STATE OF WISCONSIN

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

DISTRICT I

Case No. 2022AP1396-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.

ON APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE KORI ASHLEY, PRESIDING

RESPONDENT'S BRIEF

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INTRODUCTION

This case involves a contempt order entered against Thomas Potter, an assistant district attorney, who intentionally undermined a witness-sequestration order in a misdemeanor jury trial. The circuit court had ordered that two witnesses, victims TH and GD, would be sequestered from the courtroom prior to testifying. Potter e-mailed TH and invited him to be present in the courtroom for proceedings prior to his testimony and then informed the court of the e-mail. The court promptly found Potter in contempt, fined him $500, and stayed the order pending appeal.

Potter cannot collaterally attack the sequestration order by filing an appeal of the contempt order. No exception to the rule against collateral attacks on prior orders applies here. If the State wanted review of the sequestration order, it could have filed a supervisory-writ petition or a petition for leave to appeal a non-final order and sought a stay of proceedings or a continuance in the circuit court. The State did none of these things. TH or GD also might have sought review of the order through a supervisory-writ petition.

This Court should not reach the merits of the sequestration order because it was not challenged through the correct procedure. If the Court reaches the merits, the sequestration order was proper. The circuit court adequately explained its reasoning for sequestering the witnesses prior to their testifying, and this Court's review of that decision is deferential. Potter advances an untenable position that a victim has a nearly absolute right to attend trial proceedings.

Lastly, Potter does not dispute that he defied the sequestration order, and the record reflects that he openly undermined the order based upon a mistaken belief that being held in contempt would preserve an appeal. The circuit court properly found Potter in contempt and fined him.

This Court should affirm the contempt order.

ISSUES PRESENTED

1. Can Potter collaterally attack the sequestration order by appealing the contempt order?

The circuit court did not address this issue.

This Court should answer no.

2. Did the circuit court properly find Potter in contempt and fine him $500?

The circuit court found Potter in contempt after he openly defied the sequestration order by e-mailing a sequestered witness and invited him to be present in court prior to testifying.

This correct answer is yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested or necessary. Publication is unavailable in a one-judge appeal. Wis. Stat. § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

I. Factual background

Arielle Simmons was charged with misdemeanor battery and disorderly conduct. (R. 14 (amended criminal complaint).) She was alleged to have struck TH in the face multiple times and spilled coffee on GD. (R. 15:1–2.) TH and GD are criminal defense attorneys, and the incidents occurred in the Milwaukee County Safety Building. (R. 15:1–2, 27:14.)

II. Procedural history

In March 2022, Simmons's case was set for trial. (R. 18:6; 33:4.) She filed a motion in limine for an order requiring that "the complaining witness be excluded from the

courtroom, along with all other witnesses, when not testifying." (R. 12:4.) She argued that sequestration was necessary "to provide Ms. Simmons with a fair trial" because "[a]llowing the witnesses to remain in court during voir dire, opening statements, and the testimony of investigating officers would allow them to 'shape [their] testimony' based on what they heard presented" in the proceedings. (R. 12:4 (citation omitted).)

The State opposed the motion and argued that it should be denied because it is "blatantly inconsistent with Marsy's Law" and that "victims can no more be physically excluded from their trial than can defendants." (R. 14:1.)

On May 31, 2022, Simmons's case was set for jury selection and trial. (R. 33:5.) That morning, the State filed a document titled "State's Defense of Victim's Statutory and Constitutional Right to Attend Entire Trial." (R. 19.) The State reiterated its position that the victims could not be excluded from trial proceedings and argued that "*physical* sequestration, can be a useful tool to keep other witnesses from conforming their testimony, but just as it was never available to exclude defendants it is no longer available to exclude victims." (R. 19:2.)

On the morning of May 31, the circuit court heard the parties' arguments regarding witness sequestration. (R. 27:9–20.) The court first explained that, if it was able to make a "specific finding under the statute that [the victims'] presence would violate, in this case, Miss Simmons' due process, then I would sequester that witness." (R. 27:13.) The court did not "believe that violates Marsy's Law, because Marsy's Law specifically does not, provides that it does not supersede a defendant's federal rights." (R. 27:13.)

