WISCONSIN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant-Petitioner.

Appeal No. 23-AP-645

Rock County
16-CF-26

PETITION FOR REVIEW OF DEFENDANT-APPELLANT-PETITIONER CARL LEE MCADORY

ON PETITION FROM THE APRIL 11, 2024 OPINION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV
Rock County Circuit Court Case No. 16-CF-26
Hon. John W. Wood and Hon. Karl R. Hanson

Counsel for Defendant-Appellant-Petitioner Carl Lee McAdory:

Simerson Law LLC
Brent A. Simerson
State Bar No. 1079280
2544 N. 84th St.
Wauwatosa, WI 53226
(414) 220-0003
bsimerson@simersonlaw.com

TABLE OF CONTENTS

Page(s)

INTRODUCTION

Respectfully, the Court should review this case as it presents novel legal issues of statutory and constitutional importance. Mr. McAdory was charged with and later found guilty of two alternative forms of OWI liability under Wis. Stat. § 346.63(1): [count one] operating while under the influence (§ 346.63(1)(a)), and [count two] operating with a prohibited alcohol concentration (§ 346.63(1)(am)). Wis. Stat. § 346.63(1)(c) explains in relevant part that, "[i]f the person is found guilty of any combination of par. (a), (am), or (b) . . . , there shall be a single conviction . . . ." Prior to sentencing, the State moved to have count two dismissed, which was granted, and Mr. McAdory was convicted and sentenced on count one. He appealed.

The Court of Appeals reversed the conviction on count one, concluding in a published opinion that an instruction that the Circuit Court read to the jury relating to operating while under the influence was confusing such that it violated Mr. McAdory's due process rights. It remanded the case to the Circuit Court to convene a new trial on count one.

After remittitur, the State moved, in effect, to reopen the judgment of conviction, vacate the order dismissing count two, and reinstate and convict Mr. McAdory on count two. The State conceded that nothing in Wisconsin law authorized the Circuit Court to order this relief. Its sole support was an unrelated opinion from the Seventh Circuit, applying federal law.

The Circuit Court granted the motion. It, too, admitted that nothing in Wisconsin law authorized it to order the requested relief, also citing the unrelated Seventh Circuit opinion.

After his postconviction motion was denied, Mr. McAdory appealed again. He argued that the Circuit Court lacked the authority to reopen the judgment of conviction, vacate the order dismissing count two (which was, presumably, with prejudice as jeopardy had long since attached), and reinstate and convict Mr. McAdory on count two. If the State wanted to preserve its ability to have him convicted on count two, then it should have just waited until he had exhausted his appeal rights before choosing to dismiss a count as Wis. Stat. § 346.63(1)(c) requires.

Mr. McAdory also argued that, if, in the event Mr. McAdory succeeded in having his conviction on count one reversed, the State wished to have the dismissal order vacated and the judgment reopened and modified to convict him on count two, then it should have either cross-appealed as required by Wis. Stat. Rule 809.10(2)(b)—"[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, at the very least, raised the issue as an alternate ground for relief in briefing during Mr. McAdory's first appeal.[1]

[1] In fact, the State informed the Court of Appeals during Mr. McAdory's first appeal that it intended to have him convicted on count two, if his appeal of his conviction on count one succeeded. This occurred during oral arguments, which the Court of Appeals convened based on its concern that, if it reversed the conviction on count one, the State might turn around and, after remittitur, demand that the Circuit Court reinstate and convict Mr. McAdory on count two. During the arguments, the State revealed its plan to pursue Mr. McAdory's conviction on count two if count one's conviction was overturned. In response, the Court of Appeals panel chided the State for not having appealed or raised the issue in its earlier briefing, and questioned whether such relief was lawful at all. (See, e.g., R.270 [P-App] at 61 [104] ("So we have an order from Judge Wood saying that charge is dismissed. Have you appealed that?"), 62 [104] ("[T]ell me why you didn't raise this, why we had to raise it if it's so important."), 63 [104] ("Under what authority could Judge Wood reopen if that, if that's the correct term[?]"), 64 [104] ("So if the problem is the case law, why didn't you appeal?"), 65-66 [105]

Finally, he argued that the Circuit Court could not—consistent with the rules of appellate procedure, the double jeopardy clause, and the defendant's interest in the finality of judgments—issue a post-remittitur order reinstating a count that the State had dismissed with prejudice and after jeopardy attached.

