# CUSTODIAL INTERROGATION IN VERMONT AFTER *STATE v. HOHMAN*

## INTRODUCTION

In *Miranda v. Arizona*,[1] the United States Supreme Court under Chief Justice Earl Warren set forth procedural rules the police must follow during "custodial interrogation."[2] The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[3] If it is determined that a defendant was in "custody" during an interrogation, statements made by him in reply to police questioning may not be admitted against him at trial unless he was first given *Miranda* warnings and knowingly, voluntarily and intelligently waived these constitutional rights.[4] The *Miranda* Court promulgated these warnings to combat the police practice of "incommunicado interrogation"[5] — an action that conflicts with the fifth and fourteenth amendment privilege against compulsory self-incrimination. The Court reasoned that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[6]

A problem with the *Miranda* decision is that it did not set forth a specific standard which lower courts could apply to determine the existence or nonexistence of "custody." In *State v. Hohman*,[7] the Vermont Supreme Court recently formulated its

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1. 384 U.S. 436 (1966).
2. In *Miranda* the Court said that an individual in custody
> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Id.* at 479.
3. *Id.* at 444.
4. *Id.*
5. *Id.* at 445.
6. *Id.* at 458.
7. 136 Vt. 341, 392 A.2d 935 (1978).

own standard to determine custody based upon whether the questioned individual could reasonably have believed he was not free to leave.[8] The *Hohman* decision is significant in that it supports the basic rationale of the *Miranda* decision. It has been suggested, however, that in a post-*Miranda* decision, *Oregon v. Mathiason*,[9] the United States Supreme Court attempted to undermine the *Miranda* decision and in effect limit the rights of an individual questioned by police.[10] This comment will attempt to elucidate the differences between the *Mathiason* Court's approach for determining the existence of custody and the standard applied in *Hohman*.

## I. *State v. Hohman*: Factual Background

On April 9, 1979, George Hohman flagged down a police officer and requested that he be taken to a police station. While traveling in the police cruiser, Hohman voluntarily confessed that he had murdered a girl. The officer then advised him to remain silent until his constitutional rights could be read to him. When Hohman arrived at the police station, he was led into an interrogation room

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8. *Id.* at 350, 392 A.2d at 941.

9. 429 U.S. 492 (1977) (per curiam).

10. *Id.* at 496-99 (Marshall, J., dissenting). Some commentators have similarly stated that the Supreme Court under Chief Justice Warren Burger has attempted to undermine the *Miranda* decision. *See* Ritchie, *Compulsion that Violates the Fifth Amendment, The Burger Court's Definition*, 61 Minn. L. Rev. 383 (1977); Stone, *Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99. Cases which support a narrow interpretation of the *Miranda* decision include: Oregon v. Hass, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971). *See generally* Note, *Constitutional Criminal Procedure—Miranda Warnings Not Required Where There is No Objective Determination of "Custody": Effect of Suspect's Parolee Status*, 1 W. New England L. Rev. 189, 193-96 (1977).

In Vines v. State, 40 Md. App. 658, 394 A.2d 809 (1978), Judge Moylan concludes in a concurring opinion that *"Miranda* is now sapped of all vitality except in those cases squarely covered by it." *Id.* at 667, 394 A.2d at 814. He states further that *Miranda* is "in distinct disfavor and that it will not be extended by the Supreme Court by so much as a millimeter." *Id.* at 666, 394 A.2d at 813. *See also* Stone v. State, 583 S.W.2d 410 (Tex. Crim. App. 1979), where the court states that in *Mathiason* "the Supreme Court of the United States retreated from the sweeping language of *Miranda*." *Id.* at 412. *But see* Judge Robert's dissenting opinion in *Stone*, in which he states: "[u]nlike the majority, I would not view *Oregon v. Mathiason* . . . as a retreat from the basic constitutional principles enunciated in *Miranda v. Arizona*, but rather as an elucidation of those principles." *Id.* at 417 (Roberts, J., dissenting).

where *Miranda* warnings were read to him in the presence of two officers. Although Hohman refused to sign a "waiver of rights" form without a lawyer present, an officer asked him whether he would make a statement anyway. The suspect replied that he would do so "up to a point."[11]

Hohman then made a statement, which was recorded on tape, concerning the location of the victim's body. He concluded his statement with the words "end of statement" and declined to respond to further questioning without a lawyer present.[12] While one officer unsuccessfully attempted to contact the public defender, another officer continued to question Hohman. In reply to the continued questioning, Hohman made further inculpatory statements.

Upon being told that the public defender could not be found, Hohman insisted for the third time that he would not comment further until his attorney was present. The interrogating officer, however, informed Hohman that the state police wanted to speak to him, to which the defendant replied, "I'll play it by ear."[13] A state trooper arrived at the police station and subsequently questioned Hohman without readvising him of his rights. In response to this interrogation Hohman made further inculpatory statements. Finally, Hohman led the police to the victim's body[14] and then was

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11. State v. Hohman, 136 Vt. 341, 346-47, 392 A.2d 935, 939 (1978).

12. *Id.*

13. *Id.*

14. Although the defendant refused to waive his constitutional rights by signing a form expressly provided for that purpose, the state alleged and the Addison Superior Court determined that Hohman "waived his rights under *Miranda* by his statement 'I'll play it by ear' and by his conduct in subsequently cooperating with the police and leading them to the victim's body." *Id.* at 351, 392 A.2d at 941.

The defendant, however, did not merely request to remain silent but continuously expressed a desire to have his attorney present. In *Miranda*, the Supreme Court expounded a rule that has subsequently created confusion among jurisdictions:

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning . . . . The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and therefore consents to be questioned.

formally arrested.

