STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal Case No. 2022AP001396-CR

IN THE MATTER OF THE FINDING OF CONTEMPT IN STATE v. ARIELLE A. SIMMONS,

Attorney Thomas L. Potter

Appellant,

v.

Circuit Court for Milwaukee County, the Honorable Kori Ashley, presiding,

Respondent.

Appeal From Order Finding Contempt Entered in the Milwaukee County Circuit Court in Case 2021CM000754, The Hon. Kori Ashley, Presiding

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

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Julie Knyszek
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ISSUES PRESENTED

1. Did Potter have no other avenue to preserve the issue of victim exclusion but to act in contempt?

   Not answered by the circuit court.

   This Court should answer: Yes.

2. Was the circuit court's sequestration order against the victims erroneous?

   Not answered by the circuit court.

   This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Potter requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Simmons was charged with misdemeanor battery against TH and disorderly conduct against GD[1] in violation of Wis. Stat. § § 940.19(1) and 947.01(1). (R33:1). The case was originally set for a jury trial on March 7, 2022. (R33:3). On February 18, 2022, Simmons filed the Defendant's Motion in Limine which included motion number nine – to prohibit the victim from being in the courtroom, along with all other witnesses, when not testifying. (R12:2-4). On February 22, 2022, the State filed a response to Simmons' Motion in Limine number nine arguing it was inconsistent with Wisconsin law. (R14:1-4). On March 7, 2022, the trial was adjourned at

[1] Potter uses initials to refer to the victims, consistent with Wis. Stat. §§ 809.19 (1)(g), 809.86(4).

Simmons' request and a new trial date was set for May 31, 2022. (R33: 4).

On May 31, 2022, the State filed a document titled, "State's Defense of Victim's Statutory And Constitutional Right to Attend Entire Trial," which further defended the right of victims not to be physically excluded from the courtroom during their trial. (R19:1). On May 31, 2022, the morning session was primarily spent choosing which trial would proceed on that date. (R27: 3, 7).

In discussing the outstanding motion to exclude the victim, the trial court indicated its general practice as to sequestration was that if the court could make a specific finding that the victim's presence would violate Simmons' due process rights, the court would order exclusion when the trial begins, at openings in the court's view. (R27:13). The court then asked Simmons for a specific reason as to why the victims in the case should be excluded for the trial. (R27:14). Simmons argued that because the victims were criminal defense attorneys they would be more likely to shape their testimony to the State's theory of the case. (R27:14). Simmons requested that the victims therefore not be allowed into the courtroom until they had testified. (R27:17).

The State, represented by Potter, opposed Simmons' motion as contrary to both Wisconsin statutes and the Wisconsin Constitution and cited to the document defending the victims' right to attend filed that morning. (R27:17-18). The court ruled on motion number nine prior to starting voir dire and ruled that the "defense theory of the case" necessitated a finding under Wis. Stats. § 906.15(2d) for excluding the victims – a different rationale than the one argued by Simmons. (R27:26-27). The court referenced *State v. Payette, 2008 WI App 106, 313 Wis.2d, 756 N.W.2d 423* as authority for the ruling and ordered that the victims may not be present for opening statements and until after they testified. (R27:28). Jury selection started at 2:01 p.m. and concluded at 4:55 p.m. on May 31, 2022. (R33:5). The jury was ordered to return on June 1, 2022, at 1:15 p.m. (R33:5).

The case was recalled on June 1, 2022, at 1:29 p.m. and the court started with a sidebar to let the State make a record.

(R30:2). Potter assured the court that his actions were not meant in disrespect, but were the only means available to preserve the issue of victim exclusion for appeal. (R30:2). Potter stated he had sent an email to the primary victim in the case minutes earlier, stating exactly as follows:

> "Attorney [TH], understanding that you have expressed an interest in attending the opening statements, and perhaps other portions of State versus Arielle Simmons, as is your right as a victim, and understanding also that Judge Ashley has ordered you excluded until after you have testified, I am nevertheless inviting you to attend the opening statement because I believe Judge Ashley's order to be inconsistent with Wisconsin law, and wish to have it reviewed by an appellate court."

(R30:2-3).

Potter advised the court that he realized sending the email put him in defiance of the Court's order and that he did so intentionally so that the court would find Potter in contempt. (R30:3). Potter reiterated that he was not challenging the Court's authority, but simply attempting to preserve the matter for appeal as there would be no other way to preserve the issue from becoming moot short of the actions taken. (R30:3).

