STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP2044-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIE WILLIAMS,

Defendant-Appellant.

On Appeal from a Nonfinal Order Denying Defendant's Motion to Dismiss, Entered in Kenosha County Circuit Court, the Honorable Chad D. Kerkman, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED[1]

1. Whether WIS. STAT. § 961.443 creates a procedural bar to the initiation of prosecution, and should be determined pretrial?

   The circuit court denied Ms. Williams' pretrial motion to dismiss in which she asserted immunity under Wis. Stat. § 961.443. Instead, the court found that § 961.443 creates an affirmative defense at trial. In its response to Ms. Williams' petition for leave to appeal, the State concedes that immunity is a procedural defense to the initiation of prosecution rather than an affirmative defense, and that the issue should be litigated in a pretrial motion rather than at trial.

2. Which party carries, and to what standard of proof, the burden of establishing that a defendant qualifies as an "aider" for purposes of immunity from prosecution under WIS. STAT. § 961.443?

   The circuit court did not address this issue.

3. Whether an individual is entitled to immunity from bail jumping charges for underlying drug possession and paraphernalia offenses for which she is immune from prosecution?

   The circuit court did not address this issue.

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[1] The Court of Appeals' order granting Ms. Williams leave to appeal did not specify what issues should be addressed on appeal. (R.17). Ms. Williams presented three issues in her petition for leave to appeal; in its response, the Attorney General conceded Ms. Williams' position on the first two issues was correct, and raised an additional issue. (Attorney General's Response to Petition for Leave to Appeal Nonfinal Order pp. 4,7). Accordingly, Ms. Williams combines in the first issue in this brief the two issues as conceded by the Attorney General. The third issue in the brief addresses the Attorney General's additional issue regarding immunity for the bail jumping charges.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel believes that the issues can be adequately addressed in briefing, but welcomes oral argument if this court would find it helpful to resolution of the issues presented. Publication is warranted as this case involves an issue of substantial and continuing public interest. Counsel is unaware of any published Wisconsin case law interpreting the WIS. STAT. § 961.443 (2013-14) "911 Good Samaritan Law."[2]

STATEMENT OF THE CASE

In May 2015, the State charged Marie Williams with seven criminal offenses for events occurring on February 7, 2015: four counts of felony bail jumping as a repeater, contrary to WIS. STAT. §§ 946.49(1)(b), 939.62(1)(b); one

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[2] The statute, in full, provides:

(1) DEFINITIONS. In this section, "aider" means a person who does any of the following:

(a) Brings another person to an emergency room, hospital, fire station, or other health care facility if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(b) Summons a law enforcement officer, ambulance, emergency medical technician, or other health care provider, to assist another person if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Dials the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, to obtain assistance for another person if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(2) IMMUNITY FROM CRIMINAL PROSECUTION. An aider is immune from prosecution under s. 961.573, for the possession of drug paraphernalia, and under s. 961.41 (3g) for the possession of a controlled substance or a controlled substance analog, under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

count of possession of a controlled substance, repeater, contrary to §§ 961.41(3g)(b), 939.62(1)(a); one count of possession of narcotic drugs, party to a crime, repeater, contrary to §§ 961.41(3g)(am), 939.05, 939.62(1)(b); and one count of possession of drug paraphernalia, party to a crime, repeater, contrary to §§ 961.573(1), 939.05, 939.62(1)(a). (R.1:1-3; App.101-103).

On July 16, 2015, Ms. Williams filed a motion to dismiss counts 1–3 and counts 5–7,[3] asserting immunity from prosecution under § 961.443. (R.10; App.107). The State filed a response, and the court subsequently held a motion hearing on September 9, 2015. (R.11; R.18; App.116). At the hearing, the State informed the circuit court that the parties had reached an agreement that the circuit court could decide the motion based upon a review of the police reports, as the facts were undisputed. (R.18:3; App.118). The State indicated that it believed, based on the availability of the police reports and the agreement between the parties, that "we could resolve this motion without a jury trial. I think the Court would be in a position then to make its factual findings and then make its legal findings from there." (Id.). The circuit court, the Honorable Chad D. Kerkman, disagreed, and declined to hear testimony or argument, denying the motion as follows:

> I think you're asking me to make some factual findings and I think that's more in the province of the jury, not the judge. So what I'm thinking is that if there is a jury trial, if there's sufficient evidence to warrant it that we would include jury instructions and an affirmative defense.

