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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

A. Mr. Spaeth's police statement was derived from immunized statements and is therefore inadmissible.

The state begins its argument by agreeing that Mr. Spaeth received the immunity authorized in ***State v. Evans*** for the compelled statements to his probation agent. 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977). (Respondent's Brief at 19). It then posits that ***Evans*** immunity is a different creature than the "super-strict" immunity the United States Supreme Court approved in ***Kastigar v. United States***, 406 U.S. 441 (1972). (Respondent's Brief at 19-29).

The argument fundamentally misreads both ***Kastigar*** and ***Evans***, and ignores other United States Supreme Court decisions. Briefly, though the ***Kastigar*** Court was reviewing a federal immunity statute, it upheld it because it provided protection "coextensive" – i.e., one and the same – with the protections required by the Fifth Amendment. ***Kastigar*** established that the government may require a citizen to make incriminating statements *only* where it provides use and derivative use immunity.[1] ***Minnesota v. Murphy*** made clear that this rule applies equally to probationers. 465 U.S. 420 (1984). ***Evans*** then determined that, in order to promote

[1] While the state repeatedly characterizes this immunity as "super-strict," it is in fact less exacting than the transactional immunity that the federal statutes provided before 1970. ***Kastigar***, 406 U.S. at 452.

effective probation supervision, Wisconsin's probationers would be required to give complete, candid answers to their agents' questions or face revocation. The Court recognized that, in order to implement this policy, ***Kastigar*** required it to bestow on probationers the immunity described in that case, and that is exactly what the Court did. It could not, and did not, give any less.

1. ***Kastigar*** use and derivative use immunity is required whenever the government compels testimony. The state's factual distinctions are irrelevant.

The state dwells on the facts of ***Kastigar***, and assiduously ignores the holding. Yes, the ***Kastigar*** Court was assessing the federal immunity statute – determining whether it passed constitutional muster. The Court determined that it did because its protections – shielding the declarant not only from use of compelled testimony, but from the use of any evidence derived therefrom – were "coextensive" and "commensurate" with the Fifth Amendment's protections. ***Kastigar***, 406 U.S. at 453, 461. "Coextensive" means "having the same scope or boundaries"; "commensurate" is a synonym. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 439, 456 (1993).

Thus, ***Kastigar*** held that the federal statute is a permissible substitute for the Fifth Amendment privilege because – and only because – it places the citizen in "substantially the same position as if the witness had claimed his privilege" and refused to give incriminating statements. ***Kastigar***, 406 U.S. at 458-59. That is, it "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." ***Kastigar***, 406 U.S. at 453 (emphasis in original).

The ***Kastigar*** Court went on to contrast the federal statute from others it had stricken down, which failed to provide the required use and derivative use protection. *See* ***id.*** at 453-55 (discussing ***Counselman v. Hitchcock***, 142 U.S. 547 (1892)), 457-58 (citing ***Albertson v. Subversive Activities Control Board***, 382 U.S. 70 (1965) and ***Arndstein v. McCarthy***, 254 U.S. 71 (1920) as cases in which immunity statutes were "found deficient for failure to prohibit the use of all evidence derived from compelled testimony"). It concluded that use and derivative use immunity is "the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity." ***Kastigar***, 406 U.S. at 459.[2]

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[2] The state also claims that the ***Kastigar*** court only held that the federal immunity statute was "at least" as broad as the protection of the Fifth Amendment. (Respondent's Brief at 22). The implication seems to be that use and derivative use immunity may be broader than the Fifth Amendment requires, and hence that a government might constitutionally compel testimony while conferring a narrower immunity. The state's claim again ignores the plain language of ***Kastigar*** ("coextensive," "commensurate," "the degree of protection the Constitution requires"). It is also flatly contrary to the Court's prior and subsequent statements. *See, e.g.*, ***Murphy v. Waterfront Comm'n of New York Harbor***, 378 U.S. 52, 79 (1964) ("[W]e hold *the constitutional rule* to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.") (Emphasis added.); ***Lefkowitz v. Turley***, 414 U.S. 70, 78 (1973) ("[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.").

