STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2058-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. HANSON,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICITON RELIEF, BOTH ENTERED IN OCONTO COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL T. JUDGE, PRESIDING

# RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

1. Did the circuit court comply with Peter Hanson's constitutional right to confrontation when, at trial, it admitted Hanson's testimony from a John Doe hearing?

The circuit court overruled the confrontation objection because the evidence was not hearsay.

The court of appeals did not resolve this issue but instead found the alleged error harmless.

This Court should hold that there was no confrontation violation and that the alleged error was harmless.

2. Did Hanson fail to establish that his trial counsel provided ineffective assistance by not objecting on *Miranda*[1] grounds to the State's introduction of Hanson's John Doe testimony?

The circuit court and court of appeals determined that counsel was effective.

This Court should reach the same conclusion.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

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

## INTRODUCTION

Hanson murdered Chad McLean in 1998. The murder investigation went cold for years. In 2012, the Oconto County Circuit Court held a John Doe hearing on the murder, and Hanson testified. The State charged Hanson with the murder. At trial, the State introduced Hanson's John Doe testimony that (1) Hanson's deceased wife had told police that she thought that Hanson had killed McLean, and (2) Hanson had rejoiced over his wife's death. Hanson argues that he should get a new trial because this testimony about his wife's statement to police violated his right to confrontation and because his trial counsel was ineffective by not objecting to this testimony on *Miranda* grounds.

This Court should affirm Hanson's conviction.

First, the admission of Hanson's John Doe testimony about his wife's statement to police did not violate his right to confrontation because the State did not use this evidence to prove the truth of the matter asserted. The State did not introduce this evidence to show that Hanson's wife had in fact thought that he was guilty. Rather, the State introduced this evidence to help show why Hanson had rejoiced over his wife's death—because she was no longer able to testify against him regarding McLean's murder. This explanation showed that Hanson had a consciousness of guilt.

In any event, this alleged confrontation violation was harmless. The uncontested testimony of two witnesses told the jury that Hanson's wife had reported him to police, she saw blood on Hanson's hands right after the murder, and he had confessed to her. This testimony was more detailed and more incriminating than the John Doe testimony that Hanson challenges on appeal. Further, there was other strong evidence of Hanson's guilt.

Second, Hanson's trial counsel was effective by not objecting to Hanson's John Doe testimony on *Miranda* grounds. Because this testimony was harmless, counsel did not prejudice the defense by forgoing a *Miranda* objection. Further, counsel did not perform deficiently because the law on this issue is unsettled and, in any event, a *Miranda* objection would have failed because full *Miranda* warnings are not required at John Doe hearings.

## STATEMENT OF THE CASE

In February 1998, McLean—a slender, blonde-haired, blue-eyed, 19-year-old man—lived and worked in Green Bay. (R. 43:87, 93–94.) He had a factory job at Wisconsin Converting, which he loved. (R. 43:87, 90.) He had a perfect attendance record for which he was going to receive a bonus. (R. 43:90, 130, 141.)

Cory Byng met McLean at age 12 or 13 and they became close friends. (R. 43:194.) They eventually grew apart but became reacquainted when they ran into each other at a billiards hall in early 1998. (R. 43:195–96.) They made plans to take a road trip to the Machickanee Forest in Oconto County to go fishing. (R. 43:197.)

On Sunday, February 22, 1998, Byng picked up McLean around noon and they went to the Machickanee Forest. (R. 43:197–98.) Byng and McLean then made a surprise visit to Byng's aunt and uncle, Debbie and Billy Byng, who lived in the Town of Abrams in Oconto County. (R. 39:240, 243, 245; 43:201.) McLean and the Byngs talked, drank beer, and ate food. (R. 39:246, 276, 278.) Cory Byng was 22. (R. 43:196.)

Later that day, Hanson and his friend Chuck Mlados—who went by the nickname "Animal"—unexpectedly arrived at the Byng house. (R. 39:249, 280–81.) Billy and Hanson had been friends for 25 years. (R. 39:288.)

In the evening, McLean and Cory said that they were going back to Green Bay because they had to work the next day. (R. 39:251; 43:218, 267.) When Cory backed his truck down the driveway, he drove into a ditch and got stuck. (R. 39:252; 43:221.) Billy Byng took Cory's keys and refused to let him drive home. (R. 39:253; 43:222–23.) Cory slept on Billy and Debbie's kitchen floor all night. (R. 39:254–55, 258; 43:230.)

McLean planned to ride to Green Bay with Mlados, who lived near McLean. (R. 39:255–56.) Around 9:30 or 10:00 p.m., McLean, Mlados, and Hanson got into a pickup truck and left the Byng home. (R. 39:256–57, 279, 282; 43:184, 267.) They headed west toward Hanson's house to get Mlados's pickup truck. (R. 39:283; 43:184, 267.)

One of Hanson's neighbors, Sharon Olson, heard two or three gunshots that same night shortly after 10:00 p.m. (R. 39:196–98.) The gunshots came from the east. (R. 39:197.) Hanson's house was to the east, immediately adjacent to Olson's house. (R. 39:195.)

McLean was not at home the next three mornings when his carpooling coworker arrived, so she called McLean's mother. (R. 43:143–46.) McLean's mother reported him missing to police, and many of his friends and relatives began looking for him in Abrams and Green Bay but did not see him. (43:101–05.) McLean's mother put up hundreds of missing-person fliers and posters in Green Bay and Abrams. (R. 43:106.)

The search effort ended one month later. On Sunday, March 22, 1998, a woman who was walking her dog found McLean's body floating in the Pensaukee River in Abrams. (R. 40:100–04; 43:279–80.) McLean's body was found about a two-minute drive, or 1.3 miles, from Hanson's home. (R. 43:280, 309–10.) The Pensaukee River bordered the end

of Hanson's property. (R. 43:281, 310.) When McLean's body was found, he was wearing the same clothes he had been wearing when he disappeared on February 22. (R. 39:8; 40:103–04; 43:125, 217.)

McLean's head had four gunshot-entrance wounds and one exit wound. (R. 39:71–73.) The entrance wounds were evenly spaced in a straight line. (R. 39:71; 40:214.) This wound pattern was "[e]xtremely atypical" and "much more consistent" with being shot by a fully-automatic gun.[2] (R. 39:71.) The gunshot wounds were consistent with a smaller caliber gun, such as .22 caliber. (R. 39:76–77.) A doctor recovered three metal fragments from McLean's head during an autopsy. (R. 39:79; 43:288.) Later examination revealed that the fragments were from fired .22-caliber bullets. (R. 40:74–75; *see also* 43:296–97.) Fully-automatic guns are legally restricted and rare outside of the military, and they usually are not .22 caliber. (R. 40:216.) Yet Hanson had a .22-caliber rifle that he had modified to fire fully automatic. (R. 39:215–17, 272.) Police executed a search warrant at Hanson's property, and they recovered an empty box of .22-caliber ammunition from his storage shed as well as spent .22-caliber shell casings and fired .22-caliber bullets from the yard. (R. 43:289, 293–94.)

The McLean murder investigation went cold for years. McLean's mother put up a billboard and notices about her son's murder in Green Bay and Abrams for about nine years after his body was found. (R. 43:112–13, 115.)

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[2] A fully-automatic gun can fire multiple rounds of ammunition (e.g., bullets) by pulling the trigger once and holding it down. (R. 40:217–18.)

