

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: MONTANA, Petitioner v. DONALD GLENN IMLAY

CASE NO: 91-687

PLACE: Washington, D.C.

DATE: October 7, 1992

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1 PROCEEDINGS

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 91-687, Montana v. Donald Glenn  
5 Imlay.

6 Mr., is it Racicot? Racicot.

7 ORAL ARGUMENT OF MARC RACICOT

8 ON BEHALF OF THE PETITIONER

9 GEN. RACICOT: Mr. Chief Justice, and may it  
10 please the Court:

11 The 56-year old defendant in this case was  
12 convicted of the sexual assault of a 7-year old girl in a  
13 grocery store. At trial he testified and denied ever  
14 sexually assaulting the victim. He was sentenced to 5  
15 years in Montana State Prison, which was suspended on  
16 several conditions, one of which was that he would enroll  
17 and complete a sex offender treatment program. The  
18 defendant did in fact enroll in such a program --

19 QUESTION: When he did so and when he was so  
20 advised was he advised that the completion of the program  
21 would require an admission of guilt?

22 GEN. RACICOT: No, Your Honor, he was not. He  
23 did enroll in such a program but did not complete it. He  
24 was terminated from the program because he would not admit  
25 his guilt to the offense charged. As a result the

1 district court revoked probation and remanded the  
2 defendant to the Montana State Prison where inpatient sex  
3 offender treatment was available. Subsequently the  
4 Montana Supreme Court vacated that sentence and remanded  
5 back to the district court, where the defendant was  
6 sentenced to 5 years at Montana State Prison with no  
7 condition for treatment. And that is where the defendant  
8 presently resides.

9 The issue is whether revocation of probation, or  
10 failure to complete a sex offender treatment program  
11 because the defendant would not accept responsibility for  
12 the offense of which he was convicted, violates the  
13 defendant's privilege against self-incrimination.

14 QUESTION: May I ask a preliminary question  
15 before you get into your argument? He originally had a 5-  
16 year sentence that was suspended, and then parole was  
17 revoked, and then he received another 5-year sentence?

18 GEN. RACICOT: Justice Stevens, he was then, had  
19 his suspension, his probation revoked and was committed to  
20 the Montana State Prison for 5 years.

21 QUESTION: So if you win this case he will serve  
22 out a 5-year sentence, and if you lose this case he will  
23 also serve out a 5-year sentence?

24 GEN. RACICOT: No, sir, not precisely. If we  
25 win this case then the defendant inside, then the sentence

1 of the Montana Supreme Court ordering, ordered from the  
2 district court will be revoked or reversed and then the  
3 defendant will be subject to the sentence previously  
4 imposed which was that he could not be paroled until such  
5 time as he had completed sex offender treatment.

6 QUESTION: But it seems to me in either even he  
7 serves 5 years.

8 GEN. RACICOT: Well, he does not necessarily.  
9 Under the one circumstance, with the sentence reimposed by  
10 the district court after the initial revocation, he would  
11 be, with the recommendation of the court, subjected to sex  
12 offender treatment. Upon successful completion would then  
13 be eligible for parole. That was the recommendation of  
14 the district court.

15 QUESTION: I'm still a little puzzled. Which  
16 way will he be eligible for parole? If you win or if you  
17 lose?

18 GEN. RACICOT: If we win.

19 QUESTION: So you're really trying to advance  
20 his interests?

21 GEN. RACICOT: Yes, sir, we are.

22 QUESTION: He is better off if you win than if  
23 you lose.

24 GEN. RACICOT: In our judgment that is certainly  
25 the case.

1 QUESTION: Excuse me, he'll be eligible for  
2 parole if he successfully completes sex offender treatment  
3 if you win, you say.

4 GEN. RACICOT: Yes.

5 QUESTION: But he can't successfully complete  
6 the sex offender treatment, we are told, unless he  
7 acknowledges his guilt.

8 GEN. RACICOT: That is true as well.

9 QUESTION: So it's a rather hollow victory,  
10 isn't it? He will be paroled if he successfully completes  
11 sex offender treatment, which you acknowledge he cannot  
12 possibly do.

13 GEN. RACICOT: Well, the dynamics, Justice  
14 Scalia, are in our experience that in fact inpatient sex  
15 offender treatment, when it is available, through the  
16 course of that there is a very high likelihood that he  
17 will successfully complete. Inpatient status and being  
18 subjected to the treatment over the course of that time in  
19 our experience has indicated successful results.

20 QUESTION: But I thought the whole premise of  
21 this case is that he cannot fulfill the conditions imposed  
22 upon his obtaining parole, he cannot fulfill those  
23 conditions without confessing his guilt, without accepting  
24 his guilt. Isn't that the whole premise of this  
25 litigation?



1 GEN. RACICOT: It is.

2 QUESTION: But you, now you tell us that that  
3 premise is false, that he can indeed complete the  
4 treatment without confessing his guilt. Well, which is  
5 it?

6 GEN. RACICOT: He cannot successfully complete  
7 the treatment without confessing his guilt. He refuses to  
8 do that at the present time.

9 QUESTION: Well, then the answer to Justice  
10 Stevens' question is it really doesn't matter. He's in  
11 for 5 years, whether you win or lose, because he cannot  
12 successfully complete his treatment.

13 QUESTION: Well, he might change his mind.

14 QUESTION: He might change his mind. If you win  
15 the case he might decide that I would rather get out in  
16 less than 5 years and admit my guilt.

17 GEN. RACICOT: That is precisely --

18 QUESTION: But on the other hand, on the other  
19 hand if you lose this case I don't know whether you will  
20 just, if it's unconstitutional for you to make him admit,  
21 you may go offer him the treatment without his admitting  
22 it.

23 GEN. RACICOT: There certainly would be an  
24 educational, there are two parts to the course that is  
25 offered.

1 QUESTION: I don't know, I don't -- if you  
2 wouldn't do that your only option then is to discontinue  
3 all of this kind of treatment, program, and I don't know  
4 whether the state will do that just because he won't admit  
5 guilt.

6 GEN. RACICOT: We would, the course will still  
7 be available. There are two parts. One requires an  
8 admission, one does not. One is an educational portion,  
9 and when it's provided in an inpatient setting it has been  
10 our experience with even those who do not choose to admit  
11 at the beginning, overwhelmingly you have a chance of  
12 success throughout the course of that process.

