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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Petitioner

v.

ERNESTO LAZO VILLAMIL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II,
Affirming a Judgment of Conviction and Order Denying
Postconviction Relief Entered
in the Circuit Court for Waukesha County,
the Honorable Michael J. Aprahamian, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Can Wis. Stat. § 343.44(2)(ar)4 be interpreted in a way that resolves the ambiguity that occurs as a result of a penalty enhancer that is identical to the base offense?

The circuit court determined that there was no ambiguity in the statue because "[t]he language of the statute and its history make clear that a knowing OAR violation causing the death of another constitutes a Class H felony." (34:8; App.124).

The court of appeals determined that because the legislative history resolves any ambiguity in the language of the statute, the rule of lenity does not apply. ***State v. Lazo Villamil***, 2016 App 61 ¶8, 371 Wis. 2d 519, 885 N.W.2d 12. (App. 105). To support this conclusion, the court of appeals reasoned that the legislative history demonstrates that the intent was to write the statute in a way that punished a person less severely for operating while revoked-causing death, if the person did not know their license was revoked. ***Id***. ¶12. (App. 107). The court of appeals noted, however, that the legislature failed to achieve this intent by failing to remove the "knowledge" element from Wis. Stat. § 343.44(1)(b). ***Id***.

It ultimately held that the application of the language of Wis. Stat. §343.44(1)(b)/343.44(2)(ar)4 requires knowledge for both the misdemeanor and felony, and that for purposes of the rule of lenity, because the legislature intended to punish offenses with "knowledge" more severely, his conviction for the felony was proper. ***Id***. ¶13. (App. 107). Accordingly, the court determined that the plain language of the statute permits either a misdemeanor or felony to be charged. ***Id***. ¶ 8. (App. 105).

2. Can a statute can be applied constitutionally when the legislature assigns significantly different penalties to the exact same conduct?

The circuit court concluded that even if there was a possibility that Mr. Lazo Villamil could have been charged with a misdemeanor, the statute would not be unconstitutional because under ***State v. Cissell***, 127 Wis. 2d 205, 216-217, 378 N.W.2d 691 (1985), statutes with identical substantive elements, but different penalty schemes, do not violate due process. (34:8-9; App. 124-125).

The court of appeals affirmed the circuit court's decision on this issue.[1] ***State v. Lazo Villamil***, 371 Wis. 2d. ¶ 22 (App. 112). It determined that because there was no indication in this case that the prosecutor chose to charge a felony instead of a misdemeanor for an improper purpose, "neither the existence of different penalties for violations of the same elements nor the prosecutor's decision to charge the felony penalty here violates due process or equal protection principles." ***Id***. at ¶ 18. (App. 109-110).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Considering this Court's decision to grant Mr. Lazo Villamil's petition for review, as well as the State's cross-petition, both oral argument and publication are warranted.

[1] Mr. Lazo Villamil's appeal also raised an issue with respect to sentencing. On that issue the court of appeals granted relief and reversed and remanded for resentencing because the record failed to show that the circuit court considered the required sentencing factors. ***Lazo Villamil***, 371 Wis. 2d ¶23. (App. 112). This petition addresses only the first issue raised in Mr. Lazo Villamil's appeal.

STATEMENT OF THE CASE

In a criminal complaint dated October 31, 2012, the state charged Mr. Lazo Villamil with one count of operating after revocation, (hereinafter OAR), causing great bodily harm, contrary to Wis. Stat. § 343.44(1)(b) and (2)(ar)3. (1). The complaint alleged that on October 30, 2012 Mr. Lazo Villamil was involved in a car accident and that he did not have a valid driver's license at the time he was driving.(1). The complaint further alleged that the driver of the other vehicle was being transported for "great bodily harm type" injuries. (1).

Following the death of the driver of the other vehicle, the state filed an amended complaint, charging Mr. Lazo Villamil with "knowingly operating while revoked-causing death," contrary to Wis. Stat. § 343. 44(1)(b) and (2)(ar)4(2). In exchange for his no-contest plea, the state agreed to recommend a prison sentence, with the length of time up to the court. (43:3).

The circuit court sentenced Mr. Lazo Villamil to six years of imprisonment, divided into three years of initial confinement, and three years of extended supervision. (44:22).

