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WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant.

Appeal No. 23-AP-645

Rock County
16-CF-26

BRIEF OF DEFENDANT-APPELLANT CARL LEE MCADORY

CIRCUIT COURT FOR ROCK COUNTY
HONORABLE JOHN W. WOOD, PRESIDING
HONORABLE KARL R. HANSON, PRESIDING
Circuit Court Case No. 16-CF-26

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INTRODUCTION

On November 18, 2021, this Court granted Mr. McAdory a new trial in 20-AP-2001. Specifically, it "reverse[d] the judgment of conviction for a violation of [Wis. Stat.] § 346.63(1)(a) based on a violation of [Mr.] McAdory's right to due process" and "remand[ed] for a new trial on the § 346.63(1)(a) charge." *State v. McAdory*, 2021 WI App 89, ¶ 71, 400 Wis. 2d 215, 968 N.W.2d 770.

Mr. McAdory is back again. *However*, a new trial was never convened. Nor did he plead guilty or otherwise resolve the § 346.63(1)(a) charge (hereafter "the impaired-by-drugs offense" or "count one"). Instead, following remittitur, the Circuit Court granted the State's request to convict him for a violation of § <u>346.63(1)(am)</u> (hereafter "the strict-liability offense" or "count two")—despite the fact that the Circuit Court had *dismissed* the strict-liability offense *at the State's request* way back on October 25, 2019.

The Court is aware of a bit of the background. In 2019, a jury found Mr. McAdory guilty of violations of the impaired-by-drugs offense and the strict-liability offense, respectively counts one and two. The State then chose to dismiss count two and convict him on count one. *See* Wis. Stat. § 346.63(1)(c) ("If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction . . . .").

Mr. McAdory appealed from his conviction on count one (i.e., the impaired-by-drugs offense), thereby commencing 20-AP-2001. The State *did not* attempt to cross-appeal or otherwise argue in its briefing that the jury verdict on count two constituted an alternate ground to affirm. Indeed, it did not address the dismissal of the strict-liability offense in any meaningful way at all.

The Court even held oral arguments in 20-AP-2001 to discuss count two's dismissal. The State could not conjure any reason for why it had not addressed it in some fashion.

Yet, before remittitur could even occur, the State filed a motion to "reinstate the conviction" on count two before the Circuit Court. Its motion effectively asked the Circuit Court to reopen the judgment of conviction, "reinstate" count two, and convict Mr. McAdory of the same. The State *conceded* that nothing in Wisconsin law authorized such relief. Yet, it asked the Circuit Court to do so, anyway, citing a distinguishable federal case applying federal law. *See Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000).

Instead of following the Court's remand instructions and convening a new trial, the Circuit Court granted the State's motion on February 8, 2022. Its sole basis was *Rutledge*. Indeed, in closing, it quipped that, "much like Rutledge, McAdory must now face the fact that winning one battle does not mean victory in war."

A circuit court is not free to ignore the Court's instructions. *See* Wis. Stat. §§ 808.08(2), 808.09. It cannot order relief that Wisconsin law does not authorize it to order or that circumvents the role of Wisconsin's postconviction and appellate procedures. *See State v. Henley*, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350. It cannot resurrect a charge that was dismissed at the State's request after jeopardy attached. *See* U.S. Const. amend. V, Wis. Const. § 8.

The Court should, again, reverse.

STATEMENT OF THE ISSUES

1. Following remittitur, did the Circuit Court have the authority to disregard this Court's remand order for a new trial on count one and to, instead, reopen the judgment of conviction, "reinstate" the previously-dismissed count two, and convict Mr. McAdory of the same?

ANSWERED BY THE CIRCUIT COURT: Yes.

MR. MCADORY'S POSITION: No.

2. Having dismissed count two upon the State's motion and after jeopardy attached, did the Circuit Court's decision to "reinstate" count two and convict Mr. McAdory of the same violate his protection against double jeopardy?

ANSWERED BY THE CIRCUIT COURT: No.

MR. MCADORY'S POSITION: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral arguments are unwarranted unless the Court has questions or would like clarification. The Court should recommend that its opinion be published because this appeal addresses important questions about post-remittitur compliance with the Court's instructions, limitations on post-remittitur powers of the State and courts, and protections that the double jeopardy clause confers on criminal defendants.

STATEMENT OF THE CASE

This background section will not rehash the Court's statement of facts in *McAdory*, 400 Wis. 2d 215, ¶¶ 1, 3, 6-16. It will, instead, focus on the following: (A) the nature of the case; (B) the Circuit Court's order granting the State's postverdict motion to dismiss count two; (C) Mr. McAdory's first appeal, 20-AP-2001; and (D) post-remittitur proceedings before the Circuit Court.

A. Nature of the Case

Mr. McAdory was charged with and found guilty on counts one and two, both OWI-related offenses, but only one of which could serve as the basis for the conviction and sentencing. At the State's request, the Circuit Court dismissed count two and sentenced him on count one. This Court reversed the conviction on count one and remanded for a new trial. Instead of holding a new trial, the Circuit Court granted the State's motion to "reinstate" count two, convicting Mr. McAdory thereof and sentencing him thereon. He moved for postconviction relief, but his motion was denied. He now appeals.

B. The Circuit Court's Order Granting the State's Postverdict Motion to Dismiss Count Two

The third amended information charged Mr. McAdory with four counts, two of which are relevant here: count one (i.e., the impaired-by-drugs offense (8th), contrary to Wis. Stat. § 346.63(1)(a)) and count two (i.e., the strict-liability offense (8th), contrary to § 346.63(1)(am)). (R.39.) On August 19, 2019, a jury found Mr. McAdory guilty on both counts one and two. (R.126.)

The Court convened a sentencing hearing on October 25, 2019. (R.152; A-App 058.) During that hearing, the State moved to dismiss count two, and the Court granted the same:

> MS. WHITE: . . . [J]ust in general the State would move at this time to dismiss Count 2 as it is a duplicative count with Count 1.
>
> THE COURT: I assume there is no objection from the defense?
>
> MR. COMPTON: That is correct, Your Honor. Yes, Your Honor.
>
> THE COURT: Very well. Then on the State's motion the Court will, in fact, dismiss Count 2. . . .

(A-App 059-060.) On count one, the Circuit Court sentenced Mr. McAdory to nine years of imprisonment, broken down as four years of initial confinement and five years of extended supervision. (R.152 at 35.)

The Circuit Court noted the dismissal of count two in its hearing minutes. (R.146.) It entered the judgment of conviction on count one on October 31, 2019. (R.148; A-App 063-064.)

C. Mr. McAdory's First Appeal, 20-AP-2001

On December 2, 2020, Mr. McAdory appealed from his judgment of conviction on count one, thus commencing 20-AP-2001. (R.191.) The State did not appeal from the order dismissing count two. Nor did the State cross-appeal from Mr. McAdory's judgment of conviction on count one.

In his briefing on appeal,[1] Mr. McAdory presented two primary arguments. He argued that the jury lacked sufficient to convict him on count one. Def.'s Open. Br. at 15-19. He also argued that the Circuit Court's decision to remove language defining the phrase "under the influence" from the jury instructions violated his right to due process. Id. at 20-31.

The State mentioned in its statement of facts that the Circuit Court dismissed count two upon the State's motion, citing Wis. Stat. § 346.63(1)(c). State's Resp. Br. at 4-5. This was the lone reference to count two's dismissal. It denied that Mr. McAdory's due process rights were violated.

