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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J. SPAETH,

Defendant-Appellant.

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

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS CITED

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.

The court of appeals certified the question to this Court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case merits both oral argument and publication.

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, in April 2006. (1:1-2). 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. (1:2-3). 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. (1:3). 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." (1:3).

Mr. Spaeth filed a motion to suppress his statements. (7). The court denied the motion after a hearing. (60:51-53; App. 104-106). 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. 110-114). 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 all concurrent. (45).

Mr. Spaeth filed a timely notice of intent and notice of appeal. (47; 54). Before the circuit court record was sent to the court of appeals, Mr. Spaeth filed a motion in the court of appeals asking to remand the case to the circuit court. The motion alleged that 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. (Appellant's motion of December 18, 2009). It asked the court of appeals to remand the case so that the circuit court could reconsider the motion and possibly negate the need for appeal. The court of appeals granted the motion and remanded the case to the circuit court. (Order of January 8, 2010).

Thereafter, Mr. Spaeth filed a postconviction motion with the circuit court. (54A). After a hearing, the circuit court denied the motion. (54B). In accord with the terms of the remand order, the case was returned to the court of appeals, which certified the appeal to this Court.

(Certification of December 29, 2010; App. 120). This Court accepted the certification. (Order of February 8, 2011).

STATEMENT OF FACTS

Most evidence relevant to 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.

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. (60:7). Mr. Spaeth was required by his supervision rules both to cooperate with the polygraph examination and to give truthful information. (60:9-10). Failure to submit to the examination would result in revocation, as could a failure to be truthful. (60:9-10, 12, 44-45). Agent Dewitt was aware that the statements made during the polygraph examination were not admissible in court, and testified that she would have informed Mr. Spaeth of this. (60:42). However, the polygraph examiner apparently provided its own consent and release form, which erroneously stated that Mr. Spaeth's statements could be used against him. (14:9). Mr. Spaeth has been diagnosed with "Borderline…to Mild Retardation." (14:10). Individuals with this level of mental function are typically capable of acquiring "social and vocational skills adequate for minimum self-support, though they may require additional supervision or assistance." (14:9).

Agent Dewitt did not observe the polygraph examination, but after it was completed, she spoke with the examiner and Mr. Spaeth. (60:7-8). 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." (60:8). He said that he "may have brushed up against his nieces and nephews vaginas or butts or breast area." (60:8).

Based on this conversation, Agent Dewitt concluded that Mr. Spaeth was likely in violation of his supervision rules. (60:13-14). She contacted the Oshkosh Police Department for a probation hold. (60:8). When Officer Framke arrived at the office, Agent Dewitt told him, in Mr. Spaeth's presence, that Mr. Spaeth may have committed a sexual assault. (60:8, 14). She specifically told Officer Framke that the possible assaults involved Mr. Spaeth touching his nephews and nieces in the vagina, breast and buttock area. (60:17-18). While placing Mr. Spaeth in his squad car, Officer Framke asked him "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." (60:18). Agent Dewitt testified that she told Spaeth that "he didn't have to talk to [the police], 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." (60:9).

Officer Framke took Mr. Spaeth to the police station in handcuffs in the back of his squad car. (60:17, 19). Upon pulling into 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. (60:24). The two officers led Mr. Spaeth into an interview room and informed him of his constitutional rights. (60:20).

Detective Busha questioned Mr. Spaeth about the touching of his nieces and nephews. (60:22-23). Mr. Spaeth gave the officers a statement. (60:22). Detective Busha wrote it down. (60:22). About twenty minutes expired between Detective Busha's arrival in the parking lot and his reading of ***Miranda*** warnings. (60:34).

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

Both the Fifth Amendment to the United States Constitution and article I, § 8 of the Wisconsin Constitution bar the government from compelling a person to be a witness against him- or herself in a criminal trial. Probation officers are nevertheless empowered to insist that probationers answer their questions, even where the answers are potentially incriminating. This power can be exercised in accord with the Federal and State Constitutions because it comes with a grant of use and derivative use immunity. Not only are the compelled statements themselves inadmissible at trial, but so is any evidence derived from the statements.

