STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP2977

STATE EX REL., ROCKIE L. DOUGLAS,
PETITIONER-APPELLANT,

-VS-

BRIAN HAYES, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS, AND EDWARD F. WALL, SECRETARY, DEPARTMENT OF CORRECTIONS, OFFICE OF LEGAL COUNSEL,
RESPONDENTS-RESPONDENTS.

ON APPEAL FROM A NOVEMBER 4, 2014, CIRCUIT COURT ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND AFFIRMING THE DECISION OF THE DIVISION OF HEARINGS AND APPEALS THAT REVOKED PETITIONER'S PROBATION, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING.
KENOSHA COUNTY CASE NO. 2014CV705

PETITIONER-APPELLANT'S BRIEF AND SHORT APPENDIX

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WHETHER THE DIVISION OF HEARINGS AND APPEALS ERRED AS A MATTER OF LAW IN REVOKING ROCKIE DOUGLAS'S PROBATION FOR HIS REFUSAL TO ANSWER HIS AGENT'S QUESTIONS WHEN THE IMMUNITY THAT HIS AGENT OFFERED HIM IN EXCHANGE FOR HIS COMPELLED, INCRIMINATING STATEMENTS WAS NOT COEXTENSIVE WITH HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT, AND THUS HIS REFUSAL TO GIVE SUCH A STATEMENT WAS NOT A VIOLATION FOR WHICH HE COULD BE REVOKED?

While on probation, Douglas was arrested on suspicion of involvement in criminal activity in Wisconsin and Illinois. (R.6:41-42.) His probation agent visited him in jail, questioned him about that criminal activity, and ordered him to make a statement. (*Id.*:52; A.Ap. 3.) Douglas's agent read him the immunity language atop the standard DOC form used for taking statements from probationers. (*Id.*) That language informed Douglas that only the content of his statements would be immunized from later use in a criminal proceeding. (*See id*:25 (statement form); A.Ap. 12.) Douglas was not informed that any evidence derived from his statements would likewise be immunized (*id.*:25, 52; A.Ap. 3, 12), which state and federal law have previously recognized as necessary to protect a probationer's Fifth Amendment rights, *see State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 4, 257 Wis. 2d 40, 654 N.W.2d 438 (probationer must be "offered the protection of use and derivative use immunity"). Douglas refused to speak.

Revocation proceedings were commenced (*see id.*:3), and an administrative law judge ordered Douglas's probation revoked solely because he refused to give a statement to his agent upon her demand (*id.*:52; A.Ap.3). The Division of Hearings and Appeals administrator affirmed that decision. (*Id.*:66-67; A.Ap. 5-6.) The circuit court affirmed the administrator's

decision and denied Douglas's petition for a writ of certiorari. (R.12; A.Ap.7-11.) The circuit court concluded that no constitutional violation occurred because Douglas's probation agent had "informed [him] that his statement to her could not be used in the criminal proceedings." (*Id.*:4; A.Ap. 10.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Douglas would welcome oral argument if it would assist the panel to understand the issue presented or answer any unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Douglas believes that the Court's opinion in the instant case will meet the criteria for publication.

He argues herein that his agent's offer of immunity in exchange for his compelled, incriminating statements was not coextensive with the protections to which he is entitled by the Fifth Amendment. Namely, he argues that his agent offered him only use immunity and not derivative use immunity. However, state and federal law requires that probationers be granted both use and derivative use immunity in exchange for compelled, incriminating statements to their agents.

Whereas Douglas's agent offered him immunity by reading the Department of Corrections' standard form for that purpose, Douglas effectively contends that the DOC's standard language offering probationers immunity is insufficient to grant the scope of immunity to which probationers are constitutionally entitled. That is to say, insofar as the standard DOC language does not offer probationers derivative use immunity for the contents of their statements, the grant of immunity that it extends is not sufficient to protect a probationer's Fifth Amendment rights. Thus, it is argued, it is a violation

of a probationer's Fifth Amendment rights to be revoked for refusing to give a statement after having been read the standard DOC language.

No published case in Wisconsin has addressed whether the scope of immunity granted by the DOC's standard language is consistent with relevant law and sufficient to protect a probationer's Fifth Amendment rights. Publication is therefore warranted.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

This appeal follows administrative and circuit court proceedings regarding the revocation of Rockie Douglas's probation. (*See* R.1, R.6.) Douglas was originally sentenced to seven-and-a-half years of probation by the Kenosha County Circuit Court on April 5, 2007. (R.6:15-21.)

