STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP2065 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction of Conviction and an Order Denying Postconviction Relief Entered in the Brown County Circuit Court, the Honorable Timothy A. Hinkfuss, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Did the state violate Richard Arrington's right to counsel by outfitting a confidential informant, who was a jail inmate, with a recording device and authorizing the informant to secretly record his conversations with Arrington, against whom the state had filed a criminal complaint charging him with first-degree intentional homicide?

The circuit court found no violation of Mr. Arrington's right to counsel because it concluded that the confidential informant was not an agent of the state.

2. Is Mr. Arrington entitled to a new trial due to plain error or ineffective assistance of counsel because, with no objection from defense counsel, the state used against Arrington at trial statements that the state's informant obtained and secretly recorded while Arrington was represented by counsel?

Having concluded that the state's conduct in obtaining the statements was not a constitutional violation, the court denied Mr. Arrington's motion for a new trial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted because the state's use of a confidential informant to record conversations with jail inmates whose right to counsel has attached is novel but not isolated. The issue as to whether this conduct violates the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution is novel given that there is only one reported case in this state involving statements obtained by a jail informant. *See State v. Lewis*, 2010 WI App 52, 324 Wis. 2d 536, 781 N.W.2d 730. And that case did not involve police equipping an informant with a recording device for purposes of obtaining and memorializing as evidence statements from other inmates about the crime for which they had been charged and jailed. The issue is not isolated because in another Brown County case, *State v. Powell*, Case No. 16-CF-119, a different judge also found that such conduct did not constitute a violation of the right to counsel. (245:11).

STATEMENT OF THE CASE AND FACTS

Synopsis

Ricardo Gomez died of a single gunshot wound outside a house on Day Street in Green Bay.

(271:122-25; 273:14-15). Four days later, the state charged 20-year-old Richard Arrington with first-degree intentional homicide. (2).

At trial there was no dispute that Mr. Arrington fired several shots from a car toward the house. (271:148-50; 274:106; 275:93-96). The state argued to the jury that Arrington's intended target was Rafael Santana-Hermida ("Shorty") because the two were in a "feud," but Arrington's bullet struck Mr. Gomez instead.[1] (276:40, 62-63, 128). Consistent with what he told a detective, Mr. Arrington testified that he fired three shots toward the house after he saw Shorty reaching for a gun, and that it was Shorty's bullet that struck and killed Mr. Gomez. (274:106-07; 275:91-98). The jury heard a different version from Arrington through the state's final witness at the six-day jury trial. (275:10-33; App. 115-38)

That witness was a confidential informant and inmate named Jason Miller ("Butter") who detectives equipped with a recording device and told him he could use to record conversations with Arrington ("Swag") and two other inmates. (274:98-99; 275:10-11; 278:34-36, 46, 51; App. 115-16, 145-47, 157, 162). The conversations were recorded within a week after Arrington was jailed on the homicide charge and while he was represented by counsel. (2; 178; 255;

[1] Mr. Santana-Hermida is referred to as Shorty in the brief to be consistent with how he was referred to at trial and elsewhere in the record.

275:10; App. 115). Without an objection from defense counsel, the jury heard Miller's testimony and portions of the recorded conversations. (178; 275:13-33; App. 118-38). From that, the jury learned, among other things, that Arrington did not tell Miller that it was Shorty who shot Mr. Gomez. (275:28; App. 133). Arrington did not tell Miller that he saw Shorty with a gun, that Shorty fired a gun or that it looked like Shorty was reaching for a gun. (275:19, 28, 30; App. 124, 133, 135).

Although the court instructed the jury on self-defense and lesser forms of homicide, the jury found Mr. Arrington guilty of first-degree intentional homicide and felon in possession of a firearm. (187; 275:165-71; 276:12-29). The court imposed a life sentence with parole eligibility after 35 years on the homicide and a concurrent prison sentence on the second count. (201; App. 101-04).

Mr. Arrington filed a postconviction motion alleging that the state violated his right to counsel when it used at trial statements its confidential informant obtained in recorded conversations with Arrington after Arrington had been charged and was represented by counsel. (219:1-14). Arrington sought a new trial due to ineffective assistance of counsel or plain error, or in the interests of justice. (219:10-14). Among the witnesses at the postconviction hearing were the two detectives who equipped Miller with the recording device, authorized him to record conversations with Arrington, and reviewed and kept as evidence what Miller obtained over the course of

three days. (278:28-59; App. 139-48). The circuit court denied relief, concluding that Miller was not acting as an agent for the state when he recorded his conversations with Mr. Arrington. (247:3-9; App. 107-13).

Evidence at the Jury Trial

On the day Mr. Gomez was killed, Mr. Arrington had driven from Milwaukee to Green Bay with a 17-year-old female, A.T. (271:135-39; 275:88-89). They picked up Devin Landrum (Ricco) and drove to a house on Day Street so Landrum could buy marijuana. (275:42-44). Arrington was driving, A.T. was in the front passenger seat and Landrum was in the back seat. (271:143-44). After Landrum returned to the car, Mr. Gomez walked around the side of a neighboring house and onto the front porch of that house, where he was met by Shorty. (271:146-47; 275:42, 92). A.T. testified that Shorty and Arrington exchanged words and seemed mad. (271:149). She said Arrington rolled down her window and fired three or more shots out the window toward the house. (271:149-50). Shorty did not testify at trial.

Landrum testified that as Shorty came to the door Shorty reached for his waist as though he was reaching for a weapon. (275:42). A.T. said she did not see Shorty or anyone else shooting at the car. (271:151-52). However, A.T. said it looked like Shorty was reaching for something when he opened the door. (271:184-85). Arrington testified that

Shorty was "going crazy" when he saw him and was "acting very aggressive, very intimidating …." (271:93). It looked like Shorty was reaching for a gun. (271:94). At that point, Arrington fired three shots out the passenger side window toward the "feet area of the porch." (271:95).

Consistent with what Arrington told Detective Bradley Linzmeier about a year after the shooting (274:106-07), Arrington testified that as he was about to drive off he saw a gun in Shorty's hand. (275:97). Shorty fired the gun, and it looked like Shorty shot Mr. Gomez, who Arrington saw fall near the door. (275:97). A few days later, Arrington learned the police were looking for him and he turned himself in. (275:101).

