STATE OF WISCONSIN

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

DISTRICT II

Case Nos. 2020AP1127-CR and 2020AP1128-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALLAS R. CHRISTEL,

Defendant-Appellant.

AN APPEAL FROM POSTCONVICTION ORDERS ENTERED IN CALUMET COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Page

Statutes

Page

Page

Page

Other Authorities

Page

STATEMENT OF THE ISSUES

The State reframes the issues presented by Dallas Christel, consolidating his two constitutional claims and presenting them as a single issue before the issue relating to his new factor claim. The circuit court decided each of these two issues in favor of the State:

1. A defendant must overcome the presumption of constitutionality to invalidate a statute. For multiple claims, each must be sufficiently raised and developed. Here, Christel seeks to invalidate the unanimously enacted strangulation and suffocation statute. He presents four claims, presenting the first in only three paragraphs, ignoring relevant doctrine in the second, misapplying the applicable doctrine in the third, and relying on inapplicable doctrine in the fourth. Has Christel satisfied his burden to invalidate the statute?

2. A defendant seeking a sentence modification for a new factor must prove a fact was unknown or overlooked. Here, the circuit court sentenced Christel on two counts of bail jumping and later sentenced him on five counts in an assault case. The same judge presided over both cases. The pending assault case was discussed during the bail jumping sentence. Was the upcoming sentencing in the assault case unknown or overlooked during the bail jumping sentencing?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication and does not request oral argument. Publication is appropriate under Wis. Stat. § (Rule) 809.23(1)(a)1. and 5. to enunciate the constitutionality of the strangulation and suffocation statute in Wis. Stat. § 940.235, thereby deciding a case of substantial and continuing public interest. Publication also is appropriate under Wis. Stat. § (Rule) 809.23(1)(a)4. to contribute to the legal literature by collecting case law and reciting legislative

history. Oral argument is unnecessary under Wis. Stat. § (Rule) 809.22(2)(b).

STATEMENT OF THE CASE

Christel appeals from: (1) an order denying his challenge to the constitutionality of the strangulation and suffocation statute, (R. 199); and (2) an order denying his motion for a sentence modification that alleged the presence of a new factor, (R. 49 (No. 18-CF-39)).[1] A jury had found Christel guilty of strangulation and suffocation, contrary to Wis. Stat. § 940.235(1). (R. 166.) The jury also found him guilty of nonconsensual sexual assault by use of violence, contrary to Wis. Stat. § 940.225(2)(a). (R. 12; 165; 249:87–88, 148.) And the jury found him guilty of multiple batteries and a disorderly conduct. (R. 164, 167; 168.) Each of the crimes related to acts of domestic abuse. (R. 12.) Prior to trial, Christel pleaded no contest to two felony counts of bail jumping. (R. 57:5 (No. 18-CF-39).) All of the charged crimes included habitual criminal penalty enhancers based upon Christel's prior record. (R. 12; R. 9 (No. 18-CF-39).)

Jury trial. The victim[2] testified at trial that she moved into Christel's residence in early 2017. (R. 248:22–23.) The victim explained that she was estranged from her husband at the time. (R. 248:18.) She had known Christel decades earlier when they rode the bus together prior to high school. (R. 248:20–21.) The victim and Christel later reconnected on Facebook. (R. 248:21.) The victim testified that she "needed

[1] This brief only cites to the record in *State v. Christel*, No. 18-CF-39 (Wis. Cir. Ct. Calumet Cty.), on a few occasions. In such instances, this brief includes a parenthetical to the case number. Citations without the case number parenthetical are citations to the record in *State v. Christel*, No. 17-CF-179 (Wis. Cir. Ct. Calumet Cty.).

[2] The State uses "victim" as the designation to deidentify this individual in compliance with Wis. Stat. § (Rule) 809.86(4).

kind of a place to get on my feet," and Christel had said he had "this little apartment in New Holstein." (R. 248:21.) She moved in with Christel around late February or early March. (R. 248:22.)

The victim told the jury her friendship with Christel became a romantic relationship. (R. 248:22–23.) She explained they didn't have a relationship right away, but it turned into one. (R. 248:22–23.) The victim described the relationship as good "[i]n the beginning." (R. 248:24.) But the it worsened by May 2017. (R. 248:24–51.)

The victim recounted that the evening of May 7 began well but later "[a]wful things" happened. (R. 248:24–28.) She explained that the couple had gone to a supper club and had "a couple of drinks." (R. 248:25–26.) The victim described Christel getting agitated and "just screaming at me" during the drive from the supper club back to their residence. (R. 248:28.)

The victim described how Christel's conduct escalated from a verbal to a physical assault once the couple was back home. (R. 248:29–30.) She explained Christel was "screaming at me, and . . . the next thing that I remember is I was on the floor, and he's closed fist beating me." (R. 248:30.) The victim said Christel struck her "down on my head" with a metal chair. (R. 248:31.)

The victim testified about the events immediately preceding the sexual assault and strangulation. (R. 248:33–35.) She told the jury that Christel took off her clothes and she was fully naked. (R. 248:33–34.) The victim said that she briefly fled the apartment, but Christel forcibly pulled her back into the apartment and then to the bedroom. (R. 248:34–35.)

The victim testified that it was "the rape next." (R. 248:35.) The victim described Christel forcibly "holding my hands back behind my head." (R. 248:35.) The victim

continued that "he pulled it out, and I can see that he's hard . . . and his penis goes into me, and he's holding my hands back." (R. 248:35.) She confirmed that the sexual intercourse was not consensual. (R. 248:40–41.) The victim testified that she told Christel to stop, (R. 248:36), stating: "I was terrified and I just wanted him to stop," (R. 248:37). But it didn't stop; the assault escalated. (R. 248:36–37.)

The victim explained how Christel strangled her during the sexual assault. (R. 248:35–36.) She said that Christel placed his right hand around her neck. (R. 248:36.) The victim described Christel "[s]queezing" her neck and putting his hand at her lips. (R. 248:36.) The victim confirmed that Christel applied pressure to her neck and she had difficulty breathing, (R. 248:37), testifying: "I couldn't get my breath. I couldn't breathe," (R. 248:38). The victim confirmed that she never consented to Christel putting his hand around her neck; she didn't consent to him strangling her in any way. (R. 248:41.)

The victim testified about her injuries from the May 7 assault. She had blood flowing from her vagina. (R. 248:42–43.) Photos taken on May 10 and received as exhibits showed injuries underneath her right eye, bruising on her arms, and a mark on her mouth. (R. 248:47–51; R. 134:1–7.)

The victim explained that she did not initially report the assault and did not seek medical attention. (R. 248:43.) The victim explained that she still "loved him a lot" and had "stuff in my heart." (R. 248:43.) She told the jury about a conversation they had after the assault: "When I talked to him about the rape, he kept saying, baby, I'm so sorry. I was drugged. I don't remember any of it. I'm so sorry. I was drugged. You've got to believe me. . . . and I wanted to believe him." (R. 248:52.) The jury received as evidence the text messages between Christel and the victim after the May 7 assault, including multiple messages where Christel texted that he was "sorry." (R. 146:1, 3, 9; 248:53–60.) In one of the

messages, Christel texted: "I promise I will show you it'll be different." (R. 146:9.)

The victim told the jury that she believed Christel and moved back in with him about three to four days before May 27, 2017. (R. 248:65.) She said, "At first it was okay. It got like real manic real quick." (R. 248:65.) The victim described it becoming "hectic, crazy" where Christel's "mood would go up, down, up, down, up, down." (R. 248:67.)

The victim testified about Christel battering her and engaging in disorderly conduct on May 27. (R. 248:70–74.) She explained that "[i]t was like repeating itself almost" because "[a] lot was the same," including "[t]he ripping off of my clothes, the screaming." (R. 248:72.) The victim testified that Christel punched and kicked her during the assault. (R. 248:72–73.)