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> . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

There is little agreement among jurisdictions as to whether the court's statement should be taken literally, thereby creating a *per se* rule against further questioning until an attorney is present. In *Hohman* the state took an opposite view, asserting that the highest courts in the states of New Jersey, Indiana, Wisconsin, and Pennsylvania have determined that an individual who initially asserted his right to have an attorney present may subsequently waive that right and be interrogated. Printed Case of the Appellant at 67, State v. Hohman, 136 Vt. 341, 392 A.2d 935 (1978). *See* Rouse v. State, 266 N.E.2d 209, 211 (Ind. 1971); State v. McKnight, 52 N.J. 35, 243 A.2d 240, 245 (1968); Commonwealth v. Bullock, 459 Pa. 243, 249, 328 A.2d 493, 496 (1974); Sharlow v. State, 47 Wis.2d 259, 271, 177 N.W.2d 88, 94 (1971).

The Supreme Court dealt with the issue of waiver in Michigan v. Mosley, 423 U.S. 96 (1975). There, introduction of a defendant's confession was permitted although he had previously stated to another officer questioning him on an unrelated matter that he wished to remain silent. In footnote seven of the *Mosley* opinion the Court advised:

> The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion as follows: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

423 U.S. at 101 n.7.

Furthermore, in footnote ten of the opinion the Court stated:

> The dissenting opinion asserts that *Miranda* established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present . . . . But clearly the Court in *Miranda* imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states he wants an attorney."

*Id.* at 104 n.10 (citing Miranda v. Arizona, 384 U.S. at 474) (citation omitted).

Although it does not appear that the Vermont Supreme Court has adopted an absolute rule in which an individual can never waive his right to counsel once he has asserted that right, the court, relying upon Justice White's statement in *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring opinion), advised that such a waiver will be viewed with skepticism. State v. Hohman, 136 Vt. 341, 351, 392 A.2d 935, 941. Furthermore, the court implied that it would be more likely to uphold the validity of a waiver if the police had made an "effort to ascertain in a straightforward manner whether the defendant wished to waive his right." *Id.* at 351-52, 392 A.2d at 941. This factor was not present in *Hohman*'s factual circumstances.

Relying upon the principles established in Johnson v. Zerbst, 304 U.S. 458 (1938), and State v. Breznick, 134 Vt. 261, 356 A.2d 540 (1976), the Vermont Supreme Court concluded that the state had not met its heavy burden of clearly demonstrating that the defendant knowingly and intelligently waived his constitutional rights by his statement "I'll play it by ear," and by his subsequent conduct of leading the police to the victim's body:

Hohman unsuccessfully moved to suppress all of his admissions made from the moment he was told to remain silent while traveling in the police cruiser.[15] These statements were subsequently admitted at a jury trial in which the defendant was found guilty of second degree murder.

On appeal, Hohman contended that all statements received after he said "[e]nd of statement" were improperly obtained in violation of the requirements established in *Miranda*.[16] Hohman apparently conceded that all of his statements prior to this were voluntarily offered.

The Vermont Supreme Court agreed with the defendant and determined the existence of custody by applying a test based on the reasonable belief of the individual questioned. Under this test "[t]he proper question is not whether the defendant appeared of his own free will, but whether he reasonably believed he was free to leave."[17] That the police may have had probable cause to arrest Hohman following his recorded statement was considered "compelling" to a determination of custody when viewed together with other coercive factors surrounding the interrogation. The court concluded that an intent to restrain Hohman had been communicated to him by means of the reading of *Miranda* warnings, the filling out of an arrest form in Hohman's presence, and the police

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> The meaning of defendant's statement is, at best, ambiguous, and in our judgment, can in no way be said to constitute a knowing and intelligent waiver. Neither did the defendant's conduct in our view constitute a waiver . . . . [t]he voluntariness of the conduct and the accompanying statement does not assuage their inadmissibility as evidence so long as a situation of custodial interrogation exists.

136 Vt. at 351, 392 A.2d at 941.

The *Hohman* court suppressed all of the defendant's statements following his recorded assertion "[e]nd of statement." That evidence was crucial to the state's case, and its admission could not be considered harmless error. *Id.* at 352, 392 A.2d at 941-42.

15. 136 Vt. at 348, 392 A.2d at 939. This motion to suppress was based on the judicially established exclusionary rule. According to this rule certain evidence is excluded from trial when police have failed to comply with the dictates of the first ten amendments of the United States Constitution. F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE 159 (1974).

16. State v. Hohman, 136 Vt. 341, 348, 392 A.2d 935, 940.

17. *Id.* at 350, 392 A.2d at 941.

dominated incommunicado interrogations that followed Hohman's recorded statement.[18]

## II. Prior Case Law

To determine precisely what the term "custody" means in Vermont, it is necessary to examine the *Hohman* opinion in light of recent holdings of the United States Supreme Court and Vermont's prior case law in the area of "custodial interrogation."

### A. *Oregon v. Mathiason*

In *Oregon v. Mathiason*,[19] the United States Supreme Court determined the point at which custody attaches when an individual voluntarily comes to a police station. Carl Mathiason, a parolee,[20] had been named by the victim of a burglary as a possible suspect. After three or four unsuccessful attempts to contact Mathiason, a state police officer left a note at his apartment asking him to call. The following afternoon, the officer met with Mathiason at the state patrol office. The suspect was ushered into a private office and told that he was not under arrest. Mathiason was then falsely advised that his fingerprints had been found at

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18. *Id.* at 350, 392 A.2d at 940-41.

19. 429 U.S. 492 (1977) (per curiam).

20. The fact that Mathiason was a parolee prompted Justice Stevens to write in dissent:

> On the one hand, the State surely has greater power to question a parolee about his activities than to question someone else. . . . Arguably, therefore, *Miranda* warnings are entirely inappropriate in the parole context.
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> On the other hand, a parolee is technically in legal custody continuously until his sentence has been served. Therefore, if a formalistic analysis of the custody question is to determine when the *Miranda* warning is necessary, a parolee should always be warned.

