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STATE OF WISCONSIN  
IN SUPREME COURT  
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Case No. 2018AP75-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES L. NEILL, IV,

Defendant-Appellant-Petitioner.

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ON APPEAL FROM A DECISION OF THE COURT OF  
APPEALS AFFIRMING AN ORDER DENYING A  
JUDGMENT OF CONVICTION AND AN ORDER  
DENYING A MOTION FOR POSTCONVICTION RELIEF,  
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT  
COURT, THE HONORABLE DENNIS R. CIMPLE,  
PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## **ISSUE PRESENTED**

The crime of operating a motor vehicle while under the influence of an intoxicant (OWI) as a third offense carries a fine of not less than \$600 nor more than \$2,000, except as provided in Wis. Stat. § 346.65(2) (cm), (f), and (g). Under § 346.65(2)(f)2., if a driver commits a third-offense OWI with a minor under age 16 in the vehicle, the applicable minimum and maximum fines are doubled. Under § 346.65(2)(g)3., if a driver commits a third-offense OWI while having an alcohol concentration of 0.25 or above, the applicable minimum and maximum fines are quadrupled.

When a person commits a third-offense OWI with both a minor under age 16 in the vehicle and an alcohol concentration of 0.25 or above, is the minimum fine of \$600 both doubled and quadrupled, resulting in a minimum fine of \$ 4,800?

The circuit court answered yes.

The court of appeals answered yes and affirmed the judgment of conviction and the order denying postconviction relief.

This Court should answer yes and affirm.

## **INTRODUCTION**

Charles Neill IV drove a motor vehicle with a blood alcohol concentration above 0.25 and with a minor passenger in the car. Because Neill had two prior offenses and a minor passenger, his crime is a felony and the applicable minimum and maximum fine and time of imprisonment are doubled. Because Neill's alcohol concentration was above 0.25, the applicable minimum and maximum fines are quadrupled.

The only issue in this case is how the minimum and maximum fines are calculated when the enhancers for having a minor passenger and an excessive alcohol concentration both apply.

Neill asserts that the base minimum fine of \$600 is doubled to \$1,200 for having a minor passenger, and the base minimum fine is quadrupled to \$2,400 for having an excessive alcohol concentration, but only the quadrupling has effect. He argues that the quadrupled fine of \$2,400 subsumes the doubled fine of \$1,200. Under Neill's view of the law, if a person has an elevated alcohol concentration that results in an enhanced minimum fine, also having a minor passenger has no effect on the minimum fine.

The circuit court and both the court of appeals majority and dissenting opinions rejected Neill's interpretation of the statute. The circuit court and the court of appeals majority both concluded that under the plain language of the statute, the minimum fine of \$600 is doubled to \$1,200 and then quadrupled to \$4,800 (or \$600 is quadrupled to \$2,400 and then doubled to \$4,800). The court of appeals dissent concluded that under the plain language of the statute, the base fine of \$600 is doubled to \$1,200, and the base fine of \$600 is quadrupled to \$2,400, and those numbers are added for a total minimum fine of \$3,600.

The court of appeals also rejected the State's assertion that the statute is ambiguous. But it agreed with the State that the total minimum fine is \$4,800.

In retrospect, the State was incorrect in asserting that the statute is ambiguous. As the court of appeals correctly concluded, the statute is unambiguous, and under its plain language the minimum fine is \$4,800. This Court should therefore affirm.

## STATEMENT OF THE CASE AND FACTS

Neill was arrested for driving a minivan while under the influence of an intoxicant on July 2, 2016. (R. 1.) A citizen saw the minivan in a Subway restaurant drive-thru and observed that the driver appeared to be passed out. (R. 1:2.) The driver—later identified as Neill—woke up and drove off, and the citizen followed. (R. 1:2.) The citizen said that Neill stopped the minivan, threw a beer bottle at him, and drove away, nearly striking several cars. (R. 1:2.)

