STATE OF MINNESOTA

IN SUPREME COURT

A20-0485

Court of Appeals — Thissen, J.
Took no part, Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: August 25, 2021
Office of Appellate Courts

Adam Charles McCoy,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Benjamin T. Lindstrom, Cass County District Attorney, Walker, Minnesota, for respondent.

William Ward, State Public Defender, Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota; and

Zachary H. Johnson, Thomason, Swanson & Zahn, PLLC, Park Rapids, Minnesota for appellant.

S Y L L A B U S

1. Incriminating statements made by appellant to his probation officer and a polygraph administrator as part of court-ordered sex-offender treatment are admissible because appellant did not invoke his constitutional privilege against self-incrimination and the penalty exception to the general rule that a person cannot assert the privilege against self-incrimination without first invoking that privilege did not apply.

2. Minnesota Statutes § 634.03 (2020), which requires exclusion of confessions "made under influence of fear produced by threats," is intended to exclude confessions made under circumstances where the inducement to speak is such that it is doubtful that the confession is true.

Affirmed.

O P I N I O N

THISSEN, Justice.

In 2019, respondent State of Minnesota charged appellant Adam Charles McCoy with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct based on allegations that he sexually abused his former girlfriend's 2-year-old daughter in 2005 or 2006. The charges arose after McCoy, who was undergoing court-mandated sex-offender treatment that included a polygraph examination, as conditions of his probation following a prior conviction, confessed the abuse to his probation officer and a polygraph examiner. McCoy sought to suppress the two statements.

We hold that suppression of the two statements is not required. McCoy made the statements without invoking his constitutional privilege against self-incrimination and the so-called penalty exception to the general rule that a person cannot assert the privilege against self-incrimination without first invoking the privilege did not apply. Further, we clarify that the part of Minn. Stat. § 634.03 (2020) that requires exclusion of confessions "made under the influence of fear produced by threats" excludes confessions made under circumstances where the inducement to speak was such that there was a fair risk that the

confession is false. Such a risk did not exist here. We therefore affirm the decision of the court of appeals.

FACTS

In 2017, McCoy was convicted of third-degree criminal sexual conduct. At sentencing on the 2017 conviction, the district court stayed adjudication and set several conditions of probation related to the stay. The conditions included requirements that McCoy undergo a psychological sexual evaluation and follow all recommendations of that assessment, successfully complete an outpatient sex-offender-treatment program and submit to a polygraph examination. The probation conditions expressly state that "refusal to submit to polygraph and/or attempt to manipulate or sabotage the polygraph procedure" constitutes a violation of probation. The probation conditions also state that "[p]olygraph results will not be considered direct evidence only corroborative evidence." Wadena County probation agent Dacia Kreklau oversaw McCoy's probation.

As required by the conditions of his stay of adjudication, McCoy entered an outpatient sex-offender-treatment program. In Wadena County, sex-offender treatment occurs in the community corrections building. A county agent, including at times Kreklau, almost always attends the treatment sessions. As part of the treatment, offenders share sexual histories, including deviant sexual behaviors, with both the counselor and the county agent. Offenders are told that they must be fully truthful about their sexual histories for completion of sex-offender treatment.

To have a full understanding of the offender's involvement in deviant sexual behaviors, the treatment providers require every offender to complete a comprehensive

sexual history packet that covers everything related to the offender's sexual behavior and sexual contacts. This includes identifying persons with whom the offender has had illegal sexual contact for which the offender has not been charged. The sexual history packet is completed over the course of several weeks, before the polygraph examination.

While McCoy was in the process of completing his sexual history packet in anticipation of his polygraph examination, he spoke with Kreklau. McCoy told Kreklau that he "has a number of other uncharged victims" and sexually deviant behaviors. Among other things, McCoy told her about an incident 14 years earlier when he put the tip of his penis into the mouth of his 2-year-old "ex-stepdaughter" when she was asleep. Initially, McCoy said that he thought the incident was a dream. Later, he stated that the incident happened soon after awaking from sleep. Finally, McCoy admitted that he was awake and he knew it had happened.

Kreklau testified that, during a subsequent meeting, she asked McCoy to provide the child's name as well as when and where the incident had occurred. McCoy provided the information. Kreklau then filed a mandated report of the sexual abuse to ensure that McCoy would not have ongoing contact with the child. Kreklau testified that, "I believe we discussed . . . during that office visit that I was a mandated reporter, however I don't specifically remember when we would have had those discussions in the past."

