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.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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INTRODUCTION

Since the State reordered and reframed the issues in its response, a brief recap is necessary.

Jensen's conviction was invalidated as constitutionally infirm; the conviction was vacated, and ceased to exist. Since the conviction ceased to exist, "the matter [stood] precisely as if there had been no 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)). Thus, when the circuit court entered a new judgment of conviction without evidence or a trial, it unconstitutionally directed the entry of a guilty verdict (constituting both plain and structural error). And, since the State never appealed the order invalidating Jensen's conviction, the circuit court was without authority to reinstate the invalidated and vacated conviction.

The circuit court likewise could not revisit whether admission of Julie's letter and statements violated the Confrontation Clause because of the law-of-the-case doctrine. The Wisconsin Supreme Court, federal district court, and Seventh Circuit all decided the confrontation issue, and there was no basis for the circuit court to disregard law of the case. Regardless, the letter and statements were and still are testimonial, and the admission of them did and still would violate Jensen's confrontation rights.

ARGUMENT

I. 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.

A. The federal habeas courts decided that Julie's statements were testimonial.

As it must, the State concedes both federal courts found that Julie's letter and statements violated the Confrontation Clause. (State's brief at 10-11.) But, the State asserts that neither the federal district court nor the Seventh Circuit decided whether Julie's statements were testimonial "because the parties did not dispute that they were." (State's brief at 9-12, 37-38.) Therefore, the State argues, those decisions cannot be the law of the case.

The federal district court held "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." *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767, *17 (E.D. Wis. Dec. 18, 2013). The Seventh Circuit affirmed, holding that admitting the letter and statements "violated the Confrontation Clause and was federal Constitutional error." *Jensen v. Clements*, 800 F.3d 892, 899 (7th Cir. 2015).

A Confrontation Clause violation only occurs where statements are determined to be testimonial. *See Crawford v. Washington*, 541 US 36, 68 (2004). Nor can there be a writ of habeas corpus without a constitutional violation. 28 U.S.C. § 2254.

The law of the case "encompasses a court's explicit decisions, as well as those issues decided by necessary implication." *United States v. Kaufmann*, 985 F.2d 884, 891 (7th Cir. 1993), citing *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). Further, "once an appellate court either expressly *or by necessary implication* decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (emphasis added). Here, the federal habeas courts found Confrontation Clause violations; by necessary implication, those courts decided that Julie's statements were testimonial.

The State suggests that the federal courts were kept from deciding whether the statements were testimonial by the State's concessions that they were testimonial. However, it is well understood that a court is never bound by the parties' concessions on points of law. *Krieger v. United States*, 842 F.3d 490, 499 (7th Cir. 2016). That the State agreed the statements were testimonial did not, and could not, prevent a court from deciding the issue.

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. The State "fails to see what this has to do with whether these decisions establish the law of the case." (State's brief at 11.) The habeas courts were deciding whether Jensen's confrontation rights had been violated. If the State wished to challenge whether the statements were testimonial in the habeas litigation, there were three venues for that argument: federal district court, the Seventh Circuit, or by cert petition to the United States Supreme Court. By not raising its argument before the federal habeas courts, the State waived it. *See United States v. Miller*, 2013 WL 3353917, *14 (N.D. Ill) citing *United States v. Husband*, 312 F.3d 247 at 250-251 (7th Cir. 2002) ("because the appellate court has already addressed Miller's challenge to the search warrant and found the search valid, any challenge to the validity of the warrant on remand is closed to the defendant under the law-of-the-case doctrine. Additionally, to the extent Miller seeks to raise new issues regarding the search warrant that he could have raised on appeal—i.e., the timing of the execution of the warrant—those issues are waived."). Otherwise, the result is a piecemeal, endless litigation.

