No. 21-945

In the

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

MANUEL GARCIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOSHUA L. KAUL
Wisconsin Attorney General
JOHN A. BLIMLING*
Assistant Attorney General
Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us
**Counsel of Record*

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Garcia accuses the State of "misrepresent[ing] the record" in its framing of the issue presented. (Garcia's Br. i.) Garcia assures this Court that nothing occurred during his cross-examination of the State's witness that could be interpreted as misleading. As support, he plucks choice phrases about the appropriateness of defense counsel's cross-examination of Investigator Spiegelhoff from the trial court's comments while completely ignoring the trial court's emphatic assertion that the cross-examination was misleading. To reiterate, the trial court—not just the State—concluded that Garcia's cross-examination of Investigator Spiegelhoff would mislead the jury: "to not allow the jury, and they are the fact finders, to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled. Period." (App. 60A.)

The approach the defense planned to take was clear from the opening statements of Garcia's trial. Speaking about J.E.M.'s fall from a laundry cart during his opening statement, defense counsel emphasized to the jury that he wanted them to "keep in mind what did not occur. What didn't happen on the part of the police department, what didn't happen in terms of investigation to that matter, . . . that is also significant." (R. 77:25.)[1] Counsel effectively told the jury—and the court—that he would argue that

---

[1] Citations to "R." refer to the record in Wisconsin appeal number 2018AP2319-CR.

the police investigation was poor. And he would make that argument based on the police's decision not to investigate the laundromat incident further even though Garcia confessed by the time they learned about it.

That line of argument is what led to the State's questioning about the laundromat incident and why the officer did not investigate it further. But when defense counsel continued to harp on the failure of any police officer to go to the laundromat and measure the laundry carts or take pictures there, he absolutely put the content of the excluded statements at issue. The jurors simply would not have the context necessary to fully understand why those decisions were made unless the State was permitted to introduce Garcia's confession.

Moreover, beyond the facts specific to this case, the decision below sets the stage for criminal defendants to exploit the exclusion of evidence and mislead juries without the State having any recourse ability to correct the record. Regardless of whether or how misleading defense counsel's cross-examination in this case was, the Wisconsin Court of Appeals essentially announced that it did not matter whether the cross-examination was misleading. (App. 19A.) Instead, the court of appeals held, in effect, that the impeachment exception to the exclusionary rule is the only exception to the inadmissibility of un-Mirandized, voluntary statements. The State submits that this holding was legally wrong and warrants correction.

Garcia also suggests that the State used his confession as substantive evidence of guilt rather

than clarify Investigator Spiegelhoff's reasoning for ending the investigation. (Garcia's Br. 7.) After the trial court granted the State's request to introduce Garcia's confession, the prosecutor asked Investigator Spiegelhoff, "Is there a reason why you did not continue to investigate this case as [defense counsel] suggested?" (App. 66A.) Investigator Spiegelhoff replied, "Yes. In the afternoon of the Friday, the 12th, I interviewed Mr. Garcia at the Police Department. And while doing so, he gave a plausible explanation of the injuries describing that he punched [the victim] several times."[2] (App. 66A.) After Investigator Spiegelhoff briefly described the content of the interview, the State played a recording of it. (App. 67A.) The State then asked a few more questions related to Investigator Spiegelhoff's decision to end the investigation before concluding its questioning. (App. 69A–70A.) The State thus limited its questioning related to Garcia's confession to its effect on Investigator Spiegelhoff's investigation. The quotes that Garcia offers from the State's closing argument (Garcia's Br. 7) were made after Garcia testified and there was further disagreement about what he meant in his statements to police. They should be viewed in that context.

---

[2] Garcia claims that, "contrary to the State's representation to the Court, [he] did not say that he threw J.E.M. against a wall." (Garcia's Br. 2.) The trial court, in deciding to allow the State to introduce Garcia's confession, reviewed a transcript of the interview in question. (App. 53A–57A.) The transcript included the following question: "Did at that time or the previous time you threw him on the bed did he bounce and hit the wall or anything on either one of those times, the first or the second time you threw him on the bed?" (App. 56A.) Garcia answered, "I believe the first time." (App. 56A.)

