No. 17AP1261

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

JUSTIN A. BRAUNSCHWEIG,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Jefferson County Circuit Court,
The Honorable Randy R. Koschnick, Presiding,
Case No. 16CT412

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUES PRESENTED

1. Wisconsin law increases the potential penalties for recidivist drunk drivers based upon their number of prior convictions. Wis. Stat. § 346.65 (hereinafter "Penalty-Enhancement Statute"). This Court and the United States Supreme Court have held that prior convictions are not "elements" of a crime that the State need prove to a jury beyond a reasonable doubt. Is Braunschweig's prior drunk-driving conviction an "element" that the State must prove to a jury beyond a reasonable doubt?

The circuit court and Court of Appeals answered no.

2. Any "unvacated adjudication of guilt" counts as a prior conviction under the Penalty-Enhancement Statute. The court never vacated Braunschweig's prior drunk-driving conviction. Did the circuit court erroneously consider Braunschweig's prior conviction at sentencing?

The circuit court and Court of Appeals answered no.

3. The State may prove the existence of a prior drunk-driving conviction with any competent proof. Courts have repeatedly held that certified Wisconsin Department of Transportation (DOT) records are competent proof of the information they contain. The State submitted to the court Braunschweig's certified DOT driving record, which showed his prior conviction. Did the circuit court err in relying on it to conclude that Braunschweig had a prior conviction?

The circuit court and Court of Appeals answered no.

INTRODUCTION

Justin A. Braunschweig injured someone while driving while intoxicated in 2011 in Jackson County. Just five years later, in 2016, a police officer arrested Braunschweig in Lake Mills for driving while intoxicated with an alcohol concentration of 0.16. Like many States, Wisconsin enhances the penalties for drunk-driving recidivists based on their number of prior convictions. Wis. Stat. § 346.65. The State charged Braunschweig for a second offense, which exposed him to misdemeanor penalties instead of monetary forfeitures. Because the Jackson County circuit court had expunged its record of the prior conviction under Wisconsin's expunction statute, *id.* § 973.015, the State instead submitted to the court Braunschweig's certified DOT driving record showing the 2011 conviction. The court sentenced Braunschweig to pay a $400 fine and spend 30 days in jail as a repeat offender under Section 346.65.

The sentencing court did not erroneously exercise its discretion. This Court has definitively and correctly rejected any argument that the State must prove prior convictions to a jury under the Penalty-Enhancement Statute. *State v. McAllister*, 107 Wis. 2d 532, 319 N.W.2d 865 (1982); *see also Almendarez-Torres v. United States*, 523 U.S. 224 (1998). And the plain terms of the Penalty-Enhancement Statute allow a sentencing court to consider an expunged conviction. The statute counts any "unvacated adjudication of guilt," Wis. Stat. § 340.01(9r), and expunction does not vacate a

conviction, *compare id.* § 973.015, *with id.* § 974.06. Indeed, the expunction statute itself requires the DOT to keep records of expunged drunk-driving convictions—a provision that cannot be squared with Braunschweig's theory that expunction means the conviction no longer exists. *See id.* §§ 973.015(1m)(a); 343.23(2)(a). Finally, certified DOT records are "competent" proof, *McAllister*, 107 Wis. 2d at 539, of prior convictions at sentencing. *See State v. Van Riper*, 2003 WI App 237, ¶ 21, 267 Wis. 2d 759, 672 N.W.2d 156.

ORAL ARGUMENT AND PUBLICATION

By granting Braunschweig's petition for review, this Court has indicated that the case is appropriate for publication. Oral argument is scheduled for October 12, 2018, at 9:45 a.m.

STATEMENT OF THE CASE

A. Legal Background

1. Wisconsin's Drunk-Driving Laws

Drunk driving in Wisconsin is a hundred-year-old problem. Wisconsin has prohibited intoxicated driving since 1911. Wis. Stat. § 1636-49 (1911); *see also* Thomas J. Hammer, *Offense Definition in Wisconsin's Impaired Driving Statutes*, 69 Marq. L. Rev. 165, 166 n.2 (1986). Nevertheless, numerous people continue to drive under the influence. Wisconsin has a long history of "carnage due to drunken driving." Bill Lueders, *Why Wisconsin Has Weak Laws on Drunken Driving*, Urban Milwaukee (Nov. 10, 2014),

https://perma.cc/5PSW-7TAM. Between 2003 and 2012, over 2,500 people died in crashes involving drunk drivers. Ctr. for Disease Control, *Sobering Facts: Drunk Driving in Wisconsin* (2014), https://perma.cc/FX85-GK8P. A far higher percentage of adults in Wisconsin report driving drunk compared with the national average, and the fatality rate for all age groups exceeds the national average. *Id.* One report estimated that, in addition to the invaluable lives lost, the annual cost of "incidents related to excessive alcohol" is $6.8 billion. *Lawmaker: "Dirty secret" put brakes on Wisconsin DUI legislation*, CBS News (Oct. 9, 2015), https://perma.cc/65U7-B42J.

Many drunk drivers are repeat offenders. In fact, drunk drivers are the most common "speciali[st]" recidivists. Wis. Dep't of Corrections, *Recidivism after Release from Prison* 14 (Aug. 2016), https://perma.cc/AL6A-Z2AG. Someone with even one operating-while-intoxicated (OWI) arrest is seven times more likely to be arrested for another OWI in a given year than an individual without such an arrest. D. Paul Moberg & Daphne Kuo, *Five Year Recidivism after Arrest for Operating While Intoxicated: A Large-scale Cohort Study* 8 (Apr. 2017), https://perma.cc/L6NV-X7SU.

Responding to this phenomenon, the Legislature instituted "[e]nhanced penalty provisions for multiple OWI offenses" in 1929, under a statute that punished repeat offenses generally. *State v. Wideman*, 206 Wis. 2d 91, 100 n.12, 556 N.W.2d 737 (1996) (citing Wis. Stat. § 85.91(3)

(1929–30)). In 1950, the Legislature decided to exclude motor-vehicle offenses from the "general repeater scheme" because of the "large number of repeat motor vehicle offenses and the danger posed to the public by such offenses," *id.* at 101, and added minimum penalties for OWI offenses in 1953, *id.* at 100.

Wisconsin statutes, as relevant here, prohibit driving under the influence of an intoxicant, Wis. Stat. § 346.63(1)(a), driving with a prohibited alcohol concentration, *id.* § 346.63(1)(b), and injuring someone by driving while intoxicated, *id.* § 346.63(2)(a); outline the penalties for violating those laws, *id.* § 346.65; and provide definitions for "words" and "phrases" in Chapter 346, *id.* § 340.01.

Wis. Stat. § 346.63(1) and (2)(a), as relevant here, outline the prohibited acts. Section 346.63(1) states that "[n]o person may drive or operate a motor vehicle while . . . [u]nder the influence of an intoxicant," *id.* § 346.63(1)(a), or with a "prohibited alcohol concentration," *id.* § 346.63(1)(b). A prosecutor may charge someone with both offenses "for acts arising out of the same incident or occurrence," but convictions under subsections (a) and (b) arising out of the same incident or occurrence count as only one conviction for purposes of the Penalty-Enhancement Statute. *Id.* § 346.63(1)(c). Section 346.63(2)(a) makes it unlawful for "any person to cause injury to another person by the operation of a vehicle" while under the influence, with a prohibited alcohol

concentration, or with a "detectable amount of a restricted controlled substance in his or her blood."

The Penalty-Enhancement Statute increases the minimum and maximum potential penalties for people who violate Wis. Stat. § 346.63(1) based on their conviction history and some other factors. Someone who violates Wis. Stat. § 346.63(1) "[s]hall forfeit" between $150 and $300,[1] unless they have two or more "convictions counted under s. 343.307(1)," as relevant here, within a "10-year period." *Id.* § 346.65(2)(am); *see also id.* § 343.307(1)(a). Section § 343.307(1) states that convictions under Wis. Stat. § 346.63(1) and § 346.63(2) "count" for purposes of "determin[ing] the penalty under" Wis. Stat. § 346.65(2)(am). If he has two total convictions, the court must impose a fine between $350 and $1,100 and sentence him to imprisonment for a period between five days and six months. *Id.* § 346.65(2)(am)2. Someone with three total convictions receives a fine between $600 and $2,000 and imprisonment in county jail for between 45 days and one year. *Id.* § 346.65(2)(am)3. If a defendant has four or more total convictions, he is guilty of a felony. *Id.* § 346.65(2)(am)4–7. A defendant with four total convictions "shall be fined no less than $600 and imprisoned for not less than 60 days." *Id.*

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[1] Wisconsin is the only State where a first OWI violation is not a misdemeanor or felony. Nina Kravinsky, *Wisconsin DUI policies lag behind other states' in severity*, Badger Herald (Dec. 4, 2014), https://perma.cc/E3HZ-X768.

§ 346.65(2)(am)4. The penalties again increase incrementally at five, seven, and ten total convictions. *Id.* § 346.65(2)(am)5–7. The Penalty-Enhancement Statute also enhances the penalties if, for example, there was a passenger under 16 years of age at the time of the violation, *id.* § 346.65(2)(f), or if the person convicted had three or more convictions and an alcohol concentration over 0.17, *id.* § 346.65(2)(g)1 (doubling the minimum and maximum fines).

Wis. Stat. § 340.01 defines "words and phrases" that appear in Chapter 346, such as "[v]ehicle" and "[a]lcohol concentration." *Id.* § 340.01(1v), (74). As relevant here, it defines a "conviction," for the purposes of the Penalty-Enhancement Statute, as "an unvacated adjudication of guilt." *Id.* § 340.01(9r). It also defines the "prohibited alcohol concentration" under Wis. Stat. § 346.63(1)(b) to be 0.08 if the person has two or fewer prior OWI convictions but 0.02 if the person has three or more. *Id.* § 340.01(46m). The 0.08 and 0.02 figures correspond to the "number of grams of alcohol per 210 liters of a person's breath." *Id.* § 340.01(1v)(b).

2. Expunction

Wis. Stat. § 973.015 gives courts discretion to expunge the court's records of young offenders' convictions for less serious crimes.[2] If a person is under 25 years old when he

[2] This Court appears to prefer "expunction" instead of "expungement." *See State v. Matasek*, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811; S. Ct. R. 72.06.

commits a crime for which the maximum period of imprisonment is six years or less, the "court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition." Wis. Stat. § 973.015(1m)(a)1.[3] If the court orders expunction, the clerk of court seals the case file and destroys the court records for that case. *State v. Allen*, 2017 WI 7, ¶ 9, 373 Wis. 2d 98, 890 N.W.2d 245 (citing S. Ct. R. 72.06). Section 973.015 exists to provide a break to young offenders who demonstrate the ability to comply with the law and "shield [them] from some of the harsh consequences of criminal convictions." *State v. Hemp*, 2014 WI 129, ¶ 20, 359 Wis. 2d 320, 856 N.W.2d 811. One such benefit is that the individual can present himself to society, including "future employers," without the mark of a "past wrongdoing." *Id.* ¶ 19. The purpose is not to "erase all memory of a defendant's expunged conviction." *State v. Allen*, 2015 WI App 96, ¶ 17, 366 Wis. 2d 299, 873 N.W.2d 92, *affirmed* 2017 WI 7; *see also* Frequently Asked Questions, Wis. Cir. Ct. Access (Question 2i), https://perma.cc/DE4S-JPNX.

Indeed, the expunction statute specifically permits the DOT to keep "information" about expunged "conviction[s]"

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[3] Although not relevant to this appeal, a juvenile delinquent can petition the court upon reaching age 17 to expunge the court's records. Wis. Stat. § 938.355(4m). A court may also expunge records of a conviction if a person commits a criminal sex act as a victim of human trafficking. *Id.* § 973.015(2m)(a).

outlined in Wis. Stat. § 343.23. Wis. Stat. § 973.015(1m)(a)1. Section 343.23(2)(a) requires the DOT to "maintain a file for each licensee . . . containing . . . [an] abstract of convictions" and, *inter alia*, "a record of any reportable accident in which the person [was] involved." The secretary may use this "complete operator's record" to determine whether to suspend or revoke a person's operating privileges "in the interest of public safety." *Id.* § 343.23(2)(b). In addition, the DOT must "upon request furnish any person a[ ] [certified] abstract of the operating record of any person." *Id.* § 343.24(1). Although some private individuals need to pay fees to search these records, "law enforcement agenc[ies], [ ] state authorit[ies], [ ] district attorney[s]" and "federal governmental agenc[ies]" can search free of charge "to perform a legally authorized function." *Id.* § 343.24(4)(c)1.

3. Vacatur

Vacatur invalidates a conviction, or, in other words, removes the fact that the individual was convicted. *State v. Henley*, 2010 WI 97, ¶ 51, 328 Wis. 2d 544, 787 N.W.2d 350; *see also Vacate*, Black's Law Dictionary (10th ed. 2014). A Wisconsin court can vacate someone's conviction in limited circumstances. A court "shall vacate and set [a criminal] judgment aside" if, upon a defendant's postconviction motion, it "finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law . . . , or that there has been such a denial or infringement of the

constitutional rights of the person as to render the judgment vulnerable to collateral attack." Wis. Stat. § 974.06(d). A court may also vacate a conviction for prostitution, *id.* § 944.30, if that person was a "victim of trafficking for the purposes of a commercial sex act," *id.* § 973.015(2m)(a).

Vacatur does not hide the case from public view or destroy all of the court's related records. The case remains publicly available on the Wisconsin Circuit Court Access website. *See generally* FAQ, *supra* (Question 7b); *see also* S. Ct. R. 72.01. And the Supreme Court Rules governing court-record retention do not mention that records of vacated convictions must be treated differently. *See* S. Ct. R. 72.01.

B. Facts & Procedural History

On September 2, 2016, at around 1:00 a.m., Officer Fritsche noticed a pick-up truck driving over the center line before swerving back into the proper lane in Lake Mills, Wisconsin. R.1:2. The officer initiated a traffic stop. The stop and subsequent evidentiary breath test revealed that Braunschweig, the driver, had an alcohol concentration of 0.16. R.1:2.

The State charged Braunschweig with two misdemeanors for violating Section 346.63(1)(a) by driving under the influence and violating Section 346.63(1)(b) for having a prohibited alcohol concentration of 0.08 or more. R.1:1; R.2–3. The criminal complaint mentioned that, because this was his "second offense," he would be subject to

a penalty between $350 and $1,100 and five days to six months in prison. R.1:1 (citing Wis. Stat. § 346.65(2)(am)2). In 2011, the court convicted Braunschweig in Jackson County circuit court of violating Wis. Stat. § 346.63(2)(a)1 for "caus[ing] injury to another person by the operation of a vehicle" while under the influence of an intoxicant. R.14:6; R.33:15. The maximum penalty for that offense was one year of imprisonment. *See* Wis. Stat. § 346.65(3m). Braunschweig was 23 years old at the time of the offense. *See* R.14:5–6. Thus, the offense was eligible under the expunction statute, and the court ordered its records expunged under Section 973.015. R.14:1. Of course, Section 343.23 required the Wisconsin DOT to maintain a record of this conviction as part of Braunschweig's driving abstract. R.1:3; R.14:5–6. The State submitted Braunschweig's certified "Driving Record" from the DOT, signed by the Administrator of the Division of Motor Vehicles with the "official [DOT] Seal," showing the date, statute, and case number for the 2011 conviction. R.14:4–6.

Braunschweig made two arguments about his 2011 conviction to the circuit court before trial, and the court rejected both. First, he contended that his 2011 conviction should not count under the Penalty-Enhancement Statute because the court expunged its records under Section 973.015. R.13. But Braunschweig admitted that the prior conviction occurred and conceded that the DOT record was a "reliable [source adequate] to prove the existence of the

conviction." App. 4, 6. The circuit court rejected his motion, holding that the expunction statute, Wis. Stat. § 973.015, did not prevent the State from using the certified DOT record to prove the existence of prior OWI convictions. App. 10 (citing *Van Riper*, 2003 WI App 237). Second, Braunschweig argued that his prior OWI conviction was an element of the crime that the State had to prove to the trier of fact beyond a reasonable doubt. R.19:2; R.33:3. The court held that the prior OWI conviction was not an element of the offense; rather, it was a "determination" that a court would make before trial. R.33:13. The court did not decide the State's burden of proof for such a conviction but held that the State's proof "satisf[ied] [ ] the beyond a reasonable doubt standard." R.33:16. It then determined that the State had proven both misdemeanors beyond a reasonable doubt, R.33:38, and sentenced Braunschweig to pay a $400 fine and serve 30 days in jail, R.24:1.[4]

The Court of Appeals affirmed the circuit court's decision in a single-judge opinion. App. 16–17. Braunschweig repeated his argument that his prior OWI conviction should not count under the Penalty-Enhancement Statute because it was later expunged.[5] The court, applying *State ex rel. Kalal*

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[4] The circuit court stayed the sentence pending this appeal. App. 18 n.4.

[5] Braunschweig conceded that *State v. McAllister*, 107 Wis. 2d at 532–33, which held that a prior conviction in OWI second-offense cases is not an element that must be proved to the trier of fact, controlled his case. App. 17 n.2.

v. Circuit Court for Dane Cty., 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, concluded that the plain meaning of the pertinent statutes indicated that a conviction expunged under Section 973.015 remained a "conviction" within the meaning of the Penalty-Enhancement Statute. App. 20. First, Wis. Stat. § 340.01(9r), which defined the "words and phrases" in the statute, stated that prior convictions included all "unvacated adjudication[s] of guilt." App. 21–22. Second, Section 973.015, the expunction statute, does not "vacate" or "invalidate" the conviction. App. 23. To the contrary, the expunction statute by its own terms requires the DOT to keep record of the OWI conviction, Wis. Stat. § 973.015, and the DOT must provide that information free of charge to any law enforcement or state authority, *id.* § 343.24. App. 25–27. Thus, the circuit court "permissibly considered the fact of Braunschweig's prior conviction from a certified DOT record that DOT was statutorily authorized to maintain." App. 27.

STANDARDS OF REVIEW

This Court reviews questions of statutory interpretation de novo, *Wisconsin Department of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶ 26, 299 Wis. 2d 561, 729 N.W.2d 396, and sentencing decisions under the erroneous-exercise-of-discretion standard, *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

SUMMARY OF ARGUMENT

I. The Sixth and Fourteenth Amendments to the United States Constitution require the State to prove to a jury beyond a reasonable doubt all "elements" of a defendant's crime that increase the potential maximum sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000). Prior convictions, however, are not an "element" of a defendant's crime even if they increase the potential maximum sentence. *Almendarez-Torres*, 523 U.S. 224. This exception is rooted mainly in historical understanding and practice. The founding generation considered recidivism "[un]relate[d] to the commission of the offense" and relevant to "punishment only." *Id.* at 243–44 (citation omitted). Prior convictions did not affect the lawfulness of the defendant's conduct in the proceedings at hand. In addition, prior convictions were already subject to the judicial process.

This Court, consistent with *Apprendi* and *Almendarez-Torres*, has held that prior convictions under the Penalty-Enhancement Statute are not "elements" that the State must prove to a jury beyond a reasonable doubt. *McAllister*, 107 Wis. 2d at 532–33. The statute implicates recidivism, the most "typical" sentencing factor. *Almendarez-Torres*, 523 U.S. at 230. The prior conviction does not affect whether the defendant's conduct is unlawful in the instant offense. Moreover, due process requires only "the most basic procedural safeguards," and the United States Supreme Court gives state legislatures "wide leeway" to define the

elements of criminal offenses and to divide responsibility between the judge and jury in criminal cases. *McAllister*, 107 Wis. 2d at 539.

Here, as Braunschweig forthrightly concedes, his prior conviction is not an "element" of his crime. Opening Br. 4–5. The statute implicates recidivism, the most typical sentencing factor. Braunschweig's conduct—driving with an alcohol concentration of 0.16—was unlawful even without his prior conviction. Braunschweig makes no constitutional arguments, nor does he provide any "special justification" to overrule this Court's correct decision in *McAllister*. *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶¶ 94–100, 264 Wis. 2d 60, 665 N.W.2d 257.

II. The text makes clear that expunged convictions still count for purposes of the Penalty-Enhancement Statute. Section 340.01(9r), which defines the "words" in the statute, states that a "[c]onviction . . . means an *unvacated* adjudication of guilt." *Id.* (emphasis added). Vacatur is a legal term of art with a "special definitional meaning." *See Kalal*, 2004 WI 58, ¶ 45. In Wisconsin, an offender can ask a court to vacate his conviction under Wis. Stat. § 974.06 if the court did not have jurisdiction or the law did not authorize the sentence. Vacatur is not equivalent to expunction. Expunction, unlike vacatur, has nothing to do with the validity of the conviction. It merely requires the clerk of court to make court records related to the conviction invisible to the public. Wis. Stat. § 973.015. This courtesy exists to help

young offenders reintegrate into society: for example, by making it more difficult for employers to find out about the conviction. *Allen*, 2017 WI 7, ¶ 42. Vacatur, on the other hand, does not affect the court's retention of the case records.

A contrary interpretation would "contravene [the very] purpose" of the Penalty-Enhancement Statute: to punish those who repeatedly endanger Wisconsin citizens by driving drunk. *See Kalal*, 2004 WI 58, ¶ 49. Courts have consistently held that expunged convictions count under various penalty-enhancing statutes. *See, e.g.*, *United States v. Dyke*, 718 F.3d 1282, 1292 (10th Cir. 2013) (Gorsuch, J.). A defendant who recidivates after the "fresh start" provided by the court's grace has "manifestly rejected" the benefits of expunction "by his own conduct." *Id.* at 1292–93. Indeed, this Court held in *State v. Leitner*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, that a sentencing court could rely properly on information about a prior conviction from a number of non-court sources including prosecutors' offices, the Department of Transportation, the Department of Corrections, and public defenders' offices. *Id.* ¶¶ 28, 29, 38, 48.

III. The State satisfies due process when it proves prior convictions by a preponderance of the evidence, especially when those prior convictions do not drastically increase the potential sentence in absolute and relative terms. *United States v. Watts*, 519 U.S. 148, 156 & n.2 (1997) (per curiam). Increases of fewer than five years are generally not drastic. *See United States v. Lombard*, 72 F.3d 170, 186 & n.23 (1st

Cir. 1995); *United States v. Galloway*, 976 F.2d 414, 424–26 (8th Cir. 1992) (en banc); *compare United States v. Jordan*, 256 F.3d 922, 929 (9th Cir. 2001).

Here, a preponderance standard satisfies due process. Braunschweig's prior conviction increased his potential sentence by only six months. Wis. Stat. § 346.65(2)(am)1–2. And the State's submission of Braunschweig's certified DOT driving abstract proved the existence of his prior conviction by a preponderance of the evidence.

IV. "[A] *certified* DOT driving record is [certainly] admissible and sufficient to prove the status of an alleged repeat offender" under the Penalty-Enhancement Statute beyond a reasonable doubt. *Van Riper*, 2003 WI App 237, ¶ 16. This Court has repeatedly approved of sentencing courts' reliance on DOT records. *Wideman*, 206 Wis. 2d at 95–96; *State v. Spaeth*, 206 Wis. 2d 135, 153, 556 N.W.2d 728 (1996).

Here, Braunschweig's "certified DOT driving record" undisputedly proved the existence of his prior conviction beyond a reasonable doubt. *See Van Riper*, 2003 WI App 237, ¶ 16. It contained detailed identifying information about Braunschweig and his prior conviction, the signature of the Administrator of the Division of Motor Vehicles, and the DOT's "official Seal." R.14:4–6.

ARGUMENT

I. A Prior OWI Conviction Is Not An Element Of The Offense That Needs To Be Proven To A Jury Beyond A Reasonable Doubt

A. In any criminal case, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury," U.S. Const. amend. VI, and the State may not deprive the defendant of liberty without "due process of law," *id.* amend. XIV, § 1. "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Courts have traditionally given legislatures leeway to define the "elements" of particular crimes, such as the defendant's intent. *Id.* at 480. "[D]uring the years surrounding our Nation's founding," the law "annexed" a particular sentence, not a range of sentences, "to the crime." *Id.* at 478–79. The defendant was on notice of his potential fate at the time of the indictment, and the judge had very little discretion at sentencing. *Id.* During the 19th century, this country went from "statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Id.* at 481. Legislatures wanted judges to issue individualized sentences to "fit the offender and not merely the crime," taking personal characteristics and other relevant information into account. *Williams v. New York*, 337 U.S.

241, 247 (1949). Although judges used facts not proven to a jury beyond a reasonable doubt to set a sentence within that range, this was constitutionally permissible because the sentence was fully supported by the jury's "verdict" of guilt. *Apprendi*, 530 U.S. at 482–83.

In *Apprendi*, the Supreme Court confronted a "novel[ ] . . . legislative scheme," where a judge could find facts that "expose[d] the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*; *see United States v. Booker*, 543 U.S. 220, 237 (2005). The New Jersey statute at issue doubled the maximum punishment for a firearms offense if the trial judge found, by a preponderance of the evidence, that the defendant committed it with "a biased purpose to intimidate" because of "race, color, gender, handicap, religion, sexual orientation, or ethnicity." *Apprendi*, 530 U.S. at 469–70, 495. The Court determined that this statute effectively allowed the judge to find an "element" of the firearms crime that is within the jury's provenance. *Id.* at 495–96. "New Jersey's biased purpose inquiry goes precisely to what happened in the commission of the [instant] offense." *Id.* at 496 (citation omitted). Indeed, "[t]he defendant's intent" is "as close as one might hope to come to a core criminal offense element." *See id.* at 493. In addition, the statute created a "differential" in punishment of "constitutional significance." *Id.* at 495. It "doubl[ed]" the potential sentence by ten years and attached a "more severe

stigma" for committing a hate crime. *Id.* at 495. As a result, New Jersey's "procedure" was "an unacceptable departure from the jury tradition" and therefore unconstitutional. *Id.* at 497.

The United States Supreme Court has held, however, that a prior conviction is not an "element" of a crime that the State must prove to a jury beyond a reasonable doubt. *Id.* at 487–88; *Almendarez-Torres*, 523 U.S. 224.[6] In *Almendarez-Torres*, a federal statute increased the maximum penalty for illegally reentering the United States from two to twenty years if the defendant had been deported as a result of a prior conviction for an "aggravated felony." 523 U.S. at 226, 235–36 (citing 8 U.S.C. § 1326). The defendant claimed this statute violated his due-process rights to have "recidivism," as an "element of the offense," included in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 239–40. The Court disagreed. First, the statute "does not relate to the commission of the offense itself," *id.* at 243–44 (citation omitted); *id.* at 246, unlike the New Jersey statute at issue in *Apprendi*, 530 U.S. at 496. The "conduct," illegally reentering the United States, is "independently unlawful"—"[even]

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[6] The Court noted in *Apprendi* that "it is arguable that *Almendarez-Torres* was incorrectly decided," *see* 530 U.S. at 489–90, but it has repeatedly declined to overrule or modify it, *Dretke v. Haley*, 541 U.S. 386, 395–96 (2004); *Shepard v. United States*, 544 U.S. 13, 25–26 & n. 5 (2005). In fact, the Court has denied "hundreds, if not thousands, of certiorari petitions asking [it] to . . . reconsider *Almendarez-Torres*." Brent E. Newton, Almendarez-Torres *and the* Anders *Ethical Dilemma*, 45 Hous. L. Rev. 747, 786 (2008).

absen[t] [ ] the [prior conviction for an aggravated felony]." *Almendarez-Torres*, 523 U.S. at 230, 244; *see also* 8 U.S.C. § 1326(a). Second, the statute punishes recidivists, those who commit multiple crimes, perhaps "the most traditional" basis for enhancing sentences. *Almendarez-Torres*, 523 U.S. at 230, 243–44. Recidivism, the Court said, "is as typical a sentencing factor as one might imagine." *Id.* at 230. Third, the prior "conviction" is the result of a proceeding with "procedural safeguards" of its own. *Apprendi*, 530 U.S. at 488. Especially when defendants do not "challenge" the "fact [of prior conviction]," judicial fact-finding does not implicate the Sixth Amendment and due process concerns to the same degree. *Id.* Fourth, an increase in the "maximum permissive sentence" still allows judges to exercise discretion at sentencing. *Almendarez-Torres*, 523 U.S. at 244–45; *cf. McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (approving of a statute imposing a mandatory minimum). Finally, Congress has the "constitutional power" to define the elements of a crime and to choose sentencing factors. *Almendarez-Torres*, 523 U.S. at 246. There was no "reason . . . to think Congress intended to 'evade' the Constitution" by treating recidivism as a sentencing factor. *Id.* Thus, judges could use prior convictions to "increase punishment" significantly above the statutory range prescribed for the instant offense. *Id.* at 228.[7]

[7] The dissenting Justices in *Almendarez-Torres* disagreed with the majority's interpretation of the statute, 8 U.S.C. § 1326. They argued

This Court has interpreted the Wisconsin Constitution consistently with the United States Supreme Court's interpretation of the Sixth Amendment in general and on the prior-conviction issue in particular. *See McAllister*, 107 Wis. 2d at 538; *see also State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (Sixth Amendment right to counsel); *State v. Burns*, 112 Wis. 2d 131, 141–44, 332 N.W.2d 757 (1983) (confrontation right).[8] In *McAllister*, the State charged a defendant with violating Wis. Stat. § 346.63(1)(a) by

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that, unlike the Wisconsin Legislature with the Penalty-Enhancing Statute, *see McAllister*, 107 Wis. 2d at 533–36, Congress intended to make illegal reentry after an "aggravated felony," 8 U.S.C. § 1326(b), a "substantive offense" separate from illegal reentry without a felony conviction, *id.* § 1326(a). 523 U.S. at 262–70 (Scalia, J., dissenting). Subsection (a) stated that "[s]ubject to subsection (b)[,] any alien who [has been deported and thereafter reenters the United States] . . . shall be . . . imprisoned not more than 2 years." *Id.* at 263. Subsection (b) stated that "[n]otwithstanding subsection (a)[,] . . . any alien" who was deported "subsequent to a conviction for commission of an aggravated felony . . . shall be . . . imprisoned not more than 20 years." *Id.* at 264. "[A]ll agree[d]" that subsection (a) "define[d] a substantive offense" and subsection (b) had a "parallel structure." *Id.* at 264. In addition, the "opening phrase of subsection (b)"—"[n]otwithstanding subsection (a)"—did "not indicate that what follows merely supplements or enhances the penalty provision of subsection (a)." *Id.* In fact, the word "notwithstanding" meant that subsection (b) did not apply to any alien convicted under subsection (a), "which is what one would expect if the provision was merely increasing the penalty for certain subsection (a) convictions." *Id.* Each subsection's reference to the other is simply the "logical way" of indicating the relationship between "two separate crimes." *Id.* at 265 n.5 (quoting *United States v. Forbes*, 16 F.3d 1294, 1298 (1st Cir. 1994) (Breyer, J.)).

[8] Braunschweig does not make any constitutional arguments. *See* Opening Br. 4; Pet. for Review 8.

operating while intoxicated.[9] The defendant had two prior OWI violations, *McAllister*, 107 Wis. 2d at 533, which made him eligible for higher penalties under the Penalty-Enhancement Statute. This Court rejected his constitutional challenge, *id.* at 533, holding that the prior OWI convictions, whether "civil or criminal," were not "elements" that the State had to prove to a jury beyond a reasonable doubt. *Id.* at 538. As an initial matter, courts have "[t]raditionally" let legislatures define the elements of particular crimes. *Id.* at 539; *State v. Warbelton*, 2009 WI 6, ¶ 22, 315 Wis. 2d 253, 759 N.W.2d 557. The Penalty-Enhancement Statute clearly did "not define a[ ] [new] offense" or "change[ ] the nature of the crime." *McAllister*, 107 Wis. 2d at 537 (citations omitted). McAllister's conduct—operating a motor vehicle while intoxicated—was unlawful whether he had a prior conviction or not. *Id.* at 536; *Almendarez-Torres*, 523 U.S. at 230, 244.

In addition, the Penalty-Enhancement Statute is a typical recidivist statute that does not violate the requirements of due process. *McAllister*, 107 Wis. 2d at 538–39; *see Apprendi*, 530 U.S. at 496; *Almendarez-Torres*, 523 U.S. at 230. The Supreme Court allows States "wide leeway" "in administering [recidivist] statutes and in dividing responsibility between the judge and jury in criminal cases."

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[9] This case involved an earlier version of the Penalty-Enhancement Statute. 107 Wis. 2d at 535 n.4. As discussed *infra* pp. 28–30, the statute is similar to the version at issue in this case in all material respects. *Compare* Opening Br. 11.

McAllister, 107 Wis. 2d at 539 (citing *Spencer v. Texas*, 385 U.S. 554, 560 (1967)). Courts do not interfere unless the scheme violates the "most basic procedural" requirements of due process. *Id.* The Penalty-Enhancement Statute met those requirements. The prior OWI "convictions have already been determined in the justice system and the defendant was protected by his rights in those actions." *Id.* at 539; *Apprendi*, 530 U.S. at 488; *see also Schindler v. Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983) (upholding use of civil license forfeiture in prior DWI case to enhance penalties for subsequent DWI offenses), *cert. denied*, 465 U.S. 1068 (1984). The defendant had another opportunity to challenge their existence "before the judge prior to sentencing." *McAllister*, 107 Wis. 2d at 539. A system where the jury would have to hear "evidence of the triggering . . . convictions" would "interfere with the fact-finding process and intrude on judicial discretion by allowing the jury to rule on punishment, an area exclusively within the province of the judge." *Id.* Thus, as with most sentencing facts, the State could prove prior OWI convictions by "competent proof" "to the satisfaction of the judge." *Id.* at 536, 539.

In a very narrow subset of drunk-driving cases, however, prior OWI convictions are "elements" of the crime because the defendant's conduct is not illegal unless they exist. *State v. Alexander*, 214 Wis. 2d 628 (1997); *compare McAllister*, 107 Wis. 2d at 536; *Almendarez-Torres*, 523 U.S. at 244. Specifically, a defendant's "alcohol concentration"

between 0.02 and 0.08 is "prohibited" under Wis. Stat. § 346.63(1)(b) only if he has three or more prior convictions. *See* Wis. Stat. § 340.01(46m); *see also Alexander*, 214 Wis. 2d at 640–41. If the defendant disputes the existence of the convictions, the State must prove them to a jury beyond a reasonable doubt. *Compare Alexander*, 214 Wis. 2d at 645, 652.

Many States agree that prior convictions are not "elements" of a crime that the State need prove to a jury beyond a reasonable doubt. For example, the Kansas Supreme Court approved of a driving-under-the-influence (DUI) penalty-enhancement scheme similar to Wisconsin's. *Kansas v. Kendall,* 58 P.3d 660, 667–68 (Kan. 2002). The defendant's two prior DUI convictions changed his instant DUI offense "from a misdemeanor to a felony" and increased the maximum penalties. *Id.* at 667 (citing Kan. Stat. Ann. 1999 Supp. 8-1567(a)). He argued that, because the jury did not find the existence of his prior convictions beyond a reasonable doubt, his sentence violated his Sixth and Fourteenth Amendment rights. The court held, like this Court did in *McAllister*, that the prior conviction was not an "element" of the crime. *Id.* at 667–68 (citing *Apprendi* and *Almendarez-Torres*). As another example, the Indiana Supreme Court held that the Constitution did not require the State to prove the fact of a prior conviction to a jury beyond a reasonable doubt in order for the court to impose a ten-year sentencing enhancement for repeat sex offenses under

Indiana Code § 35-50-2-14. *Smith v. State*, 825 N.E.2d 783, 789 (Ind. 2005). The court discussed *Almendarez-Torres*, *Apprendi*, and the "almost total consensus" post-*Apprendi* "that due process and the Sixth Amendment do not require a jury determination to impose a recidivist sentencing enhancement." *Id.* (citing *United States v. Skidmore*, 254 F.3d 635, 642 (7th Cir. 2001)). The Louisiana Supreme Court similarly held that a misdemeanor predicate that increased the maximum sentence for a marijuana-possession conviction did not violate the defendant's Sixth and Fourteenth Amendment rights. *Louisiana v. Jefferson*, 26 So. 3d 112, 117 (La. 2009). The defendant argued that the court should not be able to use the prior misdemeanor conviction because he had no right to a jury trial for that offense. In his view, one of the "procedural safeguards" that justified the exception for prior convictions in *Almendarez-Torres* was absent. *Id.* at 118–20. The court disagreed. "[I]t makes little sense to conclude" that a judgment of criminality "fair and reliable enough" to impose criminal penalties in the first instance would later be "constitutionally inadequate for later use to establish the defendant's recidivism." *Id.* at 120; *see also Apprendi*, 530 U.S. at 488; *Schindler*, 715 F.2d at 347; *McAllister*, 107 Wis. 2d at 539.

B. Here, as this Court specifically held in *McAllister*, the existence of a prior OWI conviction is not an "element" of the crimes charged. The Penalty-Enhancement Statute does not set out a new crime. *See McAllister*, 107 Wis. 2d at 535–

37. Braunschweig's conduct—driving while under the influence of an intoxicant, *see* Wis. Stat. § 346.63(1)(a), and driving with an alcohol concentration of 0.16, *see id.* § 346.63(1)(b)—was unlawful whether he had prior OWI convictions or not. *See McAllister*, 107 Wis. 2d at 535; *Almendarez-Torres*, 523 U.S. at 230. In addition, the Penalty-Enhancement Statute implicates the most "typical . . . sentencing factor," recidivism. *Id.*; *see also McAllister*, 107 Wis. 2d at 535. The statute ratchets up the penalties for those who have committed the same or similar offenses: driving while under the influence of an intoxicant. Wis. Stat. § 346.65(2)(am)1–7. And Wisconsin's penalty-enhancement scheme satisfies the "most basic" requirements of due process. *McAllister*, 107 Wis. 2d at 539. Braunschweig's prior conviction was "determined in the justice system." *See id.*; *Apprendi*, 530 U.S. at 488; *see also Jefferson*, 26 So. 3d at 120; *Schindler*, 715 F.2d at 347. And Braunschweig had ample opportunity to challenge the existence of his prior conviction and failed to dispute that it occurred. App. 4, 6; *McAllister*, 107 Wis. 2d at 539; *see also Apprendi*, 530 U.S. at 488.

C. Braunschweig concedes, as he did in the Court of Appeals, that a prior OWI conviction is not an "element" of the offense that the State must prove to a jury beyond a reasonable doubt. *See* Opening Br. 4, 11; App. 17 n.2; *see also* Pet. for Review 2. The first heading in Braunschweig's Opening Brief states that the OWI "graduated penalty structure is nothing more than a penalty enhancer similar to

a repeater" statute. Opening Br. 4. In addition, he conceded in his Petition for Review that the Penalty-Enhancement Statute "is consistent with the requirements of *Apprendi*." Pet. for Review 8. Braunschweig makes no further constitutional arguments. In fact, Braunschweig does not cite a single constitutional provision or United States Supreme Court case in his Opening Brief.

And even assuming *arguendo* that he has somehow implicitly made a constitutional argument, that attempt is insufficient to justify this Court's attention. This Court "generally choose[s] not to decide issues that are not adequately developed by the parties in their briefs," especially those involving constitutional claims. *Cemetery Servs., Inc. v. Wis. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). For example, in *McEvoy v. Group Health Co-operative of Eau Claire*, 213 Wis. 2d 507, 570 N.W.2d 397 (1997), this Court "decline[d] to address" an equal-protection argument because it was "undeveloped and the defendant fail[ed] to cite any authority in support of its position," *id.* at 530 n.8.

Although Braunschweig concedes that *McAllister* was correctly decided, he nevertheless argues that, "[s]hould the Court elect to revisit *McAllister*," "it should make the existence of predicate priors an element" of the crime. Opening Br. 10–11. It should not. As an initial matter, *McAllister* is sound in principle and practice, and Braunschweig provides no "special justification" to revisit it

under stare decisis principles. *Johnson Controls*, 2003 WI 108, ¶ 94. The post-*McAllister* changes in the OWI statutory scheme do not "undermine[ ] the rationale behind" *McAllister*. *Id.* ¶ 98.

The first change that Braunschweig points to is the creation of the "prohibited alcohol concentration" charge under Wis. Stat. § 346.63(1)(b). As discussed *supra* pp. 24–25, an alcohol concentration between 0.02 and 0.08 is "prohibited" only if the defendant has three or more prior convictions. Wis. Stat. § 340.01(46m). But Braunschweig's is not one of those cases. His alcohol concentration was 0.16, which is "prohibited" regardless of any prior OWI convictions. *Id.* In any event, *Alexander*, 214 Wis. 2d 628, which Braunschweig fails to mention, already addresses this issue. Prior convictions are "elements" in a narrow subset of OWI cases where they affect the permissible alcohol concentration. *Id.* at 640–41. Indeed, the Wisconsin Jury Instructions that Braunschweig cites reflect this settled issue. Opening Br. 10 (citing Wis. Jury Instructions Criminal 2660C)). Thus, Braunschweig's concern about that statutory change is unfounded.

The second change that Petitioner cites is that, post-*McAllister*, an OWI offense under Wis. Stat. § 346.63(1) is a felony (instead of a misdemeanor) if the defendant has three or more prior OWI convictions. Wis. Stat. § 346.65(2)(am)4–

7.[10] Again, this change is irrelevant to Braunschweig's case. Braunschweig's prior OWI conviction made the offense here a misdemeanor, not a felony. *Id.* § 346.65(2)(am)1–2. Regardless, this distinction would not matter even in a felony case. Misdemeanor status or felony status is not an "element" of a crime. Whether an offense is a misdemeanor or a felony might be important here only to the extent that it increases the potential punishment. And, as the Supreme Court held in *Almendarez-Torres*, even if a statute significantly increases the potential punishment for a crime, that does not alone make one of its requirements an "element." *See* 523 U.S. at 235–36 (maximum penalty increased from two to twenty years).

Not only is *McAllister* correct and consistent with the relevant drunk-driving provisions, it is also workable in practice. *See Johnson Controls*, 2003 WI 108, ¶ 99; *compare* Opening Br. 10–11. Quite simply, if the State charges someone with an alcohol concentration between 0.02 and 0.08 for violating Wis. Stat. § 346.63(1)(b), and the defendant disputes his prior convictions, the State will need to establish them as an "element" of the crime. *See* Opening Br. 10–11 (citing Wis. Jury Instructions); *see also Alexander*, 214 Wis. 2d 628.

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[10] Braunschweig mentions that a "disputed predicate prior" turns what would have been a "forfeiture conviction" into a "criminal conviction." Opening Br. 11. But, as he concedes, *id.*, that was also the case in *McAllister*, 107 Wis. 2d at 533, and therefore this fact is not a change in the law.

II. Courts May Consider Expunged Convictions Under The Penalty-Enhancement Statute Because Such Convictions Remain "Unvacated Adjudications Of Guilt" Under Section 340.01(9r)

A. The Legislature determines which convictions count under the Penalty-Enhancement Statute. *See, e.g.*, Fla. Stat. § 775.084(1)(b)3 (prior felonies do not trigger enhanced penalties for "[h]abitual violent felony offenders" if defendant "received a pardon on the ground of innocence"); Conn. Gen. Stat. § 53a-40(h) (affirmative defense to the charge of being a persistent offender that prior conviction was pardoned for innocence); N.C. Gen. Stat. § 14-7.1(c) (pardoned felonies do not count toward "habitual felon" status). To discern legislative intent, this Court "focus[es] primarily on the language of the statute." *Kalal*, 2004 WI 58, ¶ 44. "[S]pecially-defined words or phrases are given their technical or special definitional meaning." *Id.* ¶ 45. This Court interprets the statutory language "in [ ] context . . . 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.* ¶ 46. Also, it "give[s] reasonable effect to every word, in order to avoid surplusage." *Id.* Courts will also consider the "textually or contextually manifest statutory purpose." *Id.* ¶ 49. The "court is not at liberty to disregard the plain, clear words of the statute." *Id.* ¶ 46 (citation omitted). Only if statutory language is "ambiguous" will the Court "consult extrinsic sources of [ ] interpretation" outside of the statutory text. *Id.* ¶ 50.

B. Here, the plain language of Wisconsin's drunk-driving statutory scheme indicates that convictions, even those later expunged, still "count" to determine the penalty under the Penalty-Enhancement Statute. To begin, Section 340.01 defines the "words and phrases" that appear in Chapter 346. It states that a "[c]onviction . . . means an *unvacated* adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction." Wis. Stat. § 340.01(9r) (emphasis added). Vacatur is a legal term of art with a "special definitional meaning." *See Kalal*, 2004 WI 58, ¶ 45. Vacatur invalidates or nullifies a conviction. *See Vacate*, Black's Law Dictionary (10th ed. 2014) ("To nullify or cancel; make void; invalidate."). In Wisconsin, an offender can vacate his conviction through Wis. Stat. § 974.06, which allows a court to "vacate" a judgment if the court did not have jurisdiction or imposed sentence contrary to law or in violation of the individual's constitutional rights. In other words, courts vacate convictions when they should not have occurred in the first place.

Expunction, on the other hand, merely eliminates some records of the conviction to make it easier for certain young offenders to reintegrate into society, giving them a "fresh start." *Allen*, 2017 WI 7, ¶ 42; *see also Expunge*, Black's Law Dictionary, *supra* ("To remove from a record, list, or book."). This purpose is "manifest" from the text of the expunction statute. *See Kalal*, 2004 WI 58, ¶ 49. The statute requires

that the "person [be] under the age of 25 at the time of the commission of [the] offense," the offense cannot be very serious, and the court must "determine[ ] [that] the person will benefit" from the expunction. Wis. Stat. § 973.015(1m)(a)1. But the benefits of expunction are limited. *See Allen*, 2017 WI 7, ¶ 42; *see also id.* ¶¶ 49–52 (Abrahamson, J., concurring). Although it, for example, allows the individual to present himself to "future employers" without the mark of a "past wrongdoing," *see id.* ¶ 40 (majority op.), it does not protect recidivists from future punishment. As this Court recognized, the "fresh start" is erased when the offender "returns to the criminal justice system." *Id.* ¶ 42; *see also Leitner*, 2002 WI 77, ¶ 48. That is why courts may consider "all of the facts underlying an expunged record of conviction provided those facts are not obtained from expunged court records." *Allen*, 2017 WI 7, ¶ 43; *see Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983) ("[E]xpunction under state law," after all, "does not alter the historical fact of the conviction."), *superseded by statute as recognized in Logan v. United States*, 552 U.S. 23, 27 (2007).

The expunction statute illustrates that the Legislature understands the difference between expunction and vacatur. If the State convicts someone for prostitution under Wis. Stat. § 944.30, a "court may, upon the motion of the person, vacate the conviction, . . . *or* may order that the record of the violation . . . be expunged" if that person committed the act as a result of being a "victim of trafficking for the purposes of a

commercial sex act," Wis. Stat. § 973.015(2m) (emphasis added). If expunction were identical to vacatur, the Legislature would not need to mention both. *See Kalal*, 2004 WI 58, ¶ 46 (surplusage). In addition, this language emphasizes that vacatur affects the conviction itself but expunction relates to the "*record* of the violation." Wis. Stat. § 973.015(2m) (emphasis added).

Another subsection of the expunction statute—the one most relevant here—indicates that the Legislature specifically exempted OWI sentencing from expunction's purview. Wis. Stat. § 973.015(1m)(a); *see Kalal*, 2004 WI 58, ¶ 44; *see also Logan*, 552 U.S. at 27 (legislature determines scope of relief from expunction). The statute specifically "does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23(2)(a)." Wis. Stat. § 973.015(1m)(a)1. That "information" includes prior OWI convictions. *Id.* § 343.23(2)(a), (b). State authorities, including the DOT and law enforcement, can search and use this information free of charge. *See id.* § 343.24(4)(c)1. If expunction were equivalent to vacatur—*e.g.*, if expunction nullified or canceled the conviction—it would be nonsensical for statutes to mandate that the DOT keep records of the conviction and provide them to the State and law enforcement free of charge. *See Kalal*, 2004 WI 58, ¶ 46 (avoid absurd or unreasonable results).

Finally, a contrary interpretation would "contravene [the very] purpose" of the Penalty-Enhancement Statute. *See id.* ¶ 49. The Legislature enacted that statute to punish more severely people who repeatedly drive while intoxicated and endanger more Wisconsin citizens. The penalties increase in lockstep with each prior suspension, revocation, or conviction from the first to the fifth, seventh, and then tenth. *Id.* (contextually manifest purpose). It is "hardly insensible" to think that the Legislature wanted to "account for expunged sentences in this particular statutory scheme." *Dyke*, 718 F.3d at 1292. If, after a "fresh start," the "defendant returns again into the same very sort of criminal activity, it's unclear why a statute aimed at punishing recidivism would afford the defendant the benefit of an offer he so manifestly rejected by his own conduct." *Id.* at 1293 (citation omitted). Courts agree that expunged convictions count "for purposes of recidivist sentencing provisions." *Id.* (citing *United States v. Law*, 528 F.3d 888, 911 (D.C. Cir. 2008); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992)); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705, 1726 (2003); *see also Allen*, 2017 WI 7, ¶ 40.

C. Braunschweig relies entirely on *Leitner*, 2002 WI 77, to argue that the circuit court erred in considering his expunged conviction, Opening Br. 7, 11, but that case is—at best—irrelevant to his argument. In fact, it supports the State. *Leitner* held that a sentencing court could rely on facts

underlying an OWI conviction that had been expunged. 2002 WI 77, ¶ 48. The facts in that case came from "the district attorney's case files" and "police reports." *Id.* ¶¶ 6–7. This Court noted that information about a conviction appears in "numerous locations, including a district attorney's office, the Department of Corrections, the [DOT], the Department of Health and Family Services, a public defender's office, an office of private counsel, or a victim's home or office." *Id.* ¶ 28. The expunction statute requires that only the *court* expunge its records. *Id.* ¶ 29. There was "no[ ] . . . indicat[ion]" in the statute that the Legislature intended "to shield a misdemeanant from *all* of the future consequences" of the conviction. *Id.* ¶ 38 (emphasis added); *see also Allen*, 2017 WI 7, ¶ 40; *see generally Dyke*, 718 F.3d at 1292–93. As a result, the court could consider information about a prior expunged conviction as long as that information did not come from expunged *court* records. *Leitner*, 2002 WI 77, ¶ 39.

III. The State Proved Braunschweig's Prior OWI Conviction Under The Proper Standard, Preponderance Of The Evidence

A. The proper standard of proof for a prior OWI conviction under the Penalty-Enhancement Statute is a question of first impression for this Court. The statute does not provide a standard of proof. Wis. Stat. § 346.65; *see, e.g.*, *Van Riper*, 2003 WI App 237, ¶ 7. This Court has repeatedly stated that the State "may" prove prior OWI convictions through "certified copies of conviction or other competent

proof." *McAllister*, 107 Wis. 2d at 539; *see State v. Saunders*, 2002 WI 107, ¶ 32, 255 Wis. 2d 589, 649 N.W.2d 263.

The "competent proof" of a prior conviction satisfies the requirements of due process if it meets the preponderance-of-the-evidence standard. The United States Supreme Court held that the preponderance standard generally satisfies due process with respect to sentencing facts. *Watts*, 519 U.S. at 156 & n.2 (1997) (per curiam); *see McMillan*, 477 U.S. at 91–92; *see also* Wayne R. LaFave et al., 6 Criminal Procedure §§ 26.4(h), 26.4(i), 26.5(a) (4th ed.). The United States Supreme Court did not depart from that general rule in *Almendarez-Torres*, where the fact of a prior conviction increased a defendant's potential sentence tenfold, from a two-year to a twenty-year maximum. 523 U.S. at 226, 248. Federal appellate and state supreme courts have held that the State can prove the existence of prior convictions under a preponderance standard. *E.g.*, *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001), *cert. denied*, 534 U.S. 1107 (2002); *Washington v. Witherspoon*, 329 P.3d 888, 892–93 (Wash. 2014), *as corrected* (Aug. 11, 2014) (change from ten-year penalty to mandatory life without parole under persistent offender statute); *see United States v. Quintana-Quintana*, 383 F.3d 1052 (9th Cir. 2004).

In fact, the federal courts of appeals provided "overwhelming authority" "for the proposition that [] sentencing factors need only be proven by a preponderance of the evidence" even when they increased the maximum

potential sentence. *See United States v. Kikumura*, 918 F.2d 1084, 1101–02 (3d Cir. 1990), *overruled by Booker*, 543 U.S. 220, *as recognized in United States v. Fisher*, 502 F.3d 293, 304–06 (3d Cir. 2007); *United States v. Gigante*, 39 F.3d 42, 48 (2d Cir. 1994), *as amended*, 94 F.3d 53, 56 (1996) (preponderance standard governs for "uncharged conduct"); *see also United States v. Angulo*, 927 F.2d 202, 204–05 (5th Cir. 1991) (sentencing court relied on officer's visual estimate of drug quantity).[11]

Despite the "overwhelming authority" for the proposition that sentencing factors need be proven only by a preponderance of the evidence, *see Kikumura*, 918 F.2d at 1101–02, a few courts have suggested that a higher burden of proof, clear and convincing evidence, might be appropriate in "extreme circumstances" where a fact "*dramatically* increase[s]" a defendant's maximum sentence in both relative and absolute terms, *Watts*, 519 U.S. at 156 & n.2 (emphasis added); *Apprendi*, 530 U.S. at 495; *Kikumura*, 918 F.2d at

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[11] In pre-*Booker* cases, the "maximum" sentence was the upper end of the federal Sentencing Guidelines' range because district judges were bound to impose a sentence within that range. *See, e.g.*, *Fisher*, 502 F.3d at 304–06 (describing how, before *Booker*, the "maximum legislatively authorized punishment" was "the maximum prescribed by the Guidelines" and holding *Kikumura* "no longer valid as long as the Guidelines are advisory"). In *Booker*, however, the Supreme Court applied the rule outlined in *Apprendi* to hold that the Guidelines, which mandated higher sentences based on judge-found facts other than prior convictions, violated an individual's right to a jury trial, 543 U.S. at 237. As a result, the Guidelines today provide "recommended" ranges but do not bind district judges.

1101–02; *see Lombard*, 72 F.3d at 186 & n.23. An increase was "dramatic[ ]" or "extreme" if it more than doubled an already-substantial sentence. *See Jordan*, 256 F.3d at 929 (101-month increase in the Guidelines' maximum "more than double[d] the length of [the] sentence"); *see also Kikumura*, 918 F.2d at 1089, 1102 (prior convictions resulted in unprecedented 327-month increase from initial 33-month maximum sentence); *United States v. Townley*, 929 F.2d 365, 368, 370 (8th Cir. 1991) (suggesting that a clear-and-convincing standard "might" be appropriate for a seven-fold increase from Guidelines' sentencing range of 15- to 21-months). If the initial, pre-enhancement maximum sentence is short to begin with, even a "large" increase in percentage terms is insufficient to trigger the higher evidentiary burden. *See Lombard*, 72 F.3d at 186 n.23 (citing "real difference between" 300 percent increase from one to three years versus twenty to sixty years). And increases of fewer than five years are not "extreme" or "dramatic." *See, e.g.*, *Galloway*, 976 F.2d at 424–26 (from 21–27 months to 63–78 months); *United States v. Bronaugh*, 895 F.2d 247, 248, 250–52 (6th Cir. 1990) (increase of four years); *United States v. Hunter*, 19 F.3d 895, 896–97 (4th Cir. 1994).

