STATE OF WISCONSIN

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

Case No. 2019AP2065-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

On Review of a Decision of the Court of Appeals
Reversing a Judgment and Order Entered
in the Brown County Circuit Court,
The Honorable Timothy A. Hinkfuss, Presiding

RESPONSE BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was trial counsel ineffective for failing to challenge the state's use at trial of incriminating statements that the state obtained by outfitting a confidential informant, who was a jail inmate, with a recording device and authorizing him to secretly record conversations with Mr. Arrington, after the state had charged Arrington with first-degree intentional homicide and while he was represented by counsel?

The circuit court determined the confidential informant was not an agent of the state and, therefore, concluded that the state's conduct did not violate Mr. Arrington's right to counsel. The court of appeals reversed, holding that the informant was acting as an agent of the state, and the state violated Arrington's right to counsel by using the recordings and the informant's testimony at trial. *State v. Arrington*, 2021 WI App 32, ¶37, __ Wis. 2d __, 906 N.W.2d 459. Further, the court held that counsel's failure to seek suppression of, or otherwise object to, the admission of the recordings and the informant's testimony was deficient and prejudicial. *Id*. at ¶44 & 48.

2. As an alternative ground for relief, is a new trial required because the state created plain error when it used a jail informant to obtain and memorialize incriminating statements from Mr. Arrington without the assistance of his attorney and then used those statements against Arrington at trial?

Neither of the lower courts reached this issue, the circuit court because it saw nothing improper about the state's conduct and the court of appeals because it reversed due to ineffective assistance of counsel.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

SUMMARY OF ARGUMENT

Once the government initiates criminal proceedings, a suspect becomes the accused, and the accused has the right under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution to legal representation when the government interrogates him. *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *State v. Forbush*, 2011 WI 25, ¶¶16 & 47, 332 Wis. 2d 620, 796 N.W.2d 741 (right to counsel triggered by the filing of a criminal complaint or an arrest warrant).

This protection extends beyond questioning conducted by police. *Massiah v. United States*, 377 U.S. 201, 205 (1964). It also applies to surreptitious interrogations by individuals, including jail informants, who are cooperating with police. *United States v. Henry*, 447 U.S. 264 (1980); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (abrogated on other grounds).

In disregard of this long-standing precedent, the government used a jail inmate and confidential informant – "CI 355" – to secretly record conversations with other inmates, including Richard Arrington who had been charged with first-degree intentional homicide and had appeared in court with counsel on that charge. Equipped with a recording device that the government secured around his waist, the CI, Jason Miller, initiated and recorded over three days conversations with Mr. Arrington about his pending homicide case. At trial and with no objection from defense counsel, the government played for the jury portions of the recordings and presented testimony from Miller who elaborated on Mr. Arrington's damning statements, all of which were secretly obtained without the assistance of his attorney.

The court of appeals held that the government's conduct in this case is "the very conduct that is prohibited" by the Sixth Amendment guarantees articulated by the United States Supreme Court and that trial counsel's failure to seek suppression of, or otherwise object to, the government's use of statements it obtained in violation of the Sixth Amendment was ineffective assistance. *State v.*

Arrington, 2021 WI App 32, ¶¶2, 35, 49, __ Wis. 2d __, 906 N.W.2d 459. The court of appeals is correct.

Contrary to the state's claim, the law is not unsettled. The governing principles have been in place for decades and were previously applied in this state in a case also involving a jail inmate. *State v. Lewis*, 2010 WI App 52, 324 Wis. 2d 536, 781 N.W.2d 730. The absence of another case where, as here, police equipped their CI with a recording device and authorized him to record conversations with represented inmates about their pending charges demonstrates not that the law is unclear but, rather, that such a tactic is rarely used because it is clearly unlawful.

The obvious and substantial violation of Mr. Arrington's fundamental right to counsel necessitates a new trial without the illegally obtained statements, either due to ineffective assistance, as the court of appeals held, or due to plain error.[1]

The state's claim that Mr. Arrington was not prejudiced by the tactic the state employed simply cannot be reconciled with how at trial the state relied upon the recordings and its informant's testimony – the state's final and unimpeachable witness – to destroy Mr. Arrington's claim that he shot in self-

[1] Although Mr. Arrington raised the claim of plain error below, the court of appeals did not reach it because the court reversed due to ineffective assistance of counsel, and the trial court addressed neither plain error nor ineffective assistance because it believed Miller was not acting as an agent of the state.

defense and it was another man, "Shorty," whose shot killed Ricardo Gomez. "[T]he recordings and statements eliminated any self-defense argument that Arrington could make, which was the only defense he had at trial." *Arrington*, 2021 WI App 32, ¶46. The court of appeals' decision should be affirmed.

ARGUMENT

I. The court of appeals correctly held that trial counsel was ineffective for failing to challenge the government's use of incriminating statements that the government's confidential informant elicited from Mr. Arrington and secretly recorded in violation of his right to counsel.

A. Counsel's performance was deficient because he "simply missed" an obvious claim that should have prevented the government from using against Mr. Arrington statements it obtained in violation of his right to counsel.

1. The state's claim that the law is unsettled cannot be reconciled with the long-standing principles set forth by the United States Supreme Court.

