STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2014AP122-CR
(Fond du Lac County Case No. 2011CF314)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEE H. STELLMACHER,

Defendant-Appellant-Petitioner.

Appeal From The Judgment Entered In The Circuit Court For Fond du Lac County, The Honorable Robert Wirtz, Circuit Judge, Presiding

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PETITION FOR REVIEW

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PETITION FOR REVIEW

Lee H. Stellmacher respectfully petitions this Court pursuant to Wis. Stat. §808.10 and (Rule) 809.62, to review the October 8, 2014, decision of the Wisconsin Court of Appeals, District II, affirming the judgment of conviction entered in the Circuit Court for Dane County, the Honorable Robert Wirtz, Circuit Judge, presiding.

ISSUES PRESENTED FOR REVIEW

Whether Wis. Stat. §939.31, as properly construed, requires proof of a bilateral conspiracy in which at least two participants both agree and intend to commit the underlying crime.

Relying on ***State v. Sample*** , 215 Wis.2d 487, 573 N.W.2d 187 (1998) (§939.31 criminalizes unilateral as well as traditional bilateral conspiracies), as it must until ***Sample*** is overruled, the circuit court denied Stellmacher's motion to dismiss the unilateral conspiracy charges and to instruct that a bilateral agreement was required for conviction. The Court of Appeals affirmed, likewise deeming ***Sample*** controlling on both the sufficiency of the evidence given the state's admittedly unilateral conspiracy theory and the denial of a bilateral

conspiracy instruction.

STATEMENT OF CRITERIA RELIED UPON FOR REVIEW

In ***State v. Sample***, 215 Wis.2d 487, 573 N.W.2d 187 (1998), this Court held that the language of Wisconsin's general conspiracy statute, Wis. Stat. §939.31, "plainly" criminalizes "feigned agreement" or unilateral "conspiracies" as well as the bilateral agreements historically covered by such laws. It therefore declined to consider any extrinsic evidence of the Legislature's intent regarding the statute's scope.

For a number of reasons overlooked by the parties and the Court in ***Sample***, it is time to reconsider that decision. *See* Argument, *infra*. Prime among them is the fact that the language construed there as "plainly" adopting the "feigned agreement" theory was formulated at least seven years *before* that theory was even discussed, let alone adopted, anywhere in the United States. The "feigned agreement" theory was not merely novel when §939.31 was enacted; it was non-existent, at least in this country.

Reconsideration now is especially important given that, "[i]n this state crimes are exclusively statutory, and the task of defining criminal conduct is entirely within the legislative domain." ***State v. Baldwin***, 101 Wis.2d 441, 447, 304 N.W.2d 742 (1981). If, as the considerations overlooked in ***Sample*** discussed in the Argument demonstrate, the Court in fact erred in extending application of §939.31 to "unilateral conspiracies," it is better to correct that error sooner rather than later.

Only this Court can correct any error it made in ***Sample***. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246(1997). Review accordingly is appropriate here. Wis. Stat. (Rule) 809.62(1r)(b) & (e).

STATEMENT OF THE CASE

Lee Stellmacher stands convicted of one count of conspiracy to commit first degree intentional homicide and one count of conspiracy to commit substantial bodily injury (R161; R163). The charges arose

from an incident in which, according to the state's witnesses, Stellmacher was upset at two of his prior business associates, Rick Parks and Jason Garrett, who had sued him and had threatened to harm Stellmacher's family (R212:427-29, 490-93, 503, 536, R213:554). Stellmacher allegedly sought to have Parks killed and Garrett beaten, although the individuals with whom he allegedly conspired - Jeff Kranz and undercover officer Michael Wissink - never agreed to harm anyone, thus raising the question whether someone can be guilty of conspiracy under Wisconsin law when no one but the defendant actually intends that a crime be committed.

On February 27, 2013, a jury convicted Stellmacher of the two conspiracy charges (R216:1138-41), the circuit court having denied both his request for dismissal of the unilateral conspiracy charges (R196:14-15; App. 5-6) and his request for a jury instruction implementing the bilateral mode of conspiracy (R216:1016-17, 2033-34; App. 8-11). On May 10, 2013, the circuit court, Honorable Robert Wirtz, presiding, sentenced Stellmacher to consecutive sentences totaling 16½ years initial confinement and 10 years extended supervision (R219:52-66; *see* R177).

Stellmacher's only claim on appeal being the validity of this Court's interpretation of Wisconsin's conspiracy statute, the Court of Appeals summarily affirmed on October 8, 2014 (App. 1-3).

Relevant Trial Evidence

Jeff Kranz rented space from Stellmacher that Kranz used as an auto body shop. Jason Garrett previously had rented the same space. (R212:380-82, 412-13). According to Kranz, Stellmacher complained that Garrett was threatening him and his family and was suing Stellmacher. Stellmacher wanted Garrett hurt so he could not run his own business and asked Kranz for help in finding someone to do that. (*Id.*:382-84).

Kranz allegedly spoke with "Slim," a member of the Zodiac Motorcycle Club who agreed to hurt Garrett for $2,500 (*id.*:384-86). Kranz claimed that Stellmacher paid Kranz the $2,500, but that Kranz

then stole the money, never intending that anyone should actually harm Garrett (*id.*:395-96, 398, 417-18, 426).

Kranz also claimed that Stellmacher told him that he needed Rick Parks, who lived in Indiana (R212:287), to "disappear" (R212:388). Kranz claimed that he again spoke with "Slim" but that the Zodiacs were unwilling either to kill anyone or to cross state lines (*id.*:389). However, for $10,500 they were willing to threaten Parks or to microwave his dog so he would leave Stellmacher's family alone (*id.*:389-90).

