Miller Appellate Practice, llc
Working for you

P: 715-425-9780
Fax: 866-533-1462
steve@millerlawrf.com

107 W. Walnut Street
P.O. Box 655
River Falls, WI 54022

February 8, 2021

Clerk of the Wisconsin Supreme Court
P.O. Box 1688
Madison, WI 53701-1688

Re: State v. Richard Boie
Appeal No. 19 AP 520-CR

Dear Clerk:

This letter responds to the Wisconsin Supreme Court's Order dated January 25, 2021, concerning the impact of its decision in *State v. Mercado*, Appeal No. 18 AP 2419-CR, on the issues raised in the now pending Petition for Review in *State v. Boie*, Appeal No. 19 AP 520-CR. Boie will not repeat the arguments contained in his Petition for Review but rather will focus on whether any of the issues raised in Boie's Petition were answered in, or affected by, the *Mercado* decision.

The first issue Boie raises in his Petition for Review is whether he was denied his right to confrontation. In *Boie*, a child's video-recorded statement was admitted pursuant to Wis. Stat. § 908.08(1)-(6) and played to the jury before the child testified. In her subsequent testimony the child was unable or unwilling to provide any of the details of the sexual assault allegations she made in the video-recording.[1]

[1] Boie also raises this issue in the alternative as an ineffective assistance of counsel claim based on trial counsel's failure to move for a mistrial once the witness testified.

Mercado did not address or analyze any confrontation related claims. Nor did Mercado raise any confrontation related issues in his postconviction motion or on appeal. *Mercado*, at ¶¶27, 28. Rather, the *Mercado* decision made two tangential references to confrontation, neither of which have any direct bearing on the issues decided by *Mercado*.

The first reference was made as part of the history of the case. The Court noted that when N.G., a child witness, testified prior to the video being played, she answered "no" to most of defense counsel's questions concerning whether she remembered speaking with the investigating officer or told him "serious stuff." Mercado complained to the circuit court that N.G.'s answers "obviated any meaningful opportunity for cross-examination." The circuit court disagreed, noting its main concern was whether N.G. would answer any questions on the stand at all. The content of her answers didn't matter--"[m]eaningful opportunity for cross-examination means ask questions and whatever answers there are...everyone's stuck with...." The circuit court reminded trial counsel there would be another opportunity for cross-examination after the video was played. *Mercado*, at ¶26. Mercado did not take this opportunity, however, but instead moved to dismiss the charge "based on the statements on the witness stand and the statements in the video." *Mercado*, at ¶27. The circuit court denied the motion to dismiss finding that a "prima facie case had been made and N.G.'s statement on the stand came down to credibility." *Mercado*, at ¶27. The *Mercado* decision does not comment on the circuit court's decision or address the matter further.

The second reference occurred when the Court was discussing whether *State v. James*, 2005 WI App 188, 285 Wis.2d 783, 703 N.W.2d 727 prevents a child-witness from testifying before the video is played. *James* held "that the statutory procedure [requiring the opportunity to cross-examine after the video-recording is played] satisfies the Confrontation Clause as long

as the child testifies." The Court "agree[d] with this interpretation *of Wis. Stat. §908.08(5)(a).*" (emphasis added) *Mercado*, at ¶¶51-52. Boie presumes this to mean that requiring testimony after the video is played does not violate confrontation. The Court clearly did not address the confrontation issue raised in *Boie*, namely, whether an appearance on the stand constitutes "meaningful" cross-examination under the Confrontation Clause when the witness is unwilling or unable to address the allegations made in the video-recording.

The second issue Boie raises in his Petition for Review is whether the video-recording met the requirements for admissibility under Wis. Stat. § 908.08. In particular: a) whether the child was available to testify as required by Wis. Stat. § 908.08(1) and, b) whether Boie was deprived of a "fair opportunity to meet allegations made in the statement" per Wis. Stat. § 908.08(3)(e).[2] A sub-issue is whether the "availability" requirement of Wis. Stat. § 908.08(1) incorporates the definition of "unavailability" in Wis. Stat. § 908.04(1)(c).

The Court's ruling in *Mercado* that N.G.'s video-recording was admissible under Wis. Stat. § 908.03(24) does not impact the question of admissibility under Wis. Stat. § 908.08(1)-(6) for two reasons.