Craig Taylor, a resident of the house where Mr. Gomez was killed, testified that earlier in the day he saw Arrington standing outside the house and then circling the block in a car. (271:52-53, 55). A.T. testified they had not circled the house. (271:181). Taylor said he heard about five shots, and he didn't see Shorty reach for anything, although Shorty was looking "straight ahead" at the parked car. (271:60). Taylor said he saw Mr. Gomez get hit by two bullets to his back. (271:62, 69). The medical examiner who performed the autopsy testified that Mr. Gomez was shot once in the chest. (273:14-15).

Erica Herrod testified that the night of the shooting, Arrington came to her home looking "[n]ervous" and "scared." (271:224). Arrington said

he "popped" someone and asked for bleach to wash up. (271:226). Arrington denied going to Herrod's house that night. (275:98). Her brother, Eugene Herrod, had rented the car that Arrington was driving when the shooting occurred. (271:246-49, 254). Eugene had allowed Arrington to borrow it. (271:248-49). After the shooting, Eugene was locked up three times and told "if you don't say this, say that, basically you gonna go down for it." (271:265). At first, Eugene told the detectives he had only heard about the shooting through Facebook. (271:270). Eventually, he told detectives that on the night of the shooting Arrington called and said he "fanned Shorty down" at Taylor's house and the next day called again and said he got the wrong person, felt bad and would come back and "finish the job." (271:260)

The evidence was undisputed that Arrington and Shorty had a couple of confrontations in the weeks before the shooting. Taylor testified that Arrington was present when Shorty was robbed of his gun at Taylor's house. (271:47-50). He said a third man ordered Arrington to grab Shorty's machine gun, "so Swag grabbed it in confusion because he didn't know what was going on at this point, this was happening so suddenly." (271:48). After that incident, Shorty made threatening phone calls to Arrington, including one in which a witness said Shorty was "singing a lot of threats to the house we were in." (275:67, 82-83). Brittany Harris testified that about a week before the shooting she was with Arrington when Shorty attacked him with a knife

through an open car window, cutting Arrington's lip. (273:120-30).

The state presented testimony from two men – James Allen and Christopher Howard – who said they spoke with Arrington after the stabbing. (274:194-209). Allen said that Arrington was "pretty pissed off" and said he was "going to fuck him up." (274:198). Howard said Arrington was "upset" and mentioned something about having to "handle his business …." (274:206). Both men were facing federal charges with penalties ranging from 10 years to life for Allen and five to 40 years for Howard. (274:200, 207-08). Both men had entered into agreements with federal prosecutors under which their testimony would be taken into consideration in the resolution of their pending cases. (274:200-01, 208-09).

Mr. Arrington testified that he was scared of Shorty, particularly after his threats and after Shorty stabbed him. (275:119-22). He said he fired at the house because he feared for his safety and the safety of the other two in the car. (275:127).

Jason Miller, who was described in police reports as CI 355 (235), testified as the state's final witness about conversations he had with Arrington at the jail. (275:10-33; App. 115-38). The conversations occurred on April 11, 12 and 13, 2016, beginning nine days after the shooting on April 2 and three days after Arrington was taken into custody on April 8. The criminal complaint had been filed on April 6 and

Mr. Arrington had already appeared in court with his attorney. (2; 255). Detectives outfitted Miller with a recording device that he could turn on and off at will. (274:98-99; 275:10-11; 278:37; App. 115-16, 148). Miller and Arrington were housed in the same area of the jail. (275:10; 278:28-29, 33-34; App. 115, 139-40, 144-45). The conversations occurred through a metal door, with Miller on one side and Arrington on the other. (275:12; App. 117). Miller recorded and delivered to detectives more than three hours of conversations with Arrington. (278:35, 38-39; App. 146, 149-50).[2]

Before he started talking with Arrington, Miller knew about Arrington's case from the news. (275:30-31; App. 135-36). In his testimony, Miller recounted their conversations, which included Miller reviewing the criminal complaint and advising Arrington about the state's evidence, and discussions about Arrington's interactions with Shorty and the shooting itself. (275:13-19; App. 118-24).

In the first excerpted recording played for the jury, Miller approached Arrington and asked if he wanted to read a magazine, and when Arrington declined, the conversation turned to Shorty and the evidence against Arrington. (234:1; App. 171).

[2]April 11: 1 hour, 25 minutes, 41 seconds; April 12: 33 minutes, 36 seconds; April 13: 1 hour, 7 minutes, 48 seconds. (178).

> CI 355: Hey, my nigger, like you said, nigger, the only motherfucker that seen this shit was the bitch, Ricco, and Shorty. Shorty ain't gonna ice you. You think, you 100% for sure Ricco ain't gonna say nothing?
>
> Arrington: Yeah, he ain't gonna say shit. Damn.
>
> CI 355: So the only person you gotta worry about is the bitch. You know what I'm saying? You think she's gonna come to court? You just gotta holler at your sisters and them holler at that bitch, dog.
>
> Arrington: Yeah, that's what I'm thinking ….

(275:19-21; 234:1; App. 124-26, 171).[3] Miller clarified for the jury that they were talking about convincing A.T. to not come to court. (275:21; App. 126).

In the second excerpt played for the jury, Miller and Arrington talked about the shooting and the incident where Shorty was robbed of a gun. (275:22-25; 234:5-6; App. 127-30, 175-76). Miller testified that Arrington was laughing about Shorty being scared when they stole his gun. (275:24; App. 129). Miller told Arrington that he had "embarrassed" Shorty. (275:23; App. 128). As to the shooting, the jury heard from the recording that Arrington said

[3] The portions played for the jury were not transcribed by the court reporter at trial. However, before trial the state had prepared a transcript of the April 13 recording, the only recording used at trial. That transcript was received into evidence at the postconviction hearing. (234; 278:27-28).

Shorty was "acting like a gorilla," which Miller said meant "overly aggressive," when he saw Arrington in the car. (275:23-24; 234:5; App. 128-29, 175). Arrington said Shorty's behavior "added the fuel to the fire …." (234:5; App. 175).

> CI 355: And when you pulled up, was he acting like he was a beast?
>
> Arrington: Yeah. That's what added the fuel to the fire like when I seen him, I was gonna smash off but, dog, he just did the most.
>
> CI 355: What'd he do?
>
> Arrington: Dog was acting like a gorilla.

(234:5; App. 175).

In the third excerpt, Arrington told Miller that he "dumped the crib down," which Miller told the jury meant he kept shooting at the house (275:28; App. 133), because Shorty made a challenging gesture that reminded Arrington of being stabbed by him.