That ***Kastigar*** had a different factual background than this case does not alter its fundamental holding, which could hardly be clearer: if a government wishes to compel incriminating statements, it *must* confer use and derivative use immunity. The government is forbidden to use the compelled statements as, inter alia, "investigatory lead[s]." ***Id.*** at 460.

2. A probationer does not, by virtue of probationary status, waive or otherwise lose the Fifth Amendment privilege or the right to use and derivative use immunity.

The fact that the person is on probation does not allow the state to evade ***Kastigar***'s holding, as the Court stated in ***Murphy***. Referring to use and derivative use immunity, the Court noted that

> [a] defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted.

Murphy, 465 U.S. at 426.

The state is thus wrong to claim that Mr. Spaeth has somehow "exchanged" his Fifth Amendment rights for the conditional liberty of his probation. *See also* ***Evans***, 77 Wis. 2d at 234 ("it is clear a probationer cannot be penalized for invoking his privilege against self-incrimination"); ***United States v. Antelope***, 395 F.3d 1128, 1133 (9th Cir. 2005).

3. The ***Evans*** Court conferred ***Kastigar*** immunity on compelled statements by probationers, as it was required to do.

The state's misreading of ***Kastigar*** and disregard for ***Murphy*** give rise to its gross mischaracterization of ***Evans***. The ***Evans*** Court did not create its own "judicial rule" governing a "particular event." (Respondent's Brief at 23). The ***Evans*** Court declared that a probationer could not refuse to answer his or her agent's questions, on penalty of revocation. ***Evans***, 77 Wis. 2d at 231. In order to make this declaration, the Court was *required* to, in the state's words, "import all of the language from ***Kastigar***" – including the bar on "any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures" and the prohibition of the use of compelled testimony as an "investigatory lead." ***Kastigar***, 406 U.S. at 460. (Respondent's Brief at 23, 28). The ***Kastigar*** language prescribes what the state must do *any* time it wishes to compel incriminating statements.

Contrary to the state's claim, the foregoing analysis is hardly original with Mr. Spaeth. (*See* Respondent's Brief at 19-21, 23). It has been stated in various ways in ***State ex rel. Tate v. Schwarz***, 2001 WI 127, ¶¶20-21, 257 Wis. 2d 40, 654 N.W.2d 438, ***State v. Thompson***, 142 Wis. 2d 821, 828-34, 419 N.W.2d 564 (1987), and ***State v. Mark***, 2008 WI App 44, ¶¶16, 28-30, 308 Wis. 2d 191, 747 N.W.2d 727. The state cites these cases but ignores their unanimous agreement with Mr. Spaeth on one point: ***Evans*** immunity *is* ***Kastigar*** immunity.

4. ***Evans/Kastigar*** immunity is not subject to the "attenuation doctrine" that the state imports from voluntariness cases.

As ***Kastigar*** makes clear, use and derivative use immunity is not limited by the state's urged "attenuation doctrine." (Respondent's Brief at 22, 28-30).[3,4] The scope of the immunity, as described by the Court, is obviously inconsistent with such a doctrine. ***Kastigar***, 406 U.S. at 460 ("total prohibition on use … a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by

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[3] The state is again conflating the issue of the voluntariness of Mr. Spaeth's police statement with the issue of whether it was derived from his statement to the probation officer, and hence immunized. Mr. Spaeth does not and will not "concede" that "under ***Mark***, an attenuation test applies" to the immunity he is entitled to under ***Kastigar***. (Respondent's Brief at 29). "Attenuation" analysis is part of the determination of the voluntariness of Mr. Spaeth's statement to police. (*See* Appellant's Brief at 6, 14-15). Involuntariness is a completely separate ground for exclusion. ***United States v. Bayer***, 331 U.S. 532 (1940), and its progeny are relevant only to Mr. Spaeth's second claim, and have nothing to do with his first.

