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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP192-CR

STATE OF WISCONIN,

Plaintiff-Respondent-Petitioner,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

TIMOTHY M. BARBER
Assistant Attorney General
State Bar #1036507

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 294-2907 (Fax)
barbertm@doj.state.wi.us

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INTRODUCTION

Under Wisconsin criminal law, the privilege to use deadly force is carefully circumscribed. In all cases other than perfect self-defense (including coercion, provocation, necessity, and unreasonable force to prevent a felony), the privilege results in a charge of first-degree intentional homicide being mitigated to second-degree intentional homicide.

In 2007 Wis. Act 116, the Legislature passed comprehensive legislation governing human trafficking and child sex trafficking. As part of that package, the Legislature created an affirmative defense for trafficking victims for crimes committed as a "direct result" of trafficking. Wis. Stat. § 939.46(1m). No case to date has interpreted the meaning of the scope of this defense. The legislative history shows the Legislature was concerned with providing trafficking victims immunity for crimes directly related to trafficking, such as withholding a passport. There is no mention of a new freestanding privilege to use deadly force.

This Court should grant this petition to clarify that section 939.46(1m) does not provide a free-standing complete defense to a charge of first-degree intentional homicide.

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 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 section § 939.46(1m) because she allegedly was a victim of child sex trafficking. The circuit court ruled that the defense applied only to trafficking offenses. The court of appeals granted Kizer's petition for leave to appeal, and held *inter alia*, that when it applies, the statute provides a complete defense to a charge of first-degree intentional homicide. *State v. Kizer*, 2020AP192-CR, 2021 WL 2212719 (Ct. App. June 2, 2021), *rec'd for publication*.[1] This Court should grant the petition because the court of appeals' decision was wrong and leads to absurd results.

ISSUE PRESENTED

Does the defense set forth in section 939.46(1m)—for crimes committed as a "direct result" of trafficking— provide a complete defense to a charge of first-degree intentional homicide?

Answered by the circuit court: No. 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 is charged with a trafficking offense.

Answered by the court of appeals: In an opinion recommended for publication, the court of appeals held that section 939.46(1m) provides a complete defense to a charge of first-degree intentional homicide so long as it is a "direct result" of trafficking.

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[1] Pet-App. 101–19. For ease of reading, the State will short cite to the Westlaw citation and paragraph number.

This Court should rule: In cases of first-degree intentional homicide, the trafficking defense set forth in section 939.46(1m) is subject to the mitigation limitation contained in section 940.01(2). Alternatively, the "direct result" limitation in the statute is sufficiently robust so as to preclude application of the defense to a charge of first-degree intentional homicide that is not otherwise subject to the statutory defenses of coercion, provocation, necessity, prevention of a felony, or self-defense.

STATEMENT OF CRITERIA THAT SUPPORT REVIEW

Review is justified under Wis. Stat. § (Rule) 809.62(1r)(b) and (c).

First, this case raises a real and significant question of state law. Wis. Stat. § (Rule) 809.62(1r)(b). The only statute that provides a complete defense to a crime involving use of deadly force against another is Wis. Stat. § 939.48(1) (perfect self-defense). That privilege is carefully circumscribed and in cases of deadly force applies only where, *inter alia*, the defendant reasonably believes deadly force is necessary to prevent death or great bodily harm. Wis. Stat. § 939.48(1). In cases where the amount of force used is not necessary or reasonable—i.e. imperfect self-defense—a charge of first-degree intentional homicide merely is mitigated down to second-degree intentional homicide. Wis. Stat. §§ 940.01(2) and (2)(b). Similarly, the affirmative defenses of provocation, coercion, necessity, and unnecessary force to prevent commission of a felony operate only to mitigate a charge of first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. § 940.01(2)(a), (c)–(d).

The trafficking defense at issue here—section 939.46(1m)—was placed within the statute governing coercion defenses—section 939.46. Thus, it falls under the

scope of the "privilege" statute, section 939.45(1), which applies "[w]hen the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47." Wis. Stat. 939.45(1). And in cases of first-degree intentional homicide, the defense of privilege only mitigates the charge to second-degree intentional homicide. Wis. Stat. § 940.01(2)(d).

