STATE OF WISCONSIN
IN THE SUPREME COURT
Appeal No. 18AP2005-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARLAND DEAN BARNES,

Defendant-Appellant-Petitioner

On Review of a Decision of the Court of Appeals, District III, Affirming an Order of the Circuit Court for Douglas County, the Honorable Kelly J. Thimm, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER, Garland Dean Barnes

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ISSUES PRESENTED FOR REVIEW

1. **Can a defendant "open the door" to testimonial hearsay violating his confrontation rights, and which was excluded based on an "egregious" discovery violation, by challenging the quality of the police investigation?**

The circuit court had initially excluded testimony from Officer Clauer based on an "egregious" discovery violation by the State, rendering Clauer unavailable to testify at trial, but admitted testimony from another officer that Clauer allegedly observed Barnes deliver the methamphetamine to the informant. The circuit court ruled that the defense opened the door to this testimony by challenging the lack of video surveillance of the controlled buy. The circuit court never directly addressed whether this admission violated Barnes's confrontation rights.

The court of appeals agreed that the defense opened the door to this testimony, and since the testimony was purportedly admitted for reasons other than the truth of the matter asserted, its admission did not violate Barnes's confrontation rights.

2. **Can the claim that a non-testifying officer witnessed the defendant commit the crime be admitted over hearsay objections under the theory that it is admissible to show the "course of investigation," not for the truth of the matter asserted?**

The circuit court ruled this testimony went to the testifying officer's state of mind, and therefore was not hearsay.

The court of appeals agreed that the evidence was not hearsay because it showed why the testifying officer took subsequent steps of arresting Barnes.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

The trial court excluded the testimony of a police officer (Clauer) who supposedly witnessed Garland Barnes deliver methamphetamine to a confidential informant because of what the court called an "egregious" discovery violation by the State for failure to disclose Officer Clauer's reports for over two years. But at trial, after the defense challenged the quality of the investigation and lack of video surveillance, the State was permitted to question the lead investigator about the fact that Officer Clauer claimed to have personally witnessed Barnes deliver the box of methamphetamines to the informant. The defense argued this was hearsay that nullified the discovery sanction, but the circuit court permitted it under the reasoning that the defense opened the door by challenging the quality of the investigation. The court of appeals agreed, without addressing whether it was even possible to "open the door" to a confrontation violation.

The circuit court's other basis for admitting this testimony was the belief that it was not for the truth of the matter asserted, but to show the course of the investigation by explaining why police moved in to arrest Barnes. The court of appeals agreed, and found no confrontation violation since it was not hearsay if not for the truth of the matter asserted. However, that finding is both factually and legally erroneous; it is factually erroneous because it conflates two separate sets of statements, and the record is clear that Officer Clauer's statements had nothing to do with the officers moving in to arrest Barnes. And it is legally erroneous because "course of investigation" evidence is properly limited to background information, and cannot be expanded to include contested matters bearing directly upon guilt—such as a police officer repeating out-of-court statements that a non-testifying officer *allegedly observed the defendant commit the crime*. Clearly such evidence constitutes testimonial hearsay.

The United States Supreme Court's recent decision in ***Hemphill v. New York,*** 595 US ___, 142 S.Ct. 681 (2022), provides controlling authority for why the error that occurred here violated the defendant's confrontation rights and requires reversal for a new trial. There the Court concluded that the Sixth Amendment permitted no exception for admitting unconfronted testimonial hearsay when a court believes a defendant opened the door by creating a misleading impression of the evidence. ***Hemphill, id.,*** slip op. at 13. The same rule must apply here, where the court of appeals found that testimony regarding Officer Clauer's alleged observations had the "convenient effect" of rebutting some of Barnes's challenges to the quality of the investigation. This Court should apply the holdings of ***Hemphill*** to conclude that the "convenience" of the State cannot justify violating a defendant's confrontation rights.

A. Pretrial and Trial Proceedings

Garland Barnes was convicted by a jury of delivering over 50 grams of methamphetamines on April 21, 2013 (R71:1-2). The transaction was arranged by drug task force officers from multiple agencies in Douglas County, Wisconsin, and was to occur behind the Temple Bar in the city of Superior (R167:94). The task force outfitted an informant, Charles Marciniak, with a recording device (R167:104). Marciniak had 25 prior criminal convictions and was working as an informant after having been arrested for multiple deliveries of methamphetamines (R167:92-93,156).

After Marciniak made multiple phone calls with the intended target, police gave him $7,200 in pre-recorded currency to purchase four ounces of meth (R167:95,104-06). Marciniak drove to the pre-arranged location, a parking lot where several officers were positioned to conduct surveillance and block off possible escape routes (R167:108). However, lead investigator Paul Winterscheidt hadn't parked by the time an exchange was over, and didn't personally witness the transaction (R167:108,172-73).

As Marciniak drove away, Winterscheidt heard over dispatch that the transaction was done, so he ordered officers to converge (R167:109). Police attempted, unsuccessfully, to corner the suspect vehicle, a black Chevy Tahoe, in the parking lot, resulting in a brief chase before police stopped the vehicle (R167:109-13). The white bag with recorded buy funds was located on the floor near the front console of the vehicle, near passenger Bobbi Reed (R167:112). Reed was found in possession of several grams of meth (R167:112). The driver, Garland Barnes, had no drugs or recorded money on his person, but had unmarked money in his pockets (R166:49; R167:111).

