STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2009AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J. SPAETH,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
Entered in Winnebago County Circuit Court,
the Honorable William H. Carver, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Must Mr. Spaeth's statement to police be suppressed under the Fifth Amendment to the Federal Constitution and Article 1, Section 8, of the Wisconsin Constitution?

The circuit court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Spaeth would welcome oral argument if the court would find it helpful. He does not request publication because the issue presented involves the application of well-settled law.

STATEMENT OF THE CASE

The state charged Joseph J. Spaeth with four counts of first-degree sexual assault of a child, each as a persistent repeater. (1:1). According to the complaint, Mr. Spaeth made a statement to a police detective that he had tickled a niece on two occasions, and had tickled two other children on one occasion, while at family gatherings. (*Id.* at 2-3). Mr. Spaeth told police that his hand "brushed up" against their private parts during the tickling (over clothes) for less than a minute, which is how he shows love and affection. (*Id.* at 3). He told police that he needed help and that he wished he hadn't been sexually abused as a child, but that he got a "don't care feeling." (*Id.*).

On May 16, 2006, Mr. Spaeth filed a motion to suppress statements. (7). The court denied the motion after a

hearing. (60:51-52; App. 104-05). Later, Mr. Spaeth, represented by new counsel, filed a motion to reconsider the motion to suppress, which contained some new factual information for the court. (15). The court again denied the motion after a hearing. (64:11-15; App. 110-14).

After a jury trial, Mr. Spaeth was convicted of all of the charges. The court sentenced him to life in prison without the possibility of parole. (23).

On October 17, 2008, the circuit court granted a postconviction motion for a new trial on the ground that extraneous, prejudicial information had affected jury deliberation. (35). Mr. Spaeth later pleaded no contest to an amended information charging him with four counts of child enticement and the court sentenced Mr. Spaeth to five years of initial confinement and ten years of extended supervision on each count. (45; App. 101).

Mr. Spaeth filed a timely notice of appeal. (54). Before the circuit court record was sent to this court, Mr. Spaeth filed a motion with this court asking to remand the case to the circuit court. The motion, dated December 18, 2009, alleged that undersigned counsel had determined, upon reviewing the record in preparation for filing a brief, that the circuit court had not fully considered the law applicable to Mr. Spaeth's suppression motion. It asked this court to remand the case so that the circuit court could reconsider the motion and possibly negate the need for appeal. On January 8, 2010, this court granted the motion and remanded the case to the circuit court.

Thereafter, Mr. Spaeth filed a postconviction motion with the circuit court. (54A). After a hearing, the circuit court denied the motion. (54B; App. 1441517).

STATEMENT OF FACTS

The primary evidence relevant to the only issue presented in this appeal came in through the testimony of the three witnesses at the suppression hearing: Probation and Parole Agent Rebecca Dewitt, Oshkosh Police Officer Joseph Framke, and Oshkosh Police Detective James Busha.

Testimony of Agent Dewitt

Agent Dewitt supervised Mr. Spaeth in her role as a probation and parole officer. (60:7). On February 15, 2006, as part of that supervision, Agent Dewitt had Mr. Spaeth submit to a polygraph examination. (*Id.*). She did not observe the examination but, after it was completed, she spoke with the examiner and Mr. Spaeth. (*Id.* at 7-8). At the post-examination interview, Mr. Spaeth "said that he had been horse-playing with his nieces and nephews and he knew that to be wrong." (*Id.* at 8). He said that he "may have brushed up against his nieces and nephews vaginas or butts or breast area." (*Id.*).

Based on this conversation, the Probation and Parole Office contacted the Oshkosh Police Department for a probation hold. (60:8). When Officer Framke arrived at the office, Agent Dewitt told him that Mr. Spaeth may have committed a sexual assault. (*Id.*). While placing Mr. Spaeth in his vehicle, Officer Framke asked him "if he would be willing to talk to detectives." (*Id.* at 9). Agent Dewitt told him that "he didn't have to talk to them, that he could talk to an attorney, he wasn't compelled to give them any kind of statement. And [Mr. Spaeth] said, no, he wanted to get it off his chest." (*Id.*).

