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STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP2916-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY M. SAHS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, UPHOLDING 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") submits that both oral argument and publication are warranted.

## SUMMARY OF STATE'S ARGUMENT

Sahs obfuscates the main issue in this case by focusing on the alleged written notification. The

threshold, dispositive issue in this case is whether Sahs has met his burden of proof in showing his initial, oral statement to his probation officer was compelled, and the State submits that Sahs did not meet this burden.

The circuit court properly found as fact that Sahs spontaneously made incriminating statements at a routine probation meeting, without having been asked any questions by his probation agent. The circuit court also properly found that Sahs had failed to offer any evidence he knew about the alleged written notification at the time he voluntarily gave his initial, oral statement, and the court of appeals properly affirmed the circuit court's ruling based on this factual predicate.

Because Sahs did not meet his burden of proof in showing his initial, oral statement was compelled, there is no Fifth Amendment violation here. Under *Minnesota v. Murphy's*[1] general rule, Sahs was required to invoke his Fifth Amendment privilege in order for it to apply. Even though Sahs' probation rules required him to tell the truth to his probation agent upon being asked questions, such a rule is not the equivalent of compulsion, absent evidence of incriminating questioning.

Moreover, notwithstanding the contents of the alleged written notification, Sahs was not placed within *Murphy's* classic penalty situation. Sahs did not prove he was aware of, and understood, the contents of the alleged written notification at the time he made his initial, oral statement. More importantly, even if the notification existed, Sahs' oral statement was still not compelled by the mere existence of such a written notification, because there was no evidence that Sahs' agent asked Sahs any incriminating questions, nor was there any evidence that Sahs refused to answer and was penalized for doing so.

[1] *Minnesota v. Murphy*, 465 U.S. 420 (1984).

Thus, Sahs was not subjected to *Murphy's* classic penalty situation, because he was not forced to choose between foregoing his Fifth Amendment privilege by answering those incriminating questions, or invoking the privilege and jeopardizing his conditional liberty by remaining silent. Sahs' internal motivation to spontaneously confess and incriminate himself—without being asked—did not render his oral statement compelled, even if he subjectively perceived compulsion to do so.

Likewise, immunity under *Evans/Kastigar*[2] did not arise here, because Sahs was never placed in the unconstitutional dilemma of having been asked incriminating questions in the face of the alleged threat of revocation, thereby impermissibly forcing him to answer those questions or be revoked for remaining silent.

Accordingly, Sahs' initial oral statement was admissible, and his subsequent statements were all admissible as well.

## ARGUMENT

### I. SAHS' INITIAL ORAL STATEMENT WAS NOT COMPELLED, SUCH THAT UNDER *MINNESOTA v. MURPHY*, SAHS WAS REQUIRED TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE IN ORDER FOR IT TO APPLY.

#### A. Standard of review.

This case involves the application of constitutional principles to facts, a question of law reviewed independently by this court. *State v. Spaeth*, 2012 WI 95, ¶30, 343 Wis. 2d 220, 819 N.W.2d 769. This court,

[2]*State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977); *Kastigar v. United States*, 406 U.S. 441 (1972).

however, should accept the circuit court's findings of fact, unless clearly erroneous. *Id.*

### B. Sahs had the initial burden of proof in showing compulsion.

Although Sahs insists the State has the burden in proving lack of compulsion (Sahs' brief at 18-20), this court's cases make clear that Sahs—the defendant—has the initial burden of proof in showing compulsion existed before any Fifth Amendment problem would arise.[3]

For example, this court made clear in *In re Commitment of Mark*, 2006 WI 78, 292 Wis. 2d 1, 718 N.W.2d 90 ("*Mark II*"),[4] that the defendant bears the initial burden in showing the original statement was compelled. *Mark II*, 292 Wis. 2d 1, ¶¶2, 16, 25-27 (when defendant seeks to exclude statement based upon Fifth Amendment privilege, defendant must first prove statement was incriminating, testimonial, and compelled; privilege is not self-executing and must be invoked). *See also In re Commitment of Mark*, 2008 WI App 44, ¶16, 308 Wis. 2d 191, 747 N.W.2d 727 ("*Mark III*") (same).[5]

Nothing in *Spaeth* changes the defendant's initial burden of proof. Although the defendant in *Spaeth* met

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[3]Sahs does not argue his oral statement was custodial, or that it was involuntary in the sense that it was coerced by psychological pressure. Sahs does not cite any other aspect of the allegedly coercive "process" (Sahs' brief at 15, 24) which would render his statement involuntary, other than the alleged threat of revocation and the alleged threat of polygraph testing, neither of which rendered his statement compelled, as discussed below.

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

[5]*Mark III* was the appeal after this court's remand in *Mark II*. *Mark III*, 308 Wis. 2d 191, ¶1.

his initial burden of showing compulsion by virtue of a concession, *Spaeth*, 343 Wis. 2d 220, ¶49, *Spaeth* does not eliminate the defendant's initial burden of proof. Rather, the primary holding in *Spaeth* merely presupposes that the defendant's original statement to his probation agent was compelled. *Id.* ¶¶36-39, 43. *See also Mark II*, 292 Wis. 2d 1, ¶34 (defendant has initial burden of proof).

### C. Sahs did not meet his initial burden in showing his oral statement was compelled.

There was no evidentiary hearing in this case (25:3 [R-Ap. 115]).[6] Both parties, however, proffered facts in their trial court briefs (7:1-7 [R-Ap. 101-107]; 9:1-5 [R-Ap. 108-112]); and the parties later stipulated that the court could decide the case based on the factual representations set forth therein (25:3 [R-Ap. 115]). Importantly, Sahs also declined the court's invitation to have an evidentiary hearing to elicit relevant facts into evidence (25:7-8, 16 [R-Ap. 119-120, 128]).

As discussed below, the circuit court properly decided there was no compulsion, based on "apparently undisputed" (25:8 [R-Ap. 120]), and agreed-upon or stipulated facts (25:16 [R-Ap. 128]). At the same time, the circuit court properly disregarded defense counsel's conclusory assertions about the alleged written notification as being unsupported by any evidence (25:16 [R-Ap. 128]).

[6]In its supplemental appendix, the State has provided the following documents which the State deems pertinent to the disposition of this case: Sahs' trial court brief (7 [R-Ap. 101-107]); the State's trial court brief (9 [R-Ap. 108-112]); and the circuit court's decision in the suppression hearing (25 [R-Ap. 113-130]).

1. Sahs spontaneously volunteered his oral admissions at the outset of the meeting, without being asked any questions by Agent Krause.

The court made the following factual findings based on stipulated, undisputed facts:

- Sahs was on probation for possession of child pornography, and his probation agent was Agent Krause (7:1 [R-Ap. 101]; 9:1 [R-Ap. 108]; (25:8 [R-Ap. 120]);
- Sahs agreed to a probation rule to inform his agent of his whereabouts and activities; and to "provid[e] true and correct information *when asked*" (7:1 [R-Ap. 101]; 25:9 [R-Ap. 121]) (emphasis added);[7]
- Sahs called Agent Krause in January of 2007, and asked if he could come in to talk "'about some things'" (9:2 [R-Ap. 109]; 25:11 [R-Ap. 123]);
- The mutually agreed-upon date for the meeting was January 12, 2007 (9:2 [R-Ap. 109]; 25:10-11 [R-Ap. 122-123]);
- At the outset of the meeting, Sahs voluntarily and spontaneously disclosed to Agent Krause that he had violated the rules of probation, including using his friend's computer to download and masturbate

[7]Although Sahs' moving papers did not set forth a factual record by affidavit about Sahs' actual conditions of probation, (25:8-9 [R-Ap. 120-121]), the circuit court found, based upon the parties' stipulation (25:3 [R-Ap. 115]), that Sahs had a probation rule requiring him to "'provid[e] true and correct information *when asked*'" (25:9 [R-Ap. 121]) (emphasis added). The State does not challenge the existence of this particular probation condition, because such a condition is not sufficient, in and of itself, to establish compulsion, as discussed below. Moreover, such a condition would be consistent with probation rules set forth in Wisconsin cases. *Spaeth*, 343 Wis. 2d 220, ¶68.

to child pornography (9:2 [R-Ap. 109]; (25:11-12 [R-Ap. 123-124]); and

- None of Sahs' admissions were in response to questions from Agent Krause (9:2 [R-Ap. 109]; 25:11 [R-Ap. 123]).

