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Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 8

WISCONSIN JUSTICE INITIATIVE, INC. *et. al*,
Plaintiffs,

vs. Case No. 2019-CV-3485

WISCONSIN ELECTIONS COMMISSION, *et. al.*,
Defendants.

DECISION AND ORDER

In 2017, the Wisconsin Senate and Assembly passed a Joint Resolution that contained various amendments to be made to the Wisconsin State Constitution regarding crime victims and victim rights. In 2019, both houses of the Wisconsin Legislature passed a second Joint Resolution. At that point in the process, the question of whether to amend the State Constitution was then presented to Wisconsin voters on the next April ballot. Wisconsin voters approved and ratified the amendments to the State Constitution by a margin of three to one.

INTRODUCTION

The Plaintiffs commenced this lawsuit challenging the way these amendments were presented to the voters. To understand that challenge, it is helpful begin with a brief history of the provisions in the State Constitution and what is commonly known in and outside of Wisconsin as "Marsy's Law". According to its website:

> Marsy's Law is named after Marsalee (Marsy) Ann Nicholas, a beautiful, vibrant University of California Santa Barbara student, who was stalked and killed by her ex-boyfriend in 1983. Only one week after her murder and on the way home from the funeral service, Marsy's family stopped at a market to pick up a loaf of bread. It was there, in the checkout line, that Marsy's mother, Marcella, was confronted by her daughter's murderer. Having received no notification from the judicial system, the family had no idea he had been released on bail mere days after Marsy's murder.
>
> The experience of Marsy's family is typical of the pain and suffering family members of murder victims so often endure. Marsy's family was not informed because the courts and law enforcement, though well-meaning, had no obligation to keep them informed. While those accused of crimes have more than 20 individual rights spelled out in the U.S. Constitution, the surviving family members of murder victims have none.
>
> …
>
> Marsy's Law seeks to give crime victims meaningful and enforceable constitutional rights equal to the rights of the accused. Some examples of the types of rights to which we believe all victims are entitled are:
>
> To be treated with dignity and respect throughout criminal justice proceedings
>
> To be notified of his, her or their rights as a victim of crime
>
> To be notified of specific public proceedings throughout the criminal justice process and to be present and heard during those proceedings

See, *About Marsy's Law*, Marsy's Law, www.marsyslaw.us/about_marsys_law (last visited October 23, 2020).

When amending Wisconsin's Constitution, the voters are not given the exact language or precise text of the proposed amendment(s), but rather the ballot contains a carefully worded question that is supposed to describe what is proposed.[1] Wisconsin Constitution Article XII, § 1 describes the process for amending the State Constitution. The first relevant part states that "it shall be the duty of the legislature to submit such proposed amendment or amendments to the

[1] In other states considering their version of Marsy's Law, the ballot questions ranged from as short as was used in Wisconsin, to as long as including the text of the proposed amendment. In Wisconsin, state statutes provide that "[t]here shall be a separate ballot when any proposed constitutional amendment or any other measure or question is submitted to a vote of the people, except as authorized in s. 5.655. The ballot shall give a concise statement of each question in accordance with the act or resolution directing submission in the same form as prescribed by the commission under s. 7.08 (1) (a). The question may not be worded in such a manner as to require a negative vote to approve a proposition or an affirmative vote to disapprove a proposition. Unless otherwise expressly provided, this ballot form shall be used at all elections when questions are submitted to a vote of the people." Wis. Stat. §5.64(2)(am).

people in such manner and at such time as the legislature shall prescribe …" *Id.* This being done, the electorate will vote "and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately." *Id.*

In Wisconsin, voters are supposed to be presented with a "concise statement of each question" on the ballot that is carefully worded to describe the proposed change to be made to the State Constitution. In some cases there needs to be more than one question because underlying amendments are not sufficiently similar as to lend themselves to be described in just one question. Ultimately the goal in this process is to present the voter with one or more questions such that a "yes" answer is taken to be a statement by the voter as an approval of the actual amendments to Wisconsin's State Constitution, or a "no" to have the opposite effect.

The legal issues in this case[2], stated broadly, can be described with two questions. First, should the voters have been presented with more than one question and, two, was the ballot question misleading as to the nature of or inaccurate as to the contents of the underlying constitutional amendments taken as a whole. The ballot question was sufficient to obtain voter approval regarding the definition of a "crime victim" and to describe crime victim rights. A separate ballot question should have been presented to the voters to seek their consent to change the existing rights given to persons accused of a crime. And finally, given how persons accused of a crime would be affected, the sole ballot question was deficient. The sole question did not constitutionally serve the purpose of accurately framing the precise questions to be put before the voters.

It is important to recognize at the outset that this court does not question or doubt the wisdom of Marsy's law specifically or generally the importance of protecting crime victims. These issue are not before this court. Indeed, it has long since been recognized in Wisconsin "that crime

[2] The legal issues in this case are to be decided according to the Constitution of the State of Wisconsin, Wisconsin statutes, and Wisconsin common law. Any reference made in this opinion to other states is for illustrative purposes only. Each state applies its own state law. Additionally, it should be noted that each state may have been presented with the same question, but the facts in each state are different. As discussed below, in Wisconsin, because there was a preexisting constitutional provision relating to crime victims, the Wisconsin Legislature was not just creating crime victim rights, it was changing and adding to the rights that crime victims already had. The duty to inform the voters extended to both the repeal of existing rights as it did to the creation of new constitutional rights.

victims, by virtue of the crimes they suffer, experience profound tragedy before they encounter the criminal justice system. … [W]e believe that justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims." *Schilling v. Crime Victims Rights Bd*., 205 WI 17, ¶278 Wis.2d 216, 234, 692 N.W.2d 623.

The movement undertaken by advocates for Marsy's law arose from an incalculable tragedy and that experience undeniably exposed the need to make significant changes to the administration of criminal justice. Indeed, Marsy's law, as it relates to crime victims, is good public policy even though Wisconsin had already had a constitutional amendment relating to crime victims. The decision in Wisconsin to amend the State Constitution incorporating the suggestions made by Marsy's Law, changing the existing constitutional provision, was the exclusive province of the Legislative branch subject to the will of the voters.

Similarly, this opinion is not intended to be a survey on the rights of "persons accused of a crime." This specific phrase is used throughout this opinion because the rights given to the accused are different than the rights of persons convicted of a crime. The challenge is to balance the rights of victims as against the rights of those who find themselves accused of a crime and who are thus facing the most severe consequence: the possible loss of their liberty.

Today, this court is asked only to answer the legal question of whether the procedure required by the Wisconsin's Constitution was followed. Nothing in this opinion should suggest that the provisions relating to the rights of the accused should or should not be deleted. Nothing in this opinion should suggest that the provisions relating to victims and victim rights should or should not be made part of the State Constitution. The sole purpose of this opinion is to hold that if the provisions relating to the rights of the accused are to be repealed from the existing State Constitution it was constitutionally required that the voters be asked that question directly. In the end, it is ultimately up to the voters to determine what changes are to be made to the State Constitution.

It is also important to recognize and reaffirm the solemn duty thrust upon this court by the plaintiffs who are asking the judicial branch to judge whether the action of a coordinate branch of state government, the Legislature, was constitutional. The question before this court should not be and is not an invitation to the court to substitute its judgment for what is properly a legislative

act. In judging state statues, there is a strong presumption of constitutionality and the party bringing a constitutional challenge bears a heavy burden to prove its case beyond a reasonable doubt. See Generally, *Gabler v. Crime Victims Rights Bd*. 2017 WI 67, ¶¶81-95, 376 Wis.2d 147, 198-204, 897 N.W.2d 384, (Abrahamson *concurring in part and dissenting in part*). The canons of constitutional avoidance affect this court's present analysis but do not resolve the ultimate legal question. The judicial inquiry undertaken by this court is not merely a static review of the final product, a statute or an amendment, but instead, the inquiry here is to determine whether the Legislature complied with the ultimate authority on these questions, the State Constitution, and conformed itself to the correct required process. All branches of government are bound by the Constitution.

