STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP704

DANIEL DOUBEK,

Petitioner-Appellant,

v.

JOSHUA KAUL,

Respondent-Respondent.

APPEAL FROM THE JUDGMENT OF THE BROWN COUNTY CIRCUIT COURT, THE HON. KENDALL M. KELLEY PRESIDING

BRIEF OF RESPONDENT

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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. Petitioner Daniel Doubek was convicted of "violent, abusive . . . [and] otherwise disorderly conduct" under Wis. Stat. § 947.01(1). The court of appeals in *Evans v. Wis. Dep't of Justice*, 2014 WI App 31, ¶¶ 8–25, 353 Wis. 2d 289, 844 N.W.2d 403, held that a conviction under the "violent" element of disorderly conduct in Wis. Stat. § 947.01(1) is a misdemeanor crime of domestic violence under federal law.

The court of appeals asked this court to address whether *United States v. Castleman*, 572 U.S. 157 (2014) abrogated *Evans* based on its understanding that *Castleman* requires physical contact with the victim to satisfy federal law's requirement that the crime have "as an element, the use or attempted use of physical force." *Doubek v. Kaul*, No. 2020AP704, at 2 (Wis. Ct. App. Mar. 31, 2021) (petition for certification) ("Ct. App. Order"), certification granted, No. 2020AP704 (Wis. June 16, 2021) (quoting 18 U.S.C. § 921(a)(33)(A)). *Castleman*, however, only recognized that a statute with an element satisfied by mere offensive touching qualified as a misdemeanor crime of domestic violence. It did not hold that this touching was required to satisfy the physical force requirement; in fact, it recognized that the word "violent," the type of conduct for which Doubek was convicted under Wisconsin's statute, means the use of physical force.

Doubek mistakenly contends that the U.S. Supreme Court's *Mathis v. United States*, 136 S. Ct. 2243 (2016) effectively overruled *Evans*. *Mathis*, however, simply provided guidance on what constitutes an element and what constitutes a means of satisfying an element. Under

Wisconsin law, Wis. Stat. § 947.01(1) has alternative elements rather than alternative means.

STATEMENT OF THE ISSUES

1. To qualify as a misdemeanor crime of domestic violence, a crime must have "as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). Wisconsin's disorderly conduct statute prohibits engaging in "violent" conduct tending to cause a disturbance. Wis. Stat. § 947.01(1). In *United States v. Castleman*, 572 U.S. 157, 164 (2014), the Supreme Court said that "the word 'violent' or 'violence' standing alone "connotes a substantial degree of force"' (citation omitted). Does "violent" disorderly conduct have, as an element, the use or attempted use of physical force?

The circuit court did not address this question because it was not raised by the parties.

The court of appeals asked this Court to address the issue. This Court should answer yes.

2. State law determines whether a list of alternatives in a criminal statute are alternative elements of the crime or merely alternative means of satisfying an element. Wisconsin Stat. § 947.01(1) prohibits "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Does this list of very different types of conduct constitute alternative elements or alternative means of satisfying a vague and general "disorderly conduct" element?

The circuit court answered that it was bound by *Evans*, which had already rejected the alternative means argument.

The court of appeals did not address this issue.

This Court should answer that the statute contains alternative elements.

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.

The court of appeals did not address this issue.

This Court should also answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By taking the case, this Court has indicated oral argument is appropriate and publication is warranted.

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

[1] Wis. Stat. § 947.01 (1) provides that: "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."

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.)

III. Procedural history

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 the United States Supreme Court in *Mathis v. United States*, 136 S. Ct. 2243 (2016), "effectively overruled *Evans* and *Leonard*[2]." (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 versus 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).

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[2] *Leonard v. State,* 2015 WI App 57, 364 Wis. 2d. 491, 868 N.W.2d 186.

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.) 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.)

C. Proceedings in the court of appeals

The court of appeals certified this appeal to this Court under Wis. Stat. § (Rule) 809.61 on a ground that Doubek has never pursued. The court of appeals saw the issue as whether *Evans* and *Leonard* are "'good law' in light of the United States Supreme Court's decision in *United States v. Castleman*, 572 U.S. 157 (2014)." Ct. App. Order 1.

