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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2020AP192-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

REVIEW OF A COURT OF APPEALS DECISION
REVERSING A NON-FINAL ORDER ENTERED IN THE
KENOSHA COUNTY CIRCUIT COURT, THE
HONORABLE DAVID P. WILK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

INTRODUCTION	7
ISSUES PRESENTED	8
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	9
STATEMENT OF THE CASE	10
STANDARD OF REVIEW	14
RELEVANT STATUTES.....	14
ARGUMENT	16
I. The trafficking defense under section 939.46(1m) immunizes trafficking victims only from crimes committed as part of or in furtherance of the underlying trafficking offense.....	16
A. The plain meaning of “direct result” contemplates the absence of intervening and superseding factors and an act undertaken as part of being trafficked.	16
1. “Direct result” means the primary, proximate, immediate cause, marked by the absence of intervening agency.....	17
2. The crime must be the “direct result” of the trafficker’s underlying trafficking violation, not the victim’s status.	19
B. By placing the defense under the title “coercion,” the Legislature intended to focus on crimes committed as part of the coercive trafficking violation.....	22

II.	Section 939.46(1m) is subject to the mitigation limitation set forth in section 939.45(1) in cases of first-degree intentional homicide.	25
A.	The trafficking coercion defense is one of the “privileges” under section 939.45(1) that can be used as a defense in cases of first-degree intentional homicide, but it is subject to the mitigation limitation in section 940.01(2)(d).	26
B.	The absence of express mitigation language in section 939.46(1m) is not determinative because self-defense and defense of others does not contain express mitigation language.	27
C.	Only one defense completely immunizes individuals who commit first-degree intentional homicide: perfect self-defense.	28
	CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases

<i>Faber v. Musser</i> , 207 Wis. 2d 132, 557 N.W.2d 808 (1997)	27
<i>Rock v. Commonwealth</i> , 610 S.E.2d 314 (Va. Ct. App. 2005)	18
<i>State ex rel. Kalal v. Circuit Court for Dane Cty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.....	17
<i>State v. Keeran</i> , 2004 WI App 4, 268 Wis. 2d 761, 674 N.W.2d 570	22

State v. Kizer,
 2021 WI App 46, 398 Wis. 2d 697,
 963 N.W.2d 1368, *passim*

State v. Leitner,
 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341..... 14

State v. Lopez,
 2019 WI 101, 389 Wis. 2d 156, 936 N.W.2d 125..... 22

State v. Parker,
 2001 WI App 111, 244 Wis. 2d 145, 629 N.W.2d 77..... 19

State v. Peters,
 2002 WI App 243, 258 Wis. 2d 148, 653 N.W.2d 300 14

State v. Serebin,
 119 Wis. 2d 837, 350 N.W.2d 65 (1984) 18

Whirlpool Corp. v. Ziebert,
 197 Wis. 2d 144, 539 N.W.2d 883 (1995) 19

Statutes

Ala. Code § 13A-6-159 (2021) 21

Colo. Rev. Stat. Ann. § 18-7-201.3 (2021) 21

Del. Code Ann. tit. 11, § 787 (2021–22) 21

Ga. Code Ann. § 17-10-21 (2021)..... 21

Okla. Stat. Ann. tit. 21, § 748 (2021) 21

Wis. Stat. § 939.44 14, 27

Wis. Stat. § 939.44(2)..... 28

Wis. Stat. § 939.45(1)..... 9, 14, 16, 26, 27

Wis. Stat. § 939.469, *passim*

Wis. Stat. § 939.46(1).....8, *passim*

Wis. Stat. § 939.46(1m).....7, *passim*

Wis. Stat. § 939.46(2)	15
Wis. Stat. § 939.46(3)	15
Wis. Stat. § 939.47	14, 27, 28
Wis. Stat. § 939.48(1)	28, 29
Wis. Stat. § 940.01	15
Wis. Stat. § 940.01(2)	9, <i>passim</i>
Wis. Stat. § 940.01(2)(a)	29
Wis. Stat. § 940.01(2)(b)	28, 29
Wis. Stat. § 940.01(2)(c)	29
Wis. Stat. § 940.01(2)(d)	16, 28, 29
Wis. Stat. § 940.05	28
Wis. Stat. § 940.05(1)	27
Wis. Stat. § 940.05(1)(a)	28
Wis. Stat. § 940.302(2)(a)2.	23
Wis. Stat. § 948.051	23
Wis. Stat. § 949.06	17
Wis. Stat. § 990.01(1)	17

