STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP1853

ALBERT D. MOUSTAKIS,

Plaintiff-Appellant,

v.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE,

Defendant-Respondent,

STEVEN M. LUCARELI,

Intervenor.

APPEAL FROM THE CIRCUIT COURT FOR LINCOLN COUNTY, CASE NO. 14-CV-41,
THE HONORABLE JAY R. TLUSTY, PRESIDING

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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INTRODUCTION

Albert Moustakis is the district attorney for Vilas County. The Division of Criminal Investigation of the Wisconsin Department of Justice (DOJ) conducted an investigation into various allegations against Moustakis that did not lead to any charges. Moustakis claims he is entitled to pre-release judicial review under Wis. Stat. § 19.356(4) before DOJ releases public records to a newspaper that made a public records request.

Moustakis is not entitled to pre-release judicial review of the records based on the plain meaning of the definition of "employee" in public records law, as well as the context in which the term is used, how the term fits with related statues, and the purpose of the statute. To the extent there is any ambiguity, the legislative history confirms that Moustakis has no standing to bring a pre-release review claim under Wis. Stat. § 19.356. Moustakis's interpretation would vastly expand the scope of pre-release review based on a strained reading of the statute.

STATEMENT OF ISSUES

1. Public records law defines an "employee" as someone employed by an "authority" but specifically excludes those that hold "state public office." Wis. Stat. § 19.32(1bg). The definition of "state public office" specifically includes district attorneys. *See* Wis. Stat. §§ 19.32(4), 19.42(13)(c), 20.923(2)(j). Given their specific

inclusion in the exception, are district attorneys to be covered by this category of employees?

2. Pre-release judicial review under Wis. Stat. § 19.356 applies to records that "are the result of an investigation into a . . . possible employment-related violation" of law. Wis. Stat. § 19.356(2)(a)1. Moustakis did not allege the documents at issue in this case fit into this category and admits that the documents at issue do show any "on-duty misconduct." Are the records subject to pre-release judicial review?

3. The legislature enacted Wis. Stat. § 19.356 to limit two Wisconsin Supreme Court decisions that granted pre-release review to public employees with respect to records from their personnel files. In contrast, this case involves records that DOJ created in the course of a criminal investigation. Did the legislature intend to expand the scope of the Supreme Court decisions to include pre-release judicial review for records an authority prepared in the course of investigating alleged crimes committed by non-employees?

The circuit court decided this case on the first issue, holding that Moustakis had no standing because he was not an "employee" because he holds "state public office." While it did not address the other two issues, they provide independent reasons to affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The DOJ does not believe that oral argument is warranted in this case, but does believe that the opinion in this case would warrant publication because there is currently no case law interpreting the definition of "employee" as used in Chapter 19 of the Wisconsin Statutes. *See* Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF CASE

I. The public records request

This case began with a public records request by the Lakeland Times newspaper. The newspaper made a public records request to DOJ for any records relating to "[a]ny complaints or investigations regarding Vilas County District Attorney Al Moustakis that the Wisconsin Department of Justice and the Wisconsin Department of Criminal Investigation has." (R. 5 Ex. A.) The newspaper further requested "copies of any information regarding complaints regarding Mr. Moustakis or reports or documents regarding any investigation of his conduct or handling of cases while district attorney" including "complaints and investigations regarding Mr. Moustakis that were completed or ended without any action taken against him." (*Id.*) Lastly, the newspaper requested "any communications between Mr. Moustakis and your department since he took office in 1995." (*Id.*)

Under the direction of Kevin Potter, DOJ's Public Records Custodian and Administrator of the Division of Legal Services, DOJ staff searched for and reviewed responsive documents, and made numerous redactions. (*Id.* ¶¶ 12-16.) On February 17, 2014, Potter determined that the records were ready for release. (*Id.* ¶ 15-16.) Two days later, as a professional courtesy and not pursuant to Wis. Stat. § 19.356, Potter notified Mosutakis by voicemail that DOJ was going to be providing responsive records. (*Id.* ¶ 17.) DOJ then sent Moustakis a courtesy copy of the records that were to be released. (*Id.* ¶ 24.)