Furthermore, *Bryant*[1] and *Clark*[2] (the two cases claimed by the state to have newly altered the testimonial test), were both in existence *before* the Seventh Circuit ruled. In its petition for panel rehearing, the State used *Bryant* and *Clark* to argue

[1] *Michigan v. Bryant*, 562 U.S. 344 (2011).
[2] *Ohio v. Clark*, 135 S. Ct. 2173 (2015).

that there was no clearly established federal law concerning whether statements such as Julie's letter and statements were testimonial. In that petition, which the Seventh Circuit denied, the State acknowledged that its argument was tardy, and accepted "full blame." (Appellant's Petition for Panel Rehearing at 14); (App. 114). This court should not permit the State to revive its waived argument here.

B. The federal habeas decision binds state courts in later proceedings in the same case.

The State does not limit itself to arguing that the federal decisions do not establish the law of the case. It argues even more broadly that a federal habeas decision is not binding on a state court in the same case. (State's brief at 12.) The State previously conceded in the Wisconsin Supreme Court: "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." *State v. Mechtel*, 176 Wis.2d 87, 95, 499 N.W.2d 662 (1993). The State attempts to distinguish *Mechtel* by arguing that the case did not involve a federal habeas order, yet acknowledges that the holding was "in part, because it did not arise from a federal habeas proceeding." (State's brief at 12.) As it must, the State acknowledges that the binding nature of a federal habeas decision was part of the case's holding. "The basic formula [for distinguishing holding from dictum] is to take account of facts

treated by the judge as material and determine whether the contested opinion is based upon them." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). The State's concession in *Mechtel* was sensible, because of basic concepts of federalism, and even the ability of a federal court to issue a writ of habeas corpus after a state conviction. The state appears to regret its concession, but offers nothing to contest its accuracy.

Further, Jensen pointed to *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970), which said when a 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." (Initial brief at 29.) The State fails to distinguish *Lawrence*, only arguing that it "does not explicitly say that the law-of-the-case doctrine binds state courts in post-habeas proceedings." (State's brief at 12.) The quoted language above, however, refers to "*all other courts*, subject only to the appellate process." *Lawrence*, 432 F.2d at 1076 (emphasis added). Since the State did not appeal the Seventh Circuit's decision, its holding—that the letter and statements violated the Confrontation Clause—was binding on the Kenosha County Circuit Court.

C. *Bryant* and *Clark*—released before the Seventh Circuit's decision—did not alter the primary purpose test in a way that undermines *Jensen I*.

As explained in his brief in chief at 35-38, and above, the Seventh Circuit (in a decision after *Bryant* and *Clark*) determined that admission of the letter and statements violated the Confrontation Clause. Even so, *Bryant* and *Clark* did not alter the primary purpose test in a way that would justify an exception to the law-of-the-case doctrine of the Wisconsin Supreme Court's *Jensen I*[3] holding.

Whether a change in the law warrants abandoning the law of the case is a question of law for de novo review; it is not an exercise of discretion. *State v. Stuart*, 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82.

The State asserts that the "primary purpose test," announced in *Davis v. Washington*, 547 U.S. 813 (2006) (and applied in *Jensen I*), was significantly changed by *Bryant* and *Clark*. (State's brief at 21-22.) Describing *Davis*, the State argues that previously, "it was enough that the statements were potentially relevant to a prosecution." (State's brief at 22.) And, the State argues, *Bryant* and *Clark* narrowed the test, such that the statement must be obtained "with the primary purpose to create a substitute for trial testimony." (State's brief at 22.)

[3] *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 26.

Davis was not so broad as to make testimonial any statement "potentially relevant to a prosecution." Rather, in an interrogation context, the primary purpose of the interrogation must be "*to establish or prove past events* potentially relevant to later prosecution." 547 U.S. 813, 822 (emphasis added). The State's construct removes purpose from the primary purpose test. Any statement that is potentially relevant to a prosecution is not necessarily testimonial. Rather, it must be made under circumstances showing that its primary purpose was to establish or prove past events for a later prosecution. *Id.* at 822. Applying the primary purpose test, *Davis* looked to whether the statement was a "substitute for live testimony." *Id.* at 828, 831.