This is not to say that the constitutional principles regarding the proper allocation of governmental power do not apply here. In *Service Employees International Union, Local 1 v. Vos,* 2020 WI 67, 393 Wis.2d 38, 946 N.W.2d 35, the Supreme Court recently discussed, at length, the proper role of the judicial branch. Clearly, in spite of the separation of powers between the branches of state government, there is unquestionably a necessary and proper role for the judicial branch. As to the questions now before this court, the Wisconsin Supreme Court has recognized the court's solemn delegated constitutional responsibility in *State v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882); *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803 (1925); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953); *Milwaukee Alliance Against Racist and Political Repression v. Elections Board of the State of Wisconsin*, 106 Wis.2d 593, 317 N.W.2d 420, (1982); and *McConkey v. Van Hollen*, 2020 WI 57, 326 Wis.2d 1, 783 N.W.2d 855. This case presents another occasion to do as Wisconsin courts have done for at least the last 138 years.

The genesis behind the movement to amend state constitutions nationwide, in reaction to what happened to Marsy Nicholas, was to give crime victims meaningful and enforceable constitutional rights equal to the rights of the accused, not to weaken or eliminate the rights of persons accused of committing a crime. If the amendments to Wisconsin's Constitution had just given crime victims meaningful and enforceable constitutional rights equal to the rights of the accused, (as suggested in the ballot question), this case would easily have been resolved. But, in this court's opinion, the amendments went further and reduced and in some ways eliminated

existing State Constitutional rights. From a constitutional perspective, this is a problem. Reducing or eliminating existing constitutional rights required the informed approval and ratification by Wisconsin voters.

As discussed below, it is the opinion of this court that the single question presented to the voters was insufficient because it did not reference the effect on the existing constitutional rights of the accused. Second, the single question presented to the voters did not accurately correspond to the language in the proposed amendments regarding the standard "no less vigorous". Finally, even if the sole question referenced the effect on the existing constitutional rights of the accused and even if the question did not reference the standard "equal force", there still needed to be two questions. These amendments, taken as a whole, required two questions because the portion of the amendments that affected the rights of the accused did not sufficiently relate to the principal purpose behind the changes being driven by Marsy's Law to create rights for crime victims.

DISCUSSION

In April, 2020, the Wisconsin voters were presented with a question drafted by the State Legislature. (See 2019 Senate Joint Resolution 2).

> Question 1. Additional rights of crime victims. Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?

A majority of Wisconsin voters answered this question "yes". The constitutional question today is whether this simple single question was sufficient under Wisconsin Constitution Article XII, § 1.

There is a process to be followed in Wisconsin regarding how laws are made. Statutes must be drafted in Bills and passed by both houses and signed by the Governor to become law. Courts do not gloss over a defective legislative process because the underlying reason for the law is compelling. In lawmaking, "the ends do not justify the means." When the source of law is to be found in the State Constitution, not only do State Senators and State Representatives need to understand what they are voting on, but Wisconsin voters having been drawn into the law-making

process must be similarly informed and the constitutionally mandated process must be followed. If the required process is not followed, then the voters are not given a full and fair opportunity to ratify the proposed amendments. After all, if the Legislature wants Wisconsin voters to vote on a change, the question given to the voters must be clear and concise. A clear question accurately and succinctly describes the proposed changes. Where there are more than one category of change, there may need to be separate question for each category. Wisconsin voters deserve no less than to be asked the right question(s). Wisconsin voters cannot and should not be misled or deceived if the outcome of the ballot question is to have full force and effect of law. Simply put, as good and laudable Marsy's law is, process matters; it matters a great deal.

The plaintiffs raise several issues with the ballot question that they think made it misleading. They question the use of the phrase in the ballot question "with equal force" when the actual amendment states "no less vigorous." They argue "no less vigorous" provides much greater protection to victims than "with equal force". Plaintiffs argue therefore that the ballot question misled the voters. Plaintiffs also argue that the use of the phrase, "This section is not intended to and may not be interpreted to supersede a defendant's federal constitutional rights" is misleading because it does not explain the changes being made to defendant's rights under the Wisconsin Constitution. Specifically, plaintiffs note that language in the Constitution that ensured a defendant could have a victim sequestered when necessary to a fair trial has been deleted. Removed from the State Constitution was the only reference to "fair trial". Additionally, the amendments repealed the language that provided that nothing in the victim's rights section would be interpreted to limit rights afforded to a defendant by law. Finally, the plaintiffs argue that submitting only a single question to the voters was improper.[3]

The first task in the constitutional analysis is to describe the nature and effect of the proposed amendments. After that is accomplished the second question is to determine how many question(s) are required to adequately inform the voters. The discussion of the adequacy of the

[3] This court concludes that the redefinition of "crime victim" and the creation of additional victim's rights did not require separate questions. Plaintiffs also make other arguments in support of their attack on the amendments. It is not necessary to address all of the issues plaintiffs raise given the agreement with at least one reason to declare that the changes to the Constitution were not done in compliance with the law.

single question presented to Wisconsin voters is interrelated to both of the two inquiries identified above.

I. The constitutional rights of crime victims before and after the new amendments.

Because Wisconsin's Constitution already contained a provision regarding the rights of crime victims, the Legislature was not writing on a clean slate.[4] Indeed, the Legislature amended the State Constitution by changing the definition of crime victim, by delineating new rights crime victims have, and by deleting portions affecting the existing rights of persons accused of a crime. A version of proposed Article I, Section 9m of the State Constitution taken from the drafting record, reprinted below, visually shows how the Article I, Section 9m was to be changed:

> **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.

[4] This fact separates Wisconsin from other states who successfully incorporated the suggestions of Marsy's Law into their respective state constitutions. The experience in those states, where no challenge was made, or that a challenge was unsuccessful, is in large part due to the fact that they were only creating a new set of constitutional rights for crime victims. In Wisconsin, the task was complicated by the unique situation that Wisconsin already had a provision in its constitution relating to crime victims that also referenced the constitutional rights of persons accused of a crime.

(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.

(f) To reasonable protection from the accused throughout the criminal and juvenile justice process~~;~~ .

(g) Upon request, to reasonable and timely notification of ~~court~~ proceedings~~; the opportunity to~~.

(h) Upon request, to confer with the ~~prosecution; the opportunity to make a statement to the court at disposition;~~ attorney for the government.

(i) Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon.

(j) To have information pertaining to the economic, physical, and psychological effect upon the victim of the offense submitted to the authority with jurisdiction over the case and to have that information considered by that authority.

(k) Upon request, to timely notice of any release or escape of the accused or death of the accused if the accused is in custody or on supervision at the time of death.

(L) To refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.

(m) To full restitution~~;~~ from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.

(n) To compensation~~; and~~ as provided by law.

(o) Upon request, to reasonable and timely information about the status of the investigation and the outcome of the case ~~and the release of the accused~~.

(p) To timely notice about all rights under this section and all other rights, privileges, or protections of the victim provided by law, including how such rights, privileges, or protections are enforced.

(3) Except as provided under sub. (2) (n), all provisions of this section are self-executing. The legislature ~~shall provide~~ may prescribe further

remedies for the violation of this section~~. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.~~ and further procedures for compliance with and enforcement of this section.

SECTION 2. Section 9m (1) of article I of the constitution is created to read:

[Article I] Section 9m (1) (a) In this section, notwithstanding any statutory right, privilege, or protection, "victim" means any of the following:

1. A person against whom an act is committed that would constitute a crime if committed by a competent adult.

2. If the person under subd. 1. is deceased or is physically or emotionally unable to exercise his or her rights under this section, the person's spouse, parent or legal guardian, sibling, child, person who resided with the deceased at the time of death, or other lawful representative.

3. If the person under subd. 1. is a minor, the person's parent, legal guardian or custodian, or other lawful representative.

4. If the person under subd. 1. is adjudicated incompetent, the person's legal guardian or other lawful representative.

(b) "Victim" does not include the accused or a person who the court finds would not act in the best interests of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise his or her rights under this section.