II. Procedural history

Moustakis then filed this lawsuit seeking pre-release judicial review of the records under Wis. Stat. § 19.356. (R. 1.) The DOJ moved to dismiss the 19.356 claim on the grounds that the court lacked competency to proceed because Moustakis had no standing to bring a claim under Wis. Stat. § 19.356. (R. 8-9.) As one of several arguments, DOJ argued that Moustakis did not meet the requirement of Wis. Stat. § 19.356 of being an "employee" as defined in Wis. Stat. § 19.32(1bg). An "employee" is defined as "any individual who is employed by an authority, other than an individual holding local public office or state public office, or any individual employed by an employer other than an authority." Wis. Stat. § 19.32(1bg). DOJ contended that Moustakis was included in the first category of employees (those employed by an "authority"), but he did not benefit

from pre-release review because he specifically exempted as holding "state public office." (R. 8 at 14-15; R. 9 ¶¶ 5-6.) DOJ also argued that Wis. Stat. § 19.365 did not apply to the records at issue because they did not meet the criteria under Wis. Stat. § 19.356(2)(a). (R. 8 at 13-14; R. 9 ¶ 7.)

Moustakis countered that he had standing under Wis. Stat. § 19.356 because he was actually covered by the second category of employees (those who are employed by an employer other than an "authority"). He contended that because he holds a statute constitutional office, his employer is the State of Wisconsin. He claims that because the State of Wisconsin is not listed as an authority in public records law, he is therefore not employed by an authority. (R. 24.)

At a hearing on July 1, 2014, the circuit court granted the motion to dismiss on the grounds that Moustakis was not an "employee" as defined by Wis. Stat. § 19.32(1bg) and therefore had no standing to pursue a claim under Wis. Stat. § 19.365. The court reasoned that "all employees, anyone who is employed, is either employed in the public sector or private sector," and that Moustakis was covered by the first category because he was a public employee. (R. 54 at 15-16.) Because Moustakis held state public office, he was excluded from the definition of "employee," and therefore could not bring a pre-release review claim under Wis. Stat. § 19.356. (*Id.*) On a motion for reconsideration, the circuit court affirmed its prior dismissal of the pre-release review claim. (R. 57.)

Moustakis appealed the circuit court's dismissal of his pre-release review claim under Wis. Stat. § 19.356. DOJ moved to dismiss the appeal because Moustakis had filed an amended complaint that added two causes of action and thus the appeal was not from a final judgment that disposed of all of the claims at issue in the litigation. DOJ, however, indicated that it was not opposed to the Court taking the case as a petition for leave to appeal. This Court denied the motion without deciding whether the appeal was from a final order on the grounds that it would hear the case on discretionary review even if it was not from a final judgment.

ARGUMENT

The Court should affirm the dismissal of Moustakis's claim for three reasons.

First, the circuit court was correct that Moustakis is not an "employee" entitled to bring an action under Wis. Stat. § 19.356. DOJ agrees with Moustakis that there are two categories of employees: those employed by an authority and those who are not. Moustakis falls within the first category because district attorneys are specifically included in the "state public office" exception to the first category of employees. The legislature would not have specifically included district attorneys in the exception if it did not intend them to be addressed by the category in the first instance.

Second, Moustakis has not even alleged that the records at issue are one of the three defined sets of records covered by Wis. Stat. § 19.356 and admits that the records do not reflect any employment-related crime.

Third, the pre-release review procedure applies to documents prepared by an employee's employer, not to records prepared by law enforcement agencies investigating alleged crimes committed by individuals they do not employ.

I. Standard of Review.

This case involves issues of statutory interpretation, which are questions of law that this Court reviews de novo. *Local 2489, AFSCME, AFL-CIO v. Rock Cnty*, 2004 WI App 201, ¶ 7, 277 Wis. 2d 208, 689 N.W.2d 644.

II. Moustakis has no standing under Wis. Stat. § 19.356 because he is not an "employee."

The pre-release judicial review procedure in Wis. Stat. § 19.356 is an exception to the general rule that "no person is entitled to judicial review of the decision of an authority to provide a requester access to a record." Wis. Stat. 19.356(1). While it is not self-evident why the application of a public records statute would focus on an individual's employment status, the legislature authorized pre-release judicial review for three narrow classes of "employee-related records," as a "response to the supreme court's holdings in *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis.2d 779, 596 N.W.2d 403 (1999),

and *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996)." *Local 2489*, 277 Wis. 2d 208, ¶ 2. Because the *Milwaukee Teachers'* and *Woznicki* cases involved pre-release review for public employees with respect to the release of their personnel files, the statutory pre-release judicial review procedure is limited to "employees" with respect to certain employment-related documents.

