STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2065-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY A. HINKFUSS, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 294-2907 (Fax)
shaeffersl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ISSUES PRESENTED

A jury convicted Richard Michael Arrington of first-degree intentional homicide of Ricardo Gomez. It convicted Arrington after hearing overwhelming evidence that Arrington told or implied to numerous people that he was going to kill a different man, "Shorty," that Arrington drove to a place where he knew Shorty would be, and that he shot at Shorty immediately upon seeing him (hitting Gomez instead). The jury also heard evidence that Arrington told people after the homicide that he intended to shoot Shorty when he killed Gomez. At trial, Arrington offered a self-defense theory that would have required the jury to conclude that every other witness to the shooting was lying, including his own witness.

At trial, the State introduced testimony from a jail inmate regarding conversations that he had with Arrington about Arrington's case after Arrington was represented by counsel. The State also introduced excerpts of recordings of those conversations that the inmate had made, which the inmate then explained to the jury. Counsel chose not to object to the admission of the recorded statements.

1. Was counsel ineffective for not objecting to the admission of the recorded statements as having violated Arrington's Sixth Amendment right to counsel? Specifically:

a. In light of the overwhelming evidence of Arrington's guilt and the lack of support for his claim of self-defense, can Arrington demonstrate prejudice based on the jury's hearing the recordings?

b. Was counsel deficient for not objecting to the admission of the recordings where:

i. the circumstances by which the State obtained the recordings was novel and not clearly controlled by precedent?

ii. There was no express or implied agreement that the inmate was acting as an agent of the government when he created the recordings?

2. If the State violated Arrington's Sixth Amendment rights, was the admission of the recordings harmless where the recordings only marginally bolstered the inmate's testimony, there was overwhelming evidence of Arrington's guilt, and little evidence corroborating Arrington's proposed self-defense?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication.

STATEMENT OF THE CASE

A jury convicted Arrington of first-degree intentional homicide for the shooting death of Ricardo Gomez on April 2, 2016. (R. 276:143.) The charge arose after AVT[1], who was in Arrington's car when the shooting occurred, told police that Arrington parked his car in front of a house, that Gomez and a man known as "Shorty" were by the front door, and that Arrington fired three shots toward the house and drove away. (R. 2:2.) According to AVT, it was clear that Arrington had planned the crime, telling police that Arrington "knew what was going on and thought about this before we pulled up to the house." (R. 2:3.) AVT told police that after the shooting, Arrington threatened her and her family if she reported what she had seen. (R. 2:3.)

Arrington pleaded not guilty, and the case proceeded to trial.

[1] The State uses a pseudonym.

The jury trial

At trial there was no dispute that Arrington fired shots from the car towards the house where both Gomez and Shorty stood. (R. 275:96.) The State presented voluminous evidence of Arrington's guilt that included: evidence about the events preceding the homicide; testimony from people who witnessed the homicide; evidence of Arrington's threats and actions after the homicide; and testimony and recordings from a jail inmate.

Events leading up to the homicide:

The evidence at trial was undisputed that Arrington and Shorty had confrontations before the homicide, including a robbery and an assault. (R. 275:67, 81, 121.) Numerous witnesses offered uncontradicted testimony that days before the shooting, Arrington had a confrontation with Shorty, which culminated with Arrington expressing intent to retaliate against Shorty.

Craig Taylor testified that a couple of weeks before the shooting, Arrington robbed Shorty of Shorty's machine gun. (R. 271:45, 48–49.) Brittney Harris testified that about a week before the shooting, she was in a car with Arrington across the street from Taylor's house. (R. 273:123–24.) Shorty pulled up and attacked Arrington with a blade, cutting Arrington's lip. (R. 273:120–30.) James Allen testified that days before the homicide, Arrington told him that he had robbed Shorty and that Shorty had subsequently stabbed him in the mouth. (R. 274:196, 198.) Arrington told Allen, "I'm going to fuck [Shorty] up." (R. 274:198.)

Eugene Herrod ("Eugene") testified that Arrington told him about the robbery and a "drug deal gone bad" at Taylor's house. (R. 271:250.) Christopher Howard testified that he spoke to Arrington before the shooting. (R. 274:204–05.) Arrington told Howard that Shorty had stabbed him in the mouth and that Arrington was "highly upset." (R. 274:206.)

Arrington told Howard that he "was going to have to handle his business." (*Id.*) Brianna Brown testified that a couple days before the shooting, Arrington was mad because Shorty had cut him. (R. 273:61.) Arrington was walking around an apartment and "toting a MAC [10]," which looked like a machine gun. (R. 273:58–63.)

The homicide:

On April 2, 2016, Craig Taylor, Shorty and Shorty's girlfriend were at Taylor's house around 1:30 p.m. when Taylor looked out a window and saw Arrington getting out of a car across the street. (R. 271:50–52.) Taylor told Shorty what he saw and, out of worry that Shorty's and Arrington's "ongoing problems could lead to murder," told Shorty that Arrington may have a gun. (R. 271:53.)

Arrington's presence was inconsequential, at first. A man named Lawrence Hawkins came and left Taylor's house. (R. 271:54.) Shorty called Gomez to come to Taylor's house to play video games. (R. 271:55.) Still, just before Shorty called Gomez, Taylor saw Arrington "circling the block" in his car and "just had that look in his eye like he wanted to kill something." (R. 271:55, 57.)

Approximately 30 minutes later, Gomez arrived. (R. 271:57–58.) Gomez walked up to Taylor's front door and started talking to Shorty, who was in the open doorway. (R. 271:58–59.) Taylor heard Gomez tell Shorty that "there's some guys outside looking for him." (R. 271:59.) Then, "shots started coming." (R. 271:60.) According to Taylor, "[A]ll I seen was the bullets hit [Gomez] and he fell onto Shorty. I was right there when the bullets hit him. . . ." (*Id.*)

At no point did Taylor see Shorty with a gun, and Shorty "never reached for nothing." (R. 271:62.) Rather the shooting began almost immediately when Shorty appeared in the doorway: "[a]s soon as [Arrington] sees [Shorty] peek his head, he started shooting into the doorway." (R. 271:63.)

Other witnesses corroborated Taylor's version of events. Hawkins testified that when he left Taylor's house, he saw Arrington and another male inside a parked car across the street. (R. 271:216–17.) Arrington asked Hawkins if Shorty was inside Taylor's house. (R. 271:217–18.) Hawkins told Arrington he didn't know. (R. 271:218.) Once he walked away, Hawkins called Taylor and told him that Arrington was outside asking for Shorty. (R. 271:219.)

AVT testified that she and "Risco"[2] were with Arrington during the shooting. (R. 271:139, 143.) Arrington was driving, she was the front passenger, and Risco was in the backseat. (R. 271:143–44.) Arrington parked across from Taylor's house. (R. 271:144.) Gomez knocked on Taylor's door, and Shorty opened it. (R. 271:148.) According to AVT, Arrington "was waiting for that door to open." (R. 271:148.) Arrington rolled down AVT's window and said to Shorty, "What up?" and Shorty replied, "What's good?" (R. 271:147, 149.) Then, Arrington "just started shooting a gun right by my face." (R. 271:149.) "Shorty tried to grab [Gomez] out of the way, but I guess he got hit anyways. . . ." (R. 271:150.)

