

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-827

TITLE MINNESOTA, Petitioner v. MARSHALL DONALD MURPHY

PLACE Washington, D. C.

DATE October 12, 1983

PAGES 1 thru 59



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1           IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x

3 MINNESOTA, :

4                           Petitioner :

5                           v. :   No. 82-827

6 MARSHALL DONALD MURPHY :

7   - - - - -x

8   Washington, D.C.

9   Wednesday, October 12, 1983

10           The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 10:56 a.m.

13 APPEARANCES:

14 ROBERT H. LYNN, ESQ., Assistant County Attorney,  
15 Minneapolis, Minn.; on behalf of the Petitioner.

16 DAVID A. STRAUSS, ESQ., Office of the Solicitor General,  
17 Department of Justice, Washington, D.C.; on behalf of  
18 U.S. as amicus curiae.

19 MARK. S. WERNICK, ESQ., Minneapolis, Minn.; on behalf of  
20 the Respondent.

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C O N T E N T S

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| ROBERT H. LYNN, ESQ.,                  |             |
| on behalf of the Petitioner            | 3           |
| DAVID A. STRAUSS, ESQ.,                |             |
| on behalf of the U.S. as amicus curiae | 19          |
| MARK S. WERNICK, ESQ.,                 |             |
| on behalf of the Respondent            |             |

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1                                   P R O C E E D I N G S

2                   CHIEF JUSTICE BURGER: Mr. Lynn, I think you  
3 may proceed whenever you are ready.

4                   ORAL ARGUMENT OF ROBERT H. LYNN, ESQ.,  
5                   ON BEHALF OF THE PETITIONER

6                   MR. LYNN: Mr. Chief Justice, and may it  
7 please the Court:

8                   The issue presented in this case is does the  
9 Fifth Amendment to the United States Constitution  
10 require suppression of incriminating admissions to a  
11 rape murder made by an out of custody probationer to his  
12 probation officer because that probation officer did not  
13 first warn the probationer of his right not to  
14 incriminate himself. The Minnesota Supreme Court in a  
15 divided opinion held solely as a matter of federal  
16 constitutional law that the Fifth Amendment required  
17 suppression of these admissions despite the fact that  
18 Respondent did not claim the privilege at the time the  
19 questions were asked.

20                  Instead, the Minnesota Supreme Court relied  
21 upon factors this Court has expressly rejected in at  
22 least three cases those being the Beckwith, Mathiason  
23 and Bayhiller cases. A state court may not impose  
24 greater restrictions as a matter of federal  
25 constitutional law where this Court specifically



1 refrains from doing so.

2           An understanding of the legal issues in this  
3 case requires an understanding of the facts, and I would  
4 like to briefly summarize those for the Court. October  
5 1974 a seventeen-year-old woman is raped and strangled  
6 in Minneapolis.

7           Marshall Murphy, the Respondent in this case,  
8 was a suspect, was interviewed at that time but was  
9 never arrested and was never indicted. September 1980  
10 Respondent was placed on probation for the crime of  
11 false imprisonment after a plea of guilty in that  
12 matter.

13           The conditions of his probation included the  
14 normal ones, that he report to his probation officer as  
15 directed, that he be truthful to his probation officer  
16 in all matters, that he keep his probation officer  
17 informed of what he is doing. There was also a specific  
18 condition of his probation that he attend a treatment  
19 program for sexual offenders known as Alpha House.

20           His probation officer assigned was a woman  
21 named Mara Widseth. For the following year probationer,  
22 Respondent in this case, and the probation officer met  
23 on a monthly basis at the probation officer's office at  
24 times usually selected by Respondent.

25           In July of 1981 Respondent left the treatment

1 program. He was called into his probation officer's  
2 office. They discussed the matter and she decided to  
3 allow him to continue on probation despite the fact he  
4 was no longer in the sexual offender treatment because  
5 she felt he was doing well in other areas.

6           Then September 22, 1981 the probation officer  
7 learned from a counselor at the Alpha House treatment  
8 program that Respondent had while in treatment at that  
9 program made admissions or told people that he had once  
10 committed a murder several years before.

11           When the probation officer learned that  
12 information, of course, she did not know whether that  
13 was true or false simply that those words apparently  
14 were said. She did not go to the police to learn if any  
15 such case existed.

16           She made no contact with any other  
17 authorities. She did after talking with her supervisor  
18 decide that she should relay this information she had  
19 learned to the police and she also decided she should  
20 inform the Respondent probationer of her decision.

21           So on the 24th of September she sent him a  
22 letter requesting that he come into her office to  
23 discuss further treatment. She was concerned at that  
24 time --

25           QUESTION: Mr. Lynn, may I ask you a question

1 right there?

2 MR. LYNN: Yes, sir.

3 QUESTION: At that point in the development of  
4 events could she have lawfully told the police without  
5 first talking to the probationer?

6 MR. LYNN: There is a problem there, Your  
7 Honor, unrelated to the facts here. That problem has to  
8 do with the confidentiality of the Alpha House treatment  
9 program.

10 That information was lawfully transmitted to  
11 her.

12 QUESTION: For what purpose?

13 MR. LYNN: For the purpose of monitoring his  
14 probation.

15 QUESTION: Was the Alpha House not under a  
16 restriction which would have prevented it from giving  
17 information to the police?

18 MR. LYNN: It was, Your Honor, yes.

19 QUESTION: It could give that information to  
20 her for the limited purpose of monitoring the treatment?

21 MR. LYNN: And reporting to the judge who was,  
22 of course, monitoring this probation, yes.

23 QUESTION: But you say there is at least a  
24 question as to whether before talking to the probationer  
25 she could have passed the information on to the police?

1 MR. LYNN: There is a substantial question as  
2 to that, Your Honor, yes.

3 QUESTION: Mr. Lynn, these restrictions that  
4 you just referred to in responding to Justice Stevens,  
5 are those restrictions imposed by state law?

6 MR. LYNN: Imposed by both, Your Honor. The  
7 Alpha House treatment program -- This issue was  
8 litigated below at the trial court level. The Alpha  
9 House treatment program is subject to certain federal  
10 regulations dealing with alcohol chemical dependency  
11 treatment.

12 There is also a state statute dealing with  
13 confidentiality. The trial court ruled that one or both  
14 of these statutes acted to prevent that information from  
15 going to anyone other than the probation officer.

16 QUESTION: What did -- Did the Supreme Court  
17 of Minnesota pass on that question?

18 MR. LYNN: They did not, Your Honor. That  
19 issue was not on appeal.

20 QUESTION: So it is not before us either.

21 MR. LYNN: I believe not, Your Honor.

22 QUESTION: Mr. Lynn, if when the probation  
23 officer questioned the Respondent he had refused to  
24 answer on grounds that his answer might incriminate him  
25 could Minnesota have revoked his probation for his



1 refusal to answer?

2 MR. LYNN: I believe not, Your Honor. As we  
3 discuss in our brief in this matter had he validly or  
4 had he claimed his Fifth Amendment privilege when this  
5 issue was discussed it is my interpretation of the  
6 rulings and decisions of this Court in such cases as  
7 Lefkowitz v. Turley, Lefkowitz v. Cunningham, Garrity  
8 and others that he could not be so punished.

9 He could not be revoked for invoking the Fifth  
10 Amendment validly. In other words, that would be a  
11 valid defense.

12 I do not believe that issue has been litigated  
13 in the Minnesota Supreme Court, but I believe in any  
14 event it is bound by the decisions in this Court.

15 QUESTION: You would concede that in making  
16 your argument?

17 MR. LYNN: Yes, Your Honor.

18 In any event then after this letter was sent  
19 to the probationer a meeting was set up September 28th,  
20 again at a time chosen by Respondent at the office he  
21 had been to approximately 12 times before. The  
22 probation officer began that interview by telling  
23 Respondent exactly what she had learned from the Alpha  
24 House treatment program, that is, that he had made these  
25 comments about a murder and that she felt he needed

1 further treatment.

