ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20070280
(Reference Burleigh Co. No. 06-K-01768)

State of North Dakota,

Plaintiff-Appellee,

-vs-

Matthew Crabtree,

Defendant/Appellant.

APPELLANT'S BRIEF

Appeal from the Order Denying Motion to Suppress
Dated April 13, 2007

Burleigh County District Court
The Honorable Sonna M. Anderson, Presiding

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I. STATEMENT OF THE ISSUES.

1. When a probationer attempted to avoid disclosing incriminating information and only disclosed the information to his probation officer because both the probationer and the probation officer justifiably believed that the probationer's refusal to provide the information would result in revocation of his probation and the probationer feared probation revocation would result from refusal to answer his probation officer's questions, was disclosure of that incriminating information compelled in violation of the probationer's rights under the 5th Amendment to the U.S. Constitution and Article I, Section 12 of the North Dakota Constitution?

2. Did the trial court err in denying the probationer's motion to suppress the information he was compelled to give to his probation officer?

II. STATEMENT OF THE CASE.

While on probation, Matthew Crabtree was directed to take a polygraph by his probation officer. In preparation for the polygraph, Mr. Crabtree completed a polygraph questionnaire.

The questionnaire instructions stated identifying information about sexual partners was not required. Mr. Crabtree did not want to identify one sexual partner and referred to her as "an acquaintance."

Mr. Crabtree's probation officer reviewed the questionnaire with Mr. Crabtree and asked Mr. Crabtree to provide identifying information regarding the sexual partner identified as "an acquaintance.". Believing that refusal to provide the information would subject him to probation revocation, Mr. Crabtree provided the identifying information.

The identifying information led to a charge of gross sexual imposition which was filed against Mr. Crabtree in the District Court of Burleigh County on September 12, 2006.

Preliminary hearing was held on October 25, 2006. Mr. Crabtree was arraigned and entered a plea of not guilty.

Mr. Crabtree filed a motion to suppress the statements obtained from him and all evidence derived from the unconstitutionally obtained statements on January 3, 2007.

The motion was heard before the Hon. Sonna M. Anderson on February 26, 2007. On April 13, 2007, Judge Anderson issued an order denying Mr. Crabtree's suppression motion. On April 17, 2007, pursuant to Rule 11(a)(2), N.D.R.Crim.P., Mr. Crabtree entered a conditional plea of guilty to the offense charged in the Information, reserving

the right to appeal to this Court from the District Court's Order denying Mr. Crabtree's suppression motion of April 13, 2007. (App. P. 67, Tr. Of Change of Plea 4-17-07, PP. 21-22).

Judgment was entered on September 14, 2007. The Defendant was sentenced to ten years imprisonment with all but two years of that sentence suspended. The Judgment was dated September 19, 2007 and filed on September 20, 2007. (App. PP. 68-69).

Mr. Crabtree has appealed to this Court from the order denying his motion to suppress. (App. P. 75).

III. FACTS.

In September of 2001, Matthew Crabtree plead guilty to offenses in charged in Burleigh Co. Criminal No. 08-01-K-1458 entitled State v. Matthew Crabtree. His guilty pleas were to the crimes of delivery of a controlled substance (marijuana), delivery of a controlled substance (methamphetamine), both of which were felonies, delivery of alcohol to minors, corruption or solicitation of a minor, and possession of drug paraphernalia which were all Class A misdemeanors. On the Class A misdemeanors, he was sentenced to one year imprisonment and on the felonies, he was sentenced to six years with three years suspended for five years. The misdemeanor corruption or solicitation of a minor charge required sex offender registration.

Mr. Crabtree served the full year on the misdemeanors, and part of the six year sentence on the felonies. He was then released on probation. His probation on the felony counts was revoked on December 30, 2004 and he was sentenced to six years imprisonment with execution of two years imprisonment suspended during three years of probation. His probation should have started on March 31, 2005, but Mr. Crabtree was also sentenced to serve a consecutive six month sentence for failure to register as a sex offender, and was not released from prison until September 30, 2005. Brian Weigel was assigned as Matt's probation officer on March 31, 2005 but Mr. Weigel did not start active supervision until September 30, 2005 when Mr. Crabtree was released from the penitentiary. (Brian Weigel Deposition Transcript, PP. 9-10; Tr. Prelim. Hrg, P. 3).

