RECEIVED
06-25-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2019AP664
(Waupaca County Case No. 2017CF56)

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent-Petitioner.

# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

**On Review From a Decision of the Court of Appeals, District IV, Reversing and Remanding an Order Denying T.A.J. Standing, Entered in Waupaca County Circuit Court, the Honorable Raymond S. Huber Presiding**

Ellen Henak
State Bar No. 1012490
Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
5205 N. Ironwood Rd., #100
Milwaukee, Wisconsin 53217
(414) 283-9300

Counsel for Wisconsin Association of
Criminal Defense Lawyers

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

**Cases**

**Constitutions, Statutes, and Rules**

**Other Authorities**

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2019AP664
(Waupaca County Case No. 2017CF56)

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent-Petitioner.

# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief seeking clarification from this Court that victims must seek supervisory writs to enforce their rights at the appellate level, as Article I, §9m of the Wisconsin Constitution (2020) dictates. Under that provision, they have no standing as parties to file notices of appeal to enforce any rights they have at the circuit court level. Failure to provide that clarification will abrogate the clearly-expressed will of the Wisconsin people who passed the constitutional amendment.

WACDL also seeks clarification that the role of victims enforcing their rights in the circuit court is not that of parties, but more akin to that of nonparty amicus curiae, although they need not seek permission to contribute in that way.

## ARGUMENT

**Wisconsin law grants no standing to victims on appeal. Their standing at the circuit court level does not make them parties and their participation there is akin to the participation of nonparty amicus curiae.**

Victims control the release of their medical records in criminal cases. No one disputes that victims have a right to refuse to release their medical records. *See* ***State v. Shiffra***, 175 Wis.2d 600, 609, 499 N.W.2d 719 (1993). They continue to have this right and control regardless whether a defendant requests them and meets the preliminary burden of demonstrating "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence" that is not cumulative. *See* ***State v. Green***, 2002 WI 68, ¶¶ 19, 34, 253 Wis.2d 356, 646 N.W.2d 298. Nor does their refusal to release those records necessarily result in a dismissal of the case against the defendant. A refusal, which denies defendants a fair opportunity to confront a victim's allegation, will result in those victims being precluded from testifying. *See* ***Shiffra***, 175 Wis. 2d at 609.

The question here concerns what occurs when release of medical records is necessary to protect the defendant's right to a fair trial. The question is not whether victims retain control over their own medical records. The question is how much say and control they have in deciding what the defense requires.

The answer to whether they have standing and what their role is depends on the whether the case is on appeal or

in the circuit court. They have no standing on appeal,[1] although they have limited standing in the circuit court. But standing is a generally a matter of judicial policy rather than a jurisdictional prerequisite. ***Milwaukee District Counsel 48 v. Milwaukee Co***, 2001 WI 65, ¶38 n.7, 244 Wis.2d 333, 627 N.W.2d 866. Even if this Court were to decide to hear this case on the merits, despite T.A.J.'s lack of standing at the appellate level, sound policy dictates this Court clearly state that this case is an exception and future victims must seek supervisory writs to enforce their rights at the appellate level, as Article I, §9m of the Wisconsin Constitution (2020) dictates.

### A. Victims Have No Standing to Enforce Their Rights on Direct Appeal and are Limited to Bringing Petitions for Supervisory Writs in the Appellate Courts to Enforce Their Rights.

Article I, §9m of the Wisconsin Constitution (2020), which T.A.J. and the State assert applies in this case,[2] *see* Response Brief of Appellant at 20-28; Brief of Plaintiff-Respondent at 18-22, expressly excludes any right to appeal to enforce victims' rights. Instead, it requires victims to bring a petition for a supervisory writ.

As a general rule, courts in the criminal realm have been reluctant to grant standing to nonparties and have done so only when the order involved had only a tangential relationship to the criminal proceedings and involved money.

---

[1] Note that the State appears to recognize the lack of standing on appeal and frames its argument to standing "in circuit court," although it never directly deals with standing on appeal, *See* Brief of Plaintiff-Respondent at 6, 22.