13 QUESTION: Well, but -- the other part of it  
14 though wouldn't let him out before 5 years?

15 GEN. RACICOT: If, Justice White, the --

16 QUESTION: He would have to come around and  
17 admit guilt under the program?

18 GEN. RACICOT: Yes, that's correct.

19 QUESTION: So you are not arguing that the  
20 state -- I thought you were arguing here that the state  
21 has no right to make him admit guilt as a condition of his  
22 probation. Now you tell us you're not arguing that. All  
23 you're saying is that the state cannot deprive him of the  
24 opportunity to admit guilt too soon, that it has to leave  
25 him in the program and wait the full 5 years and see if

1 he's willing to admit the guilt sometime during the 5  
2 years. But you acknowledge that the state can require him  
3 to admit guilt as a condition of his probation?

4 GEN. RACICOT: Yes, that is our position.

5 QUESTION: So we're just arguing over whether it  
6 must require him to admit guilt immediately or whether, or  
7 may require him to admit it immediately or whether it must  
8 wait 5 years for him to admit guilt. Right?

9 GEN. RACICOT: In essence, yes.

10 QUESTION: Gee, it's a much less significant  
11 case than I thought.

12 GEN. RACICOT: One thing to keep in mind, I'm  
13 hopeful that the Court will throughout the course of  
14 consideration, is that the admission of guilt that was  
15 sought was solely for treatment purposes and  
16 rehabilitation purposes, and the record indicates that.  
17 It is unequivocally clear. There was no intent at any  
18 point in time to elicit incriminating statements to be  
19 used in a future prosecution.

20 QUESTION: Well, there was -- the briefs were  
21 not clear as to whether or not the statements are  
22 privileged. I have taken the case as if there is no  
23 privilege for the, against the disclosure of this  
24 information by the therapist. Is that correct?

25 GEN. RACICOT: Yes, Justice Kennedy, that's our

1 position.

2 This Court has made it clear on a number of  
3 occasions that prosecution --

4 QUESTION: Well, but then we simply rely on the  
5 proffers of good faith by the state that this information  
6 will not be divulged?

7 GEN. RACICOT: I believe there are other, there  
8 are other safeguards that are, already have been announced  
9 by this Court as well as by the Montana Supreme Court. As  
10 well, in our judgment there is not a reasonable likelihood  
11 of future criminal prosecution in this kind of a case as a  
12 result of those proscriptions as well as a result of our  
13 intent to provide treatment.

14 QUESTION: Suppose it was the policy of the  
15 therapist routinely to report all admissions of crimes by  
16 patients under their treatment to the prosecutor's office.  
17 Would the result of the case be different?

18 GEN. RACICOT: No, sir, it would not. Because  
19 even with that report there is still by Montana Supreme  
20 Court rule an inability to use those admissions in a  
21 future prosecution. As well I believe this Court has held  
22 the same in --

23 QUESTION: Is that your case of State v. Thiel?

24 GEN. RACICOT: Thiel. Yes, sir.

25 QUESTION: I did not read the case that way. Do



1 you have any other Montana authority for that proposition?

2 GEN. RACICOT: Not Montana authority, but this  
3 Court in Murphy in our judgment certainly holds that any  
4 future prosecution based upon uncharged acts would be  
5 prohibited in this kind of a circumstance.

6 QUESTION: So your submission to us is that  
7 these statements are in effect compelled by the state at  
8 least for purposes of future prosecutions, and so he has  
9 an immunity from the use of these statements?

10 GEN. RACICOT: No, we would not say that that  
11 was our intent. There certainly could be, even if there  
12 was, even if it was stipulated that there is compulsion by  
13 rule of this Court, and the rule of the land, the law of  
14 the land is that they could not be used in a future  
15 prosecution.

16 QUESTION: Well, why, why didn't the state just  
17 grant him immunity then for prosecution for perjury or  
18 whatever it is he's worried about?

19 GEN. RACICOT: Well, that's certainly something  
20 that could have been done.

21 QUESTION: And why didn't the state do it?

22 GEN. RACICOT: Because the issue was not raised  
23 in that context. And frankly with the prohibition against  
24 utilizing it in a future prosecution my expectation is  
25 that it was not deemed necessary at that point in time,

1 nor requested.

2 QUESTION: Do you concede that he has immunity?

3 GEN. RACICOT: Yes.

4 QUESTION: Including immunity on a perjury  
5 prosecution?

6 GEN. RACICOT: Yes. This Court has made it  
7 clear --

8 QUESTION: Would he be subject to perjury for  
9 lying to a therapist?

10 GEN. RACICOT: No, because the statement is not  
11 made under oath in the State of Montana.

12 QUESTION: Right. Thank you.

13 GEN. RACICOT: I might point out that he would  
14 be subject to a prosecution for perjury regardless of  
15 whether or not this kind of a statement was requested or  
16 demanded. He could still have been subjected to a perjury  
17 prosecution based upon the evidence that was available  
18 absent any admission.

19 QUESTION: Right. I mean, my question assumed  
20 that he would be immune from prosecution using evidence  
21 obtained through the therapist.

22 GEN. RACICOT: Yes, that is our position.

23 QUESTION: So your answer is that he would be  
24 immune under those circumstances?

25 GEN. RACICOT: Yes.

1           QUESTION: It's sort of a use immunity you're  
2 talking about. I mean, you could still prosecute him for  
3 perjury but you couldn't use the evidence as evidence that  
4 he confessed his guilt to the therapist.

5           GEN. RACICOT: That is our understanding, Your  
6 Honor.

7           QUESTION: Well, the question I just asked, I  
8 guess, was whether you could prosecute the defendant for  
9 perjury. I guess it's agreed, is it not, that statements  
10 made to a therapist are not under oath and so there could  
11 be no perjury prosecution there?

12          GEN. RACICOT: That's correct, in the State of  
13 Montana.

14          QUESTION: So where would the possible perjury  
15 prosecution come from?

16          GEN. RACICOT: There are -- you could go back  
17 and because of his denial at trial and his testimony at  
18 trial charge perjury and reinstitute a prosecution based  
19 on the evidence.

20          QUESTION: Oh, I see.

21          QUESTION: On the basis of that testimony in the  
22 later statement.

23          GEN. RACICOT: Yes. The Court has made it clear  
24 that the Constitution does not forbid every Government  
25 imposed choice in the criminal process that has the effect

1 of discouraging the exercise of constitutional rights, for  
2 instance in the area of disclosure of alibi witnesses or  
3 the use of pre-arrest assertion of the privilege to  
4 impeach a trial. The availability of a constitutional  
5 protection does not mean automatically that a defendant  
6 cannot in some instances be required to make a choice of  
7 when to rely upon it, for instance in plea bargaining  
8 situations. In that situation a defendant is presented  
9 with a choice of giving up not only his right against  
10 self-incrimination but also his or her right to a trial,  
11 including the right to confront witnesses, in exchange for  
12 a more lenient sentence.

