has generally held that a witness must claim the privilege, that general rule is subject to exception when the state threatens the exercise

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* When a witness is granted "use immunity," he may be compelled to testify but his testimony is prohibited from use as evidence in a subsequent criminal prosecution. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972). The witness can be prosecuted but the evidence must be secured from an independent source. *Id.* at 460-62.

¹³² See *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977) (removal of political party officer because he refused to waive his privilege against self-incrimination held to violate fifth and fourteenth amendment rights); *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968) (proceedings which present public employees with a choice between losing their jobs or surrendering their privilege against self-incrimination held to violate the fifth amendment); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968) (state dismissal of police officer for refusal to relinquish his privilege held unconstitutional).

¹³³ 414 U.S. 70 (1973).

¹³⁴ *Id.* at 85.

¹³⁵ *Id.* at 75-76.

¹³⁶ *Id.* at 71.

¹³⁷ *Id.* at 82-83.

¹³⁸ *Id.* at 85. See also *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

¹³⁹ 385 U.S. 493 (1967).

¹⁴⁰ *Id.* at 494.

¹⁴¹ *Id.* at 495.

¹⁴² *Id.* at 500.

¹⁴³ *Id.*

of the privilege against self-incrimination with legal sanctions. As the Court has indicated, if a witness relies on the privilege, the state cannot carry out the threat.¹⁴⁴ Conversely, if a witness responds, the state cannot use the testimony against him.¹⁴⁵ Even though the witness has not claimed the privilege, the statements are inadmissible because the state has, in effect, undermined the witness' free choice and compelled his testimony. Yet, the Court has not established specific guidelines as to what a witness is required to prove to establish that the state threatened him. As *Garrity* indicates, however, an express threat of penalty is sufficient to render any resulting statements compelled.¹⁴⁶

In summary, the precedent dealing with the invocation of the privilege and admissibility of confessions has been presented both in the context of custodial interrogation and witness investigation. In both contexts, compelled confessions are inadmissible. A confession resulting from custodial interrogation is deemed compelled if *Miranda* warnings are not given. Statements are deemed compelled if a state threatens a witness for exercising the privilege. In *Minnesota v. Murphy*,¹⁴⁷ the Supreme Court applied both these lines of precedent in determining the admissibility of a confession in the context of a probation officer's interrogation of a probationer.¹⁴⁸

II. THE SUPREME COURT'S REASONING IN *MURPHY*

A. *The Majority Opinion*

In a six to three decision the Supreme Court held in *Minnesota v. Murphy* that a statement obtained by a probation officer in a noncustodial setting from a probationer who failed to assert the privilege against self-incrimination may be introduced against him in a subsequent criminal prosecution.¹⁴⁹ In reaching this conclusion, the Court analogized the status of a probationer to that of a witness before a grand jury who must claim the fifth amendment privilege in order to gain its protection. The Court further found that the three exceptions where no affirmative assertion of the privilege is required were inapplicable in the probation interview context.

The Court began its analysis by examining the extent of the protection of the privilege against self-incrimination.¹⁵⁰ According to the Court, the privilege extends to both civil and criminal proceedings whether formal or informal.¹⁵¹ Furthermore, the Court recognized that a person who is imprisoned or on probation at the time he makes incriminating statements is to be accorded the same protection as any other person.¹⁵²

Having thus acknowledged that under appropriate circumstances probationers may be entitled to protection against self-incrimination, the Court addressed the question of whether *Murphy's* probationary status, in itself, constituted a situation meriting fifth amendment protection. The Court began by analogizing *Murphy's* probation obligations

¹⁴⁴ See *supra* notes 133-38 and accompanying text.

¹⁴⁵ See *supra* notes 139-43 and accompanying text.

¹⁴⁶ *Garrity*, 385 U.S. at 500.

¹⁴⁷ 104 S. Ct. 1136 (1984).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1149.

¹⁵⁰ *Id.* at 1141-42.

¹⁵¹ *Id.* at 1142.

¹⁵² *Id.* (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1970) (prison inmates may not be compelled to furnish statements that might later incriminate them)).

to the obligation of a witness.¹⁵³ First, the Court noted that Murphy's obligation to appear before his probation officer and answer questions truthfully did not in itself convert his statements into compelled ones.¹⁵⁴ According to the Court, Murphy's duty was similar to that of a witness who is subpoenaed, sworn to tell the truth and obliged to answer on pain of contempt.¹⁵⁵

In discussing how a witness can invoke protection of the privilege, the Court stated that as a general rule, if a witness desires not to incriminate himself, he must claim the privilege rather than answer.¹⁵⁶ Failure to assert the privilege in a timely manner, the Court noted, indicates that an answer is voluntary since the witness is free to claim the privilege.¹⁵⁷

The Court then considered whether this rule might give way in situations where the government has substantial reason to believe that incriminating answers will result.¹⁵⁸ The Court observed that the Constitution does not forbid the government from asking incriminating questions.¹⁵⁹ Pointing out that its prior cases do not suggest that the incriminating nature of a question excuses a timely assertion of the privilege,¹⁶⁰ the Court concluded that the general rule still applies even when the witness is confronted with questions that the government should reasonably expect to elicit incriminating evidence.¹⁶¹

At this point in its evaluation in *Murphy*, the Court declared that it had found no basis for not applying the ordinary witness rule to probationers.¹⁶² Because Murphy had not claimed the privilege, the Court stated that his responses could not be regarded as compelled unless some factor existed which undermined his free choice and compelled him to speak.¹⁶³ The Court therefore devoted the remainder of its opinion to an examination of three exceptions where no affirmative assertion of the privilege has been required: custodial interrogation;¹⁶⁴ state threats penalizing the assertion of the privilege;¹⁶⁵ and the filing of gambling tax returns.¹⁶⁶

¹⁵³ 104 S. Ct. at 1142-43.

¹⁵⁴ *Id.* at 1142.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citing *Garner v. United States*, 424 U.S. 648, 654 (1976); *United States v. Kordel*, 397 U.S. 1, 7-10 (1970); *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 112-13 (1927)).

¹⁵⁷ *Id.* (citing *United States v. Kordel*, 397 U.S. 1, 10 (1970) (failure to claim the privilege "leaves [an individual] in no position to complain [later] that he was compelled to give testimony against himself")).

¹⁵⁸ *Id.* at 1142-43.

¹⁵⁹ *Id.* at 1143. In dicta in *Roberts v. United States*, 445 U.S. 552, 559 (1980), the Court suggested that when a government official has "substantial reason to believe that [the] requested disclosures are likely to be incriminating," the privilege need not be affirmatively claimed. The *Murphy* Court distinguished this statement by citing to Justice Frankfurter's dissenting opinion in *United States v. Monia*, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting) ("the Constitution does not forbid the asking of criminative questions.").

¹⁶⁰ 104 S. Ct. at 1143 (citing *United States v. Mandujano*, 425 U.S. 564, 574-75 (1976) (plurality opinion)).

¹⁶¹ *Id.* at 1143.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1143-46.

¹⁶⁵ *Id.* at 1146-49.

¹⁶⁶ *Id.* at 1149.

In considering the custodial interrogation exception, the Court observed that the isolation of a suspect in police custody contains inherently compelling pressures. In order to compensate for this compulsion, the Court stated that *Miranda* requires police officers to warn a suspect who is in custody of his right to remain silent and the consequences of a failure to do so.¹⁶⁷ The Court emphasized that the requirements of *Miranda* do not apply outside the context of custodial interrogations.¹⁶⁸

In determining whether a person on probation is "in custody" for purposes of the *Miranda* protections, the Supreme Court examined the four factors advanced by the Minnesota Supreme Court in support of its holding that a *Miranda*-like approach should be taken with no affirmative claim of the privilege required.¹⁶⁹ First, the Court considered the ability of a probation officer to compel a probationer to attend meetings and answer questions truthfully.¹⁷⁰ The Court found this factor analogous to the situation of a grand jury witness who must appear and answer questions truthfully or else affirmatively claim the fifth amendment privilege — all without benefit of *Miranda* warnings.¹⁷¹ Indicating that Murphy was subjected to even less intimidating pressure than a witness, the Court declined to require that *Miranda* warnings be given on the basis of this factor.¹⁷²

The Court also dismissed the second factor advanced by the Minnesota Supreme Court, that the probation officer consciously sought incriminating statements.¹⁷³ The Court noted that an investigation that focuses on an individual does not trigger the need for *Miranda* warnings in noncustodial settings.¹⁷⁴ The intent of the probation officer, the Court stated, had no bearing on the outcome of the case.¹⁷⁵

Continuing its rejection of the Minnesota Supreme Court's holding that Murphy's probation interview was analogous to custodial interrogation, the Court considered the third factor, that Murphy was unaware of the questions the probation officer was going to ask and therefore could not seek counsel before attending the meeting.¹⁷⁶ The Court declared that probationers should expect questions about prior criminal conduct while on probation.¹⁷⁷ According to the Court, Murphy could have reasonably concluded from the probation officer's letter suggesting further treatment, that she suspected him of a crime.¹⁷⁸ The Court concluded that a probationer's situation is not significantly different from that of grand jury witnesses who are unaware of the scope of an investigation.¹⁷⁹

The Court next considered the fourth factor discussed by the Minnesota Supreme Court — that there were no observers to guard against abuse or trickery.¹⁸⁰ The Court

¹⁶⁷ *Id.* at 1144.

¹⁶⁸ *Id.* The *Murphy* Court stated: "We have consistently held, however, that this extraordinary safeguard 'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.'" *Id.* (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)).

¹⁶⁹ *Id.* at 1144–45. See *State v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982). For a full discussion of the reasoning of the Minnesota Supreme Court see *supra* note 40.

¹⁷⁰ 104 S. Ct. at 1144. See *State v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982).

¹⁷¹ 104 S. Ct. at 1144 (citing *United States v. Washington*, 431 U.S. 181, 186 (1977)).

¹⁷² 104 S. Ct. at 1144.

¹⁷³ *Id.* at 1145. See *State v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982).

¹⁷⁴ 104 S. Ct. at 1145 (citing *Beckwith v. United States*, 425 U.S. 341 (1976)). See *supra* notes 155–58 and accompanying text.

¹⁷⁵ 104 S. Ct. at 1145.

¹⁷⁶ *Id.* See *State v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982).

