STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP0192-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

APPEAL FROM A NON-FINAL ORDER ENTERED IN THE KENOSHA COUNTY CICRUIT COURT, THE HONORABLE DAVID P. WILK, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INTRODUCTION

While on a prior felony bond, Chrystul D. Kizer travelled from Milwaukee to Kenosha with a loaded handgun to the home of Randall Volar, ordered him to sit in a chair, shot him twice in the head, set fire to his house, and stole his BMW. She later bragged about it on social media. When interviewed by police, she claimed that she shot Volar because a tote blocked her way to the door and she was worried Volar might get up and come at her. Her boyfriend told police that Kizer told him she planned to kill Volar before travelling to Kenosha.

Kizer was charged with first-degree intentional homicide with use of a dangerous weapon, operating a motor vehicle without the owner's consent, arson of a building, felony bail jumping, and possession of a firearm by a felon. In pretrial motions, Kizer claimed that she had a complete defense to all charged crimes under Wis. Stat. § 939.46(1m) because she allegedly was a victim of human trafficking.[1]

While the State agrees with Kizer that the statute is not limited to instances where a trafficking victim is herself charged with a trafficking offense, section 939.46(1m) does not provide a get-out-of-jail-free card for any crime committed by a trafficking victim. Nor does the statute create a license to kill and absolve a trafficking victim of all criminal responsibility for first-degree intentional homicide based on a mere showing that there was a "close" connection between the homicide and being trafficked.

[1] As discussed below, contrary to what Kizer claims on appeal, (Kizer's Br. 3), the State has never conceded that Volar was trafficking Kizer on the date in question.

STATEMENT OF THE ISSUE

What is the scope of the defense set forth in section 939.46(1m), and is Kizer entitled to assert it at trial?

Answered by the circuit court: In a non-final order, the circuit court ruled that the affirmative defense set forth in section 939.46(1m) is available only if the defendant herself is charged with a trafficking offense and the sole cause of the defendant's criminal violations was her victimization by others.

This Court should make two rulings: First, in cases of first-degree intentional homicide, the trafficking defense under section 939.46(1m) is subject to the mitigation provisions in Wis. Stat. §§ 939.45(1) and 940.01(2), which merely reduce a charge of first-degree intentional homicide to second-degree intentional homicide. Second, the defense set forth in section 939.46(1m) applies to criminal acts committed as a "direct result" of the defendant being the victim of human trafficking—that is, an act that is both the actual (but-for) and legal (proximate) result of being trafficked. This means that human trafficking must be the primary cause of the offense, with no intervening factors. The Court should then remand with instructions for the circuit court to conduct an evidentiary hearing to determine if Kizer can present "some evidence" that she satisfies the requirements of Wis. Stat. § 939.46(1m).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication is appropriate given that this case presents a new and novel issue of statewide importance.

STATEMENT OF THE CASE[2]

As alleged in the criminal complaint, on June 4, 2018, Kizer (then 17 years old) was on felony bond for Milwaukee County Case No. 17-CF-3948 and pleaded guilty to operating a vehicle and fleeing and eluding an officer—a class I felony. (R. 1:2.) The court advised Kizer that she was prohibited from possessing a firearm.[3]

Later that day, Kizer took an Uber ride to Kenosha, paid for by Volar. (R. 1:3, 5.) Kizer's boyfriend watched her put a .380 caliber handgun in her bookbag before she left; Kizer informed him that she was going to shoot the "white dude" because "she was tired of the dude touching on her." (R. 1:4.)

After initially lying to police, Kizer admitted that she went to Volar's residence, ordered him to sit in a chair near his computer and shot him twice in the head. (R. 1:3, 5.) Kizer told police that she brought the gun to protect herself and that "a tote was in her way and so she could not leave without being blocked and she believed that Mr. Volar might jump out at her so she shot him." (R. 1:6.)[4]

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[2] This case comes to the Court in an unusual procedural posture. Aside from the preliminary hearing and various bond hearings, no evidentiary hearings have occurred. Additionally, Kizer did not submit a formal evidentiary offer of proof to establish any element of her defense under section 939.46(1m). Thus, the "facts," such as they are, are limited to those alleged in the complaint and any evidence introduced at the noted hearings. Many of the "facts" set forth by Kizer mischaracterize the portions of the record cited or are based on comments made by counsel and not supported by evidence.

[3] *State v. Kizer*, No. 17-CF-3948 (Wis. Cir. Ct. Milwaukee Cty. Sept. 5, 2018), https://wcca.wicourts.gov/caseDetail.html?caseNo=2017CF003948&countyNo=40&mode=details.

[4] At trial, the State intends to present Kizer's text messages from the day before the homicide in which she told a friend, "I'm

Kizer then set fire to Volar's house, took his laptop, and drove off in Volar's BMW. (R. 1:6.) Before she left, and a few hours before the fire was reported on June 5, Kizer posted a "selfie" on her Facebook page from Volar's home. (R. 1:4.) Kizer returned to Milwaukee, got rid of the gun, and gave the BMW to her brother. (R. 1:4–5.) Kizer then told her boyfriend that "the dude was touching on her and so she shot him in the head" and set fire to the house. (R. 1:4–5.)

