RECEIVED
12-04-2018
CLERK OF SUPREME COURT
OF WISCONSIN

No. 18AP1346

In the Supreme Court of Wisconsin

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

DENNIS FRANKLIN AND SHANE SAHM,
DEFENDANTS-APPELLANTS

On Certification Of A State-Law Question
From The United States Court Of Appeals
For The Seventh Circuit

NONPARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF DEFENDANTS-APPELLANTS

BRAD D. SCHIMEL
Attorney General

RYAN J. WALSH
Chief Deputy Solicitor General

AMY C. MILLER
Assistant Solicitor General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
millerac@doj.state.wi.us
(608) 267-8938

Attorneys for the State of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

Under the federal Armed Career Criminal Act (ACCA), a defendant convicted of a federal firearm crime receives a sentencing enhancement if they have at least three previous convictions for certain crimes, including, as relevant here, burglary. A state-law conviction for burglary counts as a prior conviction under the ACCA only if the elements of the state burglary statute are not broader than the "generic" definition of burglary: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990).

The elements of Wisconsin's burglary statute, Wis. Stat. § 943.10(1m), are broader than generic burglary. A straightforward reading of the burglary statute shows that the Legislature created the crime of burglary with a locational element that could be satisfied through several different means, not separate crimes of burglary depending on which location was burglarized. Reading the burglary statute incorrectly to create multiple crimes of burglary for each location entered would open the door for statutory and constitutional challenges to thousands of burglary convictions in Wisconsin. Interpreting the statute in accord with settled precedent, by contrast, would affirm longstanding Wisconsin practice and avoid any collateral opening of the floodgates.

STATEMENT OF INTEREST

The Attorney General and the Wisconsin Department of Justice are charged with "appear[ing] for the state . . . [in] all actions and proceedings, civil or criminal, in . . . the supreme court, in which the state is interested." Wis. Stat. § 165.25(1). Given the potential ramifications of an authoritative interpretation of the State's burglary statute, the State has an interest in this case.

ARGUMENT

I. The Subsections Of Section 943.10(1m) Set Forth Different Means Of Committing Burglary, Not Distinct Elements Of Multiple Crimes

A. Statutory Interpretation Confirms That The Legislature Did Not Create Separate Crimes Of Burglary For Each Locational Subsection

Whether a criminal statute delineates elements of a crime or different means of committing a crime turns on a four-part test. Because "crimes are exclusively statutory" in Wisconsin, *State v. Baldwin*, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981), the design of the test is to discern the statute's meaning and the Legislature's intent, *see Manson v. State*, 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981). The test considers "(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.* Each factor favors reading the burglary statute to create means, not elements.

First, the language of Section 943.10(1m) clearly indicates that the locational subsections are means of satisfying the element of unlawful entry. The section begins with an introductory clause that "broadly defines" the crime of burglary—entering a location, without permission, with the intent of committing an unlawful act—indicating that "the legislature was concerned with proscribing a single wrong." *Manson*, 101 Wis. 2d at 422–23. And the introductory clause explains that a defendant violates the statute by entering "*any*" of the listed locations, Wis. Stat. § 943.10(1m) (emphasis added), indicating that "[t]he act of [entry] is the crime, not the underlying [location]," *State v. Derango*, 2000 WI 89, ¶ 17, 236 Wis. 2d 721, 613 N.W.2d 833; *see also State v. Dearborn*, 2008 WI App 131, ¶ 23, 313 Wis. 2d 767, 758 N.W.2d 463. Moreover, defendants unlawfully entering the different locations meet with the same penalties. *Compare Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (elements alter the applicable punishment). Finally, the potential overlap between the subsections shows that reading them as different elements could produce strange results, such as permitting prosecutors to charge defendants with multiple crimes if the location entered was split into rooms. *State ex*

rel. Kalal v. Cir. Ct. for Dane Cty., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.[1]

Second, the legislative history of Section 943.10(1m) reinforces the conclusion that the Legislature understood the listed locations to be means and not elements. In 1949, the Legislature commissioned the judiciary committee of the legislative council to revise the entire Wisconsin Criminal Code in order to "[s]implif[y] the criminal law." 5 Judiciary Committee Report on the Criminal Code at ii, Wis. Legislative Council (Feb. 1953); *Champlain v. State*, 84 Wis. 2d 621, 624–25, 267 N.W.2d 295 (1978). With regard to burglary, the committee meant for the revised code to eliminate the distinction between day and night as well as that between dwellings and "other structures," including ships, vessels, and railroad cars. *See* 1953 Report, *supra*, at 103; *compare* Wis. Stat. §§ 343.09–.13 (1953), *with* Wis. Stat. § 943.10 (1955). While the committee originally suggested using the term "structure" to describe the location entered, and defined structure broadly to mean "any inclosed building or tent, any inclosed vehicle (whether self-propelled or not) or any room within any of them," 1953 Report, *supra*, at 17, 102, the final version of the revised statute used the more specific locational

