STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP0681-CR
Case No. 2015AP0682-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARL L. QUIGLEY,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE S. MICHAEL WILK, PRESIDING

# BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is warranted in this case. The issues on appeal may be resolved on the briefs by well-settled law.

Publication is warranted if this court addresses whether the State's evidence supporting Quigley's pleas in Case No. 2015AP0682-CR derive from a source wholly independent of his compelled statement. Only one published Wisconsin case addresses derivative use of a compelled statement, *In re Commitment of Harrell,* 2008 WI App 37, 308 Wis. 2d 166, 747 N.W.2d 770. *Harrell* discusses the question in the context of a civil commitment case where a psychologist used a compelled statement in forming an opinion that Harrell was dangerous.

## SUPPLEMENTAL STATEMENT OF FACTS

Karl L. Quigley's brief adequately sets out the relevant facts concerning whether he was in custody when police took his initial statement. Quigley's brief at 2-12.

The State offers these additional facts relevant to whether the evidence supporting Quigley's pleas to the two counts that form the basis of the appeal in Case No. 2015AP0682-CR are from a legitimate source wholly independent of the statement he gave to his probation agent.

The State filed a criminal complaint charging Quigley with nine felonies in Kenosha County Case No. 2012CF360 (2015AP0681-CR:1:1-6). These charges arose from a contact on March 14, 2011, between Officer Willie Hamilton, Quigley and an underage girl (the victim) (2015AP0681-CR:1:7-8). At the time, Quigley was on supervision for an unrelated crime and on March 15, 2012, Quigley gave a statement about his

relationship with the victim alleged in Case No. 2012CF360 to his supervising agent (9:2; 58:11).[1] That statement disclosed uncharged sexual contacts (12:7-8). On March 28, 2012, the Department of Corrections provided Quigley's statement to Assistant District Attorney James Kraus (9:2; 12:1). On August 4, 2012, Detective Melichar took a second statement from the victim in which she disclosed additional sexual contact with Quigley not then charged and not disclosed in Quigley's March 15 statement (12:9).

As a result of the victim's August 4 statement, the State filed a second criminal complaint, Kenosha County Case No. 2012CF884, containing four counts, none of which Quigley disclosed in his March 15 statement (1). Quigley filed a motion to suppress claiming the newly charged counts constituted a derivative use of the statement he gave his supervising agent (9). ADA Kraus filed an affidavit as part of the State's response in which he admitted he had been provided with Quigley's March 15 statement on March 28, 2012 (12:1). ADA Kraus also admitted he asked Detective Melichar to re-interview the victim (12:1).

The circuit court held a hearing at which Detective Melichar testified that the victim initially was reluctant to

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[1] The circuit court denied a motion to suppress all evidence derived from Quigley's statement to his supervising agent (2015AP0682-CR:46; 2015AP0681-CR:61; 2015AP0682-CR:59). The transcript of the suppression hearing appears in the appellate record of both cases on appeal (2015AP0682-CR:58, 59; 2015AP0681-CR:61, 62). Unless otherwise noted, the record cites in this statement of facts are to 2015AP0682-CR.

talk about what had occurred between she and Quigley because of their relationship (58:9). He believed that the victim would be more forthcoming if he allowed some time to pass between the initial interview and a re-interview (58:9). He also testified it is common for individuals, especially young persons, not to disclose things because of a close relationship and to divulge additional details at later times (58:10). He testified he would have re-interviewed the victim at some point even without the March 15 statement because he thought she was holding back and not telling everything (58:12). It was normal for him to re-interview people who he felt were not giving the whole story after some time passed (58:12). Detective Melichar was aware of Quigley's March 15 statement at the time he re-interviewed the victim (58:11).

On cross-examination, Detective Melichar acknowledged that the request to re-interview the victim from the district attorney's office did prompt him to re-interview the victim but merely prompted him to do it then rather than later (58:18-19). He intended to re-interview her at some point anyway (58:19). He also testified he did not show the victim Quigley's March 15 statement nor did he review the statement with her (58:21).

On re-direct examination, Detective Melichar testified it is common for police to re-interview and perform additional investigation both with and without a request from the district attorney's office (58:23-24). He reiterated that he felt the victim was holding things back because of

her relationship with Quigley and her embarrassment over the incidents that had occurred (58:24). He thought it a strong possibility that additional sexual contact had occurred (58:24-25).

