STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP000192-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

On Review of a Decision of the Court of Appeals,
District II, Reversing a Non-Final Order Entered in
the Kenosha County Circuit Court,
the Honorable David Wilk Presiding

RESPONSE BRIEF OF DEFENDANT-APPELLANT

KATIE R. YORK
Assistant State Public Defender
State Bar No. 1066231
yorkk@opd.wi.gov

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028
marionc@opd.wi.gov

Post Office Box 7862
Madison, WI 53707-7862
(608)266-3440

Attorneys for Defendant-Appellant

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POSITION ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

INTRODUCTION

Each year millions of people worldwide are victims of human trafficking.[1] Human trafficking can happen in any community, including where people least expect it. Traffickers use violence, intimidation, manipulation, false promises, or even romantic relationships to lure victims into trafficking situations. They seek victims who are vulnerable for various reasons including age, psychological or emotional susceptibility, economic hardship, or lack of social safety net. Human trafficking is a hidden crime. Victims may be afraid to ask for help. They often do not see themselves as victims due to fear and manipulation by traffickers. They may become involved in criminal activity, which makes them further unlikely to go to the authorities. The physical, psychological, and emotional effects of trafficking on victims can be severe and long-lasting. Wisconsin DOJ, Human Trafficking: A Guide for Criminal Justice Professionals, 11 (2011).

[1] What is Human Trafficking?, Department of Homeland Security, *available at* https://www.dhs.gov/blue-campaign/what-human-trafficking (last visited, 11/24/21).

Wisconsin has taken a strong stand against human trafficking. In 2007 Wisconsin Act 216, the Legislature passed a package of laws targeting traffickers and affording rights and protections to survivors. The Act created Wis. Stat. § 940.302, criminalizing human trafficking, and Wis. Stat. § 948.051, criminalizing child sex trafficking. It also created civil causes of actions for victims, Wis. Stat. §§ 940.302(3) and 948.051(2), and protections for victims as they navigate the legal process *See* Wis. Stat. § 250.04(14)(a) (emergency assistance to victims); Wis. Stat. § 970.03(4)(a) (limiting public hearings to protect victims from emotional trauma); and Wis. Stat. § 973.20(4m) (providing restitution for psychological services for victims).

Act 216 created the affirmative defense at issue in this appeal, Wis. Stat. § 939.46(1m). The language is clear and unambiguous. "A victim of a violation of s. 940.302 (2) or 948.051 has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051."

As the court of appeals correctly held, the affirmative defense applies to "any" offense that is a "direct result" of a trafficking violation, and applies to any offense in the same manner, as a complete defense. *State v. Kizer*, 2021 WI App 46, 398 Wis. 2d 697, 963 N.W.2d 136. This Court should affirm the court of appeals' reversal of the circuit court's pretrial ruling, and remand for further proceedings to

determine whether Ms. Kizer should be permitted to present the defense to a jury.

ISSUES PRESENTED

1. Whether the circuit court erred by holding that Wis. Stat. § 939.46(1m) only affords an affirmative defense to victims charged with violations of a human trafficking law.

   The circuit court ruled that the defense only applies in cases where the victim herself is charged with a trafficking violation.

   The court of appeals reversed, and held that: the affirmative defense applies in cases where the victim is charged with "any offense" if its elements are met. In reversing the circuit court, the court of appeals provided guidance as to the meaning of "direct result."

   Ms. Kizer asks this Court to affirm the court of appeals.

2. Whether Wis. Stat. § 939.46(1m) applies in the same manner to "any offense committed as a direct result of" a trafficking violation, without differential treatment for the crime of first-degree intentional homicide.

   The circuit court held that the defense only applies in cases where the victim herself is charged with a trafficking violation.

> The court of appeals reversed, and held that the affirmative defense provides a complete defense to "any offense." It does not contain an exception for first-degree intentional homicide.
>
> Ms. Kizer asks this Court to affirm the court of appeals.

SUPPLEMENTAL STATEMENT OF THE CASE

This case is pretrial, and therefore, the facts have not yet been determined. In its Statement of the Case, the State relies on assertions made by the parties during pretrial proceedings.[2] Ms. Kizer will do the same in order to provide full context.

In the early morning of June 5, 2018, Kenosha Police were dispatched to a house fire. Inside, they found Randall Volar, deceased. (1:2-3). This was the second time in recent months that Kenosha Police had been in Volar's house to investigate criminal activity. In February 2018, police raided his house on suspicion of child sexual abuse and trafficking crimes. (71:30). Inside the house, they discovered

[2] The only testimony in the record is from the preliminary hearing, where the defense's effort to elicit facts on cross-examination was repeatedly restricted when the court granted the State's objections on relevance grounds. *See* (60: 11) (objection "discovery, not necessary for bindover"); (60:12) ("objection, again irrelevant. It's discovery for prelim"). *See* Wis. Stat. § 970.03(1) (a preliminary hearing is solely a probable cause determination).

evidence that Volar, a 34-year-old man, was paying underage girls for sex, using them to make child pornography, and prostituting them out to other men. Shortly thereafter, Volar's bank called police to advise them that it had frozen his account, which contained $500,000, under suspicion of being involved in human trafficking. (16:3; 68:15). Police arrested Volar and collected his DNA. (16:3).

Volar was then released and remained free without bond or charges for three months, until his death. (32:1). On June 4, 2018, Volar paid for an Uber to bring 17-year-old Chrystul Kizer to his house from Milwaukee. (71:20). Further investigation showed that Volar had been paying Ms. Kizer to have sex with him for more than a year, filming some of the acts. (17:1). One video was filmed on May 25, 2017, at which time Ms. Kizer was 16 years old. (30:3-4). Ms. Kizer told police that she was afraid of Volar that night and that he grabbed her and held down her arm; he was trying to have sex with her and she resisted. (16:2; 71:40). She told police that Volar lunged or jumped at her. (60:13). Volar was shot. Ms. Kizer was arrested for the shooting and for trying to cover up the scene with a fire before leaving in Volar's car.

On June 13, 2018, the State filed a criminal complaint charging Ms. Kizer with first-degree intentional homicide, use of a dangerous weapon, operating a motor vehicle without owner's consent, arson, felony bail jumping, and possession of a firearm by a felon. (1:1-2).

On October 25, 2018, counsel for Ms. Kizer filed a motion to compel discovery of any police reports and evidence related to the sex crimes investigation of Volar. (16:1). The State opposed the discovery motion. (17). The State acknowledged the investigation, and that "[t]hroughout that investigation, explicit videos and photos of multiple females were discovered." (17:1). One police report provided "a listing of videos in which the defendant, Ms. Kizer, appeared to be depicted." (17:1). Volar had been spending a large amount of money on hotel rooms. (R.32:1). However, the State argued that the defense had not shown materiality. (17:2; 4-5).[3] The court conducted an in-camera review of the "several hundred pages of records" and numerous DVDs and electronic devices. (64:4; 65:3-4; 66:2).[4] The court ultimately ordered the State to make the evidence available to the defense. (65:3-4; 66:2; 20; 28).