The victim explained that police responded to the assault on May 27. (R. 248:79.) She exclaimed: "I've never been so happy to see a uniform in my life." (R. 248:79.) But she admitted that she still was protective of Christel and wanted to shield him. (R. 248:79.) So she didn't initially tell law enforcement about the earlier assault on May 7. (R. 248:90.) The victim explained that she later opened up about the earlier assault because one of the officers was "incredibly comfortable to talk to." (R. 248:91.)

On cross-examination, Christel's attorney questioned the victim about consensual sex between the couple. (R. 248:122.) She confirmed that the couple had had consensual sex on occasions in their relationship. (R. 248:122.) His attorney tried to suggest the sexual intercourse on May 7 may have been consensual. (R. 248:121–22.) The victim testified it was not consensual. (R. 248:122.) Christel's attorney then pursued another inquiry: "Had you ever expressed to him or talked to him about an interest in asphyxiation or rough sex or role playing?" (R. 248:122.) The

victim's answer was clear and unequivocal: "Never asphyxiation." (R. 248:122.) She explained the couple once had a "four-minute conversation" that "was just touching on BDSM, but it had nothing to do with any details." (R. 248:122.) The victim testified the couple never had "rough sex." (R. 248:122.)

Christel called the victim's former coworker to present a claim the couple liked "rough" sex. (R. 248:219.) The coworker described having "locker room talk" that consisted of the victim saying she liked Christel holding her down and getting rough. (R. 248:219.) But the coworker never testified that the victim had alleged asphyxiation during sex. (R. 248:218–19.) And the coworker acknowledged only briefly knowing the victim "for like three weeks." (R. 248:218.)

Christel alleged in his testimony the couple had consensual sex on May 7. (R. 248:243–44.) He further claimed that the victim and he had engaged in consensual asphyxiation during sex, alleging that he awoke to find the victim with "her hand down my pants arousing my penis." (R. 248:243.) Christel alleged that "she had grabbed my right hand and motioned it towards her neck, and she did the pull and squeeze." (R. 248:243.) Christel said he complied, and the sex ended shortly thereafter. (R. 248:244.) Christel denied using any force during the sexual intercourse, stating he grabbed the victim's throat in a "playful sexual manner." (R. 249:42.)

At trial, Christel claimed he had a clear recollection to having consensual sex on May 7. (R. 249:41.) But Christel acknowledged "there was some things about that night that were kind of fuzzy." (R. 248:266.) Christel testified that he remembered having "a third beer at this bar, and from pretty much that point on, I did not recall what had happened." (R. 248:243.) He testified he didn't remember leaving the supper club. (R. 248:243.) Christel testified that his next memory was awakening in his bed. (R. 248:243; 249:37–38.)

Despite testifying to forgetting a long period of the evening and having no recollection to many events that evening (R. 249:42–44), Christel claimed he clearly remembered the sexual intercourse (R. 249:41).

Christel's trial testimony of remembering consensual sexual intercourse contradicted the voluntary statement he made to law enforcement shortly after his arrest. On June 1, 2017, Christel wrote a statement that he recalled going to the supper club and having a few drinks on May 7. (R. 157.) But the statement continued that Christel didn't remember leaving the supper club and didn't remember "the rest of the night." (R. 157.) The court received Christel's statement as evidence; the officer who obtained his statement read it to the jury. (R. 248:172.)

The jurors did not find Christel's defense persuasive; the jury found him guilty of all counts at the conclusion of his trial in March 2019. (R. 164; 165; 166; 167; 168; 249:148.) The circuit court accepted the jury's verdicts and found Christel guilty of strangulation and suffocation, sexual assault, and battery relating to the assault on May 7. (R. 249:148, 151.) The court also accepted the jury's verdicts and found Christel guilty of battery and disorderly conduct relating to the assault on May 27. (R. 249:148, 151.) The court tentatively scheduling the case for a sentencing hearing in April 2019. (R. 249:152.)

Bail jumping. Prior to the jury trial, Christel had signed a signature bond in September 2017. (R. 11:1.) The bond required Christel to "appear on all court dates." (R. 11:1.) The bond also contained conditions that Christel "[s]hall not possess any alcohol" and "[s]hall maintain absolute sobriety - no alcohol or illegal drugs." (R. 11:1.) The court had scheduled the assault case for a jury status hearing in February 2018, with the jury trial scheduled to commence in March 2018. (R. 40; 43.)

The jury status hearing occurred on Christel's first day out of custody. (R. 239:2.) Despite the signature bond, Christel had been in jail for an unrelated sentence until his release on the morning of the hearing. (R. 239:2, 15.) The State had moved to convert the signature bond into a cash bond. (R. 39.) Christel objected, convincing the court he was not a flight risk. (R. 239:18–20.) The court denied the State's motion. (R. 239:19–20.) At the hearing, the court instructed that the case would proceed as scheduled with the jury trial in March. (R. 239:4, 20.)

Christel failed to appear in court on the morning of trial. (R. 43.) Christel's counsel had no information about his client's whereabouts: Christel hadn't been to work since his release from jail and had moved out of his residence. (R. 240:2.) The circuit court issued a nationwide warrant. (R. 240:3.) Christel was located and arrested months later in the State of Oregon. (R. 241:6, 9; R. 248:269.)

The State charged Christel with two counts of felony bail jumping. (R. 9 (No. 18-CF-39).) One count pertained to Christel violating his bond by failing to appear and the other count pertained to Christel violating his bond by possessing alcohol at his residence in the days leading up to his missed court appearance. (R. 1:2–3 (No. 18-CF-39).)

Christel pleaded no contest to the two counts of felony bail jumping. (R. 57:5 (No. 18-CF-39).) The circuit court accepted the pleas and found Christel guilty. (R. 57:11 (No. 18-CF-39).) The court adjourned the bail jumping case to a sentencing hearing in April 2019. (R. 57:13 (No. 18-CF-39).)

Sentencing. The circuit court sentenced Christel in April in the bail jumping case and sentenced him a few months later in the assault case. (R. 250; R. 59 (No. 18-CF-39).) The court had tentatively scheduled a consolidated sentencing hearing for both the bail jumping and assault cases. (R. 249:152.) But Christel filed a postconviction motion

that delayed sentencing in the assault case to August 2019. (R. 180.)

In the bail jumping case, the circuit court imposed two six-year terms, each with three years initial confinement and three years extended supervision, to be served consecutively. (R. 33 (No. 18-CF-39); 59:17–18 (No. 18-CF-39).) The court knew about and specifically referenced Christel's recent convictions in the assault case. (R. 59:14 (No. 18-CF-39).) Christel's counsel also recognized the interplay between the cases, stating "[i]t is fairly clear" that Christel "is going to be incarcerated for quite some time," but "that's a decision that's . . . more properly argued with the [assault] file." (R. 59:11 (No. 18-CF-39.) Neither Christel nor his counsel asked to adjourn or consolidate the sentencing hearings. (R. 59:3, 12 (No. 18-CF-39).)

In the assault case, the circuit court imposed a combined 24-year sentence, consisting of 14.5 years initial confinement followed by 9.5 years extended supervision. (R. 211; 250:39–41.) The court imposed the greatest sentence on the sexual assault count, imposing 10 years initial confinement and 5 years extended supervision. (R. 211:2.) The court imposed 1.5 years initial confinement and 1.5 years extended supervision on the strangulation and suffocation count. (R. 211:2.) The court explained: "The strangulation and suffocation count . . . was so intertwined with the sexual assault, it's obviously an additional crime. It is something that put [the victim] in a greater risk of bodily harm, possibly even death." (R. 250:40.) On the remaining three counts, the court imposed a combined sentence of 3 years initial confinement and 3 years extended supervision. (R. 211:2.) The court ordered that each count would be consecutive. (R. 211; 250:39–41.)

