STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERNESTO E. LAZO VILLAMIL,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING IN PART AND REVERSING IN PART A JUDGMENT AND ORDER ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE DONALD J. HASSIN, JR., AND MICHAEL J. APRAHAMIAN, PRESIDING

# RESPONSE BREIF OF PLAINTIFF-RESPONDENT-CROSS PETITIONER

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## ISSUES PRESENTED BY DEFENDANT-APPELLANT-PETITIONER

The defendant-appellant-petitioner, Ernesto E. Lazo Villamil, raises two issues in addition to those discussed in the State's opening brief: (1) whether this Court is constitutionally prohibited from resolving the ambiguity in Wis. Stat. § 343.44, and (2) whether a statute that might provide significantly different penalties for the same conduct is unconstitutional.

## STATEMENT OF THE CASE

The statement of the case was presented in the State's opening brief.

## ARGUMENT

### I. The constitution does not impose any impediment to judicial construction of an ambiguous statute.

#### A. Judicial construction of an ambiguous criminal statute does not violate the doctrine of separation of powers by interfering with the power of the Legislature to define crimes and set their penalties since the judicial power conferred on the courts by the Wisconsin Constitution includes the authority to interpret imprecise statutes to give full force and effect to the laws the Legislature intended to enact.

Everyone agrees that the current wording of Wis. Stat. § 343.44(1)(b) and (2)(ar)4. does not reflect a law the Legislature intended to enact.

As explained in the State's opening brief, the Legislature intended to enact a set of statutes dealing evenly with all three kinds of driver's license violations.

First, the base offense was intended to prohibit operation of a vehicle without a license, while a license was suspended, or after a license was revoked. Scienter was not supposed to be an element of the base offense. The Legislature intended to impose strict liability for operating a vehicle in violation of the various license requirements.

Second, the Legislature intended to increase the penalty when a driver caused a death while operating a vehicle with no license, a suspended license or a revoked license. This was also meant to be a strict liability offense with no requirement of scienter.

Third, the Legislature intended to further increase the penalty to a felony when a driver caused a death while operating a vehicle knowing that he had no license or that his license was suspended or revoked. The addition of an element of scienter to the offense justified the increase in penalty to a felony.

The Legislature did not intend to establish an asymmetrical scheme where, unlike the penalty schemes for operating without a license or with a suspended license, the base offense of operating after revocation of a license required not only operation of a vehicle after a driver's license was revoked, but also knowledge of the revocation. Nor did the Legislature intend to create two penalty enhancers, one a misdemeanor and the other a felony, both equally applicable when a driver caused a death while operating a vehicle knowing that his license had been revoked.

Yet, because the Legislature mistakenly failed to delete one word, "knowingly," from the previous formulation of section 343.44(1)(b) when it revised the statute, this unintended scheme is what the statute now purports to pronounce as the law.

The statute as presently written is ambiguous. But the ambiguity should not be resolved by finding, contrary to legislative intent, that the statute provides different penalties for the same conduct. Rather, the ambiguity should be resolved by reading out of the statute the word "knowingly" to give full force and effect to the statutory scheme the Legislature intended to enact.

Lazo Villamil insists this Court cannot do that. He says that this Court is prevented from resolving the obvious problem with the statute because of the doctrine of separation of powers. (Lazo Villamil's Opening Br. 13.) He asserts that fixing the Legislature's mistake would interfere with the Legislature's exclusive power to define crimes and set their penalties. (Lazo Villamil's Opening Br. 14.) On the contrary, fixing mistakes that muddy the real meaning of legislation is a core constitutional power of the courts.

"The people of the state of Wisconsin, through the constitution ordained by them, have conferred upon the courts of this state the judicial power, which includes the power finally to construe, interpret and apply the law in private as well as public matters." *Thoe v. C. M. & St. P. Ry. Co.*, 181 Wis. 456, 466, 195 N.W. 407 (1923).