Subsequently, Investigator Winterscheidt met up with Marciniak, who provided him a black box containing four

ounces of methamphetamine (R167:118-19). Marciniak told Winterscheidt that he'd thrown the buy money into Barnes's vehicle, and Barnes handed him the box of meth (R167:122).

Less than one week before trial, the defense moved to exclude Marcianiak's testimony because the State hadn't disclosed consideration provided for Marciniak's work as an informant (R55). The circuit court agreed that a discovery violation had occurred and ordered disclosure of the consideration immediately, but denied exclusion of Marciniak's testimony (R168:6-8).

The defense also moved to exclude testimony from Officer Duane Clauer based on late disclosure of his reports (R53). Although Clauer participated in the original investigation from April 2013 and was present for the arrest of Barnes, his reports weren't disclosed until June-July 2015, and the prosecutor offered no explanation (R168:8-9,14). Officer Clauer's observations were critical—according to his reports, he claimed to have witnessed Barnes deliver the box with methamphetamines to Marciniak—making him the only officer who claimed to have personally observed the drug transaction (R126:13). The circuit court granted the defense motion to exclude Clauer's testimony due to "the egregious nature of the violation" (R167:4-5).

The central controversy at trial was the identity of who delivered the methamphetamines. Marciniak testified that Barnes sold him the meth (R166:88). But the defense argued Marciniak had actually sold meth to Barnes or Reed, not the other way around (*see* R166:202-03). Marciniak knew how to manufacture meth (R166:106), and as mentioned *supra,* had numerous arrests for delivering meth. There were areas on his person or in his truck he could have concealed meth (*see* R167:140-43). Marciniak was also out of surveillance for 5-10 minutes after the buy (R167:176-78;238-39).

Further, the defense attacked Marciniak's motive to set up Barnes to avoid prison for his own drug dealing. Marciniak received an extremely lenient plea agreement—probation, one day in jail, and dismissal of a 2nd meth delivery (R166:45-46;115-16). When asked if he wanted to go to prison, Marciniak testified, "Absolutely not" (R166:113), and admitted "I'll do everything to get out of [jail]" (R166:108).

The defense also challenged the quality of the investigation overall. For example, attorney Gondik cross-examined Investigator Winterscheidt about the lack of any photographs or video surveillance capturing the actual drug transaction (R167:131,136), the lack of DNA or fingerprint testing performed on the box containing meth (R167:166-68), and the fact that none of the testifying officers had personally observed the hand-to-hand transaction (R167:172-74,229; *see also* R166:23).

The State countered this strategy by presenting the excluded observations of Officer Clauer—including the crucial fact that he supposedly observed Barnes deliver the methamphetamine—through the back door with Investigator Winterscheidt. On redirect, the prosecutor asked, "Are you aware of any specific officers that observed the transaction?" to which Winterscheidt answered "Yes." (R167:185). When the prosecutor asked who, the defense objected to foundation and hearsay (R167:185). The court found that the defense opened the door when asking whether the investigators videotaped the transaction, and that it was not hearsay because it went to Winterscheidt's "state of mind" (R167:185). The prosecutor asked Winterscheidt how he knew the transaction had been completed, and he answered, "Other investigators observing the transaction notified me by radio" (R167:186). Winterscheidt testified that they said, "it went down, deal is done" (R167:186).

The prosecutor then asked if Winterscheidt was aware of any specific officers who saw the transaction of Marciniak

tossing the buy money and Barnes tossing the black box (R167:186). The defense objected to hearsay, and the court overruled based on Winterscheidt's state of mind from getting told the transaction was done (R167:187). The prosecutor again asked which investigator saw Marciniak toss the bag and Barnes toss the black box, and the defense again objected to hearsay and lack of foundation (R167:187). The court overruled, asserting it wasn't for the truth of the matter asserted, but for the officer's state of mind (R167:188). Winterscheidt answered that Officer Clauer witnessed the hand-to-hand (R167:188).

Subsequently the court clarified that attorney Gondik had opened the door by repeatedly asking about lack of surveillance (R167:202-03). Attorney Gondik argued that this ruling nullified the discovery sanction by allowing Winterscheidt to testify about what Clauer supposedly saw, and that it was hearsay that was offered for its truth (R167:203-04). The court disagreed, stating it's not "classic hearsay," and not prejudicial (R167:205). Though the court acknowledged the importance of Clauer allegedly observing "what happened between the defendant and Mr. Marciniak," it continued to rule that Gondik's questioning about lack of video surveillance opened the door, and evidence regarding Winterscheidt's state of mind for "why he did what he did" was not hearsay (*see* R144:17,22-23; R180:79-80).

On the second day of trial, the defense moved for dismissal based upon another significant discovery violation. Prior to trial, the defense moved *in limine* to exclude any recorded audio of the controlled buy due to nondisclosure (R65:1). When the court commented that it was his understanding there "was no audio," the prosecutor clarified the "audio was running," but "no audible voices are heard. It's only background noises" (R167:7-8). Investigator Winterscheidt then testified under oath that he'd listened to the audio recording, and that there were "no voices on the audio recording," and "no spoken words" (R167:128-30,161).