In early 2014, the Wisconsin Department of Corrections (DOC) commenced revocation of Douglas's probation, alleging thirteen violations of his rules of community supervision. (R.6:40.) Following a revocation hearing, an administrative law judge (ALJ) with the Division of Hearings and Appeals (DHA) found only one violation: Douglas had refused to give a statement to his agent. (*Id.*:52, A.Ap. 3.) The ALJ determined that Douglas's refusal warranted revocation. (*Id.*) Douglas appealed the ALJ's decision to the DHA administrator. (*Id.*:59-60.) The revocation decision was sustained. (*Id.*:66-67; A.Ap. 5-6.)

Douglas subsequently sought, by petition for a writ of certiorari, circuit court review of the agency's decision to revoke his probation. (R.1.) Following briefing (R.8, R.9, R.10), the circuit court upheld the revocation decision (R.12; A.Ap. 7-11.). Douglas appealed. (R.13.)

II. STATEMENT OF RELEVANT FACTS

There are two criminal cases underlying this civil appeal: Kenosha County cases 2004CF1181 and 2004CF1260. (R.6:15, 19.) In 2007, Douglas simultaneously received the same probationary sentence in both cases. (*Id.*) He thereafter signed a set of rules that governed his probation. (*Id.*:23.) Amongst other things, those rules mandated that Douglas (1) "inform [his] agent of [his] whereabouts and activities as he/she direct[ed]," (2) "provide true and correct information verbally and in writing in response to inquiries by [his] agent," and (3) "submit . . . any other . . . relevant information as directed by [his] agent," (*Id.*); *see also* Wis. Admin. Code §§ DOC 328.04(3)(e), (f), (p) (administrative provisions establishing those rules as amongst "[s]tandard rules" of community supervision). A statement atop Douglas's rules informed him that his "probation . . . may be revoked if [he] . . . violate[d] any of [those] rules." (R.6:23.)

Six-and-a-half years later in late 2013, Douglas was taken into custody following his suspected involvement in a spate of criminal activity occurring in Wisconsin and Illinois. (*Id.*:41-42.) DOC Agent Shannon Kloss visited Douglas in jail and asked him to provide a statement. (*Id.*:25, 52, 90; A.Ap. 3, 12.) He refused. (*Id.*)

According to Agent Kloss, Douglas had "promised his family that he would not give a statement until they got an attorney and he talked to his attorney." (*Id.*:90; *see also id.*:52; A.Ap. 3.) In response, Agent Kloss "stress[ed] that nothing [Douglas] said would be used against him criminally," and she "t[old] him it was a violation not to give a statement." (*Id.*:91; *see also id.*:52; A.Ap. 3.) To explain the immunity that she was offering in exchange for Douglas's statement, Agent Kloss read the following language to Douglas, which appears on the standard DOC statement form (DOC-1305):

> PROBATIONER/PAROLE/EXTENDED SUPERVISION/OFFENDER I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings.

(*Id.*:25, 52; A.Ap. 3, 12.) Douglas nonetheless refused to talk. (*Id.*:52, A.Ap. 3.) Agent Kloss "said that was fine." (*Id.*:90.)

Despite telling Douglas that his refusal to speak with her was "fine," Agent Kloss later incorporated his refusal as an alleged rule violation justifying the revocation of his probation. (*Id.*:40.) In addition to the refusal, Agent Kloss alleged twelve other violations for both criminal and non-criminal acts. (*Id.*) Many of those allegations involved purported criminal acts occurring in Illinois. (*Id.*) Douglas contested revocation. (*See id.*:3.)

Agent Kloss was the only witness at the revocation hearing. (*Id.*:82.) She testified regarding Douglas's refusal to provide a statement and the other alleged violations. (*Id.*:87-96.) However, Agent Kloss was unable to produce significant evidence regarding those other violations—she relied on the contents of a criminal complaint and a news story naming Douglas as a suspect. (*Id.*)

The ALJ found that Agent Kloss could prove only one violation: "Mr. Douglas refused to give a written (or verbal) statement to the Department on January 10, 2014 concerning the events the Department of Corrections was attempting to investigate as part of this revocation proceeding." (*Id.*:52; A.Ap. 3.) Douglas's refusal had come even though Agent Kloss read to him "the Thompson Warning at the top of the statement form" and "stressed that nothing he told her could be used against him in criminal court and that was a violation

not to give a statement." (*Id.*) That single violation was enough to warrant revocation. (*Id.*)

Douglas appealed to the DHA administrator. (*Id.*:59-60.) He argued that it was error for the ALJ to have revoked him for refusing to give a statement to his agent on January 10, 2014. (*Id.*) The revocation decision was sustained. (*Id.*:67; A.Ap. 5.) According to the administrator, Douglas's refusal to give a statement upon demand was inconsistent with the concept of supervision, and revocation was an appropriate remedy. (*Id.*:66-67; A.Ap. 5-6.)

