STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J. SPAETH,

Defendant-Appellant.

ON CERTIFICATION OF THE APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM H. CARVER, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted.

## STATEMENT OF THE CASE

On April 25, 2006, the State filed a criminal complaint against Joseph J. Spaeth, charging him with four counts of first-degree sexual assault of a child (1). Because Spaeth had previously been convicted of first-

degree sexual assault of a child, the State also charged Spaeth as a persistent repeater under Wis. Stat. § 939.62(2m)(b)2. *See* (1).

After a jury trial, Spaeth was convicted of all four counts of first-degree sexual assault of a child (23). The trial court sentenced him to life imprisonment without the possibility of parole or extended supervision (23).

The trial court later granted Spaeth's motion for a new trial on the grounds that the jury had considered extraneous prejudicial information (29; 68:68-75).

Spaeth eventually pled no contest to reduced charges; namely, four counts of child enticement (41; 42; 45). On each count, the trial court sentenced Spaeth to five years of initial confinement and ten years of extended supervision, with the sentences running concurrently (45).

On appeal to the Wisconsin Court of Appeals, Spaeth challenged the admission into evidence of his incriminating statement to police, which he gave after a post-polygraph interview with his probation agent, and after the police had *Mirandized*[1] him.

Spaeth argued that his police statement was inadmissible because the only way the police learned of his sexually assaultive conduct was from his admission to his probation agent. Spaeth argues that because his admission to his probation agent is protected by derivative use immunity, his agent was not allowed to inform police of his actions.

The court of appeals certified this case to this Court, citing "the tension between *Kastigar* [*v. United States*, 406 U.S. 441 (1972)] and the needs and policies of the [Department of Corrections]." *See State v. Joseph J.*

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

*Spaeth*, No. 2009AP2907-CR, slip op. at 10 (Wis. Ct. App. Dec. 29, 2010). This Court accepted the certification.

## STATEMENT OF FACTS

Spaeth is a registered sex offender who at the time of the events in dispute was on probation for first-degree sexual assault of a child (10:Ex. 2:1; 60:7, 10, 38).

On February 15, 2006, Spaeth took a polygraph as a condition of his probation (60:7, 37-38). Spaeth's probation agent testified that Spaeth was aware that the polygraph results and the statements made during the course of the examination would not be used in any criminal prosecution (60:41-42).

The polygraph showed that Spaeth was being deceptive (60:43).

Spaeth's probation agent and the polygraph examiner talked with Spaeth after the exam (60:7-8). Spaeth disclosed that he had been "horse-playing" with his nieces and nephews, who were children (60:8).

Spaeth's admitted physical contact with minors was a violation of his probation, so his agent called the police to take him into custody for a probation hold (60:8, 13). After the police were called, Spaeth admitted to his agent that he "may have brushed up against his nieces and nephews vaginas or butts or breast area" (60:8).

Spaeth's probation agent testified that when the police officer arrived, she told the officer that Spaeth had admitted to physical contact that "may have been a sexual assault" (60:8).

The responding officer recalled the agent telling him that Spaeth "had made some comments about possibly having inappropriate contact with some nephews and nieces," and about "having some contact with the

vagina, breast and buttock area" (60:17-18). The officer testified that his conversation with the probation agent was "very, very brief" (60:25).

The officer handcuffed Spaeth and put him in the back of the squad car (60:9, 17). The officer asked Spaeth if he would be willing to talk to detectives (60:9). The probation agent, who had accompanied Spaeth to the squad car, told Spaeth "he didn't have to talk to them, that he could talk to an attorney, [and] he wasn't compelled to give them any kind of statement" (60:9).

Spaeth's agent testified that he appeared to understand these instructions (60:9). According to the agent, Spaeth said, "no, he wanted to get it off his chest" (60:9).

After arriving at the police station, a police officer and a detective interviewed Spaeth for one hour and fifteen minutes inside an interview room (17:Ex. 2:8-9; 60:20; 65:79). At the beginning of the interview, the detective gave Spaeth a *Miranda* waiver form and had Spaeth read the *Miranda* warnings out loud (60:20, 28). The detective asked Spaeth if he understood his rights; Spaeth said he did (60:28). Spaeth signed the *Miranda* waiver form (10:Ex. 1). At no time during police questioning did Spaeth say that he did not want to make a statement or that he wanted an attorney present (60:19-20, 21).

Spaeth gave the police a statement, which the detective wrote for him and read back to him, and which Spaeth signed (10:Ex. 2; 60:21). Spaeth's statement begins: "This statement is given freely and voluntarily to Det. J. Busha and Officer J. Framke by myself Joseph Spaeth. I understand and know what I am doing and have had no threats or promises made to me" (10:Ex. 2:1).

In his statement, Spaeth admitted to two incidents of sexual assault involving his nieces, Nikki, Taylor, and Aysia (10:Ex. 2:2-4). At the time of the incidents

(February 2006), Nikki was seven years old, Taylor was six years old, and Aysia was three years old (1:3; 10:Ex. 2:2-4).

Spaeth admitted that while at his brother's house on February 11, 2006, his hand "brushed against" Nikki's "vagina, buttocks and chest," and that "[w]hen my hand was on Nikki's vagina, buttocks and chest, I knew that I need[ed] some help but at times I get a 'don't care' feeling and I just wish that I wouldn't have been sexually assaulted as a kid" (10:Ex. 2:2-3).

Spaeth also admitted that on February 14, 2006, at his brother's house, he was tickling Aysia, Taylor, and Nikki, and "as I was tickling them my hand was brushing against [their] vagina, buttocks and chest" (10:Ex. 2:3). He stated that the "longest time my hand remained on [their] vagina buttocks and chest was between 30 seconds and 1 minute. My hand would just rest on the girls[']chest vagina and buttocks" (10:Ex. 2:3-4).

In a later interview with the detective, Nikki's mother informed the detective that Nikki has a cognitive disorder and cannot comprehend things very well (17:Ex. 2:11). Nikki's mother told the detective that it would be useless to speak to Nikki because she would not be able to relay whether Spaeth had assaulted her (17:Ex. 2:11).

At trial, Nikki's mother testified that she always was present when Spaeth played with Nikki, and that although she observed Spaeth "horsing around" with Nikki, she did not notice "physical touching in any inappropriate areas" (65:135-37). She testified that Nikki "is a little slow because . . . she does not comprehend well" (65:139).