B. Here, the preponderance-of-the-evidence standard for prior OWI convictions under the Penalty-Enhancement Statute satisfies due process. *See McMillan*, 477 U.S. at 81–84 (preponderance standard sufficient to impose five-year mandatory minimum); *see also Almendarez-Torres*, 523 U.S.

at 248 (declining to apply a "heightened standard of proof" to "sentencing determinations that bear significantly on the severity of sentence"). The Penalty-Enhancement Statute does not "dramatically increase" an OWI offender's maximum punishment in relative and absolute terms. *See Watts*, 519 U.S. at 156; *Lombard*, 72 F.3d at 186 n.23; *Kikumura*, 918 F.2d at 1089. A single prior OWI conviction imposes a mere six-month increase in a defendant's maximum prison term. Wis. Stat. § 346.65(2)(am)1–2; *see Lombard*, 72 F.3d at 186 n.23. An additional OWI conviction exposes the defendant to six additional months of imprisonment. Wis. Stat. § 346.65(2)(am)2–3. Another OWI conviction, totaling four, represents the highest increase in potential sentence under the statute: five years. Wis. Stat. § 346.65(2)(am)3–7; *id.* § 939.50(3)(e)–(h); *see also Galloway*, 976 F.2d at 424–26 (increase of over four years not extreme); *Bronaugh*, 895 F.2d at 248, 250–52. These increases do not match those that troubled other courts. *See Watts*, 519 U.S. at 156; *Jordan*, 256 F.3d at 929; *Kikumura*, 918 F.2d at 1102; *Townley*, 929 F.2d at 368. In addition, these increases are only in the *potential* sentence. An individual with one prior conviction might receive a jail sentence of five days only. Wis. Stat. § 346.65(2)(am)2. An individual with four total convictions could receive a shorter sentence than someone with three. *Id.* § 346.65(2)(am)3–4.

The State undisputedly met the preponderance standard here with a certified DOT driving abstract. That

certified government record undisputedly met the stricter "beyond a reasonable doubt" standard. *See infra* Part IV. Thus, the evidence necessarily satisfied the preponderance standard.

C. Braunschweig relies entirely on *Van Riper* to argue that the State's burden of proof for a prior OWI conviction "must be beyond a reasonable doubt," Opening Br. 9, but that case did not resolve this question. Because the Court of Appeals concluded in *Van Riper* that a certified Wisconsin DOT "driving transcript" proved the existence of the defendant's prior convictions "beyond a reasonable doubt," it did not have to examine or answer whether a lower burden of proof would be appropriate. 2003 WI App 237, ¶¶ 1, 21. As discussed above, a holding that the State needed to prove a prior OWI conviction beyond a reasonable doubt would run counter to this Court's *McAllister* decision. Braunschweig makes no independent constitutional argument for his position. He does not mention the Due Process Clause or a single constitutional provision. As discussed *supra* p. 28, this Court hesitates to rule on important, complex constitutional issues without developed argument. *Cemetery Servs.*, 221 Wis. 2d at 831.

Nor does *State v. Bonds* compel a different result. 2006 WI 83, ¶ 40, 292 Wis. 2d 344, 717 N.W.2d 133. *Bonds* held that a Consolidated Court Automation Programs (CCAP) report was insufficient to prove the existence of a prior conviction under Wis. Stat. § 939.62, a statute punishing non-

OWI "habitual criminal[s]." *Id.* ¶ 2. Although some language in that opinion suggested that the State had to prove "habitual criminality" beyond a reasonable doubt, *id.* ¶ 40, that language is irrelevant to Braunschweig's case. First, *Bonds* involved an entirely different statute with different statutory language. Wis. Stat. § 939.62. This Court has repeatedly distinguished the Penalty-Enhancement Statute from other recidivist statutes like Wis. Stat. § 939.62. *See Saunders*, 2002 WI 107, ¶ 33; *Wideman*, 206 Wis. 2d at 106–07. Second, the parties in *Bonds* "agree[d]" that Wis. Stat. § 939.62 required the State to prove "repeater status beyond a reasonable doubt," so this Court did not rule independently on that issue. 2006 WI 83, ¶ 33. Here, the parties do not so agree.

IV. Even If This Court Decides That The Proper Standard Is "Beyond A Reasonable Doubt," The State Undisputedly Met Its Burden With A Certified DOT Record

A. The Court of Appeals correctly held in *Van Riper* that "a *certified* DOT driving record is [certainly] admissible and sufficient to prove the status of an alleged repeat offender" under the Penalty-Enhancement Statute beyond a reasonable doubt. 2003 WI App 237, ¶ 16.[12] That decision is consistent with this Court's caselaw. The certified DOT driving record

[12] *Van Riper*, a published Wisconsin Court of Appeals decision, has statewide precedential effect. *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997).

provides the dates of conviction, *cf. State v. Farr*, 119 Wis. 2d 651, 657–58, 350 N.W.2d 640 (1984), and contains useful information to identify an individual such as a driver's license number, date of birth, address, and physical description. The DOT's certification "ensure[s] its authenticity and accuracy." *Saunders*, 2002 WI 107, ¶ 28; *id.* ¶¶ 58–59 (uncertified judgment of conviction still meets the beyond-a-reasonable-doubt standard); *see also McAllister*, 107 Wis. 2d at 539. This Court has repeatedly approved of sentencing courts' reliance on DOT records. In *Wideman*, a court properly relied on a "police investigator's affidavit . . . attest[ing]" that he had "inspected a teletype of the defendant's driving record" from the DOT indicating that the defendant had two relevant convictions within the "past five years." 206 Wis. 2d at 95–96. In *Spaeth*, this Court held that a "DOT teletype of the defendant's driving record" was "reliable documentary proof" sufficient to establish prior convictions for "operating a motor vehicle after revocation" under Wis. Stat. § 343.44. 206 Wis. 2d at 139, 153–54.

B. Here, the State's submission of Braunschweig's certified "driving record" from the Wisconsin DOT proved the existence of his prior OWI conviction beyond a reasonable doubt. *See Van Riper*, 2003 WI App 237, ¶ 16. The document, titled "Certification of [ ] Driving Record," contained the signature of the Administrator of the Division of Motor Vehicles and the DOT's "official Seal." R.14:4; *see also Saunders*, 2002 WI 107, ¶ 32. It indicated that on February

16, 2011, Braunschweig violated Wis. Stat. § 346.63(2)(a)1, operating while intoxicated causing injury, and was convicted in Jackson County circuit court on October 31, 2011. R.14:6; *cf. Farr*, 119 Wis. 2d at 657–58. It identified Braunschweig by his driver's license number, date of birth, and address. It included the date and time that the DOT created the abstract and provided a unique identifier for the individual who created it. R.14:5. Given this information, there could be no reasonable doubt that Braunschweig's prior conviction occurred. *Van Riper*, 2003 WI App 237, ¶ 16.

C. Braunschweig concedes as he did below that a certified DOT driving record proves the existence of his prior OWI conviction beyond a reasonable doubt. Opening Br. 7, 9 n.1. Braunschweig admitted in the circuit court that the prior OWI conviction occurred, App. 6, and that certified DOT records are "reliable" to prove the existence of the conviction beyond a reasonable doubt, App. 4, 7.

To the extent that Braunschweig contends that *Leitner* prevents the circuit court from admitting the DOT record at sentencing, Opening Br. 7, that argument fails for the reasons discussed *supra* Part II.C. *Leitner* did not hold that a court could not admit DOT records about prior convictions if the conviction had been expunged under Wis. Stat. § 973.015. In fact, the *Leitner* Court *approved* of a court's reliance on the district attorney's case files and police records for information about an expunged conviction. *Leitner*, 2002 WI 77, ¶¶ 6–7, 48. The circuit court here did not erroneously exercise its

discretion in admitting and considering Braunschweig's certified DOT driving record. *See Gallion*, 2004 WI 42, ¶17.

CONCLUSION

This Court should affirm the Court of Appeals' decision.

Dated: September 17, 2018.

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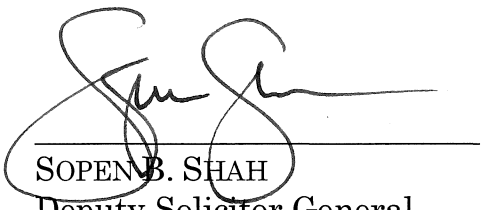
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,805 words.

Dated: September 17, 2018.



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I hereby certify that:

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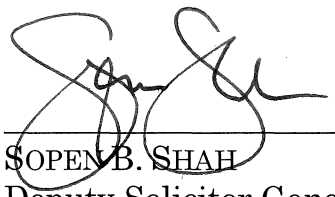

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