[3] Count four charged Ms. Williams with violating a condition of bond requiring her to be electronically monitored and is unrelated to the possession of a controlled substance or drug paraphernalia. *See* R.1:2; App. 102; *see also, infra*, Sec. III.

(R.18:2-3; App. 117-118). The court subsequently signed a written order on September 29, 2015, that denied the motion to dismiss. (R.18:3-5; App. 118-120; R.15; App.123).

On October 1, 2015, Ms. Williams filed a petition for leave to appeal the circuit court's order. The State, by the Attorney General's office, filed a response on October 16, 2015. On October 29, 2015, this Court granted Ms. Williams' petition for leave to appeal. (R.17).

STATEMENT OF FACTS

On February 7, 2015, at approximately 1:00 a.m., Kenosha County sheriff's deputies arrived at the scene of a single-vehicle accident on County Highway K. (R.1:4; App. 104). They encountered Marie Williams, who informed the deputies that she had been driving her passenger, Jason Westermann, who was unconscious but breathing, to the hospital to obtain medical attention for him. (Id.)

Ms. Williams told deputies she believed Mr. Westermann had purposely overdosed on drugs. (Id.) She explained that she and Mr. Westermann had been at his mother's residence that evening, but after his mother observed him inject heroin, she told them to leave. (Id.) According to Ms. Williams, shortly thereafter, Mr. Westermann consumed an unknown number of pills. (Id.)

Based on their interaction with Ms. Williams, the deputies believed that Ms. Williams might be under the influence of a controlled substance.[4] (R.1:4; App.104) One of the deputies located a bottle of alprazolam[5] pills inside Ms.

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[4] Ms. Williams was ultimately issued a citation for operating while intoxicated as a first offense, contrary to WIS. STAT. § 346.63(1)(a). (R.1:5; App.105).

[5] Alprazolam, a benzodiazepine, is commonly known by its brand name, Xanax. *See* the National Institute of Health's "MedlinePlus" website page on alprazolam, available at (continued)

Williams' purse. (Id.) Ms. Williams told officers that she had taken two of these pills about four hours earlier, and had also taken a Percocet pill earlier in the day, and that she had a prescription for both of these medications. (Id.).

During a search of the vehicle, officers located a GPS electronic ankle monitor that Ms. Williams had been ordered to wear as a condition of bond in a pending Racine County case, #2014CF1317. (Id.) Deputies also found a plastic bag containing loose hypodermic needles, a plastic medication bottle with a morphine sulphate pill, two containers holding needles, and a container filled with loose needles, a tourniquet, and a burnt spoon. (R.1:5; App.105).

At the time of the accident, Ms. Williams was subject to conditions of a signature bond in the pending Racine County case which required that she not commit additional crimes, submit to electronic monitoring, and leave her residence only for court appearances, doctor appointments, attorney meetings, or to look for housing if granted permission from the monitoring agency in advance. (Id.).

INTRODUCTION

In October 2013, the Wisconsin legislature introduced Assembly Bill 447, to create, in part, a "Good Samaritan" immunity statute that would provide protection from some criminal prosecutions for those who sought emergency medical assistance for individuals experiencing a drug overdose. (R.12:3). This legislation was in response to an opioid addiction that has reached epidemic proportions in many parts of the state. To date, 19 states and the District of Columbia have enacted similar laws granting immunity of some degree to overdose victims and those who seek

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https://www.nlm.nih.gov/medlineplus/druginfo/meds/a684001.html (last accessed 2/1/16).

emergency medical assistance on their behalf.[6] In addition, in his 2016 State of the Union address, President Obama identified "helping people who are battling prescription drug abuse and heroin abuse" as a bipartisan priority on which he intended to focus in the coming year. (https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address)(last accessed 2/1/16).

