WISCONSIN COURT OF APPEALS
DISTRICT II

APPEAL NO. 2021AP0859-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LYNNE M. SHIRIKIAN,

Defendant-Respondent.

Appeal from the Circuit Court for Waukesha County,
the Honorable Jennifer Dorow, Circuit Court Judge,
Presiding
Circuit Court Case No: 20-CF-000662

BRIEF OF DEFENDANT-RESPONDENT LYNNE M. SHIRIKIAN

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STATEMENT OF THE ISSUES

1. **Whether Wis. Stat. § 346.65(2)(am)5., in conjunction with other Wisconsin statutes, authorizes a circuit court to impose a bifurcated sentence of three years of initial confinement and two years of extended supervision, but stay that sentence and place the defendant on probation for three years with nine months of condition time to be spent in county jail, when the defendant has been convicted of OWI as a fifth offense.**

   Answer by the Circuit Court. Yes. Wisconsin Stat. § 346.65(2)(am)5., in conjunction with other statutes, authorizes a circuit court to stay a bifurcated sentence and place the defendant on probation, when the defendant has been convicted of OWI as a fifth offense.

2. **Whether, consistent with the constitutional right to be free from double jeopardy, a circuit court may resentence a defendant, when the circuit court imposes a bifurcated sentence under Wis. Stat. § 346.65(2)(am)5., stays the sentence, and places the defendant on probation.**

   Answer by the Circuit Court. No. The circuit court concluded Shirikian has a legitimate expectation of finality in her sentence, so resentencing her would violate her constitutional right to be free from double jeopardy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent Shirikian does not request publication or oral argument, because the parties' briefs will adequately address the facts, arguments, and issues, and because the criterion for publication is not met under Wis. Stat. § 809.23(1).

STATEMENT OF THE CASE

Wisconsin Stat. § 346.65(2)(am)5. requires a circuit court to impose a bifurcated sentence for a fifth OWI offense. The statute contains a presumptive mandatory minimum sentence of 18 months, but permits a circuit court to "impose a term of confinement that is less than one year and 6 months" if the court finds that it would be in the best interests of the community and would not harm the public to do so.

The circuit court's sentence here satisfies the provisions of § 346.65(2)(am)5. The circuit court imposed a bifurcated sentence, and it is uncontested the court made the requisite findings to invoke the sentencing exception and permit the court to impose a sentence with a "term of confinement" of less than one year and six months.

After accepting Shirikian's plea to a fifth OWI offense, the circuit court imposed a five-year bifurcated sentence, comprised of three years of initial confinement and two years of extended supervision. (R. 38:28; A.-App. 129.) However, the circuit court stayed that sentence and ordered Shirikian to three years of probation, with nine months in the county jail. (R. 38:28-29; A.-App. 129-30.)

The circuit court possessed the authority to stay Shirikian's bifurcated sentence and order probation with nine months in county jail under two separate sub-parts of Wis. Stat. § 973.15(8)(a). First, § 973.15(8)(a)1. authorizes a circuit court to stay a sentence "[f]or legal cause." Here, the sentencing exception in § 346.65(2)(am)5. constitutes legal cause permitting the circuit court to stay its bifurcated sentence.

Second, and alternatively, § 973.15(8)(a)2. authorizes a circuit court to stay a sentence "[u]nder Wis. Sat. § 973.09(1)(a)," the probation statute. Section 973.09(1)(a), in turn, authorizes a circuit court to stay execution of a sentence and place a defendant on probation, unless "probation is prohibited for a particular offense by statute." Here, probation is not prohibited by § 346.65(2)(am)5. or any other statute.

Indeed, a plain-meaning interpretation of § 973.09(1)(d) and § 346.65(2)(am)5. show probation is *permitted* here. Section 973.09(1)(d) permits a circuit court to order probation where a "person is convicted of an offense that provides a mandatory or presumptive minimum of one year or less of imprisonment . . . ." Section 346.65(2)(am)5.'s sentencing exception permits a circuit court to impose a sentence of less than 18 months of "confinement," which satisfies § 973.09(1)(d).

Moreover, it was permissible for the circuit court to confine Shirikian in county jail rather than in prison. It is clear from the probation statute, as well as from numerous criminal statutes requiring a bifurcated sentence, that the term "confinement" in § 346.65(2)(am)5. does not mean "confinement in prison." For starters, § 973.09(1)(d) permits a circuit court to order probation where the "mandatory or presumptive minimum" period of imprisonment is "one year or less," so long as the "court requires, as a condition of probation, that the person be *confined* under sub. (4) for at least the mandatory or presumptive minimum period." (Emphasis added.) Subsection (4), in turn, shows that the

term "confined" does not mean "confined in prison" because that subsection permits "confine[ment]" in a number of places *other than* prison, such as county jail, Huber, work camp, or tribal jail. Wis. Stat. § 973.09(4)(a).

In addition, several statutes requiring bifurcated sentences employ the following phrase: "confinement in prison portion of the bifurcated sentence." *E.g.*, Wis. Stats. §§ 939.616(1r), 939.616(2), 939.617(1), 939.618(2)(a), 939.6195(2). In contrast, § 346.65(2)(am)5. *omits* the words "in prison" and, instead, references the "confinement portion of the bifurcated sentence." This difference in text should be given effect. If "confinement" within § 346.65(2)(am)5. means "confinement in prison," as the State contends, then every statute providing "confinement in prison" contains the surplusage "in prison" and absurdly means "confinement in prison in prison."

In short, the circuit court's sentence is lawful. The circuit court imposed a bifurcated sentence, as § 346.65(2)(am)5. requires, and the circuit court possessed authority to stay that bifurcated sentence and order probation, pursuant to § 973.15(8)(a) and § 973.09(1)(a), (d), (4)(a). To the extent this Court may deem the statutory scheme ambiguous and the legislative history inconclusive, the rule of lenity supports the circuit court's sentence.