At trial, Taylor's and Aysia's father testified that he always was present when Spaeth played with his girls, and that while he observed Spaeth wrestling and tickling them, he did not see any contact that caused him concern (65:141-43).

As mentioned above, Spaeth was convicted after a jury trial of four counts of first-degree sexual assault of a child (23). The trial court later granted Spaeth's motion for a new trial because the jurors had considered prejudicial extraneous information (29; 68:68-75).

Spaeth eventually pled no contest to and was convicted of four counts of child enticement (41; 42; 45). On each count, the trial court sentenced Spaeth to five years of initial confinement and ten years of extended supervision, with the sentences running concurrently (45).

Spaeth appeals his judgment of conviction (54). He challenges the trial court's denial of his motion to suppress his police confession.

## STANDARD OF REVIEW

Spaeth claims that his police confession was taken in violation of his Fifth Amendment privilege against compulsory self-incrimination. The application of constitutional standards to the facts is a question of law, reviewed independently on appeal. *State v. Mark*, 2008 WI App 44, ¶ 15, 308 Wis. 2d 191, 747 N.W.2d 727. This Court reviews the trial court's findings of facts under the clearly erroneous standard of review. *Id.*

## ARGUMENT

### I. SUMMARY OF ARGUMENT.

Spaeth argues that his *Mirandized* confession to police that he had molested his nieces was inadmissible because it was not "wholly independent from" his similar admission to his probation agent (Spaeth's Br. at 12). Spaeth claims that, after he admitted the molestation to his probation agent, his constitutional rights required that his agent become an island unto herself. She could not relay

Spaeth's admission to *any* outside party—not to police, nor the parents of the molested children, nor the children themselves, nor their physician, nor anyone else—on pain of tainting any subsequent police investigation. If the probation agent did relay Spaeth's admission to a third party and the police then picked up the thread and investigated, all subsequently acquired evidence would be tainted and, therefore, inadmissible. (*See* Spaeth's Brief at 12-13) (arguing that his police confession was inadmissible because "without [his] immunized and compelled disclosures, there would have been no second interrogation by the police, and no investigation at all").

In making this argument, Spaeth looses track of the fact that the Constitution is concerned with "practical consequences." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). *Cf. Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("There is no war between the Constitution and common sense.").

Consider these hypotheticals, which demonstrate the sheer impracticality of Spaeth's reading of the law:

- A probationer admits to his probation agent that he has physically abused a young child. Like Spaeth's niece, Nikki, the child is unable to inform others of the abuse. Like in this case, the child's parents are unaware of the abuse. The agent visits the child and sees physical evidence of abuse. The agent cannot report the abuse to anyone who might tell the police—or else any resulting investigation would be tainted.

- The agent takes this same child to an emergency room for an exam. A physician observes medical evidence of abuse. Neither the agent nor the

physician, both of whom are mandatory reporters[2] and thus compelled under state law to report their findings to legal authorities, can inform the police of the abuse—or else any resulting investigation would be tainted.

- A probationer admits to actions that the probation agent believes are signs that the probationer is dangerous. The Wisconsin Administrative Code requires that whenever practical, the agent must rely on police to take a dangerous probationer into custody. Wis. Admin. Code § DOC 328.22(1) (2011). Under Spaeth's argument, however, the agent may not inform the police why the agent believes the probationer is dangerous—or else any resulting investigation would be tainted.

- A probationer tells an agent that he has hidden at a specific location in his home certain materials forbidden by his terms of probation. By law, the agent may ask police to be present during a probation search for protective purposes. *State v. Hajicek*, 2001 WI 3, ¶ 30, 240 Wis. 2d 349, 620 N.W.2d 781. But under Spaeth's reasoning, the agent could not tell the officers what the agent was searching for—or else any resulting investigation would be tainted. This would be a precarious situation for the agent, the police, and the probationer alike: the agent could be searching for something as dangerous as a bomb or as relatively innocuous as a bottle of booze, and the police would not know exactly what they were

[2] Wisconsin Stat. § 48.981 is Wisconsin's mandatory child abuse reporting statute. Section 48.981(2) identifies those persons who are "mandatory reporters." The list includes physicians. Wis. Stat. § 948.981(2)1. Similarly, probation agents are duty-bound to "[r]eport[] child abuse cases under s. 48.09, Stats., to the appropriate authority," Wis. Admin. Code § DOC 328.04(2)(t) (2011), and to "[r]eport[] all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority," Wis. Admin. Code § DOC 328.04(2)(w) (2011).

> there to protect against. The situation could devolve into an absurd game of "warm, warmer" or "cold, colder" as police are near or far from the contraband.

The impractical nature of Spaeth's argument strongly suggests that the Constitution does not support it. Probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (citation omitted). Spaeth's theory, that a probationer can violate the terms of his conditional liberty and then bathe himself in immunity by doing what he already was obligated to do—accurately report his activities to his agent—simply cannot be correct. It would place the State's probation system at odds with itself.

Fortunately, Spaeth's argument is not correct. Spaeth's argument fails due to his insistence that *any* link between his statement to his probation agent and his police confession renders his confession inadmissible. This position ignores the fact that statements that would not have been made "but for" a prior compelled statement (here, Spaeth's inculpatory statement to his probation agent) are not automatically suppressed. Indeed, if a "but for" analysis were all that was required, there would be no place for the attenuation doctrine[3] described in the case law that Spaeth himself cites. (*See* Spaeth's Br. at 16-20), (citing *Mark*, 308 Wis. 2d 191, ¶ 22).

The attenuation doctrine recognizes that at some point, the link between a compelled statement and the ultimate evidentiary "use" becomes so attenuated as to be

[3] The State uses the term "attenuation" for ease of reference even though there is no primary illegality in this case. As the Wisconsin Court of Appeals recognized, "it is clear that everyone from the lie detector examiner to the probation agent to the police officers followed protocol to ensure Spaeth's statement to police would be admissible." *See State v. Joseph J. Spaeth*, No. 2009AP2907-CR, slip op. at 10 (Wis. Ct. App. Dec. 29, 2010).

constitutionally irrelevant. This is as it should be; were it otherwise, any probationer who admitted criminal activity to his agent would be forever immunized so long as he could show some tangential connection between that admission and later-acquired evidence. The propriety of the agent's and the police's conduct would be irrelevant; so long as any subsequently-obtained evidence would not have been discovered "but for" the earlier admission, it and any evidence discovered thereafter would be forever suppressed.

