STATE OF WISCONSIN

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

DISTRICT II

Case No. 2021AP2001-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. BROTT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE JENNIFER DOROW PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT AND SUPPLEMENTAL APPENDIX

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## ISSUES PRESENTED

1. Wisconsin Stat. § 939.617 states that, for those convicted of violating Wis. Stat. § 948.12 by possessing child pornography, "[t]he term of confinement in prison portion of the bifurcated sentence shall be at least . . . 3 years." For a few years, the statute had included a provision permitting a lesser sentence if a court found that it wouldn't harm the community. But in 2011, the statute was amended to remove that option, except for a defendant who is less than 48 months older than the child depicted in the pornographic images.

Defendant-Appellant John Brott was convicted of possessing child pornography. It is not disputed that at the relevant time, Brott was 63 and the images depicted girls aged 10 to 15. Does the statute require the circuit court to sentence Brott to a 3-year term of confinement in prison?

The circuit court answered yes.

This court should answer yes.

2. Even "[t]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[1] To allege "grounds supporting a finding of a denial of equal protection," a defendant must "state[ ] that the selection was *deliberately based upon an unjustifiable standard* such as race, religion, or other arbitrary classification."[2] Brott alleges that some defendants with the same conviction have received less than the mandatory minimum, and that the variation depends on the jurisdiction and the judge. Has Brott alleged grounds that could support a finding that a three-year sentence would violate his right to equal protection?

The circuit court did not rule on this claim.

This Court should answer no.

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[1] *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

[2] *Id.* (emphasis added).

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The State joins Brott in requesting publication to make clear again to circuit courts what the statute requires.

## INTRODUCTION

No law supports the statutory and constitutional claims Brott makes. No law entitles him to the remedy he seeks.

Brott's statutory claim concerns the statutes that govern his conviction and sentence: Wis. Stat. § 948.12, which criminalizes the possession of child pornography and states what level of felony applies, and Wis. Stat. § 939.617, which states the mandatory minimum for a conviction and a limited age-related exception that undisputedly does not apply here. This Court has held that section 939.617 "has a plain and unambiguous meaning"—that unless the age-based exception applies, the circuit court has no discretion to impose anything less than the mandatory minimum.[3]

Brott argues that this is not true. He focuses on the words "may be penalized" in the portion of section 948.12 that states the felony level for the offense. He argues that this means that penalizing a person who violates it is "permissive" rather than mandatory. He then argues that there's a conflict between this "permissive" penalty statute and the mandatory penalty statute, and asks this Court to "disregard" the mandatory minimum statute "in this case and in all others like it until the matter is appropriately addressed by the legislature."[4]

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[3] *State v. Holcomb*, 2016 WI App 70, ¶ 15, 371 Wis. 2d 647, 886 N.W.2d 100.

[4] (Brott's Br. 29.)

There is no basis in law for this approach to interpreting a statute. Well-settled rules require courts to construe statutes to avoid conflict and, where conflict can't be avoided, to harmonize statutes in a way that gives each its intended effect. Applying well-established rules of statutory construction leads to one conclusion: Brott is subject to a mandatory minimum 3-year prison sentence for possessing child porn.

Brott's constitutional equal protection claim is identical to a claim rejected by the United States Supreme Court based on a sentencing statute that was applied to some defendants and not to others. It likewise fails because he has not met the pleading standards that govern it. In that case, *Oyer*, the Court held that to state such a claim, a person must allege that the disparity in application of a statute is knowing and "*deliberately based upon an unjustifiable standard* such as race, religion, or other arbitrary classification."[5] Brott has made no such allegation, and his claim must accordingly be rejected.

Brott is entitled to nothing but the mandatory minimum sentence the legislature has prescribed for possessing child pornography. This Court should affirm.

[5] *Oyler*, 368 U.S. at 456 (emphasis added).