AVT never saw Shorty shooting at the car. "If they was shooting at the car, if it was a shoot back and forth, I would have got hit. I was sitting right there." (R. 271:151–52.) "There's no way they were shooting back at that car. There was no bullets at that car. There was no gun came out that house, no." (R. 271:152.)

Police officers testified that they did a thorough search of Taylor's house, the people in Taylor's house, and the neighborhood, and they found no firearms. (R. 271:126; 273:84, 100–01.)

[2] "Risco" is Devin Landrum. (R. 275:58.)

Arrington's actions after he knew he had shot Gomez, including taking steps to avoid apprehension:

AVT testified that a "shell hit me in my head, and [Arrington] told me to shut up." (R. 271:149.) When AVT told Arrington she wanted out of the car, Arrington replied, "you on a murder case with me now, you ain't going nowhere." (R. 271:150–51.) Arrington then drove off and eventually let AVT out. (R. 271:153.) AVT drove to Milwaukee and the next day Arrington found her there. (R. 271:154–55.) Arrington took AVT's phone and threatened to kill her or her family if she told anyone about the shooting. (R. 271:157–58.)

A few days after the shooting, AVT was in Green Bay and Arrington told her to bleach and burn her clothes. (R. 271:159.) When AVT went back to Milwaukee that night, Arrington located her at a convenience store. (R. 271:163.) He rolled down the window of his vehicle, AVT saw a gun on his lap, and Arrington told her that if she didn't get in the car she was "gonna get iced." (R. 271:164–65.) AVT complied and, after driving for hours, she fell asleep. (R. 271:167, 208.) When she woke in the car the next morning alone, she ran. (R. 271:168.)

Erica Herrod ("Erica") testified that the night of the shooting, Arrington came to her home and said that he had "popped" someone, and he asked for bleach to wash up. (R. 271:225–26.) Arrington rubbed his hands, face, and hair with bleach. (R. 271:226.) Arrington needed a ride to Milwaukee, and Erica's brother, Eugene, took him. (R. 271:230.)

Eugene testified that he told police that on the night of the shooting, Arrington called and said he "fanned Shorty down." (R. 271:260.) The next day, Arrington called and told Eugene that he got the wrong person, and that he would come back and "get that [explicative] Shorty and finish the job." (R. 271:263.)

Arrington testified that after the shooting, he changed his hair and his appearance so that law enforcement could not find him.[3] (R. 275:103, 148.)

Jason Miller's conversations with Arrington:

Jason Miller testified that he had conversations with Arrington when they were in the county jail. (R. 275:10–11.) Miller recorded three conversations between April 11–13, 2016. (R. 275:12.) Miller testified that "in the beginning [Arrington] asked me to read his Criminal Complaint, asked me to - - did I think there was enough there." (R. 275:13.)

Miller testified that Arrington told him that he saw Gomez knock at Taylor's door, and Shorty opened it. (R. 275:17.) Arrington saw that Shorty noticed him and Shorty said to Arrington, "What's up?" (*Id.*) All Arrington could think about was Shorty stabbing him, and the next thing that happened is Arrington "just got to shooting." (R. 275:18.) Arrington told Miller that he "had a fucked-up aim," and that "when he got to shooting, Shorty jumped back, and when he jumped back, it hit [Gomez]." (R. 275:18–19.) Miller asked Arrington if there was any gunshot residue, and Arrington replied that "he wiped it down, everything down." (R. 275:14.)

Before Miller testified, the State requested to play three recorded audio excerpts from Miller's last day of conversations with Arrington, April 13, 2016. (R. 275:6–7, 25.) Defense counsel acknowledged to the court that he had the recordings "for quite some time" and had reviewed them "long before trial." (R. 275:7.) He told the court he had "no objection" to their admission. (*Id.*) He did object to providing a transcript to the jury, which was granted. (*Id.*)

---

[3] The court of appeals' discussion of Arrington's actions after the homicide was limited to the following, singular sentence: "A few days later, Arrington learned that the police were looking for him, and he surrendered himself to law enforcement." (Pet-App. 103.)

The State played the three excerpts for the jury. (R. 275:19.) Miller was asked to interpret and explain what both Miller and Arrington were saying in those conversations. (R. 275:21–28.) The excerpts totaled "roughly five minutes." (R. 276:99.) In the first excerpt, Miller told Arrington that Arrington needs to "holler at your sisters and have them holler at that bitch." (R. 275:21.) In the second excerpt, Miller asked Arrington if Shorty was "acting like he was a beast?" And Arrington replied, "Yeah, that's what added fuel to the fire," that Shorty was "acting like a gorilla." (R. 275:23, 154.) In the third excerpt, Miller told Arrington that Arrington's "aim ain't shit" because when he shot at Shorty, Arrington "hit the other nigger." (R. 275:27.) Arrington replied, "And I just dumped the crib down cuz I don't know if he gonna come back and dump me down." (R. 275:28.)

Arrington's first indication that he shot Gomez in self-defense came one year after the shooting during a police interview that Arrington requested:

Detective Brad Linzmeier testified that on April 13, 2017, he conducted a recorded interview with Arrington. (R. 274:100–01.) Arrington stated that he saw Gomez "walk up to the front door of [Taylor's] house and knock on the door. I heard him call for Shorty. The door then opened, and I saw Shorty step in the doorway. He was talking with [Gomez] who was on the front porch." (R. 274:106.) According to Arrington, "Shorty then looked down at me and saw me sitting in the car. Shorty then started to reach for his gun to his right waistband. I did not see a gun at that time, he was just reaching." (*Id.*) Arrington then grabbed his gun from inside the door panel, raised his "gun across towards Shorty and fired three shots out the front passenger open window. [AVT] had ducked down. I knew I hit the front porch with my shots . . . ." (R. 274:106.) Arrington stated, "Shorty ducked back inside the house, and after I shot, Shorty stepped out, pointed a black handgun down towards me, and fired one shot." (R.

274:106–07.) Arrington claimed Shorty killed Gomez: "Just as [Shorty] did this, [Gomez] who was on the porch was stepping into the house, and Shorty hit him point blank in the chest as [Shorty]was trying to shoot back at me. I seen [Gomez] fall into the house as I was pulling off." (*Id.*) Arrington denied going to Erica's house after the homicide and washing with bleach. (R. 274:113.)

Detective Linzmeier testified that this was the first time that he ever heard *any* information about Shorty having a handgun and shooting Gomez. (R. 274:123.)

Arrington's testimony offered a version of events inconsistent with that of every other witness:

Arrington testified that he was a drug dealer and that days before the homicide, he was at Taylor's house trying to sell powder cocaine when Shorty was robbed of his gun. (R. 275:82, 119.) Arrington denied having anything to do with it. (R. 275:83.) Yet after the robbery, Arrington did not want any "bad tension," so he decided to give Shorty money. (*Id.*) When Arrington tried to give Shorty the money to "settle the dispute," Shorty "just reached in [to the car] and got to stabbing me." (R. 275:84.)

On cross-examination, Arrington testified that after Shorty had cut his lip, he was not mad. (R. 275:128, 139.) Rather, he forgave Shorty. (R. 275:138.) Arrington testified that when he went to Brown's after Shorty cut his face, he did not, contrary to Brown's testimony, pace back and forth while holding a gun. (R. 275:129.)

