STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2003

WISCONSIN JUSTICE INITIATIVE, INC.,
a Wisconsin nonstock corporation,
JACQUELINE E. BOYNTON, JEROME F. BUTING,
CRAIG R. JOHNSON, and FRED A. RISSER,

Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION,
ANN S. JACOBS, in her official capacity as
Chair of the Wisconsin Elections Commission,
DOUGLAS LA FOLLETTE, in his official capacity as
Secretary of State of Wisconsin and JOSH KAUL, in
his official capacity as Attorney General of Wisconsin,

Defendants-Appellants.

On Certification from District III of the Wisconsin Court of Appeals following Appeal from a Final Decision and Order Entered in the Dane County Circuit Court, the Honorable Frank D. Remington, Presiding

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AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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TABLE OF CONTENTS

Page

INTRODUCTION 1

INTERESTS OF AMICI CURIAE 2

ARGUMENT 3

I. The ballot question failed to inform, and also misled, voters about changing protections afforded the accused. 3

A. Rights of the accused are fundamental. 5

B. The amendment changed state protections afforded the accused. 6

C. Constitutional interpretation. 11

CONCLUSION 14

CASES CITED

Appling v. Walker,
2014 WI 96, 358 Wis. 2d 132,
853 N.W.2d 888 ..... 4, 12

Kyles v. Whitley,
514 U.S. 419 (1995) 9

McConkey v. Van Hollen,
2010 WI 57, 326 Wis. 2d 1,
783 N.W.2d 855 4

Sell v. United States,
539 U.S. 166 (2003) 8

State ex. rel. Ekern v. Zimmerman,
187 Wis. 180, 204 N.W.2d 803 (1925) 3

State ex. rel. Kalal v. Circuit Court of Dane Cnty.,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110 12

State ex. rel. Thomas v. Zimmerman,
264 Wis. 644, 60 N.W.2d 416 (1953) 3

State v. Burch,
2021 WI 68, 398 Wis. 2d 1,
961 N.W.2d 314 (Bradley, R.G., J.,
concurring) 5

State v. Copeland,
2011 WI App 28, 332 Wis. 2d 283,
798 N.W.2d 250 10

State v. Green,
2022 WI 30, --Wis. 2d --, -- N.W.2d -- 8, 9

State v. Knapp,
2005 WI 127, 285 Wis. 2d 86,
700 N.W.2d 899 5

State v. O'Brien,
2014 WI 54, 354 Wis. 2d 753,
850 N.W.2d 8 9

State v. Scott,
2018 WI 74, 382 Wis. 2d 476,
914 N.W.2d 141 8

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution
art. VI, cl. 2 6

Wisconsin Constitution
art. I, § 9m (2017-2018) 10

art. I, § 6-8 5

art. I, § 9m 6, 8, 10

art. I, § 9m(2) 1, 7

art. I, § 9m(6) 6

art. XII, § 1 4

Wisconsin Statutes
906.15 10

967.04 9

970.038 9

chs. 967-972 6

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Ion Meyn, *Why Civil and Criminal Procedure are so Different: A Forgotten History*, 86 Fordham L. Rev. 697 (2017) 9

INTRODUCTION

The constitutional amendment, known as "Marsy's Law," is multifaceted and complex. It is one of the longest provisions in the Wisconsin Constitution and is longer than the United States Bill of Rights. It has several moving parts, much of which could be summed up as providing additional rights for crime victims. But that is not all it does. The language of the amendment also changed the definition of victim, changed Supreme Court jurisdiction, and limited longstanding protections afforded the accused. However, Wisconsin voters were *not* informed in the ballot question about these changes when asked to ratify the amendment. Instead, the ballot question implied protections for the accused remained intact.

Rights afforded the accused – individuals presumed to be innocent[1] – are important. They are important to the accused, but they are also important to society, in general. Such rights seek to combat systemic injustices, wrongful convictions, and governmental overreach. With a criminal prosecution, the power of the government is used to

[1] Although not directly at issue here, there is an inherent conflict with the presumption of innocence guaranteed the accused and rights of crime victims "vest[ing] at the time of victimization." Wis. Const. art. I, § 9m(2). When discussing protections for victims, the fact that the individual accused is presumed innocent can often get lost.

deprive an individual person – often indigent – of their liberty. If voters are asked to ratify a constitutional amendment that limits protections for the accused, they must be accurately informed about it. This brief will focus on the issues related to protections afforded the accused.[2]

INTERESTS OF AMICI CURIAE

The State Public Defender (SPD) represents indigent people accused of committing crimes. That representation – like the criminal justice system, generally – is multifaceted. Neither victims nor the accused comprise a monolithic group. Each individual person has their own perspectives, experiences, and goals. Accordingly, the lines between the victim and the accused can often get blurred. Sometimes their perspectives and goals are in conflict, but sometimes they are consistent. Victims can be close to, and supportive of, the accused. The accused could be their child, their parent, their spouse, or their friend. The victim may not want the same outcome as the state. When that happens, the victim may go unheard.