On June 8, Kizer posted a Facebook live video in which she displayed a handgun and ammunition, stated "she wasn't afraid to kill again" and referenced a "rich white individual." (R. 1:4.) Kizer later shared an article on Facebook about Volar's death. (R. 1:4.) Kizer's boyfriend confirmed that on June 8, Kizer posted a Facebook live video in which she was "talking about herself shooting the 'white dude.'" (R. 1:5.)

Kizer was charged with first-degree intentional homicide, use of a dangerous weapon, operating a motor vehicle without the owner's consent, arson of a building, felony bail jumping, and possession of a firearm by a felon. (R. 1:1–2.)

At the preliminary hearing, Detective Chad Buchanan testified that Kizer informed him that "she told Mr. Volar to have a seat in a chair and that she had a gun, that she pointed the gun at Mr. Volar, told him I'm going to do it and then proceeded to shoot him" in the head. (R. 60:8.) Kizer then did the dishes and started a fire using liquor and paper towels because, based on television shows, "she learned that was probably the best way to hide her tracks or cover her tracks."

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going to get a BMW." (R. 71:35.) The State will also show that the day of the homicide, Kizer sent numerous text messages to her friends describing in real time that she was "fixin' to do it," was waiting for the pizza to be delivered to Volar's house, and that she knew Volar's head was "gonna splatter everywhere." (R. 71:36.) And the State will show that after shooting Volar, Kizer called her boyfriend, bragging, "Oh boy. I did it." (R. 71:38.)

(R. 60:8–9.) Kizer also admitted to Detective Buchanan that she stole Volar's BMW, drove it back to Milwaukee, and gave it to her brother. (R. 60:9.) Detective Buchanan also testified that Kizer, who was 17, told him that she was involved in a sexual relationship with Volar, who was 34. (R. 60:12–13.)[5]

During the final pretrial conference during a discussion of Kizer's defense, her attorney made a number of allegations about the victim being involved in sex trafficking of underage girls. (R. 68:15–16.)[6] The prosecutor responded: "I'm aware of no evidence of the victim's involvement in sex trafficking or anything characterized as sex trafficking beyond him being a person postured as a customer or what we used to call a john." (R. 68:13.)[7] The State later admitted that "[a]lthough Mr. Volar had been under investigation by the Kenosha Police Department, no referral had been made for charges of child trafficking or human trafficking." (R. 32:1.)

While no motion was filed, Kizer asked the circuit court for a ruling as to the scope of her affirmative defense following briefing by the parties. (R. 68:17–18.) The parties submitted multiple briefs but no evidentiary materials. (R. 31–34.)

Kizer argued that the defense under section 939.46(1m) "is a complete defense to charges." (R. 30:3.) Kizer further argued that the statutory language—"direct result"—meant

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[5] Detective Buchanan did *not* testify that Volar gave Kizer money in exchange for sex acts or that their relationship started when Kizer was 16. (Kizer's Br. 2–3.)

[6] Kizer's appellate brief cites to numerous instances where defense counsel made such allegations before the circuit court as established fact. (Kizer's Br. 2–3.) The source of these "facts" include Kizer's motion to compel discovery, (R. 16), and statements made by counsel during a bond hearing, (R. 71:29–31), but not any admissible evidence.

[7] Kizer cites this exchange for the proposition that "[t]he State has conceded Ms. Kizer was R.V.'s trafficking victim." (Kizer's Br. 3 & n.1.)

all she had to establish was but-for causation: "[T]he acts for which she is charged would not have occurred but for her being a victim of trafficking." (R. 30:7.) She further claimed that she had complete immunity from the consequences of her criminal actions because "The actions Ms. Kizer took while being trafficked on June 4/5, 2018, until returning to Milwaukee, were a series of continuous acts without deviation. Thus, her actions were a direct result of said trafficking." (R. 30:6.)

In contrast, the State argued that due to its placement in the coercion statute, section 939.46(1m) "does not create a complete defense for first-degree intentional homicide, as is charged in this case," but rather creates a defense subject to the restrictions in section 939.46(1). (R. 31:3.) That is, a successful defense to a first-degree intentional homicide merely reduces the charge to second-degree intentional homicide. (R. 31:3.) Further, the State argued that "direct result" could not be interpreted so as to provide an alleged trafficking victim "*carte blanche* to commit any criminal offenses." (R. 31:3.) Instead, the State argued that "direct result" meant that the defense was limited to "crimes that are inherently linked to human trafficking, such as prostitution." (R. 31:3.)

In an oral ruling, the circuit court concluded that the statute was ambiguous because it could reasonably be interpreted to provide "blanket protection for any and all acts committed by a defendant who is the victim of [human] trafficking" or could reasonably be interpreted as providing a defense to "the crimes identified in 940.302(2)." (R. 70:3.) The court concluded that section 939.46(1m) "acts as an affirmative defense to the offenses listed under 940.302(2), acts, each of which, are a Class D felony." (R. 70:4–5.) However, the court said that the defense applies only if "*the* cause -- not *a* cause but *the* cause -- of the offenses in

940.302(2) was the victimization, by others, of the alleged perpetrator." (R. 70:5.)