Douglas thereafter commenced circuit court review, filing a petition for a writ of certiorari. (R.1.) The parties filed briefs. (R.8, R.9, R.10.) Douglas argued that he had a Fifth Amendment right to refuse to give a statement. (R.8:2.) He claimed that the immunity extended by Agent Kloss in exchange for abandoning his Fifth Amendment rights was insufficient to ensure that his rights were protected. (*Id.*) The State responded that the immunities granted to Douglas were sufficient. (R.9:2.)

The circuit court affirmed. (R.12; A.Ap. 7-11.) Relying on *State v. Evans*[1], the court concluded that there was no error in revoking Douglas's probation because his agent had made him aware that the "statements of his whereabouts could not have been used in court on the new charges." (*Id.*:4; A.Ap. 10.)

Douglas appealed. (R.13.)

[1] 77 Wis. 2d 225, 252 N.W.2d 664 (1977).

ARGUMENT

I. SUMMARY OF ARGUMENT

Douglas argues herein that he validly exercised his Fifth Amendment right to remain silent, and thus that the revocation of his probation was contrary to law. *See State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 4, 257 Wis. 2d 40, 654 N.W.2d 438 (revocation "premised on a legitimate assertion of [probationer's] Fifth Amendment privilege . . . [is] unconstitutional"). Specifically, he contends that the scope of the immunity offered to him by his probation agent was not equal to the immunity to which he is entitled under the Fifth Amendment, as recognized by state and federal law. *See State v. Spaeth*, 2012 WI 95, ¶ 36, 343 Wis. 2d 220, 819 N.W.2d 769 (quoting *Kastigar v. United States*, 406 U.S. 441, 453 (1972), for proposition that "'immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination'"). Instead of offering Douglas both use and derivative use immunity in exchange for his compelled, incriminating statements, his agent offered him only use immunity. (*See* R.6:52; A.Ap. 3.) Specifically, Agent Kloss "stressed that nothing he told her could be used against him in criminal court." (*Id.*) However, Agent Kloss made no offer to immunize whatever evidence may have been derived from his statement. (*See id.*)

Insofar as the Fifth Amendment requires that a probationer receive both use and derivative use immunity, Douglas properly remained silent upon his agent's offer of only use immunity. *See Tate*, 2002 WI 127, ¶ 4 (probationer must be "offered the protection of use and derivative use immunity"). Revoking his probation under those circumstances violated the constitution. *See id.* ¶ 27. He therefore asks this Court to reverse the revocation decision.

He offers the following in support.

II. THE DIVISION OF HEARINGS AND APPEALS ERRED AS A MATTER OF LAW IN REVOKING DOUGLAS'S PROBATION FOR HIS REFUSAL TO GIVE A CUSTODIAL STATEMENT TO HIS AGENT WHERE HIS DECISION TO REMAIN SILENT RATHER THAN ANSWER INCRIMINATING QUESTIONS WAS A VALID EXERCISE OF HIS FIFTH AMENDMENT RIGHTS INSOFAR AS HIS AGENT DID NOT OFFER HIM IMMUNITY COEXTENSIVE WITH THOSE RIGHTS.

A. This Court Reviews the Constitutionality of a Revocation Decision de Novo.

"On certiorari review of a probation revocation, this court reviews the [DHA]'s decision, not that of the trial court." *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶ 34, 353 Wis. 2d 307, 845 N.W.2d 373 (quotation and textual alteration omitted). Review of the propriety of a revocation decision is limited to four specific grounds, but only one of those grounds is relevant to the instant case: "whether [the DHA] acted according to the law" in ordering revocation. *Tate*, 2002 WI 127, ¶ 15.

Questions regarding the factual correctness of the DHA's findings are reviewed for substantial evidence. *George v. Schwarz*, 2001 WI App 72, ¶ 10, 242 Wis. 2d 450, 626 N.W.2d 57. However, "whether the [DHA] acted according to law . . . is a question of law that [appellate courts] review de novo, without deference to the conclusions of the [DHA] [or] the circuit court." *Tate*, 2002 WI 127, ¶ 16.