As the United States Supreme Court has recognized, this is an untenable result.

> [A]fter an accused has once let the cat out of the bag by confessing, . . . he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

*United States v. Bayer*, 331 U.S. 532, 540-41 (1947).

Thus, the attenuation doctrine demands that courts analyze shades of gray, without the bright-line causation analysis employed by Spaeth available to simplify the task. In particular, as both the Wisconsin Court of Appeals and the United States Supreme Court have explained, a confession following a compelled first statement is admissible if there is a "break in the stream of events" that is "sufficient to insulate" the second confession from the first. *Mark*, 308 Wis. 2d 191, ¶ 20 (quoting *Clewis v. Texas*, 386 U.S. 707, 710 (1967)).

Using an attenuation analysis, it is clear that the link between Spaeth's inculpatory statement to his probation agent and the ultimate evidentiary "use"—his *Mirandized* police confession—is so attenuated as to be

constitutionally irrelevant. Accordingly, the trial court did not err in suppressing Spaeth's police confession, and his conviction must stand.

## II. THE HISTORY OF SPAETH'S SUPPRESSION MOTION.

As mentioned above, the standard of review in this case requires that this Court closely examine the trial court's rulings on Spaeth's motion to suppress. This Court must uphold the trial court's findings of fact unless they are clearly erroneous. *See State v. Hambly*, 2008 WI 10, ¶ 16, 307 Wis. 2d 98, 745 N.W.2d 48. And although this Court independently applies constitutional principles to the facts, this Court benefits from the trial court's legal analysis. *Id.* Given the importance of the trial court's findings and conclusions to this Court's task, an overview of the long history of Spaeth's suppression motion may be helpful to the Court.

As discussed above, Spaeth made two incriminating statements: one to his probation agent and another to police. It is undisputed that the State never made any evidentiary use at trial of Spaeth's statement to his agent. As the trial court stated and all counsel agreed during a postconviction hearing, "we never used the probation agent at trial and the probation agent's findings or any statements made by [Spaeth] to the probation agent . . . . We definitely eliminated all that" (74A:17).

Thus, the only issue on appeal is whether Spaeth's police confession should have been suppressed as having been taken in violation of his Fifth Amendment privilege against compulsory self-incrimination. The trial court held three hearings on this issue over an almost four year span. A brief description of these hearings, and the key court events that surrounded them, follows.

### A. July 5, 2006 Hearing.

Before Spaeth's trial, defense counsel moved to suppress Spaeth's police confession on the grounds that "[u]nder *State v. Evans*, [77 Wis. 2d 225, 252 N.W.2d 664 (1977)]," the police confession was "the direct derivative of an involuntar[y] statement to the agent and any such evidence can't be used in a criminal prosecution" (7; 60:3).

On July 5, 2006, the trial court held an evidentiary hearing on the issue, which featured the testimony of Spaeth's probation agent and the two law enforcement officers who had interviewed him (60:6, 16, 27). The State summarized this testimony in the Statement of Facts section above.

At the close of testimony, the trial court denied Spaeth's suppression motion, holding in pertinent part:

> The issue does come down to [the] voluntariness of Mr. Spaeth in making the statement.
>
> . . . .
>
> [The probation agent's] polygraph procedure seems to be a procedure even authorized by the Legislature, and it seems to be monitored in an appropriate manner. It's for informational purposes. It's for aid and assistance to a probation officer to determine whether or not those on probation are engaged in potentially inappropriate or illegal behavior. And they are properly told that; statements made during the polygraph process would not be used against them in Court.
>
> But it's a fair means of the Probation Department to determine whether or not people are complying with rules. And when they come across situations that are deemed to be questionable, it certainly is appropriate to refer the matter to the police, to potentially place people in custody for potential rules violations and allow the police departments to conduct further inquiry.

> It's interesting to note, . . . [the probation agent] . . . told Mr. Spaeth that he's going to be turned over to the police. She advised him clearly that he didn't have to talk to the police and that whatever he said to her wouldn't be admissible at trial. I don't know how far one would have to go here to be fair in conducting the business of the Probation and Parole Department.
>
> And we talked about whether a person comes in, admits to a burglary or anything else, much less a sexual contact that was inappropriate in itself as a rule violation and allowing the police to inquire to see if there was, in fact, a criminal violation. He wasn't even supposed to be in contact, my understanding, with juveniles but that in itself would give grounds to place him in custody.
>
> I understand where [defense counsel is] coming from, but it doesn't really make sense. We would never have an admissible statement made to the police once the agent has ordered a custodial order here, because then you're arguing no matter what the police do, they could never formulate a statement that would be admissible.
>
> But we do have a separation here. We've got the Department of Corrections, they did their job; turned the defendant over to the police. They take the defendant in custody. They advise the defendant all the usual Miranda rights and that's on top of what, in this case, Mr. Spaeth was advised by the agent; and he proceeds to voluntarily make a statement.

(60:51-53).

### B. June 1, 2007 Hearing.

In 2007, Spaeth moved for reconsideration of the trial court's July 2006 decision denying his motion to suppress (14; 15). In his brief to the trial court (14:2-6), Spaeth relied on a case, *State v. Farias-Mendoza*, 2006 WI App 134, 294 Wis. 2d 726, 720 N.W.2d 489, which analyzed whether a *Mirandized* police statement should be suppressed as tainted by an earlier Fourth Amendment violation—the police's illegal seizure of

Farias-Mendoza. *Id.* ¶ 14. (Note that Spaeth does not allege that he suffered any Fourth Amendment violation.)

The *Farias-Mendoza* court employed the attenuation analysis under *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), which requires courts to consider: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of "intervening circumstances"; and (3) the purpose and flagrancy of the official misconduct. *Id.* ¶ 26. Spaeth argued that all three factors weighed in favor of the suppression of his police statement (14:2-6).

