STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP002001 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. BROTT,

Defendant-Appellant.

Appeal From a Final Order and
Judgment of Conviction of the
Waukesha County Circuit Court, the
Honorable Jennifer R. Dorow, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the sentencing court is bound by the mandatory minimum sentence of Wis. Stat. § 939.617(1) when it conflicts with the permissive language of the substantive statute, Wis. Stat. § 948.12(1m)?

   The circuit court answered yes.

   This court should answer no. The conflict between the two statutes is irreconcilable. This court should remand with instructions to set aside the mandatory language of Wis. Stat. § 939.617 and sentence the defendant according to Wis. Stat. § 948.12.

2. Whether the conflicting penalty provisions of this offense violate the Equal Protection Clause?

   The circuit court answered no.

   This court should answer yes. A review of similar cases reveals that after the amendment of Wis. Stat. § 939.617, effective April 23, 2012, and even after the decision in *State v. Holcomb*, there are circuit courts throughout Wisconsin that order probation and impose sentences with less than three years of initial confinement. The disparate and arbitrary imposition of the mandatory minimum violates the Equal Protection Clause.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that publication is necessary and appropriate to provide guidance to circuit courts regarding interpretation of Wis. Stat. §§ 939.617(1) and 948.12(1m) and the application of the Equal Protection Clause to the mandatory minimum bifurcated sentence imposed by the circuit court. Existing precedent examining applicable mandatory minimum sentences are in conflict, and publication is necessary to provide clear guidance.

Although Appellant's brief fully presents the issues and develops the theories and legal authorities, Appellant does not oppose oral argument if the court believes that it would not be of such marginal value that it does not justify the additional expenditure of court time.

STATEMENT OF THE CASE

On July 9, 2019, the state filed a felony summons for John Brott. (4). The summons accompanied a 10-count criminal complaint alleging 10 violations of Wis. Stat. § 948.12(1m) between February 23, 2019 and June 4, 2019. (1). Brott appeared initially with Attorney Thomas C. Simon on July 22, 2019 and was released on a signature bond with strict conditions prohibiting him from accessing any child exploitation material and any other sexually explicit material, from contacting any minor over the

internet or using a website to gather information about a minor, from intentionally deleting any history from any computer or device that accesses the internet, and from using any application where the content automatically deletes upon the recipient opening the content. (71). Brott waived his right to a preliminary hearing on August 28, 2019, and the state filed an information mirroring the charges of the criminal complaint. (10).

After two appearances before the trial court, the matter was set for jury status and jury trial in late February 2020. On January 31, 2020, Brott, by counsel, filed a letter with the court requesting a plea hearing and asking the court to remove the matter from the trial calendar. (18). The request was granted. Brott was given a hearing on April 15, 2020 to change his plea. The hearing was delayed due to the COVID pandemic and the Waukesha Court's Order for All Criminal Cases. (20).

On October 12, 2020, undersigned counsel filed a notice of appearance on behalf of Brott. (23). On November 13, 2020, counsel filed a motion to suppress statements and other evidence the state intended to use at trial. (30; 33). Counsel also filed a motion to adjourn the jury trial. (32). Pursuant to its negotiations with the state, Brott changed his plea during the next hearing, thereby withdrawing the motions filed before the hearing. (77). He entered a guilty plea on one count of possession of child pornography, and the state agreed to read-in the

remaining nine counts and to recommend a sentence of three years of initial confinement and three years of extended supervision. (36; 77). Both parties agreed to stipulate to "five counts for the purposes of the child pornography surcharge" for a total of $2,500. (36:2). The court ordered a presentence investigation. (39).

On February 5, 2021, Brott filed a motion to set aside the minimum sentencing provisions set forth in Wis. Stat. § 939.617. (41). The state filed a short response. (45). Brott also filed a packet of character letters and a sentencing memorandum, and the state filed a victim impact statement, filed under seal. (46; 47; 49). Brott also filed a motion requesting release of bond pending appeal. (48). The sentencing hearing took place on May 5, 2021. (76). The court, the Honorable Jennifer R. Dorow presiding, denied Brott's motion to set aside the minimum sentencing provisions and sentenced Brott to 3 years of initial confinement and 3 years of extended supervision. (60). The court granted Brott's motion for release on bond pending appeal. Brott filed a timely notice of appeal. (80).

STATEMENT OF THE FACTS

The National Center for Missing and Exploited Children (hereinafter NCMEC) detected an image that it believed to be child sexual abuse material, which was uploaded to IP address 65.26.228.1595 on February 23, 2019. (1:6). Based on the tip from NCMEC, the Wisconsin Department of Justice

obtained an administrative search warrant for the IP address and connected the upload to a Charter Communications customer named John Brott. (*Id.*). On May 28, 2019, the New Berlin Police Department obtained a search warrant for the home of John Brott. (*Id.*). The warrant was executed on June 4, 2019 and resulted in the confiscation of numerous electronic devices. (1:7). Among them were internet searches and at least twenty-five images believed to be child sexual abuse material. (1:7-9).