Postconviction. Christel pursued two postconviction issues relevant to this appeal: (1) a constitutional challenge to the strangulation and suffocation statute; and (2) a sentence

modification motion based on a new factor claim.[3] (R. 180; R. 44 (18-CF-39).)

On the first issue, Christel initially presented two claims challenging the constitutionality of the strangulation and suffocation statute. But he added a claim in his reply brief, alleging a liberty or privacy interest under *Lawrence v. Texas*, 539 U.S. 558 (2003). (R. 192:4.) Christel previously had raised an overbreadth claim. (R. 181:2–8.) He never raised a vagueness claim in the circuit court. (*See* R. 127; 180; 181; 192 (no vagueness challenge).) Christel's final claim alleged the statute was unconstitutional as applied to him. (R. 181:8–9.)

On the second issue, Christel moved for a sentence modification in the bail jumping case. (R. 44 (No. 18-CF-39).) Christel's sentence in the assault case—imposed after the bail jumping sentences—prohibited him from participating in a substance abuse program. *See* Wis. Stat. § 302.05(3)(a)1. (ineligibility for inmate incarcerated for crimes in Wis. Stat. § 940). At the earlier bail jumping sentencing, the circuit court had stated: "There do appear to be some substance abuse situations with Mr. Christel, so the Court will make him eligible for that [substance abuse] program." (R. 59:21 (No. 18-CF-39).) Christel claimed the assault sentence was a new factor because he was no longer eligible for the program. (R. 44 (No. 18-CF-39).)

The circuit court entered written decisions denying Christel's constitutional challenge and new factor claim. (R. 199; R. 49. (No. 18-CF-39).)

Christel filed notices of appeal and now appeals these two issues to this Court. (R. 232; R. 51 (No. 18-CF-39).)

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[3] Christel initially challenged the constitutionality of the strangulation and suffocation statute in an untimely request shortly before trial; the circuit court stated it may take up the issue postconviction if Christel was convicted. (R. 247:9, 31–32; *see* R. 199:1 (untimely).)

STANDARD OF REVIEW

This Court reviews de novo the two issues on appeal. The constitutionality of the strangulation and suffocation statute is a question of law subject to de novo review. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. And whether a new factor exists is a question of law reviewed de novo. *State v. Scaccio*, 2000 WI App 265, ¶ 13, 240 Wis. 2d 95, 622 N.W.2d 449.

ARGUMENT

I. This Court should uphold the constitutionality of Wisconsin's strangulation and suffocation statute.

When a defendant presents multiple constitutional challenges to a statute, each constitutional claim must be examined independently from one another. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19–20 (2010). A party must not conflate differing constitutional doctrines. *Id.* The party must sufficiently raise and develop each discrete constitutional claim separately. *Cemetery Servs., Inc. v. DRL*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). For example, a vagueness challenge and overbreadth claim are distinct from one another, "[o]therwise the doctrines would be substantially redundant." *Humanitarian Law Project*, 561 U.S. at 20.

A. Wisconsin's strangulation and suffocation statute does not unconstitutionally infringe on Christel's liberty and privacy interests.

1. Christel has the burden to establish an unconstitutional infringement on his liberty or privacy interest.

A defendant has the burden to show deprivation of a constitutionally protected liberty or privacy interest. *State v.*

Keister, 2019 WI 26, ¶ 8, 385 Wis. 2d 739, 924 N.W.2d 203; *see Penterman v. Wis. Elec. Power Co.*, 211 Wis. 2d 458, 469, 565 N.W.2d 521 (1997).

A liberty or privacy challenge is a substantive due process claim rooted in the Fourteenth Amendment. *Blake v. Jossart*, 2016 WI 57, ¶ 47, 370 Wis. 2d 1, 884 N.W.2d 484. This "right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." *In re Termination of Parental Rights to Diana P. (In re Diana P.)*, 2005 WI 32, ¶ 19, 279 Wis. 2d 169, 694 N.W.2d 344. This Court's task in such a challenge is to weigh the liberty or privacy interest against the state interest. *Wood*, 323 Wis. 2d 321, ¶ 18.

In a due process claim under the Fourteenth Amendment, "The doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever . . . asked to break new ground in this field." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process . . . ." *Id.*

2. The strangulation and suffocation statute does not implicate a fundamental liberty or privacy interest.

The threshold inquiry to resolve is whether a fundamental liberty or privacy interest is at stake. *In re Diana P.*, 279 Wis. 2d 169, ¶ 20. Resolving this inquiry determines whether the court reviews the challenged statute under strict scrutiny or rational basis. *In re Commitment of Alger*, 2015 WI 3, ¶ 39, 360 Wis. 2d 193, 858 N.W.2d 346. When a fundamental liberty interest is at stake, strict scrutiny applies, which requires the government to show that the challenged statute is narrowly tailored to serve a compelling state interest. *Id.* The court applies rational basis

review when a fundamental right is not implicated, upholding the statute "unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest." *Keister*, 385 Wis. 2d 739, ¶ 8 (quoting *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989)).

Here, Christel does not have a fundamental liberty or privacy interest at stake. He does not have a fundamental interest to strangle or suffocate another person during sexual intercourse. *See Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 634 (E.D. Va. 2016) ("[P]laintiff has no constitutionally protected and judicially enforceable fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment to engage in BDSM[4] sexual activity."). And he certainly has no fundamental right to strangle or suffocate a victim during a sexual assault. Christel cites no published decision from this or any other jurisdiction recognizing such a fundamental right and the State knows of none. This Court should not be the first in the nation to extend the concept of substantive due process into this area. *See Collins*, 503 U.S. at 125.

Christel invokes *Lawrence* to support his claim that he had a fundamental right to engage in the conduct at issue here. (Christel Br. 17.) He is wrong. In *Lawrence*, the Court relied on the legitimate state interest standard under *rational basis*—not the compelling state interest standard under *strict scrutiny*—to review a challenge to a sodomy law targeted at homosexuals. The Court concluded that the statute "further[ed] no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578 (emphasis added). It did not purport to apply strict scrutiny. The dissent in *Lawrence* confirms that

[4] Christel frames consensual strangulation during sexual activity or intercourse within the BDSM spectrum. (Christel Br. 23.)

"nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject" the law to the standard of strict scrutiny review. *Id*. at 586 (Scalia, J., dissenting).

In addition to confirming that strict scrutiny does not apply, *Lawrence* set out an instructive framework for examining whether a legitimate state interest provides a rational basis in support of the challenged statute. In *Lawrence*, the Court concluded a sodomy law targeted at homosexuals "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id*. at 578.[5] But, importantly, the Court recognized that a state interest may outweigh a sexual liberty or privacy interest in other instances. *See id*. (providing examples such as injury and coercion). Other courts have made note of this. "*Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct." *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005). "The *Lawrence* Court did not extend constitutional protection to *any* conduct which occurs in the context of a consensual sexual relationship." *State v. Van*, 688 N.W.2d 600, 615 (Neb. 2004). The State's interest in preventing violence or prohibiting dangerous conduct is an interest that may outweigh a sexual privacy interest. *Commonwealth v. Carey*, 974 N.E.2d 624, 631 (Mass. 2012).

This Court should employ the legitimate state interest standard from rational basis doctrine. Christel cannot credibly argue a different standard applies. First, he only

[5] So even though "a fundamental right is not at stake, . . . substantive due process still creates 'a residual substantive limit on government action which prohibits arbitrary deprivations of liberty.'" *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. Dep't of Health*, 194 F. Supp. 3d 818, 831 (S.D. Ind. 2016) (quoting *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014)).

cites in his brief to *Lawrence*, (Christel Br. 17), a case applying the legitimate state interest standard, 539 U.S. at 578. Second, he never explicitly argues in his brief strict scrutiny applies.[6] (Christel Br. 17–18.) There can be no dispute about the applicable standard and doctrine to apply.