On October 6, 2021, a panel of this Court's judge from District IV held oral arguments in this matter. (R.270; A-App 065.)[2] A substantial portion of the argument focused on count two's dismissal. In that regard, the panel discussed the following topics with counsel:

---

[1] Electronic copies of the appellate briefs from 20-AP-2001 are publicly available through the Wisconsin Court System website, https://wscca.wicourts.gov/.

[2] Undersigned counsel acquired a copy of the recording of the oral arguments from the Clerk of the Court of Appeals and Supreme Court. He then retained a court reporter to transcribe the recording. A copy of the transcript was filed with the Circuit Court and referenced in Mr. McAdory's amended postconviction brief.

- That case law required the State to dismiss one of the two counts of which Mr. McAdory was found guilty;
- That Mr. McAdory had not been convicted on count two;
- That no legal authority exists to reinstate count two on remand;
- That the State neither appealed from nor raised the issue of count two's dismissal in its appellate briefing;
- That the State had unwisely chosen to dismiss count two and convict on count one; and
- That the double jeopardy clause may bar any attempt by the State to revive count two.

(See A-App 066-071, 080-084, 092-093.)

In its November 18, 2021 published opinion, the Court reversed the conviction and remanded for a new trial on count one. Agreeing with Mr. McAdory, it found that his due process rights were violated:

> [T]he prosecution misled the jury in its opening statement and closing argument about what the State had to show to prove that he was "under the influence," one element of the impaired-by-drugs offense, and there was no direct correction of these misleading statements; the evidence was weak that McAdory operated his car while he was under the influence of cocaine and marijuana; and, over the defense attorney's objection, the circuit court modified the pattern jury instruction for the impaired-by-drugs offense in a manner that created ambiguity regarding the "under the influence" element.

McAdory, 2021 WI App 89, ¶ 2; (A-App 003-004).

The Court "conclude[d] that when these trial events are considered together there is a reasonable likelihood that the State was effectively relieved of its burden to prove that McAdory was 'under

the influence' of cocaine and marijuana while driving." *Id.*; (A-App 004). Consequently, it "reverse[d] the judgment of conviction for a violation of § 346.63(1)(a) based on a violation of McAdory's right to due process" and "remand[ed] for a new trial on the § 346.63(1)(a) charge." *Id.* ¶ 71; (A-App 039).

Although the opinion did not address the Circuit Court's post-remittitur authority or Mr. McAdory's privilege against double jeopardy, the Court noted "that the issues we address in this appeal would not have arisen if the State had instead elected to dismiss the impaired-by-drugs offense and asked the circuit court to proceed to sentencing on the strict liability offense." *Id.* ¶ 1 n.2; (A-App 003).

D. Post-Remittitur Proceedings before the Circuit Court

Following remittitur, the chronology of events leading to this appeal transpired as follows: (i) the State's motion to "reinstate the conviction" on count two; (ii) the Circuit Court's decision granting the State's motion, "reinstating the conviction" on count two, and sentencing Mr. McAdory; (iii) Mr. McAdory's motion for postconviction relief; and (iv) the Circuit Court's decision denying Mr. McAdory's motion for postconviction relief.

i. <u>The State's Motion to "Reinstate [the] Dismissed Conviction" on Count Two</u>

On December 21, 2021, before remittitur had even occurred, the State moved to "reinstate [the] dismissed conviction" on count two. (R.203.) It did not acknowledge that Mr. McAdory had not previously been convicted on count two or cite anything in Wisconsin law authorizing its request for a "reinstatement." Its sole support was *Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000), a case involving a federal court's use of a federal statute, 28 U.S.C. § 2255, to reinstate

a previously-vacated conviction. (Id. at 2). The State believed that the government's request in *Rutledge* was analogous to its request that the Circuit Court use an unspecified legal mechanism to reinstate a charge previously dismissed on the State's motion. (Id.) And despite the Court's veiled criticism of the State in footnote 2 of its opinion, the State argued that "[t]he Court of Appeals did not explicitly state that [t]he Circuit Court was *barred* from" reinstating count two. (Id. (emphasis added).)

Mr. McAdory filed a response in opposition to the State's motion on January 7, 2022. (R.210.) He made three arguments. First, he argued that there was no authority in Wisconsin law to allow the Court to reinstate count two. (Id. at 1.) Second, he argued that the Seventh Circuit in *Rutledge* authorized a district court to reinstate a previously-vacated conviction based on a federal statute, 28 U.S.C. § 2255. (Id.) By contrast, not only did 28 U.S.C. § 2255 not apply here, but the State here was seeking to reinstate *a charge previously dismissed on its own motion*, not a previously-vacated conviction. (Id.) Finally, Mr. McAdory argued that Wis. Stat. § 346.63(1)(c) permitted multiple charges but only a single conviction—which the Court had reversed—and did not provide for the reinstatement of charges. (Id. at 1-2.)

On January 28, 2022, the State filed what it captioned to be the "State's Response to Defendant's Reply Brief," much of which exceeded the scope of the previous brief, setting forth wholly new arguments. (R.216.) It again asked the Circuit Court to "reinstate the conviction" on count two. But remarkably, it *admitted* "that there appears to be no Wisconsin law that directly accounts for the specific remedy that the State is requesting in this case." (Id. at 2-3.)

Nevertheless, the State insisted that the Circuit Court possessed such authority. First, it argued that it was "within this Court's purview." (Id. at 2-4.) Although it did not explain what that phrase means, the State posited that Wisconsin appellate courts had endorsed "the concept of trial courts reinstating convictions." (Id. at 3.) As support, it cited three cases in which this Court or the Supreme Court issued remand instructions directing a circuit court to reinstate a conviction. (Id.) The State conceded that, "[w]hile the aforementioned cases may differ somewhat procedurally from the present case," those cases "all represent a common notion—that both the Wisconsin Court of Appeals and Wisconsin Supreme Court have recognized that trial courts have the power, in appropriate situations, to reinstate previous convictions." (Id.) At no time did the State recognize, however, that there was no conviction here to reinstate or that the Court's explicit remand instructions were for the Circuit Court to hold a new trial on count one.

Continuing, the State contended that "Wisconsin courts have also recognized that trial courts have the authority to utilize vacatur as a means to create reasonable remedies when required." (Id. (citing *State v. Cox*, 2007 WI App 38, ¶ 15, 300 Wis. 2d 236, 730 N.W.2d 452).) And while it admitted that this authority "has primarily been recognized in respect to vacating convictions," the State urged the Circuit Court to reinstate count two "in order to create a reasonable remedy for the situation." (Id.) Also, the State again cited *Rutledge*, reasoning that, although *Rutledge* relied on a federal statute, 28 U.S.C. § 2255, federal case law is considered persuasive authority in Wisconsin. (Id. at 3-4.)

