STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2324-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS MICHAEL BARRETT,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE CHRISTOPHER T. DEE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Has Defendant-Appellant Thomas M. Barrett proven that Wisconsin's statute prohibiting unlicensed possession of a silencer violates either the state or federal constitutional right to keep and bear arms, either facially or as-applied?

The circuit court rejected Barrett's numerous constitutional challenges to the statute.

This Court should affirm the circuit court.

2. Has Barrett shown that he was entitled to an evidentiary hearing on his claim that the government engaged in "outrageous conduct" resulting in a constitutional deprivation such that this Court should vacate his conviction?

The circuit court denied Barrett's postconviction motion without a hearing.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves only the application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

A jury convicted Thomas Michael Barrett of illegal possession of a silencer in violation of Wis. Stat. § 941.298. He now claims that the statute is an unconstitutional infringement on his right to keep and bear arms, because, according to Barrett, it is a "categorical ban" on "law-abiding citizens" possessing silencers. In the alternative, he claims the statute is unconstitutionally vague. He further alleges that the State engaged in outrageous governmental conduct

in conducting a sting operation during which Barrett purchased the silencer from a confidential informant, and that the State intimidated his private investigator, Gary Wait, out of testifying.

He is wrong on all accounts.

Silencers are not "arms." But even if they were, the statute does not categorically ban silencers. Any law-abiding citizen can possess one for any lawful purpose if he or she follows the registration requirements. Barrett has omitted any mention of this provision of the statute, and therefore his challenge based on the right to bear arms must fail.

The statute is also quite clear about the conduct it prohibits. Indeed, Barrett's vagueness challenge nears the incredible, considering that the government recorded Barrett stating that the silencer was "highly, highly, highly, highly illegal" during the sale. The statute clearly adequately informed Barrett of the conduct it prohibited.

Additionally, Barrett's outrageous government conduct claim is forfeited by his failure to timely move to dismiss the charges on this ground. Even so, the record shows that the State did not engage in outrageous government conduct. Barrett's claim that the government induced him to commit the crime is simply an attempt to relitigate his entrapment defense, which was a question for the jury. And his claim that the State intimidated Wait out of testifying is disproven by the record. The State made no threat to Wait, and even if it had, the attempt obviously failed: Wait appeared to testify on Barrett's behalf at multiple hearings months after the perceived threat was relayed.

Finally, the record shows that Wait's failure to testify, regardless of the reason, was harmless beyond a reasonable doubt. Wait's testimony would have been of marginal relevance, and there was overwhelming evidence of Barrett's guilt.

STATEMENT OF THE CASE

The Charge

The State charged attorney Thomas Barrett with possession of a firearm silencer in violation of Wis. Stat. § 941.298 after law enforcement recorded him purchasing a semiautomatic .22 caliber handgun with a silencer attached from Michael Bond. (R. 1:1.) Bond was, at the time, working as a confidential informant with the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives. (R. 1.)

Barrett's Challenges to the Constitutionality of Wis. Stat. § 941.298

Barrett moved to dismiss the charge on the ground that Wis. Stat. § 941.298 was a facially unconstitutional infringement on the right to keep and bear arms. (R. 8.) This was so, he alleged, because the constitutional provisions allow the citizenry to keep and bear "arms" for "any lawful purpose," but the prohibition on silencers is a strict liability offense that does not account for *mens rea*. (R. 8:9–22.) He also claimed that he could, under a facial challenge, assert "the rights of citizens not before the court" under the chilling effect doctrine. (R. 8:10.) He further argued the statute was overbroad because it prohibited "any device for silencing, muffling, or diminishing the report of a portable firearm," which Barrett claimed could result in prosecution for possession of mundane household items such as paper towels. (R. 8:3–8, 23.) Finally, he claimed the statute was unconstitutionally vague because it "either fails to afford proper notice of the prohibited conduct or fails to provide an objective standard of enforcement." (R. 8:23–24.)

The circuit court denied the motion. (R. 55; 165:12.) It noted that "quite simply a silencer is not arms." (R. 165:5.) It further noted that "silencer" was defined in the statute as a device manufactured to muffle a gunshot or actually used by the defendant for muffling. (R. 165:12–14.) It found that the

State had an interest in prohibiting silencers because "it's a hitman's tool, that's why. . . . It doesn't encourage or discourage the keeping [or] bearing of arms . . . it is used only to prevent detection." (R. 165:6–7.) The court ultimately determined that "there is absolutely no basis for this motion to dismiss and . . . the statute is perfectly constitutional." (R. 165:16.)

Over a year later Barrett, by new counsel, filed another motion challenging the facial validity of Wis. Stat. § 941.298. (R. 49.) He claimed that the court's previous ruling did not address his vagueness challenge, and again claimed the statute was unconstitutionally vague. (R. 49.) The State argued that Barrett did not have standing to bring such a challenge because the recordings showed Barrett stating that the gun with the silencer was "highly, highly, highly, highly illegal," and a person who "engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (R. 52:2, 4.) It further argued that, regardless, the statute was clear. (R. 52:5–7.)

The court denied the motion. (R. 54.) It determined that Barrett had standing to challenge the facial validity of the statute, but determined that it's language clearly and unambiguously stated what conduct it prescribed. (R. 54:5–6.) It found that Barrett did not, however, have standing to raise an as-applied challenge because his conduct clearly fell within conduct proscribed by the statute, and at any rate such a challenge would fail as the recordings showed that Barrett recognized the silencer as such and knew it was illegal. (R. 54:6–7.)

Proceedings Relating to Michael Bond

Pre-trial, the State listed Bond on its witness list but, as he was a confidential informant, did not provide his address. (R. 12:2.) The witness list stated, "the State will

assist the defense with personal service of this individual." (R. 12:2.)

Rather than asking the State to serve Bond with a subpoena, in April, 2012, Barrett hired private investigator Gary Wait and conducted an elaborate ruse ostensibly to serve Bond. (R. 164:6–7; 33.) Wait posed as a person willing to sell firearms to anyone, including felons, and contacted a third party who contacted Bond. (R. 48:2; 164:6.) Bond, however, contacted the Milwaukee Police Department and ATF. (R. 164:7.) They, unaware that Wait was a private investigator and not a gun dealer, set up an investigation through Bond and had him record his transactions with Wait.[1] (R. 50:9–14.) Wait set up a deal for a false gun transaction in order to lure Bond to a location and served him with a subpoena when he arrived. (R. 50:9–10; 164:6–7.)