Davis defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 823-824. Concluding that frantic answers to a 911 operator were not testimonial, the *Davis* Court applied its test: "its primary purpose was to enable police assistance to meet an ongoing emergency. [The accuser] simply was not acting as a witness; she was not testifying. What she said was not 'a weaker substitute for live testimony' at trial . . . ." *Id.* at 828.

The State argues that *Bryant* and *Clark* significantly narrowed the primary purpose test from *Davis*. It insists "*Bryant* and *Clark* require that the

circumstances show that the statement is meant to be a substitute for testimony." (State's brief at 22.) But as shown above, this is the same standard applied in *Davis*.

The language of *Bryant* and *Clark* confirms that the primary purpose test did not change. *Bryant* referred to the "primary purpose of creating an out-of-court substitute for trial testimony," and later, in application of the primary purpose test, reasoned that "the circumstances lacked any formality that would have alerted Covington to or focused him on *the possible future prosecutorial use of his statements*." 562 U.S. at 358, 377 (emphasis added). This is almost identical to the language used in *Davis*, which the State says was changed by *Bryant*.

Consider also *Clark*, which when utilizing the primary purpose test said: "There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution." *Clark*, 135 S. Ct. at 2181. *See also State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256 ("The primary purpose test decides whether the declarant is acting as a witness against the defendant, by considering whether the primary purpose of the out-of-court statement "was to gather evidence for [the defendant's] prosecution.")

The State's characterization of the analysis in *Jensen I* is also inaccurate and misleading. The State argues, "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." (State's brief at 22.) Further, the State wrote that another new development (allegedly not present in *Jensen I*) was to consider "all the circumstances in which an encounter occurs." (State's brief at 22.)

The Wisconsin Supreme Court's analysis in *Jensen I* refutes the State's characterization:

- "The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." *Jensen I*, 2007 WI 26, ¶ 24.

- "The circuit court concluded that the letter was testimonial as it had no apparent purpose other than to 'bear testimony' and Julie intended it exclusively for accusatory and prosecutorial purposes." *Id.*, ¶ 26.

- "The content and the circumstances surrounding the letter 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.*, ¶ 27.

- Referring to the voicemails, the court wrote "Again, the circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." *Id.*, ¶ 30.

The Wisconsin Supreme Court applied the primary purpose test in *Jensen I*: "No other purpose than to bear testimony," "entirely for accusatory and prosecutorial purposes," and "content and circumstances surrounding" the statements. This is nowhere near the State's characterization of broadly including "any statement that could potentially later be used . . ." Nor is it meaningfully different from the Supreme Court's analyses in *Davis*, *Bryant*, and *Clark*.

The State argues that the law also changed when *Bryant* directed courts to consider the statements and actions of both the declarant and the interrogators, whereas in *Jensen I*, only the declarant's position was taken into account. (State's brief at 22-23.) The State's claim, however, fails to acknowledge that the statements were not part of an interrogation. Rather, they were unprompted accusations, directed to police, meant only to create a record for Jensen's future prosecution.

The State argues that "*Jensen I* implies that an emergency is the only way such a statement can be nontestimonial," and that *Bryant* and *Clark* "recognized that there could be nonemergency

situations in which the declarant's primary purpose in making a statement is not to create a substitute for trial testimony." (State's brief at 23.) This also does not represent a change in the law: "As *Davis* made clear, whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Bryant*, 562 U.S. at 366. *Jensen I* simply included in its analysis the important factor of whether an emergency existed.

Finally, the State argues that the four-factor *Mattox* test, distilled from *Clark*, demonstrates a change in the law. (State's brief at 23.) Those four non-exclusive factors, identified in *Mattox*, are simply used to distill the primary purpose of the out-of-court statement. And, most of these factors were expressly considered in *Jensen I*: Formality/informality (¶¶ 29, 33); whether law enforcement was the recipient (¶ 27); and context (¶¶ 27-31). Julie's age was not expressly considered, but it also was not discussed in *Mattox* ("This factor, though pertinent in *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015) is not applicable here and will not be discussed." 373 Wis. 2d 122 at fn.7). Further, the State regards her age as a "neutral" factor. (State's brief at 25.)

