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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

Mr. Spaeth has raised two independent legal grounds for suppressing his police statement – one specific to statements derived from immunized statements and another, more general ground applicable to statements made subsequent to compelled statements.

The state's brief conflates these two grounds. The state agrees that Mr. Spaeth's statements to his probation agent were protected by use and derivative use immunity and that they were compelled. (State's brief at 7, 6). However, it does not acknowledge that the United States Supreme Court has set forth two legal standards – one applicable to a subset of compelled statements that have been immunized, *see e.g.,* ***Kastigar v. United States***, 406 U.S. 441 (1972), and a second that is generally applicable to all compelled statements, *see, e.g.,* ***Brown v. Illinois***, 422 U.S. 590 (1975); ***United States v. Bayer***, 331 U.S. 532 (1947). The state does not address the *Kastigar* standard head-on except to argue that, from a "common sense perspective," Mr. Spaeth's argument regarding application of the standard "cannot be right." (State's brief at 9). It only actually applies the *Bayer/Brown* standard to the facts of this case, suggesting that this is the only standard that the court needs to address. (*Id.* at 10-11).

This is same error that the circuit court initially made in deciding Mr. Spaeth's suppression motion, and this court should not accept the state's invitation to compound the error.

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

As to the *Kastigar* standard, the parties agree that Mr. Spaeth's statements to his probation agent were protected by "use and derivative use immunity." (*See* state's brief at 7). Thus, the question is whether Mr. Spaeth's police statement was "derived from" the immunized statements. ***State v. Evans***, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977). ***Kastigar*** itself was clear as to the meaning of "derivative use" of immunized testimony. The government bears the burden of showing that the disputed evidence "is not tainted by establishing that it had an independent, legitimate source." ***Kastigar***, 406 U.S. at 460. The source must be "wholly independent." ***Id.*** The government must prove that it did not make "any use, direct or indirect" of "any information derived" from the immunized statement. ***Id.*** This includes use of the statement as an "investigatory lead," or use of the statement "to search out other testimony to be used in evidence against" the individual. ***Id.*** at 460, 453. The Wisconsin Supreme Court has noted that, under ***Kastigar***, the immunized statement cannot "furnish a link in the chain of evidence against the defendant." ***State v. Hall***, 207 Wis. 2d 54, 78, 557 N.W.2d 778 (1997). *See also* Wayne R. LaFave, et al., **Criminal Procedure** § 8.11 (3d ed. 2007).

The state's brief does not, and cannot, argue that Mr. Spaeth's immunized statement to his probation agent did not furnish a link in the chain of evidence against him. Indeed, it furnished the only link. Rather, the state argues that Mr. Spaeth is confusing use and derivative use immunity with transactional immunity, (state's brief at 9-10), which is not accurate. Use and derivative use immunity is an "explicit

proscription of the use in any criminal case of testimony or other information compelled under [a grant of immunity] (or any information directly or indirectly derived from such testimony or other information)." ***Kastigar***, 406 U.S. at 454. In contrast, transactional immunity "accords full immunity from prosecution for the offense to which the compelled testimony relates." ***Id.*** at 453. In other words, when a person is granted transactional immunity, the government may not prosecute him or her for the conduct that is the subject of immunity, even if it discovers evidence of the conduct from an independent source. *See* LaFave, *supra*, at § 8.11(a).

Mr. Spaeth is *not* arguing for transactional immunity. A probationer does not have free pass on any criminal prosecution for conduct that he discusses with his probation agent. However, when the state requires a probationer to make a statement incriminating himself, which he is otherwise free to refuse under the Fifth Amendment, and the state uses that compelled, immunized statement to "search out" other evidence against him, ***Kastigar***, 406 U.S. at 453, then the state is barred from using that evidence in a subsequent criminal prosecution. To the extent that this law could result in the state being unable to prosecute Mr. Spaeth under the particular facts of his case, that would not be the result of a grant of transactional immunity but rather the result of law enforcement's lack of any independent evidence that he committed a crime.[1]

In arguing that Mr. Spaeth's description of derivative use immunity – indeed, ***Kastigar***'s description of derivative use immunity – is really transactional immunity, the state suggests that use and derivative use immunity is the

[1] Indeed, this case is quite unusual in that Mr. Spaeth's police statement constituted the *only* evidence of any crime.

equivalent of mere "use" immunity. However, the Supreme Court decided well over a century ago that use immunity alone is not coextensive with the Fifth Amendment and is not sufficient to permit an official to compel testimony. ***Counselman v. Hitchcock***, 142 U.S. 547, 564-65 (1892); *see also* ***Kastigar***, 406 U.S. at 453-54. The Wisconsin Supreme Court has clearly noted the Federal Supreme Court's jurisprudence on this issue. ***Hall***, 207 Wis. 2d 78; ***Evans***, 77 Wis. 2d 225, 235-36.