Importantly, the circuit court found as fact that "[n]either the parties represent that he made any statements in response to questions" (25:11 [R-Ap. 123]); and there was no evidence Sahs knew of other people being revoked for refusing to answer questions, or that Sahs himself had been threatened with revocation (25:16 [R-Ap. 128]). Rather, Sahs voluntarily requested the meeting and voluntarily made disclosures at the outset of the meeting, without any evidence of compulsion by the threat of revocation (25:16 [R-Ap. 128]).

The circuit court properly predicated its factual findings on these undisputed facts. *State v. Thierfelder*, 174 Wis. 2d 213, 217 n.4, 495 Wis. 2d 669 (1993) (stipulated factual assertions may be accepted by trial court as true, even if not in record); *State v. Schulpius*, 2006 WI App 263, ¶¶11-12, 298 Wis. 2d 155, 726 N.W.2d 706 (in trial to court, where facts were undisputed, circuit court could properly decide whether sufficient evidence existed).[8]

[8]In his trial brief, Sahs acknowledged he wanted "to apply what he had learned in treatment and be honest" (7:2 [R-Ap. 102]). At sentencing, Sahs' counsel conceded that Sahs went into his probation agent's office voluntarily (28:4); and Sahs himself admitted during his allocution that he wanted to admit the crimes to his agent, believing it was the only way he could stop his behavior (28:15).

2. There was no evidence Sahs was aware of, and understood, the alleged written notification at the time he gave his oral statement.

Even now, Sahs concedes he provided his oral admissions to his agent before his agent allegedly compelled him to give a written statement (Sahs' brief at 5-6, 22). Sahs nevertheless persists in arguing the later (alleged) written notification somehow compelled and immunized his prior oral statement, because the State conceded the written notification existed (*id.* at 2-3, 5-8, 12-13). Sahs therefore concludes there was no dispute about the existence or contents of the alleged notification (*id.* at 3, 5, 22-23, 27-28).

This argument suffers from two problems. First, the State never stipulated the written notification existed, nor did the State stipulate that the notification said what Sahs says it said. Although Sahs' trial brief proffered some language that allegedly existed on the alleged notification (7:2 [R-Ap. 102]), the State's trial brief did not stipulate to the existence of the notification or its contents. Rather, the State's trial brief merely acknowledged that, at some unspecified point in time, Agent Krause wrote down Sahs' statement on a Department of Corrections "statement form," which was later signed by Sahs (9:2 [R-Ap. 109]).

In other words, the State acknowledged Sahs' statement was eventually reduced to writing, but such an acknowledgement is not the same as stipulating to the existence of the alleged written notification, or agreeing the alleged notification's contents were the same as what Sahs said they said. The circuit court, therefore, properly found there was no evidence in the record that such a notification even existed (25:7-9 [R-Ap. 119-121]).

Contrary to Sahs' assertions that the circuit court "acknowledged" the notice (Sahs' brief at 3, 23), "agreed with [Sahs'] representation" of the notification's contents (*id.* at 4), and found the written notification to be "credibly presented" (*id.* at 23), the record clearly belies Sahs' characterizations of the circuit court's factual findings. Indeed, the circuit court found exactly the opposite: it explicitly found Sahs had not offered up the form or notification into evidence, nor had Sahs requested an evidentiary hearing for the purpose of eliciting such facts into evidence (25:7-8, 16 [R-Ap. 119-120, 128]).

Second, and perhaps more importantly, Sahs' argument suffers from another more fundamental defect. Even assuming the notification existed and said what Sahs says it said, and even assuming Sahs signed the form acknowledging the notification after giving his written statement, the State still never conceded or stipulated Sahs was aware of the written notification at the time Sahs gave his earlier, oral statement, and Sahs did not proffer any evidence whatsoever to support this assertion.

Accordingly, the circuit court properly found there was no evidence Sahs was aware of the written notification at the time he gave his oral statement, and there was no evidence that Sahs was aware of the threat of revocation for failing to provide a statement (25:16 [R-Ap. 128]).

Sahs now argues on appeal the circuit court "insufficiently considered" the alleged notification (Sahs' brief at 6), because it disregarded defense counsel's brief and pleadings allegedly proving the written notification existed (*id.* at 3-4). The circuit court, however, did not need to accept factual allegations in defense counsel's brief as true. *See, e.g.*, *State v. Kaster*, 148 Wis. 2d 789, 806, 436 N.W.2d 891 (Ct. App. 1989) (briefs by counsel do not establish facts).

Similarly, the circuit court did not need to accept as true defense counsel's bald factual allegations in his

pleadings, in the absence of any evidentiary support for his motion. *State v. Allen*, 2004 WI 106, ¶¶29-33, 274 Wis. 2d 568, 682 N.W.2d 433 (conclusory allegations insufficient to support defendant's factual assertion that documents existed; defendant must provide some reason to support existence of documents, and show that documents contain information defendant says they contain); *State v. Balliette*, 2011 WI 79, ¶79, 336 Wis. 2d 358, 805 N.W.2d 334 (defendant must submit some kind of evidentiary support, such as affidavits, to support factual allegations in pleadings; defendant cannot rely on conclusory allegations alone).

This was Sahs' motion, and Sahs' burden to prove compulsion; it was not the State's burden to disprove compulsion or prove lack of compulsion. *Mark II*, 292 Wis. 2d 1, ¶¶2, 16, 25-27. Sahs, therefore, cannot now complain about the circuit court's conclusions when he himself failed to proffer any evidentiary support to substantiate his conclusory allegations that the later alleged written notification compelled him to give his earlier oral statement. *Allen*, 274 Wis. 2d 568, ¶10 (defendant must set forth factual and legal grounds for motion, and must provide good faith argument that relevant law entitles defendant to relief).

Indeed, even upon being explicitly asked, Sahs' counsel expressly declined to offer any documentary proof—such as the alleged notification, Sahs' rules of probation, or counsel's affidavit—instead deciding to stand on his brief alone, rather than going forward with an evidentiary hearing (25:2-3, 7-8, 16 [R-Ap. 114-115, 119-120, 128]).[9]

Thus, in contrast to the other stipulated facts upon which the circuit court properly predicated its factual findings (*i.e.*, that Sahs initiated the meeting, and

[9]Even now, Sahs concedes he never attached the alleged form and/or notification to his pleadings (Sahs' brief at 3).

spontaneously gave his oral statement without being asked any questions), the circuit court properly disregarded defense counsel's conclusory assertions for which no evidence was offered, and for which no stipulations were entered (*i.e.*, the existence and contents of the alleged notification, and whether Sahs saw it before giving his oral statement). *Compare Thierfelder*, 174 Wis. 2d at 217 n.4 (factual assertions may be accepted as true, even if not in record); *with Kaster*, 148 Wis. 2d at 806 (briefs by counsel do not establish facts absent evidentiary proof).

In other words, it was proper for the circuit court to accept as true the stipulated facts as to voluntariness and/or lack of compulsion; while at the same time, reject as unsupported Sahs' conclusory assertions that the alleged notification constituted compulsion when Sahs had failed to offer any evidence of the alleged notification or of any other compulsion.

