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SUPREME COURT

No. 21AP859-CR

IN THE

Supreme Court of Wisconsin

LYNNE M. SHIRIKIAN,
Defendant-Respondent-Petitioner,

v.

STATE OF WISCONSIN,
Plaintiff-Appellant.

On Petition for Review from the
Wisconsin Court of Appeals, District II,
Reversing a Decision by the Waukesha County Circuit Court,
Hon. Jennifer Dorow, Presiding, Case No. 20CF662

PETITION FOR REVIEW

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STATEMENT OF THE ISSUES

Lynne M. Shirikian was sentenced under the recently amended penalty statute for OWI, fifth or sixth offense. Wis. Stat. § 346.65(2)(am)5. That statute directs a circuit court to "impose a bifurcated sentence under s. 973.01, and the confinement portion . . . shall be not less than one year and six months," but permits a court to "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 and if the court places its reasons on the record."

In accord with § 346.65(2)(am)5., the circuit court imposed the required bifurcated sentence, comprised of three years of initial confinement and two years of extended supervision. The court then stayed the sentence and ordered probation with nine months of conditional jail time.

The circuit court entered a judgment of conviction on February 18, 2021. The State moved for resentencing on March 2, 2021, which the circuit court denied on April 1, 2021—on the grounds that resentencing would violate Shirikian's constitutional protection against double jeopardy.

The State filed a notice of appeal on May 13, 2021—84 days after the judgment of conviction, and 42 days after the denial of resentencing. Under Wis. Stats. §§ 974.05(1) and 808.04(4), the State may appeal a "[f]inal order or judgment adverse to the state, whether following a trial or a plea of guilty or no contest" or a "[j]udgment and sentence or order of probation not authorized by law" within 45 days "of entry of a final judgment or order appealed from." The court of appeals ordered the parties to file jurisdictional memoranda addressing whether the appeal was timely.

The court of appeals reversed. It held, *first*, that § 346.65(2)(am)5. "requires a circuit court to impose either

the presumptive mandatory minimum sentence or, if the circuit court finds the exception applies, a sentence of no less than a one-year term of initial confinement to be served in prison." *State v. Shirikian*, No. 2021AP859–CR, ¶ 2, 2023 WL 1426843 (Wis. Ct. App. Feb. 1, 2023) (recommended for publication).[1] Accordingly, the court of appeals concluded the circuit court was not authorized to stay the sentence and place Shirikian on probation. *Second*, the court of appeals held that Shirikian's resentencing did not violate double jeopardy solely because she had no "legitimate expectation of finality" in an "unlawful sentence." (App.24-App.25, ¶¶ 40-42.) *Third*, the court held the State had timely appealed. (App.12 n.9.)

Shirikian presents three issues for review:

1. Does § 346.65(2)(am)5. authorize a circuit court to stay a properly imposed bifurcated sentence and place the defendant on probation with less than one year of conditional jail time? (The court of appeals answered "no.")

2. Does a defendant have a "legitimate expectation of finality" in a sentence imposed under a reasonable interpretation of a sentencing statute, even if that interpretation is later held to be incorrect, so as to implicate the constitutional right to be free from double jeopardy? (The court of appeals answered "no.")

3. Was the State's appeal untimely for failure to comport with Wis. Stat. § 974.05(1)(c)'s requirement that an appeal of "[j]udgment and sentence or order of probation not authorized by law" "shall be initiated within 45 days of entry of the judgment or order appealed from"? (The court of appeals answered "no.")

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[1] All subsequent citations to the court of appeals decision are to Petitioner's Appendix. *See*App.3–27.

CONCISE STATEMENT OF CRITERIA

A. "A real and significant question of federal or state constitutional law is presented." Wis. Stat. § 809.62(1r)(a). *See infra* Argument II.

B. A decision by this Court "will help develop, clarify[, and] harmonize the law," and "[t]he question presented is a novel one, the resolution of which will have statewide impact." Wis. Stat. § 809.62(1r)(c)2. *See infra* Argument I, II.

C. A decision by this Court "will help develop, clarify or harmonize the law," and "[t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur." Wis. Stat. § 809.62(1r)(c)3. The questions presented are pure questions of statutory and constitutional interpretation. *See infra* Argument I, II, III. The questions presented are likely to recur, as circuit courts continue to impose probation under the recently amended OWI penalty statute. *See infra* Argument I.