During an interview with law enforcement, Brott "was adamant that any images or Internet search history regarding pornography [were] his" and that his wife "was not into pornography and would not be responsible for any images or search histories." (1:7). He "denied anyone else would have had access to his computers or other devices to try and view pornography." (*Id.*). Brott's wife said that she was not involved in her husband's viewing or downloading of pornography, and she claimed that Brott had admitted to her in the past that he viewed child sexual abuse material. (1:9).

The motion to suppress filed on Brott's behalf alleged that "NCMEC, PhotoDNA and Microsoft BingImage acted as agents of the government and that these organizations conspired to commit illegal searches of Brott's property." (31:1). The motion raised several legal challenges

> At such hearing, the principal legal issues will focus on: (1) whether the National Center for

> Missing & Exploited Children ("NCMEC"), PhotoDNA, and Microsoft acted as government agents in their warrantless searches of Brott's computer and internet usage; (2) the coordination between NCMEC, PhotoDNA, and Microsoft; (3) the circumstances surrounding the interception and search of the accounts and devices prior to and during the creation of the Cybertip report at issue; (4) testimony from NCMEC and Microsoft regarding their aforementioned searches and coordination; and (5) testimony from law enforcement regarding the creation of the Cybertip report and whether the law enforcement activities related to the investigation of the Cybertip violated Brott's rights under the Fourth, Fifth, and Sixth Amendment of the United States Constitution.

(30:2-3).

The motion to suppress Brott's statements claimed they were the fruit of the illegal search and were obtained in violation of Brott's constitutional rights. (33). However, both motions were implicitly withdrawn during the plea hearing. (77). The only motion that remained before the court was an oral motion in which Brott's counsel informed the court that she intended to argue before sentencing that the court was not bound by the minimum sentence provisions of Wis. Stat. § 973.617. (77:3-4). The court agreed to hear this argument after the plea hearing and gave Brott's counsel a deadline to file a written motion regarding the issue. (77:4). The state did not object to the decision to hear argument. (77:3-4).

During the plea colloquy, the court informed Brott that it would "hear the argument" regarding the

applicability of the mandatory minimum sentence provision to his case, but it ensured that Brott understood "what the statute says about the mandatory minimum," i.e., that "pursuant to [Wis. Stat. §] 939.167, upon conviction the court shall impose a bifurcated sentence, including a term of initial confinement for at least 3 years." (77:5-6,7).

Counsel moved the court to set aside the mandatory sentencing provisions of Wis. Stat. § 939.617(1). (41). Counsel argued that the use of the word "may" in Wis. Stat. § 948.12 gives the sentencing court discretion to set aside Wis. Stat. § 939.617. (41:1-2). In support of the motion, counsel attached three exhibits showing that courts across the state had imposed and/or stayed sentences that did not adhere to the plain language of Wis. Stat. § 939.617. (41:14-32). Counsel argued that the disparity between those sentencing courts that believe they are bound by a mandatory minimum sentence and those that do not believe they are bound by a mandatory minimum sentence created an equal protection challenge wherein anyone who appeared before one of the courts that applied Wis. Stat. § 939.617 indiscriminately was subject to a higher minimum sentence than anyone fortunate enough to be sentenced by one of the other courts. (41:2).

At the beginning of the sentencing hearing, the court addressed Brott's motion regarding the mandatory minimum sentence. (76:4; App. 107). The court found that *State v. Holcomb* was "on point and

controlling," even though it did not address Brott's argument "that [Wis. Stat. §] 948.12(1m) allows for this to be non-mandatory."[1] (*Id.*). The court found that Wis. Stat. § 939.617 "is not an ambiguous statute" and affirmed that it had "no doubt concerning the mandatory nature of the requirement for a bifurcated sentence and a 3-year minimum term of initial confinement." (76:5; App. 108). The court also found that "what other courts … or other prosecutors have been doing" in cases across the state in which they do not abide by Wis. Stat. § 939.617 "comes down to prosecutorial discretion or the courts perhaps not fully understanding *Holcomb*" and that Brott's equal protection argument was inapposite. (76:30; App. 133). The court denied Brott's motion to set aside the provisions of Wis. Stat. § 939.617 and found that Brott did not meet the criteria for the exception to the mandatory minimum sentence in Wis. Stat. § 939.617(2) and (3). (76:6; App. 109).

During its sentencing remarks, the state gave Brott credit for taking responsibility for the illicit material on his devices, claiming ownership of it, and cooperating with law enforcement. (76:10; App. 113). The state also pointed out that Brott had a minimal criminal record—only one disorderly conduct from 2016—and, aside from this case, a "relatively good character." (*Id.*). The state considered certain prosocial

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[1] *State v. Holcomb*, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100.

aspects of his life positive and credited Brott and his wife with raising children that are successful and contribute to society. (76:12; App. 115). It pointed out that Brott did not distribute pornography, and although he engaged in some *post hoc* justifications and criminal thinking, the PSI writer determined he was low risk in most of the relevant categories. (76:13-15; App. 116-18).