Arrington testified that on the day of the homicide, he, AVT, and Devin Landrum drove to the house next door to Taylor's to "pick up some marijuana." (R. 275:90.) Arrington parked in front of Taylor's house, Landrum left the car to get marijuana, and AVT stayed in the car with Arrington. (R. 275:91.) Arrington saw Gomez walk to the front porch of Taylor's house, and Shorty opened the door. (R. 275:92, 135.)

Shorty saw Arrington and, according to Arrington, Shorty "just start going crazy." (*Id.*)

Arrington testified that he thought he saw Shorty reach for a gun, but that he actually didn't see a gun. (R. 275:94.) Arrington then "reached into the side door and grabbed my gun from the side door," and "fired three shots out the window." (R. 275:95.) Arrington testified he "shot at the porch area, feet area of the porch," so that "nobody [would] be hurt." (*Id.*) Arrington then drove away, looking over his shoulder, "and what I seen was Shorty come around the door with the gun in his hand at the same time that [Gomez] . . . was coming into the house, and what it looked like to me was that Gomez had been shot by [Shorty]." (R. 275:97.)

As for Arrington's actions after Gomez was shot, Arrington denied doing anything inculpatory and dismissed the contradictory testimony of the State's witnesses. Even though Erica testified that after the homicide Arrington went to her place, told her that he "popped" someone, and asked for bleach (R. 271:225–26), Arrington denied all of this. (R. 275:98.) Arrington testified that instead of going to Erica's, he left for Milwaukee. (R. 275:102.) He informed the jury that when he got to Milwaukee, he changed his hair and his appearance so that law enforcement could not find him.[4] (R. 275:103, 148.) While in Milwaukee, Arrington testified that he *never* kidnapped AVT, nor did he even see AVT or have *any* contact with her after the shooting. (R. 275:105.) AVT's testimony was "all lies." (R. 275:148.)

Arrington also denied that he told Allen that he was going to kill Shorty or implied that he was going to kill Shorty. (R. 275:105.) Arrington denied ever talking to Howard about Arrington's dispute with Shorty; nor did he ever tell Howard

[4] *But see* fn 3.

that he was going to kill Shorty or imply that he was going to kill Shorty. (R. 275:106–07.)

When asked why Eugene testified that Arrington told him that he "got the wrong guy but I'm going to come back and finish the job and get Shorty," Arrington replied, "I don't know why Eugene told you guys that." (R. 275:142.) When questioned if he remembers asking Hawkins where Shorty was on the day of the shooting when Lawrence was outside of Taylor's house, Arrington replied, "No." (R. 275:132.)

When the State asked, "So that sounds like a lot of people are making stuff up, right?" Arrington replied, "Yes." (R. 275:129.)

When asked if he called police after the incident, Arrington replied, "Not at all." (R. 275:101.) When asked what happened to the gun he used, Arrington said he didn't know, but that "[AVT] could have got rid of [it]." (R. 275:98.)

Regarding Arrington's conversations with Miller, Arrington said that he talked to Miller because he wanted to "get some information," and that Arrington "wanted [Miller's] outlook on things." (R. 275:107.) According to Arrington, he was just "leading [Miller] to believe whatever he wanted to." (R. 275:108.) Because "if I told Jason Miller what happened, what really had happened, that would mean I would be snitching." (R. 275:109.)

Landrum testified for Arrington. On the day of the shooting, Landrum testified that he was walking towards Arrington's car when he saw Taylor's house door open. (R. 275:48.) Landrum saw Shorty, and "[i]t appeared that [Shorty] was reaching for a weapon." (R. 275:49.) Landrum testified, however, that he *never* saw Shorty with a weapon, never saw any weapon in Shorty's waistband, and never saw anyone shooting other than Arrington. (R. 275:59–61.) Regardless, Arrington fired two or three shots, and then "[w]e pulled off and we drove away." (R. 275:54.) When the State

asked Landrum that if Arrington told police that *Landrum* had the gun, would Arrington be lying, Landrum replied that Arrington did not give him the gun. (R. 275:61.)

During closing, defense counsel stressed how Miller's recordings were "muddled garbage" and that they don't "change anything." (R. 276:98.) According to defense counsel, "when you try to discern what the recording does or doesn't say, when you try to figure it out for yourself, we heard it, it's variably impossible to listen to." (*Id.*) He argued that the recordings have "almost no evidentiary value." (R. 276:99.) Defense counsel also argued that Arrington's recorded statement about "dumping down on a crib" was "consistent" with Arrington's concession that he shot three times at Taylor's house. (*Id.*)

Postconviction proceedings and hearing

After his conviction, Arrington moved for postconviction relief seeking a new trial due to "ineffective assistance of counsel, plain error or the interest of justice." (R. 219:3.) The court held a hearing. Detectives Wanta and Linzmeier testified, as well as Arrington and Arrington's trial counsel, Michael Hughes. (R. 278.)

Hughes testified that he had the recordings "for quite some time" before trial. (R. 278:6.) At no time before or during trial did he research or consider moving to suppress the recordings of Miller's conversations with Arrington. (R. 278:11.)

Detective Wanta testified that in early April 2016, Miller became an informant for him on a homicide case involving a suspect named Antwon Powell[5]. (R. 278:29.) Wanta "became aware of Mr. Miller's request to speak with

[5] Wanta testified that Miller was a confidential informant on the Powell case before Miller approached him about recording Arrington. (R. 278:29–30.)

law enforcement" when Miller's attorney contacted "the district attorney's office which passed it on to the police department." (*Id*.) Wanta then met with Miller at the jail. (R. 278:31.) Wanta was aware that Miller was seeking consideration, but Wanta was not involved because "[t]hat is done by the District Attorney." (R. 278:32.) Miller told Wanta that Arrington "was talking with him (Miller) 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." (R. 278:36.) Wanta also testified, "and we said if you want to record the conversation you can." (R. 278:40.)

Between April 13–16, the detectives provided Miller with a digital recording device. (R. 278:36, 38.) Wanta testified, "[t]here's no way to monitor it or listen to this particular device. It is a matter of basically flipping a switch on the side of it on and off." (R. 278:36.) Detectives could not listen "in live-time," and Miller had the ability to turn it on and off. (R. 278:36, 37.)

On cross-examination, defense counsel asked if Miller asked for any specific consideration, and Wanta said no, that "there were no specifics involved." (R. 278:41.) Wanta testified, "we did not get involved in specifics regarding any consideration, that comes from the District Attorney. And we make that very clear from the start." (R. 278:42.)

When asked, "Did you give any direction to Mr. Miller as to what types of information to record?" Wanta replied, "I did not." (R. 278:43.) When asked, "Did you give any direction to Mr. Miller as to what type of questions to ask?" Wanta replied, "I did not." (R. 278:43.) When asked, "Did you ever direct Mr. Miller to speak with Mr. Arrington?" Wanta replied, "Mr. Miller approached us or myself about speaking with Mr. Arrington and we said it was okay or we said he could record conversations." (R. 278:46.) When asked if he knew whether Miller ever received consideration for his

recordings, Wanta replied, "I believe he did not receive the consideration."[6] (*Id.*)

Consistent with Wanta's testimony, Linzmeier testified that Miller's involvement began when Miller's attorney contacted the district attorney's office, who then contacted the police. (R. 278:50.) "Miller informed us that Mr. Arrington was talking about his case. . . 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." (R. 278:51.) Linzmeier told him, "Yes." (*Id.*) Linzmeier testified that he did not give any direction to Miller to either question or speak to Arrington. (R. 278:57.) Nor did he ever give Miller any questions to ask Arrington. (R. 278:57.)