Mr. Spaeth was compelled to cooperate with the polygraph examination and to give truthful information.

(60:9). Agent Dewitt did not tell Mr. Spaeth that he had to cooperate with law enforcement. (*Id.* at 11).

When Agent Dewitt met with Mr. Spaeth, she told him that he "may have violated his rules." (60:13). Any physical or unsupervised contact would have been a violation of the rules. (*Id.* at 13-14). Agent Dewitt told Mr. Spaeth that he was being placed on a hold because of "the responses that he gave in the polygraph test." (*Id.* at 14). Mr. Spaeth was present when Agent Dewitt told Officer Framke that she suspected Mr. Spaeth of sexual assault. (*Id.*). Agent Dewitt did not go to the police station. (*Id.* at 15).

The requirement that Mr. Spaeth submit to a polygraph is part of the "standard supervision rule that all offenders sign." (60:38). However, it is department policy that the department only requires sex offenders to take the polygraph examination. (*Id.*). Prior to the examination, Agent Dewitt would send notice of the "date and time, when to come in for the exam and what type of exam it's going to be." (*Id.* at 39). The polygraph examiner also gives the probationer his own "release of information and consent forms." (*Id.*). There is a form that "clearly states that [polygraph statements] cannot be used in criminal proceedings," but Agent DeWitt did not have time to use that form with Mr. Spaeth. (*Id.* at 40). If Mr. Spaeth had refused to submit to the polygraph examination, that "would have been a violation of his supervision." (*Id.* at 41). Agent DeWitt cannot turn over any written statement to law enforcement, but she can give them information that she learns for their "independent investigation." (*Id.*).

Testimony of Officer Framke

On February 15, 2006, Officer Framke was dispatched to the probation office. (60:17). Upon arriving there, he went to the conference room and "took [Mr. Spaeth] into custody on a probation hold." (*Id.*). Officer Framke put Mr. Spaeth in handcuffs, led him to his squad car and belted him in the back. (*Id.*). At this time "Agent Dewitt had come up to me and she made me aware that [Mr. Spaeth] had made some comments about possibly having inappropriate contact with some nephews and nieces. Agent Dewitt stated that he had talked about having some contact with the vagina, breast and buttock area." (*Id.* at 17-18).

Prior to placing Mr. Spaeth in his car, Officer Framke did not recall asking him anything other than whether he needed to be concerned about anything in searching him. (60:18). Mr. Spaeth did not say anything to Officer Framke. (*Id*.). After Officer Framke spoke with Agent Dewitt, he asked Mr. Spaeth "if he would be willing to sit down and talk to me about what Agent Dewitt had told me, and he told me that he would." (*Id*.). Officer Framke took Mr. Spaeth to the police station. (*Id*. at 19).

Upon pulling in the police station parking lot, Officer Framke met with Detective Busha, who agreed to assist Officer Framke in interviewing Mr. Spaeth. (60:20). Officer Framke told Detective Busha what Agent Dewitt had told him about Mr. Spaeth having possible sexual contact with children. (*Id*. at 24). The two officers led Mr. Spaeth into an interview room and informed him of his constitutional rights. (*Id*. at 20). Mr. Spaeth did not indicate that he did not understand his rights, or that he did not want to make a statement, or that he wanted to speak with a lawyer.

(*Id*. at 21). The officers did not threaten him or tell him that they would inform Agent Dewitt of anything he said. (*Id*.).

Mr. Spaeth gave the officers a statement. (60:22). Detective Busha wrote it down. (*Id.* at 22). Mr. Spaeth did not tell the officers that he was concerned about his parole status. (*Id.* at 26).

Testimony of Detective Busha

On February 15, 2006, Officer Framke contacted Detective Busha as he pulled into the police station parking lot. (60:27). Officer Framke told Detective Busha that "he had just picked up an individual from probation/parole who wished to make a statement" regarding "sexual assault of some children." (*Id.*). The two officers, once in the interview room, presented Mr. Spaeth with a "Miranda rights form," asked him to read part of it out loud, and then interviewed him. (*Id.* at 28).