At a hearing held on September 6, 2019, counsel for Ms. Kizer advised the court of her intent to present the affirmative defense provided under s. 939.46(1m). (68:3-4). Counsel explained that the State had turned over in discovery a "multitude" of videos documenting Volar's sexual interactions with girls as well as comments indicative of sex

[3] The State specifically objected to disclosing an arrest report of another one of Volar's victims, because she was a juvenile. (17:2). The State explained that "In this particular matter, there are multiple child victims ..." (17:3).

[4] There were some logistical issues because the police would not allow the court to possess the child pornography. (64:8).

trafficking. In one video, he told a girl that "he would post ads for her on a number of different Websites to get business for her," and made other comments showing "that he was essentially training her to be a prostitute and giving her advice on what she could do to keep different body parts of hers in working order to be a better prostitute in the future." (68:15).

Counsel argued that this evidence was a "tie in to the affirmative defense. . . the victimization and abuse that Mr. Volar inflicted upon Ms. Kizer and numerous other people, whose videos I was able to observe, and the trauma and control that occurred here." (68:15-16).

The court requested briefing from the parties on the applicability of the s. 939.46(1m) affirmative defense. Ms. Kizer's brief, filed on October 14, 2019, argued that the defense potentially applied to "any offense," without limitation. It further argued that it provided a complete defense to any offense, including first-degree intentional homicide. (30:3, 10). The brief explained how the facts of the case supported the defense. Volar "knowingly recruited, enticed, transported, patronized and solicited Ms. Kizer for commercial sex acts," and "at all times that Mr. Volar trafficked Ms. Kizer, she was a child under § 948.01 because she did not turn 18 until after Mr. Volar's death." The crimes started "as early as May 25, 2017, when she was only 16 years old. However, Mr. Volar appears to have begun trafficking Ms. Kizer even earlier because on the May 25th video Mr. Volar references 4 prior occasions of sexual contact with

Ms. Kizer." As such, "[t]he videos and other relevant evidence, establish that Mr. Volar was engaged in human, and child, trafficking, and that Ms. Kizer was a victim of this trafficking on June 4/5, 2018." (30:3-4).

On October 14, 2019, the State filed a response brief. The State argued that, "the statute appears to limit its use to crimes that are inherently linked to human trafficking, such as prostitution." (31:3). It further argued that, the defense was not a complete defense to the specific charge of first-degree intentional homicide. (31:1-5). Instead, the State's position was that it mitigated the offense to second-degree intentional homicide. (31:3).

The circuit court, the Honorable David Wilk presiding, conducted a hearing on the motion on November 15, 2019. At the hearing, the State conceded that Ms. Kizer was a victim of Volar's sex trafficking. (69:19) ("it is apparent that there have been other incidences of what would be trafficking under the statute . . . by the victim with this defendant. . ."). The State explained that Volar was captured on video "talking about paying [Ms. Kizer] and a price he pays." (71:22). The State further conceded that Volar was part of the "sex trafficking world." (71:22). Counsel for Ms. Kizer clarified that she was not arguing that she was "immune from prosecution." (R.69:2). Instead, counsel agreed that Ms. Kizer was required to present some evidence that the charged crimes were a direct result of Volar's trafficking crimes. (69:8).

The circuit court issued an oral ruling on December 9, 2019. (70:2-6). On January 23, 2020, the court entered a written order summarizing its oral ruling:

> The plain language of §939.46 is ambiguous. The defense of coercion under §939.46(1) is available to the defendant if factually supported. The affirmative defense under §939.46(lm) is available to the defendant so long as the defendant is charged with one of the acts in §940.302(2) each of which is a Class D felony, and that the cause of the offenses listed in 940.302(2) was the victimization, by others, of the alleged perpetrator in this matter.

(38:1-2).

Ms. Kizer filed a petition for leave to appeal this nonfinal order, which the State did not oppose. *See* Wis. Stat. § 808.03(2). By order dated March 2, 2020, the court of appeals granted Ms. Kizer's petition.

On appeal, the State agreed with several of Ms. Kizer's positions. It agreed that: (1) the defense was available to "any offense," not just trafficking violations under s. 940.302(2); (2) the meaning of direct result was not "sole cause," as the circuit court had held; (3) procedurally, the defense was subject to the "some evidence" burden-shifting analysis used in self-defense cases; and (4) because the evidence had not yet been introduced, the appellate court should not determine whether there was sufficient evidence to present the defense; instead, that determination

should be made in the circuit court on remand. (Court of Appeals Respondent's Brief, 10, 21).

The two primary disputed issues therefore were: (1) the meaning of direct result, and (2) whether, if successful, the affirmative defense would present a complete defense to first-degree intentional homicide or, instead, would merely mitigate the charge to second-degree intentional homicide. By decision and order dated June 2, 2021, the court of appeals reversed the circuit court and remanded for further proceedings consistent with its decision. First, the court of appeals agreed with the parties that the circuit court's ruling that the defense was "only available to Kizer if she is charged with one of the acts in WIS. STAT. § 940.302(2)" was incorrect. *Kizer*, 398 Wis. 2d 697, ¶4.

Next, the court of appeals considered the meaning of "direct result." The court consulted several sources of meaning, including dictionary definitions and relevant case law. *Id.*, ¶¶6-13. From these sources of meaning, the court of appeals concluded:

> In determining whether a jury should be instructed on whether the commission of a particular offense by a trafficking victim is a "direct result" of "the violation of [WIS. STAT. §§] 940.302(2) or 948.051," a court should consider whether there is "some evidence" to support such a finding based on whether the victim's offense arises relatively immediately from the trafficking violation of which the victim is a victim, 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. . . . This is not intended as an exhaustive list of factors for a court to consider in making such a determination; rather, it is merely intended to provide some guidance.

Id., ¶15.

The court of appeals then considered the defense's application to first-degree intentional homicide, and agreed with Ms. Kizer that "the WIS. STAT. § 939.46(1m) affirmative defense would, if successful, . . . operate as a complete defense." *Id.*, ¶5. In reaching this holding, the court of appeals compared the operative language of the defense to other related statutory provisions, including the defenses of adequate provocation, privilege, coercion, and necessity. These provisions contained mitigating language that was absent from the trafficking defense, *e.g.* Wis. Stat. § 939.47 "Necessity" ("except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.").