## STATEMENT OF THE CASE

*Brott was charged with possessing child pornography and was convicted.*

The investigation into Brott started with a tip from the National Center for Missing and Exploited Children (NCMEC) that child pornography was being uploaded to an IP address at Brott's home. (R. 1:6.) A search of Brott's electronic devices found 68 images of child pornography depicting children between the ages of 10 and 15 engaged in sex acts or simulating sex acts. (R. 76:35.)

The State charged Brott with ten counts of possession of child pornography. (R. 1:1–5.) In exchange for Brott's guilty plea to one count of possession of child pornography, the State agreed to dismiss and read in the nine remaining counts. (R. 36:2.) Brott was convicted on his plea. (R. 60.)

*Brott unsuccessfully moved the circuit court to "set aside" the mandatory minimum requirement.*

Brott moved the circuit court prior to his sentencing to "strike the penalty provision" in section 939.617 and to "instead use its discretion to fashion the appropriate sentence in this case." (R. 41:1, 10.) He made three arguments.

He argued that because the child pornography possession statute states that violators "may be penalized," "the plain language of the statute is that the court 'may' impose punishment for the offense, not that it 'shall' subject an offender to such a penalty." (R. 41:8, 9.) That meant, he argued, that "the penalty provisions *as a general matter* and as written for possession of child pornography *are discretionary and not mandatory*." (R. 41:9 (emphasis added).)

He argued alternatively that the mandatory minimum statute was ambiguous and that the court should employ the rule of lenity to interpret the statute in his favor. (R. 41:7.)

Finally, he argued that when some defendants are sentenced for possessing child pornography based on "perceived mandatory minimum prison sentences while others receive a grant of probation or a lesser term of confinement arbitrarily and irrationally, a violation of the Equal Protection Clause has occurred." (R. 41:11.) On that basis, he asked the court "to disregard" the mandatory minimum statute. (R. 41:12.)

The State opposed the motion. It cited this Court's decision in *State v. Holcomb* holding that the statute unambiguously requires the imposition of a mandatory minimum sentence of three years. (R. 45:2.) It argued that Brott had "*provided no legal authority whatsoever*" for departing from the mandatory minimum statute's requirements. (R. 45:2.)

The circuit court denied Brott's motion (R. 76:6), noting that *Holcomb* "directly dealt with a challenge" to the mandatory minimum statute and is "on point and controlling." (R. 76:4.) The circuit court stated that it had no authority "to set aside a published case." (R. 76:6.)

The circuit court found that "the only exception [to the minimum sentence] is not an exception for which Mr. Brott meets the criteria based upon his age and the age of the victims of the child pornography." (R. 76:6.) The circuit court did not directly address Brott's constitutional argument.

*The circuit court sentenced Brott to three years in prison.*

The circuit court sentenced Brott to three years in prison, stating that "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." (R. 76:39.)

The court granted Brott's motion for release pending appeal, noting that Brott would be pursuing a "nuanced issue not presented in [*Holcomb*]" on appeal. (R. 76:45.)

## ARGUMENT

### I. The plain language of section 939.617 requires the circuit court to sentence Brott to three years in prison, and there is neither ambiguity nor conflict with any other statute.

#### A. Standard of review.

This case presents a question of statutory interpretation and the application of law to undisputed facts, which this court reviews *de novo*. *State v. Wiskerchen*, 2019 WI 1, ¶¶ 1–3, 385 Wis. 2d 120, 921 N.W.2d 730.

#### B. Principles of statutory interpretation.

Resolution of the first issue in this case requires interpretation of Wis. Stat. § 939.617. "The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (citations omitted).

In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). "If the meaning of the statute is plain, [the reviewing court] ordinarily stop[s] the inquiry." *Kalal,* 271 Wis. 2d 633, ¶ 45. However, "legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *James v. Heinrich*, 2021 WI 58, ¶ 26, 397 Wis. 2d 517, 960 N.W.2d 350 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 51). "Similarly, 'statutory history' may also be used as part of 'plain meaning analysis.'" *Id.* (citing *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581).

A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Dinkins,* 339 Wis. 2d 78, ¶ 29. Statutory language is interpreted in context, and it must be understood in relation to "the language of surrounding or closely-related statutes." *Id.* ¶ 46. A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Dinkins,* 339 Wis. 2d 78, ¶ 29 (quoting *Kalal,* 271 Wis. 2d 633, ¶ 45). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* ¶ 29.