McCoy ultimately completed his sexual history packet, including completion of victim forms. In one victim form, McCoy stated that in 2005 or 2006 he had sexual contact with his ex-stepdaughter while she was sleeping. McCoy identified his ex-stepdaughter by name on the victim form.

McCoy was required to undergo a full disclosure polygraph as part of his sex-offender treatment. As noted above, completing the polygraph was also an independent condition of McCoy's probation. The full disclosure polygraph takes several hours. It includes a pretest interview where the polygraph examiner and the offender discuss the various incidents and behaviors listed in the sexual history packet. The examiner asks clarifying questions about the information in the sexual history packet. Following the pretest interview, the examiner administers the polygraph where questions about the same incidents are asked and answered. Complete honesty is imperative—a point Kreklau made clear to McCoy when she met with him to help him prepare for the polygraph. Kreklau testified that if McCoy "were terminated from treatment as a result of a failure to take a polygraph he could face a violation of his probation." Kreklau agreed that there could potentially be "severe consequences" if McCoy chose not to cooperate and take the polygraph.

McCoy underwent a full disclosure polygraph on July 18, 2019. The certified polygraph examiner, Dan Alquist, testified during the omnibus hearing. A recording of the polygraph examination and a transcript prepared by Alquist of the relevant portions of the examination were admitted into evidence. At the outset of the polygraph examination, Alquist instructed McCoy as follows:

> Today during the discussion you don't need to use the name of anyone that would identify a victim of a crime, for instance if there is anyone like that[,] we can just use ages and say how old you were and how old they were and what happened, so there is no need to worry about any additional charges or anything like that. Now if a person gets carried away in a description of something and they identify a victim[,] then that's a problem and that goes to the authorities and you could get charged. So, you need to be careful that

you don't use names of juveniles or anything like that if there is anything involving a minor.

Alquist worked through McCoy's sexual history questionnaire with him during the pretest, including his victim forms. At the end of the pretest, McCoy brought the conduct involving his ex-stepdaughter to Alquist's attention. McCoy's sexual history packet set forth the conduct, which was submitted to Alquist before the polygraph examination, but Alquist had overlooked it in questioning McCoy. The following exchange occurred:

McCoy: Did they give you the victim forms?

Alquist: Ya.

McCoy: That first question you asked, I got [to] thinking, way back when, ten years ago, twelve-fourteen years ago…

Alquist: Did you think of something?

McCoy: One of the, I guess initially that's probably the one, thought of penetrating orally a one or two year old but then didn't, but I mean I touched her and whatever, had [my] finger on her mouth, but I guess that would be considered force you know, I just thought I would talk to you.

Alquist: I'll take a look at that in just a second.

Alquist: [Victim's name]? "I put victim's mouth on my bare genitals one time." Is that accurate?

McCoy: Right . . . .

Because the victim's name was on the victim form, Alquist had her name before Alquist informed McCoy that he was a mandated reporter and cautioned McCoy not to provide the names of any minor victims.

Alquist testified that McCoy called attention to the incident with the 2-year-old victim out of "an abundance of caution." Alquist further testified that he never discussed

the reliability or admissibility of the polygraph examination with McCoy. He also said he did not advise McCoy about the consequences of passing or failing the polygraph examination. Ultimately McCoy passed the polygraph examination.

McCoy never asserted that his Fifth Amendment right against self-incrimination allowed him to refuse to disclose the incident with his ex-stepdaughter as part of sex-offender treatment or the polygraph examination.

In 2019, McCoy was charged in Cass County with four counts of criminal sexual conduct for the incident involving his ex-stepdaughter. The charges were based solely on his statements to Kreklau and Alquist about the conduct. McCoy moved to suppress his statements under Minn. Stat. § 634.03, alleging that the State could not establish corpus delicti[1] and that the statements were "made under the influence of fear produced by threats." The motion did not mention his Fifth Amendment privilege against self-incrimination.