Mr. Lazo Villamil filed a postconviction motion, arguing that Wis. Stat. § 343.44(2)(ar)4 was ambiguous and unconstitutional on its face. (26:4-11). He also argued that the circuit court failed to comply with the requirements of ***Gallion*** when it sentenced him. (26:11-13). After a hearing and subsequent briefing, the circuit court issued a written

decision and order denying Mr. Lazo Villamil's postconviction motion.[2] (34:13; App. 129).

In a published opinion, the Court of Appeals rejected Mr. Lazo Villamil's argument as to the constitutionality of Wis. Stat. § 343.44(2)(ar)4; however, it remanded for resentencing. ***State v. Lazo Villamil***, 2016 WI App 61 ¶¶ 22-23). (App. 112).

Mr. Lazo Villmail filed a petition for review in this Court on August 19, 2016, and on January 9, 2017 this Court granted review.

STATEMENT OF THE FACTS

The single count in this case, OAR-causing death, contrary to Wis. Stats. §§ 343.44(1)(b) and (2)(ar)4, stems from a car accident. Mr. Lazo Villamil remained on the scene until police arrived. (2:2). He told the police officers that he did not have a valid driver's license and that it had been revoked in the past for an operating while intoxicated offense (OWI)(2:2).

Neither the complaint, nor anything else in the record alleged that the accident was related to impaired, reckless, or any other dangerous driving. According to the accident reconstruction analysis, the victim's vehicle had slowed down in anticipation of turning left off of the highway and Mr. Lazo Villamil was decelerating and braking prior to impact. (11:2). It further indicated that even if impact had occurred at a slower speed, the victim would have likely suffered fatal injuries. (11:2). Finally, the report stated that there was "no

[2] The circuit court did grant the Mr. Lazo Villamil's motion to vacate the DNA surcharge.

evidence to suggest Mr. Lazo Villamil had diminished driving abilities." (11:3).

Ultimately, Mr. Lazo Villamil pled no contest to the single offense as charged. During the plea colloquy the circuit court discussed the factual basis and elements of the offense. (43:12-13). Specifically, it questioned Mr. Lazo Villamil as to whether he had a valid driver's license on the day of the accident, whether his license had been revoked due to an alcohol-related offense, and whether he was aware that it had been revoked. (43:13). Mr. Lazo Villamil told the court that he was aware that his license had been revoked and that it had been revoked for an alcohol-related offense. (43:13).

Various recommendations were made with respect to sentencing. The presentence investigation report recommended one to two years of initial confinement, followed by one year of extended supervision. (14). The family of the victim asked the court to impose the maximum penalty followed by deportation. (44:10-11).

The state recommended prison because Mr. Lazo Villamil had previous driving convictions, was the sole cause of the accident, and contrary to what was in the accident report, argued that it "seem[ed] to suggest that the defendant didn't even put on his brakes…" (44:11). The state also noted that the driver of another vehicle was injured. (44: 11). Pursuant to the plea agreement, the state was silent as to the length of imprisonment.

Defense counsel argued for a term of probation with an imposed and stayed sentence, given that at the time of sentencing Mr. Lazo Villamil had already been in the county jail for over fifteen months. (44:19). Defense counsel argued that Mr. Lazo Villamil's record was not a significant one in that his only convictions were for an operating while

intoxicated-second offense in 2009, and an operating while revoked in 2010. (44:19). Prior to the conviction for the second operating while intoxicated offense, Mr. Lazo Villamil had a valid driver's license. (44:13). He had completed treatment and all the requirements of Project Impact to reinstate his license, but was unable to do so due to a change in the law regarding driver's licenses for non-citizens. (44:13).

Defense counsel also provided evidence that while in pretrial custody, Mr. Lazo Villmail availed himself of programming available in the jail and that he: 1) obtained his GED; 2) took employability and English classes through Waukesha County Technical College (WCTC); 3) took an alcohol and other drug (AODA) class; and 4) took an anger management course (44:14-15). Finally, defense counsel highlighted that Mr. Lazo Villamil had not been cited for any type of reckless driving, the car was insured, and that Mr. Lazo Villamil was remorseful. (44:16-19).

The circuit court began its remarks by noting the three sentencing factors: the seriousness of the offense, the need to protect the public, and the rehabilitative needs of the defendant. (44:21). The circuit court noted that the offense was new and that its purpose was to protect the public from people whose licenses had been revoked. (44:21). The sentencing court stated that it could not understand why Mr. Lazo Villamil was driving that day and that matters were made worse because he "had been convicted of drunk driving twice and subsequent to that [he was] convicted for operating after revocation for which [he] did jail time." (44:21-22).