In the Opinion below, which has since been published, the Court of Appeals rejected these arguments and concluded that the Circuit Court had the authority to do what it did. As to the source of this authority, however, it did not follow the Circuit Court's reasoning. Nor did it accept the State's arguments or rationale. Instead, the Court of Appeals affirmed based on a novel interpretation of Wis. Stat. § 346.63(1)(c).

While the parties, the Circuit Court, and the case law have interpreted the relevant portion of § 346.63(1)(c)—"[i]f the person is found guilty of any combination of par. (a), (am), or (b) . . . , there shall be a single conviction"—to have a clear, singular meaning (i.e., that even if a defendant is found guilty under more than one of § 346.63(1)'s paragraphs, he or she is convicted but once), the Court of Appeals held that that same language not only has a different meaning (i.e., "when there is more than one [§ 346.63(1)] guilty verdict, only one can serve as the count for purposes of conviction and sentencing, and all other § 346.63(1) counts are to be dismissed"), but that it is susceptible to no other meaning. (COA Op. ¶¶ 16-17, pp. 7-8; P-App 007-008.)

("[Y]our position would be when you, if you lose, when that happens and . . . we issue an opinion that says that there was a problem . . . , you would just go back to Judge Wood and . . . say, okay, well, that's fine, Judge, no worries because you have authority to reinstate the 1, sub 1, sub am, conviction."), 73 [107] ("But yet you, you haven't briefed it. I mean you're talking to us now, we appreciate that, but yet you haven't briefed it. If it was that important, why wouldn't it be somewhere, something in the record other than, than, than this court raising it. Why, why wouldn't we say that at this point it's forfeited?").)

Based on its interpretation of § 346.63(1)(c), the Court of Appeals concluded that circuit courts may reopen judgments of conviction, un-dismiss counts, and substitute one § 346.63(1) count for another to serve as the basis for the conviction. Additionally, it held that the State could not have cross-appealed or argued for a conviction on count two in its briefing because the Court of Appeals now insists that, in Mr. McAdory's first appeal, "the State had no interest in modification of any judgment or order." (Id. ¶ 36, p. 18; P-App 018.) No mention is made of the oral arguments. The Court of Appeals also rejected Mr. McAdory's arguments regarding appellate procedure, double jeopardy, and his interest in the finality of judgments.

ISSUES FOR REVIEW

1. Does Wis. Stat. § 346.63(1)(c) grant circuit courts the post-remittitur authority to reopen judgments of conviction, vacate post-jeopardy orders dismissing § 346.63(1) counts at the State's request, and reinstate and convict defendants on those counts?

METHOD OR MANNER OF RAISING THE ISSUE: The Court of Appeals raised this issue for the first time in its Opinion below.

ANSWERED BY THE CIRCUIT COURT: Implicitly, no. The Circuit Court conceded, *inter alia*, that "[n]o law under ch. 346, Stat., or any other chapter, authorizes the court to reinstate a previously-dismissed RCS charge when an OWI conviction is later vacated." (R.279 at 9; P-App 075.)

MR. MCADORY'S POSITION BELOW: Implicitly, no.

ANSWERED BY THE COURT OF APPEALS: Yes.

2. When a defendant appeals from a judgment of conviction, seeking to have his conviction on a count reversed, the State becomes a respondent on appeal. If, in the event the defendant's appeal succeeded, the State wished to have an order dismissing a different count vacated and further wished to have the judgment of conviction reopened and modified to have the defendant convicted on the previously-dismissed count, must the State have filed a notice of cross appeal under Wis. Stat. Rule 809.10(2)(b)? Alternatively, must the State have raised this request as an alternate ground for relief in its briefing on the defendant's appeal, as provided in *State v. Alles*, 106 Wis. 2d 368, 390-91, 316 N.W.2d 378 (1982)?

METHOD OR MANNER OF RAISING THE ISSUE: Mr. McAdory raised this issue during postconviction proceedings before the Circuit Court and then, having further developed the argument, presented it on appeal before the Court of Appeals.

ANSWERED BY THE CIRCUIT COURT: Did not address.

MR. MCADORY'S POSITION BELOW: Yes.

ANSWERED BY THE COURT OF APPEALS: No.

3. Can a circuit court reinstate a count on which the defendant was found guilty but which the State moved to have dismissed after jeopardy attached, consistent with the defendant's protections against double jeopardy and his interest in the finality of judgments?