D. Julie's letter and voicemails are testimonial.

The State re-argues what has already been litigated and decided by multiple courts—that Julie's letters and voicemails are testimonial. (State's brief

at 24-27.) An application of *Mattox*'s factors to the letter and voicemails are in Jensen's brief in chief at 39-44.

Some of the State's same arguments here were already rejected by the Wisconsin Supreme Court. In *Jensen I*, the State argued that "government involvement in creating a statement is an indispensable feature of a testimonial statement." 2007 WI 26, ¶ 21; (State's brief at 24). Governmental involvement was not required then, and it is not required now. *See Davis*, 547 US at 822, fn1. The State also previously tried its argument that the letter was nontestimonial because it was created before any crime had been committed. 2007 WI 26, ¶ 28; (State's brief at 24). A letter to be opened only in the event of her death, addressed to police, naming a suspect; as discussed in *Jensen I*, those facts demonstrate that the purpose was "exclusively for accusatory and prosecutorial purposes." *Id*., ¶ 26.

Julie was an adult and college-educated. The State regards that as a neutral factor, but this is the opposite of the facts in *Clark*, where "Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system." 135 S. Ct. at 2182. In contrast, as the State points out, Julie frequently contacted law enforcement to report harassing behavior. (State's brief at 24.)

Attempting to mitigate that the letter was addressed to law enforcement, the State writes that Officer Kosman "was as much an acquaintance or friend as a police officer," someone "Julie could trust to report her concerns to." (State's brief at 24-25.) The context and circumstances tell a different story. The sealed letter was given to a friend (and not to Officer Kosman) with directions to deliver it to the police if anything happened to her. And the letter was not only addressed to Kosman, rather it was to the "Pleasant Praire Police Department, Ron Kosman or Detective Ratzenburg." 2007 WI 26, ¶¶ 5-7. These facts demonstrate how the relationship was viewed and the intended recipient of the letter: the police.

Discussing the voicemails and statements to Officer Kosman, the State stretches its characterization even further: "They were informal discussions between two people who had an ongoing relationship addressing suspicious events in one of their lives." (State's brief at 26.) The discussions: initiated by phone messages left at the police department, stating that "if she were to end up dead, Mark would be her suspect." (909:41.) The "ongoing relationship" was based upon calls for service to the police department, addressing harassment (State's brief at 24.) These were not calls made to Kosman's home phone number. And this was not a casual chat or voicemail left for a friend. It was a call to a police officer at the station, naming her husband as a suspect. The Wisconsin Supreme Court's decision plainly refutes the State's characterization: "Rather than being addressed to a casual acquaintance or

friend, the letter was purposefully directed toward law enforcement agents." 2007 WI 26, ¶ 27.

The State argues 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." (State's brief at 27.) In contrast, the Supreme Court considered the same voicemails and the same context in which they were left, and adopted the circuit court's determination that "these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." 2007 WI 36, ¶ 30.

II. The vacatur of Jensen's conviction nullified the jury's verdict; it could not be reinstated.

The State paints vacatur as a temporary act, and the effect of a vacated judgment—to place parties in the position they occupied before entry of the judgment—as meaningful only until the judgment is reinstated. (State's brief at 32-33.)

The State argues that the caselaw cited in Jensen's brief-in-chief does not establish that vacatur "threw out the entire jury trial," and attempts to distinguish *Lamar*[4] and *Braunschweig*[5] as speaking about vacating judgments, not trials. (State's brief at

[4] *State v. Lamar*, 2011 WI 50, 334 Wis. 2d 536, 799 N.W.2d 758.

[5] *State v. Braunschweig*, 2018 WI 113, 384 Wis. 2d 742, 921 N.W.2d 199.

