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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No.: 2009AP002916-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

GREGORY SAHS,
Defendant-Appellant-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY CONEN, PRESIDING.

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TABLE OF CONTENTS

CASES CITED

STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

ISSUES PRESENTED

I. How a trial court, and hence, the Court of Appeals, should consider an issue related to a Defendant's providing a Statement to a probation agent when the Statement is allegedly not

in the record. This, even though the pleadings before the trial court cited the substance of the Statement and its notice to probationers? Both the State and the trial court acknowledged these references and this information. Arguably this issue could apply to any statement provided by a criminal Defendant, when that statement is not in the record. This, even though the parties do not dispute either the existence of the Statement or its contents.

This Petition, and Appeal, pertains to Defendant's guilty plea. Prior to this plea, Defendant, at the trial court level, sought suppression of any evidence derived from a Statement that he had provided to his probation agent. Defendant had met with his agent and provided a written statement. The agent took this statement on a standard DoC form. However, this form itself indicated that none of the information provided could be used against him in criminal proceedings. This form also indicated that DoC required Defendant to provide such information, and, that failure to so provide would be a rules violation and could lead to revocation. This information was in a notice at the top of the DoC form. Defendant's agent check-marked this notification prior to taking Defendant's statement. Contrary to this notice, Defendant's agent provided the Statement to law enforcement. Law enforcement then obtained a warrant to seize and search Defendant's computer. Also, law enforcement custodially interrogated the Defendant. He provided an inculpatory statement.

Defendant provided pleadings to the trial court that asserted the existence of the notice at the top of the DoC form indicated in the preceding paragraph. The pleadings provided this entire notice verbatim to the trial court. Defendant never attached the form itself to any such pleadings. The State provided responsive pleadings that acknowledged the existence of this notice. The trial court also acknowledged this notice. Hence, at the trial level, there was no dispute about the existence of the statement nor its contents. Furthermore, the pleadings were part of the record. Hence, they were before the Court of Appeals. Nevertheless, the Court of Appeals determined that this document was not in the trial court record. This, even though Defendant had cited the existence of this document, the notice and information contained in the document, as well as background on the taking of this document. The State, at the trial court level, acknowledged this chronology and the statement on the DoC form with the accompanying notice. The State's response indicated that the agent wrote down this statement on a Department of Corrections form which was signed by the Defendant. (9:2). The trial court denied the Motion not on the basis of the "lack of record," but instead, simply on the assertion that Defendant's statement had not been compelled. The trial court acknowledged the notice and the existence of the statement. However, the Court of Appeals affirmed the trial court's denial of Defendant's Suppression Motions. (A 101-107).

Clearly, the parties, and the trial court, acknowledged the existence and the contents of the Statement at the trial level. The trial court pleadings detailed the contents of the Statement to such an extent that the parties could litigate this matter. The trial court's oral Order denying Defendant's Motions to Suppress Evidence did not question either the existence of the Statement or its contents. However, now the Court of Appeals believes that the record is insufficient to determine the contents and validity of the Statement. This conclusion is inappropriate, given that the trial court and the parties at that level were able to determine the issue. Hence, the standard for a determination of when the record is complete enough for the Court of Appeals to decide an issue must be clarified. This, under present or similar circumstances.

A Decision from this Court would help clarify the law on when, and how, information must be preserved at the trial court level in order to become part of the appellate record. Here, the DoC form had been cited by the Defendant in his filed pleadings. Both the State and trial court agreed with this representation. The State did so in its filed pleadings. The trial court did so in its oral Decision. All of this material is part of the appellate record. Nevertheless, the Court of Appeals disagreed that this Statement was part of the record. Accordingly, the Court of Appeals' Decision in this matter has created new boundaries as to when information is

part of the appellate record. Such a Decision from this Court would also help clarify the law as to what actually constitutes "part of the appellate record."

Clearly, the issue cited in this section of this Brief is not limited to identical situations such as present here. For example, an instance may arise in a Fifth Amendment Custodial Statement situation when the parties do not introduce the statement in question before the trial court, but agree to the relevant contents of that Statement.