D. The court of appeals' decision "is in conflict with controlling opinions of" this Court and with "other court of appeals' decisions." Wis. Stat. § 809.62(1r)(d). *See infra* Argument II.

STATEMENT OF THE CASE

In 2019, the Legislature amended the fifth-and-sixth offense OWI penalty statute to require circuit courts to impose a bifurcated sentence under Wis. Stat. § 973.01, the confinement portion of which must "be not less than one year and 6 months." Wis. Stat. § 346.65(2)(am)5; 2019 Wis. Act 106. The statute permits a court to "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 and if the court places its reasons on the record." Wis. Stat. § 346.65(2)(am)5. A bifurcated sentence under section 973.01 is "a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113." Wis. Stat. § 973.01(2). "The portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year." *Id.*

The decision to resentence a defendant can implicate constitutional double jeopardy protections if it constitutes "multiple punishments for the same offense." *State v. Robinson*, 2014 WI 35, ¶ 22, 354 Wis. 2d 351, 847 N.W.2d 352. "[T]he appropriate inquiry" to determine whether the protection against double jeopardy attaches in the resentencing context "is whether the defendant has a legitimate expectation of finality in her sentence. If a defendant has a legitimate expectation of finality in her sentence, then an increase in that sentence violates double jeopardy." *Id.* ¶ 23 (citing *United States v. DiFrancesco*, 449 U.S. 117 (1980)). This Court has explained, "[e]valuating the extent and legitimacy of a defendant's expectation of finality is a multi-factor inquiry that rests largely on the facts of each individual case." *Robinson*, 354 Wis. 2d 351, ¶ 43. "[A] bright line rule is simply unworkable." *Id.*

On May 27, 2020, Lynne M. Shirikian was arrested for a fifth offense OWI. Although there were eighteen years

between Shirikian's third and fourth OWI offenses, then another thirteen years between her fourth and fifth OWI offenses, the COVID pandemic gutted the support system on which she relied to manage her struggle with alcoholism. (App.45:8-15.)

The circuit court held a plea/sentencing hearing on February 12, 2021. Shirikian pleaded guilty to OWI as a fifth offense. The court informed Shirikian she faced "mandatory imprisonment, with a bifurcated sentence of not less than 1 and a half years," unless the court found the best-interest-of-the-community statutory exception applies under Wis. Stat. § 346.65(2)(am)5. (App.34:19-22, App.39:16-21.)

The circuit court found that the best-interest-of-the-community exception applied to Shirikian. (App.59:20-25.). Among other things, the court acknowledged the mitigating factors of Shirikian's "periods of significant sobriety," her "valid driver's license," and her "6 weeks in an inpatient facility." (App.55:11-App.56:13.) The court ultimately decided to impose a bifurcated sentence consisting of three years of initial confinement and two years of extended supervision. (App.58:18-22.) The court then stayed the bifurcated sentence and put Shirikian on probation for three years, with nine months of condition time with Huber release privileges and a day report obligation for the full probation term of three years. (App. 29, App.58:18-App.59:12.)

At the sentencing hearing, the State objected to Shirikian's sentence. Shirikian countered that, although "very few [OWI 5th] cases . . . have come through for sentencing yet" under the new language, "a judge up in Trempealeau County gave probation recently" and "DOJ takes the position and did in that case . . . that [the judge] is able to do pretty much what this [court] did today." (App.63:20-25.) Shirikian argued the statute authorizes probation.

The circuit court concluded its sentence satisfied the "plain language" of § 346.65(2)(am)5, which "clearly says the court may impose a term of confinement that is less than one year and 6 months":

> I have to presume the legislature understood what it was doing, that the use of the word confinement was intentional, and that had it wanted this court and a sentencing court to only impose a prison term, would have used a similar phrase like it did in the prior sentence of a bifurcated sentence, or initial confinement, to then trigger a mandatory prison sentence.

(App.65:18-24.)

On February 18, 2021, the court entered the judgment of conviction. On March 2, 2021, the State moved for resentencing. The circuit court denied the State's resentencing motion in a written order on April 1, 2021.