Mr. Weigel had been trained in the supervision of sex offenders. (Brian Weigel Deposition Tr. PP. 8-9). When Matthew Crabtree's supervision was assigned to Mr.

Weigel, Mr. Crabtree was not on probation for a sex offense. However, the probation office policy was clear that "if somebody has to register as a sex offender, if their current crime is a sex offense, or if their current crime was sex related though not a sex offense by statute, if one of those three things are present, then they are supervised by a sex offender specialist." (Brian Weigel Deposition Tr. PP. 9-10).

Between September 30, 2005 and February 8, 2006, Mr. Crabtree had unauthorized contact with minors, and that unauthorized contact led to one of the allegations which resulted in revocation of his probation on February 8, 2006. (Tr. Prelim. Hrg., P. 3).

Following his second release from the penitentiary, Mr. Crabtree met his future wife at work. They began dating and she became pregnant. Mr. Crabtree married her. (App. P. 10; Brian Weigel Deposition Tr. P. 14).

Mr. Crabtree had a probation condition which would have prohibited him from living with his wife and child once their child was born. He talked Mr. Weigel about getting his probation conditions changed so he could live with his wife and child following the child's birth. (App. PP. 10-11; Brian Weigel Deposition Tr. PP. 17-19).

Mr. Weigel determined that Mr. Crabtree had to take a polygraph examination prior to applying for a change in his probation conditions. (App. P. 11; Brian Weigel Deposition Tr. PP. 18-19).

Mr. Weigel dropped off a polygraph sex offender disclosure questionnaire (App. PP. 23-44) with Mr. Crabtree's wife and told Mr. Crabtree's wife that Mr. Crabtree had to complete the sex offender disclosure questionnaire. (Rachel Crabtree Affidavit, App. P.

16; Brian Weigel Deposition Tr. PP. 18-22). The sex offender disclosure questionnaire stated: "You can accurately fill out this form and pass your polygraph without giving any identifying information about your victims." (Underlining in original, App. P. 23). The questionnaire further stated, "All questions relate only to behavior that occurred before the date of your last conviction for a sexual offense. All questions exclude this last offense or any offense that occurred since your last conviction." (App. P. 24). Mr. Weigel told Mr. Crabtree to answer the questions relating to treatment issues for the last five years, and then changed that to since he was released from prison. (App. P. 41, App. P. 12, Tr. Of Brian Weigel Depo. P. 27).

At Mr. Crabtree's preliminary hearing in this case on October 25, 2006, Brian Weigel testified that as part of the conditions of Matt's probation, he was going to undergo a polygraph examination. (Tr. Prelim. Hrg., P. 4.). Weigel testified:

> "A. As part of the conditions of his probation, he was going to undergo a polygraph examination. We give out a sexual history questionnaire which he has to fill in all of his past victims. He has to fill in all new sexual encounters that he's had, I had asked him since prison. He told me that he had had quote 'protected sex with an acquaintance,' end quote. When I asked him who that acquaintance was, he gave me the name of K.R. He said that it took place in March after his break-up with one girlfriend and before meeting his current wife that he had sexual contact with this female named K.R.
>
> Q Did you know at that time that she was a minor?
>
> A No.
>
> Q What happened next after you had found this information out?
>
> A The information was passed on to the polygraph examiner, Rollie Rust. He then again went through the information, and his question was if he had had sexual contact with any other minors.

> That's when he stated that this female with the same name, first name started with 'K,' was a minor. That he thought that she was an adult and then later found out that she was 15 or 16 and that they had had sexual intercourse.
>
> Q So did he then go through the polygraph exam on that date?
>
> A I'm sorry, did he go through the polygraph exam on that day?
>
> Q Yes."
> (Tr. Prelim. Hrg., PP. 4-5).