The state claims that trial counsel's failure to challenge the government's use of the statements it

obtained through its informant cannot be deficient because the law is unsettled. That claim crumbles under the line of Supreme Court cases running from 1964 to 1986 – all of which remain good law – establishing the fundamental, constitutional guarantees at issue here. Indeed, some twenty years ago, in a 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.

That law consists of four decisions, of which two involve recorded conversations obtained by a co-defendant and two involve jail informants reporting what a cellmate said. None of the four involves a jail informant who police equipped with a recording device to memorialize statements elicited by the informant from an inmate whose right to counsel had attached. The fact that "none present a situation that happened here", as the state argues (brief, p. 31), speaks to the flagrancy of the violation, not to any lack of clarity in the governing law.

In *Massiah v. United States*, 377 U.S. 201, 203 (1964), a co-defendant allowed a government agent to install a radio transmitter in his car, and "totally unbeknown" to Massiah, the agent listened to their conversation and then testified at trial about Massiah's incriminating statements. The Supreme Court held that Massiah was denied "the basic protection" of the Sixth Amendment when the government used against him at trial "his own

incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." *Id*. at 206. The court expanded the protections of *Spano v. New York*, 360 U.S. 315 (1959), where statements were obtained during police interrogation, to "indirect and surreptitious interrogations." *Id*. at 206. The court noted that Massiah's Sixth Amendment right was "more seriously imposed upon because he did not even know that he was under interrogation by a government agent." *Id*. The court reversed Massiah's convictions. *Id*. at 207.

In the second case involving recorded conversations, a defendant, Colson, and his attorney contacted police and ultimately Colson agreed to wear a wire at a meeting with his co-defendant. *Maine v. Moulton*, 474 U.S. 159, 162-65 (1985). Police instructed Colson not to question Moulton but to "'just be himself in his conversation'". *Id*. at 165. Portions of the recorded conversation were used at trial. *Id*. at 167. The Supreme Court held that the state violated Moulton's Sixth Amendment right "when it arranged to record conversations between Moulton and its undercover informant, Colson." *Id*. at 176. "By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment." *Id*. at 177 (footnote omitted). The court affirmed the lower court's reversal of Moulton's convictions. *Id*. at 180.

Citing earlier decisions, the Supreme Court noted that it had "made clear that, at 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 Sixth Amendment is violated "when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.* at 176 (footnote omitted).

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

Id. (citation omitted).

The Supreme Court also found a Sixth Amendment violation in *United States v. Henry*, 447 U.S. 264, 266 (1980), where a paid jail informant, Nichols, agreed to "be alert" to any statements made by federal prisoners, including Henry. Nichols was *not* outfitted with a recording device, and police specifically told him "*not* to initiate any conversation with or question Henry" regarding a bank robbery. *Id.* (emphasis added). The Supreme Court held that the

conduct violated the Sixth Amendment, and, consequently, the government should not have been allowed to use at trial Henry's statements to its informant. *Id*. at 274. The court held that "[b]y 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*. (footnote omitted). Although Nichols had not questioned Henry, it was enough that he had "stimulated" conversation and Henry's incriminatory statements were the product of the conversation. *Id*. at 271, 273.

In *Kuhlmann v. Wilson*, 477 U.S. 436, 439 (1986) (abrogated on other grounds), an informant, Lee, agreed to "'keep his ears open'" to his cellmate's statements about the names of other perpetrators. The Supreme Court noted that *Henry* left open the question whether the Sixth Amendment forbids "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. The trial court had found that Lee obeyed the detective's instructions not to ask any questions. *Id*. at 440. The Supreme Court found no Sixth Amendment violation, concluding that a defendant "must demonstrate that the police and their informant took some action, beyond merely listening that was designed deliberately to elicit incriminating remarks." *Id*. at 459.

The governing principles are clear. The defendant must show that the police and their informant *took some action*, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Supplying an informant with a recording device for the purpose of memorializing conversations with an individual whose right to counsel has attached is certainly "some action" designed to elicit incriminating responses. The conduct is a "knowing exploitation" of the opportunity to confront the accused without counsel being present, which is incompatible with the Sixth Amendment's guarantee that the accused, after the initiation of charges, has the right to rely on counsel as a "medium" between him and the state. *Moulton*, 474 U.S. at 176. Even where the police direct their informant not to question the accused, it is sufficient if the informant "stimulates" conversation.

This court has written that "'ineffective 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, *quoting State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Based on the line of Supreme Court cases – *Massiah*, *Moulton*, *Henry* and *Kuhlmann* – reasonable counsel should have known enough to launch a challenge against the state's use of the statements at trial that the state's informant obtained from Mr. Arrington without the assistance of his attorney. This court held that counsel had no duty to raise a claim that would

require the court to *overrule* a "long line of decisions", *Lemberger*, 374 Wis. 2d at ¶¶19 & 32, or where the issue is "a matter of first impression." *State v. Hanson*, 2019 WI 63, ¶¶29-30, 387 Wis. 2d 233, 928 N.W.2d 607. Mr. Arrington's claim does not require overruling anything. Counsel was deficient for failing to raise a Sixth Amendment challenge based upon a long line of decisions from the nation's highest court.