This was exposed as false by the testimony of officer Jason Tanski, who testified that "[t[here were words on the recording," and "[y]ou can hear Mr. Marciniak talking on the recording" (R167:235-36). The court subsequently ordered the State to disclose any audio of the controlled buy to the defense (R167:286-89). The next day, when the defense moved for dismissal, the court acknowledged this was the second "pretty significant discovery violation," but denied the dismissal motion in lieu of other sanctions, including precluding the State from calling Bobbi Reed to testify (R166:60-63). The court did lament that this issue "just doesn't lend itself very well to going forward with very much confidence in what has happened here so far" (R166:61).[1]

The defense subsequently moved for mistrial again after Marciniak repeatedly referenced allegations that Barnes delivered methamphetamines to him on previous occasions, in violation of the defense motion to exclude such testimony (R166:147-48). The court agreed the excluded other-acts were mentioned "throughout" Marciniak's testimony, but denied the mistrial motion because the violations didn't create a "manifest injustice" (R166:150).

The jury found Barnes guilty (R166:229).

Prior to sentencing, the defense filed a motion for new trial based on (1) Marciniak's repeated references to other-acts violating the court's pretrial order; (2) the Court's exclusion of the defendant's rebuttal witness; and (3) the Court's erroneous admission of Officer Clauer allegedly observing the actual drug exchange, through the hearsay testimony of Investigator Winterscheidt, after the court

[1] The record contains numerous other falsehoods by the State on this issue, including filing a formal response to the defendant's discovery demand indicating the State had already disclosed the recording of the delivery (R16:2), or the prosecutor's claim during trial that she'd "just learned" about the existence of the audio recording, despite references to the recording in Winterschedit's police reports (R126:14-15). However, this Court did not accept review on that issue, so the defense will not go into further detail.

excluded such testimony as a discovery violation (R90:3). The court orally denied the motion (R144:15-23), and entered a written order to that effect (R94).

The court sentenced Barnes to 30 years in prison, with 15 years initial confinement and 15 years extended supervision (R99:1).

B. Post-conviction Proceedings

By new counsel, Barnes filed post-conviction motions seeking dismissal or a new trial based on (1) the discovery and ***Brady*** violations, primarily the late disclosure and misrepresentations regarding the wire recording; (2) various evidentiary errors, including the admission of Officer Clauer's observations, which violated the defendant's confrontation rights; (3) a request for a new trial in the interest of justice because the various errors prevented the real controversy from being fully tried; and (4) ineffective assistance of counsel, in the event the court found that trial counsel failed to fully preserve any errors, including counsel's lack of specific objection to Clauer's information as violating Barnes' right of confrontation (R125). The State submitted a response brief (R127), and the defense submitted an addendum (R128). The court held an evidentiary hearing, and entered an oral ruling denying the motions (R180:75-85), as well as a written order consistent with that ruling (R132).

Barnes timely filed a notice of appeal from the judgment of conviction and the order denying post-conviction motions (R136).

The court of appeals affirmed. *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, unpublished order (Wis. Ct. App. March 16, 2021) (App: 7-31). As relevant to

this Court's review order,[2] the court of appeals approved the admission of testimony regarding Officer Clauer's alleged observations, finding the testimony was not testimonial hearsay, and it did not violate Barnes' confrontation rights. *Id.,* ¶¶31-35. First, it tacitly approved the State's argument that "it was offering Winterscheidt's testimony about what Clauer had seen to show Winterscheidt's state of mind and what he had done after he was told the transaction had occurred." *Id,* ¶33. Second, it held that "the circuit court could reasonably conclude that the testimony was not being offered to show that Clauer had, in fact, observed the transaction but, rather, to show why he had taken subsequent investigative steps." *Id.*

The court further found no error with extending such "course of investigation" testimony to include evidence on contested matters, in part because "Barnes opened the door to Winterscheidt's testimony by attacking the quality of the police investigation on cross-examination, including specifically their failure to observe the transaction." *Id,* ¶34. Finally, since the court found the evidence non-testimonial, it found no confrontation violation because "the right to confrontation does not extend to testimonial statements offered for purposes other than establishing the truth of the matter asserted." *Id,* ¶35.

Notably, the court's opinion repeatedly characterized the defense's claim as objecting merely to testimony identifying Clauer as the officer who "witnessed the transaction" or "observed the transaction." *Id.,* ¶¶31-34. For example, the court of appeals observed in a footnote that "the mere naming of the specific officer who claimed to have witnessed the transaction did not transform the testimony into a hearsay statement for purposes of the Confrontation Clause." *Id.*, ¶35, n.7.

[2] This Court's order dated April 15, 2022 limited review to the issues pertaining to admission of Officer Clauer's observations. Accordingly, the court of appeals' reasoning for denying the other issues will not be discussed.

Regarding the alternative argument that any non-preserved objections constituted ineffective assistance of counsel, the court of appeals noted that it had not applied "any kind of forfeiture rule" to any of Barnes' arguments. *Id.*, ¶50. The court noted issues where counsel could have taken alternative actions, and questioned whether those would be deficient under prevailing constitutional standards, but concluded none would be prejudicial. *Id.*, ¶¶51-52.

The defense filed a timely motion to reconsider, arguing the court of appeals' reasoning on admission of Officer Clauer's observations omitted key facts from its argument about the hearsay and confrontation violations—that he hadn't just "observed the transaction," but that he specifically claimed to have witnessed Barnes throw the box of methamphetamine into the informant's vehicle (App: 2-6). The court of appeals denied reconsideration, noting, "this court fully reviewed the challenged testimony, including the prosecutor's questions. Nothing in the materials presented by Barnes' motion for reconsideration alters this court's view" (App: 1).

