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## Answer me or go to Jail: Why Court Ordered Polygraph Testing to Treat Probationers Violated the Fifth Amendment

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# ANSWER ME OR GO TO JAIL: WHY COURT ORDERED POLYGRAPH TESTING TO TREAT PROBATIONERS VIOLATES THE FIFTH AMENDMENT

ASHLEY J. FAUSSET\*

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I. INTRODUCTION

The Fifth Amendment grants the privilege against self-incrimination.<sup>1</sup> This privilege is implicated when the government compels a person to answer a question that incriminates him and the answer is used against him in a future criminal proceeding.<sup>2</sup> While there are some situations that are inherently coercive, generally the privilege must be invoked.<sup>3</sup> This privilege has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>4</sup>

While persons who are incarcerated or under supervised release such as probation or parole do not have the same freedoms as other citizens, the

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1. See U.S. CONST. amend. V (declaring the right not to be compelled to bear witness against oneself in a criminal case).

2. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (explaining that a person retains the right to refuse to answer questions that can incriminate him in any proceeding).

3. See *id.* at 429-31 (declining to extend *Miranda v. Arizona*, 384 U.S. 436 (1966), to questioning by probation officers because such questioning lacks the inherent coerciveness implicit in custodial interrogation).

4. See *Malloy v. Hogan*, 378 U.S. 1, 6-7 (1964) (holding that the Fourteenth Amendment prevents the states from compelling confessions by exerting influence over a suspect in such a way that the confession is not free and voluntary).

Supreme Court has never held that such persons lack constitutional rights.<sup>5</sup> Persons under supervision do, however, have diminished constitutional rights.<sup>6</sup>

This Comment argues that court ordered polygraph testing as a condition of probation violates the Fifth Amendment when the probationer is not allowed to invoke the privilege with regard to statements that may result in a revocation of his probation. Part II of this Comment explains the standard courts use to determine whether the privilege has been violated.<sup>7</sup> Part III argues that the privilege must apply even when probationers are immune from a future criminal prosecution because the consequence of revocation of probation for invocation of the privilege is sufficient to compel a person to incriminate himself.<sup>8</sup> Part IV discusses commentators' policy argument that the goal of rehabilitation outweighs protection of the Fifth Amendment privilege of probationers, and rejects the argument that concerns about recidivism are a weighing factor in the Fifth Amendment analysis.<sup>9</sup> Finally, Part V concludes that when polygraph testing is a condition of probation, the results of such testing and the probationer's invocation of the privilege against self-incrimination should remain known only to the polygraph examiner and the probationer's therapist in order to avoid a constitutional violation.<sup>10</sup>

## II. BACKGROUND

### *A. Constitutional Rights of Probationers*

In *Morrissey v. Brewer*, the Supreme Court announced that a parolee has a Due Process right to a hearing, as soon as possible after his arrest for a parole violation, to determine whether there is probable cause to believe the

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5. See *McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality opinion) ("The privilege against self-incrimination does not terminate at the jailhouse door."); see also *Murphy*, 465 U.S. at 426 (announcing that a person who is incarcerated or on probation retains the right not to have his compelled answers to questions used against him in another criminal proceeding).

6. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding that where a state has a regulation providing for warrantless search of a probationer's home, searches conducted pursuant to the regulation are valid so long as they are reasonable).

7. See *infra* Part II (discussing that the courts apply a Fifth Amendment analysis to determine whether a probationer's privilege against self-incrimination has been violated).

8. See *infra* Part III (showing that courts are not uniform in determining when the privilege against self-incrimination applies).

9. See *infra* Part IV (arguing that weighing concerns about public safety and rehabilitation more heavily than the constitutional rights of probationers proves the very necessity of the Fifth Amendment).

10. See *infra* Part V (concluding that polygraph testing is an important tool in the treatment of sex offenders but should be limited only to therapeutic use).

parolee violated his parole.<sup>11</sup> The Court held that such a hearing must be presided over by an independent decision maker.<sup>12</sup> Further, the Court held that if the parolee so desires, he is entitled to a parole revocation hearing to show that the parole violation did not occur or to offer proof of mitigating circumstances.<sup>13</sup> In *Gagnon v. Scarpelli*, the Court extended the right to a revocation hearing to probationers.<sup>14</sup>

In 1987, the Supreme Court held in *Griffin v. Wisconsin* that a warrant is not required to search a probationer's home when the search is carried out pursuant to a valid state regulation that meets the Fourth Amendment's reasonableness requirement.<sup>15</sup> The Court stated that while probationers do have valid liberty interests, those interests are conditional.<sup>16</sup> The Court justified the limited liberty interests of probationers by reasoning that concerns about rehabilitation justified supervision as a special need of the state, which permits an otherwise unconstitutional invasion of privacy.<sup>17</sup>

### B. Fifth Amendment Rights of Probationers

In *Minnesota v. Murphy*, the Supreme Court held that a probationer's incriminating statements made to his probation officer during questioning did not violate the Fifth Amendment because the probationer answered the questions instead of asserting the privilege.<sup>18</sup> In reaching this holding, the Court relied on the fact that the probation officer did not expressly state that invoking the privilege would result in a revocation of probation.<sup>19</sup> The Court determined that a violation would only occur if the probationer was

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11. See *Morrissey v. Brewer*, 408 U.S. 471, 483-85 (1972) (weighing the state interest in returning the parolee to prison without the time and cost of a new criminal trial against the liberty interests of the parolee and the societal interest in rehabilitation).

12. See *id.* at 485-86 (reasoning that a parole officer may not always be able to make such decisions objectively because his relationship with the parolee may positively or negatively impact the parolee's position).

13. See *id.* at 487-88 (explaining that such a hearing would not revolve around whether there is probable cause to believe the parolee has violated his parole; rather, the hearing would be used to determine whether such a violation warrants revocation).

14. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (holding that probation is a similar form of conditional liberty as parole and, therefore, due process requires a hearing).

15. See *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (finding that operation of a successful probation system is a "special need" of the state, which negates the need for the warrant requirement).

16. See *id.* at 874 (explaining that the liberty interests of probationers are contingent upon probation restrictions).

17. See *id.* at 875 (observing that because supervision can reduce recidivism, it is a special need of the state).

18. See *Minnesota v. Murphy*, 465 U.S. 420, 440 (1984) (explaining that a probationer cannot invoke the privilege with regard to voluntary statements).

19. See *id.* at 438 (arguing that it was unlikely *Murphy* felt compelled within the meaning of the Fifth Amendment because he freely volunteered other information).

forced to choose between making incriminatory statements or revocation of his probation for invoking the privilege.<sup>20</sup> The Court suggested that if a consequence of invoking the privilege is revocation, then use of the statements in a future criminal proceeding would violate the Fifth Amendment.<sup>21</sup> In *McKune v. Lile*, however, a plurality of the Court declined to strike down a Kansas statute that provided that statements made by a prisoner during sex offender treatment could be used in a future criminal proceeding.<sup>22</sup>

### *1. The Fifth Amendment Is Only Implicated When the Statements Are Compelled*

In *McKune v. Lile*, a plurality of the Court explained that the prisoner's status must be taken into consideration in determining the extent of the privilege against self-incrimination.<sup>23</sup> The plurality went on to define the "atypical and significant hardship" test for determining whether the Fifth Amendment rights of prisoners are violated when they invoke the privilege.<sup>24</sup> Further, the plurality held that a sex offender treatment program that required a prisoner to incriminate himself by admitting to past crimes did not implicate the Fifth Amendment, because the consequence of being moved from a medium-security prison to a maximum-security prison for noncompliance with the program was not an atypical and significant hardship.<sup>25</sup>

In her concurrence, Justice O'Connor expressly rejected the "atypical and significant hardship" analysis.<sup>26</sup> Justice O'Connor describes the

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20. *See id.* at 436 (noting that the relevant question was whether the condition of probation requiring Murphy to be truthful with his probation officer in all matters forced him to choose between waiving his privilege against self-incrimination and incarceration for remaining silent).

