STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2009AP2907

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J. SPAETH,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Winnebago County, the Honorable William H. Carver, Presiding

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ARGUMENT

I.

THE FIFTH AMENDMENT BARS THE INVESTIGATORY USE, INCLUDING INDIRECT INVESTIGATORY USE, OF IMMUNIZED STATEMENTS TO PROBATION AGENTS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address the Fifth Amendment's scope of protection to probationers who give immunized, compelled statements.

Incriminating statements compelled by an agent's threat of revocation of supervision are subject to use and derivative use immunity. *E.g.*, ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶20 & n.8, 257 Wis. 2d 40, 654 N.W.2d 438.

When a probation agent discloses an immunized statement to the police or prosecutors, Fifth Amendment difficulties may arise. In criminal cases, the Fifth Amendment requires avoiding use, including indirect investigatory use, of immunized testimony. Once a statement is compelled by immunity, the state must satisfy a court

that any proffered evidence came from "a legitimate source *wholly independent* of the compelled testimony." ***Kastigar v. United States***, 406 U.S. 441, 460 (1972) (emphasis added). Uses that fail to leave a witness in "*substantially the same position* as if the witness had claimed his privilege in the absence of a state grant of immunity," ***id.*** at 467 (emphasis added), are impermissible.

But mere knowledge of an immunized statement does not preclude future prosecution. Although an immunized statement is barred as a basis for an investigation, either directly or indirectly, *see* ***id.*** at 460, "wholly conjectural and insubstantial" uses should not run afoul of the privilege against self-incrimination.

A. The Fifth Amendment Bars Use and Derivative Use of Immunized Testimony

1. As the history of Fifth Amendment jurisprudence shows, use and derivative use immunity best balances the underlying interests

Witness statements are essential to the search for the truth, but the courts balance other interests against their unfettered use. The interests include: (1) the defendant's right against self-incrimination; (2) the government's interest in compelling witness testimony; and (3) the need to preserve accountability.

Although each of these factors matters, only the right against compulsory self-incrimination is constitutionally based. The Fifth Amendment provides, in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . ..

U.S. Const. amend V. It applies to the states through the Fourteenth Amendment. *See* ***Malloy v. Hogan***, 378 U.S. 1, 6 (1964). *See also* Wis. Const., Art. I, §8.

When these values conflict, the imperfect solution has been to grant citizens immunity, as this Court did in ***Tate***, *supra*. Imperfect is the operative term because immunity comes in a variety of forms, none of which perfectly balances the competing values. Of the

various types of immunity courts have considered over the years, use and derivative use immunity best balances these interests.

Enacted in 1857, the first immunity statute provided that "no person examined and testifying before either House . . . shall be held to answer criminally . . . for any fact or act touching which he shall be required to testify . . .." Act of Jan. 24, 1857, ch.19, 11 Stat. 155-56. Unfortunately, the statute was so permissive that it allowed savvy witnesses to foreclose future prosecution by testifying before Congress about their transgressions. *See* 42 Cong. Globe, 37th Cong., 2d Sess. 364 at 428 (1862).

Although the 1857 statute heavily protected a witness' constitutional right against self-incrimination, it failed to preserve accountability. Congress therefore eventually passed a revised "simple use" statute: "[T]he testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness . . .." Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (1862).

But the "simple use" statute, which provided more accountability, insufficiently protected defendants. In ***Counselman v. Hitchcock***, 142 U.S. 547 (1892), the Supreme Court held "simple use" prohibition inadequate because it

> could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court.

Id. at 564. To pass constitutional muster under ***Counselman***, an immunity statute "must afford absolute immunity against future prosecution for the offence to which the question relates." ***Id.*** at 586 (emphasis added).

In reaction, Congress passed the Compulsory Testimony Act of 1893, providing that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce

evidence, documentary or otherwise . . .." Act of Feb. 11, 1893, 27 Stat. 444 (1893). The Court subsequently upheld this "transactional immunity." ***Brown v. Walker***, 161 U.S. 591 (1896); *see also* ***Ullmann v. United States***, 350 U.S. 422 (1956).