In furtherance of his argument on the third factor—*i.e.*, his claim that the probation agent and the police engaged in "flagrant" misconduct—Spaeth produced a form that he had signed before his polygraph exam (14:9). He claimed the form was confusing.[4] Spaeth also produced a one-page excerpt of an undated Chapter 980 examination report that stated that Spaeth's "intellectual functioning has been previously described as somewhere in the range of Borderline Retardation to Mild Retardation" (14:6, 9-10).

Notably, Spaeth did not claim that he was incapable of knowingly and intelligently waiving the *Miranda* rights presented to him by the police. He argued,

[4] In particular, Spaeth claimed that he received "contradictory information about the polygraph" because he "was informed that the polygraph and his statements would not be used against him in a new case" (14:3-4), whereas the form stated otherwise (14:9) (stating that "[i]n regards to any admissions . . . concerning offenses for which I am not on deferred adjudication, probation, or parole, or for which I have not been previously convicted by a court of law, . . . I have the right to remain silent and not make any statement at all and any statement I make can and may be used in evidence against me at my trial").

instead, that his limited mental capacities heightened the general unfairness of law enforcement's actions in this case (14:5-6).[5]

At the hearing on this reconsideration motion, neither party took additional testimony (64).

The trial court denied Spaeth's reconsideration motion, ruling:

> [W]e can't supply information as to what the defendant was thinking at the time all this was going on because we don't know what he was thinking. We have to look at what he was presented with and whether or not he was presented with sufficient information to allow his statements into the record at the time of trial.
>
> I've also looked back at the original hearing to find out what I said about it at that time. And finding that it was admissible and that it came down -- apparently, we emphasized the voluntariness of the statements that Mr. Spaeth made. And I understand, [defense counsel], that you're kind of approaching it in a little different manner here than [previous defense counsel] did with this request to review some additional argument and cases and the actual polygraph examination release and to try to incorporate that into a final finding here as to the admissibility.
>
> I did come to one conclusion here, whether it's right or wrong, that in reviewing [previous defense counsel's] argument that I didn't find that it made a lot of sense, that going on to say we would never have an admissible statement made to the police once the agent has ordered a custodial order here because then you're arguing no matter what the police do after that we could never formulate a statement that would be admissible.

[5] Spaeth also argued that he had been subjected to a "two-tiered interrogation scheme" that was a purposeful end-run around *Miranda* (14:6-8). Spaeth appears to have abandoned this argument.

> You're trying to say, [defense counsel], 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.

(64:10-11).

The court continued:

> In any event, of course, we have the officer taking him into custody; and we all admit that the officer gave the usual, quote, Miranda warnings and usually understood these circumstances, that that's sufficient from which they might take a statement.
>
> . . . .
>
> Here, clearly, the officers came in and gave the so-called Miranda warning; even included in that was the warnings that the defendant was given by the probation agent. Any way you read this, he's been given some warnings: Look, you got a right to an attorney; you have a right to remain silent. And somewhere along the line the defendant has to exercise that opportunity . . . .
>
> . . . .
>
> I'm just finding in a similar manner that I did previously in the motion that there was plenty of advice given to your client about remaining silent and also about obtaining counsel, and I would have to incorporate my findings at the motion as well as those statements that I made today to deny your motion, to allow the statements made by your client to be admissible at trial and finding that he didn't have to talk to the police and didn't really have to talk to the probation agent, although the consequences would have been some sort of a

> revocation process perhaps. If he hadn't admitted anything, maybe they couldn't even have gone that far. So, I'll deny the motion for those reasons.

(64:14-15).

### C. Proceedings Between June 2007 and March 2010.

Spaeth's case went to trial in June 2007 (65). As mentioned above, Spaeth was convicted of four counts of first-degree sexual assault and sentenced to life imprisonment in July 2007 (23).

In March 2009, after the trial court had vacated his original conviction and sentence (34; 35), Spaeth pled no contest to and was convicted of four counts of child enticement (41; 42; 45). Spaeth thereby reduced his sentence from life imprisonment (23) to five years of initial confinement and ten years of extended supervision on each count, with the sentences running concurrently (45).

In November 2009, Spaeth filed a notice of appeal (54).

In January 2010, Spaeth asked the Wisconsin Court of Appeals to remand the case to the trial court for the purpose of permitting a postconviction motion, apparently claiming that the trial court had "not completely ruled" on Spaeth's motion to suppress his police confession. *See State v. Joseph J. Spaeth*, No. 2009AP2907-CR, order (Wis. Ct. App. Jan. 8, 2010). The court of appeals granted the motion. *Id.*

Spaeth then filed a motion with the trial court, asking it to "reconsider his motion to suppress in light of the applicable law," to vacate the judgment of conviction entered in May 2009, and to order a new trial with Spaeth's police confession suppressed (54A:13).

In March 2010, the trial court held a hearing on Spaeth's reconsideration motion. Defense counsel stated that she wanted the court "to make a ruling as to whether there was a wholly independent source of the information that was before the police based on the facts that were presented" at the two earlier suppression hearings (74A:32). Defense counsel agreed with the trial court that it was not necessary for the court to hold another evidentiary hearing (74A:28-29).

The trial court denied the reconsideration motion, stating:

> [T]he way I recall it, the way I review it, is this information, initially, of course, came to the attention of the police officers. It was very narrowly provided to them, and it was the kind of information that . . . warranted an investigation. And I don't know how we can justify suppressing that statement that Mr. Spaeth made because this initial information very minimally was provided to the police.
>
> Otherwise, they just about can't investigate anything coming from the probation and parole officers. Probation and parole officers would be limited to say look, I've got an individual here that needs [to] be investigated about potential criminal conduct. That might have been a burglary, might have been a robbery, might have been a sexual assault.
>
> . . . .
>
> I'm just going to back up the original finding here. . . . I just think, from my review of the record here, that there's nothing that -- information that's been provided that would substantiate this particular statement being found not admissible.

(74A:31-32).

## III. THERE IS NO DISPUTE THAT SPAETH'S INCULPATORY STATEMENT TO HIS PROBATION AGENT WAS PROTECTED BY *EVANS* IMMUNITY.