The defense petitioned this Court for review. That petition was held in abeyance pending the United States Supreme Court's decision in ***Hemphill v. New York,*** No. 20-637. After the issuance of the ***Hemphill*** opinion on January 20, 2022, the defense submitted a letter discussing that opinion as supplemental authority on February 22, 2022. This Court granted review on April 15, 2022, limiting review to the hearsay and confrontation issues discussed herein.

ARGUMENT

I. Defendants Cannot "Open The Door" To Evidence Violating The Right To Confrontation, Especially When That Evidence Was Excluded As A Discovery Sanction, And An Officer's Claim To Have Directly Witnessed The Defendant Commit The Crime Constitutes Testimonial Hearsay

A. Applicable Legal Standards

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This clause requires the prosecution to present its evidence through witnesses who testify in court subject to cross-examination, and prohibits the introduction of "testimonial" evidence at trial unless the declarant takes the stand. ***Crawford v. Washington***, 541 U.S. 36, 68 (2004). "Testimonial" statements include statements made to law enforcement authorities with the primary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." ***Davis v. Washington***, 547 U.S. 813, 822 (2006).

"Although a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *See* ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis.2d 99, 644 N.W.2d 919; ***State v. Hanson***, 2019 WI 63, ¶16, 387 Wis.2d 233, 928 N.W.2d 607 (whether a defendant's right to confrontation was violated is a question of constitutional law that courts decide *de novo*). Wisconsin courts generally apply United States Supreme Court precedents when interpreting the Sixth Amendment and analogous provisions under the Wisconsin Constitution. ***Hanson, id.***, ¶16.

B. Testimony About Clauer's Observations Violated Both Confrontation And Hearsay Rules, And Attorney Gondik's Questioning Could Not Open The Door

For testimonial hearsay statements to be admissible, the Sixth Amendment requires that the declarant be unavailable and that the defendant had a prior opportunity to cross-examine the declarant. ***State v. Manuel***, 2005 WI 75, ¶36, 281 Wis.2d 554, 697 N.W.2d 811. In this case, the State's own discovery violation led the court to exclude Officer Clauer's testimony, rendering him "unavailable" (R167:4-5). And the defense had no prior opportunity to question him. Accordingly, the focus of this analysis will be on whether the statements attributed to Officer Clauer were "testimonial hearsay."

1. Statements at issue

It is important to clarify the specific statements Barnes has challenged as constituting hearsay that was admitted in violation of his confrontation rights, because the court of appeals' decision demonstrated a misunderstanding of the facts and what Barnes was challenging. The court of appeals identified the challenged testimony as "Winterscheidt's testimony that Clauer had witnessed the transaction and had radioed to the other officers that the "deal was done." *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶31. But this conflates two separate categories of statements: (1) statements made by unidentified officers, which were properly admitted; and (2) statements made by Officer Clauer, which were inadmissible hearsay.

The first category involves Winterscheidt's testimony that "[o]ther investigators observing the transaction notified me by radio," and said, "it went down, deal is done" (R167:186). Barnes acknowledges that neither of those statements are testimonial because they were not admitted for

the truth of the matter asserted. Instead, they properly explained Winterscheidt's actions of moving in to make the arrest (R167:186). Accordingly, Barnes *is not* challenging the admissibility of those statements.

Moreover, those statements *were not* attributed to Officer Clauer, contrary to the court of appeals' assertion. When asked directly who informed him that the "deal is done," Investigator Winterscheidt answered, "I don't recall specifically who radioed that to me" (R167:186).

The second category of statements—the statements that Barnes has actually challenged as inadmissible hearsay, which violated his right to confrontation—are the statements elicited from the questions and answers immediately following that exchange, when the prosecutor asked:

> Q. Are you aware of any specific officers who saw the transaction that Chip Marciniak described to you where he tossed in the buy money and Garland tossed in the black box?
>
> A. Yes.
>
> Q. Who?
>
> [Defense objection overruled]
>
> Q. (By Ms. Ellenwood, continuing.) Sergeant, which investigator saw Chip Marciniak toss in a white plastic bag and Garland Barnes toss in a black box?
>
> ...
>
> Q. (By Ms. Ellenwood, continuing.) What agent saw that?
>
> A. It was DCI investigator Duane Clauer.

(R167:186-88) (emphasis added).[3]

The court of appeals interpreted Barnes' argument as only challenging the *answers* given by Investigator Winterscheidt naming the specific officer who personally witnessed the transaction. *See State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶35, n.7 ("Barnes' reply brief instead limits itself to arguing that only Winterscheidt's identification of Clauer as the officer who saw the transaction was admitted in error. We fail to perceive what difference Winterscheidt's naming of a specific officer could have made").

But as Barnes argued in his motion to reconsider, and as his arguments on appeal should have made clear, the hearsay was not just the *answers,* but the *questions*—and the questions included not just which officer supposedly observed the drug transaction, but the specific information of Barnes allegedly tossing the box containing methamphetamine into Marciniak's vehicle (R167:186-88).

That detail, unquestionably, is testimonial. It is effectively an agent of the government engaged in the investigation *claiming to have personally witnessed the defendant commit the crime*. Statements made by police officers during the course of an investigation "fall squarely within [the] class" of statements protected by the Sixth Amendment. ***Crawford***, 541 U.S. at 51-53 (finding that "testimonial" statements include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial").