Over a year later, on October 7, 2013, Barrett filed a motion to introduce other acts evidence—namely, Wait's testimony about Bond's discussions with him about purchasing firearms—to support his entrapment defense. (R. 48.) The motion was accompanied by an affidavit from Wait, alleging that Bond steered all of the conversations with him toward firearms and that Wait never brought up the subject himself. (R. 48:9–11.) The State opposed the motion on the grounds that Wait's contact with Bond nine months after Barrett's was irrelevant to Barrett's conduct when he purchased the silencer, that it was too remote, and that it risked lengthy litigation of a collateral issue; the State also noted that the facts Wait swore to in the affidavit were

[1] These recordings were never introduced at trial and are not part of the record on appeal. Portions of the recordings are transcribed or described in the parties' motions regarding admissibility of Wait's testimony on his contacts with Bond.

"grossly different" than what the recordings showed. (R. 50; 176:4–5; 177:19–25.)

The court conditionally granted the motion, allowing the other acts evidence in if the defense first introduced some evidence showing that Bond induced Barrett to buy the silencer so as to put the defense of entrapment at issue.[2] (R. 177:17, 21–23, 25–26.) Wait appeared to testify at the motion hearing, but neither the State nor the defense called him. (R. 176; 177.)

Trial and Postconviction Proceedings

The case proceeded to trial. (R. 179.) Bond testified about his cooperation with law enforcement as a confidential informant and selling the silencer to Barrett. (R. 184:24–48.) Barrett testified in his own defense, claiming he was entrapped by law enforcement and had no intention of buying the silencer. (R. 184:61–123.) Neither party called Wait as a witness. (R. 179; 180:3; 181:2; 182:3; 183:3; 184:2.) The jury found Barrett guilty. (R. 187:6.) The court sentenced him to five months in the House of Correction with Huber release. (R. 188:58.)

Barrett moved for postconviction relief. (R. 148.) He again claimed that Wis. Stat. § 941.298 was unconstitutional on the same multitude of grounds he raised previously. (R. 148:1–12.)

He also claimed that his conviction "was the result of outrageous government conduct" and therefore must be vacated. (R. 148:12.) He reargued his entrapment defense, and additionally claimed that the State had "intimidated" Wait out of testifying. (R. 148:17–19.) As proof, he attached a letter to Wait from one of Barrett's trial counsels, Attorney Thomas Grieve, informing Wait that "[a]fter a brief off-the-

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[2] Several other issues were addressed at this hearing, but they are not relevant to the issues on appeal. (R. 176; 177:29–39.)

record discussion" with the prosecutor, it was "[his] understanding that a number of individuals," including the Milwaukee County District Attorney, "contemplated making an arrest for criminal charges against you with respect to the investigation and service of process that you undertook of [Bond]." (R. 148:38.) The letter further stated that it was Grieve's "understanding that this same decision-making process may be reinstigated should you testify in Mr. Barrett's case." (R. 148:38.) Wait provided a new affidavit claiming that "[a]s a result of the threats to me from the government, I was intimidated and became apprehensive about testifying in Mr. Barrett's case . . . ." (R. 148:41.)

The circuit court rejected Barrett's constitutional challenges to Wis. Stat. § 941.298, noting that "Judges Kahn and Watts already ruled that the defendant's conduct was not constitutionally protected and that the statute is not unconstitutionally vague. Nothing submitted by the defendant persuades the court to disturb those rulings." (R. 149:2.) It also stated that it would "not entertain [Barrett's] attempt to relitigate" his entrapment defense. (R. 149:2.) It ordered further briefing on Barrett's outrageous government conduct claim regarding intimidation of Wait, however, to allow the State to respond to Barrett's allegations. (R. 149:2–3.)

The State responded that the record conclusively refuted Barrett's claim, obviating the need for an evidentiary hearing. (R. 153:6–8.) The State noted that the alleged letter from Grieve—which was not signed nor accompanied by an affidavit from Grieve verifying the letter's authenticity—stated only that it was Grieve's own understanding that law enforcement was contemplating filing criminal charges against Wait; it did not come from the government. (R. 153:3, 7.) That information allegedly came from a brief, off-the-record conversation with the State before the May 1, 2012 hearing, and Grieve never said anything at that hearing

suggesting "any perceived impropriety by the State when discussing Wait's involvement with Bond." (R. 153:3.)

Subsequent to Wait allegedly receiving this letter from Grieve, the court held multiple evidentiary hearings dealing, in part, with Wait's proposed testimony. (R. 153:3–4.) The defense did not mention any perceived threats to Wait at any of these hearings. (R. 153:4.) At the last hearing the State expressed concern over Wait's Fifth Amendment privileges if he were to testify, noting that there were potential issues with false swearing or perjury "because of certainties Wait submitted in his sworn affidavit that directly contradicted the audio recordings between Wait and Bond." (R. 153:4.) At that hearing, the defense stated that Wait was present and prepared to testify to supplement his affidavit, and added that Wait was present at prior court dates and would be available to testify at future dates. (R. 153:4.)

All of these hearings and dates "were several months after [Wait] received Attorney Grieve's alleged letter that Wait now claims intimidated him from testifying in Barrett's trial." (R. 153:4.) The State argued that Wait's willingness to testify at all of these hearings, months after receiving Grieve's letter, along with the blatant contradictions between his first affidavit and the recordings severely undermined the credibility of his latest affidavit claiming he was too intimidated to testify. (R. 153:7–8.)

Finally, the State argued that Barrett could not show prejudice even if the court found Wait credible. (R. 153:8–9.) Barrett could not show any government action enmeshed in criminal activity, nor could he show that the State succeeded in intimidating Wait from testifying considering Wait was willing to testify at the motion hearings six and seven months after receiving Grieve's letter. (R. 153:8–9.)

The circuit court agreed with the State that Barrett failed to demonstrate outrageous government conduct and denied his remaining postconviction claim. (R. 156.)

Barrett appeals.