In addition, the circuit court ruled that a trafficking victim had a separate coercion defense available under section 939.46(1) for other criminal offenses, subject to the limitations of that statute. (R. 70:5.) Finally, the court ruled that the affirmative defense under 939.46(1m) is subject to the burden-shifting "some evidence" standard used for self-defense cases. (R. 70:5.) The court entered a written order incorporating these rulings. (R. 38:1–2.)

Kizer filed a petition for leave to appeal the court's non-final order, which this Court granted. (R. 44.)

STANDARD OF REVIEW AND PRINCIPLES OF STATUTORY INTEPRETATION

The scope of a statutory affirmative defense presents an issue of law reviewed de novo on appeal. *State v. Leitne*r, 2002 WI 77, ¶ 16, 253 Wis. 2d 449, 646 N.W.2d 341. Whether the evidence supports an instruction on an affirmative defense is a question of law. *State v. Peters*, 2002 WI App 243, ¶ 12, 258 Wis. 2d 148, 653 N.W.2d 300.

"Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory 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." *Id.* ¶ 46.

If, using this process, the statute is capable of being understood in two or more reasonable senses, then the statute is ambiguous, and the court may consult extrinsic sources to determine its meaning, including legislative history. *Id.*

¶¶ 48–50. Extrinsic sources may not be used to vary the plain meaning of a statute but may be consulted to confirm it. *Id.* ¶ 51.

RELEVANT STATUTES

This case involves the interpretation and application of the affirmative defense set forth in section 939.46(1m), which is part of the "coercion" defenses identified in section 939.46. That statute recognizes three types of coercion defenses and rejects a fourth type.

First, section 939.46(1) recognizes the traditional defense of physical coercion. It states, in pertinent part:

> A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act.

Wis. Stat. § 939.46(1). However, the defense is limited in the case of a prosecution for first-degree intentional homicide, in which case "the degree of the crime is reduced to 2nd-degree intentional homicide." Wis. Stat. § 939.46(1).

Second, the provision at issue here, section 939.46(1m) sets forth a trafficking coercion defense. It states that "[a] victim of a violation of s. 940.302(2) or 948.051 has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302(2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302(2) or 948.051."

In turn, section 940.302 criminalizes a wide range of human trafficking offenses, including labor trafficking and sex trafficking, if such trafficking is the result of one or more forms of specific acts. These acts include extortion, fraud, duress, or other form of physical, financial, or legal coercion—

including causing or threatening to cause bodily harm, controlling passports or official identification, employing debt bondage, controlling access to controlled substances, or "using any scheme, pattern, or other means to directly or indirectly coerce, threaten, or intimidate any individual." Wis. Stat. § 940.302(2)(a)1.j. The other statute referenced in the trafficking coercion defense is Wis. Stat. § 948.051(1), which prohibits trafficking of a child.

Third, Wis. Stat. § 939.46(3) creates an affirmative defense to certain weapons offenses committed by individuals who petitioned for domestic abuse restraining orders or child abuse restraining orders if they also were respondents in an action for a child abuse restraining order or domestic abuse restraining order. Fourth, Wis. Stat. § 939.46(2) states that Wisconsin does not recognize spousal coercion as an affirmative defense: "It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse."

The other two relevant statutes at issue here are Wis. Stat. § 940.01(2) and Wis. Stat § 939.45(1). Wisconsin Stat. § 940.01(1) sets forth the crime of first-degree intentional homicide. Subsection (2), entitled "mitigating circumstances" states: "The following are affirmative defenses to prosecution under this section [first-degree intentional homicide] which mitigate the offense to 2nd-degree intentional homicide . . . : (d) coercion; necessity. Death was caused in the exercise of privilege under s. 939.45(1)." Wis. Stat. § 940.01(2)(d). In turn, Wis. Stat. § 939.45(1) provides that "[t]he defense of privilege can be claimed under any of the following circumstances: (1) When the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47."

ARGUMENT

Before addressing the scope of section 939.46(1m), it is important to note three significant points of agreement between the parties. First, both parties agree that the circuit court's interpretation of section 939.46(1m) is incorrect.[8] Second, both parties agree that, whatever the scope of the statutory defense, procedurally, it is subject to the "some evidence" burden-shifting analysis used in self-defense cases. *See State v. Head*, 2002 WI 99, ¶ 111, 255 Wis. 2d 194, 648 N.W.2d 413. Third, both parties seem to agree that because there has been no evidentiary hearing in this case, this Court should not address whether Kizer has put forth sufficient evidence to assert section 939.46(1m) as an affirmative defense. Rather, that issue must be determined by the circuit court on remand, consistent with this Court's ruling.

There are two main points of legal disagreement between the parties: First, whether the defense under section 939.46(1m) operates as a complete defense in case of first-degree intentional homicide; second, whether the "direct result" limitation in the statute requires both actual causation and legal causation.

