STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP996-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARKUS S. HOLCOMB,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), does not request oral argument, because the briefs should adequately address the issues in this case. The State believes that publication is warranted so that this court can

provide guidance to circuit courts in interpreting and applying Wis. Stat. § 939.617.[1]

SUPPLEMENTAL STATEMENT OF THE CASE

The defendant-appellant, Markus S. Holcomb, appeals a judgment convicting him of five counts of possession of child pornography (20; 21). Holcomb was initially charged with thirty counts of possession of child pornography (1:1-13; 10). He pled guilty to five counts as part of a plea agreement in which the remaining twenty-five counts were dismissed but read in at sentencing (16:1-2).

A presentence investigation report (PSI) was prepared (17:1; 18). Before sentencing, Holcomb requested that the circuit court strike the PSI, asserting that it was "false and inflammatory," and that the sentence proposed in the PSI was "out of line with other sentences that have been handed down in cases such as this" (19).

At sentencing, the circuit court, the Honorable Bruce E. Schroeder, denied Holcomb's motion to strike the PSI. (30:2-13). The court then sentenced Holcomb on two counts, imposing sixteen-year sentences on each, consisting of six years of initial confinement and ten years of extended supervision, to be served consecutively (20; 30:33). The court withheld sentence on the remaining three counts and imposed ten years of probation on each, concurrent to each other, but consecutive to the prison sentences (21; 30:33).

Holcomb now appeals (29). He seeks a new sentencing hearing on two grounds. First, he asserts that the sentencing court was incorrect in believing that Wis. Stat. § 939.617 provides a mandatory minimum sentence for convictions for possession of child pornography (Holcomb's Br. at 5-13). Second, he asserts that the sentencing court

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[1] The proper interpretation of Wis. Stat. § 939.617 is also at issue in another case before this court, *State v. Aaron B. Reigle*, No. 2015AP001813-CR.

erred in not striking the PSI, and in relying on inaccurate information in the PSI (Holcomb's Br. at 13-19).

SUMMARY OF ARGUMENT

Holcomb seeks a new sentencing hearing on the ground that the circuit court incorrectly believed it was required to impose the mandatory minimum sentence on two counts of possession of child pornography. He also seeks resentencing because he asserts that the PSI contained inaccurate information and that the court relied on that information in imposing sentence.

As the State will explain, the sentencing court did not err in believing it had to impose at least the mandatory minimum on the two counts for which it imposed sentence, because Wis. Stat. § 939.617 required the court to impose at least the mandatory minimum.

But the court did err in withholding sentence and imposing probation on the other three counts. The court was required to impose sentence, with at least three years of initial confinement, on all five counts. This court should reject Holcomb's claim that he is entitled to a new sentencing on the two counts, but it should remand to the circuit court with instructions to impose at least the mandatory minimum on the other three counts, as required by Wis. Stat. § 939.617.

As the State will further explain, Holcomb has not shown that the circuit court relied on inaccurate information, and he is therefore not entitled to a new PSI or a new sentencing hearing.

ARGUMENT

I. WISCONSIN STAT. § 939.617 PROVIDES A MANDATORY MINIMUM SENTENCE FOR VIOLATIONS OF WIS. STAT. § 948.12 WHEN THE OFFENDER IS MORE THAN FORTY-EIGHT MONTHS OLDER THAN THE CHILD VICTIM.

A. Applicable legal principles and standard of review.

Resolution of the first issue in this case requires interpretation of Wis. Stat. § 939.617. "'The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.'" *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted) (internal quotation marks omitted).

In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

A statute is ambiguous if it is susceptible to more than one reasonable understanding. *State v. Grady*, 2007 WI 81, ¶ 15, 302 Wis. 2d 80, 734 N.W.2d 364 (citing *Kalal*, 271 Wis. 2d 633, ¶ 47. If a statute is ambiguous, a reviewing court may examine extrinsic sources in order to guide its interpretation. *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 50).

The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447.

B. Wisconsin Stat. § 939.617 can reasonably be read as providing that a person convicted of violating Wis. Stat. § 948.12 who is more than forty-eight months older than the child victim must be sentenced to at least three years of initial confinement.