ARGUMENT

I. Wisconsin Statute § 941.298 is constitutional.

A. General legal principles and standard of review

Wisconsin has regulated silencers for over 25 years. *See* 1991 Wis. Act 39, § 3588m (creating Wis. Stat. § 941.298). The statute prohibits a person from selling, delivering, or possessing a silencer. Wis. Stat. § 941.298(2). But the prohibition does not apply to "[a]ny person who has complied with the licensing and registration requirements under 26 USC 5801 to 5872." *Id.* § 941.298(3)(c).[3] The statute defines a silencer as "any device for silencing, muffling or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating such a device, and any part intended only for use in that assembly or fabrication." *Id.* § 941.298(1).

Barrett claims that Wis. Stat. § 941.298 is unconstitutional both facially and applied to him on a multitude of grounds. Resolving these challenges requires this Court to interpret both the statute and Article I, Section 25 of the Wisconsin Constitution.

"Interpretation of the state constitution and interpretation of a state statute are questions of law that this

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[3] The silencer prohibition also does not apply in some circumstances for peace officers, armed forces, and national guard personnel. Wis. Stat. § 941.298(3)(a), (b).

court decides de novo, benefitting from the analysis of the circuit court." *State v. Hamdan*, 2003 WI 113, ¶ 19, 264 Wis. 2d 433, 665 N.W.2d 785.

"A statute may be facially unconstitutional, meaning that it operates unconstitutionally under all circumstances." *State v. Herrmann*, 2015 WI App 97, ¶ 6, 366 Wis. 2d 312, 873 N.W.2d 257. "Alternatively, a statute may be unconstitutional as applied, meaning that it operates unconstitutionally on the facts of a particular case or with respect to a particular party." *Id.*

"A statute enjoys a presumption of constitutionality." *State v. Heidke*, 2016 WI App 55, ¶ 5, 370 Wis. 2d 771, 883 N.W.2d 162 *review denied*, 2016 WI 98, 372 Wis. 2d 278, 891 N.W.2d 410. "To overcome that presumption, a party challenging a statute's constitutionality bears a heavy burden. . . . [to] 'prove that the statute is unconstitutional beyond a reasonable doubt.'" *Id.* (quoting *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328). Every presumption must be indulged to sustain the constitutionality of a statute and every doubt must be resolved in favor of constitutionality. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

Barrett asserts, based on *Herrmann*, 366 Wis. 2d 312, ¶ 11, that "a law challenged on Second Amendment grounds is not presumed constitutional" and that the State has the burden of proving its constitutionality. (Barrett's Br. 17). This Court in *Herrmann* reached that conclusion in part based on language in *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008), about the applicable standard of scrutiny when laws are challenged on Second Amendment grounds.

In the State's view, the *Herrmann* court conflated the following two things: (1) the general presumption of constitutionality in these cases and the proponent's burden to overcome that presumption, and (2) the government's relative

burden—within the intermediate-scrutiny mode of analysis—of showing the law's substantial relation to an important governmental interest. *See State v. Pocian*, 2012 WI App 58, ¶ 14, 341 Wis. 2d 380, 814 N.W.2d 894.

That issue regarding the appropriate presumption need not be resolved here, however, because as explained below, Barrett has selectively edited the statute to construct an argument under law that is inapposite when Wis. Stat. § 941.298 is read including the portion Barrett omits. His claim fails regardless of where the burden lies.

B. The statute does not impermissibly infringe on any constitutionally protected conduct.

1. Relevant Second Amendment principles.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Additionally, Article I, Section 25 of the Wisconsin Constitution similarly provides: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

Though the language of the federal Second Amendment is not identical to Article I, Section 25 of the Wisconsin Constitution, our supreme court has recognized that the two are functionally identical in intent. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶ 8–11, 373 Wis. 2d 543, 892 N.W.2d 233. In that situation, the Wisconsin Supreme Court has construed the state constitution consistently with the Supreme Court of the United States' interpretation of the federal constitution. *Pocian*, 341 Wis. 2d 380, ¶ 7. Accordingly, the decisions from the Supreme Court interpreting the federal Second Amendment are instructive to the analysis of Wisconsin's constitutional provision. *Id.*

In *Heller*, the Supreme Court held that the core right the Second Amendment protects is the individual's right to keep and bear arms for the purpose of self-defense. *Heller*, 554 U.S. at 592. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), the Supreme Court held that this prohibition against infringement of the right applied to states, as well, by virtue of the Fourteenth Amendment. Like other constitutional rights, the right to keep and bear arms is not unlimited. *Heller*, 554 U.S. at 627; *State v. Fisher*, 2006 WI 44, ¶ 9, 290 Wis. 2d 121, 714 N.W.2d 495. States remain free to place reasonable time, place, and manner restrictions on keeping and bearing arms. *Heller*, 554 U.S. at 627 n.26; *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011).

Subsequent cases applying *Heller* have employed a two-step analysis to evaluating Second Amendment challenges. *Herrmann*, 366 Wis. 2d 312, ¶ 9. "First, a court must ask 'whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* "If it does not, the inquiry is complete; if it does, the court must 'evaluate the law under some form of means-end scrutiny." *Id.* (citation omitted).

While neither the Wisconsin courts nor the Supreme Court has clarified exactly what level of means-end scrutiny must apply, the Seventh Circuit, based on the method of analysis used in *Heller*, analogized the test to that contained in free-speech jurisprudence. *Ezell*, 651 F.3d at 702–03. Accordingly, it has determined that under this second step, "the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.* at 703. "[L]aws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified." *Id.* at 708. "How much more easily depends on the

relative severity of the burden and its proximity to the core of the right." *Id.*

The statute at issue here is regulatory rather than restrictive and, at best, lies on the margins of the Second Amendment right. Accordingly, intermediate scrutiny—a showing that Wis. Stat. § 941.298 is substantially related to an important government objective—should apply to the second step of the analysis. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010).

2. The statute does not burden any constitutionally protected conduct because silencers are not "arms."

Barrett's claim fails the first step of the constitutional analysis because silencers are not "arms." Accordingly, Wis. Stat. § 941.298 does not burden any constitutionally protected conduct and the inquiry ends. *Herrmann*, 366 Wis. 2d 312, ¶ 9.

The Supreme Court of the United States in *Heller* unambiguously stated that the meaning of "arms" is, both historically and in the modern sense, "[w]eapons of offense, or armour of defence." *Heller*, 554 U.S. at 581 (citation omitted). It further stated that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.' *Id* at 582. And it determined that "'bear arms' means . . . simply the carrying of arms." *Id.* at 589. The Court held that, "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry *weapons* in case of confrontation." *Id.* at 592 (emphasis added).