The court of appeals considered at length and rejected the State's argument that consideration of Wis. Stat. § 940.01(2) "Mitigating Circumstances," warranted a different result. *Id.*, ¶¶ 19-21. While that provision applies to the s. 939.46(1) defense of

coercion, it does not apply to the s. 939.46(1m) affirmative defense for trafficking victims.

> While it is abundantly clear that the mitigation from first-degree intentional homicide to second-degree intentional homicide referred to in § 940.01(2) is applicable to § 939.46(1) (through § 939.45(1)), as both §§ 940.01(2) and 939.46(1) directly address the mitigation of a charge of first-degree intentional homicide to second-degree intentional homicide, it is not at all as clear that the legislature intended mitigation only to second-degree intentional homicide where the affirmative defense of § 939.46(1m) applies, especially since that provision itself says absolutely nothing to suggest such a limitation on the mitigation.

Id., ¶21.

The court of appeals reiterated that, "[t]he legislature could have easily written the same language into subsec. (1m) that it wrote into subsec. (1)—*"except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide*"—but it chose not to do so. Section 939.46(1m)." *Id.*, ¶22 (emphasis in original).

Finally, the court of appeals agreed with both parties on two procedural points. It held that because "the record as it relates to this defense is so limited, we do not here decide whether Kizer is entitled to utilize this defense at her trial," and remanded to the circuit court for further proceedings. *Id.*, ¶7. The

court of appeals agreed with both parties that the defense would be subject to the burden-shifting procedure applicable to self-defense. *Id.*,¶7, n.3.[5]

On July 2, 2021, the State filed a petition for review. It requested review on a single issue: "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?" (Petition for Review, 2). The State did not request review of the court of appeals interpretation of "direct result." On July 16, 2021, Ms. Kizer filed a response to the petition for review, addressing the sole issue raised in the petition for review. By order dated September 14, 2021, this Court granted review and specified, "the plaintiff-respondent-petitioner may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court." On appeal, in addition to the claim raised in its petition for review, the State argues that the court of appeals erroneously interpreted the phrase "direct result."

[5] Ms. Kizer will be permitted to set forth "some evidence" of the elements of the defense. If she meets that standard, the burden will "switch to the State to prove beyond a reasonable doubt that she either was not a trafficking victim or the commission of that particular offense was not a direct result of the violation of §§ 940.302(2) or 948.051. *See Moes v. State*, 91 Wis. 2d 756, 765-66, 284 N.W.2d 66 (1979)."

SUMMARY OF ARGUMENT

Throughout this appeal, the parties have agreed on a number of issues. *Supra* p. 18-19. However, two points of disagreement still exist. First, the State disagrees with the court of appeals' interpretation of "a direct result" used in s. 939.46(1m).[6] Second, the State disagrees with the court of appeals' conclusion that the affirmative defense, if successful, provides a complete defense to the charge of first-degree intentional homicide. Instead, it argues the defense merely mitigates the charge to second-degree intentional homicide, despite the absence of mitigation language within s. 939.46(1m).

Both of the State's arguments are attempts to rewrite the plain language of the statute. Section 939.46(1m), is simple and clear. It provides an affirmative defense to individuals, like Ms. Kizer, who can show they are victims of human trafficking violations and that the charges brought against them were a direct result of those violations. Whether the offense is "a direct result" of the trafficking victimization is a fact-intensive inquiry that relies on

[6] Although Ms. Kizer addresses the merits of that issue in the event this Court decides to address it, that issue should be considered forfeited as it was not raised in the petition for review. *Preisler v. General Cas. Ins. Co.*, 2014 WI 135, ¶3, 360 Wis. 2d 129, 857 N.W.2d 136 ("[w]e decline to consider issues not raised in petitions for review") (cited source omitted).

the common, ordinary, and accepted meaning of "direct result." The State unnecessarily complicates the affirmative defense with legal concepts that are not determined by juries – proximate cause – or are unworkable given the complex nature of trafficking victimization – absence of intervening agency. The State provides no guidance for how its proposed defense would operate in the circuit court. It also seeks to replace "a direct result" with "as part of or in furtherance of" the underlying trafficking violation or enterprise. These terms are *not* synonymous and the latter is *not* a limitation included in the plain language of s. 939.46(1m).

In addition, based upon the plain language of s. 939.46(1m), the defense applies to "*any* offense" that is the "direct result" of trafficking violations, without limitation, and in the same manner—as a complete defense. The offense of first-degree intentional homicide is no exception. This conclusion is supported by the inclusion or absence of mitigating language in other affirmative defense statutes. The defenses of coercion, necessity, and adequate provocation all include express mitigation language in the body of the defense. *See* Wis. Stat. §§ 939.46(1), 939.47, 939.44(2). On the other hand, perfect self-defense, like the affirmative defense at issue here, does not include express mitigation language, and as a result, provides a complete defense. Wis. Stat. § 939.48(1). The state's effort to avoid this straight-forward result, relies on a tenuous link from the mitigation section of the first-degree intentional homicide statute, Wis. Stat. § 940.01(2), through the

privilege statute, Wis. Stat. § 939.45(1), and ends by ignoring the long-accepted meaning of "coercion," in statute and common law. As will be shown, the State's argument fails.

Finally, the State speculates that the plain language of s. 939.46(1m), may not be what the Legislature contemplated. In doing so, it ignores the basic tenets of statutory construction, "we do not inquire what the legislature meant; we ask only what the statute means." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶39, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted).

This Court should affirm the court of appeals' decision and confirm the plain language of s. 939.46(1m).

ARGUMENT

I. Contrary to the circuit court's ruling, section 939.46(1m), provides an affirmative defense to trafficking victims for *any* offense committed as a direct result of a human trafficking violation.

A. Standard of review and principles of statutory construction.

The issues presented in this appeal are issues of statutory construction. Statutory construction is subject to de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156.

The rules of statutory construction are well settled. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Kalal*, 271 Wis. 2d 633, ¶45 (cited source omitted). "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." *Id.* The 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 application of the methodology for statutory interpretation yields a plain, clear statutory meaning, the statute is applied accordingly. *Id.*, ¶46. Where there is no ambiguity, there is no basis to consult extrinsic sources of interpretation, such as legislative history. *Id.* If a statute is ambiguous, the court may look to legislative history to ascertain meaning. *Id.*, ¶50. Yet, legislative history may not be used to contradict plain meaning. *Id.*, ¶51. "A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. . . It is not enough that there is a disagreement about the statutory meaning;" *Id.*, ¶47.

Titles of statutes are not part of the statute and may not be used to contradict plain meaning. Wis. Stat. § 990.001(6); *Wisconsin Valley Imp. Co. v. PSC*, 9 Wis. 2d 606, 618, 101 N.W.2d 798 (1960).