> Arrington: It wasn't even that though. Nigger, when he was standing up there, nigger, you wanna know all that?
>
> DI 355: What, he was talking shit?
>
> Arrington: Hey, what's up. All I could picture was this nigger stabbing me in my face. It wasn't even none of that, shit.
>
> CI 355: Ah, he told you, he was like what's up?

Arrington: Yeah, I'm talking about, he like, nigger, open the door, right. He opened the door to greet his mans, and they, they laughing and joking and whatever. Then he looked down, directly down and see me. Man, what's up? I don't know what else he was saying but, nigger.

CI 355: That's when you popped, knocked fire from their ass.

Arrington: I'm talking …

CI 355: Hey, but see, it's fucked up because you ain't hit him. You hit the other nigger, you know what I'm saying?

Arrington: Right.

CI 355: See you, boy, your aim ain't shit.

Arrington: It wasn't that he, he, like as soon as I, he ducked away, you mean.

CI 355: Aw, he jumped?

Arrington: And I just dumped the crib down cuz I don't know if he gonna come back and dump me down, you mean, and then Ricco get into the car …

CI 355: Right.

Arrington: … I mean so he act ups on bro and the bitch, you mean.

CI 355: Damn.

Arrington: I can't just smash off and leave my brother, you mean.

> CI 355: Right.

(234:22-23; App. 177-78).

The prosecutor also questioned Miller about what Arrington did not tell him.

> Q When you were talking to Swag over the three days that you would be interacting with him from April 11th, 12th, and 13th, did Swag ever tell you that he saw Shorty with a gun in his hand?
>
> A No.
>
> Q Did he ever say that Shorty fired a gun?
>
> A No.
>
> Q Did he ever – did Swag ever tell you that actually Shorty shot … Ricardo Gomez?
>
> A No.

(275:19; App. 124).

In his cross-examination of Arrington, the prosecutor questioned Arrington about his statements to Miller. (275:118, 146, 151-58). Arrington admitted he didn't tell Miller that Shorty shot Mr. Gomez; he acknowledged making fun of Shorty even though he testified he was scared of him; he conceded that "fuel to the fire" could mean that it ticked him off; and "dumped the crib down" meant he was trying to prevent Shorty from shooting back, which the prosecutor characterized as a "[p]reventive attack." (275:118, 146, 153-54, 157-58).

Evidence at the Postconviction Hearing

Two detectives, Michael Wanta and Bradley Linzmeier, testified at the postconviction hearing about Miller's work for them as a confidential informant at the jail. In April of 2016, while Miller was jailed on Brown County charges, Miller's attorney notified the district attorney's office that Miller wanted to speak with law enforcement. (278:29; App. 140). The matter was assigned to Detective Wanta and his partner, Detective Linzmeier, who was the lead detective in Arrington's case. (278:28-29, 50; App. 139-40, 161). Wanta met with Miller at the jail several times beginning on April 6, 2016. (278:31, 33, 42; App. 142, 144, 153). Detective Linzmeier was present during at least one of those meetings prior to Miller making the recordings. (278:32, 50; App. 143, 161). Miller had previously worked as a confidential informant. (278:32-33; App. 143-44).

Initially, Miller indicated that he could obtain information from inmates Donald Moore and Antwon Powell regarding a homicide that did not involve Arrington. (278:29-30, 33-34, 44, 50-51; App. 140-41, 144-45, 155, 161-62). However, Miller told the detectives that Arrington, who arrived at the jail on April 8, was talking about his case and Miller believed Arrington would tell him things about his case. (278:34, 36, 47, 51; App. 145, 147, 162). Miller asked if he should record his conversations with Arrington, and the detectives told him he should. (278:36, 46, 51; App. 147, 157, 162). When the

recordings were made, Miller, Arrington, Moore and Powell were all housed in the same location in the jail, referred to as "Fox Pod." (278:33-34; App. 144-45).

On three days, April 11, 12 and 13, Detective Wanta supplied jail staff with a two-by-two inch digital recorder that was tucked into a band around Miller's waist. (278:36-37; App. 147-48). Miller was able to turn the device on and off at will. (278:37; App. 148). Wanta would retrieve the recording device each night, and in the morning he would review the recording and transfer the contents to a CD that was placed into evidence. (278:38-39; App. 149-50). Wanta would also provide Detective Linzmeier with copies of the CD's and brief him on what appeared on the tapes regarding Arrington. (278:47, 52-53; App. 158, 163-64).

At the postconviction hearing, Arrington testified that the three conversations Miller recorded all occurred between the metal door of a jail cell that had a window and a trap opening. (278:62, 64-66). At that time, Arrington was allowed out of his cell one hour a day and Miller was allowed out four hours a day. (278:62-63). On April 11 and 13, the conversations began when Miller approached Arrington's cell door, and on April 12, Miller called Arrington over to his cell while Arrington was in the day room. (278:64-66). While Arrington was speaking to Miller at the jail, he did not know that Miller was an informant for the police, and he did not

know Miller was wearing a recording device. (278:63-64).

Detective Wanta testified that he understood Miller was seeking consideration in his pending cases in exchange for his work as a confidential informant when he made the recordings. (278:32, 41; App. 143, 152). Wanta and Linzmeier were trained that the specifics regarding consideration would come from the district attorney "based on what the confidential informant actually did." (278:32, 42, 58; App. 143, 153, 169). The understanding was that the more the informant produces, the more the informant might get. (278:32; App. 143). Wanta testified that they told Miller that "the information he would gather would, again, be used as part of his consideration." (278:43; App. 154).

Ultimately, the state provided Miller specific consideration for his work as an informant, including for the information he obtained in the recordings with Arrington. (237; 275:4-5; App. 179). Miller had three pending cases in Brown County. The state had charged him with eight crimes, all drug related, in Case No. 14-CF-177, one count of intimidation of a victim in Case No. 15-CF-1365, and one count of possession with intent to deliver cocaine in Case No. 15-CF-1366. (237; 275:4-5; App. 179). Under the agreement, Miller, who had 13 prior convictions, would plead to five counts without the repeater enhancers, the state would dismiss the other five counts, and the state agreed to cap its recommendation at six years' initial confinement and

ten years' extended supervision. (237; App. 179). The agreement contemplated that Miller would give "a full debrief and testify" against Arrington and Powell. (237; App. 179).

