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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1346

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS FRANKLIN & SHANE SAHM,

Defendants-Appellants.

On certification of a state-law question from the
United States Court of Appeals for the Seventh Circuit

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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STATEMENT OF THE ISSUE

This Court has accepted certification of this question from the Federal Court of Appeals for the Seventh Circuit:

> Whether the different location subsections of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a)–(f), identify alternative elements of burglary, one of which a jury must unanimously find beyond a reasonable doubt to convict, or whether they identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate for any case that this Court accepts for review.

BACKGROUND

Wisconsin's burglary statute covers unlawful entry into any one of a number of locations:

> (1m) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:
>
> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
>
> (f) A room within any of the above.

Wis. Stat. § 943.10(1m).

The certified question is whether subs. (a)–(f) list distinct elements of six different offenses or merely six means of committing one offense. Put more concretely, the question is whether at trial, jurors would have to unanimously agree on the location subsection, such that in a case involving burglary of a boat where someone was living, if jurors can't agree whether it should be deemed a ship or a dwelling, they would have to return a not-guilty verdict. Or, to put it another way, in that same case, could the prosecutor charge two counts of burglary—one under sub. (1m)(a) ("dwelling") and another under sub. (1m)(c) ("ship")?

However this question is framed, the answer is obvious. Section 943.10(1m)'s location subsections are means of committing a single offense: burglary. They are not elements of six different crimes.

The fact that the Seventh Circuit has certified the question might cause this Court to assume that it is more complicated than it appears. But the certification has more to do with recent developments in federal law than with the complexity of state law. Thus, some history is in order.

The underlying federal litigation is about the Armed Career Criminal Act (ACCA), a three-strikes sentence enhancement that attaches to the crime of being a prohibited person (*e.g.* felon) in possession of a firearm. 18 U.S.C. § 924(e); *see also* 18 U.S.C. § 922(g). ACCA covers anyone convicted under § 922(g) who has three prior convictions that can be categorized as a "violent felony" or "serious drug offense," and it has a huge impact—it increases the potential sentence from a *maximum* of 10-years' imprisonment, § 924(a), to a *minimum* of 15 years and a maximum of life. § 924(e).

ACCA defines "violent felony" as any offense that has an element of force or, relevant here, "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e). The listed crimes are known as ACCA's "enumerated offenses"; the last phrase ("or otherwise involves...") is a catch-all provision known as the "residual clause."

Decades ago, the Supreme Court held that in determining whether a prior conviction fits within one of these categories, federal courts cannot consider what

the defendant actually did; they can only consider the elements of the statutory offense. *Taylor v. United States*, 495 U.S. 575, 600–02 (1990). And it held that a prior burglary conviction only counts as *ACCA* burglary if the statute of conviction requires proof of these elements: "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. In ACCA parlance, this is known as "generic burglary." *Id.* at 598.

But even post-*Taylor*, until recently, nearly all burglary priors counted as ACCA predicates—for two reasons. First, *Taylor* says that when it is unclear whether a statutory crime has the elements of generic burglary, federal courts may consult documents from the underlying state case, *id.* at 602, and federal courts used this procedure in an expansive way to declare prior offenses to be generic burglary, *see Descamps v. United States*, 570 U.S. 254, 265–67 (2013). Second, federal courts generally held that even non-generic burglary fit within ACCA's "residual clause." *See, e.g., James v. United States*, 550 U.S. 192, 197 (2007), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015) (striking down ACCA's residual clause).

Now the Supreme Court has put a stop to both of these *Taylor* work-arounds. In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Court barred reliance on state-court documents in most cases.[1] And in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court

[1] A federal court is permitted to use state-court documents to declare an offense to be generic burglary only when the statute of conviction is divisible (defines multiple criminal offenses with distinct elements), for the purpose of determining which of the distinct offenses was the offense of conviction. *Id.*

struck down ACCA's residual clause. So post-*Johnson* and *Mathis*, when the statute of conviction is broader than generic burglary, based only on consideration of its essential elements, it simply is not an ACCA predicate. *Mathis*, 136 S. Ct. at 2256–57. Most typically, this occurs with state burglary statutes that cover unlawful entry of both buildings and vehicles. *See id.*

So when a state burglary statute contains location alternatives, at least one of which is a building (generic burglary) and another of which is a vehicle (not generic burglary), federal courts must determine whether the alternatives are elements or means. *Mathis*, 136 S. Ct. at 2256–57. This question of state law can mean the difference between a maximum 10-year sentence and up-to-life imprisonment. § 924(a)&(e). The Seventh Circuit does not want to get this wrong, as it relates to Wisconsin burglary, so it has certified the question to this Court.