Other Authorities

<i>American Heritage Dictionary</i> , (Houghton Mifflin, 2nd ed. 1991)	18
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012)	22
<i>Black's Law Dictionary</i> , (6th ed. 1990)	19
<i>Cambridge Dictionary</i> , https://dictionary.cambridge.org/us/dictionary/ english/direct	18
Meghan Hilborn, <i>How Oklahoma's Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country</i> , 54 Tulsa L. Rev. 457 (2019)	20
<i>Merriam-Webster Dictionary</i> , https://www.merriam-webster.com/dictionary/direct	18
Wisconsin Department of Justice, <i>Human Trafficking: A Guide for Criminal Justice Professionals</i> https://www.doj.state.wi.us/sites/default/files/ ocvs/human%20trafficking/DOJ%20HT%20Guide%20 for%20Criminal%20Justice%20Professionals%20Nov% 202020.pdf	24

INTRODUCTION

Human trafficking and sex trafficking are pernicious crimes in which traffickers prey upon and control some of the most vulnerable individuals in society. That control often involves coercing victims into participating in criminal conduct while they are being trafficked. Wisconsin Stat. § 939.46(1m)—placed under the umbrella of statutory coercion defenses—provides trafficking victims a defense for criminal acts that occur as a “direct result” of trafficking. While the defense is not limited to trafficking violations committed by a victim, it also does not create a generalized immunity for all conduct based simply on the defendant’s status as a trafficking victim. For crimes not committed as part of or in furtherance of the trafficking enterprise, a trafficked person must satisfy one of the traditional statutory defenses of coercion, provocation, necessity, prevention of a felony, or self-defense.

Chrystul D. Kizer shot and killed Randall Volar. On the day of the homicide, Kizer packed a loaded handgun, travelled from Milwaukee to Volar’s house in Kenosha, ordered him to sit in a chair, shot him twice in the head, set fire to his house, and stole his BMW. Her boyfriend told police that Kizer told him she planned to kill Volar before travelling to Kenosha. She posted about the event on social media. When interviewed by police, Kizer asserted that she shot Volar because she was worried he might get up and come at her.

The State charged Kizer 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.

Kizer, 17 at the time of the crimes, asserted that she had previously engaged in sex acts for money with Volar. In pretrial motions, Kizer claimed that she had a complete defense to all charged crimes under section 939.46(1m) based

on her age at the time of the crime and her allegation that Volar had previously paid her for sex acts.

The circuit court ruled that the defense applied only to trafficking offenses, not to the offenses with which Kizer was charged. 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*, 2021 WI App 46, 398 Wis. 2d 697, 963 N.W.2d 136.

This Court should reverse the court of appeals' decision.

First, it should hold the phrase "direct result" means that the proximate and actual cause of the crime in question was the underlying trafficking offense, with no intervening factors. The focus of the defense is to relieve victims from liability for conduct they partake in as part of or in furtherance of the trafficking offense. The defense should not be construed to apply when trafficking merely provided the opportunity or motive for a criminal act.

Second, this Court should hold that when the defense does apply to first-degree intentional homicide, section 939.46(1m) serves only to mitigate the crime to second-degree intentional homicide—the same as the general coercion defense in Wis. Stat. § 939.46(1).

ISSUES PRESENTED

1. Does section 939.46(1m) provide a trafficking victim with a complete defense from all crimes committed related to being trafficked?

Answered by the circuit court: No. The defense applies only to violations of the trafficking law committed by a trafficking victim.