[1] The fact that the locations are set out in separate subsections does not necessarily indicate that the Legislature intended the locations to be elements. *Compare Manson*, 101 Wis. 2d 413 (acts listed in different subsections created only one crime), *with State v. Seymour*, 183 Wis. 2d 683, 515 N.W.2d 874 (1994) (acts listed in same subsection created multiple crimes).

subsections as found in the statute today (excluding the subsection regarding motor homes). 9 Criminal Code 39, Wis. Legislative Council (Sept. 1955). There is no indication, however, that the committee meant this change to undo all of the work of eliminating distinctions between dwellings and other locations that the previous version had done. *See* Opening Br. 14–17; App. 127–36.[2]

Third, the nature of the proscribed conduct also strongly indicates that the Legislature meant to create one crime. Regardless of which location is at issue, the conduct remains the same. "[T]here is only one act," entry without permission. *Derango*, 2000 WI 89, ¶ 21; *compare Seymour*, 183 Wis. 2d at 701–02 ("significantly different acts"). Which of the locational subsections applies is not "material to the question of whether or not a [burglary] has been committed." *Manson*, 101 Wis. 2d at 427. The different locations are "means to the same end," to steal or commit a felony, "and are accomplished by [the same] mechanism," entry. *Id.* And because the same act can satisfy multiple locational subsections, it is unlikely the Legislature intended the

[2] Similarly, there is no indication that the committee changed its reasoning for including "any room within" when it altered the locational language in the statute. The committee's inclusion of "any room within" was "important in connection with buildings such as hotels, or vehicles such as trains or ships, where a person may be authorized to enter certain rooms of the building or vehicle but not all the rooms," not because breaking into a building through a room should constitute multiple burglaries. 1953 Report, *supra*, at 17.

subsections to create multiple crimes. *See id.*; *Dearborn*, 2008 WI App 131, ¶ 32.

Finally, it would be inappropriate to impose multiple punishments for entering the locations listed in the different subsections, as the elements reading would require. To begin, regardless of which location is entered, the act of unlawful entry invades the same interest of the victim that the burglary statute is meant to protect. *See Manson*, 101 Wis. 2d at 428; *Dearborn*, 2008 WI App 131, ¶ 37. And because the same act can satisfy multiple locational subsections, it would be inappropriate to impose multiple punishments for a single act of entry. *Derango*, 2000 WI 89, ¶ 21.

Importantly, imposing multiple punishments for violations of the subsections could violate the double-jeopardy clauses of the federal and Wisconsin constitutions. *Derango*, 2000 WI 89, ¶ 26; *see* U.S. Const. amend. V; Wis. Const. art. I, § 8; *see also* App. 107 (noting this issue). When the purported "offenses" are identical in law and fact—in that a single act violates multiple subsections and proving one violation does not require proof of a fact that the other does not—then Wisconsin courts presume that the Legislature did not intend to permit multiple punishments. *State v. Davison*, 2003 WI 89, ¶¶ 28–33, 43, 263 Wis. 2d 145, 666 N.W.2d 1; *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also* Wis. Stat. § 939.66(1) (prohibiting convictions for multiple crimes when one crime "does not require proof of any fact in addition to those which must be proved for the [other]

crime"). The State can rebut that presumption only with "a clear indication of contrary legislative intent" under the same four-part test used here. *Davison*, 2003 WI 89, ¶ 43–44, 50 n.18 (citation and emphasis omitted). Under Section 943.10(1m), there is a distinct possibility that violations of multiple subsections will be identical in law and fact. If a defendant unlawfully enters any of the locations listed in subsections (a) through (e), and that location is split into rooms, they can also violate subsection (f) through that same act. However, the offenses under each subsection will be identical in law, because proving the violation of subsection (a) through (e) requires proof of no other fact than those also required to prove the violation of subsection (f). *See State v. Gordon*, 111 Wis. 2d 133, 135–36, 330 N.W.2d 564 (1983).[3] Given that the statutory text, legislative history, and nature of the proscribed conduct all indicate that the Legislature did *not* intend to permit multiple punishments, the State would be hard pressed to show the "clear indication of contrary [ ] intent" necessary to overcome the presumption.

[3] The Seventh Circuit panel decision avoided this obvious dilemma by simply ignoring subsection (f). App. 110. But of course, when interpreting the meaning of a statute, courts cannot ignore statutory text. *Kalal*, 2004 WI 58, ¶ 46.