To the extent Garcia takes issue with the introduction of the entire video of his confession to correct the misimpression the trial court determined the defense created, he raises a different issue. The issue presented is whether Garcia's cross-examination of Investigator Spiegelhoff opened the door to the introduction of Garcia's confession. Whether playing the entire video of the confession exceeded the allowable scope is the next question in the analysis if this Court determines that Garcia did open the door to the confession. Of course, this Court could reach that question if it chooses, but it does not need to; it can simply correct the decision below on the law and remand the matter for further proceedings.

Finally, contrary to Garcia's argument, the law in this area needs this Court's resolution. Garcia offers a list of cases that, he says, have already answered the question presented by this case. His analysis of these cases emphasizes that *Miranda* violations generally render evidence inadmissible during the State's "case-in-chief." (Garcia's Br. 13–28.) This raises the question whether the State's re-direct examination of a witness that clarifies points raised during the defendant's cross-examination is part of the State's case-in-chief. Multiple courts have suggested that, at least in this context, it is not. *See, e.g.*, *United States v. Hodges*, 480 F.2d 229, 233 (10th Cir. 1973) ("In this case the tape recorded conversations in question were not introduced as part of the prosecution's case-in-chief but only after cross-examination by defense counsel had opened the area to their introduction on redirect examination by the prosecution."); *United States v. Vaughn*, 486 F.2d 1318, 1321 (8th Cir. 1973) ("When an issue has been

opened up by such searching cross-examination, it cannot be said to be overreaching simply because the prosecutor seeks by redirect examination to clarify the point raised by means of other facts known to the same witness which might not have been admissible on the case in chief, absent such cross-examination."); *United States v. Walker*, 421 F.2d 1298, 1299–300 (3d Cir. 1970) ("Indeed, the cross-examination of a witness may open the door for the admission on redirect examination of matters tending to support the case, which would not have been admissible on the case in chief." (quoting Wharton's Criminal Evidence, Vol. 3, § 897 (12th ed.))); *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) (same); *State v. Wainwright*, 376 P.2d 829, 832 (Kan. 1962) (same). Thus, the delineation of the prosecution's "case-in-chief" for purposes of the exclusionary rule is not as clear-cut as Garcia makes it out to be.

Nor does this Court's recent decision in *Hemphill v. New York*, 142 S. Ct. 681 (2022), close the door on the State's argument in this case. *Hemphill* involved the constitutional mandate that a criminal defendant be given the opportunity to confront witnesses against him. *Id.* at 691. This Court rejected the argument that the prosecution could introduce unconfronted, testimonial hearsay in order to correct a misleading impression created by the defendant. *Id.* at 692–93. But in so doing, this Court distinguished the confrontation clause—a "constitutional requirement"—from prophylactic rules designed to remedy constitutional violations that have already occurred. *Id. Hemphill* squarely addressed the former, but it did not address the latter. This case gives this Court the opportunity to ensure that courts

around the country do not interpret the mandate of *Hemphill* too broadly.

* * *

Garcia says that the State is offering a "radical proposal" that would require overturning decades of precedent. (Garcia's Br. 28.) There is nothing radical about the State's argument in this case. Prophylactic constitutional rules are designed to serve as a shield to protect defendants' rights following a constitutional violation. They are not a cudgel for a defendant to wield against the State, strategically exploiting holes in the record to mislead the jury and gain a windfall at trial. Nor would adopting the State's position require this Court to overturn precedent. This Court has not squarely addressed this question before, and the State believes that its proposed rule fits comfortably within the Court's existing precedent.

For these reasons, the State respectfully requests that this Court grant the petition for a writ of certiorari.

Dated this 10th day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING*
Assistant Attorney General

Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us
**Counsel of Record*