Second, the State argued that its requested relief was "an appropriate remedy in accordance with the Court of Appeals' decision." (Id. at 4-5.) It reiterated that "nowhere in its decision did

the Court of Appeals bar this Court from reinstating" count two. (Id. at 4.) Interestingly, the State construed footnote 2 as being *favorable* to the State, believing that it simply "highlighted that the facts deduced at trial support the conviction that the State is seeking to reinstate." (Id.) It further declared that the Court's opinion was no obstacle because the State's violation of Mr. McAdory's due process rights pertained only to the conviction on count one. (Id. at 4-5.) It claimed that, therefore, because "the conviction [on count two] was not plagued by any due process violations," its "request that this [C]ourt reinstate" count two was "a reasonable and appropriate remedy." (Id. at 5.)

ii. The Circuit Court's Decision Granting the State's Motion, "Reinstating the Conviction" on Count Two, and Sentencing Mr. McAdory

The Circuit Court was persuaded and granted the State's motion on February 8, 2022. (R.219; App 040.) It pointed out that this Court found error with the conviction on count one but "found no error in the trial leading to the guilty verdict returned by the jury related to" count two. (A-App 040.) The Circuit Court conceded that "[r]einstatement of a previously dismissed charge or vacated conviction certainly raises due process issues and a question regarding the finality of action taken on a dismissed charge or vacated conviction." (A-App 041.) It also acknowledged that, according to the State, "no case law or statutory authority directly on point related to reinstatement of a previously dismissed charge or vacated conviction." (Id.)

Nonetheless, the Circuit Court found that *Rutledge* was instructive. In *Rutledge*, the Seventh Circuit relied on 28 U.S.C. § 2255[3] to affirm a district court's order reinstating a previously-vacated, lesser-included conviction following the vacation of the greater-included conviction. (Id.) Originally, Rutledge was convicted of two federal offenses—engaging in a continuing criminal enterprise, and conspiring to distribute cocaine—and the district court sentenced him on both. (Id. (citing *Rutledge*, 230 F. 3d at 1044).) After the United States Supreme Court reversed and ordered the district court to vacate one of the convictions, the district court vacated the conspiracy conviction and sentenced him on the criminal enterprise conviction. (Id.) When Rutledge then successfully argued ineffective assistance of counsel on a postconviction claim under 28 U.S.C. § 2255, the district court vacated the criminal enterprise conviction but reinstated the conspiracy conviction. (A-App 041-042 (citing *id*. at 1045).) On appeal, the Seventh Circuit affirmed. (A-App 042 (citing *id*. at 1048-49).)

The Circuit Court found that, although 28 U.S.C. § 2255 did not apply, Wisconsin law conferred analogous postconviction and appellate rights. (Id.) It further found that, although Wis. Sat. § 346.63(1)(c) permitted only a single conviction, this did not mean that, when convicted of more than one offense under (1)(a), (1)(am), and (1)(b), just one stood while the other(s) were dismissed. (Id.) It disagreed that Mr. McAdory had any expectation of finality in the dismissal. (Id.) It explained that "[t]he statutory dual prosecution scheme provided by sec. 346.63(1)(c), Stat., permits only 'a single conviction for purposes of sentencing.' The statute does not

[3] "Section 2255 permits a federal trial court to vacate and set a judgment aside and resentence a defendant, grant him a new trial, or correct a sentence as may appear appropriate, when the conviction is open to collateral attack or is the product of a constitutional rights violation." (A-App 041-042 (citing 28 U.S.C. § 2255).)

contemplate that when a defendant is convicted of two or three offenses under sec. 346.63(1)(a), (1)(am), and/or (1)(b), one conviction stands while the others are dismissed." (Id.)

The Circuit Court found that Mr. McAdory "had no expectation of finality in his case when the trial court imposed a sentence only on count [one], the OWI conviction." (Id.) It noted that the jury found him guilty, meaning the State had met its burden and the issue was tried. (Id.) It found that count two "was only 'dismissed' subsequent to conviction because a sentence could not be imposed for both" counts and that, "[a]lthough the State and the trial court used the term 'dismiss,' when discussing what to do about the two convictions, the statute more appropriately contemplates, 'a single conviction for purposes of sentencing.'" (Id. (quoting Wis. Stat. § 346.63(1)(c)).)

Further addressing count two's dismissal count two, the Circuit Court explained that

> [t]his is not a situation where count [two], the RCS conviction, was dismissed and read in as part of a plea agreement. Nor was the count dismissed with prejudice as a result of the State's failure to prove its case at trial. It was only "dismissed" because the court cannot lawfully impose a sentence for both the OWI offense and the RCS offense. But for use of the word "dismiss," this situation is akin to *Rutledge*, where a sentence could only be imposed on one of two convictions (because one was a lesser-included offense of the other in *Rutledge*). The prosecutor and the judge used the word "dismiss," but that word does not appropriately describe what the law requires when a defendant is convicted of two offenses under sec. 346.63(1), Stat. It is apparent from the record that the prosecutor and court sought to comply with sec. 346.63(1)(c), Stat. When the conviction for one of the two sec. 346.63 offenses is vacated on post-conviction motion or appeal, the other conviction may be reinstated for sentencing because no mechanism of law foreclosed it.

(A-App 043.)

Thus, according to the Circuit Court, Mr. McAdory had no expectation of finality and that, despite being "convicted of both" counts, "[a] conviction and sentence were ordered on only one conviction to comply with the statutes." (Id.) It conceded that, "[w]hile the instant issue may have been avoided if the State had elected for the sentence to be imposed on the RCS offense, it cannot be said that McAdory is prejudiced in any way by reinstatement of the RCS conviction." (Id.) The Circuit Court found that, although his appeal resulted in the conviction on count one being vacated, "[t]he RCS conviction was, however, not truly dismissed. Simply put, the RCS conviction stands despite any inexact wording." (Id.) It further found that, once the Court vacated the conviction on count one, "the statutory barrier to sentencing on the RCS conviction was removed." (Id.) In conclusion, it remarked that Mr. McAdory "must now face the fact that winning one battle does not mean victory in war." (Id.)

On February 17, 2022, the Circuit Court sentenced Mr. McAdory on count two to nine years of imprisonment, broken down as three years of initial confinement following by six years of extended supervision. (R.229.) In a February 25, 2022 amended judgment conviction, the Court lowered the sentence to eight years of imprisonment, removing a year of extended supervision. (R.233.) Two days earlier, on February 23, 2022, the Court issued a judgment of dismissal/acquittal on count one, noting that it was "Dismissed on Prosecutor's Motion." (R.232.)

iii. <u>Mr. McAdory's Motion for Postconviction Relief</u>

Mr. McAdory moved for postconviction relief on November 4, 2022. (R.259.) After obtaining and listening to a copy of the recording

of the Court's oral arguments, undersigned counsel successfully sought to amend the supporting brief. Accordingly, on December 1, 2022, he filed an amended postconviction brief on Mr. McAdory's behalf. (R.267.)

In a separate motion, Mr. McAdory asked the Circuit Court to stay the sentence on count two—which would, at least temporarily, abrogate the probation hold he was under—and release him on bond pending the outcome of his postconviction motion. (R.269.) After a hearing on February 3, 2023, (R.290), the Circuit Court denied the latter motion, (R.275).

The State filed a response brief opposing Mr. McAdory's motion for postconviction relief on January 19, 2022. (R.268.) Mr. McAdory filed a reply brief on February 3, 2023. (R.276.)

iv. The Circuit Court's Decision Denying Mr. McAdory's Motion for Postconviction Relief

On April 3, 2023, the Circuit Court affirmed its reasoning from its prior decision and denied the postconviction motion. (R.279; A-App 044-057.) Pertinent portions of its reasoning are analyzed in the argument sections below.

