STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

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.

On Appeal from a Final Order
of the Milwaukee County Circuit Court,
the Honorable Kori Ashley, Presiding

AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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ARGUMENT

The prosecutor cannot obtain collateral review of the court's sequestration order by defying the order and then appealing the accompanying contempt order.

The State Public Defender agrees with the arguments made in the respondent's brief, and thus, will avoid repetition. However, this brief will address the practical implications and slippery slope that would be created if attorneys – and others – were permitted to ignore court orders.

At some point in every attorney's career, they will be faced with a judicial decision with which they disagree. Often, the attorney will passionately disagree. This is an inevitable consequence of an adversarial system. Attorneys empathize with their clients – or here, the victim – when they feel constitutional or statutory rights are being abridged. As defense counsel in criminal, juvenile, termination of parental rights, or commitment cases, this is a common scenario. The repercussions for our clients can involve wrongful loss of liberty (whether confinement or commitment), loss of the right to parent, forcibly being medicated, and significant collateral consequences like losing jobs, housing, family, and stability in one's life. In short, the consequences can be dire. Despite this reality, attorneys cannot ignore – or tell others to ignore – court orders simply because they passionately

disagree. There are procedures for review. Those procedures are not perfect, but the alternative proposed here – to defy court orders – is untenable.

A. Trial judges are tasked with making decisions based upon competing interests every day in our adversarial legal system.

The parties agree on the fundamental principle that the orderly administration of justice requires parties to obey court orders "until it is reversed by orderly and proper proceedings." *Mannes v. Meyers*, 419 U.S. 448, 459 (1975). Attorneys are permitted to object and make their arguments 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. "[A]n allegedly erroneous order or judgment has the same force and effect as a valid judgment." *State v. Hershberger*, 2014 WI App 86, ¶11, 356 Wis. 2d 220, 853 N.W.2d 586 (internal quotation omitted). This is how our adversarial system works. Attorneys make their arguments and the court decides. The court's decision stands until, and unless, it is later reversed. Chaos would ensue if individuals – attorneys or not – were permitted to ignore the court orders for which they disagree.

That is why there are very limited exceptions to the general prohibition against collateral attacks on prior judicial orders. *Hershberger*, 356 Wis. 2d 220, ¶13. Those limitations include: (1) where the order or judgment was procured by fraud, (2) the order or judgment was void because the court acted without

jurisdiction, or (3) there is no meaningful opportunity for review of the order or judgment. *Id.* at ¶13. It is the third exception alleged here where the prosecutor argues it is akin to an order requiring a person to reveal information that would violate the person's right against self-incrimination. *See Mannes*, 419 U.S. 448. As the respondent's brief explains, thus will not be repeated at length here, the Court in *Mannes* explicitly distinguished an order requiring release of information. After explaining that the "orderly processes are imperative to the operation of the adversary system of justice," the Court went on to explain, "a different situation may be presented" when the order during trial requires a witness to reveal information. *Id.* at 460.

Practically speaking, this makes sense. Although the sequestered witness here does not appear to have followed the prosecutor's recommendation to defy the sequestration order, it is unclear what would happen if the witness had followed the advice. Is that person held in contempt? Physically removed from the courtroom? If orders shortly before or during trial can be ignored, trials would devolve into chaos. There is no reason the discretionary decision here should be treated any differently than all the other important decisions trial courts make before and during trial.

At its heart, the prosecutor's claim: (1) implies the court had no discretion to order sequestration of the victim, and thus, his actions were warranted and (2) there was no option but to advise defying the

court's order because the issue would become moot and/or the victim would be irreparably harmed. Neither support a prosecutor telling a person to defy a court order.

1. The circuit court exercises its discretion in deciding whether a sequestration order is warranted.[1]

The appellant suggests the constitutional amendment[2] created a bright-line, *per se* rule that an alleged victim can never be sequestered during the trial. Not so. As it relates to a victim's right to attend court proceedings, the amendment struck the phrase "unless the trial court finds sequestration is necessary to a fair trial for the defendant." Wis. Const. art. I, § 9m (2017-2018). But, consistent with the Supremacy Clause, the amendment still states the amendment "is not intended and may not be interpreted to supersede a defendant's federal constitutional rights…" U.S. Const. art. VI, cl. 2; Wis. Const. art. I, § 9m(6).

The purpose of a sequestration order "is to assure a fair trial – and more specifically, to prevent a witness from shaping his or her testimony based on

[1] This brief will not address the circuit court's exercise of discretion in this case, although it agrees with the respondent's analysis, as the State Public Defender is not a party to the appeal and does not have the court record.