Defense counsel relied on its memorandum during sentencing but also highlighted the collateral consequences that Brott suffered because of this case. (76:19-20; App. 122-123). Those collateral consequences – including, among others, the registration requirements, restrictions on living arrangements and relationships, and freedom of movement in the community – impose an additional measure of deterrence, beyond that created by the initial confinement portion of the sentence. (76:25; App. 128). In addition, counsel pointed out that the forensic examination demonstrated that the images in question were deleted shortly after being seen rather than being stored or shared. (76:22; App. 125). Counsel argued that the imposition of the mandatory minimum sentence harms the least severe offenders, the people who were likely to receive less than the mandatory minimum sentence, rather than those who were likely to receive a sentence closer to the statutory maximum. (76:23; App. 126). Counsel did not make a sentencing recommendation but urged the court to consider a sentence below what it ruled was the minimum

sentence. (76:26; App. 129). Brott spoke on his own behalf as well. He delivered a personal and contrite message to the sentencing court. (76:27-28; App. 130-131).

During its sentencing remarks, the court discussed the effect these images have on the children they featured at great length. (76:29-34; App. 132-137). The court imputed culpability to Brott, saying, "there's a market for this," and Brott was willingly "part of that market." (76:34; App. 137). This case involved approximately "68 images of suspected child pornography," and the court determined that, "on the spectrum of child porn cases," this case "is fairly typical." (76:35; App. 138). It is mitigated by the fact that Brott did not engage in trading or collecting the photos and that he took "full responsibility" during an hour-long meeting with law enforcement. (76:35-36; App. 138-139).

The court found that Brott needed sex offender treatment and that the offense was a serious one because of the nature of the crime. (76:38; App. 141). However, the court found that this case was "on the more mitigated range" of cases involving child pornography. (76:39; App. 142).

The court sentenced Brott to what it believed was the minimum sentence:

> Your character is solid. Yes, this is a character flaw at this point. Yes, this is a mark against what was otherwise a very solid moral character, but your character nonetheless.
>
> When I consider the need to protect the community, this is one of those situations where again, the legislature has curbed my discretion, has told me I must impose a bifurcated sentence with an initial term of confinement, the minimum of 3 years. But when I factor in your willingness to do treatment, when I factor what your attorney has described, right? The totality of who you are, the holistic view of who you are, I do not believe there needs to be more than 3 years of initial confinement.
>
> I think three is appropriate. It is the mandatory minimum.

(76:39; App. 142).

After praising the professionalism and reliability of the PSI writer, the court quoted the PSI's comments about Brott favorably and imposed the sentence the PSI writer recommended: 3 years of initial confinement and 2 years of extended supervision. (76:40-41; App. 143-144).

In response to Brott's motion for release on bond pending appeal, the court found that Brott was not likely to commit a serious crime and that it was not likely he would fail to appear. (76:44; App. 147). The court granted his motion for release subject to conditions of bond. (76:45; App. 148).

ARGUMENT

I. The sentencing court is not bound by the mandatory minimum sentence of Wis. Stat. § 939.617(1) because it conflicts with the permissive language of Wis. Stat. § 948.12(1m).

A. Standard of review; principles of law.

This case concerns the interpretation of Wis. Stat. §§ 939.617 and 948.12. The meaning of a statute is a question of law that this court reviews de novo. *State v. Holcomb*, 2016 WI App 70, ¶ 4, 371 Wis. 2d 647, 886 N.W.2d 100 (*citing Kelly v. Brown*, 2016 WI App 31, ¶ 8, 368 Wis. 2d 353, 879 N.W.2d 127).

The pertinent statutory language must be read "in the context in which it is used; not in isolation but as a part of a whole; in relation to the language surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State v. Lalicata*, 2012 WI App 138, ¶ 8, 345 Wis. 2d 342, 824 N.W.2d 921 (*citing State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110). If a statute is ambiguous, i.e., if it is capable of being understood by reasonably well-informed persons in two or more senses, the court *may* consider extrinsic sources such as legislative history to discern the meaning of the statute. *State v. Williams*, 2014 WI 64, ¶ 19, 355 Wis. 2d 581, 852 N.W.2d 467 (emphasis added).

B. The term "may" in Wis. Stat. § 948.12 and the term "shall" in Wis. Stat. § 939.617 are irreconcilable.

The court must examine Wis. Stat. § 948.12 and Wis. Stat. § 939.617. The two statutes use "may" and "shall" incongruously. The term "may" is generally construed as permissive, while the term "shall" is generally construed as mandatory. *State v. Duffy*, 54 Wis. 2d 61, 65, n.1, 194 N.W.2d 624 (1972); *see also State v. Meddaugh*, 148 Wis. 2d 204, 307-08, 425 N.W.2d 269 (Ct. App. 1988) (discussing *Duffy* and the distinction between "may" as permissive and "shall" as mandatory). Wisconsin Stat. § 948.12(3)(a) applies to defendants over the age of 18 at the time of offense and says that "a person who violates [Wis. Stat. § 948.12(1m)] … is guilty of a Class D felony." Wis. Stat. § 948.12(3)(a).