Holcomb was convicted of five counts of possession of child pornography, in violation of Wis. Stat. § 948.12. Wisconsin. Stat. § 939.617, "Minimum sentence for certain child sex offenses," provides the minimum penalty for violations of § 948.12. It reads as follows:

> (1) Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s. 948.05 or 948.075 and 3 years for violations of s. 948.12. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.
>
> (2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:
>
> (a) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of the violation.
>
> (b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.
>
> (3) This section does not apply if the offender was under 18 years of age when the violation occurred.

The first issue in this case concerns whether subsection (2) of § 939.617 allows a court to impose a sentence with less than three years of initial confinement for a violation of § 948.12 by a person who is more than forty-eight months older than the child victim. The circuit court did not explicitly interpret the statute. It imposed consecutive sixteen-year sentences on each of two counts, consisting of six years of initial confinement and ten years of extended supervision. On the remaining three counts, the court withheld sentence and imposed ten years of probation, concurrent to each other, but consecutive to the prison sentences.

Holcomb asserts that the court incorrectly believed it was required to impose at least the minimum sentence (Holcomb's Br. at 11-13). This court need not determine what the sentencing court believed because regardless of the court's belief, the court was required to impose at least the minimum sentence.

Holcomb asserts that subsection (2) is unambiguous, and that it allows a court to impose a bifurcated sentence with less than three years of initial confinement even if the person convicted of a violation of § 948.12 is more than forty-eight months older than the child victim (Holcomb's Br. at 6, 8-9). He reads subsection (2) as providing that "[i]f the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record," the court has two options. It "may impose a sentence that is less than the sentence required under sub. (1)." Or it "may place the person on probation" if "the person convicted of a violation of s. 948.12 is no more than forty-eight months older than the child who engaged in the sexually explicit conduct." Holcomb asserts that the word "or" separates the option of a shorter sentence, which does not depend on the difference in ages between the offender and the victim, from probation, which does depend on the age difference (Holcomb's Br. at 8-9).

The State acknowledges that the statute can be read as Holcomb reads it. But the statute can also be read as providing that courts are required to impose at least the mandatory minimum sentence unless the person is no more than forty-eight months older than the child victim, in which case the court can impose either a shorter-than-minimum sentence or probation. Under this reading of the statute, the word "or" provides for two options for the sentencing court—probation or a shorter-than-minimum sentence or probation—both applying only if the person is no more than forty-eight months older that the child victim.

In a mathematical context, Holcomb interprets the statute as proving that a court can impose a shorter sentence, or impose probation if the age difference is small. In other words, A or (B if C). But the statute can also be read as providing that a court can impose either a shorter sentence or probation, if the age difference is small. In other words, (A or B) if C.

The State maintains that while there are two possible readings of the statute, the second reading—that a court is required to impose at least a minimum sentence unless the offender is more than forty-eight months older than the child victim—is correct. The lack of punctuation after "sub. (1)" strongly suggests this interpretation is correct. If the legislature had intended paragraphs (a) and (b) to apply only to probation, it could have added a semicolon or a comma after "sub. (1)," to separate "impose a sentence that is less than the sentence required under sub. (1)" from "may place the person on probation."

With a semicolon, the statute would say that a court "may impose a sentence that is less than the sentence required under sub. (1)**;** or may place the person on probation under any of the following circumstances:"

With a comma, the statute would say that a court "may impose a sentence that is less than the sentence

required under sub. (1)**,** or may place the person on probation under any of the following circumstances:"

A third way that the legislature could have written the statute to mean what Holcomb wants it to mean is as follows:

> (2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may:
>
> (a) impose a sentence that is less than the sentence required under sub. (1); or
>
> (b) place the person on probation under any of the following circumstances:
>
> (1) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of the violation.
>
> (2) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.

If the legislature had intended for the statute to be interpreted as Holcomb asserts it must be interpreted, the legislature could have written the statute in any of these ways. It did not do so. Instead, the legislature wrote a statute that can best be interpreted as providing that a court can impose either a shorter-than-minimum sentence or probation only if the offender is no more than forty-eight months older than the child victim.

Holcomb asserts that the title of § 939.617, "Minimum sentence for certain child sex offenses," means that the legislature intended to provide for a presumptive minimum rather than a mandatory minimum. He contrasts § 939.617 with surrounding statutes, Wis. Stat. §§ 939.616, 939.618, and 939.619, the titles of which all refer to a "Mandatory minimum sentence" (Holcomb's Br. at 9-10).