[3] Although the witness didn't identify specific *statements* attributed to Officer Clauer conveying this information, the testimony is still hearsay. The only way Winterscheidt could know that Officer Clauer had supposedly observed those facts is if Clauer or another officer had told him. *See, e.g.*, R166:162 ("I was only given information that DCI Agent Clauer actually observed the hand transaction").

2. Statements by a non-testifying officer claiming to have observed the defendant commit the crime are clearly admitted for the truth of the matter asserted, and are not proper "course of investigation" or state of mind evidence

The right to confrontation does not extend to testimonial statements offered for purposes other than establishing the truth of the matter asserted. ***Hanson***, 387 Wis.2d 233, ¶19. Accordingly, the purpose of admitting the evidence must still be analyzed. Simply identifying another possible purpose for the evidence is not sufficient. Quoting from Professor Blinka's treatise on Wisconsin evidence:

> The exemption, however, should not license wholesale evasion by the expedient of offering the statement "not for its truth." When the State proffers a statement for a nonhearsay purpose, close attention should be paid to the relevancy of, and need for, this use of the evidence.

7 Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 802.302, at 715 (3d ed. 2008).

The State and the lower courts identified three possible non-hearsay purposes for the admission of Officer Clauer's observations, aside from the truth of the matter asserted, specifically:

(1) Investigator Winterscheidt's state of mind, for how he knew the transaction had been completed to order officers to make the arrest. *See* R167:187-88, 203-06; *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶33;

(2) Officer Clauer's state of mind, to "show why he had taken subsequent investigative steps;" *see State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶33; and

(3) The defense "opened the door" by challenging the quality of the investigation. *See* R167:185,202-03; *see State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶34.

The first two purposes are legally and factually inaccurate; the third purpose, as discussed *infra,* runs afoul of the confrontation clause.

The statutory exception for "state of mind," Wis. Stat. sec. 908.03(3), provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design [and] mental feeling." *Id.* The plain language permits statements regarding the *declarant's* state of mind, not the listener's state of mind. Officer Clauer was the declarant, not Investigator Winterscheidt. Winterscheidt's state of mind provides no basis to admit the statements under that exception.

Statements presented for the *listener's* state of mind and to explain what the listener does are not hearsay because the statements are not admitted for the truth of the matter asserted. Wis. Stat. sec. 908.01(3). But Officer Clauer didn't testify. His state of mind, or the reason why he took certain actions, was irrelevant. And Clauer was not the officer that instructed the other officers to move in for the arrest—that was Winterscheidt (R167:109) ("[I] heard on the radio that the transaction had taken place so I gave the order to take down the suspect").

Investigator Winterscheidt testified, and therefore the reason why he took certain actions (such as ordering the officers to move in for the arrest) was arguably relevant. But the challenged statements discussed *supra* did not affect that decision, based on Winterscheidt's own testimony. Recall that when asked how Winterscheidt knew the transaction had

occurred and to move in for the arrest, Winterscheidt testified that "[o]ther investigators observing the transaction notified me by radio," and stated, "I believe the words were something like, it went down, deal is done. Something like that" (R167:186).

Investigator Winterscheidt *did not* testify that Officer Clauer told him he'd specifically observed Barnes deliver the box containing methamphetamine at that time. Winterscheidt never indicated when Clauer made these statements, or what if anything Winterscheidt did in response. Accordingly, the record does not support a claim that Winterscheidt did anything in response to statements made by Officer Clauer.

Even if a court were to erroneously characterize Winterscheidt's actions as being taken in response to something said by Officer Clauer, that would not provide a basis to admit Clauer's substantive observations of supposedly seeing Barnes commit the crime. This type of state of mind exception, showing the "course of investigation" and why an officer does something, is narrowly construed and cannot extend to key facts of the controversy. *See, e.g.,* ***Jones v. Basinger***, 635 F.3d 1030, 1046 (7th Cir. 2011) (finding a confrontation violation when the prosecution offered the statement of a non-testifying declarant inculpating Jones, on the theory that it was offered to inform he jury why the police focused attention on Jones, rather than for its truth); ***United States v. Silva***, 380 F.3d 1018, 1020 (7th Cir. 2004) ("Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule").

As the Second Circuit explained in ***United States v. Reyes***, information can be admissible to show an officer's state of mind so the jury will understand the agent's subsequent actions when that evidence clarifies a

"noncontroversial matter without causing unfair prejudice on significant disputed matters." ***Id.,*** 18 F.3d 65, 70 (2d Cir. 1994). The ***Reyes*** court offered a balancing test of weighing relevance against prejudice, which included an assessment of whether the background or state of mind information can be "adequately communicated by other less prejudicial evidence," whether the declaration addressed a contested issue in the trial, and whether the declarant would be testifying at trial, and therefore be subject to confrontation. ***Id.*** at 70-71.

Applying those factors[4] here demonstrates that Officer Clauer's observations should not have been admissible in this case, and their admission violated Barnes's right to confront his accuser. The statement pertained to the key contested issue at trial—who provided the box with methamphetamines. Officer Clauer did not testify due to the State's discovery violation. The reason for Investigator Winterscheidt's actions (moving in to arrest Barnes) was amply explained by other evidence, specifically his testimony that other officers notified him by radio "it went down, deal is done" (R167:186). There was no need for him to explain that one specific officer claimed to have observed the hand-to-hand and that Barnes produced the box which officers later discovered to contain the methamphetamine.

