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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

NON-PARTY BRIEF OF LEGAL ACTION OF
WISCONSIN, INC., AND LOTUS LEGAL CLINIC, INC.

LEGAL ACTION OF WISCONSIN, INC.

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INTRODUCTION

Legislatures and courts have created affirmative defenses to criminal prosecution for hundreds of years, recognizing that, under certain circumstances, justice and the public interest sometimes require the law to absolve a person of criminal responsibility. Sometimes even homicide cannot result in a criminal conviction when a defendant presents a successful affirmative defense.

Ms. Kizer's case illustrates the complexity of both the crime and the harm caused by human trafficking, how the criminal justice system can fail trafficked survivors, and why the Wisconsin legislature therefore provided an affirmative defense for trafficking victims charged with "any offense" as a direct result of being trafficked. The plain language of Wis. Stat. § 939.46(1m) arises out of this context, and Ms. Kizer must be able to present this defense under Wisconsin law.

ARGUMENT

The Court of Appeals concluded that the plain language of Wis. Stat. § 939.46(1m) affords human trafficking victims a complete defense to any offense directly resulting from their victimization. Closely-related anti-trafficking statutes passed by the Wisconsin legislature, reflecting the documented and unique patterns of trafficking victimization that have prompted similar laws and cases across the country, support the Court of Appeals's and Ms. Kizer's interpretation. This Court should affirm.

I. Closely-Related Wisconsin Anti-Trafficking Statutes Support that the Plain Language of § 939.46(1m) Provides Trafficking Victims a Complete Defense for *Any* Offense Directly Resulting from their Victimization.

Because “[c]ontext is important to meaning,” Wisconsin courts interpret the plain language of a statute “in relation to the language of surrounding or closely-related statutes...” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110. Statutes are “closely-related” “when they are in the same chapter, reference one another...use similar terms,” or are within the “same statutory scheme.” *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773. The doctrine of *in pari materia* directs “courts [to] read, apply, and construe together statutes and regulations relating to the same subject matter or having a common purpose...” *State v. Lasecki*, 2020 WI App 36, ¶ 33, 392 Wis. 2d 807, 946 N.W.2d 137. This “doctrine applies with particular force to

statutory provisions enacted in the same legislative act on the same subject.” *Id.* “A plain-meaning interpretation cannot contravene a... contextually manifest statutory purpose.” *Kalal*, 2004 WI 58, ¶ 49.

A. Other statutes passed in 2007 Wisconsin Act 116 illustrate the purpose of § 939.46(1m): to protect against the myriad harms of trafficking victimization.

The Wisconsin legislature enacted § 939.46(1m) in the state’s first anti-trafficking act—2007 Wisconsin Act 116 (2007 S.B. 292). Beyond designating human trafficking and trafficking of a child as criminal offenses and establishing strong corresponding penalties for those crimes, the Act also created statutory protections for trafficking victims including enhanced emergency support, child protective interventions, and expanded restitution for psychological care.¹

The context of these additional protections stresses the purpose of § 939.46(1m): to recognize and rehabilitate the unique harms inflicted onto victims by their traffickers. *See Kalal*, 2004 WI 58, ¶¶ 45-46, 49; *Reyes Fuerte*, 2017 WI 104, ¶ 27; *Lasecki*, 2020 WI App 36, ¶ 33. Including § 939.46(1m) among this suite of protections demonstrates the legislature’s awareness that the coercion, loss of autonomy, and psychological damage caused by traffickers may also drive those same victims to commit acts, including criminal acts,

¹ *See* 2007 Wisconsin Act 116 (2007 S.B. 292); *see also* Wis. Stats. §§ 48.02(1)(cm), 250.04(a), 940.302, 948.051, & 973.20(4m). These protective remedies reflect Wisconsin’s longstanding leadership in recognizing the rights of crime victims, from becoming the first state in the country to pass a crime victims’ rights bill to recently passing a constitutional amendment heightening crime victims’ rights. *See* Jillian Slaight, *Constitutional Amendment Relating to Crime Victims’ Rights*, 5 WIS. LEGIS. REFERENCE BUREAU 1, 3 (2020).

that they would not otherwise commit. Accordingly, this Act included a complete affirmative defense to protect, rather than punish, trafficking victims for conduct stemming from their victimization.

B. The parallel language and purpose of § 973.015(2m) supports the plain meaning of § 939.46(1m).

Wisconsin's vacatur statute affords sex trafficking victims a way to clear their records of convictions resulting from trafficking.² Vacatur provides post-conviction relief when victims can present evidence of their trafficking so a court may re-assess their culpability. What vacatur allows on the backend of a criminal case, the affirmative defense affords on the frontend—so that victims may avoid conviction in the first place.³

The parallel language, subject matter, and purpose of these statutes demonstrate that the plain language of § 939.46(1m) means exactly what it says: that it applies to *any* offense that *directly results* from trafficking.