On May 13, 2021, the State filed a notice of appeal—84 days after the judgment of conviction, and 42 days after the denial of resentencing. At the outset of the appeal, the court of appeals ordered memoranda addressing whether the State timely filed its appeal and whether the court had jurisdiction. (App.80-App.81.)

The court of appeals reversed in a published decision. (App.3-App.27.) The court decided it had jurisdiction over the appeal, asserting in a footnote without citation or analysis that, "[a]lthough the State could have appealed the judgment of conviction itself pursuant to § 974.05(1)(c), it was not prohibited from filing its resentencing motion and then appealing from the circuit court's denial of that motion." (App.12 n.9.)

On the merits, the court of appeals held "Shirikian's sentence was unlawful because the law does not authorize the circuit court to: (1) stay the sentence; (2) place Shirikian on probation; or (3) allow her to serve nine months in jail rather than a minimum of one year in prison." (App.26, ¶ 43.) In the

court of appeals' view, Wis. Stat. § 346.65(2)(am)5. "unambiguously states that when a person is convicted of a fifth or sixth OWI, the circuit court is *required to* ('shall') impose a bifurcated sentence." (App.17, ¶ 25 (emphasis in original).)

The court of appeals further reasoned that "neither a stay nor probation is authorized when imposing a sentence for a fifth or sixth OWI offense." (App.21, ¶ 33.) The court relied on *State v. Lalicata*, 2012 WI App 138, ¶¶ 14-15, 345 Wis. 2d 342, 824 N.W.2d 921, and *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467, to conclude "a mandatory minimum bifurcated sentence is inconsistent with permitting probation[.]" (App.23, ¶ 35 (internal quotation marks omitted).)

Finally, the court of appeals disagreed with the circuit court's double-jeopardy analysis. Specifically, the court of appeals cursorily held that, *solely* because the "sentence was not lawful" under *its* interpretation of § 346.65(2)(am)5., Shirikian had "no legitimate expectation of finality" in her sentence. (App.25, ¶ 42.) Consequently, the court of appeals concluded "resentencing her does not violate double jeopardy." *Id.*

ARGUMENT

I. This Court should grant review to clarify whether Wis. Stat. § 346.65(2)(am)5. permits a circuit court to impose a bifurcated sentence, but stay that sentence and order probation and jail time instead of a minimum 12 months in prison.

The circuit court imposed a proper sentence in accord with Wis. Stat. § 346.65(2)(am)5. by imposing a bifurcated sentence of three years confinement and two years extended supervision. The court's subsequent decision to stay the imposed bifurcate sentence and order probation also conformed with the statute. However, the court of appeals reversed,

erroneously concluding § 346.65(2)(am)5. does not authorize a stay and probation, and further requires a minimum of 12 months in prison if the court makes the necessary findings.[2]

A. Whether the circuit court had authority to stay its bifurcated sentence and order probation is an issue of statewide importance that is regularly recurring.

Whether the circuit court had authority to stay its bifurcated sentence and order probation is a novel question of statewide importance that would benefit from this Court's review. Wis. Stat. § 809.62(1r)(c)2.

The Legislature amended the fifth and sixth offense OWI penalty statute in 2019 to require a circuit court to "impose a bifurcated sentence under s. 973.01" and allow a court to "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 and if the court places its reasons on the record." 2019 Wis. Act 106. Since this Act took effect in March 2020, this Court has referenced but not definitively construed the post-amendment language. *See State v. Forrett*, 2022 WI 37, ¶ 3, 401 Wis. 2d 678, 974 N.W.2d 422 (noting a "Class G felony . . . carries with it a mandatory minimum of 18 months' initial confinement and a maximum confinement period of five years." (citing Wis. Stat. § 346.65(2)(am) 5.)).

[2] The court of appeals declined to consider the rule of lenity because it determined the statute was unambiguous. To the extent there is any ambiguity in the statute, the statutory history, legislative history, and the rule of lenity favor the circuit court's sentence. (Shirikian Ct. App. Br. at 33-39.) Shirikian so argued to the court of appeals, and if this Court were to accept review, Shirikian reserves the right to make these same arguments to this Court.