SECTION 3. Section 9m (4) of article I of the constitution is created to read:

[Article I] Section 9m (4) (a) In addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges, or protections provided by law, the victim, the victim's attorney or other lawful representative, or 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 law. The court or other authority with jurisdiction over the case shall act promptly on such a request and afford a remedy for the violation of any right of the victim. The court or other authority with jurisdiction over the case shall clearly state on the record

> the reasons for any decision regarding the disposition of a victim's right and shall provide those reasons to the victim or the victim's attorney or other lawful representative.
>
> (b) Victims may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) by filing petitions for supervisory writ in the court of appeals and supreme court.
>
> **SECTION 4.** Section 9m (5) of article I of the constitution is created to read:
>
> [Article I] Section 9m (5) This section does not create any cause of action for damages against the state; any political subdivision of the state; any officer, employee, or agent of the state or a political subdivision of the state acting in his or her official capacity; or any officer, employee, or agent of the courts acting in his or her official capacity.
>
> **SECTION 5.** Section 9m (6) of article I of the constitution is created to read:
>
> [Article I] Section 9m (6) This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim.

Enrolled joint resolution, doc. 29 (Strikethrough and underlining in the original).

There were two particular provisions in Section 9m of Article I of Wisconsin's Constitution that created rights for persons accused of a crime: first, a person accused of a crime could ask that the crime victim not be present in the courtroom during the trial if the victim's removal was necessary to assure a fair trial and second, there was an affirmative statement that indicated that nothing in Article I, Section 9m or in any statute enacted pursuant to that section would limit any right of the accused which may be provided by law. How the accused were affected by the repeal of these two provisions was not separated into a separate ballot question which would have enabled the voter to approve giving crime victims additional rights and still disapprove of changes in the Constitution that would affect rights possessed by persons accused of a crime. Indeed, the question on the ballot gave voters the wrong impression that they were only approving amendments relating to the creation rights of crime victims.

II. The ballot question did not reference the repealed language and the resulting impact on the rights of the accused.

The court's role is to determine if the ballot question was so detached from the amendment itself so as to fall outside the Legislature's broad constitutional authority to choose how to present the question to the people. In this regard, the ballot question did not communicate to the people that the amendments would abrogate the rights of individuals accused of a crime of their right to a fair trial as explicitly recognized in the now repealed provisions of Wisconsin's Constitution and the question did not adequately communicate to the people that the amendments substantially affected existing rights in the Wisconsin Constitution as recognized by the Wisconsin Supreme Court. Accordingly, regarding the rights of the accused, the proposed constitutional amendment contained components that were not necessary to effectuate the amendment's primary purpose, (i.e. defining crime victims and articulating their rights), and were not explained in the question presented to the voters. To understand the subtlety of the matter, we need to restart from the beginning.

The Wisconsin Constitution formerly provided:

Victims of Crime

> 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: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.

Wisconsin Constitution, Art. I, § 9m (2016). When this amendment was first proposed, there was a substantial amount of debate regarding the retention of language that protected the rights of the accused. The last phrase in the last sentence is the fruit of those debates. In repealing and recreating the Constitution's protection of the rights of crime victims, the amendments changed the rights of persons accused of a crime in three significant ways.

First, the former constitutional provision allowed crime victims to attend court proceedings but qualified that right and allowed their removal from the courtroom if the court "finds sequestration is necessary to a fair trial for the defendant." Crime victims have always had a qualified right to attend court proceedings[5]. But now, with the repeal of the preexisting language, the inescapable conclusion is that presently crime victims have a State Constitutional right to attend all proceedings even if their removal from the courtroom is otherwise necessary for a fair trial for the defendant.[6]

Second, the State Constitution used to say that "[n]othing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law." That language is gone. The result is the State Constitution does not now answer the question of how courts should balance a conflict between the rights of crime victims with the rights of persons accused of a crime. It was generally understood that the constitutional language in the now repealed portion guided the court, at a minimum, to not allow the rights of crime victims to automatically supersede the rights of the accused, and at most, made clear that the court should protect and preserve the rights of the accused that were provided for and guaranteed by Wisconsin law. See Generally, the legislative drafting record for the original version of Article I, Section 9m.

Third, the new provisions in the State Constitution stated the rights of crime victims be "protected by law in a manner no less vigorous than the protections afforded to the accused." As discussed below, there is a separate problem involving this language. The initial problem is that the voters were asked to approve that "the rights of crime victims be protected with equal force to

[5] The new amendments also deleted the word "court" from "court proceedings". This change suggest a broader right to attend any "proceeding" in a criminal case regardless of whether it is in the courtroom or on the record.

[6] The question of whether this would be "constitutional" under the applicable provisions of the United States Constitution is a separate question. Even if the United States Constitution preserves the accused's right to a fair trial, the changes to Wisconsin's Constitution eliminate a meritorious argument that that result, and in particular the right to sequestration, is independently protected by the State Constitution. Wis. Stat. § 906.15 governs the exclusion of witnesses from the courtroom. Wis. Stat. § 906.15(1) mandates that "[a]t the request of a party, the judge or a circuit court commissioner shall order witnesses excluded so that they cannot hear testimony of other witnesses." However, a "victim" cannot be excluded "unless the judge or circuit court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant…" Wis. Stat. § 906.15(2)(d). Sequestration is an old idea: "the practice of limiting a witness's access to other witnesses can be traced to English and Germanic law…" *State v. Green*, 2002 WI 68, ¶ 44, 253 Wis.2d 356, 646 N.W.2d 298 (Abrahamson, C.J., concurring). Sequestration serves "the important interest of promoting truthfulness in witness testimony." *State v. Ndina*, 2009 WI 21, ¶ 60, 315 Wis.2d 653, 761 N.W.2d 612. Changing the standard for when a victim needs to be sequestered is not merely expanding victims' rights, it could very well substantially alter a defendant's rights under the State Constitution to have victim witnesses sequestered when necessary to promote the truthfulness of the crime victim's testimony. Subtracting from the defendants' rights is fundamentally different than adding to victims' rights.

the protections afforded the accused." It is argued that instructing that victim rights be "protected by law in a manner no less vigorous than the protections afforded the accused" provides greater protection to victims than simply asking the courts to balance rights "with equal force".

At a visceral level it is reasonable to imagine that some people would choose to give victims more rights than what are given to criminals. Recall, however, it is also generally accepted that everybody enjoys the presumption of innocence until proven guilty. And in the process of separating the guilty from the innocent, the great English jurist William Blackstone once said "it is better to let ten guilty persons escape, than one innocent suffer." Some Wisconsin voters may not have approved the constitutional recognition of the rights of crime victims be enforced more vigorously than the respect to the rights of the accused if it meant that the innocent should unjustly suffer. Or at least, it is not hard to accept that some voters would want the choice to give innocent crime victims all the rights they rightfully deserve but decline to diminish the rights of persons only accused of committing a crime.

III. The need to draft a ballot question that reasonably, intelligently and fairly references every essential part of the proposed amendments.

Examining the ballot question in *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803 (1925), the Wisconsin Supreme Court stated that "[h]ad the Legislature in the instant case prescribed the form of submission in a manner which would have failed to present the real question, or had they, by error or mistake, presented an entirely different question, no claim could be made that the proposed amendment would have been validly enacted." *Id.* at 811. The question "must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment." *Id.* The question must have "for its object and purpose an intelligent and comprehensive submission to the people, so that the latter may be fully informed on the subject upon which they are required to exercise a franchise." *Id.* However, "[t]he drafter of the form of the question is a simple ministerial duty, which any high school student of average ability could do." *Id.* at 812.

The issue of accuracy of the question was again addressed by the Wisconsin Supreme Court in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). There, the court disagreed that the question matched the amendment. *Id.* at 660. The court took particular issue with the consideration that the ballot question was framed in mandatory language, while the

amendment had no such mandate at all. *Id.* The court stated, "It does not lie in our mouths to say that which the people think of sufficient importance to put in their constitution is in fact so unimportant that misinformation concerning it printed on the very ballot to be cast on the subject, may be disregarded." *Id.* The court invalidated the amendment. *Id.*

Given the changes identified above, recall that voters in Wisconsin were only asked:

> Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?