Finally, even assuming the written notification existed, and was the same written notification Sahs claims (Sahs' brief at 19-20),[10] there is still absolutely no evidence on this record that Sahs was aware of the alleged notification at the time he gave his earlier oral statement. Because it was Sahs' burden to prove compulsion and he failed to do so, the circuit court properly found that Sahs' oral statement was voluntary, and was not compelled in any way by any alleged written notification.

In sum, the circuit court did not err in making the only reasonable determination it could make based on the facts of record. *State v. Kennedy*, 2008 WI App 186, ¶¶15, 24, 315 Wis. 2d 507, 762 N.W.2d 412 (defendant failed to submit to circuit court all the documentation he alleges was filed; and there was nothing in record to support defendant's allegations).[11]

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[10]*See also Mark III*, 308 Wis. 2d 191, ¶5.

[11]Conversely, the State cannot be faulted for failing to proffer any evidence to rebut Sahs' assertions, because Sahs failed to (footnote continued)

### 3. The court of appeals properly affirmed the circuit court's decision, based on the record before it.

Given the record before it, the court of appeals properly affirmed the circuit court's ruling that Sahs had not met his burden in showing compulsion. *State v. Gregory M. Sahs*, No. 2009AP2916-CR), slip op. ¶¶8-9 (Ct. App., Dist. I, Oct. 26, 2010) (A-Ap. 105-106).

The court of appeals agreed there was no evidence in the record that a notification document existed. *Id.* ¶8 (A-Ap. 105). Importantly, the court of appeals also agreed there was no evidence in the record that Sahs was even aware of the alleged notification's existence at the time he gave his oral statement to his agent. *Id.* ¶9 (A-Ap. 106-107). As the court of appeals explained, "Sahs did not offer the DOC form with his written statements into evidence at the motion hearing. Therefore, we have nothing before us indicating that Sahs' statements were ever written down, let alone compelled." *Id.* ¶8 (A-Ap. 105).

Sahs now argues to this court that the court of appeals improperly "minimize[d]" the "materials" that were before the circuit court (Sahs' brief at 16), and concludes the record was not insufficient for the court of appeals to find in his favor (*id.* at 23). Given Sahs' failure to include adequate proof of his claim, however, the court of appeals properly declined to consider the alleged notification. *See, e.g., State v. Huff*, 2009 WI App 92, ¶¶9, 16, 319 Wis. 2d 258, 769 N.W.2d 154 (declining to consider evidence not in record, because it was appellant's responsibility to ensure record was sufficient for appellate

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meet his burden of showing compulsion to begin with. *Kaster*, 148 Wis. 2d at 806 (State's failure to rebut presumption irrelevant when record failed to establish presumption had arisen in first instance).

court to decide issues presented on appeal); *State v. Parker*, 2002 WI App 159, ¶12, 256 Wis. 2d 154, 647 N.W.2d 430 (tape at issue was never made part of trial court record by defendant or State).

Simply put, there was no evidence before the circuit court—or the court of appeals, for that matter—to support Sahs' claim that he was compelled by the later alleged written notification to give his earlier oral statement.

Moreover, contrary to Sahs' contention (Sahs' brief at 4-5), this court need not clarify appellate standards for when the "record is complete enough," because the law in this area is long-standing and well-established. In determining reversible error, appellate courts have always been limited to the record of the proceedings in the trial court; and the appellate record cannot be enlarged by materials which were not made part of the record in the trial court. *See, e.g., State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court limited to matters in record).

It is similarly well-established that the appellant has the duty to ensure completeness of the appellate record. *See, e.g., State v. Milanes*, 2006 WI App 259, ¶18, 297 Wis. 2d 684, 727 N.W.2d 94 (citing *State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272). *See also State ex rel. Darby v. Litscher*, 2002 WI App 258, ¶5 n.4, 258 Wis. 2d 270, 653 N.W.2d 160 (citing *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993)); *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (same); *State v. Koeppen*, 2000 WI App 121, ¶37, 237 Wis. 2d 418, 614 N.W.2d 530 (same).

The converse of the defendant's obligation to ensure the record's completeness is that the appellate courts are bound by the record as it comes to them. *See, e.g., State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶30 n.2, 242 Wis. 2d 327, 629 N.W.2d 30. *See also*

*State v. McGuire*, 2007 WI App 139, ¶18, 302 Wis. 2d 688, 735 N.W.2d 555 (appellate courts cannot consider "extraneous" material not part of appellate record); *Kennedy*, 315 Wis. 2d 507, ¶15 n.4 (document not appearing in appellate record cannot be considered on appeal).

Accordingly, where—as here—an appellate record is incomplete in connection with an issue raised by the appellant, the appellate court must assume that the missing material supports the trial court's ruling. *See, e.g., Locklear*, 242 Wis. 2d 327, ¶30 n.2; *Milanes*, 297 Wis. 2d 684, ¶18; *Provo*, 272 Wis. 2d 837, ¶19; *Darby*, 258 Wis. 2d 270, ¶5 n.4; *McAttee*, 248 Wis. 2d 865, ¶5 n.1.

This court has also adopted these well-established principles. *See, e.g., State v. Bush*, 2005 WI 103, ¶5 n.2, 283 Wis. 2d 90, 699 N.W.2d 80 (it is appellant's responsibility to ensure completion of appellate record; and when appellate record is incomplete in connection with issue raised by appellant, this court assumes missing material supports trial court's ruling). *See also State v. Janssen*, 219 Wis. 2d 362, 366 n.3, 580 N.W.2d 260 (1998) (striking and declining to consider affidavit which was not part of appellate record).

Accordingly, the court of appeals here was correct (*see Sahs*, slip op. ¶8)[12] in concluding it had no duty to search the record for evidence to prove Sahs' burden. *See, e.g., Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202 (court of appeals will not reweigh evidence, but will search record for evidence supporting trial court's findings, not for findings trial court could have made but did not). *See also Schulpius*, 298 Wis. 2d 155, ¶¶11-12 (where facts are undisputed, appellate court must only search record to support conclusion reached by circuit court).

[12]Sahs is incorrect (Sahs' brief at 23) that the court of appeals did not cite any case law for its holding.

Rather, Sahs, as the appellant, had the responsibility to ensure the record contains the necessary information to support his argument. *See, e.g., Kennedy*, 315 Wis. 2d 507, ¶24 (defendant failed to submit to circuit court all the documentation he alleges was filed; and there was nothing in record to support defendant's allegations).

In sum, the court of appeals, like the circuit court, properly accepted as true the stipulated facts, while at the same time properly rejected Sahs' allegations which he failed to support with evidence. *Compare State v. Schuman*, 173 Wis. 2d 743, 746 n.2, 496 N.W.2d 684 (Ct. App. 1993) (where State does not challenge defendant's assertion, appellate court may accept it as true); *with Allen*, 274 Wis. 2d 568, ¶¶29-33 (conclusory allegations insufficient to support defendant's factual assertion that documents existed).

Sahs has not given this court any reason to revisit these well-established legal principles. Sahs is only seeking to change factual findings from below which he perceives as errors, but what really amount to Sahs' failure of proof. Both of the lower courts properly held that Sahs failed to offer any evidence he knew about the alleged written notification at the time he voluntarily gave his initial oral statement to his probation officer.[13]

[13]If this court disagrees, however, it should remand to the circuit court for an evidentiary hearing as to whether Sahs' initial oral statement was compelled. *Mark II*, 292 Wis. 2d 1, ¶33 n.12.

### D. Under *Murphy's* general rule, Sahs was required to invoke his Fifth Amendment privilege, because there was no evidence that Sahs was subjected to *Murphy's* classic penalty situation.