Mr. Crabtree testified that Brian Weigel told him he had to complete the sexual history questionnaire. (Matthew Crabtree Aff., App. P. 8). As the Court can see, Crabtree wrote on the sexual offenders questionnaire that he had "protected sex with an acquaintance" and did not identify the acquaintance nor give the age of the acquaintance. (App. P. 41). According to Mr. Crabtree, "Mr. Weigel asked me the name of the acquaintance. I did not want to tell him the name, but I knew if I did not tell him the name of the person, Mr. Weigel would arrest me for violating my probation by not cooperating with him and by not giving honest answers and by not taking a polygraph test. Therefore, I gave Mr. Weigel the name of the lady. The person identified was K.R., the victim alleged in this action." (Matthew Crabtree Aff., App. PP. 8-9). Mr. Crabtree had been told that the conditions of his probation included the condition that he submit to polygraph testing. (Matthew Crabtree Aff., App. P. 9). Mr. Crabtree had had a parole condition that did require him to submit to a polygraph. (App. P. 20). It was Mr. Crabtree's understanding on August 22, 2006 that he was required to take a polygraph as part of his probation and that he had to answer the questions in the sexual offender questionnaire truthfully. (Matthew Crabtree Aff., App. P. 11). On August 7 or 8, 2006,

When Mr. Crabtree talked to Brian Weigel, it was Mr. Crabtree's understanding from the conversation with Mr. Weigel that he was required to answer the questions in the sexual offender questionnaire and he was required to take the polygraph. (Matthew Crabtree Aff., App. PP. 11-12).

On August 22, 2006 when Crabtree was questioned by Mr. Weigel, he knew that if he did not answer Mr. Weigel's questions he would be arrested and placed in jail, the conditions of his probation could be revoked, and that he would not be able to live with his wife or with his child. (Matthew Crabtree Aff., App. P. 12).

Mr. Crabtree's fear of arrest and incarceration was not imaginary. Brian Weigel testified that while he was supervising Mr. Crabtree, Mr. Crabtree had problems with the conditions of supervision including "he failed to give pertinent information to his probation officer, which means he lied to me in regards to contact of minors." Mr. Weigel was asked:

> "Failure to give pertinent information, what does that mean?
> A. Anything that – it goes along with they must give all pertinent information to a parole officer, such as if they move or if they change employment. And I'm not sure what the exact violation was on this one. Or if they're asked directly about a violation and they lie, that would be failure to provide pertinent information.
> Q. What if they are asked directly about a violation and they say, It's none of your business? If that a failure to give pertinent information?
> A. I would think so, yes.
> Q. Was his probation revoked?
> A. Yes."

(Brian Weigel Deposition Tr., PP. 10-11).

As the Court can see, the questionnaire, combined with Brian Weigel's directions,

led to a confusing situation. The questionnaire itself said that Mr. Crabtree did not have to disclose the identity of sexual partners. On August 22, 2006, despite Mr. Crabtree's efforts to not identify his sexual partner, Mr. Weigel ordered him to identify the person who was "an acquaintance" and in response to that question, Mr. Crabtree provided K.R.'s identity. He did so because he knew that his probation would be revoked if he did not do so. (Matthew Crabtree Aff., App. PP. 12-13).

Mr. Weigel had a mistaken belief that Mr. Crabtree had to take a polygraph, and he did tell Mr. Crabtree that he had to take it. He does not recall exactly how he worded that information but Mr. Crabtree was told that he had to take the polygraph. (Transcript of Proceedings in Rev. Of Probation, 10-27-06, Burleigh Co. Crim. No. 08-01-K-1458, P. 14).

From August 22, 2006 to September 7, 2006, Brian Weigel avoided talking to Matt. (Tr. Prelim. Hrg., P. 5). Weigel did, however, talk to his supervisor and to Joni Heine, who does sexual offender treatment at West Central Human Services. (Tr. Prelim. Hrg., P. 5).

On September 7, 2006, Brian Weigel, Joni Heine, and Mr. Crabtree met. Mr. Crabtree was asked about his contact with "K.R." and he said that it was through a mutual friend named "J.L." He said he did not know K.R.'s last name, that he had met her through J.L. who work at Burger King and that J.L. had introduced him to K.R. (Tr. Prelim. Hrg., P. 6).

