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

REPLY BRIEF

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INTRODUCTION

The government's position in this case is really about federal law, not state law. The government emphasizes that the appellants' old state judgments referred to the burglary statute's location subsection. So we know (says the government) that the appellants burglarized buildings or dwellings. And so (argues the government) federal judges should be able to sentence them under the mandatory-minimum statute at issue (ACCA). Gov. br. at 8, 21–22.

As discussed in the "background" section of the appellants' opening brief, for many years, this is how ACCA was applied. But under *Mathis v. United States*, 136 S. Ct. 2243 (2016), federal judges can't just rely on state-court records anymore. In *Mathis*, everyone knew that Mr. Mathis burglarized a building—it was a matter of record. *See id.* at 2250. But the Supreme Court held that when federal judges consider ACCA's application to a burglary statute like § 943.10, the question is whether as a matter of state law, jurors would have to unanimously agree on which of the locations a putative burglar unlawfully entered. *Id.* at 2253–54.[1]

That is precisely the question the Seventh Circuit has certified to this Court.

In its response brief, the government says that the appellants overemphasize *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. But the appellants'

[1] *Mathis*' holding seems odd, but it hews to a line of Sixth Amendment cases holding that a judge cannot make any finding of fact that increases a minimum or maximum sentence, other than the "simple fact of a prior conviction." *Id.* at 2252.

reliance on *Derango* isn't about some facial similarity between the state's burglary and child-enticement statutes. *Derango* set the contemporary (post-*Schad*[2]) standard for deciding jury-unanimity cases.

The government does not claim that this Court can ignore *Derango*'s directive to decide jury-unanimity disputes based on "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." 236 Wis. 2d at 732, ¶15. Indeed, *Derango* lifted that list of factors from *State v. Hammer*, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997), which the government faults the appellants for not citing enough. Gov. br. at 12. Yet the government's brief does not track the *Derango*/*Hammer* four-factor analysis. It focuses on factors that are irrelevant, or at least unhelpful, here.

As it turns out, when one applies the *Derango*/*Hammer* analysis to § 943.10(1m), there are more-than-facial similarities between the state's burglary and child-enticement statutes. As with *Derango*'s analysis of child enticement, when one considers the language, history, and function of § 943.10(1m), it is clear that the statute's location subsections are not elements of six distinct crimes, about which jurors would have to unanimously agree. They are alternative means of committing burglary.

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[2] *Schad v. Arizona*, 501 U.S. 624 (1991) (legislatures are free to define crimes with alternative *means*; the Constitution does not require jurors to reach unanimity any time statutory alternatives are conceptually distinct).

ARGUMENT

I. The *Derango/Hammer* factors, applied to § 943.10(1m), all show that the legislature intended the statute's location alternatives to be means, not elements.

A. Statutory language

Statutory interpretation always starts (and often ends) with the statute's language, yet the government's brief virtually ignores § 943.10(1m)'s language. Indeed, at one point, the government expressly invites this Court to ignore a portion of the statute that the government finds inconvenient: sub. (1m)(f) ("room within any of the above"). Gov. br. at 15 n.7. The government does not explain how this Court can ignore sub. (1m)(f) as a matter of statutory interpretation. Nor does it explain how this would work as a practical matter: In "room" cases, would jurors have to unanimously agree on *two* subsections?

The government implicitly discusses the statute's language in arguing that § 943.10(1m)'s location subsections are distinct. Or at least, they are more distinct than the terms within each subsection, and more distinct than the terms in Iowa's burglary statute. Gov. br. at 18–20. But the question here is not which statute (or portion of a statute) is the distinct-est. The question is whether there is the possibility of overlap. If so, then the legislature probably didn't intend to create multiple offenses.