2           At that point Respondent became angry and  
3 upset. He commented that he felt like calling a  
4 lawyer. He felt that his confidentiality had been  
5 violated.

6           She told him you will have to take care of  
7 that outside of the office because I want to talk to you  
8 further about further treatment. The probation officer  
9 did not directly ask Murphy about this murder, did not  
10 directly confront him, never threatened to revoke him,  
11 simply posited the position that she felt based on what  
12 she had learned that he needed further treatment.

13           Respondent denied that. He did that by first  
14 denying the false imprisonment charge for which he was  
15 in probation. He claimed innocence, and he said  
16 further that at the time of this rape murder he had been  
17 involved with drugs quite heavily and that since he was  
18 no longer involved with drugs the two incidents were  
19 unrelated behaviorally.

20           The probation officer confronted him with his  
21 guilt on the false imprisonment charge and at that point  
22 without further prodding by this probation officer  
23 Respondent went ahead and in some detail described the  
24 1974 murder. At that point the probation officer  
25 informed him she would have to take this information to

1 the police.

2           Respondent commented that he understood that  
3 but that unless he confessed to the police it would  
4 simply be her word against his. She encouraged him to  
5 turn himself in.

6           He asked for time to do so. At that point he  
7 began to cry. He said he committed the ultimate sin.  
8 After some moments of composing himself he walked out of  
9 her office unimpeded and left the building.

10           Two days later -- The probation officer took  
11 no action for two days. Two days later Respondent  
12 called and said he had contacted an attorney. He had  
13 decided not to turn himself in and it was two days after  
14 that, in other words, four days after these admissions  
15 that Respondent was arrested and later charged and  
16 indicted with first degree murder.

17           The Fifth Amendment to the United States  
18 Constitution says no more nor no less than no person  
19 shall be compelled in any criminal case to be a witness  
20 against himself.

21           QUESTION: Mr. Lynn, before you get into your  
22 argument, may I ask a sequel to the question Justice  
23 O'Connor asked? You said that if he claimed the  
24 privilege he could not have had his parole revoked at  
25 that time. Supposing he were asked not about something

1 that happened prior to the institution of parole but  
2 about something that went on during parole, they asked  
3 him to report what he had been doing and whether he  
4 violated any of the conditions of parole. In your view  
5 could he refuse to answer those questions and claim the  
6 privilege and still not have his parole revoked?

7 MR. LYNN: Your Honor, I would make a  
8 distinction. If the questions asked had to do with  
9 perhaps noncriminal conditions of probation, for  
10 example, if he had been drinking when he was not  
11 supposed to be --

12 QUESTION: No, suppose it related to  
13 violations of law occurring during the period of parole,  
14 is it your submission that he could refuse to answer  
15 those questions and still the Constitution would protect  
16 him from revocation?

17 MR. LYNN: That is my reading, Your Honor, of  
18 the decisions of this Court. Unless the --

19 QUESTION: Well, this Court has never  
20 addressed that question in a parole context.

21 MR. LYNN: That is exactly right, Your Honor.  
22 It may well be and there is some case law in lower  
23 courts and in the circuit courts that in the context of  
24 a probation officer-probationer relationship perhaps the  
25 Fifth Amendment has no application whatsoever. At least



1 there is some language in some Second Circuit cases to  
2 that regard or at least this Court and other courts have  
3 recognized that probationers like prisoners or parolees  
4 have a lesser right in the Fourth Amendment area of  
5 search or seizure and also in the Fifth Amendment area.

6 QUESTION: Is it the practice in Minnesota --  
7 You are relying on federal law rather -- Is it the  
8 practice in Minnesota that the parole officers in effect  
9 have an understanding with the parolees they do not have  
10 to tell them things they do not want to tell them?

11 MR. LYNN: I really do not know what the  
12 practice is, Your Honor.

13 QUESTION: It seems to be very contrary to my  
14 understanding of the way this normally works.

15 MR. LYNN: All I can say is that in my  
16 experience as a state court prosecutor this issue very  
17 rarely ever comes up as to what transpired in the  
18 interview.

19 QUESTION: And what the nature of the duty of  
20 the parolee to be candid with the parole officer is.  
21 That never comes out?

22 MR. LYNN: Certainly yes it has, Your Honor.  
23 The duty, of course, is to be truthful.

24 QUESTION: Yes, be truthful but you say that  
25 does not mean you have to answer any questions if you do

1 not want to answer them. If you do answer you must  
2 answer honestly and that is the extent of the obligation  
3 in Minnesota.

4 MR. LYNN: I believe -- Your Honor, I guess I  
5 cannot answer for the State of Minnesota because I do  
6 not believe that that issue has been addressed in our  
7 courts either. I can only deal with what is the  
8 practice and then my interpretation of case law in this  
9 Court.

10 But I do believe that if it is a valid  
11 assertion of a Fifth Amendment claim and if a  
12 probationer has his full right to a full Fifth Amendment  
13 privilege that he cannot be punished for a valid  
14 assertion of that privilege.

15 QUESTION: Well, are you qualifying your answer  
16 to my question then?

17 MR. LYNN: Only to the extent, Your Honor,  
18 that --

19 QUESTION: By saying you do not know if the  
20 probationer has a Fifth Amendment right?

21 MR. LYNN: I am saying, Your Honor, that that  
22 issue -- Yes, I guess I am saying that. That issue has  
23 not been expressly decided by this Court nor by the  
24 Minnesota Supreme Court.

25 QUESTION: So you withdraw your concession?

1           MR. LYNN: In that limited circumstance. If  
2 it is a fact that a probationer has a lesser Fifth  
3 Amendment right than others then I would withdraw that  
4 concession. I do not know that to be a fact or not a  
5 fact.

6           This Court has recognized, however, that the  
7 Fifth Amendment privilege against self-incrimination is  
8 not self-executing, that is, it must be claimed. If a  
9 witness under compulsion to testify makes disclosures  
10 instead of claiming the privilege the government simply  
11 has not compelled him to incriminate himself.

12           The reason for that rule makes sense that a  
13 person in the circumstance as the Respondent in this  
14 case -- There are many factors and circumstances which  
15 may compel one to incriminate himself. Some may deal  
16 with government compulsion and some may deal with the  
17 person's own internal feelings or notions or ideas.

18           Unless the person attempts to claim or claims  
19 the privilege there is no way to know whether or not  
20 that individual made the admissions for reasons of his  
21 own or made the admissions as a result of governmental  
22 coercion or compulsion. This Court has recognized very  
23 narrowly limited situations where one who does not claim  
24 that privilege may later assert it as a defense, and  
25 those, of course, are the inquiry here.

1           The inquiry narrowly is was the Defendant in  
2 custody or the Respondent in custody within the meaning  
3 of the Miranda case and the cases following; or  
4 secondly, absent custody were these admissions somehow  
5 coerced by genuine compulsion on the part of the  
6 government? Now custody as defined last July by this  
7 Court in California v. Baylor means, of course, formal  
8 arrest and it also means a restraint of freedom of  
9 movement of the degree associated with formal arrest.

10           In the facts of this case we have neither a  
11 formal arrest nor a restraint of freedom to that  
12 degree. The condition of probation required only that  
13 the probationer appear and report to his probation  
14 officer.

15           QUESTION: Mr. Lynn.

16           MR. STRAUSS: Yes, sir.

17           QUESTION: Do I gather from your last couple  
18 sentences that it is your view that the Supreme Court of  
19 Minnesota thought this case was governed by our Miranda  
20 decision?

21           MR. LYNN: Not precisely, Your Honor. The  
22 Supreme Court of Minnesota said in their opinion that  
23 the defendant was not in custody in the normal sense but  
24 then from that position went on to identify three  
25 factors in the facts of this case and expanded the



1 rationale if not the holding of Miranda to cover this  
2 situation and require warnings.

