STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1062-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN L. BESSERT,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant-Petitioner Ryan L. Bessert's petition for review on the following ground:

The petition fails to satisfy any criteria for review under Wis. Stat. § (Rule) 809.62(1r). Bessert asserts that this "case presents two questions of Constitutional law which this Court has not addressed." (Pet. 10.)

First, he queries, "Does testimony taken via closed circuit television violate the Confrontation Clause's requirement of in-person confrontation?" (Pet. 10.) As this Court has recognized,[1] the United States Supreme Court already answered that question, "no." *See Maryland v. Craig*, 497 U.S. 836, 855–60 (1990). The court of appeals here noted the same: "Whether the Confrontation Clause allows for modifications to the traditional face-to-face courtroom testimony at a criminal trial is not a novel question in our constitutional jurisprudence. In fact, in *Craig*, the United States Supreme Court addressed the same question presented here." *State v. Bessert*, No. 2021AP1062-CR, 2022 WL 1320393, ¶ 23 (Wis. Ct. App. May 3, 2022) (not recommended for publication).

Craig sets forth three requirements for a child to testify at trial through CCTV without violating a defendant's right to confrontation, *see Craig*, 497 U.S. at 855–56, and Wisconsin's statute permitting the CCTV accommodation incorporates them, *see* Wis. Stat. § 972.11(2m). In attacking the constitutionality of section 972.11(2m) on its face (an argument the court of appeals deemed "undeveloped"), Bessert does not argue that the statute fails to comply with *Craig*. *Bessert*, 2022 WL 1320393, ¶¶ 21, 31. Rather, in his opinion, *Craig* was wrongly decided and implicitly overruled

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[1] *See State v. Rhodes*, 2011 WI 73, ¶ 35, 336 Wis. 2d 64, 799 N.W.2d 850.

by *Crawford v. Washington*, 541 U.S. 36 (2004)—a case that says nothing about *Craig*. (Pet. 11–12); *Bessert*, 2022 WL 1320393, ¶ 25.

The court of appeals soundly declined Bessert's invitation to act on less than a hunch and ignore binding precedent allowing states to protect child abuse victims from the trauma of testifying in the defendant's physical presence at trial. Unless this Court is interested in striking down the very reasonable CCTV accommodation based on a guess that *Crawford* overruled *Craig* without so much as discussing the *Craig* opinion, review isn't warranted.

The second issue that Bessert presents for review is: "Does announcing a verdict in a later open proceeding sufficiently remedy an inadvertent courthouse closure during the original announcement?" (Pet. 12.) It's true that this Court hasn't addressed that exact issue. But as this case demonstrates, lower courts already have the guidance necessary to answer the question. *See Bessert*, 2022 WL 1320393, ¶ 40. In *Pinno*, this Court instructed that "even in the event of an improper courtroom closure, courts must carefully fashion a remedy to avoid granting a 'windfall' to an opportunistic defendant." *State v. Pinno*, 2014 WI 74, ¶ 46, 356 Wis. 2d 106, 850 N.W.2d 207. For example, when the violation occurs at a suppression hearing, the appropriate remedy is a new suppression hearing—not a new trial. *Id.* (citing *Waller v. Georgia*, 467 U.S. 39, 50 (1984)).

Here, although the courthouse was accidentally closed during the four or five minutes it took for the circuit court to announce its verdicts, numerous people still were in the gallery. (R. 129:15.) Assuming this was a violation of Bessert's public-trial right, the lower courts correctly heeded this Court's instruction that "courts must carefully fashion a remedy to avoid granting a 'windfall' to an opportunistic defendant." *Pinno*, 356 Wis. 2d 106, ¶ 46. That is, the appropriate remedy for the assumed violation is re-

announcing the verdicts in open court, *not* forcing a young, traumatized incest victim to go through another trial. Even the case that Bessert relies upon holds that re-announcing the verdicts is the appropriate remedy for any constitutional violation here. *See United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997); (Pet. 13.)

Finally, as a third issue, Bessert tells this Court that its "decision in *Cook v. Cook* was wrong when it was decided." (Pet. 17.) He submits that no law, constitutional or otherwise, supports the "radical position" that only this Court "has the power to overrule the court of appeals." (Pet. 17.) Bessert cites to *Marbury v. Madison*, 5 U.S. 137, 180 (1803)—a case that has nothing to do with the Wisconsin Court of Appeals' constitutional and statutory authority—in a plea for this Court to "free the court of appeals from its shackles." (Pet. 17–19.) Suffice it to say, this Court's decision in *Cook* is, in fact, rooted in constitutional and statutory principles. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (noting that this Court, unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court).

Review is not warranted; this Court should deny Bessert's petition.

Dated this 16th day of June 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 795 words.

Dated this 16th day of June 2022.

KARA L. JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 16th day of June 2022.

KARA L. JANSON
Assistant Attorney General