Linzmeier's opinion of the recordings were similar to defense counsel's opinion; specifically, "they were very hard to understand. They were hard to listen to as far as decipher." (R. 278:53–54.) "I couldn't understand, you know, a lot of what was said or it wasn't pertinent." (R. 278:56.)

Regarding whether he spoke to Miller about any consideration he would receive, Linzmeier testified "that's not what we do in our position. That is through the attorneys." (R. 278:58.) Miller never received any payment for his help. (R. 278:59.)

Arrington testified that before the recordings, he knew Miller from a previous time in jail. (R. 278:71.) Regarding their first conversation, Arrington testified that Miller approached his cell and asked Arrington if he wanted to read a magazine. (R. 278:64.) Arrington then asked Miller to look at the criminal complaint. (R. 278:65.) Arrington admitted that he "asked [Miller] for guidance." (*Id.*) Regarding the

---

[6] This is because, Wanta testified, Miller violated his agreement with the District Attorney. (R. 278:48.)

second conversation, Arrington testified that Miller called Arrington over to talk. (R. 278:66.) Finally, during their last day of conversations, Miller approached Arrington's cell and asked if he wanted to read a magazine. (R. 278:66.)

Arrington believed that he asked Attorney Hughes if there was a way to keep the recordings out of evidence, and Hughes told him "that the recordings really didn't matter because they didn't - - he couldn't really hear much on 'em." (R. 278:75.) When asked if *he* could hear what was on the recordings, Arrington admitted, "Not really." (*Id*.)

Postconviction court's decision

The postconviction court concluded that Miller was not acting as an agent for the State when he recorded his conversations with Arrington. (R. 247:3.) Therefore, Arrington's Sixth Amendment right to counsel was not violated. (*Id*.) The court issued numerous findings. (R. 247:3–7.)

First, "[t]he State did not put Mr. Miller and Mr. Arrington together in [the same jail pod]. It was a coincidence." (R. 247:3.)

Second, Miller's attorney approached the district attorneys about Miller "voluntarily contributing information to the police which prompted the police to have a discussion with [Miller] about being a confidential informant." (R. 247:4.) "The police never approached Mr. Miller about recording Mr. Arrington." *(Id*.)

Third, Miller "voluntarily asked the police if he should record any information from Mr. Arrington, and the detective informed him that he could record such conversations." (*Id*.) Citing *State v Lewis*, 2010 WI App 52, ¶ 25, 324 Wis. 2d 536, 781 N.W.2d 730, the court concluded, "when a person offers assistance to the police, we do not think the police must try to stop the person from providing assistance." (*Id*.) And, "it is not the government's burden to protect a defendant from their

own 'loose talk.'" (*Id.*) In this case, "Miller made requests to speak to law enforcement. Not vice versa." (*Id.*)

Fourth, police "made no promises to Mr. Miller that the fact that he was giving information would lead to a reduced sentence." (R. 247:4–5.)

Fifth, "Arrington began talking to Mr. Miller about his case without Mr. Miller prompting the conversation." (R. 247:5.) "The police could not listen in on any conversation, and had not told what questions Mr. Miller should ask Mr. Arrington." (*Id.*) Further, "Arrington volunteered information to Mr. Miller without being prompted by him." (*Id.*)

Sixth, Arrington was not the target of the investigation, Anton Powell was, which shows "a lack of intent to make Mr. Miller a police agent." (R. 247:6.) The court again noted that "Miller voluntarily asked the police on his own initiative if he should record Mr. Arrington, and he was under no obligation to do so." (*Id.*) "Further," the court found, "the police never made any promise to Mr. Miller in terms of what he will receive for his cooperation." (*Id.*) Rather, "Miller was acting with the hope that the prosecutors in his case would give him a more lenient sentence which is very similar to the confidential informant in *Lewis*, a primary source of law on this issue in Wisconsin, who was found to not be an agent of the State." (*Id.*)

Seventh, "the police did not even use the taped conversation of Mr. Arrington until approximately one year had passed." (*Id.*) And, "[o]ne would think if the recorded conversation by Mr. Arrington was so important, the police would have listened right away no matter the circumstances. This lack of review goes to police intent." (*Id.*)

Eighth, "the use of 'CI'[7] does not indicate agency." (R. 247:6.)

Finally, the police had "no affirmative duty to keep Mr. Miller away from Mr. Arrington when they knew Mr. Miller was assisting with another case." (*Id.*) It is "not the government's job to protect defendants from their own 'loose talk.'" (R. 247:7.)

The court determined that Arrington's Sixth Amendment right to counsel was not violated because Miller was not an agent of the State. (*Id.*) Rather, Miller "was acting on his own initiative and approached the police to help in Arrington's case." (*Id.*) He "voluntarily asked to record Mr. Arrington." (*Id.*) The court determined that while individually the nine points "might not be enough to show that Miller was not an agent," that "all the points together certainly show that Mr. Miller was not an agent." (*Id.*)

With respect to Arrington's argument that the error was plain and not harmless error, the court "adopted" the State's arguments "on the issue of harmless error." (R. 247:9.)

Finally, the court concluded that there was "no ineffective assistance of counsel based on my decision about the sixth amendment." (*Id.*)

The Court of Appeals' Decision

The court of appeals reversed the circuit court and granted Arrington a new trial. *State v. Arrington*, 2021 WI App 32. (Pet-App. 101–122.) The court first addressed the merits of Arrington's Sixth Amendment claim, holding that the conduct of the detectives in this case was "prohibited by" United States Supreme Court and Wisconsin case law and that "the State violated Arrington's Sixth Amendment right to counsel when [Miller] made the recordings of conversations

[7] Confidential informant.

with Arrington while acting as an agent of the State." (Pet-App. 102, 116.)

The court did not address harmless error. Rather, it shifted to the ineffective assistance claim, holding counsel was deficient when he failed "to seek suppression or otherwise object to the admission of the recordings" and that that deficiency prejudiced Arrington, namely his ability to argue self-defense. (Pet-App. 102, 118–19.)

The State petitioned for review, and this Court granted its petition.

ARGUMENT

As will be shown below, Arrington fails to meet his burden under the *Strickland* test to show counsel was ineffective. Therefore, this Court need not reach the merits of Arrington's Sixth Amendment claim. However, if this Court chooses to consider the claim on the merits, it should determine there was no right-to-counsel violation, but even if there was, such error was harmless.

I. The court of appeals erroneously determined that Arrington proved counsel was ineffective. Arrington fails to prove prejudice or deficient performance.

The court of appeals began its analysis in this case by first addressing the merits of Arrington's right-to-counsel claim before it addressed the ineffective assistance of counsel claim. (Pet-App. 109.) But because counsel did not object to the recordings (R. 275:7), this case *must* be viewed under the rubric of ineffective assistance of counsel. *See State v. Carprue*, 2004 WI 11, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,'" which is to address the alleged forfeiture "within the rubric of the ineffective assistance of counsel." (Quoting *State v. Erickson*, 227

Wis. 2d 758, 766, 596 N.W.2d 749 (1999)). Therefore, the State addresses the underlying issue through the lens of ineffective assistance.