METHOD OR MANNER OF RAISING THE ISSUE: Mr. McAdory raised this issue during postconviction proceedings before the Circuit Court and then on appeal before the Court of Appeals.

ANSWERED BY THE CIRCUIT COURT: Yes.

MR. MCADORY'S POSITION ON APPEAL: No.

ANSWERED BY THE COURT OF APPEALS: Yes.

REASONS TO GRANT REVIEW

"[S]pecial and important reasons" exist to grant this petition. *See* Wis. Stat. § 809.62(1r). Two such reasons stand out. First, this petition raises a real and significant question concerning the prohibition against double jeopardy under the federal and state constitutions. *See* U.S. Const. amend. V; Wis. Const. Art. I, § 8; Wis. Stat. § 809.62(1r)(a). Clearly, reinstating a count that was previously dismissed at the State's behest after jeopardy had attached is a serious challenge to this constitutional constraint on government power.

Second, this petition offers the Court an opportunity to develop, clarify, and harmonize the law for the reasons specified in § 809.62(1r)(c). If granted, the Court could resolve the unsettled question of how the State and circuit courts should approach guilty verdicts under more than one subpart of § 346.63(1)—a situation that frequently occurs, and is certain to recur, in courtrooms statewide. This is a question of law that would require the Court to develop a new doctrine and harmonize past case law on § 346.63(1).

STATEMENT OF THE CASE

In its 2021 Opinion, the Court of Appeals provided a detailed summary of the underlying facts. *See State v. McAdory*, 2021 WI App 89, ¶¶ 1, 3, 6-16, 400 Wis. 2d 215, 968 N.W.2d 770 (P-App 025, 027-033). Then, in its recent Opinion, the Court of Appeals provided a thorough description of the procedural posture of this case. *See State v. McAdory*, 2024 WI App 29, ¶¶ 2-4, 6-11, __ Wis. 2d __, __ N.W.2d __ (P-App 002-006). Because the Court of Appeals has done good work outlining the background of this case, this section will focus on more minor, yet still important, aspects that these Opinions overlooked.

A. Nature of the Case

Mr. McAdory was charged with and found guilty on counts one and two, both OWI-related offenses. Prior to sentencing, the Circuit Court dismissed count two at the State's request, instead convicting and sentencing Mr. McAdory on count one. He appealed. In a published opinion, the Court of Appeals reversed his conviction on count one and remanded for a new trial. Instead of holding one, the Circuit Court granted the State's motion to reopen the judgment of conviction, vacate the order dismissing count two, reinstate count two, and convict Mr. McAdory on the same. He moved for postconviction relief which was denied. He again appealed. The Court of Appeals affirmed in a now-published opinion.

B. Mr. McAdory's First Appeal, Oral Arguments, and the First Published Opinion

The Opinion below did not relate much about Mr. McAdory's first appeal. There are a few points worthy of mention.

On December 2, 2020, Mr. McAdory appealed from the judgment of conviction on count one, thus commencing Appeal No. 20-AP-2001. (R.191.) However, the State did not file a notice of cross appeal from which it could seek to vacate the order dismissing count two and modify the judgment of conviction to have Mr. McAdory convicted on count two.

In its response brief before the Court of Appeals, the State mentioned 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.)[2] However, it did not seek to have count two reinstated so that it could serve as an alternate basis on which to affirm the judgment of conviction. Nor did it, at the very least, mention that, if Mr. McAdory's appeal succeeded, it planned to request after remittitur that he be convicted on count two.

Importantly, on October 6, 2021, oral arguments were held before a panel of Court of Appeals judges from District IV. (R.270; P-App 088-133.)[3] A substantial portion of the arguments focused on count two's dismissal. In that regard, the panel discussed the following topics with counsel:

- 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;

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

[3] 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 described in Mr. McAdory's amended postconviction brief and, later, in his appellate briefs.

- 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 may have, therefore, forfeited its ability to even attempt to obtain relief from the order dismissing count two;
- 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 P-App 105-106, 108-109, 111-112.)

In its November 18, 2021 published Opinion, the Court of Appeals reversed the conviction and remanded for a new trial on count one. It concluded that, with respect to count one, "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." *McAdory*, 400 Wis. 2d 215, ¶ 2; (P-App 026-027). 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; (P-App 062).