13           There is much more of an onerous burden on the  
14 exercise of constitutional rights in that kind of a  
15 situation than there is here. The defendant in that  
16 situation is told in no uncertain terms before there is  
17 even a finding of guilt that he or she will suffer much  
18 harsher consequences in the event that he or she chooses  
19 to exercise the constitutional rights that are clearly  
20 guaranteed by the Fifth and Sixth Amendments.

21           The defendant here was not subjected to  
22 proscribed compulsion in an effort to force him to waive  
23 his Fifth Amendment rights. He was offered an opportunity  
24 to obtain leniency, namely continued probation. It was  
25 his choice. Imlay's failure to accept responsibility did



1 lead to the revocation of his probation, but his prison  
2 sentence was imposed in the first place because he  
3 sexually molested a 7-year old girl, and not because he  
4 refused to admit his guilt.

5 He wasn't ordered to confess, or required to  
6 make incriminating statements under oath, or held in  
7 contempt, or sentenced to an additional prison term  
8 because of his silence. He simply made a decision not to  
9 comply with the terms of his probation, and as a result he  
10 was denied that status, namely probation.

11 QUESTION: May I interrupt you once more to be  
12 sure I've got the sequence right? You're talking about  
13 what he wasn't compelled to do. There are three different  
14 orders entered by the district court. Am I right in this  
15 regard? First, a 5-year sentence but suspended on this  
16 condition. Second, the district judge revoked that and  
17 said you go away for 5 years but you can then get  
18 treatment in prison. That was the second order. Then the  
19 supreme court reversed that order and sent it back for  
20 further proceedings. What was the third order that was  
21 entered? Was it the --

22 GEN. RACICOT: The third order by the district  
23 court --

24 QUESTION: Yes.

25 GEN. RACICOT: Sentenced to 5 years without a

1 condition that he go through sex offender treatment before  
2 being eligible for parole.

3 QUESTION: So under the present order even if he  
4 takes the sex offender treatment he still can't get out in  
5 less than 5 years? Is that the answer?

6 GEN. RACICOT: Absent the parole board's  
7 involvement, yes, Justice Stevens, that would be the case.  
8 But they do have a requirement that prior to the time  
9 you're eligible for parole that you do go through the sex  
10 offender treatment.

11 QUESTION: It seems to me then that under the  
12 order of the district court that was subsequently reversed  
13 by the supreme court and under the order entered on remand  
14 precisely the same condition applies. In other words he  
15 has a chance to get the inpatient treatment and he might  
16 get out if he does, and if he won't admit he'll spend the  
17 5 years in jail. And that's true either under the order  
18 that the Montana Supreme Court reversed or under the order  
19 that was entered after the reversal. Am I right on that?

20 GEN. RACICOT: I think that's the practical  
21 effect, yes.

22 QUESTION: So I really don't see how it makes a  
23 particle of difference who wins or loses this case.

24 QUESTION: I don't either.

25 GEN. RACICOT: It makes a huge difference in

1 terms of not only this case but other cases --

2 QUESTION: Oh, I understand the advisory opinion  
3 would be very important to you. That's true. But in  
4 terms of the litigants in the particular case or  
5 controversy before us I don't see how Montana gains or  
6 loses anything with respect to its relationship with this  
7 defendant.

8 GEN. RACICOT: Well, if the question, Justice  
9 Stevens, is whether or not the case is moot as a result of  
10 what has occurred here --

11 QUESTION: No, I don't think it's a question of  
12 mootness. It's a question of whether there's an actual  
13 case or controversy that makes any difference.

14 GEN. RACICOT: I believe that the decisions of  
15 this Court indicate that there are in fact, that there is  
16 a case or controversy because the state is not able to  
17 impose the collateral consequences of the defendant's  
18 conviction, namely that he be compelled to go through sex  
19 offender treatment.

20 QUESTION: Well, but he is now compelled to  
21 spend 5 years in jail if he doesn't do it. That's the  
22 only way you can compel him. It's the same choice he has.  
23 He either admits guilt and goes through it and gets some  
24 benefit from it, or he doesn't.

25 GEN. RACICOT: I also believe --

1 QUESTION: I don't think it matters whether he  
2 admits guilt or not. It still will be -- the two orders  
3 come out exactly the same way.

4 GEN. RACICOT: But I also believe that this  
5 Court has indicated that the resentencing in a case like  
6 this is merely the obedience of a court's order, and that  
7 that does not by itself end up alleviating the possibility  
8 that the case is in fact a case or controversy.

9 QUESTION: But then that raises the question  
10 whether the order under review was really final and  
11 whether it had jurisdiction, I suppose, at the time,  
12 granting review at the time we did. Well, I have these  
13 concerns about whether we really have a live case. I  
14 thought I --

15 GEN. RACICOT: I understand as well. There was  
16 never any intent in this case to compel Imlay to be a  
17 witness against himself in a criminal case. As this Court  
18 noted in Allen v. Illinois, the Fifth Amendment privilege  
19 is not available because the revocation proceeding was  
20 essentially civil in nature, the aim being to provide  
21 treatment instead of punishment. And as the Illinois  
22 Supreme Court was noted to have done in Allen, it is our  
23 belief that the Montana Supreme Court has held that  
24 admissions made during sex offender treatment cannot be  
25 used against a defendant in a subsequent prosecution.



1                   And this Court in Allen noted as well its  
2       decision in Minnesota v. Murphy and held that a person may  
3       not claim the privilege merely because his answer might  
4       result in revocation of his probationary status. And  
5       that's all that occurred in this case, or could have  
6       happened in light of Thiel and in light of Murphy.

7                   QUESTION: I just want to reiterate. Thiel was  
8       a case in which the court said he has been sentenced under  
9       a plea bargain for the acts in question, and therefore  
10      double jeopardy bars his reprosecution for those crimes.  
11      It has nothing to do with the self-incrimination clause in  
12      my view.

13                  GEN. RACICOT: I understand your point, Justice  
14      Kennedy, and I would state that you are entirely correct  
15      that it is not precisely framed in those terms. The court  
16      did say Thiel has had few options other than to sacrifice  
17      his right to remain silent and to reveal his entire past.  
18      I recognize that it was based on a sense of fundamental  
19      fairness. But as well, Minnesota v. Murphy is much more  
20      explicit and I think provides the same result and is  
21      applicable to the courts of Montana and the State of  
22      Montana in this instance.

23                  The defendant was not --

24                  QUESTION: I still must confess puzzlement.  
25      Your brief says that these are not statements that are

1 covered by the Fifth Amendment because there's no  
2 possibility of incrimination. And then you have told us  
3 the reason there's no possibility of incrimination is  
4 because they're immunized. It seems to me you have to  
5 accept one theory of the case or the other. Either the  
6 Fifth Amendment is applicable or it is not.