II. Whether a Defendant's Statements and oral admissions to the probation agent has been compelled. This, when the Defendant provides those Statements and oral admissions when the Defendant attends a meeting with the agent. The Defendant had initially provided oral admissions. However the agent then required a written statement. This written statement contained a notification that the statement could not be used against the Defendant criminally, and failure to provide such a statement could lead to revocation.

Furthermore, the Defendant knows that the Department is requiring him to take a mandatory polygraph the next day. He also knows that he will fail this polygraph due to his conduct. He further knows that the Department will then require him to provide a written statement after this failure. Failure to provide such true and correct information could lead to revocation. This, due to

his original rules of supervision. Under the circumstances, all of the statements and oral admissions are compelled. The compelled statement will occur inevitably.

Here, the trial court determined that Defendant's oral admissions to his probation agent had not been compelled. This, because Defendant had provided oral admissions to his agent prior to the agent requiring the written Statement. The Statement was on a standard DoC form. However, the trial court insufficiently considered the notice at the top of that DoC form. This is the same notice indicated in the preceding section, "Issue I." As discussed, in addition to indicating that no information could be used in a criminal proceeding, it also indicated that the Defendant must account in a truthful manner and that failure to do so is a violation that could lead to revocation. The agent checked this box indicating that he had notified the Defendant of this information. Clearly, this notification creates a requirement for probationers to provide information. Or, they reasonably believe that revocation will occur. Therefore, the written Statement had been compelled. The notice does not limit its warning to whether the information must be provide in response to an agent's questions.

Furthermore, the Defendant provided the oral admissions only a day prior to a scheduled required polygraph examination. His rules of supervision required that he take the polygraph. However, Defendant knew, based upon his conduct while on supervision, that

he would fail the polygraph. Had that occurred, then the Department would have compelled a statement. He knew that he would have had to provide such a statement. His rules of supervision also required that he provide true and correct information when asked. This, or face potential revocation. Should a Defendant's oral admissions, under those circumstances, be treated as non-compelled? A compelled statement would have occurred inevitably. Hence, the oral admissions had been compelled.

Nevertheless, the Court of Appeals affirmed. The Court did not consider the written notification. Instead, the Court focused solely upon his voluntary admissions prior to the required written statement. The Court indicated that, when the Defendant had provided the oral admissions, there was nothing in the record that had indicated that he knew of the notification's existence. However, this is erroneous. The record clearly indicates that he knew that, as a rule of supervision, he was required to provide true and correct information when asked. He also knew that failure to abide by the rules of supervision could lead to revocation. So, the Court's Decision is erroneous and contrary to the facts and the record. As indicated, the oral admissions had been compelled. This situation can reasonably reoccur.

The Court must clarify the standards that determine a finding of compulsion. This, under situations similar to present here. Does compulsion occur when a Defendant provides a compelled written

statement after attending a meeting with his the agent? At that meeting he provides oral admissions that lead to the required written statement. First, the written statement is compelled. There is a warning notification at the top of that statement. Second, the oral admissions only occur a day prior to a mandatory required polygraph examination. Defendant reasonably believes that he will fail that exam due to his conduct while on supervision. The Department will then compel him to provide a written statement. Under such circumstances, are the oral statements compelled?

A Decision from this Court would help clarify the law on when a statement from a probationer to his agent is compelled. Here, Defendant had provided the statement. However, the acknowledged notice at the top of this form indicates, that Defendant had an obligation to provide the information. This, or he would be in violation of his rules and subject to revocation. Accordingly, the Court of Appeals' Decision in this matter had created new boundaries as to when such a statement becomes compelled. Such a Decision from this Court would help clarify what constitutes a compelled statement, for purposes of a statement provided to a probation agent.

Furthermore, does compulsion occur when a Defendant provides an oral admission prior to a required written statement, knowing that he inevitably will have to provide a compelled statement based upon his conduct while on supervision? Furthermore, at the time of

the providing of the oral admissions, the Defendant knew that he had an obligation to provide true and correct information or face potential revocation. This, based upon his original rules of supervision.

A Decision from this Court would help clarify and establish such necessary standards as when oral statements to a probation agent are compelled.