¹⁷⁷ 104 S. Ct. at 1145.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* See *State v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982).

examined the facts of the Murphy case to determine whether the probation officer's actions would have led a reasonable probationer to believe that his statements to her would remain confidential.¹⁸¹ There was no indication, the Court observed, that Murphy's probation officer was not concerned with the need for further treatment.¹⁸² Furthermore, the Court stated, Murphy should have known that the probation officer was required to report his confession.¹⁸³ The Court suggested that Murphy was not misled by any expectation that his statements would remain confidential. This was evidenced, the Court explained, by his apparent failure to express surprise on being informed that his statements would be made available to the police.¹⁸⁴

After examining the four factors advanced by the Minnesota Supreme Court in support of the conclusion that Murphy's interrogation by his probation officer was analogous to custodial interrogation, the Court conducted its own comparison of custodial interrogation and probation interviews. The Court concluded that meetings by probationers with their supervisors are not akin to custodial interrogation.¹⁸⁵ While custodial interrogation conveys the message that the suspect must confess, the Court observed that probation meetings are arranged at mutually agreeable times and are unlikely to convey the impression that the probationer has no choice but to submit to the probation officer's will.¹⁸⁶ While custodial arrest thrusts a person into an unfamiliar environment, the Court noted that probation meetings are at a regular time and place so the probationer does not suffer the disadvantage of an unfamiliar environment.¹⁸⁷ Moreover, the Court observed, Murphy was not physically restrained and was permitted to leave at the end of the meeting. According to the Court, the pressures on Murphy were insignificant compared to the pressures on a suspect in police custody.¹⁸⁸ Thus, the Court concluded that because the probation interview is not custodial in nature, the probation officer was not required to warn Murphy of his *Miranda* rights.¹⁸⁹

The Court also conducted its own evaluation of whether a person on probation is "in custody" for purposes of the *Miranda* protections. Although conceding that Murphy was subject to a number of restrictive conditions and would be regarded as "in custody" for purposes of federal habeas corpus,¹⁹⁰ the Court noted that "custody" for *Miranda*

¹⁸¹ 104 S. Ct. at 1145.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1146.

¹⁸⁶ *Id.* at 1145.

¹⁸⁷ *Id.* According to the Court, Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege. *Id.*

¹⁸⁸ *Id.* at 1146.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1144. See *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (state prisoner who has been placed on parole under the "custody and control" of a parole board is "in custody" within the meaning of the federal habeas corpus statute). Habeas corpus is a writ directed to a person detaining another and commanding him to produce the body of the person detained. The writ permits a prisoner to challenge the legality of detention or imprisonment on constitutional grounds. A federal court has jurisdiction under the federal habeas corpus statute to grant a writ of habeas corpus "to a prisoner . . . in custody . . . in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (1982). The habeas corpus jurisdiction statute implements the constitutional command that the writ of habeas corpus be made available. U.S. CONST. art. I, § 9. "The privilege

purposes is a much narrower standard requiring formal arrest or restraint on freedom of movement of the degree similar to that associated with formal arrest.¹⁹¹ The Court found that Murphy's situation did not meet this definition of "in custody" because Murphy was not under arrest, nor, in the Court's opinion, was his freedom of movement restrained in the degree associated with an arrest.¹⁹² Therefore, according to the Court, *Miranda* did not apply.¹⁹³

The Court next considered the second situation where no assertion of the privilege against self-incrimination is required, when an individual faces a threat of legal sanction if the privilege is claimed.¹⁹⁴ Murphy's argument, the Court noted, was that because he was required to be truthful to his probation officer in "all matters," invocation of the privilege would lead to probation revocation.¹⁹⁵ The Court then examined prior cases where individuals were threatened with a penalty for claiming the privilege, and concluded that the government acts impermissibly when it either expressly or implicitly asserts that invocation of the privilege will be penalized.¹⁹⁶

The Court then considered whether the state of Minnesota presented Murphy with the impermissible choice of making incriminating statements to the officer or jeopardizing his probationary status. First, the Court noted that the Minnesota Supreme Court had not determined whether Murphy's probation conditions contained an impermissible threat.¹⁹⁷ Therefore, the Court itself examined Murphy's probation condition that he respond truthfully to all questions.¹⁹⁸ The Court interpreted this condition as merely proscribing false statements.¹⁹⁹ According to the Court, this requirement did not mandate that Murphy answer every question his probation officer asked.²⁰⁰ Rather, the Court declared, Murphy was free to decline to answer any question that might have been incriminating, or to seek clarification of this probation condition if he did not understand his obligation.²⁰¹

After concluding that Murphy's probation conditions did not contain an impermissible threat, the Court also found that there was no reasonable basis for concluding that the state attempted to attach the penalty of probation revocation to the exercise of the privilege against self-incrimination.²⁰² First, the Court pointed out that Murphy was not

of the Writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it." *Id.*

¹⁹¹ 104 S. Ct. at 1144 (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)).

¹⁹² *Id.* at 1144.

¹⁹³ *Id.* at 1146.

¹⁹⁴ For a discussion of this line of precedent, see *supra* notes 132-46 and accompanying text.

¹⁹⁵ 104 S. Ct. at 1146.

¹⁹⁶ *Id.* at 1146-47 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 283-84 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967)). See *infra* notes 282-91 and accompanying text for criticism of the holding as contrary to the precedent cited.

¹⁹⁷ 104 S. Ct. at 1148.

¹⁹⁸ *Id.* at 1147-48.

¹⁹⁹ *Id.* at 1148. According to the Court, "Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution." *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

expressly informed during the meeting that assertion of the privilege would result in probation revocation.²⁰³ The Court emphasized that Murphy's subjective belief that his probation might be revoked if he claimed the privilege was not objectively reasonable.²⁰⁴ Under the Minnesota revocation statute,²⁰⁵ the Court noted, the probation revocation process is not automatic.²⁰⁶ Thus, the Court reasoned, even if the probation officer had recommended revocation, Murphy was still entitled to a full hearing.²⁰⁷ The Court added that under its prior decisions, the state could not constitutionally carry out a threat of probation revocation.²⁰⁸ Under Murphy's circumstances, however, the Court concluded that Murphy's apprehension that the state would revoke his probation was not reasonably perceived.²⁰⁹ Consequently, the Court concluded that he was not deterred from claiming the privilege by an impermissible threat of state sanction.²¹⁰

In the final section of its analysis, the Court summarily examined the gambling tax exception to the general rule that the privilege must be affirmatively claimed. According to the Court, this exception was inapplicable to the situation facing probationers. Because individuals would identify themselves as gamblers by filing gambling tax returns, the Court explained, the privilege may be exercised in such cases by failing to file a return rather than affirmatively asserting the privilege.²¹¹ Unlike taxpayers who would incriminate themselves by claiming the privilege at the time gambling tax disclosures were requested, according to the Court, probationers will not ordinarily have the problem of claiming the privilege at the time disclosures are requested.²¹²

In conclusion, the Court determined that Murphy was not faced with a coercive situation which prevented him from asserting the privilege. Because Murphy had not claimed the privilege, the Court concluded that his disclosures to his probation officer were voluntary. Therefore, the Court held that Murphy's statements could be introduced by the prosecution in his murder trial.²¹³

²⁰³ *Id.* The Court compared Murphy's situation to a case in which police officers were expressly informed by a grand jury that an assertion of the privilege would result in the imposition of a penalty. *Id.* See *Garrity v. New Jersey*, 385 U.S. 493 (1967). See *supra* notes 139-43 and accompanying text; *infra* notes 284-91.

²⁰⁴ 104 S. Ct. at 1148.

²⁰⁵ MINN. STAT. § 609.14 (1982).

²⁰⁶ 104 S. Ct. at 1148. The statute reads in relevant part:

When it appears that the defendant has violated any of the conditions of his probation . . . the court may without notice revoke . . . probation and direct that the defendant be taken into immediate custody.

The defendant shall . . . be notified in writing . . . of the ground alleged If such grounds are brought in issue by the defendant, a summary hearing shall be held thereon at which he is entitled to be heard and to be represented by counsel.

MINN. STAT. § 609.14 (1982).

²⁰⁷ 104 S. Ct. at 1148. See *infra* note 311 and accompanying text.

²⁰⁸ 104 S. Ct. at 1148 (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968)).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1149.

²¹¹ *Id.* (citing *Garner v. United States*, 424 U.S. 648 (1976); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grasso v. United States*, 375 U.S. 67 (1968)).

²¹² *Id.*

²¹³ *Id.*

B. *The Dissenting Opinion*

In an opinion joined by Justice Stevens, and in part by Justice Brennan,²¹⁴ Justice Marshall dissented from the Court's conclusion that Murphy's constitutional rights had not been violated.²¹⁵ The dissent began, however, by agreeing with much of the majority's analysis of the probationer's privilege against self-incrimination.²¹⁶ The dissent agreed that a probationer's right to refuse to respond to questions depends upon whether his answers would be incriminating in a criminal proceeding or in a probation revocation proceeding.²¹⁷ If the answers might expose the probationer to criminal prosecution, the dissent agreed with the majority that he has the right to refuse to respond unless granted immunity from the use of his answers in a subsequent criminal trial.²¹⁸ To an even greater extent than the Court, however, the dissent emphasized that a probationer does not have the right to refuse to answer questions relating to his probation status even when his answers might expose him to a probation revocation hearing.²¹⁹ The dissent explained this distinction by noting that the fifth amendment privilege against self-incrimination applies only to criminal proceedings.²²⁰ Because probation revocation hearings are not criminal proceedings, the dissent reasoned, the privilege does not protect the probationer against the use of compelled incriminations at revocation hearings.²²¹

The dissent, however, rejected the majority's conclusion that Murphy forfeited his privilege against self-incrimination. Instead, according to the dissent, Murphy's failure to claim the privilege was excused because he was faced with both an impermissible state threat and an inherently coercive situation.²²² Beginning with the issue of the state threat of probation revocation, Justice Marshall agreed with the majority that if a state threatens an individual with a sanction for asserting the privilege against self-incrimination, his responses are deemed compelled.²²³ The dissent, however, rejected the majority's conclusion that Murphy had to prove that he was deterred from claiming the privilege by a "reasonably perceived" threat of state penalty.²²⁴ According to the dissent, in the past

²¹⁴ Justice Brennan did not join in Part II-A of Marshall's dissent. In this section, Justice Marshall reviewed prior cases and argued that the Court has adhered to the principle that a person forfeits the privilege only when several factors that support the principle are implicated. *Id.* at 1154-58 (Marshall, J., dissenting). See *infra* note 232.

