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**STATE OF WISCONSIN**
**SUPREME COURT**
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**CASE NO. 2015AP001782-CR**

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**STATE OF WISCONSIN,**
**PLAINTIFF-RESPONDENT,**

**-vs-** **Case No. 2015 CF 766**
**(Rock County)**

**SAMBATH PAL,**
**DEFENDANT-APPELLANT-PETITIONER.**

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**ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER PRESIDING.**

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# DEFENDANT-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

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**BY:**

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## ISSUES PRESENTED

**I. WHETHER DEFENDANT WAS PROPERLY CONVICTED OF TWO COUNTS OF LEAVING THE SCENE OF AN ACCIDENT, CAUSING DEATH.**

On 8/7/15, the trial court orally denied defendant's postconviction motion for relief on this basis. (App. at 106-108, R.30:15-17). On 8/12/15, an order denying defendant's motion for relief was entered (App. at 108, R.30). On 4/8/16, the court of appeals affirmed the trial court's order (App. at 100:A to D).

**II. WHETHER DEFENDANT SHOULD BE GRANTED A RESENTENCING BECAUSE THE TRIAL COURT ERROUNEOUSLY EXERCISED ITS DISCRETION AT THE TIME OF SENTENCING BY IMPOSING AN UNDULY HARSH SENTENCE**.

On 8/7/15, the trial court orally denied defendant's postconviction motion for a resentencing (App. at 101-106, R.37:10-15). On 8/12/15, an order denying defendant's motion for a resentencing was entered (App. at 108, R.30). On 4/8/16, the court of appeals affirmed the trial court's order (App. at 100:A to D).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the Wisconsin Supreme Court is reviewing this case, both oral argument and publication are warranted.

## STATEMENT OF THE CASE

On 4/25/14, defendant Sambath Pal was charged in Rock County Circuit Court Complaint 2014 CF 766 with the commission of the offenses of: (1) hit and run resulting in death (D.J.) and (2) hit and run resulting in death (M.V.), both Class D felonies (1, App. at 111-14). Both offenses occurred out the same incident on 4/20/14 (1). On 5/16/14, a preliminary hearing was held (33). At the conclusion of the hearing, defendant Pal was bound over for trial (33:19). An information alleging the same counts as the criminal

complaint was filed (7). Defendant Pal stood mute and not guilty pleas were entered on his behalf (33:19-20). On 7/31/14, a plea hearing was held (35). Defendant Pal entered a guilty plea to each of the two counts in the information (35:8-9). The court accepted his pleas and found him guilty (35:9). On 10/1/14, a sentencing hearing was held (36). At the conclusion of the hearing, the trial court imposed two, consecutive 20-year prison terms, comprised of ten years initial confinement followed by ten years of extended supervision (36:58). Defendant Pal was denied participation in both the Substance Abuse Program and the Challenge Incarceration Program (36:58).

On 10/8/14, defendant filed a timely Notice of Intent to Seek Postconviction Relief (19). On 5/7/15, defendant filed postconviction motions, requesting a modification of sentence and the vacation of one of his convictions on the grounds of multiplicity (24). On 8/7/15, a postconviction motion hearing was held (37). At the conclusion of the hearing, the trial court denied the motions for relief (37:10-17, App. at 101-08). On 8/12/15, an order denying postconviction relief was entered (30, App. at 109).

On 8/24/15, defendant filed a Notice of Appeal. On 4/8/16, the court of appeals affirmed the trial court's orders (App. at 100:A to D). Defendant filed a timely petition for review. On 11/2/16, defendant's petition for review was granted.

## STATEMENT OF FACTS

The relevant facts are set forth in the criminal complaint (1). On 4/20/14 at 7:57 p.m., police and emergency medical services were dispatched to a traffic accident in the 4300 block of East Highway 14, approximately one-tenth of a mile west of East Old Humes Road, Town of Harmony, Rock County Wisconsin (1). Police dispatch had been told a sport utility vehicle had crashed into a group of motorcycles and that two of the motorcycle operators were found in the roadway (1). Upon arrival, Deputy Barr of the Rock County Sheriff's Department observed a male subject lying in the the middle of the westbound lane, M.V. (1). M.V. died at the scene of the accident (1). To the northwest of M.V., D.J. was found (1). D.J. was transported to Mercy Hospital in Janesville where he later died (1). Deputy Barr observed both of the motorcycles

ridden by the victims were found next to each other in the westbound shoulder of the highway at the accident scene (1). A witness to the accident told Deputy Barr D.J. and M.V. were in a group of five motorcycles at the time of the crash (1).

The driver of the sport utility vehicle did not stop at the accident scene (1). Defendant Sambath Pal was later found to be the driver of the sport utility vehicle (1). He was apprehended by authorities on 4/24/14, four days after the crash (20:3).

There are no facts in the record suggesting defendant Pal intentionally killed these two persons. There is no indication he killed them in a criminally reckless fashion. In the presentence statement, defendant Pal indicated he had crossed the center line of the roadway when he looked down at his speedometer (20:5). He denied being intoxicated at the time of the accident (20:5). He denied being in the process of texting at the time of the accident (20:5). Witnesses who observed defendant Pal shortly after the accident, did not say he was intoxicated or under the influence of any drug at the time they observed him (20:3-4).

Defendant Sambath Pal is 25 years old (1). He was sentenced to a total of 40 years in prison for his actions in leaving the scent of a traffic accident occurring on 4/20/14 (36:58). He must serve 20 years of initial confinement without the possibility of early release based upon the completion of either the Challenge Incarceration Program or the Substance Abuse Program (36:58).

## ARGUMENT

## I. AS DEFENDANT'S TWO CONVICTIONS FOR LEAVING THE SCENE OF AN ACCIDENT, CAUSING DEATH ARE MULTIPLICITOUS, ONE OF HIS CONVICTIONS SHOULD BE VACATED.

### A. <u>The current statutory scheme.</u>

This case involves an analysis of statutory language of Wis. Stat. §346.67, which has remained unchanged since 1997:

> Duty upon striking person or attended or occupied vehicle. (1) The operator of any vehicle involved in an

accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the following requirements: (a) The operator shall give his or her name, address and registration number of the vehicle he or she is driving to the person struck or to the operator or occupant or person attending any vehicle collided with; and (b) The operator shall upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of a person struck or to the operator or occupant of or person attending any vehicle collided with; and (c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent such treatment is necessary or if such carrying is requested by the injured person.[1]

Wis. Stat. §346.74(5) reads:

Any person violating any provision of s. 346.67: (a) Shall be fined not less than $1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person. (b) May be fined not more than $10,000 or imprisoned not more than 9 months or both if the accident involved injury to a person but the person did not suffer great bodily harm. (c) Is guilty of a Class E if the accident involved injury to a person and the person suffered great bodily harm. (d) Is guilty of a Class D felony if the accident involved death to a person.

[1] All references to the Wisconsin Statutes are to the 2015-16 versions unless otherwise noted.

B. **State v. *Hartnek***.

In *State v. Hartnek*, 146 Wis.2d 188, 430 N.W.2d 361 (Ct.App. 1988), defendant Hartnek caused an accident on an unspecified date. Two individuals were injured. Defendant fled the scene of the accident. He was convicted of two counts of leaving the scene of an accident, causing injury in violation of Wis. Stat. §§346.67(1) and 346.74(5)(b).[2] He appealed. On appeal, defendant asserted his convictions were multiplicitous and therefore in violation of the double jeopardy clause of the United States Constitution. In addressing the issue, the *Hartnek* court said:

> Multiplicity is the charging of a single offense in separate counts. *State v. Tappa*, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985). The double jeopardy provision of the constitution protects against multiple punishments for the same offense. *Id*. at 162, 378 N.W.2d at 886. Wisconsin has utilized a two-part test for evaluating whether a charge is multiplicitous. *Id*. The first part inquires whether the offenses are identical in law and fact. *Id*. The second part examines the legislative intent as to the allowable unit of prosecution. *Id*. Hartnek concedes that the first part of the test is met because each charge requires proof of a different injured person. We therefore examine only the second part of the test. Four factors are relevant to determining the legislative intent: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. *Id*. at 362, 146 Wis.2d 192-93.

The issue in *Hartnek* was essentially identical to the issue raised by defendant in this appeal. The court was interpreting Wis. Stat. §346.67 and its penalty section counterpart, Wis. Stat. §346.74(5). Wis. Stat. §346.67 then read:

> Duty upon striking person or attended or occupied vehicle. (1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by

[2] The statutes analyzed in *Hartnek* are identical in relevant part to those applicable in this case. The statutory penalties have been updated and the statutes have been made gender-nuetral since *Hartnek* was decided.

> any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the following requirements: (a) He shall give his name, address and registration number of the vehicle he is driving to the person struck or to the operator or occupant or person attending any vehicle collided with; and (b) He shall upon request and if available, exhibit his operator's license to the person struck or to the operator or occupant of a person struck or to the operator or occupant of or person attending any vehicle collided with; and (c) He shall render to any person injured in such accident reasonable assistance, including the carrying, or making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent such treatment is necessary or if such carrying is requested by the injured person.

At that time, Wis. Stat. §346.74(5) read:

> Any person violating any provision of s. 346.67: (a) Shall be fined not less than $1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person. (b) Shall be fined not less than $300 nor more than $5,000 or imprisoned not less than 10 days nor more than one year or both if the accident involved injury to a person but the person did not suffer great bodily harm. (c) May be fined not more than $10,000 or imprisoned not more than 2 years or both if the accident involved injury to a person and the person suffered great bodily harm. (d) May be fined not more than $10,000 or imprisoned not more than 5 years or both if the accident involved death to a person.

The *Hartke* court found multiple punishments were appropriate. The court conducted the four-part analysis from *Tappa*. As to the statutory language, the first part of the *Tappa* analysis, the court pointed out that "any person injured" could mean more than one person was injured in the accident and that a defendant would have a duty to attend to all persons injured as a result of an accident. *Id.* at 363. The court found multiple injury accidents are not rare and the legislature could have made it clear that only one penalty per accident could be imposed if it had intended to do so. *Id*. The court found that several of the penalty sections could be invoked in a single accident. *Id*. As to the legislative history

and context of the statute, the second part of the *Tappa* analysis, no significant analysis was performed. *Id*. As to the nature of the proscribed conduct, the third step in the *Tappa* analysis, the court conducted no significant analysis. *Id*. Finally, as to whether multiple punishments were appropriate when more than one person was injured, the fourth step in the *Tappa* analysis, the court summarily concluded they were. *Id*. at 364.

### C. **Double jeopardy law**.

#### 1. ***State v. Davison*.**

In *State v. Davison,* 2003 WI 89, 263 Wis.2d 145, 666 N.W. 1, the Wisconsin Supreme Court addressed a double jeopardy issue. The court discussed the established methodology for reviewing multiplicity claims:

> In *State v. Rabe*, 96 Wis.2d 48, 61, 291 N.W.2d 809 (1980), we stated: Multiplicity arises where the defendant is charged in more than one count for a single offense. (citation omitted). As we noted in *State v. George*, 69 Wis.2d 92, 230 N.W.2d 253 (1975), multiplicitous charges are impermissible because they violate the double jeopardy provisions of the state and federal constitutions. … As a general proposition, different elements of law distinguish one offense from another when different statutes are charged. Different facts distinguish one count from another when the counts are charged under the same statute. There is an established methodology for reviewing multiplicity claims. (citation omitted). First, the court determines whether the charged offenses are identical in law and fact using the *Blockburger*[3] test. (citations omitted). If it is determined, using this test, that the offenses are identical in law and fact, the presumption is that the legislative body did not intend to punish the same offenses under two different statutes.[4] (citation omitted). *Id*. at ¶¶34, 41-43.

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[3] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[4] Although not explicitly stated, one can reasonably infer from this language that the same analysis would apply when the same offense is charged as two violations of the same statute.

2. ***State v. Rabe***.

In *State v. Rabe*, 96 Wis.2d 48, 61, 291 N.W.2d 809 (1980), the Wisconsin Supreme Court addressed a double jeopardy issue. In *Rabe*, four persons were killed as a result of defendant's act in operating while intoxicated during a single accident. Defendant was charged and convicted of four counts of operating while intoxicated, causing the death of four persons pursuant to Wis. Stat. §940.09. On appeal, defendant asserted he could only be convicted of one count of the offense because the four deaths occurred as a result of the same criminal act during the accident. In addressing the issue, the *Rabe* court wrote:

> The test uniformly used in Wisconsin to determine multiplicity is the "additional facts" test, which examines "whether each count requires proof of an additional fact which the other count or counts do not." (citations omitted). The United State Supreme Court has identified three areas and interests protected by the double jeopardy provision:
>
> > "'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *United States v. Wilson*, 420 U.S. 332, 343, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975).
>
> There are two questions which usually arise in regard to the third protection identified above, the protection at issue in this case. In order to deal with the voluminous authority dealing with this aspect of double jeopardy, it is first necessary to identify and distinguish these two common types of cases from the present one. The prohibition against multiple punishments for the same offense is generally invoked in regard to cases where the defendant is charged with committing both the lesser-included offense and the greater offense and cases involving continuous or ongoing offenses. In so-called continuous offense cases, the question turns on whether the defendant's repeated commission of the same offense at different places or times constitutes ongoing crime or several separate offenses. … The issue in these cases was whether "there was a sufficient break in conduct and time between the acts to constitute separate and distinct

criminal acts." (citation omitted). In the present case, the question posed in regard to the same evidence test is different since both sides concede that all four offenses were allegedly caused by a single negligent act at a single time and place. The only significant distinction between the four charged offenses is: (1) they involve four different victims and (2) not all four victims were riding in the same vehicle; two were passengers in the defendant's car, and two were in the car struck by the defendant's car in the intersection.

In respect to sec. 940.09, the application of the additional fact test to situations where a defendant's single act causes multiple deaths indicates that double jeopardy is not offended by charging a separate count for each death. Each count requires proof of addition facts that the other counts do not, names the death of the particular victim named in each count and the causal relationship between the defendant's negligent operation of his vehicle while intoxicated and that particular death. …

Obviously the facts necessary to prove that the death of each victim was caused by the defendant's negligent conduct could be different:

> "In cases were the defendant commits one criminal act which has several victims, courts have used the "same evidence" test to allow a separate prosecution for each victim. Because the Blockburger 'same evidence' test is satisfied if each provision requires proof of a fact which the other does not, it will always sanction multiple trials if there are multiple victims since the identity of the victim is an additional proof of fact in each case." (citation omitted). *Id*. at 63-67, 291 N.W.2d at 811-18.

In *Rabe*, defendant argued he could only be convicted of one violation of §940.09 because he committed a single act of negligence. *Id*. at 71, 291 N.W.2d at 820. The State argued that the legislature was concerned with the consequences of the conduct of the defendant and that the gravamen of the offense is causing the death of another, with each death constituting a single offense. *Id*. The court agreed with the State, concluding that §940.09 proscribed the causing the death of another by negligent conduct while intoxicated:

> [T]he gravamen of the offense is more than just negligent operation of a vehicle while intoxicated, as the defendant contends. Where there is an additional fact [the death of a specific person] necessary to establish a complete offense, in this case, the defendant's causal negligence in regard to each victim, separate offenses may be charged. *Id*. at 72-73, 291 N.W.2d at 821.

## D. ***Hartnek* should be overruled**.

### 1. Defendant Pal's convictions are identical in law and in fact, and thus are multiplicitous.

In *Hartnek*, the court wrote:

> Multiplicity is the charging of a single offense in separate counts. *State v. Tappa*, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985). The double jeopardy provisions of the constitution protects against multiple punishments for the same offense. *Id*. at 162, 378 N.W.2d at 886. Wisconsin has utilized a two-part test for evaluating whether a charge is multiplicitous. *Id.* The first part inquires whether the offenses are identical in law and fact. *Id.* The second part examines the legislative intent as to the allowable unit of prosecution. *Id*. **Hartnek concedes that the first part of the test is met because each charge requires proof of different injured persons.** (emphasis added). We therefore examine only the second part of the test. Four factors are relevant to determining the legislative intent: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. *Id*. at 165, 378 N.W.2d at 887.

Unlike Hartnek, defendant Pal does not concede the first part of the *Tappa* test. Defendant asserts his offenses are identical in fact and in law. There is no need to get the second part of the *Tappa* test. Under the law cited above from *Rabe*, as the offenses against defendant Pal are identical in fact and law, and there is no clear legislative intent to provide for cumulative punishments, they are multiplicitous, and one count must be dismissed.

The elements of the offense defined in Wis. Stat. §346.67 are set forth in 2670 WIS JI-CRIMINAL. The instruction defines the offense:

> **Statutory Definition of the Crime**
>
> Section 346.67 of the Wisconsin Statutes is violated when the operator of any vehicle involved in an accident on a highway resulting in (injury to **any** person) (death of **any** person) (damage to a vehicle driven or attended by **any** person) fails to immediately stop such vehicle (at the scene of the accident) (as close to the scene of the accident as possible and forthwith return to the scene of the accident) and remain at the scene of the accident and give information (any render assistance to any person injured in the accident). (emphasis added). *Id*.

The elements of the offense, as they relate to defendant's case are also set forth:

> 1. The defendant operated a vehicle involved in an accident on a highway.
>
> 2. The defendant knew the vehicle he was operating was involved in an accident involving a person.
>
> 3. The accident resulted in (death of **any** person). (emphasis added).
>
> 4. The defendant did not immediately stop his vehicle (at the scene of the accident and remain at the scene) (as to close to the scene of the accident as possible and forthwith return to and remain at the scene) until he had fulfilled the following requirements:
>
> (a) Gave his name, address and registration number of the vehicle he was driving to (the person struck) (the operator or occupant of or person attending any vehicle collided with); and

> (b) If it was requested and available, exhibited his operator's license to the (person struck) (the operator or occupant of or person attending any vehicle collided with) [; and
> (c) Rendered to any person injured in such accident reasonable assistance including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person].
>
> 5. The defendant was physically capable of complying with the requirements I have just recited. *Id.*

The phrase "any person" is used several times throughout Wis. Stat. §346.67. It is axiomatic the phrase must be given a consistent meaning throughout the same statute. In *State v. Lloyd*, 104 Wis.2d 49, 62-63, 310 N.W.2d 617, 624-25 (Ct.App. 1981), the court defined the phrase "any person injured" from Wis. Stat. §346.67:

> It is self-evident from the dictionary definition that the word "any" was chosen by the legislature to cover both situations where only one person is injured and where many persons are injured.

This leads to the following application of the facts to the relevant jury instruction as follows:

> 1. The defendant operated a vehicle involved in an accident on a highway.
>
> 2. The defendant knew the vehicle he was operating was involved in an accident involving a person.
>
> 3. The accident resulted in (death of **any** person to wit: M.W., D.J.). (emphasis added).
>
> 4. The defendant did not immediately stop his vehicle (at the scene of the accident and remain at the scene) (as to close to the scene of the accident as possible and forthwith return to and remain at the scene) until he had fulfilled the following requirements:
>
> (a) Gave his name, address and registration number of the vehicle he was driving to (the person struck) (the operator or occupant of or person attending any vehicle collided with, to wit: M.W., D.J.); and

> (b) If it was requested and available, exhibited his operator's license to the (person struck) (the operator or occupant of or person attending any vehicle collided with, to wit: M.W., J.C.) [; and
> (c) Rendered to any person injured, to wit: M.W., J.C., in such accident reasonable assistance including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person].
>
> 5. The defendant was physically capable of complying with the requirements I have just recited. *Id.*

Because the statute uses the language "any person," which can include more than one person, each count in the information in this case charges exactly the same offense of leaving the scene of an accident causing the death of any person. Wis. Stat. §346.67 does not use the term "a person." Once Wis. Stat. §346.67 is violated, one then goes to the penalty section, Wis. Stat. §346.71, to determine the severity of the offense. If defendant left the scene of an accident involving a death, the offense is punishable as a Class D felony. Whether an accident involving one, two or three deaths, the accident is still an accident involving "a death."

### 2. Even if the offenses are not identical in law and in fact, multiple punishments are not authorized under a *Tappa* analysis.

Standard of review

As noted in *Davison:*

> If under the B*lockburger* test the charged offenses are different in law or fact, a presumption arises that the legislature did intend to permit cumulative punishments. … This presumption can only be rebutted by clear legislative intent to the contrary. ... [E]ven if the charged offenses are *not* identical in law and fact, the court must still determine whether the legislature intended multiple offenses to be brought as a single count. … At this junction, however, it is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized. 2003 WI at ¶¶44-45.

Regardless of the whether the offenses are identical in fact and in law, it is apparent cumulative punishments are not appropriate when one applies the four-part *Tappa* analysis to the applicable statutory scheme. Only one offense can be charged when one leaves the scene of an accident defined in §346.67, regardless of the number of victims in the accident.

Consistent with first argument above, as to the language of statute, part one of the *Tappa* analysis, Wis. Stat. §346.67 proscribes leaving the scene of a motor vehicle accident. It does not proscribe the mere leaving of the scene of an accident. It proscribes only the leaving of the scene of an accident involving one or more person under specified circumstances, injury to **any** person, the death of **any** person or the damage to a vehicle occupied by **any** person.[5] If one of these three circumstances exists, one then goes to the penalty section, Wis. Stat. §346.74, to determine the applicable penalty. If the accident only involved nothing worse than property damage, sub. (a) applies. If the accident involved personal injury to a person, but not great bodily harm, sub. (b) applies. If the accident involved any great bodily harm to a person, sub (c). applies. If the accident involved death to a person, sub (d) applies. The penalty section is not invoked twice simply because there are two victims. The penalties are graduated. The more substantial the injury is to any victim, the higher the potential penalty will be. The applicable penalty will presumably be based on the most seriously injured person.

This penalty scheme is no different than that for operating while intoxicated offenses. For example, Wis. Stats. §346.63(1)(a) prohibits an individual from operating while intoxicated. The penalty section, Wis. Stat. §346.63(2)(a) sets the penalty for a first offense. However, if there was a passenger in the vehicle under the age of 16, the penalty is enhanced by virtue of Wis. Stat. §346.63(2)(f). If there are two passengers under the age of 16, two counts of operating while intoxicated cannot be charged! The threshold is met when there is one passenger under the age of 16. Whether there are one or six passengers under the age of 16

[5] The legislature did not use the word "a," but rather "any" in defining the persons affected by a defendant's conduct in violating the statute.

in the vehicle, the penalty does not increase. Similarly, in this case, whether one or five persons are killed during the accident described in 346.67, the penalty section applies only once. As previously argued, as the language of the statute is not ambiguous, there is no further need to analyze the remaining *Tappa* factors.

The *Hartnek* court did not address the statutory issue in the context of the "rule of leniency" defined in *State v. Kittilstad*, 231 Wis.2d 245, 603 N.W.2d 732, 741 (1999):

> Case law clarifies that the defendant is actually referring to two separate rules, the "rule of leniency" and the general rule subjecting penal statutes to strict construction so as to safeguard a defendant's rights. The rule of lenity was developed in federal courts and holds that where a criminal statue is ambiguous it should be interpreted in a defendant's favor. *State v. Rabe*, 96 Wis.2d 48, 69, 291 N.W.2d 809 (1990). The rule of lenity is "echoed in the familiar Wisconsin rule that 'penal statutes are generally construed strictly to safeguard a defendant's rights.'" Id. at 70, 291 N.W.2d 809 (citing *Austin v. State*, 86 Wis.2d 213, 223, 271 N.W.2d 668 (1978)). As explained above, the rule of strict construction of penal statutes does not apply unless a statue is ambiguous, and it cannot be used to circumvent the purpose of the statute. Moreover, the rule "is not violated by taking a commonsense view of the statue as a whole and giving effect to the object of the legislation, if a reasonable construction of the words permits it." *Austin*, 86 Wis.2d at 223, 271 N.W.2d 668 (quoting *Zarnott v. Timken-Detroit Axle Co.*, 244 Wis. 596, 13 N.W. 53 (1944)).

Under the above law, even if there were any ambiguity as to the appropriate charging unit, the ambiguity should be construed in favor of defendant, militating a single count, rather than two counts of leaving the scene of a single accident.

The remaining *Tappa* factors do not provide support for multiple convictions for leaving the scene of the same accident. As to the second part of the *Tappa* analysis, the legislative history and the context of the statue, there is no relevant guidance either way based on legislative history or the context of the statute.

As to the third part of the *Tappa* analysis, the nature of the proscribed conduct, in *State v. Grayson*, 172 Wis.2d 156, 165, 493 N.W.2d 23, 28 (1992), the court determined the focus should be on whether the charges are "either separated in time or are of significantly different nature in fact." In *Grayson*, the focus was on whether there is an opportunity to form a new *mens rea*. Id. That is a key to the analysis. We punish criminal behavior. In this case, the *mens rea* exists in the intentional decision to leave the scene of the accident, not the negligent or intention killing of persons during the accident. The gravamen of the offense is not the killing of a person, but the flight from the scene.[6] When one focuses on what conduct the statute is trying to proscribe, the leaving of the scene of an accident, and given a defendant can only leave the accident scene once, a single count is appropriate.

Finally, with regard to the fourth part of the *Tappa* analysis, the appropriateness of multiple punishments, the *Grayson* court notes the focus should be on deterrence and proportionality. Id. at 166, 493 N.W.2d at 28. In this case, the maximum penalty for committing the offense of leaving the scene of an accident is 25 years in prison, 15 years of initial confinement followed by 10 years of extended supervision. Whether the maximum penalty is 25 years or 40 years, there clearly is sufficient deterrence to convince people not to commit the crime of leaving the scene of an accident. As to proportionality, keeping in mind the crime is the leaving of the scene of the accident, the more serious the property damage, the more persons injured or killed, the higher the appropriate penalty. Not unlike any criminal offense, the more serious it is, the more appropriate it is for the court to consider a harsher sentence. Given the substantial maximum penalty already available when at least one person dies in a hit and run accident, there is no compelling need to charge multiple counts for the single act in leaving the scene of an accident.

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[6] Indeed, that is exactly what the court determined in *Tooke v. Commonwealth*, 47 Va.App. 759, 627 S.E.2d 533, 536 (2008) in resolving a nearly-identical issue related the offense of leaving the scene of an accident involving "any person." (reasoning "the gravamen of the offense under the statute is leaving the scene of a single accident, regardless of the number of persons injured or the extent of the damages.

E. **Since *Harnek* was decided, several other states have allowed only one charge for leaving the scene of a single accident, regardless of the number of victims**.

Since *Hartnek* was decided, several other State courts have found the opposite, that a person can only be convicted of leaving the scene of the accident once, regardless of the number of persons hurt or killed in the accident.

In *State v. Stone*, 728 S.E.2d. 155 (2012), the West Virginia Supreme Court addressed a nearly-identical issue to the one before this court. In *Stone*, a defendant was in an accident that led to the deaths of five persons. He was convicted of five counts. He appealed. On appeal, the *Stone* court framed the issue as:

> The first issue for our review is whether, as a matter of law, the driver of a vehicle who leaves the scene of an accident resulting in injury or death of more than one person may be convicted of and sentenced for multiple violations of West Virginia Code §17C-4-1 (1999). It is Appellant's contention that West Virginia Code §17C-4-1 is ambiguous in this regard and that, under the rule of lenity, the statute must be strictly construed against the State and in favor of appellant. 728 S.E.2d at 160.

West Virginia Code §17C-4-1 provides, in relevant part:

> (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and shall remain at the scene of the accident [until certain requirements are met]. 728 S.E.2d. at 160.

In addressing the issue, the *Stone* court said:

> Indeed, interpretation of West Virginia Code §17C-4-1's reference to the requirements of West Virginia Code §17C-4-3 "turns upon the use of the word 'any' in conjunction with the use of the singular, rather than plural tense of the statute." *Williams v. W.Va. Dept. of Motor Vehicles*, 187 W.Va. 496, 409, 419 S.E.2d 474 (1992). In *Williams*, we recognized the various meanings of the word "any" and with regard to the statute at issue

in that case, settled on the meaning "one" or "either." 187 W.Va. at 409, 419 S.E.2d at 477. We explained that [i]t is clear from the authorities [on the meaning of the word "any"] cited herein that "any" may be used in either a singular or plural form. In this instance, the legislature has used "any" in a singular context. All references to when the statute is applicable are in the singular. Furthermore, the legislature could easily have chosen the word "all," which much more clearly stresses a plural form than "any" when worded in the statute. 187 W.Va. at 409-10, 419 S.E.2d at 477-78. Thus, we held that "'[t]he word 'any,' when used in the statute, should be construed to mean' any.'" Syl. pt. 2. *Thomas v. Firestone Tire & Rubber Co.*, 164 W.Va. 763, 266 S.E.2d 905 (1980). *Williams*, at syl. pt. 4, 187 W.Va. at 407, 419 S.E.2d at 475. With regard to West Virginia Code §171-C-4-1 and its reference to West Virginia Cod §17C-4-3, we interpret "any" in a similar manner. West Virginia Code §17C-4-1, refers to "[t]he driver of any vehicle involved in an accident resulting in injury or death of any person," requiring the driver to stop at the scene of the accident and remain until he complied with the requirements of West Virginia Code §17C-4-3. West Virginia Code §17C-4-3 in turn, requires the driver to give certain information "to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured... reasonable assistance." West Virginia Code §17C-4-1 and its reference to West Virginia Code §17C-4-3, employ "'any' in a singular context" and "[a]ll references to when the statute is applicable are in the singular". (citation omitted). Moreover, the "legislature could have easily chose the word 'all' which much more clearly stresses a plural form than 'any' when wording" id., that portion of West Virginia Code §17C-4-3 requiring the driver to "render to any person injured ... reasonable assistance." Accordingly, applying the rule of leniency, we interpret West Virginia Code §17C-4-1 to mean that a driver of a vehicle involved in an accident resulting in injury or death may be punished only once for leaving the accident scene regardless of the number of injuries or death resulting therefrom. **Our interpretation of West Virginia Code §17C-4-1 is in accordance with a majority of other jurisdictions which have construed statutes similar to West Virginia's.** (emphasis added). 728 S.E.2d 161-62.

The *Stone* court went on to cite cases with similar holdings from other States, including *State v. Ustimenko*, 137 Wn.App. 109, 151 P.3d 256 (2007) (State of Washington), *People v. Newton*, 155 Cal.App.4th 1000, 66 Cal Rptr.3d 422 (2007), *Tooke v. Commonwealth*, 47 Va.App. 759, 627 S.E.2d 533 (2006) and *People v. Sleboda*, 166 Ill.App.3d 42, 116 Ill.Dec. 620, 519 N.E.2d 512 (1988).[7] The statute in *Stone* was exactly the same as Wisconsin's in relevant part. The *Stone* court reached the opposite conclusion the court in *Hartnek* reached. The decision in *Stone* is persuasive and should be adopted in the State of Wisconsin.

It must be said that the logic and holding of *Stone* reaches a just result. While there will usually be human being affected by the offense of leaving the scene of the accident, the need for the statute transcends the needs of any individual affected by the accident. Society has an interest in determining what happened during traffic accidents. Accurate information about the accident can resolve great financial and criminal issues resulting from the accident. If persons involved in accidents stay at the scene, they can they potentially aid injured persons and they can provide important information while their memory is fresh. This information could ultimately benefit the defendant. In this case, had defendant stayed at the scene, he may not have been subject to any criminal liability!

[7] S*leboda* was decided before *Hartnek*.

### F. Defendant Pal's interpretation of Wis. Stat. §346.67 does not affect the holding of *Rabe*.

It is important to point out defendant Pal's interpretation of the Wis. Stat. §346.67 does not open the floodgates to litigation related to other statutes where it is appropriate to punish a defendant for multiple violations of the same statute during the criminal act. As correctly determined in *Rabe*, a defendant can still be convicted of multiple death caused by his or her intoxicated use of a vehicle during a single accident because the applicable statutory language of Wis. Stat. §940.09 is qualitatively different than that of Wis. Stat. §346.67:

> **940.09 Homicide by intoxicated use of a vehicle or firearm.** (1) Any person who does any of the following may be penalized as provided in sub. (1c): (a) causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.

While the "another" from this statute is singular, the "any person" language from Wis. Stat. §346.67 can be singular or plural. As "another" is specific to one victim, multiple charges would be appropriate under this statute if there are more than one victim.

The same would be true with the offense reckless endangerment in violation of Wis. Stat. §941.30:

> **941.30 Recklessly endangering safety.** (1) FIRST-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony.

Again, while the "another" from this statute is singular, the "any person" language from Wis. Stat. §346.67 can be singular or plural. As "another" is specific to one victim, multiple charges would be appropriate under this statute if there are more than one victim.

### G. **Defendant Pal did not forfeit his double jeopardy claim by entering his pleas to both counts**.

Finally, defendant Pal recognizes trial counsel did not raise this issue. There is no evidence the defendant himself knowingly and intelligently waived his right to protection against double jeopardy in this case. Ultimately, there is no value to punishing a defendant twice for the same offense. As the relevant facts to resolve the double jeopardy issue are within the court record, defendant's claims is not waived by his pleas under the law set forth in *State v. Kelty*, 2006 WI 101, ¶¶19, 52, 294 Wis.2d 62, 716 N.W.2d 886 (recognizing that by entering a guilty plea, a defendant does not waive a double jeopardy claim that can be resolved on the record.)

## II. AS DENDANT PAL'S SENTENCES WERE UNDULY HARSH, HIS SENTENCES SHOULD BE VACATED AND HE SHOULD BE GRANTED A RESENTENCING.

Standard of review

In *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507, the court said:

> When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disportionate to the offense committed as to shock public sentimentand violate the judgment of reasonable people concerning what is right and proper under the circumstances." (citation omitted).

**A. Applicable law.**

Way back in *State v. Tuttle*, 21 Wis.2d 147, 151, 124 N.W.2d 9, 11 (1963), the Wisconsin Supreme Court, in addressing the appropriate fine in a speeding case, said:

> This court, however, has statutory power to reverse and to direct the entry of a proper judgment when it appears from the record that it is probable that justice has for any reason miscarried.

Defendant concedes that normally, "a sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." See *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507. Nevertheless, *Tuttle* remains to be good law.

B. **Relevant facts**.

Defendant Pal caused an accident by crossing the centerline of a highway. There is no indication this was anything other than inadvertent. He struck two motorcyclists. One of the victims died at the scene (1). The other died at the hospital (1). Defendant Pal did not immediate stop, but instead, fled the scene of the accident. Defendant was 24 at sentencing (1). He had a work history and was employed at the time of the accident (36:38). He had a high school diploma (36:54). He had a military background (36:37). He was discharged from the military because a domestic conviction disqualified him from possessing a firearm (36:37). The sentencing court noted he had a single criminal conviction prior to the convictions in this case (36:53). The circumstances leading to the fatal accident were exactly that, a tragic accident. His vehicle crossed the centerline on a curve. There is no evidence that alcohol or other drugs impaired him at the time of the collision (36:52). He was apprehended within days (36:56). He expressed remorse for his conduct, not be mere words, but by waiving his right to a trial and pleading to the charges, as alleged. The presentence report recommended a total sentence of 20-24 years in prison, with 10-14 years of initial confinement (36:36). The State joined in that recommendation (36:36).

The sentence imposed by the court was substantially longer than the one recommended by the State. In sentencing defendant Pal, the court said:

> In reviewing the sentencing factors, the factor I give the greatest amount of weight to is the seriousness of the offenses. And, obviously, it's serious with hitting and killing these two young men, but as I've indicated, in my view, the seriousness of these offenses is only an enhancer exacerbated by you fleeing without any apparent concern for them and your actions that took several days afterwards and after learning what happened (36:57).

The sentences were imposed without defendant being made eligible for CIP or ERP, meaning defendant will have to serve most of the term of initial confinement.

C. **Analysis**.

Notwithstanding the general rule that an appellate court should not interfere with a sentence imposed by a trial court, this court should do so in this case. The punishment simply does not fit the crime. What was the crime? It was not the intentionally killing of two young men with their life ahead of them. It was the split-second decision by defendant Pal to keep driving after he accidentally hit the young men. The crime was completed within seconds. It was a horrible lapse in judgment in his part. While his continued unwillingness to take responsibility for his action by not promptly turning himself in to authorities exacerbated the offense, it did so in a diminishing fashion. A purpose of the violated statute is to make sure persons are not left to die in the streets after an accident.[8] Once defendant Pal had absented himself from the scene, he could no longer have provided aid to the victims. While it may have made the victims' families feel better, had defendant Pal turned himself in at some point after both victims had expired, it would not have helped the victims. It would not have made his conduct in compliance with the statute.

[8] There is no indication in the record that the victims were not immediately attended to by other at the scene of the accident.

While defendant Pal did not receive a maximum sentence, he received a sentence approaching the maximum.[9] This was so in spite of his young age, his limited criminal history, his positive work history, his military history, his demonstrated remorse, the lack of alcohol or other drug use being involved in the causation of the accident and the State's recommendation for far less than the maximum.

This was an emotional case for the families of the victims. Two young men died. However, the remarks of the trial court indicate it considered the deaths an aggravating factor justifying a harsh penalty. The focus by the trial court on the flight as an aggravating factor was misplaced. The causing of the deaths in this case was not an intentional act. The death of a person at the scene of a hit and run accident is what propelled the offense to a Class D felony punishable to up to 25 years in prison. The flight, on the other hand, is the essence and gravamen of the offense. It was not an aggravating factor; it was the crime. There must be flight in order to be guilty of the hit and run causing death.

It has to be pointed out that a criminal defendant who commits the most serious offense in the State of Wisconsin, first-degree intentional homicide, even in the absence mitigating circumstances, can receive a sentence similar to defendant Pal's sentence, initial confinement of as little as 20 years! Intent to kill is absent in this case. Reckless conduct leading to the death of other is absent. Taking out the emotions of this case, what penalty is appropriate when a person makes the conscious decision to flee the scene of an accident where someone dies? How can it be a penalty similar to one that could be imposed upon a person's conviction for first-degree intentional homicide when there was no intent or recklessness on the part of the defendant to cause the deaths involved? Why shouldn't the two sentences be made to run concurrently if they arose out of the same criminal act, flight from the scene of an accident?

[9] Each offense was a Class D felony punishable by up to 25 years, with a maximum term of 15 years of initial confinement followed by 10 years of extended supervision, meaning the absolute maximum sentence would have been a total of 30 years of initial confinement followed by 20 years of extended supervision.

While defendant Pal has no way of proving it, arguably, 20 full years in prison for making a split-second decision not to stop at the scene of an accident should shock the conscious of any fair-minded person in the community. Defendant Pal is forfeiting his youth while in prison for a nonviolent lapse in judgment. This court, pursuant to its authority outlined in *Tuttle*, should vacate defendant Pal's sentence and should remand this matter for a new sentencing.

## CONCLUSION

For the reasons set forth above, defendant should be granted the relief sought.

Dated: 12/7/2016

_____
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## CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 8833 words.

Dated: 12/7/2016

_____
Philip J. Brehm
Attorney for Defendant

## APPENDIX CERTIFICATION

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) the decision of the court of appeals; (3) relevant trial court entries; (4) the findings or opinions of the trial court; and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues. I further certify if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials 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.

Dated: 12/07/2015

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Philip J. Brehm
Attorney for Defendant

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 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 and that 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: 12/07/2015

_____
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## INDEX TO APPENDIX