STATEMENT OF THE CASE

Defendant Gregory Sahs was charged in a two Count Criminal Complaint dated June 28, 2008. This Complaint charged Defendant with Possession of Child Pornography, contrary to Wis. Stats. 948.12(1m) & (3)(a). Essentially, the Complaint alleged that Defendant possessed a computer that contained two photo recordings of child pornography. Law enforcement determined that the photos had been captured on two separate dates. Each Count applied to each photo recording. The Complaint also indicated that the Defendant had given a statement admitting to that the computers belonged to him, that he had downloaded the material, that he did know the sexually explicit nature of the material, and that the material related to children. (2:1-2).

An initial appearance occurred on July 3, 2008. At that time, the Court Commissioner informed the Defendant of the maximum

possible penalties. The Commissioner informed the Defendant that there was a presumptive minimum sentence of three years. (22:2-3).

On July 24, 2008, Defendant waived his preliminary hearing. After this waiver, the Court Commissioner bound Defendant over for trial. At that time, the State filed a Criminal Information. This Information contained the two original Counts originally charged in the Criminal Complaint. At that time, the Defendant entered pleas of Not Guilty to both Counts. (24:2-3; 6:1).

On October 27, 2008, Defendant filed two Motions to Exclude Evidence. His first Motion to Exclude Evidence sought to exclude written and oral statements that Defendant had provided to his probation officer allegedly admitting to the conduct alleged in the Criminal Complaint. The Motion indicated that Defendant had provided these statements to his probation agent on January 12, 2007. The Defendant's rules of supervision required that he make these statements to his probation agent or face revocation of his probation. The written statement contained this notification. Because the Defendant had to make those statements or face revocation of his probation, the statements were compelled, testimonial, and incriminating. Therefore, exclusion was required. (7:1-7).

The first Motion indicated that Defendant had been placed on probation for three years in 2005. This, after a conviction of Possession of Child Pornography out of Waukesha County. Standard

rules of probation included providing true and correct information when asked, submitting to polygraphs, and full cooperation with sex offender treatment. (7:1).

The first Motion also indicated that Defendant had participated in sex offender treatment as part of his probation rules of supervision. On December 15, 2005, he had failed a polygraph test on the question of whether he had broken any of his rules of supervision. The treatment provider temporarily expelled Defendant from the sex offender treatment program. Defendant's agent had been informed of this test result as well as Defendant's perceived noncompliance with treatment. Another polygraph had been scheduled for January 13, 2007. (7:1-2).

On January 12, 2007, Defendant attended a meeting with his probation agent, Michael Krause. He made oral statements that Mr. Krause noted in writing. The statements contained admissions to having accessed child pornography again on a personal computer that he had at a friend's house. The written statement was on a standard Department of Corrections form with a box checked off next to the following notification:

> "I have been advised that I must account in a true and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings."

Clearly, the only reason that Defendant provided the information at the January 12, 2007 meeting was because he knew that he would fail the mandatory polygraph the next day. He also knew that, based upon his rules of supervision, that he would then have to provide a compelled statement. This, or face potential revocation. Hence, the oral admissions on January 12, 2007 were not truly voluntary.

The notification was at the top of the written statement. A checked box appeared in front of this notification.

Agent Krause took Defendant into custody and revoked his probation. (7:2).

The State's Response also acknowledges that Agent Krause, and not the Defendant, wrote the entire written Statement on a Department of Corrections form. The State's Response also acknowledges the existence of the form. The Response does not deny the existence of this notification. (9:2).

Defendant argued that Defendant's January 12, 2007 statements to Agent Krause had been compelled, were testimonial, and were incriminating. Therefore, these Statements were inadmissible. (7:6).

Defendant's second Motion to Exclude Evidence sought to exclude all evidence obtained by law enforcement after obtaining the Probation and Parole statement. According to this second Motion, Agent Krause provided Defendant's information obtained in

statements to law enforcement. These were the written and oral statements made on January 12, 2007, as discussed in Defendant's First Motion to Exclude Evidence. Law enforcement then, as a result of these statements, obtained a search warrant, seized Defendant's computer, and obtained a custodial statement. The custodial statement related to the statements that Defendant had made to Agent Krause. Law enforcement obtained all of this evidence entirely due to the statements that Defendant had made to Agent Krause, and Agent Krause's subsequent passing on of the information to law enforcement. Defendant sought to exclude this evidence as illegally obtained derivative evidence. This, because the underlying original statements provided to Agent Krause were inadmissible, as argued in Defendant's first Motion to Exclude Evidence. (8:1-3).