Nor is an area of law unsettled, as the state claims (brief, p. 36), simply because the court of appeals reversed the circuit court. Rather, as shown below, the circuit court misapplied the governing principles to the undisputed facts, and the court of appeals corrected that error of law. *See Lewis*, 324 Wis. 2d 536, ¶16 (whether the conduct of the government and informant is considered government interrogation is a legal question).

The governing law is not unclear, this was not a close call 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.

2. Counsel failed to raise a claim that under binding precedent would have prevented the state from using at trial statements it obtained in violation of the Sixth Amendment.

The conduct of the detectives, the confidential informant and the prosecutor is every bit as clear as the governing principles.

Jason Miller, described as CI 355 in police reports, had previously worked as a confidential informant for the Brown County Drug Task Force. (235; 236; 278:32-33). In April of 2016, while jailed on Brown County charges, Miller's attorney notified the district attorney's office that Miller wanted to speak with law enforcement. (278:29). The matter was assigned to two detectives, Michael Wanta and Bradley Linzmeier, who was the lead detective in Mr. Arrington's case. (278:28-29).

On April 6, 2016, the state filed a criminal complaint charging Arrington with shooting and killing Ricardo Gomez four days earlier. (2). Mr. Arrington turned himself into the Green Bay Police Department on April 8, 2016. (275:101; 278:47). And on April 11, 2016, Arrington had his initial appearance with his attorney on the charge of first-degree intentional homicide.[2] (255).

Beginning on April 6, 2016, Detective Wanta met with Miller several times at the jail; Detective Linzmeier was present during at least one of those meetings. (278:31-33, 50). Initially, Miller indicated that he could obtain information from inmates Donald Moore and Antwon Powell regarding a homicide that did not involve Arrington. (278:29-30, 33-34, 44, 50-51). But Miller also told the detectives that Arrington ("Swag") was talking about his case and he believed

[2] The state later added a charge of felon in possession of a firearm. (73).

Arrington would tell him things about his case. (278:34, 36, 47, 51).

In their meetings, the three devised a plan under which the detectives supplied Miller with a two-by-two-inch digital recorder that jail staff tucked into a band around Miller's waist. (278:36-37). The detectives authorized Miller to record conversations with Arrington, in addition to Moore and Powell, all of whom were housed in the same location in the jail, referred to as "Fox Pod." (278: 36, 46, 51). Specifically, Detective Linzmeier testified:

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

(278:51). Detective Wanta testified:

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

(278:36). Detective Wanta gave Miller "directions on how to use the recorder". (278:43).

The detectives understood Miller was seeking consideration in his pending cases. (278:32, 41). Although the specifics would come from the district attorney "based on what the confidential informant actually did", the understanding was the more the informant produces the more the informant might get. (278:32). Wanta testified they told Miller "the information he would gather would, again, be used as part of his consideration." (278;43).

Over the course of three days – April 11, 12 and 13 – Miller recorded more than three hours of conversations with Arrington. (278:35, 38-39).[3] Detective Wanta would retrieve the recording device each night, and in the morning he would review the recording and transfer the contents to a CD that was placed into evidence. (278:38-39). Wanta would also provide Detective Linzmeier with copies of the CD's and brief him on what appeared on the tapes regarding Arrington. (278:47).

Before he started talking with Arrington, Miller knew about Arrington's case from the news. (275:30-31). Each recorded conversation occurred through a metal door of a jail cell, with Miller on one side and Arrington on the other. (275:12). Miller initiated each conversation. On April 11 and 13 Miller approached Arrington's cell, and on April 12 Miller called

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

Arrington over to his cell while Arrington was in the day room. (278:64-66).[4] While Arrington was speaking to Miller, he did not know that Miller was an informant for the police, and he did not know Miller was wearing a recording device. (278:63-64).

At trial, the prosecutor called Miller as the state's final witness. The state questioned Miller about what Arrington told him about the shooting and his dispute with Rafael Santana-Hermida ("Shorty"). The state then played for the jury three portions of the recording made on April 13, which Miller helped interpret for the jury. (275:10-29).

In the first recording played for the jury, Miller approached Arrington and asked if he wanted to read a magazine, and when Arrington declined, the conversation turned to Shorty and the evidence against Arrington. (234:1).[5]

> CI 355: Hey, my nigger, like you said, nigger, the only motherfucker that seen this shit was the bitch, Ricco, and Shorty. Shorty ain't gonna ice you. You think, you 100% for sure Ricco ain't gonna say nothing?

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[4] At that time, Arrington was allowed out of his cell one hour a day and Miller was allowed out four hours a day. (278:62-63).

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

> Arrington: Yeah, he ain't gonna say shit. Damn.
>
> CI 355: So the only person you gotta worry about is the bitch. You know what I'm saying? You think she's gonna come to court? You just gotta holler at your sisters and them holler at that bitch, dog.
>
> Arrington: Yeah, that's what I'm thinking ….

(275:19-21; 234:1). Miller clarified for the jury that they were talking about convincing AVT, the female passenger in Arrington's car, not to come to court. (275:21).

