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Fifth Amendment--Admissibilty of Confession Obtained Without Miranda Warnings in Noncustodial Setting

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FIFTH AMENDMENT—ADMISSIBILITY OF CONFESSION OBTAINED WITHOUT *MIRANDA* WARNINGS IN NONCUSTODIAL SETTING

Minnesota v. Murphy, 104 S. Ct. 1136 (1984).

I. INTRODUCTION

The fifth amendment right to remain silent guarantees that a state may not compel individuals to incriminate themselves in a criminal matter.[1] To ensure that suspects are not coerced into waiving this constitutional right, the Supreme Court held in *Miranda v. Arizona*[2] that in inherently coercive situations, the state must warn individuals of their rights.[3] In *Minnesota v. Murphy*,[4] the Supreme Court held that a person who is required to tell the truth to his probation officer, and thereby incriminates himself in an unrelated criminal matter, is not afforded fifth amendment warnings.[5] In *Murphy*, the Court limited the scope of an individual's fifth amendment right to be free from compelled self-incrimination and created an avenue by which states may obtain involuntary confessions by taking advantage of suspects' lack of knowledge of their constitutional rights.[6]

This Note argues that the *Murphy* Court correctly refused to apply the *Miranda* warning requirement because Murphy's situation was not as inherently coercive as interrogation in police custody.[7] The Court, however, ignored factors that undermined Murphy's free choice to exercise his right to remain silent.[8] The Court, therefore, unjustifiably determined that Murphy could not claim the privilege at trial to prevent admission of his incriminating statements.[9]

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1 U.S. CONST. amend. V states: "No person shall . . . be compelled in any criminal case to be a witness against himself."

2 384 U.S. 436 (1966).

3 *Id.*

4 104 S. Ct. 1136 (1984).

5 *Id.* at 1149.

6 *See infra* notes 135-44 and accompanying text.

7 *See infra* notes 110-20 and accompanying text.

8 *See infra* notes 121-134 and accompanying text.

9 *See infra* notes 135-44 and accompanying text.

II. HISTORY

The fifth amendment privilege against self-incrimination affords individuals the right to remain silent when confronted with questions that might incriminate them in a criminal matter.[10] Under an adversarial criminal justice system, the government may not use its power to coerce self-incriminating testimony from a suspect, but must seek incriminating evidence through independent means.[11] The government, therefore, may not exert pressure upon individuals to forego their fifth amendment privilege by threatening them with physical punishment, criminal sanctions, or any other substantial penalty.

In most situations, suspects are responsible for claiming the privilege on their own initiative. Their failure to do so results in their losing the benefit of the privilege.[12] In some situations, however, the courts have granted suspects a self-executing privilege. Suspects may assert the privilege at trial to suppress incriminating statements even though the suspect failed to invoke the privilege at the time of interrogation. The purpose of this self-executing privilege is to overcome possible restraints on a suspect's free will that may result from inherently coercive situations. The assertion of the fifth amendment privilege has arisen in widely varying contexts including custodial interrogations,[13] cross-examination of subpoenaed witnesses,[14] and interrogations in which the government has threatened suspects for invoking the privilege.[15] Although each situation involves self-incrimination, the constitutional protection afforded to the accused differs in each situation.

A. THE CUSTODIAL INTERROGATION CASES

One situation in which the Court has recognized a self-executing privilege is interrogation of a suspect in police custody. Because of the inherently coercive nature of custodial interrogation,[16] the

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10 U.S. CONST. amend. V.

11 Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961); *see also* Garner v. United States, 424 U.S. 648, 655 (1976) (the "fundamental purpose" of the fifth amendment privilege against self-incrimination is "the preservation of an adversary system of criminal justice").

12 *Murphy*, 104 S. Ct. at 1143.

13 *See infra* notes 16-34 and accompanying text.

14 *See infra* notes 35-53 and accompanying text.

15 *See infra* notes 54-61 and accompanying text.

16 *See Miranda*, 384 U.S. at 445-46 n.5. In *Miranda*, the Court documented the use of physical force and psychological coercion to elicit incriminating information. As an example, the Court mentioned a case in which "police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the

Court has recognized an exception to the non-self-executing nature of the fifth amendment privilege.[17] The simple fact that a suspect is surrounded by police in an unfamiliar, hostile environment may undermine the suspect's free will and prompt self-incriminating statements where the suspect otherwise would have remained silent.[18]

The traditional test for determining the admissibility of self-incriminating statements made in police custody focused on the voluntariness of the confession.[19] Under this test, the reviewing court subjectively scrutinized the trial court record to determine whether the confession was the product of the accused's free will or whether the confession was coerced by government authorities.[20] If the court found that coercive police conduct overcame the suspect's free will, the court would render the statement inadmissible to protect the suspect's fourteenth amendment due process rights.[21]

In *Miranda v. Arizona*, the Supreme Court abandoned the focus on surrounding circumstances and developed a per se test for the admissibility of confessions.[22] The Court held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way,"[23] he must be warned of his constitutional rights before interrogation.[24] This per se test created

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purpose of securing a statement." *Id.* at 446 (citing People v. Portelli, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965)).

17 *Id.* at 445-48, 479-91.