The issue is whether the ballot question reasonably, intelligently, and fairly referenced every essential part of the proposed amendment and whether the question fully informed the voters on the subject upon which they are required to vote. Unquestionably, the question adequately informed the voters that the State Constitution already gave certain rights to crime victims but that now in addition:

- Crime victims would have "additional rights"; and,
- That the rights of crime victims be protected with "equal force" to the protections afforded the accused; and,
- Federal constitutional rights were left intact; and,
- Crime victims could enforce their rights in court

Part of the question did not **fully** inform the voters. Three of the four statements above are true. Victims would be given additional rights, which could be enforced in court and federal constitutional rights would remain intact. But one statement is deficient. The actual text of the amendments says nothing about "equal force". Instead the amendments state that victim rights would be "protected by law in a manner no less vigorous than the protections afforded to the accused."

A. The ballot question referenced that the "rights of crime victims be protected with <u>equal force,</u> (emphasis added), to the protections afforded the accused", yet the amendment requires victim rights be "protected by law in a manner no less vigorous than the protections afforded to the accused."

The court in *State ex rel. Ekern*, referenced the "ministerial duty" to draft a question using language that any high school student of average ability could write. Yet any high school student of average ability would know that if something is done to an extent "no less vigorous", that is different than instructing that it be done with "equal force." Based on this language, the legal question is whether the voters knew or should have known that the changes to our Constitution were not to require equality, but some arguably higher standard: "no less vigorous."

The question why different words were used is not apparent.[7] The legal question is whether the ballot question fairly described the substance of the proposed constitutional amendments.[8] In order to answer that question, this court has to compare the words used to describe the proposed amendments. If the words in the ballot question are sufficiently descriptive or synonymous, then there is not be a problem. On the other hand, if the words mean different things, then the ballot question may not have fairly describe the substance of the proposed amendments.

In *State v Johnson*, 2019AP664-CR slip op. filed October 29, 2020, the Court of Appeals observed with regard to WIS. CONST. art. I, §9m:

> We construe constitutional amendments 'so as to promote the object[ives] for which they were framed and adopted.' The meaning is determined 'by ascertaining the general purpose of the whole … and the remedy sought to be applied.' When interpreting a constitutional provision, courts examine three primary sources: the plain language of the provision, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature as manifested through the first legislative action following adoption.

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[7] A reasonable observation might be that something to be done with "equal" force is inherently more attractive than instructing it be done no less vigorous and thus be more likely to be generally approved. Generally, most people think that if something is "equal", it is presumptively "fair".

[8] It appears that both the language in the actual amendments and parts of the ballot question may have come from sources outside Wisconsin. In making this observation, this court is not implying any infirmity with the use of model language in drafting legislation. The ballot question in Oklahoma stated, in relevant part, that, "This measure amends the provision of the Oklahoma Constitution that guarantees certain rights for crime victims. These rights would now be protected in a manner equal to the defendant's rights." Oklahoma's Constitution, Art. 2, § 34(A), provided that "[t]o secure justice and due process for victims throughout the criminal and juvenile justice systems, a victim of a crime shall have the following rights, which shall be protected by law in a manner no less vigorous than the rights afforded to the accused…". As discussed earlier, because Wisconsin already had a provision in its constitution recognizing crime victim rights, incorporating model language in this state required an amendment, rather than a simpler task of merely creating a new provision on the state's constitution.

(citations omitted). (slip op. p. 12). The appellate court observed that "[t]he parties to this appeal have provided no material information, and our own search has revealed none, regarding the constitutional debates in the legislature concerning the 2020 constitutional amendment. In addition, there have been no interpretations of the provision by the legislature through legislative action following adoption of the 2020 constitutional amendment." Id. f.n. 14. To interpret Article I, §9m this court can only rely on the language in the amendment.

For purposes of statutory construction when words are susceptible to different interpretations, courts look to legislative history to try to better understand and interpret the law. There are two ways to do that. First the courts can determine legislative intent by looking to extrinsic factors and second, by carefully reading the intrinsic aspects of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 38, 271 Wis.2d 633, 681 N.W.2d 110. The Wisconsin Supreme Court has stated a strong preference for relying on the intrinsic factors to determine the meaning of the statute as it was written and enacted. *Id.* at ¶ 44. The rule is that "statutory interpretation begins with the language of the statue. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* at ¶ 45. Language in the statute "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* A statute is not considered "ambiguous" until it is determined that the statute "is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* at ¶ 47. Legislative history should not be consulted unless the statute is ambiguous. *Id.* at ¶ 51.

The phrase: "to require that the rights of crime victims be protected with equal force to the protections afforded the accused" is, to say the least, problematic. The phrase has balance in how it compares crime victims with the accused. But what does it mean to refer to the "rights" of crime victims as opposed to the "protections" afforded the accused? It is not generally understood that "protections" are the same as "rights".[9] Ignoring this ambiguity, the main problem with the question is how it describes that "equal force" be applied to the rights of victims as against the

[9] Quoting from the drafting record, Justice Abrahamson writes in *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶66 that the terms "privileges" and "protections" in the former Article I, Section 9m are synonymous with "rights". Lawyers and judges might possibly think this, but it is hard to imagine the general public would consider a "right" to be synonymous with a "protection". Black's Law Dictionary, 5th Ed., does not conflate these terms.

protections afforded the accused. The language in the ballot question does not fairly correspond to the language in the amendments.

"Equal" is a clear and unambiguous word. Most every person readily understands that the word "equal" means make even or level or generally be the "same". The words "no less vigorous" are not so easily understood. Reasonable people might understand different things from these three words. "Vigorous" is an unusual word which has roots in the Latin word *vigere*, which means "be lively". Its modern day use would describe something done forcefully or energetically. Both are adjectives, but "vigorous" describes how something is done, as opposed to "equal" describes what is to be accomplished. Clearly, if something is to be done no less vigorous it can be greater to that which is equal.

The Legislative drafting records indicate that one of the principle sponsors of the amendments, in his testimony in support of Senate Joint Resolution 53/Assembly Joint Resolution 47, intended there be equality between the enforcement or protections of the rights[10] of the accused and victims. In interpreting a constitutional amendment, the courts may consider pertinent legislative history. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶24-36, 295 Wis. 2d 1, 719 N.W.2d 408. The history behind the amendment includes testimony by state legislators advocating for the passage of the bill authorizing the ballot question addressing the issue of how victim rights should be stacked as against the rights of the accused. State Senator Wanggaard testified:

> There is one last point that I want to address. I have heard repeatedly, and wrongly, that we are trying to shift the balance of justice from a defendant to victims and the prosecution. This is just not true. We are seeking to balance – to equalize – the rights of a victim with those of a defendant. To do so, we are elevating certain statutory rights to a constitutional level. Prosecutors are not gaining any additional rights. To be certain the balance of justice doesn't shift too far to victims, we have added language to the Amendment similar to the existing language stating clearly that the victim's rights do not supersede the constitutional rights of the defendant.

(See Legislative drafting record).

State Representative Novak similarly indicated that the Legislature was "simply leveling the playing field" and that "this amendment puts victims on equal footing with the accused.

[10] Nobody seemed to talk about the "protections" afforded the accused.

Representative Novak testified further: "[m]any of the rights proposed in this amendment exist in state statutes, but do not hold up when a judge is required to balance an accused criminal's constitutional rights with our current victim rights statutes. The constitutional rights of the accused are clear, but the rights of victims need clarification and strengthening. It is time to place victims on equal footing." *Id.*

First, the legislative history shows there is some confusion between establishing crime victim "rights" versus how those rights are to be protected. The words "equally" and "vigorous" describe how the rights are protected. While the nouns "rights" and "protection" refer to what crime victims and the accused can expect. The draftspersons seemed only to focus on the codification in the State Constitution victim rights. Second, nowhere in the legislative history is there any discussion why the amendments to Wisconsin's Constitution would contain the words "no less vigorous". What the legislative history clearly shows is that the amendments were intended by some to require that crime victim rights be "equal" to the rights afforded the accused. The ballot question similarly suggested that same goal and asked the voters if something should be "equal". The actual amendments, however, provided that the vigorous application of the rights of victims would never be less, and most likely, be greater than those afforded the accused. The convenience of a prepared model constitutional amendment and a model ballot question should not swallow the admonition that the constitutionally mandated task in this State is to draft "an intelligent and comprehensive submission to the people".