After the circuit court denied his motion to suppress (59), Quigley entered no contest pleas to three counts in Kenosha County Case No. 2012CF360,[2] and two counts in Kenosha County Case No. 2012CF844,[3] as a result of a plea agreement with the State (2015AP0681-CR:63:2; 2015AP0682-CR:60:2). The circuit court sentenced him to an aggregate sentence of thirty-nine years consisting of twenty-one years of initial confinement followed by eighteen years of extended supervision and a consecutive term of three years probation with sentence withheld (2015AP0681-CR:21; 64:45-46; 2015AP0682-CR:23; 24; 61:45-46).

Quigley filed a post-conviction motion seeking to withdraw his pleas based on a claim that his trial attorney provided ineffective assistance of counsel. After a hearing, the circuit court held Quigley's trial attorney neither performed deficiently nor was Quigley prejudiced by the alleged deficient performance (64:22-23).

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[2] Quigley pled to sexual exploitation of a child and two counts of possession of child pornography in Kenosha County Case No. 2012CF360 (2015AP0681-CR:21; 64:45-46).

[3] Quigley pled to second-degree sexual assault of a child under the age of sixteen and exposing genitals to a child in Kenosha County Case No. 2012CF844 (2015AP0682-CR:23; 24; 61:45-46).

## ARGUMENT

### I. Introduction

Quigley argues he is entitled to withdraw his no contest pleas on two grounds: his trial attorney provided ineffective assistance of counsel by not moving to suppress the statement Detective Melichar took from him on March 14, 2012, because he was in custody but police failed to give him *Miranda*[4] warnings prior to the statement; and the circuit court erred in failing to suppress the four charges in Kenosha County Case No. 2012CF884 which, according to Quigley, resulted from the derivative use of his compelled statement to his supervising agent. He is wrong about both reasons.

Initially, the State agrees that if Quigley prevails on either of his grounds, his plea must be set aside because the plea agreement globally addressed both pending criminal informations. But the appropriate remedy varies because the individual claims affect only one information. Placing the parties back to their original position before Quigley's pleas involves the following: If Quigley prevails on his *Miranda* claim but not on the derivative use claim, the four counts in the second case remain viable and all counts in both cases must be returned to pre-plea status giving Quigley the option of going to trial on the nine count information without his initial statement to Detective Melichar. If, however,

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

Quigley prevails on the derivative use claim but not the *Miranda* claim, only the nine counts in the first complaint should be reinstated. This later remedy is also true if Quigley prevails on both claims.

## II. The circuit court correctly denied Quigley's motion to withdraw his no contest pleas on the ground of ineffective assistance of counsel.

To prove ineffective assistance of counsel, Quigley must show: (1) his lawyer performed deficiently; and (2) his lawyer's deficient performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Quigley must show that his attorney's acts or omissions were "outside the wide range of professionally competent assistance." *Id.* at 690. A defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." *Id.*; *State v. Jacobsen*, 2014 WI App 13, ¶ 13, 352 Wis. 2d 409, 842 N.W.2d 365. There is a strong presumption that counsel acted reasonably within professional norms. *Strickland*, 466 U.S. at 689. Whether an attorney performed deficiently must be determined by applying a standard of objective reasonableness under the totality of the circumstances. *State v. Jenkins*, 2014 WI 59, ¶ 8, 355 Wis. 2d 180, 848 N.W.2d 786.

To satisfy the prejudice aspect of *Strickland*, Quigley must demonstrate that his lawyer's deficient performance was sufficiently serious to deprive him of a fair proceeding and a reliable outcome. *State v. Westmoreland*, 2008 WI App 15, ¶ 17, 307 Wis. 2d 429, 744 N.W.2d 919 (citing *Strickland*, 466 U.S. at 687, 694). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Appellate review of an ineffective-assistance-of-counsel claim presents a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. Appellate courts will not disturb the trial court's findings of fact unless they are clearly erroneous. *Id.*; *State v. Champlain*, 2008 WI App 5, ¶ 19, 307 Wis. 2d 232, 744 N.W.2d 889. The ultimate determination of whether counsel's performance falls below the constitutional minimum, however, is a question of law subject to independent review. *McDowell*, 272 Wis. 2d 488, ¶ 31; *Champlain*, 307 Wis. 2d 232, ¶ 19.