18 *Culombe*, 367 U.S. at 602. The Court noted that many factors involved in custodial interrogation may undermine a suspect's free choice to remain silent: extensive cross-questioning, refusal to permit communication with friends or legal counsel, "the duration and conditions of detention, . . . the manifest attitude of the police toward him, [and] his physical and mental state." *Id.*

19 For a discussion of the historical trend of admissibility of confessions, see Note, *Fifth Amendment Exclusionary Rule: The Assertion & Subsequent Waiver of the Right to Counsel*, 74 J. CRIM. L. & CRIMINOLOGY 1315, 1316 (1983). *See also* Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment & the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Note, *Constitutional Law — Supreme Court Limits the Application of* Miranda *by Narrowing the Definition of "Custodial Interrogation"*, 45 FORDHAM L. REV. 1222 (1977).

20 *Culombe*, 367 U.S. at 602.

21 *Id.* Also, in *Miranda*, the Court noted that even after the publication of a report by a congressional committee that documented the use of coercion to obtain confessions, "the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort a confession." 384 U.S. at 445-46.

22 384 U.S. 436 (1966).

23 *Id.* at 478.

24 *Id.* The Court held that the warnings must inform the accused that

> he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him if he so desires.

Id.

an "exception to the general rule that the Fifth Amendment privilege is not self-executing"[25] by allowing accused persons to claim the benefit of the privilege at trial even though they failed to claim the privilege during interrogation. The Court thus sought to protect individuals against "the overbearing compulsion . . . caused by isolation of a suspect in police custody."[26]

The reach of the *Miranda* procedural safeguards was limited subsequently by decisions that narrowly interpreted the definition of "custodial interrogation."[27] In *Beckwith v. United States*,[28] two Internal Revenue Service agents questioned a suspect in a private home while investigating a possible criminal federal income tax violation. The agents informed the suspect of the purpose of the interrogation and told him that he was not required to answer any incriminating questions.[29] The Court held that this interrogation did not fall within the definition of "custody" according to Miranda even though the purpose of the interrogation was to incriminate the suspect.[30] By refusing to extend the definition of "custodial interrogation" in *Miranda* to a situation in which the suspect had not been placed under arrest, *Beckwith* set the stage for subsequent decisions that would ignore the language of *Miranda* that required a self-executing privilege whenever the suspect was "deprived of his freedom by the authorities in any significant way."[31]

In *Oregon v. Mathiason*,[32] a suspect voluntarily met with a police officer at a patrol station and confessed to a burglary. The Court

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25 *Murphy*, 104 S. Ct. at 1146.

26 United States v. Washington, 431 U.S. 181, 187 n.5 (1977).

27 *See* Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968). The Court has ruled that interrogation is custodial where there was no actual arrest but there was a significant restriction on the suspect's freedom of movement. In *Mathis*, the Court held that a jailhouse setting fell within the custody definition of *Miranda* and required the use of warnings against self-incrimination. 391 U.S. at 5. Also, in *Orozco*, the Court held that police interrogation at 4 a.m. in the suspect's bedroom was "custodial." 394 U.S. at 326.

28 425 U.S. 341 (1976).

29 *Id.* at 343. The warnings given to the suspect failed to satisfy the *Miranda* warning requirement because they did not specifically advise the suspect of the right to remain silent and implied that the suspect could be compelled to answer non-incriminating questions. The warnings also did not inform the suspect of his right to have appointed counsel if he could not afford a lawyer. For a more detailed discussion of *Beckwith*, see Note, *Income Tax Investigations*—Miranda *Warnings Not Required Prior to Non-Custodial Interview with IRS Agents*, 81 DICK. L. REV. 368 (1977).

30 The defendant acknowledged that he understood his rights, and he testified that he was not forced to answer any questions. *Beckwith*, 425 U.S. at 343; *see* Note, *supra* note 29, at 369 n.13.

31 *Miranda*, 384 U.S. at 444.

32 429 U.S. 492 (1977).

held admissible the suspect's confession.[33] Thus, according to *Mathiason* and *Beckwith*, custody is limited to situations in which the suspect has been placed under arrest or his freedom of movement has been seriously restricted.[34]

B. THE WITNESS CASES

Miranda created a per se rule barring admission of incriminating statements made by suspects who received no fifth amendment warnings while being interrogated in police custody.[35]

In *Miranda*, the Court refused to apply the voluntariness test because of the presumption that custodial interrogation is inherently coercive.[36] Although the language of *Miranda* left open the possibility that its per se rule would be applied in other situations that were found to be inherently coercive,[37] *Beckwith* subsequently limited the scope of this per se rule to official arrest situations.[38]

Issues concerning the assertion of a self-executing fifth amendment privilege also have arisen where the government subpoenaes witnesses to testify at trial or before a grand jury. The Supreme Court has never explicitly held that the compulsion inherent in either situation requires the government to give *Miranda*-type warnings despite the government's ability to compel testimony.[39] In *United States v. Kordel*,[40] the Food and Drug Administration (FDA) simultaneously maintained civil and criminal actions against the defendant, a corporate officer. In his answers to FDA interrogatories in the civil action, the defendant gave information that incriminated him in the criminal action.[41] He then asserted his fifth amendment privilege in the criminal proceeding to prevent the admission of his statements. The defendant claimed that in answering the interrogatories, he faced three unpleasant alternatives: forfeiting his corporation's property by refusing to answer, subjecting himself to the risk of prosecution for perjury by lying, or aiding the government in

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33 The defendant confessed within five minutes of entering the police station and was free to leave at the end of the interrogation. *Id.* at 493-94.