*Spaeth* makes clear that, under *Minnesota v. Murphy*, 465 U.S. 420 (1984), not all statements made to probation agents are compelled. *Spaeth*, 343 Wis. 2d 220, ¶67. Because Sahs did not meet his initial burden of proof of showing compulsion, Sahs was placed squarely under *Murphy's* general rule that he needed to invoke his Fifth Amendment privilege in order for it to apply. *Id.* ¶¶43-47.

As discussed below, Sahs was not subjected to *Murphy's* classic penalty situation, notwithstanding Sahs' probation rules requiring him to tell the truth upon being asked. There was no evidence Sahs was forced to make the unconstitutional choice between foregoing the privilege and answering incriminating questions, or jeopardizing his conditional liberty by invoking the privilege and remaining silent in the face of those incriminating questions. Neither Sahs' own internal motivation to confess, nor his subjective perception of compulsion, rendered his statement compelled, absent incriminating questioning by his probation agent.

#### 1. Under *Murphy*, a probation rule requiring Sahs to be truthful, in and of itself, does not constitute compulsion, absent incriminating questioning.

This court in *Spaeth* reaffirmed the High Court's ruling in *Minnesota v. Murphy* that, as a general rule, defendants must ordinarily invoke their Fifth Amendment privilege for it to apply. *Spaeth*, 343 Wis. 2d 220, ¶¶43-

47. *See also Murphy*, 465 U.S. at 431-35. As the United States Supreme Court explained in *Murphy*, probation rules requiring truthfulness, in and of themselves, are not the equivalent of compulsion:

> *[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).

This court in *Spaeth* adopted *Murphy's* ruling that the defendant's probation status alone does not transform a defendant's statement to his probation agent into a compelled statement. *Spaeth*, 343 Wis. 2d 220, ¶67. *See also Mark II*, 292 Wis. 2d 1, ¶25 (mere fact that individual required to appear and report truthfully to probation officer insufficient to establish compulsion). In these instances of routine probation visits or interviews, the defendant must still invoke the privilege or it will not apply. *Spaeth*, 343 Wis. 2d 220, ¶¶43, 47-48, 67.

Despite *Spaeth's* holding vis-à-vis the defendant in that particular case, *Spaeth* still keeps intact *Murphy's* general rule that the defendant must still ordinarily invoke his Fifth Amendment privilege for it to apply. *Id.* ¶¶43, 47-48, 67. As long as the State does not require the defendant "to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent," the *Murphy* classic penalty situation does not exist, and the defendant must invoke the

privilege. *Id.* ¶48 (internal quotations and citation omitted).[14]

Here, as in *Murphy*, Sahs came into Agent Krause's office voluntarily, when it was convenient for both him and his agent, and spontaneously gave his incriminating oral statement, without having been asked any questions by Agent Krause. *Id.* ¶45. Accordingly, as in *Murphy*, Sahs was required to invoke his privilege, because his situation was no different than the "ordinary case in which a witness is merely required to appear and give testimony." *Id.* ¶47.

Sahs' probation condition requiring him to be truthful to his agent "when asked" (25:9 [R-Ap. 121]) did not, in and of itself, render Sahs' statement compelled, in the absence of incriminating questioning by Agent Krause. *Spaeth*, 343 Wis. 2d 220, ¶47. As *Murphy* makes clear, a truthfulness condition, by itself, does not give rise to a self-executing privilege, in the absence of questions which call for incriminating answers from the probationer:

> A state may require a probationer to appear and discuss matters that affect his probationary status; *such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer*, however relevant to his probationary status, *call for answers that would incriminate him* in a pending or later criminal prosecution.

*Murphy*, 465 U.S. at 435 (emphasis added). *See also id.* at 431 (routine probation interview requiring probationer's presence and truthful answers not transformed into inherently coercive setting, absent other evidence).

[14] *Murphy's* classic penalty situation, and the reasons why it does not apply to Sahs, will be discussed in the next section.

Other federal jurisdictions construing *Murphy* agree that the crucial factor for the penalty situation is whether incriminating questioning occurred. *See, e.g.*, *United States v. York*, 357 F.3d 14, 24 (1st Cir. 2004 (valid Fifth Amendment claim only arises if probation officer asked, and compelled defendant to answer over valid claim of privilege, questions implicating defendant in crime other than that for which he had been convicted); *United States v. Lee*, 315 F.3d 206, 211-12 (3d Cir. 2003) (same). *See also United States v. Taylor*, 338 F.3d 1280, 1284 (11th Cir. 2003) (alleged Fifth Amendment violation "entirely speculative because no incriminating questions have been asked").

*Spaeth* similarly emphasizes that it is "[t]he failure to supply truthful information *on demand*" that leads to the penalty situation, not the mere existence of a condition requiring truthfulness of the probationer. *Compare Spaeth*, 343 Wis. 2d 220, ¶47 (condition merely requiring probationer to appear and discuss matters affecting his probationary status insufficient for compulsion); *with id.* ¶68 (compelling truthful answers "*on demand*" is circumstance giving rise to compulsion) (emphasis added).

The Wisconsin Court of Appeals has also previously held that incriminating questioning is the key aspect for compulsion in classic penalty cases. *State v. Thompson*, 142 Wis. 2d 821, 829-30, 419 N.W.2d 564 (Ct. App. 1987) (probationer's answers to agent's questions prompted by accusations of criminal activity are compelled);[15] *State v. Peebles*, 2010 WI App 156, ¶16, 330 Wis. 2d 243, 792 N.W.2d 212 (citing *Thompson* for same).

In other words, the lack of incriminating questioning here is dispositive to the finding that no

[15] *Thompson* was partially abrogated on other grounds. *Mark I*, 280 Wis. 2d 436, ¶36 n.13.

compulsion existed.[16] That Sahs was required to tell the truth to his probation agent upon being asked does not mean that the State compelled Sahs to come in and confess his crimes without being asked. It is undisputed that Sahs spontaneously volunteered the incriminating information at the outset of the meeting without having been asked any incriminating questions by Agent Krause.

Moreover, even assuming, *arguendo*, that Agent Krause had asked Sahs some general questions about his whereabouts or activities—questions whose answers could violate Sahs' probation conditions—such general questions would not have automatically transformed Sahs' admissions of criminal activity into compelled admissions, because routine probation questions are not designed to elicit incriminating answers. *Spaeth*, 343 Wis. 2d 220, ¶47. *See also Murphy*, 465 U.S. at 435 n.7 (if questions put to probationer are relevant only to probationary status and pose no realistic threat of incrimination in separate criminal proceeding, no claim of Fifth Amendment privilege exists, even if answers could serve as basis for probationer's non-criminal revocation).[17]

Contrary to Sahs' contentions (Sahs' brief at 7-8, 15-18, 22), the fact that Sahs had a probation condition requiring him to tell the truth upon being asked does not, in and of itself, mean that Sahs had no choice but to spontaneously blurt out unsolicited, incriminating confessions. *Spaeth*, 343 Wis. 2d 220, ¶47. A routine probation interview does not convey the same kind of message as does a custodial interview wherein the suspect believes he has no choice but to submit to the officer's

[16]As discussed below, it is also dispositive as to why Sahs' later statements are not immunized under *Evans/Kastigar*.

[17]Contrary to the circuit court's assumption (25:11-12 [R-Ap. 123-124]), it is not fair to assume, without any evidence, that Agent Krause necessarily would have asked Sahs some general non-incriminating questions during the meeting. Even if he had, however, there is absolutely no evidence that he asked Sahs any questions which called for incriminating answers.

will and confess. *Murphy*, 465 U.S. at 433 (in contrast to custodial interrogation, it is "unlikely that a probation interview, arranged by appointment at a mutually convenient time, would give rise to a similar impression"). In sum, the coercion inherent in custodial interrogation is simply not found in a prearranged routine probation interview. *Id.* at 431-33.