In the second excerpt played for the jury, Miller and Arrington talked about the shooting and an earlier incident where Shorty was robbed of a gun. (275:22-25; 234:5-6). Miller testified that Arrington was laughing about Shorty being scared when they stole his gun. (275:24). Miller told Arrington that he had "embarrassed" Shorty. (275:23). As to the shooting, the jury heard from the recording that Arrington said Shorty was "acting like a gorilla," which Miller said meant "overly aggressive," when he saw Arrington in the car. (275:23-24; 234:5). Arrington said Shorty's behavior "added the fuel to the fire …." (234:5).

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

> CI 355: What'd he do?
>
> Arrington: Dog was acting like a gorilla.

(234:5).

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

> Arrington: It wasn't even that though. Nigger, when he was standing up there, nigger, you wanna know all that?
>
> CI 355: What, he was talking shit?
>
> Arrington: Hey, what's up. All I could picture was this nigger stabbing me in my face. It wasn't even none of that, shit.
>
> CI 355: Ah, he told you, he was like what's up?
>
> Arrington: Yeah, I'm talking about, he like, nigger, open the door, right. He opened the door to greet his mans, and they, they laughing and joking and whatever. Then he looked down, directly down and see me. Man, what's up? I don't know what else he was saying but, nigger.
>
> CI 355: That's when you popped, knocked fire from their ass.
>
> Arrington: I'm talking …

> CI 355: Hey, but see, it's fucked up because you ain't hit him. You hit the other nigger, you know what I'm saying?
>
> Arrington: Right.
>
> CI 355: See you, boy, your aim ain't shit.
>
> Arrington: It wasn't that he, he, like as soon as I, he ducked away, you mean.
>
> CI 355: Aw, he jumped?
>
> Arrington: And I just dumped the crib down cuz I don't know if he gonna come back and dump me down, you mean, and then Ricco get into the car …
>
> CI 355: Right.
>
> Arrington: … I mean so he act ups on bro and the bitch, you mean.
>
> CI 355: Damn.
>
> Arrington: I can't just smash off and leave my brother, you mean.
>
> CI 355: Right.

(234:22-23).

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

> Q When you were talking to Swag over the three days that you would be interacting with him from April 11th, 12th, and 13th, did Swag ever tell you that he saw Shorty with a gun in his hand?

A No.

Q Did he ever say that Shorty fired a gun?

A No.

Q Did he ever – did Swag ever tell you that actually Shorty shot … Ricardo Gomez?

A No.

(275:19).

The detectives' conduct was a clear violation of the Sixth Amendment 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*, 2021 WI App 32, ¶36. 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.

Had trial counsel challenged the state's conduct, the Supreme Court precedent would have barred the prosecutor from using at trial statements obtained from Mr. Arrington in violation of his right to counsel.

3. Contrary to the state's claim, *Lewis* is further support for a successful challenge to the state's conduct in this case.

The state maintains that "the facts in *Lewis* are the most similar to Arrington's case." (Brief, p. 36). In truth, what occurred here is nothing like *Lewis*, where the court found no Sixth Amendment violation because Lewis' cellmate, a man named Gray, "acted purely on his own in the hope of getting further sentencing consideration …." *Lewis*, 324 Wis. 2d 536, ¶1. Gray was not equipped with a recording device, he was not an informant for any law enforcement agency in Wisconsin, and he had no contact with law enforcement until *after* he obtained information from Lewis. *Id*. at ¶¶5-9. Although Gray had at one time been an informant for the federal government, he had no such agreement with any state agency in Wisconsin, and he obtained information from Lewis at the Kenosha County Jail without any prior contact with any state police or prosecutor. *Id*. Gray was not a government agent because there was just "'hope' and nothing else …." *Id*. at ¶23.

In contrast, Miller was not a lone wolf acting purely on his own, with no support from or control by law enforcement. Miller was acting in accordance with a plan designed and orchestrated with law enforcement, under which he recorded conversations with three inmates, including Arrington, on a device that was provided by the state, reviewed daily by the state and placed into the state's evidence. Miller,

unlike the informant in *Lewis*, was an agent of the state.

In addition to the factual differences, *Lewis* adopted a standard that when applied here shows a clear violation of Mr. Arrington's right to counsel. Relying on the Supreme Court cases, the court of appeals recognized that police cannot use a jail informant "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." *Lewis*, 324 Wis. 2d 536, ¶1. The court 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. Further, the court wrote, "*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 Sixth Amendment. *Id*. at ¶25, *quoting United States v. Surridge*, 687 F.2d 250, 255 (8th Cir. 1982). "This italicized portion says it all and is the holding of this court." *Id*.

Here, the detectives did a lot more than nothing, as the court of appeals correctly recognized.

> … 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 knew that Arrington would talk to Miller about his case, and they were interested in recording those conversations.

Arrington, 2021 WI App 32, ¶33.

The state's claim that there was "no explicit or implicit prior formal agreement" is belied by the undisputed facts. After all, the two detectives and Miller, who had done prior work for the county as a confidential informant, sat down together and devised a scheme under which Miller would obtain statements from Mr. Arrington and two other inmates. The state's assertion that there was no prior formal agreement because "Miller was not told of any consideration he might receive until well *after* the recordings were made" is both legally and factually incorrect. (Brief, p. 39) (emphasis in original).