B. The affirmative defense applies to "any offense" that is the "direct result" of the trafficking violation for which the accused was a victim.

The plain language of s. 939.46(1m), is clear and unambiguous. It reads in full:

> (1m) *A victim* of a violation of s. 940.302 (2) [human trafficking] or 948.051 [trafficking a child] 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.

(Emphasis added).

The affirmative defense is available to trafficking victims for any offense that is a direct result of the trafficking violation of which they are a victim. Although the trier of fact will make fact-intensive assessments based upon evidence involving the complicated nature of human trafficking and its effects on victims, the language of the statute itself is not complicated.

1. "Victim" defined.

Initially, the statute indicates to whom the affirmative defense applies: "a victim of a 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 definition

of "victim" includes "a person against whom a crime has been committed." Wis. Stat. § 950.02(4)(a)1.

In Ms. Kizer's case, there are two alleged victims: Ms. Kizer and Volar. Yet the victim for purposes of the affirmative defense is Ms. Kizer. The statute recognizes that trafficking victims can also victimize others, and still be afforded protection under the defense.

Both s. 940.302(2) and 948.051 prohibit various forms of human trafficking, including trafficking a child for commercial sex acts. The discussion in Ms. Kizer's case has focused primarily on child sex trafficking. A person is guilty of child sex trafficking if he or she "knowingly recruits, entices, provides, obtains, harbors, transports, patronizes or solicits or knowingly attempts to recruit, entice, provide, obtain, harbor, transport, patronize, or solicit any child for the purpose of commercial sex acts." Wis. Stat. § 948.051.

A "commercial sex act" includes, but is not limited to, sexual contact or intercourse "for which anything of value is given to, promised, or received, directly or indirectly by any person." Wis. Stat. § 940.302(1)(a)1.-3. A "child" is a person who has not reached age 18. Wis. Stat. § 948.01(1).

The defense also applies to human trafficking as defined under s. 940.302, which involves sex and labor trafficking and enumerates various modes of commission.[7]

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[7] 940.032

(2)(a) Except as provided in s. 948.051, whoever knowingly engages in trafficking is guilty of a Class D felony if all of the following apply:

1. One of the following applies:

a. The trafficking is for the purposes of labor or services.

b. The trafficking is for the purposes of a commercial sex act.

2. The trafficking is done by any of the following:

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.

The defense applies "without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051." Here, the trafficking violations in this case were committed by the deceased against Ms. Kizer. The State never formally brought charges against Volar for his crimes against Ms. Kizer or his other victims. However, this will not bar the defense.[8] In the circuit court, the State conceded that it had videos of Volar having sex with Ms. Kizer, in which he explicitly discusses paying her. (17:1; 71:22). Volar enticed, transported, patronized, and solicited sex from Ms. Kizer starting when she was 16 years old. This is a definition of child trafficking under s. 948.051. Evidence of other trafficking violations against Ms. Kizer may also be introduced on remand. The State at various times has minimized Volar's crimes against Ms. Kizer as not beyond "a person postured as a customer or what we used to call a john." (68:13; State's Petition for Review at 12).

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l. Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.

[8] Had Volar been charged for his crimes, he would have been facing not just one life sentence, but many. His crimes against Ms. Kizer alone include child enticement (s. 948.07, D felony), soliciting a child for prostitution (s. 948.08, D felony), exposing genitals to a child (s. 948.10, I felony), sexual exploitation of a child (s. 948.501, C felony), possession of child pornography (s. 948.12, D felony), and sex trafficking a child, (s. 948.051, C felony)

Regardless of the State's current position, whether Ms. Kizer is a victim such that she can present the defense will be a determination on remand. For purposes of this appeal, the definition is straight-forward.

2. "Any offense" defined.

Next, the statute indicates what the affirmative defense applies to: "*any offense* committed as a direct result of the violation of s. 940.302(2) or 948.051." (Emphasis added). The use of the phrase "any offense"—without providing exceptions or limitations—means that the affirmative defense for trafficking victims potentially applies to any offense charged. "When the legislature does not use words in a restricted manner, the general terms should be interpreted broadly to give effect to the legislature's intent." *State v. Quintana*, 2008 WI 33, ¶32, 308 Wis. 2d 615, 748 N.W.2d 447. The circuit court concluded that the affirmative defense was available solely within prosecutions of human trafficking offenses charged under s. 940.302(2). (38:1). This conclusion can only be reached by adding language to the statute, such as "any offense *under 940.302(2)* committed as a direct result. . . ." Of course, "[i]t is a cardinal 'maxim [ ] of statutory construction ... that courts should not add words to a statute to give it a certain meaning.'" *State v. Hinkle*, 2019 WI 96, ¶24, 389 Wis. 2d 1, 935 N.W.2d 271 (quoted source omitted).

The State has conceded that the circuit court erred in limiting the defense to offenses charged under s. 940.302(2) or 948.051. (State's Brief at 13). The court of appeals agreed with this concession. *Kizer*, 398 Wis. 2d 697, ¶4. There is no limitation on the type of prosecution to which the affirmative defense for human trafficking victims is available. It potentially applies to "any offense." However, this does not mean all victims of human trafficking automatically have an affirmative defense to "any offense" charged by virtue of their status as a victim. There must be a close nexus between the victimization and the offense charged—hence, the "direct result" language. Ms. Kizer can present the defense even though she is charged with offenses other than those enumerated in s. 940.302 and 948.051.

3. "Direct result" defined.

The affirmative defense is available to trafficking victims when charged with any offense that is the "direct result" of their trafficking victimization. The phrase "direct result," is not statutorily defined, but does have ordinary, common, and accepted meaning.[9] In general usage, a "result" is "a consequence, effect, or conclusion."[10] To be

[9] When interpreting a word or phrase in a statute, "it often proves useful to look at dictionary definitions." *Quintana*, 308 Wis. 2d 615, ¶42.

[10] Result, Merriam-Webster Dictionary, *available at,* https://www.merriam-webster.com/dictionary/result (last visited 11/24/21).

"direct" means to be "characterized by [a] close logical, causal, or consequential relationship."[11]

The court of appeals considered these and several other definitions of "direct" and "result," both dictionary definitions and references in case law. It then came up with a reasonable summation of the factors to consider when assessing whether the offense charged is a "direct result" of the trafficking victimization: "whether the victim's offense arises relatively immediately from the trafficking violation of which the victim is a victim, 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." The court of appeals further stated that, "[t]his is not intended as an exhaustive list of factors for a court to consider in making such a determination; rather, it is merely intended to provide some guidance." *Kizer*, 398 Wis. 2d 697, ¶51.[12] The inquiry is necessarily fact-intensive, and as such, the analysis will vary case by case.