The court said that *Evans*, "with no citation to authority," held that "violent" conduct necessarily implies the use of force. Ct. App. Order 4. It then stated that *Castleman* held that the term "'physical force' requires at least some 'offensive touching' of the victim." Ct. App. Order 5 (quoting *Castleman*, 572 U.S. at 167). The court of appeals thought that the *Castleman* court "made clear, through all the examples it referenced as well as the language it chose in its holding, that the victim of the event at issue needed to have been 'touched' at least to some degree." Ct. App. Order 6. The court of appeals thought that *Leonard* was inconsistent with *Castleman* because it held that "a defendant's conduct may be

'violent' for purposes of a Wis. Stat. § 947.01 conviction even if he . . . never actually touches, or even attempts to touch, the victim." Ct. App. Order 5 (citing *Leonard*, 364 Wis. 2d 491, ¶¶ 6–7). The court therefore asked this Court "to accept certification and address the conflict between our *Evans* and *Leonard* decisions and the Supreme Court's decision in *Castleman*." Ct. App. Order 9.

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

I. A conviction for "violent" disorderly conduct is a misdemeanor crime of domestic violence.

The court of appeals mistakenly thought that *Evans* and *Leonard* are inconsistent with *Castleman*. Because the word "violent" necessarily includes connotes the use of force, as *Castleman* itself recognized, "violent" disorderly conduct has, as an element, the use of force. Further, *Castleman* only addressed whether a battery statute which required mere touching satisfied the standard for the use of force—it did not hold that the use of force must include touching.

A. "Violent" conduct includes the use of force.

The court of appeals wrongly concluded that the term "violent" in Wis. Stat. § 947.01(1) does not have "as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). This is incorrect under a plain language analysis of the word "violent," which by definition includes the use of force. Of course, it makes eminent sense that Congress defined a "misdemeanor crime of domestic violence" based on the traditional definition of "violence" and "violent," which mean the use of physical force.

The *Castleman* court itself said that "the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force.'" 572 U.S. at 164–65 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). *Castleman* cited the Court's prior decision in *Johnson*, which cited Webster's Dictionary, the Oxford English Dictionary, and Black's Law Dictionary as support for the proposition that "violent" includes the use of physical force. *Johnson*, 559 U.S. at 140. Webster's defined "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement . . . ," *id.* (alterations in original) (quoting Webster's New International Dictionary 2846 (2d. ed. 1954)), the OED defined "violent" as

"[c]haracterized by the exertion of great physical force or strength," *id.* (quoting 19 Oxford English Dictionary 656 (2d ed.1989), and Black's defined "violent" as "[o]f, relating to, or characterized by strong physical force," *id.* (quoting Black's Law Dictionary 1706).

At the time Congress enacted section 922(g)(9) in 1996, Black's Law Dictionary defined "violent" as "[m]oving, acting, or characterized, by physical force, especially by extreme and sudden or by unjust improper force," *violent*, Black's Law Dictionary (7th ed. 1990), and "violence" was defined as "[u]njust or unwanted exercise of force, usually with the accompaniment of vehemence, outrage or fury," *violence*, Black's Law Dictionary (7th ed. 1990). The current version of Black's Law Dictionary defines "violent" as "[o]f, relating to, or characterized by strong physical force," *violent*, Black's Law Dictionary (11th ed. 2019), and "violence" as "[t]he use of physical force, usu. accompanied by fury, vehemence, or outrage; esp., physical force unlawfully exercised with the intent to harm," *violence*, Black's Law Dictionary (11th ed. 2019). Other non-legal dictionaries agree with those cited in *Johnson* that the word "violent" means the use of physical force. For example, Merriam-Webster defines "violent" to mean "marked by the use of usually harmful or destructive physical force."[3] The Cambridge Dictionary defines "violent" as "using force to hurt or attack."[4]

As a result, *Evans* was correct when it held that "'violent' conduct necessarily implies the use of physical force," and that, as a result, a conviction for "violent" disorderly conduct "has the use of physical force as an element." *Evans*, 353 Wis. 2d 289, ¶ 12.

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[3] Violent, *Merriam Webster*, https://www.merriam-webster.com/dictionary/violent (last visited August 20, 2021).

[4] Violent, *Cambridge Dictionary,* https://dictionary.cambridge.org/us/dictionary/english/violent (last visited August 20, 2021).

B. *Evans* does not conflict with *Castleman*.

The court of appeals incorrectly interpreted *Castleman* as holding that offensive touching was required for a misdemeanor crime of domestic violence. *Castleman* held, using an expansive definition of domestic violence, that the definition of a misdemeanor crime of domestic violence includes any crime with an element of offensive touching. However, the court, which was not confronted with the question, did not hold that offensive touching was required.