STATEMENT OF THE CASE

Dennis Franklin and Shane Sahm were each convicted in federal court of being a felon in possession of a firearm. *United States v. Franklin*, 884 F.3d 331, 332–33 (7th Cir. 2018), *reh'g granted, judg't vacated*, 895 F.3d 954 (7th Cir. 2018).[2] They were each found to be "armed career criminals" under ACCA, based on Wisconsin burglary convictions,[3] and sentenced to the mandatory-minimum 15 years' imprisonment. *Id.* These findings were made before the Supreme Court issued *Mathis*.

Sahm and Franklin both appealed to the Seventh Circuit, and their cases were stayed pending *Mathis* and then pending a circuit case that would apply *Mathis* in a closely related context: *United States v. Edwards*, 836 F.3d 831 (7th Cir. 2016). In *Edwards*, the Seventh Circuit was considering a different recidivist provision that covered only burglary "of a dwelling," relying on the same categorical analysis as ACCA. *Id.* at 832–33. The Seventh Circuit ultimately held that Edwards's prior Wisconsin burglary conviction, which the judgment referenced as "943.10(1m)(a)," was not (categorically) burglary of a dwelling, although state-court documents indicated that he had, in fact, burglarized a dwelling. *Id.* at 837–38.

In *Edwards*, in the course of holding that Wis. Stat. § 943.10(1m)'s first location subsection ((a), "building or dwelling") was not internally divisible, the court also

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[2] These opinions are in the appendix, but citations are to the federal reporter.

[3] Some convictions were under the superseded Wis. Stat. § 943.10(1) or the aggravated burglary section, § 943.10(2), but the legal question about the statute's location alternatives is the same regardless, so this brief refers solely to § 943.10(1m), for simplicity.

noted that "any one" of the subdivided location alternatives "satisfy the location requirement for burglary," strongly suggesting that the subdivided location alternatives were means, not elements. *Id.* at 837. *Edwards* was authored by former Wisconsin Supreme Court Justice, now Seventh Circuit Judge Diane Sykes—a fact that would later play a role in rehearing filings. *Id.* at 832.

Once *Mathis* and *Edwards* were settled, the present appeals were consolidated, then briefed and argued. After argument, one of the judges on the three-judge panel retired; on February 26, 2018 the remaining two judges ruled that Wisconsin burglary, § 943.10(1m), is "divisible": each of its location subsections ((a)–(f)) contain unique elements of distinct offenses. *Franklin*, 884 F.3d at 332 (vacated).

The now-vacated panel opinion reasoned that "[e]ach subsection can be delineated from the others (i.e., buildings, railroad cars, ships, motor homes, cargo portions of trucks)." *Id.* at 335. That is, except for the last subsection—sub. (1m)(f)—covering "a room within any of the above." *Id.* But the panel "put aside subsection (f) for these appeals." *Id.* The panel acknowledged that it was possible even for the other subsections to overlap, as with a houseboat, but said the appellants' concerns about that were "overstate[d]." *Id.* It is not clear what the panel meant by this—that no prosecutor would double-charge a houseboat burglary, even if that were legally permissible; that there would never be a burglary of a houseboat; or something else. *See id.*

The panel also thought it was significant that § 943.10(1m) "enumerates each potential location" (with

the letters (a)–(f)), so prosecutors would "usually charge a specific subsection for each burglary offense," and state appellate opinions addressing burglary convictions often specify the location subsection. *Id.* at 335–36. In the appellants' cases, circuit-court documents specifically referred to sub. (1m)(a). *Id.*

In addition, the panel relied on an Eighth Circuit case holding that § 943.10(1m) is divisible. The Eighth Circuit said that a Wisconsin case, *State v. Baldwin*, 101 Wis. 2d 441, 304 N.W.2d 742 (1981), indicated that itemized subsections are considered divisible as a matter of state law, while *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, suggested otherwise. *Franklin*, 884 F.3d at 336 n.3 (citing *United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017), which in turn cited to this Court's cases). The panel agreed with the Eighth Circuit that it was unclear whether *Baldwin* or *Derango* governed, and thus it did not factor state case law into its analysis. *Id.*

Franklin and Sahm petitioned for rehearing. They explained that *Derango* is the leading elements/means case in Wisconsin, and the panel was wrong (as a matter of both federal and state law) to disregard it. (Pet. for reh'g at 8–9, 11-14.) The petition pointed out that the author of *Derango* was now-Judge Sykes, who was on the *Edwards* panel and expressly said at the *Edwards* oral argument that none of § 943.10(1m)'s location alternatives were "distinct elements." (Pet. for reh'g at 3 (quoting Oral Argument, *United States v. Edwards*, No. 15-2373, at 05:42–44 (7th Cir. Dec. 10,

