STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP1952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK D. JENSEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN KENOSHA COUNTY CIRCUIT COURT,
THE HONORABLE CHAD G. KERKMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reorders and reframes the issues as follows:

1. Did the circuit court properly revisit the Wisconsin Supreme Court's decision holding that Julie Jensen's statements to law enforcement were testimonial?[1]

The circuit court held that, under Confrontation Clause case law issued since the supreme court's decision, Julie's statements were not testimonial and would be admissible at Jensen's new trial.

This Court should affirm.

2. Did the circuit court properly reinstate Jensen's judgment of conviction without conducting a trial after it admitted Julie's statements?

The circuit court reinstated the conviction. It reasoned that, given its ruling about Julie's statements, the evidence at a new trial would be the same as at the old one but without any constitutional error arising from the improper admission of the statements.

This Court should affirm.

3. Did the circuit court fail to comply with the federal district court's order granting Jensen's petition for a writ of habeas corpus by reinstating his judgment of conviction?

The circuit court did not address this issue.

This Court should conclude that the circuit court did not violate the order granting habeas relief.

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[1] This appeal involves the admissibility of three statements Julie made to law enforcement: a letter, voicemails, and in-person statements. When referring to this evidence as a whole, this brief refers to it as Julie's "statements." The brief also addresses the evidence separately when necessary.

4. Was the trial judge biased against Jensen?

The circuit court did not address this issue.

This Court should conclude, as it did in Jensen's earlier appeal, that the issue is waived and without merit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

Jensen contends that the circuit court erred by convicting him, on a 2008 jury verdict, of killing his wife, Julie, after two federal courts held that the verdict was based on evidence that violated his right to confrontation. Specifically, Jensen complains that the court erroneously held that the evidence was now admissible and then improperly entered a judgment of conviction rather than holding a new trial. He argues that these actions either violated all of his constitutional trial rights or defied the federal courts.

But none of the circuit court's complained-of acts were erroneous. The court properly decided that the evidence was admissible based on significant changes to confrontation law since the earlier proceedings. And its decision to convict Jensen without a trial was appropriate because the court's admitting the statements cured any error affecting the jury's verdict. Finally, the court did not defy the federal courts because, as they have explained, their decisions did not require that Jensen receive a new trial without the evidence. This Court should affirm.

STATEMENT OF THE CASE

The State relies on this Court's and the supreme court's previous decisions for record citations where possible. (152; 628). *See State v. Jensen*, 2007 WI 26, 299 Wis.2d 267, 727 N.W.2d 518 (*Jensen I*); *State v. Jensen*, 2011 WI App 3, 331 Wis.2d 440, 794 N.W.2d 482 (*Jensen II*).

The charges against Jensen, pretrial proceedings, and Jensen's conviction

Julie Jensen died in 1998 of ethylene glycol poisoning. (1:1–6.) In 2002, the State charged Jensen with first-degree intentional homicide. (1:1.)

At the preliminary hearing, the State introduced statements that Julie had made before her death. (628:2–4.) Police Officer Ron Kosman testified that Julie left him two voicemails just before she died. (628:3.) In the second, Julie told Kosman that she thought Jensen was trying to kill her. (628:3.) In a later conversation between the two, "Julie told Kosman that she saw strange writings on Jensen's day planner, and she said Jensen was looking at strange material on the Internet." (628:3.) Julie also told Kosman that "if she were found dead, that she did not commit suicide, and Jensen was her first suspect." (628:3.) Julie also told Kosman that she had given a neighbor a letter to give to police if something happened to her. (909:45–46.)

Kosman also testified that Julie had contacted him 40 to 50 times since 1992 or 1993. (834:42, 51–52.) These contacts involved her reporting harassing telephone calls and pornographic photos left at Jensen and Julie's residence that Julie thought were threatening to their relationship. (834:52; 909:51–57.) Kosman said that he responded to the residence for these calls about 30 times. (909:53.)

Julie's neighbor Tadeusz Wojt testified that just before she died, Julie gave him an envelope and told him to give it to

the police if anything happened to her. (628:2.) Detective Paul Ratzburg testified that, the day after Julie died, Wojt gave him the envelope. (628:3–4.)

A letter from Julie was in the envelope. (628:3–4.) It was addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzburg." (628:3–4.) The letter said, in part, "[I]f anything happens to me, [Jensen] would be my first suspect." (628:4.) She explained that she was suspicious of Jensen's behaviors and feared for her life. (628:4.) Julie also said that she was not suicidal or taking drugs. (628:4.)

The court bound Jensen over for trial. (628:4.) Jensen challenged the admissibility of Julie's statements to Kosman and the letter, claiming that they violated his right to confrontation. (36; 628:4.) The State conceded that Julie's post-voicemail statements to Kosman were testimonial but argued that the letter and the voicemail were not. (628:6.) It also argued that all the statements were all admissible under the forfeiture-by-wrongdoing doctrine. (628:5–6.)

The court eventually concluded that the letter and the voicemail were inadmissible in light of the United States Supreme Court's then-recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). (628:5.) It also rejected the State's argument that Julie's statements were admissible under the forfeiture-by-wrongdoing doctrine. (628:5.)

The State appealed. (628:6.) On bypass, the Wisconsin Supreme Court held that Julie's letter and the voicemail were testimonial. (152:17–19.) It also adopted a "broad" forfeiture-by-wrongdoing doctrine under which a defendant forfeits his right to confront a witness if he is the cause of the witness's unavailability for cross-examination. (152:32–33, 35.) The court remanded for a hearing to allow the circuit court to apply this forfeiture standard. (152:35–36.)

On remand, the circuit court concluded that Jensen forfeited his right to confront Julie by causing her absence

from trial and admitted the evidence. (628:7.) A jury convicted Jensen of first-degree intentional homicide. (628:9.)

Jensen's direct appeal

After Jensen's conviction, but before his appeal, the United States Supreme Court decided *Giles v. California*, 554 U.S. 353 (2008). (628:9.) *Giles* rejected the "broad" forfeiture doctrine that the Wisconsin Supreme Court had adopted. (628:10–11.) The Court held that to forfeit the right to confrontation, the defendant must have caused the witness's unavailability with the intent to keep the witness from testifying. *Giles*, 554 U.S. at 361–68. Thus, it was not enough for the defendant to have merely caused the victim's unavailability.

On appeal, Jensen argued that, under *Giles*, the circuit court's forfeiture decision was wrong and required reversal. (628:11.)

This Court affirmed. It assumed that the circuit court had erroneously admitted the statements but held that their admission was harmless error "because of the staggering weight of the untainted evidence and cumulatively sound evidence presented by the State." (628:38; *see also* 628:15–27.) The supreme court denied Jensen's petition for review. (633.)

Jensen's federal habeas corpus petition

Jensen then filed a petition for a writ of habeas corpus in the Eastern District of Wisconsin. *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013) (*Schwochert*). He asserted that the admission of Julie's testimonial statements violated his right to confrontation. *Id.* *6.

The State did not dispute that Julie's statements were testimonial. *Id.* Rather, it advanced three arguments: first, that *Giles* did not apply to the case because it had not been decided when the circuit court made its forfeiture ruling, *id.*

*6–7; second, that forfeiture by wrongdoing applied because the evidence showed that Jensen killed Julie to keep her from testifying at a potential family-court proceeding, *id*. *8–9; and third, any error in the admission of Julie's statements was harmless. *Id*. *9.

