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STATE OF WISCONSIN

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

DISTRICT II

Case No. 2020AP0704

DANIEL DOUBEK,

Petitioner-Appellant,

v.

JOSHUA KAUL,

Respondent-Respondent.

APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT FOR BROWN COUNTY,
HON. KENDALL M. KELLEY PRESIDING

BRIEF OF RESPONDENT-RESPONDENT ATTORNEY GENERAL JOSHUA KAUL

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INTRODUCTION

This case concerns the revocation of Daniel Doubek's concealed carry license. The Legislature sensibly requires the Wisconsin Department of Justice (the "Department") to revoke the license of anyone prohibited from possessing a firearm under federal law. Relevant here, federal law prohibits anyone convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. And this Court, in *Evans* and *Leonard*, already has held that a conviction under the "violent" element of disorderly conduct in Wis. Stat. § 947.01(1) is a misdemeanor crime of domestic violence. *Evans v. Wis. Dep't of Justice*, 2014 WI App 31, ¶¶ 8–25, 353 Wis. 2d 289, 844 N.W.2d 403; *Leonard v. State*, 2015 WI App 57, ¶¶ 19–23, 364 Wis. 2d 491, 868 N.W.2d 186.

Here, Doubek pled guilty to "violent, abusive and otherwise disorderly conduct," the exact charge addressed in *Evans*. As a result, Doubek was convicted of a misdemeanor crime of domestic violence, and the Department correctly revoked his concealed carry license.

Doubek mistakenly contends that the U.S. Supreme Court's *Mathis v. United States*, 136 S. Ct. 2243 (2016) effectively overruled *Evans* and *Leonard*. *Mathis*, however, simply provided guidance on what constitutes an element and what constitutes a means of satisfying an element. However, the distinction in Wisconsin law between elements, which require juror unanimity, and means, which do not, was in existence when *Evans* was decided. *Evans* specifically rejected the argument that the violence component of Wis. Stat. § 947.01(1) is merely a means of satisfying an element, as opposed to being an actual element. In any event, , only the Wisconsin Supreme Court can overrule *Evans* and *Leonard*, which it has not done.

STATEMENT OF THE ISSUES

1. *Evans* held that a conviction for "violent, abusive and otherwise disorderly conduct" was a misdemeanor crime of domestic violence. Doubek pled guilty to a charge of "violent, abusive and otherwise disorderly conduct." Did the Department err in concluding that Doubek had been convicted of a misdemeanor crime of domestic violence?

The circuit court answered no.

This Court should answer no.

2. *Evans* specifically rejected the argument that Wis. Stat. § 947.01(1) contains alternative means rather than alternative elements. Only the Wisconsin Supreme Court can overrule a decision of this Court. Can this Court overrule *Evans* and hold that Wis. Stat. § 947.01(1) contains alternative means, rather than alternative elements?

The circuit court held it was bound by *Evans*.

This Court should hold the same.

3. Default judgments are not available in administrative reviews under Chapter 227 because the remedy is inconsistent with the court's duty to conduct an independent review of the record. Judicial review of the denial or revocation of a concealed carry license is governed by Wis. Stat. § 175.60(14m), which also involves a review of the record and provides no sanction for the late filing of an answer. Is default judgment available under Wis. Stat. § 175.60(14m)?

The circuit court answered no.

This Court should also answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not warranted because this case can be decided on the briefs. Publication is not necessary because

this case is governed by binding precedent. Wis. Stat. § (Rule) 809.23(1)(b)3.

STATEMENT OF THE CASE

Some background on relevant state and federal laws is necessary to understand the facts and procedural history of this case.

I. Relevant state law governing concealed carry licenses and federal law prohibiting firearm possession.

The Wisconsin Department of Justice administers Wisconsin's concealed carry license program. *See* Wis. Stat. § 175.60. The Department may not issue a concealed carry license when "[t]he individual is prohibited under federal law from possessing a firearm that has been transported in interstate or foreign commerce." Wis. Stat. § 175.60(3)(b). Similarly, the Department "shall revoke a license issued under this section if the department determines that sub. (3) (b), (c), (e), (f), or (g) applies to the licensee." Wis. Stat. § 175.60(14)(a). Put simply, the Department must revoke a license when it determines that a licensee is prohibited from possessing a firearm under federal law.

Federal law prohibits "any person . . . who has been convicted . . . of a misdemeanor crime of domestic violence" from possessing a firearm "in or affecting commerce." 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" includes a misdemeanor under state law that "has, as an element, the use or attempted use of physical force . . . committed by a current or former spouse . . . of the victim." 18 U.S.C. § 921(a)(33)(A).