34 *Id.* at 494; *Beckwith*, 425 U.S. at 344; *see* Note, *Constitutional Law—Supreme Court Limits Applicability of* Miranda *by Narrowing Definition of "Custodial Interrogation"*, 45 FORDHAM L. REV. 1222 (1977); Note, *"In Custody?": A Relaxation of* Miranda, 23 LOY. L. REV. 1057 (1977); Note, *Criminal Procedure—Defining "Custodial Interrogation" for Purposes of* Miranda: Oregon v. Mathiason, 57 OR. L. REV. 184 (1977).

35 *Miranda*, 384 U.S. at 444.

36 *Id.* at 457-58.

37 *Id.* at 444.

38 425 U.S. at 344.

39 *See infra* notes 47-53 and accompanying text.

40 397 U.S. 1 (1970).

41 *Id.* at 7.

convicting him in the criminal action by supplying helpful evidence and leads.[42] The Court held that Kordel's statements were admissible because the situation did not compel him to testify and that "[w]ithout question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination."[43] The Court recognized, however, that Kordel was represented by counsel and probably understood the consequences of answering the interrogatories without warnings from the government.[44]

The Supreme Court has never decided explicitly whether the government must give fifth amendment warnings to grand jury target witnesses[45] before it may use their self-incriminating statements to prosecute them for a target offense.[46] In *United States v. Mandujano*,[47] a grand jury subpoenaed Mandujano to testify about local drug trafficking. The prosecutor failed to administer full *Miranda* warnings. The witness perjured himself and was subsequently tried for perjury, but not for the drug-related crimes. The Court held that the defendant could not invoke his privilege against self-incrimination at the perjury trial to suppress his perjurious statements.[48] Because the defendant in *Mandujano* had been given some warning and was prosecuted for perjury, this ruling left unresolved whether the government must administer constitutional warnings to use testimony to prosecute an individual for the target offense.[49]

In *United States v. Washington*,[50] the respondent, who was suspected of involvement in a theft, was subpoenaed to appear before a grand jury investigating the crime. The prosecutor gave the suspect full *Miranda* warnings but did not inform him of his target status. The Court held that the defendant's grand jury testimony could be used against him at the subsequent trial for the target offense.[51] Although the Court did not rule that *Miranda* warnings were required, it noted that in this situation, "the comprehensive warnings respondent received . . . plainly satisfied any possible claim to

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42 *Id.*

43 *Id.*

44 *Id.* at 9-10.

45 For purposes of this discussion, "target witness" refers to a witness the government is seeking to indict.

46 For a more detailed analysis of the constitutional rights available to grand jury target witnesses, see Comment, *Federal Grand Juries: The Plight of the Target Witness*, 11 U.S.F.L. REV. 672 (1977).

47 425 U.S. 564 (1976) (plurality opinion).

48 *Id.* at 574-75.

49 *Id.*

50 431 U.S. 181 (1976).

51 *Id.* at 186-90.

warnings"[52] and that his signing of a waiver-of-rights form was not involuntary.[53] The Court held that when witnesses supply incriminating information, they do not have a self-executing privilege that can be invoked to prevent admission of the incriminating statements. In each of the above cases, however, the defendants either had the benefits of legal counsel or warnings that would have alerted them to the consequences of supplying incriminating information.

C. THE PENALTY CASES

The Court has held that a self-executing privilege exists where the government threatens suspects with a substantial penalty for invoking their fifth amendment privilege.[54] The suspect may assert the self-executing privilege at trial to suppress any self-incriminating statement made under threat of penalty. In *Garrity v. New Jersey*,[55] the State threatened police officers who were under investigation for corruption with discharge from their jobs if they claimed their fifth amendment privilege.[56] In response to the threat, an officer failed to invoke the privilege and incriminated himself.[57] The Court held that the situation gave rise to a self-executing privilege that the individual could invoke at trial to suppress the incriminating statements.[58]

The Court also has held that a self-executing privilege exists for gamblers filing federal occupational and excise tax returns.[59] In

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52 *Id.* at 186.

53 *Id.* at 186 n.4.

54 Garrity v. New Jersey, 385 U.S. 493 (1967); *see also* Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (state attempt to punish assertion of the fifth amendment privilege was constitutionally impermissible); Lefkowitz v. Turley, 414 U.S. 70 (1973) (state may not compel a contractor to waive his privilege against self-incrimination by threatening loss of state contracts); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 392 U.S. 280 (1968) (state may not threaten public employees with discharge for refusal to waive privilege); Garner v. Broderick, 392 U.S. 273 (1968) (state may not dismiss police officer solely for refusal to waive immunity).

55 385 U.S. 493 (1967).

56 *Id.* at 494.

57 *Id.* at 495.

58 *Id.* at 500.

59 *See* Marchetti v. United States, 390 U.S. 39 (1968). In Grosso v. United States, 390 U.S. 62 (1968), the Court held that the government may not punish gamblers for refusal to pay excise taxes on wagering or occupational taxes on gambling. The Court reasoned that requiring the petitioners to pay these taxes, which were directed solely at gamblers, would require them to incriminate themselves as gamblers. To force the petitioners to choose between paying the taxes and facing prosecution for failure to do so, therefore, would require them to choose between self-incrimination and a substantial penalty. *See also* Mackey v. United States, 401 U.S. 667 (1971).