Wisconsin's statutes define a weapon as a device or instrument of death or great bodily harm:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the

> throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon, as defined in s. 941.295 (1c) (a); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

Wis. Stat. § 939.22(10).

Merriam-Webster similarly defines a "weapon" as "something (such as a club, knife, or gun) used to injure, defeat, or destroy."[4] Likewise, the American Heritage College Dictionary defines "weapon" as "an instrument of attack or defense in combat, as a gun or sword." *Weapon*, The American Heritage College Dictionary (3d ed. 1997).

A silencer is not a weapon. It is an instrument that can be attached to a weapon. It is not "used to injure, defeat, or destroy," nor is it "an instrument of attack or defense in combat." A silencer's only purpose is to muffle the report of a firearm. Wis. Stat. § 941.298(1). But it is the firearm that is the weapon, not the silencer. Ergo, the statute does not infringe on any constitutionally protected conduct. As the circuit court aptly stated, prohibiting possession of silencers "doesn't encourage or discourage the keeping . . . or bearing of arms, [a silencer] is used only to prevent detection" of the use of "arms." (R. 165:6–7.)

Barrett admits as much in his brief, but then claims, without citation to any authority, that "the legal definition of arms or weapons typically encompasses firearm components, attachments, and modifications," and that this encompasses silencers. (Barrett's Br. 19–20.) His only example is the federal definition of "firearm" contained in 18 U.S.C. § 921(a)(3), which does include silencers. He then claims that

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[4] *Weapon*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/weapon (last visited May 22, 2019).

because Congress included silencers in the definition of firearms for federal regulations, that must mean possession of a silencer "falls within the scope of the Second Amendment." (Barrett's Br. 20.) He is wrong.

Barrett conflates constitutional interpretation of the word "arms"—which contains no special definition, and therefore is interpreted according to its ordinary meaning, *Heller*, 554 U.S. at 576—with a special Congressional definition of the term "firearm" in the federal statutes; statutes that their plain text shows Congress enacted for the purpose of regulating not only weapons but other dangerous devices, as well as items that could be attached to weapons or used to make weapons. *See, e.g.,* 18 U.S.C. § 921(a)(4), (23); 26 U.S.C. §§ 5861, 5871. Moreover, Wisconsin has not defined "firearm" in this way. In Wisconsin, "firearm" means only "a weapon that acts by force of gunpowder." Wis. Stat. § 167.31(c).

It is beyond dispute that Legislatures may specially define terms when crafting statutes. *See, e.g., City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 710 (1978); *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The fact that Congress chose to specially define "firearm" in 18 U.S.C. § 921(a)(3) does not alter the plain-meaning definition of "arms" found in the Constitution, which means "weapons." *Heller*, 554 U.S. at 592. The constitutional definition of "arms" therefore does not include all firearm "components, attachments, and modifications" simply because the federal statutory definition of firearms may include those things, as Barrett claims. (Barrett's Br. 19–20.)

Even if the federal statutes could inform the constitutional analysis, there is a more specific statute that would control here. *See Busic v. United States*, 446 U.S. 398, 406 (1980). Congress further defined a "silencer," and did so in the exact same manner the Wisconsin Legislature did.

Compare Wis. Stat. § 941.298(1) *with* 18 U.S.C. § 921(a)(24). No part of that definition suggests that a silencer is a weapon.

Simply put, silencers are not "arms" under either the historical or modern understanding of the term. *Heller*, 554 U.S. at 581. Possessing one does not fall within the scope of constitutional protections, and thus the inquiry should end here. *Ezell*, 651 F.3d at 702–03.

3. Even if silencers are "arms," the statute allows individuals to possess them as long as they follow licensing and registration requirements—a condition Barrett did not meet and does not address.

Even if this Court agrees with Barrett that silencers fall within the constitutional definition of "arms," Barrett's claim fails for two other reasons.

First, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Nor does it protect "the carrying of dangerous and unusual weapons." *Id.* at 627. As Barrett himself observed when buying the silencer, a .22 with a silencer attached is not a weapon typically possessed by law-abiding citizens for lawful purposes, and it is a dangerous and unusual weapon; it is, in Barrett's own words, a "hitman's gun." (R. 95:2.)

Second, Wis. Stat. § 941.298 is not "a complete ban on law-abiding citizens from possessing silencers for any purpose," as Barrett claims. (Barrett's Br. 22–23.) It is not a categorical ban on silencers at all. Subsection (3)(c) of the statute states that the prohibition does not apply to possession of firearm silencers by "[a]ny person who has complied with the licensing and registration requirements" for silencers under 26 U.S.C. §§ 5801 to 5872. Wis. Stat. § 941.298(3)(c). The statute expressly allows properly licensed

and registered individuals—in other words, *actual* "law-abiding citizens"—to possess and use silencers "for any lawful purpose" they choose. Wis. Const. Art. I, § 25.

This Court therefore need not reach the second prong of the analysis because Barrett's argument is wholly misplaced, even if silencers do constitute "arms." Regardless of the level of scrutiny applied, as the appellant, the burden is on Barrett to at least *argue* that requiring licensing and registration to legally possess a silencer is an unconstitutional restriction on the right to possess one, assuming for the sake of argument such a right exists. *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998).

Barrett has made no effort to do so—indeed, Barrett has conveniently omitted any mention of Wis. Stat. § 941.298 subsection (3)(c) at all. (Barrett's Br. 17–31.)[5] This is likely because, as someone who did not follow the licensing and registration requirements, he cannot possibly prevail on his challenge to the statute. *Skoien*, 614 F.3d at 645 ("A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present."). Instead, Barrett argues only that a "complete ban" on silencers for "law-abiding citizens" is unconstitutional. (Barrett's Br. 17–31.) But that is not at issue here, because Wisconsin did not enact a "complete ban" on silencers for law-abiding citizens—to the contrary, the statute expressly allows law-abiding citizens to own and carry a silencer for any lawful purpose. Wis. Stat. § 941.298(3)(c).

