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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2021AP2001 – CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
JOHN R. BROTT,
Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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Defendant-Appellant-Petitioner, John R. Brott, respectfully petitions this Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District II, dated August 30, 2023, which affirmed the judgment of conviction entered in Waukesha County Circuit Court, the Honorable Jennifer Dorow presiding.

ISSUES PRESENTED

1. During sentencing for a violation of Wis. Stat. § 948.12(1m), was the sentencing court bound by Wis. Stat. § 939.617(1) even though its mandatory

language conflicted with the permissive language of Wis. Stat. § 948.12(1m)?

The circuit court and court of appeals answered yes. The court of appeals, in a published case, held that the two statutes did not conflict and that the mandatory language of Wis. Stat. § 939.617(1) prevented the sentencing court from staying a sentence or placing the defendant on probation.

2. Does the fact that the mandatory provisions of Wis. Stat. § 939.617(1) are not applied consistently across the state violate Brott's constitutional right to equal protection under the law?

The court of appeals answered no. It held that the fact that some courts have failed to impose a lawfully required sentence in accordance with Wis. Stat. § 939.617's mandatory minimum does not give rise to an equal protection claim when a court—such as the one here—does impose a sentence that is in accordance with the law.

CRITERIA FOR REVIEW

If a person is convicted of a violation of Wis. Stat. § 948.12,¹ the court shall impose a bifurcated sentence, and the term of confinement in prison shall be at least 3 years. *See* Wis. Stat. § 939.617(1). Prior to 2011 Wisconsin Act 272, the statute included a provision allowing the court to “impose a sentence that is less than the sentence required under sub. (1), or ... place the person on

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

probation, only 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.” Wis. Stat. § 939.617(2) (Wisconsin Statutes 2009-10). 2011 Wisconsin Act 272 amended sub. (2) to remove 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. It went into effect on April 24, 2012. Since then, thirty-one defendants over the age of 18—including twenty-six defendants over the age of 22 and four over the age of 60—were either placed on probation or were sentenced to less than three years of prison for violations of Wis. Stat. § 948.12. (41:14-20; App. 173-179).

In 2016, the court of appeals held that Wis. Stat. § 939.617 has a plain and unambiguous meaning: following a conviction for possessing child pornography, the court must impose a bifurcated sentence with at least three years’ initial confinement subject to the exception in sub. (2), which applies only when the defendant is not more than 48 months older than the child-victim. *State v. Holcomb*, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100. Nevertheless, since *Holcomb*, which is the most recent appellate case involving a challenge to Wis. Stat. § 939.617, seven defendants—the respective ages of whom were 40, 53, 23, 19, 60, 19, and 31 at the time of offense—were either placed on probation or were sentenced to less than three years of prison for violations of Wis. Stat. § 948.12:

Brown County, No. 2015CF0718 (2 years)

Eau Claire County, No. 2015CF1236 (probation)

Barron County, No. 2016CF0130 (probation)

Dane County, No. 2016CF0134 (2 years)

Outagamie County, No. 2016CF0331 (probation)
Sauk County, No. 2017CF0504 (probation)
Rock County, No. 2018CF0080 (probation)

(41:14-20; App. 173-179).

In addition, there have been 18 cases in which the date of violation was amended so as to predate the enactment of 2011 Wisconsin Act 272. (41:21-22; App. 180-181).

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. 182-91). It should come as no surprise that all 103 of them were either placed on probation or were sentenced to less than three years of prison. (*Id.*).

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: some counties apply the minimum while others do not. And as discussed above, the disparity goes beyond prosecutorial discretion.

To make matters worse, the geographical discrepancy is seldom tied to the location of the actual victims. 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 irrelevant factor: the jurisdiction in which the defendant resides.

This Court should grant review to answer a novel question, the resolution of which will have statewide impact: can a circuit court stay a prison sentence for a violation of Wis. Stat. § 948.12(1m)? Wis. Stat. § 809.62(1r)(c)2. The Court should answer yes. Additionally, review is warranted because this case presents a question of law of the type that is likely to recur unless resolved by the supreme court. Wis. Stat. § 809.62(1r)(c)3.

Finally, though perhaps most importantly, this case presents a real and significant question of federal constitutional law. The court of appeals relied on a tenuous interpretation of *Oyler v. Boles*, 368 U.S. 448 (1962). In *Oyler*, the Supreme Court justified the exercise of prosecutorial discretion in the face of an equal protection challenge as long as the selection was not deliberately based upon unjustifiable standards such as race, religion, or some other arbitrary classification. The difference is that *Oyler* only addresses state prosecuting authorities. The problem with Wis. Stat. § 939.617 is that some circuit courts across the state have extended their discretion to include the power to stay a sentence or impose a shorter sentence while other circuit courts have limited the breadth of their discretion. Intercession by this Court is necessary to clarify the following question of federal constitutional law: does the test articulated in *Oyler* limit an equal protection challenge when the courts and not the prosecutors are the ones consciously exercising selectivity in application of the law?

STATEMENT OF THE CASE AND RELEVANT FACTS

John R. Brott was charged with ten violations of Wis. Stat. § 948.12(1m) and (3)(a), all of which were class D felonies. (1). On May 5, 2021, in the Waukesha County Circuit Court, Brott pleaded guilty to one count, and the remaining counts were dismissed and read in. (60:1-3; App. 121-23). This conviction was the first criminal conviction in Brott's sixty-five years of life, and the only one to date. Before sentencing, he moved the circuit court for an order setting aside the sentencing provisions of Wis. Stat. § 939.617. (41). The circuit court, the Honorable Jennifer R. Dorow presiding, denied Brott's motion at the beginning of the sentencing hearing, and the case proceeded to sentencing. (76:37; App. 160).