Yet the court of appeals concluded that the trafficking coercion defense under section 939.46(1m) was untethered to any of the other statutory provisions governing use of force defenses and, despite being a part of section 939.46, provided a complete defense to a charge of first-degree intentional homicide.

This Court should take this opportunity to answer this real and significant question of state law and hold that in cases of first-degree intentional homicide, the trafficking defense set forth in section 939.46(1m) is subject to the mitigation limitation contained in section 940.01(2). Alternatively, this Court should hold that the "direct result" limitation in the statute is sufficiently robust so as to preclude application of the defense to a charge of first-degree intentional homicide that is not otherwise subject to the statutory defenses of coercion, provocation, necessity, or self-defense.

Additionally, review is proper under section (Rule) 809.62(1r)(c) because a decision by this Court will help clarify the law. The issue here is novel and of statewide importance. Given the prevalence of human trafficking and child sex trafficking, this issue is likely to recur unless resolved by this Court.

And because this case comes to this Court following a pretrial motion concerning the applicability of

section 939.46(1m) and without any evidentiary record, the question presented here is not factual in nature.

Accordingly, this case satisfies the statutory criteria for review.

STATEMENT OF THE CASE

As alleged in the criminal complaint,[2] on June 4, 2018, Kizer was on felony bond for Milwaukee County Case No. 2017-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 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.) 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

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[2] The complaint is included at Pet-App. 130–35.

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

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.)[4]

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,[5] 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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[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 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.)

[5] A transcript is included at Pet-App. 136–52.

(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.)[6]

During the final pretrial conference[7] Kizer's attorney alleged that Volar was involved in sex trafficking of underage girls. (R. 68:15–16.) 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.)[8] 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.)

Circuit court ruling re: scope of affirmative defense

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; 32; 33; 34.) Kizer argued that the defense under section 939.46(1m) "is a complete defense to the charges." (R. 30:3.)

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

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[6] Contrary to what Kizer claimed at the court of appeals, Detective Buchanan did *not* testify that Volar gave Kizer money in exchange for sex acts or that their relationship started when Kizer was 16.

[7] A transcript is included at Pet-App. 153–77.

[8] The State has *not* conceded that Kizer was being trafficked the day she murdered Volar.

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), subject to the limitations of that statute. (R. 70:5.) Finally, the court ruled that the affirmative defense under section 939.46(1m) is subject to the "some evidence" standard used for self-defense cases. (R. 70:5.) The court entered a written order incorporating these rulings. (R. 38:1–2.)

Court of Appeals' Decision

Kizer filed a petition for leave to appeal the circuit court's non-final order, which the State did not oppose, and which the court of appeals granted. (R. 44.) Before the court of appeals, both parties agreed that the circuit court erroneously interpreted section 939.46(1m) by construing it as a defense only to trafficking offenses. *Kizer*, 2021 WL 2212719, ¶ 4. Both parties also agreed that, whatever the scope of section 939.46(1m), it was subject to the "some evidence" standard for presenting an affirmative defense to a jury. *Id.* ¶ 7 n.3. Finally, both parties agreed that the record was not sufficiently developed for the court of appeals to make a determination as to whether Kizer was entitled to present a defense under section 939.46(1m) to the jury. *Id.* ¶ 7 n.4.

The court of appeals first agreed that the circuit court's interpretation of section 939.46(1m) was incorrect and that

the statute was not limited to instances where a defendant was charged with a trafficking offense. *Id.* ¶ 4.

The court of appeals held that the defense under section 939.46(1m) creates a complete defense to first-degree intentional homicide; it rejected the State's argument that the defense would only mitigate the charge to second-degree intentional homicide. *Id.* ¶¶ 5, 16. The court of appeals reasoned that other statutory defenses that served only to mitigate first-degree intentional homicide to second-degree, e.g. Wis. Stat. §§ 939.46(1), 939.44, and 939.47, "specifically state that first-degree intentional homicide is only mitigated to second-degree intentional homicide" while section 939.46(1m) contains no such limitation. *Id.* ¶ 23. In so ruling, the court of appeals reasoned that the Legislature may not have included the mitigation language in section 939.46(1m) because "it intended a sufficiently tight meaning of 'direct result' such that it did not contemplate the § 939.46(1m) affirmative defense would apply to first-degree intentional homicide." *Id.* ¶ 23 n.6.