At any rate, Barrett's claim would fail even if he had not ignored the relevant portion of the statute. As shown, Wisconsin has enacted a regulatory regime that simply

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[5] Barrett cannot claim ignorance of the subsection. He argued in the trial court that his lack of licensure was an element that the State had to prove at trial. (R. 179:12–21.)

requires individuals to comply with federal regulations to legally possess a silencer. Owning a silencer is not near the core of the Second Amendment right—it is not at all necessary for effective self-defense. *Heller*, 554 U.S. at 630. And the State's reason for requiring licensing and regulation of silencers, and prohibiting the possession of unlicensed silencers, is substantially related to an important governmental interest. Prohibiting owning a silencer without licensing and registration helps ensure that silencers remain in the hands of law-abiding citizens, and the important government interest at stake is preventing gun crimes from going undetected. In other words, as the Seventh Circuit described it, "preventing armed mayhem." *Skoien*, 614 F.3d at 642.

Neither *Heller* nor any other case "purport[s] to invalidate any and every regulation on gun use." *Justice v. Town of Cicero*, *Ill.* (*Justice I*) 577 F.3d 768, 774 (7th Cir. 2009). "[T]o the contrary, . . . *Heller* disclaims any such intent." *Id.*; *see also McDonald*, 561 U.S. at 787. Indeed, the Federal District Court considering *Justice* on remand specifically rejected the argument that mere regulation violates the Second Amendment, holding that "[a] firearms-registration requirement, though not automatically valid, is not invalid simply because it regulates the exercise of a constitutional right." *Justice v. Town of Cicero*, *Ill.* (*Justice II*), 827 F. Supp. 2d 835, 842–43 (N.D. Ill. 2011). The State is unable to find a single case holding that simply requiring licensing or registration of "arms," with no other restriction on their carrying or use, violates the Second Amendment. Wisconsin Stat. § 941.298 easily survives intermediate scrutiny. *See Justice II*, 827 F. Supp. 2d at 842–43.

As there is no question that the statute allows properly licensed and registered individuals to "keep and bear" silencers for any lawful purpose—nor is there any question that Barrett did not follow the licensing and registration

requirements—and Barrett has made no argument that such a regulation is unconstitutional, his claim that the statute is an unconstitutional infringement on the right to bear arms either facially or as-applied to him must fail.

C. Barrett has fallen far short of showing that the statute is void for vagueness.

1. Relevant law

Again, statutes are generally presumed to be constitutional. *Tammy W–G. v. Jacob T.,* 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854. As the party challenging the constitutionality of the statute as impermissibly vague, Barrett bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *Id.*

Courts apply a two-part analysis for determining whether a statute is void for vagueness: "first, the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited; and second, the statute must provide standards for those who enforce the laws and adjudicate guilt." *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). Only the first prong of the analysis—fair notice—is at issue in this case. (Barrett's Br. 33–35.)

"The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] . . . conduct comes near the proscribed area.'" *State v. Pittman,* 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993) (quoting *State v. Tronca,* 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978)). "The challenged statute, however, 'need not define with absolute clarity and precision what is and what is not unlawful conduct.'" *Id.* at 276–77 (quoting *State v. Hurd,* 135 Wis. 2d 266, 272, 400 N.W.2d 42 (Ct. App. 1986)). "A statute is not void for vagueness simply because 'there may exist particular instances of conduct the legal or illegal nature

of which may not be ascertainable with ease.'" *Id.* at 277 (quoting *State v. Courtney,* 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976)). Nor is a statute unconstitutionally vague "simply because it is ambiguous." *State v. Smith*, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). Rather, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared." *Courtney*, 74 Wis. 2d at 711.

If a defendant's alleged conduct "plainly falls within the prohibition of the statute, the defendant may not base a constitutional vagueness challenge on hypothetical facts, unless a First Amendment right is at issue." *Smith*, 215 Wis. 2d at 91. Additionally, "if an actor's conduct plainly falls within the proscription of the law, he cannot make a vagueness challenge." *Id.*

2. The statute is clear.

Barrett's only facial argument is that the statute is ambiguous. (Barrett's Br. 34–35.) But a statute is not unconstitutionally vague "simply because it is ambiguous." *Smith*, 215 Wis. 2d at 92. Rather, as explained above, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared." *Courtney*, 74 Wis. 2d at 711. Wisconsin Stat. § 941.298 gives clear direction about the conduct it prohibits.

The statute defines silencer as "any device for silencing, muffling or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating such a device, and any part intended only for use in that assembly or fabrication." Wis. Stat. § 941.298(1). It also provides directions on how a person can legally possess any of those items. Wis. Stat. § 941.298(3).

"Device" has the commonly accepted meaning of being "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function." *Device*, Merriam-Webster Online Dictionary, https://.merriam-webster.com/dictionary/device, last visited May 24, 2019.

Any ordinary person reading the statute and bent on obedience can discern "when the region of proscribed conduct is neared." *Courtney*, 74 Wis. 2d at 711. A person wanting to conform to the law knows that he or she may not possess any piece of equipment designed for the purpose of silencing, muffling, or diminishing the report of a firearm. The statute also alerts persons that it is illegal to possess any combination of parts intended to create a piece of equipment designed for the purpose of silencing, muffling, or diminishing the sound of a firearm, or to possess any single part intended only for use in creating a piece of equipment for that purpose. Finally, the statute clearly provides that a person may legally possess any of these things if he or she complies with the licensing and registration requirements for owning silencers, and directs the person who wants to possess such things to those licensing and registration requirements: 26 U.S.C. §§ 5801 to 5872. There is nothing ambiguous about this statute.

Barrett seeks to inject ambiguity into the statute that does not exist by reading selected terms in isolation. (Barrett's Br. 34.) He argues that the statute *could* be interpreted as criminalizing the possession of an item that does not actually diminish the report of a firearm, as long as it is "*for* silencing" the report of a firearm. (Barrett's Br. 34.) He says this renders the statute ambiguous to the point of being unconstitutionally vague because it does not identify "*who* must intend that the item is 'for silencing.'" (Barrett's Br. 34.)

The statute is not ambiguous in this regard. It states that a silencer is "any device for silencing." Wis. Stat. § 941.298(1). It does not matter who intends the device to be for silencing. If it is a device meant for silencing, either

because it was manufactured for that express purpose or because it is something the defendant intends to use for silencing, it is prohibited by the statute unless the defendant is licensed and registered to own such a device.

Wisconsin Stat. § 941.298 is ambiguous only to one searching for ambiguity, which is inimical to proper statutory interpretation. *Kalal*, 271 Wis. 2d 633, ¶ 47. Barrett has not shown that the statute is unconstitutionally vague.