21. *See id.* at 435 (explaining that when a probationer's answers can be used against him in a criminal proceeding and the invocation of the privilege results in revocation, the probationer is faced with the "classic penalty situation"). *Contra* *McKune v. Lile*, 536 U.S. 24, 45-46 (2002) (plurality opinion) (arguing that the penalty situation does not have a place in Fifth Amendment analysis because the line between a benefit and a penalty depends on the view of the prisoner).

22. *See McKune*, 536 U.S. at 35 (finding that the state statute, which did not grant immunity to prisoners for their incriminating statements, did not run contrary to the Fifth Amendment).

23. *See id.* at 36 (explaining that the rights and freedoms limited by incarceration must be considered in the Fifth Amendment analysis).

24. *See id.* at 37-38 (noting there is no violation of the privilege when the consequences for invoking the privilege by not participating in a sex offender treatment program involved transfer to another prison, but notably did not affect the prisoner's chances of parole).

25. *See id.* at 38-39 (articulating that the prison transfer was not truly a consequence for invoking the right, but merely served the State's penological interest by keeping all prisoners who participated in the program in the same prison).

26. *See id.* at 48 (O'Connor, J., concurring) (stating that the Fifth Amendment

appropriate test for determining whether there is a Fifth Amendment violation as being whether the penalty for invoking the privilege is so great as to amount to compulsion.<sup>27</sup> In determining that the penalties in *McKune* resulting from invocation of the privilege did not amount to compulsion, Justice O'Connor reasoned that the penalties were minor and could be imposed by prison disciplinary authorities for reasons other than invocation of the privilege.<sup>28</sup>

Several circuit courts have treated O'Connor's concurrence in *McKune* as controlling.<sup>29</sup> The Ninth Circuit, in *United States v. Antelope*, construed O'Connor's concurrence in *McKune* to require a court to apply a two-prong analysis in order to determine whether the Fifth Amendment is implicated when a probationer is incarcerated because he invoked his privilege against self-incrimination.<sup>30</sup> The two-prong test requires the probationer to show that (1) there is a risk of incrimination in the statements sought by the government and (2) the penalty for invoking the privilege instead of making the statements amounts to compulsion.<sup>31</sup>

## *2. The Privilege Against Self-Incrimination Protects Statements That Can Be Used in a Future Criminal Proceeding*

In *Antelope*, the Ninth Circuit held that where probation was revoked because of the probationer's refusal to participate in polygraph testing, the revocation in and of itself is sufficient proof that his probation was conditioned on an impermissible waiver of the privilege against self-incrimination during polygraph testing.<sup>32</sup> In reaching this conclusion, the Ninth Circuit explained that the Fifth Amendment privilege is not a broad one and that a probationer cannot generally refuse to answer all questions posed; rather, a probationer can only assert the privilege when there is a

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compulsion standard is broader than the one adopted by the plurality).

27. See *id.* at 49 (acknowledging that while *Miranda v. Arizona*, 384 U.S. 436 (1966), does not apply outside of the custodial interrogation context, the analysis of whether or not a situation results in enough pressure to compel a person to incriminate himself still needs to be considered).

28. See *id.* at 52 (finding that a person would not feel compelled to open himself up to criminal liability simply because he has an incentive to comply with prison rules).

29. See *United States v. Antelope*, 395 F.3d 1128, 1133 n.1 (9th Cir. 2005) (noting Justice O'Connor's concurrence was construed as controlling in *Ainsworth v. Stanley*, 317 F.3d 1 (1st Cir. 2002), and *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. 2002)).

30. See *id.* at 1133-34 (explaining that a "full-blown" analysis is required to determine whether the Fifth Amendment privilege of a probationer was violated).

31. See *id.* at 1134, 1138 (applying the two-prong test and determining that *Antelope's* probation was impermissibly revoked because of his invocation of the privilege).

32. See *id.* at 1139 (noting the lower court's refusal to recognize that the probationer had a right not to have his polygraph results used against him in a criminal proceeding and that this violated his privilege against self-incrimination).

real threat of criminal prosecution resulting from his answers.<sup>33</sup> The court reasoned that because Antelope had repeatedly invoked the privilege and chose to suffer the consequence of incarceration rather than answer the questions posed, the answers he was refusing to give must have been incriminating.<sup>34</sup> The second prong of the analysis was met because the court found revoking probation upon an invocation of the privilege was a sufficient penalty to amount to compulsion.<sup>35</sup>

### *3. The Privilege Against Self-Incrimination Does Not Protect Statements from Being Introduced at a Probation Revocation Hearing*

In *United States v. Lee*, the Third Circuit held that a probationer retains the privilege against self-incrimination but that the privilege only applies to answers that may be used against him in another criminal proceeding, and not to questions with respect to the conditions of his probation.<sup>36</sup> The court explained that answers relating to violations of conditions of probation are not compelled so long as those answers do not reveal conduct that is otherwise criminal.<sup>37</sup> Furthermore, the court stated that involuntary reactions by the probationer, revealed by the polygraph when he invokes his privilege, cannot be used against the probationer if the invocation of the privilege is valid.<sup>38</sup>

By contrast, the Second Circuit in *United States v. Johnson* found there was no violation of the Fifth Amendment when the district court modified a probation order to provide that the probationer could not invoke the privilege against self-incrimination during polygraph testing even when the answers could incriminate him in a future criminal proceeding.<sup>39</sup> If the

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33. *See id.* at 1134 (analogizing that there is no violation when there is no threat of criminal prosecution to a probationer just as there is no threat of criminal prosecution to a witness when the statute of limitations has expired (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896))).

34. *See id.* at 1135 (explaining that the polygraph exam required a complete autobiography including any criminal offenses for which Antelope had not been convicted).

35. *See id.* at 1137 (describing that imposing penalties for failing to make statements that are not directly related to the offense for which the probationer was convicted would render those statements compelled testimony).

36. *See United States v. Lee*, 315 F.3d 206, 213 (3d Cir. 2003) (reasoning that, because there is no threat of future criminal prosecution for a crime which he has already been convicted, the privilege only applies when the probationer risks answering questions that relate to a crime other than the one for which he was convicted).

37. *See id.* (noting that Lee was asked questions regarding contact with minors and internet usage).

38. *See id.* (explaining that the probation office cannot use the reaction to justify revocation of probation when the probationer had validly asserted the privilege).

39. *See United States v. Johnson*, 446 F.3d 272, 275 (2d Cir. 2006) (finding that the district court's order would allow Johnson to contest the introduction of statements at a future proceeding).



probationer was later prosecuted for a crime as a result of the answers to such testing, he would retain the right to challenge the admission of those statements.<sup>40</sup> The court reasoned that revocation may be based on the refusal to answer questions because such refusal interferes with the goals of probation.<sup>41</sup> In reaching its conclusion, the court relied on the value of polygraph testing in treating probationers, specifically the ease with which such testing ensured compliance with the terms of probation.<sup>42</sup>

In *United States v. Locke*, the Fifth Circuit determined that when a probationer did not invoke the privilege against self-incrimination his statements were not compelled under the Fifth Amendment.<sup>43</sup> The court further stated that polygraph testing does not create a coercive situation because the probationer's statements cannot be used against him in a criminal proceeding.<sup>44</sup> The court affirmed the revocation of Locke's probation based on the dishonest results of a polygraph examination that led to the search of his wife's computer, revealing the presence of pornography.<sup>45</sup>

*C. A Probationer Does Not Waive the Privilege Through a Plea Agreement Which Utilizes Polygraph Testing as a Condition of Probation*

In *Jacobsen v. Lindberg*, the Court of Appeals of Arizona found that a condition of probation that required the probationer to participate in polygraph testing as part of a sex offender treatment program did not constitute a waiver of the probationer's Fifth Amendment rights merely because the probationer agreed to participate in such a program.<sup>46</sup> Jacobsen pleaded guilty to a charge of Luring a Minor for Sexual Exploitation and

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40. *See id.* at 275, 280 (upholding the conditions imposed by the lower court because the probationer was not deprived of the right to object to the inclusion of incriminating statements in a future proceeding).