3 QUESTION: I more or less read the Supreme  
4 Court of Minnesota's opinion as saying that a  
5 prophylactic requirement had been adopted in the Miranda  
6 case in the custodial interrogation arrest situation and  
7 they were going to fashion kind of another Miranda  
8 doctrine in the parolee or probationer-probation officer  
9 situation.

10 MR. LYNN: I think that is precisely correct,  
11 Your Honor. That is what they did. It is half the  
12 Miranda warnings.

13 It is the right to remain silent and the  
14 warning that the evidence may be used against you. They  
15 left off the counsel part of the Miranda warning.

16 This Court has never adopted a warnings and  
17 waiver requirement in anything other than custodial  
18 interrogation as that was definted by Miranda and the  
19 cases following.

20 QUESTION: Mr. Lynn, does the probation  
21 officer in Minnesota have the power to arrest?

22 MR. LYNN: The probation officer, Your Honcr,  
23 has the same powers of arrest as a citizen.

24 QUESTION: Is the probation officer's office  
25 located where?

1           MR. LYNN: It is located in the government  
2 center, Your Honor, which includes the courtrooms of the  
3 county -

4           QUESTION: Is it in the court building or the  
5 police building?

6           MR. LYNN: It is in the court building, Your  
7 Honor.

8           QUESTION: Did you say that the probation  
9 officer has the same power of arrest as a citizen?

10          MR. LYNN: Under our arrest statute, Your  
11 Honor, there are powers applied to a peace officer and  
12 then there are citizen powers. They are almost all the  
13 same.

14          A police officer may arrest with or without a  
15 warrant on probable cause. I believe perhaps the  
16 specific answer here is that if this probation officer  
17 had something amounting to probable cause or reasonable  
18 cause that a violation of probation had occurred she  
19 could cause his arrest.

20          Probation officers do not carry weapons in  
21 Minnesota. They do not conduct searches. They do not  
22 have any of the other powers that you may associate with  
23 the police.

24          The trial court judge ruling found that this  
25 defendant was not in custody within the meaning of

1 Miranda. The Minnesota Supreme Court implicitly made  
2 that finding by not requiring the entire Miranda  
3 procedure.

4 I believe it is clear on the facts of this  
5 case and on the decisions of this Court that the  
6 defendant was not in custody within the meaning of  
7 Miranda. There have been two lower court holdings,  
8 United States v. Miller out of the Second Circuit,  
9 United States v. Holmes out of the Eighth Circuit which  
10 agree with this conclusion.

11 I presume that in those situations the  
12 probationer was under the same sort of probation  
13 conditions as Respondent was here. So that leads me  
14 then to the second inquiry. Is there anything on the  
15 facts of this case that could be found to compel or to  
16 prohibit or deny this Respondent the free choice to  
17 admit, to deny or to claim the privilege?

18 I believe as pointed out in the facts of this  
19 case there is no identifiable factor here which  
20 interfered with that free choice on his part. She never  
21 threatened him with revocation. She never threatened  
22 him with any sanction whatsoever had he claimed the  
23 Fifth Amendment.

24 Since he did not he cannot now raise it in  
25 this Court. Again, that inquiry looks further to the

1 totality of the circumstances, and I point out briefly  
2 in that regard that the probation officer was acting on  
3 good faith in the performance of her dual role (1) to  
4 assist in the rehabilitation of the probationer, and (2)  
5 to protect the public. She spoke with this man about  
6 treatment without threats or with coercion.

7 Thank you.

8 CHIEF JUSTICE BURGER: Very well.

9 Mr. Strauss.

10 ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

11 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

12 MR. STRAUSS: Mr. Chief Justice, and may it  
13 please the Court:

14 The Fifth Amendment speaks of compulsion. It  
15 prohibits the use of self-incriminating statements only  
16 when those statements have in some way been compelled.

17 Now what is notable about the Minnesota  
18 Supreme Court's opinion in this case is its failure to  
19 identify any source of compulsion that forced Respondent  
20 to speak against his will. This Court has after all  
21 defined a test for determining whether confession has  
22 been compelled.

23 The test is the familiar one whether  
24 considering all the circumstances the defendant's will  
25 was overborne. But no one, neither Respondent nor the



1 court below, seemed seriously to suggest that  
2 Respondent's will was overborne in this sense.

3 He was not a juvenile. He was not mentally  
4 handicapped. He was not particularly vulnerable in any  
5 other way.

6 The probation officer's actions can scarcely  
7 be characterized as intimidating or menacing or  
8 abusive.

9 QUESTION: Mr. Strauss, really are you fairly  
10 reading the Minnesota Supreme Court opinion? They say  
11 because of the compulsory nature of the meeting because  
12 defendant was under a court order to respond truthfully  
13 to his agent's questions and so forth. Are they not  
14 relying on compulsion when they say that?

15 MR. STRAUSS: Well, the source of compulsion  
16 they seem to identify to the extent they identify one  
17 has something to do with the probation conditions.

18 QUESTION: You may disagree with their  
19 conclusion, but they did not ignore the requirement is  
20 all I am suggesting.

21 MR. STRAUSS: Well, I think they were  
22 insufficiently precise about realizing that they had to  
23 find actual compulsion on the defendant to speak, but I  
24 think you are right, Justice Stevens, that --

25 QUESTION: Well, what if they construed the

1 Minnesota probation condition to impose a legal  
2 obligation on the probationer to answer all questions?

3 MR. STRAUSS: Well, two answers to that. In  
4 the first place, they did not. But even if they had  
5 imposed that that would simply put him in the same  
6 position as a grand jury witness who is under an  
7 obligation to speak and it is well settled on the basis  
8 of Monia and Cordell. The principle --

9 QUESTION: Yes, but it is not because of an  
10 absence of compulsion.

11 MR. STRAUSS: Oh, that is right. Of course,  
12 had they construed the probation conditions to require --

13 QUESTION: Well, it seems to me that is what  
14 they are saying when they say he was under court order  
15 to respond truthfully to his agent's questioning. Does  
16 that not only say you have to be truthful but you have  
17 to respond truthfully?

18 As I read that I thought they were holding  
19 that he had a duty to respond.

20 MR. STRAUSS: Well, the probation conditions  
21 are set out and the probation condition requires --

22 QUESTION: As you know a statute means what  
23 the state court tells it does, and I would assume state  
24 probation conditions mean what the state court tells us  
25 they mean.

1           MR. STRAUSS: I do not find in the Minnesota  
2 Supreme Court's opinion explicit instruction of those  
3 probation conditions to require the probationer to  
4 speak --

5           QUESTION: They apparently just thought it was  
6 rather obvious that a duty to respond truthfully  
7 included a duty to respond.

8           MR. STRAUSS: Well, the probation conditions  
9 which after all are written in a fashion that is  
10 supposed to be understood by the probationer say he must  
11 be truthful. That is really all they say on this  
12 point.

13          As the state has pointed out to be truthful  
14 means not to lie.

15          QUESTION: Did it also say that if the  
16 probation officer sees fit she can take you back to he  
17 judge without any more than that?

18          MR. STRAUSS: Yes, she can take him back if  
19 she has reason to believe he is violating his  
20 probation.

21          QUESTION: And you do not consider that  
22 coercion?

23          MR. STRAUSS: Oh, certainly not. A police  
24 officer who is interviewing a suspect with probable  
25 cause and believes the suspect has committed a crime can

1 arrest the suspect on the spot, but that does not mean  
2 that the fact that he has probable cause means that he  
3 has to give Miranda warnings.

4 QUESTION: You do not think a threat to have  
5 your probation -- Suppose she said if you do not confess  
6 to me now I will have your probation revoked. Would you  
7 consider that coercion?