Mr. Spaeth, under compulsion, admitted to his probation officer that he had touched his nieces and nephews. This compelled statement led to the revocation of his probation. However, as the Constitution requires, Mr. Spaeth was granted use and derivative use immunity for the statement, meaning that it could not directly or indirectly be used to convict him of new crimes. Despite the immunity grant, the probation officer gave the incriminating information to a police officer, who used it to question Mr. Spaeth and elicit a second statement of the same information. This second statement, derived from the compelled and immunized statement, falls within the immunity grant and is inadmissible against Mr. Spaeth. The

state's arguments to the contrary below confused the legal issues and ultimately relied on the claim that use and derivative use immunity is not good policy. The state's policy concerns are dubious, but more importantly, they are irrelevant. The Fifth Amendment, and the United States Supreme Court's interpretation thereof, have elected a different policy, and that policy is binding upon the state.

There is a second, independent reason that Mr. Spaeth's statement to the police officer is inadmissible. It was, in itself, involuntary. The United States Supreme Court has established that a second confession following an earlier involuntary one must be scrutinized especially closely, to determine whether the pressures that brought about the first confession remained in effect at the time of the second. Only a "break in the stream of events" sufficient to isolate the statement from "all that went before" will serve to render the second statement admissible. No such break isolated Mr. Spaeth's second statement here – it came within minutes of his first and while he remained in custody. Particularly in light of Mr. Spaeth's mental retardation, it is unreasonable to conclude that his transfer into police custody, or the reading of his ***Miranda*** rights, somehow removed the compulsion that attended his original statement.

Both the reach of Mr. Spaeth's immunity and the voluntariness of his second statement involve the application of 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. ***State v. Sykes***, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277. It independently reviews the application of constitutional principles to those facts. ***Id.***

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 is 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 by conferring use and derivative use immunity. To be constitutional, this immunity must be as broad as the right it supplants – "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 (emphasis in original).

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 declared that the state's probation agents may compel incriminating statements by their supervisees, and conferred upon such statements the use immunity required under ***Kastigar*** and ***Lefkowitz***. 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977). The appellate courts have repeatedly reaffirmed the rule of ***Evans***. *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).

Under ***Evans*** and its progeny, 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. However, incriminating answers and "any evidence derived from" such answers is inadmissible in subsequent criminal proceedings. ***Evans***, 77 Wis. 2d at 235-36.[1] *See also* ***Minnesota v. Murphy***, 465 U.S. 420, 435 n.7 (1984) (observing that a state may validly insist on answers to

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[1] The ***Evans*** court used the word "testimony" in describing the probationer's statements to his or her agent. ***State v. Evans***, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977). As noted in ***State v. Thompson***, the language of the decision is broad enough to cover unsworn answers of a probationer given in response to potentially incriminating inquiries. 142 Wis. 2d 821, 830 n.6, 419 N.W.2d 564 (Ct. App. 1987). Further, failure to provide immunity for all such statements would render their compulsion unconstitutional. ***Lefkowitz v. Turley***, 414 U.S. 70, 77-78 (1973).

The ***Evans*** decision would also have allowed immunized statements to be used against a probationer for purposes of impeachment or rebuttal. 77 Wis. 2d at 235-36. The United States Supreme Court later proscribed such use. *See* ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶21, 257 Wis. 2d 40, 654 N.W.2d 438.

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).

Where a probationer has given a compelled statement to his or her agent, the state bears the burden of showing that any evidence it wishes to introduce "'is not tainted by establishing that it had an independent, legitimate source.'" ***State v. Mark***, 2008 WI App 44, ¶28, 308 Wis. 2d 191, 747 N.W.2d 727 (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.*** 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 necessary for prosecution"). 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 also 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; ***United States v. North***, 920 F.2d 940, 942 (D.C. Cir. 1990) (***Kastigar*** forbids witness "whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how or by whom* he was exposed to that compelled testimony.") (Emphasis in original).

The state may still prosecute the probationer for the crime that is the subject of the compelled statement. The Fifth Amendment does not require "transactional" immunity. ***Kastigar***, 406 U.S. at 453. But if the state elects to prosecute, it must do so on the basis of evidence that is not directly or indirectly derived from the immunized statement. ***Id.*** at 460.

