No.

IN THE

Supreme Court of the United States

RICHARD MICHAEL ARRINGTON,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a line of decisions beginning with *Massiah v. United States*, 377 U.S. 201, 205 (1964), the Supreme Court held that the Sixth Amendment right to counsel protects an accused from surreptitious interrogation by individuals, including jail informants, who are cooperating with police. *See also United States v. Henry*, 447 U.S. 264, 274 (1980); *Maine v. Moulton*, 474 U.S. 159, 176-77 (1985); *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

The question presented is:

Whether, for purposes of determining if an accused's Sixth Amendment right to counsel was violated, a jail informant is considered a state agent where police expressly authorize the informant to record conversations with the accused about his pending case, equip the informant with a recording device and secure the recordings as evidence that is then used against the accused at trial.

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JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 1, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

At petitioner Richard Arrington's homicide trial, the state presented testimony of a jail informant who, while wearing a recording device provided by detectives, recorded conversations with Arrington about his pending charges. In postconviction proceedings, Arrington sought a new trial on the ground that the detectives' use of the informant to secretly record conversations with Arrington, who had been charged with homicide and was represented by counsel, violated his Sixth Amendment right to counsel.

The Wisconsin Court of Appeals agreed and granted Arrington a new trial, but the Supreme Court of Wisconsin found no Sixth Amendment violation and reversed. The state supreme court's holding that the jail informant was not acting as a state agent when he recorded his conversations with Arrington conflicts with decisions of the United States Supreme Court and the United States courts of appeals.

A. Factual Background

Following a jury trial, Arrington was convicted of first-degree intentional homicide and being a felon in possession of a firearm. App. 9a. At trial the state presented evidence that Arrington fired gunshots at a house following a "weeks-long feud" with a man named Shorty. App. 3a-4a. The state's theory was that although Shorty was Arrington's intended target, a bullet fired by Arrington killed a man, Richard Gomez, who was standing next to Shorty on the front steps. App. 4a-5a, 37a-38a. Arrington claimed self-defense, testifying that he fired three shots at the house because it appeared Shorty was reaching for a gun. App. 8a-9a. Further, Arrington testified that as he drove away, he saw Shorty with a gun and it looked like Shorty accidentally shot Gomez. App. 8a-9a, 63b.

The state's final witness was Jason Miller, a jail informant who used a recording device provided by detectives to record conversations with Arrington. App. 6a. The state also played for the jury portions of the recorded conversations. App. 7a, 65b-67b. Miller testified that, over the course of the recordings, Arrington never mentioned that he saw Shorty with a gun or that he saw Shorty shoot Gomez. App. 8a. The jury heard that when Miller asked Arrington if Shorty was "acting like he was a beast" when he saw him,

Arrington responded, "Yeah. That's what added fuel to the fire …." App. 8a, 66b. Further, when Miller told Arrington his aim "ain't shit" because he missed Shorty and hit Gomez, Arrington replied he "just dumped the crib down" because he did not know if Shorty would retaliate. App. 8a, 66b-67b.

Miller had previously worked as a confidential informant in Brown County, where the charges in Arrington's case were filed. App. 125d. 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. App. 64b. Miller then began working as a confidential informant with Detective Michael Wanta and Detective Bradley Linzmeier, who was the lead detective in Arrington's case. *Id*. Initially, the focus was on a case involving a different inmate, a man named Powell, but before any recordings were made, Miller told detectives that Arrington was talking about his case and he believed Arrington would tell him things about his pending charges. App. 10a-11a. The detectives authorized Miller to record his conversations with Arrington. App. 11a.

The detectives understood Miller was seeking consideration in his pending cases. App. 124d, 133d. Although the specifics would come from the district attorney, the understanding was that the more the informant produced, the more consideration they might receive. App. 64b-65b, 124d. Wanta testified they told Miller "the information he would gather would, again, be used as part of his consideration." App. 135d.