[4] Mr. Spaeth is using the shorthand "attenuation," as the state does, to refer to the factors used under ***Bayer*** and succeeding cases to determine whether a second statement following an initial, coerced statement is voluntary. (*See* Respondent's Brief at 9). In truth, the term may be misleading insofar as it is derived (along with the phrase "primary illegality") from ***Brown v. Illinois***, 422 U.S. 590 (1975). This case and its descendants describe a totally separate analysis used to determine the admissibility of confessions obtained after *Fourth* Amendment violations. Strictly speaking there is never any "primary illegality" in compelling incriminating testimony (except in cases of brutality and the like) because the Fifth Amendment is only violated by the introduction of such testimony (or evidence derived therefrom) in a criminal case. ***Chavez v. Martinez***, 538 U.S. 760, 766-70 (2003).

focusing investigation on a witness as a result of his compelled disclosures"). The state can point to no case applying its "attenuation doctrine" to narrow the scope of immunity, and to Mr. Spaeth's knowledge, none exists.[5] To the contrary, the cases show that use and derivative use immunity is not defeated even by a lengthy chain of events between immunized statement and prosecutorial use. *See, e.g.*, ***United States v. North***, 910 F.2d 843, 863 (D.C. Cir. 1990) (refreshment of other witnesses' memory by immunized testimony violates ***Kastigar***); ***United States v. Schmidgall***, 25 F.3d 1523, 1529-30 (11th Cir. 1994) (investigator's use of notes of immunized interview with defendant to shape questioning of a different witness would violate ***Kastigar***); ***Mark***, 308 Wis. 2d 191, ¶¶8, 40 (expert opinion formed in part by reading immunized statement inadmissible). It is beyond argument that such immunity is not overcome by the state's picayune "breaks." (Respondent's Brief at 30-34).

While stubbornly clinging to its irrelevant ***Bayer*** "attenuation" analysis, the state has made no attempt to argue Mr. Spaeth's statement to the police was not "derived from" his earlier statement under ***Kastigar***. Likely the state recognizes that any attempt would futile, given the facts of this case and the broad immunity ***Kastigar*** prescribes. (*See* Appellant's Brief, 9-12). In fact, the state effectively concedes that, if ***Kastigar*** immunity applies, Mr. Spaeth's police statement must be excluded: "***Kastigar*** … establishes

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[5] As Mr. Spaeth has repeatedly explained, the ***Mark*** passage which the state claims applies the ***Bayer*** attenuation analysis to ***Evans***/***Kastigar*** immunity - on which, in fact, the state's entire argument rests – is very clearly a discussion of voluntariness, and has nothing to do with immunity. (Respondent's Brief at 29-30); (Appellant's Brief at 16 n.3); ***Mark***, 308 Wis. 2d 191, ¶¶19-25.

a bright-line exclusionary rule. That is, ***Kastigar*** requires exclusion of all evidence derived from immunized testimony, no matter how attenuated." (Respondent's Brief at 20; *see also* Respondent's Brief at 30 (acknowledging that the immunized statement "may have provided an 'investigatory lead'")).

As Mr. Spaeth has shown, he is entitled to ***Kastigar*** immunity; therefore his police statement must be suppressed.

5. The state's policy arguments are misdirected.

The state's brief relies heavily upon a hypothetical parade of horribles. (Respondent's Brief at 7-9, 27-28). It even faults Mr. Spaeth for neglecting to supply a "policy justification" for his insistence that the state comply with the Fifth Amendment. (Respondent's Brief at 25). The state appears to hope the Court will ignore clear, settled and controlling law in order to advance the state's preferred policy objectives.

In each hypothetical, the state tells the middle of the story but leaves out the beginning and the end. Each should begin with "A probation agent requires a probationer to make incriminating statements in exchange for immunity"; each should end with "Probation is revoked and the probationer is sentenced, likely to prison."

The state also misrepresents the probation agent's options and responsibilities. An agent may take any action he or she finds necessary to protect the public and suspected victims, including passing immunized statements on to the police. The *only* restriction at issue is the one the Fifth Amendment places upon prosecutors and courts. Even within the courtroom, it is important to remember that the

government is only put in the same position it would be if not for its compulsion of incriminating statements.