41. *See id.* at 279-80 (expounding that revocation for refusal to answer questions is not a violation of the Fifth Amendment because the probationer is not being punished for asserting his rights, but, rather, he is being punished for refusing to answer questions (citing *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992))).

42. *See id.* at 277 (explaining that polygraphs provide an incentive not to lie without specifically noting that such incentive derives solely from the fear of being incarcerated (citing *Lee*, 315 F.3d at 213)).

43. *See United States v. Locke*, 482 F.3d 764, 767 (5th Cir. 2007) (finding that a probationer must assert the privilege if he wishes to have its protection).

44. *See id.* (explaining that the polygraph examiner's questions were attempts to uncover probation violations and not evidence of other crimes).

45. *See id.* at 766 (noting that a court order was issued to search the computer based on the probationer's dishonest polygraph results and that the district court revoked his probation for that violation).

46. *See Jacobsen v. Lindberg*, 238 P.3d 129, 133 (Ariz. Ct. App. 2010) (reasoning that a probationer cannot waive the privilege by agreeing to the terms of probation rather than facing punishment because one cannot be forced by a court to waive a right under the Constitution (citing *State v. Eccles*, 877 P.2d 799 (Ariz. 1994) (en banc))).

agreed to participate in psychological assessment.<sup>47</sup> The plea agreement included participation in polygraph testing, and the trial court assured Jacobsen that the privilege against self-incrimination was protected by Arizona statute.<sup>48</sup> He signed a waiver of confidentiality with regard to the polygraph testing that stated that results of distressed polygraphs would not be used in court or for revocation of his probation.<sup>49</sup> When Jacobsen inquired what the result would be if he invoked his privilege against self-incrimination, the polygraph examiner informed him that invocation would amount to a failure of the polygraph test for refusal to answer questions.<sup>50</sup> The court determined that Jacobsen was entitled to invoke his privilege except as related to the crime for which he had pled guilty.<sup>51</sup>

In reaching its decision in *Jacobsen*, the Court of Appeals of Arizona relied heavily on *State v. Eccles*.<sup>52</sup> In *Eccles*, the Supreme Court of Arizona, sitting en banc, construed *Minnesota v. Murphy* to stand for the proposition that probation cannot be conditioned on a waiver of the privilege against self-incrimination.<sup>53</sup> The *Jacobsen* court went on to hold that a probationer loses the privilege with regard to the offense for which he was convicted, but retains the privilege with regard to answers that could incriminate him in a future criminal proceeding.<sup>54</sup>

### III. ANALYSIS

#### *A. Though Probation Is a Privilege, Probationers Retain a Liberty Interest That Prevents Revocation Without Due Process Under the Fifth Amendment.*

Although a person who is on probation has been convicted of a crime, he

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47. *See id.* at 131 (clarifying that psychological assessment could be made through polygraph testing or through penile plethysmograph testing).

48. *See id.* (explaining that Jacobsen had raised with the trial court a question of whether the statute was sufficient to guarantee his Fifth Amendment privilege).

49. *See id.* (noting that upon signing the waiver, Jacobsen was made aware that his probation officer would be informed of his polygraph test results).

50. *See id.* (stating that there is a failure of the polygraph when the examinee refuses to answer a question for any reason).

51. *See id.* at 133 (implying there is no risk of future criminal prosecution for a crime for which one has already pled guilty).

52. *See generally id.* at 132-33 (finding that in *State v. Eccles*, 877 P.2d 799, 801 (Ariz. 1994) (en banc), the state supreme court had expressly ruled that probation cannot be conditioned on a waiver of the privilege against self-incrimination).

53. *See Eccles*, 877 P.2d at 801 (explaining that because *Murphy* prevents a state from revoking probation for invoking the privilege, it stands to reason that a state cannot compel a probationer to waive the privilege).

54. *See id.* at 801-02 (noting that the state may press for answers to questions for which the privilege was invoked so long as it offers immunity).

does not lose the protection of the Constitution.<sup>55</sup> Probation is a privilege that enables the probationer to serve out his sentence free from incarceration so long as he remains compliant with the terms of his release.<sup>56</sup> A probationer has a liberty right to remain living in the community so long as he continues to comply with the terms of his probation.<sup>57</sup> Yet, even when a probationer does not fully abide by the terms of his probation, he may still have an interest in retaining his liberty to remain in the community.<sup>58</sup> Thus, probation cannot be automatically revoked the moment a violation becomes apparent.<sup>59</sup> The Due Process Clause of the Fourteenth Amendment requires that the probationer be granted a hearing to determine whether his probation should be revoked for a violation of the conditions of his probation.<sup>60</sup>

A probationer does not lose his right to invoke the privilege against self-incrimination by reason of his conviction of a crime.<sup>61</sup> A condition requiring a probationer to have periodic meetings with his probation officer in which he is required to answer questions truthfully does not automatically mean those statements are compelled.<sup>62</sup> A probationer cannot simply claim that he was compelled; instead, he must show that compulsion existed because he was forced to choose between making the statements and incriminating himself, or being penalized for remaining silent.<sup>63</sup> Thus, a statement by the probationer is not compelled until he

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55. See *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (stating that the defendant does not lose Fifth Amendment protection because he was convicted of a crime); see also *McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality opinion) (declaring that even prisoners are entitled to some Fifth Amendment protection).

56. See *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (noting that probationers do not have the same degree of liberty as free citizens).

57. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (recognizing that probation results in a conditional loss of liberty).

58. See *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972) (enumerating two questions that must be asked before revocation of parole: first, did the parolee violate the terms of his release; and second, does the violation rise to a level for which the parolee should be incarcerated).

59. See *id.* at 482 (noting that a parolee enjoys many of the same rights as a free citizen, such as living with family, and therefore the revocation of parole is a loss of liberty to the parolee).

60. See *id.* at 480-81 (explaining that a parolee has conditional liberty and is thus entitled to some procedural due process protection from parole revocation).

61. See *McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality opinion) (explaining that while restricted liberty interests are essential in determining the Fifth Amendment rights of prisoners, such interests do not terminate the prisoner's Fifth Amendment rights).

62. See *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (comparing the position of a probationer to that of a witness under oath who may suffer penalties for lying but cannot be punished for invoking the privilege).

63. See *id.* at 434-35 (analogizing the rights of a probationer under the Fifth Amendment to those of a witness at a trial).

invokes the privilege and is required to answer the question without being assured of immunity from future use of the statement.<sup>64</sup>

Just as a witness on the stand during a trial retains the right to invoke the privilege when his answers to a question may be used against him in a future criminal proceeding, the probationer retains the right to invoke the privilege when answers to questions posed by a probation officer may be used against him in a future criminal proceeding.<sup>65</sup> When a probationer, like a witness, could have invoked the privilege but failed to do so, the statements may be used against him in another criminal trial.<sup>66</sup> The only way for a probationer to protect his statements when he failed to invoke the privilege is to show that he was threatened with revocation if he did not answer the questions posed.<sup>67</sup>

While probationers are entitled under *Murphy* to a grant of immunity for compelled statements, states do not have to grant immunity from future criminal prosecutions when participants in a prison sex offender treatment program are subject to questioning that can produce incriminating statements.<sup>68</sup> Where a state has legitimate penological interests in not granting immunity to participants in the program, a statute that allows future prosecution based on information obtained through the program is valid.<sup>69</sup> Because successful sex offender treatment requires the offender to take responsibility for all of his crimes, granting immunity for statements about other crimes would absolve the offender of his other crimes.<sup>70</sup> A grant of immunity would also preclude future prosecution when it is determined that an offender has committed a more serious offense than the one for which he was convicted, thus undermining the deterrent effect of the program.<sup>71</sup>

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64. *See id.* at 427 (stating that the Fifth Amendment is implicated when a witness is forced to answer questions after claiming the privilege).