Over the course of three days, Wanta supplied jail staff with a digital recorder that they tucked into a

band around Miller's waist. App. 12a, 64b, 128d-129d. Miller had the ability to turn it on and off. *Id*. Each night Wanta would retrieve the recording device and the next morning review the recording and transfer the contents to a CD that was placed into evidence. App. 64b-65b, 130d-131d. Wanta would provide Detective Linzmeier with copies and brief him on what appeared on the tapes regarding Arrington. App. 63b, 139d.

The state confirmed at trial that it had provided Miller consideration in the form of a plea agreement for his work as a confidential informant, including the recordings of his conversations with Arrington. The agreement contemplated consideration for a "full debrief and testimony on Powell and Arrington." App. 68b.

B. Procedural Background

As part of his direct appeal pursuant to Wis. Stat. § (Rule) 809.30(2)(h), Arrington filed a postconviction motion alleging that the state's use of Miller to obtain incriminating statements violated his Sixth Amendment right to counsel. Because trial counsel had not objected to the admission of the statements at trial, Arrington sought a new trial due to plain error, ineffective assistance of counsel or in the interests of justice. App. 68b. In addition to Detectives Wanta and Linzmeier, trial counsel and Arrington were witnesses at the postconviction hearing. App. 97d-167d. Trial counsel testified that he never considered whether the statements were obtained in violation of Arrington's right to counsel and had he identified the claim, he "likely would have, yes", filed a motion to suppress the statements obtained from Arrington. App. 69b, 103d. Arrington testified that when he was

speaking with Miller at the jail he did not know Miller was an informant or that he was wearing a recording device. App. 155d.

The trial court denied the postconviction motion, concluding there was no Sixth Amendment violation because Miller was not an agent for the state when he recorded his conversations with Arrington. App. 85c.

The court of appeals reversed, holding that the detectives' conduct in equipping Miller with a recording device and expressly authorizing him to surreptitiously record his conversations with Arrington clearly showed an agency relationship. App. 76b. Arrington's Sixth Amendment right to counsel was violated because "[w]hat occurred here was the intentional, surreptitious creation of an opportunity to confront Arrington without counsel present." App. 77b. Concluding that counsel's failure to seek suppression or otherwise object to admission of the recording and Miller's testimony deprived Arrington of the right to effective assistance of counsel, the court granted a new trial on the homicide charge.[1]

The Wisconsin Supreme Court reversed the court of appeals. Four justices concluded there was no Sixth Amendment violation because Miller was not acting as a state agent when he recorded his conversations with Arrington. App. 3a. Three justices rejected that conclusion, writing, "This case involves a textbook example of a Sixth Amendment violation." App. 41a.

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[1] Arrington had conceded that reversal of the felon in possession of a firearm charge was not warranted. App. 15a.

In reaching its conclusion that Miller was not a state agent, the majority relied, in part, on state agency law in civil cases, while acknowledging "that in prior Sixth Amendment 'state agent' precedents, the United States Supreme Court has used a more specific, nuanced analysis to determine agency status …." App. 23a. The majority concluded that there was no agency relationship between Miller and law enforcement "because the detectives did not have an agreement with Miller or control his questioning …." App. 34a. The court wrote that Miller "acted on his own initiative", no consideration was promised to Miller for gathering information on Arrington and the recording device "was nothing more than an avenue for police to place a 'listening ear' into Arrington's cell." App. 30a-31a, 34a. At the same time, however, the court recognized there "is no dispute that Miller deliberately elicited information from Arrington." App. 22a.

The three-justice concurrence wrote that the majority's conclusion "rests on its misunderstanding" of United States Supreme Court precedent, but determined that use of the statements obtained in violation of the Sixth Amendment did not prejudice Arrington's defense. App. 41a, 53a. Citing *United States v. Henry*, 447 U.S. 264, 270-71 (1980), the concurrence noted that "[w]hat matters for determining whether someone is a government agent isn't whether they have promise of specific consideration in hand before gathering information, but whether there was a 'prearrangement' with police to gather information", which there was here. App. 51a.

