Appeal No. 2020AP2003 **Cir. Ct. No. 2019CV3485**

WISCONSIN COURT OF APPEALS
DISTRICT III

WISCONSIN JUSTICE INITIATIVE, INC., A WISCONSIN NONSTOCK CORPORATION, JACQUELINE E. BOYNTON, JEROME F. BUTING, CRAIG R. JOHNSON AND FRED A. RISSER,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, IN HER OFFICIAL CAPACITY AS CHAIR OF THE WISCONSIN ELECTIONS COMMISSION, DOUGLAS LA FOLLETTE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF WISCONSIN, AND JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF WISCONSIN,

DEFENDANTS-APPELLANTS.

FILED

Dec. 21, 2021

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Nashold, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2019-20),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

ISSUES PRESENTED

In the April 7, 2020 election, Wisconsin voters ratified "Marsy's Law"—the proposed amendment to WIS. CONST. art. I, § 9m—by a three to one margin. The prior version of § 9m provides certain "privileges and protections" to crime victims; Marsy's Law expands upon and clarifies those rights. After Marsy's Law became effective, Wisconsin Justice Initiative, Inc., et al. (WJI) challenged the legal sufficiency of Question 1, the ballot question submitting Marsy's Law to the voters. The circuit court determined that the ballot question was legally insufficient and that Marsy's Law was therefore invalid. The Wisconsin Elections Commission, et al. (the Commission) appeals.

The circuit court agreed with WJI that, for three main reasons, the ballot question did not comply with the requirements of the Wisconsin Constitution. First, the ballot question did not "reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment" (the "every essential" test). *See* ***State ex rel. Ekern v. Zimmerman***, 187 Wis. 180, 201, 204 N.W. 803 (1925). Second, the ballot question was misleading: it contained "misinformation" and did not "mention[] [its subject] in accord with the fact." *See* ***State ex rel. Thomson v. Zimmerman***, 264 Wis. 644, 660, 60 N.W.2d 416 (1953). Third, under the "separate amendment" rule, the proposed amendment should have been submitted as more than one ballot question because it encompassed more than one subject matter and accomplished more than one purpose. *See* ***McConkey v. Van Hollen***, 2010 WI 57, ¶¶25-26, 41, 326 Wis. 2d 1, 783 N.W.2d 855.[2]

[2] Both the circuit court and WJI on appeal treat the "every essential" analysis as overlapping with the "misleading" analysis. In this certification, we view these inquiries as sufficiently distinct to address individually. We do so strictly for clarity and convenience, (continued)

These inquires involve significant questions of state constitutional law, the resolution of which will have a sweeping effect on our criminal justice institutions and those operating within them, including victims, defendants, prosecutors, defense attorneys, law enforcement officials, and our courts. *See* WIS. STAT. RULE 809.62(1r)(a) and (c)2. Accordingly, it would be in the best interest of these groups, and the Wisconsin voters generally, to have a timely and final decision on the sufficiency of the ballot question producing the amendment to our state constitution. Moreover, if Marsy's Law is determined to be invalid, our legislature may wish to re-propose Marsy's Law and re-submit a proper ballot question to the voters. In such case, it would be in the best interest of the proponents of Marsy's Law to resolve the instant appeal expeditiously and with finality.

Further, as we discuss in more detail below, there is little case law examining the "every essential" test of ***Ekern*** and, in fact, *no* case law applying this test to a given ballot question. In addition, there is little case law instructing the legislature on how the "every essential" test might overlap with, or be effectuated in harmony with, the "separate amendment" rule, under which sufficiently distinct propositions within one amendment must be submitted as separate ballot questions. *See* ***McConkey***, 326 Wis. 2d 1, ¶41. Accordingly, a supreme court decision will help develop and clarify the law on these important issues. *See* WIS. STAT. RULE 809.62(1r)(c).

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without expressing any opinion as to whether or to what extent these are, ultimately, separate substantive inquiries.

Finally, certification is appropriate because, as stated by the circuit court in invalidating this recently enacted constitutional amendment, resolution of this case involves the "solemn duty … [of] the judicial branch to judge whether the action of a coordinate branch of state government, the legislature, was constitutional."

