STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2009AP2916-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY M. SAHS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent State of Wisconsin ("the State") disagrees with defendant-appellant Gregory M. Sahs ("Sahs") that oral argument and publication are warranted. Oral argument is not warranted because the briefs filed by the parties will adequately develop the facts and legal arguments necessary for decision. Publication is not warranted, because this case may be resolved by

applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF FACTS

Because the State believes that Sahs has not provided all of the facts relevant to this appeal, the State submits these additional facts which led up to the events at issue in this appeal.

In 2005, Sahs was convicted of possession of child pornography and placed on probation (7:1 [A-Ap. 118]). As a condition of his probation, Sahs was required to attend sex offender treatment, which included the use of polygraph testing (7:1 [A-Ap. 118]) and group therapy sessions (9:1 [R-Ap. 101]).

Before beginning his group therapy sessions for the 2005 probation, Sahs submitted a disclosure report to the treatment provider, in which he was expected to disclose all sexual activities which occurred prior to the incident for which he was convicted (9:1 [R-Ap. 101]). But according to the treatment provider, Sahs refused to participate in the group sessions in any meaningful way, such that Sahs' probation agent, Agent Krause, set up a polygraph examination to be administered on December 15, 2006, in order to further focus on Sahs' prior sexual history (9:1 [R-Ap. 101]; 25:9-10 [A-Ap. 108-109]).

Prior to the December 15, 2006 polygraph, however, the polygraph examiner conducted a pre-test interview in which he reviewed Sahs' disclosure report and Sahs also disclosed various details of his prior sexual history (9:1 [R-Ap. 101]). Sahs passed the polygraph test (9:1-2, 6-7 [R-Ap. 101-102, 106-107]), but was nonetheless terminated from the sexual offender treatment group sessions temporarily, because the treatment provider determined that the information that Sahs had provided during the pre-polygraph interview should have

been disclosed during the prior group sessions, but Sahs had failed to disclose everything (7:1 [A-Ap. 118]; 9:2 [R-Ap. 102]; 25:9-10 [A-Ap. 108-109]).

In order to re-gain admittance to group therapy, Sahs wrote a letter fully disclosing his prior sexual history; and Sahs was thereafter allowed back into the treatment group (7:2 [A-Ap. 119]; 9:2, 8-10 [R-Ap. 102, 108-110]). Accordingly, at that time, which was around mid- to late-December of 2006, Agent Krause had no intention of revoking Sahs' probation (9:2 [R-Ap. 102]).

At some point in January of 2007, however, Sahs called his probation agent, and asked to come in to talk "'about some things'" (9:2 [R-Ap. 102]). The mutually agreed-upon date for the meeting was January 12, 2007 (9:2 [R-Ap. 102]). The circuit court found that these were the circumstances leading up to the January 12, 2007 meeting at issue on appeal (25:9-11 [A-Ap. 108-110]).[1]

On January 12, 2007, Sahs voluntarily went into Agent Krause's office (7:2 [A-Ap. 119]; 25:11-12 [A-Ap. 110-111]). Sahs then voluntarily gave an oral statement, which was not in response to any questions that Agent Krause had asked Sahs, but rather, was a statement which Sahs disclosed spontaneously (25:11-12 [A-Ap. 110-111]). In his oral statement to Agent Krause, Sahs admitted to downloading, viewing, and masturbating to, child pornography on a computer that he kept at his friend Sara Butterfield's house (7:2 [A-Ap. 119]; 9:2 [R-Ap. 102]; 25:12 [A-Ap. 111]).

[1]Apparently, another polygraph test was scheduled to take place on January 13, 2007 (7:2; 25:10-11 [A-Ap. 119, 109-110]), but the record does not reveal whether Sahs knew about this polygraph test date before he called his probation agent in early January of 2007.

Allegedly,[2] Agent Krause then reduced Sahs' statement to writing on a form used by the Department of Corrections (7:2 [A-Ap. 119]); but Sahs did not proffer this document into evidence at the motion hearing (25:9 [A-Ap. 108]), nor is this document contained in the appellate record. At some point thereafter, Agent Krause took Sahs into custody for a probation violation, and initiated revocation proceedings (7:2 [A-Ap. 119]; 9:2-3 [R-Ap. 102-103]).