3. Barrett's conduct plainly falls within the prohibition of the statute.

Barrett does not contend that he has a First Amendment right to possess a silencer, therefore he cannot make an as-applied challenge based on hypothetical facts, and his vagueness challenge must be reviewed on the facts of his case. *See Smith*, 215 Wis. 2d at 93. In other words, this Court can only review whether the statute gave Barrett notice that the item he was actually purchasing—a 6-inch, metal, cylindrical item with no serial number that was screwed onto the barrel of the .22, (R. 59:2; 62), which Barrett recognized as a "silencer," (R. 95:2) and which he described as "[h]ighly, highly, highly, highly illegal," (R. 95:1)—was illegal to possess without proper licensing and registration.

Barrett has made no argument that he had no notice that the statute prohibited unlicensed possession of the item he was purchasing—and given his obvious recognition that it was a silencer and that unregistered silencers are illegal, such an argument would border on the ridiculous. Instead, Barrett's argument is based entirely on hypothetical facts. (Barrett's Br. 33–34.) For example, he argues that "a citizen may be convicted of a felony for being in possession of an item that he or she does not believe diminishes the report of a firearm," but that an audio specialist may be able to determine diminishes a report. (Barrett's Br. 34.) But that is far afield from the facts of Barrett's case, and Barrett cannot

challenge the statute for vagueness based on the hypothetical conduct of others.

Accordingly, Barrett has failed to even make a cognizable argument that the statute gave him no notice that his conduct was prohibited, let alone meet his burden to show beyond a reasonable doubt that the statute was unconstitutionally vague as applied to him.

II. The circuit court properly rejected Barrett's outrageous government conduct claim without a hearing.

A. General legal principles and standard of review

To entitle the defendant to a hearing, a postconviction motion "must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. (John) Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (alteration in original) (citation omitted). This means the motion must "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how," and it must do so "within the four corners of the document itself." *Id.* ¶ 23.

The sufficiency of the motion, however, is not the end of the inquiry. "[A] circuit court has the discretion to deny a defendant's motion—even a properly pled motion— . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

"Whether a defendant's [postconviction motion] 'on its face alleges facts which would entitle the defendant to relief' and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law" that an appellate court reviews de novo. *Sulla*, 369 Wis. 2d 225, ¶ 23 (citation omitted).

If the motion is insufficiently pled or the record conclusively demonstrates that the defendant is due no relief, whether to grant or deny a hearing is left to the sound discretion of the circuit court. *Allen*, 274 Wis. 2d 568, ¶ 9. Typically, "[a] court properly exercises its discretion if it uses the correct legal standard and, using a demonstrated rational process, reaches a reasonable conclusion." *Pierce v. Am. Family Mut. Ins. Co.*, 2007 WI App 152, ¶ 5, 303 Wis. 2d 726, 736 N.W.2d 247.

B. Relevant law on outrageous government conduct claims and standard of review

The defense of outrageous government conduct arose out of *dicta* in *United States v. Russell*, 411 U.S. 423, 431–32 (1973) (citations and quotation marks omitted): "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed." "The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.*; *see, e.g., State v. Steadman,* 152 Wis. 2d 293, 300–02, 448 N.W.2d 267 (Ct. App. 1989) (discussion of *Russell*).

A defendant seeking to prove outrageous government conduct bears a heavy burden. "Since the Supreme Court's decision in *Russell,* both state and federal courts have limited the defense of outrageous government conduct to 'extreme cases in which the government essentially manufactured the crime or generated new crimes merely for the sake of pressing criminal charges against the defendant.'" *State v. LeMay,* 266 P.3d 1278, ¶ 29 (Mont. 2011) (citation omitted). *See also United States v. Ryan,* 548 F.2d 782, 789 (9th Cir. 1976)

(explaining that "the due process channel which *Russell* kept open is a most narrow one").

Wisconsin courts follow a framework for resolving such claims. "The defense of outrageous governmental conduct requires an assertion by the defendant that the State violated a specific constitutional right and that the government's conduct is so enmeshed in criminal activity that prosecution of the defendant would be repugnant to the American criminal justice system." *State v. Givens,* 217 Wis. 2d 180, 188–89, 580 N.W.2d 340 (Ct. App. 1998).[6] Additionally, the defendant must show prejudice to prevail on such a claim. *See United States v. Hasting*, 461 U.S. 499, 510–11 (1983).

C. Barrett's outrageous government conduct claim is forfeited by defense counsel's failure to timely move to dismiss the charges

The doctrine of forfeiture provides this court with a sufficient basis to affirm the circuit court's denial of postconviction relief. *See Mercado v. GE Money Bank,* 2009 WI App 73, ¶ 2, 318 Wis. 2d 216, 768 N.W.2d 53 (An appellate court may affirm a circuit court order on different grounds.).

The forfeiture doctrine applies to constitutional claims not properly preserved by objection. *See State v. Gove,* 148 Wis. 2d 936, 940–41, 437 N.W.2d 218 (1989).

Barrett had to object and seek dismissal of the charges as soon as the basis for his objection became "reasonably apparent." *State v. Wolter,* 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978) (footnote and citation omitted). An

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[6] Contrary to Barrett's unsupported assertion, it is not "questionable whether this 'enmeshment' is really a requirement for a claim of outrageous government conduct." (Barrett's Br. 40.) This Court has unequivocally stated that it is. *State v. Givens*, 217 Wis. 2d 180, 188–89, 580 N.W.2d 340 (Ct. App. 1998).

objection made for the first time in postconviction proceedings comes too late for claimed errors that could have been—and should have been—addressed before or during trial. *See State v. Saunders,* 2011 WI App 156, ¶¶ 29–33, 338 Wis. 2d 160, 807 N.W.2d 679.

The bases for Barrett's outrageous government conduct claim were—or should have been—apparent to Barrett long before Barrett pursued postconviction proceedings. Obviously, Barrett knew of the facts leading up to his purchasing the silencer. If he believed the use of Bond to sell the silencer amounted to outrageous government conduct, he should have moved to dismiss the charges on this ground before trial. And Grieve allegedly sent the letter to Wait informing him that the State considered filing criminal charges against him, and allegedly "intimidating" Wait out of testifying, on May 2, 2013. (R. 148:38–40.) That is nine months before Barrett's trial began. (R. 179.) Eight hearings took place in that nine months and Barrett never raised this issue at any of them. (R. 171; 172; 173; 174; 175; 176; 177; 178.)