Moreover, Sahs does not cite any other aspect of the allegedly coercive "process" or the circumstances surrounding a routine probation visit initiated by him (Sahs' brief at 15, 24)—other than the alleged threat of revocation and the alleged threat of polygraph testing, as discussed in the next section—which would have intimidated or coerced Sahs into confessing. *Murphy*, 465 U.S. at 433 (in contrast to custodial setting where psychological ploys may coerce suspect into subjugating his will to that of examiner, probationer's regular meetings with probation officer would familiarize him with questioner and insulate him from psychological intimidation that might overbear his desire to claim privilege).

Thus, under *Murphy's* general rule—adopted and reaffirmed in *Spaeth*—Sahs was required to invoke his Fifth Amendment privilege in order for it to apply. In the absence of questioning calling for incriminating responses, a general probation rule requiring Sahs to be truthful did not constitute compulsion. *Spaeth*, 343 Wis. 2d 220, ¶47.

To hold otherwise would eviscerate *Murphy*, because the logical result of such a holding would be that probationer's unsolicited statements to his probation agent during a probation interview would always be compelled and could never be voluntary.

To hold otherwise would also contravene this court's decision in *Spaeth*, which clearly holds that probationers do not receive immunity for information volunteered during a routine probation interview. *Id.* ¶67.

Finally, to hold otherwise would lead to the absurd result that probationers could be absolved from all criminal liability by simply walking into their probation agent's office and confessing all their crimes in the context of a routine probation visit. As *Spaeth* recognized, the Fifth Amendment is "not intended to permit offenders to 'game the system' by confessing all past wrongs at any opportunity they have, thereby precluding or seriously impairing a future criminal prosecution for those wrongs." *Id.*

In sum, Sahs' own decision to voluntarily and spontaneously confess his crimes did not transform Sahs' confession into a compelled one. The probation condition requiring Sahs to be truthful in response to questions asked did not render his oral statement compelled, because there was no evidence that Sahs' agent actually asked Sahs about criminal activity; nor was there any evidence that Sahs was implicitly or explicitly threatened with revocation if he remained silent, as discussed below. *Id.* ¶¶67-70.

2. *Murphy's* classic penalty exception does not apply, because Sahs was not forced to choose between foregoing his Fifth Amendment privilege by answering incriminating questions, or invoking the privilege and jeopardizing his conditional liberty by remaining silent.

Sahs argues the contents of the alleged notification place him within *Murphy's* "classic penalty exception," wherein he was not required to assert his Fifth Amendment privilege, because if he had asserted his right

to remain silent, an implied penalty of probation revocation existed, automatically rendering his statement compelled (Sahs' brief at 5, 15, 20-22, 26).

As discussed above, however, Sahs has not proven that the alleged written notification even existed, nor has he proven that he was aware of, and understood, the alleged written notification at the time he made his oral statement.

Even if this court accepts as true, however, that Sahs was aware of the notification before he gave his oral statement—an assumption not borne out by this record—Sahs' oral statement was still not compelled by the mere existence of such a written notification, because there was still no evidence that Sahs gave his oral or written statements in response to incriminating questions asked.

The only constitutionally "extra, impermissible step" the State cannot take (*i.e.*, the only impermissible action relieving Sahs of the invocation requirement) is if the State subjected Sahs to an implicit or explicit penalty (here, probation revocation) based on Sahs' refusal to answer incriminating questions (*i.e.*, his silence in the face of incriminating questions). *Spaeth*, 343 Wis. 2d 220, ¶¶47-48; *Murphy*, 465 U.S. at 435-36.

There is no evidence on this record, however, that Sahs was explicitly or implicitly forced to make this constitutionally impermissible choice. To the contrary, the only evidence of record was that Sahs freely chose to forego his privilege to remain silent, and freely chose to incriminate himself. *Spaeth*, 343 Wis. 2d 220, ¶48.

Because there were no incriminating questions posed to Sahs, there was no identifiable factor which was held to deny Sahs the free choice to admit, deny, or refuse to answer those incriminating questions; and Sahs' decision to confess is, therefore, considered voluntary, because Sahs was free to claim the privilege and would suffer no penalty as the result of his decision to do so.

*Murphy*, 465 U.S. at 429 (witness must assert privilege if "confronted with questions" that government reasonably believes would elicit incriminating answers).

In other words, Sahs was never subjected to the classic penalty situation in which he faced the unconstitutional dilemma of either foregoing the privilege and answering incriminating questions under compulsion, or invoking his privilege to remain silent and being penalized by the threat of revocation for doing so. *Spaeth*, 343 Wis. 2d 220, ¶¶47-48 (penalty situation only exists when defendant's assertion of privilege penalized, so as to foreclose free choice to remain silent).

*Murphy* itself makes clear that Sahs was not subjected to a classic penalty situation foreclosing Sahs' free choice to remain silent. In *Murphy*, the United States Supreme Court rejected the argument that the threat of revocation for untruthfulness is, itself, sufficient to give rise to the penalty situation. *Murphy*, 465 U.S. at 434 (State may not impose penalties if witness elects to exercise right to remain silent; but threat of revocation for untruthfulness is insufficient).

The *Murphy* Court noted, in *dicta*, that <u>if</u> the probationer is made to answer questions that would incriminate him, and <u>if</u> the State expressly or by implication asserted that the probationer's invocation of the right to remain silent would lead to his revocation, then the classic penalty situation may arise wherein the failure to assert the privilege is excused and the probationer's answers would be deemed compelled and inadmissible. *Id.* at 435.

But the *Murphy* Court nevertheless made clear that, in order for this penalty situation to exist, the lower courts must have some <u>evidence</u> of the extra, impermissible step. *Id.* at 436-37. For example, the High Court held that lower courts must inquire whether the defendant's probation conditions "merely required him to appear and give testimony about matters relevant to his probationary

status," or whether "they went farther and required him to choose between jeopardizing his conditional liberty by remaining silent." *Id.* at 436. The Court went on to hold that, because Minnesota did not take the extra, impermissible step, the defendant's privilege in *Murphy* itself was not self-executing. *Id.*

Similarly, the Court also held that, on the record before it, there was "no reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination," because there was no "*direct evidence* that Murphy confessed because he feared that his probation would be revoked *if he remained silent*." *Id.* at 437 (emphasis added).

Here, as in *Murphy*, there was no such direct evidence before either lower court that the State took the constitutionally impermissible extra step, because there was no direct evidence before either lower court that Sahs feared his probation would be revoked if he remained silent in the face of incriminating questions. *Id.*

Further, as in *Murphy*, there was no direct evidence that Sahs was expressly informed during the meeting that an assertion of his privilege to remain silent would result in the imposition of the penalty. *Id.* at 438. To the contrary, the circuit court explicitly found Sahs did not make any of his statements in response to questions (25:11 [R-Ap. 123]); and there was no evidence Sahs knew of other people being revoked for refusing to answer questions or that Sahs himself had been threatened with revocation in order to compel his oral statement (25:16 [R-Ap. 128]).

Indeed, the circuit court distinguished various hypothetical situations in concluding the classic penalty situation did not exist in Sahs' case:

> [T]he possibility of being revoked because you won't talk might create a compulsion. But simply the fact that an agent might do it is not enough.