Arrington's trial counsel, Michael Hughes, testified that he had copies of Miller's recordings with his client quite some time before trial. (278:6). He had reviewed them before trial and was aware that Miller was acting as a confidential informant for the police. (278:7, 19, 23). Attorney Hughes testified that he had not considered whether the statements were obtained in violation of Arrington's right to counsel, and he had not researched the question. (278:11, 21-22). He testified that if he had identified the claim, he "likely would have" filed a motion seeking to suppress the statements that Miller obtained from Arrington. (278:11).

ARGUMENT

I. The state violated Mr. Arrington's right to counsel by outfitting a confidential informant, who was a jail inmate, with a recording device and authorizing the informant to secretly record his conversations with Arrington, against whom the state had filed a criminal complaint.

A. The state's conduct violates long-standing principles set forth by the United States Supreme Court.

The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution "is indispensable to the fair administration of our adversarial system of criminal justice." *Maine v. Moulton*, 474 U.S. 159, 168 (1985). The right is equally protected by Article I, § 7 of the Wisconsin Constitution. *State v. Anson*, 2002 WI App 270, ¶9, 258 Wis. 2d 433, 654 N.W.2d 48. Once the adversarial judicial process is initiated, the right applies to every critical stage of the criminal justice process, which includes interrogation by the state. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). In Wisconsin, the right to counsel is triggered by the state's filing of a criminal complaint or an arrest warrant. *State v. Forbush*, 2011 WI 25, ¶16, 332 Wis. 2d 620, 796 N.W.2d 741. At that point, the individual's position has changed from suspect to accused.

The protection is not limited to formal police interrogations. The United States Supreme Court has repeatedly held that the protection extends to "surreptitious interrogations" by individuals who are cooperating with police. *Massiah v. United States*, 377 U.S. 201, 202-04 (1964) (Sixth Amendment violation where police listened to the defendant's conversation with a cooperating co-defendant via a radio transmitter placed in the defendant's car); *Moulton*, 474 U.S. at 171 (Sixth Amendment violation where police placed a recording device in the informant's phone and outfitted him with a body wire

for a subsequent meeting with the defendant). In *Moulton*, the Supreme Court wrote:

> Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

Id. at 176 (internal citation omitted).

Significantly, the Supreme Court also found a Sixth Amendment violation in *United States v. Henry*, 447 U.S. 264, 266 (1980), where a jail informant agreed to "be alert" to any statements made by federal prisoners, including Henry. There, the informant was *not* outfitted with a recording device, and police specifically told the informant "*not* to initiate any conversation with or question Henry" regarding a bank robbery. *Id*. (emphasis added). Yet, the Supreme Court held that the conduct violated the Sixth Amendment, and, consequently, the government should not have been allowed to use at trial Henry's statements to the informant. *Id*. at 274. The court held that the government violates a defendant's Sixth Amendment right to counsel by "intentionally creating a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel …." *Id*.

These cases recognize that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Moulton*, 474 U.S. at 170. After all, what the government obtains in surreptitious questioning of a defendant after charging and without counsel "'might well settle the accused's fate and reduce the trial to a mere formality.'" *Id*., *quoting United States v. Wade*, 388 U.S. 218, 224 (1967).

These cases govern the result here. As this court previously noted, "[t]he United States Supreme Court has announced the law in this area." *State v. Lewis*, 2010 WI App 52, ¶1, 324 Wis. 2d 536, 781 N.W.2d 730. Under that law, the state violated Mr. Arrington's right to counsel when it used its confidential informant to obtain statements from Arrington and then used those statements against Arrington at trial. There is no dispute that Arrington's right to counsel had attached. The state had filed a complaint charging him with first-degree intentional homicide and, in fact, he had appeared in court with his attorney on that charge.

For the reasons shown below, this court must reject the circuit court's conclusion that Jason Miller – CI 355 – was not an agent of the state even though the state outfitted him with a recording device, authorized him to record his conversations with Arrington and then reviewed and secured those recordings as evidence against Arrington. Although the circuit court's findings of historical facts are

sustained unless clearly erroneous, applying those facts to the question whether "the informant's questioning has to be considered government interrogation" is a question of law reviewed independently. *Lewis*, 324 Wis. 2d 536, ¶16.

B. Miller was functioning as an agent of the state when he recorded his conversations with Arrington.

In *Lewis*, this court recognized that law enforcement may not use a surreptitious government agent – such as a fellow inmate – to deliberately elicit incriminatory statements from another inmate. The court held that to establish a constitutional violation there must be "evidence of some prior formal agreement—which may or may not be evidenced by a promise of consideration—plus evidence of control or instructions by law enforcement." *Lewis*, 324 Wis. 2d 536, ¶1. Both occurred here, where police equipped a jail inmate with a recording device and authorized him to record conversations with Arrington about the homicide with which he had been charged.

The evidence is undisputed that Miller, who had previously worked as a confidential informant, contacted the district attorney through his attorney looking to provide assistance in exchange for consideration on his own pending charges. In subsequent meetings between Miller and two detectives, including the lead detective in Arrington's case, a plan was devised in which Miller would wear a recording device strapped to his waist by jail staff

that the detectives authorized him to use to record conversations with Arrington and two other inmates.

Contrary to the circuit court's conclusion (247:4; App. 108), it matters not that Miller volunteered his services to the state. The Sixth Amendment bars the state from knowingly exploiting an opportunity to confront an accused without counsel. *Moulton*, 474 U.S. at 162-63, 176 (co-defendant and his attorney approached police about cooperating). The state did just that when it took up Miller's offer and not only authorized him to "confront" Arrington without his attorney present but even provided him with the equipment to memorialize the results of those confrontations.

The circuit court's conclusion that "Mr. Arrington was not the target of the investigation" (247:6; App. 110), is both clearly erroneous and legally immaterial. Although Powell and Moore were the initial targets, Arrington became a target when the detectives expressly authorized Miller to also record conversations with Arrington. Detective Wanta testified:

> A … what he said was that Mr. Arrington was talking with him and he believed that Mr. Arrington would tell him things about the case and he asked if he should record it. I said he could record conversations with Mr. Arrington.

(278:36; App. 147). Detective Linzmeier testified:

> A Mr. Miller informed us that Mr. Arrington was talking about his case. And he, I believe, or I recall Mr. Miller saying he didn't know why Arrington felt comfortable speaking with him but he did and he asked if he should record any of those conversations.
>
> Q And what did you tell him?
>
> A Yes.

(278:51; App. 162). Arrington was a target, but that fact is legally immaterial.

