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.

# REPLY BRIEF OF DEFENDANT-APPELLANT

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## 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).

In *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, the Court set out rectify the "analytical confusion" that had crept into Wisconsin's statutory interpretation case law in the preceding century. *Kalal*, ¶ 43. The Court sought to identify and define a methodology that could be reproduced in future cases so as to best carry out the judiciary's obligation to give effect to the laws enacted by the legislature:

> It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language.

*Kalal*, 271 Wis. 2d 633, ¶ 44.

The first step is to analyze the language of the statute: "if the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal*, 271 Wis. 2d 633, ¶ 45. However, "[c]ontext is important to meaning," so

statutory language must be "interpreted in the context in which it is used." *Id.*, ¶ 46.

If the language of the statute, read in context, fails to yield "a plain, clear statutory meaning," then the court may turn to extrinsic aids. *Id.*, ¶ 46. Extrinsic aids such as legislative history are resource materials for statutory construction that are "useful to decisions based on the intent of the legislature." *Id.*, ¶ 42. Extrinsic evidence is disfavored because it is the "enacted law, not the unenacted intent, that is binding on the public." *Id.*, ¶ 44. As Justice Scalia said, "We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

The plain meaning of the statutes at issue are ambiguous, but it allows for an interpretation in which the permissive "may" trumps the mandatory "shall" and allows the court the discretion to sentence the defendant as it sees fit. The statutory language, context, structure and purpose of the statute do not provide a clear resolution for this ambiguity. The court should appy the rule of lenity. The court should also find that the statute currently violates the Equal Protection Clause.

A. This court should resolve the conflict between the two statutes by allowing courts to exercise their discretion freely and encouraging the legislature to correct the law if it is not clearly written.

The state argues that the "plain language of [Wis. Stat. §] 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." (State's Br. at 12). The state focuses its argument on the two uses of the word "shall" in Wis. Stat. § 939.617(1): "the court shall impose a bifurcated sentence," and the confinement portion of the bifurcated sentence "shall be at least … 3 years" for violations of Wis. Stat. § 948.12. (State's Br. at 13-14). There are only two exceptions to this rule, neither of which pertain to Brott.[1] (State's Br. at 14).

Other than to say that Brott "gives [it] more significance than it warrants," the state refuses to grapple with the conflict between the word "shall" in Wis. Stat. § 939.617(1) and the word "may" in Wis. Stat. § 948.12. According to Wis. Stat. § 939.617(1), "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). However, according to anyone who knowingly possesses a recording "of a child engaged in sexually explicit conduct … *may* be penalized under sub. (3)." Wis. Stat. § 948.12 (emphasis added). Anyone punished under

[1] The first exception, Wis. Stat. § 939.617(2)(b), applies when the convicted person is less than forty-eight months older than the child depicted in the pornographic images, and the second, Wis. Stat. § 939.617(3), applies when the convicted person is under 18 years old. (State's Br. at 14).

sub. (3) "is guilty of a Class D felony," except that "if the person is under 18 years of age when the offense occurs," then the person "is guilty of a Class I felony." *Id*. In the former statute, the court *shall* impose, while in the latter statute, the court *may* penalize. This constitutes a conflict because 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).

In support of its argument, the state discusses the legislative history of Wis. Stat. § 948.12. It cites the original version of the statute as created by 1987 Wis. Act 332, the amendment in 2001 Wis. Act 109 that re-classified the offense from a Class E felony to a Class I felony, the amendment in 2005 Wis. Act 433 that split it into two different classifications of felony depending on the age of the defendant, and the Wisconsin Legislative Council Act Memo for 2005 Wis. Act 433 that discussed the "presumptive minimum prison sentence for those offenses." (State's Br. at 15-16). The state also discusses the history of Wis. Stat. § 939.617. "Before it was amended in 2012, section 939.617 provided presumptive minimum sentences for violations of [Wis. Stat. §] 948.12." (State's Br. at 14). The state concedes that Wis. Stat. § 939.617, as written before the amendment, allowed a court to "impose a shorter-than minimum

sentence, or probation" if it "found that it would be in the best interests of the community and that the public would not be harmed, and explained its reasoning." (State's Br. at 14).