A. Moustakis is not an "employee" under the plain meaning of the statute.

Moustakis has no right to pre-release judicial review because he is not an "employee" as defined by Wis. Stat. § 19.32(1bg). An "employee" is defined as one of two categories: "any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority." Wis. Stat. § 19.32(1bg). Moustakis falls within the first category of employees—those employed by an authority—because his position is specifically included in the exception for holders of "state public office."

Specifically, Wis. Stat. § 19.32(4) defines "state public office" as having "the meaning given in s. 19.42(13)," which then defines "state public office" as, among other things, "[a]ll positions identified under s. 20.923(2)." Wis. Stat. § 19.42(13)(c). The cross-reference to Wis. Stat. § 20.923(2) specifically includes district attorneys. *See* Wis. Stat. § 20.923(2)(j). Further, Wis. Stat. § 20.923(2) generally deals

with "constitutional officers and other elected state officials" and includes the other state constitutional offices that would be included in Moustakis's interpretation, such as the governor, attorney general, superintendent of public instruction, lieutenant governor, secretary of state, state treasurer. *See* Wis. Stat. §§ 19.32(4), 19.42(13)(c) & 20.923(2)(c)-(i). By including holders of state public office as within the concept of individuals "employed by an authority," the legislature explicitly indicated their inclusion in that category.

Moustakis contends that those holding constitutional office are not within the category of "those employed by an authority," but are actually covered by the category of those who are not employed by an authority. This theory ignores the plan language of the statute.

Further, Moustakis's reading would make much of the "state public office" exception meaningless, contravening the rule that "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Put simply, if the legislature would not have defined the "state public office" exception to the first category of employees in a way that specifically includes district attorneys (and all other constitutional officers) if the legislature did not intend constitutional officers to be covered by that category. *Id.* (holding courts should interpret

words "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."). The most straightforward interpretation is that the legislature considered district attorneys employees of the district attorneys' office (an authority), and therefore specifically excluded them because they hold "state public office."

Moustakis's entire argument is based on the unsupported assumption that he is to be treated as employed by State of Wisconsin for purposes of Wis. Stat. § 19.32(1bg) because he holds a state constitutional position whose salary is set by the legislature. (*See* Moustakis Br. at 11.) Nothing in Chapter 19 suggests that this is the case and, as noted above, the statutory scheme actually belies this contention by defining "state public office" in a way that specifically includes district attorneys and all other state constitutional officers. *See* Wis. Stat. §§ 19.32(4), 19.42(13)(c), 20.923(2)(j). In addition, the fact that his salary is set in accordance with Wis. Stat. § 20.923(2)(e) actually works against his argument because that is the very statutory subjection referenced that makes him a holder of "state public office." If the legislature thought this fact would place district attorneys in the second category of employees, then it would not have referenced Wis. Stat. § 20.023(2) in defining "state public office."

Indeed, the legislature tailored the definition of "state public office" to exclude some positions that would have otherwise been swept in by Wis. Stat. §§ 39.42(13) & 20.923. Specifically, the legislature excluded positions "identified in s. 20.923(6)(f) to (gm)," from the definition of "state public office" in Wis. Stat. § 19.32(4). If the legislature intended for district attorneys and other state constitutional officers to be treated as employees of non-authorities, it easily could have included an exception for them as well (either by an explicit exception or by refraining from referencing Wis. Stat. § 29.923(2)). That the legislature specifically excluded some positions in this fashion while at the same time specifically including district attorneys demonstrates that it did not intend a backdoor exception-to-the-exception under which district attorneys were actually supposed to be treated as employees of a non-authority. *Kalal*, 271 Wis. 2d 633, ¶ 46.

Further, the fact that Moustakis's office is created by Article VI, section 4 of the Wisconsin Constitution does not mean he should be treated as being employed by a non-authority. Article VI, section 4 includes multiple positions, many of which Wis. Stat. ch. 19 treats as holders of "local public office." Section 4 establishes the positions, of amonth other office holders, sheriffs and chief executive officers of counties. These positions are included in the definition of "local public office" by operation of Wis. Stat. §§ 19.32(1dm) and 19.427(2) which define "local public office"

as including "[a]n elective officer of a local government unit." Wis. Stat. § 19.42(7w)(a). The county officials established in Article VI, Section 4 are covered by this definition because "Local government unit" includes counties. *See* Wis. Stat. § 19.42(7u) (defining "local government unit" as including "a political subdivision of this state.") Thus, Chapter 19 makes no categorical exclusion for officers whose position was established by Article VI, section 4.