7 GEN. RACICOT: Our position, Justice Kennedy, is  
8 that they are not incriminating, but even, even if they  
9 could perceive to be statements of that nature, that  
10 nonetheless Murphy would proscribe their use in a future  
11 prosecution. So that the remedy ultimately, even if they  
12 were incriminating statements, would be available and  
13 would eliminate any risk of violating the person's right  
14 against his self-incrimination.

15 The defendant was not compelled in this case, as  
16 I mentioned, to be a witness against himself. He was not  
17 required to answer questions in any proceeding where the  
18 answers might incriminate him in a future criminal  
19 proceeding. In the first place he testified at trial and  
20 was convicted, and any right against self-incrimination as  
21 it applied to the charge defense was extinguished as a  
22 result of that testimony.

23 In reference to uncharged acts, which would  
24 include perjury, by virtue of this Court's holding in  
25 Murphy those statements could not be used against Imlay in

1 a future criminal proceeding.

2 Finally, there was no realistic threat of  
3 incrimination in a future criminal case. The state  
4 intended from the beginning to provide treatment and not  
5 punishment, and it's obvious that there was no realistic  
6 threat of future prosecution. As a result the defendant  
7 was not being compelled in a criminal case to be a witness  
8 against himself, and as a result of that the Fifth  
9 Amendment has no application.

10 The revocation of probation in this instance as  
11 well, and as again Murphy points out, is not a penalty  
12 that triggers Fifth Amendment protections because the  
13 sought after admission was relevant to his probationary  
14 status and posed no realistic threat of incrimination in a  
15 separate criminal proceeding. The sentence of  
16 imprisonment was already imposed. The outer boundary of  
17 punishment was established, and then leniency was offered  
18 upon the condition that Imlay would complete sex offender  
19 treatment.

20 The burden was therefore upon him to demonstrate  
21 his continued entitlement to that probation. It was his  
22 choice. But making that choice did not trigger the  
23 protections of the Fifth Amendment because his decision to  
24 refuse to accept responsibility did not enhance or augment  
25 his sentence. The defendant's sentence didn't change,

1 only the conditions of the sentence changed. There was no  
2 increase in the severity of that sentence. Only the added  
3 benefit of probation was changed because of the state's  
4 obligation to provide safety and security as well as  
5 rehabilitation and treatment.

6 The state has to have, as this Court noted in  
7 Murphy, that kind of authority to ask questions relevant  
8 to its responsibilities and to take actions against a  
9 defendant whose refusal to answer impedes the discharge of  
10 those responsibilities. Extending leniency to one who is  
11 willing to cooperate is what was attempted here. It's not  
12 a case where the sentence of a defendant who has committed  
13 no additional offense was augmented because of his or her  
14 reliance upon the protections of the Fifth Amendment.

15 Imlay testified, as I mentioned, at trial, and  
16 responded during sex offender treatment in the same way.  
17 In both instances he denied the crime, but he did so  
18 voluntarily. In other words he did not remain silent and  
19 he did not claim his Fifth Amendment privilege. Because  
20 the denial was voluntary and not compelled in both  
21 instances, within the meaning of the Fifth Amendment the  
22 district court was free to rely on the defendant's denial  
23 in revoking probation. The revocation occurred on the  
24 basis of voluntary statements by Imlay in which he denied  
25 the sexual assault.



1           The protections of the Fifth Amendment in this  
2 situation are not self-executing. If Imlay desired the  
3 protection of the privilege he had to claim it. He  
4 didn't, and as a result was not compelled to answer within  
5 the meaning of that amendment.

6           QUESTION: Do you think the Fifth Amendment  
7 issue is before us at all?

8           GEN. RACICOT: It depends upon what theory --

9           QUESTION: Well, it wasn't argued or raised in  
10 the courts below, was it?

11          GEN. RACICOT: It was not.

12          QUESTION: Therefore I ask my question.

13          GEN. RACICOT: I do not, other than that the  
14 Supreme Court of the State of Montana has held that in  
15 fact sua sponte raising the issue is dispositive of the  
16 case and as a consequence --

17          QUESTION: They decided it as a Fifth Amendment  
18 issue, didn't they?

19          GEN. RACICOT: That's precisely correct.

20          QUESTION: So whether it was raised before, they  
21 nevertheless decided it.

22          GEN. RACICOT: That is correct.

23          QUESTION: General, do we have to agree with you  
24 on Murphy? I mean, I'm not sure that -- Murphy says that  
25 you cannot require someone to admit to something that he

1 can be prosecuted for as a condition of retaining his  
2 Government job, but people have an entitlement to a  
3 Government job. They don't have an entitlement to parole  
4 unless they have been rehabilitated.

5 And it seems to me if the state is saying look,  
6 if you rehabilitate yourself we'll let you out earlier.  
7 Now, that rehabilitation may necessitate your admitting  
8 the prior crime. You can't be successfully treated unless  
9 you admit it, but that's your choice. If you want to  
10 rehabilitate yourself you'll get out early, if you don't  
11 want to because of the risk of incrimination, well, that's  
12 fine too.

13 I'm not -- why does Murphy apply to that  
14 situation so clearly in your view?

15 GEN. RACICOT: Justice Scalia, I may have been  
16 mistaken in informing the Court just by referring to the  
17 Murphy case. I am referring to Minnesota v. Murphy  
18 wherein the probationer in that instance was --

19 QUESTION: Oh, I'm sorry. I thought you were  
20 talking about the Government -- okay. Okay. Okay.

21 QUESTION: May I ask one other question that's  
22 prompted by Justice Blackmun's question? He made a First  
23 Amendment argument in the Montana Supreme Court, is that  
24 right?

25 GEN. RACICOT: Yes, Justice Scalia.

1 QUESTION: And that, that has never been ruled  
2 on, has it? So if we agreed with you I suppose they could  
3 then consider that question?

4 GEN. RACICOT: Yes.

5 QUESTION: Yes.

6 GEN. RACICOT: This decision, if left standing,  
7 will substantially impact sentencing options and adversely  
8 affect effects to carry out enlightened and effective  
9 treatment efforts that are the product of years of  
10 development.

11 QUESTION: Well, why is that so? I mean,  
12 couldn't the problem simply be short circuited either by  
13 engaging in an initial colloquy informing him that if he  
14 wants to avail himself of the more lenient treatment  
15 option he has to recognize that he cannot be treated for  
16 something that he does not admit that he did, so that his  
17 choice to put himself in the position that he is in right  
18 now would be a voluntary choice, and that presumably would  
19 affect the result. I mean, isn't that the -- if you lose  
20 this case isn't that the only modification in procedure  
21 that you would have to take in order to preserve the  
22 possibility of treatment programs?