Simmons's counsel explained that "[t]here's an issue of the attack being provoked and that is exactly why we'll have a trial in front of jurors about that issue." (R. 27:10.) Counsel

argued that TH and GD should be sequestered from the courtroom until their testimony because they are "professionals in this court system" who "are very aware with how trials proceed." (R. 27:14.) They "are 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, and in order to go against defense's theory of the case. They're both defense attorneys. They have both tried cases." (R. 27:14.) Counsel argued that TH and GD "know defense theories, they know strategies, and having that highly particularized knowledge . . . due to the fact that they actually studied law and do this for a living." (R. 27:15.) Counsel disputed that the authority the State relied upon required the court to deny the motion in limine. (R. 27:15–17.)

The State, represented by Potter, argued that Simmons was "making this extraordinary request, which goes against the clear black letter language of, not only Wisconsin statutes, but the newly revised Wisconsin constitution, without a shred of authority." (R. 27:17.) The State argued that the circuit court "no longer has th[e] authority" to exclude victims from trial proceedings, and then acknowledged that exclusion of a victim might be appropriate "[i]f a witness was tampering or signaling witnesses." (R. 27:18, 19.)

After a break (R. 27:20), the circuit court returned in the afternoon to rule on witness sequestration. (R. 27:20–21, 26–28.) The court granted Simmons's motion and ordered that "[t]he alleged victims may not be present for opening statements and until after they testify." (R. 27:28.) The court explained that its "reading of Marsy's Law" was not that a victim's "right to be present during proceedings is absolute." (R. 27:26.) "Marsy's Law reflects [Wis. Const. art. I] section 9m's earlier recognition that victim's constitutional rights are not intended and may not be interpreted to supersede a defendant's federal constitutional rights, namely the right to a fair trial." (R. 27:26–27.) "Moreover, Wisconsin statute

906.15(2d) explicitly allows a court to exclude alleged victims if an appropriate showing is made." (R. 27:27.)

The court found that "under 906.15(2d) that the defense theory of the case necessitates the finding and sequestration of, I will say, the alleged victims, as outlined, this theory of alleged provocation." (R. 27:27.) "The purpose of sequestration is to assure a fair trial, specifically to prevent a witness from shaping his or her testimony based on the testimony of other witnesses." (R. 27:27.) The court cited *State v. Payette*, 2008 WI App 106, 313 Wis. 2d 39, 756 N.W.2d 423, and explained that the court had "the inherent authority to further the truth seeking objective of examining witnesses by ensuring that witnesses aren't aware of testimony already provided in the testimony when . . . they testify in the present case." (R. 27:28.)

The motion hearing ended at 1:34 p.m. (R. 27:29.) After a break, jury selection followed and concluded at 4:55 p.m., and the court ordered the jurors to return at 1:15 p.m. on June 1. (R. 33:5.)

On June 1, proceedings began at 1:29 p.m. with Potter recounting a conversation counsel just had with the court in chambers. (R. 30:2.) Potter explained that he had told the court that "just a couple minutes ago, I sent an e-mail to the primary victim in this case, [TH], that reads as follows:"

> [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.

(R. 30:2–3.) Potter stated: "Judge, I realize that by sending this e-mail I have put myself in defiance of the Court's order,

and I did that with the understanding that the Court would appropriately find me to be in contempt of that order." (R. 30:3.) He went on: "If the Court would make that finding, my office will draft an order for you to sign to that effect, not because the State is in anyway challenging the Court's authority, but simply to preserve this appeal." (R. 30:3.)

The court then found Potter in contempt, fined him $500, and explained that the e-mail was "in flagrant violation of the order that the Court entered yesterday regarding exclusion of the alleged victim in this case." (R. 30:3, 4.) At Potter's request, the court stayed its order pending appeal. (R. 30:4.)

The case proceeded to a jury trial, TH and GD testified (R. 30:72–110; 31:20–32), and Simmons was found guilty of disorderly conduct and not guilty of battery (R. 25:1–2). The court ordered judgment entered consistent with the verdicts. (R. 33:7.)