The court granted Jensen's petition. *Id*. *7. The court first rejected the State's arguments that *Giles* did not apply and that Jensen intended to keep Julie from testifying in family court. *Id*. *7–9. It next concluded that the admission of Julie's statements under the circuit court's pretrial forfeiture-by-wrongdoing decision violated Jensen's confrontation rights. *Id*. *9. Finally, the court held that the statements' admission was not harmless error. *Id*. *9–16.

The court ordered that Jensen be "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id*. *17.

The State appealed, and the Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015) (*Clements*). Like the district court, the Seventh Circuit rejected the State's argument that *Giles* should not apply. *Id*. at 899–01. It then affirmed the district court's holding that the admission of the statements was not harmless. *Id*. 901–08.

Post-habeas proceedings in state and federal court

On January 6, 2016, the circuit court vacated Jensen's judgment of conviction and held a bond hearing. (937.) The parties began to prepare for trial. (937:18)

Among other things, the parties disputed whether Julie's statements would be admissible at retrial. Jensen moved to preclude introduction of the statements. (659:4; 938:6–7.) The parties extensively briefed whether the statements would be admissible. (659; 709; 743; 761; 763; 765; 769; 773; 775.)

The circuit court held that Julie's statements were admissible. (946:73–79.) The court determined that under United States Supreme Court decisions issued since *Jensen I*, the statements were no longer testimonial. (946:73–79.) It also determined that the statements were admissible under the present-sense-impression and statement-of-recent-perception hearsay exceptions. (946:99–101.)[2]

The State then did two things. First, it filed a motion to clarify in the Eastern District. (791:22–27.) It indicated that it intended to move the circuit court to reinstate Jensen's judgment of conviction based on the court's ruling but wanted to ensure that such a step did not violate the court's order granting habeas relief. (791:26–27.) It asked the court to explain if it intended its grant of habeas relief to require the State to conduct a jury trial or just to "recommence its prosecution of Jensen." (791:26.)

Second, the State moved the circuit court to reinstate Jensen's judgment of conviction. (791.)

While that motion was pending, the Eastern District granted the motion for clarification. (804.) It held that the State complied with its order to initiate proceedings to retry Jensen within 90 days. (804:5.) The court declined to say what it would do if the state court reinstated Jensen's conviction, concluding that such a ruling would be an advisory opinion since the circuit court had not yet acted. (804:6.)

The circuit court then granted the State's motion to reinstate Jensen's judgment of conviction. (810.) The reinstated judgment noted that Jensen was tried by a jury and convicted on February 21, 2008, and listed Jensen's sentence as life in prison without the possibility of parole. (810:1.) The court later entered a written order explaining its

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[2] Jensen does not challenge the court's hearsay analysis on appeal.

decision, writing, "As the State had previously paraphrased the Supreme Court of the United States: 'There is no constitutional necessity at this point for proceeding with a new trial for [Jensen] has already been tried to a jury with [the letter and statements] placed before it and has been found guilty.'" (811; 813:1) (citing *Jackson v. Denno*, 378 U.S. 368, 395 (1964)).

After the circuit court entered the judgment, Jensen asked the Eastern District to enforce its judgment granting habeas relief, claiming that the State violated the order by reinstating the judgment. *Jensen v. Clements*, No. 11-C-803, 2017 WL 5712690 *1 (E.D. Wis. Nov. 27, 2017).

The court denied Jensen's request. *Id.* *1, 3–7. It rejected his argument that the court's order required a retrial without Julie's statements. *Id.* * 3. Instead, the court said, the order required only that the State begin retrial proceedings. *Id.* The court then determined that once the State complied with the writ, it lost jurisdiction over Jensen's habeas case and Jensen needed to challenge his new conviction in a new federal petition. *Id.* *4–7.

Jensen appealed. *Jensen v. Pollard*, 924 F.3d 451 (7th Cir. 2019) (*Pollard*). The Seventh Circuit affirmed, agreeing with the district court that the State had complied with the order. *Id.*

Jensen now appeals the circuit court's reinstated judgment.

ARGUMENT

I. The circuit court properly exercised its discretion when it revisited the supreme court's decision in *Jensen I* and determined that Julie's statements were nontestimonial.

A. Only the supreme court's decision in *Jensen I* establishes the law of the case whether the statements are testimonial.

Contrary to Jensen's argument that *Jensen I*, *Schwochert*, and *Clements* all establish the law of the case, (Jensen's Br. 27, 35–38), this Court should conclude that only *Jensen I* establishes the law of the case. That decision alone concluded that Julie's statements were testimonial. The federal courts did not decide this issue, so their decisions are not the law of the case.

"As most commonly defined, the [law-of-the-case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "[A] decision of a legal issue or issues by an appellate court establishes the 'law of the case.'" *State v. Brady*, 130 Wis.2d 443, 448, 388 N.W.2d 151 (1986) (alteration in original) (citation omitted).

Application of the doctrine "turns on whether a court previously 'decide[d] on a rule of law.'" *State v. Stuart*, 2003 WI 73, ¶ 25, 262 Wis.2d 620, 664 N.W.2d 82 (alteration in original) (citation omitted). When determining whether a prior decision establishes the law of the case, a court should look to the issues presented in that case. *See id.* ¶ 27.

The State agrees with Jensen that *Jensen I* establishes the law of the case that Julie's statements were testimonial. (Jensen's Br. 31–35.) But this Court should reject Jensen's argument that the federal decisions also establish the law of the case. Neither *Schwochert* or *Clements* addressed the rule

of law at issue here—whether Julie's statements were testimonial.

To start, the district court never addressed or resolved whether Julie's statements were testimonial because the parties did not dispute that they were. *Schwochert*, 2013 WL 6708767 *6. Instead, the court considered whether *Giles* applied, whether Jensen might have forfeited his right to confront Julie by keeping her from testifying at a family-court proceeding, and whether the admission of her statements was harmless error. *Id.* *6–17. The court's decision cannot establish the law of the case on whether Julie's statements are testimonial.

The Seventh Circuit also did not address whether the statements were testimonial. *Clements*, 800 F.3d at 899–908. It, like the district court, rejected the State's argument that *Giles* should not apply. *Id.* at 899–901. The court then upheld the district court's holding that the admission of the statements was not harmless. *Id.* at 901–08. The court did not consider whether Julie's statements were testimonial, presumably because, again, the parties did not dispute that they were. Thus, the Seventh Circuit's decision also does not establish the law of the case on whether the statements were testimonial.

Jensen contends otherwise. He argues that the district court's conclusion that the admission of Julie's testimonial statements violated his confrontation rights decided "his constitutional claim." (Jensen's Br. 36.) But the court held that the admission of the statements using a standard contrary to *Giles* is what violated Jensen's confrontation rights. *Schwochert*, 2013 WL 6708767, *6–9. The court did not conclude that Julie's statements were testimonial or even address whether they were.

Jensen makes a similar argument about the Seventh Circuit's decision. He points to its conclusion that the

admission of Julie's statements violated his confrontation rights because the State did not satisfy the forfeiture-by-wrongdoing test of *Giles*. (Jensen's Br. 36–37.) Again, the court's conclusion shows only that the court held that the admission of the statements under the wrong forfeiture test violated his rights. The Seventh Circuit, like the district court, did not assess whether the statements were testimonial.