Thus, under the doctrine of separation of powers, "[i]t is for the legislature to enact the laws, for the executive branch to administer them, and for the judicial branch to interpret and, within constitutional limits, apply them." *In*

*re Hon. Charles E. Kading*, 70 Wis. 2d 508, 543a, 235 N.W.2d 409 (1975) (Robert W. Hansen, J., dissenting). *Accord State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 405, 52 N.W.2d 903 (1952), *overruled in part by State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). "'The power to enact statutes is, clearly, solely a legislative power confided by the constitution to the legislature. The power to construe statutes is confided to the judiciary.'" *Broughton*, 261 Wis. at 405 (citation omitted).

Under our tripartite system of government, a court cannot rewrite a statute to impose its own policy choices. *Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633. Nor can a court accede to the desires of the State, *State v. Reagles*, 177 Wis. 2d 168, 176, 501 N.W.2d 861 (Ct. App. 1993), and reconfigure the elements of a crime by judicial fiat. *State v. Richards*, 123 Wis. 2d 1, 12, 365 N.W.2d 7 (1985).

But it is a "solemn obligation of the judiciary" to "determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The primary purpose of statutory construction is to discern the intent of the Legislature. *Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 612

It is a cardinal rule of statutory construction that the Legislature intends to enact statutes that comport with the constitution. *American Family Mut. Ins. Co. v. DOR*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998). So a "court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists

that would render the legislation constitutional." *American Family*, 222 Wis. 2d at 667.

Another basic rule is that even an otherwise clear and unambiguous statute should be interpreted to avoid absurd or unreasonable results. *State v. Delaney*, 2003 WI 9, ¶ 15, 259 Wis. 2d 77, 658 N.W.2d 416. And to accomplish this, the court may reject a word that raises questions about the rationality of the statute. *State v. Gould*, 56 Wis. 2d 808, 812, 202 N.W.2d 903 (1973). "[W]ords necessary to be displaced, so far as evidently inadvertently used,–to bring out the sense manifestly intended should be regarded as surplusage." *Neacy v. Supervisors of Milwaukee Cty.*, 144 Wis. 210, 216, 128 N.W. 1063 (1910).

Similarly, "before [this Court] will construe a statute in a manner which would create an anomaly in the procedure used to prosecute a particular class of criminal cases, [this Court] require[s] a strong showing that that this result is what the legislature in fact intended." *State v. White*, 97 Wis. 2d 193, 198, 295 N.W.2d 346 (1980).

The State is not asking this Court to create a new statute or to rewrite an existing statute in a way that was not intended by the Legislature to construct what the State perceives to be a better rule than the Legislature conceived.

Rather, since the intent of the Legislature is clear despite its minor but meaningful drafting error, the State is asking the Court to exercise its constitutionally conferred power of statutory construction to give effect to the intent of the Legislature so as to avoid any questions about the constitutionality of a provision that, as erroneously written, appears to present the unintended anomaly of providing two

substantially different penalties for precisely the same conduct.

Of course, since the Court has constitutional power to easily resolve the ambiguity in section 343.44 by resorting to the legislative history of the provision, the rule of lenity, which requires a court to construe a statute in favor of the accused when an ambiguity cannot be resolved, does not apply here. *State v. Setagord*, 211 Wis. 2d 397, 415, 565 N.W.2d 506 (1997).

### B. Construing an ambiguous statute to effectuate the intent of the Legislature does not violate the due process requirement of notice.

Construing an ambiguous statute to effectuate the intent of the Legislature does not create any problem of notice, as Lazo Villamil claims. (Lazo Villamil's Opening Br. 16.) Instead, it alleviates any problem that might have previously existed.

Due process demands that penal statutes provide fair notice of the conduct they seek to proscribe. *State v. Nelson*, 2006 WI App 124, ¶ 35, 294 Wis. 2d 578, 718 N.W.2d 168. However, this notice does not have to be provided with absolute clarity. *Nelson*, 294 Wis. 2d 578, ¶ 36. It is enough if the notice is sufficient to warn people who want to obey the law that their conduct comes near the area of conduct that is proscribed. *Nelson*, 294 Wis. 2d 578, ¶ 36. There may be sufficient notice even if there is a question about whether certain conduct is prohibited, or if the illegal nature of the conduct cannot be ascertained with ease. *Nelson*, 294 Wis. 2d 578, ¶ 36.