A. Arrington has a heavy burden to prove ineffective assistance of counsel.

A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* A court judges an attorney's performance based on "an objective test, not a subjective one." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 799 N.W.2d 461. "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." *Id.*

To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. A reviewing court "will uphold the circuit court's findings of fact unless they are

clearly erroneous." *Id.* "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [this Court] review[s] de novo." *Id.*

Trial counsel can never be ineffective for declining to make an argument that controlling legal authority does not support. "[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 232 (citation omitted). *See also State v. Hanson,* 2019 WI 63, ¶ 28, 387 Wis. 2d 233, 928 N.W.2d 607, *cert denied*, 140 S. Ct. 407 (2019) (providing: "In order to constitute deficient performance, the law must be settled in the area in which trial counsel was allegedly ineffective."). Thus, counsel's "failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93 (quoting *Lemberger,* 374 Wis. 2d 617, ¶ 33).

B. Arrington fails to prove prejudice because of the overwhelming evidence of his guilt and the scarcity of evidence supporting his self-defense claim.

The court of appeals erred when it determined that any deficiency prejudiced Arrington. (Pet-App. 122.) The State presented overwhelming evidence of Arrington's guilt through the testimony of numerous witnesses testimony about Arrington's actions before, during, and after the homicide.

Craig Taylor testified that on the day of the shooting, Taylor saw Arrington "circling the block" and that Arrington "just had that look in his eye like he wanted to kill something."

Taylor also saw the bullets hit Gomez and Gomez fall into Shorty. At no point did Taylor see Shorty with a gun, and Shorty "never reached for nothing." Rather, he saw Arrington shoot immediately: "[a]s soon as [Arrington] sees him peek his head, [Arrington] started shooting into the doorway." (R. 271:45, 48–49, 55, 57, 60, 62, 63.)

James Allen testified that days before the shooting, Arrington told Allen that he robbed Shorty, that Shorty had stabbed him, and that Arrington said, "I'm going to fuck [Shorty] up." (R. 274:196, 198.) Similarly, Christopher Howard testified that Arrington was "highly upset" when Shorty cut him, and that Arrington told Howard that "he was going to have to handle his business." (R. 274:206.) Brianna Brown testified that days before the shooting, Arrington was walking around an apartment upset about being cut, and "toting a MAC [10]." (R. 273:58–63.)

AVT testified that when Gomez knocked on Taylor's door, Arrington "was waiting for that door to open." And after Shorty said to Arrington, "What's good?" Arrington "just started shooting" a gun. She never saw Shorty shooting back; rather, there was "no way they were shooting back at that car. There was no bullets at that car. There was no gun came out that house, no." (R. 271:147–49, 151–52.) AVT also testified about Arrington's actions after the homicide, which included Arrington telling her, "you on a murder case with me now, you ain't going nowhere." (R. 271:150–51.) Arrington also threatened to kill AVT or her family if she told anyone about the shooting. (R. 271:158.) He told AVT to bleach and burn her clothes, and he threatened that she was "gonna get ice," if she didn't get in Arrington's car. (R. 271:159, 164–65, 167–68.)

Erica Herrod testified that on the night of the shooting, Arrington came to her house, told her that he "popped" someone, and then asked for bleach to wash up. (R. 271:225–26.) Erica's brother Eugene testified that he told police that

on the night of the shooting, Arrington called and said he "fanned Shorty down." (R. 271:260.) Eugene testified that he also told police that the next day, Arrington called and told him that he got the wrong person, and that he would "get that [explicative] Shorty and finish the job." (R. 271:260, 263.)

Contrary to Arrington's testimony, Arrington's own witness, Devin Landrum, testified that he never saw Shorty with a weapon, never saw any weapon in Shorty's waistband, and he never saw anyone else shooting other than Arrington. (R. 275:60–61.)

Defense counsel also impeached Miller's credibility. Specifically, defense counsel was able to get Miller to acknowledge that he had been convicted of a crime 18 times. (R. 275:29.) While the court of appeals determined that "[g]iven the recordings, [defense counsel] had little ability to attack Miller's credibility" (Pet-App. 120), that's just not what the trial transcript reveals. In addition to Miller's lengthy criminal history (R. 275:29), defense counsel also got Miller to admit that during the recordings, Miller told Arrington that he would have done the shooting alone (R. 275:31). Defense counsel also argued during closing that the recordings were "muddled garbage": "when you try to discern what the recording does or doesn't say, when you try to figure it out for yourself, we heard it, it's variably impossible to listen to." (R. 276:98.) Rather, the recordings had "almost no evidentiary value" that consisted of "idle chit chat." (R. 276:99.) Defense counsel also argued that Arrington's statement about "dumping down on a crib" "comports with Mr. Arrington's story. That's not a difference. That's not Mr. Arrington lying. Mr. Arrington shot three shots low at the house. It's consistent." (R. 276:99.) The court of appeals, however, failed to give recognition to the overwhelming evidence against Arrington and defense counsel's attack on Miller's credibility. (Pet-App. 120–21.)

While the court of appeals opined that "counsel failed to consider that Miller could explain at trial what Arrington's words meant"[8] (Pet-App. 119), the court failed to recognize that even if Miller had *not* recorded the conversations (or had the State not used them), Miller would still testify as to content. Either way, it's largely Miller claiming and explaining to the jury what Arrington said.

The court of appeals also erred when it determined that the recordings "eliminated any self-defense argument that Arrington could make." (Pet-App. 121.) In the very next paragraph, the court of appeals lists the *other* "evidence supporting Arrington's self-defense claim." (Pet-App. 121–22.) This included:

> The prosecutor conceded in the State's closing argument that "[s]cience in this case hasn't been able to prove anything really for sure." An officer testified that he found bullet holes on or near the porch at foot level or below, which confirmed Arrington's testimony that he fired toward the foot area of the porch. Additionally, an expert testified that although there was gunshot residue found on Gomez's jacket, she could not determine the distance from which the bullet that penetrated the jacket was fired. . . .

(Pet-App. 121.) While Arrington's self-defense evidence was sparse, his self-defense claim was certainly not "eliminated" by the recordings.

The court of appeals also erred when it determined that "the State relied on Arrington's statements to Miller to convince the jury that Shorty did not have a gun and did not shoot Gomez but, rather, Arrington fired the shots at Shorty in retaliation and hit Gomez instead." (Pet-App. 121.) As noted above, the State obtained this information from

---

[8] There was no testimony at the *Machner* hearing from defense counsel that he failed to consider that Miller could explain the recordings to the jury. (R. 278:5–27.)

Arrington's own witness, Devin Lundrum (R. 275:54, 59–61), as well as Eugene Herrod (R. 271:260, 263), AVT (R. 271:147–49, 151–52), and Craig Taylor (R. 271:45, 48–49, 55, 57, 60, 62, 63). Eugene's testimony was especially damaging, admitting that he told police that on the night of the shooting, Arrington called and said that he had "fanned Shorty down." (R. 271:260.) Eugene testified that he also told police that the next day, Arrington told him that he got the wrong person, and that he would "get that [explicative] Shorty and finish the job." (R. 271:260, 263.) So although the State discussed the recordings during closing argument, it did not need to "rely on" them to convince the jury that Arrington was guilty.