Vacatur, unlike the affirmative defense, limits its relief to prostitution charges. Wis. Stat. § 939.46(1m) could have included similar language limiting the defense to certain offenses. It did not. The defense may apply to “any offense.” The word “any,” the logical equivalent of “all” or “every,” encompasses every possible scenario of a given category. *See In re A.P.*, 2019 WI App 18, ¶ 12, 386 Wis. 2d 557, 927

² See § 973.015(2m) (providing that a court may vacate a prostitution conviction which results from sex trafficking victimization).

³ See Wis. Stats. §§ 973.015(2m), 939.46(1m).

N.W.2d 560 (citations omitted) (noting that “any” inclusively entails ‘one, some, or all indiscriminately of whatever quantity’”).⁴ The text of § 939.46(1m) allows the defense to apply broadly to all types of charges, without specification.

Similarly, as vacatur provides trafficking victims with a clean slate by vacating a resulting prostitution conviction, § 939.46(1m) provides for a complete defense. Contrast this with § 939.46(1), which explicitly mitigates intentional homicide charges. Wis. Stat. § 939.46(1m) could include such mitigating language. But, again, it does not. The affirmative defense provides a complete defense akin to its vacatur counterpart.

The opportunities for such relief are not limitless, however, as the State implies. To the contrary, § 939.46(1m) only applies if the offense “directly results” from trafficking. Vacatur, too, only provides relief if the offense results from trafficking.⁵ The nexus requirement in both statutes creates boundaries requiring victims in either scenario to establish their conduct resulted from victimization. The Court of Appeals’s and Ms. Kizer’s analysis of § 939.46(1m)’s “direct result” language, unlike the State’s interpretation, properly relies on its common, ordinary, and accepted meaning, while still deferring to the case-specific facts that ultimately determine whether or not relief applies. *State v. Quintana*, 2008 WI 33, ¶ 42, 308 Wis. 2d 615, 748 N.W.2d 447. This language appropriately presumes the finders of fact capable

⁴ The use of “any” also makes practical sense, recognizing that the legislature cannot anticipate every circumstance in which trafficking might compel a victim to commit an otherwise criminal act.

⁵ See § 973.015(2m).

of evaluating whether the offense resulted from trafficking in each particular case. Such language simultaneously regulates the application of these statutes while maintaining their mutual purpose of providing victims a meaningful opportunity to move forward from their experience.

Wisconsin's closely-related anti-trafficking statutes demonstrate the overarching effort to relieve the extraordinary harm inflicted upon trafficking victims, including the lasting consequences caused by convictions resulting from circumstances beyond their control.⁶ The plain text of § 939.46(1m) reflects this by providing a complete defense to literally “any offense” that directly results from trafficking.

II. Related Laws and Cases Across the Country, Along with Documented Patterns of Trafficking Dynamics, Verify the Plain Meaning of § 939.46(1m).

Under *Kalal*, extrinsic sources may be used to “confirm or verify” the unambiguous plain meaning of a statute. 2004 WI 58, ¶ 51. The Trafficking in Persons Act of 2000 (TVPA),⁷ affirmative defenses available to trafficking victims in other states, and the coercive dynamics of trafficking that can lead victims to commit seemingly criminal acts, all support that the plain language of § 939.46(1m) offers trafficking victims a complete defense.

⁶ See Jessica Aycock, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, 5 CRIM. L. PRAC. 5, 16 (2019); see also Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177, 199 (2016).

⁷ Trafficking in Persons Act of 2000, s. 2414, 106th Cong..

A. Federal and state anti-trafficking laws provide useful context that corroborates the plain language of § 939.46(1m).

Lawmakers draft statutes with knowledge of existing laws. *Peters v. Menard, Inc.*, 224 Wis. 2d 174, 187, 589 N.W.2d 395. The legislature’s passage of 2007 Act 116 aligned the state with the TVPA, the nation’s first comprehensive law to criminalize trafficking and create protections for victims. The TVPA’s three-pronged approach, the model for anti-trafficking laws passed in all fifty states,⁸ centers on: (1) preventing the crime, (2) protecting victims, and (3) prosecuting traffickers.⁹

Wisconsin law follows this model, holding remedies for victims and punishments for traffickers as equally critical to an effective anti-trafficking response. Wis. Stat. § 939.46(1m), particularly, affirms the TVPA mandate that “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked...”¹⁰

Wisconsin is not alone. Thirty-eight states have passed affirmative defenses for trafficking victims.¹¹ Each limits, to

⁸ See Amy Farrell et al., *The Prosecution of State-Level Human Trafficking Cases in the United States*, 6 ANTI-TRAFFICKING REV. 48, 49 (2016).