Although the Opinion did not address the Circuit Court's post-remittitur authority or Mr. McAdory's privilege against double jeopardy, the Court of Appeals 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; (P-App 026).

C. The Circuit Court Decisions Versus the Court of Appeals' Opinion Below, on the Question of Legal Authority for the Circuit Court's Actions

The Opinion below did not focus on the Circuit Court's decisions in any meaningful way. This is likely because, although the Circuit Court and Court of Appeals arrived at the same conclusions, they did so for far different reasons.

The Circuit Court issued two decisions: one granting the State's motion to reinstate and convict Mr. McAdory on count two, (R.219 [P-App 063-066]), and the other denying Mr. McAdory's motion for postconviction relief, (R.279 [P-App 067-080]). It would be fair to say that the latter decision is a broader, more developed version of the former. Accordingly, this subsection will focus primarily on the Circuit Court's decision denying postconviction relief.

There, the Circuit Court, unlike the Court of Appeals, agreed with the observations of both Mr. McAdory and the State that no Wisconsin statute—from ch. 346 or elsewhere—gave it the post-remittitur authority to reinstate the previously-dismissed count two and convict Mr. McAdory on the same. (P-App 075; see also P-App 063-064.) And while the Circuit Court, the Court of Appeals, and the State all agreed that § 346.63(1)(c) did not *prohibit* the Circuit Court's actions, (P-App 073-075, COA Op. ¶¶ 18-21, pp. 9-11 [P-App 009-011], State's COA Resp. Br. at 14-16), the Court of Appeals went one step further than Mr. McAdory, the State, and the Circuit Court were willing to go, concluding that Wis. Stat. § 346.63(1)(c) clearly authorized the Circuit Court's actions and that it would be unreasonable to interpret the statute differently, (COA Op. ¶¶ 16-17, pp. 7-8 [P-App 007-008]).

The Circuit Court and the State asserted that circuit courts possess the inherent authority to reinstate previously-dismissed count following remittitur so long as they were not explicitly prohibited from doing so and so long as the defendant had no expectation of finality in the dismissal. (P-App 075-080, State's COA Resp. Br. at 11-13, R.216 at 2-4, R.203 at 2.) Both cited *Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000), for support. (P-App 076-077, R.216 at 3-4, R.203 at 2; see also P-App 064-065.) In *Rutledge*, the Seventh Circuit relied on 28 U.S.C. § 2255[4] to affirm a district court's order reinstating a previously-vacated, lesser-included conviction following the vacation of the greater-included conviction. (Id.)

The Circuit Court also raised the merger doctrine adopted by the Kansas state judiciary. (P-App 077-079.) According to its decision, "[t]he doctrine of merger allows that if a jury returns verdicts on multiplicitous charged counts, merger of those offenses should apply and the court should only enter a conviction for one verdict." (P-App 077.) The Circuit Court explained that, even though Wisconsin had not adopted the merger doctrine, its existing scheme is tantamount to merger. (P-App 078-079.) Ultimately, it reasoned that, not only does nothing in Wisconsin law "suggest a trial court is barred from reinstating a RCS verdict or conviction, where a jury returned a verdict of guilt on that count, but it was dismissed when the court entered judgment on an OWI verdict of guilt[,]" but cases like *Rutledge* "suggest that a court is permitted to reinstate a dismissed count or conviction under such circumstances." (P-App 079.)

[4] "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." (P-App 076-077 (citing 28 U.S.C. § 2255).)

The Court of Appeals refused to adopt a ruling that the Circuit Court's actions were authorized by its inherent powers. Instead, it "assume[d] without deciding that this inherent authority does not provide justification for the circuit court's actions here[,]" instead "conclud[ing] that the court properly applied pertinent statutes," including, most importantly, § 346.63(1)(c). (Op., ¶ 18 n.6, p. 9 [P-App 009].)

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE PROPER INTRETATION AND SCOPE OF WIS. STAT. § 346.63(1)(c) AND GUIDE LOWER COURTS ON WHAT TO DO WHEN GUILTY VERDICTS ARE RETURNED UNDER MULTIPLE SUBPARTS OF § 346.63(1).