The court of appeals also ignored Arrington's incredible testimony that all of the witnesses who testified against him—Erica, Eugene, AVT, Allen, and Howard—were lying and just "making stuff up." (R. 275:129.) Essentially, the court of appeals decision requires a jury to disbelieve all other witnesses.

Contrary to the court of appeals' conclusion (Pet-App. 122), there was no reasonable probability that the jury would have accepted Arrington's self-defense theory had his recorded statements to Miller been excluded. No witnesses, *not even his own*, corroborated Arrington's defense—that Shorty shot Gomez and Arrington acted in self-defense. No one who was present at the shooting—except Arrington— saw Shorty with a gun, and multiple witnesses testified that Arrington held a grudge against Shorty and was planning to get even with him. The court of appeals also failed to recognize that Arrington gave no inkling to the theory of self-defense until a year after the shooting.

Finally, the court of appeals determined that Arrington was prejudiced because "the recordings likely changed the jury's impression of Arrington and resulted in the need for Arrington to testify *where he otherwise might not have*." (Pet-App. 121 (emphasis added).) That is simply not supported by

the record. On cross-examination at the *Machner* hearing, Arrington made clear that he decided to testify "not only" after Miller's testimony, but because the witnesses had attacked his credibility and character. (R. 278:69–70.) Arrington's decision to testify, he informed the court, "had to do with combat[ting] that as well." (R. 278:70.)

The court of appeals' conclusion that Arrington was prejudiced by his counsel's failure to object to the recordings should be reversed. Here, it cannot be said that had the jury not heard Arrington's statements that he made to Miller on the tapes, that Arrington would have been acquitted.

This Court should determine that because Arrington fails to show prejudice, that counsel was not ineffective when he failed to object to the admission of the recordings. And, because "cases should be decided on the narrowest possible ground," *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989), this Court should reverse the court of appeals on this ground.

C. Arrington fails to prove deficient performance because the law governing the use of government informants is not sufficiently clear to have raised a duty for counsel to object.

Should this Court consider *Strickland's* deficiency prong, Arrington also fails to prove it. Here, for defense counsel to be deemed deficient, Arrington needs "to demonstrate that counsel failed to raise an issue of settled law." *Brietzman*, 378 Wis. 2d 431, ¶ 49. And under the circumstances in this case, whether Arrington's Sixth Amendment rights were violated is not settled.

1. United States Supreme Court caselaw: an agent cannot deliberately elicit incriminating remarks after the right to counsel has attached.

There are four main United States Supreme Court cases that establish a general framework for determining when the use of government informants violates an accused's Sixth Amendment right to counsel. As will be demonstrated, however, none present a situation that happened here: an unpaid jailhouse inmate who approached police on his own initiative and asked if he should record another inmate in the hopes of receiving consideration.

The first case is *Massiah v. United States,* 377 U.S. 201 (1964). In *Massiah,* a government agent, Colson, deliberately elicited information from Massiah. Colson was a co-defendant and ally of Massiah—who was not in custody but free on bail and had obtained legal representation—and Colson permitted a federal agent to install a radio transmitter in the front seat of Colson's car. *Id.* at 202–03. The authorities listened to the conversation in a car down the street, during which Massiah "made several incriminating statements." *Id.* at 203. These incriminating conversations were introduced into evidence at trial. *Id.*

The Supreme Court held that the conversations were inadmissible. *Id.* at 207. According to the Court, Massiah was denied the protections of the Sixth Amendment right to counsel by the use of his own incriminating words, "which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. It concluded that Massiah's "own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." *Id*. at 207.

In *United States v. Henry,* 447 U.S. 264, 266 (1980), FBI agents reached out to Nichols, a paid informant, who was being held in the same jail as Henry. Nichols told the FBI that he was on the same cellblock as Henry, and the FBI "told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." *Id.* After Nichols' release from jail, the same FBI agent contacted him, and Nichols gave the agent information that Henry had revealed to Nichols. *Id.* The government paid Nichols for the information, Nichols testified at Henry's trial, and Henry was convicted. *Id.* at 266–67. "The arrangement between Nichols and the [FBI] was on a contingent-fee basis; Nichols was to be paid only if he produced useful information." *Id.* at 270. The Supreme Court concluded, "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.* at 274.

The Court reached a similar conclusion in *Maine v. Moulton,* 474 U.S. 159 (1985). There, a co-defendant, Colson, agreed to cooperate with law enforcement in return for a promise of no further charges against him. *Id.* at 163. Police suggested to Colson that he record his phone conversations with Moulton, and he did. *Id.* at 487. After three recordings, Moulton asked Colson to meet with him to discuss their defense, and Colson agreed to law enforcement's request that he wear a recording device for the meeting. *Id.* at 164. Moulton made numerous incriminating statements at this meeting, which were admitted at Moulton's trial. *Id.* at 166. The Supreme Court observed that "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." *Id.* at 176. In that case, however, the Court held that the State had deliberately

elicited the statements by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.*

Finally, in *Kuhlmann v. Wilson,* 477 U.S. 436, 439 (1986), detectives reached an agreement with the defendant's cellmate to be an informant. The detectives instructed the informant to ask no questions about the crime but merely to listen to what the defendant said. *Id.* at 440. The trial court determined that the informant obeyed the instructions: he only listened and made notes regarding what the defendant said. *Id.* The Supreme Court held that the Sixth Amendment does not forbid "admission in evidence of an accused's statements to a jailhouse informant who was 'placed in close proximity but [made] no effort to stimulate conversations about the crime charged.'" *Id.* at 456 (quoting *Henry,* 447 U.S. at 271 n.9). Unlike the defendants in *Henry* and *Moulton*, Kuhlmann did not "demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id.* at 459.

As will be shown below, using the framework these four cases provide, the Wisconsin Court of Appeals refused to extend *Massiah* and *Henry* to situations where an unpaid informant, acting on his own initiative, deliberately elicited incriminating information.

2. *State v. Lewis*: an unpaid informant who hopes to receive a benefit is not an agent.

Wisconsin's lone published case on this topic is *Lewis*. *Lewis* involves an inmate, Gray, who had been an informant for the federal government. 324 Wis. 2d 536, ¶ 5. Gray was not equipped with any recording device, but, similar to this case, he obtained information from a cellmate, Lewis. *Id.* ¶ 4. After obtaining the information, Gray went to law

enforcement regarding the admissions Lewis made to him. *Id.* ¶ 5.

After the jury returned guilty verdicts, Lewis moved for postconviction relief, arguing that the State had violated his right to counsel. *Id.* ¶ 7. At a hearing, an investigator testified that Gray had come forward, offering to provide information. *Id.* ¶ 8. At that same hearing, Gray "admitted that no law enforcement agency or officer ever promised anything to him in exchange for him providing information." *Id.* ¶ 9. Gray also "testified that no one from law enforcement directed him to have a conversation with Lewis and no one ever asked him to listen to or talk to Lewis in any way." *Id.* Finally, Gray "said that Lewis volunteered the information without prompting by him." *Id.* ¶ 10.