Reports from State agencies and the press indicate there are over 10,000 Wisconsin drivers with at least five OWI convictions. The Wisconsin Department of Transportation reported in December 2019 that 10,874 Wisconsin drivers had five OWI convictions. *See, e.g.*, Dep't of Transportation, *Drunk Driving Arrests and Convictions*, https://web.archive.org/web/20221209033229/https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx. The LaCrosse Tribune reported in January 2023 that Wisconsin has more than 20,000 drivers with at least five OWI convictions. Wisconsin State Journal Editorial Board, *Editorial: Lawmakers Need to Grab the Wheel, Stop Rise in OWI Crashes*, LaCrosse Tribune (Jan. 8, 2023), https://lacrossetribune.com/opinion/editorial/editorial-lawmakers-need-to-grab-the-wheel-stop-rise-in-owi-crashes/article_6ab8b58c-8d0f-11ed-b587-774d3df82178.html.

Against the backdrop of an increasing number of fifth and sixth offense OWI convictions, circuit courts will continue to grapple with a statute that has been inconsistently applied across the state. Whether a circuit court may stay an imposed bifurcated sentence and order probation for a fifth OWI conviction is an issue that is likely to recur and is currently in various stages of development in lower courts—with varying applications of the law. At the circuit court level, a Court Tracker analysis of all fifth offense OWI cases reported since August 29, 2020, revealed that probation was ordered in 22 cases (two of these were sixth offense OWI cases). (*See* App.97-App.100 (*State v. Martin*, No. 21-CF-520, Letter regarding request to withhold sentence and impose probation).) Additionally, the Dane County Circuit Court decided in September 2022 to hold open its sentencing determination in a fifth-offense OWI case until the resolution of Shirikian's appeal, which addressed the "precise issue pending" in that case. (*See* App.103-App.104 (*State v. Lockwood*,

No. 20CF1515, Order Regarding Decision on Sentencing Issue).)

The courts of appeals are also now being asked to contend with the meaning of the new statutory language. During the pendency of Shirikian's case in the court of appeals, the appellant in *State v. Latimer*, No. 22AP1063–CR, moved to consolidate his appeal with the State's appeals in *State v. Kelly*, No. 22AP1200,[3] and the instant case, on the basis that "all three cases raise an identical issue regarding whether a mandatory bifurcated sentence, with a presumptive minimum of 18 months initial confinement, is compatible with an order of probation." The court of appeals denied the motion, noting "the cases arise in three different counties and involve three different defendants." (*See* App.82 (Order Denying Motion for Consolidation).) Both *Latimer* and *Kelly* remain pending in District III.[4]

This Court's review would guide lower courts in two ways. First, this Court should clarify that a circuit court may stay a bifurcated sentence imposed under the new fifth and sixth offense OWI penalty statute and order probation. The plain language of § 346.65(2)(am)5. states, "[t]he court may impose a term of confinement that is less than one year and 6 months" if it makes certain findings that invoke the best-interests-of-the-community exception. Relevant provisions of the sentencing statutes inform the meaning of § 346.65(2)(am)5. For example, Wis. Stat. § 973.15(8)(a) permits a circuit court to stay execution of a sentence of

[3] Relevant to the issue of whether the State's appeal in this case was timely, the State in *Kelly* notably appealed the judgment of conviction—not a denial of resentencing as here.

[4] Also pending before District III is *State v. Morrow*, No. 2022AP0806–CR, which concerns whether a court may stay a sentence and impose probation under a different statute requiring a mandatory minimum sentence.

imprisonment either for "[f]or legal cause," or "[u]nder s. 973.09(1)(a)," the probation statute.

Second, this Court should clarify that the newly amended language in § 346.65(2)(am)5.—read in conjunction with § 973.09(1)(a), (d), (4)(a)—permits a court to order probation and confinement in county jail. The term "confinement" in § 346.65(2)(am)5.—read in the context of § 973.09(4)(a), which permits confinement in county jail, Huber, work camp, or tribal jail—does not mean confinement in prison.

B. The decision below is wrong: 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 a circuit court to impose a bifurcated sentence, stay that sentence, and order probation for OWI as a fifth offense.

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., and the court of appeals did not conclude to the contrary. 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. (App.58-App.59.) As shown below, pursuant to Wis. Stats. §§ 973.15(8), 973.09, the answer is "yes."