23 GEN. RACICOT: Justice Souter, there are other  
24 ways to proceed, you are entirely correct. We could  
25 proceed in the fashion that the Federal Government does

1 with the sentencing guidelines. The only difference is  
2 that there are substantial economies and there are also  
3 substantial retrievals of people involved in this system  
4 because as they go through the treatment process we are  
5 able to then I think secure their involvement in the  
6 program and their successful completion. You have to make  
7 a --

8 QUESTION: But even if you lose this case you  
9 will still have the treatment option as a voluntary option  
10 which would hasten the parole date, so that you're still  
11 going to have an inducement to your prisoners to engage in  
12 it if they can see their way clear to admitting. Isn't  
13 that true?

14 GEN. RACICOT: But it would be, Justice Souter,  
15 as the people were incarcerated and not in a probationary  
16 kind of status.

17 QUESTION: Yes.

18 GEN. RACICOT: And that allows us tremendous  
19 economies and efficiencies. And in terms of saving, costs  
20 associated with imprisoning people as well as providing  
21 incredible flexibility to deal with people in individual  
22 and very unique circumstances.

23 This case if it's left to stand in Montana will  
24 hurt everyone, not the least of which will be criminal  
25 defendants who because of these inquiries not being made



1 will be warehoused instead of treated. And I believe that  
2 will be precisely the case if this case is not overturned.  
3 Thank you.

4 QUESTION: Thank you, General Racicot.

5 Mr. Miller, we'll hear from you.

6 ORAL ARGUMENT OF BILLY B. MILLER

7 ON BEHALF OF THE RESPONDENT

8 MR. MILLER: Mr. Chief Justice, and may it  
9 please the Court:

10 We come before this Court today seeking  
11 affirmation of the Montana State Supreme Court's decision  
12 in this case. The justification of the Montana State  
13 Supreme Court's decision is based on the proposition that  
14 Mr. Imlay's Fifth Amendment right against self-  
15 incrimination was violated when the trial court revoked  
16 his probationary sentence because of his refusal to admit  
17 guilt in order to participate in the sex offender therapy  
18 program.

19 QUESTION: Mr. Miller, will your client be  
20 better off if this Court affirms the judgment of the  
21 Supreme Court of Montana than he will be if it should  
22 reverse it, or does it really make no difference?

23 MR. MILLER: Well, Your Honor, at this point if  
24 it's affirmed he will not be required to participate in  
25 the program, but he has been imprisoned for such an

1 extended period of time that actually he would serve his  
2 time.

3 QUESTION: So does it, is it really of no moment  
4 to your client whether the decision here is affirmed or  
5 reversed?

6 MR. MILLER: Well, my client is obviously  
7 concerned about the decision, but it will not affect the  
8 time that he will spend in prison.

9 QUESTION: Will it affect him in any other way?

10 MR. MILLER: It will not affect him in another  
11 way, Your Honor.

12 QUESTION: What if you lose this case? Then he,  
13 he will have the choice, I suppose, of then admitting his  
14 guilt or sticking to his guns.

15 MR. MILLER: Well, if my client, if this case,  
16 the Court finds that this case is not, should not be  
17 upheld, then basically my client would be in the position  
18 whereby, as I stated, he would have spent his time in  
19 prison and at this point it will not --

20 QUESTION: Unless he decides that he's going to  
21 admit his guilt.

22 MR. MILLER: Well, he would be able to be  
23 released from prison in a very short period of time  
24 regardless.

25 QUESTION: Because?

1 MR. MILLER: Well, because in the state prison  
2 they have two phases of the sexual offender program. They  
3 have phase 1, where an individual can participate and does  
4 not have to admit his guilt. Once he has completed that  
5 phase then there is the second phase whereby the  
6 individual will have to admit guilt prior to being  
7 admitted into that phase. My client has received  
8 notification from the prison that once he finishes the  
9 first phase they will parole him. So at this point he has  
10 participated in the first phase of the program and  
11 hopefully he will be released in the near future.

12 QUESTION: Under the present, not because he has  
13 served the full term but because he is eligible for  
14 parole?

15 MR. MILLER: Because he would be eligible for  
16 parole, yes.

17 QUESTION: And if we reverse the judgment of the  
18 Supreme Court of Montana here would that be changed in  
19 anyway?

20 MR. MILLER: I can't see where that will affect  
21 it at all at this point because of the fact that he will  
22 have finished the first phase of the program, and that is  
23 basically what he has been promised as a result of  
24 finishing the first phase, his being placed on parole.

25 QUESTION: We don't, that isn't part of the

1 record right now, is it?

2 MR. MILLER: No, it's not, Your Honor. That's  
3 just information regarding the program.

4 QUESTION: But you are telling us that it really  
5 doesn't matter what we do here. He is going to get out  
6 after he finishes phase 1 of the program.

7 MR. MILLER: Well, that is what the prison has  
8 informed my client. Now, as to whether he will actually  
9 be released I cannot assure this Court that that is the  
10 case.

11 QUESTION: Has the prison informed him of that  
12 because of the, because of the opinion that's on appeal  
13 here? I mean is the reason that they said phase 1 is  
14 enough because of the judgment below?

15 MR. MILLER: Your Honor, in speak with my client  
16 in reference to that particular subject, he was  
17 participating in phase 1 of the program and once the  
18 supreme court made its decision and he was sent back to  
19 prison he was only able to participate in the phase 1  
20 program for a period of time and they kicked him out of  
21 the program. They have since notified him to enroll back  
22 into the program and complete the program and they will  
23 release him from prison.

24 QUESTION: Mr. Miller, do you, do you agree with  
25 the state that our opinion in Minnesota v. Murphy prevents



1 the state from using admissions in this kind of a  
2 situation for a perjury prosecution?

3 MR. MILLER: Yes, Your Honor, I will agree with  
4 that. In fact in Minnesota v. Murphy it is clear that if  
5 a person uses statement that will incriminate him, then he  
6 has to have immunity. The state cannot either expressly  
7 or indirectly force a probationer to admit an  
8 incriminating statement.

9 QUESTION: The only language, the case didn't  
10 involve that, of course. What we found in the case was  
11 that he could have exercised his Fifth Amendment right as  
12 far as appears without any consequences, that the state  
13 was not compelling him to testify. So the issue was not  
14 involved. The only language I find is this, the result  
15 may be different, we said, the result may be different if  
16 the questions put to the probationer, however relevant to  
17 his probationary status, call for answers that would  
18 incriminate him in a pending or later criminal  
19 prosecution. There is thus a substantial basis in our  
20 cases for concluding that if the state either expressly  
21 or, blah, blah, blah.

