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June 29, 2020

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You are hereby notified that the Court has entered the following order:

No. 2020XX1010-CR State v. Ross L.C. #2020CF142

The court has considered the emergency motion filed on behalf of Michael Ross, seeking an exception to this court's March 22, 2020 administrative order "In re: the Matter of Jury Trials during the COVID-19 Pandemic," as extended by this court's May 22, 2020 administrative order "In re: the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings During the COVID-19 Pandemic." As this court indicated in its May 22, 2020 order, resumption of in-person proceedings and jury trials is dependent upon the circuit court's preparation of an operational plan that has been approved by the chief judge of the judicial administrative district. As of the date of this order, Wood County circuit court does not have such a plan.

IT IS ORDERED that the motion is denied in its entirety, ex parte.

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REBECCA GRASSL BRADLEY, J. (*dissenting*). The Supreme Court of Wisconsin denies Michael Ross his constitutional right to a speedy trial and deprives him of his liberty without due process of law, citing the court's prior order¹ indefinitely suspending all criminal jury trial rights in the State, now modified to permit the resumption of trials only after "an operational plan" reflecting this court's dictates "has been approved by the chief judge of the judicial administrative district."² The Constitution does not countenance such an infringement of citizens' constitutional rights, even in the face of the public health emergency presented by the COVID-19 pandemic. I dissent.

The Sixth Amendment to the United States Constitution commands: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial[.]" U.S. Const. amend. VI. The Sixth Amendment's Speedy Trial Clause enshrines an ancient liberty. The Assize of Clarendon, an English code of legal procedure established in 1166, mandated speedy trials for the accused, "without delay." In 1215, following the English barons' revolt against tyrannical rule, the Magna Carta promised "[t]o no one will we sell, to no one deny or delay the right or justice." See Patrick Ellard, Learning From Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters, 44 Am. Crim. L. Rev. 1207, 1209-10 (2007) (quoted source omitted).

The right to a "trial by jury" is "a valuable safeguard to liberty" and "the very palladium of free government." The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "[T]he Speedy Trial Clause's core concern is impairment of liberty." Doggett v. United States, 505 U.S. 647, 660 (1992) (Thomas, J., dissenting) (quoting United States v. Loud Hawk, 474 U.S. 302, 312 (1986)). "The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges." Strunk v. United States, 412 U.S. 434, 439 n.2 (1973). With respect to the rights guaranteed by the Sixth Amendment, "so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified." Ex parte Milligan, 71 U.S. 2, 120 (1866). "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now . . . sought to be avoided." Id. (emphasis added; emphasis omitted).

Nothing in the Constitution permits the judiciary to suspend the fundamental rights secured under the Sixth Amendment. "[T]here is only one instance in the Constitution where the government is expressly permitted to suspend a fundamental right[.]" Mitchell F. Crusto, State of

¹ In re the Matter of Jury Trials During the COVID-19 Pandemic (S. Ct. Order issued March 22, 2020).

² In re: the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings During the COVID-19 Pandemic (S. Ct. Order issued May 22, 2020).

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Emergency: An Emergency Constitution Revisited, 61 Loy. L. Rev. 471, 504 & n.189 (2015); see U.S. Const. art I., § 9, cl. 2. Article I, Section 9, Clause 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." If the framers had contemplated suspension of Sixth Amendment rights or any other liberties, they would have said so in the text. If, as the court says, a public health emergency justifies the blanket suspension of a Sixth Amendment right, then any constitutionally enumerated right of the people is subject to suspension by judicial decree, including:

- The free exercise of religion;
- The freedom of speech;
- The freedom of the press;
- The right of the people to peaceably assemble;
- The right of the people to petition the Government for a redress of grievances;
- The right of the people to keep and bear Arms;
- The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

This court treads a dangerous path in creating precedent that could serve as the basis for eroding other fundamental rights belonging to the people.

Informed by the lessons of history, the Constitution was established to safeguard the rights of the people even under the most exigent circumstances. The framers "foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." Ex parte Milligan, 71 U.S. at 120-21 (emphasis added).

This court's order not only overrides the United States Constitution, it flouts the Wisconsin Constitution, which mandates: "In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy public trial[.]" Wis. Const. art. I, § 7. Although the speedy jury trial right is

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constitutionally preserved, this court has long recognized that the timeframes for conducting them are left for the legislature to prescribe. "While the defendant has a right to a trial by jury, he has no vested right under the Wisconsin Constitution to the manner or time in which that right may be exercised or waived. Those are procedural matters expressly left for determination by law[.]" State ex Rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 523 261 N.W.2d 434 (1978) (emphasis added; quoted source omitted). While utterly ignoring the supreme law of the land, the court expressly refuses to follow governing statutory law. In its prior order, the court said "the ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial under Wis. Stat. sec. 971.10(3)(a)." Under that statute, criminal trials in Wisconsin "shall commence" within specified periods of time, depending on the nature of the charges. See Wis. Stat. § 971.10(1)-(2). Continuances are statutorily permissible, provided a circuit court considers multiple case-specific factors. See Wis. Stat. § 971.10(3). Although this court's May 22, 2020 order narrowed the broad sweep of its original March 22, 2020 order by returning decisions on conducting jury trials to the individual county courts, the court's current order continues to preclude every circuit court in the state from exercising its discretionary power to weigh various statutory factors—including the interests of the victim—before granting a continuance. See Wis. Stat. § 971.10(3)(b)(3).