Jensen also claims that the State could have argued in federal court that Julie's statements were not testimonial, given that the Supreme Court had issued most of its other post-*Crawford* confrontation cases by the time the parties were briefing the issues. (Jensen's Br. 36–37.) The only case not decided by then was *Ohio v. Clark*, but, as Jensen points out, the Court had released that case before the Seventh Circuit ruled. (Jensen's Br. 37.)

The State fails to see what this has to do with whether these decisions establish the law of the case. The issue is not whether the State could have argued that Julie's statements were testimonial or whether the federal courts could have determined that they were.[3] Instead, the question is what the courts actually said and held in their opinions. Neither one rendered any opinion as to whether Julie's statements were testimonial.

Finally, Jensen cites *State v. Mechtel*, 176 Wis.2d 87, 95, 499 N.W.2d 662 (1993), for the proposition that federal habeas corpus decisions bind state courts in later proceedings in the same case. (Jensen's Br. 29–30.) *Mechtel* is unavailing. The issue in *Mechtel* was whether an order suppressing

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[3] The circuit court held that the State had not forfeited its right to argue that the statements were not testimonial despite its not making this argument in the federal courts and this Court in Jensen's direct appeal. (R. 946:75.) Jensen does not argue that the court's ruling was erroneous.

evidence in a federal prosecution was binding in a parallel state prosecution arising from the same conduct. *Mechtel*, 176 Wis.2d at 89–90. In response to one of Mechtel's arguments, the State conceded that a federal habeas decision would be binding on a state court. *Id.* at 95. This Court held that the federal decision was not binding, in part, because it did not arise from a federal habeas proceeding. *Id.*

Mechtel does not control. The case did not involve a federal habeas order finding error in state-court proceedings. And this Court never held that state courts would always be bound by such orders. Rather, its discussion of the issue was driven by the State's concession there, which the State does not make here. In addition, the federal court in *Mechtel* actually decided the same issue that was before the state court. Here, neither federal court actually addressed whether Julie's statements were testimonial, so they could not bind the state courts on that issue.

Jensen also invokes *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970), to support his argument that the federal decisions are binding. (Jensen's Br. 29.) But in the part of the decision that he quotes, the court says merely that when a federal district court has jurisdiction, its decision is the law of the case and binding on all other courts. *Lawrence*, 432 F.2d at 1076. It does not explicitly say that the law-of-the-case doctrine binds state courts in post-habeas proceedings. And again, the federal courts did not decide whether Julie's statements were testimonial, so nothing in their decisions could be binding on that issue. Finally, as the State argues in the next section, exceptions to the law-of-the-case doctrine allow courts to depart from prior decisions. Thus, even if the federal decisions established the law of the case, the circuit court could, under the appropriate circumstances, decide not to follow them.

In sum, the only court that has actually considered whether Julie's statements were testimonial was the supreme

court in *Jensen I*. Thus, this Court should review whether the circuit court properly decided to disregard the law of the case established by that decision.

B. The circuit court properly revisited *Jensen I* because the Supreme Court has narrowed the definition of "testimonial" since that decision.

Even though the law of the case in *Jensen I* provides that Julie's statements were testimonial, the circuit court acted well within its authority to revisit that decision.

1. Courts have the authority to revisit the law of the case if the controlling law has changed since the previous decision.

"The law of the case doctrine is a 'longstanding rule that 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.'" *Stuart*, 262 Wis.2d 620, ¶ 23 (citation omitted). But there are "certain circumstances, when 'cogent, substantial, and proper reasons exist,' under which a court may disregard the doctrine and reconsider prior rulings in a case." *Id.* ¶ 24 (citation omitted).

For example, "a court should adhere to the law of the case 'unless the evidence on a subsequent trial was substantially different . . . controlling authority has since made a contrary decision of the law applicable to such issues,'" or controlling authority has been modified. *Id.*; *Welty v. Heggy*, 145 Wis.2d 828, 839, 429 N.W.2d 546 (Ct. App. 1988). "[A]n intervening change in the law, or some other special circumstance" can justify reexamining a claim. *United States v. Story*, 137 F.3d 518, 520 (7th Cir. 1998). In addition, an incorrect prior decision may be grounds for disregarding the

law of the case. *See McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300, 305 (1929).

"[T]he law of the case is a question of court practice, and not an inexorable rule." *Brady*, 130 Wis.2d at 448. Deciding whether it applies "requires the exercise of judicial discretion." *Id.*

2. The circuit court soundly exercised its discretion because Supreme Court confrontation decisions since *Jensen I* have narrowed the definition of what makes a testimonial statement.

Jensen contends that "[t]he circuit court could not revisit whether Julie's letter and statements were testimonial." (Jensen's Br. 28.) He is incorrect. A court can disregard the law of the case under certain circumstances. *Stuart*, 262 Wis.2d 620, ¶ 24. And one of those circumstances—a change in the governing law—was present here. *Id.*

In its decision admitting Julie's statements, the circuit court said that "a lot has happened", and that "a number of cases have been decided" since the supreme court decided *Jensen I*. (946:73.) It explained that the State had asked it "to make my own decision based upon the law that we have today, including *Ohio vs. Clark*." (946:75.) The court based its decision that Julie's statements were not testimonial on "the factors in *Ohio v. Clark*, the more recent cases including *Michigan v. Bryant* and other cases that came out since *Crawford v. Washington* and *Jensen I*." (946:78–79.)

The circuit court's decision correctly recognized that confrontation law had changed since *Jensen I*. That change in the law undermined the supreme court's decision that Julie's statements were testimonial and allowed the circuit court to depart from the earlier ruling.

a. Confrontation law at the time of *Jensen I*.

Jensen I summarizes the state of confrontation law as it existed at the time of the decision. *Crawford*, decided in 2004, "fundamentally changed the Confrontation Clause analysis." *Jensen*, 299 Wis.2d 267, ¶ 14. Under *Crawford*, the government cannot introduce testimonial statements against a defendant "unless the declarant is unavailable and the defendant has had a prior opportunity to [cross-]examine the declarant." *Id*. ¶ 15.

But *Crawford* "did not spell out a comprehensive definition of what 'testimonial' means." *Id*. ¶ 16. Rather, the Court provided three general formulations. The first is ex parte testimony or its equivalent. *Id*. ¶ 17. The second is extrajudicial statements in formalized testimonial materials, like affidavits, prior testimony, depositions, or confessions. *Id*. And the third is "[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*. (citation omitted).

The Wisconsin Supreme Court adopted these three formulations in *State v. Manuel*, 2005 WI 75, ¶ 39, 281 Wis.2d 554, 697 N.W.2d 811. *Jensen*, 299 Wis.2d 267, ¶ 18. There, under the third formulation, a witness's statements to his girlfriend implicating Manuel in a crime were not testimonial. *Id*. This is because "statements made to loved ones or acquaintances . . . are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks." *Id*. (internal quotation omitted) (citation omitted).

In 2006, in a joint opinion in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006) (*Davis*), the Court refined the definition of testimonial in what has become known as the "primary-purpose test." That test, applied to statements in response to law-enforcement interrogations,

provided that such statements are not testimonial when the circumstances objectively indicate that "primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. But when the circumstances show that there is no emergency, and that the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," then the statements are testimonial. *Id.*

Accordingly, at the time of *Jensen I*, the courts had concluded that, under *Crawford's* third formulation, nonemergency statements to law enforcement were testimonial. Emergency statements to law enforcement and statements to friends and family were not testimonial.

b. The supreme court's application of confrontation law in *Jensen I*.