The relevant text of the statute that the state says allows the court to impose a shorter-than minimum sentence, or probation, is the following:

> (1) … if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court *shall* impose a bifurcated sentence … [and] the bifurcated sentence *shall* be at least 5 years for violations of s. 948.05 or 948.075 and 3 years for violations of s. 948.12. …
>
> (2) … the court *may* impose a sentence that is less than the sentence required under sub. (1), or *may* place the person on probation …

Wis. Stat. § 939.617 (2009-10)(emphasis added).

The version of the statute quoted above imposed a mandatory penalty by using the word "shall" and allowed the court to exercise its discretion *in spite of* the mandatory language by using the word "may." *Id*. In essence, the version of the statute that the state relies upon to say that there is no conflict between "shall" and "may" includes a conflict between "shall" and "may" and resolves it in a way that uses "shall" and "may" in the manner that Brott advocates. The state accuses Brott of contravening "the rule that statutes should be reasonably construed to avoid conflict," (State's Br. at 21), but the state embraces the same conflict in its reading of the 2009-10 version of Wis. Stat. § 939.617. If this court resolves the conflict between may and shall in the same

manner, it will allow courts across the state to exercise their discretion at sentencing. The alternative is for the 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. (Brott's Br. at 22 (citing *In re Felony Sentencing Guidelines*, 120 Wis. 2d 198, 203, 353 N.W.2d 793 (1984))). As a result, this court should disregard Wis. Stat. § 939.617(1) in this case and in all others like it until the matter is appropriately addressed by the legislature.

### B. *Williams* and *Lalicata* do not preclude this court from a reading of the statute that allows supervision, and the rule of lenity is appropriate in this case.

The state argues that "[t]he decisions of the Wisconsin Supreme Court in *State v. Williams* and this [c]ourt in *State v. Lalicata* foreclose … an interpretation of a mandatory minimum statute" that allows the sentence to be imposed and stayed. (State's Br. at 19-20).

In *Lalicata*, this court held that even though Wis. Stat. § 939.616 did not expressly prohibit probation for a violation of Wis. Stat. § 948.02(1)(b), probation was not available. *State v. Lalicata*, 2012 WI App 138, ¶ 14, 345 Wis. 2d 342, 824 N.W.2d 921. The court reasoned that Lalicata's interpretation of Wis. Stat. § 973.09—which authorizes a court to impose probation unless "a person is convicted of any crime which is punishable by life

imprisonment" or "probation is prohibited for a particular offense by statute"—led to an absurd conflict between the court's authority to impose and stay a sentence and the court's authority to withhold sentence. *Lalicata*, ¶¶ 15-16. None of the statutes cited above are at issue in the present case. The statute that *is* at issue, Wis. Stat. § 939.617, was specifically cited in Lalicata as an example of a statute that "expressly *allows* probation for certain crimes." *Id.*, ¶ 12 (emphasis in original).

In *Williams*, the Court determined that Wis. Stat. § 346.65(2)(am)6. was ambiguous as to whether a court could stay a mandatory sentence in favor of probation because the language of the statute was somewhere between two clear alternatives. *State v. Williams*, 2014 WI 64, ¶ 21, 355 Wis. 2d 581, 852 N.W.2d 467.

The Court found that "the contextually manifest purposes of Wis. Stat. § 346.65(2)(am)" were to create a "graduated penalty structure" and that it would not make sense to allow probation on a seventh offense OWI if it were not permitted on a sixth offense OWI. *Williams*, ¶¶ 36-37. "Williams' interpretation would not advance the contextually manifest purpose to punish repeat offenders because a court could decline to order any period of confinement for someone who committed a seventh, eighth, ninth, or higher OWI offense." *Id.*, ¶ 38. Ultimately, the Court held that "the statute's history, structure, context, and contextually manifest purposes point to a reading that … require[s] imposition of mandatory minimum bifurcated sentences, but the

statute is not so clear that well-informed people should not have become confused." *Id.*, ¶ 39. Unless the "history, structure, context, and contextually manifest purposes" clearly point to a reading that would preclude probation in this case, *Williams* does not apply.