Douglas does not dispute the agency's factual findings; he contests only the legality of his revocation.

B. The Fifth Amendment Allows Probationers to Validly Assert the Privilege Against Self-Incrimination and not Suffer Revocation Unless Conferred Immunity Coextensive with the Privilege in Exchange for Their Compelled, Incriminating Statements.

The Fifth Amendment to the United States Constitution reads in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." This privilege has been applied to the states through the Fourteenth Amendment, and Wisconsin has its own equivalent privilege in article I, section 8 of the Wisconsin Constitution. *State v. Peebles*, 2010 WI App 15, ¶ 10, 330 Wis.2d 243, 792 N.W.2d 212.

The privilege against self-incrimination is a fundamental constitutional right. *Spaeth*, 2012 WI 95, ¶¶ 32-33 (recognizing that the privilege is "an important advancement in the development of our liberty" and "reflects many of our fundamental values" (quoted sources omitted)). "'The essence of this basic constitutional principle is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Peebles*, 2010 WI App 156, ¶ 10 (quoting *Estelle v. Smith*, 451 U.S. 454, 462 (1981)). The privilege affords a person the right to remain silent until the choice to speak is made in the unfettered exercise of will with no possibility of penalty for refusing to speak. *Id.*

The privilege against self-incrimination is not diluted by the fact that the one forced to speak is on probation at the time a compelled, incriminating statement is demanded. *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). A probationer still enjoys the

privilege against self-incrimination. *Evans*, 77 Wis. 2d at 230, 234-35, 252 N.W.2d at 666-68. Accordingly, a probationer cannot suffer the punishment of probation revocation for validly exercising the privilege against self-incrimination. *Tate*, 2002 WI 127, ¶ 22.

However, the ability to exercise the privilege against self-incrimination is in direct tension with the requirement that those on probation must answer truthfully when asked questions by their probation agents. *Evans*, 77 Wis. 2d at 231, 234-35, 252 N.W.2d 666-69 (recognizing the applicability of the Fifth Amendment to probationers, while also recognizing the importance of probationers to answer questions truthfully). The standard rules of supervision in Wisconsin's administrative code require offenders to (1) "[i]nform the agent of whereabouts and activities as directed," (2) "[s]ubmit a written offender report and any other relevant information as may be required," and (3) "[p]rovide true and correct information verbally and in writing as required by the department." DOC 328.04(3)(e), (f), (p). Pursuant to those provisions, probationers are compelled by law to give statements, despite their Fifth-Amendment right to remain silent. *See id.* As noted in *Evans*, a probationer's answers to his or her agent's questions prompted by accusations of criminal activity are "compelled," because the probationer's failure to speak may be grounds for revocation. *Evans*, 77 Wis. 2d at 231, 234-35, 252 N.W.2d at 666-68; (*see also* R.6:25; A.Ap. 12 (warning that failure to give truthful statement may result in revocation)).

As a result, a probationer may be compelled in certain circumstances to give a statement or risk revocation and potential imprisonment. *Evans*, 77 Wis. 2d at 231, 252 N.W.2d at 666-67. To resolve the tension between truthfulness and silence, and thereby ensure the effective administration of probation, Wisconsin has decided to force probationers to answer questions by granting them immunity in exchange for

their statements. *Id.* at 234-35, 252 N.W.2d at 668-69. The government thus has a right to compel statements from probationers but to do so it must provide immunity appropriate to protect the Fifth Amendment privilege. *Id.* 235-36, 252 N.W.2d at 668-69. To appropriately protect a probationer's Fifth Amendment rights, the immunity granted must be coextensive with the privilege. *Kastigar*, 406 U.S. at 447-48; *Evans*, 77 Wis. 2d at 235, 252 N.W.2d at 668.

Both the United States Supreme Court and Wisconsin have recognized that immunity coextensive with the Fifth Amendment necessitates protections sufficient to render it as if the compelled speech had never occurred. *Spaeth*, 2012 WI 95, ¶ 36 (*citing Kastigar*, 406 U.S. at 453); *Murphy v. Waterfront Comm. N.Y. Harbor*, 378 U.S. 52, 54 (1964). Thus, the one compelled to speak must enjoy both use and derivative use immunity. *Kastigar*, 406 U.S. at 453.