8 MR. STRAUSS: Oh, yes. That would be  
9 compulsion. That would be a very different case.

10 QUESTION: The only difference I submit  
11 between the two is she never used those words.

12 MR. STRAUSS: Well, she never said that to  
13 him. I should say --

14 QUESTION: But it was obvious was it not?

15 MR. STRAUSS: Oh, I do not think it was  
16 obvious at all. I do not think the Minnesota Supreme  
17 Court said that. I also add, Justice Marshall, that  
18 even though the situation you have described which is  
19 not this case would constitute compulsion I do not think  
20 it would violate the Fifth Amendment.

21 QUESTION: I was just hoping you would say  
22 there might be possibly a little bit of coercion.

23 MR. STRAUSS: I think -- The term the  
24 Minnesota Supreme Court used is pressure. There is no  
25 doubt there were some factors that impelled the



1 Respondent to speak.

2           Usually when people confess there is some sort  
3 of emotional factor involved that impels them to speak.  
4 But pressure and influence as this Court made absolutely  
5 clear in United States v. Washington those things do not  
6 amount to compulsion.

7           Compulsion is the overbearing of the witness'  
8 will and the fact that the witness was influenced by  
9 some circumstance, the fact that the State as the Court  
10 said in Washington created an atmosphere conducive to  
11 truth telling does not mean that the defendant was  
12 coerced.

13           QUESTION: May I just ask this? What is your  
14 view as to whether the probationer's probation could  
15 have been revoked if he had said I will not answer the  
16 question?

17           MR. STRAUSS: Our view obviously as a matter  
18 of federal constitutional law is that, yes, it could  
19 have been revoked.

20           QUESTION: It is different --

21           MR. STRAUSS: Yes, we disagree with the State  
22 on that point.

23           QUESTION: There are two points to be kept in  
24 mind about the probation conditions to the extent that  
25 those are where the Minnesota Supreme Court located the

1 compulsion in this case. One is as the State has  
2 explained that they did not literally require him to  
3 answer every single question, and I think as most  
4 naturally interpreted they did not require him to answer  
5 every single question.

6 I think it is fair to say they imposed on him  
7 a general duty to cooperate, but that does not mean that  
8 if, for example, he thought the probation officer was  
9 asking a question that had nothing to do with probation  
10 and was invasive of his privacy that he could not have  
11 refused to answer for that question, for that reason.  
12 It certainly does not mean that he could not have said I  
13 would rather not answer that because it might  
14 incriminate me.

15 But the second and I think more important  
16 point about the probation condition is that Respondent  
17 did not at any time seek either to clarify the meaning  
18 of those probation conditions or to invoke his Fifth  
19 Amendment privilege to the probation officer. Now had  
20 he been unwilling to speak with the probation officer he  
21 would surely have said something to her suggesting his  
22 reluctance and asking whether he could refrain from  
23 speaking.

24 QUESTION: Was he not told to talk to the  
25 probation officer?

1           MR. STRAUSS: He was told to arrange meetings  
2 with her --

3           QUESTION: And talk to her.

4           MR. STRAUSS: And to be truthful with her.

5           QUESTION: And to be truthful with her.

6           MR. STRAUSS: That is right.

7           QUESTION: You said he was not.

8           MR. STRAUSS: No, he was told those things,  
9 but those are different things from being told to answer  
10 every question even if it is incriminating. He was  
11 never told that, and he never asked whether he had to  
12 answer every question.

13           He could not conceivably have thought that  
14 just asking do I have to talk about that would  
15 jeopardize his probation, and it seems to me that if the  
16 Respondent would rather not have discussed the crime and  
17 was really being dragged into discussing the crime  
18 against his will because he feared that his probation  
19 might be revoked if he did not discuss it that the most  
20 natural thing for him to have done would have been to  
21 say do I have to talk about that.

22           QUESTION: But, Mr. Strauss, would that be  
23 natural if he was under the impression that the purpose  
24 of the inquiry was to make sure he was getting  
25 appropriate treatment? Would he not think that the

1 right thing to do in his own self-interest would be to  
2 cooperate with the person who was trying to help him in  
3 his treatment?

4 MR. STRAUSS: Well, that might have been a  
5 reason.

6 QUESTION: Is that not what she told him that  
7 she wanted the information for?

8 MR. STRAUSS: I believe she did. That might  
9 have been a reason for him to cooperate but --

10 QUESTION: Was he at error in relying on what  
11 she told him?

12 MR. STRAUSS: She never -- No court has found  
13 that she made any promise implicit or explicit that she  
14 would keep the information in confidence and would not  
15 use it and would not go to the police with it. In fact,  
16 at the end of the interview when she said to him you  
17 know I have to go to the police with this he said he  
18 understood --

19 QUESTION: Well, if he knew and who knows  
20 whether he did or not what the restrictions are on the  
21 use of this kind of information at the treatment center  
22 would he not normally have assumed that he could go  
23 forward with further discussion without running this  
24 particular risk?

25 MR. STRAUSS: If there were some sort of



1 promise given by --

2 QUESTION: Well, there is a legal promise is  
3 there not?

4 MR. STRAUSS: Well, no apparently there is  
5 not.

6 QUESTION: Well, was there not a restriction  
7 on the treatment center's use of the information?

8 MR. STRAUSS: I gather there was, yes.

9 QUESTION: Did that restriction not bind the  
10 probation officer until he repeated it to her face to  
11 face?

12 MR. STRAUSS: That is my understanding from  
13 the State, but that is different from there being a  
14 restriction on the information that the probation  
15 officer could give out on the basis of his statements.  
16 Had there been some finding that she implicitly or  
17 explicitly promised him that what he said would go no  
18 further and would only be used for purposes of treatment  
19 I quite agree that this would be a different case under  
20 Bram.

21 But there is no finding in the basis of the  
22 opinion below. It is plainly not that there was such an  
23 implicit promise or unfairness of this sort.

24 I would also reiterate as I said to Justice  
25 Stevens earlier that even if the probation conditions

1 are construed as having required Respondent to answer  
2 every single question that just puts him in the same  
3 position as any subpoenaed witness, and under the Monia  
4 presumption reaffirmed by such cases as Garner and  
5 Roberts and by the Mandujano plurality such a witness  
6 has to assert the privilege against self-incrimination  
7 in response to a question or he will not be considered  
8 to have been compelled to answer that question.

9           The reason for that rule, of course, is that  
10 witnesses are often willing to speak even though they  
11 could be compelled to speak were they not willing, and  
12 unless a witness objects and asserts his privilege there  
13 is no reason to conclude that he was not answering  
14 willingly. Respondent is at the very worst at the same  
15 position as that.

16           QUESTION: Mr. Strauss, if he did plead the  
17 Fifth Amendment could his probation be revoked for  
18 pleading the Fifth?

19           MR. STRAUSS: As a matter of constitutional  
20 law it is our view that it could for the reasons that  
21 Justice Stevens alluded to earlier and that Judge  
22 Frankel expressed in an opinion called Mandujano --  
23 called Manfredonia that we quote in our brief.

24           CHIEF JUSTICE BURGER: Mr. Wernick.

25           ORAL ARGUMENT OF MARK S. WERNICK, ESQ.,

1 ON BEHALF OF THE RESPONDENT

2 MR. WERNICK: Mr. Chief Justice, and may it  
3 please the Court:

4 When Murphy went into that probation office he  
5 was faced with the classic cruel trilemma. He was faced  
6 with the options of self-incrimination or contempt for  
7 refusing to talk or perjury if he talked falsely.

8 His only way out --

9 QUESTION: Mr. Wernick, are you saying that  
10 the probation officer could have held him in contempt?

11 MR. WERNICK: He was under a court order to  
12 respond truthfully to his probation officer in all  
13 matters. If he refused to do that that would be in  
14 contempt.

