STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2018AP1952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK D. JENSEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Kenosha County Circuit Court, the Honorable Chad G. Kerkman, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court err by entering a conviction against Jensen without a trial, a guilty plea, or affording him any of the other central rights a defendant is entitled to at trial?

The circuit court entered a judgment of conviction against Jensen without a trial or a guilty plea.

2. Did the circuit court err by effectively overruling the Wisconsin Supreme Court, the Eastern District of Wisconsin, and the Seventh Circuit, all holding that the alleged victim's statements were testimonial?

Contrary to decisions from the three reviewing courts, the circuit court held the victim's statements were not testimonial.

3. Did the circuit court violate the federal habeas court's order to retry Jensen?

The circuit court entered a judgment of conviction against Jensen without a trial, a guilty plea, or affording him any of the other rights a defendant is entitled to at trial.

4. Is Jensen entitled to a new trial because his prior trial was infected by judicial bias?

The circuit court did not address this issue since the case was returned to court for a new trial. The defendant raised this issue in his original direct appeal in 2010 and raises the issue again here to preserve it for federal habeas review.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel requests oral argument and publication, as this case has a complicated procedural history and presents significant questions of constitutional law.

INTRODUCTION

Mark Jensen's 2008 homicide conviction was vacated after the federal courts found it constitutionally infirm. Yet, the retrial that was ordered never occurred. Instead, the Kenosha County Circuit Court re-determined the constitutional issue that the federal courts had decided, and then entered a judgment of conviction and life sentence against Jensen. It did this without a jury trial, without a guilty plea, and without any evidence. The judgment can be explained in one of two ways. If it's a new judgment of conviction, then it was a directed verdict and violated all of Jensen's constitutional jury trial rights. Or it's a reinstatement of the invalidated 2008 conviction, which means the circuit court effectively reversed the Seventh Circuit. Either way, the judgment must be reversed.

STATEMENT OF THE CASE AND FACTS

In 2008, Mark Jensen went to trial, charged with homicide in the 1999 death of his wife, Julie. The trial, invalidated by Wisconsin's federal Eastern District Court and then the Seventh Circuit Court of Appeals, lasted 49 days.

The State charged Jensen with homicide after its toxicologist, Dr. Long, concluded that Julie's stomach contained a "large concentration of ethylene glycol," demonstrating "an acute ingestion, at or near the time of death," so much that she could not have consumed that large quantity on her own. (1:3.)

Critical to the State's case were Julie's oral and written statements to police against her husband in the weeks before her death. In those statements, Julie told police that if anything happened to her, Jensen would be her first suspect. (298; 909:41, 45-46, 127-28.) The State insisted before trial that these statements were "an essential component of the State's case" against Jensen. *Jensen v. Clements*, 800 F.3d 892, 894 (7th Cir. 2015).

Support for the State's theory, that Jensen poisoned his wife (as opposed to the defense theory that Julie took her own life and sought to frame Jensen), was far from overwhelming. For instance, Dr. Long had grossly overestimated the amount of ethylene glycol in Julie's stomach (it actually contained a half teaspoon), and in another case, Dr. Long altered evidence. (903:188-95; 910:33-37.) The State's case relied on a witness whom the trial judge

called "the top liar I've ever had in court." *Clements*, 800 F.3d at 907. And in turn, that "top liar's" testimony was relied on by other State's experts for their conclusions that Julie was suffocated—a theory that arose for the first time at trial. *Id.* at 897-98. Meanwhile, the jury heard evidence that Julie suffered from a major depressive disorder and posed a significant suicide risk. *Id.* at 907. And there was conflicting evidence about who in the Jensen household conducted internet searches for ethylene glycol poisoning. *Id.* at 906.

As the Seventh Circuit aptly stated: "This case was no slam dunk. The evidence was all circumstantial. And there was significant evidence in support of Jensen's theory that Julie had taken her life . . . ." *Id.* Indeed, the jury deliberated for over 30 hours before voting to convict. *Id.* at 898.

Admission of Julie's "letter from the grave," and other statements to police violated Jensen's right to confrontation. The errors were so significant that the federal district court and Seventh Circuit invalidated Jensen's conviction as constitutionally infirm, granted a writ of habeas corpus, and ordered a retrial. *Id.*; *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013). The State did not appeal the Seventh Circuit's order, and the case was returned to the Kenosha County Circuit Court for retrial.

The letter and statements

Two weeks before she died, Julie wrote a letter to police officer Ron Kosman, explaining that if anything happened to her, Jensen would be her first suspect. (298.) She sealed the letter in an envelope and gave it to her neighbors, telling them that they should give it to police if anything happened to her. (904:195.) Days after writing the letter, Julie called Officer Kosman and left a message saying her husband was trying to kill her. (909:41, 127-28.) Kosman heard the message after returning from a personal trip, then visited Julie at her home. She told him that if she wound up dead, it was not a suicide, and Jensen would be her first suspect. (909:41, 45-46.) Kosman offered to help her leave the house, but she declined, saying she thought everything would be okay, and that "her emotions were just running a little wild." (909:47-48.)

State court proceedings

Under the then-governing test of *Ohio v. Roberts*, 448 U.S. 56 (1980), the circuit court admitted Julie's letter and her statements to Kosman. *State v. Jensen*, 2007 WI 26, ¶ 9, 299 Wis. 2d 267, 727 N.W.2d 518 (*Jensen I*). The State conceded that Julie's voicemails to Kosman were inadmissible hearsay. *Jensen I*, 2007 WI 26, ¶ 9.

Before trial, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), and Jensen sought reconsideration. Applying *Crawford*, the circuit court ruled that Julie's letter

and voicemails to Kosman were testimonial and therefore inadmissible. *Id.*, ¶ 10. The State conceded that Julie's in-person statements to Kosman were testimonial and inadmissible. *Id.*, ¶ 11 n.4. The court rejected the State's argument that Julie's statements were admissible under the forfeiture by wrongdoing doctrine. *Id.*, ¶ 11.

The State appealed, and on bypass, the Wisconsin Supreme Court held that under the "facts and circumstances of this case," Julie's letter and her statements to police were testimonial. *Id.*, ¶ 20. The court noted that the letter was testimonial because it was "purposefully directed towards law enforcement agents," it was "very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death," and it was intended to implicate her husband. *Id.*, ¶ 27. The court found Julie's oral statements to police to be testimonial on largely the same basis. *Id.*, ¶ 30. The statements "served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." *Id.* The court further found that the voicemail "was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities." *Id.*

Although the court agreed that the letter and statements were testimonial, it adopted a "broad forfeiture by wrongdoing doctrine," and remanded the case to the circuit court, where, if the State proved by a preponderance of the evidence that Jensen caused

Julie's absence, his confrontation right would be forfeited. *Id.*, ¶ 57.