Detective Busha did not indicate "whether or not his parole status would be affected" by his cooperation. (60:29). He did not make any promises. (*Id.* at 29). Detective Busha knew that Mr. Spaeth had taken a polygraph examination but he did not "believe" that he talked about the exam. (*Id.*).

Mr. Spaeth gave a statement and Detective Busha wrote it down. (60:30).

Prior to the interview, Detective Busha had not investigated Mr. Spaeth. (60:2). About twenty minutes expired between Detective Busha's arrival in the parking lot and his reading of Miranda warnings. (*Id.* at 34).

Additional evidence will be cited in the context of the legal argument.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

The Fifth Amendment to the United States Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment's self-incrimination clause is applicable to the states through the Fourteenth Amendment. ***Malloy v. Hogan***, 378 U.S. 1, 6 (1964). The Wisconsin Constitution similarly provides that no person "may be compelled in any criminal case to be a witness against himself or herself." Wis. Const. Art. 1, § 8(1). A statement that has been obtained in violation of these constitutional provisions is inadmissible at trial. *See* ***State v. Mark***, 2008 WI App 44, ¶ 3, 308 Wis. 2d 191, 747 N.W.2d 727.

This brief addresses two separate lines of authority derived from the Fifth Amendment – the generally-applicable voluntariness standard as applied to a statement made subsequent to an earlier compelled statement, and a more specific standard applicable to evidence, including a statement, tainted by an earlier compelled *and* immunized statement. Both standards require that the second statement be independent of the first statement, but the more specific standard is more exacting. As discussed in detail below, the more specific standard provides that any statement made subsequent to an immunized statement is inadmissible if "tainted" by, or "derived" from, the earlier, immunized statement. In contrast, the more general standard involves a balancing test in which the court must consider a number of factors, including the nature of the original compulsion, the passage of time, and whether there were Miranda warnings.

Here, the state has conceded that Mr. Spaeth's statements to his parole agent were both compelled and immunized. (64:6; 74A:26).[1] As such, both standards are potentially applicable to the subsequent statement that Mr. Spaeth made to Officers Framke and Busha, which were the subject of the suppression motion. As described in Mr. Spaeth's remand motion, the suppression motions cited authority applicable to both standards but without clearly parsing out the distinctions between the standards. The trial court's original ruling on the suppression motions only addressed the more general standard. (60:51-52; App. 104-05). On remand, the trial court addressed the more specific standard. (74A:30-32; App. 117-19).

Because the more specific standard places a higher burden on the state, this brief begins there. However, this brief also analyzes the facts under more general standard as an additional, alternative basis for suppression.

In addressing either standard, this court must apply constitutional principles to historical facts. *See* ***State v. Ward***, 2009 WI 60, ¶ 17, 318 Wis. 2d 301, 767 N.W.2d 236. This court upholds the circuit court's findings of historical fact unless they are clearly erroneous, i.e., "against the great weight and clear preponderance of the evidence." ***Id.*** It independently reviews the application of constitutional principles to those facts. ***Id.***

[1] The state has always made it clear that it would not use Mr. Spaeth's original statements to the polygraph examiner and his agent at trial because they were inadmissible. (60:4-6).

ARGUMENT

Mr. Spaeth's Statement to Police Cannot Be Used Against Him at a Criminal Trial Under the Fifth Amendment to the Federal Constitution and Article 1, Section 8, of the Wisconsin Constitution.

A. Mr. Spaeth's Police Statement Was Derived from Immunized Statements and Therefore Inadmissible.

1. The Federal and State Constitutions Prohibit the Use, at a Criminal Trial, of Any Evidence Derived from an Immunized Statement.