*Id.* at 500 (Stevens, J., dissenting).

In a recent case on point, the court in State v. Hartman, 281 N.W.2d 639 (Iowa 1979), stated:

> It cannot be stated per se that a parolee-parole officer exchange constitutes a custodial setting even though the parolee may be the prime suspect for a fresh crime. In this case, defendant appeared as a matter of course before his parole officer and was free to leave after his interview with her. The situation is thus analogous to a voluntary appearance at a police station for questioning by a parolee who is not subsequently restrained. *Id.* at 643-44 (citation omitted).

the scene of the crime, and that his truthfulness might possibly be considered as grounds for leniency by the district attorney or by the judge. Not until after Mathiason confessed to having committed the crime was he given *Miranda* warnings.[21]

At his trial Mathiason moved to suppress the confession which he claimed was elicited from him in violation of *Miranda*. The trial court determined that the defendant was not in custody at the time the confession was made and therefore admitted the confession into evidence. Mathiason was subsequently convicted of first-degree burglary and the Oregon Court of Appeals affirmed. In the Oregon Supreme Court, defendant's conviction was reversed because the court determined that the interrogation took place in a coercive environment to which *Miranda* was meant to apply.[22]

The United States Supreme Court reversed the judgment of the Oregon Supreme Court because it had applied *Miranda* too freely. The Supreme Court apparently looked to whether the individual's freedom of movement was actually restricted to determine if the interrogation had been "custodial."[23] In adopting this narrow objective approach, the Supreme Court did not consider whether the "coercive environment" surrounding the interrogation may have caused the individual questioned to reasonably believe that he was not free to leave. The Court instead looked to three factors before and after the challenged action in reaching its conclusion that Mathiason had not been in "custody" at the time the inculpatory statements were made. First, Mathiason came voluntarily to the police station. Second, he was immediately informed that he was not under arrest. And third, at the close of a half-hour interview Mathiason left the police station without restraint.[24]

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21. Oregon v. Mathiason, 429 U.S. 492, 493-94 (1977).

22. State v. Mathiason, 275 Or. 1, 549 P.2d 673 (1976).

23. The *Mathiason* Court wrote:

> [T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way . . . . At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

429 U.S. at 495.

24. *Id.* at 495-96.

The Court did not consider it significant that Mathiason offered the incriminating statements only after he had been falsely advised that his fingerprints were found at the scene of the crime. Neither did the Court focus on the fact that Mathiason confessed after being told that his cooperation with the police might be considered by the district attorney or by the judge.[25] The Supreme Court remarked that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[26]

Disturbed by the majority's attempt to undermine the "rationale of *Miranda*," Justice Marshall wrote a dissent critical of the exclusion of the "coercive environment" as a factor in determining whether an interrogation is custodial.[27] He forcefully argued that a suspect should be entitled to *Miranda* warnings if possessed of an "objectively reasonable belief that he was not free to leave during the questioning . . . . Plainly [Mathiason] . . . could have so believed, after being told by the police that they thought he was involved in a burglary and that his fingerprints had been found at the scene."[28]

Justice Marshall stated that, in the past, warnings were restricted to custodial situations merely because *Miranda* raised only this "narrow issue."[29] He asserted, however, that this should not act as a bar to the giving of "*Miranda*-type" warnings in "inherently compelling" circumstances that may not technically be considered custodial.[30] The rationale behind *Miranda*—to combat "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he

25. *But see* Malloy v. Hogan, 378 U.S. 1 (1964), and Bram v. United States, 168 U.S. 532 (1897), where the Court stated that a confession may not be obtained by direct or implied promises.

26. 429 U.S. at 495.

27. *Id.* at 496-99 (Marshall, J., dissenting).

28. *Id.* at 496-97.

29. *Id.* at 497 (citing Beckwith v. United States, 425 U.S. 341, 345 (1976)).

30. *Id.* at 497-98.

would not otherwise do so freely"[31] —would, in Justice Marshall's opinion, require *Miranda*-type warnings in "situations that resemble the 'coercive aspects' of custodial interrogation."[32] He suggested, however, that "lesser warnings" instead of full-fledged *Miranda* warnings might be adequate in situations where a suspect is not actually physically restrained but is subjected to a highly coercive environment.[33] In conclusion, Justice Marshall advised state courts that they can "guard against the evil clearly identified by this case" by interpreting their own state constitutions to require warnings in situations in which *Mathiason* would not require warnings to be given.[34]

### B. *State v. Howe*

*State v. Howe*[35] was the first major post-*Mathiason* Vermont case in which a person who voluntarily arrived at a police station challenged the admissibility of certain statements made to police officers before he was given *Miranda* warnings.

In the early morning hours of April 1, 1975, Robert Howe reported the discovery of the body of an elderly woman who had

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31. *Id.* (citing Miranda v. Arizona, 384 U.S. at 467).

32. 429 U.S. 492, 498.

33. *Id.* at 498 n.3. Justice Marshall stated: "I do not rule out the possibility that lesser warnings would suffice when a suspect is not in custody but is subjected to a highly coercive atmosphere." *Id.* In support of this proposition Justice Marshall cites the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1(2) (Approved Draft 1975) which instructs police to advise suspects interrogated at a police station of their rights to leave and consult with counsel, relatives, or friends. Furthermore, Justice Marshall cites his concurring opinion in Beckwith v. United States, 425 U.S. 341 (1976), in which he found the following warnings sufficient when the suspect was questioned in familiar surroundings and was not under arrest:

> Under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

*Id.* at 348-49.

34. 429 U.S. 492, 499 (1977) (Marshall, J., dissenting).