1. The court of appeals erroneously held that the statute does not permit a circuit court to stay a bifurcated sentence and order probation.

Wisconsin Stat. § 973.15(8)(a) 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 s. 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.

a. The circuit court had "legal cause" to stay execution of the bifurcated sentence it imposed. 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)).

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." Because the sentencing exception in the OWI statute constitutes "legal cause," the circuit court possessed authority under § 973.15(8)(a)1. to stay the bifurcated sentence it imposed.

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. Thus, the court of appeals was incorrect when it concluded the circuit court's stay of Shirikian's sentence did not constitute "legal cause" because the stay was a personal accommodation to Shirikian. (App.22, ¶ 34.)

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 **s.** 973.09(1)(a)," the probation statute. Wis. Stat. § 973.15(8)(a)2. The paragraphs immediately following explain.

b. 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)[5] 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.

The court of appeals erred when it concluded § 973.09(1)(d) does not permit probation in these circumstances. (App.23-App.24, ¶¶ 37-39.) When read in conjunction with the exception in § 346.65(2)(am)5., sub (1)(d) of § 973.09 *expressly authorizes* 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":

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[5] Par. (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).

> 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 court of appeals is incorrect that this case is governed by *State v. Lalicata*, 2012 WI App 138, 345 Wis. 2d 342, 824 N.W.2d 921. (App.22-App.23, ¶¶ 35-36.) The court of appeals decision fails to recognize that *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.

2. The court of appeals misinterpreted statutory language and erroneously held that the circuit court failed to impose a proper bifurcated sentence.

a. The overall reasoning of the court of appeals may be summarized as follows: **(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. (App.4-App.5, ¶ 2; App.21-App.22, ¶¶ 33-34; App.23-App.24, ¶¶ 38-39.) Respectfully, the court of appeals' reasoning is inconsistent with the plain meaning of the applicable statutes when they are read in harmony with each other.

The court of appeals' reasoning is predicated on two errors. The court'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 court's second error is that Shirikian's sentence is unlawful because she was not sentenced to confinement in prison.

As to the court of appeals' 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. (App.58:18-22.) 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 court of appeals' second error: The court of appeals incorrectly concluded 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. (App.17, ¶ 25.) However, as shown below, the probation statute, § 973.09(1)(a), (d), (4)—as well as several

other criminal 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. (App.58:18-App.60:21.)

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 court of appeals concluded, (App.17, ¶ 25), then all of Wisconsin's criminal provisions employing the phrase "confinement in prison" would contain the impermissible surplusage "in prison." *Republic Airlines, Inc. v. Wisconsin 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). Indeed, under the court of appeals' interpretation, all statutes providing "confinement in prison" would absurdly mean "confinement in prison in prison."

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). In contrast, § 346.65(2)(am)5. *omits* the words "in prison" and simply references the "*confinement portion* of the bifurcated sentence."

The court of appeals decision fails to give effect to this difference in statutory text. The textual difference shows the Legislature does not require "confinement in prison" for those convicted under § 346.65(2)(am)5. *See Ball v. Dist. No. 4, Area Bd. of Vocational, Tech. & 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.

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 court of appeals concluded.

b. The court of appeals further erred when it relied on the graduated penalty structure contained in OWI statutes Wis. Stat. § 346.65(2)(am)2. through Wis. Stat. § 346.65(2)(am)7. to support its holding that probation is not authorized. (App.19-App.21, ¶¶ 30-31.) The court of appeals failed to recognize the graduated penalty structure actually supports *Shirikian's* interpretation of § 346.65(2)(am)5.

The court of appeals overlooked 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. 2d 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) (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 shows the court of appeals' reliance on *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467 was misplaced. (App.19-App.21, ¶¶ 30-31, n.15.) 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." 355 Wis. 2d 581, ¶ 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* thus does not apply because: **(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. (App.58.)

*****

In sum, the circuit court clearly 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).

The court of appeals was incorrect in holding otherwise. To help develop and clarify the law, this Court should accept

review of this novel, recurring question of state-wide importance.

II. The court of appeals' conclusion that the defendant could not have a "legitimate expectation of finality" in an unlawful sentence created a bright-line rule contrary to this Court's precedent.