[2] WACDL has not and does not take any position on whether this amendment applies to this case.

So, for example, the courts have granted sureties standing with regard to bail forfeiture orders, *see* ***State v. Iglesias,*** 185 Wis.2d 117, 517 Wis.2d 175 (1994); ***State v. Givens***, 88 Wis.2d 457, 463, 276 N.W.2d 790 (1979), and have granted a county standing with regard to who would pay experts' fees, ***In the Matter of Payment of Witness Fees in State v. Brenizer***, 179 Wis.2d 312, 507 N.W.2d 576 (Ct. App. 1993).

In interpreting a constitutional provision, the courts of this state examine: (1) its plain meaning in context; (2) the constitutional debates and practices at the time it was written, which the courts have understood to include the general history; and (3) "the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." ***Schilling v. State Crime Victims Rights Bd.***, 2005 WI 17, ¶16, 278 Wis.2d 216, 692 N.W.2d 623. The third does not yet exist here.

The plain meaning of the constitutional amendment expressly excludes a right to appeal to enforce a victim's rights in the circuit court, even though subsection (2)(i) grants a right to be heard upon request in the circuit court. Instead, the proper vehicle for vindication of victims' rights is a supervisory writ to the Court of Appeals. Article I, §9m(4)(b) (2020) expressly provides the route for review of and that path is not an appeal within the criminal court case. Wis. Const. Art. I, §9m(4)(b) (2020) provides:

> (b) Victims may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) **by filing a petition for supervisory writ in the court of appeals and supreme court.**

(emphasis added). By setting forth one procedure for enforc-

ing victims' rights in the appellate courts, the constitutional language implicitly bars other procedures. Cf. ***State v. Dorsey***, 2018 WI 10, ¶29, 379 Wis.2d 386, 906 N.W.2d 158 ("Where a specific exception is made, it implies that no other exceptions are intended.")

Examining the general history of the provision leads to the same conclusion. The exclusion of the possibility of direct appeal did not occur because the legislature was unaware that the use of direct appeal to enforce victims' rights was possible. This provision differs significantly from the Marsy's Law provision in the California Constitution on which the recent amendments were based. *See* Legislative Reference Bureau, Constitutional Amendment Relating to Crime Victims' Rights,5 Reading the Constitution 1, 6 (2020) (found at https: //docs.legis. wisconsin/gov/misc/lrb/reading_the_constitution/ crime_victims_rights_amendment_5_1.pdf). Article I, §28(17)(c)(1) of the California Constitution specifically allows victims, with or without attorneys, to enforce their rights "in any trial or appellate court with jurisdiction over the case as a matter of right." By passing the other key provisions of the California Constitution provision on victims' rights while omitting this one, the Wisconsin legislature, and the voters who passed the amendment, consciously chose not to grant the right to standing on direct appeal.

Moreover, the drafting files support the idea that the legislature and voters specifically rejected the idea that victims should be able to enforce their rights in the appellate courts via a direct appeal, rather than by supervisory writ. The concept of standing on appeal morphed over time. The Office of Senator Van Wanggard initially requested that the amendment provide that victims and their representatives "may assert and seek in any trial or appellate court..."

enforcement of the rights in this section. Drafting Request, Attachment to Email dated 3/8/17 from Scott Kelly at 2.[3] In the preliminary draft of the amendment, it had changed to allow victims to "assert and seek in any circuit court, subject to the right of appeal" to enforce their rights. 2017 SJR53, Preliminary Draft §3.

This change concerned the senator's office, which believed that it meant that there would be no standing in the appellate court unless victims initiated their requests in the circuit court. Email dated 3/27/17 from Scott Kelly. The provision then changed again to allow victims to assert their rights "in any trial or appellate court." Marked-up Preliminary Draft. And that language remained when the amendment was initially introduced. 2017 SJR 53. But the provisions were amended after introduction to their current form, which limits any appellate remedy to a petition for a supervisory writ. Amendment 2 to 2017SJR53.[4]

Nor does Wisconsin Statutes §950.105 grant standing in the appellate courts. It grants some limited standing to a victim to assert rights granted under either Wis. Stats. §950.04 or the earlier version of Article I, §9m, *see* Wis. Const. art. I, §9m (2017-18), but *only* in the circuit court. It provides, in relevant part:

> A crime victim has a right to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim under

---

[3] Items from the drafting file are found at https://docs.legis.wisconsin.gov/2017/related/drafting_files/senate_intro_legislation/senate_joint_resolutions/2017_sjr_053/02_sjr_53/17_2463df.pdf.