35. 136 Vt. 53, 386 A.2d 1125 (1978).

been the victim of a particularly grotesque murder and sexual assault. Howe offered several statements to the police in response to general on-the-scene questioning.[36] At the request of a police officer Howe was escorted in a police cruiser to the Brattleboro station house at 1:30 a.m. on April 1. Upon his arrival at the police station, the subsequently challenged statements offered in response to police questioning were written in longhand by Howe. At 4:00 a.m., Howe was first given the *Miranda* warnings. Between the hours of 1:30 and 4:00 a.m. he had remained inside the station house at police request except for a brief period when he was permitted to get a breath of fresh air outside on the station porch. Howe remained at the police station during the daylight hours of April 1 and spent the night at his wife's home accompanied by an officer. On the morning of April 2, Howe and the officer returned to the police station. Howe was subsequently released without restrictions until two days later when he was arrested and charged with first degree murder.[37]

In a majority opinion written by Justice Hill, the Vermont Supreme Court refused to suppress Howe's statements by holding that he had neither alleged nor offered evidence to prove that he was "in custody" under the *Mathiason* Court's narrow interpretation of *Miranda*.[38] Justice Hill placed significant emphasis upon the fact that Howe's attorney seemed to base his claim upon the theory that Howe was a "suspect" at the time he made the statements at issue rather than asserting that he was "in custody."[39] The court apparently adopted the axiom that if a defendant does not raise the precise issue in his pleadings the court has no duty to consider the point.[40]

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36. *Id.* at 57, 386 A.2d at 1128. The *Miranda* Court did not want the warnings they established to apply to "[g]eneral on-the-scene questioning . . . of citizens in the fact-finding process." Miranda v. Arizona, 384 U.S. 436, 477 (1966). "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.* at 477-78.

37. 136 Vt. at 57-58, 69, 386 A.2d at 1128, 1134.

38. *Id.* at 59-60, 386 A.2d at 1129.

39. *Id.* at 59, 386 A.2d at 1129.

40. It may be argued, however, that when the challenged action is of a significant constitutional dimension the court should consider the issue regardless of the imprecision of the

The court minimized the importance of the coercive environment surrounding the interrogation. Relying upon *Oregon v. Mathiason,* the majority asserted that the defendant's reconstruction of the facts did not show that he was "in custody."[41] However, the holding in *Howe* is neither based solely upon faulty pleadings nor the dictates of *Mathiason.* The Vermont Supreme Court unanimously agreed that even if the police had erred in not administering the requisite warnings prior to interrogation, this was merely harmless error because there was overwhelming circumstantial evidence of the appellant's guilt that was in no way connected with the police misconduct.[42]

Justice Billings filed a separate opinion in *Howe* which is labeled as "concurring" only because he agreed with the court's ultimate conclusion that the police error was harmless. In disagreeing with the majority's conclusion that Howe was not entitled to *Miranda* warnings, Justice Billings declared that:

> [e]ven if defendant was not "in custody" during the 1:30 a.m. to 4:00 a.m. period, it is my view that when he was detained at the station where the questioning occurred and the resulting statement came forth he was in a coercive environment

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pleadings. Nevertheless, when attempting to suppress statements elicited during a police interrogation, the Vermont practitioner should clearly assert that his client was "in custody."

41. 136 Vt. at 59, 386 A.2d at 1129 (1978).

42. *Id.* at 60, 386 A.2d at 1129. It is settled law that a *Miranda* violation can be harmless error. Milton v. Wainwright, 407 U.S. 371 (1972); Sutton v. State, 25 Md. App. 309, 334 A.2d 126 (1975). In Cummings v. State, 27 Md. App. 361, 387, 341 A.2d 294, 310 n.6 (1975), Judge Moylan said:

> It is sometimes argued that some error can never (or almost never) be harmless. There is in this argument a misperception of the function of harmless error. When we assay harmless error, we are neither condemning nor condoning the conduct which produced the error; we are simply weighing an item of proof and comparing the weight with that of other proof.

The harmless error doctrine may sometimes undermine the principles upon which the exclusionary rule is founded. It has been stated that the primary purpose of the rule is "that police will be compelled to comply with the substantive exclusion, from a criminal trial, of evidence of guilt which is otherwise relevant and competent." F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE (1974). Given the operation of the harmless error doctrine, if police have legitimately obtained overwhelming circumstantial evidence of defendant's guilt, they may fail to comply with the provisions of *Miranda* in the belief that their misconduct will qualify as harmless error.

> and could have *reasonably believed* he was not free to leave. It is just this situation where *Miranda* warnings are necessary.[43]

Justice Billings was not saying that Howe was necessarily "in custody" under the *Mathiason* Court's narrow approach. He was saying that Howe was subjected to an inherently compelling circumstance which requires warnings. This position, based largely on Justice Marshall's dissenting opinion in *Mathiason*,[44] illustrates Justice Billings' reluctance to depart from the underlying rationale in *Miranda*. Justice Billings' assertion that full *Miranda* warnings should be required in the scenario presented in *Howe* goes beyond the suggestion advanced by Justice Marshall that "lesser warnings" might suffice in highly coercive situations that may not be considered custodial.[45]

No state supreme court has adopted Justice Marshall's proposal calling for a more expansive standard for determining "custody" than the majority's standard in *Mathiason*.[46] It appears, however, that this is precisely what Justice Billings was attempting to accomplish in *Howe* when he wrote: "[t]he privilege against self-incrimination is guaranteed by both the United States and the Vermont Constitutions, U.S. Const., amendments V, XIV; Vt. Const., ch. I, art. 10. I would hold that the Vermont Constitution requires *Miranda* warnings where, as here, coercive elements are compellingly present."[47] Notwithstanding the fact that there exists no appreciable difference between the self-incrimination clauses contained in both the United States and Vermont Constitutions,[48]

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43. 136 Vt. at 69, 386 A.2d at 1134 (Billings, J., concurring) (emphasis added).