Prior to the passage of Assembly Bill 447, the Wisconsin State Council on Alcohol and Other Drug Abuse established the 911 Good Samaritan Ad-hoc Committee to examine opiate misuse and abuse in our state, research similar legislation in other states, report on their findings, and suggest possible legislation. (R.12:16). The committee reported that many opiate overdoses are preventable—with survival rates of nearly 100 percent when paramedics are present—by the administration of drugs like naloxone, which can halt or reverse the effect of opioids. (R.12:26, R.12:30). As noted by state senator Sheila Harsdorf in her written testimony in support of the legislation, heroin users often use drugs together, but when an overdose situation arises, other users tend to leave rather than call for help, due to the fear of repercussions. (R.12:9).

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[6] *See* Cal. Health & Safety Code § 11376.5 (2013); Colo. Rev. Stat. Ann. § 18-1-711 (2012); Conn. Gen. Stat. Ann. § 21a-279 (2011); Conn. Gen. Stat. Ann. § 21a-267; Del. Code Ann. tit. 16, § 4769; D.C. Code § 7-403; Fla. Stat. Ann. § 893.21 (2012); 720 Ill. Comp. Stat. Ann. 570/414 (2012); Mass. Gen. Laws ch. 94C, § 34A (2012); N.J. Stat. Ann. §§ 2C:35-30, 2C:35-31 (2013); N.M. Stat. Ann. § 30-31-27.1 (2007); N.Y. Penal Law § 220.78 (2011); N.C. Gen. Stat. Ann. § 90-96.2 (2013); R.I. Gen. Laws § 21-28.8-4 (2012); Vt. Stat. Ann. tit. 18, § 4254; Wash. Rev. Code Ann. §69.50.315 (2012); Haw. Rev. Stat. Ann. § 329-43.6 (2015); W. Va. Code Ann. § 16-47-4 (2015); Va. Code Ann. § 18.2-251.03 (2015); Ga. Code Ann. § 16-13-5 (2014); Minn. Stat. Ann. § 604A.05 (2014).

As the Ad-hoc Committee reported:

> The majority of overdose deaths occur within one to three hours after the individual has taken an opiate and most of these deaths occur in the presence of others. This situation gives a significant amount of time for witnesses to the overdose to intervene and call for medical assistance. Unfortunately, fear of arrest and prosecution, as well as the stigma attached to drug use, prevent many witnesses from calling 911 and summoning emergency medical assistance. If these barriers were removed, countless lives could be saved, offering survivors the opportunity for recovery.

(R.12:22).

Assembly Bill 447 was enacted with bipartisan support amid a package of bills aimed at addressing the widespread heroin problem in Wisconsin.[7] (*See* R.12:9, 16, 18-22, 52). In signing the bill into law, Governor Walker recognized that Wisconsin was "experiencing a dangerous trend – an escalating number of cases of heroin use, addiction, and overdose," requiring action. (R.12:52). Accordingly, Wisconsin's "Good Samaritan" immunity statute was designed to "promote life-saving emergency calls by removing some of the[] disincentives for those who can summon aid for overdose victims." (R.12:11).

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[7] Known as the Heroin Opiate Prevention and Education (H.O.P.E.) legislative packet, the seven bills introduced measures to combat the "escalating problem of opiate/heroin use and addiction." (R.12:52). *See also* the State Bar of Wisconsin's Inside Track, "New Laws Seek to Reduce Heroin Overdose Deaths, Immunize Emergency Treatment by Responders" available at http://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=6&Issue=10&ArticleID=11559 (last accessed 2/1/16)(describing 2013 Wisconsin Act 200, which requires EMTs to carry opioid antagonists and provides immunity for certain individuals who prescribe, dispense, deliver, or administer opioid antagonists and also governs the prescription, possession, dispensing, delivery, and administration of opioid antagonists like Narcan; 2013 Wisconsin Act 195, amending and creating statutes relating to opioid treatment programs; 2013 Acts 196-199, relating to substance abuse and diversion programs, disposal of drugs, regulation and monitoring of prescription drugs, and more.).