However, the titles of §§ 939.616, 939.618, and 939.619 all properly use the term, "Mandatory minimum sentence," because those statutes all provide mandatory minimum sentences, with no grant of discretion for a court to impose a shorter sentence or probation. *See State v. Lalicata*, 2012 WI App 138, ¶¶ 11-14, 345 Wis. 2d 342, 824 N.W.2d 921 (concluding that Wis. Stat. §§ 939.616, 939.618, and 939.619 all provide mandatory minimum sentences).

As this court recognized in *Lalicata*, § 939.617 is titled, "Minimum sentence for certain child sex offenses," rather than, "Mandatory minimum sentence for certain child sex offenses." *Lalicata*, 345 Wis. 2d 342, ¶ 12. This court examined Wis. Stat. § 939.617 (2009-10), and concluded that the statute provided for a presumptive minimum rather than a mandatory minimum, and therefore the statute's title did not use the term "mandatory." *Lalicata*, 345 Wis. 2d 342, ¶ 12.

The version of § 939.617 at issue in *Lalicata* provided as follows:

> Minimum sentence for certain child sex offenses.
>
> (1) Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s. 948.05 or 948.075 and 3 years for violations of s. 948.12. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.
>
> (2) If a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court may impose a sentence that is less than the sentence required under sub. (1), or may place the person on probation, only if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.

> (3) This section does not apply if the offender was under 18 years of age when the violation occurred.

Wis. Stat. § 939.617 (2009-10.)

As this court recognized, the statute provided for presumptive minimums for violations of §§ 948.05, 948.075, and 948.12. But § 939.617 had since been amended. The current version of the statute—the one at issue in this case—provides a mandatory minimum sentence in some circumstances, and a presumptive minimum sentence in others. The statute provides a mandatory minimum for all violations of § 948.075, and for violations of §§ 948.05 and 948.12 by a person more than forty-eight months older than the child victim. But the statute provides a presumptive minimum for violations of §§ 948.05 and 948.12 by a person no more than forty-eight months older than the child victim. Wisconsin Stat. § 939.617 could not reasonably be titled, "Mandatory minimum sentence for certain child sex offenses," because for some violations of §§ 948.05 and 948.12 it provides a presumptive minimum rather than a mandatory minimum.

The State's interpretation of § 939.617 is fully supported by the text of the statute, and Holcomb has pointed to nothing demonstrating that the State's interpretation is incorrect. Because there are two reasonable readings of § 939.617, the statute is ambiguous. If a statute is ambiguous, a court may examine extrinsic sources in order to guide its interpretation. *Grady*, 302 Wis. 2d 80, ¶ 15 (citing *Kalal*, 271 Wis. 2d 633, ¶ 50). As the State will explain, the legislative history behind the 2012 amendment of § 939.617 establishes that the State's reading of the statute is correct.

C. Legislative history establishes that the legislature intended for Wis. Stat. § 939.617 to provide a mandatory minimum sentence for all violations of Wis. Stat. § 948.075, and for violations of Wis. Stat. §§ 948.05 and 948.12 by a person who is more than forty-eight months older than the child victim.

As explained above, before it was amended in 2012, Wis. Stat. § 939.617 provided presumptive minimum sentences for violations of §§ 948.05, 948.075, and 948.12. If a court found that it would be in the best interests of the community and that the public would not be harmed, and explained its reasoning, it could impose a shorter-than minimum sentence, or probation, for any violation of §§ 948.05, 948.075, or 948.12. Wis. Stat. § 939.617 (2009-10).

The statute was amended by 2011 Wis. Act 272, which resulted from 2011 Assembly Bill 209, proposed by Representative Mark Honadel. The topic of Honadel's drafting request was, "Mandatory minimum sentencing for child sex crimes--remove any discretion" (R-Ap. 101). Under the resulting draft of 2011 AB 209, a court would have been required to apply the mandatory minimum unless the violation was by a person under eighteen years of age (R-Ap. 102).

Representative Honadel later proposed an amendment to the bill that would, "Allow court not to apply mandatory minimum if the victim is less than two years younger than offender" (R-Ap. 103). An e-mail to the LRB from Honadel's office requested the drafting of an amendment that

> would allow the court presumption to continue (as it does under current law) if the child is less than 2 years younger than the offender. The intent here is that the mandatory minimum would apply without the court presumption in all cases where the convicted person is over 18, except in the instance of a less than 2 year age gap.