On July 20, 2022, the court entered a written order finding Potter in contempt pursuant to Wis. Stat. § 785.03(2) "[f]or the reasons stated on the record at the hearing on June 1, 2022," and imposed a fine of $500, which was stayed pending appeal. (R. 29.) Potter appealed the contempt order. (R. 32.)

STANDARDS OF REVIEW

Collateral attack on the sequestration order. Whether Potter may collaterally attack the sequestration order by filing an appeal of the contempt order is reviewed independently. *See State v. Campbell*, 2006 WI 99, ¶ 27, 294 Wis. 2d 100, 718 N.W.2d 649.

Contempt order. Because "[t]he question of whether or not an act . . . is a contempt of court is one which the circuit court has far better opportunity to determine than the reviewing court," a circuit "court's finding that a person has

committed a contempt of court will not be reversed by a reviewing court unless the finding is clearly erroneous." *Matter of Finding of Contempt in State v. Kruse*, 194 Wis. 2d 418, 427–28, 533 N.W.2d 819 (1995). *See also Currie v. Schwalbach*, 139 Wis. 2d 544, 551–52, 407 N.W.2d 862 (1987) ("A trial court's finding that a person has committed a contempt of court will not be reversed by a reviewing court unless contrary to the great weight and clear preponderance of the evidence.").

ARGUMENT

I. Potter cannot collaterally challenge the merits of the sequestration order by appealing the contempt order.

Potter is impermissibly trying to collaterally attack the circuit court's sequestration order. The only order on review in this appeal is the contempt order. This Court should not reach the merits of the sequestration order.

A. Collateral attacks on prior judicial orders are disfavored, and the exceptions are narrow.

"A collateral attack is '[a]n attack on a judgment in a proceeding other than a direct appeal.'" *State v. Herschberger*, 2014 WI App 86, ¶ 8, 356 Wis. 2d 220, 853 N.W.2d 586 (quoting Black's Law Dictionary 318 (10th ed. 2014)). "[C]ollateral attacks on prior judicial orders or judgments are generally prohibited, unless the prior orders or judgments were 'procured by fraud.'" *Id.* ¶ 9 (citation omitted). They may also be allowed "where the prior judicial orders or judgments are void." *Id.* ¶ 10. "A judicial order or judgment is void '[w]hen a court or other judicial body acts in excess of its jurisdiction.'" *Id.* (alteration in original) (citation omitted). "However, an 'order or judgment however erroneous . . . is not

subject to collateral attack merely because it is erroneous, nor is it void for that reason.'" *Id.* (citation omitted).

"While a void judicial order or judgment 'is not binding on anyone,' an allegedly erroneously order or judgment 'has the same force and effect as a valid judgment.'" *Id.* ¶ 11 (citation omitted). "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 failing to abide by its terms." *Id.* (alteration in original) (citation 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.* (alteration in original) (citation omitted).

An exception to the general rule against collateral attacks on prior judicial orders has been recognized "where there was no meaningful opportunity for review of the order or judgment." *Id.* ¶ 12.

B. The State or the sequestered witnesses could have sought review of the sequestration order.

The general rule prohibiting collateral attacks on prior judicial orders applies because the State—and the sequestered witnesses—had a meaningful opportunity to seek review of the sequestration order prior to trial. Potter incorrectly argues that seeking review "*during the course of a trial* would be beyond impractical, bordering on impossible," so he "had to act in contempt as it was clear that the case would be proceeding immediately to a jury trial." (Potter Br. 8.) The opportunity to seek review existed *before* trial started.

The timing of the court's sequestration order in relation to the start of the jury trial is key. Importantly, "jeopardy" "attaches when the selection of the jury has been completed *and the jury is sworn*." *State v. Moeck*, 2005 WI 57, ¶ 34, 280

Wis. 2d 277, 695 N.W.2d 783 (emphasis added). Here, the jury was not sworn until the afternoon of June 1, 2022. (R. 30:2, 11 (June 1 transcript, with proceedings commencing at 1:29 p.m. and "(JURY SWORN)" thereafter); 33:6 (jury was "duly impaneled and sworn" on June 1)). The court's sequestration order was pronounced near the end of a motion hearing on May 31 that concluded at 1:34 p.m. (R. 27:26–28, 29.) Jury selection occurred shortly thereafter and concluded at 4:55 p.m. (R. 33:5.) The jury was dismissed and ordered to return at 1:15 p.m. on June 1. (R. 33:5.)