A jury will apply the "direct result" element to context-specific facts. Human trafficking is

[11] Direct, Merriam-Webster Dictionary, *available at*, https://www.merriam-webster.com/dictionary/direct (last visited 11/24/21).

[12] The State quoted the aforementioned synopsis in its fact section. (State's Brief, 13). Notably, it omitted the language focusing the affirmative defense on the victim. The trafficking violation "of which the victim is a victim."

characterized by complex dynamics of power and control. Victims of human trafficking may become involved in a number of offenses because of their victimization. DOJ Human Trafficking Guide, 11-12. (traffickers' common methods of control include pressuring the victim into illegal acts, then threatening to expose the wrongdoing if the victim disobeys the trafficker).

The jury will likely consider facts such as the trafficking victim's age and mental capacity, the duration of the abuse, whether violence or force was involved, whether threats of deportation or arrest were utilized, whether the victim was isolated and made to be dependent on the trafficker, and whether the victim was subject to psychological abuse. *See id.* at 10-11 (listing methods of control). Expert testimony may be admissible to assist the factfinder in this determination. *See State v. Hogan*, 2021 WI App 24, ¶34, 397 Wis. 2d 171, 959 N.W.2d 658 (holding admissible a detective's extensive testimony regarding the characteristics of sex trafficking and victim behaviors).[13]

[13] The victim in *Hogan* was guilty herself of trying to lure a new victim. *Id.*, ¶¶3-4. Much of the expert testimony centered on contextualizing Mary's antisocial behaviors and explaining why those behaviors were characteristic of being a trafficking victim. *Id.*, ¶13 (victims are "vulnerable, high-risk individuals"—"runaways, juveniles with adverse behavior."). Moreover, Mary thought of herself as the trafficker's girlfriend, which was another dynamic the expert expounded upon. *Id.*, ¶¶4, 13 (describing "Romeo" pimps who act in a more loving manner).

Here, the evidence will show that Volar, a 34-year-old white man, was trafficking Ms. Kizer, an African-American girl, for sex for more than a year, starting when she was only 16 years old. He benefitted from a power imbalance involving age, gender, and race. The State highlights that Ms. Kizer has a prior conviction.[14] (State's Brief, 10). That fact did not make her less vulnerable. Instead, it gave Volar leverage. He is the one who paid her bond. (71:15). She was indebted to him.

Juries are often tasked with making fact-specific determinations about statutory terms that have ordinary, non-technical meaning. For example, they determine whether conduct is "reasonable," "unreasonable," or "substantial." *See e.g.* Wis. JI-Criminal 924 (Criminal Recklessness § 939.24; Wis. JI-Criminal 1250 (First Degree Reckless Injury § 940.23(1)) (criminal recklessness includes an element that "the risk of death or great bodily harm was unreasonable or substantial"). These concepts are fact specific in nature. "Direct result" is similar.

The jury will be instructed on the language of the statute – here, "direct result" – but could also be given a list of factors to consider, as suggested by the court of appeals.[15] Any factors used to guide the

[14] Ms. Kizer would have been in juvenile court had the offense taken place two months earlier.

[15] It is common for juries to be instructed on a term by reference to factors. *See e.g.* Wis. JI-Criminal 924A. This jury instruction for determining circumstances which show "utter disregard for human life" states, "In determining whether the

determination, however, must preserve the common, ordinary, and accepted meaning of direct result.

C. The State's proposed definitions are unreasonable and contradict the plain language of the statute.

As an initial matter, this Court should find that the State forfeited a challenge to the court of appeals' construction of direct result. The State's petition for review raised a single issue: the application of the defense to the crime of first-degree intentional homicide. However, in the alternative, Ms. Kizer will address the State's many proposed definitions, some of which are made for the first time in this Court.

The State proposes several definitions. A "direct result" is:

- "proximate and actual cause" (State's Brief at 8, 16);
- "[p]rimary, proximate, immediate cause, marked by absence of intervening agency" (*Id.*, at 24);

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circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all the other facts and circumstances relating to the conduct."

- "[t]he absence of intervening and superseding factors" (*Id.*, at 16);
- "consequence of an action without any intervening circumstances or without compromising or mitigating elements" (*Id.*, at 17);
- "[a]n act undertaken as part of being trafficked" (*Id.*, at 16);
- "as part of or in furtherance of the trafficking offense" (*Id.*, at 16, 22);
- "part and parcel of the trafficking enterprise." (*Id.*, at 24).

The State's definitions fit into two basic categories. First, the State proposes a "proximate cause" definition, with a collection of related terms. (State's Brief, 8, 16, 24). Second, the State argues that an offense can only be a direct result of a trafficking violation if it is "part of," "in furtherance of," or "part and parcel of" the underlying "trafficking violation" or "trafficking enterprise." (*Id.*, 9, 16, 22, 24).

1. Direct result does not mean proximate cause.

The State argues that "direct result" means "proximate and actual cause." (State's Brief, 8). It alternatively phrases this as, "the primary, proximate, immediate cause, marked by the absence

of intervening agency." (*Id.*, 24). Sometimes it substitutes the terms "causes," "circumstances," or "factors," in the place of "agency." (*Id.*, 9, 16, 17, 19). Initially, the State seems to agree with the court of appeals' list of factors before arguing "the existence of superseding or intervening causes or agency are not simply factors among a list that the fact-finder should consider … they are conditions prerequisite to the defense." (*Id.*, 19). Yet, the existence of "superseding or intervening causes or agency" was *not* a factor on the court of appeals' list. That list of factors used ordinary words that a jury could understand.

The State's interpretation is contrary to the language of the statute, unworkable, and overly complicated. The plain language of s. 939.46(1m), does not require "prerequisites" to the defense, such as, lack of superseding or intervening causes or agency or factors. (State's Brief, 19). The statute does not use any of those terms.

The State uses tort terms – actual and proximate cause - not relevant to criminal prosecutions. Not only is proximate cause not used in criminal law, Wisconsin has jettisoned proximate cause, in favor of six policy factors, which are evaluated by a judge, not a jury. *Fandrey ex rel. Connell v. American Family Mut. Ins. Co. Eyeglasses*, 2004 WI 62, ¶¶13, 15, 272 Wis. 2d 46, 680 N.W.2d 345.

The State provides no guidance on how to identify or determine superseding or intervening causes, factors, agency, or circumstances sufficient to preclude use of the affirmative defense. Again, it should be remembered that this element, like every element, will ultimately be decided by a jury. The State's proposed definitions suggest that the circumstances surrounding trafficking offenses, and the attendant victimization, are straightforward and that superseding or intervening causes - precluding use of the affirmative defense - would be evident. This ignores the complex dynamics of human trafficking and its effects on victim behavior.