The district court granted McCoy's suppression motion. The district court's order observed that section 634.03 "provides that a confession of the defendant cannot be used 'when made under the influence of fear produced by threats' " and is intended " ' to discourage invasions of the constitutional rights of accused persons,' " including the Fifth Amendment privilege. Relying on our decision in *Johnson v. Fabian*, 735 N.W.2d 295

[1] Corpus delicti refers to the "substance or foundation of a crime; the substantial fact that a crime has been committed." *Corpus delicti*, *Black's Law Dictionary* (5th ed. 1979). Under the first part of Minn. Stat. § 634.03, "[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed . . . ." The district court did not reach the issue of whether the State had other evidence, aside from McCoy's confession, to prove sexual contact with the 2-year old victim and we express no opinion on the matter.

(Minn. 2007), the district court concluded that the State violated McCoy's Fifth Amendment right against self-incrimination.[2] The district court found that McCoy was coerced because, "had [McCoy] refused to take part in the sex-offender treatment, he would have been subject to a probation violation which could have resulted in his loss of the stay of adjudication, placing a criminal sexual conduct conviction on his record, and possibly could have subjected him to incarceration." The district court reasoned that the fact McCoy "now faces new criminal sexual conduct charges in and of itself demonstrates that the information he was compelled to provide was by its nature incriminating." The district court noted that, "it seems imperative that full disclosure of sexual behavior is an important component of successful sex-offender treatment, so encouraging full disclosure should be part of the protocol," but "use of the full disclosure to prosecute crosses a fundamental line, especially as in this matter where there exists very limited evidence to support the charge independently other tha[n] the disclosure itself." After denying the State's motion for reconsideration, the district court dismissed the charges against McCoy.

The State appealed. The court of appeals reversed the district court's suppression order based on its conclusion that *Minnesota v. Murphy*, 465 U.S. 420 (1984), is dispositive. *State v. McCoy*, A20-0485, 2020 WL 5361661, at *4 (Minn. App. Sept. 8, 2020). The *Murphy* Court held that a probationer must assert the Fifth Amendment privilege "rather than answer if he desires not to incriminate himself." 465 U.S. at 429.

[2] In *Fabian*, we determined that a Fifth Amendment violation occurred when incarcerated offenders received additional time in prison for invoking his privilege against self-incrimination and refusing to participate in sex-offender treatment based on his fear of being subjected to a perjury charge. 735 N.W.2d at 311–12.

Because McCoy did not assert his Fifth Amendment right to either the probation officer or the polygraph examiner, the court of appeals found that McCoy's confession was not compelled. *McCoy*, 2020 WL 5361661 at *4. The court of appeals distinguished *Fabian* because the offenders in *Fabian* invoked their Fifth Amendment rights and then were punished. *Id*. The court of appeals noted that "any consequence that [McCoy] would have faced had he invoked the privilege remains uncertain" here. *Id*. Thus, the court of appeals remanded to the district court for further proceedings.

ANALYSIS

The district court granted McCoy's motion to suppress the statements he made to his probation officer and the polygraph administrator. "When reviewing a district court's pretrial order on a motion to suppress evidence, 'we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo.' " *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)).

I.

The first question before us is whether McCoy's statements to his probation agent and to the polygraph examiner must be suppressed as a violation of McCoy's constitutional privilege against self-incrimination. The Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also* Minn. Const. art. I, § 7. The privilege allows a person to refuse to "answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might

incriminate him in future criminal proceedings." *Murphy*, 465 U.S. at 426 (citation omitted) (internal quotation marks omitted). "In order for the privilege to apply, two distinct elements must be present—compulsion and incrimination. The privilege prohibits only statements that are compelled *and* that present a 'real and appreciable' risk of incrimination." *Fabian*, 735 N.W.2d at 299 (quoting *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 190 (2004)). We have defined self-incrimination as "[a]nswers that would in themselves support a conviction or that would furnish a link in the chain of evidence needed to prosecute the claimant." *Id.* at 309 (citing *State v. Brown*, 500 N.W.2d 784, 787 (Minn.1993)). There is no dispute that the statements to Kreklau and Alquist were incriminating. The only open constitutional question is whether the statements were compelled.

To claim a violation of the Fifth Amendment, a witness who is being asked incriminating questions generally must assert the privilege against self-incrimination. *Murphy*, 465 U.S. at 429; *see also United States v. Kordel*, 397 U.S. 1, 7–10 (1970); *United States v. Monia*, 317 U.S. 424, 427 (1943) ("The [Fifth] [A]mendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."). But there are exceptions to this general rule that the Fifth Amendment is not self-executing.