Given this sequence of events, there was a window of opportunity for seeking review of the sequestration order: the morning of June 1, 2022, before the jury was sworn. While the window was narrow, it was not "*during the course of a trial*" and did not "border[] on impossible." (Potter Br. 8.) There were several options for meaningful review.

First, the State could have filed a petition for a supervisory writ to challenge the sequestration order. Wis. Stat. § (Rule) 809.51(1). It did not.

Second, TH or GD could have sought review of the sequestration order if they thought it violated their rights as victims. "Victims may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under [Wis. Const. art. I, § 9m(4)(a)] by filing petitions for supervisory writ in the court of appeals and supreme court." Wis. Const. art. I, § 9m(4)(b). They did not.

Third, the State could have pursued an interlocutory appeal. It could have requested a transcript of the May 31 oral ruling and that the court formalize the ruling in a written order, and then, on the morning of June 1, filed a petition for leave to appeal a non-final order and a motion to stay the trial proceedings. Wis. Stat. §§ (Rules) 809.50(1), 809.52. With those filings made, the State could have moved the circuit

court on June 1 for a continuance of the trial. While an interlocutory appeal might not have been granted, the rule against collateral attacks on prior judicial orders does not require it. Only a "meaningful opportunity for review of the order" is necessary, and such review was available. *Herschberger*, 356 Wis. 2d 220, ¶ 12.

Potter concedes that "[a]ny opportunity for appellate review of victim exclusion expired upon completion of the trial"—the issue is moot. (Potter Br. 9.) Respondent agrees; the validity of the sequestration order is moot because the trial already happened, and Simmons was found guilty of disorderly conduct and not guilty of battery. (R. 25:1–2.)

To address mootness, Potter does not argue any specific exception. (*See* Potter Br. 9–10.) Instead, he argues that this case is like *Maness v. Meyers*, 419 U.S. 449 (1975). (Potter Br. 7–8, 9–10.)

Maness involved the Fifth Amendment privilege against self-incrimination. 419 U.S. at 450, 468. A trial court held an attorney in contempt for advising his client that he could refuse, on Fifth Amendment grounds, to produce allegedly obscene magazines which had been subpoenaed for the purpose of enjoining their distribution. *Id.* at 450–55. The Supreme Court began "with the basic proposition that all orders and judgments of courts must be complied with promptly." *Id.* at 458. "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.* If the order was made during trial proceedings, counsel may object, but "once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders." *Id.* at 459.

An order requiring a witness to disclose information presents "a different situation." *Id.* at 460. "Compliance could cause irreparable injury because appellate courts cannot

always 'unring the bell' once the information has been released." *Id.* "In those situations . . . the person to whom such an order is directed has an alternative," namely, "'compliance with the trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.'" *Id.* (citation omitted). The Supreme Court held that "an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony." *Id.* at 468. "To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation." *Id.*

Maness is distinguishable. It involved the Fifth Amendment privilege against self-incrimination and, specifically, the compelled disclosure of information. There was no compelled disclosure of information when TH and GD were sequestered. (*See* Potter Br. 9–10.) Sequestration *limited* their access to information adduced at trial.

Of course, this appeal is just as moot in terms of allowing the victims to attend the trial as an appeal from the merits of the sequestration order itself. A decision in this appeal cannot provide the victims access to court proceedings that already happened; at most, it could offer an advisory opinion on the circuit court's ruling. Potter does not explain why this Court should encourage collateral attacks and disobedience of court orders rather than, for example, requiring either the State or the victim to argue that an exception to mootness allows for an appeal.

In sum, because there is no applicable exception to the rule prohibiting collateral attacks on prior judicial orders, this Court should hold that Potter cannot challenge the sequestration order by appealing the contempt order.