The holding in Williams is an example of the type of ends-focused exercise in divining legislative intent that Justice Gorsuch warned about in his concurring opinion in *Wooden v. United States*, 142 S. Ct. 1063 (2022). (*See* Brott's Br. at 23-24). "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." *Wooden*, 142 S. Ct. at 1086 (Gorsuch, J., Concurring); (App. 211-212).

The rule of lenity is a canon of strict construction that requires that ambiguity be resolved in the favor of the defendant. *State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400. The state argues that this court should turn to an examination of legislative history before applying the rule of lenity. (State's Br. at 25). It cites *State v. Cole*, 2003 WI 59, 262 Wis. 2d 167, 663 N.W.2d 700, which in 2003 advocated for the use of legislative history before turning to lenity. However, by 2015, the preference for legislative history had gone out the window, and when applying the rule of lenity, the court advocated using only "statutory language, context, structure and purpose." *Guarnero*, 363 Wis. 2d 857, ¶ 27

(citing *United States v. Castleman*, 572 U.S. 157, 172 (2014)).

It makes sense to turn toward lenity rather than to open the pandora's box of legislative history. Once the meaning is expanded beyond the legislative text, anything is fair game. Elected representatives do not vote on the legislative memos that are entered into the congressional record—they vote on legislation. The role of the court is not to decide what it wants the statute to say. As Justice Story said, "If cases are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority." *Wooden*, 142 S. Ct. at 1086 (Gorsuch, J., Concurring)(quoting *United States v. Open Boat*, 27 F.Cas. 354, 357 (No. 15,968) (CC Me. 1829)); (App. 211-212).

If the court examines previous versions of the statute—as opposed to the legislative memos accompanying the law—it will find that the amendments to Wis. Stat. § 939.617 were not exclusively punitive. The amendments 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 state argues that Brott's equal protection claim should be denied because it is "virtually identical to the equal protection claim rejected" in *Oyler v. Boles*, 368 U.S. 448 (1962). (State's Br. at 27). In *Oyler*, petitioners argued that "the habitual criminal statute imposes a mandatory duty on the prosecuting authorities to seek the severer penalty against all persons coming within the statutory standards but that it is done only in a minority of cases." *Oyler*, 368 U.S. at 455. Thus, in *Oyler*, the question was one of prosecutorial discretion, not selective application of the law based on county of residence.

The facts in *Oyler* "set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses." *Oyler*, 368 U.S. at 455-56. In stark contrast, Brott argues that the different application of the law was determined by the defendant's county of residence. (Brott's Br. at 27-28). And unlike the "conscious exercise of some selectivity," which the *Oyler* Court determined was "not in itself a federal constitutional violation," the distinction in this case is based on an "arbitrary classification." *Oyler*, 368 U.S. at 456.

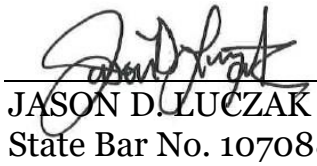
The state also mischaracterizes Brott's argument as a claim that "the ordinary exercise of prosecutorial discretion can be a basis for an equal protection claim." (State's Br. at 28). While Brott did point out the inherent unfairness in the 18 cases in which the date of violation was amended to predate the change in sentencing provisions and the 103 defendants who were granted amendments by the district attorney's office to avoid the mandatory and presumptive minimum provisions, Brott's equal protection argument did not rely on those instances. (Brott's Br. at 27). Rather, his equal protection claim was that the differences in enforcement of the mandatory minimum were based on one "irrelevant factor: the jurisdiction in which the defendant resides." (*Id*. at 27-28). This arbitrary classification leads to uneven application of the law across the state and creates and Equal Protection problem.

## 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 15th day of July of 2022.

Respectfully submitted,



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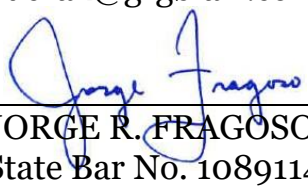

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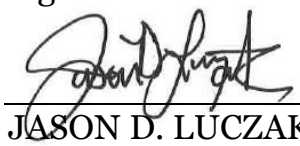
## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2654 words.

Dated this 15th day of July of 2022.

Signed:



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