The Court should grant this petition to resolve the unsettled question of how courts are to proceed when facing guilty verdicts on multiple § 346.63(1) counts. Mr. McAdory's position is that the Opinion below, now published, is deeply flawed. Wis. Stat. § 346.63(1)(c) doesn't say, and cannot be contorted to mean, that circuit courts can reinstate counts that they dismissed postverdict at the State's request. As explained in the third argument section below, such a dismissal is with prejudice as a matter of law, implicating the defendant's expectation of finality in the dismissal as well as his right against double jeopardy.

Wisconsin's comprehensive intoxicated driving law, Wis. Stat. § 346.63, provides for three OWI-related offenses:

> 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).

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.

(Emphasis added).

The Opinion below believed that this provision authorized the Circuit Court's actions. The Court should grant this petition to clarify that it does not. Not only does § 346.63(1)(c) not authorize what the Circuit Court did, but nothing does. But, as explained below, there is

a simple way to approach guilty verdicts under multiple subparts of § 346.63(1) without dismissing any counts. Regardless, the Court should grant this petition to give guidance to lower courts in a manner that does not disrupt settled law and muddy the waters of statutory construction.

A. The Court of Appeals' Interpretation of Wis. Stat. § 346.63(1)(c) Cannot be Reconciled with the Canons of Statutory Construction and Does Not, In Any Event, Support Its Ultimate Holding.

The Court of Appeals' solution to the problem of guilty verdicts on multiple § 346.63(1)(c) counts is both deficient and insufficient. It is deficient because it misapplies the rules of statutory construction and, effectively, rewrites § 346.63(1)(c). It is insufficient because, even if its interpretation was reasonable, it wouldn't authorize the Circuit Court to do what it did in this case.

"[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain," that "ordinarily stop[s] the inquiry." *State v. Kizer*, 2022 WI 58, ¶ 6, 403 Wis. 2d 142, 976 N.W.2d 356.

The relevant portion of § 346.63(1)(c)—"[i]f the person is found guilty of any combination of par. (a), (am), or (b) . . . , there shall be a single conviction"—certainly appears to have a singular meaning: Even if the defendant is found guilty under more than one of § 346.63(1)'s paragraphs, he or she is convicted but once.

Indeed, in the first *McAdory* opinion, the Court of Appeals made that point clear: "Under the statutory dual prosecution scheme, in this situation there can be only one conviction, not two." *McAdory*, 400 Wis. 2d 215, ¶ 1 (citing § 346.63(1)(c)) (P-App 025-026); *see also*

State v. Braunschweig, 2018 WI 113, ¶ 16, 384 Wis. 2d 742, 921 N.W.2d 199 ("Convictions of both [§ 346.63(1)(a) and (1)(b)] . . . count as only one conviction . . . ." (citing § 346.63(1)(c)); *State v. Bohacheff*, 114 Wis.2d 402, 413, 338 N.W.2d 466 (1983) (Interpreting § 346.63(1)(c), "it is evident that the legislature intended a prosecution . . . to terminate with one conviction for all purposes.").

Mr. McAdory, the State, and the Circuit Court all agreed on this interpretation, as well. (P-App 074, State's COA Resp. Br. at 14-16.) Indeed, the State may have put it best in its response brief:

> To be clear, nothing in the statutory text of Wis. Stat. § 346.63(1)(c) requires a circuit court to dismiss *any* charges after a jury finds a defendant guilty of multiple interrelated driving offenses; the statute merely provides that when "the person is found guilty of any combination of" those offenses "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." Wis. Stat. § 346.63(1)(c).

(State's COA Resp. Br. at 15-16.)

Yet, in the Opinion below, the Court of Appeals disagrees. It holds that not only is § 346.63(1)(c) susceptible to a *different* meaning—i.e., that "when there is more than one [§ 346.63(1)] guilty verdict, *only one can serve as the count for purposes of conviction and sentencing, and all other § 346.63(1) counts are to be dismissed*"—but it is reasonably susceptible to *no other* meaning. (Op. ¶¶ 16-17, pp. 7-8 (emphasis added) [P-App 007-008].)

According to the Opinion below, this interpretation of § 346.63(1)(c) is compelled by the directive in *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993), that "the defendant is to be sentenced on one of the charges, and the other

charge is to be dismissed." (Id.) However, we aren't told why this language supports, let alone compels, its interpretation.