REASONS FOR GRANTING THE PETITION

I. The Wisconsin Supreme Court's holding that the jail informant was not an agent of the state when, pursuant to a plan devised with detectives, he used a recording device provided by the detectives to secretly record conversations with Arrington about his pending charge conflicts with relevant decisions of this Court.

A. The detectives' conduct is a clear violation of the Sixth Amendment as interpreted and applied in four decisions from this Court.

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 assistance of counsel when the government interrogates him. *Massiah v. United States*, 377 U.S. 201, 204 (1964), *citing Spano v. New York*, 360 U.S. 315 (1959). This protection extends beyond questioning by police; it also applies to surreptitious interrogations by individuals who are cooperating with police. *Massiah*, 377 U.S. at 205; *Maine v. Moulton*, 474 U.S. 159, 176-77 (1985). That includes jail informants. *United States v. Henry*, 447 U.S. 264, 274 (1980); *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

There was no dispute that Arrington's Sixth Amendment right to counsel had attached when Miller, with the detectives' authorization, used a recording device provided by the detectives, to record conversations with Arrington about his case. Not only

had Arrington been charged, he had already made his initial appearance with counsel on the homicide case. App. 6a.

There was also no dispute that Miller deliberately elicited information from Arrington about the homicide. App. 22a. At issue was whether Miller was acting as an agent of the state when he deliberately elicited that information. The state supreme court's conclusion that Miller was not a state agent conflicts with *Massiah*, *Henry*, *Moulton* and *Kuhlmann*.

This Court has made clear that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann*, 474 U.S. at 459. A defendant does not establish a Sixth Amendment violation "simply by showing that the informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Id*. Rather, the defendant must show that "the police and their informant took some action, beyond merely listening that was designed deliberately to elicit incriminating remarks." *Id*. Here, the detectives and Miller took "some action" beyond merely listening when, with the detectives' authorization, Miller recorded conversations with Arrington about the homicide, using a recording device provided by detectives who then secured the recordings as evidence that was later used at Arrington's trial.

Of this Court's four decisions, two – *Massiah* and *Moulton* – involve recorded conversations obtained by a co-defendant and two – *Henry* and *Kuhlmann* – involve jail informants reporting what a cellmate said.

Nothing in those decisions would allow law enforcement to supply a jail informant with a recording device and authorize the informant to secretly record conversations with an inmate about his pending charges.

In *Massiah*, the informant was a co-defendant who allowed law enforcement to install a radio transmitter in his car so that the officer could listen in on conversations with Massiah. 377 U.S. at 203. This Court held that Massiah was denied "the basic protections" 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 his counsel." *Id*. at 206.

Similarly, in *Moulton*, the informant was a co-defendant who ultimately agreed to wear a wire at a meeting with his co-defendant, both of whom had been released on bail. 474 U.S. at 162-65. Police instructed the informant not to question Moulton but to "'just be himself in his conversation". *Id*. at 165. 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 …." *Id*. at 176. Citing *Massiah* and *Henry*, the Court wrote that:

> [K]nowing 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.

This Court also found a Sixth Amendment violation in *Henry*, where a paid jail informant agreed to "be alert" to any statements made by federal prisoners, including Henry. 447 U.S. at 266, 274. The jail informant was not outfitted with a recording device, and police specifically told him not to initiate any conversation with or question Henry about his case. *Id*. at 266. 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*. at 274 (footnote omitted). Although the informant had not questioned Henry, it was enough that he had "stimulated" conversation. *Id*. at 273.

In *Kuhlmann*, an inmate, Lee, entered into "an arrangement" with a detective who instructed Lee to not ask any questions of Wilson but to listen for names of other participants in the offense. 477 U.S. at 439. The trial court found that Lee followed the detective's instructions. *Id*. at 460. Lee, who was not wearing a recording device, furnished the detective with notes he had written about Wilson's statements while sharing a cell with him. *Id*. at 440. On habeas review, 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.

