STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP2977

STATE OF WISCONSIN 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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

ARGUMENT

This appeal is about the constitutionality of Douglas's revocation. Douglas contends that he had a Fifth Amendment right to remain silent because, when he refused to speak to his probation agent, she failed to correctly explain the immunity to which he was entitled under *State v. Evans*.[1] On those facts, says Douglas, he could not be constitutionally revoked. Part of Douglas's argument is that the immunity language on the standard DOC statement form omits information regarding derivative use immunity.

In response, Hayes tells this Court that, "[i]n *Brimer*[2], the court of appeals has already decided that the DOC form provides the immunity required by the Fifth Amendment." Hayes's Br. at 13 (footnote added.) Were that a correct statement of *Brimer*'s holding, Douglas's ship would be sunk. But, it is not. *Brimer* had nothing to do with the scope of immunity offered by the DOC form or even whether Brimer was constitutionally revoked. *See* 2010 WI App 57, ¶ 5.

I. HAYES'S RELIANCE ON *STATE V. BRIMER* IS MISPLACED; HE MISREPRESENTS THE FACTS AND LAW OF THAT DECISION TO HIS ADVANTAGE.

Hayes characterizes *Brimer* as "affirming [Brimer's] revocation" and "conclud[ing] that the DOC form 'immunized [Brimer] against using [his] statement in criminal proceedings.'" *Id.* at 12-13 (quoting *Brimer*, 2010 WI App 57, ¶ 13). In actuality, "[t]he only issue on appeal [was] whether using Brimer's statement at his reconfinement hearing violated his Fifth Amendment right against self-incrimination." 2010 WI App 57, ¶ 5. Brimer had limited the scope of his appeal by "conced[ing] [that]

[1] 77 Wis. 2d 225, 252 N.W.2d 664 (1977).
[2] *State v. Brimer*, 2010 WI App 57, 324 Wis. 2d 408, 781 N.W.2d 726.

his statement could not incriminate him in a future criminal proceeding because of the grant of immunity on the Department of Corrections form." *Id.* ¶ 7 n.1.

In light of Brimer's concession, the parties disputed only whether a reconfinement hearing was a civil or criminal proceeding.[3] *Id.* ¶ 6. Ultimately, the court concluded that "[b]ecause a reconfinement hearing is not a criminal proceeding, it is unnecessary to examine whether Brimer's statements were compelled and incriminating." *Id.* ¶ 13. Insofar as reconfinement hearings are civil proceedings, this Court held, the government's use of Brimer's statement at his reconfinement hearing did not violate his constitutional rights. *Id.*

The facts and law in *Brimer* thus demonstrate that Hayes's characterization of it as an affirmation of Brimer's revocation is completely inaccurate. Similarly, Hayes's suggestion that *Brimer* decided that the standard DOC statement form explains immunity coextensive with the Fifth Amendment is disingenuous. Nothing in *Brimer* is dispositive of the issue Douglas presents to this Court, and Hayes's suggestion to the contrary should be disregarded.

II. THE WISCONSIN SUPREME COURT HAS EXPRESSLY STATED THAT A PROBATIONER CANNOT BE CONSTITUTIONALLY REVOKED "UNLESS HE IS FIRST OFFERED THE PROTECTION OF USE AND DERIVATIVE USE IMMUNITY FOR WHAT ARE OTHERWISE COMPULSORY INCRIMINATORY STATEMENTS."

As previously noted, Douglas's appeal is about the constitutionality of his revocation. The Wisconsin

[3] Reconfinement hearings were gotten rid of with the enactment of 2009 Wis. Act 28. *Brimer*, 2010 WI App 57, ¶ 7 n.2. However, they were the circuit court proceedings under TIS II whereby the circuit court determined the appropriate term of re-incarceration following revocation of extended supervision. *Id.* ¶ 7.

Supreme Court considered that same issue under somewhat different facts in *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 1, 257 Wis. 2d 40, 654 N.W.2d 438. The issue in *Tate* was "whether the state may *constitutionally revoke* a defendant's probation *because he refuses*, during court-ordered sex offender treatment, and before the time for a direct appeal has expired or an appeal has been denied, *to admit to the crime* of which he was convicted." *Id.* (emphasis added). Although *Tate* did not discuss the propriety of a probation agent's immunity offer, it did consider revocation in light of a probationer's Fifth Amendment rights. Its reasoning is thus instructive.