Marchetti v. United States,[60] the Court recognized that requiring gamblers to assert the privilege at the time the tax returns were due would incriminate them. Thus, the Court held that the fifth amendment privilege against self-incrimination allowed the gamblers to refrain from filing the occupational and excise tax returns. In addition, the gamblers could assert the fifth amendment privilege as a defense in a subsequent prosecution for failure to comply with Internal Revenue Service filing regulations.[61] Under *Garrity* and *Marchetti*, accused persons may fail to claim their privilege against self-incrimination at the time the government requests information. Accused persons then may exclude incriminating statements from evidence at trial if the government threatens them with a substantial penalty for refusing to provide the requested information. This is true whether the penalty is an explicit threat of discharge from employment or whether the penalty involves the possibility of prosecution for gambling offenses or failure to file a tax return.

III. FACTS OF *MINNESOTA V. MURPHY*

In 1974, during their investigation of a rape and murder of a teenage girl, Minneapolis police questioned Marshall Murphy but failed to charge him with the crimes.[62] Six years later, Murphy was charged with criminal sexual conduct in an unrelated case but pleaded guilty to the lesser charge of false imprisonment.[63] Murphy received a suspended sentence of sixteen months for the false imprisonment charge and was placed on three years probation.[64] Murphy's probation requirements included participating in a treatment program for sexual offenders, reporting to his probation officer as

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60 390 U.S. 39 (1968).

61 *Id.* at 50-51. *But see* Garner v. United States, 424 U.S. 648 (1976), which held that the defendant, a gambler, must file a federal income tax return even if the return might incriminate him. *Id.* at 654. The *Garner* Court distinguished *Marchetti* and *Grosso* because the occupational and excise taxes were directed solely at gamblers, "the great majority of whom were likely to incriminate themselves by responding." *Id.* at 660. The Court, however, pointed out that income tax returns contain only facially neutral questions directed at the public at large and "the great majority of persons who file income tax returns do not incriminate themselves by disclosing their occupation." *Id.* at 661. The Court held, nevertheless, that the defendant could claim the privilege on the tax return. If the IRS subsequently requested the omitted information, the taxpayer could refuse to testify or supply the requested documents and rely on the privilege as a defense in a prosecution for willful failure to supply information. *See* I.R.C. § 7203 (1985). The Court also distinguished *Garner* from *Garrity* by stating that Garner would not be placed in the same dilemma as the officer in *Garrity* because Garner could not be penalized for claiming the privilege on his tax return. *Garner*, 424 U.S. at 661-63.

62 *Murphy*, 104 S. Ct. at 1140.

63 *Id.*

64 *Id.*

she directed, and responding truthfully to her questions.[65] He also had to sign a statement requiring him to comply with the conditions of his probation.[66]

From the time of his sentence until July 1981, Murphy met with his probation officer approximately once a month.[67] At this time, a counselor from his treatment program told his probation officer that Murphy had abandoned the program.[68] The probation officer wrote to Murphy, telling him that if he failed to arrange a meeting with her, she would immediately request a warrant for his arrest.[69] At the following meeting, the officer agreed not to revoke Murphy's probation because even though he had left the treatment program, he "was employed and doing well in other areas."[70]

In September 1981, a counselor in the treatment program told Murphy's probation officer that while he was in treatment, Murphy had confessed to a 1974 rape and murder.[71] After meeting with her superior, the probation officer decided that she would tell the police what she had learned.[72] In a letter to Murphy, she asked him to meet with her "to discuss a treatment plan for the remainder of the probationary period."[73]

Murphy arranged a meeting with the probation officer in her office on September 28, 1981.[74] At the meeting, the officer confronted Murphy with what the counselor had told her.[75] Murphy responded angrily to the counselor's breach of confidence and told the officer that he "felt like calling a lawyer."[76] The officer told

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65 *Id.*

66 *Id.* The probation letter that Murphy was required to sign read as follows:

> For the present, you are only conditionally released. If you comply with the conditions of your probation you may expect to be discharged at the expiration of the period stated. If you fail to comply with the requirements you may be returned to the Court at any time for further hearing or commitment. . . .
>
> It will be necessary for you to obey strictly the following conditions:
>
> BE TRUTHFUL with your Probation Officer in all matters.

Id. at 1152-53 (Marshall, J., dissenting).

67 *Id.* at 1140.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* The Court assumed that Murphy's counselor could not have provided the information about Murphy to the police and that the probation officer could not have provided the information to the state for use in a criminal prosecution because Murphy's rehabilitation program was covered by federal statutes providing for the confidentiality of patient records. *Id.* at 1140 n.1; *see* 21 U.S.C. § 1175 (1982); 42 U.S.C. § 4582 (1982).

74 *Murphy*, 104 S. Ct. at 1140.