After the citizen called 911, police located the minivan. (R. 1:2.) After police activated their squad car's emergency lights and air horn, Neill pulled over. (R. 1:2.) An officer observed that Neill appeared confused, had difficulty locating his driver's license in his wallet, was unsteady on his feet, smelled of alcohol, had glassy eyes, and performed poorly on field sobriety tests. (R. 1:2.) Another officer observed that a one-year-old child was in a car seat in the minivan, with a seat belt on but with the shoulder straps unfastened. (R. 1:2.) The officer observed an open beer bottle between the child seat and the front seat, and four more beer bottles on the passenger seat. (R. 1:2.) Officers transported Neill to the hospital where his blood was drawn. (R. 1:2.) A chemical test of the blood revealed a blood alcohol concentration of 0.353. (R. 48:3–4; 49:24.)

Because Neill had two prior OWI convictions, the State charged him with OWI as a third offense, with a minor in the vehicle—a felony. (R. 1:1.) The State also asserted that a penalty enhancer applied because of Neill's excessive alcohol concentration. (R. 1:1.) The State pointed out that the fine for OWI as a third offense is not more than \$600 nor less than \$2,000, and that the minimum and maximum fines are doubled under Wis. Stat. § 346.65(2)(f)2. because of the minor passenger, for a total of \$1,200 to \$4,000. The State asserted that the minimum and maximum fines are then quadrupled

under Wis. Stat. § 346.65(2)(g)3. because of the excessive alcohol concentration, for a total of \$4,800 to \$16,000. (R. 1:1.)

Neill pled guilty to OWI as a third offense, with a minor in the vehicle. Neill and his counsel affirmed that the fine would be between \$4,800 and \$16,000. (R. 48:4.) But at the sentencing hearing, defense counsel argued that the minimum fine was \$2,400 rather than \$4,800. (R. 49:32–33.) The circuit court, the Honorable Dennis R. Cimpl, disagreed, concluding that the minimum fine was \$4,800. (R. 49:32–33.) The court imposed two years of imprisonment, with nine months of initial confinement and 15 months of extended supervision. (R. 18:1; 49:29–30.) The court stayed the sentence and placed Neill on probation. (R. 49:30.) The court also imposed a \$4,800 fine. (R. 18:2; 49:30–33.)

Neill moved for sentence modification, seeking reduction of his fine from \$4,800 to \$2,400. (R. 36.) He argued that the penalty enhancer for his elevated blood alcohol concentration should result in a quadrupling of the minimum and maximum fines, but that the fine is not then doubled because of his minor passenger. (R. 36:5.)

The circuit court rejected Neill’s argument, concluding that nothing in the statutes indicates a legislative intent that when a person operates a motor vehicle while under the influence and penalty enhancers for having a minor passenger and an excessive alcohol concentration both apply, only one of the enhancers has effect on the person’s fine. (R. 40:3–4.) The court concluded that the minimum fine was properly set at \$4,800, so it denied Neill’s motion. (R. 40: 4–5.)

Neill appealed, and the court of appeals affirmed the circuit court decision by a 2-1 vote. *State v. Neill*, 2019 WI App 4, 385 Wis. 2d 471, 922 N.W.2d 861. The majority opinion, by Judge Brash, concluded that the statute is unambiguous, and



that “a plain reading of the statute supports the calculation of the trial court.” *Id.* ¶ 3. The court concluded that “the statute clearly indicates that adding either of the penalty enhancers changes the base minimum fine,” and that the “increased minimum fine is used as the base for purposes of calculating the other enhancer.” *Id.* ¶ 23.

The dissenting opinion concluded that both enhancers are to be applied to double and quadruple the minimum and maximum fines, but that nothing in the statute provides that the base minimum fine is changed when one of the enhancers is applied. *Id.* ¶¶ 27–28 (Kessler, J., dissenting). The dissent concluded that instead of multiplying the \$600 minimum fine by two and by four, for a total of \$4,800, the \$600 should be doubled to \$1,200, and quadrupled to \$2,400, and those totals should be added for a total fine of \$3,600. *Id.* ¶ 29 (Kessler, J., dissenting).

This Court granted Neill’s petition for review.

## STANDARD OF REVIEW

The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447.