The circuit court's interpretation does not, as Moustakis contends, ignore the plain meaning of the statutes in favor of legislative history. Instead, this interpretation implements the plain-meaning rule by looking to the "context in which [a term] is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. The context, structure, and interrelation between statutes all show that Moustakis is to be treated as employed by an authority but exempted from the definition of "employee" as a holder of "state public office."

B. The legislative history confirms the plain meaning.

At best, Moustakis has found an ambiguity in the statute. Any alleged ambiguity, however, is resolved by the legislative history, which confirms that district attorneys are not "employees" entitled to the protections of Wis. Stat. § 19.356. *See Sch. Dist. of Stockbridge v. Evers*, 2010 WI App

144, ¶ 10, 330 Wis. 2d 80, 89, 792 N.W.2d 615 ("when a statute is clear and unambiguous, legislative history may be consulted to confirm or verify a plain-meaning interpretation").

Any ambiguity identified by Moustakis is quickly resolved by looking at the legislative history of 2003 Wisconsin Act 47, which created both the definition of "employee" in Wis. Stat. § 19.32(1bg) and the process for pre-release judicial review in Wis. Stat. § 19.356. The legislative history in this case consists of notes included in the Act that became the statutes at issue. The Joint Legislative Council's explanatory notes to Act 47 make clear that Moustakis is not an "employee."

The prefatory note to Act 47 explains that the statute was enacted in response to the *Milwaukee Teachers'* and *Woznicki* decisions, which had granted public employees pre-release rights of notice and judicial review for records relating to their employment. The prefatory note says that "the logical extension of these opinions is that the right to notice and the right to judicial review may extend to any record subject, regardless of whether the record subject is a public employee." 2003 Wisconsin Act 47, Joint Legislative Council Prefatory Note. Thus, Act 47 created a definition of "employee" that addressed both public sector and private sector employees.

The Note explains that the Act "[c]reates a definition of the term 'employee' *to mean any public or private sector*

employee, other than an individual holding local public office or state public office." 2003 Wisconsin Act 47, § 1, note 1 (emphasis added). Thus, the notes to Act 47 make clear that those who hold state public office, like Moustakis, are not covered by either category of "employee." There is no category for public employees who are to be treated as private sector employees because they are employed by the State of Wisconsin.

C. The Court should not ignore the plain meaning based on an ambiguity in a subsection not at issue in this case.

Moustakis points to the term "employee" in Wis. Stat. § 19.356(9), but this subsection has no bearing on whether Moustakis fits into the first or second category of "employees."

Wisconsin Stat. § 19.356(9) provides a procedure that allows certain record subjects to augment the record production when an authority discloses "records containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office." Wis. Stat. § 19.356(9)(b). Moustakis points out that the use of the word "employee" in this subsection excludes those that hold local or state public office.

As an initial matter, it is not clear how this issue helps Moustakis in this case. To the extent he is correct that "some public officials must be able to qualify [as employees]

for purposes of Wis. Stat. § 19.356(9)," (Moustakis Br. at 17), those officials could not be district attorneys under his interpretation of the term "employee." Under his theory, district attorneys are not employed by an authority and, as a result, they cannot possibly be "a record subject who is an officer or employee of the authority" under Wis. Stat. § 19.356(9). Any ambiguity in this subsection is therefore not relevant to this case, and Moustakis never explains how this use of the word "employee" would result in his being treated as being employed by a non-authority.

In any event, the ambiguity is easily resolved by the legislative history. The notes to Act 47 state that Wis. Stat. § 19.356(9) was created "to provide that an authority must notify a record subject who holds a local public office or state public office of the impending release of a record." 2003 Act 47, § 5 note 6. This would indicate that the legislature added a word, "employee," that did not have any practical effect given the apparent mutual exclusivity of employees and those who hold public office. The rule against surplusage, however, is not an immutable law of statutory construction; it only applies "where possible." *Kalal*, 271 Wis. 2d 633, ¶ 46. While the word "employee" may very well be surplusage in this subsection, this does not defeat the purpose of Wis. Stat. § 19.356(9), because the procedure still is in effect for all "officers" of an authority that hold public office.