²¹⁵ *Id.* at 1149 (Marshall, J., dissenting).

²¹⁶ *Id.* at 1150 (Marshall, J., dissenting).

²¹⁷ *Id.* (Marshall, J., dissenting). In a footnote, the Court had summarily addressed the issue of when a probationer has the right to refuse to answer questions asked by his probation officer. *Id.* at 1147 n.7.

²¹⁸ *Id.* at 1150 (Marshall, J., dissenting). See also *id.* at 1147 n.7.

²¹⁹ *Id.* at 1150 (Marshall, J., dissenting).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1150-51 (Marshall, J., dissenting).

²²³ *Id.* at 1151 (Marshall, J., dissenting).

²²⁴ *Id.* at 1152-54 (Marshall, J., dissenting). The dissent noted two reasons for refusing to accept the majority's burden of proof. Justice Marshall's first concern was that it would be difficult for the threatened person to prove that, but for the threat, he would have refused to speak. *Id.* at 1152 (Marshall, J., dissenting). For instance, many persons are not aware that a state could not constitutionally carry out a threat to penalize exercise of the privilege. *Id.* If, however, the prosecution shows that the threat was idle, the defendant would have a difficult time demonstrating that the threat induced his confession. *Id.* at 1152 n.6 (Marshall, J., dissenting). The second concern ad-

the Court had only required a defendant to prove that the state threatened him and that he relied on that threat for testimony to be deemed compelled.²²⁵

Justice Marshall also rejected the majority's conclusion that the terms of Murphy's probation did not contain an impermissible threat.²²⁶ The dissent interpreted Murphy's probation condition "to be truthful in all matters" as a duty to answer all questions presented by his probation officer.²²⁷ Maintaining that these instructions presented Murphy with a constitutionally impermissible choice of either incriminating himself by answering or having his probation revoked for failing to obey the condition,²²⁸ the dissent concluded that the threat of probation revocation deprived Murphy of free choice.²²⁹ Therefore, according to the dissent, the state should not have been permitted to use Murphy's statements against him in a criminal proceeding.²³⁰

Justice Marshall also contended that Murphy's confession should not be admitted for a second reason — the state did not show that Murphy voluntarily and intelligently waived his right to remain silent.²³¹ According to the dissent, in previous decisions the Court has not applied the principle that failure to claim the privilege results in forfeiture where the situation impairs the individual's ability to intelligently exercise his rights.²³² In such situations, Justice Marshall maintained that the Court has required a showing by the state that the defendant knew his constitutional rights and freely waived them.²³³

dressed by the dissent was that the state should not be allowed to use the confession if the defendant relies upon the threat and incriminates himself because the state's initial attempt to coerce self-incriminating statements is constitutionally offensive. *Id.* at 1152 (Marshall, J., dissenting).

²²⁵ *Id.*

²²⁶ *Id.* at 1152–54 (Marshall, J., dissenting). See *id.* at 1148–49; *supra* notes 194–210 and accompanying text.

²²⁷ 104 S. Ct. at 1153 (Marshall, J., dissenting). See *id.* at 1148; *supra* notes 198–201 and accompanying text. The dissent rejected the Court's interpretation of Murphy's probation condition as a duty not to lie. 104 S. Ct. at 1153 (Marshall, J., dissenting). The dissent stated that the context of the phrase is important in interpreting the condition. *Id.* First, Justice Marshall noted that the duty to be truthful is the first term of the probation conditions. *Id.* Second, the dissent indicated that the phrase is capitalized: "BE TRUTHFUL." *Id.* Third, Justice Marshall noted that the phrase is immediately preceded by an emphasized instruction "to obey strictly the following conditions." *Id.*

²²⁸ *Id.* The dissent criticized the Court for hesitating to find that Murphy would have been exposed to revocation of his probation for refusing to answer the probation officer's questions solely because the Minnesota state courts did not reach the issue of the construction of Murphy's probation conditions. *Id.* at 1153 n.10 (Marshall, J., dissenting). The proper course, the dissent suggested, would have been to remand the case to the Minnesota Supreme Court to allow it to construe the probation condition. *Id.*

²²⁹ *Id.* at 1154 (Marshall, J., dissenting).

²³⁰ *Id.* (Marshall, J., dissenting).

²³¹ *Id.* at 1154–61 (Marshall, J., dissenting).

²³² See *id.* at 1156–61 (Marshall, J., dissenting). The dissent argued that the Court has applied the forfeiture principle in a variety of contexts where the individual's ability to assert the privilege is not impaired. *Id.* at 1157 & n.20 (Marshall, J., dissenting) (citing *United States v. Washington*, 431 U.S. 181 (1977); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam); *Beckwith v. United States*, 425 U.S. 341 (1976); *United States v. Murdock*, 284 U.S. 141 (1931); *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927)). However, the dissent noted that the Court has not adhered to the general rule that a privilege not claimed is lost when there was a paucity of safeguards to protect the person's ability to exercise his rights. *Id.* at 1158 & n.21 (Marshall, J., dissenting) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966); *Emspak v. United States*, 349 U.S. 190 (1955); *Smith v. United States*, 337 U.S. 137 (1949)).

²³³ *Id.* at 1158 (Marshall, J., dissenting).

According to the dissent, the circumstances under which Murphy was interrogated impaired his ability to exercise the privilege against self-incrimination.²³⁴ The dissent contended that it was unfair to charge Murphy with the knowledge that he had the right to refuse to respond to his probation officer's questions.²³⁵ According to Justice Marshall, at the time Murphy was questioned by the probation officer the scope of that right was clearly ambiguous.²³⁶ Moreover, the dissent contended, Murphy's probation officer abused the trust that is implicit in the probation relationship by using deception to elicit a confession from Murphy.²³⁷ Under these circumstances, Justice Marshall maintained, the state had the duty of proving that Murphy was aware of his rights and that he freely waived them.²³⁸ Because the state failed to meet this burden of proof, the dissent concluded, the confession should not have been admitted.²³⁹

III. WERE MURPHY'S STATEMENTS PROPERLY ADMITTED?: A CRITIQUE OF THE COURT'S REASONING

In *Murphy*, the Supreme Court held that probation officers are not required to give *Miranda* warnings before attempting to obtain incriminating statements from probationers who are not in custody.²⁴⁰ The Court indicated that statements obtained from probationers who fail to assert the privilege against self-incrimination may be admitted as evidence against them in subsequent criminal prosecutions.²⁴¹ The Court held that the statements are inadmissible, however, if the responses are not voluntary.²⁴²

The next section of this casenote will analyze the reasoning employed by the *Murphy* Court. First, this casenote will evaluate the Court's conclusion that Murphy was not deterred from claiming the privilege against self-incrimination. This casenote will submit

²³⁴ See *id.* at 1158-60 (Marshall, J., dissenting).

²³⁵ *Id.* at 1159 (Marshall, J., dissenting).

²³⁶ *Id.* at 1158-59 (Marshall, J., dissenting). The dissent noted that the Solicitor General, appearing as amicus curiae, did not correctly state the rights that could have been asserted by Murphy when questioned by his probation officer. *Id.* at 1159 (Marshall, J., dissenting). The Solicitor General argued that the government could exert more pressure upon a probationer to make incriminating statements than it could exert upon a person who had not been convicted of a crime. *Id.* at 1159 n.23 (Marshall, J., dissenting). In *Murphy*, the Supreme Court expressly rejected that proposition. *Id.* at 1142. The Court held that a person does not lose the protection of the privilege by reason of his conviction of a crime. *Id.* The dissent commented that if the lawyers representing the government did not know the scope of a probationer's privilege against self-incrimination, it is unlikely that Murphy could have known that he had the right to refuse to answer the probation officer's questions. *Id.* at 1159 (Marshall, J., dissenting).

²³⁷ *Id.* at 1159-60 (Marshall, J., dissenting). Justice Marshall observed that the environment in which Murphy was interviewed impaired his ability to claim his right to remain silent. *Id.* at 1159 (Marshall, J., dissenting). The dissent conceded that the discussion between probationers and probation officers would not be as coercive as between police officers and suspects. *Id.* (Marshall, J., dissenting). The dissent noted, however, that there exists a relationship of confidentiality between a probationer and his probation officer which is absent from the police-suspect relationship. The danger, the dissent urged, is that a probation officer can elicit admissions from a probationer that the probationer would not be likely to make to a hostile police investigator. *Id.* at 1160 (Marshall, J., dissenting).

²³⁸ *Id.*

²³⁹ *Id.* at 1161 (Marshall, J., dissenting).

²⁴⁰ See *id.* at 1144-46. See *supra* notes 149-213 and accompanying text.

²⁴¹ *Id.* at 1149.

²⁴² *Id.* at 1143.

that the Court's witness analogy was not appropriately applied to the circumstances of Murphy's interrogation by his probation officer and that Murphy's interview involved sufficient threat to render his statements inadmissible. Second, this casenote will contend that the spirit of the *Miranda* decision and the considerations underlying the privilege against self-incrimination mandate that even though Murphy was not technically in custody, he should have received warnings of his rights.

A. The Witness Analogy

Throughout its opinion, the Court used the example of a witness before a grand jury as an applicable analogy to Murphy's situation.²⁴³ The Court reasoned that a probationer has the same duty as a witness either to claim the privilege or lose its protection.²⁴⁴ Because Murphy failed to claim the privilege before making incriminating statements to his probation officer, the Court held that Murphy forfeited his right to object to the use of his admissions at his murder prosecution.²⁴⁵ There are significant differences between the status of a witness and the status of a probationer, however, which make the Court's analogy between the two situations inappropriate. Because the Court's analogy was fundamentally flawed, the *Murphy* Court's application of the forfeiture principle to the probationer's situation was ill-considered.