22 In other words even if we had said categorically  
23 that the result would be different, that would still have  
24 been dictum, but we didn't even say it categorically. We  
25 just said the result may be different, and there's a

1 substantial basis for making such an argument. Now maybe  
2 there is, but it seems to me a pretty bad argument. Why  
3 can't the state put you to your choice? If you want to be  
4 treated you admit your guilt and maybe you have to take  
5 your chance on a perjury prosecution. On the other hand  
6 if you don't want to do that you can't be treated, and  
7 since you can't be treated you're going to be a dangerous  
8 person and we're going to keep you here for 5 years. Why  
9 isn't that perfectly reasonable?

10 MR. MILLER: Well, one of the arguments that we  
11 raised in our brief is the fact that Mr. Imlay could be  
12 charged in the future with perjury if he admitted his  
13 guilt in order to participate in a sex offender therapy  
14 program. And I think as a result of the decision in the  
15 State of Montana in reference to the Drummond case that I  
16 cited in my supplemental brief it shows that an admission  
17 by Mr. Imlay would tend to incriminate him.

18 In fact the Drummond case where the defendant  
19 was accused and was convicted, at least he pled guilty to  
20 sexual intercourse without consent, and he was sentenced  
21 to the Montana State Prison. In that particular case one  
22 of the conditions placed on him was he was required to  
23 participate in a sex offender therapy program. In  
24 participating in the program he admitted certain criminal  
25 acts that he had done prior to being incarcerated. He was

1 compelled to admit these acts because of the fact that in  
2 a sex offender therapy program you are required to permit  
3 prior criminal acts and you are basically in a position  
4 whereby you can either be prosecuted for those acts or you  
5 will have immunity for those acts. It depends on the  
6 victim.

7 Now, the State of Montana has made it clear in  
8 the Montana Code Annotated that where there's a child  
9 involved a professional must notify the Department of  
10 Family Services of any information he receives during his  
11 professional duties that will show that the child has been  
12 neglected or abused. That information will also be  
13 reported to the state, and in turn the state can file  
14 charges against a particular individual while  
15 participating in the program.

16 And this is what the Drummond case is all about.  
17 Drummond was participating in a treatment program and it  
18 showed that the state was willing to take the statement  
19 that he made to his therapist during treatment and notify  
20 the Department of Family Services. And consequently he  
21 was found guilty or he pled guilty to incest, and now he's  
22 awaiting sentencing. So basically there is an exception  
23 to whether you are granted immunity when you participate  
24 in the sex offender therapy program. It depends on the  
25 victim. And it's clear pursuant to the Montana Code

1 Annotated in reference to that area.

2 So basically that is the reason why Mr. Imlay  
3 could have been under the threat of perjury because of the  
4 fact that the therapist would have been able to testify in  
5 reference to any statements made to him, not only the fact  
6 that Mr. Imlay would have to make a statement to the  
7 therapist but he would also have had to sign a contract.

8 QUESTION: About the prior crime? You're  
9 talking about statements about the prior crime?

10 MR. MILLER: About the prior crime.

11 QUESTION: So that he could be, he couldn't be  
12 prosecuted for the prior crime again but he could be  
13 prosecuted for perjury at the prior trial.

14 MR. MILLER: Exactly. He could, utilizing the  
15 testimony he gave at trial, any statements that he would  
16 make to his therapist and additional members of the  
17 program could be utilized against him to charge him with  
18 perjury for the statement that he made at trial.

19 QUESTION: And you don't think that Murphy would  
20 prevent that?

21 MR. MILLER: Well, at this point I don't think  
22 Murphy will prevent it because of the fact that the state,  
23 as I stated earlier, has this provision in reference to  
24 individuals who are participating in the sex offender  
25 therapy program and that a child is the victim. So



1 there's the exception that Montana has in its code section  
2 that would provide that the therapist would be able to  
3 reveal this information.

4 QUESTION: But Murphy is a Federal  
5 constitutional decision and that provision would  
6 presumably have to yield to Murphy if indeed Murphy  
7 clearly holds that you can't do that. Now I don't think  
8 it clearly holds that. I'm sure it doesn't clearly, I'm  
9 sure it doesn't hold it. I don't even think it clearly  
10 says it.

11 MR. MILLER: I feel that Murphy is sufficient to  
12 address that particular issue if the exception in the code  
13 section was not available. The exception in the code  
14 section is the one that permits the State of Montana to  
15 prosecute for any statements made during treatment if the  
16 victim is a child, and I think that's what happened in  
17 Drummond.

18 QUESTION: Mr. Miller, let me change the facts  
19 slightly. Let's assume your client had been convicted and  
20 he was brought on for sentencing and the judge had engaged  
21 in this colloquy with him. The judge had said basically I  
22 have two options. I can commit you to prison for 5 years  
23 or if certain conditions precedent are fulfilled I can  
24 place you on probation so that you can undergo therapy.  
25 One of the conditions of undergoing therapy is that you

1 must admit that there is something for which you need the  
2 therapy and you must admit your guilt in other words in  
3 order to go through the therapy program.

4 Your client said I'll take the therapy program,  
5 Your Honor, and your client then later on, just as he has  
6 in this case, refused to admit his guilt. Would he have a  
7 Fifth Amendment claim?

8 MR. MILLER: Under that particular example I  
9 would venture to say that he would not, because he would  
10 have waived it by way of accepting the program at the time  
11 that the court offered him an option. In other words he  
12 would have been in a position whereby he could accept the  
13 program, and since he agreed to accept the program he  
14 would be in a position to participate in the program. So  
15 he would have to admit --

16 QUESTION: Why is -- I'm sorry.

17 MR. MILLER: Excuse me.

18 QUESTION: Why isn't he basically in the same  
19 position now the colloquy is simply delayed? Somebody has  
20 made a mistake, he didn't realize he had to admit it, the  
21 court didn't think to ask him. Why isn't he in the same  
22 position now except that we're doing it somewhat down the  
23 road from the moment of sentencing?

24 MR. MILLER: Well, because at that time the  
25 court did not give him that choice.

1 QUESTION: I know, but the court's giving him  
2 that choice now.

3 MR. MILLER: In placing him in the position  
4 whereby he would have to admit his guilt in order to  
5 participate in the program and he did not have a choice or  
6 free choice to admit or deny --

7 QUESTION: The court is giving him the choice  
8 now. He said you can either participate in the treatment  
9 program or you're going to have to serve time. He is  
10 giving him the same choice that he would have given him in  
11 the first place.

12 MR. MILLER: But in your example he has a free  
13 choice. At the sentencing process he did not have a free  
14 choice. The judge placed him on a probationary sentence  
15 and one of the conditions was that he participate in the  
16 program. There was no choice involved at all at that  
17 point. So he did not have a free choice.