Additionally, those accused are often former or current victims. They may be a sex trafficking victim,

[2] The circuit court concluded that amending the Constitution to limit protections afforded the accused required a separate ballot question. The SPD agrees. However, this brief will focus on the overarching problem with failing to accurately inform the voters in the ballot question about rights of the accused, rather than repeat the parties' arguments.

a victim charged with obstruction for not cooperating with a prosecution, or a person using illegal substances to cope with past trauma. Those are just a few examples. With a client-centered, holistic approach to representation, victim's rights can benefit SPD clients. Thus, the SPD should not be viewed one-dimensionally. Our representation and interests are multifaceted. The SPD's mission is "to zealously represent clients, protect constitutional rights, and advocate for an effective and fair criminal justice system. Our commitment is to treat our clients with dignity and compassion."

ARGUMENT

I. The ballot question failed to inform, and also misled, voters about changing protections afforded the accused.

This brief will not detail the law related to ratification of a constitutional amendment, as it was thoroughly addressed in the parties' briefs. However, a few points will be reiterated.

A ballot question seeking ratification of a constitutional amendment "must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment." *State ex. rel. Thomas v. Zimmerman*, 264 Wis. 644, 659, 60 N.W.2d 416 (1953) (quoting *State ex. rel. Ekern v. Zimmerman*, 187 Wis. 180, 201, 204 N.W.2d 803 (1925)). Although the legislature has broad discretion in crafting the ballot question, its discretion is not

limitless. *McConkey v. Van Hollen*, 2010 WI 57, ¶25-26, 326 Wis. 2d 1, 783 N.W.2d 855.

This makes sense. Unlike enacting a statute, a state constitutional amendment requires approval by both the legislature (two sessions) *and* the voters. Wis. Const. art. XII, § 1. "Constitutional provisions do not become law until they are approved by the people." *Appling v. Walker*, 2014 WI 96, ¶20, 358 Wis. 2d 132, 853 N.W.2d 888 (citation omitted). A constitutional amendment is a significant change to the law. And, constitutional provisions have a more lasting effect, as "statutory language can be more easily changed than constitutional language." *Id.*

The ballot question plays an important role in the ratification process. It is the one description of the amendment we know voters see. As such, the ballot question must be accurate and not misleading. After all, "[v]oters do not have the same access to the 'words' of a provision as the legislators who framed those words; and most voters are not familiar with the debates in the legislature." *Id.*

The ballot question at issue here stated,

> **Additional rights of crime victims.** Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?

The plaintiff-respondent explained multiple defects in the ballot question, however, this brief will focus on the lack of, and misleading, information about limiting protections afforded the accused.

A. Rights of the accused are fundamental.

The rights and protections afforded the accused are important to the person accused – the person who faces the government taking away their liberty – but those protections are also important to society, in general. Such protections help combat systemic injustices, such as wrongful convictions and disparities. They also protect against governmental overreach and act as a check on the broad discretion afforded the prosecution. *See e.g. State v. Burch*, 2021 WI 68, ¶50, 398 Wis. 2d 1, 961 N.W.2d 314 (Bradley, R.G., J., concurring) ("The Framers designed the Fourth Amendment to protect the people from government overreach").

Federal constitutional rights are not the only important rights protecting those accused of committing a crime and facing a deprivation of their liberty. The Wisconsin Constitution has its own protections. *See e.g.*, Wis. Const. art. I, § 6-8. The Wisconsin Constitution can provide greater protection than the federal constitution, just not less. *State v. Knapp*, 2005 WI 127, ¶59, 285 Wis. 2d 86, 700 N.W.2d 899. This Court "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of

this state require that greater protection of citizens' liberties ought to be afforded." *Id.* (citation omitted). In addition, a variety of state statutes and binding precedent afford protections for the accused. *See e.g.* Wis. Stat. chs. 967-972.