In ***Kastigar v. United States***, the United States Supreme Court held that the government may compel an individual to provide self-incriminating information, but that must come with a grant of "use and derivative use" immunity because such immunity is "coextensive" with the scope of the Fifth Amendment privilege. 406 U.S. 441, 453 (1972). Use and derivative use immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." ***Id.*** at 453.

The Supreme Court reaffirmed ***Kastigar*** in ***Lefkowitz v.Turley***, in which it held that the Fifth Amendment privileges an individual not to answer official questions put to him in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings," absent use and derivative use immunity. 414 U.S. 70, 77-78 (1973).

In ***State v. Evans***, the Wisconsin Supreme Court held that an incriminating statement made by a probationer in response to questioning by his probation or parole agent is compelled within the meaning of the Fifth Amendment. 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977). The appellate courts have repeatedly reaffirmed this holding. *See, e.g.,* ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶ 20, 257 Wis. 2d 40, 654 N.W.2d 438; ***State v. Thompson***, 142 Wis. 2d 821, 830-31, 419 N.W.2d 564 (Ct. App. 1987). ***Evans*** and its progeny are based on Wisconsin's rule that probationers must answer questions posed by their agents honestly or face revocation. *See, e.g.,* ***Evans***, 77 Wis. 2d at 231-32; ***Tate***, 257 Wis. 2d 40, ¶ 20; ***Thompson***, 142 Wis. 2d at 830.

In ***Evans***, the court further stated:

> ...we hold that upon timely objection in criminal proceedings, the testimony of a probationer or a parolee given in response to questions by a probation or parole agent or at a probation or parole revocation hearing, which questions are prompted by pending charges or accusations of particular criminal activity, *or any evidence derived from such testimony*, is inadmissible against the probationer or parolee during subsequent proceedings on related criminal charges except for purposes of impeachment or rebuttal where his testimony at the criminal proceeding is clearly inconsistent with the statements made previously.

77 Wis. 2d at 235-36 (emphasis added).

This holding, which renders inadmissible a Wisconsin probationer's statements to his agent, as well as "any evidence derived from" such a statement, is a grant of use and derivative use immunity under ***Kastigar*** and ***Lefkowitz***. ***Evans***, 77 Wis. 2d at 232, 233, 235 (citing ***Lefkowitz*** and ***Kastigar***). *See also* ***Minnesota v. Murphy***, 465 U.S. 420,

435 n.7 (1984) (stating that a state may validly insist on answers to incriminating questions in order to administer its probation system as long as it recognizes that the required answers may not be used in a criminal proceeding); ***Tate***, 257 Wis. 2d 40, ¶ 20 (same); ***Thompson***, 142 Wis. 2d at 828-33 (noting that ***Evans*** was still good law after ***Murphy*** based on the state's probationary rules and discussing use and derivative use immunity).

As such, in a case involving a probationer's compelled, immunized statement to his parole agent and any evidence derived from the statement, ***Kastigar***, ***Evans***, and their progeny render such evidence inadmissible.

In such a case, the government bears the burden of showing that the evidence "'is not tainted by establishing that it had an independent, legitimate source for the disputed evidence.'" ***Mark***, 308 Wis. 2d 191, ¶ 28 (quoting ***Kastigar***, 406 U.S. at 460). The source must be "wholly independent." ***Kastigar***, 406 U.S. at 460.

The government must prove that it did not make "any use, direct or indirect, of the compelled testimony and any information derived therefrom." *See* ***id.*** at 460. This includes use of the statement as an "investigatory lead." ***Id.***; *see also* ***State v. Hall***, 207 Wis. 2d 54, 78, 557 N.W.2d 778 (1997) (stating that the compelled statement cannot "furnish a link in the chain of evidence against the defendant"). In other words, the government cannot use the statement "to search out other testimony to be used in evidence against" the individual. *See* ***Kastigar***, 406 U.S. at 453 (citing ***Counselman v. Hitchcock***, 142 U.S. 547, 564 (1892)). The government cannot use the statement to gain "knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *See* ***id.*** at 454 (citing

Hitchcock, 142 U.S. at 586). The government cannot present the testimony of any witness whose testimony was affected by hearing the statement. ***State v. Harrell***, 2008 WI App 37, ¶ 28-31, 308 Wis. 2d 166, 747 N.W.2d 770.