There is no question about the conduct prohibited by the felony penalty enhancer in section 343.44(2)(ar)4. It is absolutely clear that a driver commits a felony when he causes the death of another person while operating a vehicle after his driver's license has been revoked and knows that his license was revoked.

As discussed in the State's opening brief, it is not clear whether knowledge of a revocation is also a requirement of the base offense of operating after revocation or the misdemeanor penalty enhancer for this offense. These provisions are ambiguous because reasonable people could disagree about their meaning. *See Delaney*, 259 Wis. 2d 77, ¶ 14.

Inconsistently with his argument that the statute is ambiguous, Lazo Villamil asserts that "[i]t 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." (Lazo Villamil's Opening Br. 17.)

But in assessing whether a statute is ambiguous a court, and presumably a reasonably well-informed person as well, must look beyond individual words or sentences to the role of the relevant language in the structure of the entire statute, *State v. Lindsey A.F.*, 2002 WI App 223, 257 Wis. 2d 650, 653 N.W.2d 116, *aff'd*, 2003 WI 63, 262 Wis. 2d 200, 663 N.W.2d 757, and to the interaction of these words with other statutes. *DOC v. Schwarz*, 2005 WI 34, ¶ 14, 279 Wis. 2d 223, 693 N.W.2d 703. Looking there, the provisions creating the base offense and first penalty enhancer are ambiguous.

A statute is not unconstitutionally vague, i.e., devoid of notice, just because it is ambiguous. *State v. Smith*, 215

Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). Because one reasonable view of the statute regards the presence of the word "knowingly" in section 343.44(1)(b) as an unintended mistake, drivers have always had notice that knowledge of a revocation might not be a requirement of the base offense of operating after revocation or the misdemeanor penalty enhancer for this offense. They have always had notice that they could be guilty of the base offense if they operated a vehicle after their license was revoked whether or not they knew about the revocation. They have always had notice that they could be subject to the misdemeanor penalty enhancer if they caused a death while operating a vehicle after their license was revoked whether or not they knew about the revocation. Drivers have always been adequately warned that if they operated a vehicle after their license was revoked they would be nearing the area of conduct that was proscribed.

Simply clarifying a law to clear up an ambiguity does not change the law but only restates in more certain terms what it has always been. *Orr v. Hawk*, 156 F.3d 651, 654 (6th Cir. 1998); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993), *overruled on other grounds by Johnso*n *v. Apfel*, 189 F.3d 561 (7th Cir. 1999). Construing the law to clarify that knowledge of a revocation is not a requirement of the base offense of operating after revocation or the misdemeanor penalty enhancer for this offense just provides better notice of precisely what has been prohibited all along. Construing section 343.44 to effectuate the intent of the Legislature does not violate the due process requirement of notice.

Besides, Lazo Villamil has no standing to complain about notice since the ambiguities in section 343.44 reside in the statement of the base offense and the first penalty enhancer, because he does not stand convicted of those

offenses. The provision applicable to him is the second enhancer, which has always unambiguously provided notice that a driver who causes a death while operating a vehicle knowing that his driver's license was revoked is guilty of a Class H felony. Wis. Stat. § 343.44(2)(ar)4. If the conduct of the defendant plainly falls within the proscription of the statute, he may not base a vagueness, i.e., notice, challenge on the law as applied to the conduct of others. *Smith*, 215 Wis. 2d at 91.

Lazo Villamil's conduct of causing a death while operating a vehicle knowing that his driver's license was revoked plainly falls within the proscription of the statutory provision with which he was charged and of which he was convicted. Lazo Villamil had notice that his conduct was prohibited and could be punished as a felony.