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*, 2021 WI App 32, ¶34. 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 to resolve three pending Brown County cases charging him with eight crimes. (237). Under the agreement, Miller, who had 13 prior convictions, would plead to five counts without the repeater enhancers, the state would dismiss the remaining counts, and the state agreed to cap its recommendation at six years' initial confinement and ten years' extended supervision. (237). The agreement contemplated that Miller would give "a full debrief and testify" against Arrington and Powell. (237).

The state fares no better with its claim that "the detectives did nothing to direct, control, or involve themselves in Miller's questioning of Arrington." (State's brief, p. 41).

First, that Miller, through his attorney, volunteered his services to the state is of little import. In *Moulton*, a co-defendant and his attorney approached police about cooperating. *Moulton*, 474 U.S. at 162-63. The Sixth Amendment was violated because the state knowingly exploited an opportunity to confront an accused without counsel being present. *Id*. at 176. The same is true here.

Second, when Miller told the detectives he believed he could get information from Arrington about his case, the detectives responded by expressly authorizing Miller to record his conversations with Arrington. At that moment, the two detectives and their CI were all joined in a plan designed to elicit incriminating information from Arrington.

Third, although Arrington may have been talking to Miller, it was Miller who initiated each conversation once he had entered into an agreement with the state and was equipped with a recording device provided by the state.

Third, there was no need for the detectives to tell Miller what to ask because they all knew the information that was wanted: anything related to Arrington's pending homicide case.

Fourth, Miller did much more than "stimulate conversation" with Arrington. Miller maintained conversations with Arrington over long periods on three separate days, and Miller did ask Arrington specific questions, including questions about the shooting that elicited some of the most incriminating statements. It was after Miller asked if Shorty was acting like a beast that Arrington said, "Yeah. That's what added the fuel to the fire …." (234:5). Arrington said all he could "picture" was Shorty "stabbing me in my face" in response to Miller's question, "What, he was talking shit?" (234:22). After commenting on Arrington's bad aim, Miller asked if Shorty jumped, eliciting Arrington's statement that he "just dumped

the crib down". (234:22-23). This was "indirect and surreptitious interrogation." *Massiah*, 377 U.S. at 206.

The fact that it occurred in a jail with the assistance of a jail informant only enhances the violation. As the Supreme Court noted, "'confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents,' influences that were facilitated by [the jail informant's] 'apparent status as a person sharing a common plight.'" *Moulton*, 474 U.S. at 173, *quoting Henry*, 447 U.S. at 274. Indeed, here, the prosecutor acknowledged at trial that 29-year-old Miller, who had 13 prior convictions, was "pretending to be a good guy or a friend" and advisor to 20-year-old Arrington. (275:152) (see also 275:146, "you were seeking his advice" & 276:60, "this guy he's talking to at the jail for advice"). Like the informant in *Henry*, Miller "managed to gain the confidence" of Arrington, *Henry*, 447 U.S. at 274, but here, the confidant, Miller, was secretly wearing a recording device that was provided by police and returned to police with Arrington's incriminating statements.

This is not a case where "'the constable … blundered"; "it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." *Id.* at 275, *quoting People v. DeFore*, 242 N.Y. 13, 21, 150 N.E. 585 (1926) (footnote omitted). Trial counsel's deficient performance allowed the state to use statements it obtained in brazen violation of Mr. Arrington's right to counsel.

4. The record shows that counsel simply missed the issue.

The state's claim that counsel "chose not to object to the admission of the recorded statements" is misleading, at best. (Brief, p. 6). As the court of appeals concluded, the record shows that counsel "simply missed the issue." *Arrington*, 2021 WI App 32, ¶41.

Even though counsel said at trial that he had the recording "for quite some time" and had reviewed it "long before trial" (275:7), he did not move pretrial to suppress the statements nor did he object at trial to Miller's testimony. At the *Machner*[6] hearing, counsel said he had not considered whether the statements were obtained in violation of Arrington's right to counsel and he had not researched the question. (278:11, 21-22). When asked if he would have sought to suppress the statements had he identified the claim, counsel testified, "I likely would have, yes" and, "I believe I would have, yes." (278:11, 22). Counsel had no strategic reason for not seeking to exclude the statements and recording; he just missed it.

While the state is correct that in closing argument counsel told jurors the tape was "muddled garbage" (276:98), the state overcame the tape's poor quality by having Miller decipher it for the jury. Had counsel challenged the state's conduct, the jury would not have heard the recording or Miller's testimony.

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

Counsel acknowledged that his client's "fantastic" demeanor on the witness stand was cast in a different light by the profanity-laced taped conversation in which Arrington talked callously about shooting Gomez and about how he had to keep "the bitch," AVT, off the witness stand. (278:15-16). Miller's testimony was the driving force behind the decision to have Arrington testify. At the postconviction hearing, Arrington testified that before trial he didn't want to testify, but he later changed his mind when his attorney told him it was in his best interest to testify in light of the recordings. (278:67-68). Had his attorney sought and obtained suppression of the unlawfully obtained statements, Arrington likely would not have testified because the jury would have heard his version of the shooting through Detective Linzmeier's testimony.