The Wisconsin Court of Appeals determined that police cannot use a jailhouse cellmate "to deliberately elicit incriminatory statements, by investigatory techniques that are the equivalent of direct police interrogation, in the absence of counsel or a valid waiver of counsel." *Id.* ¶ 1. It held that "this 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.*

The court of appeals noted that "Gray was never under the direction or control of the government, and there was no evidence that Gray received instructions from the government about Lewis or anyone else in the Waukesha County jail. Nor was he ever a paid informant." *Id.* ¶ 20. The court of appeals "refuse[d] to extend the rule of *Massiah* and *Henry* to situations where an individual, acting on his [or her] own initiative, deliberately elicits incriminating information." *Id.* ¶ 23 (citation omitted).

Rather, the court of appeals adopted the rationale and language in *United States v. Surridge*, 687 F.2d 250, 255 (8th

Cir. 1982). In *Surridge*, the Eighth Circuit explained the point of *Henry,* 447 U.S. 264, which is "the significance of government payment which would evidence an agreement":

> [T]he key issue is the extent of government involvement. When the government pays the informant, it is evidence (although not conclusive) that a prior agreement between the government and the informant existed, whether that agreement was explicit or implicit. In the instant case, the police did nothing after the meeting to give a benefit to Spencer which would have evidenced an implicit agreement between Spencer and the police.

Lewis, 324 Wis. 2d 536, ¶ 22 (quoting *Surridge*, 687 F.2d at 254). Adopting the rationale of *Surridge*, the court of appeals determined that "[t]he fact that the government might know an informant 'hopes' to receive a benefit as a result of providing information does not translate into an implicit agreement between the government and the informant if the informant is thereafter placed into an environment where incriminating information can be obtained." *Id*. ¶ 23. It concluded: "If there is just 'hope' and nothing else, then the informant cannot be construed to be a government agent, eliciting a statement in violation of the Sixth Amendment." *Id*. ¶ 23.

The *Lewis* Court also rejected the defendant's argument that the government had an affirmative duty to separate him from a known jailhouse informant. *Lewis*, 324 Wis. 2d 536, ¶ 26. Again quoting *Surridge*, the *Lewis* Court determined that as long as police do not direct, control, or involve themselves in the questioning, there is no Sixth Amendment violation:

> "[W]hen a person offers to assist the police, we do not think the police must try to stop the person from providing assistance. *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,*

> *such questioning does not violate the [F]ifth or [S]ixth Amendments.*

Lewis, 324 Wis. 2d 536, ¶ 25 (quoting *Surridge*, 687 F.2d at 255). The *Lewis* Court concluded, "[t]he italicized portion says it all and is the holding of this court." *Id*.

3. Defense counsel was not deficient for failing to object.

While the facts in *Lewis* are the most similar to Arrington's case, neither *Lewis* nor the Supreme Court cases concern a situation where a jailhouse inmate, acting on his own initiative and in the hopes of receiving consideration, approaches police and asks if he should record a person in custody, and the police provide the inmate with a recording device.

No Wisconsin court has ever determined whether the circumstances like the ones involved in this case constitute a violation of one's Sixth Amendment right to counsel. The only reported Wisconsin case that has discussed statements obtained by a jail informant is *Lewis*, 324 Wis. 2d 536, which determined there was *no* Sixth Amendment violation. *Id*. ¶¶ 23, 25. Indeed, the way that this case has evolved supports the State's position that whether the circumstances involved in this case constitute a Sixth Amendment violation is unsettled: the circuit court, after conducting a *Machner* hearing and issuing multiple findings, concluded there was no Sixth Amendment violation. (R. 247:3, 7.) But the court of appeals, without determining that any of the court's findings were clearly erroneous, reversed and concluded that there *was* a "a clear violation." (Pet-App. 120.) In doing so, the court of appeals opined that defense counsel's failure to seek suppression "fell far below an objective standard of reasonableness" because defense counsel "simply missed the issue." (Pet-App. 119, 120.) But this again shows that this area of the law is not settled.

Counsel cannot be ineffective, however, for failing to raise an argument—even one that might have been successful—premised on a novel legal analysis. *Breitzman*, 378 Wis. 2d 431, ¶ 49. Here, defense counsel testified at the *Machner* hearing that before trial he was aware that Miller had been working as a confidential informant. (R. 278:9, 23.) He was also aware that Arrington was represented by counsel before Miller recorded Arrington. (R. 278:10–11.) At no time did he move to suppress the recordings; he had not considered or researched the issue. (R. 278:11.) He testified that had he been aware of the cases in Arrington's postconviction motion, he would have brought a motion to suppress. (R. 278:21–22.) But Arrington's 17-page postconviction motion devoted *one* sentence to *State v. Lewis,* and it did not point out that the *Lewis* Court "refused to extend the rule of *Massiah* and *Henry* to situations where an individual, acting on his [or her] own initiative, deliberately elicits incriminating information." *Lewis,* 324 Wis. 2d 536, ¶¶ 22, 23. (R. 219:8.) Defense counsel's failure to move to suppress on Sixth Amendment grounds in this case was not "outside the wide range of professionally competent assistance" sufficient to satisfy the Sixth Amendment because it was a novel issue. *See Breitzman*, 378 Wis. 2d 431, ¶ 49.

Because this is an issue of ineffective assistance of counsel, this Court need not reach the merits of Arrington's Sixth Amendment claim. But if this Court chooses to consider the claim on the merits, it should determine there was no right-to-counsel violation.

II. Arrington's Sixth Amendment claim fails on the merits because no case prohibits the police from utilizing statements obtained from an unpaid jailhouse informant who approached police about recording another inmate in the hopes of receiving a benefit.

The court of appeals erroneously concluded that the State violated Arrington's right to counsel because "[w]hat matters is that law enforcement exhibited direction and control here, as the detectives knew what Miller would be doing and that he was seeking consideration for his efforts." (Pet-App. 117.) But whether the detectives knew that Miller would be recording Arrington and hoping for consideration is *not* "what matters" for determining whether there was a right-to-counsel violation. Rather, as will be shown below, what matters is that a defendant have evidence of (1) a "prior formal agreement" between the informant and police, and (2) the police "*direct[ed] or control[led] or involve[d] themselves in the questioning of a person in custody*." *Lewis*, 324 Wis. 2d 536, ¶¶ 1, 25 (quoting Surridge, 687 F.2d at 255). Arrington has neither.

A. Under *Lewis*, a cellmate's hope to receive a benefit "does not translate into an implicit agreement," and in that situation the informant "cannot be construed to be a government agent."

Adopting the rationale of *Surridge*, the *Lewis* Court determined that "[t]he fact that the government might know an informant 'hopes' to receive a benefit as a result of providing information does not translate into an implicit agreement between the government and the informant if the informant is thereafter placed into an environment where incriminating information can be obtained." *Lewis*, 324 Wis. 2d 536, ¶ 23. It concluded: "If there is just 'hope' and nothing else, then the informant cannot be construed to be a

government agent, eliciting a statement in violation of the Sixth Amendment." *Id.* ¶ 23.