In applying the law as of 2007 and reaching its conclusion that Julie's statements were testimonial, the *Jensen I* court assessed whether they fell under the third *Crawford* formulation. 299 Wis.2d 267, ¶ 20. It considered the controlling case law, case law from other jurisdictions, the parties' positions, and the two "standard schools of thought of *Crawford*'s intended breadth and scope." *Id.* ¶¶ 20–25.

The court adopted a "broad" definition of testimonial: "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Id.* ¶¶ 24–25 (citation omitted).

Applying this standard, the court held that Julie's statements were testimonial because a reasonable person in Julie's position would have anticipated that the letter "would be available for use at a later trial." *Id.* ¶ 27. The letter's contents and the circumstances surrounding it "make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death." *Id.*

The court rejected the State's argument that Julie's letter was not testimonial because no crime had been committed when she wrote it. *Id.* ¶ 28. The definition that it had adopted focused on whether the declarant would foresee that the statement might be used in an investigation or prosecution of a crime, and whether a crime had already been committed was irrelevant to that standard. *Id.*

Next, the court compared Julie's letter to Lord Cobham's letter implicating Sir Walter Raleigh. *Id.* ¶ 29. It said that Julie's letter, while not as formal as Cobham's, was nonetheless testimonial because it "clearly implicates Jensen in her murder." *Id.* Were the court to rule otherwise, it said, accusers could "make statements clearly intended for prosecutorial purposes" without ever being confronted about them. *Id.*

Finally, the court determined that, "[f]or many of the same reasons" Julie's voicemails to Kosman were also testimonial. *Id.* ¶ 30. It agreed with the circuit court that they "were entirely for accusatory and prosecutorial purposes," and Julie did not leave the voicemail for emergency reasons. *Id.*

c. Changes to the definition of testimonial post-*Jensen I*.

Since the supreme court decided *Jensen I* in 2007, the Supreme Court has issued five decisions about the confrontation clause. Three of those decisions involve the admission of forensic testing results when the analyst who performs the testing does not testify. *See Williams v. Illinois*, 567 U.S. 50 (2012); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). These three decisions do not help resolve whether Julie's statements are testimonial. The latter two involved the admission of affidavits in lieu of testimony, and the Court had little difficulty holding that they were testimonial. And *Williams* was a plurality decision, so it is only precedential in

cases with substantially similar facts. *State v. Mattox*, 2017 WI 9, ¶ 30, 373 Wis.2d 122, 890 N.W.2d 256. The facts here are not like *Williams*, so it does not apply.

That leaves *Bryant*, from 2011, and *Clark*, from 2015. Both of these cases focused on whether statements from crime victims were testimonial.

In *Bryant*, a shooting victim identified his shooter while he was lying on the ground with a gunshot wound, in response to questions from police officers responding to the shooting. *Michigan v. Bryant*, 562 U.S. 344, 349 (2011). The Court concluded, under *Davis*, that the primary purpose of victim's statement was to allow police to respond to an ongoing emergency, and thus, it was not testimonial. *Id.* at 359–78.

In its decision, the Court clarified that in *Davis*, it had not tried to identify all conceivable statements, even those in response to police questioning, that could be testimonial. *Id.* at 357. "[T]he most important instances" of testimonial statements implicated by the Confrontation Clause "are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Id.* at 358. And in contrast, statements obtained in response to police questioning conducted with the primary purpose of responding to an ongoing emergency are not testimonial. *Id.*

But, the Court recognized, "[T]here may be other circumstances . . . when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* The Court emphasized that whether a statement is testimonial is objective and depends on the actions and motives of both the interrogator and the declarant. *Id.* at 367. This "combined inquiry" will best ascertain the conversation's primary purpose. *Id.*

Clark is the Court's most recent decision addressing the definition of "testimonial." *Ohio v. Clark*, 135 S. Ct. 2173 (2015). There, the Court concluded that a child's statement

reporting abuse to his teachers was not testimonial. *Id.* at 2181–82. It explained that statements to people other than law enforcement, while not categorically excluded from the Sixth Amendment, are "much less likely" to be testimonial. *Id.* at 2181.

In its decision, the Court said that, post-*Crawford*, it had "labored to flesh out what it means for a statement to be 'testimonial.'" *Id.* at 2179. The Court explained that it had announced the "primary purpose" test in *Davis*. *Id.* at 2179–80. And it "further expounded" on it in *Bryant*, where it held that a statement is testimonial where the "'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2180 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). Whether the statements were made during an emergency and the formality of the situation are relevant factors to this determination. *Id.*

In *Clark*, the victim's statements to his teachers were not testimonial because the victim made them as part of an ongoing emergency involving his abuse. *Id.* at 2181. The primary purpose of the conversation was not to gather evidence for prosecution. *Id.* The victim was young, and he was talking to his teachers, not the police. *Id.*

The Wisconsin Supreme Court has addressed *Clark* three times. In *Mattox*, it adopted *Clark's* definition of testimonial and identified four factors to guide whether a statement meets it. *Mattox*, 373 Wis.2d 122, ¶ 32. These are: (1) the formality of the situation producing the statement, (2) whether the declarant makes the statement to law enforcement, (3) the age of the declarant, and (4) the context in which the declarant makes the statement. *Id.* Applying these factors, the court determined that a toxicology report relied upon by a pathologist in determining a victim's cause of death was not testimonial. *Id.* ¶¶ 33–40.

And in *State v. Nieves*, 2017 WI 69, ¶¶ 36–51, 376 Wis.2d 300, 897 N.W.2d 363, a codefendant's statements to a jailhouse informant were not testimonial. In so holding, the court approvingly cited *Bryant's* and *Clark's* formulation of the primary-purpose test, *id.* ¶ 40, and concluded that the statements were nontestimonial because they lacked formality, and the codefendant did not make them to law enforcement. *Id.* ¶¶ 36–51.

Most recently, the court decided *State v. Reinwand*, 2019 WI 25, 385 Wis.2d 700, 924 N.W.2d 184. Reinwand killed his son-in-law; at trial, the State introduced statements that the son-in-law had made to 15 people saying that he feared that Reinwand would hurt or kill him. *Id.* ¶ 10. Reinwand claimed that these statements violated his right to confrontation. *Id.* ¶15–16.

The court concluded that the statements were nontestimonial, and thus, their admission did not violate Reinwand's confrontation rights. *Id.* ¶¶ 19–32. Applying *Clark*'s primary purpose test and its factors, the court held that the victim's statements were not testimonial, given that the statements were informal and the victim did not make them to law enforcement. *Id.* ¶¶ 26–28. Moreover, the statements' context showed that statements were not testimonial. *Id.* ¶¶ 30–31. The victim was "genuinely frightened" when he made the statements, so it was unlikely that he was "attempting to create a substitute for trial testimony." *Id.* ¶ 30. And, the court noted, the victim chose not to tell law enforcement about his fears. *Id.* ¶ 31.

d. The circuit court properly exercised its discretion when it concluded that the decisions since *Jensen I* warranted its revisiting whether the Julie's statements were testimonial.

Changes in the definition of "testimonial" since *Jensen I* allowed the circuit court to disregard the law of the case established by that decision. The post-*Jensen I* refinement of the primary-purpose test requiring courts to focus on whether a declarant made a statement as a substitute for trial testimony is a significant change in confrontation law. And a comparison of the law relied on in *Jensen I* and the later-decided cases shows that the supreme court applied now-incorrect legal principles when it held that Julie's statements were testimonial. The circuit court thus did not erroneously exercise its discretion by deciding to revisit the supreme court's prior ruling. *See Brady*, 130 Wis.2d at 448.