On November 10, 2008, the State filed its Response to Defendant's Motions. (9:1-10). The Response conceded that the agent wrote down the Defendant's statement on a Department of Corrections form which the Defendant had signed. (9:2). The Response does not deny the existence of the warning notice in question.

On December 17, 2008, the trial court orally denied both of Defendant's Motions to Exclude Evidence. The trial court determined that the statements were not compelled. (25:8). The court determined that the Defendant had initiated the January 12, 2007 by calling his agent. The court concluded that the Defendant had

volunteered the information that he had been violating the rules, to include using a friend's computer to download images of child pornography. The court found these facts to be undisputed. The court denied suppression of these statements to Agent Krause, based upon these facts. Accordingly, the trial court also denied suppressing the fruits of those statements. (25:11-12). The court found that the facts were insufficient to show compulsion and, therefore, suppression was not warranted. (25:16).

On December 17, 2008, the trial court also indicated that, simply because an agent might revoke is not enough to establish compulsion. (25:14).

Here, the trial court insufficiently considered the written notification at the top of the January 12, 2007 statement. This notification was that "I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked." There is a checked box in front of this notification. Defendant's First Motion to Exclude refers to this notification. The State's Response does not deny the existence of this notification. Clearly, this notification creates a requirement for probationers to provide information. Or, the probationer reasonably believes that revocation will occur. Whether or not this information must be in response to a probation agent's questions is irrelevant, under this notification. This notification does not so

limit the warning.

Furthermore, under the notification of the January 12 Statement, failure to provide information creates the possibility of revocation. This is a threat that compels the providing of the statement. To threaten revocation is to threaten a loss of freedom. Clearly, this notification compels the Statement. The Statement is, therefore, legally compelled. This, regardless of whether or not Defendant voluntarily contacted his agent to schedule an appointment, and voluntarily appeared at this appointment. Contrary to the trial court, the compulsion does not occur in the appointment, but in the providing of the Statement. Here, Defendant's Statement was compelled.

Furthermore, the trial court ignores the process in the taking of the written Statement itself. Agent Krause himself wrote out the written Statement, with the notification box checked, on a Department of Corrections form. Clearly, Defendant did not have a choice in the matter. The notification required that Defendant provide the statement. This process clearly evidences compulsion. This, once again, regardless of whether or not Defendant voluntarily scheduled, and subsequently appeared at, the meeting.

The trial court later issued a written Order Denying Defendant's Motions to Exclude Evidence. This Order was dated January 12, 2009. The trial judge was Jeffrey Conen. (10:1).

Defendant subsequently pled guilty to one Count of the two

Count Criminal Information. The trial court eventually sentenced him to seven years prison, to consist of three years initial confinement plus four years extended supervision. (28:29-30).

Defendant filed his Notice of Appeal in a timely fashion.

On October 26, 2010, the Court of Appeals denied Defendant's Appeal. The Decision indicated that the DoC Statement was not part of the record on appeal. However, this Decision ignores that the Defendant filed his pleadings with the trial court. These pleadings recited this statement and the notice. Furthermore, the Decision ignores the State's Response at the trial level which concedes the existence of the statement on a DoC form and its notice. All of these pleadings are part of the record on appeal. Finally, the trial court in its oral Decision on December 17, 2008 treated the statement and its notice, as presented by the Defendant, as having been credibly presented. This Decision is part of the record as part of the transcripts in this matter. Accordingly, contrary to the Court of Appeals, the Statement and its notice <u>are</u> part of the record on appeal. The Decision does not provide any case law that cites essentially that such a record is insufficient for a Court of Appeals' consideration and ruling. Accordingly, the Court improperly minimizes the materials provided to it, as part of the record. This failure and minimization is legally improper. It must be reversed.