In 2009, a detective interviewed Hanson's wife. (R. 1:14.) She said that on February 22, 1998, Hanson got home around 9:30 p.m. (R. 1:14.) She said that later that night, Hanson entered the house with blood on his hands and he was "freaking out." (R. 1:14.)

The Oconto County Circuit Court held a John Doe hearing in November 2012. (R. 1:3.) Before Hanson testified at the hearing, the judge told Hanson that (1) he could refuse to give answers that may incriminate him, (2) his testimony could be used against him in a future criminal case, and (3) he could have an attorney present. (R. 32:Ex. 54:49–51.) Hanson said that he did not want an attorney present. (R. 32:Ex. 54:51.) During a small part of his testimony, Hanson said that his wife had told police that she thought that he had killed McLean. (R. 32:Ex. 54:165–66.) He also testified that he had told a couple people that his wife's death was the best thing that ever happened to him. (R. 32:Ex. 54:166.)

In March 2013, the State charged Hanson with the first-degree intentional homicide, as a party to the crime, of McLean. (R. 1.) Hanson had a six-day jury trial in December 2013. (R. 38; 39; 40; 41; 43; 44.)

At Hanson's trial, the State sought to introduce his John Doe testimony about his wife, and he objected on confrontation grounds. (R. 44:71–72.) The State argued that the testimony was admissible to show Hanson's consciousness of guilt. (R. 44:72–77.) The State reasoned that Hanson had rejoiced over his wife's death because it rendered her unable to testify about McLean's murder. (R. 44:72–77.) The circuit court ruled that the testimony was not hearsay. (R. 44:81–82.)

Besides introducing the facts summarized above, the State presented three witnesses who said that Hanson had confessed to the murder. Kenneth Hudson testified that he had met Hanson at work in 1989. (R. 40:143.) In the early- to mid-1990s, Hanson was Hudson's best friend. (R. 40:145.) About two months after McLean's body was found, Hanson told Hudson that he had killed McLean by shooting him and that Chuck Mlados was present at the murder. (R. 40:162–63, 167.) Hanson said that he and Mlados hauled McLean's body and dumped it into a river. (R. 40:163–64.)

Barry O'Connor testified that he had been "drinking acquaintances" with Hanson since as early as 2005 until about 2009 or 2010. (R. 40:54, 57.) Sometime between 2008 and 2010, Hanson and O'Connor were in an Oconto bar when Hanson admitted that he and his friend Chuck had accidentally killed a "guy" in a shed near Hanson's house about ten years earlier. (R. 40:24–26.) Hanson said that he had shot the guy. (R. 40:26, 28.) Hanson said that he had gone into his house, his wife had freaked out because he had blood on his hands, he told his wife that he had killed someone, and he and Chuck had gotten rid of the body by dumping it into a river near his house. (R. 40:25, 28–29.)

O'Connor later saw Hanson in the Oconto County Jail in August or September 2013. (R. 40:12.) Hanson told O'Connor that he had confessed to the murder only to his wife, O'Connor, and a man from Marinette.[3] (R. 40:29.) Hanson was not concerned about his wife testifying against him because she was dead. (R. 40:30.) Hanson told O'Connor that he had better not tell anyone about the confession or else the "same thing" could happen to O'Connor. (R. 40:18–

[3] Kenneth Hudson lived in Marinette since 1995. (R. 40:140.)

19.) O'Connor reported Hanson's confession and threat to jail officials. (R. 40:30–32.)

Jeremy Dey testified that he met Hanson in the Oconto County Jail in fall 2013. (R. 40:108–09, 114.) Hanson told him that he had shot McLean in his garage. (R. 40:114.) Hanson said that he and his friend Chuck had put the body into a river and that it floated toward Hanson's home. (R. 40:114.) Hanson said that his wife had given a statement against him to police about the murder. (R. 40:117.)

The State spent most of its closing argument talking about the strong evidence of Hanson's guilt and briefly discussed Hanson's John Doe testimony. (R. 41:19–67, 86–94.) The State argued that Hanson's rejoicing over his wife's death showed his consciousness of guilt. (R. 41:56–57.) The circuit court gave the jury a general instruction about consciousness of guilt. (R. 41:12.)

While deliberating, the jury asked to see any exhibits about Hanson's wife's statements to police. (R. 41:99.) The circuit court denied the request because no such exhibits existed. (R. 41:99.) The jury found Hanson guilty as charged. (R. 47.) The circuit court sentenced him to life imprisonment without the possibility of parole. (R. 47.)

Hanson filed a motion for postconviction relief in November 2015, alleging ineffective assistance of trial counsel. (R. 77.) The circuit court held a hearing and later entered a written decision denying the motion. (R. 102; 106.)

Hanson appealed his judgment of conviction and the circuit court's order denying his postconviction motion. (R. 108.) The court of appeals affirmed. This Court granted Hanson's petition for review.

## STANDARD OF REVIEW

This Court independently reviews whether a defendant's constitutional right to confrontation was violated, *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W.2d 811, and whether an error at trial was harmless, *State v. King*, 2005 WI App 224, ¶ 22, 287 Wis. 2d 756, 706 N.W.2d 181.

When reviewing a claim of ineffective assistance of counsel, this Court upholds the circuit court's factual findings unless they are clearly erroneous, and it independently determines whether counsel was ineffective. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695.

## ARGUMENT

### I. The circuit court did not violate Hanson's right to confrontation, and if it did, the error was harmless.

#### A. The use of Hanson's John Doe testimony at trial did not violate his right to confrontation.

"The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." *Manuel*, 281 Wis. 2d 554, ¶ 36 (citation omitted). Under the Confrontation Clause, "'testimonial' hearsay is not admissible in a criminal trial against a defendant unless: (1) 'the defendant had had a prior opportunity for cross-examination,' and (2) the hearsay declarant is 'unavailable to testify.'" *King*, 287 Wis. 2d 756, ¶ 5 (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

"The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). So, "aside from the testimonial versus nontestimonial issue, a crucial aspect of *Crawford* is that it only covers hearsay." *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006).

"[W]here the evidence is offered not to prove the truth of the matter asserted, but rather for some other purpose, such as providing a fair context on which the trier of fact can evaluate the evidence already offered by the opposing party, the evidence is by definition not hearsay." *State v. Eugenio*, 219 Wis. 2d 391, 411, 579 N.W.2d 642 (1998).

"[O]ut of court statements may be offered to prove innumerable relevant propositions apart from the truth of the matter (explicitly) asserted." *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 133, 278 Wis. 2d 111, 692 N.W.2d 572 (Wilcox, J., dissenting) (quoting 7 Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence* § 801.3, at 536). An out-of-court statement is hearsay if its probative value hinges on its truth. *State v. Sveum*, 220 Wis. 2d 396, 406, 584 N.W.2d 137 (Ct. App. 1998).

So, for example, an out-of-court statement is *not* hearsay if the prosecution uses it to establish a defendant's consciousness of guilt, *see United States v. Shorter*, 54 F.3d 1248, 1260 (7th Cir. 1995), or to explain a person's subsequent belief or conduct, *see State v. Giacomantonio*, 2016 WI App 62, ¶ 34, 371 Wis. 2d 452, 885 N.W.2d 394; *State v. Britt*, 203 Wis. 2d 25, 40–41, 553 N.W.2d 528 (Ct. App. 1996). Evidence about a defendant's consciousness of guilt shows his awareness that his case is weak, *State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981), and is circumstantial evidence "of guilt itself," *State v. Miller*, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999)

(citation omitted). A defendant's attempt to kill a witness, for instance, shows that the defendant "was conscious of his guilt and probably suspected that [the witness] could provide compelling testimony as to his guilt." *State v. Bauer*, 2000 WI App 206, ¶ 7, 238 Wis. 2d 687, 617 N.W.2d 902.