32.) The State distinguishes *Poland*[6] and *Bravo-Fernandez*[7] only by disregarding the federal writ and subsequent vacatur. The State concedes the verdicts in those cases were constitutionally flawed, so they could not form the basis for a re-conviction. (State's brief at 34.) But the State ignores the constitutional flaw in Jensen's trial by arguing that "In Jensen's case, in contrast, a jury rendered a valid verdict after a trial free from constitutional error." (State's brief at 34-35.)

But, the federal courts in fact determined that Jensen's jury trial was *not* free from constitutional error. Jensen's conviction—and the constitutionally infirm verdict it was based on—was actually vacated.

"The order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause." *United States v. Ayres*, 76 US 608 (1869). "When a conviction is vacated, the effect is to nullify the judgment entirely and place the parties in the position of no trial having taken place at all." *United States v. Williams*, 904 F.2d 7 (7th Cir. 1990).

On January 6, 2016, when the Kenosha circuit court imposed bail, it was not merely a stopgap as suggested by the state. (State's brief at 33.) Rather, the court knew exactly what vacatur meant, and it

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[6] *Poland v. Arizona*, 476 U.S. 147 (1986).

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

was consistent with the effect of vacatur: "He's already been convicted. *That conviction has been reversed. We are now in the same position we were at before the jury trial."* (937:18) (emphasis added).

The State, though, argues that the vacated conviction could be reinstated. (State's brief at 29-30.) The State identifies three narrow exceptions to the finality of vacatur, none of which justify reinstating a verdict that was vacated after a reviewing court found it unconstitutional.

Rutledge, *Silvers* and *West* (State's brief at 30) have the same basic facts: the defendant is convicted of conducting a continuing criminal enterprise and conspiracy.[8] Although both verdicts are valid, one count must be vacated as a lesser-included because the convictions violate multiplicity. However, the lesser-included is later reinstated after a successful appeal of the other count. These cases permit reinstatement of a valid conviction to prevent a windfall; they do not support resurrecting a verdict that was properly invalidated after an appeal.

Maddox involved an inadvertent grant of a motion for judgment of acquittal, before the government had a chance to retrieve a portion of the evidence. *United States v. Maddox*, 944 F.3d 1223, 1228, 1232-33 (6th Cir. 1991). The government timely filed a motion for reconsideration, the court admitted

[8] *Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000); *United States v. Silvers*, 90 F.3d 95 (4th Cir. 1996); *United States v. West*, 201 F.3d 1312 (11th Cir. 2000).

it had erred, granted the government's motion for reconsideration, and denied the motion for judgment of acquittal. *Id.*

The remaining cases cited by the State (*Niver*, *Butera*, and *Hooper*)[9] apply the "concurrent sentence doctrine," which is a "rule of judicial convenience." When concurrent sentences are imposed, and there is a challenge to one of the counts, a court may simply vacate the judgment of conviction of the challenged count, but "if it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis. The conviction could then be subject to appellate review." *Butera*, 677 F.2d 1376 at 1386. Thus, like *Rutledge* (and unlike Jensen), the vacated convictions in these cases were never found constitutionally infirm. Rather, the court vacated a proper verdict to avoid a needless appeal, which could later be reinstated to prevent a windfall.

Jensen's conviction was not vacated pursuant to the concurrent sentence doctrine, nor as a lesser-included offense, nor inadvertently prior to appeal. Rather, Jensen's sole conviction was vacated after a full appeal and collateral review determined the jury trial was constitutionally infirm.

The federal court could have left Jensen's conviction intact, and invited the state court to reconsider the confrontation issue before his

[9] *United States v. Niver*, 689 F.2d 520 (5th Cir. 1982); *United States v. Butera*, 677 F.2d 1376 (11th Cir. 1982); *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970).

conviction was vacated. *See Jackson v. Denno*, 378 U.S. 368 (1964). The State insists *Jackson* does not address "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." (State's brief at 35.) But there was no other way Jensen's conviction could survive. The habeas court could decide the confrontation issue, or, like *Jackson*, it could return the case to the State court for a determination. Unlike *Jackson*, the Seventh Circuit actually decided the confrontation issue, meaning the trial was invalidated. The case was not in a posture where the constitutional issue was left undecided for the state court.