The State's position on these issues is as follows: First, in cases of first-degree intentional homicide, the defense under subsection (1m) is subject to the mitigation provision in Wis. Stat. §§ 939.45(1) and 940.01(2), which merely reduces a charge of first-degree intentional homicide to second-degree

[8] The circuit court ruled that section 939.46(1m) "acts as an affirmative defense to the offenses listed under 940.302(2), acts, each of which, are a Class D felony." (R. 70:4–5.) But, the circuit court's reading ignores the language immediately after—"without regard to whether anyone was prosecuted or convicted for the violation of s. 940.203(2) or 948.051." This qualification makes no sense if the statute is referring to *the victim's* violation of the trafficking laws.

intentional homicide. Second, the defense set forth in section 939.46(1m) applies to criminal acts committed as a "direct result" of the defendant being the victim of human trafficking—that is, an act that is both the actual (but-for) and legal (proximate) result of being trafficked. This means that human trafficking must be the primary cause of the offense, with no intervening factors.

Finally, there is a significant factual disagreement. As noted above, the State vehemently disagrees with Kizer's assertion that it "conceded" that she was Volar's trafficking victim *on* June 4–5, 2018. The only "concession" made by the State was its recognition that Kizer *alleged* that Volar was "postured as a customer or what we used to call a john." (R. 68:13.) No other "concession" is made at either of the two record cites indicated by Kizer. (Kizer's Br. 3 (citing R. 68:12–13; 32:1–2).)

To prove she was the victim of child trafficking under Wis. Stat. § 948.051(1), Kizer will need to present evidence that Volar solicited, enticed, or transported her to Kenosha on June 4, 2018, "for the purpose of commercial sex acts, as defined in s. 940.302(1)(a)." In turn, that means she will need to show that Volar gave or promised to give her something "of value" for sexual contact or intercourse. Wis. Stat. § 940.302(1)(a). The State has not made *any* concession relating to whether Volar solicited, enticed, or transported Kizer to Kenosha on June 4, 2018, for the purpose of promising or exchanging something of value for sexual acts. And, to date, Kizer has not submitted any admissible evidence to this effect.

I. In cases of first-degree intentional homicide, the trafficking defense under section 939.46(1m) does not create a complete defense; rather it is subject to the mitigation provision in sections 940.01(2)(d) and 939.45(1).

The parties' first point of disagreement is whether in cases of first-degree intentional homicide involving trafficking, the defense under section 939.46(1m) provides a complete defense. Kizer argues that because the plain language of section 939.46(1m) contains to limitation on the defense other than the "direct result" language, that it provides a complete defense to any and all crimes committed by a trafficking victim, including first-degree intentional homicide. (Kizer's Br. 18–20.) This argument views subsection (1m) in isolation and ignores several canons of statutory construction, as well as the statute's structure, context, and legislative history. For the reasons explained below, based on the plain text of the relevant statutes, their context, structure, and history, this Court should rule that in cases of first-degree intentional homicide, the defense under section 939.46(1m) is subject to the mitigation limitation contained in sections 940.01(2)(d) and 939.45(1).

As noted above, statutes are not read in isolation; rather, they are considered in the context of other related statutes and the structure of the provision at issue. *Kalal*, 271 Wis. 2d 633, ¶¶ 46–48. Section 940.01(2)(d) plainly provides that in cases of first-degree intentional homicide, the defenses of coercion or necessity set forth in section 939.45(1) operate to mitigate the charge to second-degree intentional homicide. In turn, section 939.45(1) provides that "[t]he defense of privilege can be claimed under any of the following circumstances: (1) When the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47." Importantly, section 939.45(1) does *not* limit itself by reference to a particular subsection of

section 939.46. Rather, by referring to the statute generally, it incorporates *all of* the subdivisions thereof, including subsection (1m).

As set forth above, section 939.46, titled "coercion," covers four different types of coercion defenses, recognizing three and disallowing one. Subsection (1) sets forth the general defense of coercion when a person reasonably believes that a criminal action is required to prevent death or great bodily injury, which, in cases of first-degree intentional homicide, merely mitigates the charge to second-degree intentional homicide; subsection (1m) sets forth a particularized form of the coercion defense in trafficking cases; subsection (2) abolishes any claim of coercion by a spouse; and subsection (3) recognizes a particularized form of a coercion defense to certain firearm offenses. These are not unrelated statutory provisions that just happen to reside near one another. Rather, they are all specific applications of when coercion can be used as an affirmative defense.

Again, contrary to what Kizer claims, (Kizer's Br. 19–20 & n.7), section 939.45(1) refers to <u>all</u> cases of coercion under 939.46—not simply the defense set forth in section 939.46(1). In effect, Kizer asks this Court to read a limitation into section 939.45(1) that does not exist. That is, she asks the court to read section 939.45(1) as providing that the mitigation limitation applies "when the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 949.46 *[except for cases of trafficking under 939.46(1m)]*." But section 939.45(1) refers to section 949.46 *generally* not subsection (1); and it does not except section 939.46(1m) from its operation. *See State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165 ("We do not read words into a statute.").

Kizer also suggests that because section 939.45 was enacted prior to section 939.46(1m), that it must be read to exclude the latter. (Kizer's Br. 19–20 & n.7.) But this

argument ignores that when interpreting statutes, courts "presume that the legislature enacts laws with full knowledge of existing statutes." *Faber v. Musser*, 207 Wis. 2d 132, 138, 557 N.W.2d 808 (1997). Thus, this Court must presume that by placing the trafficking defense within the confines of section 939.46 generally, the legislature understood that it was making the new defense under subsection (1m) subject to the existing limitations that applied to section 939.46.