I. "Claim it or lose it": The Court's Adherence to the Forfeiture Principle

A witness is subpoenaed to appear before a grand jury, sworn to tell the truth and obligated to answer under pain of contempt.²⁴⁶ The Court has held that this legal obligation to appear and give testimony does not alone render any resulting incriminating responses compelled in violation of the fifth amendment.²⁴⁷ Rather, the Court has made clear that when a witness desires not to make incriminating disclosures, he must affirmatively assert the privilege.²⁴⁸ If the witness fails to claim the privilege, and instead

²⁴³ As to the general obligation to appear and answer questions truthfully, the Court stated that:

Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt Murphy [was subjected] to less intimidating pressure than is imposed on grand jury witnesses, who are sworn to tell the truth and placed in a setting conducive to truthtelling Murphy's situation was . . . indistinguishable from that facing . . . grand jury witnesses who are unaware of the scope of an investigation or that they are considered potential defendants [Legal compulsion to attend meeting and to answer questions truthfully] is indistinguishable from that felt by any witness who is required to appear and give testimony, and, as we have already made clear, it is insufficient to excuse Murphy's failure to exercise the privilege in a timely manner.

Id. at 1146-48.

²⁴⁴ *Id.* at 1143. See *supra* text accompanying notes 156-62.

²⁴⁵ 104 S. Ct. at 1149. See *supra* text accompanying notes 163 & 213.

²⁴⁶ 104 S. Ct. at 1142. See also *Branzburg v. Hayes*, 408 U.S. 665, 682 (1973) (all citizens obligated to respond to a grand jury subpoena and answer questions relevant to a criminal investigation).

²⁴⁷ *Garner v. United States*, 424 U.S. 648, 654 (1976) ("if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself").

²⁴⁸ *United States v. Monia*, 317 U.S. 424, 427 (1943) (a witness must claim the privilege if he desires the privilege's protection); see *supra* notes 65-66 and accompanying text.

makes incriminating responses, he has forfeited his rights and cannot later object to the use of his statements at trial.²⁴⁹

The Supreme Court's adherence to the principle that a witness' failure to claim the privilege in a timely manner results in forfeiture, reflects a balancing of the individual's privilege against self-incrimination against the government's need for information.²⁵⁰ The government has an important interest in being able to use confessions as reliable evidence of guilt in prosecuting criminals.²⁵¹ Thus, the government is not prohibited from asking a witness incriminating questions and using the answers to those questions in a subsequent criminal prosecution.²⁵² The burden lies with the witness to object to the disclosure of potentially incriminating information by claiming the privilege prior to answering a question.²⁵³ If the witness claims the privilege, the government may not compel him to answer.²⁵⁴ An accommodation of the competing interests of the individual and the state is thus achieved by leaving to the individual the burden of first objecting to incriminating questions.²⁵⁵

The Court has applied the principle that witnesses forfeit the privilege against self-incrimination if they fail to claim it when the circumstances of the case show that the witness' decision not to assert the privilege was voluntary.²⁵⁶ Although the atmosphere of the jury room may exert some pressure on witnesses, the Court has noted that there are safeguards which protect the witness' ability to assert the privilege.²⁵⁷ One such safeguard is the opportunity to consult with counsel.²⁵⁸ After being served with a subpoena to testify before a grand jury, the witness is given sufficient warning that potentially incriminating questions may be asked.²⁵⁹ Because grand juries question witnesses about

²⁴⁹ *United States v. Monia*, 317 U.S. 424, 427 (1943).

²⁵⁰ *Garner v. United States*, 424 U.S. 648, 655 (1976) (insistence upon a claim of privilege reflects an appropriate accommodation of the fifth amendment privilege and the generally applicable principle that the government has the right to everyone's testimony).

²⁵¹ *Hopt v. Utah*, 110 U.S. 574, 584-85 (1884) (confessions are traditionally regarded as exceptionally reliable evidence of guilt).

²⁵² *United States v. Mandujano*, 425 U.S. 564, 571-75 (1976).

²⁵³ *Garner v. United States*, 424 U.S. 648, 655 (1976).

²⁵⁴ *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977).

²⁵⁵ *Garner v. United States*, 424 U.S. 648, 655 (1976).

²⁵⁶ See *Murphy*, 104 S. Ct. at 1156-58 (Marshall, J., dissenting) (citing *United States v. Washington*, 431 U.S. 181 (1977); *Garner v. United States*, 424 U.S. 648 (1976); *United States v. Kordel*, 397 U.S. 1 (1970)).

²⁵⁷ *United States v. Washington*, 431 U.S. 181, 183-84 (1977). See also *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (*Miranda* inapplicable in the witness context because interrogation before a grand jury unlikely to involve physical brutality or psychological techniques designed to coerce self-incrimination).

²⁵⁸ See *United States v. Washington*, 431 U.S. 181, 189 (1977) (defendant had been afforded opportunity to seek legal advice before testifying); *United States v. Murdock*, 284 U.S. 141, 148 (1931) (when defendant consulted with an attorney just before interview with revenue agent, his failure to invoke the privilege as a justification for his refusal to answer resulted in waiver). The Supreme Court has recognized that legal advice is essential to safeguard many constitutional rights. See *Maness v. Meyers*, 419 U.S. 449, 466 (1975) (lawyer not in contempt for advising client to assert the fifth amendment privilege). For a view that the right to counsel is the pivotal right for a grand jury witness see Comment, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97, 122-32.

²⁵⁹ Brief for Appellant at 23, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984). See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1973) (grand jury's task is to inquire into existence of possible criminal conduct); see also *Gardner v. Broderick*, 392 U.S. 273, 274 (1968) (where a policeman was advised that the grand jury proposed to examine him concerning the performance of his official duties).

particular crimes, witnesses have reason to consult with counsel before testifying in order to plan how to respond to incriminating questions. Furthermore, in some cases, grand jury witnesses have been provided with a lawyer.²⁶⁰ For example, the defendant in *United States v. Washington*²⁶¹ was called to testify before a grand jury about a crime in which he was implicated.²⁶² In ruling that the incriminating answers made by the defendant before the grand jury could be used against him, the Court stressed that several factors indicated that Washington's ability to exercise his rights had not been impaired.²⁶³ One such factor was the defendant's freedom to seek legal advice prior to the hearing.²⁶⁴ The Court also emphasized that the defendant had been informed at the start of the hearing that a lawyer would be provided for him if he wished and could not afford one.²⁶⁵

Another factor which indicated to the *Washington* Court that the defendant's ability to exercise his rights had not been impaired was that he had been explicitly warned of his right not to respond to incriminating questions prior to the hearing.²⁶⁶ The Supreme Court has consistently noted that witnesses are not entitled to an explicit warning of their rights.²⁶⁷ Witnesses, however, are usually aware that they have the right to assert the privilege in the courtroom because the Court has clearly established this right in a long line of precedent.²⁶⁸ Various safeguards, therefore, dispel pressure on witnesses including the opportunity to obtain legal advice and the clear scope of the right available to witnesses in the courtroom.²⁶⁹

The circumstances under which Murphy was interrogated, however, did not contain any safeguards similar to those which assist a witness in asserting the privilege against self-incrimination. Contrary to the Court's assertion, Murphy's situation was not analogous to the example of a witness served with a subpoena. Unlike a grand jury witness, Murphy had no reason to know that he was to be interrogated about prior criminal conduct. Like any probationer, Murphy met regularly with his supervising officer.²⁷⁰ During a typical meeting, probation officers will question probationers about their present activities and counsel them with any problems they might be having at home or at work.²⁷¹ Probation meetings center on conduct which occurs during the period of pro-

Because the individual is provided with some information regarding what possible criminal conduct the grand jury is investigating in the subpoena, the witness has an opportunity in advance to prepare himself legally and psychologically for questioning.

²⁶⁰ *United States v. Mandujano*, 425 U.S. 564, 567-68, 584 (1976) (after defendant was subpoenaed to testify about criminal activities in which he may have been involved, was warned that he was not required to answer incriminating questions, and told that a lawyer would be provided for him if he wished, his statements were admissible).

²⁶¹ 431 U.S. 181 (1977). See *supra* text accompanying notes 123-30.

²⁶² *Id.* at 183-84.

²⁶³ *Id.* at 188.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976).

²⁶⁸ In *Michigan v. Tucker*, 417 U.S. 433, 439 (1974), the Court noted that: "At this point in our history virtually every schoolboy is familiar with the concept, if not the language" of the constitutional ban on compelled self-incrimination.

²⁶⁹ See *supra* notes 257-68 and accompanying text.

²⁷⁰ One of Murphy's probation conditions was to meet with his probation officer as directed. 104 S. Ct. at 1140. For a description of a typical meeting see *supra* note 20.

²⁷¹ Pet. App. C, *supra* note 20, at 6. During probation interviews, the Court has noted "concern

bation, not upon pre-probation conduct. It is unlikely, therefore, that Murphy could have anticipated that he would be asked about prior criminal conduct.

Despite the Court's assertion to the contrary, Murphy's receipt of a letter from his probation officer requesting a meeting did not have the same effect as the receipt of a subpoena. Unlike a subpoena, the letter did not suggest that Murphy's past record was to be discussed. The probation officer's letter informed Murphy that the purpose of the meeting was "[t]o further discuss a treatment plan for the remainder of [his] probation."²⁷² Because the letter indicated that issues dealing with the future of his probation were to be discussed, Murphy had no reason to assume that incriminating questions regarding his prior criminal conduct would be asked. Murphy, therefore, had no reason to believe that he needed to consult with a lawyer in advance of the meeting.

Besides having no opportunity to consult with counsel, Murphy's ability to assert the privilege against self-incrimination was thwarted because the scope of Murphy's right to refuse to answer his probation officer was ambiguous. As the dissent correctly pointed out, at the time he was questioned the law was not clear on whether Murphy's status as a probationer limited his constitutional privilege against self-incrimination.²⁷³ The United States had argued before the Supreme Court that Murphy could permissibly have been subject to more pressure to incriminate himself than a person who had not been convicted of a crime.²⁷⁴ The government lawyers, however, seriously misconceived the rights that Murphy might have asserted when questioned by his probation officer.²⁷⁵ It is both insensible and unjust to require that a probationer know that he has a right to refuse to answer his probation officer when government lawyers who are knowledgeable in the law misinterpret the scope of his privilege against self-incrimination.