As the Wisconsin court of appeals correctly concluded, the detectives and Miller took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

App. 77b. The three devised a plan under which Miller would obtain statements from Arrington and at least one other inmate. For three days the detectives supplied Miller with a recording device to memorialize his conversations with Arrington. Each day jail staff secured the recorder around Miller's waist and at the end of the day Detective Wanta would retrieve the device, listen to the recordings, brief Detective Linzmeier – the lead detective in Arrington's case – on the contents and secure the recordings as evidence that was later used at Arrington's trial. The concurrence was right. The "record clearly demonstrates that Miller was an agent of the police". App. 49a. The majority's conclusion to the contrary is based upon two faulty premises, as shown below.

B. The Wisconsin Supreme Court's decision that the informant was not a state agent rests on two premises that conflict with the *Massiah* line of decisions.

Relying in part on state law agency principles, the supreme court concluded that there was no agency relationship "because the detectives did not have an agreement with Miller or control his questioning". App. 23a-24a, 34a. That conclusion conflicts with the *Massiah* line of decisions.

As to the lack of control, the supreme court noted that Miller volunteered his services to law enforcement. App. 30a. That fact is of little import. In *Moulton*, the co-defendant and his attorney approached police about cooperating. 474 U.S. at 162-63. The Sixth Amendment was violated because the state knowingly exploited an opportunity to confront

the accused without counsel. *Id*. at 176. The same is true here.

Nor does it matter that the detectives did not tell Miller what questions to ask. As the concurrence noted, *Henry* rejected that distinction. "[W]hat matters is that the police knew that Miller 'had access to [Arrington] and would be able to engage him in conversations without arousing [Arrington's] suspicions' and without Arrington's counsel present." App. 54a, *quoting Henry*, 477 U.S. at 270-71 & n.8

The supreme court's conclusion that "the detectives did not have an agreement with Miller" is belied by the undisputed facts. App. 34a. On the same day that the state charged Arrington with homicide, the detectives began meeting with Miller and devised a plan for recording conversations with inmates. App. 123d-125d, 142d. Initially the focus was on two other inmates, including a man named Powell, but when Miller told detectives that Arrington was talking about his case and asked if he "should record" those conversations, Detective Linzmeier told him "Yes" and Detective Wanta told him "he could record conversations with Mr. Arrington." App. 128d, 143d. From that point on, the detectives and Miller were joined in a plan "designed deliberately to elicit incriminating remarks." *See Kuhlmann*, 477 U.S. at 459.

The state court's conclusion that there is no agency without the government's agreement to reward the informant is unsupported by the *Massiah* line of cases and ignores the fact that Miller received consideration for his work involving Arrington.

Massiah and its progeny do not require *quid pro quo* before a person can be considered a government agent. Although in *Henry* the Court noted that the informant was paid for the information, 447 U.S. at 266 & 270, the presence of consideration was not emphasized as a factor in determining agency. Nothing in *Massiah*, *Henry*, *Moulton* or *Kuhlmann* can be read as requiring a showing that the informant received a benefit or consideration from the government.

In any case, here, the trial court found that the detectives knew Miller was seeking consideration for his work. App. 76b, 86b-87b. Indeed, the record shows consideration was contemplated and given. "Wanta testified the detectives told Miller that 'the information he would gather would … be used as part of his consideration.'" App. 76b, 135d. The understanding was that the more the informant produced, the more the informant might get. App. 124d. Ultimately, the state provided Miller consideration in the form of a plea agreement for his information and testimony against Arrington and Powell. App. 52a. The supreme court's attempt to limit any discussion of consideration among the detectives and Miller to his work involving Powell is undercut by the undisputed fact that the government gave Miller consideration for work against both Arrington and Powell. (*Id.*).