"The shield allowing the prosecution to use nonhearsay may be destroyed if the prosecutor misuses the statement." *Lee v. McCaughtry*, 892 F.2d 1318, 1326 (7th Cir. 1990). So, to determine whether an out-of-court statement was used as hearsay, a court considers the proffered justification and how the proponent of the evidence used it. *Compare Giacomantonio*, 371 Wis. 2d 452, ¶ 35 (holding that an out-of-court statement was not hearsay because "[t]he State did not rely on" it for its truth), *with State v. Kutz*, 2003 WI App 205, ¶¶ 35–37, 267 Wis. 2d 531, 671 N.W.2d 660 (holding that an out-of-court statement, although admitted for a non-hearsay purpose, was used for its truth when the State "clearly used" it that way in closing argument).

Here, at trial, the State did not offer or use Hanson's John Doe testimony to prove the truth of the matter asserted. In two pages of Hanson's John Doe testimony, the jury heard that (1) Hanson's wife Kathy had told police that she thought that Hanson had killed McLean, (2) Kathy was no longer able to testify against Hanson because she was dead, and (3) Hanson had rejoiced over Kathy's death. (R. 44:83–84.) Hanson argues that the first of those three points was inadmissible under the Confrontation Clause. But it would have been awkward, confusing, and out of context to present the jury with only the second and third points. The State argued that this testimony about Kathy's statement to police was non-hearsay because it showed Hanson's consciousness of guilt and the context for his rejoicing over Kathy's death. (R. 44:72–77.) The State

reasoned that Hanson had rejoiced over Kathy's death *because* it rendered her unable to testify against him about McLean's murder. (R. 44:72–77.) The State made the same point during closing argument. (R. 41:56–57.) Further, the State explained to the court that it was not using this testimony about Kathy's statement to police for its truth because the jury had already learned from Barry O'Connor and Jeremy Dey that Kathy had thought that Hanson killed McLean. (R. 44:72–77.)

The State thus used Hanson's John Doe testimony at issue to show what Hanson had heard and what he subsequently did. "The hearsay rule does not prevent a witness from testifying as to what he heard; it is rather a restriction on the proof of fact through extrajudicial statements." *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 427, 351 N.W.2d 758 (Ct. App. 1984) (citation omitted). The State used Hanson's John Doe testimony to show that Hanson had *heard* that Kathy had reported him to police and that he had subsequently rejoiced over her death. (R. 44:83–84.) The State did not use that testimony to prove the truth of the matter asserted—i.e., to prove that Kathy had *actually* told police that she thought that Hanson had killed McLean. Instead, Hanson's testimony about Kathy reporting him to police gave context to his rejoicing over her death. That testimony helped establish Hanson's belief that Kathy would have been willing to testify against him. That belief, in turn, provided an explanation for Hanson's subsequent conduct of rejoicing over her death.

Further, the probative value of Hanson's John Doe testimony in question does *not* hinge on its truth. This testimony provided context and showed Hanson's consciousness of guilt, regardless of whether Kathy had *actually* reported Hanson to police. What is important is that

Hanson had *heard* that Kathy had reported him to police and that he rejoiced when she died.

In short, Hanson's John Doe testimony about Kathy implied that he "was conscious of his guilt and probably suspected that [Kathy] could provide compelling testimony as to his guilt." *Bauer*, 238 Wis. 2d 687, ¶ 7. Because the State did not use Hanson's John Doe testimony to prove the truth of the matter asserted, it did not violate Hanson's confrontation right. This Court thus need not consider whether that testimony was "testimonial" under *Crawford*.

### B. Hanson's hearsay arguments are unpersuasive.

Hanson argues that Kathy Hanson's statement to police was hearsay for four reasons, but his arguments fail.

First, Hanson argues that the evidence in question was hearsay under *Street* because he "did not open the door by relying on [his wife's] statements in his defense" and because the circuit court did not give a limiting instruction. (Hanson's Br. 13–14.)

*Street* does not help Hanson. Contrary to Hanson's suggestion, "*Street* does not limit the introduction of an out-of-court statement only to occasions where the defendant has put the matter at issue." *Hodges v. Commonwealth*, 634 S.E.2d 680, 687 (Va. 2006). The Supreme Court in *Street* distinguished *Bruton v. United States*, 391 U.S. 123 (1968). *Street*, 471 U.S. at 414–16. In *Bruton*, the Supreme Court held that the Confrontation Clause did not allow the prosecution to introduce a non-testifying accomplice's confession implicating the defendant, even if the trial court gave a limiting instruction. *State v. Nieves*, 2017 WI 69, ¶ 23, 376 Wis. 2d 300, 897 N.W.2d 363 (discussing *Bruton*). The *Bruton* rule did not apply in *Street* because the accomplice's confession in *Street* was necessary to rebut the

defendant's testimony asserting that his own confession was coerced. *Street*, 471 U.S. at 414–16. Neither *Bruton* nor *Street* applies here because Hanson's case does not involve an accomplice's confession.

For similar reasons, the absence of a limiting instruction here is immaterial. *Street* requires a limiting instruction only when an accomplice's confession implicating the defendant is introduced. As the Seventh Circuit has explained, "*Street* teaches that the non-hearsay use of a statement generally does not implicate the protections of the Confrontation Clause, but that another person's out-of-court *confession directly implicating the accused* is nevertheless so inherently prejudicial that its misuse as hearsay remains a strong possibility." *Jones v. Basinger*, 635 F.3d 1030, 1050 (7th Cir. 2011) (emphasis added). "To negate that possibility, a court admitting such a statement should always 'pointedly instruct' the jury that the confession is to be used not for its truth, but only for a non-hearsay purpose." *Id.* (quoting *Street*, 471 U.S. at 414–15). A limiting instruction was not required here under *Street* because no accomplice confession was introduced at trial.

Hanson's argument about the lack of a limiting instruction fails for another reason: he did not request one at trial. (R. 41:3–7.) Limiting instructions are not mandatory unless requested. *State v. Payano*, 2009 WI 86, ¶ 100 & nn.21–23, 320 Wis. 2d 348, 768 N.W.2d 832. If a party does not request a limiting instruction at trial, the party forfeits its right to argue on appeal that such an instruction should have been given. *See, e.g*, *Treps v. City of Racine*, 73 Wis. 2d 611, 619, 243 N.W.2d 520 (1976); *State v. Kennedy*, 134 Wis. 2d 308, 321, 396 N.W.2d 765 (Ct. App. 1986). This forfeiture rule applies even when constitutional rights are involved. *State v. Glenn*, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996). To be clear, a defendant's failure to request a

limiting instruction does not forfeit his right to raise a hearsay or Confrontation Clause argument on appeal—he just forfeits his right to complain about the lack of a limiting instruction. *See, e.g.*, *United States v. Mejia*, 909 F.2d 242, 247 (7th Cir. 1990); *Hodges*, 634 S.E.2d at 687–88. Because Hanson did not ask the circuit court to give a limiting instruction on his John Doe testimony, he forfeited his right to complain about the lack of such an instruction.