II. Facts regarding Doubek's conviction.

On September 20, 1993, a criminal complaint was filed against Doubek. (R. 7:14–16.) Count 1 charged him with

disorderly conduct under Wis. Stat. § 947.01 for engaging "in violent, abusive and otherwise disorderly conduct under circumstances in which such conduct tended to cause or provoke a disturbance."[1] (R. 7:14.) Count 2 charged him with criminal trespass to a dwelling under Wis. Stat. § 943.14. (R. 7:14.)

The complaint alleged that Doubek's wife, who no longer lived with him, "was alone in the trailer with her 4 year old daughter." (R. 7:15.) The complaint further alleged that Doubek "broke through the screen and storm door and then punched a hole through the glass of the inside door with his fist." (R. 7:15.) Doubek then opened the door and entered without permission, holding a 2 x 4 piece of wood that he "raised up above his head and told [her] that she 'was dead.'" (R. 7:15.) Doubek also told his wife that if she did not get away from the door "he would 'let her have it.'" (R. 7:15.) He later said that "he did not care what happened to him if he killed her." (R. 7:15.)

On November 11, 1993, there was a judgment of conviction entered in the case. (R. 7:13.) Doubek was found guilty of Count 1, disorderly conduct under Wis. Stat. § 947.01, and not guilty of Count 2, criminal trespass to a dwelling under Wis. Stat. § 943.13. (R. 7:13.)

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[1] Wis. Stat. § 947.01 (1) states: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."

III. Procedural history before the Department and the circuit court.

A. Proceedings before the Department

On September 28, 2019, the Department revoked Doubek's concealed carry license based on Wis. Stat. § 175.60(3)(b) and 18 U.S.C. § 922(g)(9). (R. 7:3.) The Department, applying *Evans*, found that Doubek's conviction for "violent, abusive and otherwise disorderly conduct" was a misdemeanor crime of domestic violence that prohibited Doubek from possessing a firearm under 18 U.S.C. § 922(g)(9). (R. 7:3.)

B. Proceedings in the circuit court

Doubek filed a petition for review in Brown County Circuit Court on October 14, 2019. (R. 1.) The Department filed a motion for an extension and a general denial on November 5, 2019. (R. 4.) The Department explained that while the petition said it was mailed on October 14, 2019, the Department did not receive it until October 21, 2019. (R. 4:2 ¶ 3.) Further, Doubek had mailed his petition to "The Hon. Joshua Kaul, Wisconsin Department of Justice, 17 W. Main St., Madison, WI 53703-3960," (R. 3-1 ¶1), even though Department rules provide that "[t]he mailing address for the department is Wisconsin Department of Justice, Attention: Firearms Unit, Post Office Box 7130, Madison, WI, 53707-7130." (R. 3:1–2 ¶ 2 (quoting Wis. Admin. Code JUS § 17.09(1) (Note)).) Doubek opposed the motion for an extension. (R. 5.)

The Department then filed an answer and the administrative record on November 11, 2019. (R. 6–7.) Several days later, it filed a reply in support of the motion for an extension. (R. 9.)

Doubek filed several briefs on the merits with the circuit court. (R. 8, 10, 12, 15.) The Department filed two briefs on the merits. (R. 11, 13.)

As relevant to this appeal, Doubek argued that in *Mathis v. United States*, 136 S. Ct. 2243 (2016), the United States Supreme Court "effectively overruled *Evans* and *Leonard*." (R. 8:8.) Doubek contended that under *Mathis*, the types of conduct listed in Wis. Stat. § 947.01(1) were merely alternative means of committing a crime rather than alternative elements. (R. 8:9–14.)

The Department argued that the case was governed by *Evans*, and that because Doubek had pled guilty to "violent, abusive and otherwise disorderly conduct," he was convicted of a misdemeanor crime of domestic violence. (R. 6:3–5.) Further, *Evans* had not been overruled by *Mathis*; in fact, *Evans* had addressed the elements vs. means argument, and only the Wisconsin Supreme Court could overrule a published court of appeals decision. (R. 11:4–9.)

The circuit court heard oral argument on January 27, 2020, (R. 25), after which the parties filed post-hearing briefs, (R. 17–19.)

The court issued a written decision on March 31, 2020, that upheld the Department's decision and dismissed the petition. (R. 20.) On the allegedly late filing of the Department's answer, the circuit court faulted Doubek for not using the address listed in the Department's rules, but ultimately held that it could only reverse for one of the four reasons in Wis. Stat. § 175.60(14m)(f), "none of which apply here." (R. 20:3–4.) On the merits of the revocation, the court followed *Evans* in holding that Doubek had been convicted of a misdemeanor crime of domestic violence because he had been charged with "violent, abusive *and* otherwise disorderly conduct," and pled guilty to that charge. (R. 20:6 (emphasis in original).) The court rejected Doubek's reliance on *Mathis* because it would require the court to "disregard the court of appeals' decisions in *Evans* and *Leonard*." (R. 20:7.)

STANDARD OF REVIEW

Whether a conviction qualifies as a misdemeanor crime of domestic violence is a question of law reviewed de novo. *See Evans*, 353 Wis. 2d 289, ¶ 7. While *Evans* declined to choose between de novo review and great weight deference, Wisconsin courts no longer give deference to an agency's interpretation of law. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

Whether default judgment is an available remedy under Wis. Stat. § 175.60(14m) is a question of law reviewed de novo. *See Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 639, 511 N.W.2d 874 (1994) (holding that "[t]he applicability of the rules of civil procedure to a ch. 227 administrative review proceeding is a question of law, which is answered without deference to the decisions of the lower courts"). When a default judgment is an appropriate remedy, an appeals court reviews a circuit court's decision on whether to grant a default judgment for the erroneous exercise of discretion. *Split Rock Hardwoods, Inc. v. Lumber Liquidators*, Inc., 2002 WI 66, ¶ 64, 253 Wis. 2d 238, 646 N.W.2d 19.

ARGUMENT

The Department properly revoked Doubek's concealed carry license because he was convicted of the same crime addressed in *Evans*. The *Mathis* decision did not overrule *Evans*, which is entirely consistent with *Mathis*. Violent conduct is still an alternative element of disorderly conduct.

In addition, the circuit court correctly declined to enter a default judgment in this case. Default judgments are not available in judicial reviews of agency actions, and it would not have been appropriate here

I. The case is governed by *Evans*, which was not overruled by *Mathis*.

Under a straightforward application of Wisconsin law, Doubek was convicted of a misdemeanor crime of domestic violence, meaning the Department correctly revoked his concealed carry license. This result remains good law even after *Mathis*.

Evans explains the framework that applies to a law like Wis. Stat. § 947.01. Ordinarily, under what is called "the categorical approach," courts look to the fact of conviction and the statutory definition of a defense to determine if it is crime of violence. *Evans*, 353 Wis.2d 289, ¶ 18. But where, like here, the statute provides elements in the alternative, "the categorical approach is 'modified' to determine which alternative formed the basis of conviction." *Id.* Under that approach, courts look to a "limited class of documents" "to identify, from among several alternatives, the crime of conviction." *Id.*

A. Under *Evans*, Doubek has been convicted of a misdemeanor crime of domestic violence.

This Court has already addressed the issue in this case. A misdemeanor crime of domestic violence is defined as a crime that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). The defendant in *Evans* "was convicted of disorderly conduct based on a first element specified as 'violent, abusive and otherwise disorderly conduct.'" *Evans,* 353 Wis.2d 289, ¶ 12. "[T]he fact that Evans was convicted based on the element of violent, abusive, *and* otherwise disorderly conduct makes this a relatively easy case." *Id.* ¶ 20. The court held that "[b]ecause 'violent' conduct necessarily implies the use of physical force . . . Evans' conviction for disorderly conduct has the use of physical force as an element." *Id.* This Court then followed that holding in *Leonard*, 364 Wis. 2d 491, ¶¶ 20–21.

Here, Doubek was charged with "violent, abusive and otherwise disorderly conduct," (R. 7:14), and pled guilty to that charge, (R. 7:13). Thus, Doubek has been convicted of a misdemeanor crime of domestic violence. Given that Doubek is barred from owning a firearm under federal law, the Department rightly revoked his concealed carry permit. Wis. Stat. § 175.60(14)(a). As a result, this Court must affirm the Department's decision.

Only the Wisconsin Supreme Court can change the rule in *Evans* and *Leonard*. This is because "[t]he court of appeals is a unitary court; published opinions of the court of appeals are precedential; litigants, lawyers and circuit courts should be able to rely on precedent." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Given those principles, "the constitution and statutes must be read to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." *Id.* at 189–90. Doubek needs the Wisconsin Supreme Court to overrule *Evans* before he can succeed on this argument.

B. *Evans* rejected the means vs. elements argument advanced by Doubek and was not overruled by *Mathis*.

Doubek admits that his argument "is at odds with this Court's decisions in *Evans* and *Leonard*." (Doubek Br. 19.) He argues, however, that "[t]his Court's conclusion that disorderly conduct sometimes is a MCDV and sometimes is not has therefore been overruled" by *Mathis*. (Doubek Br. 19.) Doubek's argument is wrong, and to understand why, some background is needed on how the Supreme Court determines whether a crime is a misdemeanor crime of domestic violence.

1. *Evans* specifically rejected Doubek's "means" vs. "elements" argument.

Evans applied the "modified categorical" approach developed by federal courts in reaching its conclusion. As noted above, a misdemeanor crime of domestic violence is defined as a crime that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). To determine whether a crime meets this definition, courts apply a "categorical approach" under which "courts ordinarily 'look only to the fact of conviction and the statutory definition of the prior offense.'" *Evans*, 353 Wis. 2d 289, ¶ 18 (quoting *Shepard v. United States*, 544 U.S. 13, 17 (2005)). Some statues, however, "define[] an element in the alternative," and when that is the case, "the categorical approach is 'modified' to determine which alternative formed the basis of conviction." *Id.* (citing *Descamps v. United States*, 570 U.S. 254 (2013)).

Statutes are misdemeanor crimes of domestic violence when the defendant was convicted of a crime that has as an element "the use or attempted use of physical force." *Evans* concluded that "violent" conduct under Wis. Stat. § 947.01(1) was an alternative element that involved the use or attempted use of force, meaning a conviction under that element "alone or in the conjunctive with other alternatives," satisfied the federal definition. *Id.* ¶ 15.

Evans specifically rejected the argument, which Doubek advances here, that the types of conduct listed in Wis. Stat. § 947.01(1) are merely different means of satisfying one general conduct element rather than each item on the list being an alternative element. *Id.* ¶¶ 14–15. The petitioner in *Evans* argued that the different types of conduct listed in the disorderly conduct statute are alternative "manner[s] and means" of committing the first element of the crime. *Id.* ¶ 14. The court, however, was "not persuaded." *Id.* It held there was "nothing in these 'manner and means' discussions that

conflicts with our conclusion that Wisconsin's disorderly conduct statute can have the use of physical force as an element," specifically when "the 'violent' alternative is charged alone or in the conjunctive with other alternatives." *Id.* ¶ 15. Under *Evans*, "violent" conduct is an alternative element, not an alternative means.[2]

2. *Mathis* did not overrule *Evans*

Doubek incorrectly maintains that the Supreme Court overruled *Evans* in *Mathis*. That case did not directly address whether a statute like Wis. Stat. § 947.01(1) contains alternative elements or alternative means. Instead, *Mathis* explained the difference between a statute "that enumerates various factual means of committing a single element," 136 S. Ct. at 2249, from a statute with alternative elements. It noted that an example of a statute with alternative means would be one that has "use of a 'deadly weapon' as an element of a crime and further provides that the use of a 'knife, gun, bat or similar weapon' would all qualify." *Id.* at 2250. Use of a deadly weapon is the element; the list of types of deadly weapons shows the alternative factual means that could establish that the defendant, in fact, used a deadly weapon.

Mathis held that a statute contains alternative means, rather than alternative elements, when "a state court decision definitively answers the question." 136 S. Ct. at 2256. The question in *Mathis* was whether an Iowa burglary conviction satisfied the "generic burglary" definition required for a strike under the Armed Career Criminals Act (ACCA), which uses the same categorical and modified categorical approaches. *Mathis*, 136 S. Ct. at 2250. The generic definition of burglary

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[2] As *Evans* noted, Doubek's argument, "if accepted, would mean that a Wisconsin disorderly conduct conviction never qualifies as a misdemeanor crime of domestic violence." *Evans*, 353 Wis. 2d 289, ¶ 13.

is "unlawful entry into a 'building or other structure.'" *Id.* A conviction qualifies under the ACCA if it was under a statute that "is the same as, or narrower than, the relevant generic offense." *Id.* at 2257. Iowa defines burglary as "having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure." Iowa Code § 713.1. This crime was not sufficiently narrow because the term "occupied structure" includes "a broader range of places" than the generic definition. *Mathis*, 136 S. Ct. at 2250. Instead, it included "'any building, structure, *[or] land, water, or air vehicle*.'" *Id.* (quoting Iowa Code § 702.12 (2013)) (alteration and italics in original). The Iowa Supreme Court had previously held that the list of places "are 'alternative method[s]' of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle." *Id.* at 2256. Simply put, under the Iowa statute, the element is "enter[ing] an occupied structure," Iowa Code § 713.1, with the various types of "occupied structure" providing the factual means by which someone could satisfy the element.

Doubek incorrectly asserts that this applies to the crime of disorderly conduct and the types of conduct listed in Wis. Stat. § 947.01(1) (violent, abusive, indecent, etc.), meaning the types of conduct listed would not require juror unanimity.

First, there is no binding authority stating that the types of conduct listed are alternative means rather than elements. Doubek only cites an unpublished decision that has no precedential authority. (Doubek Br. 17 (citing *State v. Galarowicz*, 2012AP933–CR, 2012 WL 6115949, at *1)).

Second, the distinction between means and elements existed in Wisconsin law when this Court decided *Evans*. Thus, *Evans* stands for the proposition that the types of conduct listed in Wis. Stat. 947.01(1) are alternative elements that require juror unanimity, rather than alternative means that do not. Well before *Evans*, the Wisconsin Supreme Court

held that the "jury must agree unanimously that the prosecution has proved each essential *element* of the offense beyond a reasonable doubt before a valid verdict of guilty can be returned." *Holland v. State*, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979) (emphasis added). The court distinguished alternative means from elements, holding that "unanimity is not required with respect to the *alternative means* or ways in which the crime can be committed." *Id.* at 143 (emphasis added). Given that the distinction between means and elements, including the distinction of whether juror unanimity was required, was known when *Evans* was decided, its holding that "violent" conduct is an alternative element, rather than a means, 353 Wis. 2d 289, ¶¶ 14–15, requires that each of the listed types of conduct require juror unanimity.

3. Wisconsin Stat. § 947.01(1) has alternative elements, not means, under Wisconsin's tests for distinguishing between the two.

Not only is *Evans* binding but its result is correct under Wisconsin's law of elements vs. means. Thus, applying the modified categorical test, as summarized above, is the correct way to analyze a statute like Wis. Stat. § 947.01(1). Even if this Court had the authority to depart from *Evans*, Doubek's assertions to the contrary would be flawed.

Under Wisconsin law, to determine whether the Legislature intended a statute to contain one crime or multiple alternative crimes, the courts "look . . . to the nature of the proscribed conduct to determine whether the statutory alternatives are similar or significantly different." *Manson v. State*, 101 Wis. 2d 413, 426, 304 N.W.2d 729 (1981). "If the alternatives are similar, one crime was probably intended." *Id.* In *Manson*, for example, the court concluded that the use of force and the threat of imminent use of force were similar acts. *Id.* at 426–27.

In an attempt to apply that framework here, Doubek relies on *State v. Lomagro*, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), but the statute in that case was very different than Wis. Stat. § 947.01(1). In *Lomagro*, the defendant was charged with first degree sexual assault, which required "non-consensual sexual intercourse." *Id.* at 592. Another subsection of the statute, in turn, defined "sexual intercourse" to include several different types of sexual contact. *Id.* at 593.[3] The court ruled that "[t]he multiple acts of penis-vagina intercourse and fellatio that occurred during the one continuous carnal invasion of the victim's body are conceptually similar." *Id.* While one could argue they were not conceptually similar, the court held that the Legislature's inclusion of the two acts in the definition of "sexual intercourse" established their similarity. *Id.* Therefore, under Wisconsin's test for elements vs. means, the alternatives were means, not elements.

In Wis. Stat. § 947.01(1), in contrast, the Legislature criminalized "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct." These types of conduct are not similar. As *Evans* noted, "'abusive' conduct does not necessarily denote violence or the use of physical force but instead could be either violent or nonviolent." 353 Wis. 2d 289, ¶ 15 n.4. Similarly, violent conduct is very different from "indecent," "profane," "boisterous" and "unreasonably loud" conduct. Under *Manson*, these types of conduct are not similar, and therefore do not constitute one crime with alternative means. Moreover,

[3] For example, second degree sexual assault includes "sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence." Wis. Stat. § 940.225(2)(a). The statute then defines "sexual contact" and "sexual intercourse" to include a number of different acts. Wis. Stat. § 940.225(5)(b)–(c).

Lomagro thus says nothing about Wis. Stat. § 947.01(1), which penalizes such varying types of conduct.

Nor is Wis. Stat. § 947.01(1) similar to the statutes in *Mathis* and *Lomagro*, which concerned crimes with several elements, one element of which used specially defined phrases. In *Mathis*, that phrase was "occupied structure," defined to include different types of structure, while in *Lomagro* it was "sexual intercourse," defined to include various types of sexual contact. And *Mathis* further used the example of use of a "deadly weapon," defined to include various types of weapons. In contrast, to violate Wis. Stat. § 947.01(1), a person must "engage[] in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." The statute has no term with a specified definition; instead, it lays out seven alternative elements for the type of conduct that violates the statute. Likewise, there are no separate statutory sections containing definitions of terms used in the elements of the charged crime, as in *Lomargo* and *Mathis*.

And Wis. Stat. § 947.01(1) is not similar to the child enticement statute in *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, relied upon by Doubek. As the *Derango* court explained, that statute "criminalizes the act of causing or attempting to cause a child to go into a vehicle, building, room or other secluded place with any of six possible prohibited intents." *Id.* ¶ 17. The criminal act was enticing the child, the element with alternative means was the intent to commit a type of sexual misconduct. *Id.* ¶ 16 (citing Wis. Stat. § 948.07). Those types of misconduct were all conceptually similar—ways of sexually exploiting a child—and, as the court explained, "[t]he act of enticement is the crime, not the underlying intended sexual or other misconduct." *Id.* ¶ 17. Wisconsin Stat. § 947.01(1) is not such a statute. The crime is the act of committing one of the listed types of conduct; the

types of conduct are not means of satisfying an intent element.

Doubek's interpretation of Wis. Stat. § 947.01(1) makes little sense. Under Doubek's reading, the statute's criminal act element would forbid "conduct" in general, with a hugely varying list of examples, so long as it occurred "under circumstances in which the conduct tends to cause or provoke a disturbance." The statute would lack all specificity on the actual conduct that is criminalized—it would be a general "conduct" element with a jumble of vastly different means by which it could be satisfied. This contrasts sharply with statutes recognized as containing alternative means. Those cases have a clearly defined element—for example, use of a deadly weapon—with a list of similar things that satisfy the element—like certain types of weapons. Wisconsin Stat. § 947.01(1) is not structured as a statute with a clear element with alternative means.

C. There was sufficient evidence showing the crime of which Doubek was convicted.

Because Wis. Stat. § 947.01(1) is a divisible statute that contains alternative elements, courts use what is called the modified categorical approach to determine the crime of conviction. *Evans*, 353 Wis. 2d 289, ¶ 18. Under this approach, courts "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Descamps v. United States*, 570 U.S. 254, 257 (2013). Here, the Department properly used that approach in using the criminal complaint, (R. 7:14–16), and the judgment of conviction, (R. 7:13), to determine that Doubek had been convicted of the "violent" element of disorderly conduct. Doubek cites no authority that a court cannot look to these documents when conducting the modified categorical approach, nor could he when these documents are ways "to

determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 257.

Instead, Doubek argues that no one can know his crime of conviction because the Door County court no longer has the original case file. While those files are no longer at the court, we do have the criminal complaint and the judgment of conviction, which show the crime charged and crime of conviction. That evidence shows Count I of the complaint charged Doubek with "violent, abusive and otherwise disorderly conduct," (R. 7:14), and he then was convicted of Count I. (R. 7:13.) Further, Doubek was found not guilty of Count II, showing that the judgment reflects the crimes he did not admit to in his plea.

Doubek cites no authority that a court must have a plea colloquy transcript or a jury verdict form. Nor does he submit authority that the factual basis of a plea is required—likely because the categorical approach merely seeks to determine the crime of conviction, not the specific facts that underlie the conviction. For example, a person charged and convicted of "loud" disorderly conduct would not be convicted of "violent" disorderly conduct even if he admitted to violent conduct in the plea colloquy and vice versa. The case documents show Doubek was convicted of the "violent" element of disorderly conduct, and he submitted no evidence to the contrary.

Lastly, Doubek mistakenly contends that the Department used the facts in the complaint to establish the element of conviction. This is incorrect—the complaint itself charges "violent" conduct, (R. 7:14) and Doubek was convicted of that count, (R 7:13). The Department went through the facts in the criminal complaint in the circuit court to establish that (1) the victim had a spousal relationship with Doubek, required by 18 U.S.C. § 921(a)(33)(A)(ii), and (2) that the force was directed at the victim, as required by *Leonard*, 364 Wis. 2d 491, ¶ 28. That was appropriate because the question can be determined based on all the facts, even those outside the

limited class of documents considered in the categorical and modified categorical approaches. *United States v. Hayes*, 555 U.S. 415, 421 (2009); *Evans*, 353 Wis. 2d 289, ¶¶ 27–30.[4]

II. Default judgment was not an available remedy, but even assuming it was, it was not appropriate here.

The circuit court had no authority to enter a default judgment against the Department and, in any event, it did not erroneously exercise its discretion in declining to enter a default judgment in this case.

A. Default judgment is not an available remedy in a judicial review of an administrative decision.

While Doubek contends that the circuit court should have entered a default judgment against the Department, such relief is not available in a judicial review under Wis. Stat. § 175.60, which does not mention a default judgment remedy. In addition, it is well-established that a court cannot grant a default judgment in judicial review actions under Chapter 227. The reasoning behind that rule applies with equal force here.

As an initial matter, the mere inclusion of a filing deadline in a statute does not grant a court the authority to enter a default judgment. In a civil action, "a defendant shall serve an answer within 20 days after the service of the complaint upon the defendant." Wis. Stat. § 802.06(1)(a). Yet this statute alone does not grant a court authority to enter a default judgment. Instead, Wis. Stat. § 806.02 contains additional criteria for a court to enter a default judgment.

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[4] On appeal, Doubek does not challenge that the victim of the crime was his wife, so this brief does not discuss the issue further.

However, there is no default judgment remedy in Wis. Stat. § 175.60, and it does not incorporate Wis. Stat. § 806.02.

This is consistent with the general rule that default judgments are not appropriate in judicial reviews of administrative actions. In a Chapter 227 judicial review, a respondent "shall serve upon the petitioner, within 20 days after service of the petition upon such person" the responsive pleading. Wis. Stat. § 227.53(2). Despite this mandatory language, default judgments are not available in Chapter 227 administrative reviews. *Wagner*, 181 Wis. 2d at 642. The Wisconsin Supreme Court reasoned that a default judgment "is in conflict with the scope of review in a ch. 227 proceeding" because in an administrative review, "[t]he circuit court must conduct an independent review of the record." *Id.* at 642. The circuit court's "review must occur even if the [agency] has failed to submit a notice of appearance stating its position on review." *Id.* Instead of granting a default judgment, a circuit court can grant relief against an agency that does not file a response, such as issuing a writ of mandamus, an order to show cause why the agency should not be held in contempt, or an order to produce the record, or by refusing to consider an untimely response. *Id.* at 644. Default judgments, however, are contrary to legislative intent.

That same reasoning applies to judicial review of concealed carry license decisions under Wis. Stat. § 175.60(14m). While the statute provides that "[t]he department shall file an answer within 15 days after being served with the petition," Wis. Stat. § 175.60(14m)(d), it provides no sanction for the late filing of an answer, nor does it incorporate the default judgment statute in Wis. Stat. § 806.02. And just as in a Chapter 227 review, the court conducts an independent review of the administrative record—the court "shall review the petition, the answer, and any records or documents submitted with the petition or the answer." Wis. Stat. § 175.60(14m)(e). Further, the court, just

as in a Chapter 227 review, may only reverse if it makes certain findings. Wis. Stat. § 175.60(14m)(f). As a result, default judgment is not available because the court can grant Doubek relief only if it finds that the Department committed an error in revoking Doubek's petition.

Likewise, default judgment conflicts with the substance of the concealed carry law. The concealed carry statute clearly provides that those legally prohibited from possessing a firearm cannot have concealed carry licenses. Wis. Stat. § 175.60(3), (14)(a). Whether Mr. Doubek has a right to have a concealed carry license under Wis. Stat. § 175.60 turns on whether he is barred from possessing a firearm under federal law. If the Department was correct that Doubek is not legally entitled to possess a firearm, then he is not entitled to a license. A default judgment against the Department would allow someone to obtain a concealed carry license in violation of state law, merely because of the late filing of an answer. If the Legislature intended such a result, it would have created a default judgment remedy in Wis. Stat. § 175.60. That the Legislature did not do so means such a remedy is not available.

Doubek contends that the court was required to grant a default judgment because the statute provides that "[t]he court shall reverse the department's action if the court finds" that "the department failed to follow any procedure, or take any action, prescribed under this section." Wis. Stat. § 175.60(14m)(f)1. For the reasons discussed above, Doubek's interpretation of this provision does not make sense. Under his interpretation, a court would be allowed to grant a concealed carry license to someone who is prohibited by law from having one. Instead, the correct reading of "fail[ure] to follow any procedure" is that it refers to the Department's failure to follow a statutorily mandated procedure during the administrative process. Subsection (14m)(f) provides the court standards for reviewing the Department's

administrative decision, not standards for judging whether it followed deadlines in the judicial review process.

