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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

Case No. 2015AP2044-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

MARIE WILLIAMS,  
Defendant-Appellant.

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

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REPLY BRIEF OF  
DEFENDANT-APPELLANT

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## **ARGUMENT**

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

The State has conceded Ms. Williams' position. (State's response at 2).

- 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.

The State has conceded Ms. Williams' position. (State's response at 3).

- 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.

The State asserts that the plain language of WIS. STAT. § 961.443(2) provides immunity from prosecution only for possession of controlled substances and possession of drug paraphernalia because those offenses are specifically enumerated within the statute. (State's response at 5-6). Ms. Williams disagrees, as reasonable persons could differ as to whether a "prosecution" for the two offenses specifically enumerated in the statute includes a prosecution for bail jumping based solely on those same enumerated crimes. A

statute is ambiguous if reasonable persons could disagree to its meaning; whether a statute is ambiguous is a question of law. *Boltz v. Boltz*, 133 Wis. 2d 278, 284, 395 N.W.2d 605 (Ct. App. 1986).

Ms. Williams disputes the State's narrow view of the immunity from prosecution that the statute provides to overdose-aiders. The language of the statute explicitly prohibits the *prosecution* of an aider for the possession of controlled substances and drug paraphernalia. Ms. Williams asserts that under the statute, the term "prosecution"<sup>1</sup> encompasses offenses that rest entirely upon the same conduct that WIS. STAT. § 961.443(2) specifically immunizes.

Ms. Williams' position does not rest on a claim that the possession crimes detailed in WIS. STAT. § 961.443(2) are lesser-included offenses of bail jumping. (State's response at 7). As argued in her opening brief (Brief-in-chief at 15-18), in order to obtain convictions for bail jumping as charged in Counts 1-3, the State must satisfy beyond a reasonable doubt all of the elements of the two enumerated drug offenses in WIS. STAT. § 961.443(2). *See* WIS. J.I.—CRIMINAL 1795; *see also State v. Hauk*, 2002 WI App 226, ¶19, 257 Wis. 2d 579, 652 N.W.2d 393 (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

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<sup>1</sup> "Prosecution" is defined as:

A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime. The continuous following up, through instrumentalities created by law, of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused.

Black's Law Dictionary (5<sup>th</sup> ed. 1979).

committing a crime[.]”). The State acknowledges that in order to establish that a defendant violated the conditions of bail by committing a new offense, it must prove that the defendant actually committed the new offense. (State’s response at 7). Thus, the prosecution of Ms. Williams for bail jumping in Counts 1-3 necessarily requires the State to specifically prove the immunized conduct enumerated in WIS. STAT. § 961.443(2).

Where a bail jumping prosecution requires the State to utilize the same facts and elements as the enumerated immunized offenses in WIS. STAT. § 961.443(2), such use constitutes a “prosecution” for purposes of the immunity statute. While the offense of bail jumping alleges a violation of the conditions of bond, here, the prosecution of Ms. Williams for violating the conditions of her bond necessarily requires the State to prove the prohibited conduct that is immunized under § 961.443(2). Thus, the prosecution of Ms. Williams for bail jumping based upon possession of controlled substances and possession of drug paraphernalia falls within the scope of immunity provided for overdose-aiders by § 961.443.

When a statute is ambiguous, this Court ascertains its reasonable meaning looking to “its content, subject matter, scope, history, and purpose[.]” *State v. Frey*, 178 Wis. 2d 729, 738, 505 N.W.2d 786 (Ct. App. 1993). The State’s response to Ms. Williams’ policy arguments consist solely of opinion; no legal support was provided for its contention that “[t]he legislative policy was that letting an aider get away with any other crimes was too great a cost for furthering the goal of getting help for someone who was suffering an adverse reaction to drugs.” (State’s response at 8-9).

To the contrary, as Ms. Williams' brief-in-chief made clear, legislative intent and public policy support providing an aider in an overdose situation immunity from charges of bail jumping based upon possession of controlled substances and drug paraphernalia. (*See* Brief-in-chief at 7-9; R.12:22 ("Unfortunately, fear of arrest and prosecution...prevent many witnesses from calling 911 and summoning emergency medical assistance. If these barriers were removed, countless lives could be saved....")). As previously noted, individuals in a position to aid an overdosing drug user are likely drug users themselves. (*See* Brief-in-chief at 7-9, 20-21; R.12:9, 12:22). And, it is not uncommon for chronic drugs users to become involved in the criminal justice system at some point.

The State urges a construction of WIS. STAT. § 961.443 that likely would result in the evisceration of the statute's goal, by permitting prosecution of overdose-aiders based upon the same conduct that is specifically immunized in the statute. The content, scope, history, and purpose of WIS. STAT. § 961.443 make clear that the goal of this overdose-aider law will be thwarted by refusing to grant immunity to potential aiders whose own drug use may constitute a violation of bond conditions on an already-pending case, such that they will be deterred from seeking assistance for an overdosing companion.

Ms. Williams is not asking this Court to extend the immunity provided in WIS. STAT. § 961.443 to a new class of offenders, but to simply read the statute in a manner that is consistent with the legislative purpose and intent. (*See, e.g.*, R.12:8,9,11,13). The clear intent of this law was to remove disincentives for individuals in a position to provide life-saving help to an overdose victim. As Wisconsin State Representative John Nygren noted in his written testimony before the Assembly Committee on Criminal Justice

regarding Assembly Bill 447<sup>2</sup>: “It is important to point out that this bill does not provide protection for drug dealers; instead it helps to persuade scared individuals to do the right thing, which is to seek help in instances where people’s lives are at risk.” (R.12:8).

Accordingly, interpreting WIS. STAT. § 961.443 to provide immunity for overdose-aiders from prosecution for violations of bond conditions based solely upon the possession of controlled substances and drug paraphernalia conforms to the legislature’s expectations for the protection provided by this statute.

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<sup>2</sup> Assembly Bill 447 became WIS. STAT. § 961.443.



## **CONCLUSION**

For the reasons stated herein and in her brief-in-chief, 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 18th day of April, 2016.

Respectfully submitted,

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## **CERTIFICATION AS TO FORM/LENGTH**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,271 words.

## **CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 18th day of April, 2016 .

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