Finally, the court of appeals interpreted the meaning of "direct result" in the statute. *Id.* ¶ 7. Reviewing case law and dictionary definitions of the use of that phrase, the court of appeals concluded that the phrase contemplated both actual and proximate cause and immediacy relating to trafficking and was similar in meaning to the phrase "direct consequence." *Id.* ¶ 5–15. Accordingly, it held that on remand, the circuit court should consider a variety of factors including "whether the victim's offense arises relatively immediately from the trafficking violation . . . , is motivated primarily by the trafficking violation, is a logical and reasonably foreseeable consequence of that violation, and is not in significant part caused by events, circumstances or considerations other than that violation." *Id.* ¶ 15.

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: "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." 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) [human trafficking] or 948.051 [child sex trafficking] without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302(2) or 948.051."[9]

Third, section 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.

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[9] 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 "[u]sing any scheme, pattern, or other means to directly or indirectly coerce, threaten, or intimidate any individual." Wis. Stat. § 940.302(2)(a)2.j. The other statute referenced in the trafficking coercion defense is Wis. Stat. § 948.051(1), which prohibits trafficking of a child.

Fourth, section 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." Wis. Stat. § 939.46(2).

The other two relevant statutes at issue here are sections 940.01(2) and 939.45(1). Section 940.01 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, section 939.45 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." Wis. Stat. § 939.45(1). And again, the trafficking defense at issue here is placed in section 939.46(1m).

ARGUMENT

This Court should take review to clarify that section 939.46(1m) does not provide an alleged trafficking victim with a complete defense to a charge of first-degree intentional homicide.

The court of appeals' interpretation of section 939.46(1m) creates an absurd result: It construes the statute as providing alleged trafficking victims with a complete defense to a charge of first-degree intentional homicide with the only limitation being that the homicide is a "direct result"

of trafficking. 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 section 940.01(2). Alternatively, it should rule that the "direct result" language is sufficiently robust so as to preclude application of the defense to a charge of first-degree intentional homicide that is not otherwise subject the statutory defenses of coercion, provocation, necessity, or self-defense.

A. When viewed in context and in light of the entire statutory scheme, section 939.46(1m) does not provide a free-standing complete defense to a charge of first-degree intentional homicide.

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 so as to not create an absurd result. *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 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." Wis. Stat. § 939.45(1). 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 o*f the subdivisions thereof, including subsection (1m).

Section 939.46, titled "[c]oercion," 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. Thus, section 939.45(1) refers to *all* cases of coercion under 939.46—not simply the traditional coercion defense set forth in section 939.46(1).

Although there is no dispute that section 939.46(1m) did not exist at the time section 939.45(1) was enacted, 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). Therefore, 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. That is, 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—specifically, the mitigation provisions incorporated via section 940.01(2) and section 939.45(1).

That the Legislature intended section 939.46(1m) to be included in section 939.45(1)'s general reference to "coercion" is evident when one examines the statutory definition of

trafficking and modes of commission of the offense—all of which involve some level of coercion. 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.[10] While section 948.051, prohibiting child trafficking, does not expressly incorporate these elements of coercion, it is reasonable to assume that the Legislature saw child trafficking as

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[10] 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.
>
> 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.

Wis. Stat. § 940.302(2).

inherently coercive. In other words, all of the enumerated statutory modes of commission involve actions that are used by traffickers to control their victims—i.e. overpower their freewill.[11] 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).

In short, the crime of trafficking is inherently coercive, as indicated by its statutory elements and listed modes of commission. Thus, it is not surprising that the Legislature chose to place the trafficking affirmative defense under section 939.46, governing "coercion." And it is not surprising that in doing so, the Legislature chose *not* to amend section 939.45(1)'s general reference to "coercion" to apply only to the traditional coercion defense under section 939.46(1).