The court ruled that the email sent by Potter was a flagrant violation of the exclusion order the Court entered on May 31, 2022, found Potter in contempt of that order, and issued a fine of $500. (R30:3-4). Finding Potter in contempt was done pursuant to Wis. Stat. § 785.03(2), and was signed and filed in a written order on July 20, 2022. (R29:1).[2]

On August 15, 2022, Potter filed a notice of appeal from the July 20, 2022, contempt order (R32:1).

[2] It should be noted that TH never did try to enter the courtroom until he was called as a witness.

STANDARD OF REVIEW

The question before the court is the interpretation of Wisconsin law related to contempt orders and victim rights. Whether the circuit court has applied the correct legal standard is a question of law reviewed de novo. *Landwehr v. Landwehr*, 2006 WI 64, ¶ 8, 291 Wis. 2d 49, 57, 715 N.W.2d 180, 184. Where the circuit court acts as the trier of fact, this Court will not upset those findings unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2); *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 62, 443 N.W.2d 50 (Ct. App. 1989). Interpretation and application of the law to those facts, however, is a matter of law to review de novo. *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶¶35-36, 319 Wis. 2d 1, 768 N.W.2d 615.

ARGUMENT

I. The underlying order excluding victims from the trial was erroneously rendered and Potter's defiance of that order provided the only meaningful opportunity for review.

A circuit court's power to use contempt stems from the inherent authority of the court. *Firsch v. Henrichs*, 2007 WI 102, ¶ 32, 304 Wis. 2d 1, 20, 736 N.W.2d 85, 94, citing *Griffin v. Reeve*, 141 Wis.2d 699, 706 n. 4, 416 N.W.2d 612 (1987). That power may, within limitations, be regulated by the legislature. *Id*. "When the procedures and penalties of contempt are prescribed by statute, the statute controls." *Id*., (citing *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 367, 4 N.W. 390 (1880)). Chapter 785 of the Wisconsin Statutes was established by the legislature and deals specifically with Contempt of Court. Section 785.01 defines contempt of court and includes intentional misconduct or disobedience towards the authority of a court as two means of contempt. Wis. Stat. § 785.01(1)(a) and (b). Contempt may be punished either by a punitive sanction or a remedial sanction. Wis. Stat. § 785.02.

A court order is a type of judgment, and when a party challenges a court order as a defense to criminal contempt charges, this is a collateral attack.[3] The general rule is that a person who disobeys a court order cannot challenge the merits

[3] John R.B. Palmer, *Collateral Bar and Contempt: Challenging A Court Order After Disobeying It*, 88 Cornell L. Rev. 215, 219 (2002).

of that order as a defense to criminal contempt charges.[4] The United States Supreme Court has stressed that "[a]n injunction duly issued out of a court of general jurisdiction with equity powers [] must be obeyed [] however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case." *Howat v. State of Kansas*, 258 U.S. 181, 189–90, 42 S. Ct. 277, 280–81, 66 L. Ed. 550 (1922). Per *Howat,* "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Id*.

Wisconsin has further adopted the position that while a void judicial order or judgment "is not binding on anyone," an allegedly erroneous order or judgment "has the same force and effect as a valid judgment." *State v. Campbell,* 2006 WI 99 ¶ 42, 294 Wis.2d 100, 121, 718 N.W.2d 649. Consequently, "[w]here a court has jurisdiction over the subject matter and the parties, the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms." *Id.,* ¶ 49 (quoted source omitted). Rather, a person must abide by the terms of an allegedly erroneous order or judgment "until he [or she] succeed[s] in reversing it through the applicable review process." *Id.*

This reference to resort to "the applicable review process" implicates an exception to the prohibition against a collateral attack on a purportedly erroneous order or judgment, one which arises out of the Due Process Clause. *State v. Hershberger*, 2014 WI App 86, ¶ 11, 356 Wis. 2d 220, 229–30, 853 N.W.2d 586, 590–91. Under this exception, the rule prohibiting a collateral attack on a prior order or judgment may not apply where there was no meaningful opportunity for review of the order or judgment. *See Campbell*, 294 Wis.2d 100, ¶¶ 57–58, 718 N.W.2d 649 (disallowing a collateral attack on a custody order allegedly procured by fraud where "[a]dequate judicial processes exist to attack [the] order or judgment for fraud"); *United States v. Mendoza–Lopez*, 481 U.S. 828, 837–38, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987)

[4] *Id*.