2. Mr. Spaeth's police statement was derived from an immunized statement made to his parole agent and is 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, as it must. (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. The state has also 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).

Therefore, the question is whether Mr. Spaeth's subsequent self-incriminating statement to Officers Framke and Busha was derived directly or indirectly from the earlier statements, or, contrarily, whether it was a "wholly independent" source. *See* ***Kastigar***, 406 U.S. at 460.

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. (60:20-24, 27-28). The officers had not previously been investigating the incidents. (60:32).

Therefore, Mr. Spaeth's initial, protected statements not only provided an "investigatory lead," they provided the *only* lead. They initiated the case. *See* ***Kastigar***, 406 U.S. at 460 (approved immunity barred "the use of compelled testimony as an 'investigatory lead,' and also … the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures").

Without question, 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. The initial statement was the *only* "link in the chain of evidence" against Mr. Spaeth, as it was the only reason the officers were questioning him about touching his nieces and nephews. *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. They must be suppressed.

In the court of appeals, the state mounted a two-pronged attack on Mr. Spaeth's ***Kastigar*** claim. On the one hand, it posited that Mr. Spaeth was asserting a right to "a form of transactional immunity" rather than use and derivative use immunity. (Respondent's Brief at 9). The state provided neither factual nor logical support for this claim, because there is none. Mr. Spaeth's compelled statement to his probation officer does not prevent the state from prosecuting him – if it can come up with evidence not derived, directly or indirectly, from the statement. In practical terms, it may be that the state has little or no such evidence and thus finds conviction impossible. This is not an uncommon result when the government elects to grant use and derivative use immunity. *See* ***North***, 910 F.2d at 863 (use and derivative use immunity often "effectively preclude a future prosecution of the witness for the matters to which his/her testimony related") (citation omitted). That a grant of immunity happens to be fatal to a particular prosecution does not render it "transactional."

In fact, the state's complaint that there could be no prosecution but for the compelled statement demonstrates that Mr. Spaeth's statement to the officers was not "wholly independent" of the earlier immunized statement. As the court of appeals noted, there are many imaginable scenarios in which a statement to police officers could be a "source wholly independent" of a compelled statement. It would be so where, for example, the statement to police predated the compelled statement. But here, as the state implicitly acknowledges, without Mr. Spaeth's immunized and

compelled answers, there would have been no second interrogation by the police, and no investigation at all.

The state also argued that use and derivative use immunity is bad policy, and that it is in conflict with the Wisconsin Administrative Code. The state warned of a "probation system at odds with itself" with "troubling consequences." (Respondent's Brief at 7-8). It declared the immunity mandated by ***Kastigar*** "a terrible bargain" for the state. (Respondent's Brief at 10).

In truth, there is absolutely nothing in the Wisconsin Administrative Code that requires the prosecutors of this state to introduce evidence derived from a grant of immunity. There is also nothing in the Code directing the circuit courts to admit such evidence. Nor is there anything in ***Kastigar*** or the Fifth Amendment that prevents probation agents from cooperating with police to protect the public. It is only the introduction of immunized testimony or evidence derived therefrom in a criminal case that is enjoined. The Wisconsin Administrative Code is silent on that topic. Of course, even if the state were correct, and there were a conflict between the Code and the Fifth Amendment, the Federal Constitution provides a means of resolution. *See* Article VI, § 2.

As to policy, the state is certainly entitled to regard the bargain this Court prescribed in ***Evans*** as a bad one. The government is free, if it wishes, not to enter such bargains in the future- to refrain from compelling probationers to give incriminating statements to their agents. *See* ***Minnesota v. Murphy***, 465 U.S. at 436. Obviously, this could make supervision more difficult, but that is a choice that the state is free to make. The only thing that it *cannot* do is what it is trying to do here: have it both ways. The state wishes to compel incriminating statements from probationers, and then

to use such statements to build a case against them. This the Fifth Amendment does not allow.

