STATE OF WISCONSIN

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

DISTRICT I

Appeal Case No. 2022AP001396-CR

IN THE MATTER OF THE FINDING OF CONTEMPT IN STATE vs. 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

REPLY BRIEF OF APPELLANT

John Chisholm
District Attorney
Milwaukee County

Julie Knyszek
Assistant District Attorney
State Bar No. 1118911
Attorneys for Appellant
Julie.Knyszek@da.wi.gov

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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ARGUMENT

I. Respondent's position that there were other, better means to obtain meaningful review of the trial court's order ignores the history and context in which the issue arose; Potter's defiance of the exclusion order provided the only realistic opportunity for review here.

Respondent concedes that "[A]n 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.'" (Respondent Br. 12.)

Respondent asserts that "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." (Respondent Br. 12.) All of **31 minutes** elapsed from when the

trial court started to issue its exclusion order to the jury panel walking into the courtroom and voir dire starting at 2:01 p.m. Not much time to prepare and file a supervisory writ or permissive appeal. (R33:5).

The *mid-trial* "window of opportunity" alleged by Respondent runs from 4:55 pm, when the court finished jury selection, until 1:15 pm the next day. During that several hour "window," Potter was to prepare and file paperwork that would have caused this Court to order that the *already-in-progress* misdemeanor jury trial be halted, so that a supervisory writ or permissive appeal could be pursued? That scenario sounds more like legal fiction than what actually occurs in criminal courts. Likewise, the notion that the trial has not really begun when the jury panel enters the courtroom (Respondent Br. 13) will amuse trial lawyers everywhere.

Analyzing when a trial actually "begins" in the context of waiver of defendant's right to be present at trial, the Wisconsin Supreme Court (concurrence) discussed the federal rule and a number of other jurisdictions which recognize that trials really do begin when a jury panel enters the courtroom. State v. Washington, 2018 WI 3, ¶¶ 61-68, 379 Wis. 2d 58, 81–85, 905 N.W.2d 380, 391–93.

Respondent also argues that Potter should have sought adjournment of the trial to pursue immediate appellate review, but this argument ignores both the trial court's history in excluding victims and the context in which this fast-moving situation developed. Notwithstanding the 20-year-old statute and the recent Marsy's Law Amendment to the state Constitution, the trial court had a well-established practice of excluding victims from trial until after they had testified whenever it was "able to make a specific finding." (R27:13) That very practice is **why** the State had (1) briefed the issue and (2) requested that the ruling on victim exclusion be made first. In its brief for the trial court, the State had asserted as follows:

> "Undersigned, who is duty bound to defend this victim right like any other, will argue this motion to the Court, and will request a ruling by the Court regardless of whether this case proceeds to trial today." (R19:2)

On the first day of trial, Potter asked the trial court to address the issue of the victim's right to attend the trial before

the case was selected for trial, so the State would not be left without remedy for an adverse ruling. (R27:6) The trial court not only declined that request, but waited to order the victims excluded until calling for a jury panel (R27:26-28). Clearly the trial court was not open to delaying the trial so the issue of victim exclusion could be further litigated; it was abundantly clear that the trial was moving forward. Verdicts in the case, regardless of what those verdicts were, would moot the exclusion issue.

Faced with this systemic violation of a clearly defined victim right and bound by his general Attorney's Oath, his special duty as a "sworn minister of justice" *O'Neil v. State*, 189 Wis. 259, 262 (1926), and his statutory[1] duty to defend that right as a prosecutor, Potter preserved appellate review of yet another exclusion order by the only means he knew to be available. His action in open defiance of that order was done in furtherance of both his oath and duties of employment (SCR 40.15). It was narrowly tailored to protect and vindicate future victims' right to attend their trials.

Respondent asserts that even if the exclusion order was clearly erroneous it cannot be collaterally attacked (Respondent Br. 11), but Wisconsin law does not, in fact, impose a complete bar on collateral attacks on orders believed to be erroneous. There is at least one exception to the general rule when there is no meaningful opportunity for review of the order or judgment. As stated in *Campbell*, "Campbell had to abide by the terms of the custody order until he succeeded in reversing it through the applicable review process." *State v. Campbell*, 2006 WI 99, ¶ 49, 294 Wis. 2d 100, 124, 718 N.W.2d 649, 661. In *State v. Hershberger* several situations where an exception to the collateral bar rule were described: the order or judgment was procured by fraud, the order or judgment was void because the court acted without jurisdiction, or there was no meaningful opportunity for review of the order or judgment. *State v.* Hershberger, 2014 WI App 86, ¶ 13, 356 Wis. 2d 220, 229–30, 853 N.W.2d 586, 590–91.

Further, these exceptions to the collateral bar rule are not novel ideas. Early on in Wisconsin jurisprudence the Wisconsin Supreme Court described the careful balance that must be exercised when a court utilizes its contempt power:

[1] §950.01 Wis. Stats. "…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."