As an initial matter, the court of appeals overlooked the fact that *Castleman* itself addressed whether the word "violent" includes the use of physical force, stating that it does. As noted above, the court held that "the word 'violent' or violence' standing alone "connotes a substantial degree of force." *Castleman*, 572 U.S. at 164 (quoting *Johnson*, 559 U.S. at 140). Thus, the court made clear that a crime that required "violent" conduct would have, as an element, the use of force. The question before the *Castleman* court was whether a crime that required a lesser degree of force would satisfy the statute—in that case, whether a common law battery that "was 'satisfied by even the slightest offensive touching.'" *Id.* at 163 (quoting *Johnson*, 559 U.S. at 139). It did not address whether a crime requiring "violent" conduct—which the court recognized as including physical force—satisfied the force element.

Castleman cannot be interpreted as excluding convictions for "violent" conduct when it expressly said that the word "violent" means a substantial degree of force. *Castleman* held that "*Johnson* requires that we attribute the common-law meaning of 'force' to § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence' as an offense that 'has, as an element, the use or attempted use of physical force.'" 572 U.S. at 168. As noted above, both *Johnson* and *Castleman* said that the word "violent" satisfied this common law definition because it included the use of physical force.

Thus, when *Castleman* held that "that the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction," *id.*, it was holding that such a statute met the minimum threshold for use of force. It was not excluding convictions for "violent" conduct that did not necessarily include physical contact.

Such an interpretation would also be inconsistent with the Court's reasoning in *Castleman*, which was based on the expansive understanding of the types of violence encompassed by domestic violence underlying section 922(g). The court said that domestic violence "is not merely a type of 'violence' it is a term of art encompassing acts that one might not characterize as 'violent' in the nondomestic context. *Castleman*, 572 U.S. at 165. A conviction for "violent" disorderly conduct, on the other hand, is necessarily characterized as "violent." It would be strange for *Castleman* to hold that a crime in which the defendant admitted to "violent" conduct is not covered, whereas a defendant who admitted to conduct that is not traditionally seen as violent is covered due to the expansive understanding of domestic violence incorporated in the law.

For this reason, the court of appeals in *Leonard* rejected the argument that physical force must be directed at the victim of the crime. 364 Wis. 2d 491, ¶¶ 27–28. Such an argument is "contrary to the Court's rationale in *Castleman*," and "ignores the nature of domestic violence." *Id.* ¶ 28. The court of appeals relied on *Castleman*'s explanation that "in the domestic violence context, the accumulation of relatively mild acts of physical force over time, such as squeezing an arm hard enough to cause a bruise, can work to 'subject one intimate partner to the other's control.'" *Id.* (quoting *Castleman*, 572 U.S. at 166). As the *Leonard* court explained, an act of force against an object can be directed at a person

when it is "was directed at frightening or intimidating the person." *Id.*

Lastly, the statutory language does not require that the victim have been physically touched. A "misdemeanor crime of domestic violence" is defined as 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). An intimate partner can be a "victim" of physical force (i.e., violence) even when that conduct did not make physical contact with her. As shown above, "violent" disorderly conduct under Wis. Stat. § 947.01(1) has the use of force as an element. Thus, a conviction under this statute is a misdemeanor crime of domestic violence if the convicted person has one of enumerated relationships with the "victim" of the crime.[5] If someone in the enumerated categories is the "victim" of the "violent" disorderly conduct, then it is a misdemeanor crime of domestic violence. Nothing in Wis. Stat. § 947.01(1) or 18 U.S.C. § 921(a)(33)(A)(ii) indicates that only those who were physically struck can qualify as a victim.

II. The Department properly applied the modified categorical approach to Doubek's conviction.

Evans correctly applied the "modified categorical" approach developed by federal courts in reaching its decision. 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

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[5] Here, there was a spousal relationship. The statute also covers crimes committed by a "parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(A)(ii).

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 statutes, however, are "divisible statutes," which "set[] out one or more elements of the offense in the alternative." *Descamps v. United States*, 570 U.S. 254, 257 (2013). When faced with such a statute, courts may "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." *Id.* These documents are consulted "to identify, from among several alternatives, the crime of conviction." *Id.* at 264.