2015)).)[4] She explained that the "burglary statute in Wisconsin is um, describes the crime of burglary and sets forth alternative means of committing it—including intentionally entering any one of a number of listed places; and the fact that building or dwelling is in one subsection and the railroad car and the boat and the ship or vessel and all of the other enclosures are in other separate subsections doesn't make the separate subsections separate elements, they're just different ways of committing the offense of burglary." (*Id.* at 4-5 (quoting Oral Argument, *supra*, at 05:43–6:23).)

The appellants acknowledged that Judge Sykes's remarks at the *Edwards* argument did not have any legal authority. (Pet. for reh'g at 3.) But they argued that it was "truly remarkable that the author of Wisconsin's leading jury-unanimity opinion, now a judge on this Court, addressed precisely the question presented here and answered it in the appellants' favor." (*Id.*)

The UW Law School's Remington Center filed an amicus brief in support of the petition, arguing that the panel opinion was wrong on state law. (Amicus at 5–10.) The Remington Center expressed concern that the opinion might confuse state courts and practitioners. (*Id.* at 10–13.) It could embolden prosecutors to charge multiple crimes for a single act, lead defense attorneys to give erroneous advice, and undermine guilty pleas—at least, until this Court could get the opportunity to correctly decide the issue. (*Id.*)

The Seventh Circuit granted the petition for rehearing, vacated the panel opinion, and certified the

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[4] *Available at* http://media.ca7.uscourts.gov/sound/2015/gw.15-2373.15-2373_12_10_2015.mp3.

state-law question to this Court in a per curiam opinion. *Franklin*, 895 F.3d at 955. The court in this new opinion acknowledged the implications of the now-vacated panel opinion. If § 943.10(1m)'s location alternatives are elements, rather than means, then in Wisconsin:

- If a homeowner-victim testifies that someone stole her computer, but isn't sure whether it was taken from the garage or an RV in the driveway, jurors could only convict if they could unanimously agree on whether the defendant burglarized the garage or the RV. *Franklin*, 895 F.3d at 959.

- If someone burglarizes a single houseboat, a prosecutor could charge four crimes: burglary of a dwelling, burglary of a vessel, burglary of a room within a dwelling, burglary of a room within a vessel. *Id.*

Thus, the per curiam opinion found that the state-law question was tougher than the panel had previously recognized. *Id.* at 961. And it noted that a wrong decision on the matter could cause "substantial confusion and uncertainty" in both the federal and state courts. *Id.* Thus, the Seventh Circuit certified the state-law question to this Court. Once this Court answers the question, the Seventh Circuit can decide the underlying federal question and resolve these appeals.

ARGUMENT

I. Section 943.10(1m)'s location alternatives are not elements of distinct crimes—they are means of committing burglary.

This Court's leading case on jury unanimity in the elements-versus-means context is *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. "The threshold question . . . is whether the statute creates multiple offenses or a single offense with multiple modes of commission." *Id.* at ¶14. That is precisely the question that the Seventh Circuit has certified to this Court, regarding Wisconsin burglary.

To resolve this question, the Court "examine[s] four factors: 1) the language of the statute, 2) the legislative history and context of the statute, 3) the nature of the proscribed conduct, and 4) the appropriateness of multiple punishment for the conduct." *Id.* at ¶15 (citing *State v. Hammer,* 216 Wis. 2d 214, 220, 576 N.W.2d 285 (Ct. App. 1997), and *Manson v. State,* 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981)). The point is to determine legislative intent: "did the legislature intend to create multiple, separate offenses, or a single offense capable of being committed in several different ways?" *Id.* This analysis is conducted de novo. *State v. Dearborn*, 2008 WI App 131, ¶19, 313 Wis. 2d 767, 758 N.W.2d 463.

Here, all four factors show that § 943.10(1m)'s location alternatives are not elements of distinct offenses about which jurors would have to unanimously agree. They are various means of committing a single offense: burglary.

A. The language of the burglary statute indicates that the location alternatives are means of committing a single offense.

In *Derango*, this Court examined the state's child enticement statute, quoted below.[5] The state's burglary statute, also quoted below, has a similar structure.[6]

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[5] Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:

> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.
>
> (2) Causing the child to engage in prostitution.
>
> (3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.
>
> (4) Taking a picture or making an audio recording of the child engaging in sexually explicit conduct.
>
> (5) Causing bodily or mental harm to the child.
>
> (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Derango, 2000 WI 89, ¶16 (quoting Wis. Stat. § 948.07 (1999-2000)).