On September 7, 2006, Brian Weigel went to Burger King and got J.L.'s name and the name of K. - - - -, who had the same first name as K.R., but who was not K.R. He

contacted K. - - - -. K - - - - had not been with Matt. K. - - - - gave Brian Weigel J.L.'s cell phone number. Brian Weigel then contacted J.L., and met with J.L. on September 7. J.L. then gave Brian Weigel K.R.'s name. (Tr. Prelim. Hrg., PP. 7-8).

Using the information he obtained from J.L., Brian Weigel then contacted K.R. and talked to her. K.R. then said that she had sexual relations with Mr. Crabtree that formed the basis of this complaint. (Tr. Prelim. Hrg., PP. 8-9).

Mr. Weigel made it clear that if Mr. Crabtree had refused to fill out the questionnaire, it would be a violation of his probation, and taking a polygraph examination was a requirement of his probation. Specifically, Mr. Weigel said:

> "Q Okay. Well, did he – he didn't come in and say, I want to fill out a questionnaire, did he? He said, I'd like to see my kid when my bid's born; isn't that correct?
> A His question was, you know, what do we need to do to allow me to have contact with my unborn child.
> Q Okay. And you told him he had to fill out the questionnaire?
> A I asked him to. If he would have denied to, it would have been a violation of his probation, yes.
> Q How would have that been a violation of his probation?
> A Because it's part of the polygraph examination process, and to take a polygraph is part of his probation.
> Q So he was required to take a polygraph as part of his probation?
> A Yes." (Tr. Prelim. Hrg., P. 14)

Brian Weigel recalls that on August 8, 2006, he dropped off the sex offender questionnaire with Rachel and told her that "Matt needed to fill it out completely and then we would do a polygraph examination." (Brian Weigel Deposition Tr., P. 22, lines 4-6; The questionnaire was attached to Rachel Crabtree's Affidavit of December 28, 2006, PP. 15-18; and is set forth in the Appendix at Pages 19-22). Brian Weigel also told Rachel to

have Matt contact him that evening. In response, Mr. Crabtree did call Brian Weigel the night of August 8, 2006 and according to Brian, he told Matt that Matt would have to fill out the sexual offender disclosure and that Brian would meet with him right before the polygraph and they would go over the sexual offender disclosure right before the polygraph. (Brian Weigel Deposition Tr., PP. 22-23).

On August 22, Brian met with Mr. Crabtree and they went over the sex offenders questionnaire. This is the questionnaire where Mr. Crabtree had stated he had had sexual relations with an acquaintance. It should be noted that the first page of the sex offenders disclosure questionnaire says "You are **not** being asked to provide **identifying** information about victims. You can accurately fill out this form and pass your polygraph without giving any identifying information about your victims." The second page of the polygraph disclosure questionnaire stated "all questions relate only to behavior that occurred before the date of your last conviction for a sexual offense. All questions exclude this last offense or any offenses that occurred since your last conviction." The second page of the form further states "You will be asked questions about victims of sexual offenses that you have committed. You will not be asked to give identifying information about these victims. Should you report identifying information about these victims anyway, this information will be reported to child protective services as required by state law." (App. P. 45).

In response to the written directions, Mr. Crabtree stated he had had sexual relations with "an acquaintance." He did not disclose the acquaintance's identity. According to Brian Weigel, on August 22, 2006, when Brian was going over the sex

offender's questionnaire with Matt, "he [Matt] put Ruby and Rachel and protected sex with an acquaintance. I asked for the acquaintance's name, and he said K. . . I failed to ask what her age was. So I knew he had sex with a K. . . but I did not know anything else until Rollie came back afterwards. And then Rollie was the one that informed me that Matt was admitting he had intercourse with a girl that was a minor."

Matthew Crabtree's affidavit makes it clear that Matthew was compelled to answer Mr. Weigel's question about the identity of "an acquaintance" because his probation would have been revoked if he did not answer the question. Brian Weigel also makes it clear that Matt's probation would have been revoked if he had not answered the question. Brian said that if a probationer is "asked directly about a violation and they lie, that would be failure to provide pertinent information." " (Brian Weigel Deposition Tr., P. 11).