By failing to make a timely, specific objection to his prosecution based on a claim of outrageous government conduct—and by failing to seek dismissal of the charges with prejudice—Barrett has forfeited his right to appellate review of the claim. *United States v. Olano,* 507 U.S. 725, 733 (1993).

The only proper vehicle to advance this claim, then, would have been to allege that trial counsel was ineffective for failing to raise outrageous government conduct and move to dismiss the charges on that ground. But Barrett has forfeited that claim, too, by failing to adequately develop it. (R. 148:10–11; Barrett's Br. 32.) In his postconviction motion and his appellate brief, Barrett claimed only that "to the extent that any defect is found based on the adequacy of trial counsel's previous filings" in general, his counsel was deficient and he was prejudiced. (R. 148:10–11; Barrett's Br. 32.) His

argument comprises three sentences. (R. 148:10–11; Barrett's Br. 32.) Further, he did not seek a *Machner* hearing, which is a "prerequisite to a claim of ineffective representation." *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). (R. 148:10–11.)

Ineffective assistance of counsel is itself a complicated constitutional claim, not a catch-all provision. It is black-letter law that conclusory allegations of ineffective assistance without objective material facts explaining why counsel's failure to raise a claim was outside the boundaries of reasonable professional judgment, and that there is a reasonable probability of a different result had counsel done so, are insufficient to warrant a hearing, let alone to warrant relief. *State v. Romero-Georgana*, 2014 WI 83, ¶ 62, 360 Wis. 2d 522, 849 N.W.2d 668; *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). This Court should hold that Barrett forfeited his outrageous government conduct claim and any ineffective assistance claim based on it by failing to timely and sufficiently develop either claim in the circuit court.

As explained below, though, Barrett cannot prevail even if this Court opts to review the merits of his outrageous government conduct claim. He has conflated the concept of outrageous government conduct with entrapment, and his claim that the government intimidating Wait out of testifying is disproven by the record.

D. Barrett cannot relitigate his entrapment defense by relabeling it "outrageous government conduct."

Barrett claims that he is due a new trial because "the government went through a great deal of trouble to turn a law-abiding man into a felon" and reargues his trial defense that Barrett "had no demonstrated predisposition to commit illegal arms transactions." (Barrett's Br. 39–40.) In other

words, Barrett is attempting to relitigate his entrapment defense by relabeling it "outrageous government conduct" on appeal.

But entrapment and outrageous government conduct are separate concepts. *Steadman*, 152 Wis. 2d at 301. Though both invoke due process principles, "[t]he difference is that the entrapment inquiry focuses on the predisposition of the defendant whereas the question of governmental abuse of power focuses on whether the government 'instigated the crime.'" *Id.* (citation omitted). Merely providing a defendant an opportunity to commit the crime, as the government did here, does not amount to instigation, and it cannot support a claim of outrageous government conduct. *Id.* at 302. "[U]nless the government, in the course of a sting operation, violates a defendant's specific constitutional rights, the proper defense is entrapment." *Id.*

Barrett recognizes that the two are separate concepts, but has misunderstood the distinction. (Barrett's Br. 40–41.) Barrett repeatedly emphasizes that he was not predisposed to commit the crime and that it was "orchestrated" by the government. (Barrett's Br. 39–41). That, however, is the entrapment analysis. *Steadman*, 152 Wis. 2d at 301; *see also State v. Hyndman*, 170 Wis. 2d 198, 208, 488 N.W.2d 111 (Ct. App. 1992). Barrett points to no specific constitutional right that the government purportedly violated while conducting this sting operation, as required to show outrageous government conduct. (Barrett's Br. 39–41); *Hyndman*, 170 Wis. 2d at 209. And his only attempt to show that the government was enmeshed with the illegality consists of hyperbolic descriptions of the facts that are unsupported by the record. (Barrett's Br. 40.)[7]

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[7] For example, Barrett claims that Bond "pressured Barrett into taking possession of the item." (Barrett's Br. 40.) But the

Indeed, Barrett's entire argument on this point relies on his insistence that he "was not interested in purchasing a silencer." (Barrett's Br. 39–41.) But as *Steadman* makes clear, it is "the entrapment inquiry that focuses on the predisposition of the defendant," not the outrageous governmental conduct inquiry. *Steadman*, 152 Wis. 2d at 301; *cf. State v. Saternus*, 127 Wis. 2d 460, 470, 381 N.W.2d 290 (1986) (The defendant's state of mind is the dispositive element of entrapment regardless of "the outrageousness of the government agent's conduct."). The government merely providing the defendant with an opportunity to commit the crime is not outrageous government conduct, and "[t]hat [Barrett] seized the opportunity provided by the sting operation . . . does not amount to a violation of fundamental fairness that shocks the universal sense of justice." *Steadman*, 152 Wis. 2d at 302; *see also Saternus*, 127 Wis. 2d at 470.

Whether Barrett was interested in purchasing a silencer once the opportunity arose—in other words, whether his testimony that he did not want the silencer was credible and whether he was induced into buying it—were questions of fact for the jury considering his entrapment defense. Wis. JI–Criminal 780 (2002); *Saternus*, 127 Wis. 2d at 472. The

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recording of Barrett's and Bond's encounter shows that is not true. (R. 95.) Bond showed Barrett the two guns and Barrett said the .22 with the silencer was "[h]ighly, highly, highly, highly illegal." (R. 95:1.) Bond said, "I got it just like that, though," and that he could not take the gun apart. (R. 95:1.) Barrett said, "I know," reiterated how illegal the gun was, and then *offered*, "I can help you dispose of it, but, ya know, I mean --" (R. 95:2.) Bond said he had someone else who would buy it, and it was then *Barrett* who pressured *Bond* out of selling it to someone else, telling Bond he was "a safe guy to give it to" because he was an attorney, he could claim "attorney-client privilege" to ensure the gun was not traced back to Bond, and Barrett could "say [he] was gonna dispose of it, and the trail ends here, ya know?" (R. 95:2.)

jury rejected Barrett's claim that he was entrapped. Barrett cannot now relitigate his defense by relabeling it "outrageous government conduct."

E. The State did not impermissibly threaten Wait, and the record proves he was not intimidated.

Barrett alleges that the government violated his Sixth Amendment right to compulsory process by allegedly "intimidating" Wait from testifying at his trial by telling Attorney Grieve that it may consider pressing criminal charges against Wait for his conduct involving Bond. (Barrett's Br. 38; R. 148:40–41.)