But transactional immunity frustrated prosecutors and police. In 1964, the Court changed course and held that something less would pass constitutional muster. ***Murphy v. Waterfront Commission***, 378 U.S. 52 (1964). Forbidding the government from using the immunized testimony or its "fruits" in the prosecution was sufficient. ***Id.*** at 79.

> Once a defendant demonstrates that he has testified under a state grant of immunity, to matters related to the . . . prosecution, the . . . authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

Id. at 79 n.18. This use and derivative use immunity left both the witness and the government in "substantially the same position" as if the witness had asserted his or her privilege without a grant of immunity. ***Id.*** at 79.

Congress then passed a new immunity statute incorporating this standard, *see* 18 U.S.C. §§6001-6005, which the Court upheld. ***Kastigar v. United States***, 406 U.S. 441 (1972).

2. *Kastigar's* use and derivative use immunity requires that the prosecution prove that (1) the witness remains in a "substantially" similar position and (2) any evidence used was derived from a "wholly independent" source.

To avoid violating the constitutional prohibition against compelling testimony, an immunized witness must be left "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." ***Kastigar***, 406 U.S. at 457 (quoting ***Murphy***, 378 U.S. at 79). Accordingly, the prosecution must bear the "heavy burden" of proving that all evidence was obtained in a constitutionally acceptable manner. ***Id.***

at 461-62. "This burden of proof . . . is not limited to the negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source *wholly independent* of the compelled testimony." ***Id.*** at 460 (emphasis added).[1] In other words, a grant of immunity "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." ***Id.*** at 453 (emphasis in original).

The term "substantial" means the declarant need not remain exactly where silence would have placed him, although he or she must be very close. For example, because the privilege prohibits only criminal consequences, immunized statements may still be used in a civil proceeding, despite disgrace or loss of employment. ***United States v. Apfelbaum***, 445 U.S. 115, 124-25 (1980). Moreover, a witness whose compelled testimony is false can still be charged with perjury. *See* ***id.*** In these respects, making the "protection 'coextensive' with that of the Fifth Amendment . . . need not treat the witness as if he had remained silent." ***Id.*** at 127.

But, "substantially similar" is still, well, substantial. The "heavy burden," ***Kastigar***, 406 U.S. at 461, may, in some instances, create difficulty, or occasionally impossibility, in prosecuting, but the Fifth Amendment mandates immunity which "assur[es] that the compelled testimony can in no way lead to the infliction of criminal penalties." ***Id.*** at 461.

How much difficulty the government faces in overcoming its burden varies from case to case and depends on how entangled the prosecutor is with immunized testimony. For example, a federal prosecutor who began his investigation only after dissemination of a

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[1] Federal circuits disagree whether the government must demonstrate an independent source by a preponderance of the evidence, *e.g.*, ***United States v. North***, 910 F.2d 843, 854, 872 (D.C. Cir.) (per curiam), *modified*, 920 F.2d 940, 942 (D.C. Cir. 1990) (per curiam); ***United States v. Danielson***, 325 F.3d 1054, 1077 (9th Cir. 2003); ***United States v. Byrd***, 765 F.2d 1524, 1529 (11th Cir. 1985), or by a higher standard, e.g., ***United States v. Semkiw***, 712 F.2d 891, 894 (3rd Cir. 1983).

witness' immunized testimony may not be able to overcome the burden. *See* ***United States v. Hampton***, 775 F.2d 1479, 1490 (11th Cir. 1985):

> Unless the government relies solely upon evidence obtained prior to the immunized testimony, the principles of ***Kastigar*** generally require (as a practical matter) a showing that prosecuting officials and their agents were aware of the immunity problem and followed reliable procedures for segregating the immunized testimony and its fruits from officials pursuing any subsequent investigations.

Ultimately, whether a particular use is permissible depends on whether a reviewing court is satisfied the witness is in a substantially similar position, as if he had not been compelled to give testimony. ***Kastigar***, 406 U.S. at 457. Similarly, a reviewing court must be satisfied that the evidence the government proposes to use came from "a legitimate source wholly independent of the compelled testimony." ***Id.*** at 460.