> … [W]hat is clear is that there has to be something more than the vague threat [of revocation]. Is it enough that the witness know that it's a threat? I don't think so. Clearly if a defendant says "I don't want to talk about that" and the agent says "if you don't talk, I'll get an apprehension warrant faster than you can say 'revocation,'" then arguably there's a compulsion and then the defendant may have to answer because he's required to, but then those statements are then protected.
>
> Similarly, if a probationer says "I don't want to talk about it" and the probation officer says "Well, you have to talk about it" and the probationer says "I'm invoking my Fifth Amendment privilege against self-incrimination," then we have issues that are different than what we have here.
>
> … [But] [a]s far as can be gleaned from the facts, [Sahs] was a routine probationer. *There's no evidence that he knew of other people being revoked for refusing to answer questions or that he had been threatened with revocation*. He voluntarily requested the meeting and voluntarily made disclosures. And under the caselaw, this is clearly not enough to establish compulsion.

(25:14-16 [R-Ap. 126-128]) (emphasis added).[18]

In sum, *Murphy's* classic penalty exception does not apply here, because there was no evidence Sahs was forced to choose between foregoing his Fifth Amendment privilege by answering incriminating questions, or invoking the privilege and jeopardizing his conditional liberty by remaining silent in the face of that incriminating questioning. *Spaeth*, 343 Wis. 2d 220, ¶¶47-48; *Murphy*, 465 U.S. at 435-36.

[18]The circuit court further held that, unlike in *Mark II*, there was no need to remand for further fact-finding, because the parties had stipulated to the facts necessary for the court to render its decision (25:3, 8, 16 [R-Ap. 115, 120, 128]).

3. In the absence of incriminating questioning, neither Sahs' own internal motivation to confess, nor his subjective perception of compulsion, rendered Sahs' oral statement compelled.

Sahs' also argues the alleged threat of a polygraph constituted compulsion, because he knew he would be required to take a polygraph the next day, and that he would fail it, thereby placing him within *Murphy's* classic penalty exception (Sahs' brief at 5, 11-12, 22). Sahs therefore concludes his own subjective perception of the threat of revocation was sufficient to constitute compulsion (*id.*). But neither the facts of this case in particular, nor the polygraph cases in general, supports Sahs' arguments.

Although there was a stipulation that Sahs had been terminated from his sex offender group based on his answers to a previous polygraph and pre-polygraph testing on December 15, 2006 (7:1-2 [R-Ap. 101-102]; 9:1-2 [R-Ap. 108-109]; 25:9-10 [R-Ap. 121-122]), he had already been re-admitted to the group (*id.*), and there was no such stipulation or other evidence in the record that another polygraph was scheduled for January 13, 2007.[19] The court of appeals makes no reference to the alleged January 13, 2007 polygraph test.

Further, other than Sahs' bald allegations in his trial brief (7:2, 6 [R-Ap. 102, 106]), there is no evidence

[19]Sahs' trial brief contended another polygraph was scheduled for January 13, 2007 (7:2 [R-Ap. 102]), and the circuit court noted, "[t]he parties represent that another polygraph was set for January 13" (25:10 [R-Ap. 122]). The State's trial brief, however, does not mention the alleged January 13, 2007 polygraph.

in the record that Sahs knew a second polygraph had allegedly been scheduled at the time he called his agent in early January to set up the January 12, 2007 meeting. Nor is there any evidence—save Sahs' bald allegation—that Sahs even subjectively felt compelled to confess by the threat of the alleged second polygraph.

This lack of evidence distinguishes Sahs from *Spaeth*, which was based on the parties' concession—as well as suppression hearing testimony and documentation—that the defendant knew he could face revocation if he did not comply with the polygraph. *Spaeth*, 343 Wis. 2d 220, ¶¶5-9, 49 & n.6, 53, 58 (defendant signed polygraph consent form, and defendant's probation agent testified defendant was aware that polygraph results and any statements he made could not be used against him in criminal prosecution). Unlike in *Spaeth*, here there was no direct evidence to substantiate Sahs' conclusory allegation that he believed he would fail the polygraph, allegedly scheduled for the next day.

Sahs cites to *Mark III* in arguing his own subjective perception of these alleged threats—the alleged threat of revocation, and/or the alleged threat of a mandatory polygraph—was sufficient to constitute compulsion (Sahs' brief at 20-22). Upon first blush, *Peebles*, 330 Wis. 2d 243, ¶¶3-5, also appears to support Sahs' contention.

Neither *Mark III* nor *Peebles*, however, actually holds a defendant's mere subjective perception of the threat of revocation or threat of a mandatory polygraph is, itself, sufficient to constitute compulsion. Rather, there must be some other evidence, besides the defendant's subjective belief, which proves compulsion existed.

For example, *Mark III* held this other evidence of compulsion was the probation agent's testimony that she had explained the revocation warning to the defendant before he gave his written statement. *Mark III*,

308 Wis. 2d 191, ¶¶24-25. Similarly, *Peebles* was predicated upon other evidence that the incriminating admissions arose because the defendant was, in fact, subjected to incriminating questioning during mandatory polygraph testing. *Peebles*, 330 Wis. 2d 243, ¶¶3-5, 20.

Thus, although the defendant in *Peebles* testified he knew he could be revoked for not answering truthfully in response to inquiries by the agent, or for not submitting to the mandatory polygraph testing, *id.* ¶¶3-5, the compulsion in *Peebles* was based upon the fact that the defendant was, in fact, subjected to mandatory polygraph testing in which he was asked incriminating questions about other offenses. *Id.* ¶¶5, 20.

In other words, contrary to Sahs' contention, compulsion cannot be based upon the defendant's subjective belief alone. If it were, a defendant would be able to exclude any admissions to his probation agent, every time, merely based on his own bald testimony that "I felt compelled to confess." Such a result is contrary to this court's holding in *Spaeth*. *Spaeth*, 343 Wis. 2d 220, ¶67 (Fifth Amendment not intended to permit offenders to game the system by confessing all past wrongs during routine probation visit).

Such a result is also contrary to this court's rationale in *State v. Brockdorf*, 2006 WI 76, ¶¶16, 43, 291 Wis. 2d 635, 717 N.W.2d 657, an analogous *Garrity*[20] immunity case. In *Brockdorf*, this court held that, regardless of the defendant's subjective belief of the threatened penalty, her subjective belief was not objectively reasonable, and did not deprive her of her right to make a "free and reasoned decision to remain silent,"

[20]*Garrity v. New Jersey*, 385 U.S. 493 (1967). *Garrity* immunity arises from another of *Murphy's* "classic penalty situations" wherein a police officer's incriminating statement, given during an internal investigation, must be suppressed because it is compelled by threat of termination of employment. *Brockdorf*, 291 Wis. 2d 685, ¶¶17-18.

absent an express threat of the penalty. *Id.* ¶43. In other words, the defendant's subjective perception of the threatened penalty was insufficient to constitute compulsion. *Id.*

So too, here, Sahs' alleged subjective belief that he would fail the alleged polygraph was insufficient to constitute compulsion, for two reasons: First, there was not even any evidence of this subjective belief (save his conclusory allegations); and second, there was no evidence that Sahs was forced to give responses in answer to incriminating questions posed to him under the threat of that alleged polygraph or during polygraph questioning itself. *Peebles*, 330 Wis. 2d 243, ¶¶3-5, 20.

Indeed, Sahs' decision to come in voluntarily and confess his crimes—before he was allegedly required to do so—is the very essence of voluntariness. Sahs' internal motivation to tell the truth, at most, demonstrated that Sahs wanted to abide by his probation rules. But Sahs' probation rules did not require or compel him to come in and tell the truth unless he was asked incriminating questions (25:9 [R-Ap. 121]), either by his probation agent or by a polygraph examiner.

Any number of reasons could hypothetically exist as to why Sahs decided to come in and spontaneously confess. The record supports an inference that Sahs' may have just wanted to come clean (7:2 [R-Ap. 102]; 28:4, 15). Or, as Sahs argues now, he may have subjectively felt pressured to come in and prospectively pre-empt himself from further polygraph testing, knowing he would fail the polygraph because he had engaged in illegal activities. On the other hand, however, Sahs may have just wanted to ingratiate himself to his agent, figuring that if he stayed one step ahead, maybe his agent would be lenient.