The fact that the legislature intended the defense under subsection (1m) to operate as a specific application of the coercion defense is evident by the fact that the criminal trafficking statute—section 940.302(2)—incorporates elements of coercion as part of the definition of the offense. Section 940.302(2)(a) prohibits both commercial sex trafficking and trafficking of labor or services, but only if the "trafficking is done by [one] of the following" list of coercive actions.[9] While section 948.051, prohibiting child trafficking,

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[9] The full statutory list is as follows:

> a. Causing or threatening to cause bodily harm to any individual.
> b. Causing or threatening to cause financial harm to any individual.
> c. Restraining or threatening to restrain any individual.
> d. Violating or threatening to violate a law.
> e. Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.
> f. Extortion.
> g. Fraud or deception.
> h. Debt bondage.
> i. Controlling or threatening to control any individual's access to an addictive controlled substance.

does not expressly incorporate these elements of coercion, it is reasonable to assume that the Legislature saw child trafficking as inherently coercive.

All of the enumerated statutory modes of commission involve actions that are used by traffickers to control their victims—i.e. overpower their freewill.[10] This is consistent with the common-law's understanding of "coercion" as acts that are used to overcome an individual's freewill. *See, e.g.*, *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (discussing standard used to determine if confession was coerced).

That section 939.46(1m) is a specific application of a coercion/necessity defense and not a free-standing defense is also evident from the legislative history of the trafficking statute.[11] Section 939.46(1m) was enacted as part of 2007 Wis. Act 116 (Senate Bill 292). The drafting request for 2007 Wis. Act 116 appears to have been prompted from a request from the Wisconsin Coalition Against Sexual Assault, Inc., which

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> j. Using any scheme, pattern, or other means to directly or indirectly coerce, threaten, or intimidate any individual.
> k. Using or threatening to use force or violence on any individual.
> l. Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.

[10] Wis. Dep't of Justice, *Human Trafficking: A Guide for Criminal Justice Professionals* 1, https://www.doj.state.wi.us/sites/default/files/ocvs/human%20trafficking/DOJ%20HT%20Guide%20for%20Criminal%20Justice%20Professionals%20Jan%202020.pdf (last updated Jan. 2020).

[11] Legislative history can be used to "confirm" the plain meaning of an unambiguous statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110.

noted that, at that time, Wisconsin did not have any comprehensive human trafficking legislation. (R-App. 113.) With respect to the affirmative defense at issue, the request asked for inclusion of a provision that "[t]rafficked persons should be immune from prosecution for crime they committed as a result of being a trafficking victim." (R-App. 115.) A handwritten note next to this request indicates "spec. withholding passport, etc." (R-App. 115.) As noted above, withholding a passport is one of the many enumerated modes of commission specified in section 939.46(1m).

The drafting request also referred to the Polaris Project's *Model Elements of Comprehensive State Legislation to Combat Trafficking in Persons* [hereinafter "Polaris Model"]. (R-App. 114 n.1.)[12] While the Legislature ultimately chose not to adopt the Polaris Model's statutory structure, it is undeniable that most of the provisions contained in 2007 Wis. Act 116 were based on, or originated from, the substance of the Polaris model legislation.[13]

The Polaris Model contains two proposed provisions relating to criminal liability of trafficking victims, which apply both to crimes committed under coercion or duress and "any commercial sex act" committed as a "direct result or incident of being trafficked":

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[12] Polaris Project, *Model Elements of Comprehensive State Legislation to Combat Trafficking in Persons*, http://www.markwynn.com/trafficking/model-comprehensive-state-legislation-to-combat-trafficking-in-persons-2006.pdf (Nov. 2006).

[13] *Human Trafficking: A Guide for Criminal Justice Professionals* refers to the Polaris Project as the source of its "Common Myths and Misconceptions." Wis. Dep't of Justice, *supra* note 10, at 7.

> 1.5 VICTIM IMMUNITY FROM PROSECUTION
>
> (a) In any prosecution of a person who is a victim of trafficking in persons, it shall be an affirmative defense that he or she was under duress [if defined under state law] or coerced [if defined under state law] into committing the offenses for which he or she is being subject to prosecution.
>
> (b) A victim of trafficking in persons is not criminally liable for any commercial sex act or illegal sexually-explicit performance committed as a direct result of, or incident or related to, being trafficked.

Polaris Project Model § 1.5.

One meaningful way in which 2007 Wis. Act 116 differs from the Polaris Model is that, as noted, the Wisconsin statute specifically lists various types of coercive actions used to compel victims to partake in trafficking. Wis. Stat. § 940.302(2)(a). In other words, unlike the Polaris Model, Wisconsin law expressly incorporates coercive behavior into the very definition of criminal trafficking. Thus, the Wisconsin affirmative defense combined elements of the two Polaris Model's proposed affirmative defenses into one. In other words, it was logical to place subjection (1m) under the general coercion statute, section 939.36, because coercion was made part and parcel of the crime of trafficking.