The sentencing court commented on the continued problem of people driving without a license, and concluded that all it could do "to respond to the needs of the community

as it best can under facility of the law" was to impose the maximum term of imprisonment. (44:22). It concluded "this is a serious operating after revocation. The maximum period of confinement is three years. The maximum term of the extended supervision is three years. That is the sentence of the Court." (44:22).

Mr. Lazo Villamil filed a notice of intent to pursue postconviction relief and subsequently a postconviction motion, in which he argued that the Wis. Stat. § 343.44(2)(ar)4 is ambiguous and facially unconstitutional. (26:4-11). He also argued that the sentencing court had not provided an adequate explanation of why it imposed the maximum penalty, and therefore, he was entitled to resentencing. (26:11-13). The circuit court held a postconviction motion hearing, at which time it requested additional briefing to address specific questions. (49:19-20).

The circuit court's written decision and order rejected the constitutional challenges that Mr. Lazo Villamil raised. (34:10; App. 126). It found that "there is nothing vague or indefinite about sub.(2)(ar)4. The section makes clear that a person knowingly operating a vehicle while revoked faces the penalties applicable for a Class H felony if, in the course of the violation, he or she causes the death of another." (34:6; App. 122). It concluded that the legislative history demonstrated that "knowledge" was meant to be repealed from the base offense of OAR, and the oversight does not render the statute vague. (34:7; App. 123). Finally, it relied on ***State v. Cissell***, 127 Wis. 2d 205, 378 N.W.2d 691 (1985), to conclude that the statute did not violate due process or equal protection. (34:10; App. 126).

The circuit court also rejected Mr. Lazo Villamil's argument regarding sentencing, concluding that the it

properly exercised its discretion when imposing the maximum penalty by identifying the required sentencing factors, and identifying Mr. Lazo Villamil's driving record and the victim's death because of the crash as aggravating. (34:11-12; App.127-128). Mr. Lazo Villamil appealed.

The court of appeals determined that "any ambiguity resulting from the fact that either the misdemeanor or felony provision could apply is resolved by legislative history." ***Lazo Villamil,*** 2016 App 61 ¶ 8. (App.105). Because the ambiguity could be resolved, the court held that the rule of lenity was not applicable because the legislature intended to punish his conduct – knowingly operating after revocation causing death – more severely than if he had not known his license was revoked. ***Id***. ¶ 13. (App. 107).

The court of appeals acknowledged that the legislature failed to accomplish its intention of creating a misdemeanor offense and a felony offense with an additional element. ***Id***. ¶ 20 (App. 110-111). It concluded, however, that the unintended result of the legislature – identical statutes with two different penalties – did not implicate any constitutional violations. ***Id***. ¶¶¶ 18-20. (App. 109-111).

Mr. Lazo Villamil was, however, granted a relief in relation to sentencing. The court of appeals reversed the circuit court's order denying a new sentencing hearing and remanded for resentencing. ***Id***. ¶ 23. (App. 112). In reaching this conclusion, the court of appeals held that the sentencing court was required to consider the factors enumerated in Wis. Stat. § 343.44(2)(b) and that its failure to do so entitled Mr. Lazo Villamil to resentencing.

Both parties sought review, which this Court granted.

ARGUMENT

Summary of the Argument and Standard of Review

This case raises issues related to the interpretation of Wis. Stat. § 343.44(2)(ar)(4), which prescribes penalties for committing the offense of operating after revocation. (OAR). The base offense OAR, contrary to Wis. Stat. § 343.44(1)(b) provides that:

> No person whose operating privilege has been duly revoked under the laws of this state may knowingly operate a motor vehicle upon any highway in this state during the period of revocation or in violation of any restriction on an occupational license issued to the person during the period of revocation.

Wis. Stat. § 343.44(2)(ar), prescribes the following penalties for violating Wis. Stat. § 343.44(1)(b):

> 1. Except as provided in subds. 2. to 4., any person who violates sub. (1)(b) shall forfeit not more than $2,500 dollars.
>
> 2. Except as provided in subds. 3. and 4., any person who violates sub. (1)(b) shall be fined not more than $2,500 or imprisoned for not more than one year in the county jail or both if the revocation identified under sub. (1)(b) resulted from an offense that may be counted under s. 343.307(2).
>
> 3. Any person who violates sub. (1)(b) and, in the course of the violation, causes great bodily harm to another person shall be fined not less than $5,000 nor more $7,500 or imprisoned for not more than one year in the county jail or both, except that if the person knows at the time of the violation that his or her operating privilege has been revoked, the person is guilty of a Class I felony.

