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IN SUPREME COURT

**CLERK OF SUPREME COURT
OF WISCONSIN**

Case No. 2018AP75-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES L. NEILL, IV

Defendant-Appellant-Petitioner.

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

SUPPLEMENTAL BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

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INTRODUCTION

The State submits this brief pursuant to this Court's October 11, 2019 order for supplemental briefing.

The State charged Charles L. Neill IV with operating a motor vehicle while under the influence of an intoxicant (OWI) as a third offense, with a minor passenger in the vehicle, an unclassified felony with a minimum fine of \$1,200. Wis. Stat. §§ 346.63(1), 346.65(2)(f)2. (R. 1:1; 6.) The State also asserted that the applicable minimum and maximum fines are quadrupled under the penalty enhancer for having a blood alcohol concentration above 0.25, Wis. Stat. § 346.65(2)(g)3. (R. 1:1; 6.)

Neill pled guilty to OWI as a third offense, with a minor in the vehicle (R. 48:3–6), and the circuit court imposed the minimum \$4,800 fine. (R. 49:33.) Neill moved for postconviction relief, arguing that the minimum fine was \$2,400, rather than \$4,800. (R. 36.) The circuit court denied the motion. (R 40.) The court of appeals affirmed, concluding that the minimum fine was \$4,800. *State v. Neill*, 2019 WI App 4, ¶¶ 3, 23, 385 Wis. 2d 471, 922 N.W.2d 861. A dissenting opinion concluded that the minimum fine was \$3,600. *Id.* ¶ 29 (Kessler, J., dissenting).

In this Court, Neill again argues that the minimum fine is \$2,400, and the State again argues that it is \$4,800. During briefing, the court of appeals issued a decision in *State v. Culver*, 2018AP799-CR, 2019 WL 3334373 (Wis. Ct. App. July 25, 2019) (unpublished). In *Culver*, the court recognized that when Wis. Stat. § 346.65(2)(f) (2005–06) was applied to a fifth-offense OWI because of a minor passenger, the offense was modified from a Class H felony to an unclassified felony. *Id.* ¶¶ 22–26. The same is true of Neill's third-offense OWI, which was modified from a misdemeanor to an unclassified felony because Neill had a minor passenger. Neill's unclassified

felony third-offense OWI with a minor passenger has a minimum fine of \$1,200. And the enhancer for having an alcohol concentration above 0.25, Wis. Stat. § 346.65(2)(g)3., quadruples the \$1,200 minimum fine to \$4,800.

ARGUMENT

I. A third or subsequent OWI, committed with a minor in the vehicle, is an unclassified felony.

In *Culver*, the court of appeals concluded that a fifth-offense OWI, committed with a minor in the vehicle, was an unclassified felony under Wis. Stat. § 346.65(2)(am)5. and (2)(f) (2005–06). *Culver*, 2019 WL 3334373, ¶¶ 22–26. The court relied on a footnote in *State v. Jackson*, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872, in which this Court referred to unclassified felonies under Truth-in-Sentencing II (TIS-II). *Culver*, 2019 WL 3334373, ¶¶ 22–26. In *Jackson*, this Court said that only a few unclassified felonies remained under TIS-II, including OWI with a minor passenger as a third or fourth offense, under Wis. Stat. § 346.65(2)(f) (2001–02), and domestic abuse during the 72-hour period following a domestic abuse incident, Wis. Stat. § 939.621 (2001–02). *Jackson*, 270 Wis. 2d 113, ¶ 37 n.8.

In *Culver*, the court of appeals concluded that under *Jackson*, a fifth-offense OWI, which was a Class H felony under Wis. Stat. § 346.65(2)(am)5. (2005–06), was modified to an unclassified felony when the minor-passenger provision, paragraph (2)(f), was applied. *Culver*, 2019 WL 3334373, ¶¶ 22–26. Therefore, paragraph (2)(f) was not a penalty enhancer. *Id.* ¶ 24. The court noted that in *Jackson* this Court referred to only third and fourth-offense OWI as unclassified felonies when they were modified by paragraph (2)(f) for having a minor passenger, but not to fifth or subsequent OWIs. *Id.* ¶ 24. But the court of appeals said it “perceive[d] no

possible reason why the application of Wis. Stat. § 346.65(2)(f) to a fifth offense would be the application of an enhancer to a classified crime, but the application of § 346.65(2)(f) to a third or fourth offense would be an unclassified crime.” *Id.*