[6] Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony . . . is guilty of a Class F felony:

> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
>
> (f) A room within any of the above.

Wis. Stat. § 943.10(1m).

This Court in *Derango* explained that the child enticement "statute, by its straightforward language, creates one offense with multiple modes of commission." 236 Wis. 2d at 733, ¶17. It criminalizes the act of causing or attempting to cause a child to go into a secluded place "with *any* of six possible prohibited intents. The act of enticement is the crime, not the underlying intended sexual or other misconduct." *Id.*

The burglary statute operates the same way. It criminalizes the act of intentionally entering *any of six possible prohibited locations* without consent and with the intent to steal or commit a felony. *See* § 943.10(1m). In other words, the act of burglarious entry is the crime, not the particular location that is entered. *See id.* Long ago, common law burglary covered only "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." Wayne R. LaFave, 3 Subst. Crim. L. § 21.1 (2d ed. 2016). Now, most states have expanded on that definition, such that the offense can occur in additional locations, can occur during the day, and can involve an intent to commit non-felonious crimes. *See id.* But nonconsensual-entry-with-intent remains constant—that is what makes burglary, *burglary*. *See id.* In other words, nonconsensual-entry-with-intent is the "gravamen" of burglary. *See Derango*, 236 Wis. 2d at 734, ¶19 (discussing the "gravamen" of child enticement).

Also similarly to the child enticement statute, the text of § 943.10(1m) does not set out different penalties for the various location alternatives. Whether a burglar enters a building or a ship or a room within a house-boat, she has committed a Class F felony. § 943.10(1m). There is a distinct crime in subsection (2), for burglary

committed under aggravating circumstances, such as when a defendant steals a weapon—a Class E felony. But that doesn't impact the location alternatives. So whether a burglar breaks into a building or a ship, he has committed a Class F felony; and whether the crime involves a building or ship, if the burglar steals a firearm, he has committed a Class E felony. § 943.10(1m) & (2). Thus, the burglary statute's penalty structure indicates that the six location subsections do not distinguish separate offenses. They merely describe the various locations that can be burglarized.

B. This reading is supported by the statute's legislative history.

In *Derango*, this Court explained that an older version of the child-enticement statute "did not set forth a specific list of requisite intents, but referred to the general intent to 'commit a crime against sexual morality.'" 236 Wis. 2d at 734–35, ¶20. The legislature replaced this general language with an enumerated list of prohibited intents, and the drafting file indicates that this change was intended to "replace and clarify" the general language; there was "no indication in the legislative history that the legislature intended to take what was once a single crime and replace it with six." *Id.* This supported the Court's reading of the statute as defining a single crime with alternative means. *Id.*

The history of § 943.10 is much the same. The modern burglary statute "was created as part of the comprehensive revision of the Wisconsin Criminal Code." *Champlin v. State*, 84 Wis. 2d 621, 624, 267 N.W.2d 295 (1978). The original draft of the statute, passed in a provisional bill, defined burglary with

general location language: "Whoever enters any structure without the consent of the owner and with intent to steal or commit a felony therein may be imprisoned not more than 10 years." *Id.* at 625 (quoting S.B. 784 (1951)); *see also* 1953 Wis. Laws 623, § 343.10, p. 670. The provisional statute defined "structure" as "any inclosed building or tent, any inclosed vehicle (whether self-propelled or not) or any room within any of them." 1953 Wis. Laws 623, § 339.22, p. 661. And it defined "vehicle" to include any device for moving on land, rails, water, or in the air. *Id.*

Then the legislature's advisory committee made several changes related to burglary locations. First, it decided to exclude automobiles.[7] Then there was a redraft that replaced the word "structure" with "building, dwelling, or any room within a building or dwelling"; but committee members complained that the redraft was "too restrictive" and "if the redraft were adopted, the present law would be changed."[8] So later that same day, the committee incorporated the various locations that had been in the definition of structure into the burglary statute itself: "building, dwelling, enclosed railroad car or the enclosed portion of any ship or vessel, or any room therein."[9]

The next day, a committee member proposed adding "or any locked enclosed cargo portion of truck

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[7] Wisconsin Legislative Council, Meeting of the Criminal Code Advisory Committee (June 3, 1954); App. 128–98.

[8] Wisconsin Legislative Council, Meeting of the Criminal Code Advisory Committee at 7 (July 23, 1954); App. 131.