It is clear from all three transcripts that the State would not have located K.R. if Mr. Crabtree had not been compelled to answer Mr. Weigel's question about the identity of the acquaintance. In fact, if Mr. Weigel had honored the statement on the first page of the sex offender disclosure questionnaire that stated Mr. Crabtree was not being asked to provide identifying information about victims, Mr. Crabtree would not have been charged in this action.

IV. ARGUMENT.

The Fifth Amendment to the United States Constitution provides, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself or herself."

> "The Fifth Amendment right against compelled self-incrimination is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 12 L.Ed.2d 653 (1964). "The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 78, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). Thus, a person cannot be compelled to waive his Fifth Amendment privilege and to furnish possibly incriminating testimony unless the State grants that person immunity which protects against the use of his compelled testimony, and the evidence derived therefrom, in any subsequent criminal case in which he is a defendant. Lefkowitz v. Turley, supra; Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); Murphy v. Waterfront Com'n of New York Harbor, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)."

State v. Hass, 177 N.W.2d 486 (N.D. 1978)

Likewise, Article I, Section 12 of the North Dakota Constitution provides in relevant part: "No person shall . . . be compelled in any criminal case to be a witness against himself."

This Court has said:

> "The privilege guaranteed by this constitutional provision relates to the personal liberty of the citizen, and it is now a generally accepted principle that such constitutional provisions should be liberally construed and given full force, or the intent thereof will be unavailing."

State v. Beaton, 516 N.W.2d 645, 648 (N.D. 1994) citing In re Beer, 17 N.D. 184, 187,

115 N.W. 672, 673 (1908).

Mr. Crabtree maintains that when he was told to complete the polygraph questionnaire and then was asked the name of his sexual partner by his probation officer, he was compelled to be a witness against himself in violation of those constitutional rights.

In a somewhat analogous case, Minnesota v. Murphy, 465 U.S. 420 (1984), the Court held that when a probationer is questioned by his probation officer at the probation officer's office under circumstances that would not lead the probationer to believe that refusal to answer questions or leaving the meeting could result in revocation of his probation, then questioning by the probation officer does not result in compulsion. 465 U.S. at 433, Fn. 6.

The Court noted that the general rule that the privilege against self-incrimination must be claimed when self-incrimination is threatened, has been deemed 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. 465 U.S. at 434. For instance, the Court pointed to Garrity v. New Jersey, 385 U.S. 493 (1967), where the Court held that an individual threatened with discharge from employment for exercising the privilege to remain silent has not waived the privilege to remain silent by responding to questions rather than standing on his right to remain silent. 465 U.S. at 435. The Court said that the threat of punishment for reliance on the privilege to remain silent distinguishes self-incrimination cases from the ordinary case in which a witness is merely required to appear and give testimony. Minnesota v. Murphy, 465 U.S. at 435. The Court concluded

that it was clear to Murphy that Minnesota would not penalize Mr. Murphy for remaining silent. Minnesota v. Murphy, 465 U.S. at 435-436.

From Mr. Crabtree's affidavit and testimony and from the testimony of Brian Weigel at the preliminary hearing in this action and at his deposition, it is clear that both Mr. Weigel and Mr. Crabtree believed that Mr. Crabtree's refusal to answer questions relating to his sexual activity or the identity of his sexual partners by exercising his privilege against self-incrimination would result in revocation of his probation. Additionally, Mr. Crabtree was on thin ice. Judge Schneider had told him if he came back on a probation revocation, he was going to get the maximum sentence, (Matt Crabtree Affidavit, App. p. 12) and Mr. Crabtree's probation officer, Mr. Weigel, had told Mr. Crabtree after an oxycodone incident, that Mr. Crabtree was close to getting his probation revoked. (Matt Crabtree Affidavit, App. p. 13) Mr. Weigel had told Mr. Crabtree that Mr. Crabtree did not need a lawyer. (Matt Crabtree Affidavit, App. p. 11).