Answered by the court of appeals: The defense provides a complete defense for any crime committed as a

“direct result” of trafficking, which requires the fact-finder to apply a non-exhaustive list of causal factors.

This Court should answer: “Direct result” requires that an underlying trafficking offense is the actual and proximate cause of the crime in question with no intervening factors, which means that the crime must have been committed as part of or in furtherance of the underlying trafficking enterprise.

2. In cases of first-degree intentional homicide, does section 939.46(1m) provide a complete defense, or is the defense 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.

Answered by the circuit court: No. The defense applies only to violations of the trafficking law.

Answered by the court of appeals: The defense provides a complete defense in cases of first-degree intentional homicide.

This Court should answer: Because the list of “privilege” defenses in section 939.45(1) refers generally to the coercion defenses statute—“section 939.46”—in cases of first-degree intentional homicide, the trafficking defense only mitigates the charge to second-degree intentional homicide pursuant to section 940.01(2).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the Court accepted review, both oral argument and publication are warranted.

STATEMENT OF THE CASE

As alleged in the criminal complaint, on June 4, 2018, Kizer travelled from Milwaukee to Kenosha to Volar's home, where she shot him, set fire to his home, and stole his car. (R. 1:3, 5.) Earlier that day, she had pleaded guilty to operating a vehicle and fleeing and eluding an officer—a class I felony—in a separate criminal case. (R. 1:2.)¹

Before travelling to Kenosha, Kizer put a .380 caliber handgun in her bookbag. Kizer informed her boyfriend that she was going to shoot the “white dude” because “she was tired of the dude touching on her.” (R. 1:4.) Kizer, who was 17, later told police that she had previously engaged in sex acts with Volar for money. (R. 60:12–13.)²

Kizer travelled to Kenosha via an Uber ride paid for by Volar. As Kizer later admitted to police, she went to Volar's residence, ordered him to sit in a chair, and shot him in the head. (R. 1:3, 5; *see also* 60:8.)

At Volar's house, in real time, Kizer sent text messages to her friends describing that she was “fixin’ to do it,” was waiting for pizza to be delivered to Volar's house, and that she knew Volar's head was “gonna splatter everywhere.” (R. 71:36.) After shooting Volar, Kizer called her boyfriend, saying, “Oh boy. I did it.” (R. 71:38.) Kizer later 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

¹ *State v. Kizer*, Milwaukee County Circuit Court Case No. 2017CF3948, <https://wcca.wicourts.gov/caseDetail.html?caseNo=2017CF003948&countyNo=40&mode=details>.

² 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.

blocked and she believed that Mr. Volar might jump out at her so she shot him.” (R. 1:6.)

After killing Volar, Kizer set fire to Volar’s house, took his laptop, and drove away in his BMW. (R. 1:6.) The day before the homicide, Kizer had texted a friend, “I’m going to get a BMW.” (R. 71:35.) Before leaving Volar’s house following the shooting 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 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.)

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.)

Circuit court ruling on scope of affirmative defense

Kizer asked the circuit court for a ruling as to the scope of her affirmative defense. (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.) Kizer further argued that the statutory language—“direct result”—meant 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. 30:7.)

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.) The State also argued that, due to the provision’s 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 created a defense subject to the restrictions in section 939.46(1). (R. 31:3.) That would mean that a successful defense to a first-degree intentional homicide would merely reduce the charge to second-degree intentional homicide. (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), 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 violations of the trafficking law. *Kizer*, 398 Wis. 2d 697, ¶ 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. *Kizer*, 398 Wis. 2d 697, ¶ 7 n.3. Finally, both parties agreed that the record was not sufficiently developed for the court of appeals to make an evidentiary determination as to whether Kizer was entitled to present a defense under section 939.46(1m) to the jury. *Kizer*, 398 Wis. 2d 697, ¶ 7 n.4.

The court of appeals 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. *Kizer*, 398 Wis. 2d 697, ¶ 4.

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 concluded that the phrase included concepts of 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.