(R-Ap. 104.)

Senator Jon Erpenbach then requested that the bill be amended to, "Allow court not to apply mandatory minimum if the victim is less than four years younger than offender" (R-Ap. 105). A Wisconsin Legislative Council Amendment Memo on Senate Amendment 1 explained the proposed bill and the proposed amendment (R-Ap. 106). It states that "**2011 Assembly Bill 209** eliminates court discretion in applying mandatory minimum sentences to offenders convicted of certain child sex crimes" (R-Ap. 106). The memo explains that the then-current law set forth minimum sentences for violations of §§ 948.05, 948.075, and 948.12. It added that "[a] court may, however, impose probation or a sentence that is less than the mandatory minimum if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record" (R-Ap. 106).

The memo explains that proposed change, stating:

> **Assembly Bill 209** eliminates general court discretion to impose probation or a sentence less than the mandatory minimum for the above crimes. The bill, however, allows a court to exercise this discretion if the offender is no more than two years older than the victim. Specifically, the bill provides that the court may impose a sentence of probation or a sentence that is less than the mandatory minimum if: (a) the person is convicted of sexual exploitation of a child, s. 948.05, and is no more than 24 months older than the child; or (b) the person is convicted of possession of a child pornography, s. 948.12, Stats., and is no more than 24 months older than the child.

(R-Ap. 106.)

The memo then explains that "**Senate Amendment 1** authorizes a court to impose probation or a sentence less than the mandatory minimum if the offender is no more than forty-eight months older than the child" (R-Ap. 106).

Assembly Amendment 1 and Senate Amendment 1 were adopted (R-Ap. 107). 2011 Assembly Bill 209 became

2011 Wis. Act 272, and was enacted on April 9, 2012 (R-Ap. 108).

A Legislative Council Act Memo prepared five days before 2011 Wis. Act 272 took effect explains the effect of the amended law. It states that "**2011 Wisconsin Act 272** removes court discretion to apply a sentence below the mandatory minimum for certain child sex crimes unless the offender is no more than four years older than the victim" (R-Ap. 109).

The memo explains that the prior law set forth minimum sentences for violations of §§ 948.05, 948.075, and 948.12, but that courts had discretion not to impose a minimum sentence. It stated:

> Under prior law, a court could impose probation or a sentence that was less than the mandatory minimum if it found that the best interests of the community would be served and the public would not be harmed and if the court placed its reasons on the record.

(R-Ap. 109.)

The memo then explains the changes under the new law, stating:

> Under Act 272, a court may impose probation or a sentence that is less than the mandatory minimum under specific circumstances involving young offenders. The Act provides that a court may not impose a sentence below the mandatory minimum *unless*: (a) the offender is convicted of sexual exploitation of a child, and is no more than forty-eight months older than the child; or (b) the offender is convicted of possession of child pornography, and is no more than forty-eight months older than the child.

(R-Ap. 109.)

The legislative history makes clear that when the legislature amended Wis. Stat. § 939.617 it intended to

remove the authority of trial courts to impose probation or a shorter-than-minimum sentence for violations of § 948.075, and to limit the authority of trial courts to impose probation or a shorter-than-minimum sentence for violations of §§ 948.05 and 948.12. It intended to allow courts to impose probation or a shorter-than-minimum sentence only when §§ 948.05 or 948.12 is violated by a person no more than forty-eight months older than the child victim.

Under the State's interpretation of § 939.617, the statute works exactly as the legislature intended when it amended the statute.

If Holcomb's interpretation of § 939.617 were correct, 2011 Wis. Act 272 would have affected only the authority to impose probation. Under the old version of the statute, courts had discretion to impose a shorter-than-minimum sentence or probation. Holcomb reads the amended statute as allowing exactly the same discretion to impose a shorter-than-minimum sentence, but limiting the discretion to impose probation to violations of §§ 948.05 or 948.12 by a person no more than forty-eight months older than the child victim. Holcomb's interpretation would allow a court to impose less than the minimum sentence for violations of §§ 948.05, 948.075, or 948.12 regardless of the age difference between the person and the child victim. This is precisely what the legislature intended to prohibit when it amended § 939.617.

Nothing in the legislative history indicates that the legislature intended to differentiate between the authority to impose probation, and the authority to impose a shorter-than-minimum sentence. Nothing indicates that the only purpose of 2011 Wis. Act 272 was the limiting of trial courts' discretion to impose probation.