After a ten-day forfeiture by wrongdoing hearing, the circuit court, the Honorable Bruce Schroeder, found the State met its burden "that Jensen had caused Julie's absence from the trial and thus forfeited his right to confront the testimonial statements attributed to Julie."[1] *State v. Jensen*, 2011 WI App 3, ¶ 14, 331 Wis. 2d 440, 794 N.W.2d 482 (*Jensen II*). After the forfeiture hearing, the case went to trial where Jensen was convicted. (567.)

Four months later, the United States Supreme Court decided *Giles v. California*, 554 U.S. 353 (2008), which invalidated the Wisconsin Supreme Court's holding on the forfeiture-by-wrongdoing doctrine.

On appeal, Jensen argued that under *Giles*, "the admission of the testimonial statements [was] reversible error." *Jensen II*, 2011 WI App 3, ¶ 24. The *Jensen II* court, bound by the Wisconsin Supreme Court's holding that Julie's letter and statements to Kosman were testimonial, nonetheless found the error admitting those statements to be harmless. *Id.*, ¶¶ 34-35. Jensen also argued that his due process right to a fair trial was violated when the judge who made a pretrial finding of guilt at the forfeiture by

[1] As the Seventh Circuit noted, "there are serious reasons to question this finding." *Clements*, 800 F.3d at 897 n.1.

wrongdoing hearing then presided over his jury trial. The court found that (1) the argument was forfeited because Jensen failed to present it in the circuit court, and (2) Jensen failed to show by a preponderance of the evidence that the judge was biased or prejudiced. *Id.*, ¶¶ 95-96.

Federal habeas proceedings

Jensen filed a habeas petition in federal court. The United States District Court for the Eastern District of Wisconsin granted Jensen's petition on December 18, 2013. The State did not dispute that the letter and Julie's statements to Kosman were testimonial. *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767, *6 (E.D. Wis. Dec. 18, 2013) (App. 152). Nevertheless, before finding a constitutional violation meriting habeas relief, the court was obligated to address the merits of the confrontation claim. *Id.* at *7. The court held that "Jensen's rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court admitted Julie Jensen's letter and testimonial statements to police at his trial and that the errors were not harmless." *Id.* at *17. The court ordered Jensen "released from custody unless, within 90 days of this decision, the State initiates proceedings to retry him." *Id.*

Denying the State's motion to alter judgment, the district court made the meaning of its writ clear: the "State must therefore decide whether it will appeal the court's ruling or proceed now to a retrial."

Jensen v. Schwochert, No. 11-C-803, 2014 WL 257861, *8 (E.D. Wis. Jan. 23, 2014); (App. 171).

The State appealed. The Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015); (App. 172). The court declared "[t]his letter and other accusatory statements [Julie] made to police in the weeks before her death regarding her husband should never have been introduced at trial." *Id.* at 895. The admission of Julie's letter and her statements violated Jensen's confrontation right: "that the jury improperly heard Julie's voice from the grave in the way that it did means *there is no doubt* that Jensen's rights under the federal Confrontation Clause were violated." *Id.* at 908 (emphasis added). The error was not harmless, evidenced by the extraordinary weight the State placed on the letter at trial, and the "significant evidence in support of Jensen's theory that Julie had taken her life." *Id.* at 905-07.

Remand to state court for retrial

Jensen's conviction was vacated, and on December 29, 2015, the Kenosha County Circuit reopened the case for further proceedings. (791:4; 806:12; 808:3.)

As the parties prepared for a new trial—after the prosecutor suggested he might try to re-admit Julie's testimonial statements—Jensen filed a motion to exclude those statements. (938:6-7; 709.) Four months later, the State asked the court to revisit the Confrontation Clause question that had been

resolved in the federal courts and Wisconsin Supreme Court. (743.) It argued that no court since the trial had actually held that Julie's letter and statements were testimonial and that three recent Supreme Court decisions (*Bryant*, *Clark*, and *Williams*) redefined what constituted a testimonial statement, such that Julie's statements no longer qualified.[2] (743.) The State argued that the circuit court was not bound by the decisions of the Wisconsin Supreme Court or federal courts, which held that Julie's letter and statements to Kosman were testimonial. (945:35.) Jensen responded that the court was bound under the law-of-the-case doctrine to exclude Julie's letter and statements, because they had already been found to be testimonial by the Wisconsin Supreme Court, the federal district court, and the Seventh Circuit. (765.)

After briefing (709; 743; 761; 763; 765; 769; 773; 775), the court, by the Honorable Judge Chad Kerkman, ruled that the letter was not testimonial and thus, could be admitted at trial. (946:73-79; App. 104-10.) The court acknowledged that the federal district court and the Seventh Circuit both found that admitting the letter violated Jensen's rights under the Confrontation Clause. (946:74-75; App. 105-06.) But, not seeing any explicit instruction in those cases

[2] Notably, all three cases were decided *before* the Seventh Circuit issued its decision in this case. *Michigan v. Bryant*, 562 U.S. 344 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012); *Ohio v. Clark*, 135 S. Ct. 2173 (2015).

that the letter had to be excluded, the circuit court decided it was free to revisit whether the letter was testimonial. (946:74.) The court then considered factors first articulated by the United States Supreme Court in 2006, and concluded that the letter was not testimonial and could therefore be admitted at a retrial. (946:78-79.) The court made no finding that the law had changed in a way that would allow it to disregard the law of the case.

A month later, the State filed a motion to reinstate the verdict without a retrial. (791.) It argued that since the court ruled that the letter was not testimonial, there had been no constitutional error at Jensen's original trial, so a new trial was unnecessary. (791.) Jensen responded that the writ of habeas corpus required a new trial. (806.) The State insisted the habeas writ only required it to "initiate[] proceedings to retry" Jensen, and that it had no obligation to actually retry him, so it had complied with the writ. (791:1.)

While that issue was being briefed, the State filed a motion in the federal district court, seeking clarification of the habeas writ. (791:22.) It asserted that the district court's judgment could be read in two ways: first, it merely required the State to recommence its prosecution of Jensen without regard to whether the State actually afforded him a trial. Second, the habeas order could be interpreted as requiring that the proceedings culminate in a jury verdict unless Jensen entered a plea. (791:26.) The State recognized that under the second

interpretation, reinstating Jensen's conviction might not comply with the conditional writ, and thus wanted clarification to avoid being found in contempt. (791:27.)

The district court ruled that *at the time*, the State was in compliance with the writ since retrial proceedings had been initiated and were moving forward. (804:5-6; App. 191-92.) The court warned, however, that "[t]his does not mean . . . that Jensen will not be entitled to relief if the previous conviction is reinstated. The court offers no opinion as to whether the circuit court's determination that challenged statements are non-testimonial is proper and whether Jensen's previous conviction can be constitutionally reinstated without a new trial." (*Id.* at 6.)