In Minnesota v. Murphy, supra, the Court stated that it had not been advised of any case in which Minnesota has attempted to revoke probation merely because a probationer refused to make non-immunized disclosure concerning his own criminal conduct, and that Mr. Murphy could not reasonably have feared that assertion of the privilege would lead to revocation of his probation. Minnesota v. Murphy, 465 U.S. at 438-439.

Minnesota v. Murphy supra., was decided in 1984. In 1997, the 8th Circuit Court of Appeals decided McMorrow v. Little, 103 F.3d 704 (8th Cir. 1997). There McMorrow sued numerous North Dakota corrections officials alleging that he had been denied

participation in sex offender treatment because he would not waive his constitutional right against self-incrimination by admitting that he had committed a sexual offense. The Court stated the case history as follows:

> "McMorrow was charged with gross sexual imposition for raping a woman. A jury found McMorrow guilty. As a part of McMorrow's sentence, he was required to attend the Sexual Offender Treatment Program at the North Dakota State Penitentiary. Before McMorrow could attend the program he had to admit that he committed the crime for which he was convicted.
>
> McMorrow refused to admit that he committed the crime for which he was convicted. Because of his refusal, the officials denied McMorrow access to the sex offender program and eligibility for parole, work release, and less restrictive confinement. McMorrow brought this action claiming that the officials violated his constitutional right against self-incrimination by requiring him to admit his guilt before he could attend the sex offender program and become eligible for parole, work release, and less restrictive confinement.
>
> The officials filed a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss McMorrow's complaint. They argued that McMorrow's complaint failed to state a claim upon which relief could be granted because of their qualified immunity. The magistrate judge concluded in his report and recommendation that McMorrow had stated a claim that the officials' qualified immunity did not defeat. The magistrate judge determined that it was clearly established that it was a violation of McMorrow's constitutional right against self-incrimination to require him to admit his crime before allowing him to attend the sex offender program. The district court agreed with the magistrate judge's conclusions and adopted his report and recommendation. The officials appeal from the denial of their motion to dismiss McMorrow's complaint.
>
> The officials argue that McMorrow's complaint fails to state a claim upon which relief can be granted and should be dismissed because they are entitled to qualified immunity. They argue that they are entitled to qualified immunity because the constitutional right that McMorrow claims they violated was not clearly established."

McMorrow, supra, 103 F.3d at 705-706

The Court of Appeals held that the State corrections officials McMorrow sued had qualified immunity from the lawsuit because it was not clearly established that a prisoner's constitutional right against self-incrimination was violated by requiring him to admit his guilt.

> "McMorrow's complaint states that the officials withheld certain benefits from him because he refused to admit committing the crime for which he had been convicted. Consistent with this statement, McMorrow may be able to prove two different sets of facts, each showing a different potential violation of his constitutional right against self-incrimination by the officials. Under each alternative, we accept that McMorrow refused to admit his guilt for the crime for which he was convicted and that the officials withheld benefits from him because of this refusal.
>
> Accepting these facts, the first alternative assumes that McMorrow did not invoke his privilege against self-incrimination when he refused to admit his guilt and that his admission would not incriminate him for a crime other than the one for which he had already been convicted. McMorrow argues that a convicted defendant's constitutional right against self-incrimination prevents state officials from making benefits conditional on the defendant's admission of guilt. We will assume without deciding that McMorrow is correct and that these facts constitute a violation of his right against self-incrimination.
>
> Assuming this violation of McMorrow's constitutional right, the officials are entitled to qualified immunity because it was not clearly established that their conduct was unconstitutional. At the time the officials withheld benefits from McMorrow, no court with jurisdiction over North Dakota had held that such conduct was a violation of a convicted defendant's constitutional right against self-incrimination."

McMorrow, supra, 103 F.3d at 706 (Emphasis added)

In fact, Mr. Crabtree's fear that he could have his probation revoked if he did not incriminate himself was a valid and rational fear under the law and under the facts.

It is clear that Mr. Weigel, the one official who held Mr. Crabtree's liberty in his hand, believed that Mr. Crabtree's probation could be revoked if Mr. Crabtree invoked

his Fifth Amendment privilege against self-incrimination. Mr. Weigel's belief was conveyed to Mr. Crabtree who believe that his probation would be revoked if he tried to avoid incriminating himself when he was asked to identify his sexual partner.