Thus, application of the forfeiture principle to the facts presented in *Murphy* was unjustified. Murphy could not have anticipated that he would be asked about prior criminal conduct or that he would have reason to seek legal advice about his rights prior to the probation meeting. Moreover, at the time Murphy was questioned, the law on whether he had a right to refuse to answer his probation officer was ambiguous. Even under the rationale of the Court's opinion, it is unclear whether Murphy would have known that he had a right not to answer incriminating questions. Under established precedent, witnesses have the clearly defined right to refuse to answer any incriminating question.²⁷⁶ The *Murphy* decision, however, provides probationers with a more confusing

for the client dominates [the probation officer's] professional attitude." *Gagnon v. Scarpelli*, 411 U.S. 778, 783-84 (1973).

²⁷² The Court suggested that Murphy should have assumed from the letter in which his probation officer instructed him to make an appointment that he would be asked incriminating questions. 104 S. Ct. at 1145.

²⁷³ *Id.* at 1158-59 (Marshall, J., dissenting). See *supra* notes 235-36 and accompanying text.

²⁷⁴ 104 S. Ct. at 1159 n.23 (Marshall, J., dissenting). The Solicitor General argued in an amicus curiae brief that "[w]hen a person has been convicted of a crime, his constitutional rights can be limited to the extent reasonably necessary to accommodate the government's penal and rehabilitative interests." Brief for the United States as Amicus Curiae at 8, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984).

²⁷⁵ The Court rejected the government's contention that the probationer's privilege against self-incrimination may be limited. 104 S. Ct. at 1142. The Court stated "notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." *Id.*

²⁷⁶ See, e.g., *Maness v. Meyers*, 419 U.S. 449, 473 (1976) (White, J., dissenting) (a witness may

procedure by which to determine when they have the right to refuse to answer their probation officer's questions.²⁷⁷ Suppose, for example, that a probationer is asked an incriminating question by his probation officer. He would have the right to refuse to respond if the answer would be incriminating at a criminal proceeding.²⁷⁸ If, however, the answer relates to his probation status, under *Murphy*, the probationer must answer the probation officer's questions even if the answer would be usable at a probation revocation hearing.²⁷⁹ In the wake of *Murphy*, therefore, a probationer's right to refuse to answer his probation officer's questions, depends not upon whether the answer would incriminate him but upon whether the question is arguably related to the probationer's probationary status. Such a standard hardly serves to provide probationers with guidance regarding when they have a clear right to claim the privilege.

2. Was There a "Reasonably Perceived" Threat?: The *Murphy* Decision and Threat of Legal Sanctions

The general rule that a witness must claim the privilege against self-incrimination is subject to exception when the exercise of the privilege is threatened with a penalty.²⁸⁰ The Supreme Court held that *Murphy* was not deterred from claiming the privilege because the threat of probation revocation was not "reasonably perceived."²⁸¹ The Court in *Murphy* determined the reasonableness of the threat of probation revocation by referring to its prior cases which dealt with situations where the state threatened the exercise of the privilege with a penalty.²⁸² Here again, however, the Court was relying on its tenuous witness analogy because in all of the prior cases referred to by the Court, the individuals being threatened were witnesses.²⁸³ For example, the Court compared *Murphy*'s situation with the facts of *Garrity v. New Jersey*.²⁸⁴ In *Garrity*, policemen who were summoned to a grand jury investigation of police corruption were expressly informed that they would be discharged from the police department if they claimed the privilege against self-incrimination.²⁸⁵ The disclosures that the police officers made were

not be required to answer a question if there is some rational basis for believing that it will incriminate him).

²⁷⁷ See 104 S. Ct. at 1147 n.7; *id.* at 1150 (Marshall, J., dissenting).

²⁷⁸ See *id.* at 1150 (Marshall, J., dissenting).

²⁷⁹ *Id.*

²⁸⁰ See *supra* notes 132-46 and accompanying text.

²⁸¹ 104 S. Ct. at 1149. See *supra* notes 197-210 and accompanying text.

²⁸² 104 S. Ct. at 1146-49. See *supra* notes 132-46, 196 and accompanying text.

²⁸³ See *Lefkowitz v. Cunningham*, 431 U.S. 801, 803 (1977) (political party officer summoned to appear before special grand jury authorized to investigate the party officer's conduct); *Lefkowitz v. Turley*, 414 U.S. 70, 75-76 (1974) (architects summoned to testify before a grand jury investigating various charges of conspiracy, bribery, and larceny); *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 281-82 (1968) (Department of Sanitation employees summoned to testify before grand jury investigating alleged charges of larceny); *Gardner v. Broderick*, 392 U.S. 273, 274-75 (1968) (police officer summoned to testify before grand jury investigating alleged bribery and corruption of police officers in connection with unlawful gambling operations); *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967) (police officers summoned to appear before Attorney General who was investigating alleged fixing of traffic tickets).

²⁸⁴ 104 S. Ct. at 1148. See *Garrity v. New Jersey*, 385 U.S. 493 (1967).

²⁸⁵ *Garrity*, 385 U.S. at 494.

introduced against them in subsequent criminal prosecutions.²⁸⁶ The Court held that the incriminating statements were involuntary and therefore inadmissible because the police officers faced the penalty of discharge if they chose to remain silent.²⁸⁷

Unlike the policemen in *Garrity*, Murphy was not expressly threatened by his probation officer.²⁸⁸ The Court emphasized the absence of an express threat to justify its conclusion that Murphy's apprehension of having his probation revoked was not reasonable.²⁸⁹ This lack of an express threat, however, should not have been determinative. The Court indicated earlier in *Murphy* that implied threats as well as express threats may foreclose an individual's free choice to remain silent.²⁹⁰ Because the Court was preoccupied with the witness analogy and express threats, it failed to address whether an implied threat deterred Murphy from claiming the privilege.²⁹¹ The Court overlooked the fact that Murphy was faced with a threat of legal sanction implicit in the probationary relationship which was just as coercive as an express threat faced by a witness before a grand jury.

As regards the question of implied coercion, there are significant differences between the probationer's situation and that of a witness. Probation officers enjoy broad power to exercise coercive force over individuals under their supervision including the power to arrest and to release.²⁹² Probation officers are "armed with the power to recommend or even declare revocation."²⁹³ One commentator has noted that the pro-

²⁸⁶ *Id.* at 495.

²⁸⁷ *Id.* at 497-98.

²⁸⁸ See 104 S. Ct. at 1140-41, 1148.

²⁸⁹ *Id.* at 1147-48. First, the Court examined Murphy's probation conditions to determine if the conditions contained an impermissible threat of penalty. *Id.* at 1147. Interpreting the condition "BE TRUTHFUL to your Probation Officer in all matters" as merely a truthfulness requirement which still allowed Murphy to decline answering incriminating questions, the Court concluded that the state did not attempt to attach a penalty on Murphy's exercise of the privilege. *Id.* at 1147-49.

Besides not finding a written threat, the Court relied on the absence of "direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent." *Id.* at 1148. The Court thus implied that Murphy had to prove that, but for the threat, he would not have confessed. See *id.* See *supra* notes 198-210 and accompanying text.

²⁹⁰ 104 S. Ct. at 1146. The Court stated:

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.

²⁹¹ See *id.* at 1147-48.

²⁹² Czajkowski, *Exposing the Quasi-Judicial Role of the Probation Officer*, 37 FED. PROB. 9, 13 (1973). "With his awesome authority over the probationer, the probation officer may in various ways restrict his liberty The probation officer, in the name of rehabilitation and under the banner of standard conditions of probation, can demand that the probationer not live in or frequent certain areas, that he not engage in certain employment, and that he refrain from a number of interpersonal associations." *Id.* See also *Cabell v. Chavez-Salido*, 454 U.S. 432, 447 (1982). In *Cabell*, the Court described the power of probation officers as follows: "The probation officer acts as an extension of the judiciary's authority to set the conditions under which particular individuals will lead their lives and of the executive's authority to coerce obedience to those conditions. From the perspective of the probationer, his probation officer may personify the State's sovereign powers . . ." *Id.*

²⁹³ *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973).

bation officer controls the revocation action,²⁹⁴ and the process of revocation is, itself, highly discretionary.²⁹⁵

Moreover, the probationer's continued liberty depends on his observance of the conditions of probation.²⁹⁶ Probationers, therefore, are particularly conscientious of being cooperative with their probation officers.²⁹⁷ A probationer summoned to the probation office and asked an incriminating question may reasonably fear that failure to answer would be a violation of probation for which his probation could be revoked.²⁹⁸ The probation officer's power to recommend revocation of probation, along with the probationer's duty to cooperate with the probation officer creates an implied threat that legal sanctions are likely if the probationer fails to respond when questioned.²⁹⁹

In the courtroom, by comparison, witnesses are not confronted with such implicit threats. Although the grand jury enjoys broad power to investigate,³⁰⁰ the relationship between the witness and the grand jury does not contain the implied threat to an immediate and discretionary curtailment of liberties which exists in the probationer-probation officer relationship. The grand jury, for example, does not set the conditions of a witness's life. Nor is the witness dependent on the grand jury for his continued liberty in the way the probationer is dependent on the probation officer.³⁰¹ Therefore,

²⁹⁴ Czajkoski, *supra* note 292, at 12. "While it is the judge who actually revokes probation, it is the probation officer who initiates the revocation action and largely controls it. In a very high proportion of cases, the judge's revocation action is in accord with the probation officer's recommendation." *Id.*

²⁹⁵ *Id.* Czajkoski notes that probation officers often invoke technical violations against a probationer when new criminal offenses are suspected but cannot be easily proved. According to Czajkoski:

Given the vague and all-encompassing nature of conditions of probation, it is not difficult for the probation officer to muster a technical violation as needed. Many probationers are in a steady state of probation violations as a result of conditions relating to keeping "decent hours," abstaining from alcohol, and various prohibitions relating to sexual activity. These violations usually go unenforced by the probation officer until such times as he is given reason to believe that a new criminal offense has occurred.

Id. at 12-13.

²⁹⁶ *People v. Alston*, 77 A.D.2d 906, 907, 431 N.Y.S.2d 82, 84 (1980) (parolee's "vital interest in continued release [depends] upon his obedience and cooperation with his supervising parole officer").

²⁹⁷ *See id.*

²⁹⁸ *See, e.g., United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972). The *Deaton* court noted that "[A] parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." *Id.*

²⁹⁹ The probationer is faced with a dilemma when the probation officer asks an incriminating question: if on the one hand, he remains silent and refuses to answer the probation officer's questions, he may be found to have violated a condition of his probation; if, on the other hand the probationer feels compelled to talk in order to comply with his probationary obligations, he gives incriminating information that may be used against him.