The Supreme Court has not held that an informant becomes a government agent only when instructed by police to get information about a particular defendant. As the Iowa Supreme Court concluded, the state cannot "prevent the formation of an agency relationship by seeking information about multiple persons or by letting loose an informant at large in the jailhouse." *State v. Marshall*, 882 N.W.2d 68, 101 (Iowa 2016). Referring to a case in which an informant was dubbed "the monsignor" because so many inmates confessed to him, the court wrote, "We do not think the United States Supreme Court intended to allow the states to employ informants such as 'the monsignor' to engage in wholesale violation of the right to counsel." *Id.*, *citing Commonwealth v. Moose*, 602 A.2d 1265, 1270 (Pa. 1992). Certainly, the state cannot evade the reach of the Sixth Amendment by authorizing its informant to record conversations with three inmates rather than just one. To conclude otherwise would sanction state

conduct which, rather than interfering with one person's right to counsel, interferes with the relationship between multiple defendants and their attorneys.

Even though this court recognized that a promise of consideration is not required to prove an agency relationship, *Lewis*, 324 Wis. 2d 536, ¶1, the evidence here is that consideration was expected and delivered. The record is clear that the detectives knew Miller was making the recordings with the expectation that he would receive consideration on his pending cases, that the more he produced the more consideration he would receive, and that his assistance would be shared with the district attorney's office, which it was. Subsequently, the state offered Miller a plea agreement dismissing multiple charges and making a specific sentencing recommendation contemplating a "full debrief and testimony on Powell and Arrington." (237; App. 179).

What occurred here is nothing like *Lewis*, where the court of appeals found no Sixth Amendment violation because Lewis' cellmate, a man named Gray, "acted purely on his own in the hope of getting further sentencing consideration …." *Lewis*, 324 Wis. 2d 536, ¶1. Gray was not equipped with a recording device, he was not an informant for any law enforcement agency in Wisconsin, and he had no contact with law enforcement until *after* he obtained information from Lewis. *Id*. at ¶¶5-9. Although Gray had at one time been an informant for the federal government, he had no such agreement with any

state agency in Wisconsin, and he obtained information from Lewis at the Kenosha County Jail without any prior contact with any state police or prosecutor. *Id*. Gray was not a government agent because there was just "'hope' and nothing else …." *Id*. at ¶23.

In contrast, Miller was not a lone wolf acting purely on his own, with no support from or control by law enforcement. Miller was acting under an agreement with the state, in which he agreed to record conversations with three inmates, including Arrington, on a device that was provided by the state, reviewed daily by the state and placed into the state's evidence. Miller, unlike the informant in *Lewis*, was an agent of the state.

C. Miller not only "stimulated" conversation, he asked Arrington questions about the homicide.

Contrary to the circuit court's conclusion (247:5; App. 109), it is immaterial that the detectives did not tell Miller what questions to ask of Arrington. The detectives authorized Miller to record conversations with Arrington because, as Miller told the detectives, Arrington was "talking about his case" and he believed Arrington would "tell him things about the case …." (278:36, 51; App. 147, 162). There was no need for the detectives to tell Miller what to talk to Arrington about. They all knew the information that was wanted: anything related to his pending homicide case.

The Supreme Court has made clear that police need not have directed its jailhouse informant about specific questions to ask or statements to obtain in order for the informant's work to constitute a Sixth Amendment violation. *Henry*, 447 U.S. at 271. Indeed, in *Henry*, police told the jail informant not to initiate any conversation, and in *Moulton* police specifically told the informant, who was wearing a body wire, not to attempt to question Moulton but, rather, to "just be himself" in the conversations. *Id*. at 266; *Moulton*, 474 U.S. at 165.

Nor does it matter whether the informant actually questioned the individual. It is enough if the informant made some effort to "stimulate conversations about the crime charged." *Henry*, 447 U.S. at 271 n.9. The recording of Miller's conversation with Arrington that the state used at trial shows that Miller did that and more.

In *Henry*, the FBI agents told their jailhouse informant, Nichols, who was not wearing a wire or recording device, "to be alert to any statements made by federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." *Id*. at 266. Although Nichols had not questioned Henry, it was enough that he had "stimulated" conversation and Henry's incrimatory statements were the product of the conversation. *Id*. at 271, 273. As the Supreme Court noted, Nichols was not "a passive listener" but, rather, he had some conversations with Henry while he was in the jail. *Id*. at 271. *Contrast Kuhlmann v. Wilson*, 477 U.S.

436, 460 (1986) (jailhouse informant asked no questions but only listened to defendant's spontaneous and unsolicited statements).

Here, Miller not only stimulated conversations with Arrington, he maintained those conversations over long periods on three separate days, and Miller *did* ask Arrington specific questions, including questions about the shooting that elicited some of the most damning statements. It was after Miller asked if Shorty was acting like a beast that Arrington said, "Yeah. That's what added the fuel to the fire …." (234:5; App. 175). Arrington said all he could "picture" was Shorty "stabbing me in my face" in response to Miller's question, "What, he was talking shit?" (234:22; App. 177). After commenting on Arrington's bad aim, Miller asked if Shorty jumped, eliciting Arrington's statement that he "just dumped the crib down". (234:22-23; App. 177-78). Even more so than in *Henry*, these conversations amount to "'indirect and surreptitious interrogations.'" *Henry*, 447 U.S. at 264, *quoting Massiah*, 377 U.S. at 206.

It is significant that the government's informant obtained Arrington's incriminating statements while he was incarcerated. The Supreme Court noted that "'confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents,' influences that were facilitated by Nichols' 'apparent status as a person sharing a common plight.'" *Moulton*, 474 U.S. at 173, *quoting Henry*, 447 U.S. at 274. Indeed, the prosecutor

acknowledged at trial that 29-year-old Miller, who had 13 prior convictions, was "pretending to be a good guy or a friend" and advisor to 20-year-old Arrington. (275:152)(*see also* 275:146, "you were seeking his advice" & 276:60, "this guy he's talking to at the jail for advice").

Miller was not a passive listener. He initiated each conversation with Arrington, who was allowed out of his cell only one hour a day. Twice, Miller approached Arrington's cell door and began speaking with him, the first time asking if Arrington wanted a magazine. The other time Miller called Arrington over to his cell from the day room. Like Nichols, Miller "managed to gain the confidence" of Arrington, *Henry*, 447 U.S. at 274, but here, the confidant, Miller, was secretly wearing a recording device that was provided by police and returned to police with Arrington's incriminating statements.