Agent Krause then notified the West Allis Police Department about Sahs' statements (8:1 [A-Ap. 125]), and Detective Jacque Chevremont met with Sara Butterfield's mother, Dana, in order to retrieve the computer from Ms. Butterfield's residence (9:3 [R-Ap. 103]). On January 24, 2007, Detective Chevremont met Dana Butterfield at her residence, whereupon she showed detectives the attic area where Sahs kept his computer equipment (9:3 [R-Ap. 103]). Later, Sahs also signed a written "Consent to Search" form authorizing a search of his computer equipment (9:3 [R-Ap. 103, 111]).[3]

The next day, on January 25, 2007, Detective Chevremont arranged a meeting with Sahs while he was in custody for the probation revocation (9:3 [R-Ap. 103]). After Detective Chevremont read Sahs his *Miranda*[4] rights, Sahs waived his right to an attorney and agreed to give a statement to detectives (9:3 [R-Ap. 103]). Sahs then gave another statement admitting to downloading the child pornography while on probation (9:3 [R-Ap. 103]).

In addition to Sahs' written consent authorizing the search of his computer, Detective Chevremont also

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[2]This alleged written statement will be discussed further in the State's Argument.

[3]The actual consent form is not contained in the appellate record, but for the court's convenience, the State has included it in its appendix at R-Ap. 111.

[4]*Miranda v. Arizona*, 384 U.S. 436 (1966).

applied for and obtained a search warrant on February 1, 2007, to examine the computer recovered from the Butterfield residence (9:3 [R-Ap. 103]). The search warrant was executed, and detectives examined the computer, locating the child pornography which was the basis of the current charges (9:3 [R-Ap. 103]).

Sahs' probation was then revoked and he began serving his 18-month revocation sentence for the violations alleged in his statements (7:2 [A-Ap. 119]; 9:3 [R-Ap. 103]). Sahs also received sex offender treatment in prison (7:2 [A-Ap. 119]).

About six months later, on June 26, 2007, Sahs again spoke with Detective Chevremont, again waiving his *Miranda* rights, and again admitted to leaving a computer at the Butterfield residence (9:3 [R-Ap. 103]). He also admitted downloading and masturbating to child pornography while on probation (9:3 [R-Ap. 103]).

Any additional relevant facts will be set forth in the State's Argument. *See* Wis. Stat. § 809.19(3)(a)2. (respondent may choose to exercise its option not to present a full statement of facts).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY FOUND THAT SAHS' STATEMENTS TO HIS PROBATION AGENT DID NOT VIOLATE HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

Sahs first argues that his statements to Agent Krause violated his Fifth Amendment right against self-incrimination, because his statements were compelled (Sahs' brief at 11-15). As the State will discuss below, however, the circuit court correctly found that Sahs did

not meet his burden of proof in showing that his statements were compelled. Accordingly, this court should affirm the circuit court's ruling that Sahs' statements did not violate his Fifth Amendment right against self-incrimination.

A. Relevant legal principles and standard of review.

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The Fifth Amendment, however, prohibits only compelled testimony that is incriminating. *In re Commitment of Mark*, 2006 WI 78, ¶ 16, 292 Wis. 2d 1, 718 N.W.2d 90 ("*Mark II*").[5]

As the United States Supreme Court further explained in *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984):

> It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not 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.

Id. (internal quotations omitted).

When a defendant seeks to exclude a statement based upon his Fifth Amendment privilege, however, it is the defendant's burden of proof to first establish that the statements at issue are: 1) incriminating; 2) testimonial; and 3) compelled. *Mark II,* 292 Wis. 2d 1, ¶ 16.[6] *See also*

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[5]*Mark II* was the Wisconsin Supreme Court's review of *In re Commitment of Mark*, 2005 WI App 62, 280 Wis. 2d 436, 701 N.W.2d 598 ("*Mark I*").

[6]As the State will discuss in its Argument, Sahs' brief sets forth the incorrect burden of proof (Sahs' brief at 12-13).

In re Commitment of Mark, 2008 WI App 44, ¶ 10, 308 Wis. 2d 191, 747 N.W.2d 727 ("*Mark III*").[7]

First, a statement is incriminating if it can subject the declarant to pending or future criminal prosecution. *Mark II,* 292 Wis. 2d 1, ¶¶ 29-33; *Mark III*, 308 Wis. 2d 191, ¶ 10.

Second, a statement is testimonial if it involves a communicative disclosure of facts. *See*, *e.g.*, *State v. Mallick*, 210 Wis. 2d 427, 430-33, 565 N.W.2d 245 (Ct. App. 1997) (nonverbal guilty conduct, such as refusal to submit to field sobriety tests or breathalyzer, is not "testimonial" and can be used against defendant at trial).

Third, with respect to compulsion, the mere fact that an individual is required to appear and report truthfully to his probation or parole officer is insufficient to establish compulsion. *Mark II,* 292 Wis. 2d 1, ¶ 25. As the United States Supreme Court explained in *Murphy*:

> [T]he general obligation [of the defendant] to appear [at a meeting with his probation officer] and answer questions truthfully did not in itself convert [] otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment *unless the witness is required to answer over his valid claim of the privilege*.

