STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District IV, Affirming a Judgment of Conviction and Order of the Circuit Court Denying the Defendant's Motion for Postconviction Relief, Entered in Rock County Circuit Court, the Honorable Karl R. Hanson, Presiding

---

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

OLIVIA G. GARMAN
Assistant State Public Defender
State Bar No. 1105954

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
garmano@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

INTRODUCTION

Wisconsin impaired driving law allows the State to simultaneously prosecute an individual under three different theories of liability for the same conduct. That law, however, also provides that there may only be one conviction for the conduct.

Mr. McAdory was charged with two offenses under Wisconsin impaired driving law. He proceeded to trial and the jury returned guilty verdicts for both impaired driving offenses. Pursuant to the single-conviction provision of Wis. Stat. § 346.63(1)(c), the circuit court, on the State's motion, dismissed the restricted controlled substances offense (RCS) and entered a judgment of conviction on the operating while intoxicated offense (OWI).

Mr. McAdory appealed his operating while intoxicated conviction and the court of appeals remanded the matter for a new trial on that offense.

Upon remittitur, rather than retry Mr. McAdory on the OWI offense, the State moved the circuit court to reopen the judgment dismissing the RCS offense, reinstate that offense, and enter a judgment of conviction against Mr. McAdory for that offense. The circuit court granted the motion based on its belief that, despite the court of appeals' order for a new trial, it had the "inherent authority" to reinstate the previously-dismissed offense.

ISSUES PRESENTED

1. After an appeal has been taken and a conviction on one basis of impaired driving liability reversed and a new trial ordered for that offense, does the circuit court have authority to instead simply vacate its prior order dismissing the second basis of liability, reinstate that charge, and enter a conviction on that alternate basis of liability?

The circuit court held that, although it did not have statutory authority to do so, it had "inherent authority" to reinstate a previously-dismissed count and enter a conviction on that count, rather than conduct a new trial.

The court of appeals affirmed, holding that the circuit court was "implicitly authorized" to reinstate the previously-dismissed count and enter a judgment of conviction on that count.

2. Does the State's failure to cross-appeal or otherwise raise on appeal alternative grounds on which the appellate court could sustain the conviction result in forfeiture of that alternate argument?

The circuit court did not address this issue.

The court of appeals held that the State was not required to raise alternative grounds to support the conviction either through a cross-appeal or by raising the matter in its briefing.

3. Does the Double Jeopardy Clause and its attendant expectation of finality prohibit the circuit court from reinstating an offense on which the jury returned a verdict of guilty, but which the State voluntarily dismissed after jeopardy attached?

The circuit court held that the Double Jeopardy Clause did not bar reinstatement of the previously-dismissed count.

The court of appeals affirmed, holding that there was no double jeopardy violation because there was no risk of a second trial when the circuit court reinstated a previously-dismissed count on which the jury had returned a guilty verdict.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

In its published 2021 decision, the court of appeals provided a detailed summary of the underlying facts. *See State v. McAdory* (*McAdory I*), 2021 WI App 89, ¶¶ 1, 3, 6-16, 400 Wis. 2d 215, 968 N.W.2d 770 (App. 3, 5, 7-9). The court of appeals, again, provided a thorough summary of the procedural history of the case in its second published decision arising from this matter. *See State v. McAdory*

(*McAdory II*), 2024 WI App 29, ¶¶ 2-4, 6-11, 412 Wis. 2d 29, 8 N.W.3d 101. As such, this section will focus primarily on the arguments put forth in the courts below and the reasoning those courts used in deciding the matter.

McAdory I

Carl McAdory was found guilty after a jury trial of three charged offenses: (1) operating while intoxicated (OWI), (2) operating with a restricted controlled substance in blood (RCS), and (3) obstructing an officer. (126:1-3). Mr. McAdory additionally pleaded guilty to one count of operating after revocation. (182:223). At the sentencing hearing, the State moved to dismiss the RCS charge as "duplicative" of the OWI charge. (152:4). The court dismissed the RCS offense. (152:5). The circuit court, the Honorable John M. Wood presiding, sentenced Mr. McAdory to four years initial confinement and five years extended supervision on the OWI count and withheld sentence on the obstructing an officer and operating after revocation charges, placing Mr. McAdory on probation for two years, consecutive to the prison sentence. (152:35). Mr. McAdory appealed. (151:1; 191:1).