The State's interpretation of § 939.617 is supported by the plain language of the statute and the legislative history of 2011 Wis. Act 272. The legislature intended that a court imposing sentence for a violation of § 948.12 impose a

bifurcated sentence with at least three years of initial confinement unless the person is no more than forty-eight months older than the child victim. Wisconsin Stat. § 939.617 does exactly what the legislature intended.

Because Holcomb is more than forty-eight months older than his child victims, the sentencing court in this case was required to impose bifurcated sentences with at least three years of initial confinement on counts 2 and 4, and it did exactly that. Holcomb is not entitled to a new sentencing hearing on those counts.

However, as the State will next explain, the sentencing court was also required to impose bifurcated sentences with at least three years of initial confinement on the other three counts to which Holcomb pled guilty. The court failed to do so, instead withholding sentence and imposing probation on all three counts.

II. THE CIRCUIT COURT INCORRECTLY WITHHELD SENTENCE AND IMPOSED PROBATION ON COUNTS 5, 7, AND 8.

A. The circuit court was required to impose at least the mandatory minimum sentence on counts 5, 7, and 8.

While the circuit court in this case complied with Wis. Stat. § 939.617 by imposing at least the mandatory minimum sentence on counts 2 and 4, the court incorrectly withheld sentence and placed Holcomb on probation on counts 5, 7, and 8 (20; 21; 30:33). The court was required to impose a bifurcated sentence on those counts, and was not authorized to withhold sentence and impose probation.

Wisconsin Stat. 939.617 requires that "except as provided in subs. (2) and (3), if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court shall impose a bifurcated sentence under s. 973.01." Wis. Stat. § 939.617(1). Under either interpretation of § 939.617—the State's or Holcomb's—a court has no discretion to withhold

sentence and impose probation if the offender is more than forty-eight months older than the child victim.

Under the State's interpretation, if the offender is more than forty-eight months older than the child victim, a court has no authority to impose a shorter-than-minimum sentence or to impose probation.

Under Holcomb's interpretation, if the offender is more than forty-eight months older than the child victim, a court has authority to impose a shorter-than-minimum sentence, but has no authority to impose probation (Holcomb's Br. at 9).

In *Lalicata*, 345 Wis. 2d 342, this court addressed whether language in § 939.616, which is similar to that in § 939.617, allowed a court to impose and stay a sentence and place an offender on probation. Section 939.616 provides, in relevant part, as follows:

> Mandatory minimum sentence for child sex offenses.
>
> . . . .
>
> (1r) If a person is convicted of a violation of s. 948.02 (1) (b) or (c) or 948.025 (1) (b), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.
>
> (2) If a person is convicted of a violation of s. 948.02 (1) (d) or 948.025 (1) (c), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

Wis. Stat. § 939.616.

This court concluded that even though § 939.616 does not expressly prohibit probation, the statute makes clear that probation is not authorized, by stating that "the court shall impose a bifurcated sentence" under § 973.01 and then specifying the required minimum amount of initial confinement. *Lalicata*, 345 Wis. 2d 342, ¶ 14. This court recognized that by requiring that a court "shall impose a bifurcated sentence," the legislature prohibited courts from withholding sentence, as generally authorized to do by Wis. Stat. § 971.09(1)(a). *Lalicata*, 345 Wis. 2d 342, ¶¶ 15-16.

The same reasoning applies under § 939.617 in regard to violations of § 948.12 by a person more than forty-eight months older than the child victim. The statute requires that a court "shall impose a bifurcated sentence under s. 973.01," and the term of confinement in prison shall be at least three years. Wis. Stat. § 939.617(1). The court is not authorized to withhold sentence, or to place the offender on probation. It is required to impose a bifurcated sentenced with at least three years of initial confinement.

B. This court should remand the case to the circuit court with instructions to impose legal sentences on counts 5, 7, and 8.

As explained above, the sentencing court properly imposed sentence on counts 2 and 4, but incorrectly withheld sentence and imposed probation on counts 5, 7, and 8. Because the circuit court imposed an illegal sentence on counts 5, 7, and 8, this court should remand the case to the circuit court with instructions to impose a bifurcated sentenced, with at least three years of initial confinement, on each count. Remand and then the imposition of legal sentences on counts 5, 7, and 8, will not violate Holcomb's double jeopardy rights.