The true purpose of the claim that Officer Clauer observed the transaction, and specifically observed Barnes deliver the box containing meth, was clearly to rebut the defendant's legitimate challenges to the quality of the investigation. But doing so with the observations of an unavailable witness—one whose testimony was excluded based on the State's own discovery violation—is improper, and violated Barnes' confrontation rights.

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[4] The court of appeals emphasized another factor of the ***Reyes*** balancing test—whether the defendant "opens the door" to such evidence. *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶34, *citing* ***Reyes,*** *supra* at 70-71. However, that factor can no longer apply in cases where the hearsay declarant does not testify, given the United States Supreme Court's ruling in ***Hemphill.***

3. The defense did not open the door to Officer Clauer's observations, and the *Hemphill* decision confirms that defendants legally cannot open the door to evidence which violates the right of confrontation

As discussed *supra,* the third non-hearsay basis for admitting Officer Clauer's observations proposed by the lower courts was that the defense opened the door through cross-examination of Investigator Winterscheidt. Attorney Gondik did an extensive cross-examination that challenged many aspects of the "controlled" nature of the buy, including:

- The lack of any audio recording[5] of the buy (R167:129-30);
- The lack of any video or photographic surveillance of the buy (R167:131-40);
- The search of the informant prior to the buy did not include his groin area, or other areas where meth could have been concealed (R167:140-43);
- Out of the four recorded phone calls between the informant and Barnes prior to the buy, the only call supposedly referencing drugs or prices (call 3) did not include Barnes' voice in the audio recording (R167:143-53);
- The lack of visual surveillance on the informant between the end of the buy and the officers making contact with the informant at a motel (R167:156-58);
- The failure to test the box containing meth for either fingerprints or DNA (R167:163-68); and
- Investigator Winterscheidt did not personally observe the buy, and the other officers in his vehicle (including Tanski) were not in position to observe the buy (R167:172-73).

[5] As discussed *supra,* Investigator Winterscheidt's testimony that there was a recording with no voices was later shown to be false, as Officer Tanski subsequently testified there were audible voices, which prompted the court to order the State to disclose the recording to the defense (R167:235-36, 286-89).

The circuit court believed Barnes had opened the door to Winterscheidt's testimony on redirect regarding Officer Clauer's observations of witnessing the hand-to-hand transaction by repeatedly challenging the lack of video surveillance (R167:185,202-03). The court of appeals agreed that Barnes opened the door "by attacking the quality of the police investigation on cross-examination, including specifically their failure to observe the transaction." *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶34. The court of appeals also noted that the "testimony had the convenient effect for the State of rebutting some of Barnes' attempts to impugn the quality of the investigation." *Id.,* ¶33.

This reasoning is both factually flawed and legally erroneous. First, any claim that the defense opened the door to this testimony through attacking the lack of photographic or visual surveillance is illogical. Attorney Gondik repeatedly challenged Winterscheidt's *decision* not to obtain video or photographic surveillance, noting that over six hours passed between the first calls setting up the buy and the actual buy itself (*see, e.g.,* R167:137-38). The reasoning behind that decision could not possibly be affected by the subsequent claim that when the transaction occurred, Officer Clauer personally witnessed the hand-to-hand. At the time Winterscheidt decided not to obtain that type of surveillance evidence, he didn't know whether any officer would actually see the transaction. Thus this claim became a post-hoc rationalization, offered only to suggest police didn't need surveillance because they had sufficient evidence of guilt due to Clauer's observation.

Second, even if general questioning attacking the quality of the investigation *could* open the door, that doesn't permit the introduction of *all* evidence that might conceivably rebut the claims. *See* ***State v. Dunlap***, 2002 WI 19, ¶33, n.3, 250 Wis.2d 466, 640 N.W.2d 112 (the "curative admissibility doctrine also limits what evidence can come through the door,

once the door has been opened. In general, the inadmissible evidence should be allowed "`only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.'" ***Id.*** (citations omitted).

Attorney Gondik's questions showing the testifying officers did not personally witness the transaction doesn't provide a logical basis to open the door to whether other, non-testifying officers observed the transaction, or specifically what they saw. Note that the State did not argue that the defense opened the door *to Officer Clauer's testimony* about his observations of the transactions—which would have avoided the confrontation violation—instead, it sought to present Clauer's observations through Investigator Winterscheidt.

Nor did the State even limit the evidence to *the fact that Clauer witnessed the transaction*—which could theoretically rebut any prejudice caused by the defense attacking the inability of other officers to witness the transaction—but instead also presented the substantive claim that Officer Clauer specifically "saw Chip Marciniak toss in a white plastic bag and Garland Barnes toss in a black box" (R167:187-88).

In other words, the State's presentation of the hearsay observations of Officer Clauer went far beyond rehabilitating the quality of the investigation, and directly alleged that a non-testifying officer personally witnessed the defendant commit the crime. That is clearly improper.

Third, and most importantly: even if the defense opened the door, and even if the evidence presented in response was properly within the scope of permissible rebuttal evidence, the decision in ***Hemphill*** confirms that defendant's cannot open the door to evidence that would otherwise violate the defendant's rights to confrontation.