65. *See id.* at 426 (explaining that the privilege does not only apply to criminal defendants in a trial who take the stand, but to all witnesses in official proceedings whose answers may incriminate them in future proceedings).

66. *See id.* at 440 (concluding that because *Murphy* retained the right to invoke the privilege but did not, his statements were not compelled).

67. *See id.* at 435 (explaining that if a state implies invocation of the privilege will result in revocation, the probationer will not be deemed to have waived it).

68. *See McKune v. Lile*, 536 U.S. 24, 35 (2002) (plurality opinion) (declaring that if the state offered immunity then no Fifth Amendment claim could be made because the prisoner would not face future criminal prosecution).

69. *See id.* at 34 (noting, however, that Kansas has never brought a criminal prosecution based on information obtained from the program).

70. *See id.* (arguing that if an offender believes he cannot be punished for admitting a crime it follows that he will be led to believe the crime is not serious).

71. *See id.* at 34-35 (outlining the dual purposes of the program as rehabilitation and deterrence: rehabilitation is achieved through requiring an offender to admit his crimes, and deterrence is achieved through the fear that other crimes will be discovered through the program).

The test of whether Fifth Amendment rights are implicated is whether the consequences for a prisoner who participates in such a program, upon invoking the privilege against self-incrimination in response to questions posed by the program, constitute atypical and significant hardships in relation to the inmate's daily life.<sup>72</sup> The atypical and significant hardship analysis allows courts to weigh the liberty interests of the prisoner with the interest of the state in rehabilitation.<sup>73</sup> An inmate who is faced with the possibility that he will be moved to a maximum-security prison if he does not participate in the program is not faced with an atypical and significant hardship because it is within the purview of prison administrators to move inmates for any reason.<sup>74</sup> Conversely, if the inmate were to lose a number of good behavior credits towards parole as a consequence for invoking the privilege, it likely would constitute an atypical and significant hardship.<sup>75</sup> If the loss of good behavior credits towards parole constitutes an atypical and significant hardship under the *McKune* plurality, it is likely that the revocation of probation would be seen as a deprivation of the liberty of the probationer.<sup>76</sup>

*B. The Federal Circuit Courts Have Not Fully Implemented Murphy in a Way That Protects the Fifth Amendment Rights of Probationers Because the Courts Have Failed to Insulate Probationers from Use of Their Statements.*

The Federal Circuit Courts have consistently accepted the rule of *Murphy* that a probationer cannot be compelled to answer questions that would incriminate him in future criminal proceedings.<sup>77</sup> The courts have

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72. See *id.* at 37 (extending the Due Process test from *Sandin v. Conner*, 515 U.S. 472 (1995), which considers the already curtailed liberty of the prisoner, to cover Fifth Amendment claims as well).

73. See *id.* at 37-38 (explaining that when state interests are related to the program, those interests are weighed against the interests of the prisoner). *Contra* *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) (stating that government interests never outweigh the probationer's privilege against self-incrimination).

74. See *McKune*, 536 U.S. at 39 (noting that prison authorities are allowed to use incentives to get prisoners to behave).

75. See *id.* at 38 (submitting that the consequences faced by the prisoner for invoking the privilege were not as grave as a lengthier prison sentence or a reduction in good behavior credits, and implying that such consequences would implicate the Fifth Amendment).

76. See *id.* at 37-38 (explaining that the test is in relation to the life of a prisoner, not to the life of an average person).

77. See, e.g., *United States v. Locke*, 482 F.3d 764, 767 (5th Cir. 2007) (holding that where probation was revoked because of a probation violation, *Murphy* was not implicated because the answers could not be used in a future criminal proceedings); *United States v. Johnson*, 446 F.3d 272, 280 (2d Cir. 2006) (finding no Fifth Amendment violation when the probationer still retained the right to challenge introduction of the statements in a future criminal proceeding); *Antelope*, 395 F.3d at 1139 (concluding that the probationer was wrongly incarcerated for invoking the

not, however, reached a consistent rule on how a probationer should be protected from polygraph exam questions that will elicit an incriminating response.<sup>78</sup> Justice O'Connor's concurrence in *McKune* more closely followed the *Murphy* line of reasoning than the plurality's hardship test.<sup>79</sup> Justice O'Connor rejected the plurality's reasoning and applied the traditional Fifth Amendment test of whether the penalty imposed is enough to compel a person to incriminate himself.<sup>80</sup> The distinction between the two tests is small but significant. The "atypical and significant hardship" test proposed by the plurality is a subjective approach that focuses on the penalty faced by the inmate and how that penalty would impact his daily life.<sup>81</sup> In contrast, the compulsion test proposed by O'Connor is an objective approach that focuses on the penalty faced by the inmate and whether such a penalty would compel the inmate to incriminate himself.<sup>82</sup> In essence, the plurality puts forth a theory that the presence of compulsion is insignificant and only the harshness of the penalty matters.<sup>83</sup> Because the Court has not addressed the Fifth Amendment rights of probationers in the context of court ordered polygraph testing, the lower courts are left with two tests to choose from in determining whether the Fifth Amendment rights of probationers have been violated.<sup>84</sup> Indeed, lower courts have already split over whether grants of immunity are required when

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privilege with regard to statements that would implicate him in other criminal proceedings).

78. Compare *Johnson*, 446 F.3d at 280 (finding that there is no protection during the polygraph exam because the Fifth Amendment is not implicated until the government introduces the statements at a future criminal proceeding), with *Antelope*, 395 F.3d at 1139 (finding that the probationer did not have to wait until the statements were used against him because revocation based on the refusal to answer questions without immunity violated the Fifth Amendment).

79. See *McKune*, 536 U.S. at 50-51 (O'Connor, J., concurring) (explaining that the consequences of invoking the privilege involved changes in living conditions, not changes in liberty).

80. See *id.* at 49-50 (comparing the facts of *McKune* with those of the "penalty cases," which involved significant economic detriment to the person who invoked the privilege).

81. See *id.* at 37-38 (plurality opinion) (noting that because the Fifth Amendment compulsion analysis must consider the context of the prisoner's daily life, the consequences necessary to trigger the Fifth Amendment would have to be greater than those which would ordinarily amount to compulsion).

82. See *id.* at 48-49 (O'Connor, J., concurring) (agreeing with the judgment of the plurality that the program did not violate the Fifth Amendment because the consequences for not participating in the program were not great enough to compel self-incrimination).

83. See *id.* at 52 (noting that there are some penalties that may not constitute atypical and significant hardships yet would still be viewed as coercive within the meaning of the Fifth Amendment).