Tate ultimately concluded that "[t]he constitutional principles underlying [the] decision in *Evans* also apply to a probationer who invokes the Fifth Amendment privilege during court-ordered sex offender treatment in refusing to admit his crime of conviction, and *[it] extend[ed] the Evans immunity rule to this situation*." *Id.* ¶ 27 (emphasis added). The *Tate* court explained that *Evans* "created a rule of use and derivative use immunity" for "compelled admissions about particular instances of criminal activity by a probationer given in response to questions by a probation agent or at a probation revocation hearing" rendering them "inadmissible against the probationer in subsequent criminal proceedings." *Id.* ¶ 20. Accordingly, the court "h[e]ld that a defendant in [Tate's] situation *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* for what are otherwise compulsory self-incriminatory statements." *Id.* ¶ 4 (emphasis added). Whereas Tate had not been offered use and derivative use immunity in exchange for his statements, it was unconstitutional to revoke his probation. *Id.*

Despite the clear language in *Tate* recognizing that a probationer must "first [be] offered the

protection of use and derivative use immunity" before revocation may be constitutional, *id.*, Hayes tells this Court that "[n]o case describing the required grant of immunity suggests that a probation officer must explain derivative-use immunity," Hayes's Br. at 9. Without discussing *Tate* in any detail, Hayes relies on three other Wisconsin cases to contend that Agent Kloss's warning was sufficient to satisfy *Evans*'s mandate and to protect Douglas's Fifth Amendment rights. *See* Hayes's Br. at 8-9 (citing *Evans*, *State v. Sahs*, 2013 WI 51, 347 Wis. 2d 641, 832 N.W.2d 80, and *State v. Peebles*, 2010 WI App 156, 330 Wis. 2d 243, 792 N.W.2d 212). Douglas disagrees with Hayes' reading of those cases.

First, *Sahs* and *Peebles* are entirely distinguishable because they involve a legal and factual landscape markedly different than the one in the instant case.[4] *See Sahs*, 2013 WI 51, ¶¶ 3-6, *Peebles*, 2010 WI App 156, ¶ 1.

This case is about whether Douglas's revocation was constitutional given his choice not to speak. But, *Sahs* and *Peebles* questioned a defendant's right to exclude from a criminal proceeding evidence obtained as a result of the probationer's choice to speak. *Sahs*, 2013 WI 51, ¶¶ 3-6, *Peebles*, 2010 WI App 156, ¶ 1. *Sahs* and *Peebles* are therefore distinguishable because they consider what should happen when the probationer *speaks*, not what should happen when the probationer *refuses to speak*.

That distinction is of substantial importance. The propriety of the agent's immunity offer was not at issue in any of the cases on which Hayes relies because, as Hayes recognizes in his brief, the *Evans* immunity rule works later to automatically suppress evidence when the probationer speaks. Hayes's Br. at

[4] It must also be noted that the language *Hayes* quotes from *Sahs* does not occur in the majority opinion, but rather appears in a one-judge concurrence. Hayes fails to mention that in his brief.

7 (relying on *State v. Thompson*, 142 Wis. 2d 821, 833, 419 N.W.2d 564 (Ct. App. 1987)). Thus, upon a probationer's choice to speak, whether the agent properly offered immunity is not dispositive of suppression in a criminal proceeding.

But, Douglas's case is not about the suppression of his statement to his probation agent. He gave no such statement. Under the scope of Douglas's appeal, the relevant inquiry is not whether *Evans* would exclude his statement; it is whether Douglas had a constitutional right to remain silent in response to the immunity that he was offered in exchange for his statement.