Second, Hanson argues in passing that the jury used Kathy's statement to police for its truth because the jury asked to see the statement. (Hanson's Br. 14.) Of course, a police statement that is admitted not for its truth can become hearsay if a police report containing hearsay is given to the jury. *See State v. Hines*, 173 Wis. 2d 850, 859–60, 496 N.W.2d 720 (Ct. App. 1993). But the circuit court denied the jury's request because no such police report existed. (R. 41:99.) A limiting instruction about Kathy's statement to police might have been appropriate due to the jury's request. *Cf. Hines*, 173 Wis. 2d at 859–60. But a circuit court will not be faulted for failing to give a limiting instruction where, as here, the defendant did not request one when it became clear that the jury might have used a non-hearsay statement for its truth. *See Kutz*, 267 Wis. 2d 531, ¶ 48.

Third, Hanson argues that the evidence in question did not reveal a consciousness of guilt. (Hanson's Br. 14–15.) He contends that the record did not support that inference but instead supported other inferences as to why he rejoiced over his wife's death. (Hanson's Br. 14–15.) But "[r]easonable inferences drawn from the evidence can support a finding of fact." *State v. Gomez*, 179 Wis. 2d 400, 406, 507 N.W.2d 378 (Ct. App. 1993) (alteration in original) (citation omitted). Barry O'Connor testified that Hanson was not concerned about his wife testifying against him because she was dead. (R. 40:30.) The jury could reasonably infer

that Hanson had rejoiced over his wife's death *because* she was no longer able to testify against him.

It is irrelevant that Hanson denied that his wife's inability to testify against him was his reason for rejoicing over her death. A jury may "believe parts of a witness's testimony and disbelieve other parts." *State ex rel. N.A.C. v. W.T.D.*, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). The jury could believe that Hanson had rejoiced over his wife's death while disbelieving his denial of the reason why.

Fourth, Hanson briefly argues that if his wife Kathy was alive, he "could have invoked the spousal privilege to prevent her from testifying as to any purported confession he made to her." (Hanson's Br. 16.) It is unclear what Hanson means. He concedes that "Kathy's statements admitted through Hanson's John Doe testimony did not reference a confession from Hanson." (Hanson's Br. 19.) And Hanson has not explained how the option of asserting spousal privilege has any bearing on whether the evidence in question was hearsay.

In short, the use of Hanson's John Doe testimony at trial did not violate his right to confrontation.

### C. In any event, the alleged confrontation error was harmless.

"A Confrontation Clause violation does not result in automatic reversal, but is subject to harmless error analysis." *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362. "For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (citation omitted). "In other words, 'an error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained.'" *Id.* (citation omitted).

A court considers "the totality of the circumstances" to determine whether an error was harmless. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. In doing so, a court may consider several non-exhaustive factors, including "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27. Courts often hold that hearsay evidence is harmless if it is cumulative with uncontested facts. *Caccitolo v. State*, 69 Wis. 2d 102, 108, 230 N.W.2d 139 (1975); *Curbello-Rodriguez*, 119 Wis. 2d at 429.

Here, the alleged confrontation violation was harmless because the State introduced strong evidence of Hanson's guilt and because the evidence that Hanson challenges was insignificant and cumulative with other testimony.

Even if the circuit court had excluded Hanson's John Doe testimony about Kathy Hanson's statement to police, the jury still would have received the same information. Indeed, Barry O'Connor's trial testimony about Kathy was more detailed and more incriminating than Hanson's John Doe testimony at issue. O'Connor testified at trial that Hanson had told him that Hanson had accidentally killed a "guy" in a shed near Hanson's house and dumped the body into a river near his house. (R. 40:25–26, 28.) O'Connor further testified that Hanson had told him the following: Hanson went into his house after the killing, Kathy "was freaking out because [Hanson] had blood all over his hands and asked him what he did," and Hanson told Kathy that "[h]e killed somebody." (40:28–29.) Hanson does not argue that this testimony by O'Connor was inadmissible. By

contrast, Hanson's John Doe testimony said that Kathy had told police that she "thought" that he had killed McLean, but this testimony did not explain *why* Kathy felt that way. (R. 32:Ex. 54:165–66.) Even without Hanson's unexplained testimony that Kathy "thought" that he had killed McLean, the jury would have learned from O'Connor *why* Kathy had that belief.

And Hanson's John Doe testimony about Kathy's statement to police was also cumulative with that of Jeremy Dey, who told the jury that Kathy had "made a statement to the cops against [Hanson] about [the murder]." (R. 40:117.) Hanson does not argue that this testimony by Dey was inadmissible. He instead argues that, "[u]nlike Kathy's statements admitted through Hanson's John Doe testimony, Dey did not testify as to what Kathy told police about Hanson's involvement." (Hanson's Br. 20.) But, given O'Connor's testimony about Hanson confessing to Kathy with blood all over his hands, the jury most likely interpreted Dey's testimony to mean that Kathy had told police that Hanson had killed McLean. Hanson has not offered any other explanation for what Dey's testimony about Kathy might have meant.

Other strong evidence of Hanson's guilt further shows that his John Doe testimony was harmless.

The State showed that McLean was last seen alive with Hanson heading toward Hanson's home. Hanson, Chuck Mlados, and McLean left Debbie and Billy Byng's home around 9:30 or 10:00 p.m. on Sunday, February 22, 1998. (R. 39:256–57, 279, 282.) They headed west toward Hanson's house. (R. 39:283.) Hanson told a detective that Mlados had initially planned to drive McLean home to Green Bay, but they instead decided to drop off McLean at a restaurant and truck stop in Abrams because there was dense fog. (R. 43:266–67.) Hanson said that he had turned

around in the first driveway past the Byng house. (R. 43:185.) But Billy Byng—Hanson's friend of 25 years—testified that he remained outside for a couple minutes after Hanson left and that he did not see Hanson's truck turn around. (R. 39:283–84.) Hanson's house was less than a mile and less than a two-minute drive from Byng's house. (R. 43:280, 308.) Surveillance-camera footage did not show McLean at the truck stop at all on February 22, 1998. (R. 39:130–33; 43:247–55.) Six former employees of the truck stop testified that they did not see anyone there who resembled McLean on that date. (R. 39:116, 139, 149, 155, 179, 238.)

One of Hanson's neighbors, Sharon Olson, heard gunshots soon after McLean and Hanson left the Byng house together. Olson testified that she heard two or three gunshots on February 22, 1998, shortly after 10:00 p.m. (R. 39:196–98.) The gunshots came from the east. (R. 39:197.) Hanson's house was to the east, immediately adjacent to Olson's house. (R. 39:195.) Olson did not hear any other gunshots that night. (R. 39:198.)

The location of McLean's body bolstered the State's case against Hanson. McLean's body was found in the Pensaukee River near the Sandalwood Road bridge in Abrams, Wisconsin on March 22, 1998. (R. 43:279.) This river bordered the end of Hanson's property. (R. 43:281, 310.) Hanson's property was just over a one-mile drive—about a two-minute drive—from the area where McLean's body was found. (R. 43:280, 309–10.)