In an 8-1 opinion, United States Supreme Court held that the state trial court violated Hemphill's Sixth Amendment right to confront witnesses against him by accepting a written transcript of a former defendant's plea hearing into evidence without making that defendant available at Hemphill's trial for cross-examination. Hemphill was charged for the shooting death of a 2-year-old child after his DNA was found on the child's sweater. ***Id.*** (Slip op. at 1). At trial, Hemphill argued the killer was Nicholas Morris, who was at the scene of the crime, and had initially been identified as the shooter. ***Id.*** Hemphill also elicited testimony that police had recovered 9-millimeter ammunition from Morris' apartment, the same caliber as the fatal bullet. ***Id.***

Morris, who had pleaded guilty to possessing a .357 firearm, was unavailable to testify because he was outside the United States, but the trial court allowed the State to introduce parts of his plea transcript to rebut Hemphill's theory that Morris committed the murder. ***Id.*** Although Hemphill lacked the opportunity to cross-examined Morris' out-of-court statements, the court concluded the defense had "opened the door" and admission of the statements was necessary to correct a "misleading" impression Hemphill had created. ***Id.*** (Slip op. at 1, 4).

The jury found Hemphill guilty, and the New York Appellate Division and the court of appeals affirmed Hemphill's conviction. ***Id.*** (Slip op. at 5-6).

The United States Supreme Court reversed, holding that the trial court's admission of the transcript of Morris' plea allocution over Hemphill's objection violated Hemphill's Sixth Amendment right to confront the witnesses. ***Id.*** (Slip. op. at 8-13). The Court observed that "Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense." ***Id.*** (Slip op. at 2). The Court reaffirmed the Sixth Amendment confrontation right as a "bedrock constitutional protection[],"

and cited ***Crawford*** for the principle that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." ***Hemphill, id.*** (Slip op. at 8-9).

The government had argued that the "opening the door" rule was not an exception to the confrontation clause, but merely a "procedural rule" that "treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation." ***Id.*** (Slip op. at 9). The Court rejected this argument, asserting that door-opening "is a substantive principle of evidence that dictates what material is relevant and admissible in a case." ***Id.*** (Slip op. at 10). The Court held that the role of trial courts was not to determine the reliability of evidence, but to ensure that the "Constitution's procedures for testing the reliability of that evidence are followed," and asserted:

> The trial court here violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.

Id. (Slip op. at 11). The Court concluded that the Sixth Amendment "admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive." ***Id.*** (Slip op. at 13).

Similarly, the strategy of Barnes' counsel to challenge the quality of the investigation by pointing out the failure to record the controlled buy, and correctly noting that none of the testifying officers observed the transaction, could not "open the door" to out-of-court statements from Officer Clauer. This is true no matter how "convenient" it was for the State to invoke Officer Clauer's out-of-court observations to rebut the defense theory. *See State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶33. The State's convenience cannot justify violating the defendant's confrontation rights, particularly when it was the State's own "egregious" failure to disclose Clauer's reports for over two years that led to the circuit court excluding Clauer and rendering him unavailable.

The State's back-door attempt to admit Clauer's alleged observations through hearsay clearly violated Barnes' constitutional rights to confront his accusers.

C. Since This Testimony Went To The Crux Of The Case—Who Delivered The Meth—The Error Was Not Harmless

The errors entitle Barnes to a new trial unless the State can carry its burden of proving the errors were harmless beyond a reasonable doubt, e.g., ***State v. Mayo,*** 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115 (An "error is harmless if the beneficiary proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained") (citation omitted). In assessing whether errors are harmless, reviewing courts consider the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. ***Id.***, ¶48.

When assessing whether errors were harmless, the court must assess the cumulative effect of all errors. ***Id.,*** ¶64 & n.8, ¶66.[6]

Reversal is required in this case because the errors were frequent, affecting some of the most important issues in the case, and because the State's case was infected with false testimony and deficiencies in the supposedly "controlled" buy. Assessing those deficiencies, and how the identified errors improperly bolstered the State's case against Barnes, demonstrates clearly that the errors were not harmless.

The defense argued this was actually a drug deal involving Charles Marciniak delivering the meth that was found in possession of Bobbi Reed, rather than Barnes delivering to Marciniak. The defense argued that the presence of the box of meth and the buy money was part of setup by Marciniak. This put a premium on two categories of evidence: the credibility of Marciniak, and the objective circumstances of the "controlled" buy corroborated by police.

Marciniak's credibility was obviously questionable, considering he was a 25-time convict who'd previously been convicted of methamphetamine delivery (R166:65-67). Further, Marciniak knew how to manufacture meth (R166:106). Marciniak was working as an informant because he'd been arrested for two methamphetamine deliveries, and wanted to avoid jail or prison at all costs (R166:68,108,113). Ultimately he received a substantial deal, involving complete dismissal of one charge, probation and a single day of jail on the other (R166:115-16).

Since Marciniak's credibility was subject to attack based on bias and motive to lie, the corroborating

[6] Although this court accepted review only on the hearsay and confrontation issues, the fact that a proper harmless error analysis requires an assessment of the cumulative impact of all errors necessitates some references to other errors that occurred in this case. Barnes will attempt to limit those references to errors acknowledged by the lower courts, without going into substantial detail.

circumstances were extremely important. The main witness who could corroborate the objective circumstances, Investigator Winterscheidt, was exposed to have lied to the jury about the wire recording—a fact acknowledged by the Court of Appeals. *State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶33. The State's failure to disclose the wire recording before trial was another clear error, compounded by the "State's repeated incorrect representation that no voices could be heard on the recording." *Id.,* ¶16, n.4.