The relevant portion of Wis. Stat. § 939.617(1) says that "if a person is convicted of a violation of" Wis. Stat. § 948.12, "the court *shall* impose a bifurcated sentence," and the initial confinement "portion of the bifurcated sentence shall be at least … 3 years." Wis. Stat. § 939.617(1)(emphasis added). In isolation, this statute appears to limit the sentencing court's discretion by demanding that it impose, at minimum, a bifurcated sentence that includes no less than three years of initial confinement. The phrase "shall impose" does not necessarily prohibit probation because an imposed sentence can be stayed. For instance, the

statute requiring bifurcated sentences in prison cases states that "whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, … the court *shall impose* a bifurcated sentence under this section." Wis. Stat. § 973.01(1). The phrase "shall impose" in that statute does not prohibit probation on all bifurcated sentences. Nevertheless, the use of the word "shall" in Wis. Stat. § 939.617 makes a bifurcated sentence with a period of three years of initial confinement mandatory, even if stayed.

The mandatory nature of Wis. Stat. § 939.617 is in stark contrast to the permissive nature of the statute that criminalizes the possession of child pornography, Wis. Stat. § 948.12, which prohibits possessing a recording "of a child engaged in sexually explicit conduct." Wis. Stat. § 948.12(1m). It also authorizes the court to impose a punishment, stating that anyone who possesses such a recording under the enumerated circumstances "*may* be penalized under sub. (3)." Wis. Stat. § 948.12(1m) (emphasis added). The term "may" is permissive rather than mandatory, and under Wis. Stat. § 948.12, the court is given the discretion to impose a bifurcated sentence under Wis. Stat. § 973.01(2), i.e., a term of confinement that "may not exceed 15 years" and a "term of extended supervision [that] may not be less than 25 percent of the length of the term of confinement" and "may not exceed 10 years." Wis. Stat. § 973.01(2)(b)4. and (2)(d)3. The plain meaning of these two statutes

cannot be reconciled. If one supersedes the other, it is not clear which supersedes the other.

C. There is no clear, binding precedent as to how to harmonize Wis. Stat. §§ 939.617(1) and 948.12(1m).

1. In *Holcomb*, this court held that the word "or" in Wis. Stat. § 939.617(2) did not allow a sentencing court to deviate from the mandatory minimum without regard for the defendant's age.

As the circuit court pointed out, the court of appeals examined Wis. Stat. § 939.617(2) in *Holcomb* and held that "the circuit court may only depart from the minimum—either by imposing probation or less than three years' initial confinement—if the defendant was less than forty-eight months older than the child-victim." *Holcomb*, 371 Wis. 2d 647, ¶ 8. However, the issue in *Holcomb* differed from the issue presented to this court. The court of appeals' holding in *Holcomb* is inapposite.

In *Holcomb*, the court of appeals examined a different subsection of Wis. Stat. § 939.617 with the following language:

> If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that

> is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:

Wis. Stat. § 939.617(2).

The statute is best understood if separated into four sections: (1) the preconditions clause; (2) lower sentence option; (3) probation option; and (4) necessary circumstances clause. Holcomb argued that the preconditions clause applied to both options but that the necessary circumstances clause only applied to the probation option. The court found that both clauses—the preconditions clause and the necessary circumstances clause—applied to both options: "The natural and normal reading is that the introductory 'if' clause preceding the comma modifies the whole of the main clause, and the circumstances following the colon modify the entire section preceding the colon. *Holcomb*, 371 Wis. 2d 647, ¶ 10. The court did not address Wis. Stat. § 948.12(1) or Wis. Stat. § 939.617(1).

2. In *Lalicata*, this court held that the phrase "shall impose" prohibited probation.

Lalicata argued that his conviction for Wis. Stat. § 948.02(1)(b) was eligible for probation. *Lalicata*, 345 Wis. 2d 342, ¶ 3. He argued as follows:

> The plain language of the statute authorizing probation states that "[e]xcept [for life imprisonment sentences] or if probation is

> prohibited for a particular offense by statute ... the court, by order, may withhold sentence or impose sentence ... and stay its execution, and in either case place the person on probation." *Id.*, ¶ 4 (*quoting* Wis. Stat. § 973.09(1)(a)).
>
> Further, Wis. Stat. § 939.616(1r), which states that "[i]f a person is convicted of a violation of [Wis. Stat. §] 948.02(1)(b) ... the court shall impose a bifurcated sentence under [Wis. Stat. §] 973.01," does not explicitly prohibit probation. *Lalicata*, ¶ 5. "In fact," he continued, "probation is not even mentioned." *Id.*
>
> Two similar statutes that do prohibit probation, Wis. Stat. §§ 939.618(2)(a) and 939.619(2), expressly provide that "[t]he court may not place the defendant on probation." *Lalicata*, ¶ 6. Thus, if the legislature intended to prohibit probation in Wis. Stat. § 939.616, it would have used the same language as those two statutes.