The government claims that "it is difficult to imagine a situation" where jurors couldn't reach unanimity on whether a defendant burglarized a

building or a railroad car. Gov. br. at 20. But the Seventh Circuit had no trouble imagining a situation where jurors couldn't agree on whether a defendant burglarized a building or dwelling, or a motor home. *United States v. Franklin*, 895 F.3d 954, 959 (7th Cir. 2018). And the Iowa Supreme Court would have no trouble imagining overlap, either, between a building and a ship. As discussed in the appellants' opening brief, that court has been confronted with just that problem, in a case involving a burglary of a Yacht Club and/or boat on the Mississippi River. *State v. Duncan*, 312 N.W.2d 519, 520, 523 (Iowa 1981).

These are examples of fact-based unanimity problems: Did the burglar take the computer from the house or the RV parked in front of it? But there are also definitional problems here—an RV (motor home) is also a dwelling. *See* § 943.10(1m)(a) ("building or dwelling") & sub. (1m)(e) ("motor home"). The government addresses this (and the related problem that a boat, railroad car, etc., can also be used as a dwelling) by proposing that this Court limit the term "dwelling" to permanent structures. Gov. br. at 21. But this proposal has no foundation in state law—legislative history shows that legislators intended "dwelling" to cover non-permanent dwellings.[3] Also, the proposal would not resolve the fact-based unanimity problems or the other instances of overlap (*e.g.* building and room).

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[3] The original draft of the burglary statute did not list locations; it referred only to "structure," with "structure" defined as "any inclosed building or tent, any inclosed vehicle . . . or any room within any of them." 1953 Wis. Laws 623, § 339.22, p. 661. So the fact that the current statute covers any "building or dwelling," not just "building," which already includes *permanent* dwellings, suggests an intent to maintain coverage of tents.

B. Legislative history

The government does not acknowledge the legislative-history documents discussed in the appellants' opening brief and appended to that brief. Thus, it effectively concedes that the documents support the appellants' interpretation of § 943.10(1m).

The government does make one argument about legislative history. It explains that the original draft of the modern burglary statute had only a general location term, "structure," which was defined to include the locations that were later itemized; then the legislature itemized the locations within the burglary statute. Gov. br. at 17–18. The government suggests this change was intended to turn a single crime into many. *Id.* at 18.

But we don't have to speculate about this change—the documents appended to the appellants' opening brief show that the drafters were *not* trying to change the burglary statute by turning one crime into many. The only reference to changing the nature of the statute was a *complaint* that a different proposal would change existing law, after which the drafters *rejected* that proposal.[4] Also, the decision to itemize the locations was made in connection with one drafter's suggestion that they add yet another location, leading someone to suggest that it would be "better now if the section were set up in a-b-c fashion."[5] Thus, it appears that itemization was intended simply to made an increasingly unwieldy statute more readable.

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

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

C. Function

The government does not discuss *Derango*'s "function" factors at all: the nature of the proscribed conduct and the appropriateness of multiple punishments. It does not attempt to describe the gravamen of burglary or otherwise address the nature of § 943.10(1m). This is not surprising, since the government cannot credibly claim that the distinctions between location alternatives are somehow essential to making burglary, *burglary*.

Location generally is, of course, an element; the burglary statute only covers locations that are worth heightened protection (building, as opposed to car). But the distinctions between the locations worth heightened protection (*e.g.,* building versus motor home) are not essential to the nature of distinct crimes.

Regardless of whether a person burgles a house or an RV in the driveway, and regardless of whether jurors could agree on that, we can all agree that so long as he entered one of those locations without consent in order to steal something, he committed *burglary*.

Also, the government does not make any claim that it would be appropriate to impose multiple punishments under § 943.10(1m) for a single act. The Seventh Circuit recognized that if the statute's location subsections are elements of distinct offenses, then when someone burglarizes a houseboat, they could be charged with four crimes. *Franklin*, 895 F.3d at 959. The appellants have argued that the legislature could not have intended this, op. br. at 18, 20, and the government does not argue otherwise.