15 What I was about to say, Justice Rehnquist,  
16 that his only way out of that trilemma would be to  
17 assert the privilege. On the question that the Court  
18 has asked whether his probation could be revoked for  
19 merely asserting the privilege it is my position that a  
20 probationer has full Fifth Amendment rights with respect  
21 to a new criminal prosecution but perhaps some lesser  
22 Fifth Amendment rights with respect to a probation  
23 revocation hearing.

24 QUESTION: Is that kind of an unsettled  
25 question --

1           MR. WERNICK: It is an unsettled question and  
2 I am analogizing to Baxter v. Palmigiano where this  
3 Court said that if a prisoner asserts the privilege at a  
4 prison disciplinary hearing an adverse inference could  
5 be raised at the hearing and similarly perhaps if a  
6 probationer asserts the privilege to a probation officer  
7 the probation officer could draw an adverse inference  
8 and that along with some other fact could be used to  
9 revoke.

10           QUESTION: To add to my education where is  
11 this case that you can be held in contempt for not  
12 answering a probation officer?

13           MR. WERNICK: I used the word "contempt", Your  
14 Honor, just because the Court has used the word  
15 historically --

16           QUESTION: Contempt means contempt. It does  
17 not mean anything else.

18           MR. WERNICK: It means -- What I meant to say  
19 was that he could have had his probation revoked and the  
20 Minnesota Supreme Court so said for refusing to discuss  
21 matters with his probation officer.

22           QUESTION: But it is not contempt.

23           MR. WERNICK: It is not contempt. It would be  
24 a violation of his probation. I raised it that way to  
25 say that he was facing the classic Fifth Amendment



1 dilemma.

2           The only way out of the dilemma was for him to  
3 assert the privilege, and the issue was whether he  
4 forfeited the privilege by making the disclosure or in  
5 other words did the probation officer do something or  
6 was the situation such that he was impaired from  
7 asserting the privilege and I submit he was because of  
8 two factors: first, because of what the probation  
9 officer told him about his right to talk to a lawyer;  
10 and second, because the probation officer continually  
11 made representations to Murphy about her concern being  
12 only treatment.

13           When Murphy said that he felt like calling a  
14 lawyer he said you are not supposed to know what I have  
15 said in treatment. That was confidential. I feel like  
16 calling a lawyer.

17           Murphy's confidentiality was intimately  
18 related to his ability to assert the privilege because  
19 if what he said in treatment was confidential then  
20 using the words this Court has used "then the cat was  
21 not yet out of the bag" and Murphy could still assert  
22 the privilege and the privilege would protect him. But  
23 if what Murphy said in treatment was not confidential  
24 then the cat would already be out of the bag and Murphy  
25 would not be protected by the privilege.

1           QUESTION: Are you suggesting, Mr. Wernick,  
2 that there is a constitutional right to keep the cat in  
3 the bag to use your words or is it a constitutional  
4 right not to be compelled or forced to let the cat out  
5 of the bag?

6           MR. WERNICK: The constitutional right is not  
7 to be compelled, but where the government leads you to  
8 believe that the cat is already out of the bag and,  
9 therefore, you make a disclosure the government has  
10 mislead you and has impaired your ability to assert the  
11 privilege.

12           QUESTION: What is your authority for that  
13 proposition?

14           MR. WERNICK: That where the government has  
15 mislead as to the purpose?

16           QUESTION: Well, the same thing was involved  
17 in Oregon v. Mathiason. We said it did not make any  
18 difference.

19           MR. WERNICK: No, the Court did not reach that  
20 point in Oregon v. Mathiason. The only issue in Oregon  
21 v. Mathiason was whether the defendant was in custody at  
22 the time, and the Court said that the falsehood that the  
23 police officer had told the defendant had nothing to do  
24 with the issue of whether or not he was in custody.

25           QUESTION: Whether or not Miranda applied.

1 MR. WERNICK: Whether or not Miranda applied.  
2 That is correct.

3 QUESTION: So what is your authority for the  
4 proposition that in this particular case they would be  
5 different than Mathiason?

6 MR. WERNICK: Well, this case is different  
7 from --

8 QUESTION: What is your authority?

9 MR. WERNICK: The old authority I guess is the  
10 first case Bram v. United States or Shotwell  
11 Manufacturing. The Court has said in the context of a  
12 compulsory proceeding you cannot compel a person to talk  
13 by any implied threats or promises.

14 So I am saying when she talked to him about  
15 treatment, for example, she was impliedly representing  
16 to him that the purpose of discussing this murder was to  
17 determine whether or not he had to go back to  
18 treatment. She represented to Murphy, Your Honor, no  
19 less than three times that her concern was treatment.

20 She said in her letter that she wanted to talk  
21 about treatment for the remainder of his probation.  
22 When he got to the office she repeated I want to talk to  
23 you about treatment. This is what I have heard you have  
24 been saying.

25 When she said to him you can deal with a

1 lawyer outside the office I now want to talk to you  
2 about the behavioral relationship between the false  
3 imprisonment and the murder because I think that  
4 indicates more treatment. Now this is --

5 QUESTION: Do you think it had something to do  
6 with the treatment problems that she was dealing with?

7 MR. WERNICK: Whether it did or not she is  
8 still --

9 QUESTION: Well, let's answer it.

10 MR. WERNICK: Yes, it did have something to do  
11 with treatment.

12 QUESTION: So she had a right to ask him that  
13 question.

14 MR. WERNICK: No question, Your Honor, she had  
15 a right to ask the question, but she has to ask the  
16 question in a way that is consistent with the privilege  
17 against compelled self-incrimination and she already  
18 knew that she was going to go to the police. She had  
19 that in her mind. She met with the supervisor and that  
20 decision was made.

21 QUESTION: What reaction do you think there  
22 should be to his reference, Murphy's reference, to the  
23 fact that she thought he might want to talk to a  
24 lawyer?

25 MR. WERNICK: I think she would have to allow



1 him to call the lawyer.

2 QUESTION: Well, that indicated he was aware  
3 of the problem.

4 MR. WERNICK: I believe he was aware that  
5 there was a problem. Murphy testified that when he was  
6 confronted with this by the probationer flags went up in  
7 his head.

8 He said I felt like calling a lawyer but once  
9 the probation officer then says to him you will have to  
10 deal with a lawyer outside the office because now I want  
11 to talk about treatment that prevented Murphy from  
12 making any other assertion of his Fifth Amendment  
13 rights.

14 QUESTION: Mr. Wernick, I do not read the  
15 Supreme Court of Minnesota's opinion as relying on  
16 implied representations by the probation officer.

17 MR. WERNICK: That is correct, Your Honor. In  
18 the question presented by the State of Minnesota in its  
19 petition for certiorari they identify the fact that this  
20 was a compulsory process and that the probation officer  
21 had substantial reason to know that the answers would be  
22 incriminatory and, therefore, the privilege was  
23 self-executing at that point and this is a case where  
24 the Court could reach that issue and decided whether or  
25 not based on those two factors the privilege would be

1 self-executing.

2 I am saying this case also presents itself a  
3 third factor whether on these facts the probation  
4 officer impaired Murphy's ability to assert the  
5 privilege.

6 QUESTION: But that is asking us to make a  
7 factual finding that the Supreme Court of Minnesota did  
8 not find.

9 MR. WERNICK: Well, it is really a legal  
10 conclusion, Your Honor, I believe because the facts are  
11 in the Supreme Court opinion. The facts are she had  
12 intended all along to report Murphy to the police and  
13 yet she made representations of treatment and she told  
14 them he could not call a lawyer. Those facts are all in  
15 the opinion.

16 The Court said in more general language than  
17 just limiting it to the two factors I have identified  
18 the Court said in the same paragraph as a matter of due  
19 process where this probation officer had already decided  
20 to report Murphy to the police this cannot be used  
21 against him.