Back in state court, the circuit court adopted the State's view that holding a bond hearing and revisiting the issue of the letter's admissibility complied with the writ. (949:8-9; App. 112-13.) It then reinstated the original judgment of conviction and Jensen's life sentence. (*Id.*)

The court's view was that a new trial would be pointless as the evidence would be "materially the same as in the first trial," and it questioned why a trial should be held, since it would take a long time, "six, maybe seven weeks." (*Id.*) The court went on:

> And so, the question right now is should the prior conviction be reinstated along with the sentence or do we need to have a new trial because we

> believe that the federal court ordered us to have a new trial even though the evidence would be the same.
>
> That doesn't make a whole lot of sense to me. If the evidence is going to be materially the same as in the first trial and the federal judge says, yes, the State has complied with our order, they've—they had the choice of releasing the defendant or reinstating proceedings to try the defendant, and it sounds to me like the federal judge has agreed that the State has done what they needed to do, it doesn't make a whole lot of sense to me as far as judicial economy to have a new trial on the same evidence as in the first trial.

(Id.)

With that, the court entered a judgment of conviction and life sentence against Jensen, noting that "the Court of Appeals and the Supreme Court can do as they will." (*Id.*)

Jensen filed an objection to reinstating the conviction, arguing that doing so violated his constitutional right to a jury trial. (812; App. 109.) Without another hearing on the matter, the court entered a written order, prepared by the State, entering a conviction, finding that the evidence at a new trial would be "materially the same as the first trial," so there was no need to have a trial. (813; App. 102.)

Following the circuit court's re-entry of conviction, Jensen filed a brief in the federal district

court, arguing that the failure to retry him violated the habeas writ. *Jensen v. Clements*, No. 11-C-803, 2017 WL 5712690 (E.D. Wis. Nov. 27, 2017); (App. 193). Jensen argued that the district court had continuing jurisdiction to enforce compliance with the writ, and that he was entitled to a new trial. *Id.*

The district court found that it no longer had jurisdiction over the original habeas writ because a new judgment of conviction had been entered. *Id.*, *6. That is, while the federal court invalidated Jensen's first conviction as unconstitutional, it found that this was a *new judgment* that required Jensen to again exhaust potential state remedies. The court observed: "Whether under this unique set of circumstances the state trial court had the authority to revisit the issue of whether the letter and related statements were testimonial, as well as whether the court's determination on the merits that they were not, are matters of state and federal law of which Jensen is free to seek review in the Wisconsin Court of Appeals." *Id.* at 14-15; (App. 106-07). An appeal of this decision is pending in the Seventh Circuit.

Jensen appeals from the circuit court's order entering a judgment of conviction and life sentence against him.

ARGUMENT

I. The circuit court violated Jensen's right to a jury trial, and every constitutional right he could have exercised at that trial, by entering a conviction against him in the absence of a trial or guilty plea.

The circuit court violated Jensen's state and federal constitutional rights to a jury trial by finding him guilty without a trial. Jensen's conviction had been invalidated and vacated; he could only be convicted after a jury trial or a guilty plea. Regardless of whether the court could re-determine the confrontation issue—it couldn't, as explained in Section II—the court was without authority to enter a judgment of conviction against Jensen. This court should reverse and remand for a new trial.

These are issues of constitutional law, which this court reviews de novo. *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, ¶ 31, 320 Wis. 2d 275, 768 N.W.2d 868.

A. After Jensen's conviction was invalidated on appeal, he stood convicted of nothing and the slate was wiped clean.

The Seventh Circuit held that Jensen's trial was constitutionally infirm. The State did not seek review by the United States Supreme Court, and so Jensen's case was returned to the Kenosha County Circuit Court for retrial. The conviction was vacated and bail was set. (937:18.) Jensen stood convicted of

nothing. His prior conviction was nullified, and the slate was wiped clean.

The Wisconsin Supreme Court recently emphasized the finality of vacating a conviction: "Vacatur, unlike expunction, removes the fact of conviction." *State v. Braunschweig*, 2018 WI 113, ¶ 21, 384 Wis. 2d 742, 921 N.W.2d 199. Unlike expunction, vacatur "invalidates the conviction itself . . . ." *Id.*

Because vacatur invalidates the judgment, it is as if the judgment had never been issued in the first place: "When a judgment has been rendered and later set aside or vacated, the matter stands precisely as if there had been no judgment. The vacated judgment lacks force or effect and places the parties in the position they occupied before entry of the judgment." *State v. Lamar*, 2011 WI 50, ¶ 39 & n.10, 334 Wis. 2d 536, 799 N.W.2d 758 (quoting 47 Am. Jur. 2d Judgments § 714 (2006)).

These holdings are in accord with the United States Supreme Court's rule on the effect of a vacated conviction. The general rule is that "when a defendant obtains reversal of his conviction on appeal, the original conviction has been nullified and the slate wiped clean." *Poland v. Arizona*, 476 U.S. 147, 152 (1986). "[T]he general rule [is] that, post vacatur of a conviction, a new trial is in order."

Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016).[3]

The federal district court accepted the State's argument that the slate was wiped clean and Jensen's current conviction is an entirely new judgment. In an order denying Jensen's motion to enforce the writ—arguing that re-admitting the letter and reinstating the conviction violated the habeas writ—the federal district court observed:

> Whether the circuit court was free to revisit [the confrontation] issue at this stage of the proceedings, and if so, whether the letter and related statements are indeed non-testimonial and thus admissible under the Confrontation Clause are, to be sure, important questions that Jensen has every right to challenge. But his challenge to the circuit court's rulings, at least as an initial matter, must be by appeal to the Wisconsin appellate courts. *This is because the trial court's reinstatement of the judgment of conviction represents a new state court judgment for purposes of [the federal habeas statute].*

Jensen v. Clements, 2017 WL 5712690, *6 (emphasis added); (App. 193). Further, the State conceded at

[3] The exception is where retrial would violate double jeopardy, as after vacatur for insufficient evidence. *Burks v. United States*, 437 U.S. 1 (1978). Otherwise, the rule is a new trial.

oral argument before the Seventh Circuit that Jensen is currently being held on a new judgment[4]:

> The Court: I am really puzzled by the State's claim that this was not the same judgment. That somehow a new judgment I mean, wasn't it literally the same judgment that had been entered in 2008; the very same judgment that we found constitutionally infirm?
>
> The State: Well, as a matter of federal habeas law, we definitely agree with Judge Griesbach that once a judgment is vacated, if a new judgment is entered by the state court, regardless of how it's denominated by the state court, you have a *Magwood* situation. You have a second judgment, and *Magwood* tells us that a challenge to that second judgment is not second and successive, but it is a new judgment for purposes of federal habeas law with whatever regard to what it means under state law.

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[4] Oral Argument at 23:36, Jensen v. Pollard, No. 17-3639, available at http://media.ca7.uscourts.gov/sound/2018/ds.17-3639.17-3639_11_07_2018.mp3.

The State's concession is consistent with the Wisconsin Supreme Court's explanation of a vacated conviction–i.e., this appeal is from a new conviction and cannot be the previous one, as that conviction was invalidated, vacated, and ceased to exist.