II. This Court should not reach the merits of the sequestration order but, if it does, the order was proper.

This Court should not reach the merits of the sequestration order because Potter appealed only the contempt order. (R. 32 (notice of appeal of the July 20, 2022, contempt order)); *see County of Dane v. PSC*, 2022 WI 61, ¶¶ 88–90, 403 Wis. 2d 306, 976 N.W.2d 790 (Hagedorn, J., concurring) (explaining that an appellate court should review the specific order appealed and not another order).

If this Court reaches the merits of the sequestration order, it is reviewed for an erroneous exercise of discretion and review is "deferential." *State v. Evans*, 2000 WI App 178, ¶ 7, 238 Wis. 2d 411, 617 N.W.2d 220. This Court does "no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based upon proper legal standards and a logical interpretation of the facts." *Id.* That standard was met here.

Witness exclusion is governed by statute, as the circuit court recognized. (R. 27:26–28.) At the request of a party, a judge "shall," or on her own motion "may," "order witnesses excluded so that they cannot hear the testimony of other witnesses." Wis. Stat. § 906.15(1). "The purpose of sequestration is to assure a fair trial—specifically, to prevent a witness from 'shaping his [or her] testimony' based on the testimony of other witnesses." *Evans*, 238 Wis. 2d 411, ¶ 6 (alteration in original) (citation omitted).

The statute does not permit the exclusion of "[a] victim, as defined in s. 950.02(4) . . . unless the judge . . . finds that exclusion of the victim is necessary to provide a fair trial for the defendant." Wis. Stat. § 906.15(2)(d). "The presence of a victim during the testimony of other witnesses may not by itself be a basis for finding that exclusion of the victim is necessary to provide a fair trial for the defendant." *Id.*

The circuit court properly exercised its discretion under Wis. Stat. § 906.15(2)(d) in sequestering TH and GD. The court explained that section "906.15(2d) explicitly allows a court to exclude alleged victims if an appropriate showing is made." (R. 27:27.) The court found that "the defense theory of the case necessitates the finding and sequestration of, I will say, the alleged victims, as outlined, this theory of alleged provocation." (R. 27:27.) "The purpose of sequestration is to assure a fair trial, specifically to prevent a witness from shaping his or her testimony based on the testimony of other witnesses." (R. 27:27.) The court explained that it had "the inherent authority to further the truth seeking objective of examining witnesses by ensuring that witnesses aren't aware of testimony already provided in the testimony when . . . they testify in the present case." (R. 27:28.)

Potter's position regarding a victim's right to be present at trial proceedings goes too far and approaches a categorical rule. (*See* Potter Br. 11–18.) The Wisconsin Constitution and statutes require consideration of a victim's and defendant's rights, and the sequestration order correctly applied the law. At the very least, the circuit court did not erroneously exercise its discretion in making its decision.

Article I, section 9m(3) of the Wisconsin Constitution states that crime "victims shall be entitled to all of the following rights," including, "[u]pon request, to attend all proceedings involving the case." But, as the circuit court correctly explained, the victim's right to be present at trial proceedings is not "absolute." (R. 27:26.) Even after Marsy's Law, this concept is in the Wisconsin Constitution's victims of crime section: "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights." Wis. Const. art. I, § 9m(6).

"The Constitution guarantees a fair trial through the Due Process Clauses." *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). Thus, as the circuit court accurately

stated, "Marsy's Law reflects [Wis. Const. art. I] section 9m's earlier recognition that victim's constitutional rights are not intended and may not be interpreted to supersede a defendant's federal constitutional rights, namely the right to a fair trial." (R. 27:26–27); *see Evans*, 238 Wis. 2d 411, ¶ 6 ("[t]he purpose of sequestration is to assure a fair trial").

Likewise, the Wisconsin statutes create no categorical rule about a victim's right to attend trial proceedings. Wisconsin Stat. § 950.04(1v)(b) gives victims the right "[t]o attend court proceedings in the case, subject to [§] 906.15." Thus, a victim's right to attend proceedings is impacted by a defendant's right to a fair trial. Wisconsin Stat. § 906. 15(2) prohibits the exclusion of "[a] victim, as defined in s. 950.02(4), in a criminal case . . . unless the judge . . . finds that exclusion of the victim *is necessary to provide a fair trial for the defendant*." Wis. Stat. § 906.15(2)(d). Here, the circuit court made that finding and adequately explained its reasoning, as argued above. (R. 27:26–28.)