3. The legislature and governor had a rational basis and legitimate state interest to enact the strangulation and suffocation statute.

This Court should conclude a legitimate state interest existed in the creation of Wisconsin's strangulation and suffocation statute. "[I]t is the court's obligation to locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination." *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 371, 293 N.W.2d 504 (1980). Here, such an analysis shows the state had a rational basis to create the strangulation and suffocation statue.

The Wisconsin Legislature and Governor created the strangulation and suffocation statute in 2007 Wisconsin Act 127, enacted in March 2008.[7] The statute originated from 2007 Senate Bill 260, introduced by Senator Julie Lassa in September 2007.[8] Representative Mark Gundrum introduced an identical companion bill, 2007 Assembly Bill 499, the same day.[9]

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[6] Christel cannot sandbag the State by waiting until his reply brief to raise a new argument. *Matter of Bilsie's Estate*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

[7] 2007 Wis. Act 127, https://docs.legis.wisconsin.gov/2007/related/acts/127

[8] 2007 Wis. S.B. 260, https://docs.legis.wisconsin.gov/2007/related/proposals/sb260.pdf

[9] 2007 Wis. Assemb. B. 499, https://docs.legis.wisconsin.gov/2007/related/proposals/ab499.pdf

The bills quickly gained widespread unanimous support. Representative Gundrum's bill passed unanimously out of the Committee on Judiciary and Ethics.[10] It then passed unanimously out of the Wisconsin State Assembly by a vote of 97 ayes and zero noes in December 2007.[11] Senator Lassa's bill soon followed; passing unanimously out of the Committee on Judiciary, Corrections, and Housing.[12] It passed the Wisconsin State Senate in January 2008.[13] The Assembly took action and presented Senator Lassa's bill to the Wisconsin Governor.[14]

Governor Jim Doyle signed the legislation into law in March 2008.[15] Enacted as 2007 Wisconsin Act 127, it created Wis. Stat. § 940.235, thereby criminalizing strangulation and suffocation.[16] Under the statute, "Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony." Wis. Stat. § 940.235(1).

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[10] 2007 Wis. Assemb. B. 499, Rec. of Comm. Proceedings for Comm. on Judiciary and Ethics (Sept. 18, 2007), https://docs.legis.wisconsin.gov/2007/related/records/ab499/ajud_09192007.pdf

[11] Bill history of 2007 Wis. Assemb. B. 499, https://docs.legis.wisconsin.gov/2007/proposals/ab499.

[12] 2007 Wis. S.B. 70, Rec. of Comm. Proceedings for Comm. on Judiciary, Corrections and Housing (Dec. 4, 2007), https://docs.legis.wisconsin.gov/2007/related/records/sb260/sjch_12042007.pdf

[13] Bill history of 2007 Wis. S.B. 260, https://docs.legis.wisconsin.gov/2007/proposals/sb260

[14] *Id.*

[15] *Id.*

[16] 2007 Wis. Act 127, https://docs.legis.wisconsin.gov/2007/related/acts/127

The Wisconsin statutory language is nearly identical to Minnesota's strangulation statute enacted a few years earlier in 2005.[17] The Minnesota statute defines "[s]trangulation" as "intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." Minn. Stat. § 609.2247.

Even before enactment of Minnesota's strangulation statute, several states had enacted substantially similar laws. In 2004, Nebraska created a statute that a person committed the "offense of strangulation" when a "person knowingly or intentionally impedes the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the other person." Neb. Rev. Stat. § 28-310.01.[18] And that same year, Oklahoma created a statute that defined "strangulation" as "any form of asphyxia; including, but not limited to, asphyxia characterized by closure of the blood vessels or air passages of the neck as a result of external pressure on the neck or the closure of the nostrils or mouth as a result of external pressure on the head." Okla. Stat. tit. 21, § 644.[19] Alaska followed the next year by enacting legislation to define a "dangerous instrument" to include "hands or other objects when used to impede normal breathing or circulation of blood by applying pressure on the throat or neck or obstructing the nose or mouth." Alaska Stat. § 11.81.900(b)(15)(B).[20]

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[17] 2005 Minn. Session Laws ch. 136, art. 17, § 13, https://www.revisor.mn.gov/laws/2005/0/136/.

[18] 2004 Neb. Laws LB 943, § 2, https://nebraskalegislature.gov/FloorDocs/98/PDF/Slip/LB943.pdf.

[19] 2004 Okla. Sess. Law Serv. ch. 516 (H.B. 2380).

[20] The Alaska State Legislature provides the legislative history to its creation of strangulation and suffocation crimes in

(continued on next page)

Today, nearly every state has a strangulation, suffocation, or equivalent statute.[21] *See* Ala. Code § 13A-6-138 (Alabama), Alaska Stat. §§ 11.41.220(a), 11.81.900(b)(15)(B) (Alaska), Ariz. Rev. Stat. Ann. § 13-1204(B) (Arizona), Ark. Code Ann. §§ 5-13-204, 5-13-205, 5-26-306 (Arkansas), Cal. Penal Code § 273.5 (California), Colo. Rev. Stat. Ann. § 18-3-203(1)(i) (Colorado), Conn. Gen. Stat. §§ 53a-64aa, 53a-64bb, 53a-64cc (Connecticut), Del. Code Ann. Tit 11 § 607 (Delaware), Fla. Stat. § 784.041 (Florida), Ga. Code Ann. §§ 16-5-19(11), 16-5-21(a)(3) (Georgia), Haw. Rev. Stat. § 709-906(1), (8) (Hawaii), Idaho Code Ann. § 18-923 (Idaho), 5 Ill. Comp. Stat. § 12-3.05 (Illinois), Ind. Code § 35-42-2-9 (Indiana), Iowa Code Ann. § 708.2A (Iowa), Kan. Stat. Ann. § 21–5414(b) (Kansas), Ky. Rev. Stat. Ann. §§ 508.170, 508.175 (Kentucky), La. Stat. Ann. § 14:35.3 (Louisiana), Me. Rev. Stat. Ann. tit. 17-A, § 208 (Maine), Md. Code Ann., Crim. Law § 3-303 (Maryland), Mass. Gen. Laws ch. 265, § 15D (Massachusetts), Mich. Comp. Laws § 750.84 (Michigan), Minn. Stat. § 609.2247 (Minnesota), Miss. Code Ann. § 97-3-7 (Mississippi), Mo. Rev. Stat. § 565.073 (Missouri), Mont. Code Ann. § 45-5-215 (Montana), Neb. Rev. Stat. § 28-310.01 (Nebraska), Nev. Rev. Stat. §§ 200.400, 200.481, 200.485 (Nevada), N.H. Rev. Stat. Ann. § 631:2 (New Hampshire), N.J. Stat. Ann. § 2C:12-1(13) (New Jersey), N.M. Stat. Ann. § 30-

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2005. Bill history of 2005 Alaska H.B. 219, http://www.akleg.gov/basis/Bill/Detail/24?Root=HB%20219

[21] According to a legislation map from the Training Institute on Strangulation Prevention, only Ohio and South Carolina have not enacted strangulation legislation. Training Inst. on Strangulation Prevention, *Legislation Map*, https://www.strangulationtraininginstitute.com/resources/legislation-map/ (last visited Oct. 22, 2020). The Family Justice Center Alliance has a list of strangulation statutes. Family Justice Ctr., *States with Strangulation Legislation* (Apr. 2020), https://www.familyjusticecenter.org/wp-content/uploads/2017/11/Strangulation-Laws-Chart-4.2020.pdf

3-16 (New Mexico), N.Y. Penal Law §§ 121.11, 121.12, 121.13, 121.14 (New York), N.C. Gen. Stat. § 14-32.4 (North Carolina), N.D. Cent. Code Ann. §§ 12.1-17-02, 12.1-01-04 (North Dakota), Okla. Stat. tit. 21, § 644 (Oklahoma), Or. Rev. Stat. § 163.187 (Oregon), 18 Pa. Stat. and Cons. Stat. Ann. § 2718 (Pennsylvania), R.I. Gen. Laws Ann. § 11-5-2.3 (Rhode Island), S.D. Codified Laws § 22-18-1.1 (South Dakota), Tenn. Code Ann. § 39-13-102 (Tennessee), Tex. Penal Code Ann. § 22.01 (Texas), Utah Code Ann. § 76-5-103 (Utah), Vt. Stat. Ann. tit. 13, §§ 1021, 1024 (Vermont), Va. Code Ann. § 18.2-51.6 (Virginia), Wash. Rev. Code §§ 9A.04.110, 9A.36.021 (Washington), W. Va. Code Ann. § 61-2-9d (West Virginia), Wis. Stat. § 940.235 (Wisconsin), Wyo. Stat. Ann. § 6-2-509 (Wyoming).