Kranz claimed that he told Stellmacher the price (but without telling him the limits on Slim's agreement) and that Stellmacher gave him the money (*id.*:390-93). However, after supposedly telling Slim to just "party" with the $10,500 that allegedly came from Stellmacher (R212:397, 427), Kranz contacted the police (*id.*:397).

Kranz knew at the time that nothing was going to happen to either Parks or Garrett based on his discussions with Stellmacher (R212:398).

At police request, Kranz called Stellmacher to falsely tell him the Zodiacs were still willing to kill Parks but wanted another $5,000 (*id.*:406, 437, 442). The police had Kranz call Stellmacher to set up a meeting (*id.*:407-09). Kranz, an undercover agent playing the role of a hit man (Officer Michael Wissink), and Stellmacher later met at Kranz' autobody shop (*id.*:410-11, 443; R213:651-52; R215:920-30). Those conversations were recorded and reflected Stellmacher's statements of what he wanted done (*id.*:925; R159:Exhs.44 & 45). Officer Wissink testified that he confirmed that Stellmacher wanted Parks gone without a trace and was willing to pay the additional $5,000 (R215:924, 933-35).

Although Stellmacher and Wissink originally agreed that Wissink would only go to Indiana to scout out Parks' house (R215:958-59), Officer Wissink subsequently called Stellmacher and falsely informed him that Parks was dead and he wanted the balance of the money immediately (R214:936). The two arranged to meet (*id.*:937,

939). Police then saw Stellmacher go to a bank and withdraw some money (R213:655-56). After Wissink entered Stellmacher's pickup, the police arrested Stellmacher and found $5,000 in his glove compartment (R213:659-60; R215:940).

The police never confirmed whether the Zodiacs in fact received any money from Kranz or whether Kranz merely stole all of the money (R212:531-32; R214:711-13, 769, 778-79; 786), never subpoenaed the relevant bank records to find out (R214:766), and never subpoenaed Kranz' or Slim's phone records to confirm whether they in fact were even in contact during the relevant period (*id.*:766-67)

Kranz never intended that Parks or Garrett be injured. He stole Stellmacher's $2,500 rather than pay it to have Garrett injured and, even if the story about the Zodiacs is accurate, his intent (and that of Slim and the Zodiacs) was at most to scare Parks and perhaps to microwave his dog, or "they maybe were going to beat him up or something," for all Kranz knew. (R212:420-21, 430-31; R214:782). Whatever, it was clear to Kranz it would not be murder (*id.*:421).

The prosecutor neither granted Kranz immunity for his trial testimony nor charged him with involvement in the supposed conspiracy (R212:411, 446-47).

Stellmacher admitted during a police interrogation that he had spoken with someone he thought was from a biker club (Wissink) about roughing up Parks or making him "disappear from [Stellmacher's] life" in the hopes of ending the four years of threats from Parks. (R212:478-81, 485, 490, 492-93, 503).

ARGUMENT

I.

REVIEW IS APPROPRIATE TO RECONSIDER THIS COURT'S "UNILATERAL CONSPIRACY" DECISION IN *STATE v. SAMPLE*, 215 Wis.2d 487, 573 N.W.2d 187 (1998)

The state tried this case solely on a theory of unilateral conspir-

acy, expressly acknowledging that neither Kranz nor Wissink intended to harm anyone and that they merely feigned their agreement (R209:175-76). *See* State's Ct. App. Response Brief at 3.

Despite this Court's decision in ***State v. Sample***, 215 Wis.2d 487, 573 N.W.2d 187 (1998), the Legislature never intended Wis. Stat. §939.31 to incorporate the radical change from the common law necessary to criminalize a "conspiracy" in which only one participant in fact intends to commit the contemplated substantive criminal offense. Rather, it intended inchoate offenses involving a single participant to be addressed as Solicitation under Wis. Stat. §939.30 or attempt under Wis. Stat. §939.32.

Because this Court alone can correct the error it made in ***Sample***, ***Cook v. Cook***, 208 Wis.2d 166, ¶51, 560 N.W.2d 246 (1997), review is appropriate. Wis. Stat. (Rule) 809.62(1r)(b)&(e).

A. The Applicable Legal Standards

1. Statutory interpretation

When interpreting a criminal statute, the question is not what interpretation would serve to uphold the conviction, but what the Legislature intended. "By focusing on the intent of the legislature rather than [its] own policy views, [the Court] preserve[s] principles of separation of powers." ***Sample***, 215 Wis.2d at 495.

Accordingly, interpretation of a statute begins with its language. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning is plain, the inquiry should stop. ***Id.*** Plain meaning may be ascertained not only from the words employed in the statue, but from the context. ***Id.*** ¶46. Thus, courts interpret statutory language "in the context in which [the words are] used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** Accordingly,

> [S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute

> as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history.

Id., ¶48.

> [T]he test for ambiguity examines the language of the statute "to determine whether 'well-informed persons should have become confused,' that is, whether the statutory . . . language reasonably gives rise to different meanings."

Id., ¶47 (Citations omitted).

Statutory language, moreover, must be given the meaning it would have had at the time it was enacted. *E.g.*, ***Standard Oil Co. of N.J. v. United States***, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense ...").

If the statutory language is ambiguous the Court must resort to extrinsic sources of legislative intent, such as legislative history, to ascertain the Legislature's intent. ***Id.***, ¶50; *see, e.g.*, ***Nowell v. City of Wausau***, 2013 WI 88, 351 Wis. 2d 1, 838 N.W.2d 852 (interpreting ambiguous statute in light of legislative history, prior case law, and public policy).

Criminal statutes, moreover, must be strictly construed in favor of the defendant unless such a construction conflicts with the *manifest* intent of the Legislature. *E.g.*, ***State v. Olson***, 106 Wis.2d 572, 585, 317 N.W.2d 448 (1982). "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute." ***Fasulo v. United States***, 272 U.S. 620, 629 (1926) (citation omitted).

Statutory interpretation is a legal determination reviewed *de novo*. ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506 (1997).

2. *Stare decisis*

While "respect for prior decisions is fundamental to the rule of law," ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶94, 264 Wis.2d 60, 665 N.W.2d 257 (citation omitted), "*stare decisis* is a principle of policy, not an inexorable command." ***Id.***, ¶97 (citation omitted). Accordingly, "*stare decisis* contemplates that under limited circumstances a court may overrule outdated or erroneous holdings." ***Cook***, 208 Wis.2d at 186.

Nonetheless, "'[a] court should not depart from precedent without sufficient justification.'" ***Johnson Controls***, 2003 WI 108, ¶94 (citation omitted). A court should consider whether "developments in the law have undermined the rationale behind a decision," whether "there is a need to make a decision correspond to newly ascertained facts," and whether "there is a showing that the precedent has become detrimental to coherence and consistency in the law." ***Id.,*** ¶98 (citation omitted). The Court also should consider "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated." ***Id.***, ¶99 (citation omitted).

"*Stare decisis* is neither a straightjacket nor an immutable rule." ***Id.***, ¶100 (citation omitted). The Court "do[es] more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." ***Id.***

Stare decisis must also account for the fact that an erroneous expansion of a criminal statute conflicts with the principle that crimes are defined by the Legislature, not the courts. ***State v. Baldwin***, 101 Wis.2d 441, 447, 304 N.W.2d 742 (1981)

B. The Decision and Analysis in *Sample*

In ***Sample***, *supra*, the defendant's only alleged co-conspirators were an undercover officer and a police informant. 215 Wis.2d at 489.

The Court interpreted Wis. Stat. §939.31, which then as now provided in relevant part that:

whoever, with intent that a crime be committed, agrees or

> combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

Wis. Stat. §939.31.

The issue before the Court was whether §939.31 criminalizes only the traditional view of conspiracy as involving agreement between two or more individuals, each of whom agreed and intended to commit the substantive crime or whether it embraced a novel, unilateral approach popularized following adoption of the Model Penal Code in 1962. Under the unilateral approach, the agreement that is at the core of traditional conspiracy liability is replaced by a focus entirely on the subjective intent of the particular defendant, without regard to whether anyone else agreed with the defendant to commit a crime. ***Sample***, 215 Wis.2d at 496-97.

The ***Sample*** Court conducted a purely grammatical analysis, concluding that the statutory language of §939.31 "plainly" covers both unilateral and bilateral conspiracies. 215 Wis.2d at 497-502. The Court focused on the term "whoever." Although acknowledging that the term "is an indefinite pronoun which may be either singular, plural, or both" in a given context, ***id.*** at 497; *see* ***id.*** at 500, the Court concluded that the Legislature plainly intended it to have its broadest meaning as encompassing "both a single individual or more than one person" for purposes of §939.31. ***Id.*** at 499-500. The Court also noted the singular form of "agrees" and "combines" in the statute. ***Id.*** at 500.

The Court concluded

> A plain reading of Wis. Stat. § 939.31's codification of the inchoate crime of conspiracy evinces a legislative purpose to assess the subjective behavior of the individual defendant. This purpose is discerned from both the use of the singular form of pronouns and verbs, as well as the absence, within the statute, of a require-

> ment of criminal intent on the part of anyone other than the person charged. To read the statute as only applying to bilateral conspiracies would mean that a person is liable for conspiracy based on the state of mind of another. Such a reading would be contrary to the singular form of the statutory terms, and the grammatical construction of the statute itself.

215 Wis.2d at 501 (footnotes omitted).

The Court perceived the contrary view as freeing wrongdoers from criminal liability:

> To read the statute as limited to bilateral conspiracies would preclude the State from prosecuting anyone who entered into an agreement to commit a crime, where that second person is cooperating with law enforcement authorities, or otherwise lacks criminal intent. Instead, we read the plain language of the statute to focus on the criminal intent of a single defendant. We conclude that the plain language of Wis. Stat. §939.31 embraces both unilateral conspiracies and bilateral conspiracies.

Id. at 502 (footnotes omitted).

Having deemed the statutory language clear from this grammatical analysis, the Court did not consider other evidence of legislative intent.

C. ***Sample's*** Analysis is Incomplete and Erroneous

The ***Sample*** majority's focus on its grammatical analysis of §939.31, and its misapplication of that analysis, misled it into believing that the Legislature plainly intended to adopt a "feigned agreement" view of conspiracy. A more complete and accurate application of the legal standards of statutory construction, many of which the Court overlooked in ***Sample***, dictates that the statutory language is, indeed, ambiguous and that the Legislature did not and could not rationally have intended to adopt the "feigned agreement" theory of conspiracy in 1955 when it adopted what is now §939.31.

1. Background

The Legislature enacted the basic wording of the current conspiracy statute as part of the major overhaul of Wisconsin's Criminal Code in 1955:

> Whoever, with intent that a crime be committed agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both . . ..

Wis. Stat. §939.31 (1955); *see* 1955 Wis. Laws ch. 696.

Wisconsin's previous conspiracy statute merely defined the offense in terms of "common law conspiracy:"

> Any person guilty of a criminal conspiracy at common law shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars; but no agreement, except to commit a felony upon the person of another or to commit arson or burglary, shall be deemed a conspiracy or be punished as such unless some act, besides such agreement, be done to effect the object thereof by one or more of the parties to such agreement.

Wis. Stat. §348.40 (1953).

At common law, conspiracy required mutual agreement between at least two persons, both of whom intended to commit a crime.[1] *E.g.*, ***Morrison v. California***, 291 U.S. 82, 92 (1934) ("It is impossible in the nature of things for a man to conspire with himself. . . . In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each." (Citations

[1] Although unusual situations exusted where courts held that a single individual could be convicted of conspiracy even though the other person conspired with was not or could not, "in all these cases the prosecution was required to prove that the defendant had made a conspiratorial agreement with the other person. Both of them had to be shown to have agreed to the plan." Burgman, Dierdre A., *Unilateral Conspiracy: Three Critical Perspectives*, 29 DePaul L. Rev. 75, 80-81, and footnotes 36-40 (1979-80).

omitted)); ***Patnode v. Westenhauer***, 114 Wis. 460, 90 N.W. 467, 472 (1902).

2. The *Sample* Court's grammatical analysis was erroneous and incomplete

The ***Sample*** Court's grammatical analysis of §939.31 to conclude that the Legislature necessarily intended to criminalize "conspiracies" in which one party feigned agreement overlooked numerous factors which undermine that conclusion, rendering the statute ambiguous.

a. *Sample* overlooked the impact of its interpretation on the statutory context of §939.31 and the penalty structure for inchoate offenses

By focusing solely on its interpretation of the specific language of §939.31, the ***Sample*** Court overlooked that its "feigned agreement" interpretation rendered irrational the penalty structure of the inchoate crimes enacted at the same time.

The Criminal Code revisions of 1955 created three inchoate crimes: solicitation, Wis. Stat. §939.30 (1955), conspiracy, Wis. Stat. §939.31 (1955), and attempt, Wis. Stat. §939.32 (1955).

Solicitation, committed by one who, "with intent that a felony be committed, advises another to commit that crime under circumstances which indicate unequivocally that he has that intent," was punishable by a fine or imprisonment by no more than five years (10 years for solicitation of an offense punishable by life imprisonment). Wis. Stat. §939.30 (1955). Attempt, committed by one who "attempts to commit a felony or [certain misdemeanors]" and who "does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed [the intent to commit the crime] and would commit the crime except for the intervention of another person or some other extraneous factor" was punishable by no more than half the penalty for the completed crime (or 30 years for an offense punishable by life imprisonment). Wis. Stat. §939.32(1) (1955). Conspiracy, however, was subject to the same punishment

available for the completed offense (or 30 years for an offense punishable by life imprisonment). Wis. Stat. §939.31 (1955).

Inchoate crimes are incomplete crimes, "begun but not finished," ***Sample***, 215 Wis.2d at 501 n.14 (citation omitted). In large part, the seriousness of the inchoate crime turns on how close the contemplated substantive offense is to completion. However, although a feigned agreement "conspiracy" is less likely to succeed than a solicitation, the ***Sample*** Court's interpretation suggests that the Legislature intended to punish such "conspiracies" far more harshly than solicitation. Indeed, one person's intent to commit a crime, even when combined with a overt act in furtherance of that intent, does not necessarily rise even to the level of an attempt. As such, a feigned agreement "conspiracy" would be far less dangerous than an attempt to commit the same offense, yet the potential punishment is twice as great for the former than the latter.

Nothing in the language or context of the Criminal Code revisions of 1955 suggests such an absurd result was intended. *See* ***Kalal***, ¶46 (courts to construe statutory language reasonably so as to avoid absurd results).

However, if the Legislature intended to limit §939.31 to traditional, bilateral conspiracies, this penalty structure makes sense. Conspiracies - that is bilateral conspiracies - are criminalized in recognition of "the additional dangers inherent in group activity." ***State v. Peralta***, 2011 WI App 81, ¶21, 334 Wis.2d 159, 800 N.W.2d 512 (citations and internal markings omitted).

> In theory , once an individual reaches an agreement with one or more persons to perform an unlawful act, it becomes more likely that the individual will feel greater commitment to carry out his original intent, providing a heightened group danger.

Id. (Citations and internal markings omitted).

Accordingly, traditional, bilateral conspiracies are considered more dangerous, and thus subject to greater penalties than an attempt

to commit the same crime. The same group danger does not exist for feigned agreement conspiracies.

> [T]he increased danger is nonexistent when a person "conspires" with a government agent who pretends agreement. In the feigned conspiracy there is no increased chance the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection.

State v. Pacheco, 882 P.2d 183, 186-87 (Wash. 1994) (citations omitted).

The Legislature accordingly should not be assumed to have acted irrationally by imposing such a high potential penalty on criminal conduct that most closely parallels (and greatly overlaps) solicitation, which it assigned a much lesser penalty.

The following charts exemplify the irrational results of ***Sample's*** interpretation when hypothetical inchoate offenses directed toward the same 10-year substantive offense are compared on either a likelihood of success or a dangerousness basis.

Likelihood of Success Comparison
Based on 1955 Criminal Code

Likelihood of Success - least to greatest	**Maximum Penalty**	**Maximum Penalty Given Hypothetical 10-year Offense**
Feigned agreement conspiracy - virtual impossibility of completeness	Same as for completed offense	10 years
Solicitation - mere request - no agreement	Same as for completed offense but ≤5 years	5 years
Bilateral conspiracy - overt act less than that required for attempt[2]	Same as for completed offense	10 years
Attempt - would be complete but for extraneous factor	½ of sentence for completed offense	5 years
Completed offense	Sentence set by statute	10 years

Dangerousness Comparison
Based on 1955 Criminal Code

Perceived Dangerousness - least to greatest	**Maximum Penalty**	**Maximum Penalty Given Hypothetical 10-year Offense**
Feigned agreement conspiracy - virtual impossibility of success	Same as for completed offense	10 years
Solicitation - mere request - no agreement	Same as for completed offense but ≤5 years	5 years
Attempt - would be complete but for extraneous factor	½ of sentence for completed offense	5 years
Bilateral conspiracy - group dangerousness	Same as for completed offense	10 years
Completed offense	Sentence set by statute	10 years

The ***Sample*** Court also overlooked the fact that, at the same time

[2] ***Peralta***, 2011 WI App 81, ¶19.

the Legislature enacted §939.31, it enacted a solicitation statute, Wis. Stat. §939.30, that would cover most if not all situations in which a feigned agreement "conspiracy" charge might apply. *See* 215 Wis.2d at 502. The one exception might be in cases in which it is the state agent who advises the commission of a crime rather than the defendant. However, the Legislature reasonably could have concluded that it did not intend to encourage bad policing and the risks of entrapment inherent in criminalizing "conspiracies" initiated and created by the police.

The ***Sample*** Court viewed as unacceptable the idea that one person's guilt or innocence of conspiracy should turn on someone else's intent, ***Sample***, 215 Wis.2d at 501, yet overlooked the fact that its interpretation of §939.31 did exactly that. The ***Sample*** Court's feigned agreement interpretation effectively places in the hands of someone other than the defendant the decision whether he or she has committed a solicitation or a far more serious conspiracy.

Under that interpretation, the only significant difference between a solicitation offense and a conspiracy offense is the feigned agreement by an agent of the state.[3] If the agent says "no," the defendant is guilty of solicitation and a maximum sentence of five years in most cases. If the agent pretends to agree, and the defendant takes virtually any additional step in furtherance of the agreement, no matter how insignificant, he is guilty of conspiracy and subject to punishment up to the maximum available for the contemplated substantive crime. In short, under ***Sample's*** interpretation, the defendant's offense and potential punishment are determined by the state agent's choices and actions and not by his own culpability, a result ***Sample*** sought to avoid.

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[3] Although conspiracy also requires some overt act in furtherance of the conspiracy, that act need not itself be illegal and "[e]ven an insignificant act may suffice." *E.g.*, ***Peralta***, 2011 WI App 81, ¶¶19, 21 (citations and internal markings omitted).

b. The *Sample* Court's grammatical analysis overlooks both the internal inconsistencies of that analysis and the ambiguity it creates given other statutory language

The ***Sample*** Court's single-minded focus on the perceived meaning of "whoever" and the form of "agrees" and "combines" both blinded it to the inherent defects in that analysis and caused it to overlook the ambiguities created by its interpretation given other statutory language in §939.31.

First, the Court's conclusion that the Legislature's use of "whoever" means that it unambiguously intended to criminalize both feigned agreement and traditional, bilateral conspiracies in §939.31 conflicts with the Court's own recognition that the term "is an indefinite pronoun which may be either singular, plural, or both" in a given context, ***id.*** at 497; *see* ***id.*** at 500. The fact that "the term 'whoever' can be read as singular or plural," ***id.*** at 500, makes that term inherently ambiguous.

The far more reasonable interpretation of the statutory language is that the Legislature used the term "whoever," not to reflect a radical departure from the traditional view of conspiracy, but so that §939.31 followed the same basic format as other proscriptions in the newly revised Criminal Code, at least some of which similarly require multiple culpable parties for completion. *E.g.*, Wis. Stat. §944.06 (1955) (defining criminal incest); Wis. Stat. §944.15 (1955) (defining criminal fornication).

The ***Sample*** Court also overlooked the likelihood that the Legislature as easily could have intended "whoever" merely to reflect the defendant's individual responsibility while retaining the traditional requirement of mutual agreement and intent for conspiratorial liability. Although the "feigned agreement" theory did not arise here until the late 1950s, some courts historically had recognized that an individual conspirator remained liable for conspiracy, even if his or her coconspirator somehow avoided conviction (as through insanity,

acquittal, or immunity), so long as the state proved a mutual agreement and intent to commit a crime in the defendant's own trial. *See Unilateral Conspiracy*, 29 DePaul L. Rev. at 80-81 & fns 36-40. *See also* ***Pacheco***, 882 P.2d at 186; ***State v. Colon***, 778 A.2d 875, 883-84 (Conn. 2001).

Moreover, in its focus on "whoever" and the singular forms of "agrees" and "combines," the ***Sample*** Court overlooked the fact that the remainder of §939.31 does not fit easily within its "feigned agreement" construction of that statute. Specifically, §939.31 requires that the defendant agreed or combined "with another." While the Court is correct that a feigned agreement theory *might* be shoehorned into that language, the far more commonsense meaning of agreeing "with" someone else, and the one the Legislature actually intended,[4] is that the two parties in fact agree. The meaning of that language is far from unambiguous in supporting the ***Sample*** Court's interpretation.

The Court's grammatical analysis also fails to account for the statute's plural reference to the "parties to the conspiracy" in terms of the overt act requirement. Wis. Stat. §939.31 (requiring, *inter alia*, that "one or more of the parties to the conspiracy do[] an act to effect its object"). Again, the most reasonable interpretation of this language is that it reflects the Legislature's intent that the statute only cover bilateral conspiracies. Otherwise, it would suggest that someone who merely feigns agreement and does not intend to commit a crime nonetheless can be a "part[y] to the conspiracy" and capable of performing the overt act required for the defendant's conviction. Once

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[4] *See, e.g.*, V Judiciary Committee Report on the Criminal Code (February, 1953), Comment to proposed Wis. Stat. §339.31:

> The act required for conspiracy is either an agreement or a combination for the purpose of committing the crime. The phrase "combine with" is frequently used by the courts to make it clear that conspiracy does not require that there be a formal agreement or even that the co-conspirators know each other; but there must be some common scheme, some working together for a common purpose.

Citing ***Chamberlain v. State***, 208 Wis. 264, 242 N.W. 492 (1932); ***Patnode v. Westenhauer***, 114 Wis. 460, 90 N.W. 467 (1902).

again, the question is not whether the statutory language can be shoehorned into a particular interpretation but whether the language clearly requires that interpretation. The language is ambiguous.

c. Other presumably reasonable courts hold that language even more supportive of a feigned agreement theory nonetheless is ambiguous

While the ***Sample*** Court held that §939.31 unambiguously incorporated the feigned agreement theory of conspiracy, many of its sister courts in other states have construed far less ambiguous language as nonetheless criminalizing only bilateral conspiracies.

In ***People v. Foster***, 457 N.E.2d 405 (Ill. 1983), the Court construed the Illinois conspiracy statute which provided:

> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense.

Ill. Rev. Stat. 1981, ch.38, par. 8-2(a). The state there argued, similar to the ***Sample*** Court's rationale, that the use of "a person" rather than "two or more persons" in the statute reflected the intent to enact a unilateral as well as bilateral conspiracies. 457 N.E.2d at 407.

The Court, however, disagreed, holding that the ambiguities in the statutory language must be resolved in favor of the defendant, ***id.*** at 408, and that it would have made no sense for the legislature to have enacted a unilateral conspiracy statute given that "Illinois does have a solicitation statute which embraces virtually every situation in which one could be convicted of conspiracy under the unilateral theory." ***Id.*** at 408. The Court also noted the absence of any indication in the legislative history that the Legislature intended such a radical change in state law. ***Id.*** at 407 ("We doubt, however, that the drafters could have intended what represents a rather profound change in the law of conspiracy without mentioning it in the comments to section 8-2").

Similarly, ***State v. Pacheco***, 882 P.2d 183 (1994), held that Washington's conspiracy statute, although modeled on the Model Penal

Code, does not criminalize feigned agreement conspiracies.[5] The Court there viewed the statutory language as adopting a unilateral approach, but only to the extent that "the failure to convict an accused's sole coconspirator will not prevent proof of the conspiratorial agreement against the accused." ***Id.*** at 186. Thus, the death or insanity or acquittal in a separate trial of the sole alleged coconspirator would not prevent conviction of the defendant upon proof beyond a reasonable doubt that the two mutually agreed or combined to commit a crime. However, a mere feigned agreement would not constitute the actual agreement required for conviction under the statute. ***Id.*** at 186-87.

The Court also noted the many policy reasons mitigating against recognition of the feigned agreement theory and that adopting such a reading "is unnecessary because the punishable conduct in a unilateral conspiracy will almost always satisfy the elements of either solicitation or attempt." ***Id.***

State v. Grullon, 562 A.2d 481 (1989), likewise rejected a feigned agreement interpretation of similar language. Connecticut's conspiracy statute provides that

> A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Conn. Gen. Stats. §53a-48; *see* ***Grullon***, 562 A.2d at 484 n.1.

Applying principles of statutory interpretation that parallel Wisconsin's initial focus on the statutory language, 562 A.2d at 484, the Court deemed the dispositive issue to be the statute's use of the

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[5] The conspiracy statute at issue in ***Pacheco*** provided:

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

882 P.2d at 185.

term "agree." Noting the common meaning of that term as connoting, *inter alia*, mutual assent, the Court concluded that the ordinary meaning of the statutory terms supported a bilateral reading of the statute. ***Id.*** The Court also noted that

> "[a]llowing a government agent to form a conspiracy with only one other party would create the potential for law enforcement officers to 'manufacture' conspiracies where none would exist absent the government's presence."

Id. at 486, quoting ***United States v. Escobar de Bright***, 742 F.2d 1196, 1200 (9th Cir. 1984).

The Connecticut Supreme Court reaffirmed ***Gullon*** in ***State v. Colon***, 778 A.2d 875 (2001).

See also ***Palato v. State***, 988 P.2d 512, 514 (Wyo. 1999) (use of singular "[a]ny person" language in statute defining conspiracy, which historically has required at least two guilty parties, rendered that statute ambiguous, allowing resort to extrinsic evidence of legislative intent).

These decisions by presumably reasonable courts, construing language similar to that in §939.31 as either ambiguous or plainly reflecting legislative intent to retain the mutual agreement requirements of bilateral conspiracies, demonstrates further that the ***Sample*** Court's determination that §939.31 so "plainly" incorporates the unilateral conspiracy approach as to preclude resort to extrinsic evidence of legislative intent is misplaced. *See* ***Kalal***, ¶47 (statute ambiguous if "language reasonably gives rise to different meanings").

d. The timing and context of the original enactment of §939.31 demonstrate that *Sample's* plain meaning holding is misplaced

Statutory language must be interpreted based on the meaning those enacting it would have given it at the time, without the distorting effects of hindsight. *E.g.*, ***Standard Oil***, 221 U.S. at 59. Yet, if the holding in ***Sample*** is correct, then the Wisconsin Legislature intended, in language first developed in 1950, to overrule the longstanding

understanding of criminal conspiracy as requiring mutual agreement and intent between at least two individuals, something that no state and no court had previously done, *see* Burgman, Dierdre A., *Unilateral Conspiracy: Three Critical Perspectives*, 29 DePaul L. Rev. 75, 80-81 (1979-80), and something that apparently was not even suggested in the legal literature until 1953, and then only in a treatise critiquing the criminal law of England.

The Legislature enacted the basic "[w]hoever . . . agrees" formulation of the conspiracy statute that the ***Sample*** Court deemed to "plainly" criminalize feigned agreement conspiracies as part of the 1955 overhaul of the Wisconsin Criminal Code. This "[w]hoever . . . agrees . . ." formulation was present as early as the 1951 version of the proposed criminal code. *See* VII Report of the Wisconsin Legislative Council (April, 1951) at 23 (App. 20).

However, as late as 1959, the author of a Harvard Law Review article could confidently assert that

> Since the act of agreeing is a group act, unless at least two people commit it, no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Although he may possess the requisite criminal intent, there has been no criminal act.

Note, Developments in the Law - Criminal Conspiracy, 72 Harv. L. Rev. 922, 926 (1959) (footnote omitted).

As reflected in that article, the theory of unilateral conspiracy, in the sense that one could be guilty of conspiring with another who had no intent to actually commit the crime, appears to have first appeared in England in Williams, Criminal Law: The General Part 520-21 (1953). *See also* Fridman, Mens Rea in Conspiracy, 19 Modern L. Rev. 276 (1956) (arguing that English courts should adopt unilateral theory of conspiracy, while acknowledging that the issue appeared not to have arisen in the English courts).

The feigned agreement theory of conspiracy appears first to have arisen in this country with Section 5.03 of Tentative Draft 10 of the

Model Penal Code, apparently drafted in 1958, first presented to the American Law Institute in May, 1960, and adopted in 1962. *See* I Model Penal Code and Commentaries, §5.03 at 382 & n.* (1985); *Unilateral Conspiracy*, 29 DePaul L. Rev. at 81-82. Prior to that date, no United States court had adopted the feigned agreement theory, *id.* at 80-81 & nn.36-42, and the only decision cited by the American Law Institute in support of it was an obscure 1949 Canadian case in which the theory was raised but rejected by the court. *See id.* at 81, n.41.

Given that the feigned agreement theory had not even been publicly proposed in this country until three years *after* the enactment of §939.31, and at least seven years after creation of the language relied upon by the Court in ***Sample***, it can hardly be argued that the Legislature could have intended to enact that theory with the Criminal Code overhaul in 1955.

* * *

For all of the foregoing reasons, this Court's grammatical analysis of §939.31 and its conclusion from that analysis that the Legislature "plainly" intended to enact the feigned agreement theory of conspiracy is misplaced and should be reconsidered. Resort to extrinsic evidence of the Legislature's intent is inappropriate.

D. Applying *Kalal* to the Ambiguous Language of Wis. Stat. §939.31 Requires the Conclusion It is Limited to Bilateral Conspiracies

Having erroneously concluded that §939.31 "plainly" criminalizes feigned agreement "conspiracies," the ***Sample*** Court did not consider extrinsic evidence of legislative intent. However, those indications of legislative intent to be considered when construing an ambiguous statute such as §939.31 confirm that the Legislature in 1955 intended to retain the common law mandate that a conspiracy requires mutual agreement and criminal intent of at least two people.

As already discussed, the context of the conspiracy statute, including its wording and penalty structure as first adopted in the Criminal Code of 1955, is consistent with the longstanding bilateral

approach to conspiracy and not the feigned agreement theory. Section I,C,2,a&b, *supra*. The feigned agreement theory likewise is unjustified under the traditional rationale for conspiracy liability based on the special dangers of group criminal activity. Section I,C,2,a, *supra*. As many courts have recognized, moreover, there is simply no reason for criminalizing feigned agreements as conspiracies given that virtually any conduct covered by such a theory and worthy of prosecution necessarily falls within the definitions of solicitation, *see* Wis. Stat. §939.30, or attempt, *see* Wis. Stat. §939.32. ***Foster***, 457 N.E.2d at 408; ***Pacheco***, 882 P.2d at 186-87.

As important, however, is the fact that the Legislature gave no indication that it in any way intended such a radical change from the common law, bilateral concept of conspiracy uniformly followed to that point. *See, e.g.*, ***Gaugert v. Duve***, 2001 WI 83, ¶41, 244 Wis.2d 691, 628 N.W.2d 861 (2001) ("It is a rule of statutory construction that an intent to change the common law must be clearly expressed." (citation omitted)). Indeed, the Legislature indicated just the opposite.

The Legislative explanations contained in Judiciary Committee and Legislative Council reports for the language that became §939.31 reflect no intent to make the radical change necessary to outlaw feigned agreement "conspiracies." For instance, although the 1951 Legislative Council Report notes that "this section . . . differs considerably from the common law" and "represents a substantial revision of the law," it discusses those specific differences and revisions, none of which suggests that a feigned agreement would be sufficient for a conspiracy.[6]

The 1951 Comment reflects the following changes from the previous statute and the common law concept of conspiracy.:

1. Although prior law required an overt act, the original proposal deleted that requirement. (App. 21).

2. "At common law the rule was that an agreement to do an

[6] Although the 1951 version was not adopted, much of the language from that version was carried over, with some adaptations, to the subsequent version that was enacted in 1955.

unlawful act or to do a lawful act by unlawful means was a conspiracy. . . . The new section is restricted to an agreement to commit a crime." (App. 21).

3. "At common law the intent in a conspiracy to commit a crime had to be an intent to violate the law of conspiracy. . . . [T]his section merely requires the usual intent to do acts which constitute a crime." (App. 21).

4. There previously was a question regarding whether two persons could conspire to commit a substantive crime, such as adultery, which inherently required two people to commit. The proposal was intended to clarify that a conspiracy charge would apply in such circumstances. (App. 21).

Nothing suggests the intent to dispense with the mutual intent and agreement requirement. Indeed, in discussing the required act for conspiracy, the Comment specifically states the intent to retain that requirement:

> This section requires an agreement although that agreement may be express or implied. This means that, although there does not have to be any formal agreement and although the co-conspirators do not even need to know each other, there must be some common scheme, some working together for a common purpose.

(App. 21).

The Comments contained in the 1953 Legislative Council Report similarly reflect the intent to retain the mutual agreement and intent requirement of the common law:

> *The act.* The act required for conspiracy is either an agreement or a combination for the purpose of committing the crime. The phrase "combine with" is frequently used by the courts to make it clear that conspiracy does not require that there be a formal agreement or even that the co-conspirators know each other; but *there must be some common scheme, some working together for a*

common purpose.

(App. 15 (emphasis added), citing ***Chamberlain v. State***, 208 Wis. 264, 242 N.W. 492 (1932); ***Patnode v. Westenhauer***, 114 Wis. 460, 90 N.W. 467 (1902)).

Also making clear that the Legislature did *not* intend to nullify the mutuality requirement is its identification in the Comments of the specific changes it did make to the prior law and common law conspiracy (App. 16). Those changes tracked those noted in the 1951 Comments with the exception that the final provision required an overt act in all cases (App. 21).

The Committee further underscored the retention of the mutuality requirement in its "References" section, citing ***O'Neil v. State***, 237 Wis. 391, 296 N.W. 96 (1941), "[f]or a discussion of the requirement of an agreement for a conspiracy and the amount of participation necessary." (App. 17). The relevant discussion in ***O'Neil*** again reaffirms the need for *mutual* agreement and intent:

> If there is a meeting of minds, brought about in any way, to accomplish the common purpose, the essentials of a guilty combination are all satisfied.

Id., 296 N.W. at 102 (citations omitted).

Finally, the discussion of the new Criminal Code by AAG William Platz made no suggestion that the Legislature intended any change to the mutuality requirement:

> Besides the increase in potential penalties, the law of conspiracy is changed in four respects which are fully discussed in the comment in the 1953 code bill, the most significant being the requirement that the object of the conspiracy must be the commission of a crime.

Platz, W., *The Criminal Code: Thumbnail History of the Code*, 1956 Wis. L. Rev. 350, 364 (footnote omitted).

Because the legislative intent of §939.31 thus was *not* to create a radically new feigned agreement form of conspiracy, this Court erred in ***Sample***. Section 939.31 requires *mutual* agreement and intent for a

conspiracy conviction, and has required it since it first took effect in 1956.

Moreover, compelling reason exists to overrule ***Sample*** despite *stare decisis*. By transforming feigned agreements into "conspiracies" contrary to the Legislature's intent, the ***Sample*** Court exceeded its constitutional authority by creating a new crime. The Court cannot create crimes; only the Legislature can. *E.g.*, ***Baldwin***, 101 Wis.2d at 447.

II.

GIVEN THE PROPER INTERPRETATION OF WIS. STAT. §939.31 AS CRIMINALIZING ONLY BILATERAL CONSPIRACIES, STELLMACHER IS ENTITLED TO RELIEF

The state's case at trial focused solely on a feigned agreement theory of "conspiracy" (R209:175-76). *See* State's Court App. Brief at 9. Because §939.31 only criminalizes bilateral conspiracies, and because the evidence failed to establish mutual agreement and intent between Stellmacher and any other individual, it was legally insufficient for conviction. He accordingly is entitled to reversal of his conspiracy convictions and dismissal of those charges. *E.g.*, ***Jackson v. Virginia***, 443 U.S. 307 (1979); ***In re Winship***, 397 U.S. 358, 364 (1970).

Even if the Court could somehow find the evidence to be marginally sufficient for conviction, Stellmacher is entitled to vacation of his conviction and remand for a new trial on the grounds that the instructions provided to the jury did not make clear that conviction required mutual agreement and intent by at least two persons to commit a crime. Indeed, they expressly provided that such mutual intent is *not* required. (*See* R216:1052, 1055, 1061). Stellmacher had unsuccessfully objected to the conspiracy instructions as erroneously incorporating a unilateral theory of conspiracy (R216:1016-17; App. 8-11).

Instructions which relieve the state of its burden of proving all facts or elements necessary for conviction beyond a reasonable doubt violate due process. *E.g.*, ***California v. Roy***, 519 U.S. 2 (1996) (per curiam) (instruction which omitted necessary element violated due process); ***Carella v. California***, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond reasonable doubt violate due process).

CONCLUSION

For these reasons, Stellmacher asks that the Court grant review and set this matter for full briefing on the merits.

Dated at Milwaukee, Wisconsin, November 6, 2014.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Rules 809.19(8)(b) and 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 8,000 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the petition.

_____
Robert R. Henak

Stellmacher Pet. Rev.wpd