⁹ See U.S. Dept. of State Office to Combat and Monitor Trafficking in Persons, *3Ps: Prosecution, Protection, and Prevention*, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> (last visited Dec. 22, 2021).

¹⁰ TVPA, s. 7101(b)(19).

¹¹ See Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH L. REV. 315, 327-328 (2021).

some extent, when the defense can apply.¹² Wis. Stat. § 939.46(1m) includes a nexus requirement, unlike Oklahoma’s broader affirmative defense statute,¹³ but does not include language to limit its application based on the type of offense committed, as is common in the majority of other states.¹⁴

The TVPA and current landscape of state statutory affirmative defenses for trafficking victims illustrate the established connection between trafficking victimization and criminal charges and confirms that § 939.46(1m) applies to “any offense” that directly results from trafficking victimization.

B. Wis. Stat. § 939.46(1m) provides a broad affirmative defense for victims because trafficking, by definition, compels victims to engage in actions beyond their free will.

Wis. Stat. § 939.46(1m) acknowledges the deprivation of autonomy and lack of control that is central to the trafficker-victim relationship and commonly overlooked by the criminal justice system.

Traffickers succeed in disempowering their victims by “force, fraud, or coercion,” an element of all federal and state human trafficking crimes.¹⁵ Commonly, coercive trafficking involves manipulating a victim’s vulnerabilities, such as cultural isolation, financial dependency, or a need for love

¹² *Id.* at 327-328 (stating “[a]ll these laws include one or more of the following restrictions on when the defense can be invoked: (1) restrictions based on the offense committed, (2) a nexus requirement, (3) a coercion requirement, and (4) a temporal requirement”).

¹³ Okla. Stat. Ann. Tit. 21, § 748(D)-(E).

¹⁴ *See supra*, Richard, note 12, at 327-328.

¹⁵ *See* TVPA, s. 7102; *see also supra*, Farrell, note 9, at 56.

and belonging.¹⁶ Child sex traffickers are especially attuned to how these vulnerabilities can manifest in young people.¹⁷ Often, sex traffickers recruit victims by first acting as a romantic partner.¹⁸ Ultimately, traffickers take advantage of that emotional bond to manipulate victims into acts they otherwise would not choose to perform. Once victims lose autonomy over their bodies, their will, too, can diminish. Quickly, the line between “choice” and “force” can erode.¹⁹

The complete defense of § 939.46(1m) acknowledges this loss of autonomy and offers unique and necessary recourse to trafficking victims previously unavailable under Chapter 939.

C. The coercive dynamics of trafficking which frequently expose victims to criminal liability support the plain language of § 939.46(1m).

The criminal legal system has traditionally failed to identify and protect trafficking victims whose fear of punishment by their traffickers—and the threat of violence by law enforcement²⁰—leaves them locked in a cycle of abuse.

¹⁶ See Representative Ann Wagner & Rachel Wagley McCann, *Policy Essay: Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 701, 707 (2017).

¹⁷ See Juliana Spano, *Prevention Not Punishment: Child Victims of Sex Trafficking Must Be Treated Not Detained*, 48 HOFSTRA L. REV. 253, 269 (2019); see also Alyssa N. Daniels, *Limping Toward Decriminalization: The Case Act, De Facto Decriminalization of Domestic Minor Sex Trafficking Victims, and 2-Way CCTV*, 88 S. CAL. L. REV. 1421, 1431 (2015); Jasmine Phillips, *Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642, 1648 (2015).

¹⁸ See *supra*, Wagner & McCann, note 17, at 707.

¹⁹ *Id.* at 711.

²⁰ See Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Victims*, 24 WM & MARY J. WOMEN & L. 39, 69-76, 82, 87-89 (2017) (explaining that some trafficking victims face sexual exploitation and physical violence from law enforcement, reinforcing the perception created by their traffickers that they cannot access, and are unworthy of, traditional forms of justice).

Without appropriate legal intervention, traffickers can maintain effective and prolonged control over their victims. Wisconsin's Department of Justice (DOJ) recognizes this paradox. Its 2019 report found that Wisconsin law enforcement lacks training on the complex dynamics needed to identify and support trafficking victims.²¹ Consequently, the criminal justice system has largely struggled to identify trafficking victims as victims and, instead, often mistakes them as criminals.²²

Implicit racial bias often exacerbates this problem for Black girls from urban areas, who disproportionately shoulder the violence of sex trafficking in this country.²³ Stereotypes about how victims should look and act limit understanding of what may compel a victim to act in self-defense.²⁴ This is especially true for trafficking victims, who are often thought to need rescuing.²⁵

Under these circumstances, trafficking victims face an impossible dilemma: continue to live under their traffickers' power and control or risk the threat of power and control by the state. Traffickers, in turn, capitalize on this mutual distrust between victims and the criminal justice system.