For those reasons, the immunity sufficient to compel a probationer's statements despite an exercise of the Fifth Amendment must include not only use of the statements but derivative use. *Spaeth*, 2012 WI 95, ¶¶ 36-37, *citing Kastigar*, 406 U.S. at 453. If a probationer is not conferred immunity coextensive with the privilege against self-incrimination—which includes both use and derivative use—then the government cannot revoke for the probationer's refusal to answer questions. *Evans* 77 Wis. 2d at 236, 252 N.W.2d at 669 (refusal to cooperate with probation agent cannot be grounds for revocation without a sufficient explanation regarding the immunity conferred); *Tate*, 2002 WI 127, ¶¶ 20, 22.

A probationer thus "cannot be subjected to probation revocation for refusing" to make compelled, incriminating statements "unless he is first offered the protection of use and derivative use immunity." *Tate*, 2002 WI 127, ¶ 4. To revoke in that situation would

violate the probationer's Fifth Amendment rights, and thus be contrary to law.

C. Insofar as Douglas was not Informed That any Evidence Derived From his Statements to his Probation Agent Would be Inadmissible in a Criminal Proceeding, the Immunity Offered to him was not Coextensive With his Fifth Amendment Rights and his Refusal to Answer Therefore Valid.

In the instant case, Douglas was on probation and was required to answer his probation's agent's questions truthfully or face revocation. (R.6:23-24); *see also* DOC §§ 328.04(3)(e), (f), (p). During Douglas's probation, the police alerted the DOC that he was allegedly involved in crimes that had occurred in Wisconsin and Illinois. (*Id.*:52; A.Ap. 3.) Based on that information, Douglas's probation agent visited him in jail and interviewed him specifically about his alleged criminal activity. (*Id.*:52, 90; A.Ap. 3.) She read Douglas the standard DOC statement form, thereby informing him that he had to answer questions or face revocation. (*Id.*:25, 52, 90-91; A.Ap. 3, 12).

In addition, Douglas's agent urged him to make a statement. (*Id.*:90-91.) She "stressed that none of it c[ould] be used in a criminal proceeding," and that "it couldn't be used in criminal court." (*Id.*) When she asked if Douglas would be willing to give a statement, he refused even though "[i]t seemed like he wanted to." (*Id.*:90.) Agent Kloss testified that Douglas seemed "a little nervous to sign [the statement form]." (*Id.*:91.)

These facts show that Douglas was clearly compelled to give an incriminating statement. He was faced with the classic penalty situation of either answering questions as required by his probation or exercising his privilege and facing revocation. *See Murphy*, 465 U.S. at 435.

While *Evans* and its progeny hold that Douglas should have been offered use and derivative use immunity for his answers to his agent's compelling and potentially incriminating questions, the critical problem in the instant is that Douglas was not informed about derivative use immunity. As detailed above, only immunity coextensive with the Fifth Amendment privilege—which is inclusive of both use and derivative use immunity—is sufficient to protect a probationer's constitutional rights. However, in Douglas's case the agent's statements regarding immunity and the standard DOC form from which she read conferred only use immunity, not derivative use immunity.

First, the standard DOC form explains that the immunity Douglas would receive applies only to "this information," which obviously refers to the statements Douglas would then make to his probation agent. (R.6:25; A.Ap. 12.) But, of course, the Fifth Amendment is broader. It protects not only Douglas's statements, but anything derived from those statements. *See Spaeth*, 2012 WI 95, ¶¶ 36-37, *citing Kastigar*, 406 U.S. at 453.

Second, and equally problematic, is the failure to inform Douglas that the immunity to which he is entitled under the Fifth Amendment applied across jurisdictional lines. Relevantly, the standard DOC form's language reads that a probationer's statements cannot be used in "a criminal proceeding." (R.6:25; A.Ap. 12.) An essential hallmark of derivative use immunity is that its protections extend to other jurisdictions. *See Waterfront Comm.*, 378 U.S. at 78-80 (holding that a state witness cannot be compelled to give testimony that could be used by federal authorities). That is particularly relevant in the instant case where some of the alleged criminal activity about which the agent sought to elicit information from Douglas occurred in Illinois. (R.6:52; A.Ap. 3.) The form's reference to "a criminal

proceeding" does not explain that scope. Nor does it explain that information derived from Douglas's statements would be immunized from use by governmental authorities in another jurisdiction.

Where the agent was questioning Douglas about serious criminal offenses in which he was allegedly involved, an accurate explanation of his immunity was crucial. *See Spaeth*, 2012 WI 95, ¶ 6 (the form told the probationer that his statements could be used against him, which was not an accurate statement of the law). Of course, Douglas is not expected to know intuitively the protections he would receive from *Evans* and its progeny. Otherwise there would be no point in informing a probationer about his immunity at all. *See Evans*, 77 Wis. 2d at 236, 252 N.W.2d at 669 (relevant that the probationer was not informed). So, the relevant inquiry is whether the information provided by his agent at the time he is compelled to make a statement is sufficient to inform him about the immunity he would enjoy. *See Tate*, 2002 WI 127, ¶ 4 (a defendant cannot be subjected to probation revocation for refusing to admit to the crime of conviction, unless he is first offered the protection of use and derivative use immunity). Obviously, if an agent does not inform a probationer about the immunity to which he or she is entitled, the probationer cannot be faulted for refusing to answer questions. *See Evans*, 77 Wis. 2d at 236, 252 N.W.2d 669. Likewise, if an agent does not correctly explain to a probationer the scope of the immunity that he or she would receive, a probationer cannot be faulted for refusing to talk. *See Spaeth*, 2012 WI 95, ¶¶ 5-6 (probationer could not be faulted for making statements where he was not told an accurate statement of the law).

When Douglas refused to make a statement, his agent should have explained that even if he gave statement it would be as if he had remained silent because of his right to use and derivative use

immunity. She did not. The deficiency in Agent Kloss's explanation to Douglas can be illustrated by reference to Wisconsin's immunity statute. *See* Wis. Stat. § 972.085 (immunity granted to persons in various proceedings). The express language of that statute explains that immunity protects the person from "the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence." *Id.* Federal statutory law similarly informs a person claiming the privilege against self-incrimination that "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." 18 U.S.C. § 6002.

A statement by Douglas's probation agent consistent with either of those statutory provisions would have been sufficient to offer Douglas the immunity to which he is entitled under the Fifth Amendment, and could have assuaged his concerns about whether to make statement. Certainly, any such statement would have been an offer of immunity coextensive with Douglas's Fifth Amendment rights such that any subsequent refusal to speak would constitute a proper basis for revocation. However, Agent Kloss's offered Douglas immunity only for the content of his statement, not "evidence derived from that compelled [statement]." *See* Wis. Stat. § 972.085; *see also* 18 U.S.C. § 6002. Thus, rather than properly offering Douglas immunity coextensive with his Fifth Amendment rights, she offered him less than that to which he is entitled. When Douglas refused to speak, Agent Kloss gave no further explanation of the immunity he would enjoy; she merely said, "fine." (R.6:90.)

In the absence of an offer of immunity sufficient overcome Douglas's privilege against self-incrimination, his refusal to answer his agent's

questions was valid. *See Evans* 77 Wis. 2d at 236, 252 N.W.2d at 669. Consequently, Douglas cannot be punished through revocation of his probation for validly exercising that right. *Tate*, 2002 WI 127, ¶ 22. The Department therefore erred as a matter of law when it revoked Douglas's probation.

CONCLUSION

While in custody, Douglas was ordered to answer his probation agent's questions regarding his involvement in alleged criminal activity. In exchange for his statement, his agent offered him use immunity. He was not also offered derivative use immunity. The scope of offered immunity was therefore not coextensive with Douglas's Fifth Amendment rights. He thus had a constitutional right to remain silent, which he exercised. Because it is improper as a matter of law to revoke a probationer for the proper exercise of his or her Fifth Amendment right to remain silent, the DHA erred when it revoked Douglas's probation for his refusal to answer his agent's questions.

That decision should be overturned, and Douglas asks this Court to reverse.

Dated this 2nd day of March, 2015.

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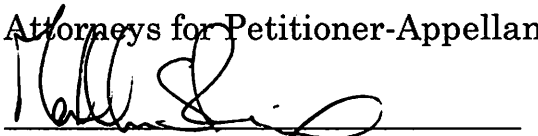

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 3,752 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 2nd day of March, 2015.

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CERTIFICATION OF APPENDIX CONTENT

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 Section 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.

Dated this 2nd day of March, 2015.

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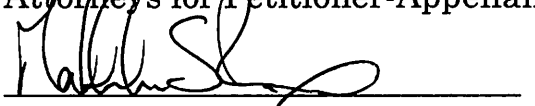

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on March 2, 2015. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 2nd day of March, 2015.

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