Paraphrasing Lalicata, 345 Wis. 2d 342, ¶¶ 3-7.

The state argued that the phrase "the court shall impose a bifurcated sentence" meant that the court may not place the defendant on probation. *Lalicata*, ¶ 7. The court of appeals agreed with the state. It held that, read in context and as a part of a whole, the phrase "shall impose" in Wis. Stat. § 939.616(1r) prohibited probation:

> Reading this series of minimum sentence statutes as a whole, we are convinced that by labeling Wis. Stat. § 939.616 a "mandatory minimum sentence" statute and stating that "the court shall impose a bifurcated sentence" and that "[t]he term of confinement in prison portion of the bifurcated sentence shall be at least 25 years," [Wis. Stat.] § 939.616(1r), the legislature has clearly prohibited probation.

Lalicata, 345 Wis. 2d 342, ¶ 14.

In support of its holding, the court of appeals pointed to the title and language of Wis. Stat. § 939.617, the provision at issue in this case, as a way of showing that "the legislature knew very well how to create exceptions allowing probation for crimes that ordinarily trigger a minimum sentence of confinement," and in such instances, "the legislature helpfully omitted the word 'mandatory' from the statute's title." *Id.* at ¶ 12.

The court also adopted the state's argument that "may" and "shall" were terms of art and that the term "shall" did not permit a court to take an alternative course of action at its discretion. *Lalicata*, ¶ 7. The court found that in the context of impaired driving cases, no reviewing court had ever interpreted the language "shall be imprisoned" to mean that a sentence can be imposed and stayed. *Id.* at ¶¶ 7,10.[2]

The court also held that Lalicata's interpretation of the statue would allow the court to order probation but prohibit the court from withholding sentence. *Lalicata*,¶ 15 (*quoting* Wis. Stat. § 973.09, which states, in part, that "the court, by order, may withhold sentence or impose sentence ...

[2] Here, the court cites *State v. Duffy*, 54 Wis. 2d 61, 65, n. 1, 194 N.W.2d 624 (1972), reasoning that in sentencing statutes the legislature uses "may" to leave the court discretion and "shall" to remove its discretion, and *State v. Meddaugh*, 148 Wis. 2d 204, 207-08, 435 N.W.2d 269 (Ct. App. 1988), discussing *Duffy* and the distinction between "may" and "shall." *Lalicata*, ¶ 7.

and stay its execution."). According to the court of appeals, "[t]o demarcate some legislative line between imposing and staying and withholding suggesting that a court may do one but not the other, defies common sense." *Lalicata*, ¶ 15.

3. In *Williams*, the Supreme Court held that a statute that said a sentence "*shall* not be less than 3 years" was ambiguous on its face.

The *Lalicata* court may have been out over their skis saying that the interpretation of the statute that prohibits withheld sentences but allows stayed prison sentences "defies common sense." Two years later, the Supreme Court found that a similar statute in the impaired driving context was ambiguous. *Williams*, 355 Wis. 2d 581, ¶ 4. Williams was convicted of a seventh offense OWI, and he argued that he was eligible for probation. *Id*., ¶ 4.

The language of the statute of conviction, Wis. Stat. § 346.65(2)(am)6. (Wisconsin Statutes 2009-10), read as follows: "The confinement portion of a bifurcated sentence imposed on the person under [Wis. Stat. §] 973.01 *shall* be not less than 3 years." *Williams*, ¶ 21 (emphasis added). The Court found that it was ambiguous because it did not make clear "whether it requires a court to impose a bifurcated sentence or whether it merely gives the court that option." *Williams*, ¶ 21. "Well-informed people may

reasonably disagree as to whether [Wis. Stat.] § 346.65(2)(am)6. requires a court to impose a bifurcated sentence *or whether probation is permitted* and a bifurcated sentence is merely an option." *Williams*, ¶ 6 (emphasis added).

Because the statute was ambiguous on its face, the court turned to "extrinsic sources such as legislative history to discern the meaning of the statute." *Williams*, ¶ 19 (*quoting Kalal*, 271 Wis. 2d 633, ¶ 51, 681 N.W.2d 110). Ultimately, the court held that the statute did require the imposition of a bifurcated sentence and did not allow the court to order probation. According to the Court, the statute was part of a "graduated penalty structure" in which the "mandatory minimum sentences generally increase with the number of OWIs." *Williams*, ¶ 32.

Applying both *Lalicata* and *Williams* to the instant case highlights the inconsistency in the two holdings. In *Lalicata*, the court held that sentencing language that did not specifically preclude probation implied that probation was prohibited. In *Williams,* the court concluded that reasonable minds could disagree about whether a sentencing court was required to deny probation as a potential sentencing option to repeat drunk drivers. Thus, the conflict between the term "may" in Wis. Stat. § 948.02 and the term "shall" in Wis. Stat. § 939.617 is yet to be addressed by a reviewing court.