75 *Id.*

76 *Id.* The trial court found that this statement did not constitute "an invocation of

Murphy he would have to postpone contacting a lawyer until after the meeting and that "their primary concern was the relationship between the crimes that Murphy had admitted to the Alpha House counselor and the incident that led to his conviction for false imprisonment."[77]

Murphy then confessed to the rape and murder, denied his guilt on the false imprisonment charge, and tried to explain the extenuating circumstances surrounding the earlier crimes.[78] The officer told Murphy she would inform the police and tried to persuade him to surrender.[79] Two days later, Murphy told the officer that he had been advised by counsel not to turn himself in.[80] An arrest warrant was issued, and Murphy was indicted for first degree murder on October 29, 1981.[81]

The trial court denied Murphy's motion to suppress his confession because it found that the confession was not compelled even though Murphy had received no warnings against self-incrimination.[82] The Minnesota Supreme Court reversed, ruling that Murphy's failure to claim the privilege was not fatal to his motion to suppress the statement at trial "[b]ecause of the compulsory nature of the meeting, because [Murphy] was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that [Murphy's] answers were likely to be incriminating."[83] The court also held that the probation officer's failure to inform Murphy of his privilege against self-incrimination rendered his subsequent confession inadmissible.[84] The United States Supreme Court granted certiorari[85] to determine whether "a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding."[86]

IV. The Supreme Court Opinions

Justice White's majority opinion held that Murphy's failure to

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the privilege against self-incrimination," but indicated the defendant's desire to consult an attorney in connection with a civil suit for breach of confidentiality. *Id.* at 1140 n.3.

77 *Id.* at 1140-41.

78 *Id.* at 1141.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* (quoting Minnesota v. Murphy, 324 N.W.2d 340, 344 (Minn. 1982)).

84 *Id.* (citing *Murphy*, 324 N.W.2d at 344).

85 459 U.S. 1145 (1983).

86 *Murphy*, 104 S. Ct. at 1141.

claim the privilege against self-incrimination at the time of the questioning prevented him from asserting the privilege at trial.[87] The Court also held that the State had not compelled Murphy to forego his fifth amendment privilege[88] and that the circumstances under which Murphy confessed fell outside the scope of the exceptions to the general rule that the fifth amendment privilege is not self-executing.[89]

The Court ruled that the State had not compelled Murphy to incriminate himself by requiring him to report to his probation officer and answer her questions truthfully.[90] The Court found that the terms of Murphy's probation placed him in "no better position than the ordinary witness at trial, or before grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination."[91] Because Murphy could have claimed his fifth amendment privilege without suffering a penalty, the Court ruled that the State had not violated the fifth amendment because it had not compelled him to make incriminating statements.[92]

Examining the situations in which the fifth amendment privilege has been held to be self-executing, the Court concluded that the probation officer's interrogation was not "custodial," and Murphy was not threatened with a penalty for exercising his privilege. Murphy, therefore, could not invoke his privilege to bar admission of his confession at trial.[93] The Court held *Miranda* inapplicable because Murphy was neither "in custody" nor was his freedom of movement curtailed to the degree associated with formal arrest.[94] The Court also dismissed as unpersuasive four mitigating factors

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87 *Id.* Justice White was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and O'Connor.

88 *Id.*

89 *Id.* at 1143-46.

90 *Id.* at 1146-49; *see supra* note 66 for terms of Murphy's probation.

91 104 S. Ct. at 1142.

92 *Id.* The Court quoted *United States v. Kordel*, 397 U.S. 1 (1970): "[defendant's] failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself." *Id.* at 1143 (quoting *Kordel*, 397 U.S. at 10). The Court also cited *Garner*, 424 U.S. at 654; Rogers v. United States, 340 U.S. 367, 370-71 (1951); and Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 112-13 (1927), to support the proposition that because the defendant failed to assert the privilege at the time he was questioned, he could not assert the privilege at trial.

93 *Murphy*, 104 S. Ct. at 1143-46.

94 *Id.* at 1144. The Court also stated that custody for *Miranda* purposes has been narrowly construed. *Id.* (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). *See supra* notes 18-34 and accompanying text.

that the Minnesota Supreme Court held brought Murphy's confession within the *Miranda* rule.[95]

The majority also decided that Murphy's privilege was not self-executing because the State had not "require[d] him to choose between making incriminating statements and jeopardizing his constitutional liberty by remaining silent."[96] The Court reiterated that Murphy was in the same position as a witness under oath and that the terms of his probation required him to answer truthfully but did not require him to answer incriminating questions.[97] The Court concluded that any belief that his probation could be revoked for claiming the privilege was unreasonable and that Murphy should have sought clarification of the terms of his probation if he was in doubt.[98] The Court also distinguished *Garrity*[99] because in that case, the State had explicitly threatened the employees if they asserted the privilege.[100] Finally, the Court decided that the self-executing privilege that it granted to gamblers filing federal occupational and excise tax returns did not apply to Murphy because, unlike the gamblers, Murphy would not necessarily incriminate himself by claiming the privilege.[101]

In his dissent, Justice Marshall agreed that Murphy could have invoked his fifth amendment privilege, but he found that under the circumstances of the case, Murphy had not waived his privilege, and the State had the burden of proving that Murphy knowingly and freely waived his constitutional rights.[102] Because the State

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95 104 S. Ct. at 1144. The Court held that the state's power to "compel Murphy's attendance and truthful answers" was indistinguishable from its power to compel witnesses to testify and, therefore, not coercive enough to bring Murphy within the *Miranda* exception. *Id.* The four mitigating factors that the Court dismissed as unpersuasive were: "First, the probation officer could compel Murphy's attendance and truthful answers. . . . Second, the probation officer consciously sought incriminating evidence. . . . Third, Murphy did not expect questions about prior criminal conduct and could not seek counsel before attending the meeting. . . . Fourth, there were no observers to guard against abuse or trickery." *Id.* at 1144-45.