18 QUESTION: So you're saying the failure of the  
19 court to give him that choice in effect gave rise to a  
20 liberty interest which cannot be defeated at this point in  
21 the same fashion that it could have been avoided in the  
22 first instance. Is that the nub of it?

23 MR. MILLER: If the court had notified him  
24 basically the position of the program and basically that  
25 he would be required to admit his guilt and he had an

1 option at that point, he would be able to make a free  
2 choice. He was not in the position to make a free choice.  
3 It is clear that by his conduct --

4 QUESTION: Why is his choice not free? I mean,  
5 it's a hard choice. He's saying to himself if I admit it  
6 I may be subject to a perjury prosecution, if I don't  
7 admit it it's going to be 5 years. That's exactly the  
8 same choice he would have had in the first place.

9 MR. MILLER: Well, he is obviously placed in a  
10 catch-22 situation whereby he would be required to either  
11 admit the offense and serve, and basically have a perjury  
12 charge brought against him, or deny it as is stated and go  
13 to prison. And I don't think that is a choice at all, if  
14 you are taking the situation whereby you are placing an  
15 individual where both ways he would lose.

16 QUESTION: Well, why does he have any more  
17 choice, Mr. Miller, under the decision of the Supreme  
18 Court of Montana where they say you can't force him to be  
19 on this treatment program because he doesn't want to admit  
20 his guilt and we won't force him to, but if he doesn't he  
21 goes to jail for 5 years. I mean, isn't that just as much  
22 of a penalty under the supreme court's decision?

23 MR. MILLER: To a degree, Your Honor, I would  
24 venture to say it is a penalty, but we must look at the  
25 fact that he is not, he does not lose the right to



1 maintain his innocence simply because he was found guilty.  
2 He still can maintain his innocence.

3 QUESTION: He can maintain his innocence while  
4 spending 5 years in jail.

5 MR. MILLER: Well, that is the option he  
6 obviously selected to this point because he is currently  
7 incarcerated.

8 QUESTION: And why isn't it very similar to the  
9 ordinary plea bargain case where someone has a choice of  
10 admitting guilt and accepting the conditions of the plea  
11 bargain or foregoing it and taking his chances?

12 MR. MILLER: Well, it's different from a plea  
13 bargaining because during plea negotiation the defendant  
14 has an opportunity to make a determination as to whether  
15 he is going to give up a certain right or benefit, i.e.  
16 that he is going to accept a bargain from the state for  
17 his guilty plea. And that is basically a contract  
18 negotiation. Once he has entered that particular contract  
19 with the state then he would have to admit his guilt to  
20 the court in order for the court to accept the plea  
21 bargaining. So at that point he does not lose anything  
22 once he has gotten his agreement through the plea  
23 agreement because he would have to admit his guilt in  
24 order to get the benefit that is in the plea agreement.

25 QUESTION: Well, so the wrong of which you

1 complain is not that he is compelled to make a choice.  
2 The wrong of which you complain, it seems to me, is that  
3 he was just not advised up front of what that choice would  
4 be.

5 MR. MILLER: Well, he was not advised to the  
6 point that when he attempted to enroll in the sex offender  
7 therapy program he maintained his innocence under the  
8 impression that he would be able to participate in the  
9 program and he continued to maintain his innocence. He  
10 did everything that was required of him in order to  
11 participate in the program. He made all the appointments  
12 and he was very cooperative. Unfortunately his therapist  
13 indicated that he could not be accepted in the program  
14 because of the fact that he did not admit his guilt, so he  
15 was in denial. But at this point he attempted to do  
16 everything necessary to obtain admission into the program,  
17 except admit his guilt.

18 QUESTION: What would he have done differently,  
19 do you think, if he had been advised at the very beginning  
20 of this choice?

21 MR. MILLER: Well, I would be speculating at  
22 this point because I am not privy as to what decision he  
23 would ultimately make in this position, but I would  
24 venture to say that he would maintain his innocence.

25 QUESTION: Which is what he has done anyway.

1 MR. MILLER: Yes, that's correct.

2 QUESTION: Mr. Miller, may I just ask, as I  
3 understand it the, after he was sentenced, the third order  
4 of sentencings, he has challenged that with a petition for  
5 habeas corpus in the Montana Supreme Court appearing pro  
6 se, according to your opponent's brief. Has that case  
7 been disposed of yet in the Montana Supreme Court?

8 MR. MILLER: Yes, Your Honor, that case has been  
9 disposed of in the --

10 QUESTION: And what happened?

11 MR. MILLER: Well, it was dismissed. It was  
12 rejected.

13 QUESTION: It was rejected?

14 MR. MILLER: That's correct.

15 QUESTION: Thank you. Which, just to take that  
16 one step farther, which means apparently the Montana  
17 Supreme Court was satisfied with the fact that he had to  
18 go to jail for 5 years even though, when he wouldn't admit  
19 his guilt.

20 MR. MILLER: That's correct, Your Honor. The  
21 state argues that it is constitutionally permissible to  
22 compel Mr. Imlay to admit his guilt for the purpose of  
23 having him accept responsibility for the crime for which  
24 he had been convicted. Now although this Court has  
25 confirmed the position taken by the state regarding the

1 acceptance of responsibility, this Court also made it  
2 clear that before a defendant could be compelled to accept  
3 responsibility whereby he would have to make an  
4 incriminating statement he should be granted immunity.

5           However, in this case with Mr. Imlay immunity  
6 would not have been appropriate under the circumstances  
7 because immunity is not a protection for a charge of  
8 perjury. Mr. Imlay would have been required to make an  
9 inconsistent statement in order to participate in the  
10 program. So by changing his statement from the original  
11 ones he made at trial he would have committed perjury and  
12 therefore any immunity that would be granted to a person  
13 participating in the sex offender program would not be  
14 applicable in his case.

15           This dilemma that Mr. Imlay was facing at the  
16 time he attempted to enroll in the sex offender therapy  
17 program is identical to that which the sex offender was  
18 facing in Gilfillen v. State of Indiana. Now, in that  
19 case the court stated that where a defendant has not pled  
20 guilty, but rather he has been found guilty while  
21 maintaining his innocence, the court cannot force him to  
22 admit his guilt as a condition of probation, nor can the  
23 court revoke a probationary sentence because he will not  
24 admit his guilt.

25           Despite the obvious violation of Mr. Imlay's



1 Fifth Amendment right against self-incrimination, the  
2 state court is requesting that this Court should disregard  
3 the blatant constitutional violation in the interest of  
4 promoting rehabilitation. Now, Mr. Imlay concedes that  
5 the state has a legitimate rehabilitative interest in  
6 requiring that sex offenders participate in a program.  
7 However, since denial is the type of behavior common to  
8 individuals convicted of sexual offenses, it seems  
9 paradoxical to classify an individual as a sex offender,  
10 place that individual on probation, and then revoke his  
11 probationary sentence simply because he exhibits the  
12 behavior common to sex offenders.