The exception at issue in this case is the so-called "penalty exception." The exception derives from the principle that involuntary incriminating statements are coercive

and inadmissible under the Fifth Amendment. The government cannot constitutionally deprive a person of his free choice to admit incriminating information, to deny incriminating information, or to refuse to answer questions that may reveal incriminating information. *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967).

The exception emerged in cases challenging laws that required a person to make an incriminating statement or face an economic or other loss. For instance, *Garrity* arose from an investigation into police corruption. *Id.* at 494. Garrity, a police officer, was required to answer an investigator's questions. *Id.* A New Jersey statute provided that, although Garrity was not required to make incriminating statements, if he refused to respond to the investigator's questions, he "shall . . . be removed" from office. *Id*. at 494 n.1. Garrity answered the questions, incriminated himself, and was convicted of a crime based on his answers. *Id*. at 495.

The *Garrity* Court first held:

> The option to lose [a] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice . . . is likely to exert such pressure upon an individual as to disable him from making a free and rational choice. We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary . . . .

Id. at 497–98 (citation omitted) (internal quotation marks omitted). It then concluded that Garrity's failure to assert the privilege against self-incrimination and instead answer the investigator's question did not constitute a waiver of his constitutional right because the privilege against self-incrimination is a constitutional right "whose exercise a State may not condition by the exaction of a price." *Id*. at 500; *see id*. at 498 ("Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the

other."). Accordingly, the Court held that a State cannot "use the threat of discharge to secure incriminating evidence against an employee." *Id.* at 499; *see also Garner v. United States*, 424 U.S. 648, 665 (1976) (holding that a defendant's incriminating statements on his tax returns were *not* compelled for Fifth Amendment purposes where the defendant did not claim privilege against self-incrimination because, under prior case law, the defendant could not be prosecuted for refusing to file tax returns on the basis that the return would incriminate him, and thus, he did not face a Hobson's choice).

In *Gardner v. Broderick*, 392 U.S. 273 (1968), the Supreme Court faced a similar situation where a person refused to answer a question in the face of imposition of a penalty. Gardner, a police officer, appeared before a grand jury investigating official corruption. *Id*. at 274. State law provided that if he did not waive his Fifth Amendment privilege and answer, without immunity, he would be discharged from his job. Gardner refused to answer. *Id*. The *Gardner* Court held that he could not be discharged solely for his refusal to waive his constitutional privilege against self-incrimination. *Id*. at 278–79; *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (holding that a lawyer could not be divested of political party office for refusing to answer incriminating questions in a special grand jury inquiry); *Unif. Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284–85 (1968) (holding that city employees could not be discharged for refusal to sign waivers of immunity before grand jury or for invoking their constitutional privilege against self-incrimination before investigation commissioner).

In summary, the penalty exception as developed before *Murphy* had two implications in circumstances where the State requires a person either to make an

incriminating statement or face economic or other severe consequences: (1) if the person makes a compelled statement, it cannot be used against him in a criminal prosecution; and (2) if the person asserts the privilege against self-incrimination and does not make the statement, the penalty may not be imposed on the person.

The *Murphy* Court analyzed how the penalty exception applies to statements made by a person on probation. 465 U.S. at 422. Murphy was charged with criminal sexual conduct in 1980 and pleaded guilty to a reduced charge of false imprisonment. *Id.* He was given a suspended sentence and placed on probation. *Id*. The terms of probation required that he participate in sex-offender treatment, report to his probation officer, and be truthful with his probation officer "in all matters." *Id*. A few months later, a sex-offender-treatment counselor informed Murphy's probation officer that Murphy had admitted to a 1974 rape and murder; a crime about which Murphy had been questioned in 1974. *Id*. at 422–23. The probation officer met with Murphy and informed him about the information the counselor had relayed. *Id*. During the meeting, Murphy failed to assert his privilege against self-incrimination and admitted to the rape and murder. *Id*. at 424. The probation officer informed the judge who had initially sentenced Murphy of Murphy's inculpatory statement in order to obtain an arrest and detention order. *Id*. at 424. Based on the statement to the probation officer, the State charged Murphy with murder and Murphy sought to suppress the statement. *Id*. at 425.