Murphy, 465 U.S. at 427 (emphasis added).

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[7]In *Mark II*, the Wisconsin Supreme Court remanded for factual findings on the issue of compulsion. *Mark II*, 292 Wis. 2d 1, ¶ 34. *Mark III* was the appeal after the Wisconsin Supreme Court's remand in *Mark II*. *Mark III*, 308 Wis. 2d 191, ¶ 1.

Therefore, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not "compelled" him to incriminate himself. *Id.* (internal citation omitted). Rather, a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence must ordinarily assert the privilege rather than answer if he desires not to incriminate himself. *Id.* at 429. If, however, the witness chooses to answer rather than assert the privilege, his choice is considered to be voluntary since he was free to claim the privilege, with only a few well-established exceptions to the general rule not applicable here. *Id.*[8]

Similarly, in the pre-arrest context, although an individual still has a pre-arrest right against self-incrimination, that right is ordinarily not self-executing and must be invoked. *Mark II,* 292 Wis. 2d 1, ¶¶ 2, 27. Accordingly, if the declarant has not been compelled to incriminate himself, he cannot successfully invoke the privilege to prevent the information he volunteers from being used against him in a criminal prosecution. *Id.*, ¶ 28 n.9 (citing *Murphy*, 465 U.S. at 440).

The application of Fifth Amendment principles to the facts is a question of law, reviewed independently on appeal. *Mark II,* 292 Wis. 2d 1, ¶ 12. To the extent that the circuit court made findings of fact, however, this court

[8]One such exception—in which the declarant is not required to invoke the privilege for it to apply—is the so-called "penalty exception." *Mark II*, 292 Wis. 2d 1, ¶ 27 n.8. In that situation, if the State, either expressly or by implication, asserts that invocation of the privilege will lead to revocation of probation, it creates the classic penalty situation, and the failure to assert the privilege is excused, such that the probationer's answers would be deemed compelled and inadmissible. *Id. See also Mark I*, 280 Wis. 2d 436, ¶ 18 (if probationers are required to choose between giving answers that will incriminate them in pending or subsequent criminal proceedings, and losing their conditional liberty as a price for exercising their right to remain silent, the State may not use the answers for any evidentiary purposes in a criminal prosecution).

should accept those findings unless clearly erroneous. *Mark III*, 308 Wis. 2d 191, ¶ 15.

B. Sahs did not meet his burden of proof in showing that his statements were compelled.

As Sahs notes (Sahs' brief at 12), the first two components of the defendant's burden of proof—incriminating and testimonial—are not at issue here, but the parties dispute the third component, compulsion.

1. The only evidence in the record is that Sahs' oral statement was voluntary.

With respect to Sahs' oral statement to Agent Krause, there is absolutely nothing in the record to prove that it was compelled. To the contrary, the only evidence in the record was that Sahs' oral statement was voluntary. Accordingly, Sahs did not meet his burden of proof in proving that his Fifth Amendment rights were violated. *Mark II*, 292 Wis. 2d 1, ¶ 16 (when defendant seeks to exclude a statement based upon his Fifth Amendment privilege, defendant must first prove that the statement was incriminating, testimonial, and compelled); *Mark III*, 308 Wis. 2d 191, ¶ 10 (same).

It is important to note that Sahs' brief sets forth the incorrect burden of proof. Sahs argues that he did not have the burden of proof, but rather, that the State had the burden in proving that the statement was not compelled (Sahs' brief at 11-13). Contrary to Sahs' argument, however, *Mark III* does not stand for the proposition that the State has this initial burden of proof. Rather, the cited portion of *Mark III* (Sahs' brief at 11-13) actually holds that the burden shifts to the State only after the defendant has made his initial burden of proof that the statement was compelled. *Mark III*, 308 Wis. 2d 191, ¶¶ 13-18 (parties

conceded that initial statement was compelled), ¶¶ 20-25 (burden shifts to State to show that subsequent statements were not compelled).

In *Mark III*, the parties conceded that the original statement was compelled, such that the only issue at hand was the State's burden to show that the statement was not compelled. *Id.* Here, in contrast, this burden shift to the State never occurred, because Sahs failed to meet his initial burden of proof in showing that the statements were compelled. Quite the contrary, the only evidence in the record was that Sahs' oral statement was entirely voluntary.

For example, the circuit court made the factual findings that Sahs initiated the January 12, 2007 meeting by calling his probation agent and telling him he wanted to talk about some things (25:11 [A-Ap. 110]). Sahs then went to Agent Krause's office and "disclosed voluntarily" that he had been violating the rules of his probation (25:11 [A-Ap. 110]), including using a friend's computer to download images of child pornography (25:12 [A-Ap. 111]). The circuit court found that Sahs' disclosures were not in response to any questions asked, but were voluntarily disclosed (25:11 [A-Ap. 110]).