The state's conduct is not only a violation it's a flagrant violation of the right to counsel. Mr. Arrington is not aware of any reported case from anywhere in the country where a court has sanctioned the sort of conduct that occurred here, that is, where the government outfits an informant/inmate with a recording device and authorizes the informant to use it to record conversations about a crime with an inmate who has been charged with that crime and is represented by counsel. The circuit court's rejection of Arrington's claim because it believed Miller was not an agent of the state must be rejected.

II. The state's flagrant violation of Mr. Arrington's right to counsel warrants a new trial as plain error or due to ineffective assistance of counsel.

Because the state violated Mr. Arrington's right to counsel when it used its confidential informant to secretly record conversations with Arrington, the state should not have been able to use those statements at trial. The statements should have been suppressed because, as noted by the Supreme Court, this is not a situation where the constable "'blundered'" … it is one where the "'constable' planned an impermissible interference with the right to the assistance of counsel." *Henry*, 447 U.S. at 275. However, trial counsel failed to seek suppression or otherwise object to Miller's testimony at trial. He simply missed the issue. Although it was the state that violated Arrington's Sixth Amendment right, counsel's omission deprives Arrington of a remedy for the violation unless the claim is reached as plain error or due to ineffective assistance of counsel. Given the flagrancy of the violation and its prejudicial impact, Mr. Arrington is entitled to a new trial under either ground.

A. The state's conduct amounts to plain error, necessitating a new trial without the illegally obtained evidence.

Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to preserve the

error. *State v. Davidson*, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. Under the plain error doctrine in Wis. Stat. § 901.03(4)[4] a conviction may be vacated when an unpreserved error is fundamental, obvious and substantial. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "'[W]here a basic constitutional right has not been extended to the accused,' the plain error doctrine should be invoked." *State v. Lammers*, 2009 WI App 136, ¶13, 321 Wis. 2d 376, 773 N.W.2d 463, *quoting Virgil v. State*, 84 Wis. 2d 166, 195, 267 N.W.2d 852 (1978).

If a defendant shows that an unobjected to error is fundamental, obvious and substantial, the burden shifts to the state to show beyond a reasonable doubt that the error was harmless. *Jorgensen*, 310 Wis. 2d 138, ¶23.

The erroneous admission of Arrington's statements, which the state obtained in violation of his right to counsel, warrants reversal as plain error. The erroneous admission of evidence has been held to amount to plain error requiring reversal of criminal convictions. *Id. at* ¶¶53-54 ("jury heard inadmissible, prejudicial evidence that violated Jorgensen's right to confrontation and due process"); *McClelland v. State*, 84 Wis. 2d 145, 162, 267 N.W.2d 843 (1978) (extrinsic

[4] The statute provides, "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Wis. Stat. § 901.03(4).

evidence showed the defendant was a violent person "who would seek self-help at the point of a gun"). The state's conduct here likewise requires reversal as plain error.

Where, as here, the plain error involves the violation of a constitutional right, the issue presents a question of law reviewed de novo. *State v. Bell*, 2018 WI 28, 380 Wis. 2d 616, ¶8, 909 N.W.2d 750.[5]

1. The error is fundamental, obvious and substantial.

Few rights are more important to the accused than the right to counsel guaranteed by the Sixth Amendment and Article I, § 7. It is a "fundamental right." *Forbush*, 332 Wis. 2d 620, ¶13, *citing Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). Once the judicial proceedings have begun, the adverse positions of the state and defendant have solidified, and a defendant is "'faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Moulton*, 474 U.S. at 170, *quoting United States v. Gouveia*, 467 U.S. 180, 189 (1984). At that point, the Sixth Amendment guarantees the accused the right to rely on counsel as a "medium" between him and the state. *Forbush*, 332 Wis. 2d 620, ¶13, *citing Moulton*, 474 U.S. at 176. And "at the very least, the prosecutor and police have an affirmative obligation

[5] The circuit court did not address Mr. Arrington's plain error claim, given its conclusion that Miller was not functioning as an agent for the state.

not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171.

The state's violation of Mr. Arrington's right to counsel is also obvious given the Supreme Court's decisions in the trilogy of *Massiah*, *Moulton* and *Henry*. The Supreme Court wrote:

> Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.

Massiah, 377 U.S. at 205 (citation omitted). In *Henry*, the Supreme Court applied that principle to statements obtained by a jail informant and held that the statements were obtained in violation of Henry's Sixth Amendment rights. *Henry*, 447 U.S. at 274. It reached that holding even though, unlike here, the government had not outfitted the informant with a recording device and had specifically told the informant not to initiate any conversation with Henry about the crime with which he was charged. *Id*. at 266. What occurred here is more egregious, making the violation of Mr. Arrington's right to counsel both obvious and substantial.

2. The state cannot prove the error harmless.

The erroneous admission of Miller's testimony and recordings is harmless only if the state can prove beyond a reasonable doubt that a rational jury would have found Arrington guilty absent the error. *Jorgensen*, 310 Wis. 2d 138, ¶23. Any claim by the state that it can meet that heavy burden is inconsistent with its heavy reliance on that evidence at trial.

Through Miller's testimony and recordings the state was able to place before the jury evidence from Arrington's own mouth contradicting his theory of defense and his testimony at trial. Arrington's words, recorded 11 days after the shooting, undermined the claim that he fired in self-defense and that it was Shorty who actually shot Mr. Gomez. The state made that point by calling Miller as its final witness, playing portions of the recordings for the jury, challenging on cross-examination of Arrington his contradictory statements to Miller, and highlighting in closing arguments the statements that, unknown to the jury, were unlawfully obtained.

Countering Arrington's claim that he was frightened of Shorty and fired in self-defense, the state elicited from Miller testimony that Arrington was laughing about Shorty being scared when they stole his gun and joking about how he had embarrassed Shorty in front of his girlfriend. The jury heard that the two talked about having to

convince "the bitch" who was in the car with Arrington to not come to court and how he had wiped down the car to hide gunshot residue.

Miller testified that Arrington did not tell him that he saw Shorty with a gun, that Shorty fired a gun or that it was actually Shorty who shot Mr. Gomez. Rather, on the recording the jury heard Arrington tell Miller that when he pulled up he saw Shorty "acting like a "gorilla", which is "what added fuel to the fire …." Arrington said "[a]ll I could picture was this nigger stabbing me in the face" and that's when "I just dumped the crib down …." Miller translated that last phrase to mean Arrington kept shooting at the house. When Miller chided Arrington that "your aim ain't shit", Arrington said "[i]t wasn't that" …. Shorty ducked away and Gomez got hit. (234:22-23; 275:18-19).