The federal government created its own strangulation and suffocation crime in the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54, https://www.congress.gov/113/plaws/publ4/PLAW-113publ4.pdf. It defines "strangling" to mean "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim" and "suffocating" to mean "intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." 18 U.S.C. § 113(b)(4)–(5).

So why did the federal government and nearly every state enact strangulation, suffocation, or equivalent statutes shortly after the start of the millennium? The legislative history and statutory intent in the creation of Wisconsin's statute provide the answer.

Medical professionals advocated for the creation of Wisconsin's strangulation and suffocation statute. At the public hearing before the Committee on Judiciary and Ethics, Jill Poarch of the International Association of Forensic Nurses appeared in favor of 2007 Assembly Bill 499.[22] The bill's drafting file shows that Jean Coopman-Jansen, a registered nurse and sexual assault nurse examiner (SANE), was consulted and provided technical assistance into the legislation.[23]

Prior to bill drafting, Julie Schuppel, another registered nurse and SANE program coordinator, had raised awareness about acts of non-lethal strangulation in an article she published with Maureen Funk in the Wisconsin Medical Journal. Maureen Funk & Julie Schuppel, *Strangulation Injuries*, 102 Wis. Med. J., no. 3, 2003, at 41.[24] The article explains strangulation occurs most often during domestic abuse and sexual assault. *Id*. The authors stated only modest pressure on the neck causes a loss of consciousness in seconds and brain death within a few minutes. *Id*. Citing a study in the Journal of Emergency Medicine, the article stated most strangulation cases had either no visible injuries or injuries too minor to photograph. *Id*. at 43 (citing Gael B. Strack, et

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[22] 2007 Wis. Assem. B. 499, Rec. of Comm. Proceedings for Comm. on Judiciary and Ethics (Sept. 6, 2007), https://docs.legis.wisconsin.gov/2007/related/records/ab499/ajud_09192007.pdf.

[23] Drafting file for 2007 Wis. Assemb. B. 499, Wis. Legis. Reference Bureau, Madison, Wis., https://docs.legis.wisconsin.gov/2007/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2007_ab_0499/01_ab_499/07_2285df.pdf.

[24] This article is not available on the Wisconsin Medical Journal website; however, it is publicly available on the End Violence Against Women International website at https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=540.

al., *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues,* 21 J. Emergency Med. 303, 303–09 (2001).)

A contemporary newspaper account during the creation of the statute confirms that medical publications were the catalyst behind the creation of Wisconsin's statute: "Advocates of the proposal cite studies on strangulation and suffocation printed in The Journal of Emergency Medicine as evidence for why the law is needed." Jeff Starck, *New Bill Could Tighten Choking Penalties*, Wausau Daily Herald, Sept. 17, 2007, at A1.

The Journal of Emergency Medicine had published groundbreaking research into nonlethal strangulation in a series of articles published in 2001.[25] Here, the circuit court understood the history, observing that "*The Journal of Emergency Medicine* published a series of articles in 2001 highlighting the prevalence and dangerousness of intimate partner strangulation." (R. 199:4.) The court cited a subsequent article, explaining that "a study showed that a woman being strangled by her partner increases her risk of becoming a homicide victim by 800%." (R. 199:4 (citing Gael B. Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, Crim. Just., Fall 2011, at 32, 32–33).)

The Wisconsin Legislature listened to medical professionals and took action. Senator Lassa stated the legislation "strengthen[s] penalties and enable[s] prosecutors to treat instances of nonfatal strangulation or suffocation with the severity they deserve." Starck, *supra*. A contemporary newspaper account explained that "[b]ecause

[25] The articles were published in volume 21, issue 3, of the Journal of Emergency Medicine. Journal of Emergency Medicine, *October 2001*, https://www.jem-journal.com/issue/S0736-4679(00)X0044-3 (table of contents).

strangulation and smothering-type crimes have a tendency to leave little outward evidence of injury, Lassa said many chronic domestic abusers have come to view these crimes as easy to get away with, even as they leave lasting emotional and hidden physical trauma on victims." *Local News Briefs*, Stevens Point J., Mar. 13, 2008, at A1. A senate co-author explained: "Strangulation wasn't taken as seriously in the past. It hadn't come to our attention that domestic abusers and sexual assaulters had a higher propensity to engage in this strangulation behavior . . . . It's an opportunity to identify this behavior before the criminal proceeds to murder." Felicia Thomas-Lynn, *Faces of Hope: Mom Fights to Save Others from Domestic Violence; Daughter's Death Spurs Push for Strangulation Law, Education Center*, Milwaukee J. Sentinel, Oct. 5, 2008, at B.2.

The legislative history and statutory intent demonstrate unequivocally that the Wisconsin Legislature and Governor had a legitimate state interest when they unanimously enacted 2007 Wisconsin Act 127, thereby creating a strangulation and suffocation statute. Here, policymakers heard from and listened to medical professionals. In *State v. Loomis*, the court commended the movement in criminal justice to research-based practices. 2016 WI 68, ¶ 37, 371 Wis. 2d 235, 881 N.W.2d 749 (relating to evidence-based risk assessment tools). Consistent with *Loomis*, the strangulation and suffocation statute was the product of the legislature and governor enacting a statute rationally based on medical research.

This Court should conclude the strangulation and suffocation statute serves a legitimate state interest. Here, the Wisconsin Legislature and Governor enacted a statute—similar to statutes in other states—that criminalized dangerous conduct prevalent in interpersonal acts of domestic abuse and sexual assault. The absence of an element relating to consent is not unusual for dangerous conduct, such as

second-degree recklessly endangering safety. Wis. Stat. § 941.30(2) ("Whoever recklessly endangers another's safety is guilty of a Class G felony."); *see* Cheryl Hanna, *Sex Is Not A Sport: Consent and Violence in Criminal Law*, 42 B.C. L. Rev. 239 (2001) (arguing against requiring consent as a defense). The legislature and governor had a rational basis to create a statute without an injury or intent to harm element, in alignment with medical research. *See*, *e.g.*, Funk & Schuppel, *supra* (lack of strangulation injuries and dangerousness of conduct).

4. Christel fails to meet his burden to establish a constitutional infringement on his liberty and privacy interests.

Christel's constitutional claim fails for two reasons: (1) he inadequately presents his claim; and (2) he doesn't have standing to assert the sexual liberty or privacy rights of others—his claim must be examined in the context of him sexually assaulting the victim.

First, this Court may conclude that Christel's claim fails because its underdeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court may decline review on underdeveloped argument). In *Cemetery Services*, this Court explained that "[c]onstitutional claims are very complicated from an analytic perspective," such that a "one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of these constitutional issues to this court." 221 Wis. 2d at 831. Christel barely surpassed the two-paragraph threshold. He dedicated only three paragraphs—about one page—to this undeveloped constitutional claim. (Christel Br. 17–18.)