> 4. Any person who violates sub. (1) (b) and, in the course of the violation, causes the death of another person shall be fined not less than $7,500 nor more than $10,000 or imprisoned for not more than one year in the county jail or both, except that, if the person knows at the time of the violation that his or her operating privilege has been revoked, the person is guilty of a Class H felony.

Mr. Lazo Villamil was convicted of violating Wis. Stats. §§ 343.44(1)(b) and (2)(ar)4. The issues in this case arise from the redundancy of the element of "knowledge" and the two distinct penalties assigned for the exact same conduct.

The first issue presented in this case, argued section I, is whether the ambiguity in the statute created by the redundancy in the element of "knowledge" can be resolved. If not, the rule of lenity should apply.

Statutory interpretation, or the application of a statute to a known set of facts, presents a question of law that appellate courts review without deference to the circuit courts. ***State v. Parent***, 2006 WI 132, ¶ 15, 298 Wis. 2d 63, 725 N.W.2d 915.

The next issue presented, argued in section II, asks whether an interpretation of in Wis. Stat. § 343.44(2)(ar)4 that permits either a felony or misdemeanor to be charged renders the statute unconstitutional.

I. The Ambiguity in Wis. Stat. § 343.44(2)(ar)4 Cannot Be Resolved; Therefore The Rule of Lenity Should Apply.

A. Wis. Stat. § 343.44(2)(ar)4 is ambiguous because the legislature failed to create any distinction between the misdemeanor and felony.

1. Principles of statutory interpretation.

The purpose of statutory interpretation is to "determine what a statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. When interpreting a statute, the language of the statute is examined first. ***Id***. ¶ 45 (citations omitted). The language of a statute should be given its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***Id***. In addition, statutory language is examined in the context it is used, not in isolation. ***Id***. ¶ 46.

If the words chosen by the legislature demonstrate a "plain, clear statutory meaning," no further analysis is undertaken. ***Id***. However, statutory language is ambiguous if it can be understood "by reasonably well-informed persons in two or more senses." ***Id***. ¶ 47. If a statute is ambiguous, extrinsic sources, such as legislative history, may be applied to the statutory text. ***Id***. ¶¶ 48-51.

In discerning the intent of the legislature, courts give deference to the policy decisions of the legislature, and consider the "scope, context and structure of the statute itself." ***Kalal***, 271 Wis. 2d 633, ¶¶¶ 44, 46, 48. The language of a statute is interpreted within the context in which it is used

and as part of a whole to "avoid absurd or unreasonable results." ***Kalal***, 271 Wis. 2d ¶ 46.

While the goal of statutory interpretation is to give a statute its "full, proper, and intended effect[,]" ***Id***. ¶ 44, courts are nonetheless barred from rewriting statutes to meet a preferred construction or to remedy drafting errors. *See e.g.*, ***State v. Reagles***, 177 Wis. 2d 168, 176, 501 N.W.2d 861 (Ct. App. 1993) (holding that the remedy for a statute's failure to cover a particular situation lies with the legislature); ***State v. Richards***, 123 Wis. 2d 1, 12-13, 365 N.W.2d 7, 12 (1985) ("Simply because the legislature could, and arguably should, have delineated the statutory elements differently does not permit this court to rewrite the elements of the crime by judicial fiat.").

Reviewing courts must presume that the legislature knows the law and the legal effect of its actions. ***In re Commitment of West***, 2011 WI 83, ¶ 61, 336 Wis. 2d 578, 800 N.W.2d 929, (*citing* ***Shill v. Wis. Rapids Sch. Dist.***, 2010 WI 86, P 103, 327 Wis. 2d 572, 786 N.W.2d 177).

2. As written, Wis. Stat. § 343.44(2)(ar)4 is ambiguous.

A statute is ambiguous when reasonable people could disagree about its meaning. ***State v. Delaney***, 2003 WI 9, ¶ 14, 259 Wis. 2d 77, 658 N.W.2d 416. In this case, the plain language of the statute could be understood.