But leaving aside the incompleteness of the state's accounts, they do illustrate a legitimate policy concern. The policy that may need changing is not the nature of the immunity that must be granted to probationers in exchange for compelled, incriminating statements, however. As explained above, that policy has been determined by the Constitution and the United States Supreme Court. The policy that this Court might consider altering is the policy regarding who decides whether and when to compel incriminating statements from probationers.

It may be that the blanket rule of ***Evans*** – *all* probationers are compelled to truthfully answer *all* questions put to them by their probation agents on pain of revocation, necessitating ***Kastigar*** immunity for *all* answers – is worth revisiting. As the state notes, within the federal system, only prosecutors can confer immunity (and therefore lawfully compel incriminating statements). ***United States v. George***, 363 F.3d 666, 671-72 (7th Cir. 2004). There is no reason this could not also be Wisconsin's rule, looking forward. Alternatively, probationers could generally be allowed to invoke the Fifth Amendment to refuse to answer a probation agent's incriminating questions, with agents (perhaps in consultation with local or state prosecutors) empowered to decide on a case-by-case basis whether to require a response in the face of such an invocation – and thereby, under ***Kastigar*** and ***Murphy***, to confer use and derivative use immunity.

Mr. Spaeth takes no position on whether this Court ought to reaffirm ***Evans***, create a new system, or leave it to the Legislature to make the rules about whether or when a

probation agent may compel incriminating statements. Any change to the existing system would not, of course, affect this Court's obligation to enforce the immunity already granted Mr. Spaeth under ***Evans*** and ***Kastigar***.

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

As noted above, though couched as a response to Mr. Spaeth's ***Kastigar/Evans*** immunity claim, the state's "attenuation" analysis goes only to his second claim: that the statement to police was, besides being derived from the earlier statement, involuntary in its own right. Mr. Spaeth has argued that the state did not meet its burden to show 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." (Appellant's Brief at 15); ***Mark***, 308 Wis. 2d 19, ¶20 (quoting ***Clewis v. Texas***, 386 U.S. 707, 710 (1967)). Mr. Spaeth pointed out the brief time between the two statements, the fact that the second came while he was in custody because of the first, and the fact that the statements concerned identical subjects. (Appellant's Brief at 17-18).

The state responds by positing "at least five breaks" separating Mr. Spaeth's first statement from his second. (Respondent's Brief at 30). Given the nature of these "breaks," it is unclear why the state has stopped at five. If the officers' failure to threaten Mr. Spaeth is a "break," (Respondent's Brief at 34), what about the fact that they did not physically abuse him? What about his getting into, and then out of, the squad car? By highlighting minor events or non-events between the confessions, the state seeks to deflect attention from their close factual and temporal linkage.

Despite the state's quibbles over the exact time between Mr. Spaeth's two statements, ultimately it points to no case where a second statement following so closely upon a compelled one has been held voluntary. (Respondent's Brief at 34-35). It also places great weight on the reading to Mr. Spaeth of the ***Miranda*** warnings. Mr. Spaeth has previously explained why the warnings were insufficient to "insulate" his second statement from "all that went before" (Appellant's Brief at 18-19) and will not repeat himself here.

The greatest problem with the state's argument is that it makes no attempt to analyze its "breaks" in terms of the relevant legal standard, or to distinguish ***Mark***. As Mr. Spaeth has argued, the circumstances of his case distinguish it from ***Bayer*** and show involuntariness even more clearly than those of ***Mark***, where the second statement was held involuntary. (Appellant's Brief at 16-19). Mr. Spaeth submits that, as in ***Mark***, the state has not carried its burden to show "that the compulsion that produced the written statement was removed." ***Mark***, 308 Wis. 2d 19, ¶23. Because Mr. Spaeth's statement to the police was involuntary, it must be suppressed.

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 13th day of June, 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 3,000 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 13th day of June, 2011.

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