44. Oregon v. Mathiason, 429 U.S. 492, 496-99 (1977).

45. *Id.* at 498 n.3.

46. *See* Note, *Custodial Interrogation After Oregon v. Mathiason*, 1979 DUKE L.J. 1497, 1519-23, for a discussion of Justice Marshall's proposal.

47. 136 Vt. at 69, 386 A.2d at 1134.

48. U.S. CONST. amend. V reads in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." VT. CONST. ch. I, art. 10 provides: "That in all prosecutions for criminal offenses, a person . . . can[not] . . . be compelled to give evidence against himself." *See* State v. Brean, 136 Vt. 147, 385 A.2d 1085 (1975), where the court stated:

> Defendant's argument that the Vermont Constitution's self-incrimination provision is broader than its federal counterpart, because of the use of the

Justice Billings interpreted the state constitution as requiring *Miranda* warnings in circumstances that would not be considered "custodial" under the *Mathiason* Court's reading of *Miranda v. Arizona*.

## III. Analysis of the *Hohman* Standard

Considering that the majority opinion in *Howe* was based in part upon the principles announced in *Oregon v. Mathiason*,[49] practitioners might have mistakenly assumed that when determining whether a suspect has been subjected to a custodial interrogation, Vermont courts would continue to deemphasize the importance of the coercive environment surrounding the questioning and, instead, would concentrate on whether the suspect was physically restrained. *State v. Hohman*[50] indicates that the Vermont Supreme Court has not followed the Burger Court's move away from *Miranda* that was manifested in *Mathiason*. In *Hohman*, the Vermont court states the current standard for custody (based on the questioned individual's reasonable belief concerning his freedom to leave) and then instructs readers to "see" the majority opinion in *Howe*.[51] Nowhere in the *Howe* majority opinion, though, is there mention of a standard of reasonable belief. A logical explanation for the development of this "subjective-objective" test[52] is that the *Hohman* court looked to the proposals contained in Justice Billings' concurring opinion in *Howe*. Those proposals are virtually identical to the *Hohman* test.[53]

Arguably, the Vermont Supreme Court could have reached the

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word "evidence" instead of "witness," is not persuasive. Both this Court and the United States Supreme Court have recognized that the various state and federal constitutional provisions relating to self-incrimination, although using slightly variant phraseology, have a common origin and a similar purpose.

*Id.* at 151, 385 A.2d at 1088 (citations omitted).

49. 429 U.S. 492 (1977) (per curiam).

50. 136 Vt. 341, 392 A.2d 935 (1978).

51. *Id.* at 350, 392 A.2d at 941.

52. The Vermont standard is subjective in part because it is based on what the questioned individual believed, and it is partly objective as the court must determine if the individual's belief was reasonable.

53. *Compare* State v. Hohman, 136 Vt. 341, 350, 392 A.2d 935, 941 (1978) *with* State v. Howe, 136 Vt. 53, 69, 386 A.2d 1125, 1134 (1978).

decision it arrived at in *Hohman* without using the subjective-objective test. The court could have simply stated that although Hohman had voluntarily arrived at the police station, he was, unlike Mathiason, neither "informed that he was not under arrest,"[54] nor was he subsequently allowed to "leave the police station without hindrance."[55] The *Hohman* court, however, was not content to premise its holding upon the absence of these two factors. Instead, it considered the coercive environment surrounding the interrogation to be a significant factor in determining whether a custodial situation existed. The *Mathiason* Court had minimized the significance of this factor. Adoption of the subjective-objective test enabled the Vermont Supreme Court to place significance on factors surrounding the interrogation that were not considered relevant in *Mathiason.*

### A. *Voluntary Arrival and Location of the Interrogation*

While aware of the fact that the *Mathiason* Court had placed considerable emphasis upon Mathiason's voluntary appearance at the police station, the Vermont Supreme Court in *Hohman* considered this factor to be "relevant"[56] but not controlling in their determination. Instead, the court chose to look to what occurred after the defendant arrived at the station house and was subjected to questioning. Although Hohman may have reasonably believed he was free to leave while voluntarily traveling in the police cruiser,[57] his state of mind presumably changed, in the court's opinion, upon being subjected to an "incommunicado interrogation"[58] within the confines of a "police dominated atmosphere."[59]

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54. 429 U.S. at 495.

55. *Id.*

56. 136 Vt. at 350, 392 A.2d at 941.

57. At trial the defendant unsuccessfully attempted to have suppressed "all of his admissions and all evidence flowing from the time he entered the police cruiser and was advised to remain silent." 136 Vt. at 348, 392 A.2d at 939-40. On appeal defendant sought to suppress only those statements made after he commented "end of statement." *Id.* This was a wise decision in light of the *Miranda* Court's declaration that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Miranda v. Arizona, 384 U.S. 436, 478 (1966).

58. 136 Vt. at 350, 392 A.2d at 940.

59. *Id.* at 350, 392 A.2d at 941.