[2] The recent constitutional amendment related to victim rights is often referred to as "Marsy's Law." Wis. Const. art. I, § 9m.

the testimony of other witnesses." *State v. Copeland*, 2011 WI App 28, ¶11, 332 Wis. 2d 283, 798 N.W.2d 250. An accused person's right to a fair trial is protected under the Fourteenth Amendment. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *State v. Herrmann*, 2015 WI 84, ¶25, 364 Wis. 2d 336, 867 N.W.2d 772 (internal quotation omitted).

Thus, as is often the case in our adversarial legal system, on the issue of sequestration, the court will need to weigh competing interests – namely, the victim's right to attend proceedings and the defendant's right to a fair trial. Review inevitably depends on the circumstances of the case. Sequestration is a discretionary decision made by the circuit court. *State v. Evans*, 2000 WI App 178, ¶7, 238 Wis. 2d 411, 617 N.W.2d 220; Wis. Stat. § 906.15. Review of discretionary decisions is deferential. *Id.* The reviewing court does "no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based on proper legal standard and a logical interpretation of the facts." *Id.*

The fact that a sequestration order is a discretionary decision highlights the untenable nature of the prosecutor's position. Trial courts regularly make discretionary decisions. Because of the deferential standard of review, reversals are rare. Yet, the procedure proposed here – advising the victim to ignore a court order – subverts the court's ability to exercise its discretion. Here, it does not appear the victim followed the prosecutor's advice.

But, again, what happens if the victim *does* follow the prosecutor's advice and ignores the court order? The victim is held in contempt? Or they are physically removed? Would the chaos force an adjournment or a mistrial? And, there is no reason this is different than other decisions made by the court before or during trial. The potential for chaos when court orders are not followed is precisely why it is unworkable to condone defying a court order.

2. There are procedural mechanisms to review adverse decisions concerning victim rights.

There are a number of procedural mechanisms that a victim or the state can utilize to dispute an order for which they disagree. Although the lines can get blurred, the prosecutor's dispute with the sequestration order, here, appears to involve vindicating the victims' rights, rather than appealing the substantive decision for purposes of litigation by the state. Regardless, there are procedural mechanisms available both to victims seeking review of "adverse decisions concerning their rights as victims" and to the state[3] seeking review of adverse decisions impacting their litigation.

First, with regard to vindicating victim rights, as appears to be the issue here, there are constitutional and statutory bases for review. The victim, the victim's attorney, other lawful

[3] Appeals by the state are governed by Wis. Stat. § 974.05.

representative, or the prosecutor – 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." Wis. Const. art. I, § 9m(4)(a). "The court or other authority with jurisdiction over the case shall act promptly." *Id.*

And, victims may obtain review of "*all adverse decisions* concerning their rights as victims … by filing petitions for supervisory writ in the court of appeals and supreme court." Wis. Const. art. I, § 9m(4)(b) (emphasis added); Wis. Stat. § 809.51. Practically speaking, this review can happen *after* the alleged violation, as the amendment contemplates "a remedy for the violation of any right of the victim." Wis. Const. art. I, § 9m(4)(a).

If the state believes immediate review is warranted, it can – on behalf of, and at the request of, the victim – seek an adjournment to afford time to file a supervisory writ before trial. Or, the state can seek an emergency stay from the court of appeals. That does not appear to have occurred here. The prosecutor cannot now complain about not having an opportunity for review when he did not avail himself of the procedural options.

In addition, the victim can file a complaint with the crime victims rights board, where a referral can be made to the judicial commission for a violation of victim rights if those rights were truly violated. Wis. Stat. § 950.09(2)(b). The state could also seek

interlocutory review. Wis. Stat. § 809.50. Again, an adjournment or stay in the court of appeals would have been necessary for pre-trial review, but it does not appear such a request was made. Litigants – including defendants – regularly make decisions about when and how to seek pre-trial review of adverse decisions. They weigh the pros and cons of the procedural options available. They do not simply ignore the orders for which they disagree.

In short, there were opportunities for review. Although a stay or adjournment may have been necessary to obtain *pre-trial* review, no such requests were made. Failing to avail oneself of the available procedural mechanisms for review does not provide justification for defying a court order.