> The power of courts of superior jurisdiction created by the constitution to punish such acts is necessarily inherent in such a court, and arises by implication from the very act of creating the court. A court without this power would be at best a mere debating society, and not a court. … It is, and must be, a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded, so that they be not overstepped. It is important that it exist in full vigor, it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence.

State ex rel. Atty. Gen. v. Cir. Ct. of Eau Claire Cnty., 97 Wis. 1, 72 N.W. 193, 194–95 (1897). The State is asking this Court to strike down the Order of Contempt against Potter as there was no other opportunity for Potter to seek review of the exclusion order. As early as 1897, the power of contempt was discussed as necessary, but to be measured and limited. While collateral attacks of a court order are limited, Potter's actions fall directly within one exception - he had no other opportunity to seek review of an issue he believed to be a violation of the Wisconsin Constitution, Statutes, and his Attorney's Oath before it became moot.

Respondent does not want this Court to "reach the merits" of the trial court's exclusion of victims and repeatedly implores that this Court "should not reach the merits." (Respondent Br. at 5, 11, and 16.) That position is hardly surprising, given the complete absence of anything in the record to support the exclusion order.

II. Respondent offers no real defense of the exclusion of the victims in this case, which is understandable given the complete dearth of facts, authority, and reasoning in the record below to support such exclusion.

Surprisingly, Respondent actually highlights the bizarre justification for excluding these victims from the trial:

> . . . 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.)

(Respondent Br. at 8.)

Neither defense counsel who argued for exclusion, nor the trial court that ordered it, ever addressed the logic of this creative but problematic argument: that something about defense attorneys make them more likely to ignore their oath and tailor their testimony to "go against defense's theory." That would be perjury, and of course a defense attorney, just like any other witness, could be impeached with his prior inconsistent statements if he actually did that. Would not this "grounds-to-exclude" extend to all lawyers, judges, law enforcement officers and legislators? They also have familiarity with legal defenses.

Neither Simmons nor the trial court, nor Respondent has 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 (completely) adopt that argument but instead found exclusion necessary due to the defense's "theory of the case." There was never even an allegation, much less evidence proffered, that either of the excluded victims had ever attempted to discuss or tailor their testimony, had a history of witness tampering, or done anything else which could justify exclusion here. Potter's response cited the historical exclusion of victims from criminal trials and the legislative change in that policy that occurred 20 years earlier. (R27:18). Potter argued a court could still order a victim not to discuss his testimony, but that physical sequestration (exclusion) from the courtroom now required a finding specific to that victim as to why it was necessary, such as a history of tampering with or signaling other witnesses in court. (R27:19).

The trial court proceeded to find that the "theory of the case" necessitated excluding both victims – but never explained exactly how or why that was the case. (R27:27) The manner in

which this was done was no less conclusory than citing "might conform testimony" as the reason. The court cited only one specific authority, *State v. Payette*, 2008 WI App 106, 313 Wis.2d, 756 N.W.2d 423, in support exclusion. (R27:28). Ironically, *Payette,* had absolutely nothing to do with excluding victims (or anyone else) from a trial, but instead discussed the right of a trial court to *protect victim rights* by ordering 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.

Wisconsin's Constitution was amended in April 2020 to add specific protections for Victims of Crime. Wis. Const. art. 1, §9m. One of these rights is, "Upon request, **to attend all proceedings involving the case**." Wis. Const. art. 1, §9m(3). [Emphasis added.] The 2019 Joint Resolution submitted to the voters and ultimately approved *removed the section* which read, "unless the trial court finds sequestration is necessary to a fair trial for the defendant." 1999 J.R. 003. The Legislature's unmistakable intent was to stop the routine exclusion of victims based on general concerns about tailoring testimony.

This is how the change appears in the 2019 Joint Resolution:

SECTION 1. Section 9m of article I of the constitution is renumbered section 9m. (2) (intro.) of article I and amended to read:

[Article I] Section 9m (2) (intro.) ~~This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law:~~ 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~~; the opportunity to attend court~~, free from unreasonable delay.

(e) Upon request, to attend all proceedings ~~unless the trial court finds sequestration is necessary to a fair trial for the defendant;~~ involving the case.

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 10th day of March, 2023.

Respectfully submitted,
JOHN CHISHOLM
District Attorney Milwaukee County

Electronically signed by:

Julie Knyszek
Assistant District Attorney State Bar No. 1118911 Attorneys for Appellant Julie.Knyszek@da.wi.gov

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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 2370.

Dated this 10th day of March, 2023

Electronically signed by:

Julie Knyszek
Julie Knyszek
Assistant District Attorney

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 10th day of March, 2023

Electronically signed by:

Julie Knyszek
Julie Knyszek
Assistant District Attorney