STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP238-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant-Petitioner.

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On review of a Decision of the Court of Appeals, District II, Affirming a Judgment and Order Entered in the Racine County Circuit Court, the Honorable David W. Paulson, Presiding

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# REPLY BRIEF

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## ARGUMENT

Mr. Washington's trial *in absentia* was unlawful, and his conviction must be reversed.

### A. *Mr. Washington did not validly waive his right to presence*

The state does not contend that Mr. Washington's trial *in absentia* satisfied the Wis. Stat. § 971.04 exception to the requirement of presence. Instead, it argues that the statutory exception governs only when presence may be forfeited, and that Mr. Washington's presence was instead knowingly and voluntarily waived.

What happened in this case was not a knowing and voluntary waiver. Mr. Washington, recall, was "semi removed" and "semi left on his own" after an "outburst." During this outburst, the court said Mr. Washington "may have to be removed from the courtroom"; this was the last contact the court had with Mr. Washington for the entire trial. That is, after having Mr. Washington at least somewhat forcibly removed from the courtroom, the court never attempted to personally communicate with him about whether he understood the right he was giving up or the disadvantages of doing so. The fact that jail staff or Mr. Washington's attorney told the court he did not wish to come back does not amount to a showing of knowing, voluntary and intelligent waiver. (Still less do his prior disagreements with counsel indicate such a waiver, as the state suggests. Respondent's Brief at 2-4, 29).

The state cites a number of cases on waiver—all of which stand in contrast to the facts here. Thus, in ***State v. Soto***, the proceeding was held by videoconference, rather

than in the physical presence of the defendant, after a colloquy establishing the defendant could see and hear (and been seen and heard by) the court, and that he agreed to the use of the technology. 2012 WI 93, ¶48, 343 Wis. 2d 43, 817 N.W.2d 848.

In ***Cuoco v. United States***, the defendant initially refused to be brought to court. 208 F.3d 27, 29 (2d Cir. 2000). The court told the marshals to bring him forcibly if necessary, so that it "could determine whether Cuoco knowingly and voluntarily waived his right to be present at trial." ***Id.*** The defendant was brought to court, where

> the judge informed him that "[i]f you in the future refuse to cooperate and to come, you will not be brought physically to court, we will deem your absence to be a voluntary waiver of your presence in court." The court further asked, "Do you understand what I just told you?" Cuoco replied that he did.

***Id.*** Later the same day, Cuoco told the court he would rather not be present for trial. His attorney explained to the court that he had counseled Cuoco about the specific disadvantages of not appearing, and the court personally addressed Cuoco and counseled him against it. ***Id.*** at 29-30. Only after this did the court permit the trial to proceed in the defendant's absence. The court of appeals upheld the waiver "[b]ecause [it] took place in open court after a full explanation of the advantages Cuoco would lose by leaving the courtroom and while the jury venire was in the courthouse." ***Id.*** at 32.

In ***United States v. Benabe***, two defendants (out of six) disrupted six pretrial hearings with interruptions and diatribes against the jurisdiction of the court. 654 F.3d 753, 762-64 (7th Cir. 2011). The court repeatedly warned the defendants, over the course of these hearings, that they would not be

permitted to attend trial if they would not agree to refrain from such disruptions. ***Id.*** Only after the defendants finally refused to answer the court's question—whether they intended to make statements to jurors without permission—did the court order them out of the courtroom for trial. ***Id.*** at 764.

Finally, in ***State v. Vaughn***, the defendant interrupted the court repeatedly over the course of several hearings. 2012 WI App 129, ¶5, 344 Wis. 2d 764, 823 N.W.2d 543. The day before trial, after several interruptions and yelling, and several warnings by the court (which noted it was "trying to give him … many possible opportunities"), the court had the defendant removed. ***Id.***, ¶8. Later, upon learning the defendant was unwilling to return to the courtroom, the court arranged for an audio/video hookup with the jail and engaged the defendant in a discussion wherein he confirmed that he did not wish to be present. ***Id.***, ¶¶9-10.

These cases do not support the state's contention that Mr. Washington's removal from court after one brief outburst, followed by his refusal to return, constitute a knowing and voluntary waiver of his right to presence. In each one, the defendants were excluded (or excluded themselves) from the courtroom only after having been repeatedly warned of that consequence of their conduct or after a colloquy in which they confirmed their desire, against the advice of counsel and the court, to forego the advantages of being present.

More than that, the cases point to approaches the court here could have taken to assure either a valid waiver or Mr. Washington's participation. The circuit court, based on Mr. Washington's "aggressiveness and his attitude," declined to have him returned to court based on its suspicion that "he

may be physically resistant to being brought back in" and thus could present a safety risk. (65:15). Mr. Washington, by this point, was in a jail cell; it would have been a simple matter to ask him whether he would cooperate with being escorted back for the purpose of waiving his right to presence. Even if he could not be brought back, the court and counsel could have paid Mr. Washington a visit in the jail (as did the judge in ***State v. Divanovic***, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996)) to ensure he understood the right he was giving up, and the disadvantages of doing so.