Heedless of the Constitution and in spite of statutory law, the court maintains its prohibition on all jury trials until an "operational plan" is in place. Ross remains confined in Wood County, which has not yet satisfied this court's directive—although it appears jury trials may resume there in September. Even so, the circuit court in Ross's case refused to set a September trial date. The backlog of cases created by this court's blanket suspension in March means Ross's trial may take place much later. Neither the Constitution nor the Wisconsin Statutes tolerate such an indefinite deprivation of liberty.

This court's orders postponing criminal jury trials in the State of Wisconsin cannot comport with the Sixth Amendment's speedy trial mandate, which, although not strictly construed so as to forbid any delay whatsoever, "necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972) (emphasis added; footnote omitted). This court's orders, which suspended all criminal jury trials indefinitely, dispense with both constitutional and statutory requirements to consider, on a case by case basis, the rights of the accused, the interests of victims,³ and the best interests of the public. Under Wisconsin law, "[e]very defendant not tried in accordance with this section shall be discharged from custody." Wis. Stat. § 971.10(4). Violations of the Constitution's Speedy Trial Clause require dismissal of the charges against the accused: "In light of the policies

³ The Wisconsin Constitution guarantees crime victims certain rights, including "proceedings free from unreasonable delay" and "timely disposition of the case, free from unreasonable delay." Wis. Const. art. I, § 9m(2)(c)-(d).

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which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.'" Strunk, 412 U.S. at 440 (citing Barker, 407 U.S. at 522).

Ross was arrested on February 13, 2020 and is unable to post the \$100,000 cash bond set by the circuit court. Because Wood County does not have an approved operational plan in place as mandated by the court, Ross remains confined in Wood County indefinitely, even though the statute requires Ross's jury trial to commence by July 1, 2020. Ross's previously scheduled June trial date was removed from the court's calendar. He asked the circuit court to release him from custody in accordance with both statutory and constitutional law. The circuit court denied his motion. Under this court's orders, Ross will remain confined until the State decides his constitutionally-guaranteed jury trial will take place. Such indefinite confinement offends constitutional guarantees established upon our nation's founding, which are grounded in English law adopted more than 800 years ago.

The people of Wisconsin should be particularly leery of governmental infringement of fundamental rights justified by declarations of necessity. "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). Justifying the suspension of the people's constitutionally guaranteed rights based on a public health emergency nullifies our Constitution. Justice Antonin Scalia once explained that "every tinpot dictator has a Bill of Rights which he casually ignores. What was debated in 1787 and what insures our freedom is our structure of government which holds each branch (and in turn by its people) to account." If the people's constitutional rights may be suspended by the judicial branch in the name of a public health emergency, our freedom is in peril; our republic is lost. More than one million Americans have died defending our liberty from external threats. The liberty for which so many have laid down their lives should not be cast aside even in "troubulous times."

Ross asserts his indefinite confinement, based on a virus for which he is not responsible and over which he has no control, is so arbitrary and capricious as to violate his Fourteenth Amendment right to due process of law. The Fourteenth Amendment to the United States Constitution, in relevant part, provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added). Nothing in the Constitution allows the judiciary to suspend its provisions in times of emergency: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in

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the light of emergency, and they are not altered by emergency." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934) (emphasis added). The majority's orders flout these core principles, reducing the Constitution to hollow rhetoric.

The majority's order purports to safeguard liberty by allowing litigants to petition this court for an exception to the indefinite suspension of all jury trials. Although multiple litigants exercised the emergency option, this court summarily denied every single request, with little or no explanation for any of its denials. If the majority so readily ignores constitutional commands and statutory law, what factors could possibly sway the majority to restore the jury trial right for any litigant? Apparently none. The majority's orders offer no meaningful "process" whatsoever.

Ross will remain incarcerated pending approval and implementation of Wood County's operational plan. Even then, there is no guarantee his jury trial will take place in September, October, or at any time in 2020. The law requires the justice system to try Ross no later than July 1, 2020 or release him from confinement. Wis. Stat. § 971.10(4). This court denies Ross, whom the law presumes innocent until proven guilty, due process of law. In violation of the Constitution and Wisconsin law, and in the name of a pandemic, Ross will remain indefinitely confined while he awaits trial. Something is gravely amiss within our constitutional order.

* * *

Neither the Constitution nor the statutes recognize a public health emergency exception to Ross' right to a timely jury trial. The court lacks any authority to infringe the right of any Wisconsin citizen to have his case tried by a jury within the mandatory timeframe established by the people's representatives in the legislature. By indefinitely suspending every jury trial in the State of Wisconsin, this court triggered a backlog of cases across the state. The delay has been exacerbated by the court's latest order, which dictated operational plans as a precondition to resuming trials. In the meantime, Ross and others similarly situated will sit indefinitely in jail, in flagrant violation of their constitutionally-guaranteed speedy trial rights. No court may lawfully override the Constitution or the laws enacted by the people's representatives in the legislature, even in a pandemic. In refusing to apply the law in Ross's case, the majority tramples his fundamental rights,⁴ invades the province of the legislature, violates the separation of powers, and "creates a confrontation of constitutional magnitude between the legislature and this court."⁵ I dissent.

Sheila T. Reiff
Clerk of Supreme Court

⁴ Liberty is a fundamental right. Foucha v. Louisiana, 504 U.S. 71, 86 (1992).

⁵ Door Cty. v. Hayes-Brook, 153 Wis. 2d 1, 29, 449 N.W.2d 601 (1990) (Abrahamson, C.J., concurring).