D. Because the plain meaning of the two statutes cannot be read together, this court should follow the permissive language of the substantive statute, Wis. Stat. § 948.12, and disregard Wis. Stat. § 939.617.

The conflict between the term "may" in Wis. Stat. § 948.02 and the term "shall" in Wis. Stat. § 939.617 renders the latter ambiguous: it is capable of being understood by reasonably well-informed persons in two or more senses. *Williams*, 355 Wis. 2d 581, ¶ 19 (*quoting Kalal*, 271 Wis. 2d 633, ¶ 47, 681 N.W.2d 110. When a statute is ambiguous, the court may consider extrinsic sources such as legislative history to discern the meaning of the statute. *Williams*, 355 Wis. 2d 581, ¶ 19 (*quoting Kalal*, 271 Wis. 2d 633, ¶ 51, 681 N.W.2d 110.

However, rather than reading the tea leaves to divine the intent of the legislature, Brott asks this court to resolve the conflict by setting aside Wis. Stat. § 939.617 regarding convictions under Wis. Stat. § 948.02. Brott contends that the doctrine of separation of powers demands a legislative solution rather than a judicial one. The separation of powers doctrine is not expressly stated in the Wisconsin constitution, it is, however, inferred from the provisions of the constitution that set forth the powers of the legislative, executive, and judicial branches. *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703

(1982); Article IV, sec. 1, Wis. Const. (legislative); Art. V, sec. 1, Wis. Const. (executive); Art. VII, secs. 2, 3, 4, Wis. Const. (judicial).

The Wisconsin constitution grants each branch set powers "upon which the other branches absolutely may not intrude." *In Matter of Complaint Against Grady*, 118 Wis. 2d 762, 776, 348 N.W.2d 559 (1984). While not all government action can be categorized as exclusively legislative, executive, or judicial, *Layton Sch. of Art & Design v. WERC, 82* Wis. 2d 324, 347, 262 N.W.2d 218 (1978), one branch may not exercise power in a way that will overly burden or greatly interfere with another branch's essential role and powers. *Grady*, 118 Wis. 2d at 775-76, (citing *Holmes*, 106 Wis. 2d at 68, 315 N.W.2d).

In this case, resolving the ambiguity in the statute would require this Court to interfere with determining what punishment ought to be affixed to an entire class of defendants – a role that lies solely with the legislative branch. *In re Felony Sentencing Guidelines*, 120 Wis. 2d 198, 203, 353 N.W.2d 793 (1984); Article IV, sec. 1 Wis. Const. As a result, this court should disregard section 939.617(1) in this case and in all others like it until the matter is appropriately addressed by the legislature.

E. Because the plain meaning of the two statutes cannot be read together, this court should apply the rule of lenity.

Alternatively, if this court declines to disregard the provision in its entirety, Brott implores this court to employ the rule of lenity in interpreting the ambiguous sentencing provision. "When there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Cole,* 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700. "[T]he rule of lenity comes into play after two conditions are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature by resort to legislative history." *Id*. ¶ 67. Even if one believes that the arguments for each position are equal, the court "must favor a milder penalty over a harsher penalty when there is doubt concerning the severity of the penalty prescribed by statute." *Id*.

The rule of lenity is not some anachronistic tool that has no place in the modern court. The day before this filing, Justices Sotomayor and Gorsuch agreed with the majority position in *Wooden v. United States*, 595 U. S. ____ (2022),[3] No. 20–5279, slip op. (Mar. 7, 2022) but concurred to say the rule of lenity provided "an independent basis for ruling in favor of [the] defendant." (*Wooden*, (Sotomayor, J., Concurring), slip op. at 19; App. 190). Justice Gorsuch went further,

[3] In *Wooden*, an opinion authored by Justice Kagan, the U.S. Supreme Court unanimously decided that William Dale Wooden's ten burglary offenses arising from the single criminal episode did not occur on different "occasions" and thus count as only one prior conviction under the Armed Career Criminal Act.

arguing that the entire project of divining legislative intent is an immoral usurpation of the legislature's authority:

> A second and related misunderstanding has crept into our law. Sometimes, Members of this Court have suggested that we possess the authority to punish individuals under ambiguous laws in light of our own perceptions about some piece of legislative history or the statute's purpose. Today's decision seemingly nods in the same direction. … It may be that the Court today intends to suggest only that judges may consult legislative history and purpose to limit, never expand, punishment under an ambiguous statute. But even if that's so, why take such a long way around to the place where lenity already stands waiting?
>
> The right path is the more straightforward one. Where the traditional tools of statutory interpretation yield no clear answer, *the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity*. As Justice Story explained, because "penal statutes are construed strictly forfeitures are not to be inflicted by straining the words so as to reach some conjectural policy." "If cases are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority." Or as Chief Justice Marshall put it, "to determine that a case is within the intention of a statute, its language must authorise [sic] us to say so." Any other approach would be "unsafe" and "dangerous"—risking the possibility that judges rather than legislators will control the power to define crimes and their punishments.