Jensen disagrees that the Supreme Court's confrontation law has changed since *Jensen I*. (Jensen's Br. 31–35.) He argues that the *Jensen I* court had the benefit of the primary-purpose test in *Davis* and that *Clark* and *Bryant* did not change that law or the formulations of testimonial in *Crawford*. (Jensen's Br. 33–34.) Thus, he claims, the circuit court lacked a basis to exercise its discretion in revisiting whether the statements were testimonial. (Jensen's Br. 33–35.)

This Court should reject this argument. Although the Supreme Court used the phrase "primary purpose" in *Davis*, its definition of testimonial in that case is broader than the one the Court adopted later in *Clark* and *Bryant*. And that broader definition shows that the supreme court applied now-incorrect law in *Jensen I*.

In *Davis*, the court said a statement made in a response to an interrogation in a nonemergency situation is testimonial

when its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In contrast, *Bryant* and *Clark* both say that statement must be obtained with the primary purpose to create a substitute for trial testimony. *Clark*, 135 S.Ct. at 2180; *Bryant*, 562 U.S. at 357. The latter is a much narrower test. Now, the circumstances must show that the questioning and statement in response is meant to create the equivalent of testimony. Previously, it was enough that the statements were potentially relevant to a prosecution.

This distinction would have made a difference in the court's decision in *Jensen I*. The court there said that, under *Crawford's* third formulation, "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Jensen*, 299 Wis.2d 267, ¶ 25 (citation omitted). And the court concluded that Julie's statements met this standard. *Id*. ¶¶ 27, 30.

The *Jensen I* court's understanding of what constituted testimonial statements is far broader than the primary purpose test explained in *Bryant* and *Clark*. Under *Jensen I*, any statement that could potentially later be used in a criminal investigation or prosecution is testimonial. In contrast, *Bryant* and *Clark* require that the circumstances show that the statement is meant to be a substitute for testimony. Hence, the definition of testimonial in *Jensen I* is at odds with the current law.

Jensen I's definition also conflicts with the Supreme Court's directive about what a court should consider when determining whether a statement is testimonial. In *Bryant*, the Court explained that courts should consider all "the circumstances in which an encounter occurs" as well as "the statements and actions of both the declarant and the interrogators" to objectively determine the interrogation's primary purpose. 562 U.S. at 367. This is because the

declarant and the questioner are likely to have different and "mixed motives." *Id.* at 367–68. In contrast, *Jensen I* instructs courts to take a much narrower view and consider only whether a reasonable person in the declarant's position would foresee whether the statement would be used in an investigation. *Jensen*, 299 Wis.2d 267, ¶ 25.

Moreover, *Bryant* and *Clark* both conflict with *Jensen I* about whether nonemergency statements to law enforcement can ever be nontestimonial. *Jensen I* implies that an emergency is the only way such a statement can be nontestimonial. *Jensen*, 299 Wis.2d 267, ¶¶ 19, 30. *Bryant* and *Clark*, in contrast, recognized that there could be nonemergency situations in which a declarant's primary purpose in making a statement is not to create a substitute for trial testimony. *Clark*, 135 S. Ct. at 2180; *Bryant*, 562 U.S. at 366.

Finally, the supreme court has conformed its confrontation law with *Bryant* and *Clark*, specifically adopting the definition of testimonial from those cases. *See Reinwand*, 385 Wis.2d 700, ¶ 24; *Nieves*, 376 Wis.2d 300, ¶ 40; *Mattox*, 373 Wis.2d 122, ¶ 32. And the court has distilled four factors from *Clark* to use in determining whether a statement meets the definition. *Reinwand*, 385 Wis.2d 700, ¶ 25; *Mattox*, 373 Wis.2d 122, ¶ 32. Thus, the court is effectively no longer applying the law it established in *Jensen I*.

In sum, the law defining what is a testimonial statement has changed significantly since *Jensen I*. And the law that the supreme court applied then conflicts with the more-recent decisions. The circuit court thus properly exercised its discretion when it decided to revisit *Jensen I's* holding that Julie's statements were testimonial.

C. The circuit court correctly concluded that Julie's statements were not testimonial.

This Court should next conclude that Jensen has not shown that the circuit court erred by concluding that Julie's statements were nontestimonial. Whether the admission of a statement violates a defendant's right to confrontation is a question of law that this Court reviews independently. *See Reinwand*, 385 Wis.2d 700, ¶ 17.

1. Julie's letter

Under *Mattox's* four factors, Julie's letter to Kosman was not testimonial. It was informal. *Mattox*, 373 Wis.2d 122, ¶ 32. Julie did not make it under oath or in response to police questioning. It was not akin to an affidavit created with the help of a government official.

Although Julie addressed the letter to law enforcement, that is not determinative. Both *Bryant* and *Clark* indicate that there may be nonemergency situations where statements to law enforcement could be nontestimonial. *Clark*, 135 S. Ct. at 2180; *Bryant*, 562 U.S. at 366. This is one such situation. Law enforcement was not involved in creating the letter. Julie wrote the letter on her own. And she was not even reporting a crime since Jensen had not yet committed one. Julie's letter was not the product of the typical police-victim interaction in a criminal investigation, and this weighs in favor of finding it nontestimonial.

Further, Julie's ongoing relationship with Kosman also suggests that the letter was not testimonial. She and Kosman did not have the usual citizen-law enforcement relationship. Kosman had more than 40 contacts with Julie since 1992 or 1993 about harassing behavior. (834:42, 51–52; 909:51–56.) He had been to her residence about 30 times. (909:53.) Kosman was someone Julie could trust to report her concerns to, and he was as much an acquaintance or friend as a police

officer. *Reinwand*, 385 Wis.2d 700, ¶ 30; *Manuel*, 281 Wis.2d 554, ¶ 53.

This Court should consider Julie's age a neutral factor regarding the letter. *Reinwand*, 385 Wis.2d 700, ¶ 29. Julie's being an adult did not make it more or less likely that the letter was testimonial.

Finally, the letter's context shows that it was nontestimonial. Julie addressed it to an officer who had been helping her deal with harassing behavior, possibly from her husband, for years. The letter was not the result of any police questioning. Julie did not even give the letter directly to Kosman despite telling him about it; she gave it to a neighbor instead. And, as noted, at the time she wrote it, there was no crime to report, just behavior that Julie thought was suspicious. There could be no reasonable expectation that the letter would be a substitute for trial testimony under these circumstances.

Jensen disagrees. He points out that Julie wanted only the police to see the letter. (Jensen's Br. 39.) And he argues that there was no ongoing emergency when she wrote it. (Jensen's Br. 39–40.) But, again, just because the letter was addressed to the police or made in a nonemergency does not mean that it was a substitute for trial testimony.

Jensen also argues that the only reasonable interpretation of the letter and Julie's directive to her neighbor to give it to the police is that she wanted Jensen prosecuted and convicted. (Jensen's Br. 40.) But this ignores that Jensen had committed no crime when Julie wrote the letter. A mere desire that police investigate Jensen is not enough to make the letter testimonial under *Clark* and *Bryant*. The facts have to show that the primary purpose of the letter was to create a substitute for testimony. They do not do so.