"A statute is ambiguous if it is susceptible to more than one reasonable understanding." *State v. Grady*, 2007 WI 81, ¶ 15, 302 Wis. 2d 80, 734 N.W.2d 364 (citing *Kalal*, 271 Wis. 2d 633, ¶ 47). "If a statute is ambiguous, [a reviewing court] may examine extrinsic sources in order to guide [its] interpretation." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 50).

The legislature is presumed to know the law when it enacts legislation. *See State v. Trongeau*, 135 Wis. 2d 188, 192, 400 N.W.2d 12 (Ct. App. 1986) ("legislature is presumed to act with full knowledge of existing laws").

"Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict." *State v. Szulczewski*, 216 Wis. 2d 495, 503–04, 574 N.W.2d 660 (1998). "When two statutes conflict, a court is to harmonize them, scrutinizing both statutes and construing each in a manner that serves its purpose." *Id.* (citations omitted).

### C. The child pornography and mandatory minimum statutes.

*The mandatory minimum statute.*

The applicable version of the mandatory minimum statute, Wis. Stat. § 939.617(1) (2017-18), states that a court "shall impose" at least three years of prison time for anyone

aged 18 or over who is convicted under Wis. Stat. § 948.12 for possessing child pornography:

> Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. . . . 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of *confinement in prison* portion of the bifurcated sentence *shall be at least . . . 3 years* for violations of s. 948.12. Otherwise the penalties for the crime apply . . . .

Wis. Stat. § 939.617(1). As it states, there are two exceptions. The first is when the convicted person is less than forty-eight months older than the child depicted in the pornographic images. Wis. Stat. § 939.617(2)(b). The second is when the convicted person is under 18 years old. Wis. Stat. § 939.617(3).

Before it was amended in 2012, section 939.617 provided *presumptive* minimum sentences for violations of section 948.12. If a court found that it would be in the best interests of the community and that the public would not be harmed, and explained its reasoning, it could impose a shorter-than minimum sentence, or probation, for any violation of section 948.12. Wis. Stat. § 939.617 (2009-10).

The statute was amended by 2011 Wis. Act 272, which was enacted on April 9, 2012. (R-App. 3.)

A Legislative Council Act Memo prepared five days before 2011 Wis. Act 272 took effect explains the amended law. It states, "2011 Wisconsin Act 272 removes court discretion to apply a sentence below the mandatory minimum for certain child sex crimes unless the offender is no more than four years older than the victim." (R-App. 4.)

The memo explains that the prior law set forth minimum sentences for violations of section 948.12 but gave courts discretion not to impose a minimum sentence. It stated:

> Under prior law, a court could impose probation or a sentence that was less than the mandatory minimum if it found that the best interests of the community

> would be served and the public would not be harmed, and if the court placed its reasons on the record.

(R-App. 4.)

The memo then explains the changes under the new law, stating:

> Under Act 272, a court may impose probation or a sentence that is less than the mandatory minimum under specific circumstances involving young offenders. The Act provides that a court may not impose a sentence below the mandatory minimum unless . . . the offender is convicted of possession of child pornography, and is no more than 48 months older than the child.

(R-App. 4.)

*The child pornography possession statute.*

Wisconsin Stat. § 948.12(1m), the applicable child pornography statute, states as relevant here, "Whoever possesses, or accesses in any way with the intent to view, any . . . , photograph, . . . of a child engaged in sexually explicit conduct . . . may be penalized under sub. (3)."

Wisconsin Stat. § 948.12(3)(a) states, "a person who violates sub. (1m) . . . is guilty of a Class D felony." The second subsection states that if the person who violates the statute is under age 18, the offense is a Class I felony. Wis. Stat. § 948.12(3)(b).

The language at issue in (1m) and (3) of the statute was added when the statute was amended to increase penalties for the offense.