³⁰⁰ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). The grand jury has great latitude to inquire into the existence of possible criminal conduct. *Id.* A witness has a duty to appear and testify if subpoenaed by the grand jury. *See id.* The powers of the grand jury, however, are limited because it is subject to judicial supervision. *Id.* The Court has also noted that interrogation before a grand jury is not likely to involve psychologically oriented techniques designed to coerce the individual to incriminate himself. *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976). This may be so because questioning before a grand jury occurs under the guidance of a judge.

³⁰¹ *See, e.g., Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 281-82

because the probationary context is not truly analogous to that of the testifying witness context, the Court erred when it determined the reasonableness of a threat presented to probationers by comparison to the witness context.

Instead of merely relying on questionable analogies to determine that Murphy's confession was not coerced, the Court should have reviewed the circumstances of Murphy's meeting with his probation officer to determine if he was actually deterred from claiming his fifth amendment privilege by a reasonably perceived threat. According to the findings of the trial court, which were accepted by both the Minnesota Supreme Court and the United States Supreme Court, Murphy was summoned to the probation office "[t]o further discuss a treatment plan for the remainder of [his] probation"³⁰² When confronted with the information about the murder, Murphy told his probation officer he needed a lawyer.³⁰³ The probation officer, however, said he could not see a lawyer until he left the office.³⁰⁴ After the probation officer dissuaded Murphy from asserting what he may have thought was his right to a lawyer, it would be unrealistic to expect Murphy to assert his rights further as the Court suggested.³⁰⁵

Murphy reasonably may have thought that he would have been subject to sanctions if he refused to answer his probation officer.³⁰⁶ At the time of the meeting, Murphy was in violation of his probation for having failed to complete a treatment program for sexual offenders.³⁰⁷ The probation officer told Murphy that she wanted to talk about the murder because she believed that he needed to go back to treatment.³⁰⁸ Murphy had reason to believe that if he was uncooperative in discussing his need for treatment the probation officer could have revoked his probation for having failed to complete treatment.³⁰⁹ Contrary to the Court's assertion, Murphy's apprehension that his probation would be revoked for failing to answer his probation officer's question was reasonable. In light of the legal sanction implicit in the probationary relationship, the voluntariness of Murphy's statements is subject to considerable doubt.

The Court in *Murphy* reasoned that even if Murphy believed he was threatened with probation revocation, that belief was unreasonable because his probation could not have been automatically revoked.³¹⁰ The Court concluded that Murphy would not have been penalized because a hearing was necessary before revocation of probation.³¹¹ This reasoning is invalid for two reasons. First, it is not consistent with prior case law. The police officers in *Garrity*, for example, were not faced with an automatic penalty for asserting

(1968) (employees advised that their employment would terminate if they refused to testify with respect to their official conduct on the ground of self-incrimination).

³⁰² *State v. Murphy*, 324 N.W.2d 340, 341 (Minn. 1982).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See 104 S. Ct. at 1154 (Marshall, J., dissenting). The Court noted, however, that Murphy should have asked for a clarification of his probation conditions by asking his probation officer whether he would violate his probation conditions for refusing to answer. *Id.* at 1148.

³⁰⁶ See *supra* notes 280-87 and accompanying text. Murphy had two years remaining on his probation. Pet. App. C., *supra* note 20, at 31. Murphy had reason, therefore, to maintain the good will of the probation officer.

³⁰⁷ See *supra* note 26.

³⁰⁸ *State v. Murphy*, 324 N.W.2d 340, 341 (Minn. 1982).

³⁰⁹ See *supra* notes 280-87 and accompanying text.

³¹⁰ *Murphy*, 104 S. Ct. at 1148.

³¹¹ *Id.* The Court also concluded that Murphy should have known that his probation could not have been revoked for an exercise of the fifth amendment privilege. *Id.*

the privilege.³¹² The police officers were only told that they "may be subjected to a proceeding to have [them] removed from office" if they asserted the privilege.³¹³ In much the same way, Murphy may have been subjected to a proceeding to revoke his probation if the probation officer determined he violated the terms of his probation by failing to discuss further treatment.³¹⁴

Second, contrary to the Court's assertion, Murphy was in fact faced with an automatic penalty if he asserted the privilege — loss of freedom. If Murphy failed to discuss the prior incident in relation to his need for further treatment, a condition of his current probation, he would have violated his probation conditions.³¹⁵ The probation officer, under Minnesota law, could then have caused Murphy to "be taken into immediate custody" and held without bail pending a revocation hearing.³¹⁶ The threat of loss of liberty by being put into jail without bail is as great or even greater a penalty that the threat of loss of employment involved in *Garrity*.

The circumstances surrounding Murphy's interview with his probation officer indicate that Murphy's apprehension of having his probation revoked for failing to answer was reasonable. Murphy would have faced the penalty of loss of liberty pending a revocation hearing if the officer determined that he had violated his probation conditions. The Court's reasoning that Murphy was not deterred from claiming the privilege is not persuasive because the Court overlooked the threat implicit in the probationary relationship and the circumstances of Murphy's interview.

B. Custody, Coercive Atmosphere and Miranda Warnings

The *Murphy* Court held that probation officers are not required to give *Miranda* warnings prior to noncustodial interviews of probationers.³¹⁷ The Court found that because Murphy was not in custody, the probation officer's failure to warn Murphy of his rights did not bar Murphy's confession from being used at his criminal trial.³¹⁸ This section will examine the Court's conclusion that Murphy was not entitled to *Miranda*

³¹² See *Garrity*, 385 U.S. at 495. See also *supra* note 283 and cases cited therein.

³¹³ *Garrity*, 385 U.S. at 504 n.1 (Harlan, J., dissenting).

³¹⁴ MINN. STAT. § 609.14 (1982) sets forth the probation revocation procedure as follows:

When it appears that the defendant has violated any of the conditions of his probation or has otherwise been guilty of misconduct which warrants the imposing or execution of sentence, the court may without notice revoke the stay thereof and probation and direct that the defendant be taken into immediate custody.

The defendant shall thereupon be notified in writing and in such manner as the court directs of the grounds alleged to exist for revocation of the stay of imposition or execution of sentence. If such grounds are brought in issue by the defendant, a summary hearing shall be held thereon at which he is entitled to be heard and to be represented by counsel . . .

Id.

³¹⁵ Brief for Petitioner, Appendix B at 14, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984). The trial court observed that "a condition of his probation was that he be honest with his probation officer, and that he was there ostensibly to discuss further treatment in regard to his current probation. Failure to follow through with either of these could have resulted in revocation of the probation and potential imprisonment." *Id.*

³¹⁶ MINN. STAT. § 609.14 (1982). See *supra* note 314 for text of Minnesota's probation revocation statute.

³¹⁷ 104 S. Ct. at 1146.

³¹⁸ *Id.*

warnings. It will be maintained that in light of the policies underlying the fifth amendment privilege against self-incrimination and the spirit of *Miranda*, there is a legitimate basis to require that *Miranda* warnings be given by the state under circumstances similar to those of Murphy's interrogation by his probation officer.

The current trend of the Court's opinions adopts a literal approach in determining when a custodial situation exists and *Miranda* warnings are necessary. The Court requires either actual arrest or "restraint on freedom of movement" of the degree associated with a formal arrest" before warnings are necessary.³¹⁹ The Court has indicated that custody bears a more direct correlation to physical control than to any psychologically oriented restraint.³²⁰

The Court continued this trend in *Minnesota v. Murphy*.³²¹ In a footnote, the Court emphasized that "Murphy was not under arrest and . . . he was free to leave at the end of the meeting. A different question would have been presented if he had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting."³²² *Murphy* is thus consistent with the Court's "literal" reading of the custody requirement of *Miranda*.

Although *Murphy* is consistent with *Miranda* in a literal sense, the spirit of *Miranda* and the policies underlying the privilege suggest that safeguards were necessary before Murphy's probation officer questioned him. The rationale of *Miranda* goes beyond the narrow issue of physical restraint in determining custody.³²³ Rather, *Miranda* required

³¹⁹ *California v. Beheler*, 103 S. Ct. 3517, 3520 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)).

³²⁰ See Note, *Custodial Interrogation After Oregon v. Mathiason*, 78 DUKE L.J. 1497 (1978). See also *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam).

³²¹ 104 S. Ct. 1136 (1984).

³²² *Id.* at 1143 n.5.

³²³ Following the *Miranda* decision, some federal and state courts emphasized the coercive, rather than the custodial, nature of the setting in evaluating when warnings were required. See, e.g., *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), cert. denied, 397 U.S. 1039 (1970); *Nail v. Slayton*, 353 F. Supp. 1013, 1017-18 (W.D. Va. 1972). The courts reasoned that *Miranda*'s safeguards were designed to counterbalance the compelling pressures inherent in a custodial setting. See, e.g., *People v. Arnold*, 66 Cal. 2d 438, 447, 426 P.2d 515, 520, 58 Cal. Rptr. 115, 120 (1967) ("[t]he vice of the custodial interrogation which [*Miranda*] condemned lay in the psychological coercion implicit in interrogation in the isolated chamber from which the suspect may reasonably believe he cannot leave"). The requirement of warnings in a setting where a suspect could reasonably feel that he is not free to go, although not literally deprived of his freedom of action, the lower courts determined, would be consistent with the spirit of *Miranda*. The lower courts concluded that this "psychological restraint" constituted the functional, and therefore legal, equivalent of custody. See *United States v. Harrison*, 265 F. Supp. 660, 661-62 (S.D.N.Y. 1967) (parolee who was asked by police to go to station for questioning actually believed himself compelled to cooperate with police, and thus, had same coercive effect as if he had actually been in custody). For example, the Supreme Court of California in *People v. Arnold*, 66 Cal. 2d 438, 448, 426 P.2d 515, 520, 58 Cal. Rptr. 115, 121 (1967), held that "custody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived." In *Arnold*, the court found that the defendant was in custody when questioned by a district attorney because she might reasonably have believed that if she had attempted to leave during the interrogation, she would have been arrested or physically detained. *Id.* at 448-49, 426 P.2d at 521-22, 58 Cal. Rptr. at 121-22. The California Supreme Court also suggested that on retrial, the trial court should consider the extent to which the authorities confronted defendant with evidence of her guilt. *Id.* at 449, 426 P.2d at 522, 58 Cal. Rptr. at 122. The court noted that this factor might have led the defendant to reasonably believe that her freedom was significantly restricted. *Id.* at 449, 426 P.2d at 522, 58 Cal. Rptr. at 122.