B. The circuit court unconstitutionally directed the entry of a guilty verdict against Jensen without evidence or a trial.

Once Jensen's conviction was vacated, "the matter [stood] precisely as if there had been no judgment." *Lamar*, 2011 WI 50, ¶ 39 n.10. Consequently, like any other person in pretrial custody, Jensen's fundamental constitutional rights included the right to a jury trial, the right to be proven guilty beyond a reasonable doubt, the right to present a defense, the right to testify at trial, and the right to confront his accusers. U.S. Const. amend V, VI; Wis. Const. Art. I, § 7. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968); *In re Winship*, 397 U.S. 358 (1970); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *Rock v. Arkansas*, 483 U.S. 44, 52-53 & n.10 (1987); *Crawford v. Washington*, 541 U.S. 36 (2004).

The most important among these was Jensen's right to a jury trial, a right he objected to the court violating by entering a judgment of conviction against him. (812.) The preservation of the right to a jury trial was "among the major objectives of the revolutionary settlement which was expressed in the

Declaration and Bill of Rights of 1689." *Duncan*, 391 U.S. at 151. There, the Supreme Court held:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.

Id. at 155-56. The right is recognized as so critical that the defendant must personally waive it. *State v. Cleveland*, 50 Wis. 2d 666, 670, 184 N.W.2d 899 (1971).

To give effect to these constitutional rights, courts have uniformly held that no court may direct a guilty verdict against a criminal defendant. "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). "In a criminal case, to grant a summary judgment to the state, even where the state's evidence is overwhelming and the evidence of the defendant to the contrary is totally lacking, would be anathema to all of our precepts of constitutional law." *State v. Koput*, 142 Wis. 2d 370, 392, 418 N.W.2d 804 (1988). "To [direct a guilty verdict] would be to deprive a

criminal defendant of the presumptions of innocence that are inherent in the criminal process." *State v. Dyess*, 124 Wis. 2d 525, 548, 370 N.W.2d 222 (1985).

In this case, the State's evidence was not overwhelming, rather there was *no* evidence at all presented on which to direct a verdict.

Here, the State was ordered to release Jensen from custody unless "the State initiates proceedings to retry him." *Schwochert*, 2013 WL 6708767, *17; (App. 165). The state court could not faithfully *initiate* proceedings for a retrial without vacating the old proceedings, which it did. That meant a new trial—free from constitutional error—would need to take place before Jensen could be convicted and sentenced. Yet, without a jury trial or any evidence, the court directed a guilty verdict against Jensen, and for the State, which it cannot do. *See Sullivan*, 508 U.S. at 277. Doing so deprived Jensen of all of his constitutional trial rights.

C. The circuit court had no authority to reinstate the invalidated and vacated conviction.

The circuit court never articulated a legal basis that allowed it to enter a judgment of conviction without a trial or guilty plea. The court simply found that the evidence at a new trial would be "materially the same as in the first trial," and that a new trial was "expected to be very long." (949:8; App. 112-13.) The inconvenience of a long trial does not authorize a court to direct a verdict against a defendant.

Though the court offered no authority for entering a conviction without a jury trial, the State relied chiefly on *Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000), to argue that the court could reinstate a vacated conviction. (791:10-14.) But *Rutledge* does not provide a justification for what the court did here. At most, *Rutledge* stands for the uncontroversial proposition that a defendant does not receive a windfall once the "wrong" conviction is vacated to correct a multiplicity violation.

In *Rutledge*, the defendant was convicted of both conducting a continuing criminal enterprise (CCE) and conspiracy to distribute drugs, among other charges. 230 F.3d at 1044. On appeal, the Supreme Court held the conspiracy charge was a lesser-included offense of the CCE charge, so one of the convictions had to be vacated. *Id.* On remand, the district court vacated the conspiracy count to correct the multiplicity violation. *Id.* Subsequently, the defendant filed a motion to vacate the CCE count due to ineffective assistance of counsel. *Id.* at 1044-45. The court granted the motion and vacated the CCE count, but at the same time, reinstated the conspiracy conviction. *Id.* at 1045.

The defendant objected, arguing that the court lacked statutory authority to reinstate a vacated conviction. *Id.* at 1047. The defendant did not raise a constitutional challenge to the reinstatement. *Id.* The Seventh Circuit held that the district court had statutory authority to reinstate the valid, but erroneously vacated, conviction. *Id.* at 1048-49.

In Jensen's case, the federal court held that the verdict rendered on a single count was infected by a violation of Jensen's confrontation right, and a new trial was ordered. That was a final judgment *from which the State did not appeal.*

Rutledge did not hold that a trial court can reinstate a conviction that has been found unconstitutional and reversed on appeal. Moreover, *Rutledge* was resolved solely on the basis of federal statutory law, not constitutional law, and thus is inapplicable here. *Id.* Both of the defendant's convictions in *Rutledge* were valid, but could not co-exist based on multiplicity. The Seventh Circuit merely held that the trial court could determine which conviction should be reinstated after the defendant's appeal was complete in order to prevent a windfall. The rationale in *Rutledge* does not support the reinstatement of a single conviction that has been found unconstitutional by a reviewing court.

If the Seventh Circuit intended to give the circuit court discretion to determine the constitutionality of Jensen's conviction, it could have done so by remanding the case to the circuit court for findings on the confrontation issue. That was the process followed in *Jackson v. Denno*, 378 U.S. 368 (1964). In *Jackson*, the state court had let the jury decide whether the defendant's confession was voluntary. On habeas review, the United States Supreme Court held that this procedure was unconstitutional, and ordered the district court to hold a hearing so that it—not the jury—could

determine whether the confession was voluntary. *Id.* at 395-96. The conviction was not vacated nor remanded to initiate a new trial. Instead, the case was simply remanded to decide whether the confession was voluntary. If it was voluntary, the conviction would be affirmed because there was no voluntariness violation. *Id.* But if the confession was involuntary, there would have to be a new trial. *See also Campbell v. United States*, 365 U.S. 85 (1961) (case remanded—but conviction not vacated—to re-determine evidentiary issue).

Unlike in *Jackson*, in this case there was no remand for additional findings because none were necessary; the federal court concluded that Jensen's confrontation rights were violated at his trial. *Clements*, 800 F.3d at 899 ("Under *Giles*, the admission of Julie's letter and statements to the police, none of which were dying declarations, violated the Confrontation Clause and was federal Constitutional error."); *Schwochert*, 2013 WL 6708767, *9 ("The admission of Julie's letter and statements to Kosman at trial . . . violated Jensen's Sixth Amendment right to confront the witnesses against him as the Supreme Court defined that right in *Crawford v. Washington*."). The State did not appeal the Seventh Circuit's order finding Jensen's conviction constitutionally infirm and his case was returned to the circuit court for retrial.