84. See *United States v. Antelope*, 395 F.3d 1128, 1133 n.1 (9th Cir. 2005) (construing Justice O'Connor's concurrence in *McKune* as the narrowest, and therefore controlling, opinion).

questioning probationers can result in incriminating statements.<sup>85</sup>

*1. A Majority of the Federal Circuit Courts Have Incorrectly Applied Murphy in the Context of Court Ordered Polygraph Tests for Probationers Because They Do Not Provide Adequate Protection to the Probationer from Being Compelled to Choose Between Answering Incriminating Questions or Revocation for Remaining Silent.*

In *Johnson*, the Second Circuit incorrectly determined that a probationer cannot assert the privilege against self-incrimination.<sup>86</sup> Though a probation revocation hearing is an administrative proceeding and not a criminal proceeding, the probationer still retains the right to be protected from the use of his statements at a future criminal proceeding.<sup>87</sup> While seemingly in line with *Murphy*, the probationer must nevertheless be granted immunity from the use of his statements at the time he answers—not, as the Second Circuit would suggest, only when those statements are introduced in another criminal proceeding.<sup>88</sup> Suggesting that a probationer's statements are protected only when he makes a Fifth Amendment claim at a future criminal proceeding leaves the probationer subject to impermissible derivative use of his statements.<sup>89</sup> If he is offered no valid grant of immunity before making the statements, there is nothing to prevent law enforcement officials from beginning a new investigation against the probationer where they would not have done so but for the probationer's statements.<sup>90</sup> Thus, even though his statements will not be introduced at a future criminal trial, there is a very real risk that the tainted evidence obtained through the Fifth Amendment violation will be used against the

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85. Compare *id.* at 1139 (holding that the lower court incorrectly revoked probation when the probationer refused to answer questions without a grant of immunity), with *United States v. Johnson*, 446 F.3d 272, 280 (2d Cir. 2006) (finding that a probationer does not need to be granted immunity at the time he makes incriminating statements because he retains the right to object to the introduction of those statements when and if there is a future criminal proceeding).

86. See *Johnson*, 446 F.3d at 279 (explaining that probation may be revoked for failure to answer incriminating questions).

87. See *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) (noting that while there are due process requirements for revocation hearings, those hearings are not criminal proceedings).

88. See *Johnson*, 446 F.3d at 280 (explaining that when probation is revoked for statements which are incriminating, the probationer retains the right to challenge the admission of those statements at a future criminal proceeding).

89. See *Murphy*, 465 U.S. at 429 (suggesting that immunity must be granted not only for the use of the statements at a future criminal proceeding but also for use of the fruits of the statements at a future criminal proceeding (citing *Maness v. Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring))).

90. See *Antelope*, 395 F.3d at 1141 n.5 (explaining that the Fifth Amendment requires that immunity be granted both to the use and derivative use of compelled statements).

probationer.<sup>91</sup> Forcing the probationer to wait until the statements are used against him in a future criminal proceeding, without granting him immunity at the time the statements are made, subverts the rule of *Murphy* because the probationer must be protected from revocation unless he is assured incriminating statements will not be introduced at a future criminal proceeding.<sup>92</sup> The lack of immunity undermines the probationer's liberty interest in remaining in the community because revocation functions as a punishment for invoking a constitutional right.<sup>93</sup> Furthermore, the probationer faces a serious risk that he will not be able to challenge the admission of such statements into evidence because he did not invoke the privilege at the time he made the statements.<sup>94</sup>

The rule of *Murphy* is that a probationer may only invoke the privilege against self-incrimination when the statements sought would incriminate him for another crime.<sup>95</sup> A probationer cannot invoke the privilege with respect to questions about his probationary status.<sup>96</sup> Though the rules may seem contradictory, that a probationer may be sent to prison when he refuses to answer questions relating to the conditions of his probation even when those answers would reveal a violation of his probation, but not when those answers would reveal another criminal offense; the law in its current form does not protect statements that only relate to the terms of probation.<sup>97</sup> Polygraph testing serves the purpose of ensuring compliance with the terms of probation; therefore, a probationer's statements regarding the terms of his probation are not protected.<sup>98</sup> Because probation is a privilege,

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91. See *Murphy*, 465 U.S. at 429 (equating failure to invoke the privilege with making a voluntary statement for which the probationer cannot later claim his Fifth Amendment rights were violated).

92. See *id.* (emphasizing that at the time a witness asserts the privilege, he must be granted immunity before he is required to answer (citing *Maness*, 419 U.S. at 473 (White, J., concurring))).

93. See *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (explaining that while a parolee is still subject to state supervision, his liberty is very different than that of a prisoner, and he relies on and has a right to that liberty).

94. See, e.g., *Murphy*, 465 U.S. at 428-29 (articulating that because the Fifth Amendment is not self-executing, when a probationer does not invoke the privilege he is deemed to have waived it).

95. See *id.* at 435 n.7 (observing that if a probationer were asked to answer a question relating to a probation condition that is not otherwise criminal, he would not be able to invoke the privilege with respect to that question).

96. See *United States v. Lee*, 315 F.3d 206, 213 (3d Cir. 2003) (explaining that the privilege only extends to statements that could be used in a future criminal proceeding, not to statements that reveal a violation of probation).

97. See *United States v. Locke*, 482 F.3d 764, 767 & n.1 (5th Cir. 2007) (stating that the probationer would not have been able to invoke the Fifth Amendment with respect to the question about viewing pornography, for which probation was ultimately revoked, because viewing pornography could not implicate him in another criminal proceeding).

98. See *United States v. Johnson*, 446 F.3d 272, 277 (2d Cir. 2006) (explaining that



probationers may find themselves restricted from otherwise lawful activity.<sup>99</sup>

When polygraph examiners seek answers to questions relating to restrictions on the probationer's conduct, the probationer retains no Fifth Amendment privilege and probation may be revoked for an attempted invocation of the privilege.<sup>100</sup> This is because the Fifth Amendment protects only those statements that would have an incriminating effect at a future criminal proceeding, and statements regarding conduct that would be lawful but for the condition of probation do not have an incriminating effect in future criminal proceedings.<sup>101</sup> Thus, even when a probationer is faced with revealing information that could result in his return to prison, he cannot invoke the privilege because such statements are not compelled within the meaning of the Fifth Amendment.<sup>102</sup>

A separate issue arises when a statement reveals both a violation of a probation condition and information that would be incriminating in a future criminal prosecution.<sup>103</sup> Many cases focus on questions that seek to elicit statements regarding past crimes for which probation cannot be revoked.<sup>104</sup> Complicating the analysis is that a common condition of probation is a requirement not to engage in criminal activity; therefore, any questions regarding the probationer's participation in criminal activity since being placed on probation would necessarily indicate that the probationer has both violated probation and committed a crime.<sup>105</sup> The rule suggests that a

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the probationer's fear that the polygraph works is enough to prevent him from lying).

99. See *Locke*, 482 F.3d at 766 (permitting revocation when the condition of probation prohibited use of the Internet and any viewing of pornographic material); *Johnson*, 446 F.3d at 280 (permitting revocation when the condition of probation prohibited direct and indirect contact with minors).

100. See *Lee*, 315 F.3d at 212 (noting that the state may revoke probation for refusal to answer questions to which the privilege does not apply).

101. Cf. *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (hypothesizing that if probation were revoked for statements revealing a failure to comply with residency requirements, the Fifth Amendment would not be implicated because the privilege extends only to criminal proceedings).

102. See *Lee*, 315 F.3d at 213 (comparing statements obtained through required polygraph testing with statements made to a probation officer and finding no difference).

103. See *Murphy*, 465 U.S. at 435 ("The result may be different if the questions[,] . . . however relevant to his probationary status, call for answers that would incriminate him . . .").

104. See, e.g., *id.* at 423 (indicating that in an interview with a counselor, the probationer revealed a rape and murder occurring prior to the conviction); *United States v. Antelope*, 395 F.3d 1128, 1130 (9th Cir. 2005) (noting that the probationer was unwilling to discuss his sexual history because of fear of prosecution for previous criminal acts).