Finally, 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. *Kizer*, 398 Wis. 2d 697, ¶¶ 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. *Kizer*, 398 Wis. 2d 697, ¶ 23. In so ruling, the court 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.” *Kizer*, 398 Wis. 2d 697, ¶ 23 n.6.

The State petitioned for review, asking this Court to clarify the scope of “direct result” and to rule that the defense under section 939.46(1m) is subject to the mitigation provision in 939.45(1). This Court granted review.

STANDARD OF REVIEW

The scope of a statutory affirmative defense presents an issue of law reviewed de novo on appeal. *State v. Leitner*, 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.

RELEVANT STATUTES

This case involves the interpretation and application of the affirmative defense set forth in section 939.46(1m), which is included under the list of coercion defenses identified in section 939.46. This case also involves application of sections 940.01(2) and 939.45(1) relating to privilege and defenses that mitigate first-degree intentional homicide to second-degree intentional homicide.

Section 939.46, titled “Coercion,” recognizes three types of coercion defenses and rejects a fourth type.

First, section 939.46(1m), the provision directly at issue here, sets forth a trafficking coercion defense. It states that a victim of human trafficking or child sex trafficking “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.” Wis. Stat. § 939.46(1m). Second, 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.” 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. 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.”

The other two statutes relevant 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 a privilege under s. 939.45(1).” Wis. Stat. § 940.01(2)(d).

And 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).

ARGUMENT

I. The trafficking defense under section 939.46(1m) immunizes trafficking victims only from crimes committed as part of or in furtherance of the underlying trafficking offense.

Under section 939.46(1m), the phrase “any offense committed as a direct result of the violation of [the trafficking laws]” means that the proximate and actual cause of the crime in question was the underlying trafficking offense, with no intervening factors. The focus of the defense is to relieve trafficking victims from liability for conduct they engage in as part of or in furtherance of the trafficking offense. The defense should not be construed so as to apply when trafficking merely provided the opportunity or motive for the criminal act.

A. The plain meaning of “direct result” contemplates the absence of intervening and superseding factors and an act undertaken as part of being trafficked.

Section 939.46(1m) provides that a victim of human trafficking or child sex trafficking “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.” The statute does not define the phrase “direct result.”

When a statutory phrase is not defined, its language “shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.” Wis. Stat. § 990.01(1). The State is not aware of any other criminal offense statutes that utilize the phrase “direct result.”³

“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.

1. “Direct result” means the primary, proximate, immediate cause, marked by the absence of intervening agency.

A “direct result” is the consequence of an action without any intervening circumstances, or without compromising or mitigating elements.

³ Wisconsin Stat. § 949.06, pertaining to restitution awards to crime victims, uses the phrase also without definition.

“Direct”—as related to causation—generally means “marked by absence of an intervening agency, instrumentality, or influence” or “stemming immediately from a source.”⁴ “When used as an adjective, the relevant meaning of ‘direct’ is ‘without intervening persons, conditions, or agencies; immediate: [as in] direct sunlight [or] direct answer’ or ‘lacking compromising or mitigating elements.’” *Rock v. Commonwealth*, 610 S.E.2d 314, 319 (Va. Ct. App. 2005) (emphasis added) (quoting *American Heritage Dictionary* 400 (Houghton Mifflin, 2nd ed. 1991)). “A ‘result’ is “[t]he consequence of a particular action, operation, or course; [an] outcome.” *Id.* (citing *American Heritage Dictionary* at 1054). In non-legal parlance, the phrase “direct result” means “a consequence flowing definitely, immediately, and largely automatically.” *Id.* That is, “direct” as an adjective means “without anyone or anything else being involved or between.”⁵ *Cf. State v. Serebin*, 119 Wis. 2d 837, 849, 350 N.W.2d 65 (1984) (discussing definition of “substantial factor” as involving the “proximate, primary, efficient, or legal cause” of the specified conduct) (citation omitted). Thus, when the two terms are put together “direct result” means “the consequence of an action *without any intervening circumstances*, or without compromising or mitigating elements.” *Rock*, 610 S.E.2d at 319 (emphasis added).