The state may still prosecute the probationer for the crime that is the subject of the compelled statement. In other words, the Fifth Amendment does not require "transactional" immunity. ***Kastigar***, 406 U.S. at 453. But it must do so on the basis of evidence that is untainted by the statement. ***Id.*** at 460.

This standard is distinct from the more general standard applicable to statements made subsequent to a compelled statement, as Mr. Spaeth raises below. Under the more general standard, a subsequent statement is considered also compelled unless it can be "separated by the circumstances surrounding" the earlier statement by a "break in the stream of events between the first and second statement." ***Clewis v. Texas***, 386 U.S. 707, 710 (1967). The question is whether the "conditions" that coerced the first confession "have been removed." ***United States v. Bayer***, 331 U.S. 532, 541 (1947). The Supreme Court has emphasized that the "purpose and flagrancy" of the official misconduct that elicited the initial confession is a key factor. ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975).

The two standards are different in two respects. First, as the ***Kastigar*** court recognized, the derivative use standard is more exacting. *See* 406 U.S. at 461-62.

Second, the focal point for the two standards is different. Under the more general standard, the court looks at, among other things, the official misconduct that elicited the original statement. In contrast, under the derivative use standard, the focus is on the prosecutorial use of any evidence

derived from the immunized statement. There may be no misconduct involved with the taking of a compelled, immunized statement from a probationer. Further, there may be no misconduct involved with law enforcement's subsequent investigation of a crime revealed through such a statement. However, there *is* a legal error if the state seeks to use evidence obtained through that investigation against the probationer in a criminal case, if the state cannot prove that the evidence had a "wholly independent" source. *See* Wayne R. LaFave, et al., **Criminal Procedure** § 8.11 (3d ed. 2007). In a case involving an immunized statement, the state has at all times controlled the means of eliciting the statement and the grant of immunity and therefore is flatly barred from using the information gleaned from the statement for any purpose. *See* **id.;** *see also* ***Thompson***, 142 Wis. 2d at 833-34.

2. Mr. Spaeth's Police Statement Was Derived from an Immunized Statement Made to His Parole Agent and Therefore Inadmissible.

The self-incriminating statements that Mr. Spaeth made to the polygraph examiner, at Agent Dewitt's direction, and to Agent Dewitt, were compelled and protected by use and derivative use immunity. *See, e.g.,* ***Tate***, 257 Wis. 2d 40, ¶ 20; ***Evans,*** 77 Wis. 2d at 235-36; ***Thompson***, 142 Wis. 2d at 830-31; (*see also* 60:9-10, 41 (Agent Dewitt testifying that she required Mr. Spaeth to answer questions but could not use them against him in a criminal proceeding)). The state has conceded this point. (74A:26; 64:6.)[2]

[2] There has never been any question as to the incriminating nature of the statements. Indeed, Mr. Spaeth's ultimate police statement, based on the earlier statements, constituted the state's only evidence of the charged crimes.

Therefore, the question is whether Mr. Spaeth's subsequent self-incriminating statement to Officers Framke and Busha was "tainted" by the earlier statements. *See* ***Kastigar***, 406 U.S. at 460.

It is plain that the answer is yes.

The evidence presented at the suppression hearing established that, after Mr. Spaeth made the compelled, immunized statements, Agent Dewitt told Officer Framke that Mr. Spaeth had "made some comments about possibly having inappropriate contact with some nephews and nieces. Agent Dewitt stated that he had talked about having some contact with the vagina, breast and buttock area." (60:12, 17-18 (testimony of Officer Framke); *see also id.* at 13-14 (testimony of Agent Dewitt)). Officer Framke took Mr. Spaeth from Agent Dewitt's office to the police station, where he agreed to make a statement about the incidents with his nieces and nephews. (*Id.* at 20-24, 27-28). The officers had not previously been investigating the incidents. (*Id.* at 32).