It is undisputed that Spaeth's inculpatory statement to his probation agent was "compelled" as a matter of law and protected by *Evans* immunity. In *Evans*, 77 Wis. 2d 225, this Court held that the State may compel a probationer to answer his probation agent's questions about particular criminal activity so long as the answers are "protected by a grant of immunity that renders the compelled testimony inadmissible against the witness in a criminal prosecution." *Id.* at 235. A probationer's answers to a probation agent's questions are deemed "compelled" when the agent's questions are designed to solicit incriminating responses and when the State, "either expressly or by implication, asserts that invocation of the [Fifth Amendment] privilege would lead to revocation of probation." *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). *Evans* immunity automatically attaches to the probationer's inculpatory answers because, under these circumstances, the probationer's Fifth Amendment privilege is self-executing. *See id.*

Applying these principles here, Spaeth's probation agent testified that a refusal by Spaeth to cooperate with the polygraph examination would have been grounds for revocation (60:44-45). Thus, it follows that his inculpatory statement to his agent was compelled and automatically covered by *Evans* immunity.

## IV. SPAETH ERRS IN HIS ROTE APPLICATION OF *KASTIGAR*.

In its *Evans* decision, this Court cited—once—the United States Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972). *See Evans*, 77 Wis. 2d at 235. Spaeth hitches his wagon to the

*Kastigar* case, going so far as to name his claim after it. *See* (Spaeth's Br. at 12) (referring to his argument as a "*Kastigar* claim").

Spaeth reads far too much into the *Evans* court's citation to *Kastigar*. Spaeth seems to assume that by citing *Kastigar*, this Court intended for all of *Kastigar*'s language to apply to cases like the one at hand.

Spaeth is no doubt enamored with *Kastigar* because it establishes a bright-line exclusionary rule. That is, *Kastigar* requires exclusion of all evidence derived from immunized testimony, no matter how attenuated.

In stating this holding, *Kastigar* employed super-strict language. It stated that there is a "total prohibition on use" of immunized testimony, "barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Kastigar*, 406 U.S. at 460. The *Kastigar* Court additionally placed a burden of proof on the government that "is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.*

Seizing on this language, Spaeth claims that because his immunized statement to his probation agent ultimately led police to *Mirandize* and question him—*i.e.*, because it was the "but for" cause of the police questioning—the resulting confession must be suppressed. He maintains that the State may not "prosecute him with evidence that it would not possess but for [his] compelled answers" to his probation agent (Spaeth's Br. at 14). Citing *Kastigar*, he writes that "the question is whether [his] . . . self-incriminating statement to [police] was . . . directly or indirectly [*sic*] from the earlier statements, or, contrarily, whether it was a 'wholly independent' source"

(Spaeth's Br. at 11) (citing *Kastigar*, 406 U.S. at 460). Spaeth reasons that because "[t]he officers had not previously been investigating the incidents," his admissions to police "were not 'wholly independent' of the earlier statements [to his probation agent.] Indeed, they were not minimally independent. They must be suppressed" (Spaeth's Br. at 11-12).

Spaeth's argument is hurt by its rote application of the text of *Kastigar*, a case that bears little actual similarity to the facts at hand. *Kastigar* involved a facial constitutional challenge to the federal immunity statute, 18 U.S.C. § 6002 (2011), which reads:

> § 6002. Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (2011).

The *Kastigar* court upheld the constitutionality of the federal immunity statute, explaining that to supplant the Fifth Amendment's privilege against compelled self-incrimination, the government need only provide "use and derivative use immunity," as compared to transactional immunity. *Kastigar*, 406 U.S. at 453. Use and derivative use immunity means that the government cannot introduce the compelled testimony into evidence at a later trial, or make derivative use of the testimony. *Id.* at 453. Use and derivative use immunity is narrower than transactional immunity, which provides "full immunity from prosecution for the offense to which the compelled testimony relates." *Id.* Thus, *Kastigar* affirmed federal prosecutors' ability to ask a federal court for an order granting a witness use and derivative use immunity in judicial, administrative, and congressional proceedings when the witness asserts the Fifth Amendment privilege against self-incrimination.

It was in this context—deciding that the federal immunity statute withstood a facial constitutional challenge—that the *Kastigar* Court employed the language that Spaeth frequently quotes in his brief. Because *Kastigar* involved only a facial challenge to the federal immunity statute, however, the Court had no reason to explain what, exactly, the federal immunity statute meant when it extended protection to "any information directly or indirectly derived from [compelled] testimony." 18 U.S.C. § 6002 (2011). Nor was the Court required to consider the relationship between its reference to "a legitimate source wholly independent of the compelled testimony" (*Kastigar*, 406 U.S. at 460), and the attenuation doctrine, which recognizes that at some point the link between a compelled statement the ultimate evidentiary "use" becomes so attenuated as to be constitutionally irrelevant. It sufficed for the Court to hold that the federal immunity statute provided at least as much protection as the Fifth Amendment.

The *Kastigar* court certainly did not contemplate how its decision should be applied to probationers—individuals who are not testifying in court in exchange for immunity, as *Kastigar* contemplates, but who are complying with an "absolute obligation" to keep their probation agents informed of their activities—an obligation that is the "very essence" of the system of probation. *Evans*, 77 Wis. 2d at 231.

This is a distinction with a difference. For starters, unlike *Kastigar*, this case does not involve federal statutory immunity, but rather a statement deemed involuntary pursuant to a line of authority beginning with *Evans*. Thus, we deal here with a judicial rule (*Evans* immunity) that governs a particular event (a probationer's inculpatory statement to his agent). We are not dealing with federal statutory language that describes the scope of the immunity provided. Thus, it is wrong to simply import all the language from *Kastigar* without scrutiny, as Spaeth does.

Another difference between *Kastigar* immunity and *Evans* immunity is the amount of prosecutorial control over whether and when a witness who might become a defendant will receive immunity. With *Kastigar* immunity, federal prosecutors have almost total discretion to determine whether and when such a witness will receive court-ordered immunity. To avoid tainting a later prosecution, federal prosecutors can refrain from seeking immunity if the witness may later be prosecuted. If it is necessary to immunize a witness who likely will be prosecuted, prosecutors can try to delay the immunity grant until after prosecution, eliminating *Kastigar* problems, or they can take precautionary measures to

avoid tainting a later prosecution.[6] Finally, federal prosecutors are able to avoid dissemination of immunized testimony by eliciting immunized testimony in secret before a grand jury, preventing dissemination to potential witnesses, and assigning unexposed prosecutors and investigators to the case. *See generally* Steven D. Clymer, *Compelled Statements From Police Officers and Garrity Immunity*, 76 N.Y.U.L. Rev. 1309, 1328-34 (2001).