WISCONSIN STAT. § 961.443 became effective April 7, 2014. (R.12:52). The statute creates immunity from prosecution for violations of § 961.573 for the possession of drug paraphernalia, and for violations of § 961.41(3g) for the possession of a controlled substance or a controlled substance analog, "under the circumstance surrounding or leading to his or her commission of" aiding as described in § 961.443(1). WIS. STAT. § 961.443(2).

The legislation, however, lacks a procedure for the implementation of, or the parameters surrounding, the immunity provided by the statute. No appellate case has yet interpreted WIS. STAT. § 961.443. Consequently, no specific guidelines exist and the procedural application of the statute appears to be an open question. This case presents an opportunity for this Court to set forth procedures to implement the immunity provided by the "Good Samaritan" statute, in a manner that reflects both the letter and spirit of this legislation.

ARGUMENT

I. WIS. STAT. § 961.443 Creates an Absolute Bar to Prosecution Under Certain Circumstances and Requires a Pretrial Determination of Its Application.

As a preliminary matter, the circuit court should have considered the merits of Ms. Williams' motion to dismiss, and permitted presentation of evidence at a pretrial hearing regarding Ms. Williams' assertion that she met the statutory definition of an "aider" and was entitled to immunity from prosecution for the offenses charged in Counts 1-3 and 5-7. The circuit court erred in concluding that WIS. STAT. § 961.443 instead creates an affirmative defense that must be presented at trial, with an instruction to the jury.

"Immunity from prosecution" is not the equivalent of an affirmative defense. *See* ***Bunn v. State***, 284 Ga. 410, 413, 667 S.E.2d 605 (2008)("As a potential bar to criminal proceedings which must be determined prior to a trial, immunity represents a far greater right than any encompassed by an affirmative defense, which may be asserted during trial but cannot stop a trial altogether."). Immunity functions as a shield against litigation, as seen in instances of qualified immunity for public officials. *See, e.g.*, ***Baxter v. DNR***, 165 Wis. 2d 298, 302, 477 N.W.2d 648 (Ct. App. 1991). In contrast, an affirmative defense presents a justification from liability, and requires a defendant risking conviction on all charges. *See, e.g.*, ***State v. Nollie***, 2002 WI 4, ¶12, 249 Wis. 2d 538, 638 N.W.2d 280. By its nature, an affirmative defense forces the defendant to face the hardships of litigation in order to ultimately be excused from his or her otherwise-wrongful acts.

At the hearing on Ms. Williams' motion to dismiss, both the State and the defense disagreed with the circuit court's conclusion that the statute created an affirmative defense. (R.18:3-5; App.118-120). Following the circuit court's explanation that it believed the determination of whether Ms. Williams was an aider entitled to immunity was "more in the province of the jury, not the judge[,]" the State called the court's attention to the parties' agreement that it could review the police reports and rely on those reports for the factual basis for its decision. (R.18:3; App.118). The State observed there was little factual dispute, and based on the availability of the police reports and agreement between the parties, it believed the issue of immunity could be resolved through a determination on the motion "without a jury trial. I think the Court would be in a position then to make its factual findings and then make its legal findings from there." (R.18:3; App.118).

Similarly, in this Court and on behalf of the State, the Attorney General's office has conceded that immunity under the statute is a procedural defense to the initiation of a prosecution, and its application should be litigated in pretrial proceedings. (Attorney General's Response to Petition for Leave, p. 7). This concession is supported by a plain reading of WIS. STAT. § 961.443.