Therefore, Mr. Spaeth's initial, protected statements did not only provide an "investigatory lead," it provided the *only* lead and it initiated the case. *See* ***Kastigar***, 406 U.S. at 460. Officer Framke and Detective Busha used Mr. Spaeth's initial statement to "search out other testimony to be used in evidence against" him, namely, a subsequent statement. *See* ***id.*** at 453. It furnished the only real "link in the chain of evidence" against Mr. Spaeth. *See* ***Hall***, 207 Wis. 2d at 78. Therefore, Mr. Spaeth's statements to Officer Framke and Detective Busha were not "wholly independent" of the earlier statements. *See* ***id.*** Indeed, they were not minimally independent and must be suppressed.

B. Mr. Spaeth's Police Statement Was Also Compelled Under the Generally-Applicable Standard and Therefore Inadmissible.

1. A Statement Made Subsequent to a Compelled Statement Is Also Compelled Within the Meaning of the Fifth Amendment Unless There Has Been a Clear Break Between the First and Second Statements.

The general rule applicable to statements made to law enforcement is that, "[w]hen an individual has given an involuntary statement, a subsequent statement is also considered involuntary unless it can be 'separated by the circumstances surrounding' the earlier statement by a 'break in the stream of events' between the first statement to the second, 'sufficient to insulate the statement from the effect of all that went before.'" ***Mark***, 308 Wis. 2d 191, ¶ 20 (quoting ***Clewis***, 386 U.S. at 710).

Of course, once an accused has "let the cat out of the bag by confessing," practically, he "can never get the cat back in the bag." ***Bayer***, 331 U.S. at 540. However, the United States Supreme Court has noted that "making a confession under circumstances which preclude its use" does not "perpetually disable[] the confessor from making a usable one after those conditions have been removed." ***Id.*** at 541. In ***Bayer***, the Court found that a second confession made six months after the first, compelled one, and while the defendant was no longer in custody, was admissible. ***Id.***

When the state seeks to use a statement made subsequent to a compelled statement, "it has the burden of demonstrating that the second statement is free from the coercive circumstances surrounding the first statement and

was not directly produced by the existence of the earlier statement." ***Mark***, 308 Wis. 2d 191, ¶ 21. Factors that may affect whether there was a "sufficient break in the stream of events from the first statement to the second include: the change of place of the interrogations, the time that passed between the statements, and the change in the identity of the interrogators." ***Id.*** at ¶ 22.

A court deciding a suppression motion should also consider the "purpose and flagrancy" of the official conduct that elicited the first confession. ***Brown***, 422 U.S. at 603-04; ***Mark***, 308 Wis. 2d 191, ¶ 22; ***State v. Farias-Mendoza***, 2006 WI App 134, ¶ 26, 294 Wis. 2d 726, 720 N.W.2d 489. The circumstances need not show that the second statement was involuntary without reference to the first statement. *Cf.* ***Taylor v. Alabama***, 457 U.S. 687, 693 (1987).

Additionally, a court should consider intervening circumstances. ***Farias-Mendoza***, 294 Wis. 2d 726, ¶ 26. Whether the interrogating authorities administered the Miranda warnings may be an intervening circumstance but this must be considered alongside other factors because "[n]o single fact is dispositive." ***Brown***, 422 U.S. at 603. Other significant intervening circumstances might include an appearance before a neutral magistrate, *cf.* ***Johnson v. Louisiana***, 406 U.S. 356, 365 (1972); the termination of custody, *cf.* ***Wong Sun v. United States***, 371 U.S. 471, 491 (1963); or consultation with counsel, *see* ***United States v. Monti***, 557 F.2d 899, 903 (1st Cir. 1977).

2. Mr. Spaeth's Police Statement Flowed Directly Out of the Compelled Statements That He Made to His Parole Agent and Is Therefore Inadmissible.