[9] Wisconsin Legislative Council, Meeting of the Criminal Code Advisory Committee at 9 (July 23, 1954); App. 132.

or trailer."[10] Then committee members "suggested that it might be better now if the section were set up in a-b-c fashion," and the committee decided to send the statute back to the technical staff for that purpose.[11]

Later that day, there was a proposal to significantly alter the burglary statute with four sections that would presumably carry different penalties, and would cover automobiles: (1) burglary of a "building, dwelling, enclosed railroad car or the enclosed portion or any ship or vessel, or any room therein, or any locked enclosed cargo portion of truck, trailer, or semi-trailer"; (2) burglary of a locked vehicle other than a passenger car or the locked cab of a truck; (3) burglary of an unlocked vehicle or of a locked passenger car or locked cab of a truck; (4) armed burglary.[12] Even in this version of the statute, which seemed to propose distinct offenses, burglary of a "building, dwelling, enclosed railroad car or the enclosed portion or any ship or vessel, or any room therein, or any locked enclosed cargo portion of truck, trailer, or semi-trailer" was proposed as a single offense. *See id.*

It is not clear (at least, not from undersigned counsel's research) when the committee rejected that version of the statute. But ultimately, they reverted back to something more like the previous version, except "in a-b-c fashion."[13]

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[10] Wisconsin Legislative Council, Meeting of the Criminal Code Advisory Committee at 11 (July 24, 1954); App. 134.

[11] App. 134.

[12] App. 134.

[13] Wisconsin Legislative Council, Meeting of the Criminal Code Advisory Committee at 1–2 (Sept. 16, 1954); App. 135–36.

As finally enacted in 1955, the relevant portion of the statute read:

> (1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony therein may be imprisoned not more than 10 years:
>
> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A room within any of the above.

1955 Wis. Laws 696, § 1, p. 990. This structure has carried through to the current version, with the legislature making only minor changes. *See* § 943.10(1m) (2017–18).

Thus, just like the child-enticement statute, the burglary statute started out with general language. And when the legislature replaced the general term "structure" with a list of specific locations, it wasn't a material change. The revision was intended to "replace and clarify" the general language, not to "take what was once a single crime and replace it with six." *See Derango*, 236 Wis. 2d at 735, ¶20. Indeed, given the definition of "structure" in the original, provisional bill, the revisions didn't change much at all, other than excluding automobiles and airplanes. They just made the statute easier to read by including the definition of structure in the statute, in "a-b-c fashion."

C. The nature of the proscribed conduct and the inappropriateness of multiple punishments confirms that the alternatives are means.

Again, the gravamen of burglary is nonconsensual entry with criminal intent. The location subsections merely list the places that can satisfy a single element of burglary—the *place* (or location or premises) element. As the state's pattern jury instruction explains, "the offense of burglary is complete upon the slightest entry by the defendant into *any one of the places described in § 943.10(1)(a)–(f)* without the consent of the person in lawful possession, when such entry is made with the required intent." Wis. JI–Criminal 1421 n.3 (emphasis added).

This Court in *Derango* said that "acts warrant separate punishment when they are separate in time or are significantly different in nature." 236 Wis. 2d at 735, ¶21. With child enticement, the Court said that there was only one act—enticing a child—that "could be committed with one or more of six possible mental states." *Id.* So it "would not be appropriate" for defendants to receive "multiple punishments" for a single act of enticement. *Id.*

Just so here: burglary is one act—nonconsensual entry with burglarious intent—that can be committed in any one of six possible locations. And just as a child-enticer might "possess more than one prohibited intention," a burglar could enter a place that fits within multiple location subsections. Indeed, a defendant will almost always enter both a location and a room within that location. *See* § 943.10(1m)(f) ("room within any of

the above"). The now-vacated Seventh Circuit panel opinion "put aside subsection (f)" when analyzing the statute. *Franklin*, 884 F.3d at 335. But this Court can't ignore sub. (1m)(f), both because state practitioners and trial courts can't ignore multiplicity problems when they arise and because principles of statutory construction do not permit this court to ignore part of a statutory whole. *State ex rel. Kalal v. Circ. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.").