II. The government focuses on factors that do not reveal legislative intent and ultimately do not support its position.

Rather than considering the *Derango*/*Hammer* factors as they relate to § 943.10(1m), the government focuses on state case law referencing § 943.10(1m) in other contexts, pattern jury instructions, and state-court documents. None of these speak to legislative intent, so they are only minimally relevant (or irrelevant) to the certified question about jury unanimity presented here, which is all about "determin[ing] legislative intent: did the legislature intend to create multiple, separate offenses, or a single offense capable of being committed in several different ways?" *Derango*, 236 Wis. 2d at 733, ¶15. In any event, the government's sources do not actually support its position.

A. Case law

The government claims this Court has suggested this § 943.10(1m)'s location alternatives are elements of distinct offenses, relying on opinions in which the Court has listed the elements of § 943.10(1) or § 943.10(1m) and, in doing so, named the location subsection and the specific location. Gov. br. at 10–11 (citing *Anderson v. State*, 66 Wis.2d 233, 251, 223 N.W.2d 879 (1974); *Johnson v. State*, 55 Wis. 2d 144, 148–49, 197 N.W.2d 760 (1972); *State v. Hall*, 53 Wis. 2d 719, 720, 193 N.W.2d 653 (1972); *State v. Steele*, 2001 WI App 34, ¶3, 241 Wis. 2d 269, 625 N.W.2d 595, *as quoted in State v. Hendricks*, 2018 WI 15, ¶25, 379 Wis. 2d 549, 906 N.W.2d 666).

The appellants have already demonstrated that Wisconsin appellate cases routinely describe offenses

with more specificity than unanimity law requires. Op. br. at 27. And regardless, none of the government's cases suggest that the specific burglary location is an element of distinct location-based burglary offenses about which jurors would have to agree. None of the cases involve a dispute about the location, much less in the jury-unanimity context. Indeed, none of the cases discuss burglary's location element at all—in each case, the defendant challenged the sufficiency of the evidence generally, or related to another element. *Anderson*, 66 Wis. 2d at 251; *Hall*, 53 Wis. 2d at 721; *Johnson*, 55 Wis. 2d at 149; *Steele*, 241 Wis. 2d at 278, ¶12.

The government acknowledges that an additional state case, *Hammer*, suggests that burglary is a singular offense (regardless of location), which would support the appellants' argument. Gov. br. at 11 (citing *Hammer*, 216 Wis. 2d at 220). The government distinguishes *Hammer* because *Hammer* makes its comment about burglary being a singular offense in an unrelated context. Gov. br. at 11–12. But that's true of *all* the cases—all of the cases cited in the government's brief make comments about burglary in other contexts.

The appellants are not arguing that *Hammer* is precedential authority for their position, and it doesn't make sense for the government to argue that other cases that use different language about burglary are authority for its position either. The legal question here must be answered with reference to § 943.10(1m)'s language, legislative history, and function, not out-of-context lines from unrelated case law.

B. Pattern jury instructions

The government also relies on the pattern jury instructions, explaining that the instructions refer only to entry into a "building," then instruct courts to modify that term if the offense involved any of the other places listed in § 943.10(1m). Gov. br. at 14–15. The government does not actually make an argument from this explanation; but presumably, it means to suggest that if a court must substitute the appropriate premises, then the specific identity of the premises must be an element about which jurors would have to agree at trial.

This is a non sequitur. The jury instruction's note that courts should modify "building" as needed says absolutely nothing about jury unanimity. It just states the obvious: if a case is about a houseboat, the trial court shouldn't call it a "building." Perhaps the court would call it a "dwelling," or a "ship," or both. Or, given that courts can tailor the instructions, it might call it a "houseboat docked at Alma Marina." *See State v. Camacho*, 176 Wis. 2d 860, 883, 501 N.W.2d 380 (1993) (courts have "great leeway" in crafting instructions).