Here, the state has conceded that Mr. Spaeth's self-incriminating statements to Agent Dewitt, based on his statement to the polygraph examiner, were compelled within the meaning of the Fifth Amendment. (64:6; 74A:26). However, at the trial level, the state argued that there was a "clear split" between Mr. Spaeth's statement to Agent Dewitt and his statement to Officers Framke and Busha, and that the statement to the police officers was voluntary and admissible. (64:6).

In addressing the connection between the original statements and the police statement, this court's decision in ***State v. Mark***, in which it found that a statement made subsequent to a compelled statement was also compelled and inadmissible, is instructive. The facts of that case were comparable to the present facts in relevant part. *See* 308 Wis. 2d 191, ¶¶ 5-7. In ***Mark***, a parolee gave an incriminating written statement to his parole agent, in which he admitted to attempting to force his way in to a neighbor's bathroom. ***Id.*** at ¶ 6. Two weeks later, the parolee told his agent, orally, that the attempted break-in had been sexually motivated. ***Id.*** at ¶ 7. The parolee was in custody at a county jail, under the agent's authority, at the time that he made both statements. ***Id.*** at ¶ 11.

There, similar to here, the state conceded that the first statement was compelled, but argued that the later oral statement was admissible because the agent did not apply any pressure to get that statement. ***Mark***, 308 Wis. 2d 191, ¶ 17, 23. This court noted that such argument did not address "the

critical inquiry: what evidence shows that the compulsion that produced the written statement was removed?" ***Id.*** at ¶ 23. Ultimately, this court found that the oral statement was not attenuated from the written statement and therefore it was compelled contrary to the Fifth Amendment. ***Id.*** at ¶ 25. Although the parolee gave the oral statement two weeks after the written one, "it was to the same agent, he was still in jail under the agent's authority, and he had been served with notice there were going to be revocation proceedings." ***Id.***

In both ***Mark*** and the present case, the conduct that elicited the first statement was not flagrant or shocking, but it did compel a parolee to reveal incriminating information. Also, in both ***Mark*** and the present case, the second statement was not made under circumstances that would render it compelled independent of the first statement.

However, in neither case was there a clear break between the first statement and the second statement. In ***Mark***, significant time elapsed between the statements but the same interviewer elicited the statements, the parolee gave the second statement while being held on his agent's parole hold as a result of the first statement, and the second statement related to the same incident as the first statement. 308 Wis. 2d 191, ¶ 25.

Here, only a negligible amount of time passed between the first statement and the second statement – a much shorter period than addressed in ***Mark***. Within minutes after Mr. Spaeth made an oral statement to Agent Dewitt, Officer Framke arrived at Agent Dewitt's office, where he handcuffed Mr. Spaeth and then transported him to the police station. (60:8,17). Officer Framke and Detective Busha directly escorted Mr. Spaeth from the squad car to an interview room, read him his rights, and then inquired about

the subject of his conversation with Agent Dewitt. (60:20-22, 27-30). While the interviewers who took the second statement were different, the transfer of Mr. Spaeth from Agent Dewitt's custody to the police officers' custody was concerted and seamless. (60:8-15.17-19). Also, he was in the officers' custody on Agent Dewitt's order, for a parole hold, (60:14), and the officers inquired about, and received a statement about, the same incident addressed in the statement to Agent Dewitt, (60:8,22).

In deciding that Mr. Spaeth's statement was voluntary, the circuit court found that Agent Dewitt acted appropriately in eliciting the first statement from Mr. Spaeth and then reporting it to the police and that Agent Dewitt and the police officers advised Mr. Spaeth of his constitutional rights. (60:52-53, App. 105-06; 64:14, App. 113). The court's first finding goes to the flagrancy of the official conduct resulting in the first statement. This factor is not particularly significant here, but neither was it significant in ***Mark***.