96 *Id.* at 1147.

97 *Id.*

98 *Id.* at 1148.

99 385 U.S. 493 (1967).

100 *Murphy*, 104 S. Ct. at 1146. The Court also cited Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); and Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 392 U.S. 280 (1968), as holding that a self-executing privilege exists in penalty situations. In none of these cases did the defendants succumb to the threats and fail to exercise the privilege at the time of interrogation. *Murphy*, 104 S. Ct. at 1146. These cases, however, hold that the state may not penalize a suspect for refusal to answer an interrogator's questions where the suspect has validly asserted his fifth amendment privilege.

101 104 S. Ct. at 1149. *See supra* notes 59-61 and accompanying text.

102 104 S. Ct. at 1150-51 (Marshall, J., dissenting). Justice Marshall was joined by

presented Murphy with a constitutionally impermissible choice between self-incrimination and loss of his probation, Justice Marshall would have ruled that Murphy's privilege was self-executing, and that he therefore did not lose the benefit of the privilege by answering his probation officer's questions.[103] Marshall pointed out that the privilege against self-incrimination was self-executing except when

> at least two of the following statements have been true:
> (a) At the time the damaging disclosures were made, the defendant's constitutional right not to make them was clearly established.
> (b) The defendant was given sufficient warning that he would be asked potentially incriminating questions to be able to secure legal advice and to reflect upon how he would respond.
> (c) The environment in which questions were asked did not impair the defendant's ability intelligently to exercise his rights.
> (d) The questioner had no reason to assume that truthful responses would be self-incriminating.[104]

Finding none of the above conditions in the instant situation, Justice Marshall emphasized the potential danger that probation officers would abuse probationers' trust and obtain statements from suspects who had unwittingly waived their constitutional right to remain silent.[105]

V. ANALYSIS

The right to remain silent serves two purposes. First, it ensures that a confession is reliable,[106] and second, it fosters an adversarial rather than inquisitorial criminal justice system.[107] The accused generally is required to claim the fifth amendment privilege by refusing to answer incriminating questions. If accused persons answer such questions, they will be barred from later asserting the privilege to prevent admission of the statements at trial.[108] In some situations, however, the right to claim the privilege may be unclear. Suspects may not realize that they have a right to claim the privilege and that they will lose this right if they do not assert it when they are interrogated. Courts, therefore, should examine carefully situations where suspects were not given warnings and subsequently incrimi-

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Justice Stevens. Justice Brennan joined the dissenting opinion in all but Part II-A, in which Justice Marshall surveyed cases holding that "in most contexts, the privilege against self-incrimination is not self-executing." *Id.* at 1152 (Marshall, J., dissenting).

103 *Id.* (Marshall, J., dissenting).

104 *Id.* at 1156 (Marshall, J., dissenting).

105 *Id.* at 1156-61 (Marshall, J., dissenting).

106 *Garner*, 424 U.S. at 655.

107 Rogers v. Richmond, 365 U.S. 534, 541 (1961).

108 Lisenba v. California, 314 U.S. 219, 236 (1941).

nated themselves. In *Murphy*, however, the Court failed to recognize Murphy's lack of knowledge and unreasonably held him responsible for invoking the privilege at the time of questioning.[109] By ignoring factors that undermined Murphy's free will, the Court also unnecessarily expanded the State's ability to coerce suspects to waive their fifth amendment privilege by exploiting the suspects' lack of knowledge of their constitutional rights.

A. THE INAPPLICABILITY OF THE *MIRANDA* CUSTODIAL EXCEPTION

The Court's refusal to extend the *Miranda* warning requirement to the noncustodial setting of the probation officer's office is both reasonable and consistent with precedent. Since *Miranda* was decided in 1966, the trend has been toward limiting its application to police arrest situations.[110] The rationale behind this limitation is that where suspects are neither "in custody" nor in an inherently coercive setting, it is unnecessary for police to warn them.[111] The setting in *Murphy* is easily distinguishable from police custody and is not inherently coercive. As the Court correctly pointed out, "[c]ustodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess."[112] A pre-arranged meeting with a probation officer in a familiar setting is unlikely to evoke the same response from the probationer.[113] Most importantly, "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained."[114] Murphy, however, was not physically restrained and was free to leave the meeting at any time.[115]

The Court's refusal to extend the warning requirement to the probation office setting is also consistent with *Beckwith v. United States*.[116] In *Beckwith*, the Court refused to require *Miranda* warnings when Internal Revenue Service agents interrogated a suspect in a private home. Although the agents purposely sought incriminating evidence during the interrogation, the Court reasoned that the

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109 104 S. Ct. at 1149.

110 *See supra* notes 27-34 and accompanying text.

111 *Id.*

112 *Murphy*, 104 S. Ct. at 1145.

113 *Id.*

114 *Id.* at 1145-46.

115 Although Murphy may have feared revocation of his probation if he left without answering the probation officer's questions, he was under no obligation to remain in her office until the questions were answered. In custodial interrogation, however, uniformed officers usually detain suspects, using force when necessary.