²¹ WIS. DEP'T OF JUST., LAW ENFORCEMENT ASSESSMENT OF SEX TRAFFICKING IN WISCONSIN (2019), 3-4, 6, 16-17, 26.

²² *Id.* at 26, 35, 52.

²³ See Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1482-87, 1496-1502 (2015); see also Jacobs, *supra* note 21, at 91-92; see also Linda Smith & Samantha Healy Vardaman, *Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U.L. REV. 265, 267 (2010).

²⁴ See Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 325 (1992) (recognizing that victims are not commonly expected to present as empowered even, and especially, if they overcome the power exerted by their abuser).

²⁵ *Id.* at 329-330; see also Butler, *supra* note 24, at 1505; Jacobs, *supra* note 21, at 91-92, 95-96.

Without safe options for protection, the realities can become so consuming and treacherous that victims may believe they have no way out of the relationship with their trafficker and no way of declining their trafficker's demands. The DOJ observed that trafficking victims "often do not believe they have the power, means or opportunity to disengage."²⁶ Victims may decide escape requires taking matters into their own hands, even resorting to lethal violence as the most viable path to ending their experience.²⁷

Several recent cases illustrate how such measures may seem extraordinary, but they are not uncommon—as the law has begun to recognize. Seventeen-year-old Sara Kruzan, a victim of child sex trafficking in California, shot and killed her trafficker.²⁸ She was sentenced to life in prison.²⁹ In 2011, her sentence was commuted and she was released.³⁰ Sixteen-year-old Cyntoia Brown, a victim of child sex trafficking in Tennessee, shot and killed a 43-year-old man who hired her for sex while she was under the control of her trafficker.³¹ She was sentenced to life in prison.³² In 2019, her sentence was also commuted and she was also released.³³ Sixteen-year-old Patrice Smith, a victim of child sex trafficking in

²⁶ WIS. DEP'T OF JUST., *supra* note 22, at 18.

²⁷ See Lauren Danice Shuman, *Pulling the Trigger: Shooting Down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser*, 56 HOWARD L.J. 983, 985-86 (2013).

²⁸ See Caitlin Miller, *Punishing the Broken and Invisible: How We Have Failed Female Youth Who Are Waived to the Criminal Justice System*, 37 WOMEN'S RTS. L. REP. 27 (2015).

²⁹ *Id.*

³⁰ *Id.*

³¹ See *State v. Brown*, 2009WL10338275, *12 (Ct. Crim. App. Tenn. 2009).

³² *Id.*

³³ See Bobby Allyn, *Cyntoia Brown Released After 15 Years in Prison for Murder*, NPR, Aug. 7, 2019.

New York, shot and killed her trafficker.³⁴ She was sentenced to 25 years to life in prison.³⁵ In 2020, her sentence was vacated and reduced.³⁶ Lacking an affirmative defense at the time of their offenses, each of these victims was first convicted of homicide before eventually obtaining post-conviction relief as jurisdictions across the country begin to acknowledge that trafficking can result in a victim killing someone who perpetuates their abuse.

Such cases help illustrate that § 939.46(1m) recognizes these dynamics and creates an affirmative defense that prevents the conviction of victims for “any offense” that directly results from their victimization, including a victim killing her trafficker.

³⁴ See *People v. Smith*, 69 Misc. 3d 1030 (N.Y. Cnty. Ct. 2020), 132 N.Y.S.3d 251, 2020 N.Y. Slip Op. 20240.

³⁵ *Id.*

³⁶ *Id.*

CONCLUSION

Rendering a fair and just verdict on Chrystul Kizer's culpability in the death of her trafficker requires a jury's careful consideration of all facts and circumstances surrounding the charged offenses. This is not only critical to a fair verdict but is also, unambiguously, required under Wisconsin law. The full context of related anti-trafficking laws and trafficking's coercive dynamics supports and verifies that § 939.46(1m) applies to "any offense," including here.

For these reasons, this Court should affirm the Court of Appeals's order and remand to the trial court with instructions to allow § 939.46(1m) to apply.

Dated this 23rd day of December, 2021.



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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 3,000 words.

**CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § 809.19(12)**

I certify I have submitted an electronic copy of this brief, 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 parties.

Dated this 23rd day of December, 2021.

Legal Action of Wisconsin, Inc.
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Signed:



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