The October 26, 2010 Decision also improperly misinterprets

the compulsion level of the Statement to the probation agent. Based upon the unrebutted notice on the DoC form in question, Defendant had no choice but to answer the questions and provide information. Failure to so provide information would have been a violation of his rules and could have led to revocation. The notice indicated such. The Court of Appeals indicates, in this Decision, that Defendant was not compelled to incriminate himself. However, this is contrary to the notice and the process. The process required a mandatory polygraph examination the day after the oral admissions. Defendant knew that he would have failed that polygraph exam due to his conduct on supervision. He also knew that, once that happened, the Department had the right to compel true and correct information. Furthermore, he knew that failure to provide such true and correct information could lead to revocation. He knew of this requirement, and the potential consequences of failure, prior to January 12, 2007. This, because the original rules of supervision had provided all of this information. Hence, the process itself, even with respect to the oral admissions, mandate a finding that the oral admissions had been compelled.

As indicated, the process required the providing of information or potential revocation. The Defendant's First Motion to Exclude Evidence indicates that the box next to this notification had been checked. (7:2). Clearly, the agent checked this off to indicate that he had provided the Defendant with this

notice. Therefore, contrary to the Decision, the record clearly supports Defendant's position that he had been aware of this notice's existence at the time of his admissions. Accordingly, for this reason as well as the reason in the prior paragraph, the admissions were not voluntary, but had been compelled.

For the aforementioned reasons, the Court of Appeals erred in deciding that the oral admissions were voluntary. Its Decision must be reversed.

ARGUMENT

ALL OF DEFENDANT'S JANUARY 12, 2007 STATEMENTS WERE COMPELLED. CONTRARY TO THE COURT OF APPEALS, THE RECORD SUPPORTS SUCH A POSITION. THEREFORE, THE TRIAL COURT ERRED IN DENYING DEFENDANT'S SUPPRESSION MOTION. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT. FURTHERMORE, ALL SUBSEQUENT DERIVED EVIDENCE SHOULD HAVE ALSO BEEN SUPPRESSED.

A. The Trial Court Erred in Denying Defendant's First Motion to Exclude Evidence. Both the Oral Admission(s) as well as the Written Statement that Defendant had provided on January 12, 2007 Had Been Compelled. Similarly, the Court of Appeals' Decision is Erroneous. Both Decisions Must be Reversed.

A written statement to a probation agent that contains the provision that the probationer must "account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked," is compelled. Furthermore, the State has the burden of showing that such statements are not compelled. The Defendant does not have this

burden. In re. Mark, 308 Wis.2d 191, 747 N.W.2d 727 (Ct.App. 2008).

Mark was a case that involved sexually violent commitment proceedings under Wis. Stats. 980. However, the Court of Appeals indicated that a respondent at a 980 commitment trial had the same rights as a defendant in a criminal case. Therefore, a respondent's statement to a parole agent is properly excluded under the Fifth Amendment privilege against self-incrimination if it is testimonial, compelled, and incriminating. Id. at 199. Accordingly, this case applies to criminal cases.

Here, no party is disputing that Defendant's January 12, 2007 statement is both testimonial and incriminating. The only issue presented by the parties, and discussed by the trial court on December 17, 2008, was the issue of compulsion. Accordingly, this Brief will only discuss the matter of compulsion.

In Mark, the State offered into evidence at a Wis. Stat. 980 jury trial both a written and an oral statement provided by Mark to his parole agent. The written statement, signed by Mark, was on a form at the top of which was printed:

> "PROBATION/PAROLE OFFENDER I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings..."

This is the exact notification present on the top of the January 12, 2007 statement at issue in this present matter.

In Mark, the Court of Appeals concluded that the State had the burden of showing that the written statement was not compelled. The Court discussed the written provision at the top of that statement. The Court discussed this provision as creating a perception on the part of Mark that he had an obligation to give a true and accurate account in order to avoid a revocation. The Court found important his thinking that he had an obligation to provide a true and accurate account in order to avoid a revocation. His perception created the compulsion. Based upon this statement, the Court concluded that this statement had been compelled. Id. at 208.

The Court in Mark did not base its conclusion as to compulsion on who asked the questions, or how the process of taking the written statement commenced. According to the Court's holding, the written notification supports a finding of compulsion; the probationer must provide a true and accurate statement in order to avoid a revocation. The perception that the probationer must provide a true and accurate account in order to avoid revocation is clearly crucial. Whether or not revocation occurs is not the test.

The Court's holding in Mark rebuts the trial court's conclusion that simply because an agent might institute revocation is not sufficient to establish coercion. As discussed, the probationer's perception, and not the actual commencement of

revocation proceedings, is crucial to a finding of compulsion. The perception is the test.