Importantly, the circuit court also found that Sahs volunteered this information "at the outset of the meeting" (25:12 [A-Ap. 111]). In other words, there is absolutely no evidence in the record that Sahs knew about the alleged written form,[9] had signed the form, or was compelled in any way by having read the form, before he gave his oral statement to Agent Krause. Quite the contrary, all of the evidence demonstrates that Sahs' oral statement to Agent Krause was given before the alleged written form was allegedly offered to Sahs.

[9]As the State will argue in the next section, Sahs also did not meet his burden of proof that this form was even offered to him.

Thus, the record conclusively shows that Sahs' oral statement was entirely voluntary—initiated by Sahs, spontaneously disclosed without any questions from his probation agent, and not in response to any written form whatsoever (25:10-12 [A-Ap. 109-111]). It is not enough for Sahs to show that he was required to appear and report truthfully to his probation officer. *Mark II,* 292 Wis. 2d 1, ¶ 25 (such facts are insufficient to establish compulsion). Rather, in order to establish compulsion, Sahs needed to show that he was required to answer the questions over his valid claim of privilege. *Murphy*, 465 U.S. at 427.

But here, there was absolutely no evidence that Sahs invoked the privilege yet was forced to answer anyway. To the contrary, the circuit court found that Sahs came forward voluntarily, initiated the meeting, and volunteered the information (25:10-12 [A-Ap. 109-111]). This court should affirm those factual findings as not clearly erroneous. *Mark III*, 308 Wis. 2d 191, ¶ 15 (appellate court should affirm circuit court's findings of fact unless clearly erroneous).

Accordingly, this court should also make the legal finding that, at least with respect to Sahs' oral statement, it was not compelled, because Sahs never invoked his Fifth Amendment privilege. *Mark II,* 292 Wis. 2d 1, ¶¶ 2, 27 (although an individual still has a pre-arrest right against self-incrimination, that right is ordinarily not self-executing and must be invoked). *See also Murphy*, 465 U.S. at 429 (witness must ordinarily assert the privilege rather than answer; but if witness chooses to answer rather than assert the privilege, his choice is considered to be voluntary since he was free to claim the privilege).

2. There was no evidence that Sahs' written statement was compelled.

Sahs' main argument is that his written statement was compelled, because he was forced to give the written statement by virtue of the alleged language on the DOC form (Sahs' brief at 11-15). As a preliminary matter, the State emphasizes again that there was absolutely no evidence that the written form compelled Sahs to give his oral statement. Rather, the circuit court found that the oral statement was voluntarily given at the outset of the meeting which Sahs initiated (25:12 [A-Ap. 111]), before the written form was allegedly given to Sahs. Accordingly, this court should find that Sahs' oral statement was not compelled.

But even with respect to the written statement, Sahs has failed to meet his burden of proof that it was compelled. *Mark II*, 292 Wis. 2d 1, ¶ 16 (when defendant seeks to exclude a statement based upon his Fifth Amendment privilege, defendant must first prove that the statement was incriminating, testimonial, and compelled); *Mark III*, 308 Wis. 2d 191, ¶ 10 (same). It is again worth noting that this was Sahs' initial burden of proof to show compulsion, not the State's. *Id.*

It might be true that the language Sahs cites (Sahs' brief at 12) could potentially render a written statement compelled under *Mark III*. *Mark III*, 308 Wis. 2d 191, ¶¶ 5, 16. But here, unlike in *Mark III*, where both parties conceded that the written statement was compelled, Sahs has not met his burden of proof that he was even given such a form to sign.

As the circuit court found here, any such language on a form might be a factor in finding compulsion, but Sahs had not offered up the form itself into evidence, nor had Sahs requested an evidentiary hearing for the purpose of eliciting such facts into evidence (25:7-8 [A-Ap. 106-

107]). Similarly, the circuit court found that Sahs' moving papers had not set forth a factual record by affidavit about his conditions of probation, but rather, had only set forth the representations of Sahs' counsel (25:8-9 [A-Ap. 107-108]).

Moreover, on appeal, Sahs has not pointed to where this alleged document occurs in the appellate record, but merely asserts in conclusory fashion that "[t]his is the exact notification present on the top of the January 12, 2007 statement" (Sahs' brief at 12), which he argues is "identical" to the one in *Mark* (Sahs' brief at 14). But this court should not consider arguments unsupported by facts in the record. *See*, *e.g.*, *State v. Lass*, 194 Wis. 2d 591, 604-05, 535 N.W.2d 904 (Ct. App. 1995) (appellate court will not consider arguments unsupported by appropriate references to the record).