2. Direct result does not mean "part of" or "in furtherance of" human trafficking.

The State's effort to define direct result as "part of or in furtherance of" the trafficking crime is a transparent attempt to add language to the statute.[16] The common, ordinary, and accepted meaning of "direct result" is not "as part of or in furtherance of." Nor is it a "technical or special definitional meaning" of "direct result."

The Legislature could have enacted an affirmative defense solely for trafficking victims who

[16] The State's argument that the charged offense must be in furtherance of the trafficking conduct or enterprise is raised for the first time in this Court. It was not raised in the circuit court, court of appeals, or in the State's petition for review to this Court. It has long been forfeited.

engaged in conduct with their traffickers akin to party-to-a-crime or as a co-defendant, but it did not do so. The State tiptoes up to the circuit court's ruling. Although it does not technically require that Ms. Kizer be charged with a specific violation of a trafficking statute, it asks for nearly the same thing with its "part and parcel" argument. (State's Brief, 24).

In attempting to shoehorn a joint liability concept into the statute, the State directs attention to the parts of the statute that discuss the trafficking violation (as the State refers to it: the "trafficker's conduct") while ignoring the victim. (State's Brief, 19, 20). The State never quotes the full text of s. 939.46(1m), always omitting the word "victim." In a literal sense, the State erases the trafficking victim.

When read in full, the language is clear: a human trafficking victim has an affirmative defense for any offense they commit as a direct result of their trafficking victimization. "[D]irect result of *the* violation" necessarily means "direct result of the trafficking violation for which the accused was a victim."

The State's argument homes in on the phrase "*the* violation" with repeated emphasis on "the." This argument is difficult to follow, especially because it ignores the statute's reference to a *victim* of the trafficking violation. Nonetheless, the State's focus on the second reference to trafficking violations – *the* violation – cannot be read in isolation without the

former reference. When read in full, *the* trafficking violation is *the* trafficking violation for which the accused was *a victim*.

A person's victimization cannot be divorced from the trafficker's conduct. And, it is the victim - because of the trafficking violation - that can argue the affirmative defense applies. Thus, as the statute is written, it is the victimization linked to the offense the victim is charged with – as a direct result – that satisfies the affirmative defense.

Again, the statute could have been written to provide a defense only to trafficking defenses that the victim commits in concert with the trafficker, but it was not written that way. There is good reason for that. The State's proposed modifications would preclude a trafficking victim from using the affirmative defense for actions taken in order to evade or escape her trafficker—for example, taking a wallet to buy a bus pass—because a victim trying to escape is not doing so as "a part of or in furtherance of the trafficking conduct."[17] In addition, a victim who turns to drugs to cope with her abuse is not acting in furtherance of the trafficker's violation.[18]

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[17] A New York court recognized that a juvenile's unlawful possession of a weapon was a direct result of having been a victim of sex trafficking because she feared for her safety. *People v. L.G.*, 972 N.Y.S.2d 418, 437 (Crim. Ct. 2013).

[18] *See, e.g.*, N.D. CENT. CODE § 12.1-41-12 (2021) (North Dakota) (including forgery, theft, and drug distribution "committed as a direct result" of trafficking).

As a final attempt to limit the defense to offenses committed "in furtherance of" human trafficking, the State points to the title of s. 939.46 "Coercion." (State's Brief, 24). It is a far stretch to say that, despite the statute having no language requiring that a victim's offense be "in furtherance of" the trafficking enterprise, the title of "Coercion" somehow compels that interpretation. Regardless, this argument relies on a title of statute to undermine the plain meaning of the statute. The State ignores Wis. Stat. § 990.001(6), which states: "[t]he titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes." Statutory titles, if considered, can only be considered when a statute is ambiguous. *State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994) ("In the face of such plain and unambiguous language we must disregard the title of the statute.") The State does not argue that the statute is ambiguous.

3. The State mischaracterizes Ms. Kizer's position.

The State creates two strawman arguments in an attempt to portray Ms. Kizer's position as unreasonable. First, the State implies that Ms. Kizer believes that she must only prove that she is a victim

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The DOJ Human Trafficking Guide explains that one of the ways a trafficker might control a victim is that he "coerces or exploits a drug addiction and then controls access to drugs." DOJ Trafficking Guide at 13.

of a violation of a trafficking statute to be afforded the defense. In other words—that she must only prove victim status. (State's Brief, 19). The State also asserts that Ms. Kizer claims "immunity" under the statute. (*Id.*, 3, 4). Neither position is correct. Ms. Kizer has been clear from the outset that she is not claiming immunity from prosecution and that she must prove a nexus between her victimization and the charged offenses.[19] (69:2, 3-4). This nexus is substantial. The State will have a full and fair opportunity to prosecute Ms. Kizer and present all of its evidence to attempt to defeat her defense.

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[19] Oklahoma is a State that provides both affirmative defenses and an immunity provision. The adult statute contains an affirmative defense: "*[i]t is an affirmative defense to prosecution for a criminal offense 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(D) (2021). The juvenile statute provides both an immunity provision and an affirmative defense: "a minor *shall not be subject to juvenile delinquency proceedings* for prostitution or other nonviolent misdemeanor offenses committed as a direct result of being a victim of human trafficking. It shall be an *affirmative defense to delinquency or criminal prosecution for any misdemeanor or felony offense that the offense was committed during the time of and as the direct result of the minor being the victim of human trafficking*." Okla. Stat. Ann. Tit. 21, § 748.2(E) (2021) (emphasis added). The first portion provides immunity from prosecution for prostitution or nonviolent misdemeanors if the offense is a direct result of being a victim. The second portion provides an affirmative defense – rather than immunity - for more serious charges and adds a temporal requirement to "direct result," "during the time of and as the direct result of" the victimization.

The words of s. 939.46(1m) are clear and unambiguous. Application of the statute to a given case is fact specific. This Court should decline the State's invitation to alter the words of the statute to create a version of the law that the Legislature could have, but did not, enact.

II. The affirmative defense for trafficking victims provides a complete defense to first-degree intentional homicide.

A. When a statute requires mitigation from first-degree intentional homicide to second-degree intentional homicide, it contains express mitigating language.

The affirmative defense for trafficking victims does not treat certain charged offenses differently than others. Instead, it applies to "any offense," and applies to those offenses in the same manner, indiscriminately. *See Brown Cty. v. A.P.*, 2019 WI App 18, ¶12, 386 Wis. 2d 557, 927 N.W.2d 560 (The common meaning of "any" when used in a statute, is "one, some, or all indiscriminately of whatever quantity.") Nothing within s. 939.46(1m), indicates that first-degree intentional homicide receives differential treatment

Affirmative defense statutes contain express mitigation language when there is differential treatment for first-degree intentional homicide. *See* Wis. Stat. §§ 939.46(1), 939.47, 940.01(2)(a). Compare the language of the following affirmative

defenses which do contain mitigation language, with s. 939.46(1m), which does not.