## II. A statute that provided different penalties for the same conduct would not deny equal protection to a revoked driver who was charged with the felony offense.

If the Court does not construe section 343.44(2)(ar)4. as the Legislature intended to provide different elements for each of the two different penalty enhancers, it would have to decide whether a statute that would provide significantly different penalties for offenses with the same elements would be constitutional.

Lazo Villamil recognizes that in *State v. Cissell*, 127 Wis. 2d 205, 378 N.W.2d 691 (1985), this Court held that statutes providing different penalties for the same conduct do not violate due process or equal protection. However, he wants to distinguish identical statutes, like the one in this case, from overlapping statutes, and argues that identical statutes, but apparently not overlapping statutes, deny

equal protection because there is no rational basis for penalizing the same conduct differently. Thus, Lazo Villamil suggests that *Cissell* should be overruled to the extent it held that identical statutes do not present any more of a constitutional problem than statues that overlap. (Lazo Villamil's Opening Br. 22–23.)

Overlapping statutes are two separate statutes that each proscribe a variety of conduct, including one type of conduct that the other statute also proscribes. Thus, statutes overlap when statute one proscribes conduct A, B and C, while statute two proscribes conduct C, D and E. Although each statute proscribes some conduct that the other does not, both statutes proscribe conduct C.

Identical statutes proscribe only one kind of conduct, but both proscribe the same conduct. Both statutes proscribe conduct C.

In *Cissell*, 127 Wis. 2d at 218–21, this Court convincingly explained why, for constitutional purposes, there is no significant difference between overlapping and identical statutes.

The points where overlapping statutes each exclusively charge offenses the other statute does not charge are irrelevant. *Cissell*, 127 Wis. 2d at 219. It makes no difference that one statute proscribes conduct A and B, while another statute proscribes conduct D and E since none of this conduct is simultaneously prohibited by different statutes. The problem that arises when different penalties are provided for the same conduct does not materialize when the conduct proscribed by each statute is different.

Only the point of overlap is relevant because it is only there that a defendant can be charged with crimes that are the same in both statutes. *Cissell*, 127 Wis. 2d at 219. "Overlapping statutes thus present the same issues as identical statutes because the point of overlap essentially creates an identical statute situation." *Cissell*, 127 Wis. 2d at 219. Whether statutes are identical or overlapping, the defendant is charged with conduct C under one statute when he could also be charged with conduct C under another statute with different penalties.

Even assuming for the sake of argument that there could not be a rational basis for the different penalties, the problem would be the same regardless of whether the statutes were identical or overlapping. It would be no more rational to provide different penalties for the same conduct in statutes that prohibit several kinds of conduct than to provide different penalties for the same conduct in statutes that prohibit only one kind of conduct. Since identical and overlapping statutes are both identical at the point of overlap, if one is irrational, both are irrational.

Therefore, Lazo Villamil's attempt to distinguish identical statutes from overlapping statutes lacks a rational basis.

Furthermore, Lazo Villamil does not really explain why there could not be any rational basis for two statutory provisions imposing different penalties for the same conduct if a legislative body had chosen to enact them.

The rational basis standard does not preclude the State from treating even similarly situated persons differently. *State v. Smet*, 2005 WI App 263, ¶ 26, 288 Wis. 2d 525, 709 N.W.2d 474. The State retains broad

discretion to create classifications, which need not be the best or wisest means of achieving a proper purpose or be free of any inequity, as long as they have a rational basis. *Smet*, 288 Wis. 2d 525, ¶ 26.

The rational basis test is a paradigm of deferential judicial restraint. *State v. Smith*, 2010 WI 16, ¶¶ 17–18, 323 Wis. 2d 377, 780 N.W.2d 90. Invalidation of a classification is permitted only if the classification is patently arbitrary, and without any rational relationship to a legitimate government interest. *Smith*, 323 Wis. 2d 377, ¶ 12; *Smet*, 288 Wis. 2d 525, ¶ 26. Any doubts must be resolved in favor of the reasonableness of the classification and the constitutionality of the statute. *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989).