During its remarks at sentencing, the court recognized Brott's otherwise "very solid moral character." (76:39; App. 162). It addressed the "25 pages of letters" submitted on behalf of Brott for sentencing, all of which spoke "incredibly highly of" him and his "devotion to family, to the community, to [his] work, [and] to friends." (76:37; App. 160). The court also recognized favorably that Brott had "worked a very full career" and had spent 30 years at his place of worship. (*Id.*).

After saying, "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," the court noted that this case—because of Brott's good character—did not call for any additional punishment:

I do not see a need [for more punishment], based upon your age, your lack of prior record, all of the other mitigating circumstances that I've discussed, not the least of which is your family support, the community support as reflected in the many, many

letters. Your acceptance of responsibility, your genuine remorse.

(76:39; App. 162).

According to the PSI writer, Brott was “very polite and cooperative during the course of this investigation,” he was “raised in a loving home,” completed his college degree, and “had a lengthy and successful career working in sales,” all facts that the court took note of during sentencing. (76:40; App. 163). The court also spoke favorably of Brott’s 40-year marriage and his relationship with his two daughters and six grandchildren. (*Id.*). Brott’s COMPAS score assessment showed that his “general recidivism risk potential and his violent recidivism risk potential were low,” and they evinced a “stable and pro-social life.” (76:41; App. 164).

Relying on its finding that Wis. Stat. § 939.617 required it to sentence Brott to three years of initial confinement, the court sentenced Brott to three years of initial confinement and two years of extended supervision. (60:1-3; App. 121-23). The sentencing court stayed the prison portion of Brott’s sentence pending appeal and allowed him to be released on bond. (76:47; App. 170).

On March 10, 2022, Brott appealed the circuit court’s denial of his motion to set aside the sentencing provisions of Wis. Stat. § 939.617. In a decision filed on August 30, 2023, the court of appeals denied Brott’s appeal, affirmed the judgment of the circuit court, and recommended the case for publication. (App. 101-119). The case was ordered published on September 27, 2023. (App. 120). This petition follows.

ARGUMENT

At the heart of this case lies a tension between the common understanding of the words may and shall. 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). The relevant portion of Wis. Stat. § 939.617(1) says that “the court *shall impose* a bifurcated sentence,” and that its initial confinement portion shall be at least 3 years. Wis. Stat. § 939.617(1)(emphasis added). Since “shall” is mandatory, then the court *must* impose a prison portion of 3 years.

However, the phrase “shall impose” does not necessarily prohibit probation because an imposed sentence can be stayed, and the statute does not address whether the court *must not* stay the sentence in favor of probation. The statute that provides the foundation for the bifurcated sentence structure in Wisconsin law uses the term “shall impose” permissively, saying that “whenever a court sentences a person to imprisonment ... the court *shall impose* a bifurcated sentence under this section.” Wis. Stat. § 973.01(1) (emphasis added). The phrase “shall impose” in that statute does not prohibit probation on all bifurcated sentences. Thus, the phrase “shall impose” in Wis. Stat. § 939.617 makes a bifurcated sentence with a period of three years of initial confinement mandatory, but it does not prohibit probation.

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 is the controlling statute.

* * *

With the exception of this offense, Brott has led an exemplary life. This much is borne out in the 25 pages of letters written on his behalf for sentencing, in the court-ordered presentence investigation report, and in the sentencing court’s comments regarding his character. The court referred to his offense as relatively mitigated when compared to similar violations, and there is no allegation that he traded or otherwise distributed illegal materials. Brott is a prime candidate for probation. He asks only for the Court to remand with instructions for the circuit court to re-sentence him with the discretion to

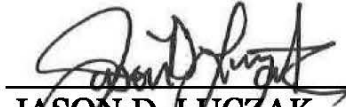
impose and stay a sentence of three years of initial confinement. This Court should grant review and overturn the court of appeals' decision.

CONCLUSION

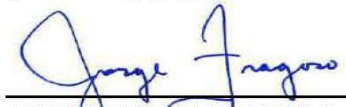
For the reasons stated above, John R. Brott asks that this Court grant review of the court of appeals' decision.

Dated this 29th day of September of 2023.

Respectfully submitted,



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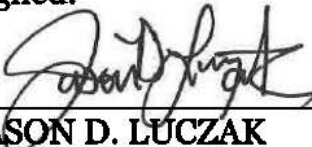
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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. §§ 809.19(8)(b) and (bm) and 809.62(4) in that it is: proportional serif font, 13 point body text, 11 point for block quotes and footnotes, uses italics for citations and emphasis, uses bold for headings, the line spacing in the body text is between 1.15 and 1.5 lines, and the page numbers are centered in the bottom margin using Arabic numerals. The length of the petition is 2,282 words.

Dated this 29th day of September of 2023.

Signed:

A handwritten signature in black ink, appearing to read "Jason D. Luczak", is written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

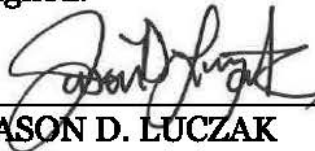
I further certify that:

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 29th day of September of 2023.

Signed:



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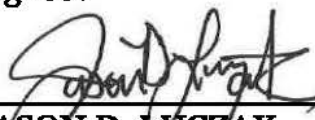
CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b).

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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