For these reasons, we certify this appeal to the Wisconsin Supreme Court.[3]

BACKGROUND

I. Overview of Marsy's Law

In 2017, "Marsy's Law," the proposed constitutional amendment to WIS. CONST. art. I, § 9m, was introduced in the legislature. Consistent with the procedures in WIS. CONST. art. XII, § 1, the 2017 and 2019 legislatures submitted the proposed amendment to the electorate.[4] The proposed amendment was submitted as a ballot question in the April 7, 2020 election, was ratified by the voters, and became effective on May 4, 2020, when the election results were certified. *See* WIS. STAT. § 7.70(3)(h).

[3] This certification focuses on the arguments the parties raise in their briefing. In a nonparty brief, Marsy's Law for Wisconsin, L.L.C., and Mothers Against Drunk Driving provide a history of victims' rights in the United States and Wisconsin, analyze Marsy's Law, and argue that the ballot question was sufficient. Amici curiae ACLU of Wisconsin and Law Forward, Inc., discuss "framing bias," arguing that the ballot question was improperly framed and that multiple ballot questions would have mitigated this framing bias.

[4] 2019 Senate Joint Resolution 2 sets forth the black-lined text of the amendment and the text of the ballot question, and it resolves to submit the amendment to the voters at the April 2020 election. 2019 Senate Joint Resolution 2 was approved by both houses of the legislature and became 2019 Enrolled Joint Resolution 3. For the history of 2019 Senate Joint Resolution 2, *see* https://docs.legis.wisconsin.gov/2019/proposals/sjr2.

As relevant to this appeal, Marsy's Law amends the prior version of WIS. CONST. art. I, § 9m in the following respects. First, whereas the prior version defines "victim" as the victim himself or herself (i.e., a "person against whom an act is committed that would constitute a crime if committed by a competent adult"), § 9m(1)(a) expands this definition to include other individuals in certain circumstances, such as a spouse, parent, or person residing with the victim.

Second, WIS. CONST. art. I, § 9m(2) sets forth sixteen separate "rights" to which victims "shall be entitled"; these rights "shall vest at the time of victimization and [shall] be protected by law in a manner no less vigorous than the protections afforded to the accused." Many of these "rights" are identical or substantially similar to those provided by the prior version of § 9m. Relevant to this appeal, however, § 9m(2)(e) gives crime victims an unqualified right, "[u]pon request, to attend all proceedings involving the case." This right is not limited by the condition found in the prior version of § 9m—namely, "unless the trial court finds sequestration is necessary to a fair trial for the defendant[.]"

Third, unlike the prior version, WIS. CONST. art. I, § 9m(4) provides a mechanism, "[i]n addition to any other available," for the victim or certain representatives to enforce "the rights in this section and any other right, privilege, or protection afforded to the victim by law." The victim may seek enforcement "in any circuit court or before any other authority of competent jurisdiction," which court or authority "shall act promptly on such a request and afford a remedy for the violation of any right of the victim." Sec. 9m(4)(a). "The court or other authority … 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 …." ***Id.*** If such decision is adverse to the victim, he or she "may obtain review …

by filing petitions for supervisory writ in the court of appeals and supreme court." Sec. 9m(4)(b).

Fourth and finally, WIS. CONST. art. I, § 9m(6) now provides, "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." (Emphasis added.) This language replaces the provision in the prior version of § 9m that states, "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*." (Emphasis added.)

II. Procedural Background

Four months before the April 2020 election, WJI sought a temporary injunction to prevent the ballot question from being submitted to the voters. The circuit court denied the motion. After the amendment passed, WJI moved for declaratory and injunctive relief, seeking a declaration that the ballot question "was insufficient under the requirements of the Wisconsin Constitution for submission to the voters" and a permanent injunction "requiring the Secretary of State to strike the amendments from the Wisconsin Constitution and prohibiting the Attorney General from implementing or enforcing those amendments."

The challenged ballot question provides:

> 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?"

As stated above, WJI raised three main arguments as to why this ballot question was constitutionally insufficient and, accordingly, Marsy's Law not duly enacted. The circuit court agreed with WJI; it entered a judgment declaring that the ballot question "did not meet all constitutional and statutory requirements" and "permanently enjoining any amendment of the Wisconsin Constitution pursuant to any vote on" the ballot question. On its own motion, the court stayed its judgment pending appeal.

DISCUSSION

I. Overview and Standard of Review

WISCONSIN CONST. art. XII, § 1 provides:

> [I]t shall be the duty of the legislature to submit [a] proposed amendment … to the people in such manner … as the legislature shall prescribe … 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.