If this Court reaches the merits of Barrett's outrageous government conduct claim based on the purported threat to Wait, it should reject that claim without hesitation. The record conclusively demonstrates that Barrett is due no relief, therefore the circuit court properly dismissed this claim without a hearing.

The circuit court found that the letter from Grieve was not a threat from the State, that it was Wait's own conduct that made Wait's testifying a dubious prospect, and that the record showed that even if the State had tried to intimidate Wait, it had failed. (R. 156:3.) Those findings are not clearly erroneous.

It was Barrett who hired Wait and concocted the plan to set up Bond "in an effort to undermine his character and credibility at trial,"—in other words, it was Barrett who attempted to interfere with the State's witness, not vice versa. (R. 156:3; 172:36–44.) Based on that conduct, according to the unsigned and unsworn letter allegedly from Grieve, the prosecutor alerted Grieve that several law enforcement agencies "contemplated" instituting criminal charges against Wait. (R. 148:38–39.)

The letter shows that the State did not threaten Wait. The letter is a statement of Grieve's understanding of his conversation with the prosecutor. (R. 148:38–39.) But Barrett has submitted nothing showing that the prosecution actually threatened Wait with criminal charges. Further, Grieve did not assert that any law enforcement agency planned to file charges against Wait; Grieve was alerting him that several agencies were contemplating doing so. (R. 148:38.) As the circuit court noted, "[c]ounsel's interpretation of that discussion is not proof that the prosecution was so enmeshed in a criminal activity or violated a specific constitutional right of [Barrett's] because the perceived threat contained in the letter did not come from the State." (R. 156:2.) The State alerting the defendant's trial counsel that a witness who has possibly committed criminal acts may face criminal prosecution for those acts is not outrageous government conduct. *Cf. State v. Koller*, 87 Wis. 2d 253, 281, 274 N.W.2d 651 (1979). Such a communication between the prosecutor and defense counsel is not a threat to the witness, and it is far from "shocking to the universal sense of justice." *Hyndman*, 170 Wis. 2d at 208.

Moreover, the record disproves Barrett's claim that Wait was intimidated out of testifying. The alleged discussion between the prosecutor and Grieve occurred nine months before Barrett's trial. (R. 148:38.) Wait appeared to testify, or the defense stated he was willing to testify, at multiple hearings after receiving Grieve's letter, including one motion hearing at which Wait appeared to testify a mere six weeks before trial. (R. 172:33; 175:18; 176:3–6; 177:37–38.) If Wait were truly intimidated by the possibility of facing criminal charges as he claims, he would not have appeared to testify on Barrett's behalf multiple times months after receiving Grieve's letter.

Further, Wait was on the defense's witness list. (R. 53:1; 178:7.) The trial transcript shows that Barrett did not

attempt to call Wait as a witness. (R. 184.) If Wait's testimony were so crucial, Barrett should have called him to the stand, and if Wait were truly concerned about being prosecuted he could have invoked his Fifth Amendment privilege against self-incrimination. *See United States v. Grubb*, 469 F. Supp. 991, 998 (E.D. Pa. 1979). But the record shows that Wait was not "driven from the stand," *id.* (citation omitted); Barrett simply failed to call him to it.

At any rate, Barrett's claim would fail for lack of prejudice. The jury heard about Bond's arrangement with law enforcement as a confidential informant and any motivations he may have had to conduct this transaction, including his statement that he "did everything in [his] power to get [his federal sentence] chopped down." (R. 181:16–19; 184:24–28, 40–45.) It also heard about law enforcement's involvement in setting up and monitoring the sale. (R. 182:12–76; 183:5–58, 184:4–22.) Barrett's transactions with Bond were recorded on audio and video and played for the jury. (R. 180:141–46; 182:20–51, 60–76; 183:17–19.) The jury heard Barrett clearly recognize the silencer and recognize that it was "highly illegal." (R. 95:1–6; 180:141–46.) The jury heard Bond tell Barrett that he would sell the gun with the silencer to someone else, and then heard Barrett coerce Bond into selling it to him for a reduced price. (R. 95:2–5; 180:141–46; 183:7–11.) And the jury heard all of Barrett's explanations for why he did not simply walk away from the sale. (R. 184:61–123.)

All of Wait's contacts with Bond were also recorded. (R. 172:36.) And the recordings showed that the affidavit Wait filed about his contacts with Bond contained statements that were, at best, grossly misleading if not outright falsehoods. (*Compare* R. 48:9 ("BOND persistently offered numerous inducements to me to purchase and sell firearms to BOND, even though I had never told BOND that I was interested in purchasing or selling firearms,") *with* R. 50:10 ("[WAIT, to BOND]: Mike, Gary. Uh, I got ahold of Mark a little earlier,

and he asked me about those .380s. Give me a call back here if you're interested. I don't know what they go for, but, ya know, he wanted me to tell him if you're serious about buyin' one or not.").) Even if Wait had testified, the State would have effectively impeached Wait with the recordings if he testified that Bond repeatedly tried to induce him to sell illegal firearms.

Furthermore, Wait's testimony about his own transactions with Bond would have been of marginal relevance, considering that entrapment is concerned with the subjective intent of the defendant. *Saternus*, 127 Wis. 2d at 470. Wait's testimony about his contacts with Bond would have done nothing to show that Barrett was not predisposed to buy the silencer when the opportunity arose. Given the overwhelming evidence of Barrett's guilt, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict even if Wait had testified.

In sum, Barrett is due no relief on this claim. As the circuit court aptly summarized: "[t]he State may have indirectly advised Wait about potential penalties, but the State did not take any action to prevent him from testifying . . . ." (R. 156:4.) And Wait clearly was willing to testify after the perceived threat—he attended multiple motion hearings, ready and willing to testify. Barrett never attempted to call him at trial. But even if Wait ultimately decided not to testify because of his potential exposure to criminal liability, the government did not engage in outrageous conduct by allegedly advising defense counsel about that possibility. *Koller*, 87 Wis. 2d at 281. Finally, given the low probative value of Wait's contacts with Bond, and the fact that Barrett's conversations and transactions with Bond were all recorded and played for the jury, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty even if Wait had testified.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court.

Dated this 5th day of June, 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 9,794 words.

Dated this 5th day of June, 2019.

_____
LISA E.F. KUMFER
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 5th day of June, 2019.

_____
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