Sahs further insinuates that the circuit court was splitting hairs, arguing that the circuit court "insufficiently considered" the alleged written notification (Sahs' brief at 13). But the law is clear that the circuit court was not obligated to consider a document which was not in evidence, and had not been proffered as evidentiary support for Sahs' moving papers—particularly when it was Sahs' burden of proof to show compulsion. *Mark II*, 292 Wis. 2d 1, ¶ 16 (defendant's burden of proof). *See also State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (if the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, then the circuit court may summarily deny the motion).

Sahs also argues that his statement was compelled, because the State acknowledged in its trial brief that Agent Krause wrote down Sahs' statement on a Department of Corrections form (Sahs' brief at 7). But contrary to Sahs' argument, all that this acknowledgement proves is that his statement was eventually reduced to writing, not that it was compelled. It was still Sahs' burden of proof to show that the oral statement was somehow compelled by threat of the

written statement—and he did not do this. It was also Sahs' burden to offer evidentiary proof—in the form of affidavits or documents entered into evidence—that the alleged form existed, and that it contained the same language as the form in *Mark*. But Sahs did not do this either.

Finally, Sahs argues that the process of taking down the written statement was somehow inherently coercive, aside from the alleged language on the form itself (Sahs' brief at 14-15). But there is absolutely no evidence on the record—in the circuit court or on appeal—that there were coercive circumstances surrounding the taking of Sahs' statement.

In sum, there was absolutely no evidence in the record to show that Sahs signed a written form compelling him to give his written statement or his oral statement. Accordingly, this court should find that Sahs did not meet his initial burden of proof in showing that he was compelled to give his statements after he validly invoked his Fifth Amendment privilege. *Mark II*, 292 Wis. 2d 1, ¶ 16 (when defendant seeks to exclude a statement based upon his Fifth Amendment privilege, defendant must first prove that the statement was incriminating, testimonial, and compelled); ¶ 27 (pre-arrest self-incrimination is not self-executing and must be invoked).

II. EVEN IF SAHS' STATEMENTS TO HIS PROBATION OFFICER WERE COMPELLED AND ADMITTED IN ERROR, SUBSEQUENT EVIDENCE WAS ADMISSIBLE, RENDERING ANY ERROR HARMLESS.

Even if this court finds that Sahs' oral and written statements to Agent Krause were somehow compelled, the inquiry does not end there. As the State will discuss below, the computer images seized pursuant to Sahs' consent, as well as Sahs' two later post-*Miranda*

statements, were still admissible, because there was a sufficient break in the stream of events between Sahs' earlier statements to Agent Krause and the later evidence. Accordingly, this court should affirm Sahs' conviction, because any error in admitting the earlier compelled statements would be harmless, given the later duplicative evidence all of which would have been admissible against Sahs.

A. The concept of derivative use immunity has no application here, because Sahs did not show that he received use immunity for his statements.

Sahs argues that "the sole source of the law enforcement's evidence, to include the computer and Defendant's custodial statement, was the January 12, 2007 compelled statement," such that the later "derivative" evidence needed to be suppressed as well, because the State did not show an "independent, legitimate source" for the evidence (Sahs' brief at 15-16). For this proposition, Sahs relies on *Kastigar v. United States*, 406 U.S. 441 (1972), and *New Jersey v. Portash*, 440 U.S. 450 (1979), both of which were adopted in *Mark III*, 308 Wis. 2d 191, ¶¶ 26-44.

Sahs, however, confuses and fails to differentiate Fifth Amendment privilege analysis, and the use/derivative use immunity analysis set forth by *Kastigar* and its progeny. These analyses are related but distinct. For the reasons discussed below, this court should analyze the facts here under a Fifth Amendment privilege analysis, rather than use/derivative use immunity analysis.

In *Kastigar*, the federal statute that provided immunity from use and derivative use of compelled statements was deemed to be commensurate with the protection afforded by the Fifth Amendment privilege against self-incrimination, and therefore sufficed to

supplant the privilege. *Kastigar*, 406 U.S. at 459. *See also In re Commitment of Harrell*, 2008 WI App 37, ¶ 17, 308 Wis. 2d 166, 747 N.W.2d 770. Stated another way, immunity from use and derivative use is coextensive with the scope of the Fifth Amendment privilege against self-incrimination, and is therefore sufficient to compel testimony over a claim of privilege. *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 20 n.8, 257 Wis. 2d 40, 654 N.W.2d 438 (citing *Kastigar*, 406 U.S. at 453). The leading use/derivative use case in Wisconsin, *Evans*,[10] was created for this limited purpose. *Tate*, 257 Wis. 2d 40, ¶ 20; *Mark II*, 292 Wis. 2d 1, ¶ 33 n.12.