The unusual gunshot wounds to McLean's head strongly supported Hanson's guilt. The four gunshot-entrance wounds on McLean's head were evenly spaced in a straight line. (R. 39:71; 40:214.) The doctor who performed an autopsy on McLean testified that this gunshot-wound pattern was "[e]xtremely atypical" and "much more

consistent" with being shot by a fully-automatic gun. (R. 39:71.) A detective who was present at the autopsy testified similarly. (R. 40:214–15.) The doctor testified that the gunshot wounds to McLean's head were consistent with a smaller caliber gun, such as .22 caliber. (R. 39:76–77.) During the autopsy, the doctor recovered three metal fragments from McLean's head. (R. 39:79; 43:288.) The state crime laboratory determined that the metal fragments were from fired .22-caliber bullets. (R. 40:74–75; *see also* 43:296–97.) The doctor was unaware of any .22-caliber weapons that are manufactured to fire fully automatic. (R. 39:80.) The doctor had never worked on any other case where he thought that a fully-automatic .22-caliber weapon was involved. (R. 39:81.) The detective who observed McLean's autopsy testified that fully-automatic guns are legally restricted and rare outside of the military and that they usually are not .22 caliber. (R. 40:216.)

Although fully-automatic .22-caliber rifles are very rare, Hanson possessed one. Hanson's longtime friend Billy Byng testified that Hanson had bragged "a few times" about modifying his .22-caliber rifle to fire fully automatic. (R. 39:272.) One of Hanson's former neighbors testified that he had seen Hanson fire a .22-caliber rifle that Hanson modified to fire fully automatic. (R. 39:215–17.) Hanson admitted to a detective that he used to own a .22-caliber gun and that he had access to a friend's modified, fully-automatic .22-caliber rifle. (R. 43:292.) When police executed a search warrant at Hanson's property, they recovered an empty box of .22-caliber ammunition from his storage shed as well as spent .22-caliber shell casings and fired .22-caliber bullets from the yard. (R. 43:289, 293–94.) The highly unusual gunshot wounds on McLean's head, coupled with Hanson's possession of a rare gun capable of causing those wounds, strongly suggested that Hanson shot McLean.

Hanson's suspicious behavior after McLean's disappearance supported this conclusion. Before McLean disappeared, Hanson had a lot of social activity at his house, including target practice with guns in his backyard. (R. 39:210–12, 302–03.) But after police started investigating McLean's disappearance, "it became very quiet" at Hanson's household. (R. 39:222.) The gunshots and parties "came to a screeching halt." (R. 39:222; *see also* 39:307.) Before McLean went missing, Mlados used to occasionally visit Hanson's house, mainly on weekends. (R. 39:223–24.) But after McLean disappeared, Mlados visited Hanson's house much more often, including weeknights. (R. 39:223–24, 228.) Those unusually frequent visits were suspicious because McLean was last seen alive with Mlados and Hanson.

Hanson's case involved three other especially strong pieces of evidence: three confessions. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citation omitted). About two months after McLean's body was found, Hanson told his close friend Kenneth Hudson that he had killed McLean by shooting him and that Chuck Mlados was present at the murder. (R. 40:162–63, 167.) Hanson said that he had hauled McLean's body and dumped it into a river. (R. 40:163–64.) Jeremy Dey testified that Hanson had admitted to shooting McLean in his garage. (R. 40:114.) Hanson told Dey that he and his friend Chuck had put the body into a river. (R. 40:114.) Hanson also admitted to his drinking buddy Barry O'Connor that he and his friend Chuck had accidentally killed a "guy" in a shed near Hanson's house. (R. 40:24–26.) Hanson said that he had shot the guy and that he and Chuck had dumped the body into a river near

his house. (R. 40:28.) These three confessions are powerful evidence of Hanson's guilt.

The evidence in the seven preceding paragraphs—evidence that Hanson does not challenge on appeal—overwhelmingly proved that Hanson killed McLean. Although the State's case partly rested on circumstantial evidence, "circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

In sum, the alleged confrontation error was harmless. Hanson's John Doe testimony merely provided information that the jury received from other witnesses. And there was overwhelming admissible evidence that Hanson killed McLean: (1) McLean was last seen alive with Hanson heading toward Hanson's nearby home; (2) shortly thereafter, Hanson's neighbor heard gunshots coming from the direction of Hanson's home; (3) McLean's body was found about a mile away from Hanson's home in a river that bordered Hanson's property; (4) McLean had highly unusual gunshot wounds that were consistent with a rare type of gun that Hanson had in his possession; (5) Hanson behaved suspiciously shortly after McLean disappeared; and (6) Hanson confessed to the murder to three people.

### D. Hanson's arguments against harmless error are unavailing.

Hanson argues that the alleged error cannot be harmless because the jury, while deliberating, asked to see any exhibit about Kathy Hanson's statement to police. (Hanson's Br. 18.) The State has already explained why that argument fails: the circuit court did not provide any such exhibits to the jury because none existed. (R. 41:99.) Further, at most, the jury's request might have suggested that the jury believed that Kathy had thought that Hanson

killed McLean. But the jury already knew from O'Connor's and Dey's uncontested testimony that Kathy had thought that Hanson killed McLean. Hanson's cumulative John Doe testimony about Kathy did not affect the verdict for the reasons stated above.

Hanson also argues that the witnesses who testified about his confessions—Kenneth Hudson, Barry O'Connor, and Jeremy Dey—were unreliable. (Hanson's Br. 20–21.) He argues that O'Connor and Dey were "jailhouse informants." (Hanson's Br. 20.) He contends that Hudson was unreliable because he had a pending criminal case and because Hanson was using Hudson's stepson's truck the night that McLean disappeared. (Hanson's Br. 21.)

But it is not an appellate court's role to determine credibility of witnesses. *State v. Marten-Hoye*, 2008 WI App 19, ¶ 25, 307 Wis. 2d 671, 746 N.W.2d 498. In any event, Hudson, O'Connor, and Dey were credible. Indeed, the circuit court found their testimony "compelling," "reliable," and "detailed and credible." (R. 106:4.)

O'Connor and Dey never asked to receive and were not offered any benefit for testifying in this case. (R. 40:31–32, 61, 123, 125, 132.) Even if they could be characterized as jailhouse informants, jailhouse informants are not inherently unreliable. *See Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009) (rejecting the argument that uncorroborated jailhouse-informant testimony must be excluded at trial because it is inherently unreliable). O'Connor and Dey were reliable.

Hudson was reliable, too. Hudson testified that law enforcement did not promise him any benefits in his pending criminal matter for testifying at Hanson's trial. (R. 40:176–77.) Hudson thought that he might benefit in his pending case by testifying *honestly*. (R. 40:177.) Further, Hudson's

stepson's pickup truck did not give Hudson a reason to falsely accuse Hanson of the murder. Hudson's stepson, Jason Close, was storing his pickup truck on Hanson's property during the winter in early 1998. (R. 40:197.) Hudson testified that Hanson had confessed to using the pickup truck to haul McLean's body and dump it into a river. (R. 40:163–64.) After the police searched and released the truck, Hudson was not as concerned about the truck's possible involvement in McLean's murder. (R. 40:168.) Even if Hudson was willing to commit perjury to prevent Close from becoming a suspect 15 years after McLean's death, it would make no sense for him to falsely testify that Hanson had used Close's truck to dispose of McLean's body. It would make far more sense for Hudson to accuse someone who did not have access to the truck, to divert police attention from his stepson.

Hanson further argues that, unlike his John Doe testimony at issue, O'Connor's and Dey's testimony about Kathy involved "multi-layer hearsay" and was thus less powerful. (Hanson's Br. 20.) Hanson has not explained what he means or otherwise developed that argument.