B. Speculative "non-evidentiary" use is not per se violative of the privilege against self-incrimination

At a minimum, the Fifth Amendment bars direct or indirect evidentiary use of compelled testimony. ***Kastigar***, 406 U.S. at 453. Barred evidentiary use of compelled testimony includes use "as an 'investigatory lead,' [including] evidence obtained by focusing investigation on a witness . . .," ***Id.*** at 460; by prosecutors to impeach a defendant at trial, ***New Jersey v. Portash***, 440 U.S. 450, 459-60 (1979); and "by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements . . .," ***United States v. North***, 910 F.2d 843, 860 (D.C. Cir.) (per curiam), *modified*, 920 F.2d 940, 942 (D.C. Cir. 1990) (per curiam).

But some non-evidentiary use is permitted. A prosecutor's mere knowledge of or access to a defendant's immunized testimony does not, by itself, taint a criminal proceeding. *See* ***United States v. Crowson***, 828 F.2d 1427, 1430 (9th Cir. 1987); *see also* ***United States v. Caporale***, 806 F.2d 1487, 1518 (11th Cir. 1986). The

difficult question arises in defining permissible non-evidentiary use.

"An initial difficulty is that a precise definition of the term nonevidentiary use is elusive" and courts generally resort to example. *See* ***North***, 910 F.2d at 857. In addition, the federal courts of appeal are divided. The most restrictive position on permissible use forbids a prosecutor not only from making evidentiary use of immunized testimony, but also from using it in "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and other generally planning trial strategy." ***United States v. McDaniel***, 482 F.2d 305, 311 (8th Cir. 1973).

Many courts have refused to adopt such a broad approach, however, likely due to practical realities. ***McDaniel's*** view of the scope of the privilege does not grant transactional immunity, but the effect might be indistinguishable. *See, e.g.*, ***Crowson***, 828 F.2d at 1431-32. Some courts view requiring a Chinese wall between the immunized testimony and the prosecution as "the equivalent of granting transactional immunity," *see* ***id.***, especially in less populous counties with only one prosecutor.

A better approach considers the subtle thoughts of prosecutors to be non-evidentiary use. Some courts refuse to "foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial." *See* ***United States v. Mariani***, 851 F.2d 595, 600 (2nd Cir. 1988); *accord*, ***United States v. Serrano***, 870 F.2d 1, 17-18 (1st Cir. 1989); ***United States v. Byrd***, 765 F.2d 1524, 1531 (11th Cir. 1985). In ***Mariani***, for example, the district court overturned the defendant's conviction because the government used the defendant's compelled statements: (1) to corroborate in the prosecutor's mind the testimony of two witnesses at trial; (2) to confirm the government's decision to pursue RICO charges; and (3) to decide not to prepare to cross-examine the defendant. ***Id.*** But the Court of Appeals reversed, holding that the "uses" complained of were "wholly conjectural and insubstantial." ***Id.*** at 601. The Court did not view the prosecutor's

thought process as a "use" at all, stating:

> We do not see how the prosecutor's judgment that [the defendant] would not take the stand can be considered a use of the immunized testimony. The failure to prepare any cross-examination of [the defendant] could not have strengthened the government's case.

Id.

Similarly, in ***United States v. Velasco***, 953 F.2d 1467, 1474 (7th Cir. 1992), the Court explained:

> The burden on the prosecution to establish an independent source for evidence against a defendant is a heavy one indeed, but we decline to make it an impossible one to bear. We adopt the position of ***Mariani***, and cases following, that the mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible "use" of that information.

This approach, allowing those non-evidentiary uses having only "tangential influence," avoids speculating and entangling the courts with thought processes. It also more effectively balances the constitutional imperative against self-incrimination with other needs of criminal justice.

C. No reason exists to treat immunized statements to an agent differently than any other immunized statement.

Providing the same level of use and derivative use immunity under ***Kastigar*** and its progeny to agent-compelled statements as to prosecutor-compelled statements complies with Fifth Amendment requirements. ***Tate***, 2002 WI 127, ¶20 & n.8 (use and derivative use immunity under ***Kastigar*** required to compel statements from probationer). Like a prosecutor, a probation or parole agent may compel statements from defendants he supervises, *see* ***State v. Peebles***, 2010 WI App 156, ¶16, 330 Wis.2d 243, 792 N.W.2d 212, but such situations implicate Fifth Amendment protections, ***State v. Evans***, 77 Wis.2d 225, 252 N.W.2d 664 (1977); *see* ***Minnesota v. Murphy***, 465 U.S. 420, 426 (1984).