(*Wooden*, (Gorsuch, J., Concurring), slip op. at 40-41; App. 211-212)(internal citations omitted and cleaned up)(emphasis added).

Here, the amendment to Wis. Stat. § 939.617 in April 2012 did not simply increase the penalty by turning what was previously a presumptive minimum into a mandatory minimum. The amendment also loosened previous restrictions for young offenders, providing specific outlets to avoid both mandatory and presumptive minimum penalties. So, unlike the legislative actions involved in developing the penalty provisions involved in *Lalicata* and *Williams,* both of which were made more putative, the legislature amended Wis. Stat. § 939.617 to make it more forgiving as well as more putative. As a result, the legislative intent here is unclear and the court should apply the rule of lenity.

II. The conflicting penalty provisions of Wis. Stat. §§ 948.12 and 939.617 violate the Equal Protection Clause and require setting aside Wis. Stat. § 939.617.

The Equal Protection Clause of the U.S. Constitution "shields persons not only from 'suspect classifications' but from classifications that are not rational." *State v. Cissell*, 127 Wis. 2d 205, 231, 378 N.S.2d 691 (1985) (Abrahamson, J., dissenting). It is the obligation of the legislature to provide reasonable and practical grounds for drawing criminal penalty classifications. *See State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989). "When considering an equal protection challenge that does not involve a suspect or quasi-suspect classification, the

fundamental determination to be made . . . is whether there is an arbitrary discrimination [occurring] . . . and thus whether there is a rational basis which justifies a difference in rights afforded." *In re Joseph E.G.*, 2001 WI App 29, ¶ 8, 240 Wis. 2d 481, 623 N.W.2d 137 (internal citations omitted); *See also McManus,* 152 Wis. 2d at 130-31. When circuit courts in different counties apply Wis Stat. §§ 939.617(1) and 948.12(1m) disparately, they subject some defendants to mandatory minimum prison sentences while others are eligible for probation or a lesser term of confinement arbitrarily and irrationally; this arbitrary and irrational disparity strikes at the heart of the Equal Protection Clause.

A review of Court Tracker data for those defendants subject to prosecution for possession child pornography in Wisconsin clearly demonstrates the inequality and problem. Since the passage of 2011 Wisconsin Act 272 and its date of effective date of April 23, 2012, thirty-one defendants, not subject to special penalty provisions for those under 18 years old at the time of the offense, were convicted of violating section 948.12(1m). (41:14-20; App. 153-159).[4] Six of these defendants were sentenced after the court of appeals decided *Holcomb* in 2016, the last appellate case involving a challenge to Wis. Stat. § 939.617.

[4] Defendant's Motion, Exhibit A: Chart of Cases Resolved with Sentences Under 3 Years Initial Confinement.

Aside from those matters where the sentencing court disregarded the provisions in section 939.617(1), *Stats.*, there have been 18 cases where the date of violation was amended to predate the change in sentencing provisions to work around the alleged the sentencing provision. (41:21-22; App. 160-161).[5] An additional 103 defendants were granted amendments by the district attorney's office to avoid the mandatory and presumptive minimum provisions in Wis. Stat. § 939.617 altogether. (41:23-32; App. 162-171).[6]

There is no rational basis for the difference in application of the sentencing and alleged mandatory minimum provisions in child pornography cases throughout the state. The effective minimum penalty is determined by the venue of prosecution: some counties apply the minimum while others do not. Unlike many other types of criminal acts, the venue of a child pornography possession case is almost never the location where the child victim was assaulted during the making of the audio-visual depiction. Instead, the venue of prosecution in these matters is where a particular defendant viewed or possessed the images that were created elsewhere – which is most often within the county where the defendant resides. Thus, the discrepancies in sentencing and prosecution of these offenses are based on one arbitrary and

[5] Defendant's Motion, Exhibit B: Chart of Child Pornography Cases with Amended Dates of Violation.

[6] Defendant's Motion, Exhibit C: Chart of Child Pornography Cases Amended to Alternative Criminal Statutes.

irrelevant factor: the jurisdiction in which the defendant resides. For these reasons, Brott contends that ordering a sentence of three years initial confinement because it is allegedly mandated by Wis. Stat. § 939.617(1) is a perpetuation of the inequality in prosecution and sentencing for these types of crimes and a violation of the Equal Protection Clause.

III. The proper remedy for Brott is a new sentencing hearing with instructions to the sentencing court to forgo Wis. Stat. § 939.617.