Here, the court of appeals examined both dictionary definitions of “direct result” and the use of that phrase or similar terms in case law generally and concluded that the phrase contemplated both actual and proximate cause and immediacy relating to trafficking and was similar in meaning

⁴ *Direct*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/direct> (last visited Nov. 4, 2021) (emphasis added).

⁵ “Direct,” *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/direct> (last visited Nov. 4, 2021).

to the phrase “direct consequence.” *Kizer*, 398 Wis. 2d 697, ¶¶ 5–15. Specifically, the court of appeals looked to the definition of “direct” in *Whirlpool Corp. v. Ziebert*, 197 Wis. 2d 144, 153-154, 539 N.W.2d 883 (1995) and *Black’s Law Dictionary* (6th ed. 1990) as “immediate; proximate; by the shortest course; without circuitry; operating by an immediate connection or relation.” *Kizer*, 398 Wis. 2d 697 ¶ 13 (citations omitted). It also looked to the definition of “direct consequence” at issue in *State v. Parker*, 2001 WI App 111, ¶ 8, 244 Wis. 2d 145, 629 N.W.2d 77, which was interpreted to mean “one that definitely, immediately and largely automatically flows from the conviction. If a consequence might or might not occur in a given case, and is the result of a separate decision-making process, it is collateral.” *Kizer* 398 Wis. 2d 697, ¶ 14 (citation omitted).

The error in the court of appeals’ decision is that the existence of superseding or intervening causes or agency are not simply factors among a list that the fact-finder should consider. Under the definition of “direct result,” they are conditions prerequisite to the defense. Additionally, defining “direct result” does not end the inquiry because the statute limits the defense to criminal actions that are the direct result of someone else’s specific violation of the trafficking law.

2. The crime must be the “direct result” of the trafficker’s underlying trafficking violation, not the victim’s status.

The court of appeals’ analysis falls short because it fails to recognize that the defense under section 939.46(1m) is based on the trafficker’s conduct, not the defendant’s status as a trafficking victim. That is, the focus of the statute is on *the trafficker’s conduct* in violating the trafficking law—“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.” Wis. Stat. § 939.46(1m). The language of the statute focuses on the underlying act of trafficking by the perpetrator of the trafficking offense—not the status of the defendant as a “victim of trafficking” generally.

In other words, under the plain language of section 939.46(1m), the fact that trafficking provided the victim the opportunity to commit a crime or framed the context of the crime is not sufficient. The criminal act must be a direct result of *the trafficker’s conduct*. One commentator discussing the states’ trafficking laws and defenses has characterized Wisconsin’s statute as requiring a “strict nexus” to the trafficking crime. Meghan Hilborn, *How Oklahoma’s Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 Tulsa L. Rev. 457, 476–77 (2019).

While the statute includes “any offense,” that language is qualified and limited to “any offense committed as a direct result of the violation of section 940.302(2) [human trafficking] or 948.051 [child sex trafficking] without regard to whether anyone was prosecuted or convicted.” Wis. Stat. § 939.46(1m). The statute does not say: “any offense committed while the victim is being trafficked”; or “any offense committed by a trafficking victim relating to trafficking” or “any offense caused by being a trafficking victim.” The plain language limits “any offense” to those committed as a “direct result” of someone else’s violation of the trafficking law—i.e., those acts committed as part of or in furtherance of the trafficking offense.

And finally, the statutory text does not say “as a direct result of any act of” trafficking. Rather, it says, “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.” Wis. Stat. § 939.46(1m). The choice of “the violation” further buttresses the conclusion that the criminal act for

which immunity is sought must be part of the underlying criminal act committed by the trafficker—not trafficking generally.