The *Murphy* Court held that the penalty exception did not apply to Murphy and concluded that the privilege against self-incrimination did not require suppression of his statement. *Id*. at 437–38. It offered two reasons for its decision. *Id.* at 434–38. First, it

determined that a requirement to be truthful with a probation officer about matters relevant to a probationer's probationary status or risk revocation does not create a Hobson's choice as contemplated by the penalty exception cases. *Id*. at 436. The Court articulated a distinction between probation requirements that "merely required [Murphy] to appear and give testimony about matters relevant to his probationary status" and probation requirements that "went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Id*. The Court stated: "On its face, Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution." *Id*. at 437. In other words, the Court declined to construe the probation requirement that Murphy be truthful with his probation officer as a requirement that Murphy answer every question put to him by the probation officer. Accordingly, the Court concluded that Murphy's case did not fall under the penalty exception articulated in *Garrity*. *Id*. at 437–38. However, in applying the penalty to cases of probation revocation, the Court did not create a blanket ban. Instead, if conditions of probation required that an offender answer a question that requires self-incrimination, then the penalty exception may apply. *Id*.

The *Murphy* Court also observed that "[r]evocation is not automatic" under Minnesota's probation revocation statute, Minn. Stat. § 609.14 (1982),[3] and case law from

[3] Section 609.14 today remains substantively the same in all relevant respects to the provision analyzed in *Murphy*.

this court. 465 U.S. at 438; *see State v. Austin*, 295 N.W.2d 246 (Minn. 1980). Rather, under that law the probationer is entitled to a hearing, and the court must find that he intentionally or inexcusably violated a specific condition and "that the need for confinement outweighs the policies favoring probation." *Id*. at 438–39. The Court also noted that no Minnesota court had ever revoked probation merely because a probationer refused to make inculpatory statements to a probation officer. *Id*. at 439. More critically, the Court held that it would be unconstitutional to revoke probation in any event merely because a probationer refused to make inculpatory statements to a probation officer "in light of [the Supreme Court's] decisions proscribing threats of penalties for the exercise of Fifth Amendment rights." *Id*. at 439. Because of that constitutional prohibition, the Court concluded that Murphy did not face any risk that his probation would be revoked if he refused to comply with his probation conditions. *Id*.

Thus, the question we must answer is whether McCoy's probation requirements "merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *See id.* at 436. To answer this question, we must consider two issues. First, did McCoy's probation conditions allow him to refuse to provide the inculpatory answers to Kreklau and Alquist? If he could refuse to provide the incriminating information, the exception does not apply. Second, if McCoy's probation conditions required him to provide inculpatory answers to Kreklau and Alquist, could the State constitutionally revoke

Murphy's probation for refusing to answer such questions? If probation could not be revoked, the exception does not apply. It is to these inquiries we now turn.

A.

Looking to the first question, and after a careful review of the district court's findings, we conclude that McCoy's probation conditions did not allow him to refuse to provide the incriminating statements to Kreklau and Alquist. The district court found that, "[u]nder the terms and conditions of [McCoy's] probation, [McCoy] was required to complete sex-offender treatment, which included taking a polygraph examination." The district court further stated: "It seems imperative that full disclosure of sexual behavior is an important component of successful sex-offender treatment, so encouraging full disclosure should be part of the protocol." Indeed, both Kreklau and Alquist testified that full disclosure is critical to successful sex-offender treatment. The State agreed.

The State contends, however, that it was not necessary for McCoy to tell Kreklau about the incident with his ex-stepdaughter. The State points out that McCoy did not make the statements in response to a question by Kreklau. Rather, McCoy brought the incident to Kreklau's attention "immediately" during a scheduled office visit, stating that he needed to talk with her about his sexual history questionnaire. We do not think the distinction the State draws is relevant on the specific facts of this case.

The district court found that Kreklau and the other Wadena County probation officers were embedded in and closely involved with the sex-offender-treatment program in which McCoy participated. The group sessions took place at the county community corrections offices and a probation agent almost always attended the group treatment

sessions. Kreklau testified that a county probation agent attends 95 percent of the sex-offender-treatment sessions and that the offender talks about past sexual history "in group with their therapist, and then [with] the probation agent in the group." Accordingly, probation officers were often present when incriminating disclosures were made. Additionally, the probation agents report back to colleagues regarding the individuals involved in the treatment sessions.