## ARGUMENT

**The circuit court and court of appeals properly concluded that the minimum fine for OWI as a third offense, with a minor passenger and an alcohol concentration above 0.25, is \$4,800.**

### **A. Applicable legal principles on statutory interpretation**

The issue in this case requires the interpretation of Wis. Stat. § 346.65. “The purpose of statutory interpretation is to determine what the statute means so that it may be given its

full, proper, and intended effect.” *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted).

When it interprets a statute, a reviewing court “begins with the plain language of the statute.” *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court “generally give[s] words and phrases their common, ordinary, and accepted meaning.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to “interpret statutory language reasonably, ‘to avoid absurd or unreasonable results.’” *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). “An interpretation that contravenes the manifest purpose of the statute is unreasonable.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49). “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶ 46.

“[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.” *State v. Dorsey*, 2018 WI 10, ¶ 30, 379 Wis. 2d 386, 906 N.W.2d 158 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). “If the plain language of a statute is ambiguous as to meaning,” a reviewing court considers “the scope, context, and purpose of the statute.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶¶ 48–49).

## **B. The statute at issue here**

The penalty for a third-offense OWI is set forth in Wis. Stat. § 346.65(2)(am)3., which states that “[e]xcept as provided in pars. (cm), (f), and (g),” a person who violates Wis. Stat. § 346.63(1), the OWI statute, “shall be fined not less

than \$600 nor more than \$2,000 and imprisoned for not less than 45 days nor more than one year in the county jail.”

Under the plain language of the statute, the minimum fine is \$600 “[e]xcept as provided in pars. (cm), (f), and (g).” Wis. Stat. § 346.65(2)(am)3. Paragraph (cm) concerns counties that “offer a reduced minimum period of imprisonment of the successful completion of a probation period that include[d] alcohol and other drug treatment.” Wis. Stat. § 346.65(2)(cm). That paragraph is not at issue in this case.

The exceptions in paragraphs (f) and (g) are at issue in this case. Paragraph (f) concerns an increased penalty for having a minor passenger when the person operates a motor vehicle while under the influence of an intoxicant. Under section 346.65(2)(f)1., the minimum and maximum fines for a person who commits a first offense OWI with a minor passenger are increased to \$350 and \$1,100. Under section 346.65(2)(f)2., when a person with at least one prior OWI offense commits another OWI with a minor passenger, “the applicable minimum and maximum fines and imprisonment under par. (am)2. to 7. for the conviction are doubled.”

Paragraph (g) concerns an increased penalty for a person who commits an OWI offense with an alcohol concentration of 0.17 or above. The increased penalty applies only to an OWI which is a third, fourth, fifth, or sixth offense. Under section 346.65(2)(g)1., if the person’s alcohol concentration was 0.17 to 0.199, “the applicable minimum and maximum fines under par. (am) 3. to 5. are doubled.” Under section 346.65(2)(g)2., if the person’s alcohol concentration was 0.20 to 0.249, “the applicable minimum and maximum fines under par. (am) 3. to 5. are tripled.” Under section 346.65(2)(g)3., if the person’s alcohol

concentration was 0.25 or above, “the applicable minimum and maximum fines under par. (am) 3. to 5. are quadrupled.”

When a person commits an OWI with a minor passenger, application of the enhancer for having a minor passenger is simple. If the person has no prior OWI offenses, the minimum and maximum fines are increased to \$350 and \$1,100. If the person has one or more prior offenses, the minimum and maximum fines for the offense—\$600 and \$2,000—are doubled to \$1,200 and \$4,000.

When a person commits an OWI with an elevated alcohol concentration, application of the enhancer for having an elevated alcohol concentration is similarly simple. The enhancer applies only to a third, fourth, fifth, or sixth offense. If the person commits such an offense, the minimum and maximum fines of \$600 and \$2,000 are doubled to \$1,200 and \$4,000, or tripled to \$1,800 and \$6,000, or quadrupled to \$2,400 and \$8,000, depending on the person’s alcohol concentration.

**C. Under the plain language of Wis. Stat. § 346.65, when a person operates a motor vehicle with an alcohol concentration of 0.25 or above and a minor passenger, the minimum and maximum fines are both doubled and quadrupled, for a total of eight times the base minimum and maximum fines.**

The issue in this case concerns the minimum fine that applies to a person like Neill, who commits an OWI as a third, fourth, fifth, or sixth offense, with both a minor passenger and an elevated alcohol concentration.

As the circuit court and court of appeals majority both concluded, the statutory language is unambiguous—it requires that the default minimum fine of \$600 is both

doubled and quadrupled when the two required enhancers are applied.<sup>1</sup> In other words, the minimum and maximum fines are eight times the applicable unenhanced minimum and maximum fines.<sup>2</sup>

As an initial matter, both enhancers apply to Neill. “[W]hen the facts support multiple penalty enhancers, multiple enhancers may normally be applied to the same underlying crime.” *State v. Beasley*, 2004 WI App 42, ¶ 14, 271 Wis. 2d 469, 678 N.W.2d 600. The plain language of the relevant statute supports this conclusion. The minimum fine for a third-offense OWI is “\$600” “[e]xcept as provided in pars. (cm), (f), and (g).” Wis. Stat. § 346.65(2)(am)3. (emphasis added). The word “and” shows that the enhancers in paragraphs (f) and (g) both apply when their conditions are met. The word “or” is a disjunctive particle while the word ‘and’ is a conjunctive particle.” *Cross v. Leuenberger*, 267 Wis. 232, 235, 65 N.W.2d 35 (1954); *see also State v. Anagnos*, 2012 WI 64, ¶ 32, 341 Wis. 2d 576, 815 N.W.2d 675 (relying on the “conjunctive word ‘and’” when interpreting an OWI-related statute).

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<sup>1</sup> In its brief to the court of appeals, the State asserted that the statute was ambiguous, but that the circuit court’s interpretation of the statutes gave effect to both enhancers and was correct. The court of appeals concluded that the statute is unambiguous, and that the circuit court’s interpretation was correct. After further consideration, the State recognizes that the circuit court and court of appeals were correct not only in their conclusions regarding the minimum fine in this case, but in their conclusions that the statutory language is unambiguous.

<sup>2</sup> The circuit court and court of appeals decided only the minimum fine for a person who commits an OWI as a third offense, with a minor passenger and an alcohol concentration of 0.25 or above. The analysis of the circuit court and court of appeals would also apply to the maximum fine, which would be enhanced from \$2,000 to \$16,000.

Because both enhancers must be applied to Neill, the question becomes how to apply them. The result is the same regardless of which enhancer is applied first: Neill's minimum fine is \$4,800, as the circuit court and court of appeals concluded. A court first doubles the minimum fine of \$600 under the minor-passenger enhancer, and then the court quadruples the new applicable minimum of \$1,200 because of Neill's alcohol concentration. A court could also begin by quadrupling the \$600 default minimum fine because of Neill's alcohol concentration. The court would then double the new applicable minimum fine of \$2,400 because Neill had a child in his car.

Under section 346.65(2)(am)3., "Except as provided in pars. (cm), (f), and (g)," the term of imprisonment for an OWI as a third offense is "not less than 45 days nor more than one year," and the fine is "not less than \$600 nor more than \$2,000." Two exceptions to the minimum \$600 fine—paragraphs (f) and (g)—apply in this case.

When the minor-passenger enhancer in paragraph (f) is applied first, Neill's minimum fine becomes \$1,200. Under paragraph (f)2., "If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction under s. 346.63(1), the applicable minimum and maximum and imprisonment under par. (am) 2. to 7. for the conviction are doubled." The \$600 minimum fine for a third offense with a minor passenger is therefore doubled to \$1,200. In addition, because Neill had two or more prior OWI convictions, his current OWI offense with a minor passenger is a felony rather than a misdemeanor. Wis. Stat. § 346.65(2)(f)2.

When the enhancer for having an alcohol concentration of 0.25 or above is applied next, "the *applicable* minimum and maximum fines under par. (am)3. to 5. are quadrupled." Wis. Stat. § 346.65(2)(g)3 (emphasis added). Neill's alcohol

concentration would require a court to quadruple the default minimum fine of “\$600” “[e]xcept” when the minimum has already been enhanced “as provided in” paragraph (f). Wis. Stat. § 346.65(2)(am)3. So, for Neill, the *applicable* minimum fine under paragraph (am)3. is \$1,200 because the default \$600 minimum has already been doubled under the minor-passenger enhancer. The minor-passenger enhancer modifies Neill’s minimum fine to \$1,200, and the alcohol-concentration enhancer then quadruples that applicable minimum fine to a total of \$4,800.