Additionally, it is noteworthy that section 939.46(1m) states that a trafficking victim has "an affirmative defense for any offense committed as a direct result of" trafficking. It does not say a "complete affirmative defense." Wis. Stat. § 939.46(1m).

Therefore, while section 939.46(1m) provides a general affirmative defense available in trafficking cases, in cases of first-degree intentional homicide, when read in the context of the surrounding and related statutes, 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).

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[11] 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%20Nov%202020.pdf* (last updated Jan. 2020).

B. The legislative history contains no indication that the Legislature intended to give trafficking victims immunity for prosecution for first-degree intentional homicide.

Legislative history can be used to "confirm" the plain meaning of an unambiguous statute. *Kalal*, 271 Wis. 2d 633, ¶ 51. Here, there is no indication in the legislative history to section 939.46(1m) that the Legislature intended to create complete immunity for trafficking victims who commit first-degree intentional homicide.

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 noted that, at that time, Wisconsin did not have any comprehensive human trafficking legislation. (Pet-App. 190.) 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." (Pet-App. 192.) A handwritten note next to this request indicates "spec. withholding passport, etc." (Pet-App. 192.) 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 Comprehensive State Legislation to Combat Trafficking in Persons* [hereinafter "Polaris Model"]. (Pet-App. 191 n.1.)[12] While the Legislature ultimately chose not to

[12] Polaris Project, *Model 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).

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":

> 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 the Wisconsin statute specifically lists various types of coercive actions used to compel victims to partake in trafficking as part of the element of a criminal trafficking offense. 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

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[13] The Wisconsin DOJ, *Human Trafficking: A Guide for Criminal Justice Professionals* at 7, refers to the Polaris Project as the source of its "Common Myths and Misconceptions". Wis. Dep't of Justice, *supra* at 16.

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.

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 the court of appeals' ruling. *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. Wis. Stat. § 939.46(1). 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.

Yet, despite the absence of any legislative history to support the notion, the court of appeals concluded that in enacting section 939.46(1m), the Legislature chose to create a freestanding defense to first-degree intentional homicide for trafficking victims that was completely untethered to existing statutory notions of reasonable use of force, necessity, or mitigation. As referenced at the outset, the only statute that provides a complete privilege for a private citizen to use deadly force is the statutory privilege of self-defense under section 939.48(1). But this defense is carefully circumscribed and in cases of deadly force applies only where, *inter alia*, the defendant reasonably believes deadly force is necessary to prevent death or great bodily harm. Wis. Stat. § 939.48(1). In cases where the amount of force used is not necessary or reasonable—i.e. imperfect self-defense—a charge of first-degree intentional homicide merely is mitigated down to second-degree intentional homicide. Wis. Stat. §§ 940.01(2), (2)(b).

Yet there is absolutely nothing in the statute's legislative history to support the court of appeals' conclusion that section 939.46(1m) created an entirely new privilege to use deadly force without any criminal sanctions. Instead, the legislative history shows that the Legislature was concerned with providing trafficking victims with immunity for crimes like withholding a passport. In short, the legislative history to section 939.46(1m) does not support the notion that the legislature intended to create a free-standing complete defense to a charge of first-degree intentional homicide for trafficking victims.

C. Alternatively, and to avoid an absurd result, this Court should clarify that the statutory language "direct result" precludes application of section 939.46(1m) to an act of homicide that is not otherwise privileged.

As demonstrated above, the State's reading of section 939.46(1m) is supported by the statutory text, surrounding statutes, and legislative history. Additionally, the court of appeals' decision demonstrates (albeit not intentionally) the absurdity of holding that section 939.46(1m) operates as a complete freestanding defense to first-degree intentional homicide. *See Kalal*, 271 Wis. 2d 633, ¶ 46 ("statutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results").

As noted, both parties asked the court of appeals to interpret the meaning of "direct result" within section 939.46(1m). *Kizer*, 2021 WL 2212719, ¶ 5. The court of appeals largely adopted the State's proposed meaning of "direct result" as requiring both actual and proximate causation and rejected Kizer's more lax "close relationship" standard. *Id.* ¶¶ 5–15.[14] Accordingly, it held that on remand, the circuit court should consider "whether the victim's offense arises relatively immediately from the trafficking violation . . . , is motivated primarily by the trafficking violation, is a logical and reasonably foreseeable consequence of that violation, and is not in significant part caused by events, circumstances or considerations other than that violation." *Id.* ¶ 15.