The point of this examination of legislative history is to demonstrate that the Legislature was well-aware of the existing provisions of section 939.46 (entitled "coercion") and made a conscious choice to place the trafficking defense in subsection (1m) *within* the existing statutory framework—not as a standalone provision. And, this decision makes perfect sense because the Legislature chose to define the offense of trafficking as requiring some element of coercion.

Conversely, there is absolutely *nothing* in the legislative history of section 939.46(1m) that suggests that the Legislature intended to create a free-standing *complete*

defense to cases of first-degree intentional homicide where the defendant is an alleged trafficking victim. On this point, it is again important to return to the context of the statute and examine the consequences of Kizer's interpretation. *See State v. Hayes*, 2004 WI 80, ¶ 16, 273 Wis. 2d 1, 681 N.W.2d 203 ("Additional sources of legislative intent such as the context, history, scope, and objective of the statute, including the consequences of alternative interpretations, illuminate the intent of the legislature.").

Again, section 939.46(1) provides a defense where a threat by a person causes the defendant "reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm," except that in cases of first-degree intentional homicide, the charge is reduced to second-degree intentional homicide. Thus, in cases of deadly force, in order to assert a coercion defense, an ordinary person must show that they reasonably believed their act was necessary to prevent death or great bodily harm. And even then, the defense merely serves to mitigate the degree of the charge.

If Kizer's interpretation of section 939.46(1m) is correct, then it creates a de facto privilege for a trafficking victim to use deadly force without any showing of a threat and lets the alleged victim off scot-free. Yet, there is nothing in the text, context, or legislative history of section 939.46(1m) that suggests that the Legislature intended to create such a broad license to kill, and, as explained below, such a result would be absurd.

In short, while section 939.46(1m) provides a general affirmative defense available in trafficking cases, in cases of first-degree intentional homicide, that defense merely operates to reduce the charge to second-degree intentional homicide, pursuant to the plain language of sections 940.01(2)(d) and 949.45(1). Kizer's alternative interpretation looks to subjection (1m) "in isolation" and fails to take into account the statutory context, structure, and legislative

history and is incongruent with the standards for interpreting statutes under *Kalal*, 271 Wis. 2d 633, ¶¶ 46–48. As such, Kizer's interpretation is unreasonable and must be rejected.

II. The "direct result" limitation in section 939.46(1m) requires a trafficking victim to demonstrate that trafficking was both the actual (but-for) and legal (proximate) cause of the charged criminal offense; it is not sufficient that the offense has a "close" relationship to trafficking.[14]

A. "Direct result" requires both actual (but-for) and legal (proximate) causation—i.e. trafficking must be the primary cause without any intervening factors.

Next, the parties disagree as to the meaning of the "direct result" language in section 939.46(1m). Again, the pertinent statutory text provides: "A victim of a violation of s. 940.302(2) or 948.051 has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302(2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302(2) or 948.051." Based on the rules of statutory interpretation set forth in *Kalal*, 271 Wis. 2d 633, ¶¶ 45–51, this Court should rule that section 939.46(1m) establishes a defense to crimes where human trafficking was both the actual (but-for) and proximate (primary without any intervening factors) cause of the criminal offense.

The circuit court concluded "direct result" means that the defense applies only if "*the* cause -- not *a* cause but *the* cause -- of the offenses in 940.302(2) was the victimization, by others, of the alleged perpetrator." (R. 70:5.) In contrast, Kizer alleges that it is sufficient to show that trafficking was a

[14] This Court needs to address this issue regardless of how it resolves the preceding one.

"substantial factor" in the commission of the offense. (Kizer's Br. 15.) Previously, Kizer argued that the defense would apply to her simply because her crimes occurred *while* she allegedly was being trafficked—although she couched this in the terms of "but-for" causation. (R. 30:6.) Neither the circuit court's interpretation nor either of Kizer's interpretations are entirely correct.

As explained by the United States Supreme Court in *Burrage v. United States*, 571 U.S. 204, 210 (2014), "[t]he law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause." Thus, "[w]hen a crime requires 'not merely conduct but also a specified result of conduct,' a defendant generally may not be convicted unless his conduct is 'both (1) the actual cause, and (2) the "legal" cause (often called the "proximate cause") of the result.'" *Id.* (quoting 1 Wayne LaFave, *Substantive Criminal Law* § 6.4(a), at 464–66 (2d ed. 2003)).

But-for causation requires that an event would not have happened without the challenged conduct. *Id.* at 211–15. This standard for causation applies where a statute specifies that one thing "results from" or occurs "because of" another. *Id.* But-for causation excludes actions that "merely played a nonessential contributing role in producing the event." *Id.* at 212. Accordingly, but-for causation is more stringent than the "substantial factor" or "contributing factor" formulation of causation, which is "less demanding" and requires proof only that action was a "material element" in bringing about a result. *Id.* at 215.

Here, at a minimum, section 939.46(1m) must be construed to require "but-for" causation. Not only does the statute require conduct and a specified result of that conduct—trafficking causing the offense—but the statute uses stronger language than just "results from" or "because of." *See Burrage*, 571 U.S. at 210 (stricter but-for causation is required by statutory terms "because of" and "results from").