When the child pornography possession statute was first enacted in 1988 as part of Chapter 948, Crimes Against Children, the relevant language stated that whoever knowingly "possesses any . . . photograph . . . of a child engaged in sexually explicit conduct . . . *is guilty* of a Class E felony." *See* 1987 Wis. Act 332 (emphasis added).

The legislature then enacted 2001 Wis. Act 109, which changed the felony level for the offense from a Class E to a Class I felony.

The legislature then enacted 2005 Wis. Act 433, which deleted the language designating the offense a Class I felony and instead created the language at issue in this case. The new statute changed "is guilty of a Class I felony" to "may be penalized under sub. (3)." *See* 2005 Wis. Act 433. It added sub. (3), which makes the offense a Class I felony for persons under 18 and a Class D felony for everyone else.

The Wisconsin Legislative Council Act Memo for 2005 Wis. Act 433 stated that the Act "generally increases the penalties for . . . possession of child pornography, imposes a presumptive minimum prison sentence for those offenses, and requires persons convicted of [it] to pay a child pornography surcharge." (R-App. 5.)

*The bifurcated sentence statute relevant to a Class D felony.*

Wisconsin Stat. § 973.01(1), which was enacted in 1998, states that except for circumstances not relevant here, "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. *See* 1997 Wis. Act 283, § 419.

The statute also describes how a bifurcated sentence, defined as "a sentence that consists of a term of confinement in prison followed by a term of extended supervision," is to be structured. Wis. Stat. § 973.01(2). It sets the maximums for both portions. For a Class D felony, "[t]he portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year and . . . may not exceed 15 years." Wis. Stat. § 973.01(2)(b)4. For a Class D felony, "[t]he term of extended supervision may not be less than 25 percent of the length of the term of confinement in prison . . . and . . . may not exceed 10 years." Wis. Stat. § 973.01(2)(d)3.

### D. The plain language of section 939.617 requires imposing a three-year prison sentence in this case.

Brott is an adult convicted of violating section 948.12 by possessing child pornography. (R. 60.) By its plain language, section 939.617(1) states that a circuit court "shall impose" on such a person "a bifurcated sentence under s. 973.01," and that the "term of confinement in prison portion of the bifurcated sentence shall be at least . . . 3 years for violations of s. 948.12."

Giving all these words their "common, ordinary, and accepted meaning," the "meaning of the statute is plain." *See Kalal*, 271 Wis. 2d 633, ¶ 45. That "ordinarily stop[s] the inquiry." *See id.* This Court is required to interpret section 939.617 "reasonably, to avoid absurd or unreasonable results." *See id.* ¶ 46. And because "[a]n interpretation that contravenes the manifest purpose of the statute is unreasonable," *see Dinkins,* 339 Wis. 2d 78, ¶ 29, this Court is precluded from interpreting section 939.617 in a way that contravenes its purpose of requiring a mandatory minimum prison sentence for persons convicted of possessing child pornography.

Here, "the meaning of the statute is plain," and in such cases, that "ordinarily stop[s] the inquiry." *See Kalal*, 271 Wis. 2d 633, ¶ 45. This Court may, however, consult "legislative history . . . to confirm or verify a plain-meaning interpretation." *James*, 397 Wis. 2d 517, ¶ 26 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 51). "Similarly, 'statutory history' may also be used as part of 'plain meaning analysis.'" *Id.* (citing *Richards*, 309 Wis. 2d 541, ¶ 22).

The legislative history of section 939.617 verifies the plain-meaning interpretation in this case because it shows that the legislature deliberately amended the statute in order to strip circuit courts of the discretion to impose probation or

any sentence other than the mandatory minimum when sentencing an offender who is at least 18 and at least 48 months older than the child depicted in the pornographic images. The statutory history of section 948.12—the evolution from "is guilty of a Class E felony" to "is guilty of a Class I felony" and then "may be penalized under (sub)3. [as either a Class I or Class D felony depending on age]"—"may be used as a part of" the analysis. *James*, 397 Wis. 2d 517, ¶ 26. It reflects the legislature's evolving approach to discretion for sentencing young offenders. Its relevance here is that it shows that the words Brott relies on were added to create different felony levels for defendants of different ages, not to make the penalties for the felonies optional.