In contrast, Wisconsin prosecutors in cases like this have no discretion about whether and when a probationer who might become a defendant will receive *Evans* immunity. Under circumstances like those present here, Wisconsin prosecutors do not have the choice to refrain from immunizing a probationer whom they may later prosecute; *Evans* immunity automatically attaches to probationers' inculpatory statements to their agents. Wisconsin prosecutors also have no opportunity to delay the immunity grant until after prosecution; the immunity is conferred at the time the probationer makes the incriminating statements to his agent. Nor are Wisconsin

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[6] For example, the United States Attorneys' Manual suggests the following "Steps to Avoid Taint":

> 1. Before the witness testifies, prepare for the file a signed and dated memorandum summarizing the existing evidence against the witness and the date(s) and source(s) of such evidence;
>
> 2. Ensure that the witness's immunized testimony is recorded verbatim and thereafter maintained in a secure location to which access is documented; and
>
> 3. Maintain a record of the date(s) and source(s) of any evidence relating to the witness obtained after the witness has testified pursuant to the immunity order.

United States Attorneys' Manual, Criminal Resource Manual, 726, USAM 923.1230 (1997). Also available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00726.htm.

prosecutors given advance notice of an *Evans* immunity grant so that they may take precautions to reduce the possibility of taint and compile evidence to prove that the State's evidence is completely untainted. Finally, Wisconsin prosecutors have no ability to prevent the dissemination of the compelled statement such that a later investigation will not be "tainted." Such dissemination is *mandatory*. Probation agents *must* report probationers' criminal activity to law enforcement. They are duty-bound to "[r]eport[] child abuse cases under s. 48.09, Stats., to the appropriate authority," Wis. Admin. Code § DOC 328.04(2)(t) (2011), and to "[r]eport[] all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority," Wis. Admin. Code § DOC 328.04(2)(w) (2011).

Thus, even though both the *Evans* court and the *Kastigar* court used the term "immunity," the circumstances under which these types of immunity are given are vastly different. Spaeth presents no policy justification for vesting a probationer's inculpatory statements to a probation agent with the full measure of protection that courts bestow on formally immunized testimony under *Kastigar*.

Finally, the nature of the bargain struck in the granting of *Evans* immunity versus *Kastigar* immunity is completely different. Spaeth's agreement to honestly report his activities to his probation agent was not the result of the State trying to "purchase" testimony that would otherwise be protected by the Fifth Amendment privilege—as is the case with federal *Kastigar* immunity. Rather, Spaeth's disclosure to his probation agent was an essential part of the consideration he agreed to provide in exchange for the conditional liberty of probation.

The *Evans* court recognized this quid pro quo. It explained:

> The liberty enjoyed by a probationer is, under any view, a conditional liberty. It is conditioned on adhering to the conditions of

> probation as set forth in the probation agreement. His position is not that of the non-convicted citizen. Whether sentence is withheld or imposed and stayed, a convicted person's status as a probationer "is a matter of grace or privilege and not a right," *Garski v. State*, 75 Wis. 2d 62, 67, 248 N.W.2d 425, 428 (1977), made possible by the legislature.
>
> . . . .
>
> The theory of probation contemplates that a person convicted of a crime who is responsive to supervision and guidance may be rehabilitated without placing him in prison. This involves a prediction by the sentencing court society will not be endangered by the convicted person not being incarcerated. This is a risk that the legislature has empowered the courts to take in the exercise of their discretion. To be effective, there must be adequate supervision to guide the probationer into useful and productive activities and away from further criminal activity and to insure that society's interest in its own safety is not jeopardized.
>
> If the convicted criminal is thus to escape the more severe punishment of imprisonment for his wrongdoing, society and the potential victims of his anti-social tendencies must be protected. Supervision must be such as to most likely assure such result. The probation officer cannot maintain a personal surveillance over each probationer placed under his charge. He must depend on reports from others, oftentimes anonymous, which the officer must check out. One of the ways is to confront the probationer with the information and discuss it with him, or to ask the probationer about his activities, associations, and whereabouts at particular times. If the probationer refuses to discuss his activities or answer specific questions, such refusal under the probation agreement may be grounds for revocation.
>
> The absolute obligation to keep one's probation agent informed of one's whereabouts and activities when requested is the very essence of the system of probation.

*Evans*, 77 Wis. 2d at 230-31.

It is peculiar for Spaeth to suggest that the *Evans* court, after discussing the interrelationship between a probationer's "absolute" duty of accountability and the need to protect the public from probationers' "anti-social tendencies," intended to *limit* the ability of probation agents to communicate with law enforcement. As this Court already has recognized, "[c]ooperation with law enforcement for the purpose of preventing crime is a specific goal of probation supervision." *State v. Hajicek*, 2001 WI 3, ¶ 33, 240 Wis. 2d 349, 620 N.W.2d 781 (*citing* Wis. Admin. Code § DOC 328.01(5) (June 1999)).

If this Court rules in Spaeth's favor, cooperation between probation agents and police will transform from being required as an important part of crime prevention, to being avoided as poisonous to the evidentiary value of criminal investigations. According to Spaeth, probation agents to whom probationers have admitted criminal activity must wall themselves off from law enforcement or risk tainting entire police investigations. Consider the Catch-22 that Spaeth believes his agent was in. The agent could either: (a) comply with her duties by reporting Spaeth's admitted child sexual assaults to police, with the subsequent police questioning and resulting confession deemed tainted; or (b) breach her duties by not reporting the assaults to police, and hope the police eventually discovered the assaultive behavior—which was ongoing and unknown to anyone else—on their own.

Spaeth encourages the Court not to worry about this dilemma. He assures that nothing in *Kastigar* or the Fifth Amendment prevents probation agents from cooperating with police; it is "only" the admission into evidence of statements like Spaeth's and any derivative evidence that is enjoined. (Spaeth's Br. at 13).

This logic, however, transforms probation from a period of time when a probationer should be on his best behavior to an opportune time to commit new crimes.

Evidence of new crimes will be unusable in court, and the worst that can happen is a probation revocation.