When interpreting a statute, this Court begins with the language of the statute, and "give[s] it its common, ordinary, and accepted meaning[.]" ***State v. Harmon***, 2006 WI App 214, ¶10, 296 Wis. 2d 861, 723 N.W.2d 732 (citation omitted). "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. 'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.'" ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). The scope and purpose of the statute is to be considered, as is the context in which the statutory language is used. ***Id.*** Further, this Court interprets a statute "reasonably to avoid absurd or unreasonable results." ***Id.***

The language and purpose of section 961.443 make clear that the statute is intended to provide an absolute procedural bar to prosecution under certain circumstances, rather than an affirmative defense to be raised at trial. WISCONSIN STAT. § 961.443(2) unambiguously states that a person who is an "aider" as defined in the statute is "immune from prosecution." Black's Law Dictionary defines "immune" as "[h]aving immunity; exempt from a duty or liability." Black's Law Dictionary (9th ed. 2009). "Prosecution," in turn, is defined as "[a] criminal proceeding in which an accused person is tried." ***Id.*** Had the legislature intended the "Good Samaritan" law to create an affirmative defense, it would instead have included language, as it has done for other affirmative defenses, that the statute provides

"a defense to a prosecution," rather than "immunity from prosecution." *See* WIS. STAT. §§ 939.45 (privilege), 939.46 (coercion), 939.47 (necessity).

Similarly, the placement of the statute within Wisconsin's criminal code reflects the legislature's intent that the statute provides *immunity* from prosecution, rather than *a defense* to a prosecution. WISCONSIN STAT. § 961.443 is located within Chapter 961, the "Uniform Controlled Substances Act," rather than grouped with other affirmative defenses in Chapter 939's Subchapter III "Defenses to Criminal Liability." Such placement, along with the plain language of the statute, reflects the intent of the legislature to provide immunity from prosecution to an "aider" to a drug overdose, rather than an affirmative defense to be raised at trial.

For these reasons, the only rational conclusion is that the circuit court erred when it concluded WIS. STAT. § 961.443 created an affirmative defense, to be raised by the defendant at trial. Instead, whether a person is an aider entitled to immunity under the statute is a pretrial determination which, if established, bars prosecution for drug possession and drug paraphernalia offenses.

In this case, Ms. Williams attempted to obtain emergency medical assistance for Mr. Westermann, following their ouster from his mother's home after midnight in February and Mr. Westermann's ingestion of both pills and heroin. (R.1:4; App.104). En route to taking Mr. Westermann to the hospital, the vehicle went off the road. (Id.) When officers arrived at the accident scene, Ms. Williams alerted them to Mr. Westermann's medical condition and potential overdose. (Id.) Ms. Williams' thwarted effort to obtain medical assistance for Mr. Westermann by bringing him to the hospital might have established her aider status under subsection 961.443(1)(a). In any event, Ms. Williams' actions ultimately satisfied subsection (1)(b), as, in order to assist Mr. Westermann, she

alerted deputies who arrived at the scene of his condition. Ms. Williams should have the opportunity to present this information to the circuit court in a pretrial evidentiary hearing in order to establish her status as an "aider" for purposes of immunity from prosecution, pursuant to WIS. STAT. § 961.443.

II. Ms. Williams Carries the Burden in a Pretrial Proceeding to Establish, by a Preponderance of the Evidence, That She Qualifies as an "Aider" for Purposes of WIS. STAT. § 961.443.

While undersigned counsel have been unable to find relevant caselaw that establishes procedures for the application of similar aider-immunity statutes from other states, caselaw from "castle doctrine"-immunity laws from other states[8] is instructive. Using those procedures as a guide, Ms. Williams contends that the appropriate procedure for application of the immunity provisions of WIS. STAT. § 961.443 places the burden on a defendant to establish, by a preponderance of the evidence in a pretrial proceeding, that he or she is an "aider."