Moreover, there is overlap beyond sub. (1m)(f). Subsection (1m)(a) covers any "building or dwelling," and every other listed location can be used as a dwelling. Even "building" overlaps to some extent: this Court has found in another context that a mobile home is a "building." *State v. Kuntz*, 160 Wis. 2d 722, 740, 467 N.W.2d 531 (1991) ("We conclude that no rational jury could plausibly find that the structure in question was a mobile home without also finding that the structure was a building."). The notion of treating these as legal elements—so that jurors would have to agree on whether, for example, a defendant burglarized a trailer home or a building or a dwelling or a room within one of those—is nonsensical. Thus, as with the child-enticement statute, "[m]ultiple punishments for a single act" of burglary "would not be appropriate under this statute." *See Derango*, 236 Wid. 2d at 736, ¶21.

Further, beyond this definitional overlap (a single location can be both a dwelling *and* a boat), it is easy to

describe circumstances in which it would be unclear just what was burglarized. The Seventh Circuit gave the example of a computer stolen either from a house or from the RV parked outside of it. *Franklin*, 895 F.3d at 959. Also, in one of the Iowa cases cited in *Mathis*, jurors were permitted to disagree on whether the defendant burglarized a Yacht Club or an individual boat docked with the club, on the Mississippi River. 136 S. Ct. at 2249 (citing *State v. Duncan*, 312 N.W.2d 519, 520, 523 (Iowa 1981)). The Mississippi River, of course, also borders Wisconsin, so that precise situation could arise here. Certainly, legislators would not have intended for this sort of insubstantial factual dispute to result in acquittal.

Finally, in *Derango*, once this Court determined that the legislature intended to create a single offense, it asked whether this was constitutionally permissible—whether it would offend "fundamental fairness and rationality." 236 Wis. 2d at 737–38, ¶¶23–24. Here, holding that § 943.10(1m)'s location alternatives are means of committing a single offense is not fundamentally unfair or irrational. Indeed, holding otherwise would offend notions of fairness and rationality and almost certainly lead to double-jeopardy claims on appeal. A prosecutor cannot be permitted to charge a person who unlawfully enters a single houseboat on a single occasion with four felonious burglary offenses. *See Franklin*, 895 F.3d at 959.

II. The federal courts' difficulty here is likely due to lack of familiarity with state case law, statutory style, and court documents.

The above application of state law is not unsettled or unclear. Some federal jurists in the Seventh and Eighth Circuits have gotten the issue wrong, but this is probably just related to their lack of familiarity with Wisconsin case law, our legislature's drafting style, and the format of our standardized circuit-court documents.

Starting with case law, federal judges are not generally familiar with Wisconsin cases. In the Seventh Circuit's now-vacated panel opinion, the only mention of *Derango* was in a footnote, in the context of agreeing with the Eighth Circuit that the panel could not discern whether *Derango* or another case, *Baldwin*, 101 Wis. 2d 441, governed this situation, leading it to disregard state case law. *Franklin*, 884 F.3d at 337 n.3. In contrast, this Court well knows that *Derango* describes the contemporary standard for determining whether something is an element or a means. *See, e.g., State v. Hendricks*, 2018 WI 15, ¶¶24–26, 379 Wis. 2d 549, 906 N.W.2d 666 (relying on *Derango*); *State v. Johnson*, 2001 WI 52, ¶¶11–13, 243 Wis. 2d 365, 627 N.W.2d 455 (same); *Dearborn*, 313 Wis. 2d at 778–91, ¶¶17–41 (same).

Further, this Court knows that *Baldwin* does not describe the contemporary standard. In *Baldwin*, the Court considered whether jurors in a second-degree sexual assault case had to agree whether the defendant "used" or "threatened" force. 101 Wis. 2d at 447–48. In the course of deciding this, the Court said that Wis. Stat. § 940.225(2)(a)'s "use" or "threat" alternatives were not distinct, and contrasted this with the alternatives among

the second-degree-sexual-assault subsections. *Baldwin*, 101 Wis. 2d at 449; *see also id.* at 449 n.5 (noting the subsections—in addition to use or threat of force: causation of injury, underage victim, etc.). The Eighth Circuit relied on this observation in *Baldwin* to find that Wisconsin treats itemized, subdivided alternatives as elements rather than means, *Lamb*, 847 F.3d at 932 & n.2.

There are at least three problems here. First, *Baldwin* does not say that second-degree sexual assault's subdivided alternatives are elements of distinct offenses, so one can't read much of anything into its comment about them. Second, *Baldwin* does not suggest that this elements/means question would turn on whether the alternatives are itemized. Indeed, state law is clear that the question does *not* turn on itemization. *Derango*, 236 Wis. 2d at 738, ¶25 (child enticement's itemized intent alternatives are means); *Manson*, 101 Wis. 2d at 427–28 (robbery's itemized "use" or "threat" alternatives are means). Third, *Baldwin*'s analysis was conducted under the old "conceptually distinct" constitutional standard for jury unanimity, which the Supreme Court has replaced with the "fundamental fairness" standard. *Derango*, 236 Wis. 2d at 736, ¶22 (noting that *Baldwin* was decided under abrogated law). So *Baldwin*'s discussion of second-degree sexual assault is not remotely helpful here.