If anything, the existence of Wis. Stat. § 19.356(9) actually supports the circuit court's decision. Under

Moustakis's interpretation, he would have no right to augment the record (and neither would any other state constitutional officer) because they could never be employed by an authority. It seems unlikely that the legislature would create two systems of review—one for employees who do not hold local and state public office and one system for holders of local and state public office—but do so in a way that would exclude a large category of state public officials from using the second process. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

III. The records at issue in this case do not fall within the categories covered by Wis. Stat. § 19.356(2).

Regardless of whether he is an "employee," Moustakis has failed to establish that the records fit into any of the three types of records to which the pre-release judicial review procedure applies. *See* Wis. Stat. § 19.356(2)(a)1.-3.

The only potentially applicable category in this case is Wis. Stat. § 19.356(2)(a)1., which covers records "containing information *relating to an employee* that is created or kept by the authority and that is the result of an investigation into a *disciplinary matter involving the employee* or possible *employment-related violation by the employee* of a statute, ordinance, rule, regulation, or policy of the employee's employer." Wis. Stat. § 19.356(2)(a)1. (emphasis added).[1]

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[1] The second category does not apply because the documents at issue were not "obtained by the [DOJ] through a subpoena or search warrant." Wis. Stat. § 19.356(2)(a)2. The third category does not apply

Moustakis has never alleged, let alone established, that the records at issue in this case involve either a disciplinary matter or an employment-related violation of law.

The records in this case cannot relate to an "investigation into a disciplinary matter" involving Moustakis because Moustakis is not an employee of the DOJ. As a result, DOJ has no authority to bring a "disciplinary matter" against him.

The records in this case also do not relate to a "possible employment-related violation of a statute, ordinance, rule, regulation or policy of the employee's employer." Moustakis's own pleadings never allege that the records fit into this category and, in fact, make clear that the documents at issue in this case do not involve any "employment-related violation" of law.

Moustakis's complaint and amended complaint both admit "that this case does not involve allegations of on-duty misconduct by the record subject [Moustakis]." (R. 1 ¶ 9; R. 25 ¶ 10.) Moustakis submitted an affidavit attesting that "no aspect of the records suggest either on-duty misconduct by Affiant, misconduct by any member of Affiant's professional staff, nor any wrongful acts by the Vilas County District Attorney's Office." (R. 23 ¶ 8.) Simply put, DOJ's

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because the DOJ is an "authority" under public records law, so the records were not "prepared by an employer other than an authority," and because Moustakis is not an employee of the DOJ, so the records do not contain "information relating to an employee of that employer." Wis. Stat. § 19.356(2)(a)3.

investigation into potential criminal activity of a public official does not necessarily equate to an "employment related-violation of a statute, ordinance, rule, regulation, or policy of the employee's employer," Wis. Stat. § 19.356(2)(a)1, and Moustakis has not alleged that the records fit this category.

IV. The pre-release review procedure does not apply to records produced by authorities who do not employ the record subject.

The court should also reject Moustakis's attempt to expand the pre-release review procedure in Wis. Stat. § 19.356 well beyond the rights granted in the *Milwaukee Teachers'* and *Woznicki* decisions. Those cases centered on public employees' right to judicial review for the release of records from their personnel files in response to public records requests. This case does not involve any documents from Moustakis's personnel file; instead, Moustakis seeks pre-release review of a DOJ investigation into potential criminal activity.

Expanding the right of pre-release review to all government investigations of crime that might relate to someone's employment would expand Wis. Stat. § 19.356 well beyond the scope of *Milwaukee Teachers'* and *Woznicki.* Such an expansion is inconsistent with the legislative intent to narrow and limit the review afforded by those cases. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 42, 327 Wis. 2d 572, 595, 786 N.W.2d 177, 189 ("The legislature

apparently adopted Wis. Stat. § 19.356 in 2003 to narrow and codify the notice and judicial review rights set forth in *Woznicki*."). The Court should interpret Wis. Stat. § 19.356(2)(a)1. as applying only to investigatory documents actually prepared by the employee's employer.