In support of Ms. Williams' proposed procedure and burden of proof, she directs this Court to ***Bretherick v. State***, 170 So.3d 766 (Fla.2015). There, the Florida Supreme Court addressed the proper procedure and burden of proof in relation to Florida's "Stand Your Ground" law, which provides immunity from prosecution where a defendant has used force in accordance with certain statutorily-specified circumstances. ***Bretherick*** at 768. The Florida Supreme Court held that a defendant claiming immunity under the "Stand Your Ground" law bears the burden of proof by a

[8] In contrast, Wisconsin's own "castle doctrine" law creates an affirmative defense that entitles a qualifying defendant to a jury instruction, rather than a provision for immunity from prosecution. *See* WIS. STAT. § 939.48(1m); *see also* ***State v. Chew***, 2014 WI App 116, ¶¶8-9, 358 Wis. 2d 368, 856 N.W.2d 541.

preponderance of the evidence at a pretrial evidentiary hearing. ***Bretherick*** at 768-69 (citing *Dennis v. State*, 51 So.3d 456 (Fla.2010)). The Court found that this procedure and burden were "fully consistent with the legislative intent to provide immunity to a limited class of defendants who can satisfy the statutory requirements." ***Id.***

Like Wisconsin's aider-immunity statute, Florida's "Stand Your Ground" law provides that a person "is immune from criminal prosecution," yet it stood "silent as to how to best effectuate the defendant's substantive right to this immunity from prosecution[.]" ***Bretherick*** at 771-72. In explaining its holding, the Florida Supreme Court referenced the Colorado Supreme Court's decision in ***People v. Guenther***, 740 P.2d 971, 976, 980 (Colo. 1987), in which that court determined that Colorado's "Stand Your Ground" immunity statute provided for dismissal at the pretrial stage, and that a defendant claiming immunity must establish, by the preponderance of the evidence, the factual support for entitlement to immunity. ***Bretherick*** at 774. The ***Bretherick*** court reasoned that placing the burden of proof on the defendant was "consistent with how other types of motions to dismiss" were handled, as well as "consistent with jurisprudence that requires the defendant, who is seeking the immunity, to bear the burden of proof by a preponderance of the evidence." ***Id.*** at 776.

The reasoning of the ***Bretherick*** and ***Guenther*** courts makes sense—the circumstances of the overdose situation are more likely to be known by the defendant, who is in the best position to assert them in support of a claim that he or she is entitled to immunity from prosecution under WIS. STAT. § 961.443. In addition, as in several "castle doctrine" immunity statute cases, a "preponderance of the evidence" standard is an appropriate level by which the court can determine whether the defendant has satisfied his burden. *See* ***Bretherick***, 170 So.3d at 775; ***State v. Duncan***, 392 S.C. 404, 709 S.E.2d 662, 665 (2011); ***Bunn,*** 284 Ga. at 412-13;

Guenther, 740 P.2d at 972 (each determining that a defendant bears the burden of proof by a preponderance of the evidence at a pretrial evidentiary hearing to establish immunity from prosecution under castle doctrine laws providing a person "is", or "shall be" "immune from criminal prosecution.").

In addition, other nontrial proceedings in Wisconsin place a preponderance-of-the-evidence burden on the party bearing the burden. *See, e.g.*, ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798 (burden of preponderance of the evidence is on the State at pretrial *Miranda-Goodchild* hearings on proper *Miranda* warnings and the voluntariness of a defendant's statements to police); ***State v. Rewolinski***, 159 Wis. 2d 1, 14-16, 464 N.W.2d 401 (1990)(defendant, as proponent of a motion to suppress, bears burden of proof by preponderance of evidence that he manifested a subjective expectation of privacy that was invaded by government action and that that expectation was legitimate; "the 'controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence.'" (quoting ***United States v. Matlock***, 415 U.S. 164, 178 n.14, (1974)). *See also* ***State v. Daniel***, 2014 WI App 46, ¶2, 354 Wis. 2d 51, 847 N.W.2d 855 (in a postconviction competency proceeding, burden of proof by a preponderance of the evidence rests with the defendant).

Accordingly, placing the burden on Ms. Williams to establish in a pretrial proceeding that she is an "aider" by a preponderance of the evidence is the most appropriate means of effectuating her substantive right to WIS. STAT. § 961.443's guarantee of immunity from prosecution.