It is not that the task would have been difficult. It would have been best had the ballot question avoided the misleading notion that victims' rights would only be equally protected, wherein the constitution would require that they be protected in a manner no less vigorous than the protections afforded to the accused. The voters in Ohio appear to have been given slightly better information on that state's ballot. At least the amendment and the question contained the same word "vigorous".[11] However, the majority of states who passed a version of Marsy's Law,

[11] The question in Ohio stated that "the proposed amendment would expand the rights of victims … and require that the rights of victims be protected as vigorously as the rights of the accused. More specifically, for the purpose of ensuring due process, respect, fairness, and justice for crime victims and their families in the criminal and juvenile justice systems, the amendment would provide victims with:

- the right to privacy and to be treated with respect, fairness, and dignity;
- the right to information about the rights and services available to crime victims;
- the right to notification in a timely manner of all proceedings in the case;

simply omitted any reference on their ballots as to how or by what measure victim rights would be enforced and focused the voters, instead, on the definition of crime victims and the due recognition of victim rights.[12] If the ballot question made no reference to how the victim rights would be enforced, critics could not fault the question for what the voters were told.

Finally, the language used in the ballot question presented to Wisconsin voters is all the more unusual given the fact that it has long been declared the Legislature's intent that the rights extended in Chapter 950 Stats., "Rights of victims and witnesses of crime"' should be "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. Informing the voters that the State Constitution would memorialize the existing statutory rights for crime victims and direct these rights to be protected in a manner no less vigorous than the protections afforded criminal defendants would likely survive constitutional scrutiny. Even though honoring and protecting victim rights no less vigorously may have been the longstanding intent of the Legislature, when the Legislature decided to put the question to the voters, and codify legislative intent as a constitutional right, it was obligated to draft the question that fairly and accurately described the amendments, even if the amendments echoed what the state statutes already said. Wisconsin voters could not have been misled if the ballot question referenced the same terms as in the proposed amendment and as found in Ch. 950 Stats. The same cannot be said for using the terms "equal force".

B. The ballot question assured that federal constitutional rights would remain but made no mention of the impact to state constitutional rights.

The drafting record also shows that it was widely understood that the original draft of the amendments were going to affect the rights then presently enjoyed by persons accused of committing a crime. In response, the proponents of the constitutional amendments disclaimed any

- the right to be present and heard at all court proceedings, including the right to petition the court to protect the victim's rights;
- the right to a prompt conclusion of the case;
- to refuse discovery requests made by the accused, except as authorized by Article I, Section 10 of the Ohio constitution;
- the right to reasonable protection from the accused;
- the right to notice of the release or escape of the accused; and
- the right to restitution.

[12] Illinois, South Dakota, North Dakota, Montana, North Carolina, Nevada, Kentucky, Georgia, Florida and Pennsylvania appear to have avoided any mention of how victim rights would be enforced in their ballot questions. It appears that only Oklahoma, like Wisconsin, asked a question containing the word "equal" but passed an amendment that required enforcement "no less vigorous".

intent to affect or depreciate the rights of the accused. In an apparent attempt to allay these concerns, a separate amendment was offered to reiterate the application and primacy of the rights guaranteed in the United States Constitution. But that statement did little to ameliorate the actual constitutional effect.

The Wisconsin State Public Defender highlighted and foreshadowed the effect of the proposed amendments on the rights of the accused and opined that simply referencing the United States Constitution would be ineffective. The State Public Defender testified in relevant part:

> The due process rights of a defendant and the presumption of innocence are presently reflected in Wisconsin's Victims of Crimes constitutional provision at Article I, Section 9m ("Nothing in this section … shall limit any right of the accused which may be provided by law.") That language is stricken by the proposed constitutional amendment and replaced in Section 5 of the substitute amendment with new language that is less precise and more open to future litigation. While this concept was added back at our request, the actual language is not an adequate substitute for the current provision. Stating that these provisions shouldn't be interpreted to "supersede a defendant's federal constitutional rights' implies that defendant's rights in the Wisconsin constitution and rights set forth in state statutes have been compromised."

(See Legislative drafting record).

The insertion of the reference to the United States Constitution was offered as an apparent attempt to avoid impact on the rights of accused. In the end, the amendment to preserve federal constitutional rights did nothing to address the loss of State Constitutional rights. And the significance of this conclusion is that if that is true, then the ballot question did not properly present the correct question to the Wisconsin voters for their ratification.

1. Impact on the state constitutional right to a fair trial and sequestration.

There used to be an explicit reference in the State Constitution that persons accused of a crime had a State Constitutional right to a "fair trial". That language is gone. It is hard to view the change as only being symbolic. In response it is argued that even without this language, the United States Constitution requires that a person accused of a crime be given a fair trial. It is not yet known how courts will balance the victim's right to be present if a court determines that his or her presence undermines the fairness of the trial. There is no doubt that these amendments impact the balancing between the two concepts, a fair trial and the right to be present and eliminated the

explicit primacy of ensuring the accused has this inalienable State Constitutional right to exclude witnesses from hearing other witnesses testify if the judge determines exclusion is necessary for a fair trial.

This is not merely an academic observation. The question today is about the integrity of the process of amending the State Constitution by ballot. Voters deserve to know what they are voting on. Wisconsin has a long tradition of an informed electorate. Only by framing a question that reasonably, intelligently, and fairly comprised or referenced every essential of the amendment, could the voters decide whether and how to change the rights of persons accused of crimes, including the preservation of the right to sequester, which for generations has served the important interest of promoting truthfulness in witness testimony. It is hard to imagine that when informed that the words in the State Constitution referencing a "fair trial" were to be deleted, there would be anybody that would think that information was nonessential. More likely, many voters might pause before voting to delete what should be a universally accepted proposition even notwithstanding the legal complexity relating to the difference between state versus federal constitutional rights.

2. Impact to State Constitutional rights generally.

An "accused" may have been afforded rights by "law" that a "defendant" would not receive from the "federal constitution." The Wisconsin Supreme Court has not been hesitant to say that "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment." *State v. Doe*, 78 Wis.2d 161, 171, 254 N.W.2d 210, 215 (1977).

To say the Wisconsin Constitution does not abrogate rights guaranteed by the United States Constitution is a true statement. Of course rights guaranteed by the United States Constitution cannot be changed by the Wisconsin Legislature or in a ballot question approved by Wisconsin voters. That ability was relinquished by the States when they ratified the United States Constitution. To say the Wisconsin Constitution does not abrogate rights guaranteed by the United States Constitution obfuscates the fact that the amendments were going to affect state, not federal, constitutional and statutory rights. With sleight of hand, the ballot question eliminated existing

State Constitutional rights guaranteed by the State Constitution, by noting the obvious, that the amendment did not affect another, entirely separate and distinct, document – the United States Constitution.

Consequently, language on the ballot assuring voters that the proposed amendments did not affect the United States Constitution is a non sequitur to the loss of State Constitutional Rights. It is axiomatic that Wisconsin cannot limit the defendant's federal constitutional rights. *State v. Knapp*, 2005 WI 127, ¶ 57, 285 Wis.2d 86, 700 N.W.2d 899 (explaining that the federal constitution sets a minimum, but Wisconsin can provide more protections). It is quite likely a reasonable inference to be drawn from that statement is that the criminal defendant was not losing anything, when, in fact, the defendant was likely losing something very important. In *State ex rel. Thomson v. Zimmerman*, the court criticized the use of mandatory language in the question that was related to permissive language in the amendment. *Id.* at 660. Here, there is a similar disconnect.

There are rights that the Wisconsin Constitution recognize that are not contained in the United States Constitution. The doctrine of "new federalism" is well recognized in Wisconsin case law:

> Although our court has been willing to consider federal precedents which accord with the Wisconsin Constitution, *Allen v. State*, 183 Wis. 323, 329, 197 N.W. 808 (1924), this court has refused to be bound by federal decisions which are contrary to our state constitutional values. This court clearly stated this view in *Nunnemacher v. State*, 129 Wis. 190, 198, 108 N.W. 627 (1906), as follows: "We are fully aware that the contrary proposition has been stated by the great majority of the courts of this country, including the supreme court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reasoning by which it is supported."
>
> Justice Smith's statement in 1855 urging the court to look to the Wisconsin constitution should be followed by the court:
>
> "The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs let us construe, and stand by ours." *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567 (1856).
>
> This court has a long history of recognizing the vitality of the Declaration of Rights of the Wisconsin Constitution (Article I) and of interpreting Article I, section 11.