An appeal of a Seventh Circuit federal habeas order is to the United States Supreme Court, not to a state trial court. "The same reasoning which permits

to the states the right of final adjudication upon purely state questions requires no less respect for the final decisions of the Federal courts of questions of national authority and jurisdiction." *Deposit Bank of Frankfort v. Bd. Of Councilmen of City of Frankfort*, 191 U.S. 499, 517 (1903).

The State did not appeal the Seventh Circuit's order and as such, the circuit court was obligated to retry him. Instead, by entering a verdict against him, the court violated all of Jensen's trial-related constitutional rights protected in the Fifth and Sixth Amendments to the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution.

D. The entry of a judgment of conviction against Jensen also constitutes plain and structural error.

This court must reverse for a new trial to correct the violation of Jensen's constitutional trial rights. The issues presented in this appeal were preserved by timely objections, but also constitute both plain and structural error. The circuit court directed the entry of a guilty verdict without evidence, a jury trial, or guilty plea, thereby violating Jensen's constitutional rights to a jury trial, to be proven guilty beyond a reasonable doubt, to present a defense, to testify at trial, and to confront his accusers.

In *State v. Jorgensen*, 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77, the Wisconsin Supreme Court explained the doctrine of plain error:

> [W]here a basic constitutional right has not been extended to the accused, the plain error doctrine should be utilized. Wisconsin courts have consistently used this constitutional error standard in determining whether to invoke the plain error rule.
>
> However, the existence of plain error will turn on the facts of the particular case. *The quantum of evidence properly admitted and the seriousness of the error involved are particularly important*. Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt.

Id., ¶¶21-22 (emphasis added, quoted sources, internal citations, internal quotations omitted).

The quantum of evidence admitted in this case? There was none. And the gravity of the error is incomparably significant because the trial court completely deprived Jensen of his right to a jury trial, and every accompanying right that he could have exercised at a trial. The law prohibiting a directed verdict against a criminal defendant is unambiguous. Consequently, the circuit court committed plain error that can only be remedied by reversal for a trial.

The circuit court's complete denial of Jensen's right to a trial is also structural error, meaning the State cannot attempt to argue that the error was harmless. *Sullivan*, 508 U.S. at 279; *State v. CLK*, 2019 WI 14.

"Structural errors seriously affect the fairness, integrity or public reputation of judicial proceedings and are so fundamental that they are considered per se prejudicial. A structural error is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Structural errors infect the entire trial process and necessarily render a trial fundamentally unfair." *State v. Travis*, 2013 WI 38, ¶ 54, 347 Wis. 2d 142, 832 N.W.2d 491 (internal quotations omitted).

In this case, there was no "framework within which the trial proceeds" because there was no trial. The complete absence of evidence in the case means that it is impossible to find the error harmless. Because a harmless error analysis in this case is impossible, the deprivation of Jensen's right to a trial, and the rights he could have exercised at that trial, is a structural error requiring reversal for a trial.

II. The circuit court had no authority to revisit the admissibility of Julie's letter and statements to Kosman; the Wisconsin Supreme Court, federal district court and the Seventh Circuit decided the issue and those decisions are binding.

The circuit court was without authority to revisit the admissibility of Julie's letter and her statements to Kosman because the prior decisions of the Wisconsin Supreme Court, the federal district court, and the Seventh Circuit are binding. And even

if the court could re-visit the higher courts' holdings, the letter and statements to Kosman must still be excluded because they are testimonial under the primary purpose test set forth by the United States Supreme Court.

A. The circuit court could not revisit whether Julie's letter and statements were testimonial.

1. The law of the case doctrine.

"[A] decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 664 N.W.2d 82 (internal quotations omitted). The United States Supreme Court has defined the law of the case doctrine similarly: "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983).

Application of the law of the case doctrine "turns on whether a court previously decided upon a rule of law . . . not on whether, or how well, it explained the decision." *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 817 (1988) (internal quotations omitted). Thus, the doctrine stands for the proposition that a circuit court is bound to apply

decisions from reviewing courts in the same case. *Stuart*, 2003 WI 73, ¶ 23.

"A court should adhere to the law of the case unless the evidence on a subsequent trial was substantially different, or controlling authority has made a contrary decision of the law applicable to such issues." *Id.*, ¶ 24 (internal brackets omitted) (quoting *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986)). Additionally, a court may reconsider a legal issue in the interests of justice. *Id.*

The law of the case doctrine includes decisions by federal courts reviewing state court proceedings, such as habeas corpus review. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("Of course in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on all other courts, subject only to the appellate process.").

In this case—as in any habeas case—the State of Wisconsin represented the opposing party in the Seventh Circuit, and the decision on the Confrontation Clause was made in this very case. In fact, in *State v. Mechtel*, the State conceded "that had the defendant brought a *habeas corpus* proceeding in federal court and had a federal court made a determination that the state proceeding was

constitutionally infirm, that determination would be binding." 176 Wis. 2d 87, 95, 499 N.W.2d 662 (1993).[5]

Whether a prior decision establishes the law of the case is a question of law that this court reviews de novo. *Stuart*, 2003 WI 73, ¶ 20.

The Wisconsin Supreme Court, the Eastern District of Wisconsin, and the Seventh Circuit all unambiguously decided that Julie's letter and statements to Kosman were testimonial, and admission of those statements would violate the Confrontation Clause.

The circuit court in this case conceded that it was "bound by the law of the case," and that it was bound by the decisions in the federal courts, but it believed there had been no order from a reviewing court that Julie's letter and statements to police could not be admitted. (946:73-74; App. 104-05.) Immediately contradicting itself, the court acknowledged that the federal courts found admission of the letter violated Jensen's confrontation rights:

> I agree that I think *Clements*—no *Schwochert*—holds that Jensen's rights under the Confrontation Clause of the Sixth Amendment were violated when the Trial Court admitted Julie Jensen's letter and testimonial statements

[5] Other state courts have also recognized this principle. *See Com v. McCandless*, 778 A.2d 713, 717 (Pa. Super. Ct. 2001); *State v. Cumbo*, 451 P.2d 333, 337 (Ariz. Ct. App. 1969).

> to police at his trial and that the errors were not harmless.
>
> In *Clements* it states, "We conclude that after consideration of the correct standard of review, the improperly admitted letter and accusatory statements resulted in actual prejudice to Jensen. That the jury improperly heard Julie's voice from the grave in the way it did means there is no doubt that Jensen's rights under the federal confrontation clause were violated.

(946:74; App. 105.) Without explaining why or how those decisions could be disregarded and re-visited, the circuit court proceeded to consider the confrontation question anew, and concluded that there had been no violation. (946:75-79; App. 106-10.) The circuit court offered no justification for abandoning the law of the case. Indeed, there was no justification to offer. The letter and statements are the same letter and statements that the Wisconsin Supreme Court and federal courts determined were testimonial. And the law regarding whether a statement is testimonial has not changed. *See Stuart*, 2003 WI 73 at ¶24.