B. The amendment changed state protections afforded the accused.

Prior to the amendment, Wis. Const. art. I, § 9m made clear "[n]othing in this section, or in any statute enacted pursuant to this section, *shall limit any right of the accused which may be provided by law*." (Emphasis added). In other words, the rights in § 9m could not exceed *any* right of the accused provided by law, including those provided in the federal constitution, state constitution, by statute, or binding precedent. This provided significant protection for the accused.

Without telling the voters in the ballot question that the rights of the accused would be limited, the aforementioned portion of § 9m was struck in the amendment. It was replaced with, "[t]his section is not intended and may not be interpreted to supersede a defendant's *federal constitutional rights* or to afford party status in a proceeding to any victim." Wis. Const. art. I, § 9m(6) (emphasis added). Notably, the Supremacy Clause prohibits the Wisconsin Constitution from superseding the federal constitution. U.S. Const. art. VI, cl. 2. Thus, this provision simply states what is already required.

Still, the ballot question was not simply silent about rights of the accused, it was misleading. It misled voters into believing the rights of the accused were left intact and enforcement of victim's rights would be with "equal force." Specifically, it stated the amendment would "require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact." This creates two problems.

First, by stating federal constitutional rights of the accused are "intact," and failing to state other rights of the accused are now limited, voters are left with the incorrect impression that rights of the accused have not been changed. That is not consistent with the language of the amendment, as discussed earlier. Thus, voters – who care about victims, but also care about rights of the accused remaining intact – were misled.

Second, the amendment does not say rights of the accused and rights of victims will be treated with "equal force." It says victim rights will be "protected by law in a manner *no less vigorous* than the protection afforded to the accused." Wis. Const. art. I, § 9m(2) (emphasis added). Victim rights cannot be protected less vigorously but could be protected more vigorously than state protections afforded the accused. That is not equal force. This is important because it is common for rights of the accused and victim rights to be in conflict. Often times opposing rights are balanced. The amended language – unlike

the prior language – puts a thumb on the scale for the victim (and prosecution).

For example, consider this Court's recent decision in *State v. Green*, 2022 WI 30, --Wis. 2d --, --N.W.2d --. In balancing the accused's "substantial liberty interest in refusing involuntary medication" and the state's interest in bringing the accused to trial, this Court cited the state's "*constitutional duty* to provide timely justice to crime victims" and the "victims guaranteed right to 'justice and due process,'"[3] when tipping the scales away from an automatic stay for an involuntary medication order after the accused is found incompetent. *Id.* at ¶¶31, 35 (emphasis added).

As explained in *State v. Scott*, the reasoning for an automatic stay "is simple—if involuntary medication orders are not automatically stayed pending appeal, the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity." 2018 WI 74, ¶44, 382 Wis. 2d 476, 914 N.W.2d 141 (citing *Sell v. United States*, 539 U.S. 166, 177 (2003). Despite the nullity, this Court concluded an automatic stay was not warranted pre-trial. Section 9m no longer

[3] As mentioned earlier, not all victims have the same perspectives and goals. Some may not support involuntary medication for the accused in favor of an expedient resolution. And, not all charged offenses involve a victim as defined by the amendment. Still, simply the *potential* for a victim to prefer expediency tipped the scales.

prohibits limiting "any right of the accused provided by law" *and* rights of victims could be protected more vigorously. Those changes limit protections afforded the accused, even in cases like *Green*, where there is a "substantial liberty interest" at stake for the accused and the accused is presumed innocent.

The changes discussed above have also fundamentally impacted defense counsel's ability to represent an accused person. Consider access to information – *i.e.*, discovery – which is the bedrock of an attorney's ability to effectively represent their client. With the amendment, obtaining information necessary for effective representation of the accused is far more difficult.

Criminal discovery was already different from civil discovery, in that those accused and facing a loss of liberty have less opportunity than civil litigants to discover information prior to trial. Ion Meyn, *Why Civil and Criminal Procedure are so Different: A Forgotten History*, 86 Fordham L. Rev. 697, 699 (2017). Depositions are rarely, if ever, used. Wis. Stat. § 967.04. Preliminary hearings are limited. *State v. O'Brien*, 2014 WI 54, ¶24, 354 Wis. 2d 753, 850 N.W.2d 8 (the scope is limited to a plausible basis supporting probable cause); Wis. Stat. § 970.038 (hearsay permitted at preliminary hearings). Even obtaining exculpatory information is challenging, as it is the state – *i.e.*, prosecutors and law enforcement – who decides whether information is exculpatory. *See e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (the prosecution, alone, knows what is undisclosed

and has the responsibility to gauge whether evidence should be disclosed).