Quigley argues that his attorney performed deficiently because he did not move to suppress the statement Quigley gave Detective Melichar on March 14, 2012. Quigley's brief at 17-23. In a trio of 1970 cases, the United States Supreme Court established the principle that a knowing and

voluntary guilty plea normally bars the defendant from later challenging alleged constitutional violations that occurred prior to the plea. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970). The Supreme Court explained the underlying rationale for this rule in *Tollett v. Henderson*, 411 U.S. 258, 267 (1973):

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards [of competence demanded of attorneys in criminal cases].

The same is true under Wisconsin law. The "general rule is that a guilty[ or] no contest … plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886 (quoting *State v. Multaler*, 2002 WI 35, ¶ 54, 252 Wis. 2d 54, 643 N.W.2d 437) (footnote omitted).

The legislature has created an exception to the guilty plea-waiver rule in Wis. Stat. § 971.31(10), which provides that a defendant who pleads guilty or no contest still has the right to appeal "[a]n order denying a motion to suppress evidence." Additionally, a guilty plea does not waive an

ineffective-assistance claim directed at counsel's advice about whether to enter the plea or that counsel failed to object to a defect in the plea colloquy (a defect Quigley does not claim here). *Kelty*, 294 Wis. 2d 62, ¶ 43.

To determine whether a suspect is in *Miranda* custody, courts must ask whether there is a *formal arrest* or restraint on freedom of movement to the degree associated with a *formal arrest*. *Stansbury v. California*, 511 U.S. 318, 322, (1994) (per curiam); *State v. Lonkoski*, 2013 WI 30, ¶ 6, 346 Wis. 2d 523, 828 N.W.2d 552.

Not all restraint on freedom of movement is custody for *Miranda* purposes. In *Illinois v. Perkins*, 496 U.S. 292, 297 (1990), the Court stated:

> It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.

Thus a *Terry*[5] stop does not trigger *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984); *State v. Griffith*, 2000 WI 72, ¶ 69 n.14, 236 Wis. 2d 48, 613 N.W.2d 72. Even though the person has been seized under the Fourth Amendment's criteria, the person is not "in custody" for purpose of *Miranda*. Quigley's reliance solely on whether he was free to leave is misplaced. The restraint

[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

must rise to the level of a formal arrest. *See Lonkoski*, 346 Wis. 2d 523, ¶ 6.

At the *Machner*[6] hearing, Quigley claimed he and his trial attorney, Dirk Jensen, did not discuss the statement he gave to Detective Melichar on March 14, 2012 (2015AP0861-CR:67:25-27). Attorney Jensen testified they did watch the video recording of the statement and discussed it for two and one-half hours (2015AP0861-CR:66:11-12). The circuit court found Attorney Jensen more credible (2015AP0861-CR:69:22).

Quigley's claim fails on the deficient performance prong. The United States Supreme Court observed that an "asserti[on] that a coerced confession induced [a] plea is at most a claim that the admissibility of [the] confession was mistakenly assessed …." *McMann*, 397 U.S. at 760. The Court then remarked:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. … Questions … cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving

[6] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

> trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

*Id.* at 769-70.

The question Quigley's claim presents, then, is not whether a motion to suppress would have been successful, but whether Attorney Jensen's advice to plead no contest forgoing the motion to suppress amounted to a reasonable good-faith assessment of the facts. *See State v. Milanes*, 2006 WI App 259, ¶ 17, 297 Wis. 2d 684, 727 N.W.2d 94 (holding withdrawal of a plea motivated by a confession erroneously thought admissible depends not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases).

Quigley, like Milanes, assumes that had Attorney Jensen filed a motion to suppress it would have been granted. The circuit court found otherwise, concluding Quigley was not in custody (2015AP0681-CR:69:17-18). Whether Quigley was or was not in custody presented a close question. He was repeatedly told he was free to leave. He repeatedly agreed he had come to the police station voluntarily. The circuit court found that Attorney Jensen and Quigley had discussed the March 14 interview, a discussion that according to Attorney Jensen lasted over two hours. Quigley thus made his decision to enter a negotiated

plea based on Attorney Jensen's reasonable assessment of the success of the motion.