Neill’s minimum fine is \$4,800 even if the enhancer for an elevated alcohol concentration is applied first. Again, “[e]xcept as provided in pars. (cm), (f), and (g),” the fine for a third-offense OWI is “not less than \$600 nor more than \$2,000.” Wis. Stat. § 346.65(2)(am)3. Because Neill had an alcohol concentration of 0.25 or above, “the applicable minimum and maximum fines under par. (am)3. to 5. are quadrupled.” Wis. Stat. § 346.65(2)(g)3. The minimum fine of \$600 is therefore quadrupled to \$2,400.

When the enhancer for having a minor passenger is applied next, the *applicable* minimum and maximum fines under par. (am)2. to 7. are doubled. Wis. Stat. § 346.65(2)(f)2. (emphasis added). When applying the minor-passenger enhancer to Neill, the minimum fine under paragraph (am)3. would be “\$600” “[e]xcept” when the minimum has been quadrupled “as provided in” paragraph (g). Wis. Stat. § 346.65(2)(am)3. The *applicable* minimum fine under paragraph (am)3. is thus \$2,400 because the \$600 default minimum has already been quadrupled due to Neill’s alcohol concentration of 0.25 or above. Because Neill had a minor passenger, a court must double the applicable minimum fine of \$2,400, resulting in a total minimum fine of \$4,800.

In short, Neill operated a motor vehicle while under the influence of an intoxicant, as a third offense, with a minor passenger and an alcohol concentration of 0.25 or above. As the circuit court and court of appeals both concluded, the \$600 minimum fine for a third-offense OWI is therefore doubled and quadrupled (or quadrupled and doubled) for a minimum fine of \$4,800.

**D. Neill’s argument that only one of the two enhancers can have effect on the minimum fine is contrary to the plain language of the statutes.**

Neill argues that the interpretation of the statute by the circuit court and the court of appeals “was incorrect as a matter of law.” (Neill’s Br. 7.) He claims that even if enhancements to the fine for an OWI for having a minor passenger and for having an elevated alcohol concentration both apply, only one can have effect on the fine. (Neill’s Br. 9–10.) He claims that although his fine for third-offense OWI is doubled under section 346.65(2)(f)2. because he had a child in the car and quadrupled because his alcohol concentration of 0.353 was above 0.25, the result is that the minimum \$600 fine is only quadrupled. (Neill’s Br. 9–10.)

Neill points out that the enhancer for having a child passenger modifies “the applicable minimum and maximum fines and imprisonment under par. (am) 2. to 7.” and the enhancer for having an elevated alcohol concentration modifies “the applicable minimum and maximum fines under par. (am) 3. to 5.” (Neill’s Br. 8–9 (citing Wis. Stat. §§ 346.65(2)(f)2., 346.65(2)(g)3).) He claims that nothing in the statute allows for applying one enhancer and then applying the other enhancer to the modified minimum and maximum fines. (Neill’s Br. 8–9.) Neill also claims that nothing in the statute allows for applying both enhancers to the minimum and maximum fines provided by section



346.65(2)(am) and then adding the totals, as the court of appeals dissent concluded the statute requires. Neill's position is that only one of the two enhancers has effect on the minimum and maximum fine. He says that "[p]roperly applied, the greater enhancement of the fine (quadruple) subsumes the lesser enhancement (double)." (Neill's Br. 10.) "The minimum fine is \$600 times four, or \$2,400." (Neill's Br. 10.)

Neill focuses on the words "under par. (am)2. to 7." in section 346.65(2)(f)2. and "under par. (am)3. to 5." in section 346.65(2)(g)3. But in arguing that only one of the enhancers has effect on the minimum and maximum fine, Neill reads the words "[e]xcept as provided in pars. (cm), (f), and (g)," in section 346.65(2)(am)3., out of the statute.

Neill's argument violates the cardinal rule that statutory language is to be interpreted to avoid surplusage. *State v. Dowdy*, 2012 WI 12, ¶ 31, 338 Wis. 2d 565, 808 N.W.2d 691. When the words "[e]xcept as provided in pars. (cm), (f), and (g)," in section 346.65(2)(am)3., are given effect, "the applicable minimum and maximum fines under par. (am)2. to 7." and "the applicable minimum and maximum fines under par. (am)3. to 5." are modified by the first enhancer applied. If "[e]xcept as provided in pars. (cm), (f), and (g)," does not modify the applicable minimum and maximum fines or term of imprisonment, those words would be unnecessary.

As explained above, when the penalty enhancer for having a minor passenger is applied, "the applicable minimum and maximum fines under par. (am) 3. to 5." are modified. For instance, for a third-offense OWI, "[e]xcept as provided in pars. (cm), (f), and (g)," the minimum and maximum fines are \$600 and \$2,000. Wis. Stat. § 346.65(2)(am)3. When paragraph (f)(2) is applied because of a minor passenger, "the applicable minimum and maximum

finer under par. (am)[3].” are \$1,200 and \$4,000. When paragraph (g) is then applied for having an elevated alcohol concentration, “the applicable minimum and maximum fines under par. (am) 3.,” which have been modified under section 346.65(2)(f) to \$1,200 and \$4,000, are now doubled, tripled, or quadrupled. Because Neill had an alcohol concentration of 0.25 or above, “the applicable minimum and maximum fines under par. (am)3.,” are quadrupled to \$4,800 to \$16,000.

The same is true if the penalty enhancer for an elevated alcohol concentration is applied first. When the penalty enhancer for having an elevated alcohol concentration is applied, “the applicable minimum and maximum fines under par. (am)2. to 7.” are modified. For instance, for third-offense OWI, the minimum and maximum fines are \$600 and \$2,000 “[e]xcept as provided in pars. (cm), (f), and (g).” Wis. Stat. § 346.65(2)(am)3. When paragraph (g)3. is applied first because of an elevated alcohol concentration, “the applicable minimum and maximum fines under par. (am)[3].” are quadrupled to \$2,400 and \$8,000. When paragraph (f)(2) is then applied for having a minor passenger, “the applicable minimum and maximum fines under par. (am)[3],” which have been modified to \$2,400 and \$8,000 under section 346.65(2)(g), are now doubled to \$4,800 to \$16,000. In other words, when applying the minor-passenger enhancer in paragraph (f)2., a court must double the minimum \$600 fine “[e]xcept” when the minimum fine has already been quadrupled by the alcohol-concentration enhancer “as provided in” paragraph (g). Wis. Stat. § 346.65(2)(am)3. In that case, a court must double the new minimum fine of \$2400.

**E. Neill’s interpretation of the statute would not give effect to both enhancements to the fine for a third-offense OWI .**

The circuit court rejected Neill’s argument that the penalty enhancer for an elevated alcohol concentration subsumes the enhancer for having a minor passenger, as they relate to the minimum and maximum fines. It reasoned that, “When the facts support multiple penalty enhancers, multiple penalty enhancers may normally be applied to the same crime.” (R. 40:4 (citing *Beasley*, 271 Wis. 2d 469, ¶ 14).) The court recognized that the two penalty enhancers operate “based on entirely different factual circumstances – one for having a minor child in the vehicle and the other for having an excessive alcohol concentration.” (R. 40:4.) The court concluded, “It is perfectly reasonable and understandable that the legislature should want to punish a person who operates a motor vehicle while intoxicated when both of these factual circumstances are present.” (R. 40:4.)

The court of appeals agreed, concluding that “[a] plain reading of the statute reveals that there is no language precluding the application of both enhancers to the same offense,” and that “multiple enhancers may normally be applied to the same underlying crime.” *Neill*, 385 Wis. 2d 471, ¶ 22 (quoting *Beasley*, 271 Wis. 2d 469, ¶ 14).