Brott concedes that "[i]n isolation, [section 939.617] 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." (Brott's Br. 20.)

Although Brott does not develop an argument on this point, he appears to imply that a mandatory sentence can be imposed and stayed. (Brott's Br. 21 ("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*.") (emphasis added).) The decisions of the Wisconsin Supreme Court in *State v. Williams* and this Court in *State v. Lalicata* foreclose such an interpretation of a mandatory minimum statute.

In *State v. Lalicata*, the defendant, who was subject to a mandatory minimum statute for a child sex crime, argued that "his trial counsel was ineffective for failing to realize that the court could *impose but stay the mandatory minimum* sentence and give probation instead." *State v. Lalicata*, 2012 WI App 138, ¶ 3, 345 Wis. 2d 342, 824 N.W.2d 921 (emphasis added). This Court "reject[ed] Lalicata's implausible reading,

that the 'impose and stay' option is available" when a statute requires that a court "shall impose" sentence. *Id.* ¶ 16.

Williams had argued that the text of the mandatory minimum statute for a seventh offense OWI did not require a court to impose a bifurcated sentence including three years of prison time; he argued that it required that *if* the court imposed a bifurcated sentence, the period of confinement in prison had to be at least three years. *State v. Williams*, 2014 WI 64, ¶ 3, 355 Wis. 2d 581, 852 N.W.2d 467. At sentencing, he had made this argument and "requested that the court either withhold sentence and place him on probation *or stay any imposed prison sentence*." *Id.* ¶ 11. The circuit court rejected the argument that it could stay the sentence, concluding that the statute required it to impose a bifurcated sentence with a three-year prison term. *Id.* ¶ 13. The Wisconsin Supreme Court ultimately upheld that interpretation. *Id.* ¶ 47. In response to Williams' argument that because the mandatory minimum statute at issue "does not explicitly prohibit probation, the sentencing court retains the option to order it," the court stated, "[T]his is true *only if* [the statute] does not impose a mandatory minimum sentence of three years initial confinement." *Id.* ¶ 34 (emphasis added). It cited *Lalicata* for the proposition that "a mandatory minimum bifurcated sentence is inconsistent with permitting probation." *Id.*

Thus, if Brott is implying that a circuit court has the authority to impose and stay a bifurcated sentence that includes mandatory prison time, he is incorrect. This Court has rejected that argument.

Alternatively, if this Court considers the statute ambiguous on the question of whether the mandatory minimum sentence can be imposed and stayed for probation, it should consult the legislative history and conclude that the legislature intended to foreclose that option when it repeatedly moved to increase the penalties for possessing

child pornography and to severely limit courts' discretion in sentencing for those offenses. *See Grady*, 302 Wis. 2d 80, ¶ 15 ("If a statute is ambiguous, [a reviewing court] may examine extrinsic sources in order to guide [its] interpretation." (citing *Kalal*, 271 Wis. 2d 633, ¶ 50)).

The legislative memo for 2011 Wis. Act 272 explicitly states that "2011 Wisconsin Act 272 *removes court discretion to apply a sentence below the mandatory minimum* for certain child sex crimes unless the offender is no more than four years older than the victim." (R-App. 4 (emphasis added).) Comparing the new law to the prior version that allowed a circuit court to "*impose probation* or a sentence that was less than the mandatory minimum," the memo stated that "[u]nder Act 272, a court may only impose probation or a sentence that is less than the mandatory minimum *under specific circumstances involving young offenders*. The Act provides that a court *may not impose a sentence below the mandatory minimum unless* . . . the offender is convicted of possession of child pornography, *and* is no more than 48 months older than the child." (R-App. 4 (emphasis added).)

### E. The use of the word "may" in Wis. Stat. § 948.12 does not make that statute "permissive," so there is no conflict with or ambiguity about the mandatory minimum statute.