First, the circuit court in Boie admitted the video-recording under Wis. Stat. § 908.08(1)-(6) only. It did not consider whether some other exception to the hearsay rule was available under Wis. Stat. § 908.08(7), or exercise any discretion in that regard. In *Mercado*, the Court noted that while N.G.'s statement was admitted "under a different hearsay exception" the Court,

---

[2] This issue was also raised in the alternative as an ineffective assistance of counsel claim in the event it was not fully preserved.

on review, would not "reverse a lower court decision where the court has exercised its discretion based on a mistaken view of the law if the facts and their application to the proper legal analysis support the lower court's conclusion." *Mercado*, at ¶33; 67, n. 19. Boie assumes this Court will not, on review, exercise initial discretion which is the prerogative of the circuit court. Unlike the circuit court in *Mercado*, the circuit court in *Boie* did not exercise discretion to admit the video under any hearsay exception permitted by Wis. Stat. § 908.08(7). No alternative to Wis. Stat. § 908.08(1)-(6) was discussed or contemplated. Therefore, the video-recording was not properly admitted unless it met the requirements of Wis. Stat. § 908.08(1)-(6) and Wis. Stat. § 908.04(1)(c).

Alternatively, even if this Court could, on review, retroactively exercise the circuit court's discretion and find there was no error because the video could have been admitted under Wis. Stat. § 908.08(7), the witness must still meet the threshold availability requirements of Wis. Stat. § 908.08(1). Video-recordings "are admissible if the child *is available to testify* and the child's statements fall into one of the provisions of Wis. Stat. 908.08." (emphasis added). *Mercado*, at ¶41. See *State v. Synder*, 2003 WI App 172, ¶12, 266 Wis.2d 830, 668 N.W.2d 784: "*Section 908.08(1)* permits the admission of a 'videotaped oral statement of a child *who is available to testify*, as provided in this section." (emphasis added). *Mercado*, at ¶66. Wis. Stat. § 908.08 "provides two methods by which a party may introduce a child's video-recording." *Mercado*, at ¶66; *Synder*, at ¶12. The first is "meeting the various requirements set forth in subsections (2) and (3)." *Synder*, at ¶12; *Mercado* at ¶66. The second is to admit the recording "under this chapter as an exception [to] the hearsay rule" per Wis. Stat. § 908.08(7). *Id.* Under either option, Boie argues, the availability requirement of Wis. Stat. § 908.08(1) must be met.

Mercado does not address whether the availability requirement of Wis. Stat. § 908.08(1) applies to admission under either Wis. Stat. § 908.08(1)-(6) or Wis. Stat. § 908.08(7). *Mercado* does not address whether the availability requirement of Wis. Stat. § 908.08(1) incorporates the definition found in Wis. Stat. § 908.04(1)(c). *Mercado* does not address whether a witness who cannot remember the details of the sexual assault alleged in the video meets the definition of unavailability under Wis. Stat. § 908.04(1)(c) (a witness is not available under Wis. Stat. § 908.04(1)(c) if she "[t]estifies to a lack of memory of the subject matter of the declarant's statement;....").

The third issue Boie raised is whether the Court should overrule the apparent holding in *State v. James* which requires a child witness to testify after the video-recording is played, but not before. As the Court makes clear in the *Mercado* decision, *James* has been misinterpreted. *James* applies to what happens after the video is played, not before. As such, nothing prevents the circuit court from allowing a child witness to testify before the video-recording is played. *Mercado*, at ¶52. Therefore, the issue of whether *James* should be over-ruled is moot. Nonetheless, in this case the circuit court applied *James* as *only* allowing witness testimony after the video-recording is played, and not before, which is relevant to the question of whether the availability requirement of Wis. Stat. § 908.08(1), as well as confrontation, was satisfied before the video-recording is admitted. In this case, the circuit court erred when it insisted the witness testify *after* the video-recording was played, thus preventing the defendant from showing the witness was not "available" pursuant to Wis. Stat. § 908.08(1) and that "meaningful" cross-examination under the Confrontation Clause was not possible.

In sum, confrontation was neither raised nor addressed in *Mercado*. The Court's holding that the video was admissible as an exception to the hearsay rule under Wis. Stat. §

908.03(24) does not address confrontation concerns. Nor does it address whether this Court may, on review, deem a video admissible under Wis. Stat. § 908.08(7) when the circuit court made no such finding but relied solely on Wis. Stat. § 908.08(1)-(6). Nor does it address whether the witness met the availability requirement of Wis. Stat. § 908.08(1).

Sincerely,

Steven L. Miller
SLM/slm

cc: AAG Scott E. Rosenow
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Richard Boie