But regardless, the jury-instruction note is irrelevant to the jury-unanimity question presented here. Indeed, the pattern jury instruction also says that trial courts should specify which felony a burglary defendant is alleged to have intended, Wis. J.I.—Crim. § 1424 & n.7, although Wisconsin law is crystal clear that this is something about which jurors need not be unanimous, *Hammer*, 576 N.W.2d at 287. Similarly, the pattern jury instruction for child enticement directs courts to specify which prohibited intent was involved. Wis. J.I.—Crim. § 2134 & n.5. But we know that is not

something about which jurors have to be unanimous. *Derango*, 236 Wis. 2d at 738, ¶25.

What's more, to the extent that it matters whether the jury instructions committee thinks § 943.10(1m) creates multiple location-based offenses, the committee apparently thinks otherwise. The committee generally creates separate instructions whenever a statute sets out multiple, distinct offenses. *See, e.g.,* Wis. J.I.—Crim. § 1421 (burglary with intent to steal); Wis. J.I.—Crim. § 1424 (burglary with intent to commit a felony)[6]; Wis. J.I.—Crim. § 1425A (burglary while armed). So the fact that the committee did not create separate instructions for each burglary location indicates that it considers the location alternatives to be means, not elements.

But this is only tangentially relevant. The legal question here must be answered with reference to legislative intent, not evidence of what the jury instructions committee thinks about jury unanimity.

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[6] A pre-*Schad* case held that burglary with intent to steal and burglary with intent to commit a felony are distinct crimes. *Champlain v. State*, 53 Wis. 2d 751, 193 N.W.2d 868 (1972). The government suggests a couple of times that *Champlain* supports its position. Gov. br. at 12, 15. But it doesn't advance this argument, likely because *Champlain* is no longer good law. *See* Franklin/Sahm reply br. at 16–19 (7th Cir. Jan. 12, 2017). This Court has never expressly said that *Champlain* is overruled in relevant part, though, so the instructions treat these as distinct offenses.

C. Subdivision

The government's most emphatic arguments revolve around § 943.10(1m)'s "structure"—*i.e.* the fact that it is subdivided. *See* gov. br. at 16–17, 18–22. The appellants addressed this issue in their opening brief. Op. br. at 22–28.

The government uses Iowa as a foil, claiming that Iowa burglary (in which the location alternatives are means, not elements) is different. Iowa lists the alternatives in a definitional statute, while Wisconsin itemizes them in the burglary statute. Gov. br. at 16. The government claims that this *stylistic* difference makes a *legal* difference because in Iowa, charging documents can't reference a subsection that's tied to the location. *Id.* at 16–17, 19–20. In Wisconsin, charging documents (and thus judgments) can, and usually do, reference a subsection that's tied to the location. *Id.*

But while the fact that one can glean the location from the face of court documents might make the government's argument seem "plausible," ultimately, it is irrelevant to the legal question. *See Manson v. State*, 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981) (saying that the robbery statute's subdivisions lent "plausibility" to the argument that the legislature intended to create two crimes, but then holding that it is one crime with alternative means)). A prosecutor cannot *make* something an element by including it in a charging document, just as a clerk can't make something an element by including it in a judgment. *See* App. 142–61 (documents referencing non-elemental subsections in child-enticement and robbery cases).

The government argues that it must be meaningful that the location subsection ends up on the judgment, because that is what permits federal courts to impose mandatory-minimum ACCA sentences in cases like the ones at bar. Gov. br. at 21–22. This just highlights that the government's position here is driven by federal law, by *Mathis*—not by state law.

But this case, in this Court, is not about a federal mandatory-minimum statute. It is about state law. And as a matter of state law, the answer to the Seventh Circuit's certified question is clear: § 943.10(1m)'s location subsections identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict.

CONCLUSION

For the reasons stated above and in their brief-in-chief, Dennis Franklin and Shane Sahm respectfully ask this Court to answer the certified question by holding that the location subsections of Wisconsin's burglary statute "identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict."

Dated this 30th day of October, 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 2,997 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 30th day of October, 2018.

Signed:

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