Second, Christel does not have standing to assert the sexual liberty and privacy rights of others. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (standing should be

strict when lack of relationship); *see also Doe v. Heck*, 327 F.3d 492, 518 (7th Cir. 2003) (relationship provided standing for party to bring claim on behalf of others (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925))), *as amended on denial of reh'g* (May 15, 2003). So Christel's argument for a constitutionally protected personal sexual liberty and privacy interest must be examined in the context of his own nonconsensual sexual assault, not the consensual sexual behavior of others.

Christel misrepresents his claim of a liberty and privacy interest as relating to a consensual sexual encounter. But this Court need not review the strangulation and suffocation statute in the context of a consensual encounter because the jury convicted Christel of a nonconsensual sexual assault through force or violence. (R. 165; R. 249:87–88.)

Christel's constitutional claim fails in the factual context of the sexual assault he committed. The same claim Christel makes to this Court was analyzed and rejected in *Carey*. 974 N.E.2d at 626. In *Carey*, the Commonwealth prosecuted a defendant for strangling a family friend. *Id.* at 627–28. The victim described a non-consensual violent physical assault. *Id.* at 628. The defendant testified that he strangled the victim as part of a consensual sexual encounter with no intent to harm the victim. *Id.* at 629. The defendant contended that, "in light of the holding in *Lawrence*, . . . the judge erred by not instructing the jury that consent was a defense to his conduct." *Id.* at 629–30. The Massachusetts Supreme Court called the defendant's suggestion a "selective misreading of *Lawrence* itself." *Id.* at 631. The court recognized some right to sexual privacy, but "reasoned that such a right 'would be outweighed in the constitutional balancing scheme by the State's interest in preventing violence.'" *Id.* (quoting *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1060 (Mass. 1980)). The court concluded the absence of an element of consent was not a constitutional error. *See id.*

at 627 (no conflict with *Lawrence* and absence of consent defense).

This Court should conclude Christel does not have a constitutionally protected right to strangle or suffocate a victim during a sexual assault. The legislature and governor had a rational basis to create a strangulation and suffocation statute that serves a legitimate state interest.

B. Wisconsin's strangulation and suffocation statute is not unconstitutionally overbroad.

1. Christel has the burden to overcome the strong presumption of constitutionality in an overbreadth claim.

In an overbreadth claim, a defendant must overcome the strong presumption that a statute is constitutional. *Redevelopment Auth. of Milwaukee v. Uptown Arts & Educ., Inc.*, 229 Wis. 2d 458, 462, 599 N.W.2d 655 (Ct. App. 1999). The person raising the claim "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (alteration in original) (quoting *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

Overbreadth rests upon the concept of substantive due process. *State v. Tronca*, 84 Wis. 2d 68, 89, 267 N.W.2d 216, 225 (1978). Substantive due process is a constitutional limitation on the boundaries of police power. Wayne R. LaFave, 1 *Substantive Criminal Law* § 3.3 (3d ed. 2017); *accord State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶¶ 57–61, 353 Wis. 2d 307, 845 N.W.2d 373.

A court is "careful to 'only sparingly utilize the overbreadth doctrine as a tool for statutory invalidation, proceeding with caution and restraint.'" *State v. Jackson*, 2020 WI App 4, ¶ 13, 390 Wis. 2d 402, 938 N.W.2d 639

(*quoting State v. Oatman*, 2015 WI App 76, ¶ 8, 365 Wis. 2d 242, 871 N.W.2d 513). Within an overbreadth challenge, the claimant must show that "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *State v. Culver*, 2018 WI App 55, ¶ 9, 384 Wis. 2d 222, 918 N.W.2d 103 (alteration in original) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

2. Overbreadth doctrine does not extend beyond limited settings already recognized by the Court and doesn't apply here.

Overbreadth claims "are especially to be discouraged." *Sabri v. United States*, 541 U.S. 600, 609–10 (2004). A party generally "does not have standing to raise a facial challenge that a statute is overbroad." *State v. Konrath*, 218 Wis. 2d 290, 305, 577 N.W.2d 601 (1998). But a court may "tolerate" and "modify the rules of standing in the First Amendment context because of 'the gravity of a "chilling effect" that may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 181, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *State v. Stevenson*, 2000 WI 71, ¶ 12, 236 Wis. 2d 86, 613 N.W.2d 90).

The United States Supreme Court has typically "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The Wisconsin Supreme Court is in accord with this limited application of the overbreadth doctrine." *Brandmiller v. Arreola*, 189 Wis. 2d 215, 228–29, 525 N.W.2d 353 (Ct. App. 1994), *aff'd*, 199 Wis. 2d 528, 544 N.W.2d 894 (1996). So in most circumstances, unless a statute "infringe[s] on a fundamental right protected by the First Amendment, [a court] should not address the overbreadth challenge." *Id.*

Courts have only "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings," beyond the First Amendment. *Sabri*, 541 U.S. at 609–10. The United States Supreme Court reconciled any inconsistency extending overbreadth doctrine beyond the First Amendment by stating that, outside the limited settings already recognized, "and absent a good reason, [the Court does] not extend an invitation to bring overbreadth claims." *Id.* at 610.

Granted, as Christel noted, the Supreme Court has applied overbreadth analysis in a few limited settings beyond the First Amendment. (Christel Br. 18–19.) But overbreadth remains "limited mostly if not exclusively to the First Amendment." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321 (2000). Christel is dismissive of such a limitation. He ignores any citation to *Salerno* and other binding Wisconsin precedent following *Salerno*. (Christel Br. ii–v.)

Christel fails to understand that overbreadth precedent does not apply here. He states that "the Supreme Court has also applied the overbreadth doctrine to rights falling outside the scope of the First Amendment, where fundamental rights are implicated." (Christel Br. 18.). But no fundamental right is implicated; there is not a recognized fundamental liberty or privacy interest to strangle or suffocate another person during sex. *See Rector*, 149 F. Supp. 3d at 634 (no fundamental right to BDSM sexual activity). So this Court cannot apply overbreadth to the new setting advocated by Christel.

This Court should not extend overbreadth doctrine beyond its present precedential limits. It should reject Christel's invitation to find that he has a constitutionally protected interest and new fundamental liberty right to strangle and suffocate another person.

3. Christel hasn't proved overbreadth doctrine applies and, even if it did, a limiting construction is preferred to invalidating a statute in its entirety.

Christel's overbreadth claim fails because he misapplies and conflates constitutional principles and doctrines. He grafts his overbreadth claim onto his liberty interest claim, (*see* Christel Br. 18–20), thereby replicating his misapplication of *Lawrence* to incorrectly assert the strangulation and suffocation statute implicates a fundamental right, *see supra* I. A. 2. (statute doesn't implicate a fundamental right). He fails to adequately address well-established overbreadth doctrine, such as that articulated in *Salerno* and *Sabri* defining the limits and restraints of overbreadth to the First Amendment and those limited additional settings already recognized by the Court. (*See* Christel Br. 18–20 (limited discussion).) And Christel has no discussion about overbreadth remedies beyond striking down a statue in its entirety. (Christel Br. 18–20.)

Even assuming overbreadth applied here, Christel had to show a "substantial number" of unconstitutional applications. *Culver*, 384 Wis. 2d 222, ¶ 9. Christel provides only one: consensual erotic asphyxiation in sexual relationships. (Christel Br. 19.) Christel's single example—a circumstance that doesn't implicate a fundamental right—is not the substantial number required to trigger overbreadth doctrine. It is insufficient to overcome the strong presumption that the statute is constitutional. "[I]nvalidating a statute is 'strong medicine' to be 'employed with hesitation, and then "only as a last resort."'" *Jackson*, 390 Wis. 2d 402, ¶ 13 (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

Assuming arguendo the strangulation and suffocation statute was overbroad for not containing a lack of consent element, then the appropriate remedy is a limiting construction requiring a lack of consent. Under overbreadth

doctrine, "courts may apply a limiting construction to rehabilitate the statute when such a narrowing and validating construction is readily available." *Stevenson*, 236 Wis. 2d 86, ¶ 15. A limiting construction is a preferred remedy to invalidating a statute. *Compare id*. (limiting construction), *with Jackson*, 390 Wis. 2d 402, ¶ 13 (invalidation last resort).