If this court agrees that Wis. Stat. § 939.617 should be set aside for this case, then the sentencing court erroneously exercised its discretion when it denied defendant's motion, and Brott is entitled to a resentencing hearing. *See State v. Spears*, 227 Wis. 2d 495, 596 N.W.2d 375 (1999) (holding that the circuit court erroneously exercised its discretion at sentencing and affirming the court of appeals' decision to remand for a resentencing). In *Spears*, the circuit court refused to consider the victim's criminal record at sentencing. *Spears*, 227 Wis. 2d at 505–06. The Court affirmed the court of appeals' decision to remand for resentencing with instructions to consider the victim's criminal record. *Spears*, 227 Wis. 2d at 298-99, 506. The Court did not conduct a harmless error analysis or follow the "actual reliance" framework of *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

Nevertheless, Brott is entitled to a resentencing even if this court believes the *Tiepelman* analysis is necessary. In *Tiepelman*, the court held that "[a] defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." *Tiepelman*, 291 Wis. 2d 179, ¶ 26. Once actual reliance on inaccurate information is established, "the burden then shifts to the state to prove the error was harmless." *Id*.

The circuit court clearly relied on the misinformation. The court said as much when it denied Brott's motion. It found that Wis. Stat. § 939.617 was "not an ambiguous statute" and affirmed that it had "no doubt concerning the mandatory nature of the requirement for a bifurcated sentence and a 3-year minimum term of initial confinement." (76:5; App. 108).

Notably, the court sentenced Brott to the *minimum* term required by Wis. Stat. § 939.617. On its face, this minimum sentence presents the possibility the court would have given him a shorter sentence if it thought a shorter sentence were possible.

> When I consider the need to protect the community, this is one of those situations where again, *the legislature has curbed my discretion*, has told me I must impose a bifurcated sentence with an initial term of confinement, the minimum of 3 years. But when I factor in your willingness

> to do treatment, when I factor what your attorney has described, right? The totality of who you are, the holistic view of who you are, I do not believe there needs to be more than 3 years of initial confinement.

(76:39; App. 142) (emphasis added).

The word "curbed" signifies restraint, so the court's choice of the phrase "the legislature has curbed my discretion" indicates that, if not for the mandatory minimum offense, the court would have considered giving Brott a lower sentence. (*Id.*). The court was restrained by the legislature, meaning that the court actually relied on the misinformation.

The court's error was not harmless. "The state can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *State v. Travis*, 2013 WI 38, ¶ 73, 347 Wis. 2d 142, 832 N.W.2d 491. That is not the case here. As discussed above, the circuit court gave explicit attention to the mandatory minimum sentence. What's more, the court spoke favorably of Brott. It said that, aside from this offense, he had a "very solid moral character" and that this case was "on the more mitigated range" of cases involving child pornography. (76:39; App. 142). The court also spoke favorably of the PSI writer's comments about Brott. Like the court, the PSI writer applied the mandatory minimum sentence requirements of Wis. Stat. § 939.617. (40:24). The PSI writer recommended the minimum sentence. (*Id.*). She

spoke favorably of Brott and found that he presented a low risk of recidivism:

> A COMPAS Core assessment was completed with Mr. Brott. Both the defendant's overall general recidivism risk potential and his violent recidivism risk potential were low. COMPAS identified the defendant's strength areas as being over the age of 30, having residential stability in a positive social environment, having positive associates and peers, having current full-time employment, a skill or trade, and being a high school graduate. These scores are indicative of the stable and prosocial life the defendant has lived.
>
> On the Criminogenic Needs Scale the defendant scored "Unlikely" in all areas. Mr. Brott's treatment need at this time is to address his sexually deviant behavior in looking at child pornography. It is recommended that he participate in a Sex Offender Treatment program.

(40:23).

Altogether, the court's comments were very favorable towards Brott. The court imposed the minimum sentence and likely would have imposed a lower sentence if not for its finding that the mandatory minimum sentence of Wis. Stat. § 939.617 applied to this case. It actually relied on misinformation, and the court's error was not harmless.

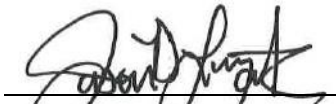
As a result, Brott asks this court to remand for resentencing with instructions to the sentencing court to disregard the provisions of Wis. Stat. § 939.617(1).

CONCLUSION

For the reasons stated above, Brott asks this court to remand to the circuit court for a resentencing with instructions to set aside the sentencing provisions of Wis. Stat. § 939.617(2), Stats., and to sentence him at the circuit court's discretion.

Dated this 10th day of March of 2022.

Respectfully submitted,



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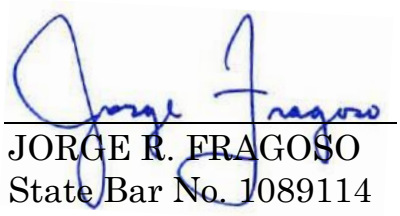

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,223 words.

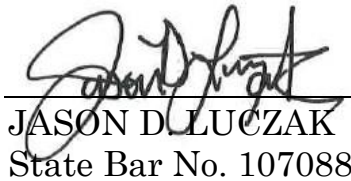
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 10th day of March of 2022.

Signed:



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CERTIFICATION AS TO APPENDIX

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

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

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

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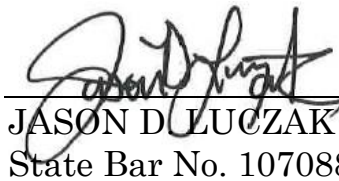

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APPENDIX

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