> We should continue our traditional approach of examining our own constitution and our own precedents. See Sundquist, *Construction of the Wisconsin Constitution Recurrence to Fundamental Principles*, 62 Marq. L. Rev. 531 (1979); Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 Marq. L. Rev. 596 (1979); *Comment, Rediscovering the Wisconsin Constitution: Presentation of Constitutional Questions in State Courts*, 1983 Wis. L. Rev. 483.
>
> Our court has long recognized that the home is entitled to special dignity and sanctity under our state constitution. See, e.g., *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89 (1923); *Jokosh v. State*, 181 Wis. 160, 163, 193 N.W. 976 (1923). Long before it was constrained to do so by the fourth and fourteenth amendments to the United States Constitution, this court relied on the Wisconsin Constitution to sustain and enforce the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. *Laasch v. State*, 84 Wis. 2d 587, 598, 267 N.W.2d 278 (1978) (Abrahamson, J., concurring).

State v. Rogers, 119 Wis.2d 102, 126-28, 349 N.W.2d 453 (1984).

The point here is not to debate the wisdom of "new federalism"[13]. The Wisconsin Constitution has been a source of State Constitutional Rights protecting the accused for many years. See *In re Jerrell C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110; *State v. Dubose*, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582; and *State v. Knapp*, 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899. As observed by Judge Adelman in the Marquette Law Review, (see f.n. 1 infra.):

> Prior to *Knapp* and *Dubose*, the court ordinarily interpreted Wisconsin's citizen protections consistently with the United States Supreme Court's interpretation of the parallel clauses of the Federal Constitution. However, in both *Knapp* and *Dubose*, the court noted that it never disclaimed its authority to do otherwise, that the United States Supreme Court had repeatedly stated that each state's highest court could interpret its own constitution independently, and that other state supreme courts had determined that their state constitutions provided criminal defendants with increased protections in the same areas. In *Knapp*, the court explained that courts created the exclusionary rule as a means of implementing a constitutional protection and that it had done so nearly forty years before the United States Supreme Court. Further, the court stated that the "'lock-step' theory of interpreting the Wisconsin Constitution no broader than its federal counterpart' rested on concerns about uniformity but that countervailing factors overcame such concerns."

[13] For an interesting discussion of "new federalism", see Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court's Critics*, 91 Marq. L. Rev. 425 (2007).

(footnotes omitted).

Similarly, Judge Diane Sykes writing in the Marquette Law Review about the Wisconsin Supreme Court, may have lamented the development of what Justice Crooks' called the "new federalism movement", she nonetheless recognized that it exists and its significance as a matter of state constitutional law jurisprudence. Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 Marq. L. Rev. 723 (2006). As Justice Crooks wrote in his concurrence: "[t]he Wisconsin Supreme Court has a 'long history of recognizing the vitality of the Declaration of Rights of the Wisconsin Constitution (article 1).'" *State v. Knapp*, 2005 WI at ¶ 84, n.1.

Although Wisconsin's Supreme Court's reliance on Wisconsin's Constitution has ebbed and flowed, the fact remains that the State Constitution and particularly the Declaration of Rights section can be an independent source of State Constitutional rights. The logical inference to be drawn by the sentence in the ballot question that rights guaranteed by the United States Constitution remain, is that rights emanating from Wisconsin's own Constitution, such as the right to a fair trial, and rights flowing from Article 1, the Declaration of Rights, would still remain, albeit from a different source. Stripping the rights formerly provided the accused that were in the State Constitution but assuring the voter that this does not change the United States Constitution misstates the true effect of the proposed amendments. It would have been much clearer for the voter to have been informed that the repealed provisions of the State Constitution are simply being withdrawn and not to lull the voter into thinking that the source of existing substantive and procedural rights are found only within the United States Constitution.

The reverberations from these amendments will be felt as lower courts struggle to balance the competing rights of victims as against the rights of the accused and the ambiguity of making sure the rights of victims are protected, not "equally", but "no less vigorously". It is not in the best interest of crime victims that there be any lack of clarity in their rightful role in the administration of criminal justice. It is clear that persons simply accused of committing a crime now have fewer rights than they did before. It is also apparent that what rights persons accused of committing a crime still have may be subordinate to the rights of victims, rather than being on equal footing, left to the courts to weigh and balance. Crime victims are not well served when their rights and the rights of the accused are not clearly drawn. Time and again, crime victims said they felt re-victimized by failed expectations as they journeyed through the administration of criminal justice.

Uncertainty over how courts should balance these rights may create another opportunity to fail persons victimized by crime.

It may be that these constitutional infirmities were caused by the self imposed task of describing all the changes in one question or by using in artful words suggested in model text. As discussed above, the single question did not sufficiently describe to the voters the effect the underlying amendments would have on the courts and on persons accused of a crime. As discussed below, the inadequacy of the question presented to the voters is due in large part to the fact that there should have been more than one question.

IV. The need tor two questions, one regarding what rights to give victims, and another asking for the approval to modify existing rights to persons accused of a crime.

The Constitutionally mandated procedure in Wisconsin is to require a separate question when proposed amendments involve different subjects, different purposes and are not dependent on each other. The question of whether there should have been more than one question is related to and dependent upon the discussion above, that is, the inadequacy of the single question posed to the voters. In large part, the failure to capture the essence of the changes proposed in the State Constitution is due to the difference between giving rights to victims and taking rights from persons accused of a crime is sufficiently complex so as to require consent of the voters by asking two questions.

In *State v. Timme*, the Wisconsin Supreme Court reviewed a challenge to a constitutional amendment that re-organized the legislature so that it met biennially instead of annually. 54 Wis. 318, 11 N.W. 785 (1882). The court determined that "amendments to the constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view." *Id.* at 791. Stated slightly differently, to require more than one question, "the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *Id.*

This test strikes a balance between efficiency and clarity. The State Supreme Court endeavored to avoid a test that would require "every proposition in the shape of an amendment to the constitution, which standing alone changes or abolishes any of its present provisions, or adds

any new provision thereto, shall be so drawn that it can be submitted separately, and must be so submitted." *Id.* at 790. The court believed that such a construction would "be so narrow as to render it practically impossible to amend the constitution…" *Id.* The court was particularly concerned that such an interpretation could lead to a rejection by the voters of one "amendment" that would make all the other amendments, even if voted for, useless or unworkable. *Id.*

The court in *Timme* stated that "[i]t is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the legislature." *Id.* at 791. The court added that it was "highly proper, if not absolutely necessary, as part of that change, to change the term of office of the senators as well as of the members." *Id.* The court acknowledged that the pay raise for legislatures was "perhaps, less intimately and necessarily connected with the change to biennial sessions, yet it was clearly connected with it." *Id.* The court suggested that "the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit, as separate amendments, the separate propositions necessary to accomplish a single purpose." *Id.*

The issue of whether separate questions was necessary was also discussed in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). The court there framed its discussion by beginning with the statement that "there is a presumption that all acts of the legislature are constitutional until established otherwise…" *Id.* at 648. The ballot question at issue in that case was, "Shall sections 3, 4, and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population." *Id.* at 651. In the purported amendment, Section 3 would be changed so area would be considered and dropped "the exclusion of Indians and the military in calculating population." *Id.* at 654. Section 4 was to be changed so that assembly were drawn by town, village or ward lines. *Id.* In Section 5, the "proposed amendment dropped the prohibition against dividing assembly districts in forming senate districts, and thus left no direction or restriction whatever as to the latters' boundaries." *Id.* The only requirement was that "the district is formed from territory which is 'contiguous' and, in the discretion of the legislature, 'convenient' …" *Id.* The court determined that the change in the formation of boundaries "has no bearing on the main purpose [taking area as well as population into account] of the proposed amendment … nor does it tend to effect or carry out that purpose."