In addition, if, as the supreme court seems to believe (App. 30a-31a), the government can avoid an agency relationship whenever the police tell an informant that any consideration would come from the district attorney's office, the concurrence is correct that "it's unclear how anyone could ever be [a state

agent]." App.51a. It would allow one arm of law enforcement – the police – to design a plan with an informant for the purpose of eliciting incriminating statements from an accused without running afoul of the Sixth Amendment simply because another arm of law enforcement – the prosecutor – determines the specifics of consideration for that information. Such a result is inconsistent with this Court's declaration that "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. *Moulton*, 474 U.S. at 176 (footnote omitted).

II. The decision below conflicts with decisions of the United States courts of appeals, even decisions in circuits that apply a stringent, bright-line rule for determining agency.

Certiorari is also warranted because the decision below conflicts with decisions of the United States courts of appeals, even with decisions from circuits that have adopted a stringent, bright-line test for determining if an informant is a government agent.

Some courts have concluded that there is, by necessity, no bright-line rule for determining whether an individual is a government agent for purposes of the Sixth Amendment right to counsel. "[T]he infinite number of ways that investigators and informants can combine to elicit information from an unsuspecting defendant precludes us from establishing any litmus test for determining when an informant is acting as a

government agent under *Massiah*." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 893 (3rd Cir. 1999).

In addition to the Third Circuit, the Fourth, Sixth and Eleventh Circuits have rejected any sort of bright-line rule in favor of a multi-factored review of the circumstances of the particular case. *See Depree v. Thomas*, 946 F.2d 784, 793-94 (11th Cir. 1991) ("There is by necessity, no bright-line rule for determining whether an individual is a government agent […]. The answer depends on the 'facts and circumstances' of each case."); *accord Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir. 1983); *Ayers v. Hudson*, 623 F.3d 301, 310-12 (6th Cir. 2010). Some state courts also take this view. *See*, *e.g.*, *State v. Ashby*, 247 A.3d 521, 536 (Conn. 2020); *State v. Marshall*, 882 N.W.2d 68, 91 (Iowa 2016); *State v. Stahlnecker*, 690 S.E.2d 565, 572 (S.C. 2010); *Commonwealth v. Murphy*, 862 N.E.2d 30, 38-39 (Mass. 2007). The general consensus of these decisions is that there must be "some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation takes place." *Depree*, 946 F.2d at 794; *see also Ashby*, 247 A.3d at 538.

Four circuits – the First, Second, Eighth and D.C. Circuits – have adopted a bright-line rule that "[i]f an informant has not been instructed by the police to get information about the particular defendant, that informant is not a government agent for *Massiah* purposes." *United States v. Johnson*, 338 F.3d 918, 922 (8th Cir. 2003), *citing Moore v. United States*, 178 F.3d 994 (8th Cir. 1999); *see also United States v. LaBare*, 191 F.3d 60, 65 (1st Cir. 1999); *United States*

v. Birbal, 113 F.3d 342, 346 (2nd Cir. 1997); *United States v. Watson*, 894 F.2d 1345, 1348 (D.C. Cir. 1990). Two other circuits – the Fifth and Tenth Circuits – appear to follow a variation of the bright-line rule, finding agency exists when the informant acted at the government's instruction *or* the government compensated the informant. *Creel v. Johnson*, 162 F.3d 385, 394 (5th Cir. 1998); *United States v. Taylor*, 800 F.2d 1012, 1016 (10th Cir. 1986).

The Wisconsin Supreme Court's decision that Miller was not a government agent when he deliberately elicited incriminating statements from Arrington is inconsistent with the federal circuit court decisions, even those that employ a bright-line rule. Miller was acting under instructions of law enforcement that included obtaining information from Arrington, and consideration for his work was contemplated and given.