C. Wisconsin's strangulation and suffocation statute is not vague.

1. Christel has the burden to prove the statute is unconstitutionally vague.

In a vagueness challenge, the court presumes that the regulation is constitutional. *See State v. Ruesch*, 214 Wis. 2d 548, 556, 571 N.W.2d 898 (Ct. App. 1997). The person raising the claim has the burden to show beyond a reasonable doubt that the regulation is unconstitutionally vague. *Id.* The party must show the statute is vague in *all* its applications. *Hegwood v. City of Eau Claire*, 676 F.3d 600, 604 (7th Cir. 2012).

Vagueness rests upon the concept "that procedural due process requires fair notice and proper standards for adjudication." *City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285 (1989). The primary issue is whether the regulation is "sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties." *Id.* A regulation may be unconstitutionally vague when "it fails to afford proper notice of the conduct it seeks to proscribe." *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 16, 291 N.W.2d 452 (1980).

A person raising vagueness "does not have standing to challenge it on the grounds of being vague as it may be applied to others." *State v. Clement*, 153 Wis. 2d 287, 296, 450 N.W.2d 789 (Ct. App. 1989). So a "defendant cannot hypothesize fact situations but is confined to the conduct charged." *State v.*

Driscoll, 53 Wis. 2d 699, 701-02, 193 N.W.2d 851 (1972). In other words, if there is nothing vague about the application of the statute to the defendant's conduct, he cannot raise a vagueness challenge on the ground that it might be vague in some other case.

2. Wisconsin's strangulation and suffocation statute is not impermissibly vague.

Wisconsin's strangulation and suffocation statute is not vague. It clearly and succinctly states that "[w]hoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony." Wis. Stat. § 940.235(1).

The statute has two elements. Wis. JI–Criminal 1255 (2015). First, the State must prove "[t]he defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth" of the victim. *Id*. Second, the State must prove "[t]he defendant did so intentionally." *Id*. The second element "requires that the defendant acted with the mental purpose to impede normal breathing or circulation of blood or was aware that [the] conduct was practically certain to cause that result." *Id*.

The statute articulates two types of conduct that constitute the criminal impediment of normal breathing and blood circulation. Wis. Stat. § 940.235(1). A defendant either: (1) applied pressure on a victim's throat or neck; or (2) blocked the victim's nose or mouth. *Id*. Such explicitness is the antithesis of vagueness.

Wisconsin's strangulation and suffocation statute is much more explicit than other statutes that have survived vagueness challenges, such as recklessly endangering safety, stalking, soliciting prostitutes, and disorderly conduct.

Balistreri v. State, 83 Wis. 2d 440, 265 N.W.2d 290 (1978) (recklessly endangering safety in Wis. Stat. § 941.30); *State v. Givens*, 28 Wis. 2d 109, 135 N.W.2d 780 (1965) (disorderly conduct in Wis. Stat. § 947.01); *State v. Ruesch*, 214 Wis. 2d 548, 571 N.W.2d 898 (Ct. App. 1997) (stalking in Wis. Stat. § 940.32); *State v. Johnson*, 108 Wis. 2d 703, 324 N.W.2d 447 (Ct. App. 1982) (soliciting prostitutes in Wis. Stat. § 944.32).

This Court should conclude that the strangulation and suffocation statute is not impermissibly vague. "A statute need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Hurd*, 135 Wis. 2d 266, 272, 400 N.W.2d 42 (Ct. App. 1986). Wisconsin's strangulation and suffocation is not vague; it provides sufficient clarity and precision.

3. Christel failed to meet his burden to prove vagueness beyond a reasonable doubt.

Christel's vagueness challenge requires him to "establish, beyond a reasonable doubt, that there is no possible application or interpretation of the statute which would be constitutional." *State v. Smith*, 215 Wis. 2d 84, 90–91, 572 N.W.2d 496 (Ct. App. 1997). He must show the statute is vague in every application. *Hegwood*, 676 F.3d at 604.

Christel's vagueness challenge fails. He never raised this claim in the circuit court, presenting it for the first time to this Court.[26] (*See* R. 127; 180; 181; 192 (no vagueness challenge).) Christel is upset that the strangulation and

[26] Failing to present a claim in the circuit court typically is fatal to a party. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. But "facial constitutional challenges to criminal convictions cannot be forfeited" and may be made for the first time on appeal. *Id.* ¶ 75 n.3 (citing *State v. McCoy*, 139 Wis. 2d 291, 295 n.1, 407 N.W.2d 319 (Ct. App. 1987) (vagueness claim not forfeited)).

suffocation statute criminalizes "non-injurious behaviors" in "private sexual choices." (Christel Br. 17, 21.) Christel has again misstated that the strangulation statute infringes on a fundamental right. (Christel Br. 21.) He has again conflated distinct constitutional doctrines; grafting a liberty and privacy principle from substantive due process doctrine onto his vagueness claim governed by procedural due process doctrine.

Christel's vagueness challenge is doomed by his misapplication of vagueness doctrine. To prevail, Christel must show the statute is vague in *all* its applications, *see Hegwood*, 676 F.3d at 604, including cases such as his own act of strangling a victim during a nonconsensual sexual assault. Christel's vagueness challenge fails because he lacks standing to challenge vagueness as applied to others, *see Clement*, 153 Wis. 2d at 296; he cannot hypothesize fact situations, *see Driscoll*, 53 Wis. 2d at 701–02. But that is precisely what Christel has done; he provides a hypothetical of "erotic asphyxiation . . . to increase pleasure during a sexual encounter." (Christel's Br. 21.) Christel conceded earlier in his brief that "[i]t is obvious that the state has an interest in prosecuting and preventing mal-intended or harmful sexual encounters." (Christel Br. 17.) His claim fails because he cannot show vagueness in all applications.

This Court may dispatch Christel's vagueness challenge. *See State v. Laramore*, 179 P.3d 1084, 1088 (Idaho Ct. App. 2007) ("[C]ontention that the [Idaho strangulation] statute is unconstitutionally vague on its face is without merit."). Christel didn't raise a vagueness challenge below and now offers it to this Court without properly understanding vagueness doctrine. Any vagueness challenge must fail because the strangulation and suffocation statute provides much more clarity and precision than other statutes that survived vagueness challenges.

D. Wisconsin's strangulation and suffocation statute is not unconstitutional as applied to Christel.

1. Christel has the burden to overcome the presumption that a statute is constitutional.

A party asking this Court to find a statute unconstitutional has the burden to overcome the presumption of constitutionality and prove unconstitutionality beyond a reasonable doubt. *Wood*, 323 Wis. 2d 321, ¶ 15. This presumption and burden apply whether the party makes a facial or as-applied challenge. *Id*.

A constitutional claim is "very complicated from an analytic perspective, both to brief and to decide." *Cemetery Servs.,* 221 Wis. 2d at 831. A party must do more than make a general statement on the law, *United States v. South*, 28 F.3d 619, 629 (7th Cir. 1994), because "undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived," *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991). A constitutional claim must be more than broadly stated; it must be specifically argued. *State v. Scherreiks*, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989).

Christel cannot overcome the constitutionality presumption and satisfy his burden unless he adequately identifies the applicable constitutional doctrine. *Compare Wood*, 323 Wis. 2d 321, ¶ 15 (burden and presumption), *with Scherreiks*, 153 Wis. 2d at 520 (specificity). He also must sufficiently develop and specifically apply the relevant constitutional principle to the relevant facts in his case. *Compare Wood*, 323 Wis. 2d 321, ¶ 15 (burden and presumption), *with Scherreiks*, 153 Wis. 2d at 520 (specificity).