III. Ms. Williams is Entitled to Immunity From Prosecution on Bail Jumping Charges That Rely Entirely Upon the Drug Offenses For Which Prosecution is Barred Under WIS. STAT. § 961.443.

In its response to Ms. Williams' petition for leave to appeal, the State queried whether an individual who qualifies as an aider under WIS. STAT. § 961.443 would be entitled to immunity from bail jumping charges that are based upon possession of controlled substances and drug paraphernalia, the two offenses specifically identified in the statute for which an aider is immune from prosecution. (State's Response to Petition for Leave to Appeal, p. 4). As seen above, the statute does not address many of the practical problems presented by this statute. *See, supra*, Sec. I and II.

A bail jumping prosecution is, at its core, the prosecution of a crime within a crime. WISCONSIN J.I.—CRIMINAL 1795 sets forth the jury instructions for the crime of bail jumping, and provides:

> Bail jumping, as defined in § 946.49(1) of the Criminal Code of Wisconsin, is committed by one who has been released from custody on bond and intentionally fails to comply with the terms of that bond.
>
> **State's Burden of Proof**
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.
>
> **Elements of the Crime That the State Must Prove**
>
> 1. The defendant was (arrested for) (charged with) (a felony) (a misdemeanor).
>
> (A felony is a crime punishable by imprisonment in the Wisconsin state prisons. _____ is a felony.)
>
> (A misdemeanor is a crime punishable by imprisonment in the county jail._____ is a misdemeanor.)
>
> 2. The defendant was released from custody on bond.

> This requires that after (arrest) (being charged), the defendant was released from custody on bond under conditions established by a judge) (court commissioner) (bail schedule).
>
> 3. The defendant intentionally failed to comply with the terms of the bond.
>
> This requires that the defendant knew of the terms of the bond and knew that (his) (her) actions did not comply with those terms.
>
> **ADD THE FOLLOWING IF THE VIOLATION OF BOND IS ALLEGED TO INVOLVE THE COMMISSION OF A CRIMINAL OFFENSE**
>
> **[The defendant is charged with violating a condition of bond that required that (he) (she) not commit any crime. The State alleges that the defendant committed the crime of _____. The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant committed the crime of ____.**
>
> **The crime of _____ is committed by one who**
>
> **LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.]**
>
> …

(emphasis added)(App.124-125).

The jury instructions for the third element of bail jumping—that the defendant intentionally failed to comply with the terms of the bond—mandate that if the violation of bond is alleged to involve the commission of a criminal offense, then the elements of that crime are to be listed, and the jury is to be told that the State must prove beyond a reasonable doubt that the defendant committed the underlying crime. WIS. J.I.—CRIMINAL 1795; (App.124-125).

Thus, while the ramifications are different and bail jumping is distinct from the underlying crime, the prosecution for bail jumping requires the instruction on, and sufficient

proof of, the same elements as the underlying offense. ***State v. Henning***, 2003 WI App 54, ¶25, 261 Wis. 2d 664, 660 N.W.2d 698 rev'd (as to remedy), 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871 ("We think it self-evident that when a bail jumping charge is premised upon the commission of a further crime, the jury must be properly instructed regarding the elements of that further crime.")(*See* WIS. J.I.—CRIMINAL 1795 fn. 12: "NOTE: Henning was reversed as to the remedy ordered by the Court of Appeals. The part of the decision relating to defining the new crime was not affected.")(App.128).

Ultimately, this means that the State must prosecute a defendant for their immunized underlying conduct in order to secure a conviction on the bail jumping charge. In fact, there must be "evidence sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that a defendant intentionally violated his or her bond by committing a crime[.]" ***State v. Hauk***, 2002 WI App 226, ¶19, 257 Wis. 2d 579, 652 N.W.2d 393. Where the State cannot use evidence of a defendant's possession of paraphernalia or controlled substances in a prosecution because of immunity, neither should it be able to use the immunized conduct in a bail jumping prosecution.