It is not surprising that federal judges might think that itemization of statutory alternatives is meaningful: Wisconsin statutes are very frequently subdivided and itemized, but federal statutes are not. *See Edwards* Oral argument, *supra*, at 6:27–6:44 (Sykes, J.: "Take out the alphabetical subsections, just put it all in one big paragraph, the way federal statutes are arranged,

irritatingly, um and . . . we've got one burglary offense and a whole bunch of different ways of committing burglary.").

As an example, here are the federal robbery ("Hobbs Act" robbery) and state robbery statutes:

18 U.S.C. § 1951	**Wis. Stat. § 943.32(1)**
Robbery is "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining."	Robbery is the taking of property from the person or presence of the owner "by either of the following means": "(a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property; or (b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property."

Both statutes cover use of force and threat of force: the federal statute does this in an undivided paragraph, Wisconsin in a subdivided paragraph. Yet even in Wisconsin, these are means, not elements; jurors need not agree whether a robber violated § 943.32(1)(a) or (1)(b). *Manson*, 101 Wis. 2d at 424–28.

Here are the federal and state enticement statutes:

18 U.S.C. § 2422	**Wis. Stat. § 948.07**
Child enticement is defined as knowingly enticing (or persuading or inducing or coercing) a minor "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense."	Child enticement is defined as causing or attempting to cause a minor to go into certain places "with intent to commit any of the following acts": "(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095. (2) Causing the child to engage in prostitution. . . . . (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961."

In both jurisdictions, the intent element can be met with an intent to cause the minor to engage in prostitution or sexual contact (among other things). But as with robbery, the federal statute is undivided while the state statute is divided. And again, this difference is stylistic only—jurors need not unanimously agree on the prohibited intent. *Derango*, 236 Wis. 2d at 738, ¶25.

Similarly, the fact that our legislature subdivided and itemized the burglary statute's location alternatives is stylistic only. As discussed, the legislature did not intend for § 943.10(1m) to create six crimes. It simply drafted § 943.10(1m) in a-b-c fashion so that it would be easy to read and comprehend.

Finally, federal judges are also unfamiliar with Wisconsin's standardized circuit-court documents. The Seventh Circuit's now-vacated panel opinion thought it meaningful that the charging documents and judgments filed in Franklin's and Sahm's burglary cases referred to § 943.10(1m)(a)—to the alphabetical subsection. *Franklin*, 884 F.3d at 336. The panel thought that the prosecutor's decision to charge the appellants all the way out to the alphabetical subsection, and the judgments' reference to that subsection, indicated that the alphabetical subsection must be an element about which jurors would need to unanimously agree. *Id.*[14]

This is another area where federal and state criminal law is markedly different. Federal judges are used to a system in which the Fifth Amendment's grand-jury guarantee "requires that the allegations in the indictment and the proof at trial match." *United States v. Adkins*, 743 F.3d 176, 185 (7th Cir. 2014) (internal quotations omitted). In Wisconsin, in contrast, the precise language of charging documents is not critical. Charging documents can include matters that need not be proved at trial, and they can be amended at any time—even during trial. *Derango*, 236 Wis. 2d at 751–52, ¶¶48–51.

Further, in Wisconsin, charging documents and judgments usually (likely, *uniformly*) describe the charge out to the last statutory subsection, regardless of whether jurors would have to be unanimous about that subsection. To demonstrate this fact, appended to this

[14] In its Seventh Circuit brief, the government filed two exemplar state judgments and one exemplar state information, in order to argue this point. The government's exemplars are now appended to this brief. App. 137–41.

brief are certified copies of informations and judgments from six cases that this Court recently decided that involved child enticement or robbery. App. 142–61 (certified documents from *State v. Sanders*, Waukesha County Case No. 13-CF-1206; *State v. Asboth*, Dodge County Case No. 12-CF-384; *State v. Hendricks*, Milwaukee County Case No. 11-CF-4101; *State v. Frey*, Florence County Case No. 09-CF-14.[15]

As discussed, the law is crystal clear that with child enticement, jurors need not be unanimous on the prohibited intent (the numerical subsections of § 948.07) because the intent alternatives are means, not elements. *Derango*, 236 Wis. 2d at 738, ¶25. And in a robbery case, jurors need not be unanimous on whether the defendant used or threatened force (the alphabetical subsections of § 943.32(1)), because those aren't elements either. *Manson*, 101 Wis. 2d at 424–28. Yet the appendix materials show that in child-enticement and robbery cases, circuit-court documents reference the statutory subsections (by number or letter and/or description) that this Court has expressly said are not elements of the offenses. *See* App. 142–61.