Through his rote application of *Kastigar*, then, Spaeth has contorted *Evans* immunity into a virtual guarantee of nonprosecution. Adopting his position would turn Wisconsin's probation system on its head.

## V. THIS COURT SHOULD APPLY THE ATTENUATION DOCTRINE TO THE FRUITS OF STATEMENTS IMMUNIZED UNDER *EVANS*.

Wisconsin, like all states, has a legitimate need to "sensibly administer its probation system." *Murphy*, 465 U.S. at 435 n.7. In light of this need, it is not surprising that *Evans* did not use the super-strict language of *Kastigar*. The *Evans* court did not state that there is a "total prohibition on use" of a probationer's statement to his agent, so that the statement "can in no way lead to the infliction of criminal penalties." *Kastigar*, 406 U.S. at 460-61. The *Evans* court did not "bar[]the use of" a probationer's statement to his agent "as an 'investigatory lead,'" nor did the *Evans* court "bar[] the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.* at 460. The *Evans* court did not state that the State's "burden of proof . . . is not limited to a negation of taint," nor did it assign the State "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.*

In short, the *Evans* decision, and later cases interpreting it, did not establish what Spaeth assumes it did: a "but for" exclusion test under circumstances like these, wherein *any* link between a probationer's

inculpatory statement to his probation agent and a later police confession renders the confession inadmissible.[7]

The *Evans* court did impose a ban on evidence "derived from" a probationer's statements to his probation agent. *Evans*, 77 Wis. 2d at 235. In *Mark*, 308 Wis. 2d 191, the Wisconsin Court of Appeals recognized that at some point, the causal relationship between a parolee's inculpatory statement to his agent and the subsequently discovered evidence may become so imperceptible that the evidence may be deemed to have *not* been "derived from" that statement. That is, the Wisconsin Court of Appeals ruled that an attenuation doctrine applies to the fruits of a parolee's immunized statements to his agent. The State submits that this Court should do the same here.

Strangely, after arguing in support of *Kastigar*'s bright-line exclusion test in the first section of his brief (Spaeth's Br. at 10-14), Spaeth later seems to concede that, under *Mark*, an attenuation test applies. He describes the test as follows:

> 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)).

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[7] *See State ex rel. Tate v. Schwarz,* 2002 WI 127, ¶ 22 n.10, 257 Wis. 2d 40, 654 N.W.2d 438 (declining to decide whether immunity should extend to admissions made during court-ordered sex offender treatment regarding uncharged conduct); *State v. Thompson,* 142 Wis. 2d 821, 833, 419 N.W.2d 564 (Ct. App. 1987) (holding that State may not make any "*evidentiary use* . . . in criminal proceedings" of a probationer's coerced statement to his probation agent) (emphasis added). Note that *Thompson* does not say that such statements may not be used to inform police of a probationer's criminal activity.

(Spaeth's Br. at 14).

In this passage, the *Mark* court held that the attenuation rule that governs coerced confessions may be used in determining whether the State made impermissible derivative use of incriminating statements by a parolee to his parole agent. *See id.* ¶¶ 20-22 (quoting *Clewis v. Texas*, 386 U.S. 707, 710 (1967)) (describing factors to determine whether the taint of a prior coerced confession carries over to a subsequent confession).

The State agrees with both the *Mark* court and Spaeth: Spaeth's police confession is admissible if it is attenuated from his inculpatory statement to his probation agent. The police confession need not be, in the super-strict language of *Kastigar*, "wholly independent" from his earlier statement. *Kastigar*, 406 U.S. at 460. The fact that his statement to his probation agent may have provided an "investigatory lead," *id.*, does not automatically doom his police confession to inadmissibility. Rather, the police confession is admissible if there were sufficiently isolating breaks in the stream of events between Spaeth's inculpatory statement to his agent and his later confession.

## VI. FIVE "BREAKS" SEPARATED SPAETH'S INCULPATORY STATEMENT TO HIS PROBATION AGENT FROM HIS POLICE CONFESSION.

Here, there were at least five breaks in the stream of events between Spaeth's inculpatory statement to his agent and his statement to police.

### A. First Break.

Spaeth's agent told him that he could remain silent and that he did not have to speak to police at all (60:9), thus removing any reasonable fear on Spaeth's part that he had to talk with police to avoid a probation revocation.

### B. Second Break.

Spaeth gave his statements to two different sets of questioners: the first statement to his probation agent, and the second to police. Spaeth's probation agent was not present at the police interview (60:22).

### C. Third Break.

The statements occurred in two separate locations: the first in the polygraph examination room at the probation agent's office (60:7-8), and the second at the police station (60:19-20).

### D. Fourth Break.

The police officers gave Spaeth his *Miranda* warnings before the police interview (60:28). Spaeth read them out loud (60:28). He wrote "yes" and his initials next to questions on the form that asked: "Do you understand each of these rights?" and "Realizing that you have these rights, are you now willing to answer questions or make a statement?" (10:Ex. 1). He expressly waived his right to remain silent (10:Ex. 1; 60:20, 28).

Although Spaeth claims in his brief that he suffers from "mental retardation" (Spaeth's Br. at 6) and was confused by a waiver form given to him as part of his polygraph exam (*id.* at 18-19), there is no evidence in the record that his intellectual abilities or any instructions he was given adversely affected his ability to understand and

knowingly waive his *Miranda* rights. Tellingly, Spaeth never testified that he was unclear about his rights or was unwilling to speak with police, nor did any expert testify to Spaeth's supposed mental limitations.

Although there were three hearings on Spaeth's suppression motion over an almost four-year stretch, the only evidence in the record of Spaeth's claimed "mental retardation" is a one-page excerpt from an undated Chapter 980 evaluation from an unknown author (14:10). One paragraph on this page states that Spaeth's "intellectual functioning has been previously described as somewhere in the range of Borderline Retardation to Mild Retardation" (14:10). This paragraph shows that someone, sometime, said somewhere that Spaeth falls within an undefined range of retardation. This is hardly the stampede of evidence that Spaeth leads this Court to expect by virtue of the assuredness of his argument. (*See* Spaeth's Br. at 18-19) (claiming that, with his "mild retardation," Spaeth "certainly would not have understood the rights he might be waiving").