The state also makes a "common sense" argument that Mr. Spaeth cannot prevail because this "would place the State's probation system at odds with itself" and would have "troubling consequences." (State's brief at 7-8). This is not a legal argument and it is not capable of defeating Mr. Spaeth's legal argument given that the Constitution is the law of the land. In any event, the Constitution can exist in harmony with our probationary system. A probation agent is free to compel her clients to make incriminating statements under a grant of immunity and use the statements to revoke probation. The agent may share this information with police but, if police officers care about making sure that subsequently-gathered evidence is useable in court, the officers should wall off the statements from their investigation. Alternatively, if the agent believes that her client may have committed a crime, values prosecution over revocation, and is concerned that the police will not wall off immunized statements, then the agent may turn his or her concerns over to the police for an independent investigation rather than compelling a statement. Finally, regardless of the evidentiary utility of any statements or other evidence, law enforcement may use information gleaned from them to protect possible victims or take other lawful preventative action.

It is unreasonable for the state to argue that derivative use immunity is a bad deal for the state because "[t]he only thing the State received in exchange for granting Spaeth use and derivative use immunity was compliance with conditions of probation that he already was bound by – to follow the law; to accurately report his activities to his agent; to take a polygraph." (State's brief at 10). Under the Fifth Amendment, no person, including a probationer, may be "compelled in any criminal case to be a witness against himself." The only reason that a probation agent can compel a statement – the only reason that a probationer may lawfully be "bound by" the state's probationary rules as applied to questions about potentially criminal matters – is that the state grants the probationer immunity that is coextensive with the Fifth Amendment's protection. ***Evans***, 77 Wis. 2d at 235-36. In other words, the "only thing" that the state receives in exchange for immunity is the ability to extract information that the probationer could otherwise refuse to give. (*See* state's brief at 10).

Finally, as noted above, the state's brief superimposes the generally-applicable standard for statements made subsequent to a compelled statement onto the immunity standard, acting as if these are all part of one big test. (State's brief at 10-12). The *Kastigar* standard, described above, is distinct from the *Bayer/Brown* standard, described in detail in Mr. Spaeth's brief-in-chief. In ***State v. Mark***, a case involving a probationer's compelled, immunized statement, the court of appeals applied the *Bayer/Brown*, rather than the *Kastigar*, standard. 2008 WI App 44, ¶¶ 20-22, 308 Wis. 2d 191, 747 N.W.2d 727. However, this was not because *Bayer/Brown* was the only standard that could have been applied to the facts of the case, but because it was the only one that the parties argued. ***Id.***, ¶ 21, n.12. Here, Mr. Spaeth has raised both applicable standards – the more

specific *Kastigar* standard and the more general *Bayer/Brown* standard. The state's conflation of these two standards is little more than an attempt to avoid actually applying the *Kastigar* standard.[2]

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

Because the state's argument regarding the legal standard goes to Mr. Spaeth's second argument, not his first, this brief turns to the second argument.

The state's brief argues that there were several breaks in the stream of events between Mr. Spaeth's statement to the polygraph examiner and his statement to police. But the state's list of distinct "breaks" fails to capture the reality of the relevant period, during which Mr. Spaeth was seamlessly picked up from his probation agent's office, where he made a compelled statement, taken to the police station, and interrogated. Mr. Spaeth's agent told him that he did not have to talk to police only as she and an officer placed him in a squad car. (60:9). Mr. Spaeth gave the statements to different individuals in different locations, but in the context of his agent transferring him into police custody, from which he was taken directly to an interview room in the police station. (*Id.*). Given this quick, seamless transfer, during which Mr. Spaeth was never released from custody and did not consult with an attorney or anyone else, the fact that the officers recited the *Miranda* warnings to Mr. Spaeth did not

[2] The state contends that Mr. Spaeth's argument relies "heavily on this court's ruling in ***State v. Mark***." (State's brief at 10). This is true only with respect to Mr. Spaeth's second argument. (Brief-in-chief at 15-22).

affect a "break in the stream of events" between the statements. ***Mark***, 308 Wis. 2d 191, ¶ 20.

CONCLUSION

For the reasons stated above and discussed in his brief-in-chief, Mr. Spaeth 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 26th day of July, 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 1,786 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 26th day of July, 2010.

Signed:

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