But here, the *Evans'* concept of derivative use immunity, adopted from the *Kastigar* line of cases, has no application, because derivative use immunity requires that the defendant establish that he gave his compelled testimony under an initial grant of use immunity. *Kastigar*, 406 U.S. at 453; *Harrell*, 308 Wis. 2d 166, ¶ 17. Once the defendant meets this initial burden by establishing that he had an initial grant of use immunity, then the burden shifts to the State to prove that the derivative evidence was not tainted, by establishing that it had an independent, legitimate source for the disputed derivative evidence, wholly independent of the initial testimony compelled by the grant of use immunity. *Mark III*, 308 Wis. 2d 191, ¶ 28.

As discussed above, however, Sahs never met his initial burden of proof in showing that he ever <u>received</u> use immunity for his initial statements to Agent Krause. Not only did Sahs not establish the conditions of his probation or the requirements set forth in the alleged DOC form, but he also never met his burden of proof in showing that the initial statements were compelled in the first instance. In other words, Sahs cannot now receive derivative use immunity for his later statements, because

[10]*State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977).

he never showed that he received the initial grant of use immunity which compelled his earlier statements.

Accordingly, contrary to Sahs' argument, this court should not analyze this case under the concepts of use and derivative use immunity set forth in the *Kastigar* line of cases, because those concepts have absolutely no application here. Rather, this court should analyze the facts under the strict Fifth Amendment analysis set forth in *Mark III*, as discussed below.[11]

B. There was a sufficient break in the stream of events between Sahs' initial statements to Agent Krause and the later evidence obtained.

Rather than analyzing the case under *Kastigar*, as Sahs proposes, this court should analyze the facts under Fifth Amendment privilege principles, as discussed below.

1. Relevant legal principles and standard of review.

When an individual has given a compelled or involuntary statement in violation of his Fifth Amendment right against self-incrimination, his subsequent statement will also be considered involuntary unless it can be "separated from the circumstances surrounding" the earlier statement by a "break in the stream of events,"

[11]If this court disagrees, however, this court should remand for an evidentiary hearing under *Kastigar*, at which time the State could then present evidence that the later evidence was derived from a source wholly independent from the defendant's earlier immunized statement. *See Harrell*, 308 Wis. 2d 166, ¶ 31 n.11. *See also Mark II*, 292 Wis. 2d 1, ¶ 33 n.12 (prior to taking of testimony on remand concerning the circumstances surrounding the giving of the written statement, it is impossible to determine whether the conditions required for a grant of limited use immunity ever existed).

between the first statement to the second, "sufficient to insulate the statement from the effect of all that went before." *Mark III*, 308 Wis. 2d 191, ¶ 20 (internal quotations and citations omitted).

The rationale for this rule was explained by the United States Supreme Court in *United States v. Bayer*, 331 U.S. 532, 540-41 (1947):

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

Thus, when the State seeks to use a statement made subsequent to an involuntary statement, the State has the burden of demonstrating that the second statement is free from the coercive circumstances surrounding the first statement and was not directly produced by the existence of the earlier statement. *Mark III*, 308 Wis. 2d 191, ¶ 21.

Factors that may be relevant in deciding whether there is a "sufficient break" in the "stream of events" from the first statement to the second statement include: the change in the place of the interrogations, the time that passed between the statements, and the change in the identity of the interrogators. *Id.*, ¶ 22. Additionally, this court should also consider the extent to which the coercion employed in obtaining the initial confession was severe enough to likely affect the defendant's subsequent statements. *Id.* The critical inquiry is, therefore: what evidence shows that the compulsion that produced the initial statement was removed? *Id.*, ¶ 23.

As was the case above, the application of Fifth Amendment principles to the facts is a question of law, reviewed independently on appeal. *Mark II,* 292 Wis. 2d 1, ¶ 12. To the extent that the circuit court made findings of fact, however, this court should accept those findings unless clearly erroneous. *Mark III*, 308 Wis. 2d 191, ¶ 15.

2. There was a sufficient break in the stream of events between Sahs' initial statements and Sahs' consent to search his computer.

As discussed above, sometime after his January 12, 2007 statements to Agent Krause, Sahs was taken into custody for the probation violations, and revocation proceedings were initiated (7:2 [A-Ap. 119]; 9:2-3 [R-Ap. 102-103]). On January 24, 2007, Detective Chevremont then went to the Butterfield residence, whereupon she consented to the seizure of the computers, after which Sahs signed a written consent form, agreeing to allow detectives to search his computer's contents (9:3 [R-Ap. 103, 111]). A few days later, on February 1, 2007, detectives also executed a search warrant and examined the computer, locating the images there (9:3 [R-Ap. 103]).