Kreklau further testified that her discussions with McCoy about his sexual history were conducted in a therapeutic capacity. She testified that as part of her work, she wanted offenders like McCoy to talk to her about their sexual history for therapeutic purposes.[4] During the sessions when McCoy disclosed the incident with his ex-stepdaughter, McCoy met with Kreklau to seek guidance on the process of completing his sexual history packet as a required part of his treatment and in anticipation of his polygraph examination. Finally, although McCoy did not raise the incident in response to a question by Kreklau, he did not disclose the name of the victim or the date of the incident until asked directly by

[4] It is true that Kreklau and other probation officers in the Wadena County sex-offender-treatment program play a dual role. While participating in a therapeutic capacity as an embedded part of the treatment program, the probation officers are also mandated reporters. Kreklau testified that, based on information she gleaned from offenders participating in the sex-offender-treatment program, she has made over 100 reports to law enforcement. The district court noted the dissonance between the two roles in its findings: "[Kreklau] met with and encouraged [McCoy] that when it came to the polygraph part of the treatment program, not only would [he] be expected to discuss the current offense, [and] current compliance with probation conditions, but also discuss and disclose past uncharged behavior that could constitute and support criminal charges if known and disclosed. The district court went on to observe that "[t]he process in this instance is investigative, not therapeutic."

Kreklau. These facts all indicate that the disclosure to Kreklau was part of the treatment process that required full disclosure.

McCoy's statements to Alquist, the operator of the polygraph examination, were also a required part of sex-offender treatment.[5] McCoy's conditions of probation expressly required that he successfully complete sex-offender treatment and a polygraph examination. To successfully complete the polygraph, McCoy was required to fully and truthfully disclose to Alquist his sexual history, including deviant sexual behaviors and all of his victims. Accordingly, unlike the general requirement to be truthful at issue in *Murphy*, McCoy's probation conditions impose a prohibition on refusing to answer the polygraph administrator's questions about his sexual history and victims.

The State argues that because Alquist warned McCoy at the beginning of the examination not to disclose the names of any victims during the polygraph, McCoy cannot now contend that he could not decline to answer Alquist's questions.[6] That argument fails, however, because McCoy disclosed the name of the victim in the sexual history questionnaire provided to Alquist *before* the polygraph examination started. Indeed,

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[5] The State argues that because Alquist was not a government employee, but rather acting under contract with the sex-offender-treatment providers, the Fifth Amendment does not apply. This is an overly literal analysis of the Fifth Amendment. The state action at issue here was ordering McCoy to complete the polygraph examination. Whether Alquist was an independent contractor or a government employee is irrelevant, as the State was still acting in imposing this requirement on McCoy.

[6] Under our precedent, information about a victim and the incident without the specific name nonetheless may be incriminating. *Fabian*, 735 N.W.2d at 306 (stating that incriminating statements are those that "would in themselves support a conviction or furnish a link in the chain of evidence needed to prosecute the accused").

McCoy did not voluntarily name the victim during the polygraph; Alquist gleaned the name from the written disclosure.

B.

We now turn to the second part of the analysis: Could the State constitutionally revoke McCoy's probation for refusing to provide full disclosure of prior criminal acts?

Pointing to language in *Murphy* that "[r]evocation is not automatic under [Minn. Stat. § 609.14]," 465 U.S. at 438, the State argues that, to satisfy the second requirement, McCoy must establish that failing the polygraph examination and failing to complete sex-offender treatment in violation of the conditions of his probation would result in the mandatory revocation of his probation. We see no reason why probation revocation following the discretionary process set forth in section 609.14 and our case law should be treated any differently from mandatory revocation for constitutional purposes. The constitutional harm is the ultimate imposition by the State of a penalty for exercising a constitutional right. *Garrity*, 385 U.S. at 500.

The critical part of the "revocation is not automatic" paragraph in *Murphy* is the Supreme Court's observation in the final sentence of the paragraph that a district court could not constitutionally impose revocation for refusal to make incriminating disclosures "in light of our decisions proscribing threats of penalties for the exercise of Fifth Amendment rights." 465 U.S. at 439. Indeed, that conclusion follows directly from Supreme Court precedent in *Garrity*. *See* 385 U.S. at 497–98. In other words, Murphy could not establish any risk that his probation would be revoked for refusing to answer

questions because *Garrity* had already determined that such revocations are unconstitutional.