22 So I think the Court can affirm based on the  
23 facts that are in the Supreme Court opinion. When she  
24 told him again that she would not let him call a lawyer  
25 because she wanted to talk about this behavioral

1 relationship I submit that when he first said he felt  
2 like calling a lawyer he was worried that the so-called  
3 cat had gotten out of the bag, but when she said you  
4 cannot call a lawyer because I want you to talk about  
5 this behavioral relationship at that point it was fair  
6 of him to assume that they were only talking about  
7 treatment. Indeed, I ask the Court to look closely at  
8 the confession in this case because the confession  
9 really is an explanation of why he does not need  
10 treatment.

11           His confession is I am innocent of the false  
12 imprisonment charge. At the time of the murder I was on  
13 drugs. I am not using drugs any more therefore the  
14 false imprisonment is not related to the murder and  
15 therefore I do not need treatment.

16           This is his confession. Now it was after he  
17 made the confession the probation officer said well you  
18 know I have to go to the police.

19           It was at that point Murphy says, well, I  
20 understand that and then he says to his probation  
21 officer you must really care about me to have me come in  
22 and talk about this because you could have just picked  
23 up the phone and started dialing the police. Again,  
24 Murphy was wrong about the nature of his confidentiality  
25 rights.

1           The federal statute is clear. The probation  
2 officer could not just have picked up the phone and  
3 called the police.

4           The language of the federal statute is that  
5 neither the treatment center nor the probation officer  
6 may initiate or substantiate a criminal prosecution  
7 based on information received from these federally funded  
8 treatment centers. So when Murphy said you just could  
9 have called the police again Murphy was wrong about his  
10 confidentiality rights.

11           The issue in this case does not turn on  
12 whether Murphy was in custody because she had this legal  
13 power to compel. The significance in this case --

14           QUESTION: Can I ask you if the probation  
15 officer calls in a person on probation and says I hear  
16 you have been out drinking in bars and you know that you  
17 are not supposed to do that. Have you been doing it and  
18 remember that if you refuse to answer your probation can  
19 be revoked, and he refuses to answer.

20           Would you say that the probation can be  
21 revoked in that circumstance if he refuses to answer?

22           MR. WERNICK: I would say -- Well, the Court  
23 raises a very difficult question there because --

24           QUESTION: Well, what is your view of it?

25           MR. WERNICK: My view is that it probably



1 cannot but --

2 QUESTION: It cannot you say.

3 MR. WERNICK: Not just for refusing --

4 QUESTION: Well, then suppose the probation  
5 officer says if you refuse to answer, of course, your  
6 probation will be revoked and the fellow says well I  
7 will answer yes I have but he says you have compelled me  
8 to answer so you may not revoke my probation or use this  
9 against me. Do you think he can use his statements  
10 against him?

11 MR. WERNICK: I think that they --

12 QUESTION: For the purpose of revoking  
13 probation?

14 MR. WERNICK: Yes.

15 QUESTION: So that is not compulsion. That  
16 would not be a compelled answer?

17 MR. WERNICK: That would be -- In a sense,  
18 yes, that would be compelled --

19 QUESTION: Yes what?

20 MR. WERNICK: Yes it was compelled but yes it  
21 is --

22 QUESTION: But it is not barred by the Fifth  
23 Amendment. Its use is not barred by the Fifth Amendment  
24 even if it is compelled.

25 MR. WERNICK: That is because, Your Honor, the

1 values underlying the self-incrimination clause go to  
2 protect the adversary nature of the criminal justice  
3 system. It goes to protect the nature of a criminal  
4 trial.

5 QUESTION: Well, in this case I guess you do  
6 not contend that there was any physical or mental  
7 coercion in this case. He finally answered the question  
8 about his involvement in this crime.

9 MR. WERNICK: Yes.

10 QUESTION: I take it that those statements  
11 could be used against him for the purposes of revoking  
12 probation.

13 MR. WERNICK: I would say in this case they  
14 could not be used against him for the purposes of  
15 revoking probation --

16 QUESTION: Why not?

17 MR. WERNICK: Because she told him he could  
18 not call a lawyer and any amount --

19 QUESTION: Well, I know but that all flows  
20 from -- You say it is not a Miranda case at all.

21 MR. WERNICK: Well, when a government official  
22 who has power to compel an answer to a question tells an  
23 individual that they cannot call a lawyer --

24 QUESTION: So this is a counsel case not a  
25 Fifth Amendment case?

1 MR. WERNICK: Counsel is related to the Fifth  
2 Amendment as this Court has said in *Maness v. Meyers*. A  
3 person's ability to assert the privilege depends in many  
4 cases on their access to counsel.

5 QUESTION: Mr. Wernick, is there not another  
6 factor that you may not have thought about but as a  
7 matter of Minnesota law is a parole revocation a  
8 criminal proceeding or is it not?

9 MR. WERNICK: I think --

10 QUESTION: Because if it is not a criminal  
11 proceeding the Fifth Amendment by its terms does not  
12 apply.

13 MR. WERNICK: It is a --

14 QUESTION: Would not apply that is to use for  
15 parole revocation purposes.

16 MR. WERNICK: It is not an adversary  
17 proceeding such as a criminal trial. There are some due  
18 process rights which attach to it.

19 QUESTION: I understand that, but it is a  
20 criminal proceeding? If it is not a criminal proceeding  
21 what would the source of the Fifth Amendment assertion  
22 be with respect to parole revocation as opposed to this  
23 case which is an indictment?

24 MR. WERNICK: Your Honor, you are setting up  
25 categories for me which I am not sure how to describe

1 the ultimate label of whether a revocation proceeding is  
2 a criminal proceeding or perhaps the best word to use is  
3 a "quasi" criminal proceeding.

4 QUESTION: Well the Constitution does not use  
5 the word "quasi". It either is or it is not.

6 MR. WERNICK: Well, perhaps then it is best  
7 said that --

8 QUESTION: But the point that you have to keep  
9 in mind is that the use that might be made of his answer  
10 what might be one thing in a subsequent trial and might  
11 be something else in a parole revocation hearing if that  
12 is not a criminal proceeding.

13 MR. WERNICK: I fully agree with the Court.  
14 If in this case let's assume that the law is that where  
15 a probation officer uses a compulsory process to  
16 deliberately incriminate, to gather evidence for the  
17 police that the law is that that cannot be used in a  
18 criminal trial absent some sort of advisory of the Fifth  
19 Amendment privilege.

20 Now the law may be is that when there is not  
21 Fifth Amendment privilege advisory you cannot use the  
22 statement in the context of a criminal trial but you  
23 could use it in a context of a revocation hearing. The  
24 reason I said in this case you could not use Murphy's  
25 statements in a revocation hearing is because the



1 probation officer went farther than that.

2 She completely undermined Murphy's ability to  
3 assert the privilege when he said --

4 QUESTION: Well, what difference does it  
5 make? What if she beat him up to get the information  
6 out of him and said the court requires you to answer.  
7 She compelled him in every sense of the word. It still  
8 would be admissible in the civil proceeding I would  
9 think.

10 There is no Fifth Amendment objection to doing  
11 it unless you violated some other right.

12 MR. WERNICK: Well, Your Honor, the Court  
13 raises good points and I guess my position is that once  
14 she cuts off his total ability to assert the privilege  
15 by saying he cannot call a lawyer that if he comes so  
16 involuntary at that point that it should not be used for  
17 any purpose whatsoever.

18 QUESTION: I got the impression earlier you  
19 had more or less conceded that in light of Murphy's  
20 remarks about a lawyer that he did not need a warning.  
21 A warning would have been a formality. I want to be  
22 sure what is your position on that?