Id. at 656. Therefore, the court held that a separate question would have been necessary. *Id.* Similarly, the court held "that a constitutional change in the individuals to be counted is not a detail of a main purpose to consider area in senate districts but is a separate matter which must be submitted as a separate amendment." *Id.* at 657.

A ballot question for an amendment that would change how bail worked in Wisconsin was challenged in *Milwaukee Alliance Against Racist and Political Repression v. Elections Board of the State of Wisconsin*, 106 Wis.2d 593, 317 N.W.2d 420 (1982). The court reiterates that "[i]t is within the discretion of the legislature to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one purpose." *Id.* at 604-605. The court determined that "[t]he purpose of the amendment in the present case was to change the constitutional provision from the limited concept of bail to the concept of 'conditional release.'" *Id.* at 607. The court found that the question was proper because "[w]hen the purpose of the proposed amendment was to change the historical concept of bail with its exclusive purpose of assuring one's presence in court, as defined by common law, to a comprehensive plan for conditional release, the defeat of either proposition would have destroyed the overall purpose of the total amendment." *Id.*

More recently, the issue was reviewed by the Wisconsin Supreme Court in *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis.2d 1, 783 N.W.2d 855. This case involved the passage of an amendment that defined marriage as being "between one man and one woman." *Id.* at ¶ 1. Further, the amendment stated that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." *Id.* The plaintiff in that action argued that the two propositions should have been submitted as separate questions. *Id.* at ¶ 2. It is entirely legitimate for a single amendment to be complex or multi-faceted. *Id.* at ¶ 26. The separate amendment rule is relevant "when the substance of an amendment cannot be said to constitute a single amendment." *Id.* The court noted that "[a]s long as there is one general purpose, and the items are connected with that purpose, the legislature has great latitude as to how it drafts amendments." *Id.* at ¶ 31. The court determined that the purpose of the amendment was "to preserve the legal status of marriage in Wisconsin as between only one man and one woman." *Id.* at ¶ 55. The court held that because "[b]oth propositions in the marriage amendment relate to and

are connected with this purpose … the marriage amendment does not violate the separate amendment rule …" *Id.* at ¶ 56.

As *Timme* makes clear, the separate amendment rule applies when the propositions in the amendment relate to more than one subject and have distinct and separate purposes that do not connect with each other. 11 N.W. at 791. The connections between purposes do not have to be so finely tethered that one would be impossible without the other. Even in *Timme*, the court approved of the question despite noting that a pay raise was "less intimately and necessarily connected with the change to biennial sessions …" *Id*. In *Milwaukee Alliance Against Racist and Political Repression*, the court noted that the legislature has the discretion to submit distinct propositions in one amendment so long as they relate to "the same subject matter and are designed to accomplish one purpose." *Id.* at 604-605.

The principle issue in this regard is whether there is a sufficient connection between expanding the rights of crime victims and the reduction of the rights formerly given to the accused. Increasing the categories of "crime victims" and affording them new expanded rights could have been easily done without affecting the rights of persons accused of a crime. Recognizing the respect and role of crime victims does not have to come at the cost of denying persons accused of a crime a fair trial.

In *State ex rel. Thomson v. Zimmerman*, the court concluded the amendment did more than just make area a consideration in drawing senate districts. *Id.* at 651. The court considered the fact that the amendment also would change who would be included in population counts. Id. at 654. It also removed requirements for drawing senate districts. *Id.* The court considered these issues to be sufficiently distinct that they would need to be submitted to voters as separate questions. *Id.* at 657. If one reasonably assumes the purpose of the amendments here was to expand and recognize the rights of crime victims, then one can easily conclude that the majority of the provisions are related to the same purpose. The majority of the provisions are all "details of a main purpose." *Id.* Each one either defines "victim," which is likely necessary for a victims' rights amendment, or the provision creates a right for the victim. But why delete the reference to the accused having a fair trial? What purpose is served by deleting the reference to the fact that the accused is no longer, in the face of these new victim rights, to be afforded the protection of existing state law and rights recognized elsewhere in the Wisconsin State Constitution? Virtually everything the amendments

gave to crime victims could have been given without the corresponding elimination or erosion of the rights of the accused. These amendments to the State Constitution were about protecting crime victims. The impetus for change has never been a subversive intent to strip from the accused those procedural protections in place to ensure a fair trial or to change criminal justice administration which has been carefully designed hopefully to only convict the guilty and always let the innocent go free.

If the Legislature wanted to expand the definition of a crime victim and to give crime victims greater rights and at the same time curtail the rights of persons only accused of committing a crime, it was required to frame the issues to elicit voter ratification by asking two separate questions. The two concepts are sufficiently distinct. They should be submitted to voters as separate questions. Conflating the separate questions of creating something new for crime victims and deleting something old for persons only accused of committing a crime was a mistake of constitutional proportions. It may be that in the end Wisconsin voters will ratify redefining "crime victim", increasing crime victim rights, and curtailing the rights of the accused. But having two separate and clearly worded questions is the only way to know for sure.

V. The possible application of the Doctrine of Severability

This court asked the parties if it could simply strike portions of the amendments and leave the rest.[14] Both parties said this court did not have that authority. If that is true, then if one part fails, no matter how small or insignificant, then the whole amendment would be unconstitutional. Clearly, the Doctrine of Severability is available to courts when judging the constitutionality of state statutes. See Wisconsin Stat. § 990.001(11). An effective remedy to the problems identified above would be as simple as restoring two sentences to the Constitution:

- This state shall ensure that crime victims have the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; and,
- Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.

[14] According to Wikipedia: "Don't throw the baby out with the bathwater" is an idiomatic expression for an avoidable error in which something good is eliminated when trying to get rid of something bad, or in other words, rejecting the favorable along with the unfavorable.

This court reluctantly accepts the argument advanced by both parties that there is no precedent for applying the Doctrine of Severability to a challenge of the kind and nature presented here. If there was, that is what this court would do. But admittedly, circuit courts have limited power to act in the absence of precedent. Appellate courts are not so constrained. As this case works its way through the appellate process, it may be a salutary development in the common law if the Doctrine of Severability were applied a challenge under Article XII, Section 1 so as to avoid the cost and inconvenience of possibly going back to square one. As troubling as it is, the court accepts that the circuit court does not have authority to afford the parties the efficiencies of this remedy.

VI. On the Court's own motion, this Decision and Order is stayed pending appeal.

On the reasonable assumption that one, (or both), parties will understandably appeal this Decision and Order to the appellate courts,[15] this court, on its own motion, stays this Decision and Order pending appeal. A court should issue a stay pending appeal when a party:

(1) makes a strong showing that it is likely to succeed on the merits of the appeal;

(2) shows that, unless a stay is granted, it will suffer irreparable injury;

(3) shows that no substantial harm will come to other interested parties;

(4) shows that a stay will do no harm to the public interest.

State v. Gudenshwager, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995).

In *Service Employees International Union Local 1 v. Vos,* 2020 WI 67, 393 Wis.2d 38, 946 N.W.2d 35, the Supreme Court reversed this court's denial of a stay pending appeal in a separate order issued in that appeal. Clarifying the *State v. Gudenshwager* standard, the Supreme Court held:

> "When we address the first factor of the likelihood of success on appeal where a statute has been enjoined, our prior decisions require us to take into account the presumption of constitutionality that attaches to regularly enacted statutes. Unlike the situation in *League of Women Voters of Wisconsin*, the plaintiffs in this case do not allege that either Act 369 or Act 370 was invalidly enacted into law. Therefore, the presumption of constitutionality clearly should be applied in this case. Further, as both the Governor and the Attorney

[15] On the off chance that nobody appeals, the stay will expire after the time passes for filing such appeal.