Now, the accused's diminished discovery rights have been narrowed further with the amendment. It is common for documents to be more heavily redacted or not disclosed in the name of "Marsy's Law." This is true irrespective of an actual request by the alleged victim. This occurs at all stages of a criminal case: pre-trial, post-conviction, and during revocation proceedings. It can even be difficult to timely obtain the name of one's accuser. This is not just about additional rights for crime victims. It is about the amendment striking the provision prohibiting § 9m from limiting "any right of the accused which may be provided by law" – *e.g.*, state discovery laws.

Additionally, the amendment changed § 9m related to sequestration of victims during trial. As it relates to a victim's right to attend court proceedings, the amendment struck the phrase "unless the trial court finds sequestration is necessary to a fair trial for the defendant." Wis. Const. art I, § 9m (2017-2018). Sequestration is a discretionary decision made by the circuit court. Wis. Stat. § 906.15. The purpose "is to assure a fair trial – and more specifically, to prevent a witness from shaping his or her testimony based on the testimony of other witnesses." *State v. Copeland*, 2011 WI App 28, ¶11, 332 Wis. 2d 283, 798 N.W.2d 250. With the stricken language, and the provisions explained above, this is another example of the amendment tipping the scales away from

protections for the accused, even though the voters were not informed accordingly by the ballot question.

This amendment is new. All the potential impacts of limiting protections for the accused have not come to light yet, but people accused of committing crimes have already experienced diminished protections. The issue here is not about the veracity of these changes. It is about using the ballot question to seek ratification from the voters but failing to inform voters in the ballot question that the rights of the accused have changed and then implying their rights remained intact.

C. Constitutional interpretation.

The brief filed on behalf of Marsy's Law for Wisconsin and other organizations, argues "Marsy's Law does not impact rights of the accused," noting lawmakers' comments about "equaliz[ing]" rights of the victim to those of the accused or stating the amended rights "do NOT supersede any rights" of the accused. (Marsy's Law Brief, 9, 15-16). If this Court agrees and concludes the ballot question was appropriate – *i.e.*, the amendment does not limit the rights of the accused as discussed above – then, the SPD asks this Court to make that clear. As explained earlier, the language of the amendment conflicts with the ballot question, which is the one description of the amendment we know voters saw. If the amendment is upheld, it should *not* be interpreted as limiting *any* rights of the accused or allowing rights of the victim to supersede those of the accused.

Interpreting a constitutional amendment differs from interpreting a statute. *Appling v. Walker*, 2014 WI 96, ¶20, 358 Wis. 2d 132, 853 N.W.2d 888. With statutory interpretation, the focus is "primarily on the language of the statute." *State ex. rel. Kalal v. Circuit Court of Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public." *Id.*

Conversely, "[t]he purpose of construing a constitutional amendment 'is to give effect to the intent of the framers *and of the voters* who adopt it.'" *Id.* at ¶19 (emphasis added) (citation omitted). "Constitutions should be construed 'so as to promote the objects for which they were framed and adopted.'" *Id.*

The court, therefore, examines three primary sources to determine the meaning of a constitutional provision: (1) the plain meaning, (2) "the constitutional debates and practices of the time," and (3) "the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." *Id.* (citation omitted). This involves a more intensive review of extrinsic evidence. *Id.* at ¶20. This Court has concluded,

> The reasons we employ a different methodology for constitutional interpretation are evident. Constitutional provisions do not become law until they are approved by the people. **Voters do not have the same access to the "words" of a provision as the legislators who framed those words; and most voters are not familiar with the debates in the legislature**. As a result, voters necessarily consider second-hand explanations and discussion at the time of ratification. In addition, the meaning of words may evolve over time, obscuring the original meaning or purpose of a provision. The original meaning of a provision might be lost if courts could not resort to extrinsic sources. Finally, interpreting a constitutional provision is likely to have a more lasting effect than the interpretation of a statute, inasmuch as statutory language can be more easily changed than constitutional language. Thus**, it is vital for court decisions to capture accurately the essence of a constitutional provision**.

Id. (emphasis added).

Therefore, if this Court concludes the amendment merely equalizes victim rights and does not impact rights of the accused, as indicated by its plain language and stricken protections, the SPD asks for that clarification.

CONCLUSION

For these reasons, this Court should affirm the circuit court's conclusion and render the amendment invalid.

Dated this 26th day of May, 2022.

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 2,989 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 26th day of May, 2022.

Signed:

KATIE R. YORK
Appellate Division Director