In apparent disregard of *Mathiason*'s de-emphasis of the significance of the interrogation's location, the *Hohman* court stated, "[g]iven the fact that it was the abuses of incommunicado interrogation in a police dominated atmosphere which disposed the Supreme Court to act in *Miranda*, . . . the determination of custody must focus on the compulsive aspect of the custodial interrogation."[60] Thus, the location of the interrogation (a private room in the police station regularly used for interrogations) became an important factor in determining whether George Hohman was subjected to the coercive pressures that *Miranda* sought to control.[61]

### B. *Freedom to Leave After the Interrogation*

In *Hohman*, the compulsive aspects of the interrogation were measured at the time the defendant uttered his inculpatory statements.[62] The emphasis in *Mathiason* on the fact that the defendant left the police station following the interrogation cannot realistically be considered germane under *Miranda*'s rationale as interpreted by the *Hohman* court.[63] The *Miranda* decision sought to control the coercive atmosphere that causes an individual to incriminate himself.[64] That a suspect is permitted to leave following an interrogation in which he felt compelled to offer incriminating statements does not eradicate the evil that has already taken place. In *Hohman*, the court's attention was not directed toward what occurred after the defendant offered the incriminating statements. It looked instead to whether the defendant reasonably believed he was free to leave at the moment he gave statements in reply to police questioning. Similarly, the Vermont Supreme Court has subsequently implied that a custodial determination cannot be predicated upon the mere fact that an individual is arrested following a

60. *Id.* at 349, 392 A.2d at 940 (citations omitted).

61. *Id.* at 350, 392 A.2d at 940.

62. *Id.*

63. Justice Billings stated that he did not believe the court would have reached a different conclusion in *Hohman* if the defendant had been free to leave at the conclusion of the interrogation. The standard of what the reasonable man believed is determined at the time the individual gives the statement, not after it is given. Interview with Justice Billings, Vermont Supreme Court Justice, in Woodstock, Vt. (Nov. 12, 1979).

64. 384 U.S. at 467.

voluntary conversation with police officers.[65]

### C. *Investigative Focus, Probable Cause and the Subjective Intent of the Police*

Several courts have determined that an individual is entitled to *Miranda* safeguards when police suspicion has focused on the individual.[66] This standard stems from the pre-*Miranda* decision *Escobedo v. Illinois*.[67] In *Escobedo,* the United States Supreme Court held that when the police "process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[68]

In a confusing footnote in *Miranda,* it appears that the Court held that the term "focus," as used in *Escobedo,* was synonymous with their definition of custodial interrogation—"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[69] Although the precise meaning of the term "focus" is subject to debate,[70] the United States Supreme Court held in *Beckwith v. United States*[71] that while an investigation may have "focused" on a particular individual he is not necessarily in custody for the purposes of *Miranda.*[72]

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65. State v. Mecier, 138 Vt. 149, 412 A.2d 291 (1980). *See* text accompanying note 100 *infra.*

66. State v. Patterson, 59 Hawaii 357, 361, 581 P.2d 752, 754 (1978); State v. Kalai, 56 Hawaii 366, 537 P.2d 8 (1975); People v. Ridley, 396 Mich. 603, 242 N.W.2d 402 (1976); People v. Reed, 393 Mich. 342, 224 N.W.2d 867, *cert. denied,* 422 U.S. 1044 (1975); State v. Wheeler, 92 N.M. 116, 117, 583 P.2d 480, 481 (1978). *But see* United States v. Hall, 421 F.2d 540 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).

67. 378 U.S. 478 (1964).

68. *Id.* at 492.

69. 384 U.S. at 444 n.4.

70. *See* Graham, *What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona,* 14 U.C.L.A. L. Rev. 59, 67-68 (1966).

71. 425 U.S. 341 (1976).

72. The investigative focus in *Beckwith* was only upon the defendant "in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding." *Id.* at 347.

Arguably, the term "focus," as used in *Escobedo,* could not be considered the determinative factor by the *Hohman* court in that *Escobedo* looked to the interrogating officer's state of mind.[73] For police suspicion that has focused on a particular suspect to be considered relevant under the *Hohman* standard, it must be communicated to the suspect. It is the subjective intent of the police to restrict the defendant's freedom of movement that must be communicated to the defendant in order for him to form a reasonable belief that he is not free to leave.

Although police may have probable cause to arrest the defendant, this knowledge must be communicated to him to be considered a compelling factor under the standard applied by the *Hohman* court.[74] The court pointed out that in the Arizona case of *State v. Mumbaugh,*[75] it was "held that where there is probable cause it is presumed that the police will do their job and arrest."[76] The Arizona Supreme Court concluded that "[t]his standard gives the officer a clear and familiar line to follow, . . . [b]ut a finding that no probable cause exists does not necessarily mean that there was 'no custody.' "[77] The *Hohman* court apparently followed this reasoning in part, stating that "[w]hether the police actually believed the defendant is irrelevant if the defendant, placed in a situation characterized by incommunicado interrogation and a police dominated atmosphere, reasonably believed he was not free to leave."[78] The *Hohman* court, however, does not appear to have

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73. This position was adopted in Cummings v. State, 27 Md. App. 361, 341 A.2d 294 (1975), where Judge Moylan stated:

> *Escobedo*'s "focus" looked to the state of mind of the interrogating policeman, *Miranda*'s "custody" looks to the state of mind of a reasonable interrogated suspect.
>
> . . . .
>
> It is clear that the question of "custody" in this case is to be viewed from the state of mind of the appellant (or, more precisely, the state of mind of a reasonable person in the appellant's circumstances) and not from the state of mind of [the officer].

*Id.* at 381, 341 A.2d at 306-07.

74. 136 Vt. 341, 349-50, 392 A.2d 935, 941 (1978).

75. 107 Ariz. 589, 491 P.2d 443 (1971).

76. 136 Vt. at 350, 392 A.2d at 941.