2. This Court should not review the as-applied challenge because Christel does not adequately identify relevant constitutional doctrine to support his claim.

Christel dedicated only a single paragraph in his brief to present the legal principle for his as-applied claim. In the paragraph, Christel cites to a single footnote from one case. (Christel Br. 22 (quoting *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211).) He dedicates eight subsequent paragraphs to argue the strangulation and suffocation statute is unconstitutional as applied to him. (Christel Br. 22–25.) But Christel never again cites to any legal authority, relying entirely on that single footnote from the *only* case he presented in his short opening paragraph. (*See* Christel Br. 22–25 (quoting *Olson*, 309 Wis. 2d 365, ¶ 44 n. 9).)

This Court should decline to review Christel's undeveloped as-applied constitutional claim. *See Pettit*, 171 Wis. 2d at 646-47 (declining to review inadequately developed argument). The footnote Christel cited in his brief provides an overview as to facial and as-applied constitutional challenges. (*See* Christel Br. 22 (quoting *Jackson*, 309 Wis. 2d 365, ¶ 44, n.9).) But *Olson* pertained to a real estate developer seeking a declaratory judgment against a township that challenged a land division and planning code ordinance on constitutional grounds relating to ex post facto as well as an unlawful and uncompensated taking of private property. *Jackson*, 309 Wis. 2d 365, ¶¶ 2, 44. It's unclear from Christel's citation to *Olson* the underlying constitutional principles relevant to his claim. He doesn't make Olson's ex post facto claim, and he doesn't make an as-applied unlawful taking claim. Christel made only a general as-applied claim untethered to any underlying constitutional doctrine.

This Court should decline review. Christel's citation to *Olson* does not sufficiently articulate the nature of his constitutional claim.

3. Christel cannot meet his burden to show the strangulation and suffocation statute is unconstitutional as applied to him.

If this Court reviews Christel's as-applied claim, it will find that he cannot show that the strangulation and suffocation statute is unconstitutional as applied to him. Christel's as-applied challenge is effectively a rehash of other claims where he asserted the strangulation and suffocation statute should have an element requiring a lack of consent in situations of consensual sexual erotic asphyxiation. (*Compare* Christel Br. 22–25 (as-applied), *with id.* at 17–21 (arguing for element as to consent).) But as the State observed previously when explaining Christel's lack of standing to bring a liberty or privacy claim, *supra* I. A. 4., he was convicted of a *nonconsensual* sexual assault by force or violence (R. 165; 249:87–88).

If this Court reviews Christel's general as-applied claim, he cannot prevail under the facts and procedural history of his case. Christel alleged at trial that he strangled the victim during a consensual sexual encounter. (R. 248:243–44.) The State argued the opposite to the jury: "This is not some sort of erotic asphyxiation situation, not even close. This was a rape. This was a forceful rape in an intimate partner relationship." (R. 249:120.) The jury resolved the factual dispute when it found Christel guilty of nonconsensual sexual assault by force or violence (R. 165; R. 249:87–88.) This Court may quickly dispatch Christel's general as-applied claim that betrays the jury's sexual assault verdict.

* * * * *

Christel invites this Court to invalidate the unanimously enacted strangulation and suffocation statute. He does so through four underdeveloped constitutional claims. Christel, as the party asking this Court to strike down the statute, should have provided a targeted and clear claim with a developed argument. *See United States v. Levy*, 741 F.2d 915, 924 (7th Cir. 1984) (rifle, not the shotgun, is a better instrument to hit a target without "obscuring the significant issues by dilution"). Christel had to "do more than simply toss a bunch of concepts into the air." *State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). This Court should reject Christel's invitation because the statute is constitutional.

II. This Court should affirm the circuit court order denying Christel's sentence modification motion because no new factor was presented.

A. This Court reviews de novo whether Christel proved by clear and convincing evidence the existence of a new factor.

A circuit court employs a two-step inquiry to decide whether a defendant may receive a sentence modification based on a new factor. *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis. 2d 53, 797 N.W.2d 828. First, the defendant has the burden to prove "by clear and convincing evidence the existence of a new factor." *Id.* Second, "if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." *Id.* ¶ 37.

Here, only the first step of the inquiry is at issue because the circuit court found Christel didn't prove a new factor existed. (R. 230:3.) Christel suggests that the circuit court was deficient for only considering the first step. (Christel Br. 15 ("The court completely failed to address the second prong . . . .").) But such a criticism is misplaced because

Harbor contemplates a circuit court addressing only one step when that step is dispositive. 333 Wis. 2d 53, ¶ 38.

Under the first step of the inquiry, a defendant must overcome a "fairly high" hurdle. *State v. Ramuta*, 2003 WI App 80, ¶ 8, 261 Wis. 2d 784, 661 N.W.2d 483. The defendant has the burden to prove "a fact or set of facts" that was "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), *quoted in Harbor*, 333 Wis. 2d 53, ¶ 40.

This Court should limit its review to the first step in the new factor analysis, deciding only whether Christel satisfied his burden and proved by clear and convincing evidence the existence of a new factor.

B. Christel cannot prove a new factor existed because the circuit court knew and did not overlook the pending assault case when it sentenced him in the bail jumping case.

This Court should conclude that Christel's sentence in the assault case is not a new factor in his bail jumping case. His claim fails for the same reason such a claim failed in *Ramuta*. *See* 261 Wis. 2d 784, ¶¶ 8–21 (new factor analysis).

In *Ramuta*, this Court explained that the high hurdle a defendant must overcome is further heightened when the claim is based on a subsequently imposed sentence. *Id.* In *Ramuta*, a defendant received a sentence for a robbery spree followed by a later sentence for another robbery spree. *Id.* ¶¶ 1–3. At the first sentencing hearing, the circuit court was "apprised multiple times throughout the sentencing proceeding that the defendant had charges pending" in another county. *Id.* ¶ 18. The defendant later claimed the subsequent sentence was a new factor warranting

modification of his earlier sentence. *Id.* ¶ 3. This Court was unconvinced, explaining that the defendant had "not demonstrated by clear and convincing evidence that either the [subsequent] sentencing was unknown or overlooked." *Id.* ¶ 20.

Christel's new factor claim fails, as it did in *Ramuta*, because his subsequent sentencing in the assault case was neither unknown nor overlooked during his sentencing in the bail jumping case. The judge who sentenced Christel in the bail jumping case in April 2019 was the same judge who had presided at the multiday jury trial in the assault case one month earlier in March 2019. (R. 247–49; R. 59 (No. 18-CF-39).) The assault case was discussed repeatedly by the parties and court during the sentencing hearing in the bailing jumping case. (R. 59 (No. 18-CF-39).) The impending sentence in the assault case was clearly known and not overlooked.

Chrisel's argument to this Court fails. He incorrectly assumes the assault sentence was "new" because it was not in existence at the time of his bail jumping sentence. (Christel Br. 13–15.) But Christel cannot reconcile such an argument with *Ramuta*; it fails because the pending assault case was known and not overlooked. *See Ramuta*, 261 Wis. 2d 784, ¶¶ 8–21 (subsequent sentencing not a new factor when pending case known). *Harbor* confirmed that a new factor claim fails when the fact was known and not overlooked. 333 Wis. 2d 53, ¶¶ 48–49. Christel's argument fails for the same reason it failed in *Ramuta*. *See* 261 Wis. 2d 784, ¶ 20.

But should this Court depart from *Ramuta* and conclude Christel proved a new factor by clear and convincing evidence, then the remedy is to remand for the circuit court to advance to the second step in the new factor analysis. (Christel Br. 15.) Here, there is no need for a remand because the circuit court properly concluded under the first step in the analysis that a new factor did not exist.

CONCLUSION

This Court should affirm the circuit court's postconviction orders that denied Christel's constitutional challenge and denied his new factor claim.

Dated this 18th day of November 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,853 words.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 18th day of November 2020.

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