The State suggests that it is immaterial whether Jensen's conviction stems from a new judgment or is based on the old jury verdict. Yet, the distinction matters a great deal. If it is the old judgment (determined to be constitutionally infirm and vacated), then the state circuit court has attempted to overrule the Seventh Circuit. "A right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions." *Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort*, 191 US 499, 517 (1903). If a new judgment, then the circuit court improperly directed a verdict without a jury trial, guilty plea, or evidence, and the result is plain and structural error. (Initial brief at 25-27.)

The State does not dispute Jensen's claim that if reinstatement was error, it was both plain and structural. (State's brief at 36.)

III. The writ was not complied with.

In federal litigation occurring concurrently with this appeal, the Seventh Circuit recently held that the State complied with the writ when it initiated proceedings to retry Jensen, and the habeas court lost jurisdiction at that "moment." *Jensen v. Pollard*, 924 F.3d 451, 455 (7th Cir. 2019).[10]

In direct contradiction to its prior assertion that this court is not bound by the federal habeas decision, the State on this issue asserts that this court must defer to the Seventh Circuit's decision. (State's brief at 36-37.)

Even if the concurrent federal litigation concludes with a determination that the State technically complied when it initiated proceedings (and for the reasons outlined in his brief in chief at 44-48, it didn't), and Jensen must first litigate all complaints in this direct appeal, the circuit court was still bound by the Seventh Circuit's holding that Julie's letter and statements to Kosman violated the Confrontation Clause, and was prohibited from reinstating a vacated and constitutionally infirm

[10] A petition for rehearing *en banc* is presently pending before the Seventh Circuit which has requested an answer from the State.

judgment. (Initial brief at 46-48); *Jensen v. Clements*, 800 F.3d at 899.

Neither the district court nor the Seventh Circuit has upheld the readmission of Julie's statements or the re-convicting of Jensen without a trial. Both courts have found technical compliance with the writ, while offering no opinion on the constitutional violations involved in re-convicting Jensen without a trial. *Pollard*, 924 F.3d at 455-56 ("We lack jurisdiction to explore whether that judgment is constitutionally infirm. Jensen is free to challenge any perceived constitutional errors via his direct appeal in state court."); *Jensen v. Clements*, No. 11-C-803, 2017 WL 5712690, *7 (E.D. Wis. Nov. 27, 2017).

The State points out that the habeas order did not specifically contemplate that Jensen might plead guilty, which "would have been a permissible outcome." (State's brief at 38.) But the State fails to explain how Jensen could plead guilty if—as the State argues—the jury's verdict was never invalidated. The writ did not list Jensen's pleading options because it was not directed at Jensen; it was to the State to cure Jensen's unconstitutional conviction.

IV. Judicial bias.

The State argues Jensen forfeited his judicial bias claim by failing to present it in the trial court. (State's brief at 39.) Jensen admits the law-of-the-case doctrine prevents this court from re-determining

judicial bias. (Initial brief at 48-49.) This argument is re-asserted to preserve the claim for federal habeas review, if necessary. *Jensen v. Clements*, No. 11-C-803, 2017 WL 5712690, *7 (E.D. Wis. Nov. 27, 2017).

The State also argues it was impossible for the trial judge to be biased because it was "obligated by statute and *Jensen I* to rule on forfeiture by wrongdoing." (State's brief at 39.) That the judge was required to rule on Jensen's guilt does not purge the bias. By requiring a pretrial ruling on guilt, the court's holding prevented the same judge from later presiding over the trial. Judge Schroeder's self-disqualification from the post-habeas proceedings corroborates the bias that infected Jensen's first trial. Jensen had a due process right to a trial judge who had not previously expressed an opinion of guilt in the case. 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).

CONCLUSION

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

Dated this 5th day of August, 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 4,998 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 5th day of August, 2019.

Signed:

_____

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 5th day of August, 2019.

Signed:

_____

DUSTIN C. HASKELL
Assistant State Public Defender

APPENDIX

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TO
APPENDIX

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