3. The possibility of a moot issue does not justify ignoring a court order.

The prosecutor's true complaint is not that there is no mechanism for review – there is. But, rather, the complaint is that there was insufficient time *in this case* for pre-trial review, and thus, the witness would be irreparably harmed and/or the issue would become moot. First, as explained above, it does not appear an adjournment or stay was requested, which would have provided an opportunity for pre-trial review. Second, it is not clear the victims actually observed the entire trial, despite the prosecutor's advice, so the alleged harm was not actually subverted. Third, the concern that harm will occur before there is an opportunity for review is not

unique to the state or victims. There is often insufficient time for review of pre-trial decisions in advance of trial. That does not mean court orders can be ignored. And, claims may often become moot before an appellate decision is rendered. That is why there are exceptions to mootness if a decision on the merits is needed, including if the issue is "capable of repetition and yet evades review." *Portage County v. J.W.K.*, 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509.

If prosecutors are permitted to tell a victim to ignore a court order because the prosecutor believes a constitutional right has been violated and the issue may become moot, defense counsel – who takes the same oath cited by the state to "support the constitution of the United States and the constitution of the State of Wisconsin" – would likewise be permitted to give such advice. Constitutional issues are regular issues in criminal, commitment, delinquency, and termination of parental rights cases. Defense counsel has the awesome responsibility of fighting for and protecting their clients' constitutional rights every single day. Unfortunately, in the process of obtaining review for decisions related to constitutional rights – such as loss of liberty, loss of the right to parent, loss of the right to make medical decisions, etc. – our clients may be harmed and the issues we are litigating may become moot. Undoing such errors can be frustrating and time-consuming, but still, the process must be followed.

For example, significant litigation has occurred in recent years over moot chapter 51 commitment orders. *See e.g. Sauk County v. S.A.M.*, 2022 WI 46, ¶¶19-27, 402 Wis. 2d 379, 975 N.W.2d 162. It is virtually impossible to complete appellate review before the 6-month order expires and difficult for a 1-year extension order.[4] Even if the order is reversed, the person has already been committed for 6 months or more. *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277 (the commitment order expired before the court determined the evidence was insufficient to commit him). The same is often true with involuntary medication. *See e.g., Outagamie County v. Melanie L.*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607; *Winnebago County v. Christopher S.*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109. There is no way to "un-ring the bell" once a person has been involuntarily committed or medicated.

Consider, as well, people wrongfully charged and/or wrongfully convicted.[5] They may be wrongfully incarcerated for days, weeks, years, or decades – but they must abide by the established

[4] Without extensions but following the allotted time for the appellate process, it takes about 10 months to finish briefing if there is no postdisposition litigation. *See generally* Wis. Stat. § 809.30.

[5] *See* The National Registry of Exonerations, available at, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Apr. 13, 2023), showing 3,298 exonerations since 1989 with over 29,100 years lost.

statutory and constitutional procedures for trial and subsequent review even if there are erroneous decisions that led to their loss of liberty. And, people can be subject to incorrect credit calculations, and thus, are incarcerated longer than permitted. *See e.g., In re Dionicia M.*, 2010 WI App 134, ¶¶17-22, 329 Wis. 2d 254, 971 N.W.2d 236; *State v. Obriecht*, 2015 WI 66, 363 Wis. 2d 816, 867 N.W.2d 387. There is no way to get those days of freedom back.

Even though these harms cannot be undone, defense counsel cannot advise clients to ignore orders, even if counsel believes the order is incorrect. Until those judgments or orders are deemed erroneous, they are treated with the same force and effect. *Hershberger*, 356 Wis. 2d 220, ¶10. Although counsel can seek a stay of the alleged erroneous judgment or order, there is no guarantee such a request would be granted. Still, the procedures for review must be followed.

Finally, the appellant cites the attorney's oath as justification for his actions. All attorneys take this oath and it states "I will support the constitution of the United States and the constitution of the state of Wisconsin." SCR 40.15. It goes on to state "I will maintain the respect due courts of justice and judicial officers." *Id.* The oath does not mandate – nor does it support – a prosecutor ignoring a court order. To do so, would not "maintain the respect due courts of justice and judicial officers." The reason an issue like this is tricky is that there are competing constitutional interests – a victim's right to attend

proceedings and an accused's due process right to a fair trial. That is why attorneys advocate for their position and the court decides. Once the court makes the decision, the parties must abide by it unless the order or judgment is later reversed upon review. Attorneys should not be encouraged to ignore court orders for which they disagree.

CONCLUSION

For these reasons, this Court should not allow collateral review of the sequestration order through the contempt appeal.

Dated this 14th day of April, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,695 words.

Dated this 14th day of April, 2023.

Signed:
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