23 MR. WERNICK: My position is that after he  
24 said I feel like calling a lawyer and was told that he  
25 could not because he had to talk about treatment that

1 the probation officer completely confused Murphy as to  
2 what was going on in that conversation so at that point  
3 to the extent he might have been worried about a  
4 criminal prosecution before he talked once the probation  
5 officer told him no you cannot call a lawyer because  
6 this is about treatment then at that point he was  
7 confused and he thought he was talking about --

8 QUESTION: Well, you do not usually have  
9 lawyers at probation talks with prisoners do you?

10 MR. WERNICK: No, you do not.

11 QUESTION: I do not understand the importance  
12 about a lawyer there.

13 MR. WERNICK: The importance --

14 QUESTION: Asking for a lawyer at the  
15 probation talk.

16 MR. WERNICK: The importance of a lawyer is  
17 this. When Murphy was confronted by the probation  
18 officer with her knowledge Murphy was faced with an  
19 extremely complicated legal situation.

20 QUESTION: And should have a lawyer?

21 MR. WERNICK: Well, he felt like he needed one  
22 and he certainly did.

23 QUESTION: Well, I am asking what  
24 constitutional provision requires him to have a lawyer  
25 at a talk with a probation officer?

1           MR. WERNICK: The Fifth Amendment says that  
2 the privilege against self-incrimination can be asserted  
3 -- the amendment as this Court has interpreted that the  
4 privilege can be asserted in any language. You do not  
5 have to be a lawyer to know how to assert the privilege  
6 and my --

7           QUESTION: Well, do you have a Fifth Amendment  
8 if a man stops you in the street? You get your Fifth  
9 Amendment in court do you not?

10          MR. WERNICK: But this was court. This was a  
11 compulsory process.

12          QUESTION: It was not a court.

13          MR. WERNICK: He was under --

14          QUESTION: This was in the probation officer's  
15 office.

16          MR. WERNICK: Your Honor --

17          QUESTION: That is not a court.

18          MR. WERNICK: But this Court has said --

19          QUESTION: Is that not a court? Is it a  
20 court?

21          MR. WERNICK: It is not a courtroom. I will  
22 concede only that much.

23          QUESTION: Is it a court?

24          MR. WERNICK: It is not a court room.

25          QUESTION: It is not a court.

1 MR. WERNICK: All right. Not a court.  
2 QUESTION: All right.  
3 MR. WERNICK: By court I mean court room  
4 because --  
5 QUESTION: If it is not a court where do you  
6 get the right to a lawyer?  
7 MR. WERNICK: He was under compulsion to speak  
8 via the court order and when he said I feel like calling  
9 a lawyer I am not saying that the probation officer had  
10 to go appoint him a lawyer at that time. I am saying  
11 Murphy was attempting to assert the privilege. He was  
12 attempting to find out what his legal rights were under  
13 the circumstances.  
14 When she prevented him --  
15 QUESTION: Why did he not ask may I go and see  
16 a lawyer?  
17 MR. WERNICK: Murphy's testimony was that he  
18 said I feel like I should have a lawyer present.  
19 QUESTION: Did he ask for a lawyer?  
20 MR. WERNICK: Well, he said I feel --  
21 QUESTION: He said I feel like a lawyer.  
22 MR. WERNICK: Or --  
23 QUESTION: I feel like I am King Midas. That  
24 does not help.  
25 (Laughter)



1 MR. WERNICK: Your Honor, take a look at the  
2 probation officer's response and then work backwards.  
3 She said to him you will have to --

4 QUESTION: I would rather -- I usually read  
5 forward.

6 MR. WERNICK: Well, the probation officer said  
7 to him you will have to deal with a lawyer outside the  
8 office. There is no --

9 QUESTION: Did he not eventually do it?

10 MR. WERNICK: My point is that --

11 QUESTION: Did he not eventually do it?

12 MR. WERNICK: Yes he did.

13 MR. WERNICK: But there is no dispute in this  
14 case, Justice Marshall, that the lawyer was on notice  
15 that Murphy wanted to talk to a lawyer before he talked  
16 about the murder. The only reason he did not do that is  
17 because the probation officer said to him you cannot.

18 QUESTION: I would like to know if the  
19 probation officer said all right I will get you the  
20 lawyer and he got you and you came into the room and he  
21 said to you do I have to answer this question. What  
22 would you have said?

23 MR. WERNICK: Absolutely not.

24 QUESTION: No obligation to answer the  
25 question?

1               MR. WERNICK: No because the probation officer  
2 has the power to compel Murphy to talk about it, but  
3 like any other compulsory process of the court or  
4 probation officer --

5               QUESTION: Would you have given the same  
6 answer if the question had pertained to an alleged  
7 criminal act after the beginning of the probationary  
8 period?

9               MR. WERNICK: Yes. A person on probation has  
10 full Fifth Amendment rights with respect to new criminal  
11 prosecutions.

12              QUESTION: But what if he then said well I  
13 want the information solely for the purpose and I  
14 represent to you it will be used only for that purpose  
15 of determining whether or not to revoke your probation.  
16 Would he have a duty to answer that question or not?

17              MR. WERNICK: I would say he would not have a  
18 duty to answer that question, but that the probation  
19 officer at that point under the authority of Baxter v.  
20 Palmigiano and the Court has not decided this issue in  
21 the context of probation but that the probation officer  
22 could at that point probably make an adverse inference.  
23 In other words, when the probationer will not talk about  
24 it the probation officer can assume the worst.

25              QUESTION: Well, if that is true then he might

1 as well answer if the consequence is going to be parole  
2 revocation if that is the maximum consequence.

3 MR. WERNICK: That is true if he has been  
4 assured that what he says is not going to be used  
5 against him at a criminal trial.

6 QUESTION: Well, if the rule of the employee  
7 discharge cases applies it follows automatically that  
8 the testimony would be immunized from use at a criminal  
9 prosecution but not from use for discharge purposes.

10 MR. WERNICK: I agree. When I say, by the  
11 way, that Murnphy could not have been revoked just for  
12 asserting the privilege the State of Minnesota does  
13 concede that if Murphy had asserted the privilege there  
14 would have been a revocation hearing.

15 QUESTION: Well, as a practical matter when a  
16 person asserts the privilege really the only option that  
17 the person sitting there or a court is to draw an  
18 adverse inference if they refuse to testify. Unless you  
19 are going to get out the thumbscrews you do not ever  
20 literally, you know, compel anyone to testify against  
21 their will.

22 It is really other devices that are used in  
23 the face of a refusal to testify.

24 MR. WERNICK: Yes, I am not sure I follow the  
25 Court's point, though, on that. But nonetheless it is

1 compulsion whether it is physical force or not. It is  
2 compulsion.

3 I missed the Court's point.

4 QUESTION: I thought you were suggesting in  
5 your response to Justice Stevens that there was  
6 something peculiar about the fact that the remedy would  
7 have been to draw an adverse inference, and really I  
8 think that is what the remedy is in most cases.

9 MR. WERNICK: Yes, except in a criminal trial  
10 where the Fifth Amendment prohibits the finder of fact  
11 from drawing an adverse inference. I do not know how  
12 enforceable that is but certainly the jury cannot be  
13 instructed that they can draw an adverse inference.

14 You cannot argue that they can draw an adverse  
15 inference. But in a criminal trial you cannot draw an  
16 adverse inference, and that may be the difference I am  
17 suggesting between the criminal trial and the revocation  
18 proceeding.

19 It is an unsettled question of law. The cases  
20 that the Solicitor General cited in limiting the Fifth  
21 Amendment or in suggesting that this Court should limit  
22 the Fifth Amendment rights of probationers are First  
23 Amendment and Fourth Amendment cases where this Court  
24 has said that because of the particular institutional  
25 needs of a prison system the government can limit First



1 Amendment rights and Fourth Amendment rights of people  
2 in prison.

3           The precedent in this Court for limiting Fifth  
4 Amendment rights of people convicted of crime is to the  
5 contrary. Prisoners are entitled to Miranda warnings  
6 when they are being interrogated about new offenses  
7 while they are in prison, and this Court did assume in  
8 *Baxter v. Palmigiano* that if a prisoner were to be  
9 compelled to testify at a prison disciplinary hearing  
10 then his testimony would be immunized at a criminal  
11 trial.