(stating, with respect to a criminal prosecution for re-entry to the United States following a deportation order, that "judicial review must be made available before [an] administrative order may be used to establish conclusively an element of a criminal offense").

This exception is one that has also been recognized by the United States Supreme Court. It has long been the law that where immediate review of an order is not provided for, one may refuse to comply and challenge the underlying order on appeal. *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *United States v. Ryan*, 402 U.S. 530, 532, 91 S. Ct. 1580, 1580-82, 29 L. Ed. 2d 85 (1971). The *Ryan* court responded to the respondent's contention that without immediate review by an appellate court he would be forced to undertake a substantial burden in compliance. *Id*. The Supreme Court responded that:

> [C]ompliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id.

The United States Supreme Court in *Maness v. Meyers* further modified the collateral bar rule. *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975). *Maness* dealt with a situation where the trial court, during trial, ordered a witness to produce material which had the substantial possibility to result in self-incrimination of that witness. *Id*., at 451-452. The Court noted the basic principle that all orders and judgments of courts must be complied with and if a person to whom a court directs an order believes that order is incorrect, the remedy is to appeal; but, absent a stay, he must comply promptly with the order pending appeal. *Id*., at 458. However, the Court went on to acknowledge that an order by a court to reveal information at trial presents a different situation than other types of orders, to which the collateral bar rule applies. *Id*., at 460. That compliance with such an order could cause, "irreparable injury because appellate courts cannot

always 'unring the bell' once the information has been released." *Id*. Therefore, a party to whom such an order is directed may disobey the order and collaterally attack its validity during contempt proceedings. *Id.* (alteration in original) (quoting the dictum of *United States v. Ryan*, 402 U.S. 530, 532-33 (1971)).

Here, the granting of motion in limine nine was not reviewable as a matter of right. Only through the finding of contempt was an opportunity for review of victim exclusion made available. The release of incriminating information at trial cannot be undone; likewise the improper exclusion of a victim causes irreparable harm, regardless of the outcome of that trial.

A. Potter had no other means to preserve the victim exclusion issue for appeal.

The order Potter violated so as to be held in contempt was an order by the court granting Simmons' motion in limine number nine decided immediately prior to selecting a jury on the afternoon of trial. (R27:26-28). Appeals may be made to the court of appeals as a matter of right upon a final judgement or a final order. Wis. Stat. §808.03(1). An appeal from a ruling on a motion in limine clearly does not fall within that category.

A judgment or order not appealable as a matter of right may be pursued as a permissive appeal, but only if such appeal will either materially advance the termination of the litigation or clarify further proceedings in the litigation, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. Wis. Stat. §808.03(2)(a),(b), and (c). This Court should recognize that, as a practical matter, prosecuting such a theoretically available permissive appeal *during the course of a trial* would be beyond impractical, bordering on impossible.

Potter had no other effective opportunity for review of the order and therefore had to act in contempt as it was clear that the case would be proceeding immediately to a jury trial. Potter requested that the circuit court deal with the issue of the victim's right to attend trial in the morning session on May 31, 2022. (R27:3). Potter put on the record that he sought to do so

in advance of starting the trial, because the court had not always allowed for that. (R27:4). Potter requested a clear ruling on the issue prior to starting the trial, and filed a motion with authority on the issue. (R27:4). On May 31, 2022, Potter again asked the trial court to address the issue of the victim's right to attend the trial. (R27:6). The trial court asked Potter why would they do that if Simmons' trial was not proceeding on that date. (R27:6). Potter informed the court that it could not be done upon the case being selected for trial and the trial starting, as it would not leave the State with any remedy for appeal. (R27:6). Instead, the court responded by passing the case to see if the other case would resolve. (R27:6). The other case did ultimately resolve. (R27:7).

The court heard arguments on motion in limine nine in the morning session and reserved ruling on number nine for "before we start the trial." (R27:13-19). The court ruled on Simmons' motion in limine number nine at approximately 1:34 p.m. and shortly thereafter a jury panel was in the box, at approximately 2:01 p.m. (R27:27-29, R33:5). The court was intent on proceeding to trial on that date and immediately did so after issuing its decision on motion in limine number nine. The court had made clear that the trial was moving forward and any request for a permissive appeal under Wis. Stat. 808.03(2) would not have automatically resulted in a stay of the trial.