2. *Jensen I*

The circuit court commented that "a lot has happened" since the Wisconsin Supreme Court's decision in *Jensen I*, but it made no ruling that the state of Confrontation Clause law had been altered in a manner justifying reconsideration of the law of the case. (946:73; App. 104.) Nor could it. Since *Jensen I*, the United States Supreme Court has evaluated a

number of different statements to determine whether the statement in question was testimonial. *See Ohio v. Clark*, 135 S. Ct. 2173 (2015); *Williams v. Illinois*, 567 U.S. 50 (2012) (plurality opinion); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). None altered the underlying test for determining whether a statement is testimonial, which was applied in *Jensen I*.

Before *Jensen I*, in 2007, the United States Supreme Court had already decided *Crawford*, as well as *Davis v. Washington*, 547 U.S. 813 (2006) (also deciding *Hammon v. Indiana*). *Crawford* held that the Confrontation Clause bars admission of an out-of-court statement from an individual who does not testify if that statement is "testimonial" and the defendant had no prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68. The Court did not specifically define the meaning of "testimonial," but included various formulations to use when determining whether a statement is testimonial, which included: "[S]tatements 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." *Id.* at 52. *Jensen I* relied on this formulation to hold Julie's statements to Kosman and her letter were testimonial. *Jensen I*, 2007 WI 26, ¶ 20.

Jensen I also had the benefit of the Supreme Court's decision in *Davis*. There, the Court considered an oral statement to a 911 operator

(*Davis*) and a written statement to an officer following a domestic abuse incident (*Hammon*). When considering the statements at issue, the Court looked to the "primary purpose" of the statements and held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

Jensen I considered *Crawford* and *Davis* and held that Julie's statements and letter were not made for the purpose of addressing an ongoing emergency. *Jensen I*, 2007 WI 26, ¶¶ 27-30.

The Supreme Court's confrontation decisions following *Crawford* and *Davis* have not redefined its approach to issues involving the Confrontation Clause and have not narrowed the definition of "testimonial." Rather, the Court has decided whether different out-of-court statements made in different contexts are testimonial by looking at the "primary purpose" of the statement—the very test applied in *Davis*. *Ohio v. Clark*, 135 S. Ct. 2173, 2179-80 (2015).

In *Michigan v. Bryant*, 562 U.S. 344, 348 (2011), the Court held statements made by a shooting

victim to responding officers were not testimonial because their "primary purpose" was "to enable police assistance to meet an ongoing emergency." *Id.* at 358.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Williams v. Illinois*, 567 U.S. 50 (2012), the Supreme Court applied the primary purpose test to determine whether various forensic lab reports were testimonial.

Finally, and most recently, the Court decided *Ohio v. Clark*, 135 S. Ct. 2173, 2177 (2015), and held that a three-year-old child's statements to a teacher about an abuser were not testimonial because the child did not make the statements with the primary purpose of creating evidence for a future prosecution. The child's statements occurred in the context of an ongoing emergency involving suspected child abuse, and the teacher's questions and the child's answers were primarily aimed at identifying and ending the threat; therefore, the statements were not testimonial. *Id.* at 2181-82.

The primary purpose test was first applied in *Davis*, and it has been repeatedly reaffirmed as the correct test for determining whether an out-of-court statement is testimonial. *See State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256 ("the dispositive question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the out-of-court statement was to create an out-of-court substitute for trial testimony.").

Jensen I came after *Davis* was decided, and recognized it as the binding test. *Jensen I*, 2007 WI 26, ¶ 19. The Supreme Court has applied the primary purpose test to a number of different statements, but the test has remained unchanged.

Indeed, in *Jensen I*, the Wisconsin Supreme Court held the letter was testimonial because it was "purposefully directed towards law enforcement agents," it was "very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death," and it was intended to implicate her husband. 2007 WI 26, ¶ 27. The court found Julie's statements to Kosman to be testimonial on largely the same basis. *Id.*, ¶ 30. The statements "served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." *Id.*

There was no basis for the circuit court to re-visit the Wisconsin Supreme Court's decision in *Jensen I* that Julie's letter and statements to Kosman are testimonial.

3. *Clements* and *Schwochert*.

The circuit court was similarly bound by the federal district court, and then the Seventh Circuit determinations that introduction of these statements violated Jensen's confrontation right. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) (law of the case applies after habeas court ruling); *Mechtel*, 176 Wis. 2d at 95 (the State

conceded law of the case applies after a federal habeas decision).

There can be no writ of habeas corpus without a constitutional violation. 28 U.S.C. 2254. "[W]here a state court does not reach a federal constitutional issue that was fairly presented to it, a federal habeas court reviews the claim *de novo* . . . ." *Schwochert*, 2013 WL 6708767, *7. In addressing Jensen's constitutional claim, the court noted that the State conceded that the letter and statements to Kosman were testimonial. *Id.*, *6. At the time of the concession, the United States Supreme Court had already set forth the primary purpose test, and had applied it in *Davis*, *Bryant*, *Bullcoming*, and *Melendez-Diaz*.

The federal district court granted Jensen's habeas petition, concluding: "Jensen's rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court admitted Julie Jensen's letter and testimonial statements to police at his trial and that the errors were not harmless." *Id.*, *17. To grant Jensen habeas relief, the district court was required to—and did—decide his constitutional claim as well as harmless error.

The Seventh Circuit affirmed the district court. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015). That decision also necessarily addressed the merits of Jensen's claim that his constitutional rights were violated: "Under *Giles*, the admission of Julie's letter and statements to the police, none of which were

dying declarations, violated the Confrontation Clause and was federal Constitutional error." *Id.* at 899.

When the case was decided by the Seventh Circuit, the United States Supreme Court had already decided *Clark*. The federal courts in Jensen's habeas proceedings were not bound to accept the State's concession that the statements were testimonial if it conflicted with the law. *Hernandez v. Holland*, 750 F.3d 843, 856-57 (9th Cir. 2014). In fact, the State was free to argue in the federal courts that there had been no confrontation violation, but the State chose not to pursue that argument.[6]

The district court and Seventh Circuit decisions barred the court from re-admitting Julie's letter and statements to Kosman. These decisions, entered in 2013 and 2015, granted Jensen a new trial because the admission of Julie's testimonial statements violated his constitutional rights under the Confrontation Clause *and* because such violation was not harmless. To reach this conclusion, the federal courts necessarily—and explicitly—decided that the statements were testimonial. Furthermore, at the time the Seventh Circuit affirmed the district court, the most recent United States Supreme Court case on

[6] The State did petition the Seventh Circuit panel for a rehearing, arguing for the first time that there was no clearly established federal law concerning whether Julie's letter and statements to Kosman were testimonial. The Seventh Circuit denied that petition. *Clements*, 800 F.3d 892, *rehearing denied* Oct. 9, 2015.

the Confrontation Clause, *Clark*, had been decided. Further litigation of the exact issue decided by the Seventh Circuit is barred by the law of the case.

B. Even if the court could revisit the confrontation question, admitting the letter and statements to Kosman still violated Jensen's confrontation right.