"Thus, the constitution assigns considerable authority and discretion to the legislature in the way it submits amendments to the people for a vote." ***McConkey***, 326 Wis. 2d 1, ¶25. This discretion is not unlimited, however, and the legislature must act within its constitutional grant of authority. ***Id.***, ¶¶25-26. Whether a ballot question meets all legal requirements, such that a constitutional amendment was properly adopted, is a question of law that is reviewed de novo. *See* ***id.***, ¶12.

The Commission challenges the circuit court's determination that the ballot question is insufficient. Again, the court concluded that the ballot question: (1) fails the "every essential" test, *see* ***Ekern***, 187 Wis. at 201; (2) is

misleading, *see* ***Thomson***, 264 Wis. at 660; and (3) should have been presented as more than one question, *see* ***McConkey***, 326 Wis. 2d 1, ¶41. We briefly discuss these issues to demonstrate why review by our state's highest court is warranted.

II. Sufficiency of the Ballot Question Under the ***Ekern*** *"Every Essential" Test*

A. Legal principles

As previously stated, WIS. CONST. art. XII, § 1 provides that "it shall be the duty of the legislature to submit [a] proposed amendment … to the people *in such manner ... as the legislature shall prescribe*." (Emphasis added.) In ***Ekern***, 187 Wis. at 199, the supreme court considered "the meaning of [this] portion of section 1 of article 12, in which the term 'manner' is used." The court concluded that this provision does not require that the legislature itself formulate the ballot question; thus, it was permissible for statutes then in effect to delegate this role to the secretary of state. ***Id.*** at 199-200. In so holding, the court remarked on the necessary content of any ballot question:

> Had the Legislature in the instant case prescribed the form of submission [of the proposed amendment] 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. In other words, even if the form is prescribed by the Legislature, [the ballot question] *must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment*. This demonstrates quite clearly the fact that the form of submission is after all a mere form, and that the principal and essential criterion consists in a submission of a question or a form which has 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. at 201-02 (emphasis added).[5]

In two subsequent cases, Wisconsin courts have referred to the ***Ekern*** "every essential" test. *See* ***Thomson***, 264 Wis. at 659-60; ***Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*** (***MMAC***), 2011 WI App 45, ¶¶22-30, 332 Wis. 2d 459, 798 N.W.2d 287; *see also* note 5. In neither ***Thomson*** nor ***MMAC***, however, did the court apply the "every essential" test to the ballot question at issue. In fact, the ***Ekern*** court itself did not evaluate the ballot question under the "every essential" test: because the procedural challenges in that case concerned other aspects of the ratification process, it was enough for the ***Ekern*** court to deem that ballot question "clear and unambiguous, so as to enable voters to vote intelligently." *See* ***Ekern***, 187 Wis. at 204. Accordingly, although the "every essential" test determines the comprehensiveness of a ballot question, this test has never been applied to invalidate *or* uphold any ballot question.

The content of a ballot question is further governed by WIS. STAT. § 5.64(2)(am). In pertinent part, § 5.64(2)(am) states that "[t]here shall be a separate ballot when any proposed constitutional amendment or any other measure

[5] In ***Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*** (***MMAC***), 2011 WI App 45, ¶22, 332 Wis. 2d 459, 798 N.W.2d 287, this court remarked that, standing alone, "it is not apparent that the ***Ekern*** court means that the ballot question itself must 'fairly comprise or have reference to every essential of the amendment.'" We noted, however, that the supreme court in ***State ex rel. Thomson v. Zimmerman***, 264 Wis. 644, 659, 60 N.W.2d 416 (1953), "unmistakably read[] the 'every essential' language from ***Ekern*** as addressing the sufficiency of the 'concise statement' required by WIS. STAT. § 6.23(8) (1953)" (which statute, since amended and renumbered as WIS. STAT. § 5.64(2)(am), required "a concise statement of the nature of" the proposed amendment to be printed on the ballot). *See* ***MMAC***, 332 Wis. 2d 459, ¶23. Thus, reading ***Ekern***, ***Thomson*** and ***MMAC*** together, the conclusion follows that the "every essential" test governs the sufficiency of a ballot question on a proposed constitutional amendment. The parties agree that this is the applicable legal test for evaluating the sufficiency of this ballot question.

or question is submitted to a vote of the people," which "ballot shall give a concise statement of each question in accordance with the act or resolution directing submission."