Here, the interaction between Wis. Stat. § 343.44(1)(b), the base offense, and Wis. Stat. § 343.44(2)(ar)4, the enhanced penalty scheme, creates ambiguity because the element that is meant to increase the penalty is already an element of the base offense. ***DOC v. Schwarz***, 2005 WI 34, ¶ 14, 279 Wis. 2d 223, 693 N.W.2d

703. (the interaction of provisions within a statute can create ambiguity).

The base offense, Wis. Stat. § 343.44(1)(b) provides that a person whose operating privilege has been revoked, may not "knowingly" operate a vehicle on a highway. The base offense is punished as a forfeiture. Wis. Stat. § 343.44(2)(ar)1.

The penalty first increases from a forfeiture to a misdemeanor if the reason for the revocation is related to alcohol or a controlled substance. Wis. Stat. § 343.44(2)(ar)2.

The penalty for committing the base offense also increases from a forfeiture to a misdemeanor if during the course of committing the OAR a death occurs. Wis. Stat. § 343.44(2)(ar)4. The same subsection then provides that anyone who in the course of a violation of OAR causes the death of another and *knew* that their operating privilege was revoked, is guilty of a class H felony. Wis. Stat. § 343.44(2)(ar)4. However, "knowledge" is already required in order for one to be guilty of the base offense of OAR. Accordingly, the penalty enhancer is illusory.

B. The separation of powers doctrine prevents the ambiguity in Wis. Stat. § 343.44(2)(ar)4 from being resolved.

The separation of powers doctrine is not expressly stated in the Wisconsin constitution, it is, however, inferred from the provisions of the constitution that set forth the powers of the legislative, executive, and judicial branches. ***State v. Holmes***, 106 Wis.2d 31, 42, 315 N.W.2d 703 (1982); Article IV, sec. 1, Wis. Const. (legislative); Art. V, sec. 1, Wis. Const. (executive); Art. VII, secs. 2, 3, 4, Wis. Const. (judicial).

The Wisconsin constitution grants each branch set powers "upon which the other branches absolutely may not intrude." ***In Matter of Complaint Against Grady***, 118 Wis.2d 762, 776, 348 N.W.2d 559 (1984). While not all government action can be categorized as exclusively legislative, executive or judicial, ***Layton Sch. of Art & Design v. WERC***, 82 Wis.2d 324, 347, 262 N.W.2d 218 (1978), one branch may not exercise power in a way that will overly burden or greatly interfere with another branch's essential role and powers. ***Grady***, 118 Wis.2d at 775-76, (*citing* ***Holme****s*, 106 Wis.2d at 68, 315 N.W.2d).

In this case, resolving the ambiguity in the statute would require this Court to interfere with determining what constitutes the crime of OAR/OAR causing death, and what punishment ought to be affixed – a role that lies solely with the legislative branch. ***In re Felony Sentencing Guidelines***, 120 Wis. 2d 198, 203, 353 N.W.2d 793 (1984); Article IV, sec. 1 Wis. Const.

1. Permitting prosecution as either a misdemeanor or felony should not resolve the ambiguity.

The court of appeals acknowledged the ambiguity created by the illusory penalty enhancer, but concluded that the legislative history resolved it. ***Lazo Villamil***, 371 Wis. 2d ¶ 8. (App. 105). Despite the legislative history indicating an intent to draw a distinction between the misdemeanor and felony, the court of appeals stated that the statute can be applied as either a misdemeanor or felony. ***Id***. ¶ 13 (App. 109).

The legislative history, therefore, is at odds with the holding that the statute can be applied as either a

misdemeanor or felony, as the legislature did not intend to create an identical statute, but rather an enhanced penalty scheme.

2011 Wisconsin Act 113[3] (Act 113) amended Wisconsin Stat. § 343.44. As relevant to this case, Act 113 created Wis. Stat. § 343.44(2)(ar)4. As previously discussed, this subsection identifies two penalties for a single offense. 2011 Assembly Bill 80,[4] (Bill 80) repealed "knowingly" operating after suspension as a separate and distinct violation. The legislative counsel act memo related to Act 113 and Bill 80 indicate that Act 113 "repeals all existing penalties for knowingly committing an OWS, OAR, or OWL violation and creates new penalties[.]" However, the element of knowledge was never removed from Wis. Stat. § 343.44(1)(b).