> General concede, the presumption of constitutionality, by itself, is sufficient to satisfy the first *Gudenschwager* factor of a "strong showing" of a likelihood of success on appeal in the context of a motion for temporary relief pending appeal. See *Gudenschwager*. 191 Wis. 2d at 441 ("Since regularly enacted statutes are presumed to be constitutional, see *Chicago & N.W.R. Co. v. LaFolIette.* 27 Wis. 2d 505, 520-21, 135 N.W.2d 269 (1965), we conclude that, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal of Judge Wolfe's finding that chapter 980 is unconstitutional."). Consequently, as we did in *Gudenschwager*. We conclude that the first factor weighs in favor of granting a stay of an injunction against the enforcement of a statute. *Id.*
>
> Turning to consideration of irreparable harms, we acknowledge that in most cases there will be some harm to both sides, especially when the stay motion is directed toward an injunction against the enforcement of a statute that is presumed to be constitutional. That does not mean, however, that the totality of the harms on each side of the issue will be of equal severity and magnitude, nor that they will be equal in terms of the ability and likelihood that the harms can be remedied or mitigated by the ultimate decision on appeal.

Id.

The *State v. Gudenshwager* factors support a stay pending appeal. First, the presumption of constitutionality discussed in the *SEIU* case demonstrates a sufficient likelihood of success on appeal. This court is mindful that the nature of the legal questions presented has and will continue to yield different answers by well informed and reasonable persons. Second, beneficiaries of the amendments, namely crime victims, will no doubt be concerned about the possible harms resulting from an injunction that interrupts the effects of these new laws. “The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant.” *Id.* at 441-42.

In this case, there is a legitimate concern that a victim’s rights could be impacted by an injunction preventing the application of the rights set forth in the amendments. Additionally, according the *SEIU* case, the public interest is benefited by a stay pending appeal because of the presumption of constitutionality to legislative decisions. The public expects stability in the laws of the State and it is clearly in the public’s interest that these provisions currently in the State Constitution should not be enjoined, (only then to possibly be restored), as this case works its way possibly toward the Wisconsin Supreme Court.

CONCLUSION

In conclusion, each person should ask themselves whether they want to deny anybody the right to a "fair trial" or whether it is necessary to eliminate or reduce the constitutional rights of the accused as a cost of recognizing and respecting the rights of crime victims. I suspect even the most ardent supporter of victim rights wanted explicit and enforceable rights that leveled the playing field and constitutional rights that properly reflected the harm of being a victim before, during and after any criminal trial, but not necessarily at the expense of those rights given to the accused to prevent a rush to justice.

A Wisconsin crime victim summarized the problems with the criminal justice system in Wisconsin before Marsy's law changed things. She wrote, in part:

> … Though I was told I could come to every hearing, it was almost discouraged. I was told it wasn't really necessary. Though I believe this was communicated to me in an effort to comfort me and shield me from reliving my nightmare over and over, not knowing what was going on or how the legal process worked was much more frightening.
>
> I felt as if, despite the fact that this process was initiated by a violent act that affected me, I was not an important part of that process. This experience raised questions for me as to why the person who did this to me has enforceable rights to information and to be a part of the process, while I often felt pushed to the back of the courtroom and left behind by the process?
>
> Marsy's Law for Wisconsin is a grassroots movement working with a broad coalition of Wisconsinites seeking to secure equal rights for victims of crime. Wisconsin already has many of the rights in place — such as the right to have standing in court, or the right to receive restitution payments before the government takes any money from the accused — but at the statutory level. So if my rights conflicted with the rights of the man who destroyed my life as I knew it, a judge would have no choice but to follow the law and allow his rights to trump mine.
>
> With Marsy's Law for Wisconsin, these rights would be elevated to a constitutional level, allowing a judge to weigh the rights of both the victim and the accused when presented with a conflict. Marsy's Law for Wisconsin also would strengthen some rights that are already in the Constitution, such as letting me speak up at more court proceedings than just at disposition. That would have given me a stronger voice in the process — just like my attacker had.
>
> Wisconsin has many good rights for victims. But if the current level of support that Wisconsin offers victims of crime were enough, then perhaps more victims would have felt protected and empowered to be a part of the legal process. If current support for victims' rights were enough, other victims might have felt they would be believed and come forward to law enforcement about abuse they suffered.

> Ultimately, if victims' rights statutes provided enough weight, I may not have had to write this column today.

See, Marsy's Law for Wisconsin, https://www.equalrightsforwi.com/it_happened_so_fast (last visited October 23, 2020), originally published in the Wisconsin State Journal April 7th, 2017.

Crime victims deserve to have their rights clearly stated and it is arguably persuasive that these rights be set forth in the State Constitution. Who is a "crime victim" needed to be defined. But all of these things could have been accomplished if one of two things had happened:

1. That the State Constitutional rights enshrined in the now repealed parts of the old State Constitution applicable to persons accused of a crime had remained[16]; or alternatively,
2. That the voters had been asked in two questions whether to redefine crime victims and give them new rights, and in the second question, whether to eliminate existing State Constitutional rights previously given to those persons accused of a crime.

What should not have happened, according to the constitutionally required procedure for amending the State Constitution, was to amend the State Constitution without asking Wisconsin voters questions seeking their approval and ratification of the actual changes, including those affecting the constitutional rights afforded the accused.[17]

Rights guaranteed by the State Constitution can be repealed and various criminal procedural protections can be withdrawn. To change the State Constitution requires the approval of Wisconsin voters on the ballot. An informed decision by Wisconsin voters requires properly worded questions. When the question is not concise, the amendments are not properly enacted. Every victim and every victim rights advocate spoke passionately about recognizing "equal" rights between victims and the accused, and about "elevating" the rights of victims equal to that enjoyed

[16] Namely, that a crime victim had a right to be in the courtroom unless the trial court finds sequestration is necessary to guarantee a fair trial for the defendant and second, that nothing in Article I, Section 9 or in any statute enacted pursuant to that section, shall limit any right of the accused which may be provided by law.

[17] When the original Crime Victims Amendment was presented to the voters the first time, the importance of that amendment's protection of the rights of the accused was reflected in the actual question on the ballot. Wisconsin voters were asked: "Shall section 9m of article I of the constitution be created requiring fair and dignified treatment of crime victims with respect for the privacy and the ensuring that the guaranteed privileges and protections of crime victims are protected by appropriate remedies in law without limiting any legal rights of the accused." Emphasis added. If the Marsy's law amendments are not designed to affect the rights of the accused, clearly the Legislature knew how to properly word the ballot question. The statement in the ballot relating to the Marsy's law amendments about leaving the federal constitutional rights intact is not the same as a promise to not limit any legal rights of the accused.

by the accused. Repeatedly, when the issue arose regarding the rights of the accused, the answers were in chorus, that Marsy's Law in Wisconsin sought to provide victims with rights that are equal to those of the accused – nothing more, nothing less and that the promise was that the amendments would not infringe upon the rights of the accused. Instead, the said, the purpose and scope of the amendments was to simply give victims' equal legal footing when evaluating a victims' rights against those of the accused.

Respectfully, and unfortunately, that is not what these amendments do. To the extent the Legislature intended to draft amendments that did not affect the constitutional rights of the accused, it did not succeed. And because the Legislature did not avoid this perhaps unintended result, the task of framing one question was doomed to fail from the beginning. A fair, accurate and concise description of the scope of the actual amendments required two questions, each carefully designed to fully, fairly and accurately inform the Wisconsin voter before he or she cast his or her ballot.

The choice going forward remains as it did from the beginning. Either the Legislature changes the amendments restoring the legal rights of the accused allowing the same question to again be presented to the voters or alternatively the Legislature keeps the amendments as drafted, and present two new ballot questions to the voters, one relating to victims and victim rights and the other relating to the change in the constitutional rights afforded the accused.

IT IS HEREBY ORDERED AND ADJUDGED, that the question on the ballot did not meet all constitutional and statutory requirements as to the content and form necessary to adequately inform the public on the purpose of the amendments upon which they were voting. Accordingly, pursuant to Wisconsin Constitution Article XII, § 1 and Wisconsin Stat. §5.64(2)(am), the Petitioners' Petition for Declaratory Judgment, paragraph K, is granted. Upon the Court's own motion, this Order and Judgment is stayed pending appeal. The provisions set for the amendments discussed above shall continue to be applied and enforced pending further decision of this court or further order of the appellate courts upon appeal.

SO ORDERED,

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL