STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1824-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRUCE T. HENNINGFIELD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE ALLAN B. TORHORST, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts of the case. Accordingly, the State does not request oral argument.

The case meets criteria for publication. This Court has on several occasions addressed the doctrine of issue preclusion as applied to prior countable convictions in OWI cases. A published decision will guide the bench and bar on this issue.

ARGUMENT

I. The circuit court correctly denied Henningfield's postconviction motion.

A. The circuit court correctly rejected Henningfield's ineffective-assistance-of-counsel claim.

Henningfield first argues his trial attorney provided ineffective assistance of counsel during his opening statement when he stated:

> My client, basically it's out of the bag, he had a lower alcohol expectation, a .02. This is an intelligent jury. I heard what you do, what you -- you're professional, some of you married, some of you not. I know you can put two and two together, but the issue is not that was he drunk or was he not drunk.

(54:66.)

A claim of ineffective assistance of counsel requires a defendant to show that counsel performed deficiently and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). An

attorney performs deficiently if he/she performs outside the range of professionally competent assistance, meaning the attorney's acts or omissions were not the result of reasonable professional judgment. *Id.* at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight . . . and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson,* 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

The prejudice prong of the *Strickland* test is satisfied when the attorney makes errors of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the court's confidence in the outcome of the trial. *Id*. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted); *State v. Prineas*, 2012 WI App 2, ¶ 21, 338 Wis. 2d 362, 809 N.W.2d 68.

Appellate review of an ineffective-assistance-of-counsel claim presents a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. Appellate courts will not disturb the trial court's findings of fact unless they are clearly erroneous. *Id.*; *State v. Champlain*, 2008 WI App 5, ¶ 19, 307 Wis. 2d 232, 744 N.W.2d 889. The ultimate determination of whether counsel's performance falls below the constitutional minimum, however, is a question of law subject to independent review. *McDowell*, 272 Wis. 2d 488, ¶ 31; *Champlain*, 307 Wis. 2d 232, ¶ 19.

This Court "need not address both components of the inquiry if the defendant fails to make an adequate showing

on one." *State v. Harbor*, 2011 WI 28, ¶ 67, 333 Wis. 2d 53, 797 N.W.2d 828. Here, Henningfield fails to prove *Strickland* prejudice. So this Court can reject Henningfield's claim for want of his proof of prejudice.

Initially, Henningfield correctly observes that the circuit court confused this case with some other case when reciting Henningfield's theory of defense. No matter. This Court will affirm if the circuit court makes the correct ruling for the wrong reason. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

Perhaps Henningfield believes that it was obvious to the jury that he had prior OWI convictions, based on his attorney's statement that "he had a lower alcohol expectation, a .02. . . . [Y]ou can put two and two together." (54:66.) But the statement did not directly inform the jury of Henningfield's prior OWI convictions. If it was obvious to the jury from his trial attorney's statement, it was also obvious from having already heard of the lower PAC level on two occasions: during the State's voir dire and during the State's opening statement. (54:28-30, 62.) Henningfield does not claim any error in those disclosures nor does he explain how, in light of these two references, defense counsel's comment shakes this Court's confidence in the verdict. Moreover, the Court had to instruct the jury that Henningfield's PAC was .02. (22:7.) *See* Wis. JI-Criminal 2660C (2002); *State v. Alexander*, 214 Wis. 2d 628, 652, 571 N.W.2d 662 (1997).

Additionally, Lilly Jones testified that after she and her nephew, Ryan Pierce, arrived on the scene, Henningfield got "inside the truck to drive it out [of the ditch] but they [Henningfield and Pierce] couldn't get it out onto the highway." (54:105, 107.) Henningfield does not address this separate proof of operating at all. *See* Wis. Stat. § 346.63(3)(b) ("'Operate' means physical manipulation or

activation of any of the controls of a motor vehicle necessary to put it in motion."); *see also Milwaukee County v. Proegler*, 95 Wis. 2d 614, 626, 291 N.W.2d 608 (Ct. App.1980) (holding one who does nothing more than start the engine operates a vehicle); *State v. Modory*, 204 Wis. 2d 538, 545, 555 N.W.2d 399 (Ct. App. 1996) (holding that the immobility of a motor vehicle does not preclude a finding that the defendant operated the motor vehicle). And he was convicted of OWI, not of driving with a PAC. (35.) It is thus possible the jury believed Henningfield's story but convicted him based on Jones' testimony that he operated after he returned to his truck.

Henningfield's tale of drinking heavily only after sliding into the ditch is also not very credible, however. His testimony directly contradicted both Lilly Jones and Officer Karasek and it was also internally contradictory. Jones testified that when she arrived on the scene she observed one person whom she assumed was the driver, outside of the truck. (54:106.) Henningfield testified that before he got to his truck, he noticed the Jones car stopped in the northbound lane of the roadway even with his truck. (54:147.) Jones testified that Pierce pushed the truck while Henningfield tried to drive the truck out of the ditch. (54:107.) Henningfield testified that he declined Pierce's offer to push the truck out of the ditch. (54:148.) But on cross-examination, he testified that Pierce did try to push the truck out of the ditch. (54:160.)

Officer Karasek testified that when police investigated the scene, they found a second sign had been struck on the median at the intersection of County H and Durand Avenue. (54:75, 77.) Henningfield denied hitting that second sign. (54:148-49.) Officer Karasek testified the front of Henningfield's truck had been damaged. (54:74.) In addition to denying he hit the sign at the intersection, Henningfield

testified he hit the 55 m.p.h. speed limit sign when his truck was at an angle to County H. (54:141.) That would have produced damage on the side of his truck, not the front. Officer Karasek followed the tire tracks. (54:74.) He testified the tracks came from the other side of Durand Avenue, going straight in a southerly direction, proceeded to strike a sign on the intersection median, then went down into the ditch where Henningfield's truck came to rest after hitting the speed limit sign. (54:77, 170.) Henningfield denied traveling in a southerly direction north of Durand Avenue. (54:139.) Officer Karasek testified a vehicle turning left off of Durand Avenue could not have left the tracks he found. (54:170.)

Henningfield's own testimony contains internal contradictions. He testified he told Officer Karasek he had just gotten off work. (54:149.) Yet he also testified he left work at 11:05 p.m. and he admitted he told officer Karasek he had just gotten off work. (54:137, 146.) He also agreed that was not truthful. (54:149.) As noted, he testified that he declined Pierce's offer of help but then admitted Pierce tried to push the truck back onto the road. (54:148, 160.) Henningfield, on cross-examination, testified that Pierce did try to push the truck out of the ditch. (54:160.) He claimed when he slid off the road, his cell phone "launched between the passenger seat and the console and I was unable to get it out at that time." (54:143.) But he also testified he was in the truck looking for his cell phone at the time Pierce tried to push the truck back onto the road. (54:160.)

Perhaps most telling were his various explanations and excuses for not telling Officer Karasek his story that he had been drinking at the Hiawatha Ballroom between the time he slid into the ditch and his return to the scene. When the prosecutor first asked him whether he had told Officer Karasek, he claimed he "never got a chance." (54:152.) But after Officer Karasek asked how the accident happened, he

asked Henningfield if he had been drinking. Henningfield said he had not. (54:71, 149.) That was Henningfield's first opportunity to tell the officer his intoxication occurred after the accident. When Officer Karasek attempted to administer field sobriety tests, Henningfield told him he had an injured ankle. (54:73, 150.) That was Henningfield's second opportunity to tell the officer his story. Then, after Officer Karasek arrested him, according to Henningfield, he told the officer "but I wasn't drinking" without any mention of the Hiawatha Ballroom. (54:150.) That was Henningfield's third opportunity to tell the officer his story. Then, at the hospital, Officer Karasek asked Henningfield if he consented to a blood draw. (54:78.) Henningfield again claimed he had not been drinking. (54:78.) That was Henningfield's fourth opportunity to tell the officer his story. Henningfield also told Officer Karasek nothing would be found in the blood sample the hospital personnel had taken. (54:79.) Yet another opportunity to tell his story. Finally, at the hospital, he "blurted out to hospital staff that he had only had three drinks." (54:79.) Another opportunity. When Officer Karasek confronted Henningfield with his statement, he denied making it. (54:79.) But he testified on direct examination that he had been drinking that night. (54:151.)

Henningfield testified on his own behalf and admitted to 19 convictions. (54:140-41.) By stipulating to the blood test, he did not contest that his blood-alcohol concentration was 0.278. (18.) Henningfield contested only the fact that he drove or operated his truck while having a 0.278 blood alcohol content (BAC). There is simply no good reason for this Court to conclude that the trial in this case was unreliable.

B. Henningfield is not entitled to a new trial in the interest of justice.

As part of his ineffective-assistance-of-counsel claim, Henningfield argues he is entitled to a new trial in the interest of justice. As applied to alleged omissions of defense counsel where a claim of ineffective-assistance-of-counsel will lie, the "real controversy" alternative of the interest of justice test permits an appellant to circumvent the prejudice requirement of *Strickland*, rendering *Strickland* a nullity. *Cf. State v. Flynn*, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994) (Wis. Stat. § 752.35 "'was not intended to vest [the court of appeals] with power of discretionary reversal to enable a defendant to present an alternative defense' that may have not been advanced by trial counsel at the first trial whose representation is alleged to be ineffective because of that failure") (quoted source omitted). The "real controversy" approach is not designed and should not be used to supplant pure claims of ineffective-assistance-of-counsel. The prejudice component of *Strickland* already embodies the concerns of the "real controversy" standard by focusing on whether the alleged deficiency of counsel "render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

This Court has authority to reverse in the interest of justice. Wis. Stat. § 752.35. "[A] new trial may be ordered on either of two grounds: (1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried." *See State v. Maloney*, 2006 WI 15, ¶ 14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citation omitted).

Under the first prong of the "interest of justice" analysis, the real controversy has not been tried when the

jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case, or when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

In order to grant a discretionary reversal because it is probable that justice has for any reason miscarried, the second prong, there must be a substantial probability of a different result on retrial. *State v. Schumacher*, 144 Wis. 2d 388, 401, 424 N.W.2d 672 (1988), citing *State v. Wyss*, 124 Wis. 2d 681, 741, 370 N.W.2d 745 (1985). *See also State v. D'Acquisto*, 124 Wis. 2d 758, 765, 370 N.W.2d 781 (1985), quoting *Lock v. State*, 31 Wis. 2d 110, 118, 142 N.W.2d 183 (1966). As such, the defendant must meet a higher threshold in order for this Court to grant a new trial under the second prong. *Maloney*, 288 Wis. 2d 551, ¶ 14 n.4.

The discretionary authority under either aspect of Wis. Stat. § 752.35 to order a new trial in the interest of justice is, the case law cautions, a power to be used only "infrequently and judiciously." *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). The "court[s] approach[] a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice, and thus we exercise our discretion only in exceptional cases." *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98 (quoting *Morden v. Continental AG,* 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659). The Wisconsin Supreme Court reiterated that the discretionary reversal power should be used "only in *exceptional* cases." *State v. McKellips*, 2016 WI 51, ¶ 52, ___ Wis. 2d ___, ___ N.W.2d ___ (emphasis the court's). The power may be exercised "only after *all other claims are weighed and determined to be unsuccessful"* and the court must "engage in an analysis

setting forth the reasons that the case may be characterized as exceptional." *Id.* (emphasis the court's) (internal quotation marks omitted).

The only issue in Henningfield's trial was whether he got drunk before or after he drove. That issue was fully tried. This is not an exceptional case.

II. Henningfield is not entitled to a new trial based on an involuntary jury waiver.

A. Stipulating to three or more prior countable convictions in a PAC case does not implicate the waiver of a jury trial.

Henningfield next argues he is entitled to a new trial because the circuit court's colloquy with him concerning his stipulation that he had three or more prior convictions was inadequate to waive his right to a jury determination on the status element of PAC.

Wisconsin Stat. § 972.02 establishes the procedure for a criminal defendant to waive his right to a jury trial. Section 972.02(1) states:

> Except as otherwise provided in this chapter, criminal cases shall be tried by a jury selected as prescribed in s. 805.08, unless the defendant waives a jury in writing or by statement in open court or under s. 967.08(2)(b), on the record, with the approval of the court and the consent of the state.

See also State v. Anderson, 2002 WI 7, ¶ 10, 249 Wis. 2d 586, 638 N.W.2d 301.

In *Anderson*, the Wisconsin Supreme Court set forth the requirements for a jury waiver.

> The waiver cannot be based on circumstantial evidence or reasonable inferences. The defendant, not his attorney, must waive the right to a jury trial by an affirmative act of the defendant himself. Furthermore, the court must advise the defendant of the unanimity requirement, such that the court cannot accept a jury verdict that is not agreed to by each member of the jury. Finally, this court has stated that [t]he right to a trial by jury is one of the rights that is 'so fundamental to the concept of fair and impartial decision making, that their relinquishment must meet the standard set forth in *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Accordingly, a jury trial waiver must be an intentional relinquishment or abandonment of a known right or privilege.

Id. ¶ 11. The procedure for determining whether a defendant validly waives a jury trial is the same as the procedure for determining whether a defendant has entered a voluntary plea. *Id.* ¶ 24. That procedure is set forth in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The waiver of one element requires the same procedure as a full jury waiver. *State v. Warbelton*, 2009 WI 6, ¶ 59, 315 Wis. 2d 253, 759 N.W.2d 557.

In *Warbelton*, the defendant was charged with stalking, one element of which was that he had been convicted of a violent crime. *Id.* ¶ 1. The defendant offered to stipulate to the fact that he had been convicted of a violent crime, and attempted to partially waive his right to a jury trial on that element. *Id.* ¶ 49. The trial court accepted his stipulation, and entered it into evidence. *Id.* ¶ 54. The trial court told the jury "that Warbelton had been convicted of a violent crime, and that the stipulation was conclusive proof." The supreme court concluded that this was the proper procedure for an agreed upon fact, under *Old Chief v. United States*, 519 U.S. 172 (1997), and *State v. McAllister*, 153 Wis.

2d 523, 451 N.W.2d 764 (Ct. App. 1989). *Warbelton*, 315 Wis. 2d 253, ¶ 54.

Warbelton also "asked the court to grant his request to waive a jury determination of the element." *Id.* ¶ 55. The State did not consent to the waiver. *Id.* The supreme court determined that Warbelton could not waive a jury determination of that element, because the State did not consent to the waiver. *Warbelton*, 315 Wis. 2d 253, ¶¶ 56-57.

State v. Alexander, 214 Wis. 2d 628, 652, 571 N.W.2d 662 (1997), addressed the waiver of the status element of driving with a prohibited blood alcohol concentration. Like, Henningfield, Alexander had stipulated he had sufficient prior convictions to lower the PAC then in effect. Nevertheless, the circuit court allowed the introduction of evidence of two or more prior convictions and submitted that element to the jury. *Id.* at 634. Alexander advanced two arguments on appeal: the circuit court erroneously exercised its discretion by admitting any evidence regarding his prior convictions, and the circuit court erroneously exercised its discretion by submitting the element that the defendant has two or more prior convictions to the jury. *Id.* at 639. The State argued that not submitting the element to the jury was, in effect, a partial jury waiver which required the State's consent. *Id.* at 645. The court determined that Alexander's stipulation merely "dispense[d] with the need for proof of the status element, either to a jury or to a judge. Accordingly, this is not an issue of partial jury waiver. . . ." *Id.* at 646.

This Court reached a similar conclusion in *State v. Benoit*, 229 Wis. 2d 630, 600 N.W.2d 193 (Ct. App. 1999). There, in a burglary trial, Benoit stipulated to non-consent. *Id.* at 634. The circuit court submitted the standard instruction to the jury informing them they must find

non-consent beyond a reasonable doubt. The circuit court also informed the jury Benoit had stipulated to the owner's non-consent. *Id.* at 634-35. This Court held the right to a jury trial was not implicated when "(1) the jury is instructed on the element and (2) the court does not resolve the issue on its own." Since, in this case, the circuit court submitted the PAC element to the jury, as Alexander instructs it to do, there was no waiver of a jury trial.

This result is further compelled by the fact that a waiver of a jury trial, even as to one element, requires the consent of the State as noted above. *Warbelton*, 315 Wis. 2d 253, ¶ 59. Thus, if, as Henningfield argues, his right to a jury trial requires a full colloquy, it also requires the State's acquiescence. The State could, therefore, force proof of prior countable convictions in every PAC third or greater case by refusing to consent to the waiver.

The colloquy here was adequate to stipulate to three or more prior countable convictions. Henningfield is not entitled to a new trial on this claim.

B. Any error in the colloquy was harmless.

Any error in the waiver is also harmless. An error is harmless if "it [is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189; *State v. Eison*, 2011 WI App 52, ¶ 11, 332 Wis. 2d 331, 797 N.W.2d 890.

The claimed error in this case went only to the charge of driving with a prohibited blood-alcohol concentration. See *State v. McAllister,* 107 Wis. 2d 532, 319 N.W.2d 865 (1982) (holding the number of a defendant's prior countable OWI

convictions is *not* an element of OWI). Wisconsin Stat. § 346.63(1)(c) provides that a person may be charged and the prosecution may proceed on both OWI and PAC. However, if the person is found guilty of both charges for acts arising out of the same occurrence, there may be only a single conviction. Wis. Stat. § 346.63(1)(c). Henningfield was convicted only of OWI. (35.) The number of convictions is not an element of OWI. Any error in the circuit court's colloquy regarding three or more prior countable convictions was, therefore, harmless beyond a reasonable doubt.

III. The doctrine of issue preclusion does not apply to the penalty scheme of Wis. Stat. § 346.65.

Lastly, Henningfield argues that the doctrine of issue preclusion bars the State from convicting him of OWI tenth. Henningfield notes he pled to and was convicted of OWI fifth immediately preceding this current prosecution. Based on that conviction, Henningfield argues that issue preclusion operates to bar the State from prosecuting him for OWI tenth.

A. The statutory sentencing scheme for OWI convictions precludes issue preclusion.

Wisconsin Stat. § 346.65(2)(am) establishes the sentencing scheme for OWI convictions. To determine whether issue preclusion may be applied to this statutory scheme, this Court must construe that statute. "The analytical framework for statutory interpretation is well-established. First, [courts] look to the statute's language, and if the meaning is plain, the inquiry typically ends there." *State v. Williams,* 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." In determining a statute's

plain meaning, the scope, context, structure, and purpose are important. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 45, 48, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). "A reviewing court may consider the statutory history as part of the context analysis." *Williams*, 355 Wis. 2d 581, ¶ 17 (citing *Richards v. Badger Mut. Ins. Co.,* 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581.

> The statutory history of Wis. Stat. § 346.65(2) reveals a general trend toward harsher mandatory minimum sentences as the number of OWIs *601 increases. The first version of § 346.65(2) distinguished between the first OWI and all subsequent OWIs. See Wis. Stat. § 346.65(2) (1957). In contrast, the current statute makes eight different OWI-offense distinctions and provides increasing penalties depending on the number of OWIs the offender has committed and, in some instances, on the temporal proximity of an offense to the offender's previous OWI.

Id. ¶ 30.

"The legislature's use of 'shall' in Wisconsin's OWI escalating penalty scheme . . . is mandatory. . . ." *Eau Claire v. Booth*, 2016 WI 65, ¶ 23, ___ Wis. 2d ___, ___ N.W.2d ___. "The central concept underlying the mandatory OWI escalating penalty scheme set forth in Wis. Stat. § 346.65(2)(am) is exposure to progressively more severe penalties for each subsequent OWI conviction as the number of countable convictions increases." *Id.* ¶ 24.

This mandatory sentencing scheme requires the sentencing court to determine the number of countable convictions for sentence enhancement. "[T]he proper time to determine the number of a defendant's prior convictions for sentence enhancement purposes is at sentencing. . . ." *State v. Matke*, 2005 WI App 4, ¶ 9, 278 Wis. 2d 403, 692 N.W.2d

265. The State need only prove countable prior convictions "by certified copies of conviction or other competent proof offered . . . before sentencing." *Id.* ¶ 6.

Issue preclusion is an equitable doctrine founded on principles of fundamental fairness. *See Kruckenberg v. Harvey*, 2005 WI 43, ¶ 52 n.42, 279 Wis. 2d 520, 694 N.W.2d 879. Henningfield's argument attempts to circumvent the mandatory sentencing scheme the legislature imposed on sentencing courts with an equitable doctrine. If adopted, his argument would permit OWI defendants to negotiate away prior countable convictions. Perhaps as he did in his last preceding conviction, a defendant might dispute whether certain prior convictions met the statutory standard for counting. The State might, for reasons unrelated to the legal question of whether the prior conviction counted, agree to charge and offer competent proof of fewer than the number of countable convictions. For instance, if the State would have a difficult time proving whether a defendant or some other person in the car was the driver, or whether the defendant became intoxicated after an accident, the State might agree to proceed on a charge with less exposure to the defendant in order to secure a plea and conviction that would count in the future.

This Court should not allow a principle arising out of common law equity to defeat a legislatively mandated sentencing scheme. It should reject Henningfield's argument that issue preclusion applies here on the basis that the statutory sentencing scheme forecloses arguments such as issue preclusion and estoppel.

B. Applying the analytical framework for issue preclusion requires rejection of Henningfield's claim.

"Issue preclusion addresses the effect of a prior judgment on the ability to re-litigate an identical issue of law or fact in a subsequent action." *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54 (*Mrozek II*) (citing *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995)). "In order for issue preclusion to be a potential limit on subsequent litigation, the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and be necessary to the judgment." *Id.* (citing *Town of Delafield v. Winkelman*, 2004 WI 17, ¶ 34, 269 Wis. 2d 109, 675 N.W.2d 470; *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993)). Whether an issue was actually litigated in a prior proceeding, making issue preclusion a potential limit on litigation in an individual case is a question of law, reviewed de novo. *Mrozek II*, 281 Wis. 2d 448, ¶ 15 (citation omitted).

If a court determines that the issue was actually litigated previously, and was necessary to the judgment, "the circuit court must then conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand." *Id.* ¶ 17 (citing *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 220-21, 594 N.W.2d 370 (1999)). A court considers any of the following factors that are relevant to its decision:

> (1) whether the party against whom preclusion is sought could have obtained review of the judgment; (2) whether the question is one of law that involves two distinct claims or intervening contextual shifts in the law; (3) whether there are apt to be significant differences in the quality or extensiveness of the two proceedings such that

> relitigation of the issue is warranted; (4) whether the burden of persuasion has shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) whether matters of public policy or individual circumstances would render the application of issue preclusion fundamentally unfair, including whether the party against whom preclusion is sought had an inadequate opportunity or incentive to obtain a full and fair adjudication of the issue in the initial litigation.

Id. ¶ 17 (citing *Michelle T.*, 173 Wis. 2d at 688-89, (citing Restatement (Second) of Judgments § 28 (1982))). "[T]he weight to be given each factor is within the sound discretion of the trial court." *State v. Hirsch*, 2014 WI App 39, ¶ 14, 353 Wis. 2d 453, 847 N.W.2d 192, (citing *Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 305, 592 N.W.2d 5 (Ct. App. 1998)).

"The burden is on the party asserting issue preclusion to establish that it should be applied." *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485 (citing *Paige K.B.*, 226 Wis. 2d at 219). "Whether issue preclusion is a potential limit on litigation in an individual case is a question of law, on which we give no deference to the circuit court's decision." *Mrozek II*, 281 Wis. 2d 448, ¶ 15 (citing *Heggy v. Grutzner*, 156 Wis. 2d 186, 192-93, 456 N.W.2d 845 (Ct. App. 1990)). "[W]hether the circuit court properly applied, or refused to apply, issue preclusion in an individual case is a discretionary decision." Id. ¶ 15 (citing *Paige K.B.*, 226 Wis. 2d at 219-23).

Henningfield relies on his guilty plea OWI, fifth offense, the conviction immediately preceding his current convictions, to establish application of issue preclusion. (40:4.) Actual litigation of an issue in a prior case is "[a]

threshold prerequisite for application of the doctrine" of issue preclusion. *Randall v. Felt*, 2002 WI App 157, ¶ 9, 256 Wis. 2d 563, 647 N.W.2d 373 (citation omitted). "An issue is 'actually litigated' when it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Id.* (quoting Restatement (Second) of Judgments § 27 (1982)).

Henningfield argues at some length that his guilty plea constitutes actual litigation of the issue that only five of his prior convictions are countable thus rendering this current conviction as a sixth. He primarily relies on this Court's decision in *Mrozek v. Intra Financial Corp.*, 2004 WI App 43, 271 Wis. 2d 485, 678 N.W.2d 264 (*Mrozek I).* He asserts that in *Mrozek I*, this Court held that a conviction resulting from a guilty plea constitutes actual litigation. He acknowledges that in *Mrozek II,* the Wisconsin Supreme Court reversed, in part, this Court's decision. *See Mrozek II*, 281 Wis. 2d 448, ¶ 43. However, he claims that the supreme court meant to limit *Mrozek II* to the facts before it. Thus, according to Henningfield, *Mrozek II* does not control his case. The State disagrees.

The *Mrozek* cases involved a complex series of business transactions which caused Mrozek to plead guilty to security fraud for failing to inform investors of material facts in connection with the sale of notes to finance a motel construction project. *Id.* ¶ 9 and n.4. Subsequent to her plea, Mrozek sued Mallery, the law firm she had employed for legal advice on the motel project, for malpractice in its legal representation of her. *Id.* ¶ 12. The circuit court granted Mallery's motion for summary judgment on Mrozek's claims "concluding that her guilty plea precluded her malpractice

claim against Mallery for any damages arising out of her criminal conviction." *Id.* This Court affirmed the circuit court's dismissal of Mallery's claims.[1] This Court concluded that a guilty plea constitutes "actual litigation" for the purposes of issue preclusion. *Mrozek I,* 271 Wis. 2d 485, ¶ 16-21.

The supreme court noted that "[w]e have never squarely confronted the question whether issue preclusion may apply as a consequence of a guilty plea. However, after reviewing a wide range of authorities, we conclude that issue preclusion is not available based on Mrozek's guilty pleas." *Mrozek II*, 281 Wis. 2d 448, ¶ 18 (footnote omitted). Quoting from a New Jersey case, the *Mrozek II* Court observed:

> [A guilty plea] represents the decision of the defendant "to forego such litigation and usually for reasons having little or nothing to do with the nature of the issues." . . . The motives for the State and a criminal defendant to make a plea agreement are many. The State may be seeking to conserve its scarce resources by avoiding a trial and a defendant may be attempting to secure his freedom or at least a reduced term of incarceration. Such reasons have little or nothing to do with the determination of the issues in the [later action].

Id. ¶ 21 (quoting *Prudential Prop. & Cas. Ins. Co. v. Kollar*, 578 A.2d 1238, 1240-41 (N.J. Super 1990)).

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[1] The circuit court dismissed all claims and this Court affirmed. The State addresses only Mrozek's claims against Mallery because the dismissal of only those claims implicate the doctrine of issue preclusion. *See Mrozek II*, 281 Wis. 2d 448, ¶ 16.

Henningfield's argument that *Mrozek II* does not control contains several flaws. He first rests his distinction that the *Mrozek II* decision allows this Court to independently decide his case on the fact that the question of Mallery's malpractice was not an essential element of the offense to which Mrozek pled. Henningfield's Br. at 40. But neither are the countable prior convictions an essential element of OWI. *State v. McAllister*, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982) (holding the offense of OWI consists of two elements: (1) driving or operating a motor vehicle, and (2) doing so while under the influence of an intoxicant.). *Accord Matke*, 278 Wis. 2d 403, ¶ 6.

More importantly, in *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), the Wisconsin Supreme Court held the court of appeals may not overrule, modify or withdraw language from its prior published decisions. Nor may this Court "dismiss a statement from an opinion by [the supreme court] by concluding that it is dictum. . . . By concluding that a statement in a supreme court opinion is dictum, the court of appeals necessarily withdraws or modifies language from that opinion, contrary to . . . *Cook.*" *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 57-58, 324 Wis. 2d 325, 782 N.W.2d 682. Thus, the *Mrozek II* Court's conclusion that a guilty plea does not "fulfill the 'actually litigated' requirement for issue preclusion," *Mrozek II*, 281 Wis. 2d 448, ¶ 21, is binding on this Court.

Lastly, the transcript of Henningfield's plea in the earlier case indicates that not only did he plead guilty to the OWI fifth charge but the circuit court relied on his admission of four prior convictions to determine the number of countable prior convictions. (40:6.) So to the extent Henningfield argues that the number of countable prior convictions was essential to his judgment of conviction, this

argument fares no better than his argument that the plea did not encompass an issue going to an essential element of OWI fifth.

It is true, as Henningfield points out, that the judgment of conviction at least implicitly "finds" he had only four prior countable convictions. But the legislatively mandated sentencing procedure encompassed in the OWI escalating penalty scheme envisions the sentencing court making a separate finding on the prior countable convictions each time a defendant is convicted and sentenced. That is the inevitable conclusion one must draw from the *Matke* Court's holding that "the proper time to determine the number of a defendant's prior convictions for sentence enhancement purposes is at sentencing, regardless of whether some convictions may have occurred after a defendant committed the . . . offense [on which the court pronounces sentence]." *Matke,* 278 Wis. 2d 403, ¶ 9.

CONCLUSION

For the reasons given above, this Court should affirm Henningfield's judgment of conviction for OWI tenth and the order denying his postconviction motion.

Dated at Madison, Wisconsin, this 15th day of August, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,018 words.

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Warren D. Weinstein
Assistant Attorney General

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Dated this 15th day of August, 2016.

_____
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