Relevantly, and contrary to Hayes' representation, Hayes's Br. at 9, *Evans* does more than suggest that a probation officer must explain derivative use immunity to a probationer: it says so. *See Evans*, 77 Wis. 2d at 235-36, 252 N.W.2d at 668-69. After creating its use and derivative use immunity rule, the *Evans* court responded to Evans' argument that he should not have been revoked "for mere refusal to give information." 77 Wis. 2d at 235-36, 252 N.W.2d at 668-69. The court explained: "Had *sufficient explanation* been given to the defendant *with regard to the type of immunity herein granted*, then refusal to cooperate would be grounds for revocation." *Id.* at 236, 252 N.W.2d at 669 (emphasis added). Thus, according to the plain language of *Evans*, a sufficient explanation of its immunity rule is a necessary condition to a valid revocation following a probationer's refusal to speak. *Id.*

It is indisputable that *Evans* grants a probationer both use and derivative use immunity in exchange for a statement. *Tate*, 2002 WI 127, ¶ 20. *Evans* therefore required Douglas's agent to sufficiently advise him that he would enjoy both forms of immunity if he spoke. That rule has been reinforced by the cases following *Evans*, such as *Tate*. The failure of Douglas's agent to explain both use and derivative

use immunity therefore puts Douglas in the same position as Evans and Tate: he should not have been revoked. *Evans*, 77 Wis. 2d at 236, 252 N.W.2d at 669.

Nonetheless, Hayes argues that the following language—which was read to Douglas—was sufficient to explain both use and derivative use immunity: "'I have also been advised that none of this information can be used against me in criminal proceedings.'" Hayes's Br. at 9 (quoting standard DOC statement form). He reads the words "this information" as explaining derivative use immunity because "'[t]his information' can apply both to the exact statements made as well as the information contained in the statements." *Id.* To demand more, says Hayes, would be to ask more of probation agents than police officers. Douglas disagrees.

III. THE LANGUAGE THAT DOUGLAS PROPOSES AS SUFFICIENT TO PROPERLY EXPLAIN THE IMMUNITY COEXTENSIVE WITH THE FIFTH AMENDMENT IS NOT NOVEL OR ONEROUS.

First, Hayes's understanding of derivative use immunity—and thus his position on the propriety of the form's language—is flawed. Derivative use immunity does not apply to just "information contained in the statements." *Contra* Hayes's Br. at 9. Instead, it prohibits use of any evidence discovered as a result of the probationer's statement for which there is no "legitimate source *wholly independent* of the compelled testimony;" it renders inadmissible "evidence derived directly and indirectly" from the statement; it bars "the use of compelled testimony *as an investigatory lead*;" and it prevents "the use of any evidence obtained *by focusing investigation* on a witness as a result of his compelled disclosures." *Kastigar v. United States*, 406 U.S. 441, 453, 460, (1972) (emphasis added).

For example, in *State v. Spaeth*, the Wisconsin Supreme Court concluded that a probationer's

statement to police was inadmissible because it was derived from his statement to his probation agent. 2012 WI 95, ¶ 3, 343 Wis. 2d 220, 819 N.W.2d 769. Spaeth admitted certain conduct to his probation agent who, in turn, told police about Spaeth's admissions. *Id.* ¶ 11. Because Spaeth's later, Mirandized statement to police was "not derived from a source wholly independent from the compelled testimony," it was inadmissible. *Id.* ¶ 59.

In light of the expansive scope of derivative use immunity, it makes no sense to suggest, as does Hayes, that the occurrence of "this information" on the DOC statement form is enough to explain derivative use immunity to a probationer. To the average person, "this information" conveys the existence of a Fifth Amendment protection for the information that is told to the agent during the interview. However, the average person cannot be expected to read "this information" as conveying the existence of a Fifth Amendment protection to the fruits of any investigation not wholly independent of the information that is told to the agent during the interview. "This information" does not convey to the average person that a subsequent statement to police more expansive in scope than the statement to the agent would also be excluded. *Cf. Spaeth*, 2012 WI 95, ¶ 59.

Second, Hayes's complaint that advising a probationer of derivative use immunity, in addition to use immunity, would be too onerous or demanding on agents is not well-founded. The state and federal statutory language that Douglas quoted in his first brief demonstrates both the problem with Hayes's position and how a probationer can easily be properly informed of use and derivative use immunity. *See* Douglas's 1st Br. at 15; *see also* Wis. Stat. § 972.085, 18 U.S.C. § 6002. In both statutes, there is succinct language explaining that evidence derived from the protected speech is also protected. *See* Wis. Stat. §

972.085, 18 U.S.C. § 6002. Consistent with those statutes, simply modifying the standard form language as follows would be enough to explain derivative use immunity and avoid the problem at the heart of this case: "I have also been advised that none of this information, *or any evidence derived therefrom*, can be used against me in criminal proceedings."