Consequently, McCoy's claim that the penalty exception applies in this case must fail as well. The district court erred when it claimed the authority under Minn. Stat. § 609.14 (2020) to revoke McCoy's stay of adjudication had he asserted his privilege against self-incrimination and refused to fully disclose the incident with his ex-stepdaughter as part of the court-ordered sex-offender treatment and polygraph examination. The Constitution does not allow revocation under those circumstances.[7]

II.

McCoy based his initial suppression motion before the district court on the part of Minn. Stat. § 634.03 that states: "[A] confession [cannot] be given in evidence against the defendant whether made in the course of judicial proceedings or to a private person[] when made under the influence of fear produced by threats." The district court did not analyze the language of Minn. Stat. § 634.03. Instead, it quoted *State v. Azzone* for the proposition that "section 634.03 is meant 'to discourage invasions of the constitutional rights of accused persons to be free from undue pressure to confess exerted by law enforcement authorities'. " 135 N.W.2d 488, 493 (Minn. 1965). Based on *Azzone*, the district court analyzed whether McCoy's constitutional privilege against self-incrimination was

[7] In general, when an offender is not cooperative with his or her probation conditions, including participation in court-ordered treatment, a district court has the authority to revoke the offender's probation if the factors set forth in *Austin*, 295 N.W.2d at 250, are satisfied. We reach the result here because McCoy was participating in court-ordered sex-offender treatment and provided specific factual information during an interview with his probation officer that the State then used as the basis for a new prosecution.

violated. We conclude that the district court's reliance on *Azzone* was misplaced. In *Azzone*, our focus was not on section 634.03, but rather on interpreting Minn. Stat. § 634.04 (2020), which requires corroboration of accomplice testimony. 135 N.W.2d at 493. To clarify the type of evidence required to corroborate accomplice testimony, we compared the type of evidence required under section 634.04 with the type of evidence needed to corroborate a confession by the defendant under the corpus delicti part of section 634.03 (which, as noted in footnote 1, is not at issue in this appeal). *Id.* Because our comment on the purpose of section 634.03 (especially the second clause) was not necessary to the ultimate holding in *Azzone*, it is dicta. *See State v. Coleman*, 957 N.W.2d 72, 78 (Minn. 2021) (concluding that a statement in an earlier opinion was dicta because it was not necessary to the court's ultimate holding).

We now clarify that the second part of section 634.03, which was adopted at statehood, is meant to codify the common law notion that district courts should exclude confessions made under circumstances where the inducement to speak was such that it is doubtful that the confession was true. *See generally* 3 Wigmore, Evidence § 822 (Chadbourne ed. 1970) (discussing common law rule); *Developments in the Law: Confessions*, 79 Harv. L. Rev. 935, 954–59 (1966); *State v. Freeman*, 12 Ind. 100, 102 (Ind. 1859) (interpreting the same language as the second part of Minn. Stat. § 634.03 and concluding that "the words addressed to the accused must involve a threat; and the motive to confess thereby produced, must be sufficient so to operate on his mind as to render it doubtful whether the confession should be relied on as worthy of credit"); *see also Lisenba v. California*, 314 U.S. 219, 236 (1941) (distinguishing a state law designed to exclude

false confessions and constitutional due process rules that prevent fundamental unfairness in the use of evidence, whether true or false, and noting that "[t]he criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession"). Because section 634.03 was first adopted in 1851, its purpose could not have been to discourage the invasion of constitutional rights that had not yet been recognized. *See* 1851 Minn. Terr. Law, Ch. 132, § 240. McCoy's fear that his failure to disclose the incident with his ex-stepdaughter would result in a probation violation does not in any way suggest that McCoy's statements about the incident with his ex-stepdaughter were false; indeed, the statements were made because McCoy felt an obligation to be truthful with his probation officer and to pass the polygraph, suggesting that the admissions were true. Accordingly, the second part of section 643.03 does not require exclusion of the statement.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

CHUTICH, J., took no part in the consideration or decision of this case.