The state quotes ***Illinois v. Allen***'s pronouncement that "[i]t would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes." 397 U.S. 337, 346 (1970). This is surely true. On the other hand, the dignity of our courts—their status as "palladiums of liberty" and "guardians of the public welfare" that "strive to administer equal justice to the rich and the poor, the good and the bad," ***id.***, is not augmented by trying a man *in absentia* without a serious effort to make him understand what's at stake.

### B. *Mr. Washington's absence from his entire trial was not harmless beyond a reasonable doubt*

The state finally argues that any error in trying Mr. Washington *in absentia* was harmless. The state must prove this proposition beyond a reasonable doubt. ***State v. Peterson***, 220 Wis. 2d 474, 488, 584 N.W.2d 144 (Ct. App. 1998).

While the state presents its argument as four separate points, the first, second, and fourth amount to the same thing—the state says Mr. Washington's attorney's participation in the trial "represented" Mr. Washington's

"interests," that she presented a defense, and that Mr. Washington has not argued that she ought to have done anything different. Respondent's Brief at 27-28, 29.

These arguments are beside the point—this appeal is not about Mr. Washington's right to counsel, and the performance of his lawyer is not at issue. For this reason, the state's reliance on ***Peterson*** is misplaced. The defendant in that case was not brought into chambers when the court was deciding how to respond to two jury questions. 220 Wis. 2d at 479-80. The court did hear argument from the defendant's lawyer before responding to the questions. ***Id.*** at 480. The court of appeals held the defendant's absence harmless because (1) his lawyer was present, (2) the question being decided was a legal one to which the defendant likely could not have made any contribution, and (3) the court's answer to the jury question was correct. It was "therefore highly unlikely that Peterson suffered any prejudice as a result of" his own absence from the conference. ***Id.*** at 489-90.

Peterson's only period of absence was when the court was making a legal decision out of view of the jury—a time when his lawyer's participation was sufficient to advance any interest Peterson might have had. This explains the court of appeals' finding of harmlessness based, in part, on the fact of his lawyer's participation. The facts of ***Peterson*** are completely incomparable with the facts here, yet it is the only case the state cites. (There are other cases finding a defendant's absence harmless; like ***Peterson***, they all involve very brief absences. *See* ***State v. Tulley***, 2001 WI App 236, ¶11, 248 Wis. 2d 505, 635 N.W.2d 807 (defendant and counsel excluded from in-chambers voir dire of three jurors, none of whom served on the jury); ***State v. David J.K.***, 190 Wis. 2d 726, 737-38, 528 N.W.2d 434 (Ct. App. 1994) (defendant absent from in-chambers voir dire; attorney told

defendant what had happened and attorney and defendant agreed on which jurors to strike)).

Far more apt is ***State v. Harris***, 229 Wis. 2d 832, 601 N.W.2d 682 (1999), which the state ignores though it is much closer to the facts here (though Harris's absence was still nowhere near as significant as Mr. Washington's).

In ***Harris***, the circuit court conducted a partial voir dire of potential jurors in the absence of the defendant and, for some of the time, his counsel. 229 Wis. 2d at 835-37. Though there was no specific claim that any biased juror had been seated, the court of appeals observed that "[u]nless a defendant and his or her lawyer are present when potential jurors are questioned, the subtleties of responses are lost." ***Id.*** at 844. It went on to note that the "the interplay between potential jurors and a defendant, while often subtle, is both immediate and continuous." ***Id.*** Though the defendant was present for the trial itself, the court therefore rejected the argument that his absence from voir dire was harmless.

***Harris*** points up a central problem with the state's harmlessness argument. The state faults Mr. Washington for not saying what about the trial would have been different had he been present, but how could he? He was absent. As with denial of the right to confrontation (a right closely related to the right to presence), "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation." ***Coy v. Iowa***, 487 U.S. 1012, 1021–22 (1988).

Mr. Washington's argument is not that his lawyer failed to present a defense, or that the judge failed to properly instruct the jury, or that the evidence against him was

insufficient. It is that he was tried entirely *in absentia*, never being seen by the jury that convicted him. He need not also have been denied some *other* right, as the state seems to suggest, in order to have been prejudiced. If a defendant's absence from his entire trial may be held harmless, the right to presence is null.

## CONCLUSION

For the foregoing reasons, Mr. Washington respectfully requests that this court vacate his convictions and sentences and remand with directions that he receive a new trial.

Dated this 22nd day of June, 2017.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,876 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of June, 2017.

Signed:

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