[4] Found at https://docs.legis.wisconsin.gov/2017/related/drafting_files/senate_intro_legislation/senate_joint_resolutions/2017_sjr_053/04_ssa2_sjr53/17s0104_1.pdf

> the statutes or under article I, section 9m, of the Wisconsin Constitution.

The phrase "a court in the county in which the alleged violation occurred" refers to circuit courts. The Court of Appeals has four districts, physically located in four different counties– Milwaukee, Waukesha, Dane, and Marathon—and restricting standing on appeal cases arising in to those four counties would be strange.

The history of §950.105 supports limiting victim standing to the circuit courts. As originally proposed, the provision allowed the exercise of a victim's rights in *any* court and read:

> A crime victim has a right, independent of the rights and duties of the crime victims rights board under s. 950.09, to exercise and assert in any court his or her rights as a crime victim under the statutes or under article I, section 9m of the Wisconsin constitution.

2011 AB 232. Assembly Amendment 1 to the bill changed the language to what it is today. *See* Assembly Amendment 1 to 2011 AB 232.

Victims have no standing in the appellate courts to appeal to enforce their rights. Their remedy is to seek a supervisory writ. Although, like any other nonparty who has an interest in a case and whose participation may be desirable, nothing bars them from moving under Wisconsin Statutes (Rule) 809.19(7) to file a nonparty brief, they have no direct role in any criminal case on appeal no matter what law applies here, as this Court should clarify.

The constitutional limitation of appellate remedies to supervisory writ also implicates the grounds for relief that

victims may raise and the remedies available. To obtain a supervisory writ, a petitioner must demonstrate that:

> (1) an appeal is an utterly inadequate remedy; (2) the duty of the circuit court is plain; (3) its refusal to act within the line of such duty or its intent to act in violation of such duty is clear; (4) the results of the circuit court's actions must not only be prejudicial but must involve extraordinary hardship; and (5) the request for relief was made promptly and speedily.

***State ex rel. Dressler v. Circuit Court for Racine Co., Branch 1***, 163 Wis.2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). Because appeals are unavailable to victims as a matter of Wisconsin constitutional law, the first requirement necessarily will be met.

The choice of supervisory writ over appeal for vindication of victim rights indicates that the will of the people of Wisconsin is that the role of victims would remain circumscribed. They cannot challenge an unfavorable circuit court ruling or action if it was within the discretion of the court. They cannot challenge a ruling that does not cause them direct and serious harm. They cannot wait and complain later after the results of the case displease them.

Moreover, the issuance of supervisory writs is "an extraordinary and drastic remedy that is to be issued only upon some grievous exigency." ***Id.*** Supervisory writs are subject to equitable principles, allow the appellate courts to consider the rights of the public and third parties, and are within the discretion of appellate courts. ***Id.*** Restricting victims to the use of supervisory writs allows the appellate courts to focus on rights and policies within the entire system. It prevents victim rights from being the sole or even the most important consideration in criminal cases.

The use of supervisory writs also restricts victim's remedies. Unlike ordinary appeals, issuance of a supervisory writ is "considered an extraordinary and drastic remedy," ***id.***, but is limited to ordering the circuit court to comply with the law. Victims cannot, for example, seek damages or seek to overturn convictions or acquittals.

### B. The role of a victim under Wisconsin Statutes §950.105 or the recent amendments to Article I, §9m of the Wisconsin Constitution in the circuit court is similar to that of a nonparty amicus curiae, except that the circuit court must allow their participation.