That conclusion is correct, even though third and fourth-offense OWI offenses were somewhat unique under the 2005–06 statutory provisions that were applicable in *Culver*. In 2006, third and fourth offenses were misdemeanors that were modified to unclassified felonies because of a minor passenger. Wis. Stat. § 346.65(2)(am)3., (2)(am)4., (2)(f). In contrast, a second offense was a misdemeanor and remained a misdemeanor even with a minor passenger, Wis. Stat. § 346.65(2)(am)2., (2)(f), and a fifth or subsequent offense was a felony and remained a felony with a minor passenger. Wis. Stat. § 346.65(2)(am)5., (2)(f). But while *Jackson* did not mention a fifth or subsequent offense being an unclassified felony when there was a minor passenger, the court of appeals in *Culver* was correct to conclude that a fifth-offense OWI with a minor passenger was an unclassified felony.

The court of appeals in *Culver* did not engage in statutory construction to conclude that a fifth-offense OWI with a minor passenger is an unclassified felony. *Culver*, 2019 WL 3334373, ¶ 22. But statutory construction confirms that the court of appeals’ conclusion was correct.

The OWI penalty statute at issue in *Culver* provided that a person guilty of OWI as a fifth or subsequent offense, “[e]xcept as provided in pars. (f) and (g), is guilty of a Class H felony and shall be fined not less than \$600 and imprisoned for not less than 6 months.” Wis. Stat. § 346.65(2)(am)5. (2005–06.) Paragraph (f) modified the term of imprisonment and the fine for having a minor passenger. It provided that “the applicable minimum and maximum forfeitures, fines, or imprisonment under par. (am) for the conviction are doubled.” Wis. Stat. § 346.65(2)(f) (2005–06.)

A Class H felony carried a maximum 6-year term of imprisonment, and a maximum fine of \$10,000. Wis. Stat. § 939.50(3)(h) (2005–06.) Paragraph (f) doubled the minimum and maximum fines to \$1,200 and \$20,000, and the minimum and maximum terms of imprisonment to 1 year and 12 years.

Paragraph (f) modified a fifth-offense OWI from a Class H felony to an unclassified felony. It did so explicitly, stating that “[a]n offense under s. 346.63(1) that subjects a person to a penalty under par. (am) 3., 4., or 5. when there is a minor passenger under 16 years of age in the motor vehicle is a felony.” The Legislature could only have meant that fifth-offense OWI with a minor passenger was an unclassified felony rather than a Class H felony because a Class H felony carried “a fine not to exceed \$10,000 or imprisonment not to exceed 6 years, or both.” Wis. Stat § 939.50(3)(h) (2005–06).

A classified felony is similarly modified to an unclassified felony by the application of paragraph (f) under the current statutes. Wisconsin Stat. § 346.65(2)(am) provides the classifications for OWI offenses. A first offense is a civil offense. Wis. Stat. § 346.65(2)(am)1. A second offense is a misdemeanor. Wis. Stat. § 346.65(2)(am)2. A third offense is a misdemeanor. Wis. Stat. § 346.65(2)(am)3. A fourth offense is a Class H felony. Wis. Stat. § 346.65(2)(am)4. A fifth or sixth offense is a Class G felony. Wis. Stat. § 346.65(2)(am)5. A seventh, eighth, or ninth offense is a Class F felony. Wis. Stat. § 346.65(2)(am)6. And a tenth or subsequent offense is a Class E felony. Wis. Stat. § 346.65(2)(am)7. Those classifications apply unless paragraphs (bm), (cm), (dm), (f), or (g) apply.

Paragraph (f), which applies when a person commits an OWI with a minor in the vehicle, affects the classification of every OWI offense except a second offense.¹

¹ Second-offense OWI remains an unclassified misdemeanor.

A first-offense OWI is modified from a civil offense to a misdemeanor by application of Wis. Stat. § 346.65(2)(f)1., which provides for imprisonment “for not less than 5 days nor more than 6 months.” Wis. Stat. § 346.65(2)(f)1.

Third and subsequent OWI offenses are modified to unclassified felonies by application of Wis. Stat. § 346.65(2)(f)2., which provides that “[a]n offense under s. 346.63(1) that subjects a person to a penalty under par. (am) 3., 4., 5., 6., or 7. when there is a minor passenger under 16 years of age in the motor vehicle is a felony.” Wis. Stat. § 346.65(2)(f)2.

A third offense is modified from a misdemeanor to an unclassified felony because of a minor passenger.

A fourth or subsequent offense is modified from a classified felony to an unclassified felony. A fourth offense is a Class H felony with a maximum 6-year term of imprisonment. When paragraph (f)2. is applied, the maximum term of imprisonment is doubled to 12 years, and the offense is not a Class H felony but an unclassified felony.