STANDARD OF REVIEW

The interpretation of statutes—including Wis. Stat. § 346.63 and those found in chs. 808, 809, and 974—presents a question of law that the Court reviews de novo. *See State v. Thompson*, 2012 WI 90, ¶ 15, 342 Wis. 2d 674, 818 N.W.2d 904 (citation omitted).

"The issue of judicial authority is a question of law that this [C]ourt reviews de novo." *State v. Henley*, 2010 WI 97, ¶ 29, 328 Wis. 2d 544, 787 N.W.2d 350 (citation omitted). Whether a circuit court has either the statutory or non-statutory authority to take a given post-remittitur action is also a question of law that the Court reviews de novo. *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 22, 303 Wis. 2d 94, 735 N.W.2d 418 (citations omitted).

The Court "is the final arbiter of the meaning of its own mandates, which [it] review[s] as questions of law." *Id.*

"Whether a defendant's convictions violate the Double Jeopardy Clauses of the Fifth Amendment and Article I, Section 8 of the Wisconsin Constitution, are questions of law appellate courts review de novo." *State v. Schultz*, 2020 WI 24, ¶ 16, 390 Wis. 2d 570, 939 N.W.2d 519 (citation omitted).

ARGUMENT

The Court should reverse the Circuit Court's ruling. This appeal involves the interpretation of Wisconsin's comprehensive intoxicated driving law, Wis. Stat. § 346.63. Mr. McAdory was found guilty of violating subsections (1)(a) and (1)(am) of this statute:

> OPERATING UNDER INFLUENCE OF INTOXICANT OR OTHER DRUG.
>
> (1) No person may drive or operate a motor vehicle while:
>
> **(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or**
>
> **(am) The person has a detectable amount of a restricted controlled substance in his or her blood.**
>
> (b) The person has a prohibited alcohol concentration.

§ 346.63(1)(a)-(b) (emphasis added).

These three subsections—(1)(a), (1)(am), and (1)(b)—each set forth a distinct intoxicated driving offense. Wis. Stat. § 346.63(1)(c) instructs that a defendant may be charged, tried, and found guilty of any one or combination of the three offenses arising out of a single incident or occurrence; however, whether guilty of one or more such offenses, the defendant may incur no more than one conviction:

> (c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. If the person is charged with violating any combination of par. (a), (am), or (b), the

> offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require.

Mr. McAdory presents two arguments on appeal. First, he argues that, following remittitur, the Circuit Court did not have the authority to disregard this Court's remand order for a new trial and to, instead, reopen the judgment of conviction, "reinstate" a previously-dismissed charge, and convict Mr. McAdory of the same. Second, having dismissed count two upon the State's motion and after jeopardy attached, the Circuit Court's decision to "reinstate" count two and convict Mr. McAdory of the same violated his protection against double jeopardy.

I. FOLLOWING REMITTITUR, THE CIRCUIT COURT DID NOT HAVE THE AUTHORITY TO DISREGARD THIS COURT'S REMAND ORDER FOR A NEW TRIAL AND TO, INSTEAD, REOPEN THE JUDGMENT OF CONVICTION, "REINSTATE" A DISMISSED CHARGE, AND CONVICT MR. MCADORY OF THE SAME.

The Circuit Court did not have the power on remittitur to convict Mr. McAdory of a previously-dismissed offense. He sees no fewer than four problems with these actions. First, the Circuit Court ignored this Court's remand instruction. The Court ordered a new trial on count one. Wisconsin law limits a circuit court's post-remittitur authority when directed to hold a new trial. *See* Wis. Stat. §§ 808.08, 808.09. Here, a trial was never even calendared, much less convened. The Circuit Court was not at liberty to substitute its own mandate for the Court's.

Second, mandate aside, *nothing* in Wisconsin law authorized the Circuit Court's actions. Wis. Stat. § 346.63, and case law interpreting it, in no way suggest that, if this Court reverses the conviction on one count and remands for a new trial, the circuit court can resurrect a previously-dismissed count and swap it in as the basis for the conviction. If anything, the case law suggests just the opposite.

Third, Wisconsin's rules of postconviction or appellate procedure do not include reopening a judgment of conviction, un-dismissing a count, and swapping in that count for another. *See* Wis. Stat. chs. 974, 808, 809. By taking these actions, the Circuit Court effectively circumvented the role that these rules play in postconviction proceedings. Accordingly, the Circuit Court's actions were contrary to *State v. Henley*, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350.

Finally, the Circuit Court did not have the authority to afford the State relief that it ought to have sought on appeal. If the State was aggrieved by the Circuit Court's dismissal of count two, then it could have raised count two within Mr. McAdory's appeal, by way of either a cross-appeal or, in briefing, as an alternate argument for sustaining the judgment of conviction. *See* Wis. Stat. §§ 974.05(2), 809.10(2)(b); *State v. Alles*, 106 Wis. 2d 368, 387-91, 316 N.W.2d 378 (1982). Having done neither of these things, however, the Circuit Court did not have the post-remittitur power to grant relief that the State could have sought, but failed to seek, in appellate proceedings.

The Circuit Court acknowledged in its postconviction decision that the "[r]einstatement of a previously dismissed charge . . . certainly raises due process issues . . . ." (A-App 046.) True.

However, the more pressing issue is that the Circuit Court lacked the authority to take these actions in the first place. Not only was Mr. McAdory entitled to an expectation of "finality," (id.), but he was also entitled to an expectation that the Circuit Court would not suddenly enlarge its authority beyond what Wisconsin law allows just to sustain a conviction in his case alone.

A. The Circuit Court Exceeded Its Limited Post-Remittitur Authority When It Disregarded the Court's Order For a New Trial on Count One.

The Circuit Court committed reversible error because its actions exceeded its lawful authority. It was not authorized to disregard the Court's remand instruction that it convene a new trial on count one. Faced with remittitur, a circuit court possesses limited statutory and non-statutory authority. *See* Wis. Stat. §§ 808.08, 808.09. The Circuit Court far surpassed those limitations here.

Wis. Stat. § 808.09 gives this Court "several options" on how it may resolve any given appeal: (1) the [Court] may reverse, affirm, or modify the judgment or order; **(2) it may order a new trial**; or (3) if the appeal is from a part of the judgment or order, it may reverse, affirm, or modify that part of the judgment or order." *Tietsworth*, 303 Wis. 2d 94, ¶ 31 (emphasis added). Once it has settled on an option, the Court then "remit[s] its judgment or decision to the court below and thereupon the court below shall proceed in accordance with the judgment or decision." *Id.* (quoting § 808.09). This is the mandate.

Once the circuit court has received the Court's mandate and the case is remitted, the circuit court has the following statutory authority to act in accordance with the mandate:

> FURTHER PROCEEDINGS IN TRIAL COURT. When the record and remittitur are received in the trial court:
>
> (1) If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.
>
> **(2) If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.**
>
> (3) If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. . . .

Wis. Stat. § 808.08 (emphasis added).

In addition to its statutory authority, the circuit court "often has *some* discretion on remand to resolve matters not addressed by a mandate," so long as its actions are "*consistent with* that mandate." *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court*, 2000 WI 30, ¶ 25, 233 Wis. 2d 428, 608 N.W.2d 679 (citing *Fullerton Lumber Co. v. Torborg*, 274 Wis. 478, 483, 80 N.W.2d 461 (1957)) (emphases added). However, this non-statutory authority is limited: "The circuit court also has authority, without explicit direction, to address collateral matters 'left open' in the case, *such as costs, preparation and entry of necessary documents, and correction of clerical or computational errors*, so long as these actions do not undo the decision of the [Court]." *Tietsworth*, 303 Wis. 2d 94, ¶ 32 (emphasis added).