Miller's testimony and the recordings "were decidedly not helpful" to Mr. Arrington, and their admission "constituted a clear violation" of his Sixth Amendment right to counsel. *Arrington*, 2021 WI App 32, ¶44.

B. The state's argument that Mr. Arrington was not prejudiced by the state's use at trial of the statements the state obtained in violation of the Sixth Amendment should be rejected.

1. Miller's testimony and the recordings eviscerated Mr. Arrington's claim that he fired in self-defense and it was actually Shorty who shot Mr. Gomez.

Whether Mr. Arrington was prejudiced by counsel's deficient performance is not a review of the sufficiency of the evidence. *State v. Sholar*, 2018 WI 53, ¶¶44-46, 381 Wis. 2d 560, 912 N.W.2d 89. "Even where the evidence is sufficient to sustain the conviction, when a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined." *State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992).

Confidence in the outcome is undermined because, as the court of appeals concluded, "the recordings and statements eliminated any self-defense argument that Arrington could make, which was the only defense he had at trial." *Arrington*, 2021 WI App 32, ¶46. The statements Miller obtained from Arrington only eleven days after the shooting undermined his statements to Detective Linzmeier twelve months later and his testimony at trial

eighteen months later that he fired in self-defense and that it was Shorty who shot Mr. Gomez. (274:106-07; 275:91-98).

Countering Arrington's claim that he was frightened of Shorty and fired in self-defense, the state elicited from Miller testimony that Arrington was laughing about Shorty being scared when they stole his gun and joking about how he had embarrassed Shorty in front of his girlfriend. (275:23-24). The jury heard the two talk about having to convince "the bitch" not to come to court and how he had wiped down the car to hide gunshot residue. (275:14, 19-21; 234:1).

Most significantly, Miller testified that Arrington did *not* tell him that he saw Shorty with a gun, that Shorty fired a gun or that it was actually Shorty who shot Mr. Gomez. Rather, on the recording the jury heard Arrington tell Miller that when he pulled up he saw Shorty "acting like a "gorilla", which is "what added fuel to the fire …." Arrington said "[a]ll I could picture was this nigger stabbing me in the face" and that's when "I just dumped the crib down …." Miller translated that last phrase to mean Arrington kept shooting at the house. When Miller chided Arrington that "your aim ain't shit", Arrington said "[i]t wasn't that" …. Shorty ducked away and Gomez got hit. (234:5, 22-23; 275:17-19).

Those statements, all obtained in violation of the Sixth Amendment, contradicted Arrington's statements to Detective Linzmeier and his testimony at trial that he fired three shots toward the "feet area

of the porch" when he saw Shorty reaching for a gun, and that as he was about to drive off, he saw Shorty fire a gun and hit Mr. Gomez. (274:106-07; 275:94-97). On cross-examination the prosecutor used the unlawfully obtained statements to shred Arrington's credibility. Through the recording, the prosecutor showed that rather than being scared of Shorty, Arrington was making fun of him when talking to Miller:

> Q I heard you laughing on there about Shorty, kind of making fun of him when he was, during that robbery, had to go ask a girl, I guess you called her a bitch, to go get the other gun, you thought that was kind of funny?
>
> A If that's how you want to put it.
>
> Q Is that the guy you were scared of, the guy you were making fun of on the audio tape there?
>
> A Yes.

(275:118).

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

> Q And you went on to describe talking to Jason Miller, that you shot – basically shot and Shorty ducked away; is that right?
>
> A I believe so, yes.

. . .

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

A Yes.

Q So at that point, when you start shooting at the house, you even said you don't even know if he's going to shoot back?

A Which means I was trying to prevent him from shooting back.

Q This is like a preventive attack ….

(275:157-58).

The state highlighted that Arrington did not tell Miller that Shorty shot Mr. Gomez:

Q I bet when you talked to him, you told him, "Hey, I didn't even kill the guy, his own friend shot him," I bet you told him, though, right, because you were seeking advice, you told him that?

A No, I did not tell Jason Miller that.

(275:146).

While Miller's testimony and the recording were potent evidence to impeach Arrington, Miller was an unimpeachable witness, a fact the state capitalized on at trial but denies in this court. (State's brief, p. 27). Trial counsel was able to impeach the credibility of two

men – James Allen and Christopher Howard – who testified that after Shorty cut Arrington with a knife, Arrington made comments threatening retaliation. Allen had nine prior convictions and Howard had 21. (274:200, 207). Even more importantly, counsel showed that both had pending federal charges and the government had promised consideration on those charges in exchange for their testimony against Arrington. (274:200-01, 207-09).

Even though Miller also had a prior record and was promised consideration, his testimony about Arrington's statements was unimpeachable because the state had the recordings of those conversations. That fact was not lost on the prosecutor, who told the jury, "what's fortunate … is we got the recording", which prevented Arrington's counsel from doing what defense lawyers do, which is to "attack people and say they're lying, they have motives to lie or reasons …." (276:58). The prosecutor was right. Counsel had no credible way to attack Miller's credibility or the recordings.