To achieve this meaning, words must be *added* to § 346.63(1)(c). But "courts should not add words to a statute to give it a certain meaning." *Fond du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). Rather, they ought to "interpret the words the legislature actually enacted into law[,]" *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165, and "decline to read into the statute words the legislature did not see fit to write[,]" *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

Clearly, the Opinion's novel interpretation is devised to fill a void that the Legislature overlooked. While tempting, this, too, violates the rules of construction. *See Enbridge Energy v. Dane Cty.*, 2019 WI 78, ¶ 23, 387 Wis. 2d 687, 929 N.W.2d 572 ("A matter not covered [by a statute] is to be treated as not covered.").

Consequently, the canons of construction demonstrate that, absent legislative action, the Court of Appeals' interpretation of § 346.63(1)(c) is erroneous.

However, it should be noted that, even if the Opinion below was right—that "when there is more than one [§ 346.63(1)] guilty verdict, only one can serve as the count for purposes of conviction and sentencing, and all other § 346.63(1) counts are to be dismissed"—this still does not authorize the Circuit Court's actions. The Circuit Court reopened a judgment of conviction, reinstated a § 346.63(1) count that the Circuit Court had dismissed at the State's request postverdict, and convicted Mr. McAdory of the same. Even liberally construed, the Court of Appeals' interpretation of § 346.63(1)(c)

would not have authorized the broad range of power exercised by the Circuit Court.

The Court should grant review to correct this erroneous attempt at statutory interpretation and to directly address with the ultimate question: What should a court do when confronted by guilty verdicts on more than one § 346.63(1) count?

B. Instead of Dismissing the Other Counts with Prejudice, the State Could Simply Select the Count on Which the Court is to Proceed to Sentencing and Request that Proceedings on the Other Counts be Stayed.

A better solution is available. Instead of allowing the bad facts of this case create even worser law, the Court should issue simple instructions. If guilty verdicts on more than one § 346.63(1) count are returned, the State should designate the count on which it would like the circuit court to proceed to sentencing and request that proceedings on the remaining counts be stayed. Unless, in the exercise of discretion, the court has a substantial reason to deny the State's request, it should proceed accordingly.

Once the defendant's appeal terminates, the case will be remitted back to the circuit court to effectuate the mandate of the higher courts, whether that is to dismiss the remaining counts, entertain a potential motion to lift the stay, or undertake some other action. The Court should review this case and hold that this approach best resolves the problem at hand.

II. THE COURT SHOULD GRANT REVIEW TO ADDRESS THE CONSEQUENCES OF THE CIRCUIT COURT'S POST-JEOPARDY ORDER GRANTING THE STATE'S MOTION TO DISMISS IN RELATION TO THE DEFENDANT'S INTEREST IN THE FINALITY OF JUDGMENTS AND PROTECTION AGAINST DOUBLE JEOPARDY.

The extraordinary posture of this case is troubling, in part, because Mr. McAdory did not foresee any of it. Once count two was dismissed, the defense had every reason to believe that it was dismissed for good. The Court should grant this petition to explain when, and to what extent, defendants have an interest in the finality of judgments. Specifically, it should clarify that, when a court orders the dismissal of a count upon the State's motion and after jeopardy has attached, the defendant's expectation of finality precludes any attempt to revive it.

A. Mr. McAdory Reasonably Expected Finality in the Order Dismissing Count Two and Was, In Any Event, Protected Against the Reinstatement of Count Dismissed With Prejudice and Against the Risk of Double Jeopardy.

In the lower courts, the State was quick to accuse Mr. McAdory of "feigning" surprise.[5] Likewise, the Circuit Court rejected his claim to an expectation of finality because

> [t]he jury also convicted McAdory of [count two]. The State's case was put to the test. The issue was tried. . . . [I]t cannot be said that McAdory is prejudiced in any way by reinstatement of the RCS conviction. He had a trial. The jury

[5] Given that, in the words of the Court of Appeals' first Opinion, "the issues we address in [the first 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[,]" the irony of this accusation is not lost on Mr. McAdory.

> considered the evidence on the RCS charge and found him guilty.

(P-App 065-066.)

Mr. McAdory disagrees. To undersigned counsel's knowledge, Mr. McAdory is the only person in 175 years of Wisconsin case law to be convicted on a criminal count that had been dismissed post-verdict at the State's request. While it is true that Mr. McAdory was found guilty on count two, thereby elevating the State's interest in securing a conviction, once the State moved to have count two dismissed, its interest in securing a conviction gave way to Mr. McAdory's interest in the finality of judgments.