105. See *Antelope*, 396 F.3d at 1130 (explaining that the terms of the probationer's release required participation in the very treatment plan which he feared would require disclosure of information that could incriminate him).

probationer must, nevertheless, answer questions that would reveal activity that is both criminal and a violation of probation and face possible revocation of probation, but will also be protected from use of those statements in future criminal proceedings.<sup>106</sup>

*2. The Ninth Circuit in Antelope Closely Follows Murphy Through O'Connor's Concurrence in McKune, but Overlooks the Chance to Determine How to Address Statements That Reveal Both Criminal Activity and Probation Violations.*

The Ninth Circuit in *Antelope* correctly decided that because government interests in rehabilitation do not outweigh the probationer's interest in remaining on probation, the privilege may be invoked when the statements would be incriminating in future criminal matters even if the statements sought are relevant to probationary matters.<sup>107</sup> The state has a valid interest in overseeing the rehabilitation of probationers.<sup>108</sup> That interest, however, cannot be weighed against the probationer's privilege against self-incrimination.<sup>109</sup> While the interests of the state may be taken into consideration to determine punishment, the Constitution bars punishment for the invocation of a right.<sup>110</sup> Because a probationer retains the right to invoke the privilege against self-incrimination in all criminal matters other than the crime for which he was placed on probation, the state may not insist on answers to questions relating to other criminal matters without a grant of immunity.<sup>111</sup> Thus, the court correctly determined that *Antelope's* probation was wrongly revoked because he was not offered immunity from future prosecution resulting from the statements that were sought.<sup>112</sup>

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106. See *Murphy*, 465 U.S. at 435 (suggesting there may be a different interpretation when a statement reveals both a violation of probation and criminal behavior, but failing to reach the issue).

107. See *Antelope*, 395 F.3d at 1134-35 (noting that even when questions are relevant as to the terms of probation, the probationer retains the privilege if the answers to those questions would incriminate him in future matters (citing *Murphy*, 465 U.S. at 435)).

108. See *McKune v. Lile*, 536 U.S. 24, 33 (2002) (plurality opinion) (explaining that the rehabilitation of sex offenders is a valid state interest).

109. See *Antelope*, 395 F.3d at 1134 (stating, but not citing, authority for the rule that government interests in rehabilitation do not outweigh the probationer's privilege against self-incrimination).

110. See *id.* at 1138 (explaining that *Antelope's* rights were violated because he was incarcerated for invoking the privilege).

111. See *id.* at 1140 (finding that a witness does not have to answer questions until he is assured of protection from the use of his statements in future criminal proceedings (citing *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973))).

112. See *id.* at 1139 (explaining that the district court's view that *Antelope* should not be granted immunity for his statements placed *Antelope* in a Catch-22: forcing him to choose between losing his liberty for answering questions or losing his liberty for remaining silent).

A probationer is protected from having his probation revoked when he invokes the privilege against self-incrimination with respect to statements that would implicate him in a future criminal proceeding.<sup>113</sup> The privilege against self-incrimination is available only where there is a threat of future criminal prosecution.<sup>114</sup> This reasoning implies that a state may revoke probation when a probationer asserts the privilege with respect to conduct that can reasonably reveal only probation violations and not criminal behavior.<sup>115</sup> When a probationer repeatedly refuses to answer questions by invoking the privilege, and is willing to suffer the consequence of returning to incarceration, there is a presumption that the statements he sought to protect were incriminating.<sup>116</sup> Revoking probation because of an invocation of the privilege amounts to a longer prison term, which the plurality in *McKune* suggested would be impermissible.<sup>117</sup> The question remains whether revoking probation over a statement revealing criminal activity, even with a grant of immunity from use in future criminal proceedings, impermissibly lengthens the term of incarceration.

*3. The Courts Are Unanimous in Finding That There Is No Violation of the Fifth Amendment When a Probationer Answers Incriminating Questions Instead of Invoking the Privilege Because the Fifth Amendment Must Be Invoked in Order to Be Claimed.*

The privilege against self-incrimination is not a self-executing right.<sup>118</sup> The Court has carved out a few rare exceptions where a person may be faced with a situation that is so coercive in nature that any statements made are automatically inadmissible under the Fifth Amendment.<sup>119</sup> In situations where a person is faced with an inherently coercive environment, he is entitled to a warning regarding the use of any incriminating statements in a

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113. See *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984) (reasoning that states cannot revoke probation simply because a probationer invoked the privilege).

114. See *Antelope*, 395 F.3d at 1134 (explaining that the purpose of the privilege is to prevent interrogation (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896))).

115. See *United States v. Locke*, 482 F.3d 764, 767 n.1 (5th Cir. 2007) (indicating that the probationer could not have invoked the privilege because his statement did not reveal otherwise criminal behavior).

116. See *Antelope*, 395 F.3d at 1134 (noting that the privilege may be invoked only when there is an actual threat of future criminal prosecution).

117. See *McKune v. Lile*, 536 U.S. 24, 52 (2002) (O'Connor, J., concurring) (stating that the imposition of a longer sentence when a probationer refused to make disclosures is unconstitutional).

118. See *Murphy*, 465 U.S. at 433-34 (stating that a probationer cannot claim an exception to the non-self-executing rule because the nature of a meeting with a probation officer is not inherently coercive).

119. See *id.* at 429-30 (explaining that custodial interrogation is so inherently coercive that a suspect would feel compelled to answer all questions posed).

future criminal proceeding.<sup>120</sup> Thus far, the Court has declined to extend the warning requirement to the administration of polygraph tests to persons on probation.<sup>121</sup>

Courts have found that the setting for a polygraph exam is not considered inherently coercive because the court ordered nature of the tests does not amount to a level of compulsion that offends the Fifth Amendment.<sup>122</sup> Though a probationer is hooked up to a polygraph machine during an exam, the test itself is not coercive in nature because the machine can be unhooked.<sup>123</sup> The belief that most probationers have that they are obligated to complete the exam does not create a coercive atmosphere.<sup>124</sup> Additionally, probationers should routinely expect questions related to prior and current criminal history.<sup>125</sup> Ultimately, a probationer's privilege against self-incrimination is not violated unless he asserts the privilege and is made to answer without a grant of immunity.<sup>126</sup>

Because the privilege against self-incrimination is not a self-executing right, a probationer must invoke the privilege in order to be granted immunity from the use of the statements against him in a criminal proceeding.<sup>127</sup> A probationer who fails to invoke the privilege cannot later claim that the incriminating statements were introduced in violation of the Fifth Amendment.<sup>128</sup> Since failure to invoke the privilege means that a probationer cannot raise a Fifth Amendment challenge when the statements are introduced at a future criminal proceeding, the Second Circuit in *Johnson* erred when it determined that a probationer could not invoke his

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120. See *id.* at 430 (proclaiming that the well-known *Miranda* warning was created to curb the inherently coercive nature of a custodial interrogation).

121. See *id.* (observing that the Court has been reluctant to extend the requirement of *Miranda* warnings and will not do so in the context of questioning by probation officers because a probationer is not in custody as it is defined under *Miranda* jurisprudence).

122. See *id.* at 431 (finding that a required interview with a probation officer does not create an inherently coercive setting for the probationer because the probationer retains the right to invoke the privilege).

123. See *United States v. Lee*, 315 F.3d 206, 212 (3d Cir. 2003) (explaining that the probationer can leave the room at any time he chooses with only minimal delay but failing to note that refusal to take the exam is often a violation of probation).

124. See *id.* (stating that staying through a polygraph exam is no different than staying the full length of an interview with a probation officer).

125. See *Murphy*, 465 U.S. at 432 (noting that part of the job of the probation officer is to determine the criminal history of the probationer).

126. See *Lee*, 315 F.3d at 212 (noting that the setting of a polygraph exam does not create a coercive environment).

127. See *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) (explaining that a probationer must assert a specific and not a general intention not to answer questions).