Although victims have standing in the circuit court to enforce their rights, they are not parties. The passage of the recent amendments to Article I, §9m does not change that analysis. Article I, §9m(6)(2020) specifically states that §9m "is not intended and may not be interpreted…to afford party status in a proceeding to any victim." If victims are not parties, yet are to be heard at proceedings then what is their role? Their role is akin to that of amicus curiae, except that allowing them that role is mandatory, not discretionary.

The usual way for a nonparty to be heard is by becoming amicus curiae. The appellate courts in this state have a long history of dealing with nonparty amicus curiae and that history is instructive in setting the role for victims in the circuit court. Indeed, circuit courts in this state have some familiarity to amici as they occasionally have invited nonparties to serve as amici curiae in civil cases. *See, e.g.,* ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶32, 307 Wis.2d 1, 745 N.W.2d 1.

Although most nonparties in the appellate courts must file motions for permission to participate, *see* Wis. Stats.

(Rule) 809.19(7)(a), sometimes the courts solicit them and no motion is needed. In the case of victims, one way to look at their role is to consider them nonparties for whom the legislature and the people of the state have mandated participation in the circuit court without the need to file a motion to participate. After all, "[a]n amicus curiae (amicus) is a nonparty with a strong interest in the subject matter of the case." Neal Nettesheim and Clare Ryan, Friend of the Court Briefs: What the Curiae Wants in an Amicus, 80 Wis. Lawyer 11, 11 (May 2007).

Amici, like victims in a criminal case, are not parties. *See* Friend of the Court Briefs at 12. Victims too are nonparties with a strong interest in the subject matter of the case. In the circuit court, only the state and the defendant are parties. Only a district attorney or a properly-appointed special prosecutor can prosecute a criminal case. Wis. Stats. §§978.045, 978.05(1). The defendant is a party because the lawsuit is against him.

Like the nonparty amicus, the role of a victim is limited and specific. The victim's right to be heard is not a right to control the litigation. Other than motions related directly to the participation such as motions for extension of time to file a submission or motions to change the form of a submission by, for example, extending the page limit, "[a]n amicus cannot file motions or pleadings, manage the case, or raise issues the court has not agreed to review." *See* Friend of the Court Briefs at 13.

For a nonparty, the right to be heard at proceedings is generally a right to comment on issues already joined. *See generally* ***United States v. Michigan*****,** 940 F.2d 143, 165-66 (6th Cr. 1991) (stressing the distinctions in federal civil law

between amici and named parties). Similarly, because victims are not parties, they cannot be allowed to assume control of the controversy in adversarial fashion. They should not be able to file general motions or pleadings, except in the rare circumstances when statutes specifically grant the right to do so, *see, e.g.,* Wis. Stats. §950.04(1v)(d) (allowing victims to seek orders for certain testing). They should not be allowed to file pleadings or amend them. Victims should not be allowed seek discovery from the defendant. They should not be allowed to preemptively seek protective orders preventing a defendant from making a ***Shiffra-Green*** motion, although, as a practical matter, they will have an opportunity to be heard because a defendant seeking privileged mental health treatment records will have to make a motion before release or the records can occur.

## CONCLUSION

WACDL therefore asks that this Court expressly hold that at victims have no standing on appeal in criminal cases and must enforce their rights through supervisory writs. WACDL also asks that this Court hold that, when victims have the right to an opportunity to be heard in the circuit court, their role is akin to that of amicus curiae, except that allowing them that role is mandatory, not discretionary.

Dated at Milwaukee, Wisconsin, June 22, 2021.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.

Attorney Ellen Henak
State Bar No. 1012490
Attorney Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

5205 N. Ironwood Rd., #100
Milwaukee, Wisconsin 53217
(414) 283-9300
ellen.henak@sbcglobal.net

**WIS. STATS. (RULE) 809.19(8)(d) CERTIFICATION**

I hereby certify that this petition conforms to the rules contained in Wis. Stats. (Rules) 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,876 words.

Ellen Henak

## WIS. STATS. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the brief.

_____

Ellen Henak

## CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 23rd day of June, 2021, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Ellen Henak

Johnson Amicus Brief marked RRH.wpd