The penalty structure that the legislature contemplated failed to recognize that unlike OAS, which had an enhanced penalty scheme for the additional knowledge element, OAR always required knowledge as an element before one could be found guilty. Likewise, the legislative reference bureau analysis also failed to recognize that inherent in the operating after revocation statute was a knowledge requirement, which, unlike OAS, never provided a distinct violation for "unknowingly" operating after revocation.

Based on this legislative history, the court of appeals determined that Mr. Lazo Villamil was properly convicted of the class H felony. ***Lazo Villamil***, 371 Wis. 2d. ¶ 13. However, the court's construction of the statute – permitting

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[3] Act 113 is available at http://docs.legis.wisconsin.gov/2011/related/acts/113

[4] Assembly Bill 80 is available at http://docs.legis.wisconsin.gov/2011/related/proposals/ab80

prosecution of either a felony or misdemeanor – gives the statue meaning never intended by the legislature. Construing the statue in this way, the court of appeals delegated power to the executive branch, and determined which penalties apply to the offense. Both of these actions constitute a violation of the separation of powers doctrine. ***Grady***, 118 Wis.2d at 775-76.

2. Implied repeal in this case is not appropriate because it implicates due process and separation of powers.

Because the conflicting provisions of the older version of the statue and the newer version of a statute are irreconcilable, another way this Court could elect to resolve the conflict is with implied repeal. ***State v. Matthew A.B.***, 231 Wis. 2d 688, 706, 605 N.W.2d 598 (Ct. App. 1999). Since the infancy of statehood, however, appellate courts, have consistently disfavored this remedy *See e.g.*, ***Attorney General ex. Rel. Taylor v. Brown***, 1 Wis. 513, 525 (1853). This Court should continue this long-standing approach to disfavor use of implied repeal as a remedy to conflicting statutory provisions.

The court of appeals did not address that state's position that base offense of OAR, Wis. Stat. § 343.44(1)(b), be construed so that knowledge is not an element. Not only is implied repeal generally disfavored, in this case, implied repeal of "knowledge" from the base offense would create a new, strict liability offense, thereby violating the separation of powers doctrine, as well as creating constitutional problems in relation to notice of the newly created offense.

Failure of a statute to give fair notice of the proscribed conduct and the consequences violates due process. ***Cissell***, 127 Wis. 2d 205, 216-217, 378 N.W.2d 691 (1985). (internal

citation omitted). Moreover, criminal offenses must be able to be understood by ordinary people. ***Id***. at 224. Here, the word knowledge appears in the language of the statute. It would be unreasonable to expect an ordinary person to read the plain language of the statute and understand it to mean anything other than requiring knowledge of revocation.

C. The rule of lenity applies because the ambiguity cannot be resolved.

The court of appeals found the rule of lenity inapplicable to this case. ***Lazo Villamil*** 371 Wis. 2d ¶ 13 App. 109). While the court held that application of the statute to the language the legislature actually wrote – that "knowledge" of revocation status is an element of both the misdemeanor and felony, because there was an intent to apply the more severe penalty to those who had

"When there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." ***State v. Cole***, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700; (citing ***State v. Morris,*** 108 Wis.2d 282, 289, 322 N.W.2d 264 (1982); ***State v. Wilson,*** 77 Wis.2d 15, 28, 252 N.W.2d 64 (1977)). "More specifically, the rule of lenity comes into play after two conditions are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature by resort to legislative history." ***Id***. ¶67. Even if one believes that the arguments for each position are equal, the court "must favor a milder penalty over a harsher penalty when there is doubt concerning the severity of the penalty prescribed by statute. ***Id***.

This court cannot resolve the ambiguity in the statute by impliedly repealing the element of knowledge from the base offense because doing so violates the separation of

powers, and creates a new offense without notice. The error can only be remedied by the legislation. Because this court cannot remedy the ambiguity through an alternate statutory construction, the rule of lenity must apply. ***Cole***, 262 Wis. 2d ¶ 13.

II. Statutes that Prescribe Significantly Different Penalties for the Exact Same Conduct Cannot Be Applied Constitutionally.