77. State v. Mumbaugh, 107 Ariz. at 594, 491 P.2d at 449.

78. 136 Vt. at 350, 392 A.2d at 941.

placed as much significance on the existence of probable cause as did the Arizona court in *Mumbaugh*.[79] The Vermont court clearly stated that "[t]he fact that the State may have had probable cause to arrest based on the strength of defendant's confession as an admission against penal interest . . . is not, by itself compelling."[80] The existence of probable cause compels a conclusion that the suspect was in custody *only* when "coupled" with the fact that the suspect was somehow apprised of the fact that the police were not going to allow him to leave.[81] The unexpressed intent of the police to restrain the suspect cannot logically be considered a compelling factor in the determination of whether the defendant was in custody when a court has chosen to apply a test grounded upon the reasonable subjective belief of the defendant.[82]

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79. State v. Mumbaugh, 107 Ariz. 589, 594, 491 P.2d 443, 448 (1971), held that "[c]ustody must be determined by an analysis of the relevant circumstances with particular attention to probable cause gauged by the 'reasonable man' test." In support of this test, the *Mumbaugh* court relied upon the following language that it derived from Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969): "The trial court should also consider the extent to which the authorities confronted defendant with evidence of her guilt, the pressures exerted to detain defendant, and any other circumstances which might have led defendant *reasonably to believe that she could not leave freely.*" State v. Mumbaugh, 107 Ariz. 589, 594, 491 P.2d 443, 448 (1971).

It is curious to note that the *Mumbaugh* court chose to ignore the following language in *Lowe* concerning probable cause:

> In Hoffa v. United States, 385 U.S. 293, . . . the Supreme Court held that whether or not the police have probable cause for arresting the suspect, has no relevance as to when the person's right to receive warnings attaches.
>
> > Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Lowe v. United States, 407 F.2d 1391, 1396 (9th Cir. 1969).

80. 136 Vt. at 350, 392 A.2d at 940 (citation omitted).

81. *Id.* at 350, 392 A.2d at 940-41.

82. In People v. Allen, 28 A.D.2d 724, 281 N.Y.S.2d 602 (1967), the unexpressed subjective intent of the arresting officer was considered to be totally irrelevant.

> The statement sought to be suppressed was made by defendant in his own home, in the presence of his wife and other persons, in answer to a question asked by the arresting police officer, prior to his arrest. Defendant had not been advised of his right to remain silent, or his right to counsel, or that any statement which he might make could be used against him. However, although the arresting officer testified that he went to defendant's home for the purpose of making an arrest, and would not have permitted defendant to

The subjective intent of the police may be communicated to the defendant verbally or through physical actions. This position was adopted in *United States v. Hall*[83] in which the court stated:

> [I]n the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so.[84]

In *Hohman*, the Vermont Supreme Court considered the fact that during the interrogation an officer filled out an arrest form in the defendant's presence.[85] The court also considered the fact that there were several interrogations of the defendant administered by various officers.[86] Thus, in *Hohman*, the "investigative focus" was communicated to the defendant by the execution of the arrest form and continuous interrogations which may have contributed to the defendant's reasonable belief that he could not leave.

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> leave the room before the interrogation was commenced, he had not so informed defendant; nor had he at that time taken him into custody or otherwise deprived him of his freedom of action.

*Id.* at 724, 281 N.Y.S.2d at 603.

*See also* Cummings v. State, 27 Md. App. 261, 341 A.2d 294 (1975); State v. Hall, 12 Ariz. App. 147, 468 P.2d 597 (1970). In State v. Ferrell, 41 Or. App. 51, 596 P.2d 1011 (1979), the court held that although an officer testified that he would not have allowed the defendant to leave the scene of a traffic stop, this did not establish that defendant was in custody because the officer did not communicate his intention to the defendant. Similarly, in People v. Bryant, 71 A.D.2d 564, 418 N.Y.S.2d 621 (1979), the court stated:

> At the very beginning, a "straw man" ("the police conceded that had Bryant sought to leave during the questioning, he would not have been permitted to do so") should be identified and eliminated. There is not the slightest indication in the evidence that this attitude on the part of the police was ever conveyed to defendant. We do not have any indication at all that defendant had any idea that he was not free to leave at any time.

*Id.* at 564, 418 N.Y.S.2d at 623. *See* Lowe v. United States, 407 F.2d 1391, 1396-97 (9th Cir. 1969); Williams v. United States, 381 F.2d 20, 22 (9th Cir. 1967); Ellington v. Conboy, 333 F. Supp. 1318, 1323 (S.D.N.Y. 1971).

83. 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

84. *Id.* at 545.

85. 136 Vt. at 350, 392 A.2d at 940.

86. *Id.*

### D. *Miranda Warnings*

An element distinguishing the circumstances in *Mathiason* and *Howe* from those in *Hohman* is that Hohman received *Miranda* warnings at the beginning of the interrogation. Relying upon the principles expounded in *United States v. Akin*,[87] the *Hohman* court held that the question of custody is not necessarily determined simply because the suspect is read the *Miranda* warnings.[88] Though not conclusive by itself, the Vermont Supreme Court considered the reading of *Miranda* warnings at the outset of interrogation an important factor when coupled with the other coercive factors surrounding the interrogation in *Hohman*.[89] When proceeding under the test of what the reasonable belief of the individual questioned is, it would not be difficult to define an interrogation as "custodial" from a layman's point of view once the police have given him *Miranda* warnings. Unlike an attorney, who may have knowledge of the precise meaning of *Miranda* warnings, a layman who has seen hours of televised police dramas in which a criminal is commonly read *Miranda* warnings at the time of arrest might reasonably believe that he is not free to leave once these warnings have been recited. On the other hand, it may be difficult to justify placing much emphasis on the giving of *Miranda* warnings from a law enforcement perspective. In *United States v. Akin*,[90] the Fifth Circuit Court of Appeals held:

> [t]o rule that an FBI agent's extra-cautious efforts to inform a person of his constitutional rights converts an otherwise non-custodial situation into "custodial interrogation" could easily work to defeat one of the Supreme Court's main objectives in *Miranda*, the objective of encouraging law enforcement agencies to develop ways of protecting individual rights that are in harmony with effective law enforcement.[91]

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87. 435 F.2d 1011 (5th Cir. 1970).

88. 136 Vt. at 349, 392 A.2d at 940.