Here, as discussed, the trial court insufficiently considered the written notification on the top of the January 12, 2007 statement. This notification is identical to that present in Mark. Defendant's First Motion to Exclude refers to this notification. The State's Response does not deny its existence. Clearly, as indicated in Mark, this notification creates a requirement for probationers to provide information. Whether or not this information must be in response to a probation agent's questions is irrelevant, under this notification. Mark essentially states that this notification does not so limit its warning. The notification creates the compulsion.

Furthermore, under the provision of the January 12 statement, failure to provide information creates the possibility of revocation. This is a threat that compels the providing of the statement. To threaten revocation is to threaten a loss of freedom. Clearly, a probationer thinks that failure to provide the statement will lead to revocation. This perception compels the statement. The notification creates the perception. Therefore, according to Mark, the statement is, therefore, compelled. This, regardless of whether or not Defendant voluntarily contacted his agent to schedule an appointment, and voluntarily appeared at this appointment. Contrary to the trial court, the compulsion does not occur in the

appointment, but in the providing of the statement. Here, Defendant's statement was compelled.

Furthermore, the trial court ignores the process in the taking of the written statement itself. Agent Krause himself wrote out the written statement, with the notification box checked, on a Department of Corrections form. Both parties agreed as to such a process. Logically, Defendant did not have a choice. The notification required that Defendant provide the written statement. Therefore, this process clearly evidences compulsion. This, regardless of whether or not Defendant voluntarily scheduled, and subsequently appeared at, the meeting.

Finally, Defendant's oral admissions on January 12, 2007 were not truly voluntary. This, even though he had provided them prior to the written statement with the notification. First, he knew from his original rules of supervision that failure to provide true and correct information could lead to revocation. So, contrary to the Court of Appeals, he knew of the existence and substance of this notification prior to the providing of the oral admissions. Furthermore, he knew that he would fail the mandatory polygraph examination the next day. Then, he knew that the Department had the right to compel a written Statement from him at that point. So, for both of these reasons, the simple oral admissions were not voluntary and were compelled.

On October 26, 2010, the Court of Appeals denied Defendant's

Appeal. This, for two reasons. First, the Decision indicated that the DoC form containing the Defendant's Statement at issue was not part of the Record on Appeal. However, this Decision ignores that the Defendant filed his pleadings with the trial court. These pleadings provided this Statement and its warning notice. Furthermore, the Decision ignores the State's Response at the trial level which acknowledges the existence of the Statement and its notice. All of these pleadings are part of the record on appeal. The Court of Appeals received this material during the course of this appeal. Finally, the trial court in its oral Decision on December 17, 2008 treated the Statement and notice, as presented by the Defendant, as having been credibly presented. The Decision acknowledges the existence of this form and its notice. This oral Decision is part of the record as part of the transcripts in this matter. Accordingly, contrary to the Court of Appeals, the Statement and its notice <u>are</u> part of the record. The Court of Appeals had this material for its consideration. The Decision does not provide any case law that cites essentially that such a record is insufficient for a Court of Appeals' ruling. Accordingly, the Court improperly minimizes the materials provided to it, as part of the record. This failure and minimization is legally improper. It must be reversed.

The October 26, 2010 Decision also improperly misinterprets the compulsion level of the Statement to the probation agent. Based

upon the undisputed notice at the top of the DoC form in question, Defendant had no choice but to answer the questions and provide information. Failure to so provide information would have been a violation of his rules and could have led to revocation. The notice indicated such. The Court indicates, in this Decision, that Defendant was not compelled to incriminate himself. However, this is contrary to the notice and the process. The process required the providing of information or potential revocation. Revocation clearly implies custody. The Defendant's First Motion to Exclude Evidence indicates that the box next to this notification had been checked. (7:2). Clearly, and reasonably, the agent checked this box off in order to indicate that he had provided the Defendant with this notice. Therefore, contrary to the Decision, the record clearly supports Defendant's position that he had been aware of this notice's existence at the time of his oral admissions. Furthermore, as discussed, the record clearly indicates that Defendant knew from his original rules of supervision that the Department required that he provide true and correct information when asked. He also knew that failure to follow the rules of supervision could lead to revocation. He knew of this information prior to January 12, 2007. Also, he knew that he would fail the required polygraph examination. Accordingly, the oral admissions were not voluntary, but had been compelled. He had no choice but to provide the information. This, or face possible custody as a rules

violation. The Court errs in deciding otherwise.