Any opportunity for appellate review of victim exclusion expired upon completion of the trial. That is to say that whether Simmons was convicted or acquitted, the issue would be moot. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. As a general rule, a court "will not consider a question the answer to which cannot have any practical effect upon an existing controversy." *State v. Leitner*, 2002 WI 77, ¶ 13, 253 Wis. 2d 449, 646 N.W.2d 341 (citation omitted). Any verdict moots the issue of whether the court's order was in violation of the victim's right to attend the trial, as the case is over and double jeopardy applies.

This inevitable mooting of the issue at question makes this situation similar to the one in *Maness v. Meyers* where following the court order in a trial would have resulted in a

disclosure that could not be fixed by appellate review. *Maness*, 419 U.S. 449, 460, 95 S.Ct. 584. In the instant case, the trial proceeded with the victims excluded from portions of the trial in violation of the rights bestowed upon them by the Wisconsin Constitution and Wisconsin Statutes. The circuit court's recurring practice was to exclude victims "if I'm able to make a specific finding" (R27:13). Such systemic victim's rights violations required Potter to preserve that important issue for appellate review.

B. Potter had a duty under the Wisconsin Constitution and Wisconsin Statutes to protect the rights of victims.

The Attorney's Oath taken upon admission to the practice of law in Wisconsin contains an oath to "support the constitution of the United States and **the constitution of the state of Wisconsin**." SCR 40.15 [emphasis added.] Potter took that oath in 1985. The Wisconsin constitution was amended in April 2020 to include Section 9m in Article I entitled, "Victims of Crime." Wis. Const. art. I,§9m. Section 9m ensures that victims be entitled to enumerated rights which are to be protected in a manner no less vigorous than the protections afforded to the accused. Wis. Const. art. I.,§9m(2). **Victims are entitled to the right, upon request, to attend all proceedings involving the case.** Wis. Const. art. I., §9m(2)(e). [emphasis added.] Further, that the attorney for the government upon request of the victim, may assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the victim by the law. Wis. Const. art. I., §9m(4)(a). Part of Potter's duties as a prosecutor – a very important part – is the protection and enforcement of victim rights.

Potter notified the court in the morning session of May 31, 2022, that he wanted to be heard on the right of the victim's to attend the trial. (R27:3). Potter informed the court that there were two victims in the case who wanted to attend the trial. (R27:4). Potter filed a written response giving clear authority for the victims in this case to do exactly that. All of that was done in furtherance of both his oath and duties of employment. SCR 40.15. Given the way the circuit court responded, defying the exclusion order was the only means left to protect and

vindicate the victims' right to attend in this case *and future cases*.

II. The order prohibiting victims from attending the trial without more specific reasons from defense violated the Wisconsin Constitution and Statutes.

The court explained its practice was to exclude victims from trial until after they had testified whenever it was "able to make a specific finding" (R27:13) but ultimately made a general finding. Simmons indicated she was arguing for sequestration because both victims were "professionals in this court system," and aware of how trials proceed. (R27:14) . Simmons argued that the victims were of "the professional caliber that they have the ability to change their testimony, modify their testimony, in order to adapt it to the State's theory of the case." (R27:14). The only basis for these assertions was that both victims were criminal defense attorneys who have tried cases and were thus aware of the court system. (R27:14). Their knowledge and experience in trying criminal cases somehow meant they could not be trusted to testify truthfully. (R27:15). As Potter would argue, the fact that the victims were officers of the court was hardly reason to deny their right to attend the trial; such an "employment status" argument presumed bad faith and made no sense. (R27:19).

In response, Potter noted the irony of a criminal defense lawyer basically arguing that criminal defense lawyers cannot be trusted. He also cited to the Wisconsin Constitution ("Marsy's Law") explicitly granting victims the right to be present for all proceedings. (R27:18). Potter then discussed the historical exclusion of victims from criminal trials and the legislative change in that policy which had occurred 20 years earlier. (R27:18). Potter further argued a court could still tell a victim they can't discuss their testimony, but physical sequestration (exclusion) from the courtroom now required a finding of some concern specific to that victim, such as a history of tampering with or signaling other witnesses in court. (R27:19).