Wisconsin's defense strikes a balance between possible defenses for trafficking victims. Some states' trafficking defense laws provide protection to anyone who commits an offense while "being a victim" of human trafficking.⁶ The broadest of these is Oklahoma, which simply requires a defendant to show "that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking." Okla. Stat. Ann. tit. 21, § 748 (2021). At the other end of the spectrum, some states limit their trafficking defense to only acts of prostitution by a trafficked person.⁷

Wisconsin's defense falls between those two extremes. It is not limited to acts of prostitution. But it is also not a defense based solely on a defendant's status as a trafficking victim. Rather, the defense is carefully circumscribed and applies only to those crimes a trafficked person commits that are the direct consequence of the trafficker's underlying trafficking offense—that is, crimes committed as part of or in furtherance of the underlying trafficking violation.

⁶ See, e.g., Colo. Rev. Stat. Ann. § 18-7-201.3 (2021) ("a direct result of being a victim of human trafficking"); Del. Code Ann. tit. 11, § 787 (2021–22) ("a direct result of being a victim of human trafficking"); Ga. Code Ann. § 17-10-21 (2021) ("a direct result of being the victim of an offense of trafficking").

⁷ See, e.g. Ala. Code § 13A-6-159 (2021) (limiting defense to cases of prostitution or explicit performance).

B. By placing the defense under the title “coercion,” the Legislature intended to focus on crimes committed as part of the coercive trafficking violation.

That the trafficking defense focuses on crimes that occur as a direct result of the trafficker’s conduct is further evident by where the defense appears: under the umbrella of “Coercion” defenses in section 949.46. “[A] statute’s ‘title and headings are permissible indicators of meaning.’” *State v. Lopez*, 2019 WI 101, ¶ 26, 389 Wis. 2d 156, 936 N.W.2d 125 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012)). “When the legislature adopts non-statutory language in titles, that language has meaning and reflects a decision of the legislature.” *Id.* ¶ 27.

The trafficking defense does not use the word “coercion” in the subsection. But the Legislature placed the defense in section 949.46, which gathers coercion defenses. Therefore, the defense must be interpreted through the lens of coercive actions—i.e. actions taken by the trafficker.

The traditional coercion defense is focused on “[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” and “which causes him or her so to act.” Wis. Stat. § 939.46. Case law interpreting that defense has held that it “is limited to the ‘most severe form of inducement.’” *State v. Keeran*, 2004 WI App 4, ¶ 5, 268 Wis. 2d 761, 674 N.W.2d 570 (citation omitted). It applies in situations where a reasonable person would conclude that committing the criminal act was the only means of avoiding death or great bodily harm—i.e. where there is “no possible escape.” *Id.* (citation omitted).

The language and placement of the trafficking coercion defense reveals that the Legislature wanted to create a broader defense that was not limited by this “no possible

escape” language but was nonetheless cabined by the inherently coercive nature of trafficking. Indeed, the offense of trafficking is defined with reference to a list of specific coercive acts. 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.⁸ While section 948.051, prohibiting child trafficking, does not expressly incorporate these elements of coercion, it is reasonable to assume that the Legislature saw

⁸ 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)(a)2.

child trafficking as 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:

Trafficked individuals are compelled to work in the commercial sex industry and service and labor sectors by traffickers who gain financially from the victims' exploitation. It is a criminal enterprise carried out in urban and rural communities. It is not always easy to detect because traffickers are skilled at manipulating their victims through false promises, threats, coercion and violence. Trafficked individuals may fear law enforcement and resist disclosing their victimization for many reasons. Due to the manipulation of traffickers, many victims often do not identify themselves as victims.

Wis. Dep't of Justice, *Human Trafficking: A Guide for Criminal Justice Professionals* 1 (last updated Nov. 2020) (emphasis omitted).⁹

While it is clear that the Legislature did not intend to hold trafficking victims to the same rigorous standards as section 939.46(1), by placing the trafficking defense under the statutory title "coercion," it is evident that the defense is focused on situations part and parcel of the trafficking enterprise.

* * * * *

The statutory language, structure, placement, and related statutes reveal three critical points about section 939.46(1m):

- The ordinary definition of "direct result" means primary, proximate, immediate, automatic, and marked by the absence of intervening agency.

⁹ <https://www.doj.state.wi.us/sites/default/files/ocvs/human%20trafficking/DOJ%20HT%20Guide%20for%20Criminal%20Justice%20Professionals%20Nov%202020.pdf>.