13 The parties who submitted amicus brief on behalf  
14 of the state express concern that if this Court upholds  
15 the Montana State Supreme Court decision in this case it  
16 will have an adverse effect on the rehabilitation process.  
17 While their position is understandable, their logic is  
18 faulty. Should this Court uphold the decision of the  
19 Montana State Supreme Court such a decision would send a  
20 clear message to all sex offender programs that society  
21 demands treatment for all sex offenders, not just for a  
22 few, not just for the ones who will admit their guilt but  
23 for all sex offenders.

24 QUESTION: It would also send a message that, I  
25 would think, that if the state doesn't change its sex

1 offender program those who can't get in it because of  
2 their unwillingness to admit guilt will simply go to  
3 prison instead, which is what happened here.

4 MR. MILLER: Yes, and I would like to add to  
5 that that they would go to prison and they will come back  
6 out of prison in the communities to re-offend, at least  
7 that is the concern of society is that being that they are  
8 not receiving treatment they are not benefitting from the  
9 incarceration. So to be inclusive a treatment plan would  
10 take care of the problem of having individuals  
11 incarcerated just for the purpose of incarceration and  
12 being returned to the community to re-offend.

13 QUESTION: What are you asking of us, Mr.  
14 Miller? What do you want, what do you want states to do?  
15 Let's assume that states believe and that medical  
16 testimony demonstrates that you cannot have successful  
17 treatment without acknowledgement of guilt. Now, I have  
18 heard that, I don't, I'm not a psychiatrist, but I have  
19 certainly heard that said often that the first step is  
20 acknowledgement of your, of the problem. Now suppose that  
21 that is true. What would you have the state do? Despite  
22 the fact that you can't be successfully treated, let you  
23 out before the 5 years?

24 MR. MILLER: I feel that the program should be  
25 basically structured the same way that you have the

1 Alcohol Anonymous program set up, where a person can  
2 participate regardless of whether he is going to admit or  
3 not. He needs to be in a program if the individual has a  
4 problem.

5 QUESTION: You just want him in the program, you  
6 don't care whether he gets out of prison early or not?

7 MR. MILLER: My client, in fact my client will  
8 be getting out of prison in a very short period of time.  
9 I thought I made that clear earlier. So as far as my  
10 client is concerned, but as far as the program is  
11 concerned in general the program has to be inclusive in  
12 order to take into consideration all types of individuals  
13 who are considered sex abusers.

14 QUESTION: So, I see. This case is about  
15 whether he gets into the program, not about whether he  
16 gets out of prison early, not about whether he gets his  
17 probation? Just about whether he gets in the treatment  
18 program without being willing to confess his guilt.

19 MR. MILLER: Well, as I explained earlier, my  
20 client will be getting out of prison in a very short  
21 period of time according to the information he has  
22 received from the prison. So basically he will be getting  
23 out of prison in a very short period of time.

24 QUESTION: Okay. You don't want us to say that  
25 anybody has to be released early despite his unwillingness

1 to admit guilt? You don't -- that's not the proposition?

2 MR. MILLER: That's not my position at this  
3 point.

4 QUESTION: I don't know whether the prison would  
5 take this view if we reverse.

6 MR. MILLER: Well, basically as far as my client  
7 is concerned he will be getting out of prison in the very  
8 near future according to the information I have received  
9 from him.

10 QUESTION: Well, I know, according to the  
11 information, but you don't know why they said that.

12 MR. MILLER: They informed him basically about  
13 the first stage. Once he completes the first stage --

14 QUESTION: Well, I know, but you think that's  
15 the general rule in the prison?

16 MR. MILLER: I don't think that's the general  
17 rule. I think that's an exception to him.

18 QUESTION: Well, why are they saying it to him?  
19 Maybe because he won his case in the Supreme Court of  
20 Montana.

21 MR. MILLER: Well, a lot of things have happened  
22 to him since the decision from the Montana Supreme Court  
23 while he was in prison.

24 QUESTION: Anyway that isn't part of the record.

25 MR. MILLER: In closing it is clear that Donald



1 Imlay's Fifth Amendment right against self-incrimination  
2 was violated when his probationary sentence was revoked  
3 because of his refusal to admit guilt in order to enroll  
4 and participate in a therapy program. Clearly the sex  
5 offender therapy program must be inclusive in order to  
6 accomplish its rehabilitative objective. Therefore we are  
7 requesting that this Court confirm the Montana State  
8 Supreme Court decision in this case.

9 Thank you.

10 QUESTION: Thank you, Mr. Miller.

11 General Racicot, you have 2 minutes remaining.

12 REBUTTAL ARGUMENT OF MARC RACICOT

13 ON BEHALF OF THE PETITIONER

14 GEN. RACICOT: Mr. Chief Justice, and may it  
15 please the Court:

16 There are two points that I would like to make.  
17 First of all in reference to the Drummond case which is  
18 not a part of the record, it is not altogether clear  
19 precisely what the posture of that case is, but we do know  
20 some things. First of all the cases are not final.  
21 Secondly, the perjury charge in that case was the result  
22 of two different sworn statements given by the defendant,  
23 one at his original sentencing and one subsequently at a  
24 civil trial. And thirdly, it is not clear at all that  
25 there's any evidence derivative of any statements that he

1 made during sex offender treatment that were relied upon  
2 for subsequent prosecution. So it is entirely a different  
3 case.

4 And in reference to Justice Stevens' point,  
5 which obviously poses some consternation for me as well,  
6 if we lose, Justice Stevens, the parole board could not  
7 refuse parole based upon a failure to complete phase 2 of  
8 the sex offender treatment. That's what we want. We want  
9 to be able to make Mr. Imlay go through phase 2, which  
10 does require an admission.

11 So in our judgment we would urge upon you that  
12 there is a case or controversy.

13 QUESTION: May I just ask, is the sentencing  
14 order that's now operative, is that in the record?

15 GEN. RACICOT: Yes.

16 QUESTION: Can you tell me, it's not in the  
17 printed appendix but it's in the record, is that right?

18 GEN. RACICOT: That is my recollection, yes.

19 QUESTION: Thank you.

20 QUESTION: But we were told that the prison has  
21 informed Mr. Imlay that he's about to be released. Is  
22 that in the record?

23 GEN. RACICOT: That is not in the record, Your  
24 Honor, and I don't know that to be the case.

25 Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
2 Racicot.

3 The case is submitted.

4 (Whereupon, at 10:58 a.m., the case in the  
5 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

Montana, Petitioner v. Donald Glenn Imlay

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*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

***BY** Ann-Marie Federico*

**(REPORTER)**