Whether resentencing violates Shirikian's right to be free from constitutional double jeopardy presents "[a] real and significant question of federal . . . constitutional law." Wis. Stat. § 809.62(1r)(a). The court of appeals decision is also "in conflict with controlling opinions of" this Court and with "other court of appeals' decisions." Wis. Stat. § 809.62(1r)(d).

The Constitution guarantees protection "against multiple punishments for the same offense." *Robinson*, 354 Wis. 2d 351, ¶ 22. The United States Supreme Court held in *United States v. DiFrancesco* that "the appropriate inquiry" under this protection "is whether the defendant has a legitimate expectation of finality in her sentence. If a defendant has a legitimate expectation of finality in her sentence, then an increase in that sentence violates double jeopardy." *Id.* ¶ 23 (citing *DiFrancesco*, 449 at 136-37).

Here, the court of appeals invented—without any citation to any Wisconsin or U.S. Supreme Court authority—a brand new bright-line rule. Citing only three out-of-circuit federal cases from the 1980s and 1990s, the court of appeals held that if a sentence is ultimately held to be unlawful, then a defendant cannot have a legitimate expectation of finality. Full stop. (App.23, ¶ 42 (citing *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992); *United States v. Jackson*,

903 F.2d 1313, 1316 (10th Cir. 1990); *United States v. Kane*, 876 F.2d 734, 737 (9th Cir. 1989)).)[6]

This bright-line rule ignores a much more constitutionally sound standard that Shirikian proposed in her brief, but the court of appeals ignored. Specifically, a defendant can have a "legitimate expectation of finality" in a sentence based on a circuit court's *reasonable interpretation* of a statute—even if a court of appeals later holds that a different interpretation is better, thus rendering the circuit court's interpretation technically "unlawful." This Court should accept review to address this novel and important question of constitutional law. Wis. Stat. § 809.62(1r)(c)2.

Just as importantly, the court of appeals' bright-line rule is "in conflict with controlling opinions of" this Court and with "other court of appeals' decisions." Wis. Stat. § 809.62(1r)(d). In a cursory analysis, the court of appeals concluded Shirikian did not have a "legitimate expectation of finality" solely because it determined the sentence was unlawful. In so holding, the court failed to apply this Court's established analytical framework for "legitimate expectation of finality" questions.

This Court has explained, "[e]valuating the extent and legitimacy of a defendant's expectation of finality is a multifactor inquiry that rests largely on the facts of each individual case." *Robinson*, 354 Wis. 2d 351, ¶ 43. In *State v. Robinson*, this Court reaffirmed "the approach set forth in *Jones* and adopted by this [C]ourt in *Gruetzmacher* as the

[6] The court of appeals also cited *DiFrancesco*, 449 U.S. at 137, apparently for this same proposition. But nothing in the cited page of *DiFrancesco*—and nothing in the entirety of that opinion—stands for the proposition that Shirikian lacked a legitimate expectation of finality on the bright-line ground that her sentence ultimately "was not lawful." (App.23, ¶ 42.)

appropriate framework for determining whether a defendant has a legitimate expectation of finality." *Id.* "[T]he court of appeals in *Jones* set forth a list of factors, which were adopted and applied by this court in *Gruetzmacher*, that are relevant to whether a defendant has a legitimate expectation of finality in his or her sentence." *Id.* ¶ 38. *Robinson* cautioned, "In cases such as these, a bright line rule is simply unworkable." *Id.* ¶ 43. Rather, "the *Jones* factors must be evaluated in light of the circumstances in each case." *Id.* (quoting *State v. Gruetzmacher*, 2004 WI 55, ¶ 34, 271 Wis. 2d 585, 679 N.W.2d 533).

Among the factors that courts "must" evaluate are "the completion of the sentence, the passage of time, the pendency of an appeal, or the defendant's misconduct in obtaining sentence." *Id.* ¶ 38 n.9 (quoting *State v. Jones*, 2002 WI App 208, ¶ 10, 257 Wis. 2d 163, 650 N.W.2d 844). This list is "not exhaustive." *Id.*

The court of appeals did not even mention these factors. Its decision not only *necessarily* eschews the required multi-factor analysis, but also runs afoul of *Robinson*'s admonition against "bright line rule[s]." *Id.* ¶ 43; *see also State v. Willett*, 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881.