Quigley's reliance on *State v. Burnside*, Case No. 2013AP1293-CR (Wis. App. Apr. 29, 2014) (unpublished) Fine, J., is unavailing. First, *Burnside* is not binding precedent. The facts of this case are more similar to *Lonkoski* than to *Burnside*. *See Lonkoski*, 346 Wis. 2d 523, ¶ 7. But most importantly, *Burnside* is not an ineffective assistance claim after a guilty plea. *Burnside* presented this Court with the question this case does not present: whether the circuit court correctly decided that Burnside was not in custody. Here the question is whether Attorney Jensen's advice amounted to a reasonable good-faith assessment of the likelihood of a finding he was in custody. *See Milanes*, 297 Wis. 2d 684, ¶ 17. Quigley has not demonstrated deficient performance.

The circuit court also found Quigley did not demonstrate prejudice (2015AP0681-CR:69:23). To establish prejudice in the guilty plea context, the defendant must show a reasonable probability that "the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376, 1384 (2012). The mere suppression of Quigley's statement would not have affected any of the six possession of child pornography counts. Nor would it have kept the State from proving that Quigley persuaded the victim to engage in filming the videos found on his cell phone through the cell phone itself and the

victim. Lastly, the victim would still be available to testify about Quigley's exposing his genitals to her. The circuit court was correct.

## III. The circuit court correctly denied Quigley's motion to withdraw his no contest pleas on the ground that the second information resulted from a derivative use of Quigley's statement to his supervising agent.

The Fifth Amendment privilege against self-incrimination protects a person against use of statements which are compelled and any use of a compelled statement to "search out other [evidence] . . . against" the person. *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892). The government may compel statements so long as the speaker receives "immunity from use and derivative use … coextensive with the scope of the privilege against self-incrimination[.]" *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *see also State v. Spaeth*, 2012 WI 95, ¶ 70, 343 Wis. 2d 220, 819 N.W.2d 769.

The State conceded below that Quigley's March 15 statement to his supervising agent was compelled (2015AP0682-CR:11:1). In *State v. Evans*, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977), the Wisconsin Supreme Court crafted an immunity for the supervision setting present in the case of parole, probation or extended supervision. Quigley's March 15 statement enjoyed this *Evans* immunity. But the Fifth Amendment does not require, and *Evans* does not confer, a transactional

immunity. "Use immunity does not protect the substance of compelled testimony, it only protects against the use of compulsory testimony as a source of evidence." *United States v. Crowson,* 828 F.2d 1427, 1428-29 (9th Cir. 1987) (citation omitted) (internal quotation marks omitted). The State could still prosecute Quigley for any crime disclosed in his statement so long as it did not use his statement directly or indirectly. *See Kastigar*, 406 U.S. at 457-58.

If the State proceeds to prosecute an immunized supervisee such as Quigley, it must establish that all of the evidence it proposes to use was derived from legitimate sources wholly independent of the compelled statement. *Id.* at 461-62. An inquiry into an independent source must proceed witness-by-witness and, if necessary, item-by-item. *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir. 1991). The government must show its evidence derived from legitimate, independent sources by a preponderance of the evidence. *United States v. Byrd*, 765 F.2d 1524, 1529 (11th Cir. 1985). The government need only show that the evidence more likely than not was derived independently of the immunized statement. *Id.* The government is not required to negate all abstract "possibility" of taint. *Id.* A finding that evidence has an independent source presents a question of fact subject to review for a clearly erroneous determination. *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir. 1995).

Courts have considered *Kastigar's* "wholly independent source" rule to have two aspects: an evidentiary aspect and a non-evidentiary aspect. The evidentiary aspect requires that each step of the investigative chain through which any evidence was obtained be untainted. *United States v. Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994). Non-evidentiary use might conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy. *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). But these two aspects are not always clearly defined.

Suppose a compelled statement discloses a crime unknown to law enforcement prior to the statement and further reveals the only witnesses to be the defendant and a third party unknown to law enforcement prior to the statement. There is little doubt that using the newly disclosed witness constitutes a derivative use of the compelled statement. The immunized statement provides an investigatory lead to the evidence. Likewise, if a witness becomes aware of the immunized statement and uses it to formulate his/her testimony or refresh recollections, that too is an indirect use of the compelled statement. *See United States v. North* (*North I*), 910 F.2d 843, 860-63 (D.C. Cir. 1990); *Poindexter*, 951 F.2d at 373.