"The government must occasionally decide which it values more: immunization … or prosecution. If the government chooses immunization, then it must understand that the Fifth Amendment and ***Kastigar*** mean that it is taking a great chance that the witness cannot constitutionally be indicted or prosecuted." ***North***, 910 F.2d at 862. The state made its choice with Mr. Spaeth. It immunized him, and compelled him to answer questions, and revoked his supervision based on those answers. It now apparently regrets its choice and wishes also to prosecute him with evidence that it would not possess but for those compelled answers. But the fact remains that it was the state, not Mr. Spaeth, that chose the "bargain" it now bemoans. It is now this Court's constitutional obligation to hold the state to its choice.

B. Mr. Spaeth's police statement was compelled and is 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.

As Mr. Spaeth has argued above, his statement to the police is inadmissible because it falls within his grant of immunity. It is inadmissible for another reason as well – it was, itself, involuntary. The 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 [and] the second, 'sufficient to insulate the statement from the effect of all that went before.'" ***Mark***, 308 Wis. 2d 191, ¶20 (quoting ***Clewis v. Texas***, 386 U.S. 707, 710 (1967)).

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." ***United States v. Bayer***, 331 U.S. 532, 540 (1947). 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, though he was forbidden to leave a military base, 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.,*** ¶22.

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, the court of appeals' 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.[3] 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.***, ¶6. Two weeks later, the parolee told his agent, orally, that the attempted break-in had been sexually motivated. ***Id.***, ¶7. The parolee was in custody at a county jail, under the agent's authority, at the time that he made both statements. ***Id.***, ¶11.

There, as 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. ***Id.***, ¶¶17, 23. The court noted

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[3] The ***Mark*** court did not address whether the second statement fell within the use immunity conferred upon the parolee's initial compelled statement, instead holding that the second statement was itself compelled. ***State v. Mark***, 2008 WI App 44, ¶25, 308 Wis. 2d 191, 747 N.W.2d 727. The respondent in ***Mark*** does not appear to have raised the argument.

that such argument did not address "the critical inquiry: what evidence shows that the compulsion that produced the written statement was removed?" ***Id.***, ¶23. Ultimately, the court found that the oral statement was not attenuated from the written statement and was therefore compelled contrary to the Fifth Amendment. ***Id.***, ¶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 improper; it was the lawful compulsion that this court authorized in ***Evans***. 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 the one 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 relied on the fact 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 appropriateness of the agent's and officers' actions is not in question. Rather, the question is whether there was a break in the stream of events between Mr. Spaeth's first and second statements such that the compulsion which was concededly present in the first had been removed by the time of the second. Agent Dewitt testified that Mr. Spaeth was required to take the polygraph examination or face revocation of parole. (60:9-10, 12). 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, or evaluating the stakes involved in his statement to the police. And a person with "mild retardation", such that he had only the skills "adequate for minimum self support," (14:10), certainly would not have

understood the rights he might be waiving. The ***Miranda*** warnings thus did not affect a "break in the stream of events from the first statement to the second" sufficient to insulate his confession to the police from "all that went before." *See* ***Mark***, 308 Wis. 2d 191, ¶22; ***Clewis***, 386 U.S. at 710.

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*** and its 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 held that a lapse of six months, combined with a release from custody, was sufficient. 331 U.S. at 540. In ***Mark***, the court of appeals held that a lapse of two weeks, in the absence of significant intervening circumstances, was not enough. 308 Wis. 2d 191, ¶25.

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. (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. The case law demonstrates that it is not true that there could never be a voluntary statement. *See, e.g.,* ***Bayer***, 331 U.S. at 540-41. But in this case, where the second statement flowed directly from the first, coming while Mr. Spaeth remained in custody and only minutes after the compelled statement, the state did not and cannot meet its burden to prove that "the compulsion that produced the . . . [first] statement was removed." ***Mark***, 308 Wis. 2d 191, ¶23.

CONCLUSION

Because Mr. Spaeth's statement to the police fell within his immunity grant, and also because the statement was involuntary, he respectfully requests that this Court reverse the judgment of conviction and remand the case to the circuit court with instructions to suppress the statement.

Dated this 8th day of April, 2011.

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 5,568 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 8th day of April, 2011.

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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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