128. See *Murphy*, 465 U.S. at 428-29 (expounding that failing to assert the privilege is functionally the same as volunteering information, so one cannot raise the claim at a later time).

privilege during polygraph testing and instead had to wait and see if the statements were introduced at a later criminal proceeding.<sup>129</sup> The Second Circuit is alone in its view of *Murphy* that the privilege only applies when the statements are introduced in a future proceeding.<sup>130</sup>

*C. The Arizona Court of Appeals Further Guards the Fifth Amendment in Jacobsen v. Lindberg by Disallowing the Derivative Use of the Statements at Trial.*

The court in *Jacobsen* correctly applied the rule of *Murphy* that a probationer may not be compelled to answer questions that would incriminate him in a future criminal proceeding when it held that a court could not condition probation on a waiver of the Fifth Amendment.<sup>131</sup> A court conditions probation on a waiver of the Fifth Amendment when it orders the probationer to undergo periodic polygraph testing as a condition of probation and does not allow the probationer to retain the right to invoke the privilege against self-incrimination during the polygraph exam.<sup>132</sup> The argument is that the probationer has, by accepting this condition of probation, chosen to waive his Fifth Amendment right in lieu of incarceration.<sup>133</sup> To force this choice on the probationer at sentencing is, however, the very compulsion that the Fifth Amendment prohibits.<sup>134</sup> A probationer cannot waive his Fifth Amendment rights at sentencing when he chooses probation because he is forced to choose between giving up the privilege or incarceration.<sup>135</sup> This is the very same choice he is faced with

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129. See *United States v. Johnson*, 446 F.3d 272, 280 (2d Cir. 2006) (noting that as long as the probationer can challenge the introduction of the statements at a future criminal proceeding, the statements are not derived in violation of the Fifth Amendment).

130. See *United States v. Locke*, 482 F.3d 764, 767 (5th Cir. 2007) (explaining that during questioning a probationer may invoke the privilege with regard to answers that would incriminate him in a future prosecution); see also *Antelope*, 395 F.3d at 1134 (stating that the privilege must be invoked only when there is a threat of prosecution from the statements); *Lee*, 315 F.3d at 212-13 (noting that statements that are incriminating in a criminal proceeding are protected).

131. See *Murphy*, 465 U.S. at 438 (articulating that it is a violation of the Fifth Amendment for a state to revoke or even threaten to revoke probation because of an invocation of the privilege).

132. See *Jacobsen v. Lindberg*, 238 P.3d 129, 131 (Ariz. Ct. App. 2010) (noting that *Jacobsen* specifically inquired into the consequences for invoking his privilege against self-incrimination and was informed that it would be a failure of the polygraph if he refused to answer a question).

133. See *id.* at 133 (rejecting the argument that a probationer waived his Fifth Amendment rights because polygraph testing was a term of the plea agreement).

134. See *id.* at 131 (restating the precedent of the Arizona Supreme Court that barred probation conditioned on a waiver of the privilege).

135. See *id.* at 133 (explaining that allowing probation to be conditioned on a waiver of the Fifth Amendment cannot be reconciled with the fact that a probationer cannot be made to waive the Fifth Amendment during a polygraph exam (citing *State v. Eccles*, 877 P.2d 799, 802 (Ariz. 1994) (en banc))).

when he is not allowed to invoke the privilege during polygraph testing.<sup>136</sup> While the court in *Antelope* implies that probation cannot be conditioned on a waiver of the Fifth Amendment, only the *Jacobsen* court clearly states the rule.<sup>137</sup>

Though the court in *Jacobsen* did not apply the “atypical and significant hardship” test announced in *McKune*, the court would have reached the same conclusion under this test.<sup>138</sup> Because *Jacobsen* was on probation and living in the community, he therefore experienced many of the rights and freedoms available to free citizens.<sup>139</sup> To remove *Jacobsen* from society because he had invoked the privilege against self-incrimination would drastically upset the balance of his daily life by thrusting him into incarceration.<sup>140</sup> There is a drastic difference between the punishment rejected as not atypical and significant in *McKune*, and the punishment faced by *Jacobsen*.<sup>141</sup> Incarcerating a probationer who is enjoying the freedoms of civilian life, such as holding a job and living with family, differs drastically from moving a prisoner from medium- to maximum-security prison.<sup>142</sup>

*Jacobsen*’s plea agreement provided that he was to participate in polygraph testing and the trial court determined that if an incriminating question was asked, *Jacobsen* would be protected by statute.<sup>143</sup> The Arizona Court of Appeals found the statute was insufficient to guarantee the full protections of the Fifth Amendment because it did not protect

136. Compare *United States v. Antelope*, 395 F.3d 1128, 1139 (9th Cir. 2005) (holding that a probationer was impermissibly incarcerated for invoking his Fifth Amendment privilege), with *Jacobsen*, 238 P.3d at 131 (holding that probation cannot be conditioned on a waiver of the Fifth Amendment privilege).

137. See *Jacobsen*, 238 P.3d at 131 (“[A] waiver of the privilege against self-incrimination may not be made a condition of probation.”); see also *Antelope* 395 F.3d at 1135 (noting that treatment via polygraph testing placed *Antelope* at a “crossroads”).

138. See *McKune v. Lile*, 536 U.S. 24, 37-38 (2002) (plurality opinion) (implying that an extension of incarceration would constitute an atypical and significant hardship).

139. See *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (holding that because parolees have become accustomed to daily life in the community, revocation of parole without a hearing deprives them of liberty without due process).

140. *Contra McKune*, 536 U.S. at 44-45 (plurality opinion) (explaining that taking away benefits from a prisoner that were granted by the prison itself cannot be deemed to compel a prisoner to incriminate himself).

141. Compare *id.* (allowing a treatment program in a prison to take away television and gym access), with *Jacobsen*, 238 P.3d at 131-32 (disallowing a treatment program for a probationer to revoke probation).

142. See *McKune*, 536 U.S. at 51 (O’Connor, J., concurring) (explaining that the prisoner still retained his fundamental rights to have family and clergy visits, and meet with his attorney).

143. See *Jacobsen*, 238 P.3d at 131 (noting that *Jacobsen* had filed a Motion to Preclude Polygraph Examination and Pre-Polygraph Questionnaire because he believed the condition infringed upon his Fifth Amendment protection).

probationers from the derivative use of their statements.<sup>144</sup> By invalidating the Arizona statute, the court in *Jacobsen* also protected probationers from having their compelled statements used in future criminal proceedings as evidence other than in the prosecution's case-in-chief.<sup>145</sup> A statement cannot be used against a probationer when it was derived in violation of the Fifth Amendment.<sup>146</sup> Without added protections, however, there is a risk that evidence that is discovered as a result of those compelled statements will be admitted into evidence.<sup>147</sup> To provide probationers full protection under the Fifth Amendment, they must be protected from all use of their statements in criminal proceedings.<sup>148</sup> Therefore, the result in *Jacobsen* prevents the statements from being admitted into evidence in future cases to show character, propensity, or other bad acts.<sup>149</sup>

#### IV. POLICY RECOMMENDATION

The usual justification for ordering probationers to take polygraph exams is that such exams reduce recidivism.<sup>150</sup> There is concern that allowing probationers to invoke the privilege undermines the goal of treatment.<sup>151</sup> Because honesty is necessary for effective treatment, a probationer should not be allowed to keep information from his polygraph examiner.<sup>152</sup> While

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144. *See id.* at 134 (interpreting section 13-4066 to preclude only the introduction of the statements, not other use of the statements by the prosecution (citing ARIZ. REV. STAT. ANN. § 13-4066 (2006))).

145. *See id.* at 133-34 (striking down section 13-4066, which allowed prosecutors to admit into evidence statements obtained during polygraph testing that showed the propensity of the defendant to commit sexual misconduct (citing ARIZ. REV. STAT. ANN. § 13-4066 (2006))).