Due process concerns are routinely protected by means less draconian than excluding victims. As was argued in this case, the court can, by statute, order that any witness –

including victims – not discuss their testimony during the trial. Wisconsin Statute 906.15(3). A defendant can of course also cross-examine the witness along these lines: "You were here in court when all the other witnesses testified, weren't you? You heard all the testimony of the other witnesses, didn't you? And now today, you are telling us your story based on what you heard those witnesses say, isn't that correct?" The witness can also be impeached with prior statements. Such effective remedies remain, and can protect due process rights without the wholesale exclusion of victims.

The court's ruling began by noting that a victim's right to be present during proceedings was not absolute (R27:26), and that Section 9m of the Wisconsin Constitution does not supersede a defendant's federal constitutional rights, namely a right to a fair trial. (R27:26-27). The court then noted that Wisconsin Statute 906.15(2d) allows a court to exclude victims if an appropriate showing is made. (R27:27). The court ultimately found that Simmons' "theory of the case" necessitated a sequestration of the victims – but never explained how or why that is the case. (R27:27) That type of finding is no less conclusory than the now verboten "might conform testimony" reason. The court cited *State v. Payette*, 2008 WI App 106, 313 Wis.2d, 756 N.W.2d 423, to support the conclusion that the court had the authority to further the truth seeking objective of examining witnesses by making sure witnesses aren't aware of testimony already provided when that witness testifies. (R27:28).

This ruling was not only erroneous but violated the mandates of the Wisconsin Constitution and statutes which were amended to add specific rights and protections to victims of crime. The circuit court's only cited authority, *Payette,* did touch upon a trial court's considerable latitude in reasonable control of the courtroom and the conduct of the parties and witnesses before it. *State v. Payette*, 2008 WI App 106, 313 Wis.2d, 756 N.W.2d 423. However, *Payette* had absolutely nothing to do with excluding victims (or anyone else) from a trial.

Instead, *Payette* discussed the right of a court to order that a criminal defendant not turn around and stare at a victim making an impact statement at the defendant's sentencing

hearing. *Id*., at ¶ 51. The appellate court noted the defendant was *present in the courtroom*, able to consult with trial counsel, and able to present a rebuttal to the statement the victim made in court. *Id*., at ¶52-53. The appellate court noted that the trial court had just heard a lengthy description of Payette's violent and abusive conduct toward the victim and did not want the defendant to look at the victim so as to prevent any intimidation. *Id*., at ¶51.

A. The order was erroneous because it was in direct violation of the Wisconsin Constitution.

Wisconsin's Constitution was amended in April 2020 to add specific protections for Victims of Crime. Wis. Const. art. 1, §9m. One of the rights declared in the 2020 amendment was that trial judges can no more physically exclude victims from the courtroom than they can exclude defendants:

> **Victims of crime**. SECTION 9m. [As created April 1993 and amended April 2020]…
> (2) In order to preserve and protect victims' rights to justice and due process throughout the criminal and juvenile justice process, **victims shall be entitled to all of the following rights**, which shall vest at the time of victimization and be protected by law in a manner no less vigorous than the protections afforded to the accused:
> (a) To be treated with dignity, respect, courtesy, sensitivity, and fairness.
> (b) To privacy.
> (c) To proceedings free from unreasonable delay.
> (d) To timely disposition of the case, free from unreasonable delay.
> (e) Upon request, **to attend all proceedings involving the case**.

Wis. Const. art. 1, §9m(3). [Emphasis added.]

Further review of the Joint Resolution which was submitted to Wisconsin voters reveals the intention of the legislature and the public to protect a victim's right to attend the entire trial. The 2019 Joint Resolution submitted to the voters indicates a change to subsection (2)(e) which initially read: "Upon request, to attend all proceedings unless the trial court finds sequestration is necessary to a fair trial for the

defendant; involving the case." 2019 Senate Joint Resolution 2. (App - 138). The joint resolution submitted to Wisconsin voters and ultimately approved removed the section which read, "unless the trial court finds sequestration is necessary to a fair trial for the defendant." *Id*. The Legislature's clear intent was to make exclusion of a victim from trial proceedings the rare exception rather than the rule. The statute specifically related to the exclusion of crime victims is Wis. Stat. 906.15 and it seems instructive that when declaring the rights of victims, the legislature removed a limit on the right of a victim to be present during proceedings in the case.