The legislature enacted Wis. Stat. § 19.356 in order to apply "the rights afforded by *Woznicki* and *Milaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin." 2003 Wisconsin Act 47, Joint Legislative Council Prefatory Note. The legislature made clear that it was limiting the holdings of *Woznicki* and *Milwaukee Teachers'* by providing that, as a general rule, there was no duty to notify a record subject of a document release and that "no person is entitled to judicial review of the decision of an authority to provide a requester access to a record," Wis. Stat. 19.356(1), and that pre-release review only applied in limited, specified circumstances.

Given this background, the legislature limited Wis. Stat. § 19.356's pre-release review procedures to "certain employee-related records." *Local 2489*, 277 Wis. 2d 208, ¶ 2. In *Woznicki,* the supreme court granted a public employee the right to notice and de novo review in circuit court of a district attorney's decision to release the employee's "complete personnel file from his employer" and his "personal telephone records." 202 Wis. 2d at 182. In *Milwaukee Teachers'*, the court extended those same rights to public employees "when a records custodian who is

not a district attorney decides to release information from the employees' personnel records in response to request made under Wisconsin's open records law." 227 Wis. 2d 779, ¶ 1. The statutory pre-release review procedure must be analyzed with this background in mind.

In contrast to *Woznicki* and *Milwaukee Teachers'*, Moustakis is not seeking the pre-release review of his personnel file or records relating to an investigation conducted by his employer. Instead he is seeking pre-release review of a criminal investigation conducted by a law enforcement agency that is not his employer. While one can try to fit these documents into Wis. Stat. § 19.356(2)(a)1. as records that are the "result of an investigation into a ... possible employment-related violation of a statute, rule, regulation or policy of the employee's employer," a more reasonable interpretation is that the statute's reference to investigatory records is limited to records created by the employee's employer.

Applying Wis. Stat. § 19.365 to the investigatory records created by DOJ and other law enforcement agencies would result in a dramatic extension of *Woznicki* and *Milwaukee Teachers'* to all law enforcement investigations into crimes relating to employment. Moustakis claims that he has standing under Wis. Stat. § 19.356 because he is not employed by an authority, a category that covers all private sector employees then all private sector employees. Thus, if Wis. Stat. § 19.356(2) covers the documents at issue in this

case, all public employees (excluding state and local office holders) and all private sector employees would have the right to pre-release review of all DOJ investigatory records if DOJ investigated an employment-related crime (as well as any other state or local government agencies that conduct similar investigations). For example, records stemming from a DOJ investigation into embezzlement by employees at a bank would fall under Wis. Stat. § 19.356 under Moustakis's interpretation.

As the Attorney General concluded in an opinion, extending Wis. Stat. § 19.356(2)(a)1. to include "employment-related records prepared by an employee's employer, but also records prepared by other entities, would be contrary to the Committee's goal of limiting the scope of required notification under *Woznicki* and its progeny." OAG 1-06 at 7. Such an interpretation would result in an abrogation *sub silentio* of *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179 (1979), which held that police blotters showing "the charges upon which arrests have been made, must, as a matter of law, be available for inspection."

Statutes must be read in a way that "avoid[s] absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. Interpreting the statute to cover records created by law enforcement agencies that do not employ the record subject, as Moustakis does, results in absurd and unreasonable results. The pre-release review procedure does not apply to

those investigated for crimes not related to employment; for example, individuals who participate in the illegal sale of narcotics. Under Moustakis's interpretation, however, the procedure would apply to a doctor that stole prescription drugs from work and illegally sold them on the street because that sale of drugs was related to employment.[2]

Given the context of Wis. Stat. § 19.356's enactment, it is not reasonable to interpret the statute as expanding pre-release review to a whole new class of law enforcement records—investigations of employment-related crimes—that was never addressed by *Woznicki* and its progeny. Because the records at issue were not prepared by Moustakis's employer, pre-release judicial review simply is not available.

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[2] Although perhaps full-time drug dealers could argue that because selling drugs is their job, the crime is actually employment-related. The fact that such arguments are possible under Moustakis's interpretation counsels against interpreting the statute in this manner. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (holding that statute should be interpreted "reasonably, to avoid absurd or unreasonable results").

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the circuit court.

Dated this 10th day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5, 100 words.

Dated this 10th day of December, 2014.

BRIAN P. KEENAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of December, 2014.

BRIAN P. KEENAN
Assistant Attorney General