Statute	**Language**
Coercion, s. 939.46(1)	(1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act, **except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.**
Necessity, s. 939.47	Pressure 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 to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, **except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.**
Adequate provocation, s. 939.44(2)	Adequate provocation is an affirmative defense **only to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide.**
Affirmative defense for trafficking victims, s. 939.46(1m)	A victim of a violation of s. 940.302 (2) or 948.051 has an affirmative defense for **any offense** committed as a direct result of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051.

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). The fact that these closely-related provisions contain mitigation language whereas the affirmative defense at issue here does not, reflects a deliberate choice. Unlike coercion, necessity, and adequate provocation, the trafficking defense applies to "*any offense* committed as a direct result of the violation of s. 940.302(2) or 948.051," without limitation. Wis. Stat. § 939.46(1m) (emphasis added); *See State v. Lopez*, 2019 WI 101, ¶21, 389 Wis. 2d 156, 936 N.W.2d 125 ("When the legislature does not include limiting language in a statute, we decline to read any into it.")

The State argues the absence of mitigation language in s. 939.46(1m), is not determinative because self-defense and defense of others do not contain express mitigation language. (State's brief, 27). The State unwittingly undercuts its position with this argument.

Mitigation language within s. 939.48(1), self-defense, would not make sense because if self-defense is proven, there is no mitigation. It is a complete defense. There is a related, but separate, defense for "unnecessary defensive force" under s. 940.01(2)(b). This defense applies where "[d]eath was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was

unreasonable." Wis. Stat. § 940.01(2)(b). Unnecessary defensive force is not a complete defense to first-degree intentional homicide. Instead, it is subject to the s. 940.01(2) mitigation. In practice, a jury is instructed on self-defense and unnecessary defensive force at the same time. However, they have different elements.[20] This is unlike coercion, necessity, and adequate provocation where the elements of the defense are the same in every context and the only difference is the effect on the penalty for first-degree intentional homicide.

The State's comparison highlights the fact that a statute uses express mitigation language when limiting the defense for first-degree intentional homicide. Wis. Stat. §§ 939.44(2), 939.46(1), 939.47. And, when there is no mitigating language in the statute, there is a complete defense. Wis. Stat. §§ 939.46(1m), 939.48(1).

Section 939.46(1m) does not single out any crime for differential treatment. Instead, it applies to "any offense" in the same manner, as a complete defense.

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[20] *See State v. Head*, 2002 WI 99, ¶70, 255 Wis. 2d 194, 648 N.W.2d 413 (comparing elements).

B. Sections 940.01(2)(d) and 939.45(1) apply to coercion as defined in 939.46(1), not the affirmative defense for trafficking victims as defined in 939.46(1m).

The State argues that first-degree intentional homicide warrants different treatment, despite the absence of limiting language in the statute. Its argument relies on the cross reference between three statutes, none of which are s. 939.46(1m):

> Section 940.01(2), states:
>
> > (2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
> >
> > (d) *Coercion; necessity.* Death was caused in the exercise of a *privilege under s. 939.45 (1).*
>
> Wis. Stat. § 940.01(2) (emphasis added).
>
> Section 939.45(1), states:
>
> > *Privilege***.** The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The 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; or …

Wis. Stat. § 939.45(1) (emphasis added).

As shown, the first-degree intentional homicide statute, s. 940.01(2), contains mitigation language for certain situations. One situation is where the privilege statute, s. 939.45(1), applies. Privilege under s. 939.45(1), 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."

The parties dispute the meaning of the phrase "coercion . . . under s. 939.46" The State argues it is the entire section, i.e. all four subsections, including the trafficking defense, s. 939.46(1m). (State's Brief, 26). This is wrong. Instead, "coercion . . . under s. 939.46" is common law coercion, which was codified in s. 939.46(1).

The privilege statute, s. 939.45, was enacted in the same act that created s. 939.46 (coercion) and s. 939.47 (necessity). Ch. 696, § 1, Laws of 1955.[21] Originally, s. 939.46 contained two subsections:

> (1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is

[21] *See Quintana*, 308 Wis. 2d 615, ¶¶16-24 (considering the history of the Mayhem statute in determining plain meaning).

> for murder the degree of the crime is reduced to manslaughter.
>
> (2) It is no defense to a prosecution of a married woman that the alleged crime was committed by command of the husband nor is there any presumption of *coercion* when a crime is committed by a married woman in the presence of her husband. Married women shall be judged according to the standard set out in sub. (1).

Wis. Stat. § 939.46 (1955) (emphasis added).

Subsection (1), was a codification of the common law defense of coercion. *Moes v. State*, 91 Wis. 2d 756, 764-65, 284 N.W.2d 66 (1979).[22] Subsection (2), stated there was no defense or presumption of coercion when an alleged crime was committed by command of or in the presence of one's husband. The affirmative defense at issue here, s. 939.46(1m), was enacted 53 years later in 2008.

As the court of appeals correctly noted, when s. 939.45 and 939.46 were enacted, s. 939.45(1) could only have incorporated s. 939.46(1), despite referring generally to s. 939.46. *Kizer*, 398 Wis. 2d 697, ¶14. The only use of the word "coercion" in all of s. 939.46 is located in sub. (2). As shown above, that subsection (the marital provision) was created at the same time

[22] *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it" (quotation omitted).

as sub. (1). At that time, those were the only two subsections. Plainly, sub. (2), when using the term "coercion," was speaking of sub. (1). Like the use of "coercion" in s. 939.46(2), the use of "coercion" in s. 939.45(1), refers to the codified common law coercion defense in s. 939.46(1).

The affirmative defense at issue here involves the use of power and control thus making it conceptually related to the coercion defense. This explains why both the coercion defense and the trafficking defense are positioned under s. 939.46.[23] However, its logical placement within s. 939.46 did not transform it into the "coercion" defense which has a specific meaning under common law and was codified in Wisconsin in 1955 under s. 939.46(1). Cases still refer to s. 939.46 generally when discussing "coercion," but the clear implication is s. 939.46(1). *See Kelli B. v. Monroe Cnty. Department of Human Services*, 2004 WI 48, ¶59, 271 Wis. 2d 51, 678 N.W.2d 831 (referencing "the statutory defense of coercion, which is narrowly defined in § 939.46.")