146. *See* *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (explaining that a person must be granted immunity before he is required to answer questions that will incriminate him (citing *Maness v. Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring in result))).

147. *See Jacobsen*, 238 P.3d at 131 (overturning the lower court which had granted less than full immunity under a then valid statute).

148. *See id.* at 134 (finding that a statute that does not grant full immunity as required by the Fifth Amendment is invalid (citing *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 54 (1964))).

149. *See id.* (explaining that section 13-4066 allowed evidence to be admitted under Arizona rules of evidence, which in turn allowed for the introduction of otherwise inadmissible statements to show propensity towards certain acts (citing ARIZ. REV. STAT. ANN. § 13-4066 (2006), ARIZ. R. EVID. 404)).

150. *See, e.g.*, Angela Kebric, Comment, *Polygraph Testing in Sex Offender Treatment: A Constitutional and Essential Tool for Effective Treatment*, 41 ARIZ. ST. L.J. 429, 438 (2009) (arguing that close monitoring is needed to keep the public safe from sex offenders).

151. *See* Merrill A. Maiano, Comment, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 LEWIS & CLARK L. REV. 989, 999 (2006) (stating that the threat of a polygraph exam revealing criminal activity is what deters probationers from committing crimes).

152. *See* Kebric, *supra* note 150, at 435-36 (explaining that the fact that probationers

the goal of effective treatment is admirable, it does not justify infringement of a probationer's Fifth Amendment rights.<sup>153</sup> If courts are allowed to use rehabilitation as an excuse to ignore the constitutional rights of probationers, what is to prevent courts from using crime prevention as an excuse to ignore the constitutional rights of free citizens?

Because the current law already runs the risk of asking courts to weigh policy concerns against constitutional protections, courts need to take special care in determining how to approach cases where the statements sought are both incriminating and reveal a violation of probation.<sup>154</sup> A statement arising out of past conduct is a non-issue, because the condition of probation is only to refrain from future criminal conduct; thus the appropriate action is to grant immunity from use of the statement in future criminal proceedings.<sup>155</sup> When the statement arises out of conduct after probation has begun it can be inferred that immunity will be granted as to future criminal proceedings, but the probationer will still face revocation for violating probation.<sup>156</sup> The courts continue to hold that only those statements that can be used in a future criminal proceeding are incriminating.<sup>157</sup> Even if a probationer is insulated from the use of his statements in a future criminal proceeding, he is still faced with a coercive choice: answer the question for which immunity has been granted and face revocation for a probation violation, or refuse to answer the question for which immunity has been granted and face revocation for failure of the polygraph.<sup>158</sup> This result leaves open the possibility that a probationer is

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admit to more crimes while undergoing a polygraph than in regular interviews with probation officers necessitates the use of the polygraph).

153. *Accord* United States v. Antelope, 395 F.3d 1128, 1134 (9th Cir. 2005) (stating that government interests do not outweigh the Fifth Amendment).

154. *See* Minnesota v. Murphy, 465 U.S. 420, 442 n.3 (1984) (Marshall, J., dissenting) (disagreeing with the majority that the privilege only extends to future criminal prosecutions, and instead advocating that the privilege requires absolute immunity from any action taken by the state (citing Piccirillo v. New York, 400 U.S. 548, 562 (1971) (Brennan, J., dissenting))).

155. *See id.* at 429 (majority opinion) (requiring that a probationer be assured at the time the statements are made that the statements will not be used in a future criminal proceeding).

156. *See Antelope*, 395 F.3d at 1135 (explaining that a probationer has a right to invoke the privilege with respect to questions about criminal activity even where such activity violates probation conditions, but failing to discuss whether probation can be revoked after immunity is granted from use of the answers in criminal proceedings (citing *Murphy*, 465 U.S. at 253)).

157. *See, e.g.,* United States v. Lee, 315 F.3d 206, 213 (3d Cir. 2003) (holding that the privilege cannot be invoked with respect to questions where the answers sought could not be the basis of a criminal prosecution).

158. *Cf. Jacobsen v. Lindberg*, 238 P.3d 129, 133 (Ariz. Ct. App. 2010) (holding that a sentencing court cannot require a waiver of the Fifth Amendment before granting probation; to do so would force the defendant to choose between going to trial for another crime when it is revealed during questioning, or automatic loss of probation).



returned to prison for the admission of a crime for which he was not allowed to invoke the privilege, and for which he was not afforded an opportunity for a trial, with only a due process right to a revocation hearing.<sup>159</sup> In effect, the Fifth Amendment privilege against self-incrimination is illusory as applied in the probation context.

## V. CONCLUSION

The Supreme Court in *Murphy* has already taken the first step in protecting the Fifth Amendment rights of probationers.<sup>160</sup> The Ninth Circuit in *Antelope* properly interpreted existing precedent when it applied Justice O'Connor's concurrence in *McKune* to polygraph testing of probationers.<sup>161</sup> Together, *Murphy* and *McKune* protect probationers from the threat of revocation when they invoke the privilege against self-incrimination during a polygraph exam with regard to questions that may produce incriminating answers.<sup>162</sup> The Court has not, however, chosen to protect probationers from this same threat when the statements sought will only reveal violations of probation.<sup>163</sup>

Because rehabilitation is a legitimate government interest, polygraph testing should be included as part of a treatment program.<sup>164</sup> However, in order to fully protect the Fifth Amendment rights of a probationer, the results of the test should be kept confidential between the polygraph examiner and the treatment program.<sup>165</sup> This will automatically prevent any risk to the probationer that his statements could be used against him in

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159. See *Murphy*, 465 U.S. at 441 (Marshall, J., dissenting) (noting that the majority relies on the distinction between criminal and revocation proceedings in its determination that the privilege only extends to the use of the statements in criminal proceedings).

160. See *id.* at 435 (majority opinion) (concluding that a state cannot revoke probation for invocation of the privilege).

161. See *Antelope*, 395 F.3d at 1138 n.4 (articulating an alternate reasoning for its holding that revocation resulted in a longer prison sentence therefore violating the Fifth Amendment, and finding that the probationer was placed in the classic penalty situation).

162. Compare *McKune v. Lile*, 536 U.S. 24, 53 (2002) (O'Connor, J., concurring) (arguing that there is a distinction between forcing a person to accept consequences of his action and imposing on him a penalty for invoking the privilege), with *Murphy*, 465 U.S. at 435 (explaining that forcing a probationer to choose between remaining silent and returning to jail or making the statements and facing prosecution creates a penalty situation forbidden by the Fifth Amendment).

163. See *Murphy*, 465 U.S. at 435 n.7 (drawing a line between statements that are likely to reveal a criminal act and those that will only reveal a probation violation).

164. See *McKune*, 536 U.S. at 33 (explaining that offenders who are not truthful are more likely to fail in treatment).

165. See *Jacobsen v. Lindberg*, 238 P.3d 129, 131 (Ariz. Ct. App. 2010) (setting out in the facts that Jacobsen had been asked to sign a confidentiality waiver that enabled the polygraph examiner to inform Jacobsen's probation officer of the exam results).

a future criminal proceeding or be used to revoke his probation.<sup>166</sup> Restricting knowledge of the statements to examiners and treatment providers resolves any confusion the probationer may have over whether or not he retains a right to invoke the privilege.<sup>167</sup> This level of confidentiality will ensure that the probationer's rights are not invaded while still considering the government's interests in rehabilitation.

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166. *See Murphy*, 465 U.S. at 435 n.7 (arguing the difference between statements that indicate a criminal violation and those that indicate a probation violation, and assigning Fifth Amendment protection only to the former).

167. *But see McKune*, 536 U.S. at 35) (noting that allowing prosecution for statements obtained through polygraph testing furthers state interests in deterrence).