The self -incrimination clauses of the Fifth Amendment and Article I, Section 12 provide that no person shall be compelled in any criminal case to be a witness against himself. The question is whether the procedures used in Mr. Crabtree's interview resulted in compulsion.

Both Mr. Weigel and Mr. Crabtree believed and were convinced that if Mr. Crabtree remained silent, his probation would be revoked. Part of the previous grounds used to revoke Mr. Crabtree's probation was that Mr. Crabtree had failed to give pertinent information.

In deciding Mr. Crabtree's suppression motion, the Trial Court apparently found that Mr. Crabtree's answers to the polygraph questionnaire and to Mr. Weigel's questions were voluntary and not compelled and that Mr. Crabtree apparently had nothing to fear if he asserted his privilege against self incrimination despite the fact that both Mr. Crabtree and his probation officer believed and stated otherwise.

That finding, of course, is not supported by any evidence. Mr. Crabtree and Mr. Weigel were both of the opinion that Mr. Crabtree's invocation of his right to remain silent would result in probation revocation. There was no North Dakota case which clearly held otherwise.

But the Court's opinion can be interpreted to mean that before Mr. Crabtree will be heard to complain about a violation of his right to remain silent unless he first

invoked that right by asking to remain silent.

Generally, a person must affirmatively assert his Fifth Amendment privilege. His answers to questions are not considered to be "compelled" within the meaning of the Fifth Amendment unless he is required to answer after he has claimed the privilege. If he chooses to answer without claiming the privilege, "his choice is considered voluntary because he 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.

But there are well-defined exceptions to the general rule that the privilege must be claimed. The exceptions arise when the individual is deprived of his "'free choice to admit, to deny, or to refuse to answer.'" Garner v. United States, 424 U.S. 648, 657 (1975)(quoting, Lisenba v. California, 314 U.S. 219, 241 (1941). In such cases, the privilege becomes "self executing".

> "[I]f 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."

Murphy, 465 U.S. at 435.

The record is clear. The State expressly and implicitly asserted that if Mr. Crabtree invoked his privilege to remain silent that action would lead to revocation of his probation.

The question of whether there has been "compulsion" was nicely addressed by the Minnesota Supreme Court in Johnson v. Fabian, 735 N.W.2d 295 (Minn. 2007). The Minnesota court establishes a sound analytical framework for addressing the question.

"The precise question faced by the Court in Murphy was whether the Fifth and Fourth Amendments prohibited the introduction into evidence in a criminal trial of Murphy's incriminating admissions made to his probation officer. 465 U.S. at 422, 104 S.Ct. 1136. The Court initially explained the general rule, subject to several exceptions, that a witness facing questions that could elicit incriminating answers must assert the privilege against self-incrimination; otherwise, his answers will be considered voluntary and not violative of the privilege against self-incrimination. Id. at 429, 104 S.Ct. 1136. One of the exceptions to that general rule is where assertion of the privilege is penalized so severely that free choice is foreclosed and answers given without assertion of the privilege are considered compelled. Id. at 434, 104 S.Ct. 1136.

"Addressing this exception, the Court in *Murphy* explained that a penalty could not be found in that case based on fear of incarceration, whether the test was subjective or objective. *Id.* at 437, 104 S.Ct. 1136. In terms of a subjective test, the Court noted that **"[t]here is no direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent."** Emphasis Added *Id.* Addressing an objective standard, the Court stated that any subjective fear that Murphy's probation could be revoked for asserting his privilege against self-incrimination would have been objectively unreasonable, because the Court's "decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." *Id.* at 438, 104 S.Ct. 1136. Indeed, the Court pointed out that the state conceded that "it would not, and legally could not, revoke probation for refusing to answer questions calling for [incriminating] information." *Id.* Emphasizing the point, the Court reiterated that "in light of our decisions proscribing threats of penalties for the exercise of Fifth Amendment rights, Murphy could not reasonably have feared that the assertion of the privilege would have led to revocation." Id. at 439, 104 S.Ct. 1136. Accordingly, the Court concluded that Murphy was not compelled to answer based on a reasonably perceived threat of revocation, and the penalty exception did not apply. Id.

