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SUPREME COURT

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2019AP2065 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

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# RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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## REASONS FOR DENYING REVIEW

### I. The court should deny review because the court of appeals applied well-established precedent, much of it from the United States Supreme Court, and correctly held that the state's conduct of equipping a jail informant with a recording device and authorizing him to record conversations with Arrington about his pending criminal case violated the Sixth Amendment.

The state frames its petition for review around the claim that this case presents an unsettled legal question. The state is wrong. First, the state ignores long-standing precedent from the United States Supreme Court, which the court of appeals correctly applied to this case. Second, the state fails to recognize that what is "novel" about this case is that the government's conduct – equipping a jail informant with a recording device and authorizing him to secretly record conversations with other inmates whose right to counsel had attached – was a flagrant violation of the Sixth Amendment's protections as enunciated by the Supreme Court. This was not a close call, the law is not unclear, and, in finding a Sixth Amendment violation, the court of appeals correctly applied well-established, binding legal principles to the egregious facts of this case.

A. The governing principles are clear from the Supreme Court cases the state has chosen to ignore.

In an earlier Wisconsin case involving statements obtained by a jail informant, the court of appeals correctly observed that "[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. Here, the court of appeals applied that law – specifically, four Supreme Court cases spanning 20 years – in determining that Mr. Arrington's Sixth Amendment right to counsel was violated. *State v. Arrington*, No. 2019AP2065-CR, slip op., ¶¶24-27 (Wis. Ct. App. April 6, 2021) (App. 101-23). In its petition, the state ignores the Supreme Court cases, while declaring the law unsettled.

At issue is the right to the assistance of counsel that is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution once the adversarial judicial process has begun and an individual goes from suspect to accused. 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.

The Supreme Court has been steadfast that once the right to counsel attaches, the Sixth

Amendment guarantees the accused the right to rely on counsel as a "medium" between him and the state. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). "[A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id*. at 171.

The protection is not limited to formal police interrogations but extends to "surreptitious interrogations," which include conversations secretly recorded by an individual who is cooperating with police. *Id*. at 176 (Sixth Amendment violated 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); *Massiah v. United States*, 377 U.S. 201, 202-04 (1964) (Sixth Amendment violated where police listened to the defendant's conversation with a cooperating co-defendant via a radio transmitter placed in the defendant's car).

The Supreme Court instructed that while 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", "knowing exploitation by the State of an opportunity to confront the accused without counsel is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity." *Moulton*, 474 U.S. at 176.

Regarding the use of jail informants, the Supreme Court held that the government violates the Sixth Amendment by "intentionally creating a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel …." *United States v. Henry*, 447 U.S. 264, 274 (1980). There, a jail informant agreed to "be alert" to any statements made by federal prisoners, including Henry. 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*. at 266 (emphasis added). Nevertheless, the Supreme Court held that the government's 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 174; *contrast Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (no violation because no showing that police and informant took some action, beyond merely listening, that was designed to elicit incriminating statements).

This line of cases – *Massiah*, *Moulton*, *Henry* and *Kuhlmann* – establishes the law governing Mr. Arrington's case, as the court of appeals correctly recognized. Only by ignoring this precedent can the state claim that this case presents an unsettled legal question.

B. The only novel aspect of this case is how flagrantly the state violated the Sixth Amendment protections.

In its petition, the state notes that in his court of appeals brief Mr. Arrington sought oral argument and publication because the issue was "novel but not isolated." (Brief-in-chief, p. 2). The issue was not isolated because the state had used the informant to obtain statements against at least one other inmate. (*Id*.). The novelty of the issue is the flagrancy of the violation, which the court of appeals correctly addressed in its decision which is recommended for publication.

As Arrington noted in his brief-in-chief (p. 28), he is not aware of any reported case from anywhere in the country where a court has sanctioned the sort of conduct that occurred here. The evidence is undisputed that two detectives, one of whom was the lead detective in Arrington's case, met with an inmate, Miller, who had previously worked as a confidential informant (CI) and was offering his services again. The three devised a plan under which the detectives supplied a recording device that jail staff strapped to Miller's waist on three days for the purpose of secretly recording conversations with inmates about their pending cases. The detectives expressly authorized Miller to record conversations with Arrington, against whom the state had filed a complaint charging him with homicide and who had appeared in court with an attorney on that charge.

Each day, a detective listened to the recordings obtained by their CI and secured the contents into evidence, which were subsequently used at Arrington's trial.

The government's conduct was a clear violation of the Sixth Amendment's guarantees enunciated by the Supreme Court. The court of appeals correctly held that "[w]hat occurred here was the intentional, surreptitious creation of an opportunity to confront Arrington without counsel present." *Arrington*, slip op., ¶36 (App. 117). Citing *Henry*, the court concluded "the detectives' actions violated the Sixth Amendment because they created a situation likely to induce Arrington to make incriminating statements without his counsel's assistance." *Id*. Quoting *Kuhlmann*, the court concluded, "Law enforcement and Miller took action 'beyond merely listening, that was designed to elicit incriminating' statements for use against Arrington." *Id*., *citing Kuhlmann*, 477 U.S. at 459. Review is unwarranted because the court of appeals' holding is compelled by Supreme Court precedent.