Indeed, the circuit court cannot undertake *any* actions that "undo the decision of the [Court]" or that "conflict with [its] expressed or implied mandate[.]" *Id.* (citing 6A *Callaghan's Wisconsin Pleading & Practice* § 55.81 (4th ed. 2005)).

The Court here instructed the Circuit Court to hold a new trial on count one pursuant to Wis. Stat. § 808.09. Upon remittitur, the Circuit Court had no discretion but to follow Wis. Stat. § 808.08(2): "If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar." The Circuit Court erred when it did not schedule and hold a retrial on count one.

Additionally, the Circuit Court's decision to reopen Mr. McAdory's judgment of conviction, "reinstate" a previously-dismissed count, and convict him on that count did not fall within its limited non-statutory authority and was, in any event, inconsistent with the Court's mandate. Summarily convicting a defendant for one offense is in no way consistent with holding a retrial for another offense. Consequently, the Circuit Court's post-remittitur actions exceeded both its statutory and non-statutory authority.

B. Wis. Stat. § 346.63(1)(c) Prohibited the Court from Convicting Mr. McAdory a Second Time.

The State's postverdict decision to convict Mr. McAdory on count one and dismiss count two was a crucial lapse in judgment. It was a volitional choice. Because the State did not thoughtfully consider the consequences of electing to dismiss count two, Mr. McAdory has had to endure two appeals, all while incarcerated.

According to case law, if a jury returns a verdict against the defendant on more than one of the three charges set forth in § 346.63(1)(a), (1)(am), and (1)(b), "the defendant is to be sentenced on one of the charges, and the other charge[s] [are] to be dismissed." *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993). The State must dismiss the other charges because "the legislature d[oes] not authorize two convictions." *State v. Bohacheff*,

114 Wis. 2d 402, 408 n.6, 338 N.W.2d 446 (1983); *see also id.* at 417 ("[W]e conclude that the legislature did not intend to require two convictions, even if there were two guilty verdicts, or to impose multiple punishments.").

Importantly, this rule from *Bohacheff* applies *not only* "for the most obvious and serious consequences of a conviction, such as sentencing"—"the legislature intended a prosecution . . . to terminate with one conviction *for all purposes*." *Id.* at 413 (emphasis added).

The Circuit Court's decision cannot be reconciled with *Bastian* and *Bohacheff*. Just as the conviction on count one was a conviction *for all purposes*, the dismissal of count two was a dismissal *for all purposes*. It was not simply for purposes of sentencing.

Moreover, the Circuit Court could not "reinstate" a conviction on count two because the State did not elect to convict Mr. McAdory on count two. Pursuant to Wis. Stat. § 346.63(1)(c), the State chose to convict him solely on count one—for being under the influence of an intoxicant or controlled substance, in violation of § 346.63(1)(a)—and to dismiss count two. As this Court recognized in footnote 2 of its published opinion, the State's decision in this regard was clearly imprudent. However, nothing in Wis. Stat. § 346.63 authorized the Circuit Court to grant the State's request for relief from its imprudent decision.

C. The Circuit Court Improperly Circumvented the Role of Wisconsin's Rules of Postconviction and Appellate Procedure.

As the Circuit Court acknowledged in its February 8, 2022 decision, the State conceded that nothing in Wisconsin law authorized

the Circuit Court to "reinstate" count two. (R.216 at 2-3; A-App 041.) The Assistant Attorney General made the same concession to the Court's panel. Unsurprisingly, the Circuit Court did not cite any such authority in its postconviction decision.

In the absence of a grant of authority, the Circuit Court should not have turned to *Rutledge* for support. The district court in *Rutledge* purported to have statutory authority to reinstate Rutledge's conviction under the federal postconviction statute, 28 U.S.C. § 2255. Here, neither the State nor the Circuit Court cited Wisconsin's postconviction/appellate statutes or otherwise alleged that they somehow authorized the "reinstatement" of count two.

Absent a source of authority in Wisconsin law, the Circuit Court should have, instead, concluded that it did not have the authority to revisit Mr. McAdory's judgment of conviction, revive count two, and convict him on that count. All available remedies are set forth in Wisconsin's postconviction/appellate procedures. If a party wishes to obtain relief relating to criminal convictions or to otherwise reopen a criminal judgment, then it must follow the statutes set forth in chapter 974. A party cannot just ask a court to grant these remedies outside of the postconviction/appellate framework. This would allow parties to circumvent the requirements and limitations of these statutes, rendering them meaningless. This is the import of *State v. Henley*, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350. *Henley*, not *Rutledge*, governs this case.

In *Henley*, the defendant Henley was convicted of five counts of second-degree sexual assault, and he subsequently exhausted his appeals. Upon learning that the Seventh Circuit granted his co-defendant's habeas corpus petition and vacated his convictions based on ineffective assistance of counsel, Henley asked a Wisconsin circuit

court to vacate his convictions. The circuit court agreed and granted his motion, thereby vacating Henley's convictions. This Court certified the case to the Wisconsin Supreme Court which granted review. It reversed.

Before the Supreme Court, Henley argued that the circuit court had the authority to revisit his convictions under Wis. Stat. § 805.15(1), Wis. Stat. § 806.07, or the court's inherent authority. The Supreme Court disagreed. *Id.* ¶¶ 30-77. It stated that "Henley should not be looking to the civil statutes for guidance regarding his postconviction options. The legislature has already created § 974.02 and § 974.06, which, by their terms, provide the primary statutory means of postconviction relief for criminal defendants." *Id.* ¶ 44. It held that "convicted criminal defendants wishing to challenge their conviction through a postconviction motion, appeal, or both, must abide by these sections." *Id.* ¶ 49.

Although the State's motion here did not identify any statute authorizing the Circuit Court to "reinstate" count two, its motion most closely resembles one under Wis. Stat. § 806.07. Wis. Stat. § 806.07 is entitled "relief from judgment or order." The State's motion sought relief from the October 31, 2019 judgment of conviction, (R.148), making Wis. Stat. § 806.07 appear to be a close fit. However, *Henley* foreclosed this use of Wis. Stat. § 806.07 to revisit a judgment of conviction in this manner. *Id.* ¶¶ 67-71. It explained that, "[i]f convicted criminal defendants can use § 806.07(1)(h) to challenge their conviction, why would they ever use [the postconviction/appellate statutes] §§ 974.02 and 974.06?" *Id.* ¶ 70. It concluded that "they would not," again reiterating that "Sections 974.02 and 974.06 were written to provide the primary statutory means of postconviction, appeal, and post-appeal relief for convicted criminal defendants." *Id.*

Henley further addressed the inherent powers of circuit courts to revisit judgments of conviction. *Id.* ¶¶ 72-77. While the Supreme Court admitted "that circuit courts have 'inherent, implied and incidental powers,'" it held that "a circuit court's inherent authority to order a new trial in this case would unwisely broaden the scope of the circuit court's inherent powers." *Id.* ¶¶ 73-74. It explained:

> As outlined above, we should only invoke inherent power when such power is necessary to the functioning of the court. Recognizing inherent authority to order a new trial here, where Henley seeks another crack at the same arguments that failed earlier, would take us far beyond the more modest justifications for inherent authority. We would effectively be extending an ongoing invitation to litigants to keep asking the circuit courts to revisit the same arguments over and over again, with no stopping point, much less a sensible one.