The state is simply wrong when it argues that there was no prejudice because, even if there were no recordings, "Miller would still testify as to content." (Brief, p. 28). A challenge to the statements would have prevented the state from presenting to the jury not just the recordings but also Miller's testimony about the statements he obtained from Mr. Arrington in violation of the right to counsel. *See Henry*, 447 U.S. at 274 (defendant's rights violated when jail informant

testified at trial about statements obtained in violation of the Sixth Amendment).

2. The state's case against Mr. Arrington suffered from a lack of supporting scientific evidence, a missing witness and conflicting statements from those who witnessed the shooting.

The state's claim that "[n]o witnesses" corroborated Mr. Arrington's defense is simply not true. (Brief, p. 29). Of the 42 witnesses at trial, only four actually witnessed the shooting. Three of the four, including Arrington, thought Shorty was reaching for something. AVT testified it looked like Shorty was reaching for something when he opened the door. (271:184-85). Devin Landrum, the backseat passenger, testified that as Shorty opened the door for Mr. Gomez, Shorty was "reaching for his waist for something which appeared to be a weapon."[7] (275:48). Shorty looked angry. (275:50). Landrum said Arrington fired his gun after Shorty reached for what appeared to be a weapon. (275:54).

Although Craig Taylor said he didn't see Shorty reach for anything, the reliability of his testimony was in doubt because he insisted that Mr. Gomez was shot twice in the back. (271:62). "I saw Ricky get shot twice, I seen that. I seen the bullets hit him …." (271:62). But the medical examiner who performed

[7] Landrum is also referred to as "Risco" and "Rico." (2:3; 275:58).

the autopsy testified that Mr. Gomez died of a single gun shot wound to his chest. (273:14). Taylor also said he didn't see Mr. Arrington fire the shots. (271:102).

A fifth person – Shorty – would have witnessed the shooting, as he was standing near Mr. Gomez when he was shot. But Shorty was conspicuously absent from the trial. Taylor testified that after the police arrived Shorty and his girlfriend, Nina, "just sneak out the door" because they "didn't want to be questioned or nothing like that …." (271:104-05). "'[T]hey was walking across the street, trying like to sneak off, trying not to be seen." (271:72). The state did not present testimony from Shorty or Nina. Although no guns were found in Taylor's home, there was no evidence that police searched Shorty or his girlfriend.

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

The location of spent shell casings and bullets found on the scene supported Mr. Arrington's testimony that he fired three shots toward the "feet area of the porch" because he did not want to actually hit anyone. (275:95-96). Police found three spent shell

casings on or near the street, which is where Arrington was parked. (273:84). Another officer testified to three locations at the front of the house that were damaged by bullets, each of which was below the entryway of the front door, which was "either at the feet or below whoever would be standing there." (271:127-31).

None of the state's experts could disprove the possibility that Mr. Gomez was killed by a bullet fired by Shorty. A tool mark examiner could not conclude whether a bullet and bullet fragment found on the scene were fired through the same firearm. (274:174-75). The medical examiner could not tell from the autopsy the distance from which the bullet that killed Mr. Gomez was fired. (273:34). Another expert who examined gunshot residue on Mr. Gomez's jacket could not determine the distance from which the bullet was shot that penetrated the jacket. It could have been fired from a distance or from close range. (274:153, 161).

As the prosecutor conceded in closing argument, "[s]cience in this case hasn't been able to prove anything really for sure." (276:124). Indeed, although Erica Herrod claimed that Arrington used her bleach to wash himself the night of the shooting, a fingerprint analyst could not find Arrington's prints on the bottle. (274:37).

Eugene Herrod, who had loaned the rental car to Arrington and claimed Arrington said he "fanned Shorty down" (271:260), testified that he was

pressured by police – "I had got locked up three times" (271:264) – before making that statement. Eugene testified that some of the things he told police were not honest because "they was like basically telling me like, okay, if you don't say this, say that, basically you gonna go down for it." (271:265).

Although Taylor claimed that Arrington had been circling the block before the shooting, AVT said that wasn't true. (271:181). Brianna Brown, who saw Arrrington on the day Shorty cut him, testified that Arrington was upset but he had calmed down and didn't take a gun when he left the apartment. (273:70). Tamakeco Brown testified that Arrington was "pretty shook up" after the stabbing but seemed scared, not angry. (275:68). She also said that Shorty had called Arrington and was "singing a lot of threats," making her scared that Shorty would "shoot up the house." (275:67-68).

As the court of appeals correctly noted, the issue is not whether Mr. Arrington *would have* been acquitted without the statements the state obtained in violation of the Sixth Amendment. *Arrington*, 2021 WI App 32, ¶48. Rather, he is entitled to a new trial because there is a *reasonable probability* that he would have been acquitted or found guilty of a lesser offense if the jury had not heard the statements. Because the court instructed the jury on self-defense and lesser forms of homicide (276:12-28), the jury had the option of finding him not guilty of first-degree intentional homicide but guilty of second-degree intentional homicide (imperfect self-defense), or first or second-

degree reckless homicide. Given the holes in the state's case, Mr. Arrington was prejudiced by the state's use of the unlawfully obtained statements that destroyed his theory of defense.