warnings to neutralize situations in which there are "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak" ³²⁴

Coercion was the evil with which *Miranda* sought to grapple.³²⁵ The Court recognized in *Miranda* that police officers were taking advantage of coercive interrogation techniques to procure confessions to be used against suspects.³²⁶ The *Miranda* Court offered a detailed account of the psychologically oriented coercive techniques referred to in various police manuals.³²⁷ One tactic was to be alone with the person under interrogation.³²⁸ Another technique noted by the Court was to posit the guilt of the accused as a fact and to maintain only an apparent interest in confirming specific details.³²⁹ Trickery is also referred to in the manuals as a tactic to induce a confession.³³⁰ The Court noted that further coercive interrogation techniques were advised in such manuals should the subject wish to speak to an attorney or relative.³³¹ The Court designed the remedy of warnings to shield suspects from such interrogation strategies.³³² Recognizing the coercive atmosphere that generally exists in the context of a police interrogation, the Court held that law enforcement officials are required to fully advise the suspect of his constitutional rights before custodial interrogation.³³³ According to the Court, one basic purpose of the remedy of exclusion of all in-custody statements without prior *Miranda* warnings was to deter law enforcement officers from taking advantage of interrogation techniques "at odds with one of our nation's most cherished principles — that the individual may not be compelled to incriminate himself."³³⁴

Murphy's probation officer, however, took advantage of interrogation techniques similar to those noted by the *Miranda* Court in order to procure a confession to be used to convict Murphy. First, the probation officer's conduct was deceptive and incorporated several elements of trickery condemned by the *Miranda* Court.³³⁵ While wanting to convey

³²⁴ *Miranda*, 384 U.S. at 467.

³²⁵ *Id.* at 456. "In the cases before us today, . . . we concern ourselves primarily with this interrogation atmosphere and the evils it can bring." *Id.*

³²⁶ *Id.* at 445-55.

³²⁷ *Id.*

³²⁸ *Id.* at 449-50.

³²⁹ *Id.* at 450.

The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already — that he is guilty.

Id.

³³⁰ *Id.* at 453.

³³¹ *Id.* at 454. The Court noted that the following advice is given in the police manuals if the subject wishes to speak to a relative or attorney:

the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, "Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself."

Id. (quoting from INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 112 (1962)).

³³² *Miranda*, 384 U.S. at 467.

³³³ *Id.* at 444.

³³⁴ *Id.* at 457-58.

³³⁵ See *supra* note 330. The Court condemned trickery in *Spano v. New York*, 360 U.S. 315, 323 (1959) (officers played on trust and falsely said job was in jeopardy). The current Court,

the information about Murphy's pre-probation crime to the police,³³⁶ the probation officer needed Murphy to talk about the murder in her presence before the information could be used to convict him of the crime.³³⁷ The probation officer thereby summoned Murphy to her office to discuss "further treatment."³³⁸ By apparently limiting the purpose of the meeting to discuss a condition of his current probation status, the probation officer misled Murphy and took advantage of the threat of legal sanction implicit in the probation relationship.³³⁹ Had the probation officer asked Murphy to appear in her office without indicating a specific purpose, the officer's conduct would have been less suspect.

Once Murphy was inside the probation office, the probation officer utilized a tactic referred to in pre-*Miranda* police manuals.³⁴⁰ She took Murphy by surprise by positing his guilt as a known fact,³⁴¹ and exacerbated Murphy's confusion by prodding him to discuss the rape-murder in the context of its relationship to the offense for which he was on probation.³⁴² Like the police interrogation technique noted in *Miranda*, Murphy's probation officer appeared to maintain only an interest in confirming details — the relationship between the past crime and Murphy's need for further treatment.³⁴³ The *Miranda* Court noted that such tactics are designed to put the subject in a psychological state so that a confession of guilt will follow.³⁴⁴ Murphy's responses to his probation officer confirm that he thought he could clear himself of trouble with his probation

however, seems to have greater tolerance for trickery. See *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977) (per curiam) (police falsely told defendant that his fingerprints were found at burglary scene but Court held these false statements were irrelevant to the issue of custody).

³³⁶ 104 S. Ct. at 1140 ("After discussions with her superior, the officer determined that the police should have this information"). See *supra* text accompanying notes 23–24.

³³⁷ *Murphy*, 104 S. Ct. at 1140 & n.1. Applicable confidentiality laws prohibited the officer from directly telling the authorities about the information received from the treatment facility. See *supra* notes 24–25.

³³⁸ 104 S. Ct. at 1140.

³³⁹ *Id.* The Court contended that there is no evidence that Murphy's probation officer used treatment as a subterfuge. *Id.* According to the Court, the result in *Murphy* would not have changed even if the probation officer's sole purpose was to obtain incriminating statements for the police. *Id.* at 1140 n.2.

³⁴⁰ See *Miranda*, 384 U.S. at 448–55. The *Miranda* Court noted that interrogation manuals instructed the police:

to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it.

Id. at 450.

³⁴¹ See *Murphy*, 104 S. Ct. at 1140. The probation officer did not ask Murphy whether he committed the crime. Rather, the officer opened the meeting by telling Murphy that she knew he had admitted committing a rape-murder. *Id.*

³⁴² *Id.* at 1141; see *supra* note 340. At the time of the meeting, Murphy had two years remaining on his probation. Pet. App. C., *supra* note 20, at 31. The penalty for rape-murder in Minnesota is mandatory life imprisonment. MINN. STAT. § 609.185(2) (1974). By telling Murphy that the purpose of the meeting was "to discuss a treatment plan for the remainder of [his] probation," the probation officer implicitly represented that Murphy would not be subject to criminal penalty if he discussed the murder. Pet. App. C., *supra* note 20, at 36.

³⁴³ See *supra* note 340.

³⁴⁴ *Miranda*, 384 U.S. at 450.

officer by discussing the prior crime. After admitting that he had committed the crime, Murphy immediately explained that further treatment was not necessary because the crime was caused by a drug habit that he had since broken.³⁴⁵

The probation officer's response to Murphy's exclamation that he wanted to call a lawyer is also reminiscent of a police tactic highlighted in *Miranda*. The police manuals cited by the *Miranda* Court advised officers to dissuade persons from speaking to attorneys by indicating that they could handle the questioning on their own.³⁴⁶ Similarly, Murphy's probation officer belittled his request to speak with a lawyer by indicating that he could not call from her office.³⁴⁷ Murphy testified that after he asked to call a lawyer, the probation officer "seemed . . . kind of angry and frustrated."³⁴⁸ Then the probation officer explained to Murphy that all she wanted to talk about was the relationship between the prior crime and the crime for which he was on probation.³⁴⁹ The probation officer was implying that this was a matter which Murphy was able to discuss with her without a lawyer.

Furthermore, the probation officer employed a third tactic condemned by the *Miranda* Court — being alone with the person under interrogation in the confines of the interrogator's office. Privacy, the *Miranda* Court noted, "is essential to prevent distraction and to deprive [the person] of any outside support."³⁵⁰ Murphy's meeting was held in private. No family or friends were present to support him. Moreover, the meeting was held in the probation officer's office. As one police manual stated, the investigator possesses all the advantages in his own office because the atmosphere suggests "the invincibility of the forces of the law."³⁵¹ The same is true in the probation office. As one commentator noted: "Viewed from the eyes of the probationer, the [probation] officer represents a power that can, and does limit his freedom."³⁵²

Although Murphy was familiar with the office, his familiarity did not dispel the coercive atmosphere of the probation office. The coercive pressures in a probation office are similar to those in a police office because the probation officer has power over the conditions of the probationer's life and the discretion to restrict his liberty. As the Supreme Court has noted, probationers look to their probation officers as an "officer of the Court system that imposes punishment."³⁵³ Murphy testified that he felt that if he had walked out of the office without his probation officer's permission, his probation would have been revoked.³⁵⁴ The trial court observed that if Murphy did not discuss further treatment in regard to his current probation, and instead walked out of the office, the probation officer could have caused Murphy to have been "taken into immediate custody and held without bail pending a revocation hearing."³⁵⁵

Thus, contrary to the Court's conclusion, Murphy's probation interview was analogous to interrogations held in police custody which occurred prior to *Miranda*. *Miranda*

³⁴⁵ *Murphy*, 104 S. Ct. at 1141.

³⁴⁶ *Miranda*, 384 U.S. at 454.

³⁴⁷ *Murphy*, 104 S. Ct. at 1140-41.

³⁴⁸ Pet. App. C, *supra* note 20, at 26.

³⁴⁹ 104 S. Ct. at 1141.

³⁵⁰ *Miranda*, 384 U.S. at 455.

³⁵¹ *Id.* at 450.

³⁵² Arcaya, *The Multiple Realities Inherent in Probation Counseling*, 37 FED. PROB. 58, 58-59 (1973).

³⁵³ *Fare v. Michael C.*, 442 U.S. 707, 721 (1979) (probationer's request for his probation officer not a *per se* invocation of his fifth amendment rights under *Miranda*).

³⁵⁴ Pet. App. C., *supra* note 20, at 19-20, 26.

³⁵⁵ See *supra* note 315.

sought to deter the use of coercive interrogation techniques. Because Murphy was subjected to the same coercive pressures found to jeopardize the privilege against self-incrimination in *Miranda*, he should have been warned of his rights by the probation officer. The situation which confronted Murphy is not so dissimilar from that of a person under arrest as to justify the imposition of differing standards leading to diametrically opposite results.

C. *Frustration of Constitutional Policies: The Murphy Court's Approval of the Use of the Probation System to Gather Incriminating Statements*

As a consequence of *Murphy*, noncustodial probation interviews may now be used to gather evidence for criminal prosecutions. The Court indicated that Murphy's statements would be admissible even if the probation officer's sole purpose was to obtain incriminating statements.³⁵⁶ The probation system is not only an inappropriate system to investigate pre-probation crimes, but also having probation officers act as detectives is itself constitutionally offensive. The policies behind the privilege against self-incrimination and the deterrent purpose of *Miranda* will be frustrated if noncustodial probation interviews are used to gather evidence to convict probationers of pre-probation crimes.