B. Adopting The Federal Government's Position Would Throw The Validity Of Thousands Of Wisconsin Convictions Into Doubt

Any decision by this Court adopting an authoritative construction of Section 943.10(1m) will have retroactive effect, even in cases where the defendant has exhausted direct review. A decision has retroactive effect on both direct and collateral review when it creates a rule of substantive criminal law, or, in other words, when it "declares what acts are crimes." *State v. Lagundoye*, 2004 WI 4, ¶¶ 12, 21, 268 Wis. 2d 77, 674 N.W.2d 526 (citation omitted). A decision interpreting a criminal statute, therefore, can have both direct and collateral retroactive effect. *See, e.g.*, *Bousley v. United States*, 523 U.S. 614, 620–21 (1998).

The retroactive effect of adopting the federal government's elements reading would be to allow those adjudged guilty of burglary under Section 943.10(1m) to challenge their convictions, seriously undermining the "essential" "principle of finality" in criminal law. *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality op.). In 2017 alone, the Wisconsin Department of Justice reports over 17,000 burglaries committed and over 2,500 burglary arrests across the State. Wis. Dep't of Justice, UCR Offense Data (last updated Oct. 1, 2018);[4] Wis. Dep't of Justice, UCR Arrest Data

[4] https://www.doj.state.wi.us/dles/bjia/ucr-offense-data.

(last updated Oct. 1, 2018).[5] And Wisconsin courts, including this Court, have consistently treated burglary as having three "essential elements:" entry, without consent, with prohibited intent. *See State v. O'Neill*, 121 Wis. 2d 300, 305, 359 N.W.2d 906 (1984); *Gilbertson v. State*, 69 Wis. 2d 587, 592, 230 N.W.2d 874 (1975); *Anderson v. State*, 66 Wis. 2d 233, 251, 223 N.W.2d 879 (1974); *see also State v. Benoit*, 229 Wis. 2d 630, 634 n.3, 600 N.W.2d 193 (Ct. App. 1999) (splitting the "consent" element into two parts). Courts have not considered the particular location entered to be an element of the offense. If, instead, the locational subsections are to be considered elements, then convicted defendants could raise myriad challenges to their burglary convictions, including as to guilty pleas, jury instructions and unanimity, and criminal complaints, and courts could consider those challenges even if the defendant previously waived or forfeited the argument, under the plain-error doctrine or in the interest of justice. *State v. Mayo*, 2007 WI 78, ¶¶ 28–30, 301 Wis. 2d 642, 734 N.W.2d 115 (courts can consider waived issues under plain error doctrine or in the interest of justice); *see State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (plain error applies when "a basic constitutional right [was] not [ ] extended to the accused" (citation omitted)); *see also* Wis. Stat. § 751.06.

---

[5] https://www.doj.state.wi.us/dles/bjia/ucr-arrest-data.

If the locational subsections are separate elements of burglary, then defendants who pleaded guilty or no contest to burglary could challenge and withdraw those pleas for violating due process. A defendant's plea must be knowing, voluntary, and intelligent in order to satisfy due process. *State v. Cross*, 2010 WI 70, ¶¶ 14, 16, 326 Wis. 2d 492, 786 N.W.2d 64. To be knowing and intelligent, Wisconsin law requires, among other things, that the pleading defendant understand "the nature of the charge." Wis. Stat. § 971.08; *State v. Bangert*, 131 Wis. 2d 246, 261–62, 389 N.W.2d 12 (1986). "An understanding of the nature of the charge must include an awareness of the essential elements of the crime." *Id.* at 267. Thus, if the particular location entered is an element of burglary, then courts must ensure the defendant understands that the State must prove beyond a reasonable doubt the particular location entered. *See State v. Nichelson*, 220 Wis. 2d 214, 220–21, 582 N.W.2d 460 (Ct. App. 1998); *see also State v. Bollig*, 2000 WI 6, ¶¶ 50–51, 232 Wis. 2d 561, 605 N.W.2d 199; *compare State v. Hendricks*, 2018 WI 15, ¶¶ 18–26, 379 Wis. 2d 549, 906 N.W.2d 666 ("sexual contact" not an element and therefore did not need to be defined in plea colloquy). Any defendant who pleaded guilty or no contest to a burglary charge, and whom the court did not ensure understood that the location entered was an element of burglary, could then challenge those pleas and possibly withdraw them.