The Court of Appeals also misstates its cited case law in its Decision. The Court cites State vs. Mark, 292 Wis.2d 1, 718 N.W.2d 90 (2006) for the proposition that the mere fact that an individual is required to appear and report truthfully to his or her probation agent is insufficient to establish compulsion. The Court indicates that Mark cited Minnesota vs. Murphy, 465 U.S. 420 (1984) for this proposition. However, this use by the Court is incorrect. Contrary to the Court, this case supports Defendant's position.

In Mark, the Wisconsin Supreme Court indicated that Minnesota vs. Murphy indicated that the answers of a witness are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of privilege. However, the Supreme Court further indicated that this general rule that a witness must assert his privilege has a few well established exceptions. This general rule is inapplicable in cases where the assertion of the privilege is penalized so as to foreclose a free choice to remain silent and compel incriminating testimony. Id. at 19 (Paragraph 27, footnote 8), citing Minnesota vs. Murphy.

The Supreme Court in Mark also indicated the following, citing Minnesota vs. Murphy:

> "There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have

> created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." Id. at 19 (Paragraph 27, footnote 8), citing Minnesota vs. Murphy, 465 U.S. 434-435.

Therefore, based upon Mark, Defendant did not have an obligation to assert any privilege in order to assert compulsion. As indicated in Murphy, Defendant's status as a probationer prohibited him from asserting a privilege. Had he asserted such a privilege, then he would have been penalized. Revocation was the penalty. Clearly, and contrary to the Court of Appeals, both Mark and Murphy support the Defendant's position that he could not assert any privilege. These cases also support his position that his answers, and the statement in question, had been compelled. Therefore, based upon all of the facts and law indicated herein, the Court of Appeals erred in deciding otherwise. Defendant's statement had been compelled and was not voluntary. The Court's Decision must be reversed.

Furthermore, the Wisconsin Supreme Court has just recently issued case law that supports Defendant's position. This case is State vs. Spaeth, 343 Wis.2d 220, 819 N.W.2d 769 (2012).

In Spaeth, the Supreme Court found that Spaeth's failure to take a polygraph could result in his revocation, and his failure to sign the "consent form" prior taking this polygraph could have been deemed a refusal to take the polygraph. In addition, any statements that Spaeth made during the polygraph were subject to derivative

and use immunity and could not be used against him in a criminal trial. State vs. Spaeth, 343 Wis.2d 220 at 226.

Here, the written notification indicates that Defendant's refusal to provide information could lead to his revocation. Furthermore, the notification indicates that this information could not be used against him in a criminal trial. This is equivalent to derivative and use immunity. Accordingly, the situation here is identical to that in Spaeth, except that Spaeth concerned a polygraph and this present situation concerns the providing of information. In both situations, the probationer's conduct, whether the providing of information or a polygraph, was mandatory and subject to revocation. Furthermore, in both situations, the conduct was protected against criminal prosecutions.

After taking the polygraph, Spaeth admitted various violations of his rules of supervision, as well as possible criminal offenses, to his agent. Id. at 227. Subsequently, law enforcement arrested Spaeth based upon these statements. He made an inculpatory custodial statement to police after having been Mirandized. Id. at 227-228.

In Spaeth, the Supreme Court found that Spaeth's statement to his agent was compelled, incriminating, and testimonial. The Court found that the statement to police had been derived from this statement to the agent. Accordingly, the police statement was not derived from a source "wholly independent" from his compelled

testimony. The police statement was subject to derivative use immunity and could not be used in any subsequent criminal trial. The Court ordered suppression of the resulting police custodial statement.