Given this timeline of events, the computer search pursuant to Sahs' consent was sufficiently attenuated from Sahs' initial statements to Agent Krause, such that the later evidence would be rendered admissible, even if the initial statements were compelled, because the later evidence was free from any coercive circumstances of the initial statements, and not directly produced by the existence of the earlier statements. *Mark III*, 308 Wis. 2d 191, ¶ 21.

Unlike in *Mark III*, the later evidence here was obtained on a different day, with a different detective. *Id.*, ¶ 22. Although Sahs was still in custody for the probation violation, the revocation proceedings had already been

initiated (7:2 [A-Ap. 119]), such that Sahs was no longer compelled by the threat of possible revocation to give his consent to search. *Mark III*, 308 Wis. 2d 191, ¶ 25. In other words, unlike in *Mark III*, the circumstances of Sahs' restraint had changed, even though he was still restrained for the probation violation. *Id.* By that point, Sahs knew that he was going to be revoked; unlike in *Mark III*, Sahs' consent to the computer search was not coerced by the threat of possible revocation if he did not consent. *Id.* Moreover, because any alleged coercion employed in obtaining the initial statements was not severe, it was not likely to affect the subsequent statements, because Sahs already knew he was going to be revoked when he voluntarily gave consent to search his computer. *Id.*, ¶ 22.

Accordingly, this court should find that Sahs' consent to search his computer was separated from the circumstances surrounding the earlier statements by a break in the stream of events, such that the later evidence would have been admissible, because it was sufficiently insulated from the effect of all that went before. *Mark III*, 308 Wis. 2d 191, ¶ 20.

3. There was a sufficient break in the stream of events between Sahs' initial statements and Sahs' first post-*Miranda* statement to Detective Chevremont.

Similarly, there was a sufficient break in the stream of events between Sahs' initial statements to Agent Krause and his first post-*Miranda* statement to Detective Chevremont, such that Sahs' later statement was admissible because it was free from any coercive circumstances of the initial statements, and not directly produced by the existence of the earlier statements. *Mark III*, 308 Wis. 2d 191, ¶ 21.

As discussed above, Detective Chevremont met with Sahs on January 25, 2007, which was 13 days after his meeting with Agent Krause (9:3 [R-Ap. 103]). During that January 25, 2007 meeting, Detective Chevremont read Sahs his *Miranda* rights—which Sahs waived, and after which Sahs gave another statement admitting to downloading the child pornography while on probation (9:3 [R-Ap. 103]).

Given this timeline of events, Sahs' first post-*Miranda* statement to Detective Chevremont was sufficiently attenuated from Sahs' initial statements to Agent Krause, such that the later evidence would be rendered admissible, even if the initial statements were compelled. *Mark III*, 308 Wis. 2d 191, ¶ 21. Unlike in *Mark III*, here there was a basis for inferring that Sahs was no longer obligated to give a true and accurate statement in order to avoid revocation. *Id.*

Here, that basis was Sahs' *Miranda* warning—which he waived freely and voluntarily. Sahs' free and voluntary *Miranda* waiver was the very essence of saying that his subsequent post-*Miranda* statement was voluntarily given, and not a product of any initial compulsion that might have existed to give a true and correct statement to his probation agent. *Id.*, ¶ 22. Any compulsion that might have previously existed had been removed, because Sahs had been duly warned—via the *Miranda* warning—that any statement he made now could be used against him, yet he chose to give his statement anyway. *Id.*, ¶ 23 (the critical inquiry is: what evidence shows that the compulsion that produced the initial statement was removed?).

Accordingly, this court should find that Sahs' first post-*Miranda* statement was separated from the circumstances surrounding the earlier statements by a break in the stream of events, such that the later evidence would have been admissible, because it was sufficiently insulated from the effect of all that went before. *Mark III*, 308 Wis. 2d 191, ¶ 20.

4. There was a sufficient break in the stream of events between Sahs' initial statements and Sahs' second post-*Miranda* statement to Detective Chevremont.

Finally, even if Sahs' consent to search his computer and his first post-*Miranda* statement were a product of the coercive effects of the initial statements, Sahs' second post-*Miranda* statement—given six months later—most certainly was not.

As noted above, Sahs' probation was revoked after he gave his first post-*Miranda* statement, and the search warrant was executed (7:2 [A-Ap. 119]; 9:3 [R-Ap. 103]). But approximately six months then elapsed, and on June 26, 2007, Sahs again spoke with Detective Chevremont, again waived his *Miranda* rights, again admitted to leaving a computer at the Butterfield residence, and again admitted downloading and masturbating to child pornography while on probation (9:3 [R-Ap. 103]).