To even get to this point of the analysis, one would have to look past the directed verdict entered without any evidence, look past the Supremacy of the Federal court writ, and look past the law of the case doctrine, whether it be from the Wisconsin Supreme Court, Federal District Court, or the Seventh Circuit. Jensen's conviction must be reversed for each of the above reasons. Nonetheless, even without the law-of-the-case doctrine, Julie's letter and statements to Kosman are still inadmissible because they are testimonial. Whether they are testimonial is a question of law, reviewed de novo. *State v. Zamzow*, 2017 WI 29, ¶ 10, 374 Wis. 2d 220, 892 N.W.2d 637.

The primary purpose test asks "whether, in light of all the circumstances, viewed objectively, the primary purpose of the out-of-court statement was to create an out-of-court substitute for trial testimony. *State v. Mattox*, 2017 WI 9, ¶ 32 (internal quotations and brackets omitted). Relying on *Clark*, *Mattox* identified four considerations that are helpful when determining whether a particular statement under the circumstances is testimonial: "(1) the formality/informality of the situation producing the

out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant; (4) the context in which the statement was given." *Id.* The court acknowledged that these were only "some" potential factors to consider. *Id.*

Considering all of the circumstances, Julie wrote the letter and made her statements to Kosman with the primary purpose that the statements be used against Jensen in case of her death; therefore, they are testimonial.

1. The letter.

Julie, an adult college-educated woman, wrote and signed a letter which she gave her neighbor that she clearly intended to be used at Jensen's trial in the case of her death. (298; 904:195.) She did not give her neighbors permission to read the contents of her letter, and instructed them that the letter was to be given to police only in the event of her death. (904:195.) The letter was addressed to the Pleasant Prairie Police Department and specific police officers. (298.) It was intended to be her testimony from the grave.

The letter cannot be considered a statement to address an ongoing emergency. The Wisconsin Supreme Court already held that it was not intended to address an ongoing emergency. *Jensen I*, 2007 WI 26, ¶¶ 29-30. The circumstances surrounding Julie's statements support this finding. If her intention had been to seek police intervention for an ongoing

emergency, she would have made arrangements for others to read the letter or deliver it to police immediately. The only reasonable interpretation of the letter is that it was intended to ensure that her husband would be prosecuted and convicted after her death. This was not merely the primary purpose of Julie's letter, it was the only purpose. This is the very essence of a testimonial statement. Additionally, the evidence at Jensen's first trial showed that Julie did not perceive herself to be in the midst of an emergency; she declined her neighbors' offer of assistance so she could remove herself from the household. (904:118.) She declined a similar offer from Kosman. (909:47-48.)

This is the opposite of the non-testimonial statements discussed in *Davis*, *Bryant*, and *Clark*. In *Davis*, the declarant called 911 to report a physical attack on her; thus, its purpose was to respond to an ongoing emergency aimed to halt the attack. 547 U.S. at 828. In *Bryant*, a mortally wounded victim's statement identifying the shooter was not testimonial because there was an ongoing emergency; a dangerous person with a gun was at large and could shoot and kill another person. 562 U.S. at 374-77. Finally, there is nothing from *Clark* that suggests Julie's letter was written to address an emergency. In *Clark*, a child made statements to a teacher about marks on his body, which identified abuse. 135 S. Ct. at 2178. The Court concluded that those statements—which were not made to law enforcement—were made for the purpose of addressing child abuse and the safety of the child in

the home. *Id.* at 2181. Julie's letter bears no resemblance to any of these cases involving on-going emergencies.

The Wisconsin Supreme Court previously explained that Julie's letter most closely resembles the quintessential confrontation violation:

> Perhaps most tellingly, Julie's letter also resembles Lord Cobham's letter implicating Sir Walter Raleigh of treason as discussed in *Crawford*. At Raleigh's trial, a prior examination and letter of Cobham implicating Raleigh in treason were read to the jury. Raleigh demanded that Cobham be called to appear, but he was refused. The jury ultimately convicted Raleigh and sentenced him to death. In the Supreme Court's view, it was these types of practices that the Confrontation Clause sought to eliminate. While Julie's letter is not of a formal nature as Cobham's letter was, it still is testimonial in nature as it clearly implicates Jensen in her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused.

Jensen I, 2007 WI 26, ¶ 29 (internal citations omitted). In light of this holding, and the absence of evidence of an on-going emergency, Julie's letter is testimonial.

2. Julie's statements to Officer Kosman.

At Jensen's first trial, Kosman testified that he received two phone messages from Julie. (909:41, 127-28.) The first was a request he call her upon his return. In the second, she said he should call her as soon as possible and if she were to end up dead, Jensen would be her suspect. (909:41, 127-28.) He called her back and she did not want to talk over the phone because she thought Jensen might be recording her calls and that he was leaving himself notes, which she photographed. (909:43.)

Kosman stopped at her home and advised her to go to a women's shelter, but she declined. (909:41, 45-48.) She explained that her husband was acting secretive, spending a lot of time on his computer, and when she would try to look at what he was doing he would try to hide the screen, and he complained she wasn't romantic enough. (909:44.) Officer Kosman testified that Julie initially seemed confused, scared, and somewhat emotional, but she calmed down as the conversation continued. (909:46, 48.)

Julie told Kosman she gave film and a letter to her neighbor and he requested both items, but she declined to give him the letter because she did not really think Jensen would do anything. (909:45-46.) Kosman testified that Julie went to the neighbors and retrieved the roll of film and then told Kosman that the letter was only to be opened in the event of her death. (909:45.)

By the end of the conversation, Julie told Kosman that her emotions were running a little wild and she felt Jensen would not harm her, himself, or anyone else and she became calm. (909:47-48.) This conversation took about 30-45 minutes. Kosman advised her if at any point she was fearful about staying at home she should contact the police department. He told her she should go to the shelter or a relative if she felt something would happen. Kosman testified that Julie did not want the police to pursue it any further, but to have knowledge of it and document it. (909:147.)

Many of the same reasons that the letter is testimonial apply to Julie's statements to Kosman that if she died, Jensen would be the suspect. First, these were statements to a law enforcement officer regarding longstanding concerns. This was not an emergency situation. In fact, when offered assistance seeking shelter outside of her home, Julie told Kosman that she did not want police to pursue the issue further at that time. Rather, the primary purpose of her statements was to provide information to the police to ensure that her concerns were documented for future prosecutorial use. (909:147.)

Second, as with the letter, the context surrounding Julie's statements to Kosman is significantly different than *Clark*. Compared with the child's statements about abuse to a concerned teacher and social workers, Julie's statements were made for no other purpose than to provide a substitute, if necessary, for in-court testimony. Unlike the three

year old in *Clark*, Julie was a college-educated woman who reached out to police to document her concerns, then refused offered assistance. Objectively, there is no other reason to make such statements than to ensure her concerns would be documented to ensure someone else could testify in court if Julie could not. Thus, these statements were testimonial.