Only one published Wisconsin case addresses the question of indirect use of a compelled statement: *In re Commitment of Harrell*, 2008 WI App 37, 308 Wis. 2d 166, 747 N.W.2d 770. That case involved both the direct and indirect use of a compelled statement in a Wis. ch. 980 civil commitment proceeding.[7] While on parole for sexual assault, Harrell admitted in a written statement to his parole agent that he offered to perform oral sex on a sixteen-year-old boy. *Id.*, ¶ 3. The State introduced Harrell's compelled statement at his commitment trial. *Id.*, ¶ 14. A psychologist also used the statement to score an actuarial instrument and considered the statement as evidence Harrell had not made progress in treatment while in prison both of which formed a basis for his opinion. *Id.*, ¶¶ 5, 30. The *Harrell* opinion is of minimal assistance here.

First, introducing Harrell's statement was a direct evidentiary use. Second, the State did not contend it could demonstrate that the psychologist's scoring or opinion derived from legitimate sources wholly independent of Harrell's compelled statement. *Id.*, ¶ 31. Third, in a footnote, the *Harrell* Court addressed two sources that it considered not to be wholly independent. *Id.*, ¶ 31 n.11. The first was the decision to revoke Harrell's parole which referred to

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[7] At the time of Harrell's commitment trial, Wis. Stat. § 980.05(1m) gave Harrell all the rights of a criminal defendant. *In re Commitment of Harrell*, 2008 WI App 37, ¶ 8, 308 Wis. 2d 166, 747 N.W.2d 770. As the *Harrell* Court noted, the legislature repealed that statute in 2006. *Id.* ¶ 8 n.6.

Harrell's compelled statement. This was an indirect evidentiary use. The second was a separate interview the psychologist undertook with Harrell in which Harrell admitted the conduct. The Court observed that if the psychologist had read Harrell's compelled statement, the interview would not be wholly independent. *Id.* But no court made a finding on whether or not the psychologist had read Harrell's compelled statement.

The victim here had knowledge of the incidents of sexual contact with Quigley independent of his statement to his supervising agent. Her testimony can be said to be a legitimate independent source if, as here, she was not shown Quigley's statement or had the statement described to her. *See United States v. Koon*, 34 F.3d 1416, 1432-33 (9th Cir. 1994) ("Ensuring that the content of a witness's testimony is based on personal knowledge provides the required Fifth Amendment protections and meets the *Kastigar* requirement that the defendant's compelled statements shall not be used against him in subsequent criminal proceedings.") (footnote omitted). Detective Melichar testified he did not show the victim Quigley's March 15 statement or review the statement with her (2015AP0682-CR:58:21). This distinguishes this case from the footnote about the psychologist reading Harrell's compelled statement. Here, the circuit court found the State's evidence to be a legitimate source wholly independent of Quigley's March 15 statement.

Viewed slightly differently, did the State use Quigley's statement as an investigatory lead? What must the State prove in the case of investigatory leads to establish a legitimate source wholly independent of his statement?

Several courts have held:

> In determining whether the immunized testimony could have influenced the government's decision to pursue its line of investigation, if it appears that that pursuit could have been motivated by both tainted and independent factors, the court must determine whether the government would have taken the same steps "entirely apart from the motivating effect of the immunized testimony."

*United States v. Nanni,* 59 F.3d 1425, 1432, (2d Cir. 1995) (citing *United States v. Biaggi*, 909 F.2d 662, 689 (2d Cir. 1990)). *Accord: United States v. Slough*, 641 F.3d 544, 552 (D.C. Cir. 2011); *United States v. Pond*, 454 F.3d 313, 328 (D.C. Cir. 2006). If prosecutors would have taken such steps, there is no violation of the defendant's Fifth Amendment rights. *People v. Kronberg*, 672 N.Y.S. 2d 63, 66 (N.Y. App. Div. 1998).