But Sahs' subjective motivation to avoid being caught in a lie is insufficient to constitute compulsion under *Murphy*. *See Brockdorf*, 291 Wis. 2d 635, ¶43

(defendant's only compulsion to give statement was that she realized she had been caught in a lie, and concluded her best course of action was to confess to the truth, rather than continuing to lie or remaining silent). And any self-serving hope for leniency Sahs may have had is also insufficient to render his statements compelled. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 287-88 (1998) (death row inmate's self-imposed pressure to speak at voluntary clemency review in hopes of improving his chances at clemency did not render interview compelled).

This court, however, need not speculate as to the reasons why Sahs made the decision to come and spontaneously confess, because the record only supports one conclusion: Sahs (for whatever reason) made the decision to spontaneously and voluntarily confess to his crimes before he was compelled to—thereby avoiding the situation where he was, in fact, compelled to confess in response to incriminating questions. Such a decision demonstrates exactly why Sahs' oral statement was voluntary and admissible, rather than compelled and inadmissible.

As the Seventh Circuit astutely remarked in *United States v. Cranley*, 350 F.3d 617 (7th Cir. 2003):

> It is always something of a puzzle why criminals confess. Probably Cranley realized that the [authorities] had the goods on him and so would nail him even if he clammed up, but that if he confessed he might get points for having cooperated. No matter. His failure to assert his Fifth Amendment privilege forfeited it ….

*Id.* at 623.

E. Because Sahs oral statement was not compelled and Sahs failed to invoke his Fifth Amendment privilege, Sahs' oral statement and all his subsequent statements were properly admitted in the criminal prosecution against Sahs.

As noted above, the threshold issue in this case—whether Sahs' initial, oral statement was compelled—is also dispositive of the case. Because Sahs' initial, oral statement here was volunteered during a routine visit with his probation officer (*i.e.*, it was not compelled), Sahs' subsequent statements—his written statement to police, as well as his three later *Mirandized* statements to police—were all admissible as well, and could be used in the prosecution against Sahs. *Spaeth*, 343 Wis. 2d 220, ¶67.

*Spaeth* and *Murphy* are both clear on this point. *Id.* (if statement to probation agent is not compelled, it is not covered by Fifth Amendment privilege; it may be shared with law enforcement; and it may be used in a criminal prosecution). *See also Murphy*, 465 U.S. at 440 (because defendant revealed incriminating information instead of timely asserting Fifth Amendment privilege, his disclosures were not compelled incriminations, and he could not successfully prevent information he volunteered to his probation officer from being used against him in criminal prosecution).

Even if Sahs' later written statements were somehow compelled by the alleged written notification—an assumption <u>not</u> borne out by this record—the contents of Sahs' written statements were cumulative to his earlier, non-compelled oral statement. Thus, the admission of the written statements were harmless error, if error at all. *Mark II*, 292 Wis. 2d 1, ¶34 (admission of compelled statement subject to harmless error analysis); *Mark III*,

308 Wis. 2d 191, ¶10 (appellate courts should remand for harmless error analysis).

## II. SAHS IS NOT ENTITLED TO *EVANS/KASTIGAR* IMMUNITY FOR ANY OF HIS STATEMENTS, BECAUSE NONE OF HIS STATEMENTS WERE GIVEN IN RESPONSE TO INCRIMINATING QUESTIONS.

Sahs also argues the alleged written notification, in and of itself, immunizes his written statement and all of his later *Mirandized* statements under the derivative use immunity principles set forth in *Kastigar v. United States*, 406 U.S. 441 (1972) [and *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977)] (Sahs' brief at 26-31). This immunity argument, however, suffers from the same lack of evidence and flawed logic as Sahs' compulsion argument.

Immunity simply does not arise here, because Sahs was never asked any questions, such that he was never forced to answer incriminating questions by virtue of the alleged threat of revocation. Therefore, Sahs' situation is distinguishable from all the immunity cases, and he is not entitled to immunity for any of his statements. Consequently, this court need not even reach the issue of whether Sahs' subsequent statements were derived from a wholly independent source than his initial oral statement.

### A. The mere existence of the threat of revocation does not give rise to *Evans/Kastigar* immunity, in the absence of incriminating questioning by the agent.

Sahs is correct (Sahs' brief at 26-27) that a defendant's answers during a polygraph, as well as a

defendant's refusal to submit to a polygraph, may be immunized under *Evans/Kastigar*, because polygraph testing is mandatory for sex offenders in Wisconsin. *Spaeth*, 343 Wis. 2d 220, ¶¶50-59. Contrary to Sahs' contention (Sahs' brief at 27-29), however, the law does not extend this immunity to the defendant's mere providing of information without the defendant being questioned; nor does the law provide that the mere existence of a written notification threatening revocation, in and of itself, automatically gives rise to derivative use immunity.

Rather, *Evans* and its progeny make clear the only situations giving rise to immunity are the same as the two situations giving rise to *Murphy's* classic penalty dilemma—namely: 1) when the State forces the defendant to answer incriminating questions by virtue of the threat of revocation or threat of a polygraph; or 2) when the State penalizes the defendant (*i.e.*, revokes or threatens to revoke his probation) for invoking the privilege (*i.e.*, for remaining silent) in the face of incriminating questioning during the polygraph or probation interview.

In *Evans* itself, this court explained the first situation:

> [S]tatements or the fruits of statements made by a probationer to his probation agent or in a probation revocation hearing *in response to questions which*, as here, *are the result of pending charges or accusations of particular criminal activity*, may not be used to incriminate the probationer in a subsequent criminal proceeding.

*Evans*, 77 Wis. 2d at 227-28 (emphasis added; internal footnote omitted).

Although the State can compel a probationer to truthfully answer questions, and can consider those compelled answers in a revocation proceeding, the State may not use those compelled answers against the

defendant in a future criminal prosecution, and must grant the defendant *Kastigar* immunity for any incriminating answers the defendant gives in response to that questioning. *Id.* at 235-36. *See also Spaeth*, 343 Wis. 2d 220, ¶¶52-58 (probationer may be revoked based upon compelled incriminating answers, but immunity for future criminal prosecution based upon those answers is constitutionally required).

This court discussed the second situation giving rise to immunity in *State ex rel. Tate v. Schwarz*, 2002 WI 127, 257 Wis. 2d 40, 654 N.W.2d 438. In *Tate*, this court held that the State may not penalize a probationer (*i.e.*, revoke or threaten to revoke his probation) merely because the probationer refuses to answer incriminating questions (*i.e.*, is silent in the face of incriminating questions), unless the State first grants the probationer immunity from future prosecution. *Id.* ¶4 (it was unconstitutional to revoke defendant's probation based on his legitimate assertion of his Fifth Amendment privilege against self-incrimination). *See also Evans*, 77 Wis. 2d at 234-36 (probationer cannot be revoked for invoking privilege against self-incrimination absent grant of immunity).

As this court further explained in *Tate*, the use and derivative use immunity required by *Evans* extends to incriminating statements made during sex offender treatment, because defendants in Wisconsin are required to admit to the crimes for which they are convicted, and "[t]he price of remaining silent [is] probation revocation." *Tate*, 257 Wis. 2d 40, ¶22.

Stated differently, the flip side of a defendant being compelled to give incriminating answers in response to an agent's questioning is a defendant being penalized for remaining silent in the face of those incriminating questions. *See Peebles*, 330 Wis. 2d 243, ¶11. Either way, however, immunity does not arise unless the probationer is actually questioned first. As *Murphy* makes clear:

> [A] state may validly *insist on answers to even incriminating questions* and hence sensibly administer its probation system, as long as it recognizes that the *required answers* may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's "right to immunity as a result of his compelled testimony would not be at stake."