12           So there is no authority for the proposition  
13 that the Fifth Amendment rights of probationers should  
14 be limited in the context of what can be used against  
15 them in a criminal trial. In identifying what the  
16 institutional needs --

17           QUESTION: You still have to show some  
18 compulsion.

19           MR. WERNICK: Yes.

20           QUESTION: Your compulsion in this case was  
21 just asking the questions along with refusing him a  
22 lawyer?

23           MR. WERNICK: Asking the questions pursuant to  
24 a court order, refusing the lawyer, telling him that  
25 this is just about treatment and I would add, Your

1 Honor, that another significant fact in that regard is  
2 that at the time Murphy talked about this he was already  
3 in violation of his probation for having failed --

4 QUESTION: I take it then consistent with your  
5 answers to me before and to Justice Stevens if the  
6 probation officer says to him I just want to check up on  
7 your treatment now have you been taking your treatment  
8 as you were supposed to do and the gentleman says I  
9 refuse to answer. I will not talk about that and I do  
10 not have to talk about that. I have been advised by my  
11 lawyer I do not have to talk about it.

12 The probation officer says well I am going to  
13 go to the judge and am going to revoke your probation.  
14 He says well you cannot do that I have been advised by  
15 my lawyer that you cannot revoke my probation. Would  
16 you say that he could not revoke the probation then?

17 MR. WERNICK: I do not believe that answering  
18 --

19 QUESTION: Just for the refusal. He goes to  
20 the judge and the judge says I revoke your probation  
21 because you refused to answer. You refused to comply  
22 with one of the conditions of your probation. You said  
23 I take it that you could not revoke the probation on  
24 that ground.

25 MR. WERNICK: In that hypothetical the judge

1 may be able to revoke probation on that ground because  
2 it is not a crime to refuse to go to treatment.

3 QUESTION: I know but we are talking about  
4 compulsion and an answer being used to revoke  
5 probation.

6 MR. WERNICK: But you can only assert -- When  
7 you are under court order to talk you can only assert  
8 the privilege as to those matters which would implicate  
9 you in a criminal prosecution. If Murphy --

10 QUESTION: Well, you told me a while ago that  
11 you could not revoke the probation if he asked him have  
12 you been drinking at bars.

13 MR. WERNICK: I was going to -- The reason  
14 that --

15 QUESTION: You said no you could not revoke  
16 probation if he then said it is none of your business.

17 MR. WERNICK: The issue there would be, Your  
18 Honor, whether you can assert the privilege when you are  
19 being asked about something which is not a crime but  
20 yet is a violation of your probation. That is what  
21 makes --

22 QUESTION: That is the drinking one and that  
23 is the treatment one.

24 MR. WERNICK: Well, no because she is asking  
25 him tell me about this murder.

1 QUESTION: No, no. In my example I said he  
2 just asked him about treatment. Are you taking your  
3 treatment and he says none of your business.

4 Do you think that probation could be revoked  
5 then?

6 MR. WERNICK: If the Fifth Amendment only  
7 protects against further criminal prosecutions then the  
8 answer to your question is he could be revoked because --

9 QUESTION: And similarly about drinking at  
10 bars.

11 MR. WERNICK: Similarly about drinking at bars  
12 but differently about being asked if he has committed  
13 other crimes.

14 QUESTION: Then in neither case I would think  
15 would there be compulsion.

16 MR. WERNICK: In both cases there may be some  
17 compulsion but --

18 QUESTION: Well, there must --

19 MR. WERNICK: The government --

20 QUESTION: You have to say there is enough to  
21 --

22 MR. WERNICK: Your Honor, the government can  
23 compel --

24 QUESTION: You have to say there is enough  
25 compulsion to keep it out of a criminal trial.



1           MR. WERNICK: There is nothing illegal about  
2 the government compelling information. The government  
3 does it all the time and it must compel information in  
4 order to function, but it has to do it in a way that is  
5 consistent with the Fifth Amendment. When Murphy says I  
6 feel like calling a lawyer and when she tells him he  
7 cannot and when she tells him as to the nature of the  
8 interview she is not conducting herself in a way which  
9 is consistent with protecting the values underlying the  
10 Fifth Amendment.

11           It seems to me, Your Honor, all parties in  
12 this case have agreed that the most important  
13 institutional need of the probation system is a trust  
14 relationship between the probationer and the probation  
15 officer. If this Court puts its seal of approval on the  
16 conduct of the probation officer in this case then that  
17 institutional need would be undermined, and I ask the  
18 Court to affirm the judgment of the Minnesota Supreme  
19 Court.

20           CHIEF JUSTICE BURGER: Mr. Lynn, do you have  
21 something further?

22           ORAL ARGUMENT OF ROBERT H. LYNN, ESQ.,  
23 ON BEHALF OF THE PETITIONER -- REBUTTAL

24           MR. LYNN: A few points if I may, Your Honor.  
25           As to the issue of a mention of a lawyer in

1 this conversation on September 28th the constitutional  
2 right to a lawyer arises in only two circumstances that  
3 have been recognized by this Court. That is the  
4 in-custody Miranda type of interrogation where the  
5 request for a lawyer is viewed by the prophylactic rules  
6 in that decision to affect protection of the Fifth  
7 Amendment rights.

8           The only other situation is at a critical  
9 stage of a criminal proceeding and that is the true  
10 Sixth Amendment right to counsel. Neither of those two  
11 situations applies to a probation interview generally or  
12 to this one specifically.

13           Secondly, just to reiterate my major point.  
14 The privilege in the Fifth Amendment does not prohibit  
15 asking questions or asking incriminative questions.

16           It only prohibits the government from  
17 compelling self-incrimination. The focus of that  
18 inquiry has to be on the words and deeds and actions of  
19 the governmental agent in this particular case.

20           Either individually or in combination there  
21 are no factors identifiable here in the conduct of the  
22 probation officer which could be found under the  
23 existing decisions of this Court to compel his answers  
24 in the sense that he did not have the free choice to  
25 admit, deny or to claim the privilege.

1                   QUESTION: Mr. Lynn, what if Minnesota's  
2 parole conditions were a little less ambiguous because  
3 apparently there is some argument about what they really  
4 mean. Supposing they said in so many words every  
5 probationer has an absolute duty to respond to every  
6 question propounded to him by the probation officer  
7 truthfully, fully in all detail concerning conduct  
8 during the probationary period, and the failure to  
9 respond to any such question shall be grounds for  
10 revocation of the probation, would there be any  
11 constitutional objection to that?

12                  MR. LYNN: I do not believe so, Your Honor.

13                  QUESTION: But you do not construe these  
14 parole conditions to require any such broad duty to  
15 respond as I understand your argument. I would think  
16 the interest of the parole system would be served by  
17 maximizing the flow of communication rather than by  
18 creating situations where you have got to claim  
19 privileges and all the rest.

20                  MR. LYNN: I would generally agree with the  
21 Court. Of the facts of this particular case, however,  
22 there is a problem --

23                  QUESTION: There is a problem because it  
24 relates to antecedent criminal conduct, but if it were  
25 not for that -- Well, I guess we understand each other.

1 MR. LYNN: Thank you.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 (Whereupon, at 11:55 a.m., the case in the  
5 above-entitled matter was submitted.)

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**CERTIFICATION**

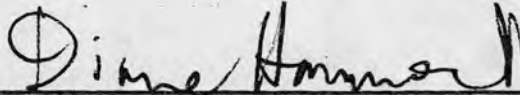
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MINNESOTA, Petitioner v. MARSHALL DONALD MURPHY # 82-827

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