116 425 U.S. 341 (1976).

agents' intent alone did not justify the assumption that the setting was so inherently coercive or that the danger of coercing the suspect was so imminent as to require rigid procedural safeguards.[117] Similarly, the probation officer in *Murphy* purposely sought incriminating evidence.[118] As in *Beckwith*, the intent of the officer, by itself, does not require the conclusion that the officer coerced Murphy's confession.

In *Miranda*, the Court created a per se rule allowing accused persons who are interrogated while in police custody without benefit of fifth amendment warnings to invoke the privilege at trial and thereby prevent the State from using any incriminating statements against them.[119] Under this rule, courts do not decide whether a statement was coerced or voluntary. Instead, the *Miranda* Court held that interrogation under police custody was so inherently coercive as to justify barring admission of any statement made in the absence of a fifth amendment warning.[120] In *Beckwith*, the Court's refusal to extend the warning requirement to situations in which the suspect had not been arrested is consistent with *Miranda* because noncustodial situations are not usually as compelling as arrest situations. Murphy's situation was neither as hostile nor as intimidating as interrogation while in police custody. In *Murphy*, therefore, the Court justifiably refused to extend the *Miranda* warning requirement to the instant situation.

Although the Court correctly decided that this warning requirement did not apply to Murphy's situation, the majority's reliance on witness cases to establish the non-self-executing nature of Murphy's privilege omitted essential considerations that make Murphy's situation more coercive than the courtroom setting. Unlike the suspects in the witness and custodial interrogation cases, Murphy had no opportunity to consult with counsel nor was he warned of his right to remain silent; moreover, his right to assert his privilege was unclear at the time of his interrogation.[121] In *Kordel*, the fifth amendment right of the witness, a corporate officer who faced incriminating himself in a criminal action, was apparent at the time of the interrogation.[122] Likewise, in *Washington*, the defendant's right to remain silent was well established.[123]

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117 *Id.* at 344.
118 104 S. Ct. at 1140.
119 *Miranda*, 384 U.S. at 444.
120 *Id.* at 457-58.
121 104 S. Ct. at 1158-61 (Marshall, J., dissenting).
122 The Court stated: "[w]ithout question [the defendant] could have invoked his Fifth Amendment privilege." *Kordel*, 397 U.S. 1, 7 (1970).
123 431 U.S. 181 (1976).

In contrast, Murphy's right to remain silent was uncertain at the time of his meeting with his probation officer. In an amicus brief for the United States, the Solicitor General argued that the "government may constitutionally exert upon a probationer pressures to incriminate himself that it could not exert upon a citizen who had not been convicted of a crime."[124] Although the Court stated that any attempt by the State to punish Murphy for asserting the privilege would have been unconstitutional, it is obvious from the Solicitor General's belief that the State could exert pressure upon him that Murphy's rights were not clearly established when he met with his probation officer. Because of the uncertainty over his constitutional right, the Court should not charge Murphy with knowledge of it. Murphy's lack of knowledge would hinder his free choice to refuse to answer.

The witness cases that the Court cited also differ from *Murphy* because the defendants in these cases had the opportunity to consult with counsel before giving self-incriminating testimony. In *Kordel*, the Court recognized that the defendant was represented by counsel when he answered interrogatories that the government subsequently used against him and, therefore, he probably understood the consequences of his answers.[125] In both *Washington*[126] and *Mandujano*,[127] the defendants were informed that they would be allowed to consult with an attorney outside the grand jury room. In *Washington*, the defendant explicitly consented to answer incriminating questions before the grand jury and chose not to speak with an attorney.[128] Murphy, however, was never told that he had the right to speak with an attorney before he answered his probation officer's questions.[129]

The suspects who incriminated themselves before grand juries also were warned of the possibility that testimony would be used against them and were informed of their right to remain silent.[130] Although the defendant in *Washington* incriminated himself by responding to questions about crimes in which he was involved, the Court found that he was aware of his rights and that he gave incriminating testimony knowing of the possible consequences in a crimi-

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124 *Murphy*, 104 S. Ct. at 1159 n.23 (quoting Brief for the United States as *Amicus Curiae* at 8).

125 397 U.S. at 7-10.

126 431 U.S. at 184.

127 425 U.S. at 581.

128 431 U.S. at 183-84.

129 104 S. Ct. at 1159 (Marshall, J., dissenting).

130 *Washington*, 431 U.S. at 183-84; *Mandujano*, 425 U.S. at 581.

nal prosecution.[131] The Court held that "the comprehensive warnings respondent received . . . plainly satisfied any possible claim to warnings."[132] Because Murphy received no warnings, his dilemma plainly was more compelling than Washington's situation.

In *Murphy*, the United States Supreme Court also unreasonably interpreted the penalty cases as requiring a threat intended by the State. The Court recognized that imposing a penalty for a valid exercise of the fifth amendment privilege could impermissibly "foreclos[e] a free choice to remain silent."[133] The Court in *Murphy* should have examined the legal effect of the revocation statute to determine whether it implied a threat of probation revocation for assertion of the fifth amendment privilege. Instead, the Court relied heavily on the fact that "Murphy was not expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result in the imposition of a penalty."[134]

B. APPLICATION OF THE VOLUNTARINESS STANDARD TO *MURPHY*

Because of the inapplicability of the witness and penalty cases to the facts of *Murphy*, the Court should have examined the surrounding circumstances to determine whether the confession was a product of Murphy's free will.[135] Under a voluntariness test, the Court should have examined three factors: the suspect's knowledge of his right to remain silent, his access to legal counsel, and his perception of a threat of penalty for invoking the privilege.[136]

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131 431 U.S. at 188.

