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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP2001-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. BROTT,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner John R. Brott, convicted for possessing child pornography, was sentenced in accordance with the mandatory minimum for the offense: three years of initial confinement in prison. Wis. Stat. § 939.617. He now “asks only for [this] 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.” (Pet. 10–11.) In the circuit court and court of appeals, he asked for the same thing, arguing that a second statute should be read as giving discretion in these cases, and such a reading would create a conflict with the statute that mandates a minimum prison sentence of three years for such a conviction. Because of the conflict he alleged existed, he asked the courts to “set[] aside” the mandatory minimum requirement until such time as the legislature decides to clear up the purported conflict. (Pet-App. 7 n.2.)

The court of appeals rightly called that “a nonstarter” and “reject[ed] [Brott’s] request to . . . simply disregard” the statute rather than to resolve the alleged conflict. (Pet-App. 7 n.2.) It proceeded to consider the text and legislative history of the two statutes and concluded that they were “neither . . . ambiguous nor irreconcilable,” dismissing “Brott’s attempt to merge the two statutes to create ambiguity.” (Pet-App. 15.) Of course, it is well settled that courts are to construe statutes to *avoid* conflict and, where it can’t be avoided, to harmonize them in a way that gives each its intended effect. Brott cited no authority for the proposition that a court should disregard the statute.

The court of appeals rejected as equally meritless the argument that a lawful mandatory minimum sentence violates Brott’s constitutional right to equal protection; he’d argued it was unfair that there were cases where a Wisconsin court had failed to impose the required mandatory minimum

incarceration sentence on a defendant convicted of possessing child pornography. Referencing the relevant constitutional standard for such a claim, the court of appeals concluded that there was no evidence that any unlawful sentences had been “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification” such that a constitutional claim could be advanced. (Pet-App. 20.)

The law of statutory interpretation in general is well settled. So is the interpretation of this particular statute. The decision in this case is the second time¹ a published case has held that the statute at issue unambiguously requires three years of incarceration.

CRITERIA FOR REVIEW

Petitioner argues that his petition satisfies the criteria for granting review (Pet. 6) set forth in Wis. Stat. § (Rule) 809.62(1r)(c)2 (“A decision by the supreme court will help develop, clarify or harmonize the law, and . . . [t]he question presented is a novel one, the resolution of which will have statewide impact.”) and Wis. Stat. § (Rule) 809.62(1r)(c)3 (“A decision by the supreme court will help develop, clarify or harmonize the law, and . . . [t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.”).

But with an unambiguous statute and two published decisions by the court of appeals on the question of whether it actually means what it says, there is no need to “develop, clarify or harmonize the law” on this point. So the petition does not satisfy either of those criteria.

¹ The first was *State v. Holcomb*, 2016 WI App 70, ¶ 15, 371 Wis. 2d 647, 886 N.W.2d 100 (holding that the statute has “a plain and unambiguous meaning” and “requires the court to impose a bifurcated sentence with at least three years’ initial confinement”).

As for his equal protection claim, Petitioner argues that it satisfies the criteria set forth in section 809.62(1r)(a): “A real and significant question of federal or state constitutional law is presented.” It does not. He has made an assertion of a federal constitutional violation, but he has not raised “[a] real and significant question” because he has failed to engage with, much less satisfy, the legal standard that applies to such claims. Precedent of the Supreme Court of the United States is dispositive of the claim because he has not met the applicable standard, which requires him to present evidence that the alleged violation “was deliberately based upon an unjustifiable standard.”² The question he raises is whether that precedent applies “when the courts and not the prosecutors are the ones consciously exercising selectivity in application of the law”—but he has never offered evidence that any court is “consciously exercising selectivity.” (Pet. 6.) If Brott’s allegations of unlawful sentences imposed in cases of child pornography possession are true, the State shares his concern that persons convicted of that crime are being sentenced contrary to the law. But as the court of appeals correctly concluded, that fact “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.” (Pet-App. 19–20.)

Petitioner has not shown that he satisfies the statutory criteria for review. No law, statutory or constitutional, supports his view that he is entitled to be exempt from the penalty prescribed by the legislature for possessing child pornography.

CONCLUSION

This Court should deny Brott’s Petition.

² *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

Dated this 13th day of October 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 901 words.

Dated this 13th day of October 2023.

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 the Wisconsin Supreme Court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of October 2023.

Electronically signed by:

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