Here, the Department properly used that approach in looking to the criminal complaint that charged Doubek in Count 1 with "violent, abusive and otherwise disorderly conduct," (R. 7:14–16), and the judgment of conviction, which showed Doubek had pled guilty to Count 1, (R. 7:13). Using these documents, the Department determined that Doubek had been convicted of the "violent" element of disorderly conduct. Doubek cites no authority that a court cannot look to these documents—the charging document and judgment of conviction—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. The complaint is equivalent to an "indictment" specifically allowed under the modified categorical approach, *id.*, and the judgment of conviction is allowed even under the categorical approach. *United States v. Ker Yang*, 799 F.3d 750, 753 (7th Cir. 2015) (noting that modified categorical approach allows courts "to look beyond the judgment and statute of conviction"). A court need not look to jury instructions here given that there was a plea agreement or to a plea colloquy

when the complaint and judgment establish the crime for which Doubek was convicted.

Importantly, whether the victim satisfies the required relationship is not covered by the categorical approach. Instead, this 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. As a result, there is no problem with looking into the facts of the case to determine if there was a victim of the defendant's violent conduct who satisfies one of the statutory relationships.

Doubek incorrectly asserts that the Department relied on the "brute facts" in determining he committed a misdemeanor crime of domestic violence. (Doubek Br. 25.) This is not true. As shown above, the crime for which he was convicted is a misdemeanor crime of domestic violence. The facts in the criminal complaint in the circuit court help 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. This was permissible under *Hayes*.

III. *Mathis* did not overrule *Evans*.

Doubek incorrectly maintains that the Supreme Court's *Mathis* decision overruled *Evans*. However, *Mathis* did not directly address whether a statute like Wis. Stat. § 947.01(1) contains alternative elements or alternative means. The statute at issue in *Mathis* was very different from Wis. Stat. § 947.01(1), *Mathis* held that this question is governed by state law and, under Wisconsin law, Wis. Stat. § 947.01(1) contains alternative elements.

A. Under *Mathis*, Wis. Stat. § 947.01(1) does not contain alternative means.

Mathis addressed the difference between a statute "that enumerates various factual means of committing a single element," from a statute with alternative elements. 136 S. Ct. at 2249. An example of a statute with alternative means is 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 addressed whether an Iowa burglary conviction satisfied the "generic burglary" definition required for a strike under the Armed Career Criminals Act (ACCA), which also uses the categorical and modified categorical approaches. *Id.* at 2250. The Supreme Court held that Iowa's statute contained alternative means because the Iowa Supreme Court had already determined that the statute at issue contained alternative means rather than elements. *Id.* at 2256.

Whether a crime satisfies the ACCA is based on whether the crime meets the elements of a generic crime, and in *Mathis* that was the generic definition of burglary: "unlawful entry into a 'building or other structure.'" *Id.* at 2246 (quoting *Taylor v. United States*, 495 U.S. 575, 598 (1990)). 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 in original).

Mathis held that whether a statute contains alternative means or alternative elements is determined by state law, such as when "a state court decision definitively answers the question." 136 S. Ct. at 2256. The Iowa Supreme Court had previously held that the list of places—building, structure, land, water or air vehicle—"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. Under Iowa law, 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.

Mathis did not abrogate or overrule *Evans*. Unlike in *Mathis*, there is no binding authority holding that Wis. Stat. § 947.01(1) contains alternative means rather than elements. Doubek only cites an unpublished decision, (Doubek Br. 19–20 (citing *State v. Galarowicz*, 2012AP933–CR, 2012 WL 6115949, at *1 (Wis. Ct. App. Dec. 11, 2012) (unpublished)), which has no precedential authority. Wis. Stat. § 809.23(3)(b). Thus, *Mathis* does not directly apply here. Further, *Galarowicz* was a one-judge decision, which should not, as Doubek contends (Doubek Br. 19–20), be enshrined as forever binding Wisconsin law.

In addition, the distinction between means and elements existed in Wisconsin law when the court of appeals decided *Evans*. Thus, *Evans* stands for the proposition that the types of conduct listed in Wis. Stat. 947.01(1) are alternative elements rather than alternative means. Well before *Evans*, this 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 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.

Doubek incorrectly states that this Court needs to look to jury instructions to determine if a crime contains alternative means or elements. (Doubek Br. 16.) *Mathis* held that state law governs the question of means or elements in a conviction under state law. *Mathis* mentioned other alternatives for when "state law fails to provide clear answers," so that "federal judges have another place to look." 136 S. Ct. at 2256. Given that this Court is the ultimate authority on Wisconsin law, it merely needs to apply Wisconsin law to answer this question.