However, in rejecting the State's argument that section 939.46(1m) was subject to the mitigation provision in sections 940.01(2)(d) and 949.45(1), the court of appeals explained a

[14] Compare State's Response Br. 19–25 with Kizer's Appellant's Br.15–17.

possible reason that the Legislature did not place an express mitigation limitation within section 939.46(1m). *Id.* ¶ 23 n.6. The court said that it was "possible" that the Legislature did not include such an express limitation "because it intended a sufficiently tight meaning of 'direct result' such that it did not contemplate the § 939.46(1m) affirmative defense would apply to first-degree intentional homicide." *Id.* ¶ 23 n.6. The court of appeals continued to explain that Legislature may have "intended a sufficiently tight meaning of 'direct result' such that it did not contemplate the § 939.46(1m) affirmative defense would apply to first-degree intentional homicide." *Id.*

But if that is what the Legislature intended, then it is absurd to construe section 939.46(1m) as providing a complete defense to a charge of first-degree intentional homicide. In other words, if, as the court of appeals posited, the Legislature did not intend section 939.46(1m) to apply *at all* to first-degree intentional homicide, then it certainly didn't intend it to provide a *complete* defense without any mitigation restriction.

The result of the court of appeals' decision is particularly troubling given the breadth of the statutory definition of trafficking, which covers soliciting and transporting an individual for a commercial sex act. *See* Wis. Stat. § 940.302(1)–(2). In other words, under the court of appeals' decision, any person who answers an internet ad for escort services and pays for an Uber arguably can be murdered without consequence, so long as the killing is a "direct result" of the trafficking transaction.

The absurdity of the court of appeals' reading of 939.46(1m) is also evident from the language of legislation that was proposed, but did not pass, in 2019. 2019 Assembly

Bill 228,[15] would have created 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." (Pet-App. 214–15.) Notably, this proposal is much narrower than what the court of appeals ruled 939.46(1m) already provides. Yet, there would have been be no need for the proposed legislation if section 939.46(1m) means what the court of appeals claims. In other words, if section 939.46(1m) already provides a complete defense to first-degree intentional homicide, then 2019 Assembly Bill 228 would have been entirely superfluous.

For these reasons, the court of appeals' reading of section 939.46(1m) is unreasonable and creates absurd results because the statutory text, structure, and history provide no indication that the Legislature sought to grant trafficking victims a complete defense to first-degree intentional homicide. Because sections 940.01(2)(d) and 939.45(1) specify that the defense of coercion simply mitigates first-degree intentional homicide, and because the trafficking defense was placed within the statute governing "coercion" defenses, the defense under section 939.46(1m) should likewise be subject to the mitigation restriction in section 940.01(2)(d).

If this Court disagrees, then consistent with the court of appeals' discussion of legislative intent, the State requests that this Court holds that the statutory "direct result"

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

language is "sufficiently tight" such that it does not cover instances where an alleged trafficking victim is charged with first-degree intentional homicide and is otherwise unable to assert one of the mitigating circumstances defenses under section 940.01(2)—i.e. self-defense, provocation, prevention of a felony, coercion, or necessity.

Indeed, as the court of appeals recognized, it is entirely reasonable to assume that the Legislature did not even contemplate section 939.46(1m) would apply to a charge of first-degree intentional homicide given the existing affirmative defenses to first-degree intentional homicide.

As noted, the privilege of self-defense applies in cases of deadly force and applies only where, inter alia, the defendant reasonably believes deadly force is necessary to prevent death or great bodily harm. Wis. Stat. § 939.48(1). And in such cases, "actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference." Wis. Stat. § 939.48(1). Yet, if the amount of force used was unnecessary or unreasonable, then the defense operates only to mitigate the charge to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b). Likewise, someone charged with first-degree intentional homicide who is able to establish adequate provocation, coercion, or necessity has a defense, but that those too only serve to mitigate the charge to second-degree intentional homicide. Wis. Stat. § 940.01(2)(a), (d). And unreasonable use of deadly force to prevent or terminate the commission of a felony likewise simply mitigates first-degree intentional homicide to second. Wis. Stat. § 940.01(c).