In sum, the State did not violate Hanson's confrontation right by introducing his John Doe testimony about his wife. Further, the alleged confrontation violation was harmless because that testimony was insignificant and cumulative and because the State introduced other strong evidence of Hanson's guilt.

## II. Hanson's trial counsel provided effective assistance.

### A. A defendant bears a heavy burden to prove ineffective assistance of counsel.

"Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." *State v. Balliette*, 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334. A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688). Further, "the test for effective assistance of counsel is not the legal correctness of counsel's judgments, but rather the *reasonableness* of counsel's judgments under the facts of the particular case *viewed as of the time of counsel's conduct*." *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

To prove prejudice, "[t]he 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. *Strickland*'s prejudice standard

"does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* (citing *Strickland*, 466 U.S. at 693).

The reliability and fairness of Hanson's trial are *not* part of the prejudice analysis. Although the *Strickland* Court referred to reliability, the Supreme Court in a later case "removed the discussion of reliability from determining whether there was prejudice." *Floyd v. Hanks*, 364 F.3d 847, 852 (7th Cir. 2004) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). The fundamental-fairness "prejudice analysis only applies in cases where the defendant challenges his conviction based upon unusual circumstances that, as a matter of law, do not typically inform the court's inquiry." *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006). "For example, such unusual circumstances could occur when a state court relies on overruled law or the defendant's lawyer refuses to let him commit perjury." *Id.* (citations omitted).

### B. Hanson's trial counsel did not prejudice the defense by forgoing a *Miranda* objection at trial to Hanson's John Doe testimony.

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. A prejudice analysis under *Strickland* is "essentially consistent" with a harmless error analysis, but there is a difference in the burden of proof. *State v. Harvey*, 2002 WI 93, ¶ 41,

254 Wis. 2d 442, 647 N.W.2d 189. "While the defendant bears the burden of proof to establish prejudice under the ineffective assistance of counsel analysis, the State bears the burden of proof in the harmless error analysis." *State v. Prineas*, 2012 WI App 2, ¶ 22, 338 Wis. 2d 362, 809 N.W.2d 68. A harmless error is non-prejudicial under *Strickland*. *See, e.g.*, *State v. Weed*, 2003 WI 85, ¶¶ 34–35, 263 Wis. 2d 434, 666 N.W.2d 485.

Hanson's ineffective assistance claim fails because he has not shown prejudice. Hanson's John Doe testimony about his wife did not prejudice his defense at trial because, as explained above, that evidence was harmless. The jury would have convicted Hanson even if his lawyer had persuaded the circuit court to exclude that evidence on *Miranda* grounds. Because Hanson fails the prejudice prong of *Strickland*, this Court need not determine whether trial counsel performed deficiently.

### C. Further, Hanson's trial counsel performed reasonably by forgoing a *Miranda* objection.

Hanson's trial counsel, Jeffrey Jazgar, reasonably declined to object at trial on *Miranda* grounds when the State introduced Hanson's John Doe testimony about his wife. Attorney Jazgar believed that *Miranda* warnings were not required at a John Doe hearing. (R. 102:26.) Because the law on this issue is unsettled, Attorney Jazgar did not perform deficiently by forgoing a *Miranda* objection. In any event, his performance was adequate because a *Miranda* objection would have failed.

### 1. Counsel's performance was adequate because the law is unsettled whether *Miranda* warnings are required at John Doe hearings.

"[I]t is axiomatic that '[c]ounsel is not required to object and argue a point of law that is unsettled.'" *State v. Maday*, 2017 WI 28, ¶ 55, 374 Wis. 2d 164, 892 N.W.2d 611 (second alteration in original) (quoting *State v. Maloney*, 2005 WI 74, ¶ 28, 281 Wis. 2d 595, 698 N.W.2d 583). "[B]asing an ineffective assistance of counsel claim on [an attorney's] failure to do so would be to engage in the kind of hindsight examination expressly disavowed by the Supreme Court in *Strickland*, 466 U.S. at 689." *Maloney*, 281 Wis. 2d 595, ¶ 30. "[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Id.* ¶ 29 (citation omitted).

"[A]n assertion that one's counsel was ineffective for failing to pursue particular constitutional issues is a claim separate and independent of those issues." *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004). So, when a defendant argues that his lawyer was ineffective by not raising a certain issue, a court generally is "confined to considering the narrower issue of whether the law was so well settled that counsel's performance was legally deficient." *State v. Breitzman*, 2017 WI 100, ¶ 56, 378 Wis. 2d 431, 904 N.W.2d 93, *cert. denied*, 138 S. Ct. 1599 (2018). A court thus "need not address the merits" of the issue that counsel failed to raise. *State v. Lemberger*, 2017 WI 39, ¶ 32, 374 Wis. 2d 617, 893 N.W.2d 232.

"When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461 (citing *Maloney*, 281

Wis. 2d 595, ¶ 23). The law is unsettled "[w]hen case law can be reasonably analyzed in two different ways," *id.*, or when there is no controlling case law on point, *see, e.g.*, *Maloney*, 281 Wis. 2d 595, ¶¶ 19, 30 (finding the law unsettled because the issue was a "matter of first impression for this court"); *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 26, 369 Wis. 2d 75, 879 N.W.2d 772 (finding the law unsettled because "there is no Wisconsin case law directly on point on the issue" and existing Wisconsin case law did not "present a factual situation similar enough to the facts of this case"); *Weber*, 174 Wis. 2d at 114–15 (finding the law unsettled because "no case law had extended" a given statute to the defendant's situation); *see also State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis. 2d 447, 746 N.W.2d 545 (finding the law unsettled because the only published Wisconsin case on point was nearly 50 years old).

Hanson's ineffective assistance claim fails under those principles. No Wisconsin case law has held that *Miranda* warnings are ever required at John Doe hearings. This legal issue is therefore unsettled, so Attorney Jazgar did not perform deficiently by declining to raise it. This Court may reject Hanson's ineffective assistance claim for this reason, regardless of whether it reaches the prejudice prong of *Strickland*.

### 2. In any event, counsel's performance was adequate because a *Miranda* objection would have failed.

"In determining whether counsel's performance was deficient for failing to bring a motion, [a court] may assess the merits of that motion." *State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16. And "[c]ounsel does not perform deficiently by failing to bring a meritless motion." *Id.* Indeed, an attorney's failure to raise a meritless

argument is neither deficient performance nor prejudicial under *Strickland*. *State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369.

Here, there would have been no merit to a *Miranda*-based objection to the State's use of Hanson's John Doe testimony at trial. Attorney Jazgar thus did not perform deficiently (or prejudice the defense) by declining to make this objection.

"The Fifth Amendment to the United States Constitution provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *State v. Martin*, 2012 WI 96, ¶ 30, 343 Wis. 2d 278, 816 N.W.2d 270 (alterations in original). This right applies to the states by virtue of the Fourteenth Amendment. *Id.*

"In order to protect a suspect's Fifth Amendment privilege against self-incrimination, a suspect who is interrogated while 'in custody' is entitled to *Miranda* warnings." *State v. Quigley*, 2016 WI App 53, ¶ 31, 370 Wis. 2d 702, 883 N.W.2d 139. Under *Miranda*, police may not subject a person to a custodial interrogation unless he is "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Martin*, 343 Wis. 2d 278, ¶ 31 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). A statement obtained in violation of *Miranda* is inadmissible in the prosecution's case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

The John Doe judge came close to giving a full-blown *Miranda* warning to Hanson. The judge told Hanson that (1) he could refuse to give an answer that may incriminate him, (2) his answers could be used against him in a future criminal case, and (3) he could have an attorney present.