B. Under Wisconsin law, Wis. Stat. § 947.01(1) has alternative elements.

Under Wisconsin law on elements versus means, Wis. Stat. § 947.01(1) has alternative elements. As a result, the modified categorical approach, as summarized above, is the correct way to analyze Wis. Stat. § 947.01(1).

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.[6] 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 the term "sexual intercourse" established their similarity. *Id.* Therefore, under Wisconsin's test for elements versus 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

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[6] 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).

do not constitute one crime with alternative means. *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 an element including a specially defined phrase. In *Mathis*, the burglary statute's term "occupied structure" was defined in another subsection to include different types of structures. The element was "occupied structure" while the separate definition listed alternative means. In *Lomagro*, the crime used the term "sexual intercourse," which was defined in another section to include various types of sexual contact. And *Mathis* further used the example of a statute that criminalized the use of a "deadly weapon," which was then 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 does not have a definition with means listed in another statutory section as in *Lomagro* and *Mathis*; instead, it lays out seven alternative elements for the type of conduct that violates the statute.

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.[7] As the *Derango* court explained, that statute at issue, Wis. Stat.

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[7] Doubek says that *Derango* employed a fundamental fairness test for when unanimity is required. (Doubek Br. 18.) The question of whether a Wisconsin statute contains alternative elements or alternative means is a question of legislative intent. *State v. Derango*, 2000 WI 89, ¶ 15, 236 Wis. 721, 613 N.W.2d 833. The fundamental fairness test only comes into play after a court has determined the statute contains alternative means, which in some instances still requires juror unanimity based on due process. *Id.* ¶ 22.

§ 948.07, "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 act of enticement is the crime, not the underlying intended sexual or other misconduct." *Id.* Further, those types of misconduct were all conceptually similar; they are all ways of sexually exploiting a child. *Id.* ¶ 16. Wisconsin Stat. § 947.01(1) is not such a statute. The criminal act is committing one of the listed types of conduct; the types of conduct are not different 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 is "conduct" in general—"one of seven alternative conducts." (Doubek Br. 16.) But these "alternative conducts" vary greatly, with the only common thread being the second, separate element that requires that the conduct have occurred "under circumstances in which the conduct tends to cause or provoke a disturbance." Under this reading, the first element—the criminal act itself—is practically meaningless. 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 or sexual intercourse—with a list of similar things that satisfy the element—like certain types of weapons or sexual contact. Wisconsin Stat. § 947.01(1) is not a statute with an element satisfied by alternative means.

Lastly, Doubek misstates the jury instruction for disorderly conduct, claiming that the jury instruction 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." (Doubek

Br. 19.) Tellingly, Doubek has inserted "alternative means" in brackets because the jury instruction does not say that the types of conduct are alternative means. The quoted footnote says "[t]he Committee recommends selecting one of the terms in parentheses where possible, but believes it is proper to instruct on all alternatives that are supported by the evidence." Wis JI-Criminal 1900 at 2. This actually supports the items being elements because *Mathis* contrasted "which things must be charged (and so are elements) and which need not be (and so are means)." 136 S. Ct. at 2256.

Moreover, the footnote is in a section titled "Elements of the Crime That the State Must Prove," and says "[t]he defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct." Wis JI-Criminal 1900 at 1. This instruction supports the conclusion that the types of behavior are alternative elements and, at the very least, does not in any way indicate they are alternative means.

IV. Default judgment is not an available remedy in an administrative review and, in any event, was not appropriate here.

The circuit court had no authority to enter a default judgment against the Department. To the extent the remedy was even available, the circuit court 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. 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. This 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 statute. The 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 a court could enter one. To the extent it was available, the circuit court did not erroneously exercise discretion in declining to grant a default.

As an initial matter, the statute does not clearly provide that the Department must file an answer 15 days after the petitioner mails the petition. Instead, it 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.[8] For example, the discovery statutes place the response date "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. (R. 4:2 ¶ 3.) 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, 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 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 no grounds for the relief discussed in *Wagner*, like a writ of

[8] 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 deadline by which he was required to serve his petition. 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.

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 the law 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—within 15 days after receiving the petition—and then filed the answer six days later. At most, the Department was a few days late in filing its answer—caused by Doubek sending the petition to

the Attorney General rather than to the address of the Department's firearms unit. 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 23rd day of August 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8174 words.

Dated this 23rd day of August 2021.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

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) (2019–20).

I further certify that:

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

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

Dated this 23rd day of August 2021.

_____
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