A fifth or sixth offense is a Class G felony with a maximum 10-year term of imprisonment. When paragraph (f)2. is applied, the maximum term of imprisonment is doubled to 20 years, and the offense is not a Class G felony but an unclassified felony.

A seventh, eighth, or ninth offense is a Class F felony with a maximum 10-year and 6-month term of imprisonment. When paragraph (f)2. is applied, the maximum term of imprisonment is doubled to 25 years, and the offense, which is not a Class F felony but an unclassified felony.

And a tenth or subsequent offense is a Class E felony with a maximum 15-year term of imprisonment. When paragraph (f)2. is applied, the maximum term of

imprisonment is doubled to 30 years, and the offense is not a Class E felony but an unclassified felony.

That application of Wis. Stat. § 346.65(2)(f)2. to a third offense or subsequent OWI results in an unclassified felony is evidenced by the plain language of paragraph (f)2., which provides that the modified offense “is a felony.” It is also evidenced by the statutory history of Wis. Stat. § 346.65.

Paragraph (f) first appears in the 1995–96 statutes. At that point, no OWIs were felonies. A third, fourth, or fifth or subsequent offense were all misdemeanors. Wis. Stat. § 346.65(2)(c), (d), (e) (1995–96.) Application of paragraph (f) modified each of those offenses to an unclassified felony: “An offense under s. 346.63(1) that subjects a person to a penalty under par. (c), (d) or (e) when there is a minor passenger under 16 years of age in the motor vehicle is a felony.” Wis. Stat. § 346.65(2)(f) (1995–96.)

The Legislature made a fifth or subsequent OWI offense a Class H felony in the 2001–2002 statutes. Wis. Stat. § 346.65(2)(e) (2001–02.) Yet the Legislature did not amend paragraph (f) to remove paragraph (e) from the list of offenses that are felonies when paragraph (f) is applied because of a minor passenger. It did not do so because when paragraph (f) was applied, a fifth offense was modified from a Class H felony to an unclassified felony.

The Legislature reclassified many OWI offenses in the 2007–08 statutes. It made a fifth or sixth offense a Class H felony. Wis. Stat. § 346.65(2)(am)5. It made a seventh, eighth, or ninth offense a Class G felony. Wis. Stat. § 346.65(2)(am)6. And it made a tenth or subsequent offense a Class F felony. Wis. Stat. § 346.65(2)(am)7.

The Legislature also amended paragraph (f) to state, “An offense under s. 346.63(1) that subjects a person to a penalty under par. (am) 3., 4., 5., 6., or 7. when there is a

minor passenger under 16 years of age in the motor vehicle is a felony.” Wis. Stat. § 346.65(2)(f) (2007–08). The Legislature amended paragraph (f) to state that the offenses it had created in paragraphs (am)5., 6., and 7., for a Class H, G, or F felony, all remained felonies when paragraph (f) was applied. By amending paragraph (f) in this manner, the Legislature demonstrated that the Class H, G, and F felonies it had created were no longer Class H, G, and F felonies when paragraph (f) was applied. Instead, those classified felonies were modified to unclassified felonies with doubled penalties.

The current statutes work in the same manner. A third-offense OWI is a misdemeanor, but it is modified to an unclassified felony when paragraph (f)2. is applied. Fourth and subsequent offense OWIs are classified felonies that are modified to unclassified felonies when paragraph (f)2. applies.

And when the OWI offense becomes an unclassified felony, the applicable minimum and maximum fine is doubled under paragraph (f). Wis. Stat. § 346.65(2)(f)2. For an OWI third with a minor passenger, the misdemeanor with a fine of \$600 to \$2,000 becomes an unclassified felony with a fine of \$1,200 to \$4,000.

II. When paragraph (g) is applied to an OWI with a minor passenger that is modified to an unclassified felony, it enhances the fine for the unclassified felony.

This case concerns the application of both Wis. Stat. § 346.65(2)(f) for having a minor passenger, and Wis. Stat. § 346.65(2)(g) for having an elevated alcohol concentration, for a third-offense OWI. Neill’s third offense OWI was modified from a misdemeanor with a minimum \$600 fine to an unclassified felony with a minimum fine of \$1,200 by application of paragraph (f)2. because he had a minor passenger. What remains is the application of paragraph (g).