WISCONSIN STAT. § 961.443 explicitly prohibits the prosecution of an overdose-aider for drug possession and paraphernalia. Because bail jumping based on new crimes of drug possession and possession of paraphernalia requires the jury to be instructed on the specific elements of those crimes, and the State to prove with evidence sufficient beyond a reasonable doubt that a defendant committed those crimes, a prosecution for bail jumping under these circumstances in fact constitutes a prosecution for the drug and drug paraphernalia crimes prohibited by WIS. STAT. § 961.443.

Furthermore, Ms. Williams urges this Court to consider the legislative intent that drove this bill into law. The clear intent of Wisconsin's "Good Samaritan" aider-

immunity law was to remove disincentives that prevent witnesses from seeking help for overdose victims. (*See* R.12:9; R.12:22). The legislature recognized that providing immunity from prosecution for offenses related to illegal drug possession and paraphernalia that often accompany a drug overdose would remove a significant barrier for those who could seek assistance for a person they witnessed experiencing an overdose. This legislative intent would be frustrated if prosecution is permitted for charges such as bail jumping, which are based solely upon drug possession and paraphernalia offenses that are subject to immunity under the statute.

Allowing prosecution for a criminal offense based upon the same underlying circumstances which prevent prosecution of the drug possession and paraphernalia charges ultimately perpetuates, rather than removes, the barriers and disincentives to seeking medical assistance for an overdose victim. Permitting prosecution of an overdose-aider for bail jumping based on possession of controlled substances and possession of drug paraphernalia will discourage potential aiders from seeking help for overdose victims and contradicts the legislative intent behind the statute, which aims to encourage people to seek help, rather than refuse to do so because of fear of legal consequences for their own illegal drug use.

It is well-documented that substance abusers often struggle with drug addiction over long periods of time, which frequently leads to involvement in the criminal justice system. (*See* National Council on Alcoholism and Drug Dependence "Alcohol, Drugs, and Crime" available at https://ncadd.org/about-addiction/alcohol-drugs-and-crime (last accessed 2/1/16)). It would not be surprising, then, that a potential overdose-aider who could qualify for immunity from prosecution for drug possession or drug paraphernalia under WIS. STAT. § 961.443 may be on some form of court-ordered supervision or have already-pending criminal cases

which could subject them to bail jumping charges based on their drug possession. Interpreting the statute to permit prosecution for offenses such as the bail jumping charges in this case that are based solely upon the immunized drug possession or drug paraphernalia charges will deter potential aiders from seeking help for overdose victims, and contradicts the legislative intent.

The grant of immunity provided in WIS. STAT. § 961.443 implements a legislative policy decision that a person who summons assistance in order to help save the life of an overdosing victim will not be held criminally responsible for their own illegal drug possession in the same circumstance. In order to effectuate this policy, the statute should be broadly construed to extend to bail jumping charges that are solely based upon drug or drug paraphernalia possession offenses that are subject to immunity under the statute. To conclude otherwise would be contrary to the goals of the legislature and the law. *See* ***Helvering v. Stockholms Enskilda Bank***, 293 U.S. 84, 89 (1934)("If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail.").

CONCLUSION

Ms. Williams requests that this Court enter an order directing the circuit court to hold a pretrial evidentiary hearing on her motion to dismiss, at which Ms. Williams would have the burden of proof to establish, by a preponderance of the evidence, that she qualifies as an "aider" under WIS. STAT. § 961.443, and is therefore immune from prosecution. Ms. Williams also asks this Court to hold that, if her "aider" status is properly established for purposes of WIS. STAT. § 961.443, she is immune from prosecution of the bail-jumping charges in Counts 1-3 as well as the drug crimes charged in Counts 5-7, on which the bail-jumping charges are based.

Dated this 1st day of February, 2016. .

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. 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 5,103 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 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 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 1st day of February, 2016.

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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; (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 one or more initials or other appropriate pseudonym or designation 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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