Not surprisingly, the prosecutor spent considerable time in his cross-examination of Arrington highlighting the inconsistencies between what he told Miller and what he told both Detective Linzmeier and the jury. The prosecutor was able to show that rather than being scared of Shorty, Arrington was making fun of him on the recording:

> Q I heard you laughing on there about Shorty, kind of making fun of him when he was, during that robbery, had to go ask a girl, I guess you called her a bitch, to go get the other gun, you thought that was kind of funny?

A If that's how you want to put it.

Q Is that the guy you were scared of, the guy you were making fun of on the audio tape there?

A Yes.

(275:118). Shorty's gesture on the porch made Arrington angry – added "fuel to the fire" and that's why he shot:

Q So he's acting like a beast, adding fuel to the fire just means making the situation worse and ticking you off, right?

A That the way you could interpret it.

(275:153). Referring to the tape, the prosecutor contradicted Arrington's testimony that he fired three shots toward the "feet area of the porch" (275:95):

Q And you went on to describe talking to Jason Miller, that you shot – basically shot and Shorty ducked away; is that right?

A I believe so, yes.

. . .

Q And you said, "Actually, I dumped the crib down because I don't know if he's going to come back and dump down on me"; is that right?

A Yes.

> Q So at that point, when you start shooting at the house, you even said you don't even know if he's going to shoot back?
>
> A Which means I was trying to prevent him from shooting back.
>
> Q This is like a preventive attack ….

(275:157-58). Significantly, the state highlighted that Arrington did not tell Miller that Shorty shot Mr. Gomez:

> Q I bet when you talked to him, you told him, "Hey, I didn't even kill the guy, his own friend shot him," I bet you told him, though, right, because you were seeking advice, you told him that?
>
> A No, I did not tell Jason Miller that.

(275:146).

The state didn't stop there. In closing argument the prosecutor highlighted Jason Miller, its final and unimpeachable witness.

> Last witness [w]as Justin [sic] Miller. Now, I think what's fortunate in that case is, you know, a lot of times defense lawyers will attack people and say they're lying, they have motives to lie or reasons, and the problem they have with Justin [sic] Miller, though, is we got the recording. We don't just have, right, Justin [sic] Miller, who was in jail with him, saying I'll tell you what he had to say.

(276:58-59). The prosecutor reiterated what the jury heard on the tapes, describing Miller as "an older type guy" who "plays along" with Arrington while wearing the recording device. (276:59). He argues that Arrington's "really mad" when Shorty mocks him from the porch and all he could picture was Shorty cutting him in the face. "So yeah, he wants to kill him." (276:60). Referring to Arrington's statement to Miller that he "'dumped down on the crib'", the prosecutor asked jurors, "Does any of that sound like self-defense?" (276:60).

The prosecutor went on to remind the jury what Arrington did *not* say to Miller.

> He never mentions to this guy he's talking to at the jail that Shorty had a gun. He never mentioned to this guy he's talking to at the jail for advice that someone else had a gun, that someone else shot somebody. None of that.

(276:60). Shortly thereafter, the prosecutor asked the jury to find Arrington guilty of first-degree intentional homicide, as well as felon in possession of a firearm. The jury did just that.

On this record, the state cannot prove beyond a reasonable doubt that its use at trial of the statements its informant unlawfully obtained from Mr. Arrington was harmless beyond a reasonable doubt. The state's flagrant violation of Arrington's right to counsel constitutes plain error requiring a new trial and suppression of the recordings and any

testimony about statements obtained by Miller from Arrington.

B. Counsel's failure to seek suppression or otherwise object to admission of the unlawfully obtained statements deprived Arrington of effective assistance of counsel.

If relief is not granted as plain error, the court should hold that counsel's failure to seek suppression or otherwise object to admission of Miller's testimony and recordings violated Mr. Arrington's right to effective assistance of counsel guaranteed by the Sixth Amendment and Article I, § 7. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. "'Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly.'" *State v. Coleman*, 2015 WI App 38, ¶20, 362 Wis. 2d 447, 865 N.W.2d 190, *quoting State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983).

In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient and that he was prejudiced by the deficient performance. *Thiel*, 264 Wis. 2d 571, ¶18, *citing Strickland*, 466 U.S. at 687. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.* at ¶19. Counsel's omission is prejudicial if there

is a reasonable probability that, but for the error, the result of the proceeding would have been different. *Id*. at ¶20. This is not an outcome determinative standard. *State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). Rather, a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Thiel*, 264 Wis. 2d 571, ¶20. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *Id*., *quoting State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

Whether counsel was ineffective is a mixed question of law and fact. *State v. Guerard*, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. The circuit court's factual findings will not be disturbed unless clearly erroneous, but the ultimate issues of whether counsel's performance was deficient and prejudicial are reviewed independently. *Id*.

1. Deficient performance.

If this court agrees that the state's use of its confidential informant to obtain and record Arrington's statements violated his right to counsel, the question of deficient performance is easily resolved. The circuit court said nothing as to the deficiency prong other than, "There is no ineffective assistance of counsel based on my decision about the sixth amendment." (247:9; App. 113).

Even though counsel said at trial that he had the recording "for quite some time" and had reviewed it "long before trial" (275:7), he did not move pretrial

to suppress the statements nor did he object at trial to Miller's testimony. The evidence is undisputed that counsel simply missed the issue.

Counsel testified at the postconviction hearing that he knew the recordings were made by a confidential informant for the state – CI 355 – who was Jason Miller and that the conversations occurred *after* the state had filed the criminal complaint against Arrington. (278:8-10). Counsel said he had not considered whether the statements were obtained in violation of Arrington's right to counsel and he had not researched the question. (278:11, 21-22). When asked if he would have sought to suppress the statements had he identified the claim, counsel testified that he "likely would have" and, "I believe I would have, yes." (278:11, 22). Counsel had no strategic reason for not seeking to exclude the statements and recording; he just missed it.

Counsel performed deficiently because a motion to suppress Arrington's statements would have been well supported by case law, as shown in the preceding section, and should have prevented the state from using those statements in its case-in-chief. Further, had the statements been suppressed, it likely would have altered Arrington's decision about whether to testify at trial given that the jury would not have been able to hear those statements at all if he did not testify. *See Kansas v. Ventris*, 556 U.S. 586, 594 (2009) (informant's testimony obtained in violation of the Sixth Amendment was admissible to impeach defendant's inconsistent testimony at trial).