Finally, Jensen points to the supreme court's comparison of Julie's letters to the evidence against Sir Walter Raleigh. (Jensen's Br. 41.) But the court's comparison is based largely on its conclusion that Julie's letter could be used for "prosecutorial purposes." *Jensen*, 299 Wis.2d 267, ¶ 29. Again, that is not the current test for what makes a statement testimonial. The primary purpose of Julie's letter was not to serve as a substitute for trial testimony.

2. Julie's voicemails and in-person statements to Jensen

For similar reasons, Julie's remaining statements to Kosman—the voicemails and the later in-person statements—were also not testimonial.

In the voicemails, Julie asked Kosman to call her and said that if she died, Jensen would be her suspect. (909:41, 127–28.) In person, Julie told Kosman that she thought Jensen was trying to kill her and make it look like a suicide. (909:45–46.) She said that Jensen would spend a lot of time on the computer and try to hide what he was looking at. (909:44.) Julie also mentioned the letter that she gave to Wojt. (909:45–46.)

Kosman said that Julie was "confused, scared, [and] somewhat emotional" at the start of the in-person conversation. (909:45.) She calmed down the more they talked, and as she did, she said that she thought Jensen would not try to harm her. (909:45–46.) Kosman explained that he thought Julie "just needed someone to talk to and maybe get some reassurance that everything was going to be okay." (909:45.)

The primary purpose of these conversations was not to create a substitute for trial testimony. They were informal discussions between two people who had an ongoing relationship addressing suspicious events in one of their lives. True, Julie made these statements to police, but this was not

a typical police-citizen interaction involving a crime investigation. Julie "just needed someone to talk to." (909:45.) Julie's statements were a product of her being scared and confused and needing reassurance from an authority figure who knew her situation and who had helped her before. They were not a deliberate or calculated attempt to accuse Jensen of anything, let alone build a criminal case against him. The statements were nontestimonial.

As he does with the letter, Jensen argues that the statements were testimonial because Julie made them in a nonemergency situation. (Jensen's Br. 43.) But nonemergency statements to law enforcement can be nontestimonial. *Clark*, 135 S. Ct. at 2180; *Bryant*, 562 U.S. at 366. As discussed above, the context of the statements and Julie's history with Kosman support the conclusion that these statements fall into the category of nontestimonial nonemergency statements contemplated in *Clark* and *Bryant*.

Jensen also compares Julie's statements to the ones in *Clark*, noting that Julie was a college-educated adult, not a three-year-old child. (Jensen's Br. 43–44.) He contends that there were no reasons for Julie to make her statements other than to document her concerns and to ensure that someone could testify about them if she could not. (Jensen's Br. 44.) As argued, this is incorrect. The record shows that the primary purpose of Julie and Kosman's conversation was for her to express her concerns and to get reassurance that she was overreacting. Her statements were not testimonial.

II. The circuit court properly entered a judgment of conviction against Jensen based on the jury's verdict.

Because Julie's statements were admissible, the remaining question is whether the circuit court properly reinstated the judgment of conviction against Jensen. It did, and this Court should affirm.

A. Circuit courts have authority to reinstate previously vacated convictions.

The facts in this case are unique. While there appears to be no case law directly addressing the specific scenario at issue here, several cases discuss the legal principles implicated.

Vacatur, as a concept, does not have a fixed meaning. Courts can tailor the scope of vacatur to fit a given situation. In the context of criminal law, the court's ability to tailor the scope means that defendants can seek vacatur of anything from DNA surcharges[4] and fines,[5] to pleas,[6] sentences and entire convictions.[7] The facts of a given case will dictate the contours of any particular order for vacatur.

Courts accept that vacatur is a tool they can use in crafting a "reasonable remedy" to correct error. *State v. Cox*, 2007 WI App 38, ¶ 15, 300 Wis.2d 236, 730 N.W.2d 452. When addressing errors—or potential errors—in a jury trial, vacatur of a conviction is conceptually distinct from throwing out an entire proceeding; courts can craft a "reasonable remedy" without discarding the entire trial. Vacatur of a conviction based on a jury verdict thus does not automatically erase the jury trial or render the jury's verdict void. Accordingly, a court may vacate a judgment of conviction but contemplate revisiting the trial to determine whether further action is needed. In appropriate cases, courts can—and do—reinstate previously vacated convictions without requiring a

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[4] *See State v. Scruggs*, 2015 WI App 88, 365 Wis.2d 568, 872 N.W.2d 146,

[5] *See State v. Ramel*, 2007 WI App 271, 306 Wis.2d 654, 743 N.W.2d 502.

[6] *See State v. Jackson*, 229 Wis.2d 328, 600 N.W.2d 39 (Ct. App. 1999),

[7] *See State v. Salas Gayton*, 2016 WI 58, 370 Wis.2d 264, 882 N.W.2d 459.

new trial or plea. *See, e.g.*, *Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000).

Rutledge is instructive. There, Rutledge had been convicted of multiple counts related to drug dealing, including conducting a criminal enterprise (CCE) and conspiracy to distribute cocaine. *Id.* at 1044. On Rutledge's appeal, the United States Supreme Court held that conspiracy to distribute cocaine was a lesser-included offense of CCE and that he therefore could not be convicted of both counts. *Id.* On remand, "[t]he district court vacated the conspiracy conviction and resentenced Rutledge on the remaining five convictions, giving him the same sentence for each conviction as it had after trial." *Id.* Rutledge then sought review of, among other things, his conviction for CCE. *Id.* at 1044–45. After reviewing Rutledge's claims, the district court vacated his conviction for CCE but, at the same time, reinstated his conviction for conspiracy to distribute cocaine *Id.* at 1045.

Rutledge appealed, arguing that the court "lacked statutory jurisdiction to reinstate a vacated sentence." *Rutledge*, 230 F.3d at 1045. The Seventh Circuit affirmed, holding that "a district court does have statutory authority to reinstate a vacated conviction." *Id.* at 1047. In a footnote, the court commented that "Rutledge [did] not raise any constitutional challenge regarding this issue, presumably because the Double Jeopardy Clause does not bar reinstatement of a conviction on a charge for which a jury returned a guilty verdict." *Id.* at 1047 n.3 (citing *United States v. Wilson*, 420 U.S. 332, 344–45 (1975)).

In concluding that the district court's reinstatement of Rutledge's previously vacated conviction was proper, the court noted that the Supreme Court's earlier decision in Rutledge's case was "instructive on whether a district court can reimpose a vacated conviction." *Id.* at 1048 (citing *Rutledge v. United States*, 517 U.S. 292, 305 (1996)). "In particular, the Court favorably cited the opinion in *United*

States v. Silvers . . . where the district court reinstated a previously vacated conspiracy conviction after vacating and granting a new trial on the defendant's CCE conviction." *Id.* Finally, the court noted that its decision had "substantial support in precedents that have addressed the question of whether a district court can reinstate a vacated conviction. The majority of courts to consider this issue have found that districts courts do have such power." *Id.* at 1048–49 (citing *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996); *United States v. Maddox*, 944 F.2d 1223, 1233 (6th Cir. 1991); *United States v. Niver*, 689 F.2d 520, 531 (5th Cir. 1982); *United States v. West*, 201 F.3d 1312 (11th Cir. 2000); *United States v. Butera*, 677 F.2d 1376, 1386 (11th Cir. 1982); *United States v. Hooper*, 432 F.2d 604 n.8 (D.C. Cir. 1970)).