"In summary, the Court in Murphy decided that there was no Fifth Amendment violation in that case, not because the threat of additional incarceration is not compulsion, but because there was no such threat. ..."

Johnson v. Fabian, supra., 735 N.W.2d at 306-307.

The Supreme Court has found that certain types of penalties are capable of

coercing incriminating testimony. These include termination of employment, Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of City of New York, 392 U.S. 280 (1968), the loss of a professional license, Spevack v. Klein, 385 U.S. 511 (1967), ineligibility to receive government contracts, Lefkowitz v. Turley, 414 U.S. 70 (1973) and the loss of the right to participate in political associations and hold public office. Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

Obviously, if loss of the right to hold public office, the ineligibility to receive government contracts, and termination of employment are threats which an lead to compulsion, the threat of imprisonment certainly constitutes compulsion.

Under either a subjective or an objective test, Mr. Crabtree's statements were compelled.

The subjective test is the more difficult test for Mr. Crabtree to meet. The accused has a strong incentive to lie about his state of mind at the time he made the statement. But in this case Mr. Crabtree's sworn, subjective testimony was supported by the testimony of his probation officer, Brian Weigel, and the past history of his case. The subjective test has been satisfied.

The objective test has been met. There was no definitive North Dakota case that prohibited revocation of Mr. Crabtree's probation for claiming his privilege against self incrimination. He was subject to written probation conditions which required him to be truthful. His probation officer had told him he had to answer questions. Mr. Crabtree wanted the advice of a lawyer and was told he didn't need a lawyer. Both Mr. Crabtree and his probation officer believed the written condition which required him to take a

polygraph test applied to Mr. Crabtree at the time he was tested. At the time Mr. Crabtree was told to identify the sexual partner he had identified as "an acquaintance" he faced the choice of answering or going to jail. The answer was not freely given. It was compelled in violation of his rights under the State and Federal constitutions. Mr. Crabtree's identification of his sexual partner was not free and voluntary, but instead was the product of compulsion. When Mr. Crabtree was questioned at West Central human services he acted under the same compulsion. Because his statements were compelled his statements, and all the evidence derived from those statements should be suppressed.

Unlike Minnesota v. Murphy, supra, where the accused had no reason to believe silence would result in probation revocation, in this case there was a clear and real threat of probation revocation and incarceration if Mr. Crabtree refused to identify his sexual partner. The threat compelled his statement.

Although Mr. Crabtree believes the case is clear, if there is some doubt about the application of Article I, Section 12 of the North Dakota Constitution this Court's preference for a liberal construction of that provision militates for suppression of the evidence.

V. CONCLUSION.

For the foregoing reasons, Mr. Crabtree asks this Court to enter its order reversing the decision of the District Court and order the District Court to suppress evidence in accordance with Mr. Crabtree's motion.

Dated this 13 day of December, 2007.

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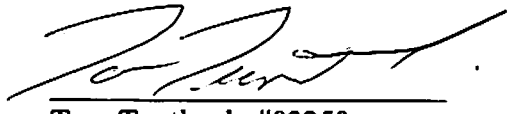

Tom Tuntland #03250

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20070280
(Reference Burleigh Co. No. 06-K-01768)

State of North Dakota,

Plaintiff-Appellee,

-vs-

Matthew Crabtree,

Defendant/Appellant.

AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF MORTON)

Marilyn Kottsick, being first duly sworn, deposes and states that she is over the age of eighteen years and not a party to the above-entitled matter. That on December 13, 2007, she served a copy of the following documents:

APPELLANT'S BRIEF AND APPENDIX

by placing the same in an envelope addressed as follows, which address is the last known address of the party to be so served and depositing the same, with postage prepaid into the United States mails at Mandan, North Dakota:

Julie Lawyer
Assistant State's Attorney
Burleigh County Courthouse
514 E Thayer
Bismarck ND 58501

Marilyn Kottsick

Subscribed and sworn to before me on December 13, 2007.

TOM TUNTLAND
Notary Public
State of North Dakota
My Commission Expires Oct. 31, 2011