Here, the situation, as indicated, is identical to that of Spaeth. Mr. Sahs' statements, whether oral or written, were compelled, incriminating, and testimonial. Based upon the notification, they were subject to derivative and use immunity. The police directly used these statements in order to obtain a custodial statement, and physical evidence. The agent had provided the written and oral statements to law enforcement. These written, and oral, statements resulted in the police's obtaining the custodial statement and physical evidence. As in Spaeth, this police statement and physical evidence were not obtained from a source "wholly independent" from the compelled testimony. Accordingly, as in Spaeth, this Court must reverse the Court of Appeals' Decision and suppress the custodial statement and all resulting physical evidence.

Furthermore, Spaeth rejects any argument that Defendant's statements to his agent on December 12, 2007 were not compelled. As in Spaeth, Defendant had an obligation to provide information to his agent. This, whether or not oral or written. Furthermore, Spaeth rejects any argument that the mere possibility of revocation is insufficient to create compulsion. Spaeth's failure to take the

polygraph could have resulted in his revocation. Id. at 226. As discussed, Spaeth holds that the requirement to provide information or possibly face the consequence of revocation creates compulsion, and hence involuntariness. This is the exact situation here. This, with respect to both the oral admissions as well as the written statement.

State vs. Spaeth is directly precedential in this present matter. The Supreme Court's ruling in this case mandates reversal of the Court of Appeals' Denial of Defendant's Appeal.

Based upon the foregoing, Defendant's January 12, 2007 written Statement to Agent Krause was compelled. Furthermore, the oral admissions had also been compelled. The trial court erred in concluding otherwise. It's oral Order must be suppressed.

As discussed herein, the trial court's Decision and Order, and the Court of Appeals' Decision, are erroneous and improper. They are contrary to appropriate case law and the trial evidence. They must be reversed.

B. Because the January 12, 2007 Statement had been Compelled, the Derivative Evidence must also be Suppressed.

The Fifth Amendment protection at trial also precludes the Government from presenting evidence that is the result or derivative use of compelled statements. The prosecution cannot use the compelled evidence in any respect, to include any evidence derived either directly or indirectly from such evidence. Kastigar vs.

United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), New Jersey vs. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979); In re. Mark, 308 Wis.2d 191 at 213-214.

Once a Defendant establishes that a statement is compelled, the Government has the burden of showing that it had an independent, legitimate source for the disputed evidence. There is an affirmative duty on the prosecution to prove that the evidence that it proposes to use is derived from a legitimate source wholly independent of the compelled statement. Kastigar vs. United States, 406 U.S. 441 at 453, 460.

Here, 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 to Agent Krause. Even the State's Response acknowledges that the sole source of the police department's information concerning the content of the statement arrived from Agent Krause. The State indicates that, upon completion of the taking of the statement, Agent Krause took Defendant into custody and initiated revocation proceedings. Then, Agent Krause notified the appropriate police department regarding the Defendant's statements. Shortly thereafter, on January 24, 2007, law enforcement recovered the computer. On January 25, 2007, law enforcement obtained a custodial statement from the Defendant while he was in custody. On February 1, 2007, the Detective obtained a search warrant and examined the computer. Finally, the police Detective re-

interrogated the Defendant on June 26, 2007. (9:2-3).

There is no legitimate, independent source for the evidence that law enforcement obtained in this matter. The sole source for all of this evidence is Defendant's compelled January 12, 2007 statement to Agent Krause. Based upon the matters presented within this Petition, the Court must order the suppression all of this evidence. Both the trial court and the Court of Appeals erred in deciding otherwise.

CONCLUSION

WHEREFORE, For the Reasons Indicated Above, GREGORY SAHS, by and through his attorney Mark S. Rosen of the Law Offices of Rosen and Holzman, hereby requests that this Honorable Court reverse the Decision of the Court of Appeals.

Dated this _____ day of December, 2012.

Respectfully Submitted,

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State Bar No. 1019297

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CERTIFICATION

I hereby certify that the Defendant-Appellant-Petitioner's Supreme Court Brief in the matter of State of Wisconsin vs. Gregory Sahs, 2009AP001916-CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is thirty one (31) pages.

Dated this 11th day of December, 2012, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant-Petitioner
State Bar No. 1019297

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant-Petitioner's Supreme Court Brief in the matter of State of Wisconsin vs. Gregory M. Sahs, Court of Appeals Case No. 2009 AP 2916-CR is identical to the text of the paper brief in this same case.

Dated this 11th day of December, 2012, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

INDEX TO APPENDIX