After all, the jury would have been able to hear Arrington's version of what occurred without him having to testify. This is true, in part, because Arrington's testimony largely matched the statement he gave to Detective Linzmeier about a year after the shooting and six months before trial. In its case-in-chief, the state called Detective Linzmeier as a witness and asked him to read the written statement obtained from Arrington. (167; 274:103-07). In that statement, Arrington said that when he saw Shorty reaching for his waistband he fired three shots out the front passenger window, in front of A.T., hitting the front porch. (274:106). He said Shorty fired a shot toward him that hit Mr. Gomez. (274:107). He also described the incidents in which Shorty was robbed of his gun and Shorty cut him with a knife. (274:104-06). Consequently, it would not have been necessary for Arrington to testify in order for the jury to hear Arrington's description about why he shot toward the house and that Shorty not only had a gun, he fired the gun and it was Shorty's bullet that killed Mr. Gomez.

On this record, where counsel failed to identify an issue that is well supported by case law and that would have kept devastating evidence from the jury, counsel performed deficiently by failing to move to suppress or otherwise object to the recordings and Miller's testimony.

2. Prejudice.

Arrington was prejudiced by counsel's failure to seek exclusion of Miller's testimony and the recordings. The question of prejudice is not a review of the sufficiency of the evidence. *State v. Sholar*, 2018 WI 53, ¶¶44-46, 381 Wis. 2d 560, 912 N.W.2d 89. "Even where the evidence is sufficient to sustain the conviction, when a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined." *Marcum*, 166 Wis. 2d at 917.

Although the state's evidence was solid as to the fact that Arrington fired shots from the car, it relied upon Arrington's statements to Miller to convince the jury that Shorty had no gun and Shorty did not shoot Mr. Gomez but, rather, Arrington fired the shots at Shorty, not out of self-defense or fear but in retaliation, and hit Mr. Gomez instead. As shown above, the state relied heavily on the statements obtained by Miller to help fill holes in its case.

The state was missing a critical witness, Shorty. Given what the jury had heard about Shorty – carrying a machine gun, cutting Arrington with a knife – the prosecutor had little choice but to concede in closing argument that "Shorty's probably not a nice guy and he probably still doesn't like Arrington, right?" (276:47). Given his penchant for weapons and violence, it's not implausible that Shorty had a gun, fired the gun toward Arrington and hit his

friend by mistake. Moreover, of all of the 42 witnesses at trial, only four – Taylor, A.T., Landrum and Arrington – actually witnessed the shooting. A.T. testified that it looked like Shorty was reaching for something when he opened the door. (271:184-85) Landrum testified that as Shorty opened the door for Mr. Gomez, Shorty was "reaching for his waist for something which appeared to be a weapon." (275:48). Although Taylor said he didn't see Shorty reach for anything, Taylor testified that he didn't actually see Arrington fire any shots. (271:102). Moreover, the reliability of Taylor's testimony was in doubt because he said that Mr. Gomez was shot twice in the back, contrary to the autopsy which showed that he was shot once in the chest. (271:62, 69; 273:14-15). The statements Miller obtained from Arrington undermined other evidence creating reasonable doubt that it was not Arrington, but Shorty, who killed Mr. Gomez.

As the prosecutor conceded in closing argument, "[s]cience in this case hasn't been able to prove anything really for sure." (276:124). Consistent with Arrington's testimony that he fired toward the feet area of the porch, an officer testified that bullet holes found on or near the porch were all at the feet or below where anyone would have been standing. (271:130-31). Although an expert testified about gunshot residue found on Mr. Gomez's jacket, she could not determine the distance from which the bullet was shot that penetrated the jacket. (274:153, 161). It could have been fired from a distance or from close range. (*Id.*).

Because, as argued by defense counsel, the state's citizen witnesses amounted to "a series of self-serving criminals" (276:77), counsel was able to impeach many of those witnesses with their prior convictions and motives to fabricate. For example, Taylor had seven convictions, Lawrence Hawkins, who claimed to see Arrington outside Taylor's home the afternoon of the shooting, had 19 convictions (271:221), and Eugene Herrod had six convictions. (271:266). In addition, Herrod, who had loaned the rental car to Arrington and claimed Arrington said he "fanned Shorty down" (271:260), testified that he was pressured by police – "I had got locked up three times" (271:164) – before making that statement.

Counsel was also able to impeach the credibility of two men – Allen and Howard – who testified that after the stabbing Arrington made comments threatening retaliation. Allen had nine prior convictions and Howard had 21. (274:200, 207). Even more importantly, counsel showed that both had pending federal charges and the government had promised consideration on those charges in exchange for their testimony against Arrington. (274:200-01, 207-09).

Even though Miller also had a prior record and was promised consideration for his testimony, his testimony about Arrington's statements was unimpeachable because the state had the recordings of those conversations. As the prosecutor told the jury, "what's fortunate … is we got the recording", which prevented Arrington's counsel from doing what

defense lawyers do, which is to "attack people and say they're lying, they have motives to lie or reasons …." (276:58). The prosecutor was right. Counsel had no credible way to attack Miller's credibility or the recordings. Counsel argued only that the recording were poor quality, "muddled garbage," consisting of "idle chitchat" that "doesn't change anything." (276:98-99).

The reality is that the recordings spoke volumes. The jury heard that, just five days after turning himself in, Arrington told Miller he "dumped the crib down" because he was ticked off about Shorty stabbing him, and he didn't tell Miller that Shorty shot Mr. Gomez, that he saw Shorty with a gun, or even that he saw Shorty reaching for what he thought was a gun. None of that should have gotten before the jury because the state obtained those statements in violation of Arrington's right to counsel.

Counsel's deficient performance in failing to have Miller's testimony and the recordings suppressed undermines confidence in the outcome of the trial.

CONCLUSION

For the reasons set forth above, Mr. Arrington respectfully requests that the court reverse the judgments of conviction and order denying his postconviction motion. Further, the court should remand with directions that the statements obtained

and recordings made by the state's informant be suppressed and that Mr. Arrington receive a new trial.

Dated this 20th day of February, 2020.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,090 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 20th day of February, 2020.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of February, 2020.

Signed:

_____

SUZANNE L. HAGOPIAN
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX