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SUPREME COURT

In the Supreme Court of Wisconsin

Daniel Doubek,

Petitioner-Appellant,

v.

Joshua Kaul,

Respondent-Respondent

Appeal No. 2020AP000704

Appeal from the Judgment of the Brown County Circuit Court, The Hon. Kendall M. Kelley

Brief of Appellant

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1. Does Wisconsin's disorderly conduct statute sometimes constitute a misdemeanor crime of domestic violence, as defined by federal law, and sometimes not?
   Circuit Court answer: Yes
2. Is a petitioner who is seeking circuit court review of a revocation of a concealed carry license required to serve the Department of Justice with a copy of the petition at an address other than the official address of the Department of Justice and at a post office box, even though the applicable statute gives the petitioner an option to serve the petition in person?
   Circuit Court answer: Yes.

Statement on Oral Argument

The Court has ordered oral argument in this case.

Statement of the Case

This case is about the revocation of a license to carry a concealed weapon, and the intersection of Wisconsin's disorderly conduct statute with the federal prohibition of possession of firearms by persons convicted of "misdemeanor crimes of domestic violence.

On November 11, 1993, Petitioner-Appellant Daniel Doubek ("Doubek") was convicted in the Circuit Court of Door County of disorderly conduct, in violation of Wis.Stats. § 947.01. R7, p. 13.[1] The Door County Clerk of Courts has no record for that case, including any transcripts of a plea colloquy or jury verdict. R7, p. 29. Subsequent to the conviction, the Department of Justice ("DOJ") issued a license to carry a concealed weapon ("CCW") to Doubek. R7, p. 19.

On September 29, 2019, DOJ revoked Doubek's CCW. R14. DOJ asserted that Doubek was "no longer eligible for a [CCW]" because he had a "Federal Disqualifier for Domestic Violence." *Id.* DOJ's conclusion was based on the 1993 conviction. On October 14, 2019, Doubek commenced this action pursuant to Wis.Stats. § 175.60(14m)[2], challenging the revocation. R1. On March 31,

[1] References to the record in this brief are to document numbers as they appear in the Index to the record at the Clerk's office. Please note that these document numbers are ***not*** the same as the document numbers in the record at the Circuit Court clerk's office and are therefore not the document numbers that the Circuit Court clerk stamped on the documents.

[2] All Wisconsin statutory references are to the 2017-18 version unless otherwise noted.

2020, the Circuit Court denied Doubek's petition. R22. Doubek filed a notice of appeal the same day. R23.

Argument

Summary: The Circuit Court erred by failing to apply binding U.S. Supreme Court precedent to the facts of this case and determining that disorderly conduct can be a misdemeanor crime of domestic violence.

Pursuant to Wis.Stats. § 175.60(2), DOJ "shall issue a license to carry a concealed weapon to any individual who is not disqualified…." Pursuant to Wis.Stats. § 175.60(14), DOJ "shall revoke a license … if [DOJ] determines [that the licensee is prohibited under federal law from possessing a firearm]…"

A licensee whose license has been revoked may seek administrative review with DOJ (Wis.Stats. § 175.60(14g)) or judicial review (Wis.Stats. § `75.60(14m)), or both. In a case of judicial review, under Wis.Stats. § 175.60(14m)(f)(2) and (3), a reviewing court must reverse DOJ if DOJ erroneously interpreted a provision of law or if DOJ's action depends on a fact not supported by substantial evidence in the record. Doubek will show that the circuit court incorrectly affirmed DOJs erroneous interpretation of federal law, and that the record is factually incomplete (as a matter of federal law).

The crux of the merits of this case is whether Doubek is prohibited under federal law from possessing firearms on account of a prior conviction for what DOJ claims was a "misdemeanor crime of domestic violence" ("MCDV"),

pursuant to 18 U.S.C. § 922(g)(9). Under Wis.Stats. § 175.60(3)(b), a person who is prohibited under federal law from possessing firearms is not eligible for a CCW. Because whether someone has been convicted of a MCDV is a matter of federal law, this case will turn largely on federal law and cases interpreting that law.

A MCDV is defined in 18 U.S.C. § 921(a)(33) as an offense that i) is a misdemeanor under federal or state law; ii) has, ***as an element,*** the use or attempted use of physical force; that iii) is committed against someone within a certain relationship to the perpetrator. *United States v. Hayes*, 555 U.S. 415, 420, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) [emphasis supplied]. Thus, there is a misdemeanor test, a force test, and a relationship test. Generally, the misdemeanor test is obvious – a crime of conviction either was a misdemeanor, or it was not. Likewise, the relationship test is not difficult. Assuming there is a victim, the victim's relationship to the perpetrator generally can be established.

The difficulty most often lies in determining if a given crime meets the force test. Whether the disorderly conduct statute met (and meets) the force test is at the heart of this case. This will be discussed in great detail below.

1. The Force Test

A. Overview

The Supreme Court of the United States has ruled that courts are not to look to the actual conduct of the misdemeanant in determining if a given crime meets the force

test and therefore constitutes a MCDV. The Court has referred to this (proper) methodology as an "elements" approach as opposed to a (disallowed) "brute facts" approach[3]. So, for example, if a person were convicted of violating a noise statute, but the facts of the case are that he very loudly beat his wife, the conviction would not be a MCDV (assuming the noise statute did not have use of force as an ***element*** of the crime). It would not matter that the "brute facts" would otherwise meet the definition of a MCDV (i.e., the beating of the wife). Only the elements of the noise statute (e.g., making an unreasonably loud noise) would be used to determine if the force test were met. Because making a loud noise is not a use of force, the hypothetical noise statute would not, under the elements approach, meet the force test.

An understanding of Supreme Court of the United States jurisprudence in this area requires a review of a series of cases. The Court developed a line of cases mostly in the area of the federal Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), and then later applied that line of cases to MCDVs. The ACCA concerns itself with whether a felon's prior history includes certain violent crimes. The Court has developed a methodology for determining if certain convictions count under the ACCA. This Brief will review the cases in chronological order, with the understanding that where cases reference whether a crime counts under the

[3] For that reason, the actual conduct of which Doubek was accused in the 1993 conviction is not discussed in this brief.

ACCA, the methodology will apply to whether a crime is a MCDV because the methodology was later incorporated by the Court into MCDV jurisprudence.

B. The Categorical Approach

The analysis begins with the so-called categorical approach the Supreme Court developed in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed. 607 (1990). In *Taylor*, the Court ruled that courts should look to the elements of a given statute under which a person was convicted to see if they meet the force test.

For simple criminal statutes without alternative methods of committing the crime or differing sentences, the categorical approach is straight forward. For example, say there were a battery statute that criminalized the intentional, unwanted touching of another person resulting in an injury. If a person were convicted of that statute, a reviewing court could see that the force test would be met "categorically," because unwanted touching inherently involves some (even if minor) use of force. On the other hand, the hypothetical noise statute described earlier would not meet the force test categorically, so that it could never be a MCDV (regardless of the facts of the case).

Under the categorical approach, a reviewing court may "look only to the fact of conviction and the statutory definition of the … offense" to make the determination of whether the force test has been met. 495 U.S. at 602. A statute is "overbroad" if it includes behaviors that do not meet

the force test. An overbroad statute fails the categorical approach, so that a conviction of an overbroad statute never can constitute a MCDV. This is true even if the person were convicted for engaging in behavior that, factually, would fit the force test. The idea is that the court cannot "try" the person again, so the court may not look at his actual behavior, only his conviction. Thus, in the example of the noise statute described above, because the noise statute does not contain an element of force, that statute categorically fails the force test. A conviction of the noise statute cannot, as a matter of law, be an MCDV, even if the facts giving rise to the conviction ***could have*** constituted a MCDV under a different statute.

C. The Modified Categorical Approach

Taylor also recognized that statutes might not fit neatly into the categorical approach. This is especially true for a statute that describes multiple ways a crime may be committed. In those instances, *Taylor* adopted what later became known as the "modified categorical approach." Under the modified categorial approach, the court must determine if the statute of conviction is "divisible." A divisible statute is one that can be committed in multiple ways by the application of different elements. A divisible statute could be said to define separate crimes with those separate elements. It becomes necessary, for force test analysis, to determine which "version" of the crime the defendant committed (i.e., whether it was a version that includes a force element or not). In such a case, the court may look at certain "extra-statutory materials … to discover

which statutory phrase contained within a statute listing several different crimes covered a prior conviction." *Descamps v. United States*, 133 S.Ct. 2276, 2284, 186 L.Ed.2d 438 (2013). In *Shepherd v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Court ruled explicitly that the ***only*** documents a court may inspect in the case of a divisible statute (to determine if the force test were met) are the charging document and the terms of a plea agreement or the transcript of a plea colloquy between the judge and the defendant (or a comparable court document). And even then, the court may not look at the "brute facts" if they happen to be included in the charging documents. Documents such as police reports are inadmissible for this purpose.

D. Application to MCDV Cases

As noted earlier, cases such as *Taylor*, *Descamps*, and *Shepherd* are ACCA cases. In *United States v. Castleman*, 134 S.Ct. 1405, 1413, 188 L.Ed.2d 426 (2014), however, the Court announced it would "follow the analytic approach of [*Taylor* and *Shepherd*]" to determine if a crime constituted a MCDV.

E. Means v. Elements

After the above-referenced Supreme Court cases, the Court of Appeals issued two rulings applying those cases to specific disorderly conduct convictions. In *Evans v. Wisconsin Department of Justice*, 353 Wis.2d 289, 844 N.W.2d 403, 2014 WI App 31 (2014), the Court of Appeals

reviewed the DOJ's denial of a CCW for Robert Evans. The Court considered the MCDV implications of the disorderly conduct statute, Wis.Stats. § 947.01(1), which 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.

The Court of Appeals noted that disorderly conduct has two elements: 1) engaging in an enumerated conduct and 2) doing so under circumstances that causes or tends to provoke a disturbance. The Court concluded that the seven alternatives in the first element of disorderly conduct can be charged singly, in the conjunctive, or in the disjunctive. In the case of Mr. Evans, he was convicted of "violent, abusive, and otherwise disorderly conduct." *Evans,* 2014 WI App 31 at ¶ 12.

The Court of Appeals in *Evans* applied what is in essence the modified categorical approach on the theory that the conduct element can be accomplished in multiple ways (i.e., one or more of the enumerated conducts)[4]. Some of those ways may encompass the force needed for a MCDV (e.g., violent) and some may not (e.g., profane). The Court of Appeals reasoned it must therefore look to the *Shepherd*

[4] The Court of Appeals avoided adopting one of the approaches by name, but it is clear from the Court's analysis that it was applying the modified categorical approach. In a later case (*Leonard*, discuss below), the Court explicitly stated that it used the modified categorical approach in *Evans.*

documents to see which way of accomplishing the first element applied[5].

In *State v. Leonard*, 364 Wis.2d 491, 868 N.W.2d 186 (Ct.App. 2015), the Court of Appeals once again considered the application of the Wisconsin disorderly conduct statute to the federal MCDV statute. The Court followed the *Evans* reasoning but elaborated that the modified categorical approach applies to disorderly conduct, "Because the first element 'allows for alternatives.'" *Id.*, ¶ 21. The Court again emphasized that whether the alternative means of committing disorderly conduct are alleged in disjunctive or conjunctive drives whether the crime is a MCDV or not. The result of *Evans* and *Leonard* is that sometimes the disorderly conduct statute meets the force test for a MCDV and sometimes it does not.

Since *Evans* and *Leonard*, the Supreme Court of the United States has clarified how the modified categorical approach is to be applied (or not), and specifically how to distinguish between statutes that have alternative ***elements*** and those that have alternative ***means*** of committing the crime. In *Mathis v. United States*, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), the Court effectively overruled *Evans* and *Leonard*, to the extent those cases applied the modified

[5] Interestingly, the Court of Appeals in *Evans* observed that Mr. Evans' arguments would lead to the result that the Wisconsin disorderly conduct statute can never qualify as a MCDV. *Evans* at ¶ 13. The court "question[ed] whether that would be a reasonable result," but avoided answering its own question. As will be seen in this Brief, Mr. Evans presciently argued what the Supreme Court of the United States would later rule.

categorical approach to the disorderly conduct statute. The Court did so by announcing/reiterating the distinction between elements and means of committing a crime (just as Mr. Evans had argued in his case).

The *Mathis* Court considered a different type of crime from those in earlier Supreme Court cases. *Mathis* "involve[d] a different type of alternatively worded statute – one that defines only one crime, with one set of elements, but which lists alternative factual means by which a defendant can satisfy those elements." *Id.* The Court ruled that the modified categorical approach only may be used with crimes that have alternative ***elements*** but may not be used with crimes that have alternative ***means***.

The Court provided a road map for discerning such cases. First, the reviewing court must determine if the alternatively phrased statute lists elements or means. 136 S.Ct. 2256. If they are elements, the court should use the *Shepherd* documents to determine with which alternative elements the defendant was charged (and convicted). If they are means, the modified categorical approach should not be used. Only the categorical approach is allowed and no extrinsic documents are to be consulted (i.e., only the fact of conviction and the statute of conviction are used). The Court reminded the parties that "it is impermissible for a particular crime to sometimes count … and sometimes not, depending on the facts of the case." 136 S.Ct. at 2251. The Court went on to say, "[I]f instead [of being elements] they are means, the court has no call to decide which of the statutory

alternatives was at issue in the earlier prosecution." *Id.* at 2256.

The Court then explained how to determine if a given crime contains elements or means. To begin the inquiry, the reviewing court should look to state court decisions to see if alternatives listed in the statute are elements or means. *Id.* If the state courts have said that the list is alternative methods of committing one offense, so that the jury need not agree on which of them was actually done, the list is means and not elements. *Id.* If case law is no help, the statute itself may provide the answer. If the statutory alternatives carry different punishments, they must be elements. *Id.* And, finally, the Court said, if jury instructions list or reiterate all the elements, "That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. *Id.*

F. *Wisconsin Law on Elements v. Means*

Applying the *Mathis* test to the disorderly conduct statute makes clear that the statute only lists means. First, *Evans* tells us that there are only two elements to disorderly conduct: 1) one of seven alternative conducts; and 2) that conduct tending to cause or provoke a disturbance. *Evans* at ¶ 10.

Second, this Court has decided the question of how statutory alternatives are treated. In *Manson v. State,* 101 Wis.2d 413, 304 N.W.2d 729 (1981), this Court ruled that

jury unanimity on the particular alternative means of committing the crime is required only if the acts are "conceptually distinct." Unanimity is not required if the acts are "conceptually similar." 101 Wis.2d at 419, 428-430. In *State v. Lomagro,* 113 Wis.2d 582, 335 N.W.2d 583 (1983), this Court said that when the legislature groups acts together under one definition, that grouping as a matter of public policy declares them to be conceptually similar. 113 Wis.2d 593. In *Lomagro*, the legislature had grouped fellatio and penis-vagina intercourse together as alternative means of committing sexual assault. So, this Court reasoned, in a prosecution for sexual assault, the state need not prove specifically which of those acts was committed, and the jury need not agree which act was committed as long as it unanimously convicts for sexual assault.

This Court gave a then-recent example of a prosecution for battery where the state claimed the defendant threw a log at, punched, and kicked the victim. 113 Wis.2d 594, *citing State v. Giwosky,* 109 Wis.2d 446, 326 N.W.2d 232 (1982). In that example, the jury need not have been unanimous on which specific act the defendant committed as long as it unanimously convicted for battery.

The jury instruction given in *Lomagro* told the jury that sexual intercourse could be penile penetration of the female genitals or fellatio. That is, some jurors could vote to convict if they believed there was penile penetration, and some could vote to convict if they believed there was fellatio. Juror unanimity was not required on which alternative

occurred, in order for there to be a valid conviction. The Court affirmed that instruction, thereby approving of a jury instruction that made the alternatives means and not elements.

In addition, juror "unanimity is not required with respect to the alternative means or ways in which the crime can be committed." *Holland v. State*, 91 Wis.2d 134, 143, 280 N.W.2d 288 (1979). When the charged behavior constitutes one continuous course of conduct, the jury unanimity requirement is satisfied regardless as to which act constituted the crime charged. *State v. Giwosky*, 109 Wis.2d 446, 451, 326 N.W.2d 232 (1982).

Since *Lomagro,* this Court somewhat modified its test for determining when juror unanimity is required. In *State v. Derango,* 613 N.W.2d 833, 236 Wis.2d 721, 737 (2000), the Court followed a recent Supreme Court of the United States precedent and said, "We start with [the] presumption in favor of the legislative determination to create a single crime with alternative modes of commission, for which unanimity is not required." If that presumption is "fundamentally fair" and "rational," then juror unanimity is not required. *Id.*

Third, the standard jury instruction for disorderly conduct is found at WIS JI_Criminal 1900. The instruction tells us there are two elements to the statute (one of seven enumerated kinds of conduct and that such conduct tends to cause or provoke a disturbance). The instruction includes all the seven alternative means of committing disorderly conduct, and has a comment in FN 1 of the instruction that

reads, "The Committee recommends selecting one of the [alternative means] where possible, but believes it is proper to instruct on all alternatives that are supported by the evidence."

Because the disorderly conduct statute may be violated by any of the seven enumerated means, juror unanimity does not require agreement on which of the means was used to commit the crime. *State v. Galarowicz,* 345 Wis.2d 848, 826 N.W.2d 123, ¶19 (Ct.App. 2012) *unpublished* ("Garlarowicz's yelling, swearing, and object throwing in the residence were alternative means of committing disorderly conduct…. We conclude unanimity was achieved because the jury agreed Galarowicz engaged in conduct that, under the circumstances, tended to cause or provide a disturbance."). In *Galarowicz*, the State in its brief before the Court of Appeals argued:

> This [disorderly conduct] statute clearly establishes "different modes or means by which the offense may be committed," and therefore unanimity is not required…. [T]he disorderly conduct verdict is constitutionally unanimous because of the longstanding recognition that the "unanimity principle requires that the jury agree that the defendant participated in the crime, not how the defendant participated."

Brief of the Plaintiff-Respondent [the State], Appeal No. 2012-AP-933-CR, Filed October 24, 2012. Thus, the State convincingly argued to the Court of Appeals that disorderly conduct has seven means of establishing the conduct element and juror unanimity is not required among those means.

In the present case, the State argued to the Circuit Court that the decision in *Galarowicz* should be turned upside down and asked the Court to declare the State's (victorious) position in *Galarowicz* to be wrong. This Court should not permit the State to argue that juror unanimity is not required for disorderly conduct in a criminal prosecution but that it is for CCW revocations. The people of the State of Wisconsin deserve to have a definitive ruling on this issue.

Because juror unanimity is not required in a disorderly conduct prosecution, the disorderly conduct statute is "overbroad" and a conviction under that statute cannot count as a MCDV.

G. Application to the Present Case

With the foregoing in mind, we turn to the present case. Doubek was convicted in Door County Circuit Court of disorderly conduct in 1993. R7, p. 13. DOJ characterizes that conviction as for a MCDV. There are several reasons, however, why that cannot be.

The 1993 version of the disorderly conduct statute, Wis.Stats. § 947.01, was identical to the current version of § 947.01(1) quoted above. Because there is a list of seven types of conduct that can constitute disorderly conduct, we must determine if they are elements or means.[6] As it happens, case law tells us they are means and not elements.

[6] The misdemeanor test and relationship test are not at issue in the present case.

This Court in *Evans* ruled that disorderly conduct has but two elements: 1) engaging in conduct of the type or types enumerated, and 2) doing so under circumstances that tend to cause or provoke a disturbance. 2014 WI App 31, ¶10 ("Although there may be different ways to state the first element, what is clear is that the first element need not consist of all seven types of listed conduct…. Rather the first element allows for alternatives."). Thus, the Court of Appeals has announced there are only two elements to disorderly conduct with seven different means of committing the first element (the conduct element). The circuit court followed that conclusion in the present case, and DOJ has not appealed that determination.

Second, applying the *Manson-Lomagro-Derango* analysis, the legislature has grouped all seven types of conduct together in § 947.01 and declared them to be disorderly conduct. By making this grouping, the legislature has declared as a matter of public policy that they are conceptually similar and therefore jury unanimity (as to which means of conduct was committed) is not required in a prosecution for disorderly conduct. The *Derango* presumption applies, that the legislature intended to define but one crime with alternative means of committing it. DOJ has not rebutted the presumption.

Moreover, it is fundamentally fair to treat the alternatives in the disorderly conduct statute as means, because they are morally equivalent (engaging in behavior that tends to provoke a disturbance). Finally, the Court of

Appeals determined in *Galarowicz* that juror unanimity is not needed among the disorderly conduct means, because all the means listed in the statute tend to provoke a disturbance.

Because the disorderly conduct statute lists alternative means, not elements, only the categorical approach can be applied to a conviction for that crime. Applying the categorical approach, we see, as already noted, that some alternative means could meet the force element (*e.g.*, "violent") and some could not (*e.g.*, "profane"). Under the categorical approach, the disorderly statute is "overbroad" and therefore not, as a matter of law, a MCDV.

Doubek notes that this conclusion is at odds with the Court of Appeals' decisions in *Evans* and *Leonard*, but those decisions were released before the Supreme Court of the United States' decision in *Mathis* that instructed lower courts on the proper application of alternative means of committing a crime.

The Court of Appeals' conclusion that disorderly conduct sometimes is a MCDV and sometimes it is not has therefore been overruled. The *Mathis* decision negates the logic of DOJ in the present case in looking to the charging document to see whether the alternative means were charged in the conjunctive or disjunctive. Under *Mathis*, it does not matter because the statute is overbroad and cannot meet the force test.

The circuit court seemed conflicted by *Mathis.* It readily concluded, "Applying *Mathis* would require this

Court to accept [Doubek's] argument that the disorderly conduct statute lists alternative means and not alternative elements. It would also require this Court to accept [Doubek's] interpretation of *Mathis* and disregard the court of appeals' decisions in *Evans* and *Leonard.*" Exactly. Nevertheless, despite the circuit court's conclusion that applying *Mathis* would compel ruling in Doubek's favor, the circuit court contradicted itself by ultimately concluding "it is unclear to this Court as to whether a conflict exists."

The conflict is clear. The Court of Appeals in *Evans* and *Leonard* applied the modified categorical approach to the disorderly conduct statute, and concluded that sometimes disorderly conduct is a MCDV and sometimes it is not, depending on which of the alternative means of committing the crime were found for conviction. The *Mathis* court ruled that single crimes with alternative means of commitment are subject only to the categorical approach, and either always are MCDVs or never are MCDVs (if they are overbroad). Because the disorderly conduct statute is overbroad, it can never be a MCDV and *Evans* and *Leonard* have been overruled to the extent they ruled otherwise.

H. Missing Circuit Court Records

Even if this Court somehow concludes that the modified categorical approach is appropriate to disorderly conduct (which it is not), that approach cannot be applied in the present case. As noted earlier, in order to apply the modified categorical approach, the reviewing court has to

examine, not just the charging document, but the plea colloquy or jury verdict in order to determine what the conviction actually was for. The Clerk of the Door County Circuit Court has reported that she has no criminal case files on Doubek. R7, p. 29. That means there is no copy of the plea colloquy or the jury verdict on which to apply the modified categorical approach. If the modified categorical approach cannot be applied, DOJ cannot demonstrate that the apparent conviction was for a MCDV.

Consider, for example, the charging document in the present case. R7, pp. 14-16. It accuses Doubek of "engag[ing] in violent, abusive, and otherwise disorderly conduct." R7, p. 14. Because we do not have the plea colloquy or jury verdict, we do not know of what Doubek was convicted. It is possible, for instance, that he pleaded guilty but as the factual predicate for his plea he said he engaged in "otherwise disorderly conduct" but not violent or abusive conduct. If that were the case, even the modified categorical approach would conclude that Doubek had not been convicted of a MCDV.

If DOJ used the modified categorical approach (which it should not have done in the first place), it would have had to base its conclusion on facts not contained in the record (on account of the lack of the plea colloquy or jury verdict). Under Wis.Stats. § 175.60(14m)(f)(3), reversal of DOJ's decision would still be required.

Because the *Shepherd* documents are not available, DOJ made use of non-*Shepherd* documents, which is categorically forbidden. For example, DOJ draws most of its "brute facts" from the charging document. DOJ draws them, however, not from the description of the crime in terms of the elements, but from a narrative that follows, which essentially consists of a regurgitation of a police report from the Door County Sheriff. These facts simply cannot be used. The only thing that can be drawn from the criminal complaint is the actual statute that was allegedly violated. DOJ completely ignores the application of the categorical approach (or even the modified categorical approach), and instead engages in a "brute facts" analysis that has been thoroughly discredited. Said another way, DOJ erroneously interpreted a provision of law, so Wis.Stats. § 175.60(14m)(f)(2) requires reversal.

I. *Disorderly Conduct Does Not Have a Force Element*

The foregoing discussion has been assuming *arguendo* that some of the means of committing disorderly conduct could meet the force test of a MCDV. Doubek will show that in fact they could not. This means that, even if this Court concludes that the different behaviors of disorderly conduct are separate "elements" of the crime, disorderly conduct still cannot be a MCDV.

To reiterate, the seven enumerated conducts are violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly. We need not dwell on indecent, profane, boisterous, unreasonably loud, or otherwise

disorderly, as it is self-evident that those types of conduct do not inherently involve the use of any force. That leaves violent and abusive.

Under Wisconsin law, it is possible to be convicted of disorderly conduct for being violent or abusive against someone with a domestic relationship, without having committed a MCDV. Logically, a person can be mentally abusive as well as physically abusive. Thus, a person convicted of being "abusive" to his spouse under circumstances that tend to cause a disturbance does not necessarily pass the force test, because just mental abuse has no force element. Because a reviewing court cannot consider the brute facts, but only the crime of conviction, disorderly conduct for being abusive is "overbroad" and cannot constitute a MCDV.

The only "element" remaining is violent. Again, a person can be violent, even violent towards a spouse, without meeting the force test necessary for a MCDV. One need look no further than *Leonard.* In that case, Leonard was convicted of disorderly conduct for kicking in the door of his house. The Court of Appeals said that, while it is possible Leonard's actions were done to frighten and intimidate his wife, the court was precluded from examining the brute facts of the case. Because the violence could have been done against Leonard's wife ***or not,***, it was not possible to say the conviction was for a MCDV and Leonard was not, therefore, prohibited from possessing firearms.

The holding in *Leonard* should be the holding in every disorderly conduct conviction. The reason is that being "violent" does not necessarily involve use of force or threats of force ***against a person***. It is possible to be violent against inanimate objects. Consider, for example, a person who purposefully and violently breaks something belonging to his spouse. He has not used force against his spouse. That is, being "violent" does not have ***"as an element"*** the use of force against a person.

If this Court rules otherwise, the only way to know if a given disorderly conduct conviction for being "violent" constitutes a MCDV is to look to the brute facts of what the person did. Was he violent to his wife because he broke her grandmother's vase out of anger or was he violent because he hit her? The former would not involve the use of force against the wife and the latter would. The only way to know which it was would be to look at the brute facts, which is something the Supreme Court of the United States has ruled is not permissible.

In short, the only crimes that can meet the force test are those that ***really*** have as an element the use of force against a person. The most common example in Wisconsin by far is battery, in violation of Wis.Stats. § 940.19. There may be other examples of misdemeanors that have as an

element the use of force against a person, but battery is going to cover the large majority of cases.[7]

Summary: The Circuit Court erred by failing to find the DOJ in default and for failing to apply Supreme Court precedent.

A reviewing court must reverse the DOJ's revocation of a CCW if the court finds that DOJ failed to follow any procedure, or take any action, prescribed under § 175.60. Wis.Stats. § 175.60(14m)(f)(1). As discussed further below, DOJ failed to file an answer within 15 days after being served with the Petition as required by § 175.60.

A person whose CCW has been revoked by DOJ has the option of seeking administrative review or judicial review. Wis.Stats., § 175.60(14g) and (14m). If the person seeks judicial review, he files a petition in circuit court and serves a copy of the petition on DOJ "either personally or by registered or certified mail." Wis.Stats. § 175.60(14m)(c). On October 14, 2019, Doubek served a copy of his petition on DOJ via certified mail addressed to Defendant Joshua Kaul,

[7] Doubek recognizes that defendants are commonly charged with disorderly conduct under circumstances when a battery charge would be appropriate. In addition, Wisconsin does not have an assault statute, separately criminalizing an attempted or threatened battery, either of which could ***possibly*** constitute a MCDV in the right circumstances.

Charging decisions are a matter of prosecutorial discretion and not for this Court. If the State chooses to charge a person with disorderly conduct when a battery charge also would fit the facts of the situation, such election necessarily eliminates the possibility that the crime will be a MCDV. Moreover, if the legislature wanted to create a separate crime of assault, to cover attempted or threatened batteries, it could do so. It is not for this Court's to turn the disorderly conduct statute into a MCDV when disorderly conduct does not fit the federal definition and case law for a MCDV.

the chief executive of the DOJ, at 17 W. Main Street in Madison. R3, p. 1. DOJ admits that it received the petition on October 21, 2019. R3, p. 2. DOJ claims, however, that it did not bother routing the petition to its "firearms unit" until November 5, 2019.[8]

Under Wis.Stats. § 175.60(14m)(d), DOJ is required to file an answer within 15 days after being served. Generally, service by mail is complete upon mailing, but even taking the date on which DOJ ***received*** the petition (October 21), DOJ was required to file an answer by November 5. On that date, DOJ filed a motion for an extension of time to file an answer. R3. The circuit court never ruled upon that motion. Instead, the circuit court said Doubek "failed to put any effort into finding the correct mailing address to serve the Department of Justice." This conclusion is demonstrably incorrect.

The circuit court contradicts itself by saying that Doubek "carefully read through" the statutes and administrative codes applicable to CCW revocations. The circuit court concluded that the administrative code "provides the address to send petitions to ***throughout the code***. Wis.Admin.Code JUS 17." [Emphasis supplied]. Despite this conclusion, the circuit court only found one instance of an address in the administrative code, not in the section dealing with judicial review.

The section dealing with ***administrative*** review, JUS 17.09, has in a "note" (and not in the text of a regulation) a mailing address for DOJ to which to send petitions for

[8] DOJ does not explain why it did nothing with the petition for 15 days from October 21 to November 5.

administrative review. The administrative code contains ***no reference*** to the possibility of ***judicial*** review, so it contains no mention of an address to which to serve petitions for ***judicial*** review.

The circuit court's opinion was that Doubek should have served a petition for judicial review on DOJ at the address for serving petitions for administrative review. There are several reasons why this conclusion does not follow.

First, DOJ's own administrative regulations only specify that address for administrative review, not judicial review. The rules of statutory construction dictate that the inclusion of one implies the exclusion of all others. *State v. Riekkoff*, 112 Wis.2d 119, 126, 332 N.W.2d 744, 748 (1983). That rule would indicate that only administrative review petitions are to be sent to the address listed.

Moreover, it would make sense for DOJ to have an address to send petitions ***to DOJ*** for DOJ's own internal administrative review. On the other hand, it also makes sense that DOJ's civil litigation attorneys would work on petitions for judicial review (which is exactly what happened), and they might not be at the same address as DOJ's administrative reviewers.

Perhaps most importantly, the statute authorizing judicial review provides that petitioners may serve their petitions "either personally or by registered or certified mail." The circuit court found that the "proper" address for service was a post office box. It is self-evident that personal service is not possible on a post office box. Because the legislature has made a public policy decision that personal service is

permissible, DOJ lacks the authority to require service at a post office box where personal service cannot be achieved.

Finally, in the face of a statute instructing a petitioner to serve the "Department of Justice" with the petition, it is only logical that a petitioner would use the address of the Department of Justice. Using common internet search engines, one finds that the Department of Justice is located in the Risser Justice Center at 17 W. Main Street in Madison. And, the Department of Administration's official employee directory lists the address for Attorney General Joshua Kaul as 17 West Main Street in Madison[9]. That is exactly where Doubek served the petition.

The circuit court also determined that the address listed in the revocation letter (but not for judicial review purposes) should have been the one Doubek used for service of the petition. Again, there is no basis for this conclusion, especially in light of the statute permitting personal service.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed, with instructions to vacate DOJ's decision to revoke Doubek's CCW and to order reinstatement of Doubek's CCW *instanter*.

/s/ John R. Monroe
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John Monroe Law, P.C.
Attorney for Appellant

[9] https://stateempdir.wi.gov/Search/SearchName

Certificate of Service

I certify that on July 2, 2021, I served three copies of the foregoing via U.S. Mail upon:

Christopher J. Blythe
POB 7857
Madison, WI 53707-7857

/s John R. Monroe
John R. Monroe

Certifications:

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 7,258 words.

I certify that the text of the electronic copy of the Brief of Appellant is identical to the text of the paper copy of the Brief of Appellant.

I certify that this Brief of Appellant was mailed via priority mail to the Clerk of the Supreme Court on July 2, 2021.

/s/ John R. Monroe

John R. Monroe