Paragraph (g) applies only to third, fourth, and fifth or sixth offenses. It doubles, triples, or quadruples the applicable minimum and maximum fines, depending on the person's alcohol concentration. Neill's alcohol concentration was 0.353, which is above 0.25, so paragraph (g)3. applies, and the applicable minimum fine is quadrupled.

Neill argues that the minimum fine for a third-offense OWI—\$600—is quadrupled to \$2,400 under paragraph (g). He asserts that the required doubling of the fine under paragraph (f) has no effect, because it is subsumed by the quadrupling under paragraph (g). (Neill's Br. 10.)

Neill's argument is wrong for two reasons. First, if application of paragraph (g)3. subsumes the application of paragraph (f), the same would logically be true of paragraph (g)1., under which the applicable minimum and maximum fines are doubled. And that would mean that either paragraph (f) or paragraph (g) would double the applicable minimum and maximum fine, and the other paragraph would have no effect. The minimum fine for a person with a minor in the vehicle would be the same whether the person's alcohol concentration was 0.08 or .0199, even though the Legislature has required that the minimum fine be increased when the alcohol concentration is above 0.17.

Second, applying paragraph (g)3. to quadruple the \$600 minimum fine for a misdemeanor third-offense OWI to \$2,400 ignores that the offense has been modified because of the minor passenger to an unclassified felony with a \$1,200 minimum fine. A third-offense OWI with a minor passenger cannot have a fine less than \$1,200. When paragraph (f) applies, the applicable minimum fine for this unclassified felony is \$1,200, not \$600. The minimum \$600 fine applies to a misdemeanor third-offense OWI, not to the unclassified felony of third-offense OWI with a minor passenger.

Culver and the language of Wis. Stat. § 346.65(2)(f) strongly support the conclusion of the circuit court and the court of appeals that the minimum fine for a third-offense OWI with a minor passenger is \$4,800. Under Wis. Stat. § 346.65(2)(am)3., a person who commits a third-offense OWI, “[e]xcept as provided in pars. (cm), (f), and (g), 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.” When paragraph (f) applies, the person is guilty of an unclassified felony, not a misdemeanor. *See Jackson*, 270 Wis. 2d 113, ¶ 37 n.8; *Culver*, 2019 WL 3334373, ¶¶ 22–26. And the applicable minimum fine and term of imprisonment are not \$600 and 60 days. They are \$1,200 and 120 days.

Paragraph (f) modifies a third offense with a minimum fine of \$600 to an unclassified felony with a minimum fine of \$1,200 when the person has a minor passenger. Paragraph (g) then doubles, triples, or quadruples the applicable minimum fine under par. (am)3. The applicable minimum fine under paragraph (am)3. is \$600 except in a few scenarios, including when there is a minor passenger. When there is a minor passenger, the applicable minimum fine is \$1,200. And that minimum fine is quadrupled by paragraph (g) to \$4,800.

The dissenting opinion in the court of appeals recognized that when paragraph (f) applies, the minimum fine is doubled to \$1,200. *Neill*, 385 Wis. 2d 471, ¶ 29 (Kessler, J., dissenting). But it concluded that when paragraph (g)3. is applied, the minimum fine of \$600 is quadrupled to \$2,400, and those totals are added for a total fine of \$3,600. *Id.*

While adding the fines in that manner would give some effect to both paragraph (f) and paragraph (g), that method fails to account for the modification of the misdemeanor OWI third offense to an unclassified felony OWI third offense because of a minor passenger. Because *Neill*’s offense was modified to an unclassified felony, the penalty enhancer in

paragraph (g) quadruples the \$1,200 minimum fine for this felony offense. It would not make sense to quadruple the minimum \$600 fine for a *misdemeanor* third-offense OWI when Neill's minor passenger changed the crime to an unclassified *felony* with a minimum \$1,200 fine.

Third-offense OWI with a minor passenger is an unclassified felony with a \$1,200 minimum fine. Wis. Stat. § 346.65(2)(am)3, (f)2. The "applicable minimum and maximum fine under par. (am)3.," when paragraph (f) applies, is \$1,200. Quadrupling that minimum fine under paragraph (g)3. results in a \$4,800 minimum fine.

CONCLUSION

This Court should 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 21st day of October, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

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 2,926 words.

Dated this 21st day of October, 2019.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed 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 21st day of October, 2019.

MICHAEL C. SANDERS
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Charles L. Neill, IV
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of October, 2019.

MICHAEL C. SANDERS
Assistant Attorney General

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WITH WIS. STAT. § (RULE) 809.19(13)**

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 21st day of October, 2019.

MICHAEL C. SANDERS
Assistant Attorney General