Neill does not dispute that his interpretation of the statute, under which “the greater enhancement of the fine (quadruple) subsumes the lesser enhancement (double) in this case,” would mean that one of the enhancers would have no effect on the minimum and maximum fines to which he is subject. (Neill’s Br. 10.) But he argues that “both penalty enhancers, nonetheless, did apply and did have a substantial effect on Mr. Neill’s penalty,” because his having a child passenger made his third offense a felony, and doubled the

minimum and maximum term of imprisonment. (Neill’s Br. 10.)

Neill’s interpretation of the statute would correctly result in section 346.65(2)(f)2. affecting the classification of his crime and the minimum and maximum term of imprisonment, but his interpretation simply ignores the doubling of the minimum and maximum fines that § 346.65(2)(f)2. requires. The statute does not say that applicable minimum and maximum fines *may* be doubled if there is a minor passenger in the car. And it does not say that *either* the minimum and maximum term of imprisonment or the minimum and maximum fines are doubled. It says that “the applicable minimum and maximum fines *and* imprisonment under par. (am) 2 to 7. for the conviction *are* doubled.” Wis. Stat. § 346.65(2)(f)2. (emphases added). Neill’s interpretation simply does not give effect to the statute’s required doubling of the minimum and maximum fines.

**F. The court of appeals dissenting opinion reaches a result that is not supported by the statutory language.**

The court of appeals dissent interpreted the statute as providing that the \$600 minimum fine would be doubled to \$1,200 under section 346.65(2)(f)2., and the \$600 minimum fine would be quadrupled to \$2,400 under section 346.65(2)(g)3., with those numbers added for a total minimum fine of \$3,600. *Neill*, 385 Wis. 2d 471, ¶ 29 (Kessler, J., dissenting).<sup>3</sup> Neill asserts that the dissent’s conclusion is not allowed by the plain language of the statute. (Neill’s Br. 13.) But he relies on the dissent’s conclusion that “the statute does not specifically instruct a court to apply the *second or*

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<sup>3</sup> Under the dissent’s reasoning, the \$2,000 maximum fine would be doubled to \$4,000, and quadrupled to \$8,000, for a total maximum fine of \$12,000.

*subsequent* multiplier to an *already multiplied* fine.” Neill, 385 Wis. 2d 471, ¶ 27 (Kessler, J., dissenting).

The dissent claimed that the majority opinion added words to the statute’s text. *Id.* But as explained above, an interpretation of the statute as not requiring the second or subsequent multiplier to be applied to an already multiplied fine reads the words “[e]xcept as provided in pars. (cm), (f) and (g)” out of the statute. Under that phrase, “the applicable minimum and maximum fines under par. (am)[3]” are modified. And the second or subsequent multiplier is then properly applied to the already multiplied fine.

In addition, nothing in the statutes says that the minimum and maximum fines are added. Instead, both provisions call for multiplying the minimum and maximum fine, doubling it under section 346.65(2)(f), and doubling, tripling, or quadrupling it under section 346.65(2)(g). The statute plainly requires multiplying, not adding.

**G. The rule of lenity should not be applied because the statutory language is unambiguous.**

Neill argues that the language in Wis. Stat. § 346.65 is unambiguous. (Neill’s Br. 15.) But he asserts that if, as the State argued in the court of appeals, the language is ambiguous, the rule of lenity should apply, and this Court should interpret the statutory language in his favor. (Neill’s Br. 13–16.)

As explained above, after further consideration of the statutory language and the court of appeals opinion, the State agrees with the circuit court and the court of appeals that the statutory language is unambiguous. The rule of lenity is to be applied only in the event of a “grievous ambiguity.” (Neill’s Br. 15 (citing *State v. Guarnero*, 2015 WI 72, ¶¶ 25–27, 363 Wis. 2d 857, 867 N.W.2d 400)). The circuit court, the court of

appeals majority and dissenting opinions, Neill, and the State all agree that the statutory language is unambiguous. The rule of lenity therefore should not be applied in interpreting the statute.

## **CONCLUSION**

For the reasons explained above, the State respectfully requests that this Court affirm the court of appeals' decision that affirmed the judgment of conviction and the circuit court's order denying Neill's motion for postconviction relief.

Dated this 15th day of August 2019.

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 4897 words.

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Assistant Attorney General

## **CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of August 2019.

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