Because the circuit court's sentence is lawful, resentencing would violate Shirikian's constitutional right to be free from double jeopardy

This Court should affirm.

STATEMENT OF FACTS

The State charged Shirikian with OWI – Fifth or Sixth Offense. (R. 1.) On February 12, 2021, the circuit court held a plea and sentencing hearing. (R. 38; A-App. 102-39.) Shirikian was present in person at the hearing, and she pleaded guilty to OWI as a fifth offense. (R. 38:2-13; A-App. 103-114.) The circuit court accepted her plea. (*Id*.)

The circuit court then addressed sentencing. It noted the applicable statute—Wis. Stat. § 346.65(2)(am)5.—contains a "presumptive minimum" term of confinement of 18 months. (R. 38:24; A.-App. 125.) The circuit court also noted, however, the statute permits a court to impose a lesser sentence than the presumptive minimum, if the court makes the requisite finding that such lesser sentence would be in the best interests of the community and the public would not be harmed. (*Id*.) The court weighed the interests of protecting the public and the seriousness of the offense against the needs of the Defendant and the circumstances of the case. (R. 38:27-28; A.-App. 128-29.) In doing so, the circuit court noted several aggravating and mitigating factors. (R. 38:20-28, A.-App. 121-29.)

Pursuant to the statutory language, the circuit court found the best interests of the community would be served and the public would not be harmed if it imposed a sentence less than the presumptive minimum. (R. 38:29, A.-App. 130.) The circuit court made several factual findings on the record to support its ultimate finding the sentencing exception applied, including:

- Apart from her previous OWI offenses, Shirikian has a clean criminal record, (R. 38:23; A.-App. 124);

- Shirikian had "periods of significant sobriety," and her fourth OWI offense was thirteen years prior, (R. 38:25; A.-App. 126);

- Shirikian has a valid driver's license, (*id*.);

- Shirikian has undergone significant treatment for alcoholism, (*see id*.);

- Shirikian participates in alcohol-recovery groups, (*id*.);

- Shirikian has a strong support network, including her husband and friends who wrote letters to the court on her behalf, (*id*.);

- Shirikian is a good person of good character who "thrive[s] under structure," but is "struggling with a *disease*," (R. 38:26, 27; A.-App. 127, 128 (emphasis added)).

The State does not argue the circuit court failed to make the requisite findings to invoke the best-interests-of-the-community sentencing exception to § 346.65(2)(am)5.

Upon making these findings, the circuit court announced its sentence. As relevant to this appeal, the circuit court imposed a bifurcated five-year sentence, comprised of three years of initial confinement and two years of extended supervision. (R. 38:28; A.-App. 129.) However, the circuit court stayed that bifurcated sentence and sentenced Shirikian to three years of probation, with nine months in the county jail. (R. 38:28-29; A.-App. 129-30.)

At the hearing, the State challenged the circuit court's sentence as inconsistent with the provisions of § 346.65(2)(am)5. (R. 38:32-35; A.-App. 133-36.) The court disagreed. The circuit court interpreted the statute to mean "confinement" may include probation and condition time that is less than one year and six months. (R. 38:35; A.-App. 136.) In other words, the circuit court interpreted the statute as not mandating a "prison sentence because of that language that says the court may . . . impose a term of confinement that is less than one year and 6 months." (*Id*.)

The circuit court then immediately remanded Shirikian into custody to begin serving her condition time in county jail. (R. 38:36-37; A.-App. 137-38.)

On March 2, 2021, the State moved for resentencing. (R. 29; A.-App. 143-49.) The State again argued § 346.65(2)(am)5. does not permit a circuit court to stay its bifurcated sentence and order probation and confinement in county jail. (*Id*.) Rather, the State argued, the statute requires the circuit court to impose a bifurcated sentence with a minimum of one year and six months of initial confinement, unless the court deems the exception in the statute applicable, in which case the court may impose a bifurcated sentence with at least one year of confinement in prison. (*Id*.)

The circuit court denied the State's Motion for Resentencing. (R. 34; A.-App. 101.) Citing *State v. Willett*, the circuit court noted Shirikian "is entitled to finality in the sentence imposed by the Court," and resentencing would violate the constitutional prohibition against double jeopardy.

(*Id*. (citing *State v. Willett*, 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881).)

The State filed a Notice of Appeal on May 13, 2021. (R. 36.) For the reasons explained in Shirikian's Jurisdictional Memo filed on May 25, 2022, the State's appeal is untimely and, therefore, this Court lacks jurisdiction. (May 25, 2022 Shirikian Jurisd. Memo.)

STANDARD OF REVIEW

This appeal involves review of the circuit court's sentencing and interpretation of the statute informing the circuit court's sentence. This appeal also involves the question of whether any resentencing would violate double jeopardy.

"It is a well-settled principle of law that a circuit court exercises discretion at sentencing" and sentencing decisions are reviewed to determine whether the circuit court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Where the circuit court's discretion in sentencing has been demonstrated, the appellate court adheres to "a consistent and strong policy against interference" with that discretion. *Id*., ¶ 18 (quoting *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971) (internal quotation marks omitted)). "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *Id*. (quoting *State v. Borrell*, 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992) (brackets in original; internal quotation marks omitted)).

The circuit court's sentence here was based, in part, on its interpretation of Wis. Stat. § 346.65(2)(am)5. Statutory interpretation is a question of law this Court reviews *de novo*. *State v. Cole*, 2003 WI 59, ¶ 12, 262 Wis. 2d 167, 663 N.W.2d 700. The goal of statutory interpretation is to discern the legislature's intent, which begins with an inquiry of the plain meaning of the statute's text. *State ex rel. Kalal v.*

Circuit Court for Dane Cnty., 2004 WI 58, ¶¶ 43, 45, 271 Wis. 2d 633, 681 N.W.2d 110. In addition, "statutory 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 unreasonable or absurd results." *Id*., ¶ 46.