The "'Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.'" *State v. Gruetzmacher*, 2004 WI 55, ¶ 29, 271 Wis. 2d 585, 679 N.W.2d 533 (quoting *United States v. DiFrancesco*,

449 U.S. 117, 137 (1980)). The supreme court in *Gruetzmacher* added that "double jeopardy does not demand that a defendant's sentence be given a level of finality such that its later increase would be prohibited." *Id.* (citing *DiFrancesco*, 449 U.S. at 137).

When a court has imposed an improper sentence, resentencing a defendant to impose a legal sentence does not necessarily violate double jeopardy. *Id.* (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)). The "'[c]onstitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.'" *Id.* (quoting *DiFrancesco*, 449 U.S. at 135 (in turn quoting *Bozza*, 330 U.S. at 166-67)). And resentencing for imposition of a legal sentence does not necessarily put a person in jeopardy twice. *Id.* (citing *DiFrancesco*, 449 U.S. at 135; *Bozza*, 330 U.S. at 166-67).

Whether a sentence can be modified without violating double jeopardy depends on whether the defendant "has a legitimate expectation of finality in his or her sentence." *Id.* ¶ 33 (citing *State v. Jones*, 2002 WI App 208, ¶ 9, 257 Wis. 2d 163, 650 N.W.2d 844). A defendant's legitimate expectation of finality "may be influenced by many factors, such as the completion of the sentence, the passage of time, the pendency of an appeal, or the defendant's misconduct in obtaining sentence." *Id.* (quoting *Jones*, 257 Wis. 2d 163, ¶ 10).

In the current case, Holcomb had no legitimate expectation in any sentence on counts 5, 7, and 8. On those counts, the circuit court did not impose a sentence—it withheld sentence and placed Holcomb on probation. Holcomb has not begun serving his probation, which was made concurrent to his prison sentences on counts 2 and 4. And Holcomb is appealing, seeking resentencing. He has no expectation of finality, and remand for the circuit court to impose a sentence as required by § 939.617 would not violate his double jeopardy rights.

III. THE CIRCUIT COURT DID NOT ERR IN DECLINING TO STRIKE THE PSI, AND IT DID NOT RELY ON INACCURATE INFORMATION IN IMPOSING SENTENCE.

A. Introduction.

Holcomb argues that the circuit court erred in denying his motion to strike the PSI and in relying on inaccurate information in the PSI when it imposed sentence (Holcomb's Br. at 13-19). Before sentencing, Holcomb's counsel wrote a letter to the court asking that the court strike the PSI because it "implies that Mr. Holcomb produced and distributed child pornography" (19). Holcomb pled guilty to five counts of possession of child pornography, but denied that he had produced or distributed child pornography (19).

At the sentencing hearing, the court addressed Holcomb's concerns with the PSI, and declined to strike the PSI or order a new PSI (30:2-13).

On appeal, Holcomb argues that the court erred in not striking the PSI, and that the court relied on inaccurate information in the PSI (Holcomb's Br. at 13-19). He seeks resentencing (Holcomb's Br. at 19).

B. Applicable legal principles and standard of review.

Defendants have a right to challenge any statement in the PSI that they believe is inaccurate or incomplete. *State v. Greve*, 2004 WI 69, ¶ 11, 272 Wis. 2d 444, 681 N.W.2d 479 (citing *State v. Watson*, 227 Wis. 2d 167, 194, 595 N.W.2d 403 (1999)).

Defendants also have a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1 (citing *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990)). "The defendant requesting

resentencing must prove, by clear and convincing evidence, both that the information is inaccurate and that the trial court relied upon it." *State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423. A reviewing court determines de novo whether a defendant has been denied this due process right. *Tiepelman*, 291 Wis. 2d 179, ¶ 9 (citing *State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993)).

C. Holcomb has not shown that the circuit court erred in not striking the PSI, or that it relied on inaccurate information in imposing sentence.

Holcomb argues that the sentencing court erred by not striking the PSI and ordering a new one. However, "striking" a PSI does not necessarily mean destroying the PSI and ordering a new one. "It means isolating objected-to portions of a PSI so that they will not be considered or used against the defendant." *State v. Melton*, 2013 WI 65, ¶ 73, 349 Wis. 2d 48, 834 N.W.2d 345) (footnote omitted). Alternatively, "'strike' can mean to redline or line through objected-to information, to identify and make marginal notes disavowing objected-to information, to redact objected-to information, to make a record that the court will not use objected-to information, and the like." *Id.* ¶ 71 (footnotes omitted).