Each of the evidentiary errors Barnes alleged impacts the corroborating evidence in some way, and undermines the "controlled" nature of the buy. The first key piece of evidence against Barnes was the recorded phone calls, purportedly between Barnes and Marciniak, for the purpose of arranging a methamphetamine delivery. However, law enforcement acknowledged that the language in the calls is ambiguous except for call 3—where Barnes allegedly changed the amount of methamphetamines to be delivered—and law enforcement only recorded one side of that call, so Barnes' voice cannot even be heard (R167:100,143-53).

The searches of Marciniak and his vehicle were important aspects of controlling the transaction, because as Investigator Winterscheidt testified, they needed to make sure Marciniak didn't have any narcotics hidden prior to the buy (R167:106). But Winterscheidt acknowledged his search of Marciniak's person was less than thorough, because it did not include the groin area where narcotics could be hidden (R167:140-43). And as Barnes alleged on appeal, Winterscheidt's testimony that Marciniak's vehicle was thoroughly searched should have been stricken for lack of foundation, because not one of the testifying officers—Winterscheidt included—actually performed that search (R167:108,218).

The lack of control regarding the circumstances of the controlled buy itself became a major component of the

defense theory. The defense attacked the lack of video or photographic evidence to corroborate the crime or disprove the defense theory (R167:131-40), and the fact that none of the testifying officers actually observed the transaction (R167:172-73).

This context demonstrates why the errors presently before the Court are so harmful. The State was allowed to fix these evidentiary deficiencies by presenting the hearsay claim from Investigator Winterscheidt that Officer Clauer personally observed the transaction, and specifically that Clauer observed that Barnes provided the box containing meth to Marciniak. While the State claimed this testimony was necessary to show Winterscheidt's state of mind in pursuing Barnes, this was an obvious ruse—testimony showed the officers moved in because someone said the "deal is done." The only reason Clauer's supposed observation was presented through Winterscheidt was to shore up a hole in the State's case, and support a post-hoc rationalization that other evidence of guilt wasn't necessary.

The claim that Clauer personally observed the transaction was highly prejudicial, creating a substantial danger that the jury used it for its truth, because it went to the heart of the controversy. The importance of this evidence is simple: if the jury believed Clauer personally witnessed Barnes deliver the box containing meth to Marciniak, that alone was enough to convict. And by presenting this observation through Winterscheidt, the State was able to obviate the discovery violation, presenting the only additional fact Clauer would have testified to (R126:13), while leaving Barnes unable to cross-examine Clauer.

The cumulative prejudice caused by these errors must also be considered in connection to the numerous violations of the court's pretrial ruling excluding any references to prior drug deals, which were summarized in the court of appeals ruling. *State v. Garland Barnes,* Appeal No. 2018AP2005-

CR, ¶¶22-23. While the circuit court viewed those references as "innocuous," they were particularly problematic because they involved Marciniak repeatedly referencing prior instances where Barnes allegedly delivered drugs to Marciniak, when the defense was alleging Marciniak was the one guilty of delivering drugs to Barnes.

Finally, the primary fact cited by the court of appeals as supposedly rendering all of these errors harmless—the claim that the buy money police provided to Marciniak "was found in the center console of Barnes' vehicle"—was not accurate. *See State v. Garland Barnes,* Appeal No. 2018AP2005-CR, ¶¶43,56. The money wasn't found *in* the center console, but laying on the passenger side floor "near but below" the center console (R167:273). The fact that the controlled buy funds were found on the floor where Marciniak threw them is completely consistent with the defense theory that Marciniak was trying to set Barnes up.

The evidence in this case was not remotely overwhelming. The hearsay observations of Officer Clauer were used repeatedly to excuse the failures of the "controlled buy," and to basically tell the jury it was okay because another (non-testifying) officer Barnes commit the crime. For example, when subsequently recalled as part of the defense case, Investigator Winterscheidt referenced this again when defense counsel questioned the lack of surveillance on the controlled buy, twice referencing the fact that he learned that "Agent Clauer actually observed the hand transaction" (R166:162).

Likewise, in closing arguments, the prosecutor referenced how Investigator Winterscheidt was aware that other officers saw the transaction happen (R166:186-87). And in rebuttal, the prosecutor minimized the lack of other evidence by again referenced allegedly having officers who witnessed the transaction:

> Yes, there's not video. Yes, there's no fingerprints or DNA, but we don't need them. Why? Because we had outstanding officers in the location, able to observe Garland Barnes come there that day with this black Tahoe, see the transaction.

(R166:210).

The prosecutor may not have cited Officer Clauer by name, but the testimony made it clear that he was the only officer who (allegedly) witnessed the hand-to-hand transaction. There was no other officer for the prosecutor to refer to.

The frequency of the error, the lack of other corroborating witnesses, and the repeated emphasis by both the lead investigator and the prosecutor makes it clear the error was not harmless beyond a reasonable doubt. *See* ***Mayo, id.***, ¶48. Reversal is warranted.

CONCLUSION

For the reasons stated above, Barnes respectfully asks the court to reverse the decisions below and grant a new trial.

Respectfully submitted: May 16, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,496 words.

Signed 5/16/2022:

Electronically signed by: Cole Ruby

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CERTIFICATION - APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

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