There has not been an abundance of case law on the effect the 2020 amendment on different aspects of criminal trials. However, case law discussing victims' rights pre and post the 2020 Amendment does provide some clarity. First, a crime victim has a right to make arguments for a maximum sentence, in disagreement with a plea agreement, and to make a statement at sentencing. *State v. Stewart*, 2013 WI App 86, 349 Wis. 2d 385, 836 N.W.2d 456. Second, a crime victim has standing to oppose and make arguments supporting a victim's opposition to a defendant's *Shiffra*[5] motion for an in camera review and the grant of standing applies retrospectively. *State v. Johnson*, 2020 WI App 73, 394 Wis. 2d 808, 951 N.W.2d 616. Third, that the state has a duty to provide timely justice to crime victims by bringing competent defendants to trial .*State v. Green*, 2022 WI 30, 401 Wis. 2d 542, 973 N.W.2d 770.

The Wisconsin Constitution was specifically amended by the legislature and approved by the citizens of this state to guarantee the right of victims to attend **all** proceedings The Constitution now places that right of victims on equal footing with that of defendants. Victim rights do not supersede a defendant's federal constitutional rights, but should be protected by law in a manner no less vigorous than the protections afforded to the accused. Wis. Const. art. 1, §9m (6) and (2). The constitution makes no exception for the due process rights of Simmons, in fact it says victims' rights are equal to those of Simmons.

[5] *State v. Shiffra,* 175 Wis.2d 600, 499 N.W.2d 719 (Ct.App.1993).

B. The order was erroneous because it was in direct violation of Wisconsin Statutes.

It was not just the Wisconsin Constitution which protects a victim's right to be present during all proceedings involving their case. Long before the Wisconsin Constitution was amended, the Wisconsin legislature had curtailed the then-common practice of excluding victims from the courtroom who wanted to attend their trials.

A review of the history of the crime victim's right to attend trial indicates that we have essentially come full circle. The Lewis & Clark Law Review article, entitled *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus* provides an in depth commentary on the history of victim participation. Victims bore the burden of prosecution in early American history; this burden later shifted to the State, and the idea of victim sequestration was introduced. Recently there has been a national shift back towards victims as participants in the trial.[6] Wisconsin followed a similar path, allowing for sequestration of witnesses and victims without a distinction as to the special status a victim holds in the court proceedings. Our legislature corrected this practice by statute long before the Wisconsin Constitution was amended in 2020. In 2001, the legislature added section (d) below [emphasis added]:

> **906.15 Exclusion of witnesses.**
>
> (1) At the request of a party, the judge or a circuit court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The judge or circuit court commissioner may also make the order of his or her own motion.
> (2) Subsection (1) does not authorize exclusion of any of the following:
> . . .
> (d) A victim, as defined in s. 950.02 (4), in a criminal case or a victim, as defined in s. 938.02 (20m), in a delinquency proceeding under ch. 938, unless the judge or circuit court commissioner finds that exclusion of the victim is necessary

[6] Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 503–04 (2005).

> to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile. **The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant** or a fair fact-finding hearing for the juvenile.
> (3) The judge or circuit court commissioner may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

Wis. Stat. 906.15. [Emphasis added.]

The Legislature recognized that there are two very different types of "sequestration." One, an order that witnesses not discuss their testimony with any other witness until the conclusion of the trial can and should apply to victims just as it does to all other witnesses in a case. The second type, physical sequestration, can be a useful tool to keep other witnesses from conforming their testimony, but that tool has been strictly limited for excluding victims. Victims, just like all witnesses, take an oath before they testify, and if they do "change their story" to conform with other witnesses they may have observed testify, they can be impeached with their prior statements. Absent some specific finding by the Court that a particular victim witness, because of some special, particularized circumstances (such as being observed in court trying to influence testimony, or having a history of witness tampering), physical sequestration is no longer an option for victims who wish to exercise their constitutional right to attend their trials.