The conclusion that "coercion. . . under s. 939.46" means common law coercion set forth in 939.46(1) is further buttressed by the fact that application of first-degree intentional homicide mitigation language to each of the s. 939.46 subsections would be nonsensical. Consider

[23] Section 4.11 of the Wisconsin Bill Drafting Manual instructs drafters to place new statutes where they fit best, while avoiding creating new sections.

subsection 939.46(3), which was enacted in 2018.[24] It is also under the same statute as coercion, but it would be unreasonable to argue that the mitigation of first-degree intentional homicide to second-degree applies. As the court of appeals noted, "§ 939.46(3) only provides an affirmative defense in limited circumstances related to straw purchases of firearms and thus does not apply in any way to a homicide charge" *Kizer*, 398 Wis. 2d 697, ¶21.[25]

When the other affirmative defenses were added to s. 939.46 the Legislature would not have needed to amend the privilege statute to retain its meaning. Instead, coercion is *still* "under . . . 939.46," as s. 939.46(1). It is just not the *only* affirmative defense under s. 939.46. It would be different had the legislature amended s. 939.45(1) of the privilege statute to say "under *any of the circumstances* described in 939.46." This is the language used in sub. (2) of the privilege statute, for the defense of persons or property defense. Subsection 939.45(2) provides privilege: "When the actor's conduct is in defense of persons or property *under any of the circumstances* described in s. 939.48 or 939.49."

[24] 2017 Wisconsin Act 145 (published Mar. 29, 2018).

[25] This defense also targets an area of concern involving power imbalance— in domestic and child abuse situations. It provides an affirmative defense to "intentionally furnishing, purchasing, or possessing a firearm for a person, knowing that the person is prohibited from possessing a firearm." The defense applies to a petitioner for a domestic abuse or child abuse injunction if the person prohibited from possessing a firearm was the respondent.

(Emphasis added). Comparing the language of these closely-related subsections supports the conclusion that "coercion" in s. 939.45(1) means common law coercion codified in s. 939.46(1).

Again, the State's reliance on the title of s. 939.46, "Coercion," should be rejected. And again, the State ignores s. 990.001(6), which explicitly states that, "titles. . . are not part of the statutes." The State relies on a statement from this Court's decision in *Lopez*, 389 Wis. 2d 156, ¶27, for the proposition that, "[w]hen the legislature adopts non-statutory language in titles, that language has meaning and reflects a decision of the legislature." (State's Brief, 22). What the State fails to acknowledge is that "coercion" is *not* non-statutory language. It appears in s. 939.46 in sub. (2). As already explained, sub. (2) was enacted in the same 1955 act as sub. (1). Not only is coercion a statutory term, it is a term that has always has been given meaning by reference to sub. (1).[26] Statutory titles can never be used to contradict

[26] The State asks this Court to consider the title by citation to *Reading Law*, at 221. What the State fails to acknowledge, however, is that the authors of *Reading Law* advise the reader to check the statutes for the legislature's directives regarding the use of titles. *Id.* at 224. Not all jurisdictions are the same. The United States Code does not have a provision that excludes titles from the statutes. However, Wisconsin does, and therefore, titles should not be considered. *See Lopez*, 389 Wis. 2d 156, ¶¶39-44 (Rebecca Grassl Bradley, concurring) (referencing the advice given by Scalia & Gardner and concluding that, "[g]iven the Wisconsin

the plain meaning of a statute. *Black*, 188 Wis. 2d at 645.

Ultimately, the affirmative defense for trafficking victims' logical placement in s. 939.46 did not redefine the "coercion" defense, as it has long been defined. Instead, s. 940.01(2)(d) and 939.45(1) apply to the coercion defense defined in s. 939.46(1), not the affirmative defense for trafficking victims in s. 939.46(1m).

C. This Court should not disregard the plain meaning of the statute because the Legislature might not have "contemplated" or "wanted" this meaning.

The State speculates the court of appeals' interpretation "creates a result that the Legislature may well not have contemplated." (State's Brief at 29). It also discusses what "the Legislature wanted" (*id.* at 22), and "intended." (*Id.* at 14, 22, 24). This Court does "not inquire what the legislature meant . . . only what the statute means." *Kalal*, 271 Wis. 2d 633, ¶39, (quoted source omitted). The drafters were aware when they wrote "any offense," that this would include first-degree intentional homicide.

But moreover, it is entirely reasonable that the Legislature would have intended to provide strong protection to victims of trafficking. Act 216 created robust provisions to accomplish that goal. Part of

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legislature's declaration that titles 'are not part of the statutes,' titles should not be used even to resolve an ambiguity."

protecting victims is recognizing that they may become involved in criminal activity as a direct result of their victimization. This explains why the majority of states have enacted similar provisions.[27] The State is wrong when it asserts that Ms. Kizer's reading would result in an affirmative defense that is "completely untethered to existing statutory notions of reasonable use of force, necessity, or mitigation." (State's Brief, 29). Ms. Kizer does not advocate for a "get-out-of-jail-free card for any crime committed by a trafficking victim." (Court of Appeals' Response Brief, 6). The defense is not unlimited. Instead, the statute contains a real and significant nexus requirement: the offense must be a "direct result" of the human trafficking violation. The plain meaning of the statute is not unreasonable and this Court should not rewrite the statute based on what the State believes the Legislature would have wanted.[28]

Ms. Kizer is a survivor of sex trafficking. Volar used her for commercial sex and to create child pornography over the span of at a least a year, beginning when she was just 16 years old. Ms. Kizer was just one of many victims of Volar's sex trafficking

[27] *See National Conference of State Legislatures, Human Trafficking State Laws* (last visited 11/22/21), https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx#tabs-2

[28] The State asserts that only perfect self-defense can be a complete defense, but this is ipse dixit. (State's Brief at 28-29). Just because the State believes this should be true, does not mean it is.

enterprise. On the night of his death, Volar paid for Ms. Kizer to come to his house. After she arrived, he restrained her. (71:40). He was trying to have sex with her against her will. (16:2). He lunged at her. (60:13). And it ended tragically. The State has its own theory of the case, and it will be afforded a full opportunity to present it. But what is clear is that Ms. Kizer should also be given a full and fair opportunity to present her case.

This Court should affirm the court of appeals' decision which reversed the circuit court. The case should be remanded to the circuit court where Ms. Kizer is given the opportunity to present evidence in support of the s. 939.46(1m) affirmative defense.

CONCLUSION

Ms. Kizer respectfully asks the Court to affirm the court of appeals' reversal of the circuit court's order and remand with directions to the circuit court to permit Ms. Kizer to present evidence in support of the affirmative defense under s. 939.46(1m).

Dated this 24th day of November, 2021.

Respectfully submitted,

KATIE R. YORK
Assistant State Public Defender
State Bar No. 1066231
yorkk@opd.wi.gov

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028
marionc@opd.wi.gov

Post Office Box 7862
Madison, WI 53707-7862
(608)266-3440

Attorneys for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,029 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 24th day of November, 2021.

Signed:

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KATIE R. YORK
Assistant State Public Defender