B. A default judgment was not appropriate in this case.

In any event, a default judgment was not appropriate even if one assumes it is an available remedy. The statute does not clearly provide that the Department must file an answer 15 days after the petitioner mails the petition. The statute provides that "[t]he department shall file an answer within 15 days *after being served* with the petition under par. (c)." Wis. Stat. § 175.60(14m)(d). The best reading of the term "after being served" is that the deadline begins running when the Department receives the petition and not when the petition is mailed.[5] For example, the discovery statutes place the response date on "within 30 days after the service," Wis. Stat. § 804.09(2)(b)1, while Wis. Stat. § 175.60(14m)(c) places the response date "after being served." And, here, one week passed between mailing and receipt. (Doubek Br. 23.) Under Doubek's reading, the Department would have had only eight days to respond to the petition and, conceivably, would be required to respond even if it never received the petition. Under the correct reading of the statute, the Department's answer was due on November 5, 2019.

The Department filed a response by November 5, by filing a motion for an extension and a general denial. (R. 4.) This filing generally denied all factual allegations inconsistent with the record and stated that it need not

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[5] The Department recognizes that the rules of civil procedure provide that "[s]ervice by mail is complete upon mailing." Wis. Stat. § 801.14(2). The Department does not dispute that the date of the mailing would be used to determine if Doubek complied with a service deadline. The language of Wis. Stat. § 175.60(14m), however, starts the response date "after being served" and not "after service," indicating a different start date for the answer.

respond to any legal allegations. (R. 4:2–3.) This response was sufficient to satisfy the requirement of an "answer," and was sufficient to join issues of law and fact under Wis. Stat. § 806.02(1).

Further, nothing in Wis. Stat. § 175.60 indicates that a court cannot grant an extension to the response deadline, particularly to account for a mailing that took one week to get to the Department. Six days after filing its motion for an extension, the Department filed a fuller answer and statement explaining its action, which specifically admitted and denied Doubek's factual allegations. (R. 6.) While Doubek alleges that the circuit court did not specifically grant the motion for an extension, it did so implicitly by addressing the Department's arguments on the merits. And, here, there were not even any grounds for the relief discussed in *Wagner*, like a writ of mandamus or order to show cause, because the Department promptly filed its answer.

Moreover, Doubek is attempting to impose a strict reading of Wis. Stat. § 175.60(14m) without strictly complying with its terms himself. The statute provides that "[a] copy of the petition *shall be served upon the department* either personally or by registered or certified mail within 5 days after the individual files his or her petition under par. (b)." Wis. Stat. § 175.60(14m)(c). Doubek, however, served the petition on the Attorney General. References to the "department" in Wis. Stat. § 175.60 refer to "the department of justice," Wis. Stat. § 175.60(1)(b), not to the Attorney General (who is not even mentioned in Wis. Stat. § 175.60). The Attorney General is not the Department of Justice. *Compare* Wis. Stat. § 165.015 (listing duties of the Attorney General), *with* Wis. Stat. § 165.25 (listing duties of the Department). Moreover, the Department's rules specify that "[t]he mailing address for the department is Wisconsin Department of Justice, Attention: Firearms Unit, Post Office Box 7130, Madison, WI, 53707-7130," Wis. Admin. Code JUS

§ 17.09(1)(Note), which is not the address Doubek used to serve the Department. Doubek, therefore, did not serve his petition on the Department as required by Wis. Stat. § 175.60(14m). If Doubek wishes to impose such a strict reading of Wis. Stat. § 175.60(14m) on the Department, then he needs to strictly comply with the statute as well. At the very least, his error in addressing the petition to the Department justifies declining to enter a default judgment.

Lastly, the circuit court did not erroneously exercise its discretion in deciding not to grant a default judgment even if Wis. Stat. § 802.06 applied here. The Department moved for an extension on the date its answer was due—and at the very least 15 days after receiving the petition—and then filed the answer six days later. At most, the Department was a few days late in failing its answer—caused by Doubek sending the petition to the Attorney General rather than to the Department's firearms unit's listed address. And this lateness, to the extent the answer was even late, did not lead to any delay in the circuit court deciding this case. If the circuit court even had authority to enter a default judgment, it would not be an erroneous exercise of discretion for a circuit court to refuse to do so in these circumstances.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the circuit court.

Dated this 20th day of August 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6789 words.

Dated this 20th day of August 2020.

Brian Keenan

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

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 20th day of August 2020.

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