Thus, the fact that Franklin's and Sahm's circuit-court documents described their charges out to the last statutory subsection says absolutely nothing about the elements/means question presented here. It appears to be an accident of software design: prosecutors in this state produce charging documents with a standardized software program which presumably uses some sort of drop-down menu, and that program communicates

[15] *See* Wis. Stat. § 909.02(4) (certified copies of public records are self-authenticating).

with the circuit courts' own software program.[16] So over-inclusive charging documents lead to over-inclusive judgments.

What's more, these circuit-court documents lead to over-inclusive appellate opinions. When this Court describes convictions for child enticement and robbery, it routinely describes the offenses with reference to statutory subsections that, again, the Court has expressly said are non-elemental. *State v. Sanders*, 2018 WI 51, ¶10, 381 Wis. 2d 522, 912 N.W.2d 16 (Mr. Sanders was charged with "child enticement contrary to Wis. Stat. § 948.07(1)"); *State v. Hendricks*, 2018 WI 15, ¶9, 379 Wis. 2d 549, 906 N.W.2d 666 (referring to "the charge of and plea to child enticement, which is a felony, under 948.07(1)"); *State v. Asboth*, 2017 WI 76, ¶7 & n.2, 376 Wis. 2d 644, 898 N.W.2d 541 (noting that Mr. Asboth was charged with armed robbery under "Wis. Stat. § 943.32(1)(b) and (2)"); *State v. Lepsch*, 2017 WI 27, ¶6, 374 Wis. 2d 98, 892 N.W.2d 682 (referring to the charge of "armed robbery with use of force, contrary to Wis. Stat. § 943.32(1)(a) and (2)"); *State v. Frey*, 2012 WI 99, ¶16, 343 Wis. 2d 358, 817 N.W.2d 436 (describing two counts of "Child Enticement, Wis. Stat. § 948.07(6)").[17]

It makes sense that this Court refers to, say, 948.07(1) (child enticement with sexual-contact intent) rather than, simply, 948.07 or child enticement, because that's what the circuit-court documents say. But this can't be construed as evidence that the intent

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[16] *See* PROTECT Case Management System, http://dait.state.wi.us/section.asp?linkid=11&locid=13; Consolidated Court Automation Programs, https://www.wicourts.gov/courts/resources/docs/ccap.pdf.

[17] Also see the circuit-court documents in the appendix.

alternatives are elements, since we know that they are not elements. *Derango*, 236 Wis. 2d at 738, ¶25. Thus, just as Franklin's and Sahm's circuit-court documents are irrelevant to the elements/means question presented here, so too are state appellate cases that often describe Wisconsin burglary's location subsection. *See Franklin*, 884 F.3d at 335 (vacated) (citing state cases that have described the offense in this way).

This all just shows why federal courts have found the elements/means question here confusing: (1) there is no state case right on point (yet), (2) the burglary statute's location alternatives are subdivided, (3) the appellants' state circuit-court documents referred to the location subsection, and (4) state appellate opinions often refer to the location subsection. But *Derango* clearly applies here and the last three points noted above are irrelevant. Under *Derango*, the burglary statute's location alternatives are not elements of distinct offenses about which jurors would have to unanimously agree. They are means of committing a single offense: burglary.

CONCLUSION

The text, history, and function of Wis. Stat. § 943.10 all support the conclusion that the statute's location alternatives are means, not elements, and nothing militates against that conclusion. Thus the appellants, Dennis Franklin and Shane Sahm, respectfully ask this Court to answer the Seventh Circuit's certified question by holding that the location subsections of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a)–(f), "identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict."

Dated this 28th day of September, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,478 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 28th day of September, 2018.

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CERTIFICATION ON APPENDIX
(modified for this certified-question case)[18]

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix *that substantially complies with § 809.19(2)(a), as appropriate in this certified-question case from the Seventh Circuit Federal Court of Appeals.*

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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[18] If the Court would like additional materials in the appendix, undersigned counsel would be happy to supplement and refile the appendix as ordered by the Court.

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[19] In *Sanders*, the certification appears on a separate cover page that is included with this appendix. This is in contrast to the other cases, in which the certification seal is simply affixed to the record documents.