One unpublished authored opinion of this Court seems to adopt this approach: *State v. Seiler*, Case No. 2013AP1911-CR, (Wis. App. July 23, 2014) (unpublished), Brown, J. (R-Ap.101-08). Seiler was discovered parked alone in a car after dark with a juvenile female, N.F., in violation of his probation rules. Seiler was arrested; his agent visited him in jail, and obtained a statement in which Seiler told the agent that he was just discussing family issues with N.F. The agent disbelieved Seiler's account and conducted a

follow-up investigation. Thereafter the agent advised the sheriff's department to investigate whether Seiler had sexual contact with N.F. The sheriff's investigation resulted in charges and a conviction. *Id.*, ¶ 1 (R-Ap.101-02). This Court rejected his claim that the evidence against him constituted a derivative use of his compelled statement.

> We reject Seiler's argument because the investigation that led to Seiler's charge was based on sources independent of his statements to the agent. The mere fact that Seiler happened to mention some of the people with whom the agent and sheriff's investigators later spoke does not immunize him for prosecution for the crime the independent investigation uncovered. *See Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) (holding that "use and derivative use" immunity is "coextensive with the scope of the privilege against self-incrimination"). Those he mentioned were already known to the agent and would have been contacted during the investigation regardless of Seiler's mentioning them during his discussion with his agent while he was in jail.

*Id.,* ¶ 2 (R-Ap. 102).

In Seiler's statement to his agent, Seiler mentioned that he talked to N.F. about issues she had with S.S. *Id.*, ¶ 5 (R-Ap. 103-04). In light of all the circumstances, the agent thought Seiler's account incredible and decided to call N.F.'s mother and Seiler's wife. In addition, S.S. contacted the agent because he worked with Seiler and wondered why Seiler was not at work. *Id.*, ¶ 6 (R-Ap. 104). The agent's conversation with S.S., along with Seiler's background, led her to suggest further investigation to the sheriff's department. A sheriff's department detective spoke with

S.S., Seiler, and N.F. S.S. told the detective that N.F. had said she engaged in sexual intercourse with Seiler. When the detective spoke with N.F., she confirmed that sexual intercourse had occurred. The detective then spoke to Seiler and told him what N.F. said, and Seiler admitted the sexual intercourse as well. *Id.*, ¶ 7 (R-Ap. 104).

The issue came before this Court in the context of an ineffective-assistance-of-counsel claim. *Id.*, ¶ 10 (R-Ap. 105). In rejecting Seiler's claim that his counsel performed deficiently because the evidence against him constituted a derivative use of his statement, this Court observed that the police already knew who N.F. was; it was inevitable that when she was taken into custody by police, her parents would then have police contact; S.S. contacted the agent himself because he wondered why Seiler missed work; there was nothing in the record to suggest that the agent shared anything in particular that Seiler said when she talked to the sheriff's department. *Id.*, ¶ 14 (R-Ap. 107). Important to this case, the methodology in *Seiler* closely tracts the approach the Second and District of Columbia Circuits and New York have taken in analyzing whether an investigation that could have been motivated by both tainted and independent factors violates the Fifth Amendment.

Here, at the time of Quigley's statement, law enforcement had already interviewed the victim, who provided a legitimate source independent of Quigley's statement about any contact arising from their relationship.

Detective Melichar testified he would have interviewed the victim again because he thought she was holding something back (2015AP0682-CR:58:12). The request to re-interview the victim from the district attorney's office motivated by Quigley's statement merely prompted him to do it then rather than later (2015AP0682-CR:58:18-19). So the State demonstrated Detective Melichar "would have taken the [investigatory] steps 'entirely apart from the motivating effect of the immunized testimony.'" *Nanni,* 59 F.3d at 1432. That re-interview resulted in the disclosure of acts which formed the basis for the second information. The State did not charge any of the acts Quigley disclosed on March 15. The acts alleged in the second information were not disclosed in Quigley's March 15 statement.

The circuit court correctly denied Quigley's motion to withdraw his no contest pleas to the two counts in the second information.

## CONCLUSION

For the reasons given above, this Court should affirm Quigley's judgment of conviction and the order denying his motion to withdraw his pleas.

Dated at Madison, Wisconsin, this 17th day of November, 2015.

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 4,821 words.

Dated this 17th day of November, 2015.

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Warren D. Weinstein
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 17th day of November, 2015.

_____
Warren D. Weinstein
Assistant Attorney General

## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 17th day of November, 2015.

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Warren D. Weinstein
Assistant Attorney General