To the extent this Court addresses the merits of the sequestration order, entering it was not error because the court reached a reasonable conclusion, under proper legal standards, considering a logical view of the facts. *See Evans*, 238 Wis. 2d 411, ¶ 7.

III. The circuit court properly found that Potter was in contempt of court and fined him.

The circuit court properly found Potter in contempt and fined him, and this Court should affirm the contempt order.

Chapter 785 governs contempt of court. "Contempt of court" is "intentional" "[m]isconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court" and also includes "[d]isobediance, resistance or obstruction of the authority, process or order of a court." Wis. Stat. § 785.01(1)(a), (b).

A "punitive sanction" is "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." Wis. Stat. § 785.01(2). A court may impose a punitive sanction for contempt. Wis. Stat. § 785.02. Under the "summary procedure," the court "may impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court." Wis. Stat. § 785.03(2). "The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court." Wis. Stat. § 785.03(2).

"A court, after finding a contempt of court in a summary procedure under s. 785.03(2), may impose for each separate contempt of court a fine of not more than $500 or imprisonment in the court jail for not more than 30 days or both." Wis. Stat. § 785.04(2)(b).

A. Potter does not argue that the circuit court used an improper contempt procedure.

Potter does not argue that the circuit court followed the wrong procedure in finding him in contempt, nor could he. He waived any such argument by his actions procuring the contempt order below. *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 ("waiver is the intentional relinquishment . . . of a known right" (citation omitted)).

Potter conceded that by e-mailing TH and inviting him to violate the sequestration order he "put [himself] in defiance of the Court's order, and I did that with the understanding that the Court would appropriately find me to be in contempt of that order." (R. 30:3.) He even requested that he be found in contempt: "If the Court would make that finding, my office will draft an order for you to sign to that effect, not because the State is in anyway challenging the Court's authority, but simply to preserve this appeal." (R. 30:3.) Potter waived any argument that there was an improper contempt procedure.

B. The circuit court was competent to enter the sequestration order, so Potter's intentionally defying it was contemptuous.

Lastly, Potter argues that if he "had other recourses to appeal the trial court's exclusion order than act in contempt, this court should still strike down the contempt order as the underlying order was void." (Potter Br. 18.) Because the sequestration order was "void," his "act in contempt of that order was therefore permitted" and the "order of contempt should not stand." (*Id.* 19.)

Potter is wrong, as the court did not erroneously exercise its discretion to sequester witnesses. He incorrectly argues that "the legislature has removed the power of courts to outright exclude victims without specified findings," so "the trial court's order was void as it failed to identify sufficient specific reasons" for exclusion. (*Id.* 18.) As argued above, the sequestration order complied with Wis. Stat. § 906.15(2)(d). Further, Marsy's Law recognizes that a victim can be excluded to ensure that a defendant receives a fair trial. *See* Wis. Const. art. I, § 9m(6).

Potter argues that *Ex parte Fisk*, 113 U.S. 713 (1885), "best state[s]" why the "collateral bar rule" makes the sequestration order void. (Potter Br. 18.) In *Fisk,* a federal court ordered the defendant in a civil suit to submit to a deposition, and the Supreme Court determined that a federal statute prohibited the court from ordering the deposition. 113 U.S. at 726. This is nothing like this case.

Fisk is distinguishable, and Potter's argument is circular. He presumes that the sequestration order was void so, therefore, the contempt order was void. (Potter Br. 19 (quoting *Fisk*, 113 U.S. at 714 (when a court "punish[es] a man for refusing to comply with an order which that court had no authority to make" both the "order itself" and the contempt are "void")).) As argued, the order was proper and not void.

CONCLUSION

This Court should affirm the contempt order.

Dated this 23rd day of February 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4924 words.

Dated this 23rd day of February 2023.

CERTIFICATE OF E-FILE/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 Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of February 2023.

Electronically signed by:

Clayton P. Kawski
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