- The plain language of the statute requires a link to the trafficker's *conduct*, not merely the victim's *status*.
- By placing the defense under the statutory title "coercion," the Legislature evinced an intent that the defense applies to crimes committed as part of the underlying trafficking violation.

Accordingly, the defense will apply to first-degree intentional homicide only in rarest of cases—where the criminal act occurs as part of the trafficking crime. In cases of crimes that are not committed as part of or in furtherance of the trafficking enterprise, trafficking victims must satisfy one of the traditional statutory defenses of coercion, provocation, necessity, prevention of a felony, or self-defense.¹⁰

II. Section 939.46(1m) is subject to the mitigation limitation set forth in section 939.45(1) in cases of first-degree intentional homicide.

Further, this Court should reverse that portion of the court of appeals' decision in which it concluded that the trafficking defense under section 939.46(1m) operates as a complete defense to a charge of first-degree intentional homicide. Instead, this Court should hold that when the defense does apply to first-degree intentional homicide, the defense serves only to mitigate the crime to second-degree

¹⁰ This is a narrower position than that asserted in the State's petition for review. See Pet. For Rev. 8 (suggesting the defense would not apply at all in cases of first-degree intentional homicide not otherwise covered by existing privileges); *but see* R. 31:3–4 (arguing at the trial court that the defense is limited to "crimes that are inherently linked to human trafficking, such as prostitution") and State Ct. of App. Br. 28–29 (arguing the underlying trafficking offense must be the immediate cause of the criminal act with no intervening factors and that simply providing the opportunity to commit a crime is not sufficient).

intentional homicide, the same as the general coercion defense in section 939.46(1).

- A. The trafficking coercion defense is one of the “privileges” under section 939.45(1) that can be used as a defense in cases of first-degree intentional homicide, but it is subject to the mitigation limitation in section 940.01(2)(d).**

Two other statutory provisions—sections 940.01(2)(d) and 939.45(1)—provide context from which to understand the restrictions on the trafficking coercion defense in section 939.46(1m). They counsel that the defense is one of mitigation, not a complete defense.

As discussed above, 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. Subsection (1m) contains the trafficking coercion defense. The other two subsections provide context but are not directly applicable here.

Section 939.45 provides that “[t]he defense of privilege can be claimed . . . [w]hen the actor’s conduct occurs under circumstances of coercion or necessity so as to be privileged under any subsection of section 939.46 or 939.47.” Wis. Stat. § 939.45(1). It does not restrict itself to the traditional defense of coercion under section 939.46(1).

And in turn, section 940.01(2)(d) expressly states that in cases of first-degree intentional homicide, the privilege of coercion under section 939.45(1) “mitigate[s] the offense to 2nd-degree intentional homicide.” Importantly, section 940.01(2)(d) speaks of coercion broadly without citation to the coercion statute or any of its specific subsections. This section’s only statutory citation is to section 939.45(1), which again refers to section 939.46 generally. Finally, the statute governing second-degree intentional homicide refers back to

instances in which a privilege is exercised under section 939.45(1), stating that in cases of first-degree intentional homicide, such privileges will mitigate the offense to second-degree intentional homicide if not disproven by the State. Wis. Stat. § 940.05(1).

While section 939.46(1m) did not exist at the time section 939.45(1) was enacted, 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). This Court should 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 should presume that 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). The court of appeals’ decision ignores this doctrine and instead seems to suggest that statutory references are only valid as to the initial statutory configuration. *Kizer*, 398 Wis. 2d 697, ¶¶ 20–21.

B. The absence of express mitigation language in section 939.46(1m) is not determinative because self-defense and defense of others does not contain express mitigation language.

In rejecting the State’s mitigation argument, the court of appeals relied heavily on the fact that the defenses of adequate provocation, coercion, and necessity—contained in Wis. Stat. §§ 939.44, 939.46(1), and 939.47 respectively—contain express language stating the defense operates to mitigate a charge of first-degree intentional homicide to second-degree intentional homicide, while the trafficking coercion statute does not. *Kizer*, 398 Wis. 2d 697, ¶¶ 16–18.