But more importantly, neither the State nor the Circuit Court quite grasped the concept of the finality interest. It isn't—as the State seems to suggest—concerned with the sincerity of one's belief in finality, whatever that might be taken to mean. Nor does it somehow disappear just because, in one court's view, the defendant received a fair trial. Indeed, as this Court once declared: "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." *State v. Henley*, 2010 WI 97, ¶ 75, 328 Wis. 2d 544, 787 N.W.2d 350.

The defendant's interest in the finality of judgment is not just some vague notion. It is a source of legal protections. However, no single principle, rule, or doctrine protects a defendant's interest in the finality of judgments *in toto*. Rather, they are an amalgam of various safeguards, two of which Mr. McAdory raised in the courts below: "with prejudice" dismissals, (Def.'s Opening Br. at 44-47), and the

double jeopardy clause, (id. at 40-44). These are explored in the subsection that follows.

B. Because Count Two Was Dismissed at the State's Request and After Jeopardy Had Attached, It Was Dismissed with Prejudice and As Required by the Protections Against Double Jeopardy.

By the time the Circuit Court granted the State's postverdict motion to dismiss count two, jeopardy had attached and a determination of the merits had been made. Count two's dismissal was, in other words, with prejudice, and Mr. McAdory was protected from again being placed into jeopardy on that count.

The Court of Appeals disagreed. It could do so because, while countless cases suggest the above conclusion, there is no case directly on point—thus allowing the Opinion below to deny the fire amidst the billows of smoke.

The Court should grant this petition to clarify under what circumstances a dismissal order is with prejudice and whose reinstatement is prohibited. 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).

The case law has examined dismissing counts with prejudice and the double jeopardy problems inherent in reinstating them. As it relates to dismissing criminal counts, a circuit court has the authority to overrule the State's decision to seek the dismissal of a count if it's

in the public interest. *State v. Kenyon*, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978). However, a circuit court does not have the power to order a count dismissed with prejudice prior to the attachment of jeopardy. *State v. Braunsdorf*, 98 Wis. 2d 569, 574, 297 N.W.2d 808 (1980). Only the State can do that. *Id.* at 586 ("[W]e 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.").

These concepts were further developed in *State v. Comstock*, 168 Wis. 2d 915, 949, 45 N.W.2d 354. *Comstock* was meaningful in two regards. First, this Court held that, because jeopardy attaches upon the acceptance of a guilty plea, the double jeopardy clause barred the circuit court from later setting aside those guilty pleas. *Id.* at 937-47. For the same reason, the Court also concluded that, because the State agreed to dismiss certain felony counts in exchange for the defendant's promise to plead guilty to misdemeanor counts, the Circuit Court correctly issued an "order dismissing with prejudice felony counts[.]" *Id.*

In other words, because the felony counts were dismissed after jeopardy attached, they were properly dismissed with prejudice.

Second, *Comstock* also stands for the rule that, because the felony counts were dismissed with prejudice, the State cannot have them reinstated. *Id.* at 948-53. The Court "conclude[d] that allowing the state to reinstate the two felony charges dismissed with prejudice in this case would amount to allowing the state to make repeated attempts to convict an individual for the same offense." *Id.* at 950. It reasoned that, "[w]hen the [plea hearing] ended, the defendant had every reason to believe that pursuant to the plea agreement the four

felony charges were terminated and that his convictions of the misdemeanors were final." Consequently, it further

> conclude[d] that **the state cites no case supporting its position that the two felony charges dismissed with prejudice under the circumstances of this case may be reinstated. In this case, fundamental fairness -- whether derived from the double jeopardy or due process clause -- prohibits the prosecutor from reprosecuting the dismissed counts** (counts 3 and 4 of the original information).

Id. at 951 (emphasis added).

Finally, another case along these same lines is *State v. Miller*, 2004 WI App 117, 274 Wis. 2d 471, 683 N.W.2d 485. 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 of Appeals analyzed the doctrine of claim preclusion, or res judicata. *Id.* ¶¶ 24-29. 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." *Id.* ¶ 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.

Together, these cases emphasize the interplay among the attachment of jeopardy, the demarcation between dismissals without and with prejudice, and the double jeopardy clause. The State here 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. Having count two reinstated after that point was, constitutionally speaking, out of the question. The Court should grant review to uphold these principles of law.