89. *Id.* at 350, 392 A.2d at 940.

90. 435 F.2d 1011 (5th Cir. 1970).

91. *Id.* at 1013.

## III. JUSTIFICATION OF *Hohman*

Authorization of limited intrusions on individual liberties motivated by the desire to control criminal activity may unintentionally invite abuse within the field of law enforcement. In *Spano v. New York*,[92] the Supreme Court said that societal abhorrence of

> the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.[93]

Under *Miranda*, "[a]ny statement given freely and voluntarily without any compelling influences, is of course, admissible in evidence."[94] The *Hohman* court made no mention of an intent to restrict police interrogations of cooperative persons.[95] The Vermont Supreme Court would probably agree with an early statement by Justice Burger made while sitting as judge on the Circuit Court of Appeals for the District of Columbia, that:

> [t]he cooperative innocent person would find it oppressive indeed if courts were to hold every person interrogated must first be taken before a magistrate and subjected to the judicial processes applicable to a person criminally charged, i.e., warned that he had a right to maintain silence and to counsel as a preliminary to interrogation.[96]

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92. 360 U.S. 315 (1959).

93. *Id.* at 320-21. In *Spano* an individual was subjected to intense questioning from early evening until the next morning. The defendant subsequently confessed after being urged to do so in the interests of protecting the status of a rookie policeman who had befriended the defendant. In Townsend v. Sain, 372 U.S. 293 (1963), the defendant was allegedly given "truth serum" and confined for three days without the assistance of counsel. In Reck v. Pate, 367 U.S. 433 (1961), the suspect was subjected to a brutal eight hour incommunicado interrogation which caused the individual to vomit blood. This is by no means an exhaustive list of cases in which law enforcement officials have abused the power and discretion granted to them.

94. 384 U.S. 436, 478 (1966).

95. *See* State v. Killary, 133 Vt. 604, 349 A.2d 216 (1975).

96. Hicks v. United States, 382 F.2d 148, 161 (D.C. Cir. 1967).

The *Hohman* court did not advocate this extreme position. There is a striking difference between the terms "interrogation" and "custodial interrogation," the latter being the practice that the *Hohman* decision was aimed at controlling.

The *Hohman* standard should not be seen as an overly broad interpretation of *Miranda*. Rather it appears to be an intermediate position between the narrowly construed objective standard expounded in *Mathiason*, and a purely subjective standard that might "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question."[97]

Further, the *Hohman* decision cannot be said to have established an inelastic custodial standard that tends to coddle criminals. In *Hohman*, the court rejected the notion of one "test based on key factual elements whose presence will conclusively and in all cases determine custody."[98] The court stated that custodial determinations must be "based on the totality of circumstances in each particular case."[99] When an injudicious decision would result from a strict application of the *Hohman* test, the Vermont Supreme Court has implicitly held that the standard must be modified. This is evidenced in the recent case of *State v. Mecier*.[100]

In *Mecier*, the defendant barricaded himself within his house while the police surrounded the home and attempted to convince the defendant to surrender. During a telephone conversation with the police, the defendant made incriminating remarks that he subsequently claimed were inadmissible because "they resulted from interrogation while the defendant was in custody and had not been warned of his right to remain silent."[101] Citing *State v. Hohman* the court said that because the defendant "spontaneously and voluntarily initiated" the incriminating statement he could not have held a "reasonable belief that he was not free to avoid compulsive

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97. This major criticism of a purely subjective test was articulated in People v. P., 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260 (1967).

98. 136 Vt. at 349, 392 A.2d at 940.

99. *Id.*

100. 138 Vt. 149, 412 A.2d 291 (1980).

101. *Id.* at 153, 412 A.2d at 294.

interrogation."[102] The court did not base its conclusion on whether the individual could have "reasonably believed he was not free to leave"[103] the house, for common sense would indicate that if the defendant had attempted to leave he would have been arrested immediately. The *Mecier* court held that the defendant had not been subjected to a custodial interrogation because it did "not appear that the conduct of the police contributed to the defendant's belief that he was in an inherently compelling atmosphere."[104] Apparently the court recognized that the defendant could have discontinued the interrogation by hanging up the phone at any time. It is irrelevant whether this particular defendant subjectively believed he was able to end the conversation. Rather the pertinent questions are whether a reasonable person in the defendant's position would have believed that he was free to avoid the compulsive interrogation in the circumstances presented by *Mecier* and whether the defendant reasonably believed he was free to leave in the *Hohman* situation.

## Conclusion

The opinion rendered in *State v. Hohman*[105] can certainly be viewed as a landmark decision in Vermont. Although one may have expected the Vermont Supreme Court to establish a test for determining the existence of custody based chiefly upon the United States Supreme Court's directives established in *Oregon v. Mathiason,*[106] the Vermont judiciary has chosen instead to adopt a standard founded upon the dissenting opinion of Justice Marshall in *Mathiason.* The current test used by the Vermont court is based upon the reasonable subjective belief of the individual questioned. Investigative focus, probable cause to arrest, and the subjective intent of the police to restrict the individual's freedom of movement are considered important to a custodial determination only in the event that these factors were communicated to the defendant.

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102. *Id.*
103. State v. Hohman, 136 Vt. at 350, 392 A.2d at 940.
104. State v. Mecier, 138 Vt. 149, 153, 412 A.2d 291, 294.
105. 136 Vt. 341, 392 A.2d 935 (1978).
106. 429 U.S. 492 (1977) (per curiam).

In *State v. Hohman*,[107] the Vermont Supreme Court did not interpret *Miranda* too broadly. The custodial standard adopted in *Hohman* appears to be an intermediate position between *Mathiason*'s narrow objective approach and a standard based solely on the subjective opinion of the suspect.

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107. 136 Vt. 341, 392 A.2d 935 (1978).