Hayes's reliance on *Miranda v. Arizona*[5] to show the unreasonableness in Douglas's position also misses the mark. If Douglas was complaining that his agent's explanation of derivative use immunity was erroneous because it failed to inform him of the finer points of that type of immunity, perhaps Hayes would have legitimate gripe. But, Douglas is instead complaining about the failure to even mention derivative use immunity to him, not some failure in detailing the nuances of its scope. As explained above, Douglas believes that a very succinct statement regarding derivative use immunity would satisfy *Evans* in the same way that a very succinct explanation of a suspect's *Miranda* rights can satisfy the government's obligation in those circumstances.

Hayes is right that a *Miranda* warning need not be given with "talismanic" adherence to *Miranda*'s language. *California v. Prysock*, 453 U.S. 355, 359 (1981). However, any warning not given "in accordance with" *Miranda*'s language must nonetheless be "a fully effective equivalent." *Miranda*, 384 U.S. at 476. Any such equivalent warning must inform the suspect of

> the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

[5] 384 U.S. 436 (1966).

Id. at 479. A warning that fails to inform the suspect of any one of those rights is not consistent with *Miranda*'s rule and "no evidence obtained as a result of interrogation can be used against him." *Id.*

Miranda's call for a functionally equivalent warning is actually helpful Douglas's claim, which argues that Agent Kloss failed to inform him of derivative use immunity, as *Evans* required. Her omission of that information rendered defective her *Evans* warning in the same way that the omission of information regarding the right to an attorney would render defective a *Miranda* warning. As was stated above, Douglas is not demanding that a probationer be informed of derivative use immunity with talismanic certainty, nor does he expect a probation agent to explicate the nuances thereof. He is simply contending that *Evans* and it progeny necessitate that a probationer be provided with a "sufficient explanation" of the *Evans* immunity rule, which includes direct and derivative use immunity. *Evans*, 77 Wis. 2d at 236, 252 N.W.2d at 669. Douglas did not receive such information in the instant case, and he should not have been revoked.

CONCLUSION

Douglas's case is about immunity; it is about what the government must give a probationer in exchange for a compelled, incriminating statement. Informing a probationer about immunity is purposed on ensuring that probationers understand the scope of their Fifth Amendment privilege so that they can measure whether to speak or face revocation. If the probationer is not made fully aware of what evidence can later be excluded from criminal proceedings, the probationer cannot meaningfully measure his or her right to remain silent against the government's right to re-incarcerate. Whereas the government is making a promise when offering immunity, particularity as to the scope of that immunity is imperative. Otherwise, a

probationer cannot know if his or her compelled speech is worth the risk.

Given Agent Kloss's limited explanation of the immunity to which Douglas was entitled, he could not adequately and accurately assess whether to speak or to remain silent. He was thus within his rights to refuse to speak, and his subsequent revocation violated his Fifth Amendment rights. For all those reasons and the ones stated with more specificity in Douglas's first brief, the revocation of his probation should be overturned.

Douglas asks this Court to reverse.

Dated this 15th day of April, 2015.

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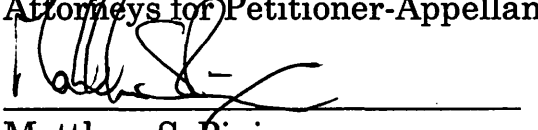

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CERTIFICATION

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 2,758 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).

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Dated this 15th day of April, 2015.

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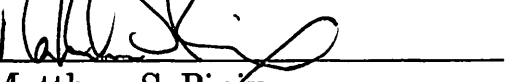

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CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Reply Brief will be delivered to a FedEx, a third-party commercial carrier, on April 15, 2015, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 15th day of April, 2015.

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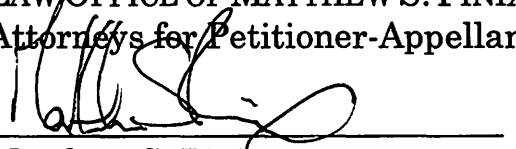

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