The court of appeals' bright-line rule that a legitimate expectation of finality can never accompany an ultimately unlawful sentence does not comport with *Robinson*, *Jones*, or *Gruetzmacher*—decisions which this Court has neither overturned nor disavowed. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). The court of appeals erred by failing to apply "the proper analysis," consisting of a "multi-factor inquiry" that "*must be evaluated* in light of the circumstances *in each case*." *Robinson*,

354 Wis. 2d 351, ¶ 43 (emphases added). By concluding the unlawful sentence could form a *singular* basis on which to determine there was no legitimate expectation of finality, the court of appeals reinserted the sort of bright-line rule that *Robinson* rejected.

This Court should accept review to reaffirm *Robinson*'s "multi-factor inquiry," clarify whether the unlawfulness of a sentence is a factor in that inquiry, and decide whether a sentence imposed based on a reasonable interpretation of a statute—even if later determined to be unlawful—affords a legitimate expectation of finality in that sentence.

III. The court of appeals lacked jurisdiction because the State did not timely file this appeal.

The State's failure to timely file its appeal deprived the court of appeals of jurisdiction.

An analysis of Wis. Stats. §§ 808.04(4), 974.05(1), as well as Wis. Stat. § 809.82(2)(b), show the State's appeal is untimely. Under Wis. Stat. § 974.05(1), the State has the right to appeal a "[f]inal order or judgment adverse to the [S]tate" or a "[j]udgment and sentence . . . not authorized by law" "[w]ithin the time period specified by s. 808.04(4)." Wis. Stat. § 974.05(1)(a) & (c). Section 808.04(4), in turn, requires that an appeal by the state "shall be initiated within 45 days of entry of the judgment or order appealed from." Under Wis. Stat. § 809.82(2)(b), that 45-day time period "may not be enlarged." Wis. Stat. § 809.82(2)(b).

Forty-five days after the circuit court's February 18, 2021 Judgment of Conviction was April 5, 2021. The State missed its deadline by filing its Notice of Appeal on May 13, 2021. (App.77.) Because the State filed its Notice of Appeal 84 days after February 18, 2021, its appeal is untimely, and the court of appeals lacked jurisdiction. (*Compare* App.28-App.30 *with* App.77.)

The court of appeals did not provide any explanation or analysis for its conclusion the State timely appealed. Instead, the court of appeals merely asserted that Wis. Stat. § 974.05(1)(a) "allows the State to appeal an adverse final judgment or order after a guilty plea" and, therefore, authorizes the State to appeal the circuit court's denial of the resentencing motion. (App.12 n.9.)

The court of appeals decision to exercise appellate jurisdiction contravenes the plain meaning of Wis. Stats. §§ 808.04(4), 974.05(1), and silently overrules longstanding precedent. In the court of appeals' view, the State can enlarge the jurisdictional time period by filing a motion for resentencing. This view is wrong—and correcting it is of utmost importance, both for the integrity of the law and for fundamental fairness to criminal defendants.

The court of appeals reasoned that, even though the State's appeal was filed 84 days after the Judgment of Conviction (February 18, 2021), it was filed only 42 days after the circuit court denied resentencing. (App.12 n.9.) But the court of appeals did not cite any authority that supports its conclusion that the Motion for Resentencing tolled or extended the 45-day time period under Wis. Stat. § 808.04(4). To the contrary, because the State did not raise in its Motion for Resentencing any new issues that the circuit court had not previously decided as of February 18, 2021, the default rule controls: The time for filing an appeal "may not be enlarged." Wis. Stat. § 809.82(2)(b); *Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 46-48, 310 N.W.2d 615 (1981); *Silverton Enters., Inc. v. Gen. Cas. Co. of Wis.*, 143 Wis. 2d 661, 665, 442 N.W.2d 154 (Ct. App. 1988).