This second post-*Miranda* statement is most certainly not a product of any initial coercion that existed when Sahs gave his initial statements to Agent Krause. It was separated by many months' time, and given to a different detective. *Mark III*, 308 Wis. 2d 191, ¶ 22. By that point, Sahs had already served some or most of his sentence for the probation revocation, and had been duly warned—again—that any statement could be used against him (9:3 [R-Ap. 103]). Yet Sahs voluntarily and freely chose, again, to give that second post-*Miranda* statement to Detective Chevremont.

Thus, there was no longer any basis for Sahs to believe he was obligated to give a true and accurate statement in order to avoid revocation, nor was there any basis for Sahs to believe that he was obligated to give a

statement without his attorney present, because he had been given a *Miranda* warning but waived his *Miranda* rights and gave a statement anyway. *Mark III*, 308 Wis. 2d 191, ¶ 25. Sahs' second post-*Miranda* statement was sufficiently separated from the circumstances surrounding the earlier statements by a break in the stream of events, such that the later evidence would have been admissible, because it was sufficiently insulated from the effect of all that went before. *Id.*, ¶ 20.

Not only was the second post-*Miranda* statement separated by time and events, it was free from any coercive effects of the initial statements and not directly produced by the existence of the earlier statements. *Id.*, ¶¶ 21-22. Sahs was in no way, shape or form, obligated to give this later statement, but he chose to give it anyway. This court should find Sahs' second post-*Miranda* statement admissible, even if his initial statements were compelled. *Id.*

Consequently, given the duplicative nature of this later evidence which would have been admissible against Sahs, any error in admitting the earlier compelled statements would have been harmless, and this court should affirm Sahs' conviction. *Id.*, ¶¶ 45-46 (errors in admitting evidence that should have been excluded under Fifth Amendment are subject to harmless error analysis).

C. In the alternative, an evidentiary remand is required to allow the State to meet its burden of proof on whether there was a sufficient break in the stream of events between Sahs' initial statements to Agent Krause and the later evidence obtained.

As the circuit court explicitly stated, it was not going to make any factual findings as to what happened after the January 12, 2007 meeting, because it found that

Sahs' initial statements to Agent Krause were not compelled (25:12 [A-Ap. 111]). Therefore, because Sahs did not meet his initial burden of proof that the statements were compelled, the State was not required to meet its burden of proof in showing that the statements were not compelled. *See*, *e.g.*, *Mark III*, 308 Wis. 2d 191, ¶¶ 13-18 (parties conceded that initial statement was compelled), ¶¶ 20-25 (burden shifts to State to show that subsequent statements were not compelled). Similarly, because the circuit court found that the initial statements were admissible, the State was not required to meet its burden of proof under a harmless error analysis. *Id.*, ¶¶ 45-46.

Accordingly, even if this court finds that Sahs' initial statements were compelled, the remedy is not to enter a judgment of acquittal or to allow Sahs to withdraw his plea, as Sahs argues (Sahs' brief at 17). Rather, the remedy is to remand to the circuit court for an evidentiary hearing, because the State never had the opportunity to proffer evidence that there was a sufficient break in the stream of events between Sahs' initial statements to Agent Krause and the later evidence obtained. *Mark III*, 308 Wis. 2d 191, ¶¶ 20-25 (burden shifts to State to show that subsequent statements were not compelled).

Similarly, if this court finds that Sahs received use immunity for his original statement, this court must remand for an evidentiary hearing under *Kastigar*, so that the State can have an opportunity to meet its burden of proof that Sahs' later statements were derived from a source wholly independent of Sahs' original immunized statement. *Harrell*, 308 Wis. 2d 166, ¶ 31 n.11. *See also Mark II*, 292 Wis. 2d 1, ¶ 33 n.12 (prior to taking of testimony on remand concerning the circumstances surrounding the giving of the written statement, it is premature to apply *Evans*, because it is impossible to determine whether the conditions required for a grant of limited use immunity ever existed).

CONCLUSION

For the reasons set forth, the State respectfully requests that this court affirm the judgment of conviction. Sahs' statements to Agent Krause were not compelled; but even if they were, there was a sufficient break in the stream of events between his initial statements and the subsequent evidence obtained later, such that the later evidence was admissible against Sahs.

In the alternative, should this court find that the initial statements were compelled, or that the initial statements were given under a grant of use immunity, the State respectfully requests that this court remand for an evidentiary hearing so the State can meet its burdens of proof that the later statements were not compelled and not derived from the earlier statements.

Dated this 12th day of April, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,975 words.

Dated this 12th day of April, 2010.

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SARAH K. LARSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of April, 2010.

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