That absence is not determinative because other statutory defenses that are subject to mitigation similarly do not contain express mitigation language.

Most notably, the statute setting forth the defense of self-defense and defense of others contains no mention of mitigation. *See* Wis. Stat. § 939.48(1). Instead, mitigation in cases of self-defense/defense of others is accomplished in the same “mitigating circumstances” paragraph of the statute governing first-degree intentional homicide—Wis. Stat. § 940.01(2). Along with “[c]oercion,” section 940.01(2) lists “[u]nnecessary defensive force” as a defense that mitigates first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b), (d).

Thus, the mitigation limitation for trafficking coercion is accomplished in the same manner as it is for imperfect self-defense. Both are established through section 940.01(2), which says that the exercise of either privilege operates to mitigate first-degree intentional homicide charge to second-degree intentional homicide under section 940.05. And section 940.05 (governing second-degree intentional homicide) reiterates this mitigating effect by referring back to section 940.01(2). Wis. Stat. § 940.05(1)(a).

While it is true that other defenses (*e.g.* sections 939.44(2), 939.46(1), and 939.47) include express mitigation clauses in the defense itself, that isn’t required. It is not required because mitigation is already accomplished by the statutory cross-references listed above.

C. Only one defense completely immunizes individuals who commit first-degree intentional homicide: perfect self-defense.

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 and where the use of force is proportional to the threat posed. 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). 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). In short, every statutory defense to first-degree intentional homicide is tightly circumscribed, and in all cases other than perfect self-defense, these defense serve only to mitigate the charge to second-degree intentional homicide.

The court of appeals concluded that when enacting section 939.46(1m), the Legislature created a new and complete defense to first-degree intentional homicide for trafficked persons, a defense that was completely untethered to existing statutory notions of reasonable use of force, necessity, or mitigation. This seems particularly unlikely given, as the court of appeals recognized, that the Legislature likely did not even contemplate section 939.46(1m) would apply to a charge of first-degree intentional homicide given its intended “sufficiently tight meaning of ‘direct result.’” *Kizer*, 398 Wis. 2d 697, ¶ 23 n.6.

The State’s reading of the statute is consistent with its plain language, structure, context of surrounding statutes, and does not create an unreasonable result. In contrast, the court of appeals’ decision reads section 939.46(1m) in isolation of its greater framework, ignores the overall structure of defenses to first-degree intentional homicide, and creates a result that the Legislature may well not have contemplated.

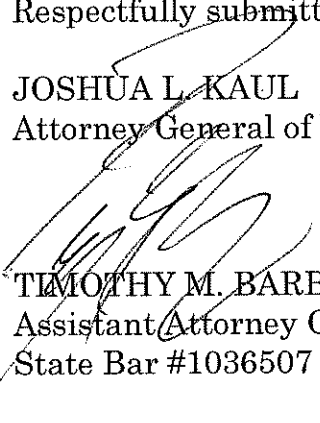
CONCLUSION

This court should reverse the decision of the court of appeals. It should conclude that the defense under section 939.46(1m) applies to criminal offenses that are the immediate and proximate result of the underlying trafficking offense, with no intervening factors—i.e., offenses that occur as part of or in furtherance of the underlying trafficking violation. This Court should also hold that, in cases of first-degree homicide, the trafficking defense only mitigates the charge to second-degree intentional homicide.

Dated this 4th day of November 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,291 words.

Dated this 4th day of November 2021.



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**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §(RULE) 809.19(12) (2019-20)**

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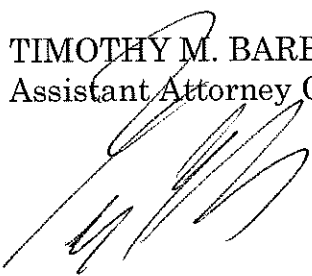
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §(Rule) 809.19(12) (2019-20).

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 4th day of November 2021.



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