Finally, the State contends it would not violate constitutional double jeopardy if the circuit court were to resentence Shirikian. Whether resentencing would violate double jeopardy is a question of law this Court reviews *de novo*. *Willett*, 238 Wis. 2d 621, ¶ 4.

ARGUMENT

I. Wisconsin statutes grant the circuit court authority to impose a bifurcated sentence, but stay that bifurcated sentence and order probation with confinement in county jail.

A. The plain meaning of the sentencing exception to Wis. Stat. § 346.65(2)(am)5., in conjunction with Wis. Stats. §§ 973.09, and 973.15(8)(a), permit the circuit court to impose a bifurcated sentence, stay that sentence, and order probation for OWI as a fifth offense.

Whether the circuit court properly exercised its discretion in sentencing Shirikian is predicated largely on interpretation of multiple Wisconsin statutes. Shirikian's guilty plea to OWI as a fifth offense invokes Wis. Stat. § 346.65(2)(am)5. Next, Wis. Stat. § 973.15(8)(a) grants the circuit court authority to stay a bifurcated sentence imposed under § 346.65(2)(am)5. Finally, Wis. Stat. § 973.15(8)(a)2. and Wis. Stat. § 973.09 grant the circuit court authority to order probation in these circumstances. Pursuant to the plain meaning of these statutes, the circuit court possessed the authority to impose a bifurcated sentence of three years of initial confinement and two years of extended supervision, but stay that bifurcated sentence and order three years of probation with nine months of confinement in county jail.

1. It is uncontested the circuit court made the requisite finding to invoke the "best-interest-of-the-community" sentencing exception to Wis. Stat. § 346.65(2)(am)5.

Sentencing for a fifth OWI offense is initially governed by Wis. Stat. § 346.65(2)(am)5. That statute provides the sentencing court shall impose a bifurcated sentence, and the "initial confinement" portion of the bifurcated sentence cannot be less than one year and 6 months, unless the court finds it would serve the best interests of the community and cause no harm to the public for the defendant to be sentenced to a "term of confinement that is less than one year and 6 months." Specifically, the statue provides in relevant part as follows:

> The court shall impose a bifurcated sentence under s. 973.01, and the confinement portion of the bifurcated sentence imposed on the person shall be not less than one year and 6 months. The court may impose a term of confinement that is less than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed if the court places its reasons on the record.

Wis. Stat. § 346.65(2)(am)5.

The State agrees the second sentence quoted above—*i.e.*, the sentencing exception in the statute—applies to this appeal. (State Br., p. 13.) In addition, the State does not argue the circuit court failed to make the requisite findings to invoke the statute's sentencing exception. The State further agrees "the statute requires a court to impose a bifurcated

sentence," and a bifurcated sentence is one that "consists of a term of confinement in prison followed by a term of extended supervision." (State Br., p. 13); Wis. Stat. § 973.01(2).

Thus, the circuit court's sentence satisfies the provisions of § 346.65(2)(am)5.: **(a)** the circuit court concededly made the requisite findings to apply the "best-interest-of-the-community" sentencing exception in the statute; and **(b)** the circuit court imposed a bifurcated sentence, comprised of three years of initial confinement, followed by two years of extended supervision. (R. 38:28-29; A.-App. 129-30.)

Accordingly, the question becomes whether the circuit court possessed the authority to stay its imposed bifurcated sentence and order three years of probation, including nine months of confinement in county jail. (R. 30:28-29; A.-App. 29-30.) As shown below, pursuant to Wis. Stats. §§ 973.15(8), 973.09, the answer is "yes."

2. Wisconsin Stat. § 973.15(8)(a) authorized the circuit court to stay its imposed bifurcated sentence.

Wisconsin Stat. § 973.15(8)(a)—which the State entirely fails to mention—authorized the circuit court in these circumstances to stay its bifurcated sentence. Section 973.15(8)(a) authorizes a circuit court to stay execution of a sentence *either* "[f]or legal cause," *or* "[u]nder Wis. Stat. § 973.09(1)(a)," the probation statute:

> The sentencing court may stay execution of a sentence of imprisonment or to the intensive sanctions program only:
>
> 1. For legal cause; [or]

2. Under s. 973.09(1)(a) . . . .

Wis. Stat. § 973.15(8)(a)1., 2.

Both alternatives within Wis. Stat. § 973.15(8)(a) are satisfied here.

The circuit court had "legal cause" to stay execution of the bifurcated sentence it imposed. The statutes do not define "legal cause," but Wisconsin case law has elucidated the phrase's meaning. Legal cause "refers to a stay based on the legality of the conviction or the duty to enforce the sentence, and has been explained as 'good cause, having to do with the sentence itself, and not on grounds which have no relation to the action in which the sentence is pronounced and are more properly for the consideration of the governor, in whom the power to pardon is vested, rather than the judiciary.'" *State v. Szulczewski*, 216 Wis. 2d 495, ¶ 28, 574 N.W.2d 660 (1998) (quoting *Drewniak v. State ex rel. Jacquest*, 239 Wis. 475, 486, 1 N.W.2d 899 (1942)). Accordingly, a stay for the "personal accommodation of the defendant" is not legal cause under Wis. Stat. § 973.15(8)(a)1. *Id*., ¶ 30.

The following circumstances have been held to constitute a stay for "legal cause":

- a stay pending appeal, *Szulczewski*, 216 Wis. 2d 495, ¶ 29 (citing *Reinex v. State*, 51 Wis. 152, 8 N.W. 155 (1881));
- a stay to consolidate sentencing matters, *id*. (citing *Weston v. State*, 28 Wis. 2d 136, 146, 135 N.W.2d 820 (1965)); and
- a stay of execution of imprisonment for a defendant convicted of and sentenced for a crime while that defendant is under

> commitment related to being found not guilty of a previous crime by reason of mental disease or defect, *id*., ¶¶ 2-6, 30-31.