Adequate provocation requires a showing that the defendant reasonably believes the victim has done something "which causes the defendant to lack self-control completely at the time of causing death." Wis. Stat. § 939.44(1)(b). The defense of coercion requires a showing that the victim was

threatened in a manner "which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm." Wis. Stat. § 939.46(1). And the defense of necessity requires a showing of "[p]ressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm." Wis. Stat. § 939.47.

Given the availability of these defenses, it is imminently reasonable to conclude that the Legislature did not contemplate providing trafficking victims with a new, complete defense to a charge of first-degree intentional homicide if their conduct was not otherwise privileged.

As the court of appeals held, the "direct result" language in section 939.46(1m) contemplates immediacy, both actual and proximate cause, and the absence of any intervening factors. *Kizer,* 2021 WL 2212719, ¶ 5–15. This reading of "direct result" would encompass situations where a trafficking victim kills a trafficker in self-defense, due to adequate provocation, due to coercion, due to necessity, or while trying to prevent a felony. But it is not reasonable to read "direct result" as extending to situations where a trafficking victim kills someone and none of the other affirmative defenses to first-degree intentional homicide apply.

In other words, it is unreasonable and absurd to construe section 939.46(1m) as providing a complete defense to a charge of first-degree intentional homicide under circumstances where the defendant could not otherwise claim self-defense, coercion, adequate provocation, or necessity. To so hold would mean that a trafficking victim has an unfettered privilege to kill someone involved in trafficking even though the trafficking victim is not threatened with death or bodily harm, is not adequately provoked, is not

coerced, and kills under circumstances where it is not necessary or reasonable. That *cannot* be what the Legislature intended.

The absurdity of the court of appeals' holding is evident from the (albeit limited) facts of record here. As alleged in the criminal complaint and set forth in the preliminary hearing testimony, the evidence suggests that Kizer committed premeditated homicide because she wanted to obtain the victim's BMW. Kizer's statements to police do not indicate that she was forced to place the handgun in her backpack or forced to take an Uber to Kenosha. And her statement contains no indication that Volar was threatening her or forcing her to commit any commercial sex acts at the time she shot him. Instead, Kizer merely alleged 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.)

The fact that Kizer alleges that she had been trafficked by Volar in the past should not be sufficient to satisfy the "direct result" requirement in section 939.46(1m). So holding could mean that any trafficking victim could get away with premeditated murder simply because she was a trafficking victim.

Accordingly, if this Court agrees with the court of appeals that the defense in section 939.46(1m) does not mitigate a charge of first-degree intentional homicide to second-degree intentional homicide, then it should clarify the meaning of the "direct result" limitation in the statute. This Court should hold that "direct result" is sufficiently robust so as to preclude application of the defense to a charge of first-degree intentional homicide that is not otherwise subject the statutory defenses of coercion, provocation, necessity, prevention of a felony, or self-defense.

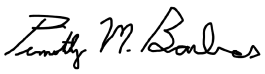
CONCLUSION

This Court should accept the petition.

Dated this 2nd day of July 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



TIMOTHY M. BARBER
Assistant Attorney General
State Bar #1036507

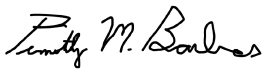
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 294-2907 (Fax)
barbertm@doj.state.wi.us

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 7,224 words.

Dated this 2nd day of July 2021.



TIMOTHY M. BARBER
Assistant Attorney General

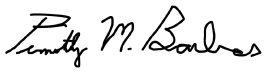
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I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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 this 2nd day of July 2021.



TIMOTHY M. BARBER
Assistant Attorney General

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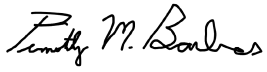
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APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of July 2021.



TIMOTHY M. BARBER
Assistant Attorney General

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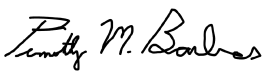
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TIMOTHY M. BARBER
Assistant Attorney General