C. The court of appeals' holding does not conflict with *Lewis*.

The state's claim that review is warranted because the court of appeals' decision conflicts with *Lewis* is without merit. The court of appeals correctly applied the standard set forth in *Lewis* in concluding that Miller was acting as an agent of law enforcement

when he recorded his conversations with Arrington. *Arrington*, slip op., ¶¶28-37 (App. 114-18).

In *Lewis*, the court of appeals addressed whether inculpatory statements made by a represented defendant to a jailhouse cellmate violated the defendant's Sixth Amendment rights. The court of appeals found no 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.

The court of appeals held that establishing an agency relationship "requires 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." *Id*. at ¶1. Where, as in *Lewis*, "there is just 'hope' and nothing else," the jailhouse informant is not a government agent. *Id*. at ¶23.

Here, the court of appeals correctly concluded that both prongs were satisfied. The attempt to gain information from inmates, including Arrington, was "planned between Miller and law enforcement in advance." *Arrington*, slip op., ¶32 (App. 116). As part of the planning, Miller agreed to wear a

recording device, and the detectives expressly authorized Miller to record conversations with Arrington.

The state claims there was no prior formal agreement because "Miller was not told of any contemplated consideration until well *after* the recordings were made." (State's petition, p. 14). That assertion is both legally and factually incorrect.

First, evidence of consideration is not required in order to have a prior formal agreement. Under *Lewis*, "some prior formal agreement … *may or may not* be evidenced by a promise of consideration …." *Lewis*, 324 Wis. 2d 536, ¶1 (emphasis added).

Second, as to the facts, the record shows that consideration was contemplated and given. The circuit court found that the detectives knew Miller was seeking consideration for his work. *Arrington*, slip op., ¶34 (App. 116). The detectives told Miller that "'the information he would gather would … be used as part of his consideration.'" *Id.* The understanding was the more Miller produced the more consideration he might get. (278:32). In fact, the state ultimately provided Miller consideration by offering him a plea agreement on his pending charges that contemplated a "full debrief and testimony" on Arrington. (237).

The state also claims there was no police control or instructions because the detectives did not

tell Miller what questions to ask. (State's petition, p. 14). In *Lewis*, the court wrote that as long as the police "*do nothing to direct or control or involve themselves in*" the questioning of a person in custody by a private citizen, there is no Sixth Amendment violation. *Lewis*, 324 Wis. 2d 536, ¶25, *quoting United States v. Surridge*, 687 F.2d 250, 255 (8th Cir. 1982) (emphasis added in *Lewis*). As the court of appeals recognized here, the detectives did a lot more than nothing.

> … law enforcement outfitted Miller with a recording device in order to create recordings of information obtained from Arrington. Officers then planned to retrieve the recordings, preserve them as evidence, and then refit Miller with the recording device the next day. The record further shows that Miller initiated the conversation with Arrington on each occasion with the officers' full knowledge. Moreover, both Miller and law enforcement knew that Miller was attempting to obtain information on Arrington's case. Although Miller was not told what to say or ask, the detectives new that Arrington would talk to Miller about his case, and they were interested in recording those conversations.

*Arrington*, slip op., ¶33 (App. 116).

The court of appeals correctly applied *Lewis* and the Supreme Court precedent upon which the *Lewis* agency standard is based when it held that "[t]he conduct by the detectives here is the very conduct that is prohibited by [those] cases."

*Arrington*, slip op., ¶35 (App. 117). Review is unwarranted because the court of appeals applied well-established precedent to the egregious conduct in this case and correctly held that Mr. Arrington's right to counsel was violated.

## II. Whether trial counsel was ineffective in failing to move to suppress or otherwise object to Miller's testimony and the recordings satisfies none of this court's criteria for granting review.

The state claims that review is warranted because the court of appeals erroneously determined that trial counsel was ineffective for failing to raise a novel issue involving "unsettled law." (State's petition, pp. 9-11). As shown above, the law governing Arrington's claim is not unsettled and the novelty is the flagrancy of the violation. The state presents no credible argument suggesting, much less establishing, that any of the criteria for granting review under Wis. Stat. § (Rule) 809.62(1r) is satisfied. What's left is the state's dissatisfaction with the result. But there is no error to correct, even if this court were an error-correcting court, which it is not.

As shown above, the court of appeals correctly held that admission of the recordings and Miller's testimony about the recordings "constituted a clear violation of Arrington's Sixth Amendment right to counsel." *Arrington*, slip op., ¶44 (App. 120). As the court concluded, the record shows that trial counsel

"simply missed the issue." *Id.* at ¶41 (App. 119). Counsel testified at the *Machner*[1] hearing that although he had the recordings "for quite some time" and reviewed them "long before trial" (275:7), 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). The court of appeals correctly held that counsel's failure to seek to exclude the recordings was not strategic and "fell far below an objective standard of reasonableness." *Arrington*, slip op., ¶44 (App. 120).