The stay here is analogous to the scenarios above that constitute stays for legal cause. Here, the circuit court's stay of Shirikian's bifurcated sentence was for "good cause having to do with the sentence itself . . . ." *Id*., ¶ 28. The legal cause is the sentencing exception in § 346.65(2)(am)5. that permits the circuit court to impose "a term of confinement that is less than one year and 6 months if the court finds the best interests of the community will be served and the public will not be harmed . . . ." By definition, this sentencing exception in the OWI statute does *not* pertain to "personal accommodation of the defendant." *Szulczewski*, 216 Wis. 2d 495, ¶ 30. Rather, it pertains to "the best interests of the community" and to protecting the public. Wis. Stat. § 346.65(2)(am)5.

Accordingly, the circuit court possessed authority under § 973.15(8)(a)1. to stay the bifurcated sentence it imposed. Thus, it was lawful for the circuit court to impose a bifurcated sentence of three years of initial confinement followed by two years of extended supervision; to stay that bifurcated sentence; and to sentence Shirikian to three years of probation, pursuant to the provisions of § 346.65(2)(am)5. and § 973.15(8)(a)1.

However, even if the best-interests-of-the-community sentencing exception in § 346.65(2)(am)5. does not constitute "legal cause" under § 973.15(8)(a)1., the circuit court nevertheless possessed authority to stay its bifurcated sentence and order probation. This is true because—in

addition to granting courts authority to stay sentences for "legal cause"—§ 973.15(8)(a) grants circuit courts authority to stay sentences "[u]nder Wis. Stat. § 973.09(1)(a)," the probation statute. Wis. Stat. § 973.15(8)(a)2. Here, the circuit court possessed authority to stay its bifurcated sentence pursuant to the probation statute. Part I.A.3. below shows why this is the case.

3. Wisconsin Stat. § 973.09(1)(a) authorized the circuit court to stay its imposed bifurcated sentence and order probation.

Wisconsin Stat. § 973.09(1)(a) authorized the circuit court to stay its imposed bifurcated sentence and order probation. That statute provides in relevant part:

> Except as provided in par. (c)[1] or if probation is prohibited for a particular offense by statute, if a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefore. . . .

Wis. Stat. § 973.09(1)(a).

As demonstrated, sub. (1)(a) authorizes a circuit court to stay execution of a sentence and place the person on probation, unless "probation is prohibited for a particular offense by statute." *Id*. Here, § 973.09(1)(a) authorized the circuit court to place Shirikian on probation because in these circumstances probation is not prohibited by any statute.

[1] Sub (c) provides that a person who is convicted of any crime punishable by life in prison is not eligible to be placed on probation. Wis. Stat. § 973.09(1)(c).

The State contends Wis. Stat. § 346.65(2)(am)5. prohibits a circuit court from ordering probation because § 346.65(2)(am)5. does not specifically *authorize* probation. (State Br., pp. 23-24.) But the State's argument ignores Wis. Stat. § 973.09(1)(d), which when read together with § 346.65(2)(am)5., does *expressly authorize* probation here.

The exception in § 346.65(2)(am)5. permits a circuit court to impose a sentence of confinement of less than one year and six months. Meanwhile, § 973.09(1)(d) permits a circuit court to order probation where a "person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment":

> If a person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment, a court may place the person on probation under par. (a) if the court requires, as a condition of probation, that the person be confined under sub. (4) for at least that mandatory or presumptive minimum period. . . .

Wis. Stat. § 973.09(1)(d).

Thus, read together, § 346.65(2)(am)5. and § 973.09(1)(d), (4) authorized the circuit court to place Shirikian on probation.

The State's reliance on *State v. Lalicata* is misplaced. 2012 WI App 138, 345 Wis. 2d 342, 824 N.W.2d 921. *Lalicata* does not apply because the case did not involve § 973.09(1)**(d)** at all. This is critical: whereas § 973.09(1)(d) applies here because the sentencing exception in the OWI statute permits a mandatory minimum that may be one year or

less, § 973.09(1)(d) could not apply in *Lalicata* because the statute there set a mandatory minimum of 25 years. 345 Wis. 2d 342, ¶¶ 2, 5. Indeed, the State in *Lalicata* went out of its way to distinguish § 973.09(1)(d) from the *Lalicata* situation, arguing that § 973.09(1)(d) "expressly authorizes probation." *Id*., ¶ 7. The State's position in *Lalicata* is Shirikian's position here.

The State further contends the circuit court's order of probation is unlawful because: **(a)** Wis. Stat. § 973.01(2)(b) requires a mandatory bifurcated sentence to include at least one year of confinement in prison; and **(b)** Wis. Stat. § 973.09(1)(d) requires the circuit court, "as a condition of probation," to "confine[]" the defendant "for at least that mandatory or presumptive minimum period of imprisonment" referenced in § 973.01(2)(b); but **(c)** the circuit court did not order Shirikian confined for at least one year but, rather, ordered her confined for nine months. (State Br., pp. 13-15.) The State is incorrect.

The State's argument in this regard is predicated on two errors. The State's first error is that Shirikian's sentence violates § 973.01(2)(b) because she was not sentenced to at least a year of confinement. The State's second error is that Shirikian's sentence is unlawful because she was not sentenced to confinement in prison.

As to the State's first error: the circuit court's bifurcated sentence satisfied § 973.01(2)(b)'s requirement that the confinement portion of the sentence be at least a year. Here, the circuit court ordered a bifurcated sentence that included a three-year prison sentence. (R. 38:28; A.-App.

129.) For the reasons explained above, § 973.15(8)(a) permitted the circuit court to stay that three-year prison sentence. Then, the sentencing exception in § 346.65(2)(am)5., coupled with § 973.09(1)(d), permitted Shirikian to be sentenced for less than one year of confinement. Thus, the circuit court's order that she be confined for nine months is statutorily permissible.

As to the State's second error: The State incorrectly argues the term "confinement" in § 346.65(2)(am)5. means "confinement in prison" and, therefore, it was unlawful for the circuit court to confine Shirikian in county jail. (State Br., pp. 13-16.) In this regard, the State asserts that, under the circuit court's interpretation of the OWI statute, the word "confinement" in the first sentence means "initial confinement," but the word "confinement" in the second sentence would include probation and condition time. (*Id*., p. 15.) That is not accurate. The term "confinement" means the same thing in both sentences of the OWI statute: As shown below, the probation statute, § 973.09(1)(a), (d), (4)—as well as several other statutes—demonstrate "confinement" does not mean "confinement in prison." The circuit court permissibly imposed a three-year prison sentence, but stayed that sentence under § 973.15(8)(a) and § 973.09(1)(a), (d), (4)(a).

As noted, § 973.09(1)(d) permits a circuit court to order probation where the "mandatory or presumptive minimum" period of imprisonment is "one year or less," so long as the "court requires, as a condition of probation, that the person be *confined under sub. (4)* for at least the

mandatory or presumptive minimum period." Wis. Stat. § 973.09(1)(d) (emphasis added). Subsection (4), in turn, shows the term "confined" does *not* mean "confined in prison" but, instead, means confined in any number of places *other than prison*, such as county jail, Huber, work camp, or tribal jail:

> The court may also require as a condition of probation that the probationer be *confined* during such period of the term of probation as the court prescribes, but not to exceed one year. The court may grant the privilege of leaving the *county jail, Huber facility, work camp, or tribal jail* during the hours or periods of employment or other activity under s. 303.08(1) while confined under this subsection. . . . In those counties with a *Huber facility* under s. 303.09, the sheriff shall determine whether *confinement under this subsection is to be in that facility or in the county jail*. . . .

Wis. Stat. § 973.09(4)(a) (emphasis added).

Consistent with the sentencing exception in § 346.65(2)(am)5. and with § 973.09(1)(d), (4)(a), the circuit court permissibly stayed Shirikian's bifurcated sentence and ordered three years of probation with nine months confinement in county jail with Huber release privileges. (R. 38:28-29; A.-App. 29-30.)

The probation statute is not the only statute that shows the term "confinement" within § 346.65(2)(am)5. does not mean "confinement in prison." The criminal code is replete with provisions employing the phrase "confinement in prison." If "confinement" meant "confinement in prison," as the State asserts, then all of Wisconsin's criminal provisions

employing the phrase "confinement in prison" would contain the impermissible surplusage "in prison." *Republic Airlines, Inc. v. Wis. Dep't. of Rev*., 159 Wis. 2d 247, 255, 464 N.W.2d 62 (Ct. App. 1990) (a court should avoid an interpretation of a statute that would create superfluity in other statutes).

Even more tellingly as to the meaning of § 346.65(2)(am)5., several Wisconsin statutes expressly require a bifurcated sentence—as § 346.65(2)(am)5. requires—but those statutes address "the term of *confinement in prison portion* of the bifurcated sentence." *E.g*., Wis. Stats. §§ 939.616(1r), 939.616(2), 939.617(1), 939.618(2)(a), 939.6195(2) (emphasis added) (see chart immediately below for specific text). In contrast, § 346.65(2)(am)5. *omits* the words "in prison" and simply references the "*confinement portion* of the bifurcated sentence."

This difference in statutory text should be given effect. It shows the legislature does not require "confinement in prison" for those convicted under § 346.65(2)(am)5. *See Ball v. District No. 4, Area Bd. of Vocational, Technical & Adult Educ*., 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984) (stating courts presume the legislature chooses "its terms carefully and precisely to express its meaning"). Instead, as shown above, a stayed bifurcated sentence with an order of probation is permissible.

The following is just a partial list of statutes that would contain the impermissibly superfluous words "in prison" if the Court were to adopt the State's argument that the term "confinement" in § 346.65(2)(am)5. means "confinement in prison." Under the State's interpretation, all statutes

providing "confinement in prison" would absurdly mean "confinement in prison in prison":

Wisconsin statute	**Relevant statutory text**
Wis. Stat. § 939.32(1m)(a)1.	"Subject to the minimum term of extend supervision . . . if the crime is classified as a felony . . . the maximum term of ***confinement in prison*** is one-half the maximum term of ***confinement in prison*** specified in s. 973.01(2)(b) . . . ." (Emphasis added).
Wis. Stat. § 939.616(1g)	"If a person is convicted of a violation of s. 948.02(1)(am) or 948.025(1)(a) . . . the court may not make an extended supervision eligibility date determination on a date that will occur before the person has served a 25-year term of ***confinement in prison***." (Emphasis added.)
Wis. Stat. § 939.616(1r)	"If a person is convicted of a violation of s. 948.02(1)(b) or (c) or 948.025(1)(b), the court shall impose a bifurcated sentence under s. 973.01. The term of ***confinement in prison portion of the bifurcated sentence*** shall be at least 25 years. . . ." (Emphasis added.)

Wisconsin statute	**Relevant statutory text**
Wis. Stat. § 939.616(2)	"If a person is convicted of a violation of s. 948.02(1)(d) or 948.025(1)(c), the court shall impose a bifurcated sentence under s. 973.01. The term of ***confinement in prison portion of the bifurcated sentence*** shall be at least five years. . . ." (Emphasis added.)
Wis. Stat. § 939.617(1)	". . . [I]f a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court shall impose a bifurcated sentence under 973.01. The term of ***confinement in prison portion of the bifurcated sentence*** shall be at least 5 years for violations of 948.05 or 948.075 and three years for violations of 948.12. . . . ***The court may not place the defendant on probation***." (Brackets and emphasis added.)

Wisconsin statute	**Relevant statutory text**
Wis. Stat. § 939.618(2)(a)	". . . [I]f a person is has one or more prior convictions for a serious sex crime and subsequently commits a serious sex crime, the court shall impose a bifurcated sentence under s. 973.01. The ***term of confinement in prison portion of a bifurcated sentence*** imposed under this subsection may not be less than three years and 6 months . . . . ***The court may not place the defendant on probation***." (Brackets and emphasis added.)
Wis. Stat. § 939.6195(2)	". . . Notwithstanding s. 973.01(2)(b), the ***term of confinement in prison portion of the bifurcated sentence*** shall be at least 4 years . . . . ***The court may not place the person on probation***." (Emphasis added.)
Wis. Stat. § 973.195(1r)(a)	"***CONFINEMENT IN PRISON***. (a) Except as provided in s. 973.198, an inmate who is serving a sentence imposed under s. 973.01 for a crime other than a Class B felony may petition the sentencing court to adjust the sentence if the inmate has served at least the applicable percentage of the ***term of confinement in prison portion of the sentence***. . . ." (Bold and italics added; caps in original.)

Thus, the probation statute, § 973.09(1)(d), 4(a), which specifically provides that a defendant can be "confined" in places other than prison, as well as every Wisconsin criminal provision that references "confinement in prison," show the term "confinement" within § 346.65(2)(am)5. does not mean "confinement in prison," as the State contends.

The State also is incorrect that the "structure, context, and purpose" of § 346.65(2)(am)5. supports its contention the statute mandates confinement in prison. (State Br., pp. 16-17.) Specifically, the State argues an interpretation of § 346.65(2)(am)5. that would not require a minimum term in prison would be contrary to the graduated penalties provided in Wis. Stat. § 346.65(2)(am)2. through Wis. Stat. § 346.65(2)(am)7. for OWI's. (State Br., pp. 16-17.)

The State's argument is belied by the best-interests-of-the-community sentencing exception in § 346.65(2)(am)5. The State overlooks that § 346.65(2)(am)5. is the only statute within the series of OWI statutes ranging from Wis. Stat. § 346.65(2)(am)2. through Wis. Stat. § 346.65(2)(am)7. that contains an exception permitting the circuit court to sentence the defendant to less than the presumptive minimum sentence prescribed. By including the sentencing exception in § 346.65(2)(am)5., the legislature intentionally permitted the circuit court to deviate from the so-called graduated-penalty structure for OWI's and order a lesser sentence than one year and six months, if the court deems it in the bests interests of the community to do so. *See Ball*, 117 Wis. at 539. As shown above, when the circuit court makes the requisite

finding the sentencing exception to § 346.65(2)(am)5. applies, the statutory scheme linking § 346.65(2)(am)5. to § 973.15(8)(a) (the statute permitting the circuit court to stay its sentence) and to § 973.09(1)(a), (d), (4)(a) (the probation statute) permits the circuit court to stay a bifurcated sentence and order probation.

Section 346.65(2)(am)5.'s sentencing exception not only is unique among the OWI statutes, but also renders *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467 inapplicable. (*See* State Br., pp. 16-17, 24.)

In *Williams*, the court did not consider whether the term "confinement" within Wis. Stat. § 346.65(2)(am)6. meant "confinement in prison." Unlike Shirikian, the defendant in *Williams* did not contest the proposition that the term "confinement" means "confinement in prison." *Id*., ¶ 3. Instead, the *Williams* court considered whether § 346.65(2)(am)6. requires a circuit court to impose a bifurcated sentence. *Id*., ¶¶ 2-3.

Williams does not apply for two reasons: **(a)** § 346.65(2)(am)6. does not contain any sentencing exception similar to the one in § 346.65(2)(am)5., and that sentencing exception ultimately permits a court to order probation instead of imposing mandatory prison time; and **(b)** the circuit court here *did* impose a bifurcated sentence. (R. 38:28; A.-App. 129.)

*****

In sum, the State does not contest the circuit court made the requisite finding that allowed it to sentence Shirikian pursuant to the best-interests-of-the-community

sentencing exception in § 346.65(2)(am)5. That exception permitted the circuit court to impose a sentence of less than the presumptive minimum of one year and six months. The circuit court imposed a bifurcated sentence, as the statute dictates, but stayed the bifurcated sentence. The circuit court had authority to stay the bifurcated sentence pursuant to two independent statutory grants of authority: **(a)** "legal cause," pursuant to Wis. Stat. § 973.15(8)(a)1.; or **(b)** the probation statute, pursuant to § 973.15(8)(a)2. Finally, the court's order of three years of probation and nine months of confinement in county jail satisfies the provisions of the probation statute, § 973.09(1)(a), (d), 4(a).

Accordingly, the circuit court's sentence is lawful, pursuant to the plain meaning of Wis. Stats. § 346.65(2)(am)5., § 973.15(8), and § 973.09(1)(a), (d), 4(a).

However, even if the Court were to conclude the statutory provisions at issue are ambiguous, the ambiguity should be resolved in favor of the circuit court's sentence. Part I.B. below shows why.

B. If the Court were to deem Wis. Stat. § 346.65(2)(am)5. ambiguous, the statutory and legislative history, as well as the rule of lenity, support resolution of any ambiguity in favor of the circuit court's sentence.

The State's and Shirikian's respective sentencing arguments are based on a plain-meaning interpretation of Wis. Stat. § 346.65(2)(am)5. However, if the Court were to conclude the statute is ambiguous on its face, the statutory history, legislative history, and the rule of lenity support resolving any ambiguity in favor of the circuit court's

sentence. *Kalal*, 271 Wis. 2d 633, ¶¶ 50-51 (stating courts generally consider legislative history only if the subject statute is ambiguous); *Cole*, 262 Wis. 2d 167, ¶¶ 67-68 (the rule of lenity applies in favor of the defendant where the penal statute is ambiguous and the legislative history does not clarify the legislature's intent).

1. The statutory history shows the previous iteration of Wis. Stat. § 346.65(2)(am)5. did not contain the "best-interest-of-the-community" sentencing exception.

A court may consider statutory history to discern the legislature's intent. *Richards v. Badger Mut. Ins. Co*., 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581. Statutory history "encompasses the previously enacted and repealed provisions of a statute." *Id*.

The statutory history of Wis. Stat. § 346.65(2)(am)5. supports the circuit court's sentence. The legislature amended § 346.65(2)(am)5. to its current form via 2019 Wis. Act 106, and the current version of the statute took effect on March 1, 2020. (A.-App. 150.) The immediately-prior version of the statute provided for a presumptive minimum term of imprisonment of 6 months, but the prior version did not contain the best-interest-of-the-community sentencing exception. (*Id*.)

The legislature's amendment to § 346.65(2)(am)5. does not show on its face the legislature intended the current version of the statute to mandate at least a year of confinement in prison. Although the amendment added the text requiring the circuit court to impose a bifurcated

sentence, the amendment also added the sentencing exception to the statute permitting the circuit court to "impose a term of confinement of less than one year and six months if the courts finds" the exception applies. (*Id*.) The amendment to the statute does not prohibit the circuit court from staying an imposed bifurcated sentence, and the amendment does not prohibit the circuit court from ordering probation. (*Id*.)

Accordingly, the statutory history of § 346.65(2)(am)5. does not yield the conclusion the legislature intended to mandate at least a one-year prison term, as the State contends the statute requires. Instead, the statutory history supports the circuit court's imposing, but staying, a bifurcated sentence and ordering probation. (*See id*.)

2. The legislative history of Wis. Stat. § 346.65(2)(am)5. supports the circuit court's sentence.

The legislative history of Wis. Stat. § 346.65(2)(am)5. also supports the circuit court's sentence. As noted, the previous version of the statute required a minimum period of "imprisonment" of six months. (*Id*.) The initial drafting request for an amendment to the statute expressed the author's desire for an "[i]ncreased minimum period of imprisonment for 5th and 6th OWI" and instructed drafters to "[r]edraft 2017 AB 99 (17-1384), requiring 1.5 year minimum sentence for 5th and 6th OWI." (A.-App. 151.)

This drafting request does not show any legislative intent to require a minimum term in prison of at least one year. Rather, the stated intent was to increase the "period of imprisonment" from a minimum of six months to a minimum

of 1.5 years. (*Id.*) The term "imprisonment" does not exclusively mean "confinement"; rather, "imprisonment" encompasses the period of confinement and the term of extended supervision. *State v. Volk*, 2002 WI App 274, ¶ 28, 258 Wis. 2d 584, 654 N.W.2d 24; *see also* Wis. Stat. § 973.01. Thus, the initial drafting request shows the legislature's intent to increase the "minimum period of imprisonment" by requiring a "1.5 year minimum sentence" for a fifth or sixth OWI, *without stating any intent that a defendant convicted of such offense serve time in prison for at least a year*. (A.-App. 151.)

The second and third drafting requests likewise do not reflect a legislative intent to mandate at least a one-year prison term. The second drafting request instructed drafters to "[c]hange the 18 month mandatory minimum sentence to a presumptive minimum if the judge makes the determination that there is good cause for sentencing less than 18 months, and states that cause on the record." (A.-App. 154.) The third drafting request instructed drafters to amend the draft bill to state "term of confinement" instead of "sentence." (A.-App. 156.) Neither of these drafting requests expresses a desire to prohibit a circuit court from staying an imposed bifurcated sentence and ordering probation. (*See* A.-App. 154, 156.)

The Wisconsin Legislative Council Amendment Memo likewise does not indicate the legislature intended to prohibit a circuit court from staying a bifurcated sentence and ordering probation. That Memo states in part:

> 2019 Senate Bill 6 changes the mandatory term of imprisonment for operating under the influence of an intoxicant or other drug (OWI) 5th and 6th offense. . . . Senate Bill 6 eliminates the mandatory six-month period of imprisonment and instead requires the court to impose a bifurcated sentence, the confinement portion of which shall not be less than one year and six months. . . . Senate Amendment 2 allows a court to impose a term of confinement that is less than one year and six months if the court finds that the best interest of the community will be served and the public will not be harmed if the court places its reasons on the record.

(A.-App. 158 (paragraph breaks omitted).)

Here, the circuit court's sentence fulfills the legislature's intent in amending § 346.65(2)(am)5., as reflected in the legislative history. The previous iteration of the statute required a minimum sentence of six months "imprisonment," which does not mean six months of confinement, but means six months total time of confinement plus extended supervision. *Volk*, 258 Wis. 2d 584, ¶ 28. The legislative history of the statute reflects that the legislature intended to increase the presumptive minimum "period of imprisonment." (A.-App. 151.) The legislature did so by including a presumptive minimum bifurcated sentence of one year and six months, but the legislature also included an exception to that presumptive minimum sentence, which grants circuit courts the latitude to impose a sentence of less than the presumptive minimum in their discretion. (A.-App. 154, 158.) The circuit court here served the legislative purpose of the current version of § 346.65(2)(am)5. by applying the exception and ordering three years of probation with nine months in county jail: The circuit court's imposed

sentence exceeds the minimum six-month term of "imprisonment" required by the pervious iteration of the statute. (R. 38:38-29; A.-App. 129-30, 150, 154, 158.)

3. The deference owed to a circuit court's sentence and the rule of lenity support the circuit court's sentence.

The deference owed to a circuit court's sentence, *Gallion*, 270 Wis. 2d 535, ¶ 17, as well as the rule of lenity, also support the circuit court' sentence, *Cole*, 262 Wis. 2d 167, ¶¶ 67-68.

If the Court were to both conclude Wis. Stat. § 346.65(2)(am)5. is ambiguous and the legislative history does not clarify the legislature's intent, then the Court should apply the rule of lenity. *Id*., ¶ 67. The rule of lenity holds that "a court must favor a milder penalty over a harsher penalty when there is doubt concerning the severity of the penalty prescribed by statute." *Id*. Thus, an ambiguous penal statute "should be interpreted in favor of the defendant." *Id*.

Although Shirikian has articulated a plain-meaning interpretation that permitted the circuit court to stay its bifurcated sentence and order probation, the State's alternative plain-meaning interpretation could lead the Court to conclude the statute is ambiguous. *State v. Lehman*, 2004 WI App 59, ¶¶ 7, 11, 270 Wis. 2d 695, 677 N.W.2d 644 (concluding the subject statute was ambiguous because there was more than one reasonable interpretation). If the Court were to conclude § 346.65(2)(am)5. is ambiguous, and the legislative history does not clarify the legislature's intent, the

Court should affirm the circuit court's sentence on the basis of the rule of lenity. *Cole*, 262 Wis. 2d 167, ¶¶ 67-68.

II. Resentencing would violate the constitutional right against double jeopardy.

The circuit court correctly concluded resentencing Shirikian would violate her constitutional right to be free from double jeopardy. U.S. Const. amend. V; Wis. Const. art. I, § 8. As shown above, Shirikian's sentence is lawful. Accordingly, any resentencing would violate double jeopardy. *Willett*, 238 Wis. 2d 621, ¶ 6.

The circumstances here are strikingly analogous to those in *Willett*, in which this Court concluded the defendant had a legitimate expectation in finality of his sentence and resentencing would violate constitutional double jeopardy. Willett pled no contest to two counts of arson, negligent handling of burning materials, and recklessly engendering safety. 238 Wis. 2d 621, ¶ 2. The circuit court imposed and stayed four years of prison and forty years of probation on the arson counts and a total of fourteen years of prison on the other two counts. *Id*. The court ruled Willett was to serve the prison sentences consecutively to each other, but not consecutive to another prison term Willett was to receive four days later due to his revocation in another case. *Id*. Although the circuit court expressed it wanted to make the sentences consecutive to the sentence in the other case, the court indicated it did not believe it had the authority to do so because Willett was not yet serving that sentence. *Id*. After the State subsequently provided the circuit court case law suggesting it had the authority to impose the sentences

consecutively to Willett's revocation sentence, even before Willett had been revoked, the circuit court amended the judgment of conviction to make the sentences consecutive. *Id*. The resentencing occurred four months after the original sentencing. *Id*., ¶¶ 1-2.

Willett challenged the resentencing, and this Court reversed. *Id*., ¶ 6. This Court held Willett's resentencing violated his constitutional right to be free from double jeopardy. *Id*. The Court's reasoning was three-fold. First, this Court rejected the State's argument that Willett did not have a reasonable expectation of finality because Willett heard the circuit court express in the initial sentencing hearing that it wanted to impose the sentence it ultimately imposed as a resentence. This Court noted that Willett also heard at the initial sentencing hearing the circuit court reject the State's suggestion it could impose the sentence the court desired. *Id*.

Second, Willett already had been serving his sentence for four months when the circuit court changed his sentence from concurrent with the revocation sentence to consecutive with that sentence. *Id*.

Third, in the initial sentencing, the circuit court did not make an error analogous to a "slip-of-the-tongue" but, rather, imposed the initial sentence intentionally, albeit based on its incorrect understanding of the law. *Id*.

This Court's reasoning in *Willett* supports the conclusion that resentencing Shirikian would violate constitutional double jeopardy. First, just as the defendant in *Willett*, Shirikian heard the State's objection to the circuit court's sentence and the circuit court's reasoning for

overruling that objection. *Id*.; (R. 28; R. 38:32-38; A.-App. 133-37, 143-48.) Thus, to the extent the State argues Shirikian did not have a reasonable expectation of finality in her sentence because she was aware the State believes her sentence is unlawful, this Court has already rejected such argument. *Willett*, 238 Wis. 2d 621, ¶ 6.

Second, Shirikian will have served a much longer portion of her sentence than Willett. This Court deemed it constitutionally significant that Willett had already served four months of his sentence when the circuit court resentenced him. *Id*. Here, Shirikian has served 17 months of her sentence and will continue to serve that sentence during the pendency of this appeal. (*See* R. 38.)

Finally, just as the initial sentence in *Willett*, Shirikian's sentence is lawful. Thus, any alternation of her lawful sentence would violate constitutional double jeopardy. *Willett*, 238 Wis. 2d 621, ¶ 6.

Even if, however, this Court were to conclude the circuit court's sentence was unlawful, it nevertheless should conclude resentencing would violate Shirikian's right to be free of double jeopardy. In such event, the Court should rule that, if a circuit court's sentence is ultimately unlawful but based on a good faith and plausible interpretation of statute, then it would violate constitutional double jeopardy to permit resentencing.

CONCLUSION

The circuit court's sentence is lawful. The circuit court imposed, but stayed, a bifurcated sentence. Wisconsin statutes authorized the circuit court to stay the bifurcated

sentence in these circumstances, where the best-interests-of-the-community sentencing exception to Wis. Stat. § 346.65(2)(am)5. constitutes "legal cause" for the stay, and the probation statute otherwise permits the stay. In addition, the circuit court's order of three years of probation with nine months of confinement in county jail is consistent with the provisions of § 346.65(2)(am)5. and the probation statute, Wis. Stat. § 973.09(1)(a), (d), 4(a). Finally, because the circuit court's sentence is lawful, resentencing would violate Shirikian's constitutional right to be free from double jeopardy.

Accordingly, for the reasons set forth, Shirikian respectfully requests the Court affirm.

Respectfully submitted and dated at Milwaukee, Wisconsin this 22nd day of July, 2022.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c), Stats. for a Brief. The length of this brief is 7,832 words.

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