(R. 32:Ex. 54:49–51.) The following discussion will show that the judge was not required to go further by providing full-blown *Miranda* warnings—i.e., telling Hanson that he had an absolute right to remain silent and a right to an *appointed* lawyer.

"[B]efore [*Miranda*] warnings need be given, it must be established that the defendant was both 'in custody,' and under 'interrogation' by police." *State v. Mitchell*, 167 Wis. 2d 672, 686, 482 N.W.2d 364 (1992). Both of these requirements involve police.

Regarding custody, *Miranda* warnings are required for "[o]nly those interrogations that occur while a suspect is in *police custody*." *J.D.B. v. North Carolina*, 564 U.S. 261, 268 (2011) (emphasis added). "The warning mandated by *Miranda* was meant to preserve the [Fifth Amendment] privilege [against compelled self-incrimination] during 'incommunicado interrogation of individuals in a *police-dominated atmosphere*.'" *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (emphasis added) (quoting *Miranda*, 384 U.S. at 445.) This kind of atmosphere has "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* (quoting *Miranda*, 384 U.S. at 467). The *Miranda*-warning requirement "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (citation omitted).

Interrogation is also limited to questioning *by police*. "The seminal case interpreting the meaning of interrogation under *Miranda* is *Rhode Island v. Innis*, 446 U.S. 291 (1980)." *State v. Hambly*, 2008 WI 10, ¶ 46, 307 Wis. 2d 98, 745 N.W.2d 48. The *Innis* Court repeatedly stated that interrogation under *Miranda* involves questioning *by police*. *Innis*, 446 U.S. at 301–02. As the *Innis* Court explained, "the

definition of interrogation can extend only to words or actions on the part of *police officers* that they should have known were reasonably likely to elicit an incriminating response." *Id.* (emphasis added). Indeed, "the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against *coercive police practices*." *Id.* at 301 (emphasis added).

*Miranda* warnings are *not* always required "whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." *Perkins*, 496 U.S. at 297. For example, "an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response." *Id.* at 300. The reason why is that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." *Id.* at 296.

The same reasoning applies to a witness who testifies at a John Doe hearing, like Hanson did. Hanson was not entitled to full *Miranda* warnings at the John Doe hearing because he was neither in police custody nor under interrogation by police.

Case law on federal grand-jury proceedings is instructive. *Miranda* warnings are not required in a federal grand-jury proceeding, so they are not required in a John Doe hearing, either.

Wisconsin's John Doe hearings are like federal grand-jury proceedings because both are secretive investigations into possible crimes. *O'Keefe v. Chisholm*, 769 F.3d 936, 942–43 (7th Cir. 2014). In fact, "John Doe proceedings, although

held in secret, afford substantially more protection to a potential accused than does a grand jury." *State v. Doe*, 78 Wis. 2d 161, 165, 254 N.W.2d 210 (1977). So, "that which is permitted of a grand jury is equally permissible under the John Doe proceedings of the State of Wisconsin." *Id.* at 170; *see also id.* at 166 (holding that an order to produce a handwriting exemplar in a John Doe proceeding is constitutional because such an order is constitutional in a grand-jury proceeding).

"Grand-jury witnesses have no right to *Miranda* warnings, nor do they have an absolute right to remain silent—even witnesses implicated in the criminal activities that the grand jury is investigating." *United States v. Williston*, 862 F.3d 1023, 1027 (10th Cir.), *cert. denied*, 138 S. Ct. 436 (2017) (citing *United States v. Mandujano*, 425 U.S. 564, 579–80 (1976) (plurality opinion)). "Courts confronting this issue have uniformly suggested that any *Miranda*-type warnings that may be applicable in the grand jury context are minimal at best. The Supreme Court in such cases has explicitly distinguished the custodial nature of police interrogations from the grand jury context." *United States v. Gillespie*, 974 F.2d 796, 804 (7th Cir. 1992).

As the Supreme Court explained in *Mandujano*, for instance, "[t]he *Miranda* Court simply did not perceive judicial inquiries and custodial interrogation as equivalents: '(T)he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.'" *Mandujano*, 425 U.S. at 579 (plurality opinion) (second alteration in original) (quoting *Miranda*, 384 U.S. at 461). "The [*Miranda*] Court thus recognized that many official investigations, such as grand jury questioning, take place in

a setting wholly different from custodial police interrogation." *Id.* at 579–80 (plurality opinion).

In cases since *Mandujano*, the Supreme Court has suggested that *Miranda* warnings are not required at grand-jury proceedings. In *United States v. Washington*, 431 U.S. 181, 186 (1977), the Supreme Court noted that it had never held that *Miranda* warnings were required at grand-jury proceedings. The Court declined to resolve that issue because the defendant had received *Miranda* warnings before testifying at a grand-jury proceeding. *Id.* Later, in *Murphy*, the Supreme Court held that the defendant was not entitled to *Miranda* warnings before speaking to his probation officer because he "was not 'in custody' for purposes of receiving *Miranda* protection." 465 U.S. at 430. The Court repeatedly compared the defendant's situation to a subpoenaed witness at a trial or grand-jury proceeding. *Id.* at 427, 431, 432.

Relying on *Mandujano*, *Washington*, and *Murphy*, federal courts of appeals have concluded that *Miranda* warnings are not required at grand-jury proceedings. *See, e.g.*, *United States v. Myers*, 123 F.3d 350, 360–62 (6th Cir. 1997); *Gillespie*, 974 F.2d at 802–05; *United States v. Pacheco-Ortiz*, 889 F.2d 301, 307 (1st Cir. 1989); *In re Grand Jury Proceedings, Ortloff*, 708 F.2d 1455, 1458 (9th Cir. 1983); *United States v. Prior*, 546 F.2d 1254, 1257 (5th Cir. 1977). As the Tenth Circuit has aptly explained, relying on *Mandujano*, "a full-*Miranda*-warning requirement would run counter to the Supreme Court's direction that grand-jury witnesses are *not in custody* while testifying, and that grand-jury questioning is *not interrogation*." *Williston*, 862 F.3d at 1032 (emphases added).

Further, an important distinction exists between *Miranda* and the Fifth Amendment. Grand-jury witnesses have a Fifth Amendment privilege against compelled self-

incrimination. *Washington*, 431 U.S. at 186. *Miranda* goes beyond this privilege by providing a right to remain silent, not just a right to refuse to answer incriminating questions. *Williston*, 862 F.3d at 1031–32.

Given that distinction, there are sound policy reasons for not extending *Miranda* warnings to grand-jury proceedings. "A full *Miranda* warning . . . would destroy a key part of the grand jury's investigative power. Witnesses who happen to be in custody for unrelated reasons could refuse to answer any grand-jury questions, whether about themselves or other criminal activities." *Williston*, 862 F.3d at 1032. "This absolute right to remain silent, for the witnesses often best positioned to offer valuable information, would hobble the grand jury's ability to get to the bottom of crimes, both to prosecute the guilty and protect the innocent." *Id.*

Those concerns apply equally to John Doe proceedings. Law enforcement officers obtain powerful investigative tools by invoking a John Doe proceeding, including the power to "compel the testimony of a reluctant witness." *State v. Washington*, 83 Wis. 2d 808, 823, 266 N.W.2d 597 (1978). An absolute right to remain silent under *Miranda* would gut this power to compel testimony. Further, John Doe proceedings are designed both to discover crimes and protect innocent citizens from groundless prosecutions. *In re Doe*, 2009 WI 46, ¶ 13, 317 Wis. 2d 364, 766 N.W.2d 542. Those twin goals would be stifled if a John Doe witness could invoke a right to remain silent under *Miranda*.