II. The state's obvious violation of Mr. Arrington's fundamental right to counsel guaranteed by the Sixth Amendment warrants a new trial due to plain error.

The flagrancy of the violation and its prejudicial impact warrant relief on an alternative ground, plain error.

Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to preserve the error. *State v. Davidson*, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. Under the plain error doctrine in Wis. Stat. § 901.03(4)[8] a conviction may be vacated when an unpreserved error is fundamental, obvious and substantial. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "'[W]here a basic constitutional right has not been extended to the accused,' the plain error doctrine should be invoked." *State v. Lammers*, 2009 WI App 136, ¶13, 321 Wis. 2d

[8] 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).

376, 773 N.W.2d 463, *quoting Virgil v. State*, 84 Wis. 2d 166, 195, 267 N.W.2d 852 (1978).

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

The erroneous admission of Mr. Arrington's statements, which the state obtained in violation of his right to counsel, warrants reversal as plain error. The erroneous admission of evidence has been held to amount to plain error requiring reversal of criminal convictions. *Id. at* ¶¶53-54 ("jury heard inadmissible, prejudicial evidence that violated Jorgensen's right to confrontation and due process"); *McClelland v. State*, 84 Wis. 2d 145, 162, 267 N.W.2d 843 (1978) (extrinsic evidence showed the defendant was a violent person "who would seek self-help at the point of a gun"). The state's conduct here likewise requires reversal as plain error.

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

A. The state's conduct amounts to an obvious and substantial error as it violates long-standing precedent barring the government from using against a defendant statements it obtained by using an informant to surreptitiously interrogate the defendant without the assistance of his attorney.

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." *State v. Forbush*, 2011 WI 25, 13, 332 Wis. 2d 620, 796 N.W.2d 741, *citing Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

As argued in the preceding section, once the judicial proceedings have begun, the adverse positions of the state and defendant have solidified, and a defendant is "'faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Moulton*, 474 U.S. at 170, *quoting United States v. Gouveia*, 467 U.S. 180, 189 (1984). At that point, the Sixth Amendment guarantees the accused the right to rely on counsel as a "medium" between him and the state. *Moulton*, 474 U.S. at 176.

This protection recognizes that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Id.* at 170. What the government obtains in surreptitious questioning of a defendant after

charging and without counsel "'might well settle the accused's fate and reduce the trial to a mere formality.'" *Id.*, *quoting United States v. Wade*, 388 U.S. 218, 224 (1967).

> Once the right to counsel has attached and been asserted, the State must of course honor it. … We have … made clear that, at 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.

Moulton, 474 U.S. at 170-71 (footnote omitted).

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*, and the court of appeals' decision in *Lewis*. The Supreme Court 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 fundamental right to counsel both obvious and substantial.

B. The state's claim of harmless error cannot be reconciled with how the state used the statements against Mr. Arrington at trial.

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

As shown in the preceding section, through Miller's testimony and the recordings the state was able to place before the jury evidence from Arrington's own mouth contradicting his theory of defense and his testimony at trial. Arrington's words, recorded 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 argument the statements that, unknown to the jury, were unlawfully obtained.

Through the state's final and unimpeachable witness, Miller, the jury heard that Arrington "dumped the crib down" – kept shooting at the house – not because Shorty reached for a weapon but because Arrington wanted to retaliate: "All I could picture was this nigger stabbing me in the face." (234:22).

From that, the prosecutor was able to argue Arrington's "really mad when the guy's basically mocking him after he cut him…." "So yeah, he wants to kill him. He wants to hurt him bad." (276:60). Referring to Arrington's statement to Miller that he dumped the crib down, the prosecutor asked jurors, "Does any of that sound like self-defense?" (276:60).

The prosecutor gushed in closing argument about the good fortune of having the unimpeachable recordings made by its final witness.

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

(276:58-59).

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

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

(276:60). Shortly thereafter, the prosecutor asked the jury to find Arrington guilty of first-degree intentional homicide. The jury did just that.

The state nailed down its prosecution of Mr. Arrington by using damning evidence that it obtained not by happenstance or good fortune but by devising a plan to obtain incriminating statements in blatant violation of Arrington's right to counsel. The state created plain error, entitling Mr. Arrington to a new trial.

CONCLUSION

For the reasons set forth above, Richard Arrington respectfully requests that the court affirm the decision of the court of appeals, which reversed the judgment of conviction and order denying postconviction relief, and remanded for a new trial on the homicide charge without the use of the recordings and Miller's testimony about the jailhouse conversations with Arrington.[9]

Dated this 23rd day of November, 2021.

Respectfully submitted,

Electronically signed by
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[9] Arrington did not seek reversal of the conviction for possession of a firearm by a felon because that crime was factually undisputed and conceded by the defense at trial.

CERTIFICATION AS TO FORM/LENGTH

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. The length of this brief is 9,165 words.

Dated this 23rd day of November, 2021.

Electronically signed by:

Suzanne L. Hagopian
SUZANNE L. HAGOPIAN
Assistant State Public Defender

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 23rd day of November, 2021.

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