The function of the probation system is to supervise probationers, not to initiate criminal investigation.³⁵⁷ As the Supreme Court has noted, the purpose of probation "is to help individuals reintegrate into society as soon as they are able."³⁵⁸ Probationers and probation officers are joined in a counseling relationship.³⁵⁹ Because the probation officer is a court-appointed supervisor, there is tension between the needs of the probationer as a "client" in a counseling relationship and the representative of a legal institution.³⁶⁰ The Court has recognized this tension and indicated that "concern for the client should dominate [the probation officer's] professional attitude."³⁶¹

The normal duties of probation supervision entail routine questioning at interviews. The probation officer, for example, may investigate the circumstances surrounding the offense for which the probationer is on probation, or ask questions about the probationer's background.³⁶² The interview might also focus on an investigation into some incident occurring during the period of probation which could lead to revocation of probation.³⁶³ Sometimes, incriminating information may result when the probation officer asks a

³⁵⁶ *Murphy*, 104 S. Ct. at 1140 n.2.

³⁵⁷ *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 267 (9th Cir. 1975) (law enforcement agencies should not look to the probation system to gather evidence for criminal trials). The Administrative Office of United States Courts has also indicated that the probation system should not be used to obtain information for criminal prosecutions: "Self-incriminating statements made in the routine course of probation business without '*Miranda*' warnings may be used in revocation hearings. The focus should be on obtaining this information for a probation revocation hearing rather than for further criminal prosecution." Brief for Respondent at 30 n.14, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984) (quoting X GUIDE TO JUDICIARY POLICIES AND PROCEDURES, at 4-35).

³⁵⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 783 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

³⁵⁹ *Arcaya*, *supra* note 352 at 58.

³⁶⁰ *Id.*

³⁶¹ *Gagnon v. Scarpelli*, 411 U.S. 778, 783-84 (1973).

³⁶² Amicus brief for the National Association of Criminal Defense Lawyers at 10, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984).

³⁶³ *Id.*

probationer about other criminal conduct.³⁶⁴ This type of questioning is within the realm of effective probation supervision because the purpose of those questions is only to determine whether to further regulate or revoke probation.³⁶⁵

The purpose of Murphy's probation officer's questions, however, was not to investigate a pre-probation crime to further supervise Murphy's probation, but to obtain incriminating statements which could later be used to convict him of a capital crime.³⁶⁶ The probation officer went beyond the rehabilitation function and utilized the probationary relationship for an entirely different purpose. This type of conduct is not only disruptive to the effectiveness of probation supervision,³⁶⁷ but will also allow police to use probation officers to question probationers in noncustodial settings when the probationer is suspected of a crime.³⁶⁸

Moreover, if the probation officer is delegated the police's interrogation function in noncustodial interviews, the basic purpose behind *Miranda* of deterring law enforcement officers from taking advantage of coercive interrogation techniques will be frustrated.³⁶⁹ Without having to give *Miranda* warnings, the probation officer can utilize the counseling relationship to obtain a confession, and report the confession to the police. The probation

³⁶⁴ *Id.*

³⁶⁵ Brief for Defendant at 32, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984). Probation officers should be able to question probationers freely regarding conduct during the term of probation without having to give *Miranda* warnings before every meeting. When a probation officer seeks incriminating evidence about a pre-probation crime, however, the probation officer should be required to advise a probationer of the privilege against self-incrimination. *Id.* See *infra* notes 366-78 and accompanying text.

³⁶⁶ See *Murphy*, 104 S. Ct. at 1140. The probation officer determined that the police should have the information. *Id.* The officer arranged a meeting at which she wanted Murphy to discuss the crime in relation to a current condition of his probation. *Id.* at 1140-41. Incriminating statements resulted. *Id.* The probation officer who was not even under court order, gave the statements to the police. *Id.* Additional treatment did not appear to be the motive for the meeting. Thus, the probation officer was acting not as the supervising official, but as an agent of the police.

³⁶⁷ The role of the probation system is to rehabilitate individuals. See *supra* notes 358-61 and accompanying text. The benefit of a treatment program for sexual offenders is minimal, however, if the probationer knows that his disclosures to a therapist will result in prosecution on criminal charges. Moreover, after *Murphy*, the probationer may not freely relate information to his probation officer for fear of incriminating himself. See Brief for Respondent at 33, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984). See also *People v. Parker*, 82 A.D.2d 661, 667, 442 N.Y.S.2d 803 (N.Y. App. Div. 1981), *aff'd*, 57 N.Y.2d 815, 441 N.E.2d 1118, 455 N.Y.S.2d 600 (1982). The *Parker* court observed:

The use of statements made by a parolee to his parole officer as evidence in a criminal trial against the parolee disrupts and destroys the confidence and trust which must inevitably inhere in the relations created by the parole system. The parole system presupposes the rehabilitation of the offender and must be built on the frank communication of advice and information between parolee and his supervisor, and that relationship will be damaged beyond repair if the indispensable pillar of candid exchange is undermined.

Id.

³⁶⁸ The *Murphy* Court indicated that probation officers may obtain incriminating statements "for the police" in noncustodial settings without giving *Miranda* warnings. See 104 S. Ct. at 1140 n.2.

³⁶⁹ See *supra* note 334 and accompanying text. In the fourth amendment context, this principle has been applied by the Ninth Circuit. *Smith v. Rhay*, 419 F.2d 160, 162 (9th Cir. 1970) (a parole officer may not conduct a warrantless search of items in the parolee's possession while acting on the prior request of law enforcement officials and in concert with them).

officer may even use coercive interrogation techniques which the Court prohibited police officers from using in *Miranda*.³⁷⁰ After the Court's decision in *Murphy*, the police now have an incentive to utilize the probation system to gather evidence to convict probationers because *Miranda* warnings are not required in noncustodial interviews. The requirements of having to warn suspects who are also probationers of their rights may thereby be eliminated if the interrogating officer is a probation officer rather than a police officer.

Moreover, the Court's approval of Murphy's probation officer's conduct is inconsistent with our nation's accusatorial system of criminal justice. In such a system, the government accuses and bears the burden of proving the guilt of a person accused of a crime.³⁷¹ The government must establish guilt by "evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."³⁷² One of the purposes of the fifth amendment privilege against self-incrimination was to preserve this type of criminal justice system.³⁷³ The privilege is implicated when the government's questioning subverts our accusatorial system and, instead, becomes inquisitorial.³⁷⁴ In an inquisitorial investigation, the purpose of questioning is to elicit admissions of guilt from the subject of the investigation.³⁷⁵

Such an inquisitorial situation existed in Murphy's interview with his probation officer. The probation officer sought to elicit evidence from Murphy by assuming a nonadversarial position — that of probation officer instead of police officer.³⁷⁶ Furthermore, using noncustodial probation interviews to elicit incriminating evidence is a way "to avoid the burdens of independent investigation . . ."³⁷⁷ Murphy's probation officer

³⁷⁰ See *supra* notes 325–55 and accompanying text.

³⁷¹ *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

³⁷² *Id.* See also *Tehan v. Shott*, 382 U.S. 406, 415 (1966) (the basic purposes behind the privilege against self-incrimination relate to "preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder[s] the entire load'").

³⁷³ *Garner v. United States*, 424 U.S. 648, 655 (1976) ("the fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice"). See also *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), where the Court listed the recognized policies underlying the privilege:

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice, our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id.

³⁷⁴ The privilege against self-incrimination was developed by opposition to the inquisitorial practices of the English Courts of Star Chamber. See *supra* notes 53–56 and accompanying text.

³⁷⁵ See *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). The *Tucker* Court stated: "Anyone who reads accounts of [the ecclesiastical inquisitions and Star Chamber proceedings], which placed a premium on compelling subjects of investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion." *Id.*

³⁷⁶ See *Murphy*, 104 S. Ct. at 1160 (Marshall, J., dissenting).

³⁷⁷ *Garner v. United States*, 424 U.S. 648, 655–56 (1976).

did not investigate but sought to induce Murphy to convict himself with his own statements.³⁷⁸

The underlying policies behind *Miranda*, therefore, suggest that Murphy should have been warned of his rights before his probation officer sought to obtain incriminating evidence regarding a pre-probation crime. Although Murphy was subjected to same sort of coercive pressures found to jeopardize the privilege in *Miranda*, the Supreme Court did not require that warnings be given him by his probation officer prior to questioning. The Court took a much more restrictive view emphasizing technical custody or actual, physical deprivation of the individual's freedom to walk away from questioning before *Miranda* warnings are necessary.³⁷⁹ Thus, *Murphy* deprives probationers much of the protection provided by the privilege against self-incrimination.

CONCLUSION

In *Minnesota v. Murphy*, the Supreme Court relied on an inappropriate analogy between the probation setting and the situation confronting witnesses before grand juries in holding that probationers must affirmatively assert the privilege against self-incrimination in response to incriminating questions asked by probation officers. The Court recognized that a "reasonably perceived" threat of penalty upon the exercise of the privilege may excuse the obligation to claim the privilege. The reasonableness of the threat, however, was improperly judged according to witness standards. Instead, the reasonableness of the threat should have been judged according to circumstances actually confronting the probationer.

Furthermore, while *Murphy* is consistent with the literal interpretation of *Miranda*, the Court frustrated the spirit of *Miranda* and the policies underlying the privilege by holding that *Miranda* warnings are not required to be administered by probation officers before noncustodial probation interviews. The Court failed to recognize that unlike the situation of a witness before a judicial body, Murphy's confession was procured in an environment which lacked procedural safeguards. Murphy's probation interview contained inherently compelling pressures which undermined his will in much the same way as if he had been questioned while under arrest. Moreover, as a consequence of *Murphy*, the police may be able to circumvent the requirements of *Miranda* by using the probation system to gather evidence for criminal prosecutions of probationers suspected of prior criminal activity. The probationer's privilege against self-incrimination, therefore, should have been protected by requiring *Miranda* warnings to be administered prior to noncustodial probation interviews where probation officers attempt to gather incriminating testimony regarding pre-probation crimes.

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³⁷⁸ See *Murphy*, 104 S. Ct. at 1160 (Marshall, J., dissenting).

³⁷⁹ *Id.* at 1143 n.5.