Instead, the statute says that the offense at issue must be the "direct result" of trafficking. Wis. Stat. § 939.46(1m).

Wisconsin law is consistent with this understanding of causation and recognizes that "[w]here the statute involves a specified result that is caused by conduct, it must be shown, as a minimal requirement, that the [specified] conduct was an antecedent 'but-for' which the result in question would not have occurred." *State v. Serebin,* 119 Wis. 2d 837, 849, 350 N.W.2d 65 (1984) (emphasis added) (citation omitted).

However, but-for causation is not the end of the inquiry, for it addresses only actual (or physical) causation. "But mere physical causation is not always enough; a particular physical cause is enough only when it is a cause of which the law will take cognizance." *Id.* That is, the physical cause must be the "proximate, primary, efficient, or legal cause of [the specified] result." *Id.*

The fact that section 939.46(1m) requires both physical and legal cause naturally flows from the statutory language "direct result." "Direct"—as related to causation—generally means "marked by absence of an intervening agency, instrumentality, or influence" or "stemming immediately from a source."[15] In other words, the words "direct result" mean the "proximate, primary, efficient, or legal cause" of the specified conduct—i.e. a cause with no intervening factors. *Serebin*, 119 Wis. 2d at 849. To this extent, the circuit court *was* correct that under section 939.46(1m) trafficking must be "the cause"—i.e. the actual and proximate cause—of the charged offense. (R. 70:5.)

While the State agrees with Kizer that "'direct result' does not mean the sole cause of the offense," (Kizer's Br. 16), as demonstrated above, it means more than a "substantial

[15] *Direct*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/direct (last visited Sept. 1, 2020).

factor" or "close" connection; it means a but-for cause "marked by absence of an intervening agency, instrumentality, or influence."[16] Kizer's "close" connection proposal simply is inconsistent with the statutory text "direct result" and Wisconsin case law discussing actual and proximate cause. *Cf. State v. Lecker*, No. 2019AP1532-CR, 2020 WL 5200776, ¶¶ 14–16 (Wis. Ct. App. Sept. 1, 2020) (rec'd for publication)[17] (holding that the statutory phrase "circumstances surrounding" requires a "close relationship").

B. A "close" relationship with trafficking is not sufficient.

Kizer interprets "direct result" to require proof that trafficking was a mere "substantial factor" in the commission of the crime. (Kizer's Br. 15–16.) In turn, she interprets "substantial factor" as requiring a "a close logical, causal, or consequential relationship between the offenses charged and the victimization. (Kizer's Br. 16.) This cannot be correct.

First, Kizer's interpretation ignores that the more stringent "but-for" standard of causation applies to a statute like section 939.46(1m), which specifies both the offending conduct and the result. *Serebin*, 119 Wis. 2d at 849. Requiring only a "close logical" relationship between the conduct and result is not nearly enough to show but-for causation. Indeed, requiring only a "close" relationship arguably is less stringent than the substantial factor standard for causation. Second, Kizer's proposed reading ignores entirely the element of legal or proximate causation, which is dictated by the statutory qualifier "direct." Finally, as discussed below, Kizer's "close" relationship standard, combined with her assertion that

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[16] *Direct*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/direct (last visited Sept. 1, 2020).

[17] Cited for persuasive value pursuant to Wis. Stat. § 809.23(3) pending publication. (R-App. 139–47.)

subsection (1m) creates a complete defense to first-degree intentional homicide, creates an absurd result.

Kizer offers a number of factors that she believes the jury should consider in determining if the charged offenses were the "direct result" of human trafficking. (Kizer's Br. 16.) The State does not dispute that these and other factors may be relevant to the jury's determination. But the ultimate standard under which those facts must be assessed is whether the alleged trafficking was both the but-for and the immediate, proximate cause of the charged offenses. And before Kizer can even get to a jury, she must show "some evidence" of both actual and legal causation. *Head*, 255 Wis. 2d 194, ¶ 111.

Thus, in terms of how the defense operates, Kizer must do more than merely present some evidence that the charged crimes occurred *while* she was being trafficked.[18] Rather, she needs to present some evidence that the charged non-homicide offenses would not have occurred but-for the fact that she was being trafficked and that the alleged trafficking was the primary (or proximate) cause of the offenses, to the exclusion of other intervening factors.

As noted, the State intends to prove at trial that Kizer committed premediated homicide with the motive of obtaining Volar's BMW. Under the State's theory (and assuming Kizer proves she was being trafficked by Volar on June 4, 2018), the fact that trafficking provided Kizer *the opportunity* to commit the charged offenses is not sufficient to present an affirmative defense under section 939.46(1m). Rather, Kizer needs to present some evidence that her alleged trafficking was the primary reason she shot Volar twice in the

[18] And again, it has not been established that Kizer was being trafficked the evening Volar was murdered.

head, burned his house, and stole his vehicle, not interrupted by any intervening cause—i.e. ulterior motive.

Again, while the State is not asking this Court for an explicit ruling on whether Kizer can present a section 939.46(1m) defense to the jury, based upon Kizer's arguments thus far, she likely would not fall within the parameters of section 939.46(1m). Kizer has not alleged that Volar threatened her life or coerced her into travelling to Kenosha with a loaded firearm. There is no evidence Volar threatened Kizer with bodily harm if she did not engage in sexual activities. There is no evidence that Kizer was pressured to engage in acts of arson or theft at Volar's urging.