B. Analysis

The circuit court determined that the ballot question did not meet the "every essential" test because it did not inform the voters that Marsy's Law removes state constitutional protections for the accused. Specifically, a victim's right to attend court proceedings is no longer qualified by the condition in the prior version of WIS. CONST. art. I, § 9m, "unless the trial court finds sequestration is necessary to a fair trial for the defendant." Moreover, the provision in the prior version of § 9m, stating 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," is replaced by the provision, "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights," § 9m(6). The circuit court determined that this latter provision enshrines more limited protections to a defendant, because it permits § 9m to limit rights other than "a defendant's federal constitutional rights"—namely, state constitutional and statutory rights—when balancing the rights of a victim with those of a defendant.

The Commission raises two main arguments as to why the ballot question met all constitutional and statutory requirements. *See* ***Ekern***, 187 Wis. at 201-02; WIS. STAT. § 5.64(2)(am). First, the Commission argues that a ballot question need only provide a concise summary of the essential elements of a proposed amendment and need not address the potential (and speculative) "legal impacts" or "effects" of the proposed amendment. The Commission notes that, when asked by the circuit court to give an example of a circumstance where

"elevating the rights of crime victims [under Marsy's Law would] … compromise or interfere with the rights of criminal defendants," WJI did not offer any meaningful example. The Commission urges this court to refrain from striking down a ballot question "based on speculative concerns that may never prove true."

As shown by the competing positions in this case, there is a need for clarification and development of the court's "every essential" test in ***Ekern***. *See* ***MMAC***, 332 Wis. 2d 459, ¶35 (questioning "whether there is a workable standard as to what constitutes an 'essential element'"). To be sure, a test that moves too far on the margins in either direction can have significant ramifications in terms of how future ballot questions must be presented to voters to validly amend our state's highest law.

The Commission's second argument is that the ballot question *did* in fact communicate the essential elements of these changes. Specifically, the Commission argues that the ballot question accurately conveyed that the "federal constitutional rights of the accused [are left] intact" under Marsy's Law, which is consistent with the language in WIS. CONST. art. I, § 9m(6) that Marsy's Law is "not intended and may not be interpreted to supersede a defendant's federal constitutional rights." These arguments dovetail into our next discussion—namely, the circuit court's determination that the ballot question was fundamentally misleading in how it characterized the effect of Marsy's Law on the rights of defendants.[6]

[6] WJI argued to the circuit court, and it reiterates on appeal, that the ballot question also should have referenced the following: (1) that WIS. CONST. art. I, § 9m(1) expands the definition of "victim" in what WJI views as significant ways, such that classes of people not protected under the previous version of § 9m have new constitutional rights; and (2) that, in WJI's view, § 9m(4) expands the supreme court's original jurisdiction. Having ruled in WJI's favor regarding the (continued)

III. Whether the Ballot Question Is Misleading

A. Legal principles

In ***Thomson***, 264 Wis. 644, the supreme court evaluated the sufficiency of a ballot question for a proposed amendment changing how legislators were elected. The supreme court "[d]isregard[ed] … the controversy over whether this [ballot question] fairly comprised every essential of the amendment" because there was another problem with the question: it contained an actual error or mischaracterization. ***Id.*** at 659-60. The court observed:

> It does not lie in our mouths to say that 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. If the subject is important enough to be mentioned on the ballot it is so important that it must be mentioned in accord with the fact. The question as actually submitted did not present the real question but by error or mistake presented an entirely different one and, therefore, as stated [in ***Ekern***], no claim can be made that the proposed amendment is validly enacted.[7]

Id. at 660.

"every essential" test on other grounds, the circuit court did not address WJI's additional arguments related to this test. We likewise do not address these arguments in this certification, noting only that these legal questions may also warrant supreme court review.

[7] In contrast to the court's previous statement that it was "disregard[ing]" whether the "every essential" test was met (because the ballot question was misleading), this latter reference to ***Ekern*** would seem to view the "misleading" inquiry as partially or entirely subsumed within the "every essential" inquiry. *See* ***Thomson***, 264 Wis. at 659-60. Again, we view these as potentially distinct inquiries in some circumstances, so for ease of analysis, we address them separately in this certification.