Id. ¶ 74 (footnote omitted).

Such a broad inherent power, the Supreme Court explained, would mean that defendants could raise the same postconviction arguments an unlimited number of times and without any limitation as to time—"not just for 10 years, but 20, 30, or 50 years after a conviction." *Id.* ¶ 74 n.28. Allowing defendants to do so would undermine the need for finality:

> Put simply, the circuit court's authority to revisit old arguments must end somewhere. While defendants deserve a fair hearing, defendants do not deserve unlimited, duplicative hearings. The fair administration of justice is not a license for courts, unconstrained by express statutory authority, to do whatever they think is "fair" at any given point in time. Rather, any conception of the fair administration of justice must include the principle of finality. Thus, while circuit courts do have inherent powers, we do not recognize a broad, inherent power to order a new trial in the interest of justice at any time, unbound by concerns for finality and proper procedural mechanisms.

Id. ¶ 75.

Finally, the Supreme Court again reiterated that, "if a circuit court has the inherent power to order a new trial in the interest of justice at any time for any reason, including when the litigant has already raised the same claims (as is the case here), we must again ask — what would be the point of § 974.06?" *Id.* ¶ 76. It answered that "[n]o criminal defendant challenging his conviction following the postconviction motion and appeals process would limit themselves to the restrictive grounds and high bar in § 974.06. Recognizing or granting a circuit court's inherent authority here would open the courts to claim after claim and render the restrictions in § 974.06 illusory." *Id.*

Henley precluded the State's motion to "reinstate the conviction" on count two. As the next subsection shows, if the State was aggrieved by the dismissal of count two, its recourse was to file a cross-appeal or otherwise raise the matter within Mr. McAdory's direct appeal. But it did nothing, and the time in which to invoke these procedures has long since passed. If the State was allowed to obtain relief from a judgment of conviction whenever it pleased, then there would be no incentive for it to follow the ordinary postconviction/appellate procedures under Wisconsin law. Indeed, if allowed, the State could theoretically bring its motion to "reinstate the conviction" an unlimited number of times and for as long after the conviction as it desired. As such, the State's motion clearly undermines the principle of finality of judgments.

Consequently, the Circuit Court did not have the power to reopen Mr. McAdory's judgment of conviction, reinstate count two, and convict him of the same.

D. The Circuit Court Could Not Grant the State Relief That It Ought to Have Sought in *State v. McAdory*, Appeal Number 20-AP-2001.

Finally, the Circuit Court lacked the post-remittitur authority to grant the State relief that it failed to pursue in *State v. McAdory*, appeal number 20-AP-2001. Wisconsin's postconviction and appellate procedures afforded the State an ample opportunity to pursue its request for relief before this Court. It simply failed to act in a timely manner and in the correct forum.

Once Mr. McAdory filed his notice of appeal on December 2, 2020, (R.191), the State was on notice that he was trying to overturn the October 25, 2019 judgment of conviction, (R.148). At that juncture, if the State wished to preserve its ability to request a modification to the judgment of conviction and the order dismissing count two, and to have Mr. McAdory convicted on count two instead of count one, then it was required to file a notice of cross-appeal. Because it did not do so on or before January 4, 2021, the Circuit Court was powerless to grant the State this remedy.

The analysis is straightforward. To start, the State is authorized to pursue cross-appeals. Wis. Stat. § 974.05(2) ("If the defendant appeals . . . , the state may move to review rulings of which it complains, as provided by s. 809.10(2)(b)."). Wis. Stat. § 809.10(2)(b) states in relevant part:

> *Cross-appeal*. A respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding **shall** file a notice of cross-appeal within the period established by law for the filing of a notice of appeal, or 30 days after the filing of a notice of appeal, whichever is later. . . .

(Emphasis added).

The State's motion to "reinstate the conviction" on count two was simply a mislabeled request to modify the judgment of conviction and the order dismissing count two. It was, in effect, asking the Circuit Court to vacate count two's dismissal order, reopen the judgment, and substitute a conviction on count two for the conviction on count one. Given the use of the word "shall" in Wis. Stat. § 809.10(2)(b), such a modification to the judgment of conviction and order dismissing count two could only be achieved by filing a notice of cross-appeal. However, the State failed to cross-appeal within the 30-day period following Mr. McAdory's filing of the notice of appeal (or at any time thereafter).

The case law supports the filing of a "protective" appeal of just this sort in a case involving Wis. Stat. § 346.63(1). *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993); *see also Estate of Donnell v. Milwaukee*, 160 Wis. 2d 529, 532-35, 466 N.W.2d 670 (Ct. App. 1991) (another case involving protective appeals, where defendants assert cross-appeals against co-defendant and third-party defendants in response to plaintiffs' appeal).

In *Bastian*, police cited Bastian for, *inter alia*, operating while intoxicated ("OWI charge") and having a prohibited blood alcohol concentration ("BAC charge") under Wis. Stat. § 346.63(1)(a), (1)(b). 178 Wis. 2d at 193. Following a trial to the municipal court, the court found Bastian guilty of the OWI charge. *Id.* at 193-94. However, on the BAC charge, the court explicitly declined to find Bastian guilty or not guilty, instead ordering the BAC charge dismissed. *Id.*

Bastian appealed to the circuit court for a de novo trial on the OWI charge only. *Id.* at 194. The municipality did not appeal. *Id.* However, the circuit court ordered that the de novo trial must be on both the OWI charge and the BAC charge. *Id.* A jury then found

Bastian guilty of the BAC charge but not guilty of the OWI charge. *Id.* Bastian appealed the BAC conviction. *Id.*

This Court reversed. *Id.* at 195-97. It explained that, because the municipal court did not find Bastian guilty or not guilty of the BAC charge as § 346.63(1)(c) required, its "dismissal of the BAC charge was the functional equivalent of an acquittal." *Id.* at 195-96. It was the municipality's obligation to appeal the municipal court's failure to make a finding of guilt on the BAC charge. *Id.* at 196. Because it failed to do so, the circuit court lacked subject matter jurisdiction over the BAC charge. *Id.* The Court further advised that, "[i]f the municipal court refuses to find guilt on both charges, the municipality is on notice and should take a protective appeal." *Id.* at 197.

Like the municipality in *Bastian*, the State here should have filed a "protective" cross-appeal. That the jury *did* make a finding of guilt in this case is inconsequential. After Mr. McAdory appealed, the State was on notice that, if it wished to obtain a modification to either the judgment of conviction or the order dismissing count two, it was required to file a notice of cross-appeal within 30 days under Wis. Stat. § 809.10(2)(b).

At the very least, the State should have argued in its briefing in appeal number 20-AP-2001 that the Court should vacate the dismissal of count two as an alternate ground on which to affirm the judgment of conviction. "[A] respondent may raise an issue in [its] briefs without filing a cross-appeal 'when all that is sought is the raising of an error which, if corrected, would sustain the judgment . . . .'" *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507, 516, 331 N.W.2d 325 (1983) (quoting *State v. Alles*, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (1982)). As the Supreme Court wrote in *Alles*:

> The reason for this is the accepted appellate court rationale that a respondent's judgment or verdict will not be overturned where the record reveals the trial court's decision was right, although for the wrong reason. An appellate court, consistent with that percept [sic], has the power, once an appealable order is within its jurisdiction, to examine all rulings to determine whether they are erroneous and, if corrected, whether they would sustain the judgment or order which was in fact entered.