That is the situation we have here. There was no explicit or implicit prior formal agreement. The undisputed testimony from Detective Wanta was that he was aware that Miller was seeking consideration, but that he was not involved because "[t]hat is done by the District Attorney." (R. 278:32.) Similarly, Detective Linzmeier's undisputed testimony was, "that's not what we do in our position. That is through the attorneys." (R. 278:58.) Accordingly, these circuit court's findings are not clearly erroneous: the detectives "made no promises to Mr. Miller that the fact that he was giving information would lead to a reduced sentence;" the "police never made any promise to Mr. Miller in terms of what he will receive for his cooperation;" and "Miller was acting with the hope that the prosecutors in his case would give him a more lenient sentence which is very similar to the confidential informant in *Lewis*." (R. 247:5–6.)

Lewis requires that the defendant have evidence of "a prior formal agreement," and the court of appeals pointed to none. Indeed, the court of appeals even acknowledged in its opinion that "it was not specified what the consideration would be." (Pet-App. 116.) Arrington offered no evidence of any understanding or benefit conferred upon Miller in exchange for recording Arrington. All the court of appeals could point to, time and again, was that the detectives "knew" that Miller was seeking consideration. (Pet-App. 116–18.) Under *Lewis,* that is not enough. 324 Wis. 2d 536, ¶¶ 1, 22, 23. As *Lewis* noted, the *hope* of a benefit is not the same as a *promise* of a benefit. *Id.* ¶ 23. Like the jailhouse cellmate in *Lewis,* Miller was "promised nothing." *Id.* ¶ 11. Indeed, Miller was not told of any consideration he might receive until well *after* the recordings were made (R. 237), not "prior." Arrington simply fails to provide any evidence of a "prior formal agreement" between the State and Miller.

While the court of appeals determined that "[t]here is no need to have consideration at all, let alone consideration spelled out in advance" (Pet-App. 117), the State agrees. *See Lewis*, 324 Wis. 2d 536, ¶ 25 n.3. But what Arrington *still* must show under *Lewis* is evidence "of both an agreement between the government and the inmate and control or directions by the government." *Id.* Here, the court of appeals pointed to no prior formal agreement. (Pet-App. 117.)

The postconviction court got it right: "Miller was cooperating with the government because of a hope that he would receive a reduced sentence, and the government was under no obligation to turn him away when he asked to help." (R. 247:7.) He was "the classic entrepreneur, seeking to market his information without any advance arrangement." *See State v. Marshall,* 882 N.W.2d 68, 101 (Iowa 2016). Because there was no prior implicit or explicit formal agreement, Arrington fails to show a Sixth Amendment violation.

B. Under *Lewis*, "[a]s 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, such questioning does not violate the [F]ifth or [S]ixth Amendments."

Police cannot use a jailhouse cellmate to deliberately elicit incriminatory statements "by investigatory techniques that are the equivalent of direct police interrogation." *Lewis*, 324 Wis. 2d 536, ¶ 1. In addition to having evidence of a "prior formal agreement," this also requires that a defendant provide evidence that police directed, controlled, or involved themselves in Arrington's questioning. *Lewis*, 324 Wis. 2d 536, ¶¶ 1, 25. As the audio recordings, testimony, and circuit court findings show, that didn't happen here. (R. 178; 278:28–60.)

Here, it is undisputed testimony that the detectives did nothing to direct, control, or involve themselves in Miller's questioning of Arrington. As the postconviction court found:

- Miller "voluntarily contributing information to the police which prompted the police to have a discussion with [Miller] about being a confidential informant."
- "The police never approached Mr. Miller about recording Mr. Arrington."
- Miller "voluntarily asked the police if he should record any information from Mr. Arrington, and the detective informed him that he could record such conversations."
- "Miller made requests to speak to law enforcement. Not vice versa."
- "Arrington began talking to Mr. Miller about his case without Mr. Miller prompting the conversation."
- "The police could not listen in on any conversation, and had not told what questions Mr. Miller should ask Mr. Arrington."
- "Arrington volunteered information to Mr. Miller without being prompted by him."
- Miller had ability to turn off the recorder and was under "no obligation" to record.

(R. 247:4–6.)

These findings are not clearly erroneous, nor did the court of appeals determine that *any* of the circuit court findings were clearly erroneous. The evidence is undisputed that the officers did not control, instruct, or involve themselves in Miller's questioning of Arrington. *See Lewis*, 324 Wis. 2d 536, ¶¶ 1, 25. While the court of appeals determined that there was "control here, as the detectives *knew* what Miller would be doing and he was seeking consideration for his efforts" (Pet-App. 117 (emphasis added)),

as demonstrated above, *knowing* that Miller was going to record and that he was hoping for consideration does not equate to government "control" under any caselaw. Nor is "control" providing Miller with what he asked for: the ability to record. (Pet-App. 117.) Again, as the circuit court found, "The police . . . had not told what questions Mr. Miller should ask Mr. Arrington." (R. 247:5.)

Arrington fails to show evidence that the police "deliberately elicited" incriminatory statements from him "by investigatory techniques that are the equivalent of direct police interrogation." *See Massiah*, 377 U.S. at 206; *Lewis*, 324 Wis. 2d 536, ¶ 1. Here, the police did "nothing to direct or control or involve themselves in the questioning of [Arrington] by [Miller]," and so "such questioning does not violate the [F]ifth or [S]ixth Amendments." *Lewis*, 324 Wis. 2d 536, ¶ 25 (quoting *Surridge,* 687 F.2d at 255).

C. If this Court determines that the recordings should have been suppressed, then any error was harmless.

The erroneous admission of evidence in violation of a defendant's Sixth Amendment right to counsel is subject to a harmless error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986*). See State v. Dyess*, 124 Wis. 2d 525, 544, 370 N.W.2d 222 (1985) (with the exception of the burden shifting, the test for harmless error is essentially consistent with the test for prejudice in an ineffective assistance of counsel claim). "To determine whether an error is harmless, this court inquires whether the State can prove 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[ ].'" *State v. Jorgensen,* 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77 (citation omitted):

> This court has identified several factors to assist in determining whether an error is harmless: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or

> absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case.

Id.

Here, if the court finds there was error, the State meets its burden of proving it was harmless. Defense counsel failed once to object to the admission of the recordings. (R. 275:7.) While the State discussed the recordings during closing argument, the recordings did not bring anything that Miller's testimony alone would not. The importance was minimal. Also, the evidence was cumulative because it was corroborated by other witnesses. (R. 275:54, 59–61; 271:260, 263, 147–49, 151–52, 45, 48–49, 55, 57, 60, 62, 63.) The recordings did not duplicate untainted evidence; as the court of appeals noted, the self-defense theory included other self-defense evidence. (Pet-App. 121–22.) Further, the State could have relied on Miller's testimony and not the recordings. And, finally, the other evidence against Arrington was overwhelming.[9]

[9] On this final factor, the State incorporates the facts and arguments made in Section I.B. For the same reasons Arrington cannot show prejudice, the State shows the error was harmless because of the overwhelming evidence of his guilt.

CONCLUSION

The State requests that this Court reverse the court of appeals decision and reinstate Arrington's conviction of first-degree intentional homicide.

Dated this 3rd day of November 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 294-2907 (Fax)
shaeffersl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,834 words.

Dated this 3rd day of November 2021.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 3rd day of November 2021.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General

Appendix
State of Wisconsin v. Richard Michael Arrington
Case No. 2019AP2065-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § (Rule) 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 § (Rule) 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 3rd day of November 2021.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 3rd day of November 2021.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General