The crux of Brott's argument is that the mandatory minimum statute "conflicts with the permissive language of Wis. Stat. § 948.12(1m)" because that statute contains the phrase "may be penalized." (Brott's Br. 19, 21–22.) Brott's argument consists of pointing to the "may" in section 948.12(1m) and the "shall" in section 939.617, and then simply asserting that "[t]he plain meaning of these two statutes cannot be reconciled." (Brott's Br. 21–22.)

Describing the child pornography possession statute, he states, "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.'" (Brott's Br. 21.)

The first problem with Brott's strained reading is that it contravenes the rule that "statutes should be reasonably construed *to avoid conflict*." *Szulczewski*, 216 Wis. 2d at 503–04 (emphasis added).

The second is that it rests solely on the statute's use of the word "may," which he gives more significance than it warrants. The use of the word "may" does not automatically render a provision permissive, and its mere use does not overcome "indications of legislative intent to the contrary":

> The word "may," when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.

*United States v. Rodgers*, 461 U.S. 677, 706 (1983) (footnote omitted) (citations omitted). This deference to "the structure and purpose of the statute," see *id.*, is consistent with the well-settled principle that a word is interpreted in its context and with reference to "the language of surrounding or closely-related statutes." *Kalal*, 271 Wis. 2d 633, ¶ 46.

The words "may be penalized under sub. (3)" were added when the legislature added sub. (3) and made the offense a Class D or Class I felony depending on the age of the offender. In that context, it makes sense to read the words "may be penalized" as simply indicating that the person who

has violated the statute is subject to one of the penalties listed in sub. (3).

Moreover, the "legislature is presumed to act with full knowledge of existing laws," *see Trongeau*, 135 Wis. 2d at 192, Knowing the existence of the "may be penalized" language added in 2005, the legislature enacted ever-stricter rules for mandatory minimum sentences for defendants who are at least 18 and not close in age to the child victims of the pornography. It acted deliberately to constrain the discretion of circuit courts in these cases. This is an indication that in the view of the legislature, the language added in 2005 to Wis. Stat. § 948.12 is not a free-standing grant of discretion to circuit courts to decide whether or not to penalize a person who violates the child pornography possession statute. If it were, it would have been changed.

The statute that defines the crime of possessing child pornography does not make penalizing the person who violates it "permissive" or optional. It is not fairly read to grant circuit courts discretion not to penalize persons guilty of a Class D felony. There is no conflict between the child pornography statute and the mandatory minimum statute. The statutes are easily read and interpreted in harmony.

A person like Brott who violates the statute prohibiting the possession of child pornography "*is* guilty of a Class D felony." Wis. Stat. § 948.12(3)(a). Under other circumstances, a person convicted of a Class D felony would face up to 15 years in prison. But the legislature has chosen to impose a specific penalty for defendants who violate section 948.12. "[I]f a person is convicted of a violation of s. . . . 948.12, the court shall impose a bifurcated sentence under s. 973.01." Wis. Stat. § 939.617. Brott was so convicted, so the circuit court was required to impose a bifurcated sentence. When it did, it was instructed that "[t]he term of *confinement in prison* portion of the bifurcated sentence *shall be at least . . . 3 years* for violations of s. 948.12." Wis. Stat. § 939.617.

The statutory history of section 948.12—the evolution from "is guilty of a Class E felony" to "is guilty of a Class I felony" and then "may be penalized under sub (3.) [as either a Class I or Class D felony depending on age]"—is fairly understood as the legislature's evolving approach to use discretion for sentencing young offenders, not an indication that penalties are optional.

In any event, this Court "may examine extrinsic sources in order to guide its interpretation" of an ambiguous statute, if there is one. *See State v. Stenklyft,* 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769. There is ample legislative history, set forth above, for the child pornography possession statute and the mandatory minimum statute to eliminate any ambiguity created by the "may be penalized" language.

### F. Alternatively, if the statutes conflict, principles of statutory interpretation require this Court to give effect to the mandatory minimum statute.