The court's second finding, regarding the Miranda warnings, is relevant but not dispositive. *See* ***Brown***, 422 U.S. at 603. And in this case, the court erred in not giving the Miranda warnings particularly low weight given Mr. Spaeth's mild retardation, (14:10), and the confusing instructions that Mr. Spaeth received prior to being transported to the police station. Agent Dewitt testified that Mr. Spaeth was required to take the polygraph examination or face revocation of parole. (60:9, 38-39). She also testified that he was required to give truthful information or face violation of parole. (60:9); *see also* ***Evans***, 77 Wis. 2d at 231-32. However, the private polygraph agency gave Mr. Spaeth a consent form that stated – incorrectly – that anything he said to the examiner *was* admissible at trial. (14:9). A reasonable person, given this conflicting

information, would not have a reasonable basis for judging the legal distinctions between each of his statements. And a person with mental retardation, such that he had only the skills "adequate for minimum self support," (14:10), certainly would not have understood the distinctions. Therefore, the ***Miranda*** warnings did not affect a "break in the stream of events from the first statement to the second." *See* ***Mark***, 308 Wis. 2d 191, ¶ 22.

The circuit court explicitly rejected consideration of the lack of intervening circumstances and short time between the first and second statements. It stated:

> You're trying to say . . . that somehow if there would be some time intervening here, over the lunch hour or something like that, that suddenly we would have an admissible statement, if the defendant is given the appropriate Miranda warnings and then makes a statement. That there would be – Something should be intervening. I don't know what would be intervening. Talking lunch hour, you're talking another day? I guess we could continue this argument forever, and I don't really find that there has to be something intervening here that would correct any potential error on the part of the police, if they did make an error.

(64:11; App. 110).

This refusal to consider a factor that is highly relevant under ***Bayer***, ***Brown***, and their progeny, was erroneous. While there is no bright line for determining whether sufficient time has elapsed between a compelled statement and a later statement, it is not true, as the court suggested here, that this makes the inquiry pointless. In ***Bayer***, the Court found that a lapse of six months, combined with a release from custody, was sufficient. 331 U.S. at 540. In ***Brown***, the Court found that a lapse of two hours, with no

significant intervening circumstances, was insufficient. 422 U.S. at 604. Similarly, in ***Mark***, this court found that a lapse of two weeks, in the absence of significant intervening circumstances, was not enough. 308 Wis. 2d 191, ¶ 25. *See also* ***United States v. Stark***, 499 F.3d 72, 76-77 (1st Cir. 2007) (collecting cases for the purpose of comparing the time that lapsed in each and the result under ***Brown***).

Here, less than one hour elapsed between the first statement and the second statement, and that period was spent transporting Mr. Spaeth, who was handcuffed, to the police station and directing him to an interview room. (*See* 60:8-9, 34.) While a clear break in the chain of events, such as release from custody or consultation with counsel, could alleviate concerns about such a negligible lapse in time, here, there was no intervening circumstance other than the recitation of the Miranda warnings, which, as discussed above, was of limited use.

Finally, the circuit court expressed concern here that, if defense counsel's argument was correct, then once a parole agent compels a statement, "[w]e would never have an admissible statement made to the police . . . because . . . no matter what the police do, they could never formulate a statement that would be admissible." (60:53, App. 106; *see also* 64:11, App. 110 (repeating this concern at the reconsideration hearing)).

This demonstrates a misunderstanding of the applicable law. First, the case law on the general voluntariness standard demonstrates that it is not true that police would be unable to produce an admissible statement. *See, e.g.,* ***Bayer***, 331 U.S. at 540-41. Further, the question is not whether the second statement is voluntary with reference to the police actions independent of the first statement. *See*

Taylor, 457 U.S. at 693. Rather, the question is whether the state has met its burden of proving that "the compulsion that produced the . . . [first] statement was removed." ***Mark***, 308 Wis. 2d 191, ¶ 23.

Here, the state did not meet its burden of proof and the court's denial of the motion to suppress was erroneous.

CONCLUSION

Because law enforcement obtained Mr. Spaeth's statement in violation of the federal and state constitutions, he respectfully requests that this court reverse the judgment of conviction and remand the case to the circuit court with instructions to suppress his statements to law enforcement.

Dated this 23rd day of April, 2010.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,720 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of April, 2010.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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