III. THE COURT SHOULD GRANT REVIEW TO EXPLAIN THAT, IF THE DEFENDANT'S SUCCESS ON APPEAL WOULD HAVE CAUSED THE STATE TO NEED RELIEF FROM A JUDGMENT OR ORDER, THEN IT WAS REQUIRED TO CROSS-APPEAL OR AT LEAST BRIEF THE ISSUE WITHIN THE DEFENDANT'S APPEAL.

The Court should also grant this petition to clarify the role that cross appeals play in appellate procedure. When Mr. McAdory filed

his December 2, 2020 notice of appeal, (R.191), thereby commencing his first appeal, the State was on notice that he was trying to overturn the October 25, 2019 judgment of conviction, (R.148 [P-App 084-087]). At that point, if the State wished to preserve its ability to request a modification to the judgment of conviction and the vacation of the order dismissing count two, such that Mr. McAdory could be 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 post-remittitur.

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. Rule 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).

"A cross-appeal is necessary . . . when the respondent seeks a modification of the order from which an appeal is taken." *State v. Pico*, 2018 WI 66, ¶ 48 n.14, 382 Wis. 2d 273, 914 N.W.2d 95; *see also* Rule 809.10(2)(b) Judicial Council Note, 1978 ("The respondent who desires to challenge a judgment or order must file a notice of cross-appeal."). By Rule 809.10(2)(b)'s own terms, the same is true of modifications sought to other orders entered within the same case including, presumably, vacations thereof.

Thus, any modification that the State wished to have made to the judgment of conviction or order dismissing count two—both of which it would later seek after remittitur—could only be achieved by filing a notice of cross-appeal. However, the State failed to file one within the 30-day period following Mr. McAdory's filing of the notice of appeal (or, indeed, at any time thereafter).

The case law has endorsed this procedure, including in a case involving Wis. Stat. § 346.63(1). *See Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993). 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.*

The Court of Appeals 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 of Appeals 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 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. Rule 809.10(2)(b).

At the very least, the State should have argued in its briefing in Mr. McAdory's first appeal that the Court of Appeals 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 this 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.

The Court should grant this petition to clarify that, because the State failed to pursue a cross-appeal or at least raise the issue in its briefing in the first appeal, the State was barred from obtaining such relief post-remittitur. It could not circumvent the effect of Wis. Stat. Rule 809.10(2)(b) by simply asking the Circuit Court to modify the judgment of conviction and vacate the dismissal order instead. By that point, the Circuit Court lacked the authority to grant the State its desired remedy.

CONCLUSION

For the foregoing reasons, Mr. McAdory respectfully requests that the Court grant this petition.

Dated this 3rd day of June, 2024.

SIMERSON LAW LLC
Attorney for Defendant-Appellant-Petitioner

Simerson Law LLC
2544 N. 84th St.
Wauwatosa, WI 53226
Tel. (414) 220-0003
bsimerson@simersonlaw.com

Electronically signed by Brent A. Simerson
Brent A. Simerson
State Bar No. 1079280

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

I hereby certify that this petition for review meets the form and length requirements of Wis. Stat. Rules 809.19(8)(b), (bm), and (c), and 809.62(4), 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 petition for review is **7,619 words**.

Dated this 3rd day of June, 2024.

SIMERSON LAW LLC
Attorney for Defendant-Appellant-Petitioner

Simerson Law LLC
2544 N. 84th St.
Wauwatosa, WI 53226
Tel. (414) 220-0003
bsimerson@simersonlaw.com

Electronically signed by Brent A. Simerson
Brent A. Simerson
State Bar No. 1079280

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

I hereby certify that separately filed with this petition for review is an appendix that complies with Wis. Stat. Rules 809.19(2)(a) and 809.62(2)(f) and (4), and that contains:

(1) A table of contents;

(2) The decision and opinion of the court of appeals;

(3) 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;

(4) Any other portions of the record necessary for an understanding of the petition; and

(5) A copy of any unpublished opinion cited under Rule 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of June, 2024.

SIMERSON LAW LLC
Attorney for Defendant-Appellant-Petitioner

Simerson Law LLC
2544 N. 84th St.
Wauwatosa, WI 53226
Tel. (414) 220-0003
bsimerson@simersonlaw.com

Electronically signed by Brent A. Simerson
Brent A. Simerson
State Bar No. 1079280