If the statutes are deemed to be in conflict, this Court is required to use rules of statutory interpretation to resolve the conflict. "When two statutes conflict, a court is to harmonize them, scrutinizing both statutes and construing each in a manner that serves its purpose." *Szulczewski*, 216 Wis. 2d at 503–04 (citations omitted). It may look to the rule of statutory construction favoring the later-enacted statute. *Schwenker v. Bekkedal*, 204 Wis. 546, 583–84, 236 N.W. 581 (1931) ("If this is at all inconsistent with the express provision in the first part of the statute . . . *the amendment is the last expression of the legislative intent*, and must be given effect over the expression in the statute originally enacted." (emphasis added)).

It may look to the rule of statutory construction that applies where two statutes relate to the same subject matter; if there is conflict, the specific statute controls over the

general statute. *Kramer v. City of Hayward*, 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973). In this case, it is clear that sections 948.12 and 939.617 relate to the same subject matter, namely, penalties for possession of child pornography. However, section 948.12 is a general statute and section 939.617 is a specific statute. The latter governs particular requirements for the sentencing of defendants who have specific characteristics.

Brott argues that this Court should conclude that "[t]here is no clear, binding precedent as to how to harmonize" the two statutes. (Brott's Br. 22.) But there *is* binding precedent, *see Szulczewski*, 216 Wis. 2d at 503–04, that requires this Court to do so. Courts faced with apparently conflicting statutes without "precedent as to how to harmonize" such statutes nevertheless proceed to harmonize them all the time – that's how precedent is created.

He argues that *Holcomb*, which addressed a different textual argument, is not dispositive of this case. That may be; but *Holcomb* stands for the proposition that there is no ambiguity in Wis. Stat. § 939.617, and that is relevant to the analysis in this case.

Brott argues that the holdings in *Lalicata* and *Williams* conflict—because in one case the statute at issue was deemed ambiguous and in the other the statute at issue was deemed unambiguous—and "[t]hus, 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." (Brott's Br. 27.) It is true that the argument that Brott made in this case "is yet to be addressed," but that is because it has not been made before. These cases have nothing to do with it. As explained above, *Lalicata* and *Williams* did not interpret the same statute, and neither interpreted either of the two statutes at issue in this case. So it is unclear how these cases advance Brott's argument.

Having argued that the statutes here are in conflict, Brott next argues that this court should "resolve the conflict by setting aside Wis. Stat. § 939.617 regarding convictions under Wis. Stat. § 948.[12]." (Brott's Br. 28.) He argues that it is inappropriate for a court to determine the statutory meaning, so "this [C]ourt should disregard section 939.617(1) in this case and in all others like it until the matter is appropriately addressed by the legislature." (Brott's Br. 29.) It is unsurprising that Brott cites no authority for such a disposition because it is the opposite of what the law requires. Courts determine the meaning of statutes every day. *See Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 19, 315 Wis. 2d 293, 759 N.W.2d 571 ("[W]e embrace a major responsibility of the judicial branch of government, deciding what statutes mean." (citation omitted)). In short, there is no legal basis for this Court to set aside a statute even if it is in conflict with another statute.

### G. The conditions do not exist for the application of the rule of lenity.

Finally, Brott makes a meritless argument that this Court should apply the rule of lenity. But although he cites the conditions for when the rule of lenity is appropriate (Brott's Br. 30), he fails to show that they are present here. As he acknowledges, "[T]he rule of lenity comes into play after two conditions are met: (1) the penal statute is ambiguous; and (2) [the reviewing court] [is] unable to clarify the intent of the legislature by resort to legislative history." *State v. Cole*, 2003 WI 59, ¶ 67, 262 Wis. 2d 167, 663 N.W.2d 700. As explained above, there is nothing ambiguous in the text of the statute. And this Court would have little difficulty in this case being able "to clarify the intent of the legislature by resort to

the legislative history," which is set forth above. There is no need for the application of the rule of lenity in this case.[6]

## II. Brott's equal protection claim fails because he hasn't alleged the facts that are required for such a claim.

### A. Standard of review.

An appellate court reviews questions concerning federal constitutional claims *de novo*. *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987).