The absence of evidence supporting Spaeth's claim that he "certainly would not have understood the rights he might be waiving" (Spaeth's Br. at 19), is explained by the fact that Spaeth has never directly challenged the knowing and intelligent nature of his *Miranda* waiver. To the contrary, Spaeth attached the one-page excerpt regarding his mental abilities to a motion in which he argued the police and his agent had engaged in "flagrant" misconduct, given that Spaeth "was particularly vulnerable to contradictory or unclear information" (14:6). By this argument, Spaeth only tried to paint the State actors in an unfavorable light; he did not argue, and did not preserve for appeal, a claim that he lacked the cognitive abilities to validly waive his *Miranda* rights provided to him by police.

To the extent he did preserve an argument that he lacked the mental capacity to understand his *Miranda* rights, the trial court implicitly rejected it. The

determination of whether a defendant knowingly and intelligently waived his Miranda rights involves applying constitutional principles to the facts. *Hambly*, 307 Wis. 2d 98, ¶¶ 70-71. This court may assume that the trial court implicitly made findings of fact in favor of its decision. *State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

Spaeth's argument that he did not knowingly and intelligently waive his *Miranda* rights because he lacked the capacity to understand them is not compelling on the facts of record. Spaeth completed twelve years of schooling and graduated from high school (42). He has substantial experience with the criminal justice system, having previously been convicted of two counts of fourth-degree sexual assault and one count of first-degree sexual assault (12:1-2; 20:4). He wrote to the trial court during postconviction proceedings, demonstrating that he was able to read, write, express dissatisfaction with postconviction counsel, and state his "hope to have this case reopened considering I'm 100% innocent" (48:3). The mother of the one of the victims, Nikki, testified that in the ten years she has known Spaeth, she has never "[had] any difficulty in talking to him and relating questions to him and him answering you" (65:135, 140). Finally, no one disputes that Spaeth was competent to waive his right to testify at his trial and—after the trial court vacated his conviction and life sentence—that he was competent to waive the variety of constitutional rights necessary to plead to reduced charges and obtain a greatly reduced prison term (65:162-63; 42; 73). In other words, throughout this case, Spaeth has proven himself perfectly capable of waiving constitutional rights when it benefits him.

On the facts of record, then, there is ample support for the trial court's implicit finding that Spaeth understood the *Miranda* rights that police provided him, as well as the consequences of the decision to waive them.

### E. Fifth Break.

There is no indication on the record that the police officer and the detective who questioned Spaeth pressured Spaeth using his disclosure to his probation agent. The police officer made no threats or promises (60:21). He did not threaten that he would report Spaeth's level of cooperativeness to his agent (60:21). The detective denied ever telling Spaeth that his parole status would be affected by his level of cooperation (60:29). The detective denied talking to Spaeth about his polygraph examination (60:29). The detective testified that Spaeth gave the impression that he knew he had done wrong, that he wanted to get these events off his chest, and that he wanted help (65:102, 120-21).

## VII. THE RELATIVELY BRIEF TIME LAPSE BETWEEN SPAETH'S FIRST AND SECOND STATEMENTS IS NOT DISPOSITIVE.

Spaeth claims that the trial court assigned inadequate weight to the relatively brief period of time between his statement to his probation agent and his police confession (Spaeth's Br. at 19-20). He variously claims that "less than one hour" and "only minutes" elapsed between the two statements, though it is unclear from the record how, exactly, he calculated those time periods (Spaeth's Br. at 20).[8]

[8] Spaeth's claim that "only minutes" passed between the first and second statements appears artfully vague. Though obviously unofficial, MapQuest (www.mapquest.com), calculates the distance between the Oshkosh Police Department's address (420 Jackson Street) and the probation office (300 South Koeller Street (60:17)), to be 2.96 miles—about nine minutes by car. Assuming that the responding officer left the police station immediately after the probation agent called, that he spent only a short time at the probation office, and that he drove Spaeth directly back to the police station, about a half-hour would have passed between Spaeth's inculpatory statement to his agent and his arrival at the police station.

Assuming Spaeth's one hour calculation is correct, this relatively brief period of time is not the smoking gun that Spaeth makes it out to be. When evaluating whether a second confession is attenuated from a coerced first confession, "we look at the length of time between confessions, any change in the place of interrogation, and any change in the identity of the interrogators. . . . No single factor is determinative; rather, all three must be considered in the aggregate." *Watson v. DeTella*, 122 F.3d 450, 454 (7th Cir. 1997). "[T]here is simply no bright-line test for determining the amount of time needed to adequately isolate a later statement from a prior coerced confession." *Id.* at 455. It is clear, however, that under certain circumstances, even a relatively short period of time can serve as a "break" between a prior coerced statement and a later statement. *See id.* at 455 (approximately two hour break served to insulate second confession from taint of prior coerced confession).

Here, Spaeth clearly knew his circumstances had changed when, following his admission to his agent, the police arrived; his agent told him he did not have to speak to them and that he could talk to an attorney; the police drove him to the police station; and, in a police interview room, the police had him read aloud and sign a *Miranda* waiver form. At this point, it should have been obvious to Spaeth that he was speaking to a police officer investigating a criminal matter, rather than a probation agent investigating a rules violation. That this "stream of events" took place over the course of one hour certainly does not prove that his second statement was inextricably connected to the first.

Thus, based on all the circumstances, there were sufficient "breaks" between Spaeth's first and second statements to dissipate the compelled nature of his inculpatory statement to his probation agent. The

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The interview appears to have begun about twenty minutes after Spaeth arrived at the station (60:34). The record thus suggests that about an hour passed between Spaeth's first and second statements.

questioning took place at different locations, with different questioners, and there is no indication in the record that Spaeth did not understand his *Miranda* rights once he was given them, or that his subsequent waiver of those rights was anything but knowing and voluntary.

## CONCLUSION

Although Spaeth's immunized statement to his probation agent was the "first cause" of his later *Mirandized* police confession, Spaeth fails to show the link between this confession and any violation of Fifth Amendment principles. The trial court properly denied his motion to suppress his police confession.

Accordingly, this Court should affirm Spaeth's judgment of conviction.

Dated this 26th day of May, 2011.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,979 words.

Dated this 26th day of May, 2011.

_____
Mark A. Neuser
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of May, 2011.

_____
Mark A. Neuser
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