The state court relied heavily on the Eighth Circuit's decision in *Moore* (App. 25a-28a), but the facts are unlike what occurred here. Although the informant had a general proffer agreement to provide information about drug-related activity, at no time did anyone ask him to listen in or solicit any comments from Moore. 178 F.3d at 999. The informant was not an agent because "[t]o the extent there was an agreement between [the informant] and the government, there is no evidence to suggest it had anything to do with Moore." *Id.*; *see also Johnson*, 338 F.3d at 921 (jail informant was not an agent because he was not "instructed, either in express words or by implication, to get information about Ms. Johnson").

Decisions in the other three circuits have likewise found a jail informant to not be an agent because the informant was "neither instructed nor authorized" to gain information about the defendant. *Watson*, 894 F.2d at 1348 (informant with history of cooperating with the DEA not an agent when "there is no evidence that the DEA in any way encouraged [him] to talk to [the particular defendant]"; *see also LaBare*, 191 F.3d at 65 (informant not an agent when the government asked him to report incriminating statements, but "in no way focused [his] attention on an individual defendant"); *Birbal*, 113 F.3d at 345-46 (informant who had a general agreement to provide information about criminal activities was not an agent because he "had not been enlisted to seek out and collect information from Birbal or any other jailmates").

Unlike in those cases, Miller recorded conversations with Arrington after the detectives had expressly authorized Miller to gather information from Arrington about his pending case. The detectives even equipped Miller with a recording device to secretly memorialize as evidence his conversations with Arrington and one other inmate, Powell. In the language of the Second Circuit, Miller was "deputized by the government to question that defendant." *Birbal*, 113 F.3d at 346. Thus, even under the more stringent bright-line rule, Miller was a state agent when he recorded his conversations with Arrington.

Even circuits that seem to require evidence of consideration do not demand, as the state supreme court seemed to believe (App. 30a-31a), that the consideration must be in the form of a "payment" or

that the terms of the consideration must be made explicit before the informant begins their work for the government. Evidence that consideration was implied is sufficient. *See Taylor*, 800 F.2d at 1016 (in the absence of "any express or implied *quid pro quo*", inmate who was merely placed in defendant's cell was not a government agent); *see also Creel*, 162 F.3d at 393 (approves district court's formulation that there must be a showing that the informant "was promised, reasonably led to believe, or actually received a benefit in exchange for soliciting information").

Although in *United States v. York*, 933 F.2d 1343, 1357 (7th Cir. 1991), *overruled on other grounds by Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999), the court wrote "there is no agency absent the government's agreement to reward the informant", language relied upon by the majority of the state court (App. 24a-25a), the Seventh Circuit wrote in the next paragraph:

> Agreements, of course, don't have to be explicit or formal, and are often inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a sustained period of time.

Id.

The majority wrongly concluded that Miller was not an agent because the detectives made "no promises for gathering information on Arrington" but, rather, "told Miller that any payment or consideration would come from the District Attorney's office." App. 30a-31a. Relying on *Henry* and *York*, the concurrence got it right:

> What matters for determining whether someone is a government agent isn't whether they have a promise of specific consideration in hand before gathering information, but whether there was a "prearrangement" with the police to gather the information, Henry, 447 U.S. at 270-71, and whether the police and informant "behaved as though" there was an agreement between them, York, 933 F.2d at 1357-58.

App. 51a. Here, the undisputed facts show that consideration was contemplated and given. The detectives told Miller that the information he gathered "'would … be used as part of his consideration.'" *Id*. And, in fact, Miller received consideration in the form of a plea deal for his information and testimony against both Arrington and Powell. App. 52a.

Review by the Supreme Court is warranted because the Wisconsin Supreme Court's conclusion as to when a jail informant is a state agent for purposes of the Sixth Amendment right to counsel is inconsistent with *Massiah*, *Henry*, *Moulton* and *Kuhlmann* and with federal circuit court decisions, even those that apply the most demanding bright-line rule for determining agency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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