Legislative enactments are presumed constitutional and the party challenging the constitutionality must prove the statute unconstitutional beyond a reasonable doubt**. *State v. McManus,*** 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989). Like statutory construction, the constitutionality of a statute presents a question of law that this Court reviews de novo. ***Cole***, 262 Wis. 2d ¶ 10

This Court addressed the constitutionality of identical statutes that prescribe different penalties in ***State v. Cissell***, 127 Wis. 2d 205, 378 N.W.2d 691 (1985). In that case, this Court was asked to (1) determine whether the elements of felony abandonment were identical to the elements of misdemeanor failure to pay support; and (2) if the elements were identical, whether charging the defendant with the felony violated his rights to equal protection or due process. ***Id***. at 207-208[5].

First, this Court held that the elements of the misdemeanor and felony were identical. ***Id***. at 214. Next, this Court considered whether statutes with substantively identical elements, but different penalties, offends due process and

[5] There were two other questions presented to this Court that will not be addressed in the same way in this case. ***Cissell***, 127 Wis. 2d at 208-209.

equal protection. ***Id***. Relying on ***United States v. Batchelder***, 442 U.S. 114 (1979), this Court held that overlapping statutes (which was the situation in ***Batchelder***), present the same issues as identical statutes. ***Cissell***, 127 Wis. 2d at 219. Accordingly, this Court held that identical statutes that provide different penalties do not violate due process, equal protection, or impermissible delegation of authority. ***Id***.

Relying in turn on ***Cissell***, the court of appeals rejected Mr. Lazo Villamil's constitutional argument. ***Lazo Villamil***, 371 Wis. 2d ¶ 22. (App. 112). Since Mr. Lazo Villamil made no suggestion that the decision to charge him with a felony instead of a misdemeanor was based on "race, religion, or other arbitrary classification," there was no equal protection violation under ***Cissell***.

A. Identical statutes with different penalties violate equal protection and unlawfully delegate power to the executive branch.

The guarantee of equal protection is broader than discussed in ***Cissell*** and the court of appeals decision in this case. The fact that Mr. Lazo Villamil did not allege that his prosecution was based on some suspect classification, does not mean that equal protection is not implicated. "Equal protections not shields persons not only from 'suspect classifications' but from classifications that are not rational." ***Cissell***, 127 Wis. 2d at 231 (J.Abrahmson dissenting).

It is the obligation of the legislature to provide reasonable and practical grounds for drawing classifications. ***McManus***, 152 Wis. 2d at 131). "When considering an equal protection challenge that does not involve a suspect or quasi-suspect classification, the fundamental determination to be made . . . is whether there is an arbitrary discrimination in the statute . . . and thus whether there is a rational basis which

justifies a difference in rights afforded." ***Joseph E.G.***, 2001 WI App 29 ¶ 8, 240 Wis. 2d 481, 623 N.W.2d 137 (internal citations omitted); *See also* ***McManus***, 152 Wis. 2d at 130-31.

Here, there is no rational basis for the distinction between the misdemeanor and felony penalties provided for OAR-causing death. The legislature purported to draw a classification between those who committed the offense knowing that their operating privileges were revoked and those who did not. However, as discussed in the sections above, that distinction does not actually exist because the underlying offense already requires knowledge. Thus, the apparent intent of the legislature to create a distinction in penalty scheme based on "knowledge" is illusory. Without a legitimate and rational distinction, applying misdemeanor or felony penalties would be arbitrary and serve no rational purpose.

The legislature in this case failed in its duty to provide guidance in drawing a rational distinction between the two offenses. And, in doing so, it has abdicated its responsibility to set a penalty for the offense. Because the failure of the legislature to provide distinction between the offenses is a result of error, should this Court determine that the choice between a misdemeanor or felony is up the prosecutor, the judicial branch will be usurping the power of the legislature, and giving power where none was intended.

B. The line of constitutionality should be drawn between overlapping and identical statutes.

Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 13.7(a) (2d ed.2007) describes different scenarios in which a person's conduct may fall within two statutes.

In assaying the Batchelder reasoning, it is useful to think about three types of situations in which a defendant's conduct may fall within two statutes. They are: (1) where one statute defines a lesser included offense of the other and they carry different penalties (e.g., whoever carries a concealed weapon is guilty of a misdemeanor; a convicted felon who carries a concealed weapon is guilty of a felony); (2) where the statutes overlap and carry different penalties (e.g., possession of a gun by a convicted felon, illegal alien or dishonorably discharged serviceman is a misdemeanor; possession of a gun by a convicted felon, fugitive from justice, or unlawful user of narcotics is a felony); (3) where the statutes are identical (e.g., possession of a gun by a convicted felon is a misdemeanor; possession of a gun by a convicted felon is a felony). The Court in Batchelder had before it a situation falling into the second category, but [it] seems to have concluded that the three statutory schemes [were] indistinguishable for purposes of constitutional analysis. But in terms of either the difficulties which are confronted at the legislative level in drafting statutes or in the guidance which is given to a prosecutor by the legislation, the three schemes are markedly different.