Accordingly, *Rutledge* provides that a vacated conviction does not disappear entirely, and that courts can reinstate a vacated conviction when the circumstances warrant it. Thus, as discussed below, *Rutledge* offers persuasive support for the circuit court's reinstatement of Jensen's conviction.

B. The circuit court's entry of a judgment of conviction did not violate Jensen's constitutional rights because it was based on a verdict rendered after a jury trial uninfected by constitutional error.

Given the principles and case law discussed above, this Court should affirm the circuit court's order reinstating Jensen's judgment of conviction. As discussed, the court correctly determined that Julie's statements were admissible because they were not testimonial. The result is that Jensen's original trial was free from constitutional error, so reinstatement of the jury's verdict from that trial was proper.

To argue otherwise—that even though the retrial would have consisted of the same evidence free from constitutional

error, the parties had to repeat the same exercise that already resulted in a jury verdict—requires an overly rigid view of vacatur. That view disregards that the circumstances of a given case dictate the scope and contours of any particular order for vacatur. Here, the scope of the vacatur extended to Jensen's judgment of conviction, but that does not mean that the vacatur irrevocably cast aside the entire trial and jury verdict. The federal court did not order that, and there is no indication that the circuit court's intent was to do so. As *Rutledge* demonstrates, vacatur under these circumstances does not erase the entire trial—it affects only the judgment of conviction. If the trial remained infected with a constitutional infirmity, reinstatement would have been improper, but the trial was not so infected.

Rutledge provides support for that conclusion. In both *Rutledge* and Jensen's case, a court vacated a defendant's conviction—Rutledge's due to a multiplicity violation, and Jensen's due to a habeas order finding a violation of his confrontation rights. In both cases, the circumstance giving rise to the vacatur dissipated—in Rutledge's by vacating the CCE conviction, and in Jensen's by determining there was no confrontation violation. And, in both cases, the court reinstated the previously vacated conviction.

And the distinctions between those cases are without a difference. While the Seventh Circuit upheld the reinstatement of Rutledge's conviction on statutory, rather than constitutional, grounds, the Seventh Circuit also recognized that reinstatement did not offend Double Jeopardy protections: "the Double Jeopardy Clause does not bar reinstatement of a conviction on a charge for which a jury returned a guilty verdict." *Id.* at 1047 & n.3 (citing *Wilson*, 420 U.S. at 344–45). It would be very strange for the court to make that pronouncement if the action would nevertheless violate due process. It would be stranger still for the court to affirm the vitality of statutory authority to reinstate a

conviction that also violated defendants' due process rights. This Court should not presume that the Seventh Circuit and Supreme Court, in ruling on statutory grounds, simply ignored due process considerations when making their holdings.

Jensen's primary argument seems to be that the nature of vacatur is fixed—that the circuit court irretrievably threw out the entire jury trial when it vacated Jensen's conviction, therefore requiring a new trial to convict Jensen under any circumstances. (Jensen's Br. 15–16.) As discussed, the case law does not bear that position out. Rather, vacatur is contextual, and courts have authority to reinstate a vacated conviction based on a jury verdict when it becomes clear the jury's verdict was not improper. *See Rutledge*, 230 F.3d at 1047.

Jensen cites numerous cases to support his argument, but all come up short. For example, he cites *State v. Braunschweig*, 2018 WI 113, ¶ 21, 384 Wis.2d 742, 921 N.W.2d 199, for the proposition that "[v]acatur, unlike expunction, removes the fact of conviction." (Jensen's Br. 16.) He goes on to cite *State v. Lamar*, 2011 WI 50, ¶ 39 n.10, 334 Wis.2d 536, 799 N.W.2d 758, to establish that vacatur puts the parties in the position they were in "before entry of the judgment." (Jensen's Br. 16. (quoting 47 Am. Jur. 2d Judgments § 714).) The problem with *Braunschweig* and *Lamar*, however, is that neither says anything about the trial itself—in each case, the Wisconsin Supreme Court discussed only the judgment of conviction.

Braunschweig involved the difference between a vacated conviction and an expunged conviction for purposes of OWI counting. *Braunschweig*, 384 Wis.2d 742, ¶¶ 4–5. The court held that an expunged conviction could constitute the predicate offense for a second-offense OWI because "[v]acatur invalidates the conviction itself, whereas expunction of a conviction merely deletes the evidence of the underlying

conviction from court records." *Id.* ¶ 22. The court in *Braunschweig* cited *Lamar*, which involved a sentence credit issue. *See Lamar*, 334 Wis.2d 536, ¶ 3. In the court's "narrow" holding in *Lamar*, *id.* ¶ 41, it commented on the nature of vacatur in a footnote: "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." *Id.* ¶ 39 n.10 (quoting 47 Am. Jur. 2d Judgments § 714).

The State does not dispute that the vacatur of Jensen's conviction set the judgment of conviction aside and that, until the court reinstated it, the judgment of conviction "lack[ed] force or effect and place[d] the parties in the position they occupied before entry of the judgment." *Id.* ¶ 39 n.10 (quoting 47 Am. Jur. 2d Judgments § 714). That is why, for example, a new bail hearing took place—Jensen was no longer being held pursuant to a judgment of conviction. But it does not follow that, once the parties were in the positions they occupied before the judgment, it was not possible to reinstate the conviction; as discussed above, it was.

Further, neither of the two United States Supreme Court cases Jensen invokes—*Bravo-Fernandez v. United States*, 137 S. Ct. 352 (2016), and *Poland v. Arizona*, 476 U.S. 147 (1986)—support his position. (Jensen's Br. 16–17.) *Poland* involved the effect of reversal of a death sentence. *Poland*, 476 U.S. at 148. The Court was asked "whether the Double Jeopardy Clause bars a further capital sentencing proceeding when, on appeal from a sentence of death, the reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencing judge relied,

but does not find the evidence insufficient to support the death penalty." *Id.* In holding that it does not, the Court reasoned that the reversal gave the state a clean slate to seek the death penalty again because a jury had not found a lack of evidence supporting a capital sentence. *Id.* at 154–55. Thus, *Poland* is, at its core, a double jeopardy case affirming states' ability to seek the death penalty in certain situations. It is not a due process case, and any suggestion that it describes a due process right under circumstances such as these is tenuous at best.

Bravo-Fernandez concerned how the issue-preclusion analysis in a double jeopardy challenge applies to a situation where a jury has returned inconsistent verdicts of conviction and acquittal on separate charges. *Bravo-Fernandez*, 137 S. Ct. at 356–57. Although the Court had confronted the issue before, *Bravo-Fernandez* had an added wrinkle: a subsequent proceeding resulted in the conviction being vacated for unrelated reasons. *Id.* at 357. In other words, the question in *Bravo-Fernandez* was this: if a jury renders two verdicts—one of guilt and one of acquittal—that are logically inconsistent, and the guilty verdict is later overturned, do issue-preclusion and double jeopardy prohibit the government from re-trying the defendant on the acquitted charge? The Supreme Court held that they do not. *Id.* at 366. *Bravo-Fernandez* thus did not address the propriety of a court's reinstatement of a previously vacated conviction; like *Poland*, its focus was on the state's ability to re-try a defendant.