III. The circuit court failed to comply with the habeas writ, which granted Jensen a new trial without the letter or Julie's statements to police.

The federal habeas order states that "Jensen is therefore ordered released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Jensen v. Schwochert*, 2013 WL 6708767 at * 17. The State had the option of releasing Jensen, or giving him a trial free of the Confrontation Clause violation that doomed his first trial. The State did not comply with the federal district court's order.

While the State initiated proceedings by vacating the judgment and setting bond, it never provided Jensen with the relief he was entitled to. Instead, it asked the court to revisit the confrontation issue at the center of the case—a question of law that had already been resolved by the Wisconsin Supreme Court, the federal district court, and the Seventh Circuit.

Jensen first presented this issue in federal court, arguing that the state court had not complied

with the habeas court's order by re-deciding the confrontation question and entering a conviction without a trial. Although the State's compliance with the writ seems to present a question of federal procedural law, the district court declined to resolve the issue, ruling:

> The fact that the circuit court characterized its action as "reinstating" the judgment of conviction, as opposed to entering a new judgment of conviction on the original verdict, does not change the result. It remains the case that the original conviction was vacated and the State initiated proceedings for a new trial. Only after the trial court later determined that the letter and statements that were the subject of the previous harmless error analysis were not testimonial under current law and thus lawfully admissible did the court decide that the original trial was free of error and the resulting verdict valid. It thereupon ordered entry of a judgment of conviction upon the verdict rendered after the earlier trial, thereby giving rise to new rights for Jensen to appeal and/or seek post-conviction relief. It is for the Wisconsin appellate courts to determine, at least as an initial matter, whether this procedure is lawful and complies with the Constitution and laws of the United States, as well as those of the State of Wisconsin.

Clements, 2017 WL 5712690, *7; (App. 207). Whether a lower court complied with a habeas writ is a question of law that the appellate court reviews de novo. *Mason v. Mitchell*, 729 F.3d 545, 550 (6th Cir. 2013).

Vacating the conviction and holding a bond hearing did not satisfy the habeas writ. Jensen's petition for a writ did not complain about the bond hearing; it was premised on the use of the letter and Kosman's statements at trial. The State cannot fail to correct the constitutional violation, then reissue a new judgment with the same date of conviction. (810; App. 101.)

The State did not take any steps in federal court to alter the Seventh Circuit's unambiguous holding that Jensen's confrontation rights had been violated. Instead, the State asked the circuit court to essentially overrule that decision.

The federal court order clarifying the habeas writ at the State's request did not permit the court to admit the letter or reinstate Jensen's conviction without a trial. (804; App. 187.) The district court expressly stated it was not deciding those questions: "This does not mean, however, that Jensen will not be entitled to relief if the previous conviction is reinstated. The court offers no opinion as to whether the circuit court's determination that challenged statements are non-testimonial is proper and whether Jensen's previous conviction can be constitutionally reinstated without a new trial." (806:15.)

The State is bound to comply with a federal habeas order. *Madej v. Briley*, 371 F.3d 898 (2004). In *Madej*, the habeas court ordered that the defendant, who had been sentenced to death, be resentenced.

371 F.3d at 898. Instead of holding a new sentencing hearing, the governor commuted the defendant's sentence to life in prison. *Id.* at 899. The State asked the court to vacate the writ as moot, but the court denied the request, pointing out that the defendant could have been sentenced to as low as 20 years' imprisonment; the commutation had not satisfied the habeas writ. *Id.*

Like it did in this case, the State argued there that the defect had been cured, so compliance with the writ was unnecessary; the defendant was no longer facing a death sentence. Moreover, the State argued that commutation barred resentencing as a matter of state law. *Id.* at 899. The Seventh Circuit disagreed, pointing out that "the Constitution supersedes any incompatible state principles," and the court had previously concluded that the Constitution required resentencing.

Under *Madej*, a state cannot deprive a defendant of relief by imposing a new judgment that does not remedy the constitutional violation that infected the original judgment. The defendant in *Madej* had an unconstitutional sentencing, just as Jensen had an unconstitutional trial. The state court could not grant a partial remedy that failed to cure the constitutional error.

The circuit court failed to comply with the habeas decisions, which entitled Jensen to a new trial, free from the confrontation violation that infected his first trial. This court should reverse the

decision of the circuit court and remand for a new trial in compliance with the habeas order.

IV. Judicial bias.

As noted above, Jensen is currently in prison, either because the circuit court unconstitutionally directed a new judgment against him without a trial or plea, or because the circuit court re-entered an old, constitutionally infirm conviction that was invalidated by a higher court. If this court concludes that Jensen's current conviction is a re-entry of the old constitutionally infirm judgment—despite that conviction having been vacated—then this judgment is infected by the same judicial bias that Jensen presented in his direct appeal in *Jensen II*. There is nothing about the circuit court's recent decisions that eliminates the judicial bias that tainted Jensen's jury trial.

The judge that presided over Jensen's jury trial was biased because he had previously expressed his opinion about Jensen's guilt at the forfeiture by wrongdoing hearing. (879:36.) That judge could not then, consistent with due process, preside over Jensen's trial. U.S. Const., amend V & XIV; *Franklin v. McCaughtry*, 398 F.3d 955 (7th Cir. 2005); *Neder v. United States*, 527 U.S. 1, 8 (1999).

Under the law-of-the-case doctrine, the court of appeals is bound by the prior determination of this issue in *Jensen II*. Jensen renews those arguments made in his first direct appeal, and incorporates

those arguments here, in order to preserve them for review by a federal habeas court, if necessary.

The federal district court, in a proceeding brought while this matter was still in the circuit court, ruled that if Jensen believes "bias on the part of the previous judge infected the jury trial upon which a different judge entered a new judgment, he is free to raise that issue in the appellate courts of Wisconsin and, if unsuccessful, seek federal [habeas] relief pursuant to § 2254."

Notably, the record now includes additional evidence that Judge Schroeder believed himself to be biased in this case because he disqualified himself from serving as the judge at a new trial. (647.) As cause for his recusal, he signed a form noting that the court, "Previously expressed an opinion as to the merits of the case," requiring recusal under Wis. Stat. § 757.19(2)(g).[7] Consequently, Jensen was denied his due process right to a neutral judge at trial. *In re Murchison*, 349 U.S. 133, 136 (1955).

[7] "Any judge shall disqualify himself or herself from any civil or criminal action or proceedings when one of the following occurs: . . . (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Wis. Stat. § 757.19(2)(g).

CONCLUSION

For the reasons argued above, Jensen asks that the court reverse and remand for a new trial without Julie's letter and statements to Kosman.

Dated this 27th day of February, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,996 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 27th day of February, 2019.

Signed:

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DUSTIN C. HASKELL
Assistant State Public Defender

CERTIFICATION AS TO 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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 27th day of February, 2019.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender

APPENDIX

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TO
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