Thus, whether viewed as an iteration of the "every essential" test or its own separate inquiry, a ballot question cannot contain "misinformation" and must mention all subjects "in accord with the fact." ***Id.***

B. Analysis

The circuit court determined that the ballot question was misleading in two respects: (1) in how it referenced constitutional provisions protecting the rights of the accused; and (2) in how it referenced balancing the rights of the accused against the rights of the victim.

First, the circuit court viewed the ballot question as misleading because it informed voters that Marsy's Law "le[ft] the federal constitutional rights of the accused intact," but *without* mentioning: (1) the *removal* of the provision conditioning the victim's right to attend court proceedings on the defendant's right to a fair trial (i.e., the removal of the previous provision "unless the trial court finds sequestration is necessary to a fair trial for the defendant"); and (2) the *replacement* of the previous provision, "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," with the provision, "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights." *See* WIS. CONST. art. I, § 9m(2)(e), (6).

Accordingly, the circuit court concluded that voters were misled into believing that Marsy's Law did not change *any* constitutional provisions relating to the accused, with the ballot question's reference to protecting a defendant's "federal constitutional rights" misdirecting the voters away from the above-mentioned changes to WIS. CONST. art. I, § 9m. The court noted that "[i]t is axiomatic that Wisconsin cannot limit the defendant's federal constitutional

rights"; thus, changing state constitutional language while "assuring the voter that this does not change the United States Constitution misstates the true effect of the proposed amendment." In sum, in the court's view, the protections for victims in § 9m (and in any statute enacted pursuant to § 9m) can now be interpreted to limit *or* entirely supersede any state constitutional or statutory right of the accused—but voters were misled about this fact.

The Commission, again, views the circuit court's reasoning as "improperly rest[ing] on concerns about *possible effects* of the Amendment in particular cases." It argues that "the circuit court essentially held that the Ballot Question was misleading because it did not inform voters that the Amendment could *possibly* result in cases where a judge may conclude that a victim's constitutional right outweighs a defendant's state constitutional right to the detriment of the defendant, *if* that right is not also protected by the federal constitution." The Commission also contends that the circuit court "assigned more work to the Ballot Question than was due," arguing that the circuit court improperly required the ballot question to "broadly educate voters" on the Wisconsin Constitution.

As part of a reviewing court's analysis of whether a ballot question is misleading, is the court first required to answer the underlying question of whether the amendment as written *did* alter an accused's constitutional rights? And, if we assume that Marsy's Law removes language from the prior version of WIS. CONST. art. I, § 9m that could *potentially* accord protections to the accused vis-à-vis victims under the Wisconsin Constitution or statutes—if not now, then at some point in the future—then a question for determination is whether the ballot question contains misinformation on this point. Perhaps, as the Commission suggests, this change will have no practical effect regarding an accused's rights

and therefore need not be mentioned at all. Even so, there is a question as to whether it was misleading—"a sleight of hand," in the circuit court's words—for the ballot question to arguably imply that Marsy's Law did not change *any* constitutional language relating to the defendant's rights.

As part of this inquiry, the court may also have to determine a set of standards for analyzing this question, both as to the ballot question at issue and future ballot questions. For example, one could view this as an objective test, based on the understanding of the average voter. In reading the ballot question, would the average voter reasonably infer that Marsy's Law did not change *any* constitutional language relating to the defendant's rights? Or, would the average voter infer, from the reference solely to "federal constitutional rights," that *state* constitutional protections might be altered?

The circuit court further determined that the ballot question misrepresents the extent to which a victim's rights are to be balanced against the rights of the accused. Whereas WIS. CONST. art. I, § 9m(2) states that the victim's rights shall "be protected by law *in a manner no less vigorous* than the protections afforded to the accused," the ballot question states that the victim's rights shall "be protected *with equal force* to the protections afforded the accused." (Emphases added.) WJI argued that these phrases connote different comparative levels of protection. The circuit court agreed, concluding that the voters were misled into believing that the victim's and the accused's rights were to be protected *equally*, whereas § 9m, in fact, permits a victim's rights to be protected *to a greater extent* than the accused's rights.