Defendants convicted after a trial could challenge those convictions as failing to meet the unanimity requirement if the locational subsections are elements. App. 107 (noting this issue). The Wisconsin constitution requires that the jury be unanimous as to every element of the crime charged. *Derango*, 2000 WI 89, ¶ 13; Wis. Const. art. I, §§ 5, 7. When the Legislature sets out different means of committing a crime, the constitution requires unanimity with regard to those means only when it would be irrational or fundamentally unfair to treat the statute as creating means of committing a single crime, rather than creating multiple crimes. *See Derango*, 2000 WI 89, ¶¶ 22–25; *State v. Norman*, 2003 WI 72, ¶ 62, 262 Wis. 2d 506, 664 N.W.2d 97. When the Legislature sets out different elements, however, the constitution always requires unanimity as to each element. *Derango*, 2000 WI 89, ¶¶ 13–14. So, if each locational subsection is an element, creating multiple crimes of burglary, then the jury must be unanimous as to the location entered. Any conviction in which the jury was not unanimous or where there was a question as to the jury's unanimity regarding the location entered would then be subject to constitutional challenge.

The Wisconsin Jury Instructions regarding burglary do not guarantee that the jury would have been properly instructed if the locational subsections are elements. The instructions for burglary with intent to steal and for burglary with intent to commit a felony simply list "building" as the

place entered, and then comment that the term "must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f)." Wis. JI-Criminal 1421, 1424 & cmts. (2001). However, the instructions do not say how they should be modified, or that any of the locational terminology must be defined for the jury. And the instructions' proposed definitions of "building" are so broad as to include many of the other locational subsections. *See, e.g.*, Wis. JI-Criminal 1424, cmt. (suggesting definitions of "building"). The instructions for certain aggravated burglaries likewise simply use the term "enclosure" and then give that term a broad definition that could cover any of the locational subsections. *See* Wis. JI-Criminal 1425B, 1425C & cmts. (2005). Given that the jury instructions are not written in a way that treats the locational subsections as elements, there is a very real possibility that numerous convicted defendants could challenge their burglary convictions based on inadequate jury instructions. *See State v. Gonzales*, 2011 WI 63, 335 Wis. 2d 270, 802 N.W.2d 454.

Amending the complaint at trial could also pose problems if the locational subsections are considered elements. Under Wis. Stat. § 971.29(2), the complaint may be amended "[a]t the trial" only where it is "not prejudicial to the defendant" to do so. Because "[t]he purpose of a charging document is to inform the accused . . . in order to enable him to prepare a defense," *Derango*, 2000 WI 89, ¶ 50, to amend the complaint in such a way as to deprive the defendant of fair

notice violates the defendant's right to due process, *see Whitaker v. State*, 83 Wis. 2d 368, 373, 265 N.W.2d 575 (1978). When the amendment "does not change the crime charged and the alleged offense remains the same," "a defendant is not prejudiced." *Derango*, 2000 WI 89, ¶ 50. Yet if the locational subsections are elements, then amending the complaint to alter the location entered would change the crime charged and could be prejudicial, *see State v. Neudorff*, 170 Wis. 2d 608, 619–21, 489 N.W.2d 689 (Ct. App. 1992), creating yet another avenue for convicted defendants to challenge those convictions.

CONCLUSION

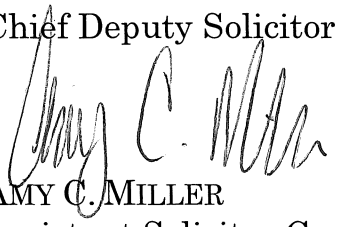
This Court should hold that the locational subsections in Wis. Stat. § 943.10(1m) are means of committing burglary, not elements.

Dated: December 3, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

RYAN J. WALSH
Chief Deputy Solicitor General



AMY C. MILLER
Assistant Solicitor General
State Bar No. 1101533
Counsel of Record

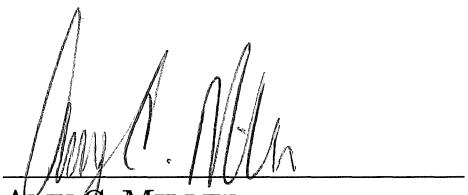
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8938
millerac@doj.state.wi.us

Attorneys for the State of Wisconsin

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,971 words.

Dated: December 3, 2018.



AMY C. MILLER
Assistant Solicitor General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

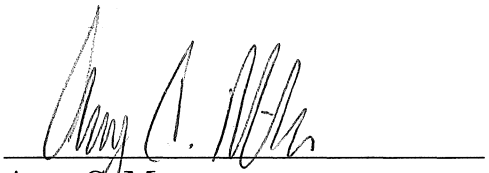
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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: December 3, 2018.



AMY C. MILLER
Assistant Solicitor General