Here, providing different penalties for the same statutory conduct could have a rational relationship to a legitimate government interest in distinguishing between different offenders based of the facts of their offenses.

Neither of the penalty enhancers in section 343.44(2)(ar)4. applies unless a person who is operating after revocation of his driver's license "causes" the death of another person. A death may have more than one cause. *State v Payette*, 2008 WI App 106, ¶ 17, 313 Wis. 2d 39, 756 N.W.2d 423. Criminal liability may attach if the defendant's conduct is only a "substantial factor" in causing the death. *Payette*, 313 Wis. 2d 39, ¶¶ 17–18.

A substantial factor need not be the sole or primary factor in causing the harm. *State v. Miller*, 231 Wis. 2d 447, 456, 605 N.W.2d 567 (Ct. App. 1999). A substantial factor is simply an act that a reasonable person would regard as a

cause of a result in the popular sense. *Pieper v. Neuendorf Trans. Co.*, 87 Wis. 2d 284, 289, 274 N.W.2d 674 (1979).

There may be situations where a revoked driver is highly negligent or reckless in causing a fatal accident, for example, by driving through a red light at a high rate of speed while impaired. There may be other situations where a revoked driver is only marginally negligent in causing an accident, such as where he was driving slightly over the speed limit which caused him to enter an intersection just at the time an impaired driver went through a red light at a high rate of speed.

Prosecutors have discretion to determine which crime to charge when offenses have the same elements but different penalties. *Cissell*, 127 Wis. 2d at 220. It would not be irrational for a legislative body to conclude that a prosecutor should be able to charge a reckless revoked driver with a felony for causing a death, but should also be able to give consideration to an ordinarily negligent driver by charging only a misdemeanor. Prosecutors may be properly influenced in their charging decisions by the penalties available on conviction. *Cissell*, 127 Wis. 2d at 217.

Of course, the Legislature did not actually engage in this sort of analysis since it did not intend to create a pair of penalty enhancers with the same elements but different penalties. But if it had intended to create such a statute, it could have had a rational basis for its decision.

Thus, as *Cissell* held, there is no denial of equal protection as long as a prosecutor does not choose which provision should be charged on the basis of some unjustifiable standard such as race, religion or other arbitrary classification. *Cissell*, 127 Wis. 2d at 215.

Lazo Villamil also asserts that interpreting section 343.44(2)(ar)4. to create two penalty enhancers with the same elements but different penalties would improperly delegate power to the executive branch. (Lazo Villamil's Opening Br. 16, 19.)

Since Lazo Villamil does not develop this argument, it may be ignored. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992). But it would not be persuasive in any event since it was expressly rejected in *United States v. Batchelder*, 442 U.S. 114 (1979), on which the decision of this Court in *Cissell* relied. *Cissell*, 127 Wis. 2d at 215. Put simply, when a legislative body demarcates the range of penalties that the prosecutor may seek, albeit in statutes that impose different penalties for the same conduct, the Legislature has exercised its power to define crimes and set the penalties. *Batchelder*, 442 U.S. at 125–26.

Nevertheless, all these constitutional questions can and should be avoided by interpreting section 343.44(2)(ar)4., as the Legislature plainly intended, to create two penalty enhancers with different elements as well as different penalties. The statute should be interpreted to create one penalty enhancer that punishes as a misdemeanor causing a death while operating a vehicle after revocation of a driver's license, and another penalty enhancer that punishes as a felony causing a death while operating a vehicle with knowledge that a driver's license has been revoked.

## CONCLUSION

It is therefore respectfully submitted that the part of the decision of the court of appeals that upheld the constitutionality of section 343.44(2)(ar)4. should be affirmed, although on grounds different from those on which the court of appeals relied.

Dated this 20th day of March, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 3,745 words.

Dated this 20th day of March, 2017.

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## 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 20th day of March, 2017.

_____
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