The first of the three is certainly unobjectionable. Such provisions are quite common (robbery-armed robbery; battery-aggravated battery; joyriding-theft; housebreaking-burglary), and usually are a consequence of a deliberate attempt by the legislature to identify one or more aggravating characteristics which in the judgment of the legislature should ordinarily be viewed as making the lesser crime more serious. They afford guidance to the prosecutor, but—as noted in Batchelder—do not foreclose the prosecutor from deciding in a particular case that, notwithstanding the presence of one of the aggravating facts, the defendant will still be prosecuted for the lesser offense.

By contrast, the third of the three is highly objectionable. It is likely to be a consequence of legislative

> carelessness, and even if it is not such a scheme serves no legitimate purpose. There is nothing at all rational about this kind of statutory scheme, as it provides for different penalties without any effort whatsoever to explain a basis for the difference. It cannot be explained in terms of giving assistance to the prosecutor. Where statutes are identical except for punishment, the prosecutor finds not the slightest shred of guidance. It confers discretion which is totally unfettered and which is totally unnecessary. And thus the Court in Batchelder is less than convincing in reasoning that this third category is unobjectionable simply because in other instances, falling into the first category, the need for discretionary judgments by the prosecutor has not been and cannot be totally eliminated.
>
> As for the second of the three categories, it clearly presents a harder case. Here as well, the dilemma is likely to have been created by legislative carelessness ... overlapping statutes are very common at both the federal and state level, and it can hardly be said that in every instance they are a consequence of poor research or inept drafting. Drafting a clear criminal statute and still ensuring that in no instance could it cover conduct embraced within any existing criminal statute in that jurisdiction can be a formidable task. (This fact alone may make courts somewhat reluctant to find overlap per se unconstitutional, although the consequence of such a finding, limiting punishment to that under the lesser of the two statutes until such time as the legislature decides what to do about the now-identified overlap, is hardly a cause for alarm.) Moreover, in the overlap scheme the two statutes will at least sometimes assist the prosecutor in deciding how to exercise his charging discretion.

The third scenario described above is the situation in this case. There is nothing rational about a statutory scheme that creates two statutes identical expect for punishment. This Court should draw a distinction between overlapping statutes

and identical statutes. An example of another court that has done this is Utah. In ***State v. Williams***, 2007 UT 98 ¶ 1, 593 Utah Adv. Rep. 39, 175 P.3d 1029, the Utah Supreme Court was confronted with determining whether an overlap of elements of possession of a controlled substance and possession of drug paraphernalia presented any constitutional violations of due process or equal protection. That court determined that a doctrine in existence prior to ***Batchelder*** could in fact co-exist with ***Batchelder***. ***Id***. ¶ 20.

The Utah Supreme Court determined that unfettered prosecutorial discretion to charge either of two identical statutes with different penalties offends equal protection. ***Williams***, ¶15. Following the reasoning of the United States Supreme Court, the Utah Supreme Court looked to the legislative intent and determined there was no violation of equal protection where the legislature had an intent to create two separate criminal statutes that overlapped. ***Id***, ¶ 22.

Unlike in that case, here, the identical statutes were not a result of legislative intent, but rather the result of poor drafting. Prosecutorial discretion should not save the legislature's failure to effectuate its intent. As written, Wis. Stat. § 343.44(2)(ar)4 provided no guidance to prosecutors and nothing in the legislative history shows that there was an intention to create identical statutes. This Court should follow the example of the Utah Supreme Court and draw the constitutional line where statutes are identical and there is no rational basis.

CONCLUSION

Mr. Lazo Villamil respectfully requests that for the reasons stated above that this Court reverse the decision of the court of appeals and vacate the judgment of conviction and apply the rule of lenity, thereby commuting the conviction to a misdemeanor; alternatively he asks that this court find the statue under which he was convicted unconstitutional.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6, 249 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 22rd day of February, 2017.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22rd day of February, 2017.

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