The Commission argues that this parsing of language is "hypercritical" and that the legislature must have a reasonable amount of leeway

to craft a ballot question that is understandable to the average voter. *See* ***Morris v. Ellis***, 221 Wis. 307, 316-17, 266 N.W.2d 921 (1936) (deeming "hypercritical" the objection to the form of the ballot question in a municipal referendum; voters were mistakenly asked to approve a *resolution authorizing a referendum* and not the substantive resolution itself, but the "true import [of the ballot question was] obvious and not calculated to mislead a voter"). According to the Commission, the legislature had the discretion to determine that the phrase "no less vigorous" is difficult to understand, and to substitute a phrase that—while perhaps not embodying the precise same meaning—is close enough. Thus, another novel question that is appropriate for the court's determination is whether, and to what degree, a ballot question must faithfully represent the text of the proposed amendment. The court will then be able to apply its answer to that question to this dispute regarding the two phrasings used.

IV. The Separate Amendment Rule

A. Legal principles

WISCONSIN CONST. art. XII, § 1 provides 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." In ***McConkey***, an appeal accepted on certification, the supreme court analyzed the relevant case law on when a proposed amendment must be submitted as more than one ballot question. The court rejected the view that, to be submitted as one question, "distinct propositions [must be] interconnected and dependent upon one another such that if one proposition failed, the total purpose would be destroyed." ***McConkey***, 326 Wis. 2d 1, ¶42. Rather, as stated, the applicable test is more deferential to the

legislature: "The propositions … need only relate to the same subject and tend to effect or carry out one general purpose." ***Id.***

"Text and historical context should make the purpose of most amendments apparent," and a "plain reading of the text of the amendment will usually reveal a general, unified purpose." ***Id.***, ¶44. Other "helpful" extrinsic sources for determining purpose "includ[e] the previous constitutional structure, legislative and public debates over the amendment's adoption, the title of the joint resolution, the common name for the amendment, the question submitted to the people for a vote, [and] legislative enactments following adoption of the amendment." ***Id.***

B. Analysis

Here, the circuit court concluded that the proposed amendment should have been submitted as more than one ballot question. *See* ***id.***, ¶41 ("'It 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 general purpose.'" (quoting ***Milwaukee All. Against Racist & Pol. Repression v. Elections Bd.*** (***Milwaukee Alliance***), 106 Wis. 2d 593, 604-05, 317 N.W.2d 420 (1982))). Specifically, as pertinent to this appeal, the circuit court concluded that the proposed constitutional provisions expanding crime victims' rights did not relate to, were not dependent on, and did not accomplish the same purpose as proposed provisions curtailing the rights of the accused. As the court put it, Wisconsin voters may very well have wished to ratify both constitutional changes, but these "two concepts are sufficiently distinct," so "having two separate and clearly worded questions is the only way to know for sure."

Both parties agree that the purpose of Marsy's Law is to increase and strengthen victims' rights. The Commission further argues that the purpose of Marsy's Law is *not* to change any rights or protections afforded to the accused. However, as explained in the previous section, the circuit court determined that Marsy's Law does just that. In its view, the changes relating to defendants' rights do not effectuate the purpose of Marsy's Law and, accordingly, should have been submitted separately.[8]

In response, the Commission reiterates its position that Marsy's Law did not, in fact, change any substantive rights for defendants. Thus, again, the question is whether the removal of constitutional language related to protections afforded a defendant, *regardless of its present effect*, warrants submitting a separate question. Although our case law provides guidance on this point, further guidance from our supreme court is needed to address this question and others of statewide significance. For example, where constitutional provisions may have consequences outside the amendment's central purpose, how must Wisconsin courts ensure the voters' right to separately approve distinct provisions, while respecting the legislature's discretion in this regard?

CONCLUSION

Because of the statewide importance of the issues at stake, the novelty of some of these questions, and the lack of significant authority on others, supreme court review is necessary to clarify whether the ballot question for

[8] WJI further asserts that changes to "the constitutional definition of crime victim" and "Supreme Court jurisdiction" also required separate questions, such that the proposed constitutional amendment should have been submitted as four questions. WJI does not develop its arguments on these two points, and this certification does not address them.

Marsy's Law: (1) fails the "every essential" test, *see* ***Ekern***, 187 Wis. at 201; (2) is misleading, *see* ***Thomson***, 264 Wis. at 660; and (3) should have been presented as more than one question, *see* ***McConkey***, 326 Wis. 2d 1, ¶41. We urge the supreme court to accept this certification to determine—in the first instance and with finality—whether this important state constitutional provision was validly enacted.