### B. A claim of an equal protection violation must allege that the disparity is both knowing and "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

The United States Supreme Court has recognized that "[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick v. Hopkins*, 118 U.S. 356, 373–74 (1886).

The unequal application of state laws is, however, "not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Absent a showing by petitioners that

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[6] Brott quotes at length from a writing signed by two justices in *Wooden v. United States*, 142 S. Ct. 1063 (2022), that endorses a different application of the rule of lenity. (Brott's Br. 30–31.) This Court has no power to overrule, modify or withdraw language from a previously published decision of the court of appeals or the supreme court. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997).

facts had been deliberately ignored by prosecutors, "allegations [that] set out no more than a failure to prosecute others because of a lack of knowledge" merely showed disparity, and that "does not deny equal protection due petitioners under the Fourteenth Amendment." *Id.* at 456. Where "statistics . . . might imply a policy of selective enforcement," "grounds supporting a finding of a denial of equal protection [are] not alleged" unless the claim "state[s] that the selection [for enforcement] was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 456.

"The courts have rejected claims that broad prosecutorial discretion deprives defendants of equal protection of the laws, in the absence of circumstances that would constitute an abuse of discretion or discriminatory prosecution." *State v. Lindsey*, 203 Wis. 2d 423, 445–46, 554 N.W.2d 215 (Ct. App. 1996). *See also State v. Cissell*, 127 Wis. 2d 205, 224, 378 N.W.2d 691 (1985) ("no violation of equal protection where prosecutor charged more serious of two identical element crimes that had different penalties").

### C. Brott failed to allege the facts that are required for an equal protection claim.

Brott's equal protection claim does not get past the starting gate because he has not alleged the facts necessary to support such a claim. His claim—that some circuit courts in different counties sentence defendants to mandatory minimum prison sentences while others do not—is virtually identical to the equal protection claim rejected in *Oyler*, 368 U.S. at 456.

The petitioners in *Oyler* had submitted statistics showing that "according to [state] records a high percentage of those subject to the [habitual offender] law" had not had it enforced against them. *Id.* at 456. Specifically, the petitioners alleged that they had suffered from "selective use of a

mandatory State Statute, in that 904 men who were known offenders throughout the State . . . *were not sentenced as required by the mandatory Statutes*." *Id.* at 455 (emphasis added). The petitioners argued that this "denie[d] equal protection to those persons against whom the heavier penalty is enforced." *Id.* at 456. The Court rejected their claim.

It concluded that the unequal application of state laws is "not in itself a federal constitutional violation." *Oyler*, 368 U.S. at 456. An equal protection claim is alleged only when the unequal application of a statute is both knowing and "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* This is a pleading standard that Brott has neither identified nor satisfied. His argument that there are instances where "offenders . . . were not sentenced as required by the mandatory [s]tatutes," is the same one made by the *Oyler* petitioners. *See id.* Brott's claim suffers the same deficiencies as well. He has not alleged that the instances he identified (Brott's Br. 33) were both knowing and "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." *Oyler*, 368 U.S. at 456. His argument is that "some counties apply the minimum while others do not," (Brott's Br. 34), but this does not show that the decisions are deliberately based on an unjustifiable standard. An equal protection claim must do so.

Further, Brott's implication that the ordinary exercise of prosecutorial discretion can be a basis for an equal protection claim (Brott's Br. 34) is without merit; that argument was soundly rejected in *Lindsey*, 203 Wis. 2d at 445–46, and *Cissell*, 127 Wis. 2d at 224.

The requirements for stating an equal protection claim are not met here. Imposing the sentence that the statute requires for Brott's conviction does not constitute a violation of his constitutional right to equal protection under the law. The circuit court properly applied the statute when it

sentenced Brott to three years in prison. Brott is not entitled to a new sentencing hearing.

## CONCLUSION

This Court should affirm Brott's judgment of conviction.

Dated this 8th day of June 2022.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,307 words.

Dated this 8th day of June 2022.

Electronically signed by:

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of June 2022.

Electronically signed by:

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