106 Wis. 2d at 391.

However, because the State failed to pursue a cross-appeal or at least raise the issue in its appellate briefing, the State was barred from obtaining this relief. It could not circumvent the effect of Wis. Stat. § 809.10(2)(b) by simply asking the Circuit Court to modify the judgment of conviction instead. The Circuit Court lacked the authority to grant the State this remedy.

II. HAVING DISMISSED COUNT TWO UPON THE STATE'S MOTION AND AFTER JEOPARDY ATTACHED, THE CIRCUIT COURT'S DECISION TO "REINSTATE" COUNT TWO AND CONVICT MR. MCADORY OF THE SAME VIOLATED HIS PROTECTION AGAINST DOUBLE JEOPARDY.

The Circuit Court violated Mr. McAdory's privilege against double jeopardy. The federal and state constitutions shielded him from being placed in double jeopardy. U.S. Const. amend. V (No person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."); Wis. Const. § 8 ("[N]o person for the same offense may be put twice in jeopardy of punishment . . . .").

These clauses protect "(1) 'against a second prosecution for the same offense after acquittal[,]' (2) 'against a second prosecution for the same offense after conviction[,]' and (3) 'against multiple

punishments for the same offense.'" *State v. Schultz*, 2020 WI 24, ¶ 21, 390 Wis. 2d 570, 939 N.W.2d 519 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). "Jeopardy attaches . . . [i]n a jury trial when the selection of the jury has been completed and the jury sworn." Wis. Stat. § 972.07(2); *see also Martinez v. Illinois*, 134 S. Ct. 2070, 2074 (2014) ("There are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn." (internal marks, citations omitted)).

The Circuit Court could not "reinstate" count two because the State had it dismissed after jeopardy attached. The reasons are twofold. First, once the State elected to have count two dismissed and to have Mr. McAdory convicted on count one, the double jeopardy clause entitled him to the expectation of finality on count two and protected him from further prosecution on that charge. Second, case law suggests that the State's post-jeopardy dismissal of count two was with prejudice, further supporting the conclusion that the State was barred from again prosecuting Mr. McAdory on that charge.

A. Once the State Elected to Have Count Two Dismissed and to Have Mr. McAdory Convicted on Count One, the Double Jeopardy Clause Entitled Him to the Expectation of Finality on Count Two and Protected Him from Further Prosecution on that Charge.

The Circuit Court contended that none of the three double jeopardy categories applied and that, when this Court reversed the conviction on count one, it was free to "reinstate" and convict Mr. McAdory on count two. Its conclusion is misguided. Mr. McAdory originally argued that count two's dismissal was tantamount to an acquittal. After further reflection, he now cites three reasons why this situation falls within the prohibitions against successive prosecutions and multiple punishments for the same offense.

i. <u>Scope of Jeopardy</u>

Count two clearly fits within the scope of Mr. McAdory's jeopardy. "[A]n accused must suffer jeopardy before he can suffer double jeopardy." *State v. Killian*, 2023 WI 52, ¶ 24, __ Wis. 2d __, 991 N.W.2d 387 (quoting *Serfass v. United States*, 420 U.S. 377, 393 (1975)). The defendant must be "subjected to the risk of conviction" because, "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* ¶ 25 (quoting *Serfass*, 420 U.S. at 391-92). "[I]f a defendant was never subject to the 'risk of a determination of guilt' of an offense, then jeopardy never attached for that offense, and it is not within the scope of jeopardy." *Id.*; *see also id.* ¶ 27 ("[J]eopardy attaches when 'an accused has been subjected to the risk of conviction' by 'a trier having jurisdiction to try the question of the guilt or innocence of the accused.'").

Based on the record, there can be no doubt that the 2019 trial placed Mr. McAdory at actual risk of being convicted of the strict-liability offense in count two. Indeed, the jury *found him guilty* on count two, a clear indicator that it was within the scope of jeopardy. Consequently, when the State had count two reinstated in 2022, it again placed Mr. McAdory in jeopardy of being convicted on count two, contrary to the privilege against double jeopardy.

ii. <u>Multiplicity</u>

Under the double jeopardy principle of multiplicity, "[a] defendant may be charged and convicted of multiple counts or crimes arising out of one criminal act only if the legislature intends it." *State v. Lechner*, 217 Wis. 2d 392, 402, 576 N.W.2d 912 (1998) (citations omitted). Under Wis. Stat. § 346.63(1)(c), the Legislature authorized the State to charge a defendant with any one or combination of the

three intoxicated driving offenses, each of which requires proof of a fact that the others do not. *See id.* ¶ 15 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Ordinarily, this would suggest that "the [L]egislature ha[d] promulgated separate, distinct offenses providing for *multiple convictions* and punishments." *Id.* (emphasis added). Yet, with respect to the three intoxicated driving offenses, the Legislature permits only a *single conviction*. *See* Wis. Stat. § 346.63(1)(c).

Indeed, according to the case law, charging a defendant with the three intoxicated driving offenses "does not violate double jeopardy protections because [§ 346.63(1)] subjects the defendant to only one conviction and one punishment." *State v. Raddeman*, 2000 WI App 190, ¶ 5, 238 Wis. 2d 628, 618 N.W.2d 258 (quoting *Bohacheff*, 114 Wis. 2d at 405). "Since the [Supreme Court] determine[d] that the [L]egislature did not authorize two convictions (and consequently no multiple punishments), there is . . . no need for the court to resolve . . . whether [§ 346.63(1)(a), (1)(am), and (1)(b)] set forth the same offense" for purposes of double jeopardy. *Id.* ¶ 7 (quoting *Bohacheff*, 114 Wis. 2d at 408 n.6) (emphasis omitted).

Nevertheless, the Circuit Court here was satisfied that the State could convict Mr. McAdory on *both counts one and two*. Within hours of issuing its February 8, 2022 decision "reinstating the conviction" on count two, the Circuit Court convened a status hearing. (R.237; A-App 111.) It told the parties that, the conviction on count two notwithstanding, it would have "the clerk update the court file to show that Count 1, the OWI eighth, that the disposition after remittitur from the Court of Appeals should indicate that the defendant has entered a not guilty plea and that matter is to be scheduled for trial still." (A-App 113.) The Circuit Court then asked the State "for a decision on whether they're going to pursue trial on

Count 1 . . . ." (Id.) Despite the Circuit Court's apparent willingness to place Mr. McAdory in jeopardy of being convicted on both counts one and two, the State decided a few weeks later that it would not retry him on count one.

Although Mr. McAdory was never actually convicted on both counts simultaneously, the Circuit Court's interpretation still allowed the State to freely swap in and out the charge serving as the basis for the single conviction. This could lead to absurd and unjust outcomes. If the State simply disagreed with the sentence that the defendant received on one charge, then it could simply move to dismiss that charge, reinstate the other charge, and see whether the new conviction yielded a sentence more to its liking. The same goes for if the State sensed that it did not have the upper hand on appeal. The Legislature did not intend to give the State multiple kicks at the cat. When statutes allow for only one conviction, double jeopardy protects the defendant from being subjected to multiple convictions. *State v. Cox*, 2007 WI App 38, ¶¶ 7-8, 300 Wis. 2d 236, 730 N.W.2d 452. It even "protects a defendant from *repeated attempts* by the State to convict the defendant for an alleged offense." *State v. Jaimes*, 2006 WI App 93, ¶ 7, 292 Wis. 2d 656, 715 N.W.2d 669 (emphasis added).

iii. Finality of Judgments

Finally, by dismissing count two postverdict, the State induced Mr. McAdory to expect that he would not be further prosecuted or punished for the strict-liability offense. Double jeopardy "serves a constitutional policy of finality for the defendant's benefit." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). It "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and

insecurity." *Blueford v. Arkansas*, 566 U.S. 599, 605 (2012) (citation, marks omitted).