Accordingly, any such compelled statements are immunized against use or derivative use in criminal cases. ***Peebles***, 2010 WI App 156, ¶16; ***Tate***, *supra*. The following four rules apply:

> First, if a probationer refuses to incriminate himself or herself as required by a condition of supervision, he or she cannot be automatically revoked on that ground; second, if the probationer refuses despite a grant of immunity, his or her probation may be revoked on that basis; third, any incriminating statements the probationer provides under the grant of immunity may be used as justification for revocation, but not used in any criminal proceedings; and fourth, if a probationer is compelled by way of probation rules to incriminate himself or herself, the resulting statements may not be used in any criminal proceeding.

Peebles, ¶16 (citation omitted).

No reason exists to define "use" for these purposes any differently than for prosecutor-immunized statements nor does any case law suggest that this ban on usage allows anything that "use and derivative use" forbids. As in the prosecutorial-immunity context, *see* ***Kastigar***, 406 U.S. at 453, this interpretation bars both direct and indirect evidentiary use, but not law enforcement's mere knowledge of the statement, *cf.* ***Crowson***, 828 F.2d at 1430. Nor is prosecution foreclosed simply because the immunized statement might have a tangential influence on prosecutorial thoughts. *Cf.* ***Velasco***, 953 F.2d at 1474. As long as the probationer's position remains "substantially similar" to that if no immunized statement existed and any evidence arises from a "wholly independent" source, criminal prosecution is permissible. *Cf.* ***Kastigar***, 406 U.S at 453-54, 460.

This level of protection will not harm law enforcement unless probation agents choose to disclose immunized statements. Although a probation agent is a member of the executive branch, he or she is not a member of law enforcement. A probation agent's primary role is to ensure that a probationer complies with his or her conditions, rather than to ferret out new crimes. At worst, an agent who does not turn the compelled statement over to law enforcement puts the police in no worse position than they were in prior to the statement. At

best, the agent protects law enforcement from taint if the prosecution later builds a case from independent sources.

Practically speaking, giving immunized self-incriminating statements still has consequences. Use of the statement in revocation proceedings, which are civil proceedings, is permissible, *see* ***Peebles***, *supra*, so revocation and imprisonment after revocation of probation, parole, or extended supervision can result.

Protecting a probationer's constitutional right as required by ***Kastigar*** also encourages - rather than discourages - forthright behavior. Full ***Kastigar*** immunity against use or derivative evidentiary (and most non-evidentiary) use of compelled statements encourages the probationer to be candid and risk revocation (but avoid self-incrimination). Failing to provide the full use and derivative use of immunized statements required by ***Kastigar***, on the other hand, increases the odds the probationer will remain silent to avoid the risk of an additional conviction and even more prison time.

Additionally, a probationer who gives self-incriminating testimony is not immune from civil consequences, ***Apfelbaum***, 445 U.S. at 125, and the compelled statements can be used to protect the public in other ways. A prosecutor may use any immunized statement as a basis to civilly commit a probationer under Chapter 980 - assuming the "predicate offense" exists. *See* Wis. Stat. §980.01(6). Likewise, if a child has or may be harmed, an agent may contact Child Protective Services and the compelled statement may be used in a proceeding to terminate parental rights. *See* ***State ex rel. Cramer v. Schwarz***, 2000 WI 86, ¶62, 236 Wis.2d 473, 613 N.W.2d 591.

CONCLUSION

For the above reasons, WACDL respectfully asks that this Court comply with ***Kastigar's*** mandate to prohibit the use and derivative use (including most non-evidentiary use) of compelled, and therefore immunized, statements to probation agents.

Dated at Milwaukee, Wisconsin, June 30, 2011.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,997 words.

_____
Jake L. Remington

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Jake L. Remington

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 30th day of June, 2011, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Jake L. Remington

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