*Murphy*, 465 U.S. at 435 n.7 (emphasis added; quoted source omitted).[21]

*Peebles* is also instructive here, because it outlines the two situations for immunity and makes clear that neither exists in Sahs' case. For example, *Peebles* noted that, in *Evans*, immunity arose when the defendant's probation was revoked because he refused to answer the agent's incriminating questions. *Peebles*, 330 Wis. 2d 243, ¶¶12-14. A probationer's "*answers to an agent's questions* prompted by accusations of criminal activity" are, therefore, compelled, because a *refusal to speak* may be grounds for revocation. *Id.* ¶13 (emphasis added). Accordingly, the State may compel the probationer "*to answer self-incriminating questions* for the agent, or face the potential of revocation" only if he is protected by a grant of immunity. *Id.* ¶14 (emphasis added).

*Peebles* also explained that, in *Thompson*, the defendant's probation was revoked because he refused to answer the agent's questions. *Peebles*, 330 Wis. 2d 243, ¶¶15-16. Again, however, the "'*answers* to the probation

[21]The State is also constitutionally permitted to revoke a probationer's probation for lying in response to his agent's questions, because it is the giving of the false information that is prosecutable, rather than any criminal admissions contained within the false statement. *See, e.g., United States v. Melancon*, 662 F.3d 708, 712 (5th Cir. 2011) (exclusionary rule does not act as bar to prosecution when false statements themselves were the criminal act); *United States v. Vreeland*, 684 F.3d 653, 660 (6th Cir. 2012) (citing *Brogan v. United States*, 522 U.S. 398, 404 (1998)) (Fifth Amendment allows witness to remain silent but does not confer privilege to lie).

agent'" were compelled and immunized only because "'the price of [the defendant's] *silence* was revocation of his probation.'" *Id.* at 16 (emphasis added). Thus, the State may "compel probationers *to answer questions and then use those responses, or refusals to answer*, as grounds for revocation; but, the probationer must first be granted immunity prohibiting the information's use in any criminal proceeding." *Id.* (emphasis added).

Finally, *Peebles* reiterated this court's holding in *Tate* that the State cannot revoke the defendant's probation for refusing to admit his crime (*i.e.*, for remaining silent), unless the defendant is first given use and derivative use immunity for what are otherwise compulsory self-incriminatory statements. *Peebles*, 330 Wis. 2d 243, ¶¶17-18.

Thus, the cases cited in *Peebles* make clear that *Evans/Kastigar* immunity does not arise unless the probationer is either forced to give answers to questions by virtue of the threat of revocation, or is penalized with revocation (or the threat of revocation) for remaining silent without first having received a grant of immunity for incriminating statements. Neither situation exists here.

Contrary to Sahs' assertion (Sahs' brief at 27-29), the mere existence of a notification which threatens probation revocation cannot be sufficient, in and of itself, to grant *Evans/Kastigar* immunity. If it were, then everything a probationer ever volunteered to his agent during a routine probation visit would be immunized and inadmissible—an absurd result which is contrary to *Spaeth*. *Spaeth*, 343 Wis. 2d 220, ¶67.

Such a holding would also, in effect, be akin to granting the defendant transactional immunity—or full immunity from prosecution for the offense to which the confessions relate—thereby affording him an immunity which is considerably broader than, and not intended by, the Fifth Amendment. *See Kastigar*, 406 U.S. at 453 (Fifth Amendment privilege has never been construed to

mean that one who invokes it cannot subsequently be prosecuted).

This court, however, has never contemplated such a broad immunity. *Mark II*, 292 Wis. 2d 1, ¶33 n.12 (characterizing *Evans* immunity as "limited use immunity" only applying where statement given in response to questions by probation agent and prompted by pending charges or accusations of particular criminal activity).

In sum, Sahs is not entitled to *Evans/Kastigar* immunity for any of his statements. There is no evidence that Sahs' statements were given in response to compelled questioning designed to elicit incriminating information about Sahs' suspected criminal activity.[22] Sahs simply came in on his own, voluntarily, and spontaneously confessed to these crimes during a routine probation visit that he himself initiated, without having been asked any questions—incriminating or otherwise—by his agent.

### B. Because Sahs' oral statement was neither compelled nor immunized, his subsequent statements were admissible, and this court need not reach the issue of whether the subsequent statements were derived from a wholly independent source.

Contrary to Sahs' contention (Sahs' brief at 29-31), this court need not reach the issue of whether Sahs' subsequent statements were derived from a wholly

[22]Indeed, this case is exactly the kind of situation which this court alluded to in *Spaeth*, 343 Wis. 2d 220, ¶75, where the "probation agent ha[d] no advance warning that a probationer ha[d] committed new crimes and police ha[d] no independent knowledge that these crimes have been committed."

independent source than his initial oral statement. Although *Spaeth* held the State did not meet its burden in showing a wholly independent source in that case, *see Spaeth*, 343 Wis. 2d 220, ¶¶74-79, *Spaeth* was predicated on the parties' concession that compulsion existed in the first instance. *Id.* ¶49.

As discussed above, however, *Evans/Kastigar* derivative use immunity has no application here, because Sahs failed to meet his initial burden of proof that he gave his oral statement in response to compulsion (*i.e.*, in response to incriminating questioning wherein the threat of revocation existed). Accordingly, the burden shift to the State does not occur. *Mark III*, 308 Wis. 2d 191, ¶28 (once defendant meets initial burden, burden shifts to State to prove it had independent, legitimate source for disputed or tainted derivative evidence, wholly independent of initial testimony compelled by grant of use immunity); *In re Commitment of Harrell*, 2008 WI App 37, ¶17, 308 Wis. 2d 166, 747 N.W.2d 770 (derivative use immunity requires that defendant first establish he gave his compelled testimony under initial grant of use immunity).

In short, Sahs did not prove he was impermissibly penalized with revocation or the threat of revocation for his assertion of his right to remain silent in the face of incriminating questions: there was no evidence of incriminating questioning, nor was there evidence Sahs ever asserted his Fifth Amendment privilege to remain silent. *Tate*, 257 Wis. 2d 40, ¶ 4; *Peebles*, 330 Wis. 2d 243, ¶ 11.

Therefore, Sahs is not entitled to receive immunity for his oral or written statements under *Evans/Kastigar*. Consequently, this court need not reach the issue of whether Sahs' subsequent *Mirandized* statements were derived from a source wholly independent from his initial oral statement. Those subsequent statements are admissible as a matter of law, because Sahs' initial oral statement was neither compelled nor immunized in the

first instance. *Spaeth*, 343 Wis. 2d 220, ¶67; *Evans*, 77 Wis. 2d at 227-28.[23]

## CONCLUSION

The lack of questioning in this case is dispositive, and forecloses Sahs' arguments related to Fifth Amendment compulsion and *Evans/Kastigar* immunity. Because Sahs' initial oral statement was neither compelled nor immunized, Sahs' later written statement and his three later *Mirandized* statements to police were all admissible.

Accordingly, the State respectfully requests that this court affirm the judgment of conviction.

Dated this 17th day of January, 2013.

Respectfully submitted,

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[23]If this court disagrees, however, it should not reverse, but should remand to the circuit court for an evidentiary hearing under *Evans/Kastigar* to determine whether derivative use immunity applies. *Mark II*, 292 Wis. 2d 1, ¶33 n.12. Contrary to Sahs' contention (Sahs' brief at 30-31), the State did not "acknowledge[]" that the "sole source" of the later information was Sahs' initial oral statement.

## 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 10,939 words.

Dated this 17th day of January, 2013.

_____
SARAH K. LARSON
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## 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 17th day of January, 2013.

_____
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