Under the Circuit Court's decision, the State could wait indefinitely long before asking the Circuit Court to "reinstate" a charge. After all, what limitations period would govern? Without an endpoint specified by law, the timing would be left to the vagaries of prosecutorial whim. All the while, the defendant would be forced to live his life in fear, worry, and frustration about when, if ever, the State might suddenly decide to file its reinstatement motion. This cannot be. A defendant must be able to enjoy finality at some point in time. The most logical point in time would be once the State dismisses the charge and, therefore, acquiesces to the termination of jeopardy on that charge.

B. The Dismissal of Count Two was With Prejudice Because Jeopardy Had Attached, a Decision on the Merits Had Been Made, and the State was Barred from Refiling the Charge Against Mr. McAdory.

By the time the Circuit Court granted the State's postverdict motion to dismiss count two, jeopardy had attached, a determination of the merits had been made, and the State was barred from recharging Mr. McAdory with the strict-liability offense. Count two's dismissal was, in other words, with prejudice. *See State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980); *State v. Miller*, 2004 WI App 117, 274 Wis. 2d 471, 683 N.W.2d 485.

In *Braunsdorf*, the Supreme Court affirmed its past holding that the State's prosecutorial discretion to terminate pending prosecutions is subject to the trial court's authority to determine whether dismissal is in the public interest. *Id.* at 574 (citing *State v. Kenyon*, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978)). The key issue in *Braunsdorf* was

whether, in exercising this authority, the trial court had the inherent power to dismiss such cases with prejudice. *Id*.

The Supreme Court "note[d] . . . that only sec. 976.05(1), Stats.,[4] gives trial courts the power to dismiss a case with prejudice. Otherwise, *dismissals prior to the attachment of jeopardy are without prejudice*." *Id.* (citations omitted, emphasis added). Braunsdorf cited a number of cases that he "claim[ed] embody the proposition that a trial court may dismiss a criminal case with prejudice, prior to jeopardy." *Id.* at 575. The Supreme Court rejected them, "[h]aving concluded that none of our cases accord trial courts the power to dismiss a criminal case with prejudice prior to jeopardy, with the narrow exception involving the constitutional right to a speedy trial. . . ." *Id.* at 578.

The Supreme Court also declined to find that trial courts have the inherent power to do so. *Id.* at 578-85. In so holding, it stated that, "[b]ecause we find that (1) the existence of this inherent power has only recently been articulated in American jurisprudence, and (2) it arises frequently in connection with a procedural rule or statute authorizing dismissals, we conclude that the power to dismiss a criminal case with prejudice prior to jeopardy on nonconstitutional grounds is not essential to the existence or the orderly functioning of a trial court, and it is not, therefore, an inherent power of the trial courts of this state." *Id.* at 585. Finally, in response to the defendant's argument that allowing for pre-jeopardy dismissals with prejudice would aid in the economical use of judicial resources, the Supreme Court replies that

[4] Wis. Stat. § 976.05 pertains to agreements on detainers; thus, it is not relevant to this motion.

> we believe that the power to dismiss a criminal case with prejudice before the attachment of jeopardy, regardless of how judiciously it is used by trial courts, is too great an intrusion into the realm of prosecutorial discretion. *See: United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967). Comment, *The Nolle Prosequi Under Rule 48(a) of the Federal Rules of Criminal Procedure*, 1978 Det. C.L. Rev. 491, 498-504 (1978); Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 Colum. L. Rev. 130, 136-38 (1975). Accordingly, we hold that the trial courts of this state do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial.

Id. at 586 (emphases added).

One example of an application of the *Braunsdorf* rule came in *State v. Miller*, 274 Wis. 2d 471. There, the State charged Miller with two intoxicated driving charges: an impaired-by-drugs offense under § 346.63(1)(a), and a prohibited-alcohol-concentration offense under § 346.63(1)(b). *Id.* ¶ 2. On the eve of trial, the circuit court struck the State's expert testimony due to the untimely disclosure of expert discovery. *Id.* ¶¶ 2-4. After denying the State's motion for a continuance, the circuit court granted the State's request to dismiss the charges without prejudice. *Id.* ¶¶ 4-5. When the State re-filed the charges, Miller unsuccessfully moved to dismiss based on, *inter alia*, claim preclusion. *Id.* ¶ 6. Convicted, he later appealed. *Id.* ¶¶ 6-8.

This Court analyzed the doctrine of claim preclusion, or res judicata. *Id.* ¶¶ 24-29. The double jeopardy clause incorporates the principles of claim preclusion as they are "essential to the Constitution's prohibition against successive criminal prosecutions." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016). It "bars claims that were or could have been litigated in a prior proceeding when these requirements are met: (1) an identity between the parties or their privies in the prior and present actions; (2) an identity

between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction." *Miller*, *supra*, ¶ 25.

The Court concluded that claim preclusion did not apply because "there was no 'final judgment on the merits.'" *Id.* ¶ 27. It explained that, not only was the order excluding the expert testimony not a decision on the merits, but neither was the dismissal order: "The order dismissing the charges also was not a 'final judgment on the merits' because it was *without prejudice*, **meaning that no decision on the merits had been made and the State was therefore free to refile the same charges to obtain a judgment on their merits**." *Id.* (citing *Russell v. Johnson*, 14 Wis. 2d 406, 411-12, 111 N.W.2d 193 (1961)) (emphases added). The Court further stated that, although "a final judgment on the merits need not be the result of a full litigation of the claims"—consider, e.g., stipulated judgments, default judgments—"the common element is that the judgment ends the litigation on the merits of the claim or claims." *Id.* ¶ 28.

Braunsdorf and *Miller* support the conclusion that count two's dismissal was with prejudice and that its later reinstatement was barred by the double jeopardy clause. Careful emphasis is placed on the attachment of jeopardy as the demarcation between dismissals without and with prejudice. Indeed, the State directed the Circuit Court to dismiss count two after jeopardy had attached and after a full and final determination of the merits had been made. Unlike a dismissal *without* prejudice, following the dismissal here, the State could not have promptly re-filed and re-prosecuted the strict-liability charge against Mr. McAdory. Litigation had ended. For these additional reasons, the dismissal of count two was with prejudice, and convicting him thereon violated his double jeopardy protections.

CONCLUSION

For the foregoing reasons, Mr. McAdory respectfully requests that the Court reverse the Circuit Court's order denying his motion for postconviction relief and vacate the amended judgment of conviction on count two.

Dated this 7th day of August, 2023.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b), (bm), and (c) as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this brief is **10,954** words.

Dated this 7th day of August, 2023.

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I hereby certify that separately filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) A table of contents;

(2) The findings or opinion of the circuit court;

(3) A copy of any unpublished opinion; and

(4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

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