In addition to the update in Wis. Stat. §906.15 under Chapter 950 of the Wisconsin Statutes, "Rights of Victims and Witnesses of Crime," victims and witnesses of crimes have specifically defined rights and services to which they are entitled and which are to be provided by the district attorney and courts among others. Wis. Stat. § 950.07. One of those rights is to attend court proceedings in the case. Wis. Stat. §950.04(b). Chapter 950 also allows a district attorney to assert a victim's statutory or constitutional crime victim's rights in a criminal case or proceeding under the section. Wis. Stat. §950.105. The legislative intent is instructive as to the aim of Chapter 950 and states: "the legislature declares its

intent, in this chapter, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants." Wis. Stat. §950.01.

Neither Simmons nor the circuit court cited to a single case, from any court, which held that a witness sitting through a trial, and then testifying, violated a defendant's federal constitutional right to due process. The sole proffered basis for excluding the victims in this case was the fact they were defense attorneys who were aware of how the court system works. (R27:14-15). The circuit court did not adopt that argument but instead found exclusion necessary due to the defense "theory of the case." There was never even an allegation, much less evidence proffered, that either of the attorney victims had ever attempted to discuss or conform their testimony, signal each other, or any other witness, in court, had a history of witness tampering, or any other pertinent fact which would justify exclusion here.

Again, the only proffered justification for exclusion was the *occupation of the victims*, and the circuit court cited only the "theory of the case" to justify excluding victims despite the clear policy disfavoring such a remedy. The trial court finding was as vague as Simmons' argument was bizarre.

Lastly, it is not just the constitution and statutes which recognize the important role victims now play in court proceedings – the highest court of our state does as well. In the Wisconsin Supreme Court decision after the 2020 Amendment, *Gabler v. Crime Victims Rts. Bd*., the Court wrote,

> We close by reaffirming this court's commitment to upholding the crime victims' rights enshrined in our statutes and constitution. No less than we did a decade ago, "we believe that justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims. . . . Our decision today does not signal a departure from our consistent protection of victims' rights.

Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶ 58, 376 Wis. 2d 147, 188–89, 897 N.W.2d 384, 404

Excluding the victims from the trial, whether based solely on their profession as "officers of the court," or due to a vague and completely undeveloped concern about the "theory of the case," violated the Wisconsin Constitution, statutes, and the proscribed policy of the state by Wisconsin's highest court.

III. The trial court did not have competency to issue the order prohibiting victims from attending the trial

Even if this court finds that Potter had other recourses to appeal the trial court's exclusion order than to act in contempt, this court should still strike down the contempt order as the underlying order was void.

The citizens of Wisconsin and its elected representatives have agreed that the rights of victims should be as equally protected as the rights provided to criminal defendants. The legislature is also responsible for conferring a circuit court's lesser powers, otherwise characterized as a court's "competency." *State v. Minniecheske*, 223 Wis. 2d 493, 497–98, 590 N.W.2d 17, 19 (Ct. App. 1998). Here, the legislature has expressly removed the power of the court to exclude victims without specific findings as to why such exclusion is necessary to protect a defendant's federal constitutional rights. The trial court therefore lacked the competency to issue the exclusion order.

A void judicial order or judgment "is not binding on anyone." *State v. Campbell,* 2006 WI 99 ¶ 42, 294 Wis.2d 100, 121, 718 N.W.2d 649. As a general rule, a judgment or order is valid—i.e., not void—when the following elements are present: (1) the court has subject matter jurisdiction; (2) the court has personal jurisdiction; (3) adequate notice has been afforded the affected persons. *Id*., at ¶ 43. Because the legislature has removed the power of courts to outright exclude victims without specified findings, the trial court's order was void as it failed to identify sufficient specific reasons.

The collateral bar rule and its application to the case here is best stated by *Ex Parte Fisk:*

> This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments, and orders necessary to the due administration of law, and the protection of the rights of suitors. When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.

Ex parte Fisk, 113 U.S. 713, 714, 5 S. Ct. 724, 726, 28 L. Ed. 1117 (1885)

Because the trial court issued an order it could not lawfully make after the 2020 Amendment to the Wisconsin Constitution and under the Wisconsin statutes, the order was void. Potter's act in contempt of that order was therefore permitted per the case law and the order of contempt should not stand.

CONCLUSION

The order of contempt against Potter should be reversed as the underlying order was erroneous and Potter had no other meaningful opportunity for review of it than to act in contempt.

Dated this 25th day of January, 2023.

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), (bm), and (c) for a brief produced with a proportional serif font. The word count of this brief is 6244.

Dated this 25th Day of January, 2023

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th Day of January, 2023

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