132 *Id.* at 186.

133 *Murphy*, 104 S. Ct. at 1146 (quoting Garner v. United States, 424 U.S. at 661).

134 *Id.* at 1148.

135 A voluntariness standard was applied to determine the admissibility of confessions obtained during custodial interrogation prior to *Miranda*. *See supra* text accompanying notes 19-21. Under this test, the Court focused on surrounding circumstances and characteristics to determine whether a confession was a product of an accused's free will. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959) (Court ruled confession involuntary and therefore inadmissible where police questioned suspect, an uneducated immigrant with documented mental disorders, for prolonged period of time, used a childhood friend to help break down his resistance, and denied him access to counsel).

136 A voluntariness test was also proposed for use in grand jury target witness cases. *See* Comment, *Federal Grand Juries: The Plight of the Target Witness*, 11 U.S.F.L. REV. 672 (1977). Under this test, the court would determine whether a grand jury target witness' testimony could be used in a subsequent prosecution for the target offense by examining four factors. First, the court must decide whether the witness was a *target* of the investigation, i.e., a person the government was seeking to indict. *Id.* at 683. Second, the court should examine the warnings law enforcement officials gave the witness. This test does not require full *Miranda* warnings. Instead, the court can consider the impact of any partial warnings or of the lack of any warning. *Id.* at 684. Third, the court should take into account the witness' educational and criminal background. *Id.* Fourth, the court should examine the availability of legal counsel to the witness. *Id.*

Applying this voluntariness test, the Court should have found that Murphy's lack of knowledge of his rights weighed in favor of a self-executing privilege. Murphy's right to remain silent was unclear at the time of his interrogation. As discussed above, even the Solicitor General misunderstood the rights available to Murphy.[137] It is obvious that Murphy's rights were not well-established when he met with his probation officer; the Court, therefore, cannot fairly charge that Murphy knew his rights.

Murphy's inability to consult with counsel before or during the interrogation also should have weighed in favor of a self-executing privilege. Without access to counsel, the potential for unfairness increases. The Court discounted the effect of this factor by holding that Murphy should have expected questions about previous criminal conduct.[138] His probation officer, however, led him to believe that the purpose of the meeting was to discuss a new treatment program.[139] Even though he might have suspected that she had new information about a prior crime, the probation officer stressed that the purpose of the visit was to discuss the need for new treatment.[140] Thus, it would be reasonable for Murphy to believe that he would not be interrogated about prior crimes at this meeting. By finding that the lack of opportunity to consult with counsel favors a self-executing privilege, the Court would not unreasonably burden noncustodial criminal interrogations. An attorney would not have to be present at all noncustodial interrogations, but if an attorney were present, a court could consider that fact when deciding whether the confession was voluntary. Thus, the absence of counsel would not automatically make the confession involuntary, but the presence of counsel would weigh heavily toward finding that a suspect's statements were not coerced.

Finally, the Court should have found that Murphy reasonably could have perceived a threat of revocation of his probation that impaired his free choice to exercise his right to remain silent.[141] The terms of Murphy's probation stated in bold type that probation was conditioned upon his being truthful with his probation officer in all matters.[142] The majority held that this language required him to

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137 *See supra* note 124 and accompanying text.

138 *Murphy*, 104 S. Ct. at 1145.

139 *Id.* at 1140.

140 *Id.*

141 The Court found that Murphy could not have reasonally believed that his probation would be revoked for refusing to incriminate himself because "[o]ur decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." 104 S. Ct. at 1148.

142 *See supra* note 66 and accompanying text.

answer all matters truthfully, except that he was free to claim the privilege for incriminating questions.[143] The probation letter, however, clearly stated on its face that he must respond truthfully in all matters.[144] It is highly unlikely that probationers, who have at most only a vague familiarity with their fifth amendment privilege, would understand that the State could not penalize them for invoking their fifth amendment privilege. Because Murphy reasonably could have perceived a threat for invoking the right to remain silent, the Court should have found that his free will was overcome.

Although separately these factors may not have justified a decision that Murphy's confession was involuntary, all three factors together weighed against a finding of voluntariness and should have led the Court to recognize a self-executing privilege. The self-executing privilege prevents the State from benefitting from a coercive interrogation by allowing the accused to invoke the privilege at trial to suppress coerced statements. To allow admission of statements that likely were involuntary allows states to coerce confessions and unnecessarily undermines the fifth amendment rights of probationers.

VI. CONCLUSION

In *Minnesota v. Murphy*, the Court correctly refused to find that Murphy was in custody at the time of the interrogation and to apply *Miranda*; however, it mechanically applied its witness analogy to Murphy's situation. In doing so, the Court steered away from the policies of earlier cases that prevented states from threatening a suspect with any substantial penalty for the assertion of the fifth amendment privilege. The Court thus has provided new opportunities for the states to obtain involuntary confessions by exploiting suspects' lack of knowledge of their fifth amendment privilege.

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143 104 S. Ct. at 1148.
144 *See supra* note 66.