Under the foregoing precedent, Hanson was neither in custody nor subjected to interrogation under *Miranda* when he testified at a John Doe hearing. Because questioning witnesses without *Miranda* warnings "is permitted of a grand jury," it "is equally permissible under the John Doe proceedings of the State of Wisconsin." *Doe*, 78 Wis. 2d at

170. The John Doe judge's advisements protected Hanson's Fifth Amendment privilege against compelled self-incrimination. (R. 32:Ex. 54:49–51.)

In short, because a *Miranda*-based objection to Hanson's John Doe testimony at trial would have been meritless, Attorney Jazgar did not perform deficiently by declining to make one.

### D. Hanson's arguments are undeveloped and meritless.

Hanson asserts that he was in custody and subjected to interrogation for *Miranda* purposes at the John Doe hearing. (Hanson's Br. 24, 26, 28.) But he does not develop an argument on either of those points. This Court "do[es] not usually address undeveloped arguments." *State v. Gracia*, 2013 WI 15, ¶ 28 n.13, 345 Wis. 2d 488, 826 N.W.2d 87. Resolving an undeveloped argument "would be imprudent." *State v. Grandberry*, 2018 WI 29, ¶ 30 n.19, 380 Wis. 2d 541, 910 N.W.2d 214. This Court need not resolve the underlying *Miranda* issue because it may instead conclude that Hanson's John Doe testimony did not prejudice his defense at trial. This Court also could reject Hanson's ineffective assistance claim, without reaching the underlying *Miranda* issue, by simply concluding that the law on this issue is unsettled.

Indeed, Hanson appears to concede that the law is unsettled. "Hanson acknowledges that there is no binding authority requiring that all witnesses at a John Doe hearing be read *Miranda* warnings before being questioned." (Hanson's Br. 28.)

Hanson argues, however, that "one critical fact differentiated Hanson from a general witness: he was in custody at the time he was questioned." (Hanson's Br. 28.) Hanson appears to contend that he was in custody for

*Miranda* purposes at the John Doe hearing because he "was in custody in the Oconto County jail on an unrelated matter." (Hanson's Br. 24.) Besides being undeveloped, that argument has no merit.

"[I]mprisonment, without more, is not enough to constitute *Miranda* custody." *Howes v. Fields*, 565 U.S. 499, 512 (2012). If this Court addresses this issue, it should hold that *Howes* abrogated several decisions by this Court. Relying on *Mathis v. United States*, 391 U.S. 1 (1968), this Court has held "that a person who is incarcerated is *per se* in custody for purposes of *Miranda*." *State v. Armstrong*, 223 Wis. 2d 331, 355, 588 N.W.2d 606 (1999); *accord State v. Hockings*, 86 Wis. 2d 709, 720 & n.5, 273 N.W.2d 339 (1979); *Schimmel v. State*, 84 Wis. 2d 287, 294–95, 267 N.W.2d 271 (1978), *overruled on other grounds by Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

But the Supreme Court in *Howes* rejected that view of *Mathis*. A federal court of appeals in *Howes* misread *Mathis* the same way that this Court did in *Armstrong*, *Hockings*, and *Schimmel*. *See Howes*, 565 U.S. at 506 (noting that "the Court of Appeals misread the holding in [*Mathis*]"). "*Mathis* did not hold that imprisonment, in and of itself, is enough to constitute *Miranda* custody." *Id.* at 507. In *Mathis*, a federal court of appeals "held that *Miranda* did not apply to [the defendant's] interview for two reasons: A criminal investigation had not been commenced at the time of the interview, and the prisoner was incarcerated for an 'unconnected offense.'" *Id.* at 506 (quoting *Mathis v. United States*, 376 F.2d 595, 597 (5th Cir. 1967)). The Supreme Court in *Mathis* "rejected both of those grounds for distinguishing *Miranda*." *Id.* at 507. So, the Supreme Court's "holding in *Mathis* is simply that a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda* by either of the two factors on

which the Court of Appeals had relied." *Id.* at 507. After clarifying *Mathis*, the *Howes* Court held that Howes was not in custody under *Miranda* when two sheriff's deputies questioned him while he was in jail serving a sentence. *Id.* at 514–17.

A Wisconsin court "must not follow a decision of this court on a matter of federal law if it conflicts with a subsequent controlling decision of the United States Supreme Court." *State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142. This Court's decisions in *Armstrong*, *Hockings*, and *Schimmel* conflict with the more-recent *Howes* decision on a matter of federal law. This Court must follow *Howes*.

In short, Hanson was not in *Miranda* custody at the John Doe hearing. In similar contexts, federal courts have held that witnesses at judicial proceedings were not in *Miranda* custody even though they were "in unrelated custody." *Williston*, 862 F.3d at 1032 (holding that the defendant was not in *Miranda* custody at a grand-jury proceeding even though he was wearing handcuffs and shackles and had been escorted by federal marshals); *see also United States v. Byram*, 145 F.3d 405, 409 (1st Cir. 1998) (holding that the defendant was not entitled to *Miranda* warnings when he "was brought from jail under subpoena" and testified at his trial). Indeed, under *Howes*, Hanson would not necessarily have been in *Miranda* custody even if *police* had questioned him *in jail*. Hanson's incarceration in the Oconto County jail did not render him in custody under *Miranda* when he testified at the John Doe hearing.

And Hanson does not even try to explain how the prosecutor's questions at the John Doe hearing were an interrogation for *Miranda* purposes. His failure to develop an argument on the interrogation prong of the *Miranda* test

is a sufficient reason for rejecting his ineffective assistance claim.

In a footnote, Hanson argues that *Miranda* warnings should be required for all "putative defendant witnesses at a John Doe hearing." (Hanson's Br. 28 n.8.) He reasons that, without *Miranda* warnings at a John Doe hearing, a defendant's Fifth Amendment privilege against compelled self-incrimination could be nullified because his John Doe testimony could be used against him at his trial. (Hanson's Br. 28 n.8.) But an argument is forfeited if it is raised only in a footnote. *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918. In any event, Hanson's concern is misplaced. "If the [Fifth Amendment] privilege is claimed [in a John Doe proceeding], testimony may be compelled if transactional immunity is granted." *Ryan v. State*, 79 Wis. 2d 83, 95, 255 N.W.2d 910 (1977). Transactional immunity "accords full immunity from prosecution for the *offense* to which the compelled testimony relates." *State ex rel. Douglas v. Hayes*, 2015 WI App 87, ¶ 11, 365 Wis. 2d 497, 872 N.W.2d 152 (citation omitted). So, if a John Doe witness is compelled to incriminate himself, he could not even be tried for an offense discussed during his testimony. His compelled testimony thus could not be used against him at a later trial.

In sum, Attorney Jazgar provided effective assistance by forgoing a *Miranda*-based objection at trial to Hanson's John Doe testimony.

## CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 15th day of March 2019.

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 10,990 words.

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Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of March 2019.

_____
SCOTT E. ROSENOW
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