In this case, the sentencing court addressed Holcomb's concerns at the sentencing hearing (30:2-13). Holcomb's counsel explained that he objected to the PSI because it claimed that Holcomb had produced and distributed child pornography, but Holcomb claimed to only have possessed child pornography (30:5-8). The court explained why it was not ordering a new PSI, stating:

> The idea that I would order another presentence, were it within my authority to do that and I suspect in limited circumstances that probably would, but I could get exactly the same information provided to me without the

> opinions and I'd have to go through the same reasoning process in dealing -- in processing -- for processing that information.

(30:12.)

At sentencing, the court made clear that it understood Holcomb's objection to the PSI, and it explained how it viewed the information to which Holcomb objected. The court stated that its understanding was that in addition to possessing child pornography, Holcomb had taken photographs of clothed children, without their knowledge, and deposited them on a website where others could access them (30:10). The court stated that by taking these photographs and putting them on a public website, Holcomb "almost certainly" did not do anything illegal, "but in terms of how the general public would understand it, they would find it very revolting and alarming and the parents would certainly find it alarming understandably" (30:10). The court said that it did not think it should pretend that these non-pornographic pictures do not exist, and that it was fair for the court to consider those photographs in assessing Holcomb's personality and character (30:10-11). The court noted that the photographs, while not illegal, were "revolting, reprehensible, alarming" (30:11).

As the court's remarks make clear, it understood Holcomb's objection to the PSI writer's characterization of Holcomb as producing and distributing child pornography, and it understood what the PSI writer was referring to in making that characterization. The court explicitly stated that it understood that the images in question were not illegal, and that the State had not proved that Holcomb produced or distributed child pornography.

The prosecutor informed the court that Holcomb had put some of the images on a web site, and said that "some of the images were password protected. Whether he did or did not share that password with other users, I don't know" (30:30). The court explained that it understood that Holcomb had put images or videos of a child onto a website,

and it questioned why a person would do so "if not for distribution" (30:30).

The court's remarks demonstrate that it understood what crimes Holcomb admitted to committing, and what else he had done that was legal and uncharged, but also "revolting, reprehensible, alarming" (30:11).

Holcomb points to nothing indicating that the court did not understand his characterization of the PSI, or that in imposing sentence the court actually relied on inaccurate information or the PSI's sentencing recommendation. Holcomb argues on appeal that the PSI recommended fifteen years of imprisonment, which "was very close to the sentence" the court imposed—two consecutive sentences of six years of initial confinement and ten years of extended supervision (Holcomb's Br. at 17).

However, the PSI noted that each of the five counts of possession of child pornography to which Holcomb pled guilty carried a mandatory minimum sentence with at least three years of initial confinement (18:1-2). The PSI recommended only the minimum sentence on each count, "followed by a period of 2-3 years of extended supervision" (18:20). The recommendation was for a sentence with three years of initial confinement on each count, significantly less than the maximum of twenty-five years of imprisonment, with fifteen years on initial confinement, on each count. The PSI recommended that the sentences be consecutive, for a total of fifteen years of initial confinement (18:20).

The sentencing court imposed sixteen-year sentences consisting of six years of initial confinement and ten years of extended supervision on each of two counts, and it withheld sentence and imposed ten year terms of probation on the remaining three counts. Nothing in the court's sentencing remarks indicate that the court relied on inaccurate information in the PSI in imposing sentence, or that it even relied on the PSI's sentencing recommendation. Holcomb is therefore not entitled to resentencing on counts 2 and 4.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment of conviction as to counts two and four, but remand the case to the circuit court with instructions to impose bifurcated sentences with at least three years of initial confinement on the remaining counts, in accordance with Wis. Stat. § 939.617.

Dated this 7th day of January, 2016

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 6,542 words.

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Michael C. Sanders
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.

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Dated this 7th day of January, 2016.

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Michael C. Sanders
Assistant Attorney General

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP996-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARKUS S. HOLCOMB,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

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Michael C. Sanders
Assistant Attorney General

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Dated this 7th day of January, 2016.

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