The court of appeals also correctly held that prejudice was proven because "the recordings and statements eliminated any self-defense that Arrington could make, which was the only defense he had at trial." *Id.* at ¶46 (App. 121).

The evidence was undisputed that Arrington fired three or more gunshots toward the front of a house where the victim, Ricardo Gomez, was standing near another man nicknamed "Shorty" who had recently attacked Arrington. In dispute was whether, as the state maintained, Arrington fired the shots intending to kill Shorty in retaliation but instead hit Mr. Gomez, or, as Arrington testified, he

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

fired in self-defense because he saw Shorty reaching for a gun and it was Shorty's bullet that struck and killed Mr. Gomez.

Through the recordings and Miller's testimony, in which Miller interpreted for jurors the profanity and slang laced recordings, the jury learned that Arrington said he "dumped the crib down" – kept shooting at the house – because he was angry at Shorty. (275:28). 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. (275:19-21).

Most importantly, the jury learned what Arrington did *not* say when Miller recorded their conversation just days after the shooting. 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. (275:19, 28, 30).

As the court of appeals correctly concluded, "there was some evidence supporting Arrington's self-defense claim making counsel's failure to object to the admissibility of the recordings all the more prejudicial." *Arrington*, slip op., ¶47 (App. 121-22). Of the state's witnesses at trial, only four were present at the shooting, and three of those witnesses testified they saw Shorty reaching for something. (271:185; 274:106; 275:49-50). The fourth did not see

Arrington fire any shots and, contrary to the autopsy, believed Mr. Gomez was shot twice in the back, casting doubt on the reliability of his testimony. In addition, as the prosecutor conceded at trial, "'[s]cience in this case hasn't been able to prove anything really for sure.'" *Arrington*, slip op., ¶47 (App. 21). An officer testified that bullet holes on or near the porch were all at foot level or below, confirming Arrington's testimony that he fired toward the foot area of the porch. (*Id.*). 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. (*Id.*). It could have been fired from a distance or from close range. (274:153, 161).

The court of appeals correctly held that counsel's deficient performance prejudiced Mr. Arrington.

This court should deny review because the court of appeals correctly applied well-established, binding precedent to reach its conclusions that the government's conduct violated Mr. Arrington's Sixth Amendment right to counsel and that his attorney's failure to seek exclusion of the unlawfully obtained evidence constituted ineffective assistance of counsel. The decision is recommended for publication, as Arrington requested, which should put to rest the tactic that had been used against him and at least one other inmate. Contrary to the state's claim, the governing law is neither unclear nor unsettled. The

state has not shown that the criteria for granting review are satisfied.

## III. If review is granted, Mr. Arrington will renew his claim of plain error as an alternative ground for affirming the court of appeals.

Pursuant to § 809.62(3)(d), Mr. Arrington alerts the court that an alternative ground for affirming the court of appeals exists, which is plain error. If, over Arrington's objections, the court grants review, he will renew the arguments made below that the state's use of its confidential informant to secretly record conversations with Arrington amounts to plain error.[2]

Under the plain error doctrine in Wis. Stat. § 901.03(4)[3] 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

[2] The trial court did not address plain error or ineffective assistance of counsel because it concluded the government's conduct did not violate Arrington's Sixth Amendment right to counsel. The court of appeals reversed due to ineffective assistance of counsel without addressing plain error.

[3] 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).

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).

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). The state's violation of Mr. Arrington's fundamental right to counsel is obvious given the Supreme Court's decisions in *Massiah*, *Moulton*, *Henry* and *Kuhlmann*, as well as the court of appeals' decision in *Lewis*. The Supreme Court has warned:

> 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.

Reversal of Arrington's conviction would be warranted on this ground as well because the state could not meet its burden of proving beyond a reasonable doubt that a rational jury would have found him guilty absent the error. *Jorgensen*, 310 Wis. 2d 138, ¶23 (burden to prove harmlessness shifts to the state once a fundamental, obvious and substantial error is established). Any claim by the state that it could meet that heavy burden is inconsistent with its heavy reliance on that evidence at trial.

Through the recordings and Miller's testimony, 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 eleven 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. The prosecutor gushed in closing about the good

fortune of having the unimpeachable recordings made by its final witness, Miller.

> 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 reminded 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. The jury did just that.

On this record, the state could not prove beyond a reasonable doubt that its use at trial of the statements its informant unlawfully obtained from Mr. Arrington was harmless. The state's flagrant violation of Arrington's right to counsel constitutes plain error, an alternative ground for affirming the decision of the court of appeals.

## CONCLUSION

For the reasons set forth, Mr. Arrington respectfully requests that the court deny the state's petition for review.

Dated this 17th day of May, 2021.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,764 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 17th day of May, 2021.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender

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