Instead, the State has strong evidence that Kizer travelled to Kenosha with the preconceived notion of murdering Volar in order to obtain his BMW. The State will show that Kizer obtained a firearm, asked her boyfriend how to use it, and took it with her on June 4 (hours after she had been ordered to not possess any weapons as part of her existing criminal case), and excitedly texted her friends while she was in the act of murdering Volar. She then posted photos on social media of her in Volar's house and, after he was dead, decided to burn down his house to cover her tracks and steal his vehicle. She later posted on social media bragging about killing Volar.

In other words, all the evidence suggests that Kizer's desire to murder Volar and obtain his vehicle was the actual as well as proximate cause of her decision to shoot him. The fact that she alleges that she was being trafficked at the same time is not sufficient to satisfy the "direct result" requirement in section 939.46(1m).

III. Construing section 939.46(1m) as providing a complete affirmative defense to all crimes that merely have a "close" connection to trafficking creates an absurd result.

Statutory language must be interpreted "reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. Additionally, statutes must be interpreted in a manner that does not conflict with the statutory purpose. *State v. Wiskerchen*, 2019 WI 1, ¶ 21, 385 Wis. 2d 120, 921 N.W.2d 730. As discussed above, the purpose behind the affirmative defense set forth in section 939.46(1m) appears to have been to protect victims of human trafficking from being further victimized by being forced to commit additional crimes by the person or person's trafficking them. Kizer's interpretation of section 949.46(1m) would frustrate that purpose by allowing victims of human trafficking the license to commit crimes no other individual is permitted to.

First, there is absolutely no indication in the statutory text, structure, context, or legislative history that suggests the Legislature intended to, in essence, grant the victim of trafficking a license to kill simply because the homicide has a "close" connection to human trafficking. Under Kizer's interpretation, she would be allowed to escape criminal liability for murdering her alleged trafficker, even though: (a) child trafficking under section 948.051 does not involve any additional element of force or coercion (i.e. it is a strict liability offense) and (b) she does not allege that she feared for her life or believed that shooting her alleged trafficker twice in the head was necessary to prevent death or great bodily harm. She merely alleges that a "tote" blocked her way from the door and that she believed that Mr. Volar might "jump out at her," (R. 1:6), after she ordered him at gunpoint to sit behind a desk. In essence, Kizer asks this Court to interpret subsection (1m) as sanctioning revenge/opportunity killings. That is a patently absurd result.

Second, by arguing for a lax "close" connection standard, Kizer asks this Court to immunize trafficking victims for a wide variety of criminal offenses that are merely connected to trafficking without any regard for how or why or whether other intervening factors were present. Requiring a trafficking victim to show both actual and legal causation comports both with the "direct result" limitation in section 939.46(1m), and the fact that the motivation behind the statute was to protect trafficking victims from liability for crimes they were forced to commit because of the trafficking—not give them a license to commit volitional crimes.

In contrast, Kizer's proposed "close" connection standard gives a trafficking victim the license to commit a primary offense (here homicide), further offenses to cover up the primary crime (here arson), as well as opportunistic offenses (here vehicle theft). In effect, Kizer's "close" connection standard would immunize trafficking victims from all crimes committed *while* they are being trafficked. That is not a reasonable interpretation of section 939.46(1m).

Finally, the absurdity of Kizer's position is evident from pending proposed legislation, 2019 Assembly Bill 228,[19] which would create a separate defense as Wis. Stat. § 939.46(1p) that permits a trafficking victim to use deadly force if she "believed that the use of force was necessary to prevent or terminate an unlawful interference with his or her person or that the use of force was necessary to escape from sex trafficking." (R-App. 137.) Notably, this proposal is much narrower than what Kizer argues section 939.46(1m) already provides. Yet, there would be no need for the proposed legislation if section 939.46(1m) means what Kizer claims.

[19] Available at https://docs.legis.wisconsin.gov/2019/proposals/ab228 (last visited September 1, 2020).

For these reasons, Kizer's interpretation of section 939.46(1m) cannot be the law.

CONCLUSION

For these reasons, this Court should rule that in cases of first-degree intentional homicide, the trafficking defense under section 939.46(1m) is subject to the mitigation provisions in Wis. Stat. §§ 939.45(1) and 940.01(2), which merely mitigate a charge of first-degree intentional homicide to second-degree intentional homicide. Second, the defense set forth in section 939.46(1m) applies to criminal acts committed as a "direct result" of the defendant being the victim of human trafficking—that is, an act that is both the actual (but-for) and legal (proximate) result of being trafficked. This means that human trafficking must be the primary cause of the offense, with no intervening factors. The Court should then remand with instructions for the circuit court to conduct an evidentiary hearing to determine if Kizer can present "some evidence" that she satisfies the requirements of Wis. Stat. § 939.46(1m).

Dated this 4th day of September 2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,768 words.

Dated this 4th day of September 2020.

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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).

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

Dated this 4th day of September 2020.

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