In citing these cases, Jensen seeks to draw a parallel between double jeopardy and the existence of a valid jury verdict, but those cases do not help him: the verdicts in *Poland* and *Bravo-Fernandez* suffered from fatal flaws. Accordingly, the question in those cases was not whether those verdicts could form the basis for a conviction—they could not—but whether they precluded the state from prosecuting again. In Jensen's case, in contrast, a jury

rendered a valid verdict after a trial free from constitutional error. *Poland* and *Bravo-Fernandez* do not address such a situation; as discussed, *Rutledge* does.

Jensen also makes much of the semantics surrounding the reinstated conviction. He argues that it is significant that the reinstated judgment of conviction "represents a new state court judgment for purposes of [the federal habeas statute]." (Jensen's Br. 17 (alteration in original) (emphasis omitted) (quoting *Clements*, 2017 WL 5712690, *6).) Yet he never fully explains why that matters. Contrary to Jensen's position, the judgment is not based on "no evidence at all," nor is it the result of a "directed . . . guilty verdict." (Jensen's Br. 21 (emphasis omitted).) The judgment, regardless of whether it is the old judgment reinstated or a new judgment, was based on the jury's guilty verdict. Once the circuit court determined that verdict was not tainted by a confrontation violation, it was free to enter judgment on the verdict. That the judgment is "new" for purposes of the federal habeas statute is of no consequence in a state court proceeding.

Jensen also suggests that the federal habeas court could have followed the lead of *Jackson v. Denno*, 378 U.S. 368 (1964), and made explicit that it was "remanding the case to the circuit court for findings on the confrontation issue." (Jensen's Br. 23.) But *Jackson* says nothing about a court's ability to reinstate a previously vacated conviction, nor does it prescribe a specific formula required for a trial court to revisit evidentiary issues. Rather, the Court in *Jackson* simply identified a procedure for the circuit court to use on remand in that case to determine whether a confession was voluntary. *Id.* at 395–96. Jensen appears to use *Jackson* to suggest that the circuit court's actions in his case violated the federal habeas order. But, as discussed below, the federal courts have already determined that there was no violation of the habeas order.

Finally, Jensen argues that it was "plain and structural error" for the court to reinstate his conviction. (Jensen's Br. 25.) For the reasons discussed above, the reinstatement of his conviction did not violate Jensen's constitutional rights and there was no error. Therefore, it does not constitute plain or structural error. *See State v. Sonnenberg*, 117 Wis.2d 159, 177, 344 N.W.2d 95 (1984) (a plain error must be "obvious and substantial" (citation omitted)).

III. There is no basis for this Court to grant Jensen relief based on his claim that the circuit court failed to comply with the federal order granting his petition.

Jensen next argues that this Court should reverse his conviction because the circuit court failed to comply with the federal order granting him habeas relief. (Jensen's Br. 44–48.) This Court should reject this argument for three reasons.

First, the circuit court could not violate the federal court's order because it was not a party to the federal litigation. *See Clements*, 2017 WL 5712690, *6. Instead, the case was between Jensen and his state prison custodian. *See also Pollard*, 924 F.3d at 455 (habeas writ is directed at the person detaining the petitioner, "it is not directed at the state government in toto" (emphasis omitted) (citation omitted)). The court's order granting Jensen's petition did not require the circuit court to do anything. It ordered the State to begin proceedings to retry Jensen and, if it did not, to release him from custody. *Schwochert*, 2013 WL 6708767 *17.

Second, the federal courts have already concluded that the State complied with the order granting Jensen's petition, and comity requires this Court not to second-guess that decision. "Under [comity], courts will, as a matter of discretion, rather than obligation, defer to the assertion of jurisdiction or give effect to the judgments of other states or sovereigns out of mutual respect and for the purpose of

furthering the orderly administration of justice." *Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶ 19, 261 Wis.2d 598, 660 N.W.2d 705.

The district court concluded that the State complied with its order granting Jensen's petition by initiating retrial proceedings. *Clements*, 2017 WL 5712690, *3–7. That court, which issued the writ in the first place, was in a far better position than this Court to make that determination. This Court should defer to that decision.

In addition, the Seventh Circuit affirmed the district court's decision that the State complied with the order. *Pollard*, 924 F.3d at 455–56. The court held that the district court had not abused its discretion in interpreting its own order and rejecting Jensen's proposed interpretation that it required him to receive a trial free from Julie's statements. *Id*. The district court's judgment required only that the State release Jensen or begin proceedings to retry him. "It did not contain an implicit right to retrial without Julie's letter or statements." *Id*. This Court should defer to the Seventh Circuit's decision as well.

Third, and finally, the State complied with the federal court's order. The order required only that the State release Jensen or begin proceeding to retry him. The State did the latter. The court's order does not require that Jensen receive a trial, let alone one where Julie's statements were excluded. Courts should not construe orders granting habeas relief "as carrying an attendant list of unstated acts . . . that the state court must perform" *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015).

Jensen insists that reinstating his judgment ignores the federal court's holdings that his constitutional rights were violated. (Jensen's Br. 46.) But he ignores two things: first, that confrontation law has changed significantly since the trial that the federal courts reviewed in their decisions, and

second, that the federal courts did not conclude that Julie's statements were testimonial.

Next, Jensen complains that the federal order granting his petition did not allow the State to introduce Julie's statements or reenter his conviction without a trial. (Jensen's Br. 46.) But it also does not contemplate that Jensen could be convicted on a guilty plea, and that, of course, would have been a permissible outcome. And, again, the federal courts have already determined that the State complied with the order.

Jensen also calls the order granting him habeas relief a "remand to state court." (Jensen's Br. 9.) It was not. The lower federal courts do not exercise appellate jurisdiction over state courts. *State v. Henley*, 2011 WI 68, ¶ 15 n.4, 335 Wis.2d 559, 800 N.W.2d 418.

Finally, Jensen points to *Madej v. Briley*, 371 F.3d 898 (7th Cir. 2004), which he claims prevented the circuit court from reinstating his conviction. (Jensen's Br. 46–48.) But in *Madej*, the order granting habeas relief specifically required the state court to conduct a new sentencing hearing, which it did not do. *Madej*, 371 F.3d at 899–900. The district court's order here did not require the State or the circuit court to conduct a new trial, so their failure to do so did not violate the order.

IV. Jensen has not shown judicial bias.

Jensen last argues that the judge who presided at his trial was biased because he had admitted Julie's statements under the forfeiture-by-wrongdoing doctrine. (Jensen's Br. 48–49.) Jensen contends that the judge's ruling was an opinion that Jensen was guilty. (Jensen's Br. 48.)

This Court has already rejected Jensen's claim, and he says that he is reasserting it only to preserve it for later federal review. (628:36–38; Jensen's Br. 48–49.) But Jensen

also argues that the judge's decision to disqualify himself from the more-recent proceedings bolsters his claim. (Jensen's Br. 49.)

Jensen's claim fails for the same two reasons it failed on his earlier appeal. First, the claim is forfeited because Jensen did not raise it in the circuit court. (628:36.) *See State v. Marhal*, 172 Wis.2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). Second, the claim is meritless. The judge was obligated by statute and *Jensen I* to rule on forfeiture by wrongdoing. He did not show bias merely by doing so. (628:37.) And Jensen does not explain how the court's recent recusal bolsters his claim. Although the judge said he had "[p]reviously expressed an opinion . . . [on] the case," he did not say that he did so before or during trial. (647:1.) This Court should deny Jensen relief on this claim.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction.

Dated this 14th day of June 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,953 words.

Dated this 14th day of June 2019.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

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

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Dated this 14th day of June 2019.

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