The court of appeals decision silently overrules case law that prohibits an enlargement of time for the State to file a notice of appeal in these circumstances. The State's Motion for Resentencing is akin to a motion for reconsideration, and

Wisconsin courts have long held that an appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the prior order sought to be reconsidered. *Silverton Enters*., 143 Wis. 2d at 665; *see also Marsh*, 104 Wis. 2d at 45-46; *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972). "An order denying reconsideration is not appealable since it does not prevent an appeal from the original order or judgment." *Silverton Enters*., 143 Wis. 2d at 665.

The State's appeal here is exactly the type of appeal prohibited by the rule of *Silverton*, *Marsh*, and *Ver Hagen* – a rule that has equal application to motions for reconsideration filed by the State in criminal cases. *State v. Edwards*, 2003 WI 68, ¶¶ 5-8, 13, 262 Wis. 2d 448, 665 N.W.2d 136 (citing *Silverton*, *Marsh*, and *Ver Hagen* and concluding the circuit court order denying the State's motion for reconsideration was appealable because the State's motion raised a new issue). The State acknowledges it argued at the February 12, 2021 hearing, at which Shirikian was convicted and sentenced, "that because the [circuit] court imposed the required bifurcated sentence, it could not stay the sentence and order probation." (App.91-App.92; *see also* App.94 ("[T]he sentencing issue did not arise until the sentencing hearing when the [circuit] court said it intended to stay Shirikian's sentence and order probation, and the State asserted it was improper to do so.").) The State raised that same argument again in its Motion for Resentencing. (*See* App.69-App.74.) Thus, consistent with the rule of *Silverton*, *Marsh*, and *Ver Hagen*—as well as with Wisconsin statutes governing appeals by the State in criminal cases—the State was obligated to appeal the circuit court's February 18, 2021 Judgment of Conviction within 45 days. *Silverton Enters*., 143 Wis. 2d at 665; *Marsh*, 104 Wis. 2d at 45-46; *Ver Hagen*, 55 Wis. 2d at 26; Wis. Stats. §§ 808.08(4), 974.05(1).

Because the State failed to do so, Wisconsin appellate courts lack jurisdiction. *Id.*

The court of appeals decision erroneously gives the State two bites at the apple and in this case almost doubled the 45-day time for appeal. The State could have timely appealed the sentence after the court denied resentencing on April 1—the State was still within the 45-day window to appeal the February 18 order. Instead, the State stalled until May 13—84 days after the time to appeal the judgment and order of probation. In the civil context, the court of appeals has cautioned that "a motion for reconsideration should not be used as a ploy to extend the time to appeal from an order or judgment when the time to appeal had expired." *Silverton Enterprises,* 143 Wis. 2d at 665; *see also Edwards*, 262 Wis. 2d 448, ¶ 8. This principle holds even more weight in the resentencing context, in light of the power imbalance between a defendant and the State.

This Court should address this purely statutory question to "help develop, clarify or harmonize the law." Wis. Stat. § 809.62(1r)(c)3. Left to stand, the court of appeals decision erroneously permits the State to enlarge its appeal timeline, in plain violation of Wis. Stat. § 974.05(1) and Wis. Stat. § 809.82(2) (authorizing the enlargement of time for a *criminal defendant* to appeal under Wis. Stat. § 809.30—not the State). Petitioner is aware of *no other case* in Wisconsin in which the court accepted the State's belated challenge to a sentence via an appeal of a resentencing denial, and the State has not cited any. This Court should accept review to clarify the strict statutory boundaries of the State's authority to appeal a sentence.

CONCLUSION

This Court should grant the petition for review.

Dated this 3rd day of March, 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a petition and appendix produced with a proportional serif font. The length of this petition is 7,711 words.

Dated this 3rd day of March, 2023.

Douglas M. Raines

Douglas M. Raines

E-FILING CERTIFICATION

I hereby certify that certify that the text of the electronic copy of this petition for review is identical to the text of the paper copy of this petition for review.

Dated this 3rd day of March, 2023.

Douglas M. Raines

Douglas M. Raines

CERTIFICATE OF MAILING

I certify that on March 3, 2023 this Petition for Review and Appendix was delivered:

Clerk of the Supreme Court
110 E. Main Street
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Madison, WI 53703

Michael C. Sanders
Asst. Attorney General
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Dated this 3rd day of March, 2023.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wisconsin Statutes section 809.62(2)(f), (4) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under section 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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 3rd day of March, 2023.

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