On appeal, Mr. McAdory argued that the evidence was insufficient to convict him of the OWI offense, and that statements made by the prosecution combined with the modified pattern jury instruction violated his due process rights. *McAdory I*, 400 Wis. 2d 215, ¶ 2 (App. 4-5). Mr. McAdory challenged only his

conviction for the OWI offense. Mr. McAdory did not challenge a conviction for the RCS offense because no judgment of conviction was entered for that offense. (*See* 148). The State did not file a cross-appeal or otherwise raise alternative grounds on which the judgment of conviction could be affirmed.

While the court of appeals noted that it "was a close case," it ultimately held that the State presented sufficient evidence to the jury that, if believed, could result in a finding of guilt on the OWI offense. *Id.* at ¶¶ 26, 29 (App. 16-17). As to the jury instruction, the court of appeals held that it unconstitutionally misled the jury "about the State's burden to prove that he was under the influence of controlled substances, given the multiple, significant, uncorrected missteps." *Id.* at ¶ 38 (App. 21). The court of appeals also noted that "[t]he prosecution's opening statement . . . misled the jury," *id.* at ¶ 58 (App. 34-35), and that "the prosecutor repeated the same misstatements of law from the opening statement in both the initial closing and the rebuttal closing," *id.* at ¶ 61 (App. 35-36). "Putting together the ambiguous aspects of the instruction with the deeply problematic trial events, [the court of appeals] concluded that this created a reasonable likelihood that the jury did not understand the burden that the State had in proving" the operating while intoxicated offense. *Id.* at ¶ 64 (App. 37).

The court of appeals thus reversed and "remand[ed] for a new trial on the § 346.63(1)(a) charge." *Id.* at ¶ 71 (App. 40). The mandate line of the

decision read: "*By the Court.*—Judgment reversed and cause remanded." *Id.*

On Remand

The court of appeals released its decision in *McAdory I* on November 18, 2021. *See generally id.* Pursuant to Wis. Stat. § (Rule) 809.26(1), the record was remitted to the circuit court on December 23, 2021. (204:1). The State did not file a motion for reconsideration in the court of appeals, or a petition for review with this Court. *See* Wis. Stat. § (Rule) 809.24; Wis. Stat. § (Rule) 809.62.

Rather, the State filed a motion in the circuit court asking the court to "reinstat[e] the conviction of Operating With Restricted Controlled Substances in Blood – 8th Offense." (203:1). In its motion, the State cited no Wisconsin authority that purported to give the circuit court the authority to "reinstate" the previously-dismissed offense. In its reply to Mr. McAdory's opposition to the reinstatement motion, the State argued that reinstating the previously-dismissed offense "was within [the circuit court's] purview." (216:3). Additionally, "[t]he State recognize[d] that there appears to be no Wisconsin law that directly accounts for the specific remedy that the State . . . request[ed] in this case." (216:3).

The circuit court, the Honorable Karl R. Hanson presiding, issued its written decision on February 8, 2022. (219). It held that Mr. McAdory did not have an expectation of finality in his judgment of conviction and sentence when he took his appeal. (219:4). "While

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." (219:4). Although the court recognized 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," (219:2), it held that it could do so "because no mechanism of law foreclosed it," (219:4).

At the next hearing, the circuit court sentenced Mr. McAdory for the RCS offense. (239:9). After Mr. McAdory was sentenced for the RCS offense, the State moved to dismiss the OWI offense. (239:10). Mr. McAdory's trial counsel timely filed a notice of intent to seek postconviction relief. (234).

On November 4, 2022, Mr. McAdory filed a Wis. Stat. § (Rule) 809.30 motion for postconviction relief. (260). Mr. McAdory applied for and was granted leave by the circuit court to file an amended/supplemental motion for postconviction relief after he received a transcript of the oral argument held in *McAdory I*. (*See* 264). Mr. McAdory filed an amended motion for postconviction relief on December 1, 2022. (267). Mr. McAdory argued that the text of Wis. Stat. § 346.63(1)(c) prohibited the circuit court from convicting Mr. McAdory for a second time of a § 346.63(1) offense, (267:10); that no Wisconsin law provided the circuit court with the authority to reopen a judgment of conviction after appeal, reinstate a

previously-dismissed count, and convict Mr. McAdory of the same, (267:11-14); and that the resurrection of the previously-dismissed count violated double jeopardy principles, (267:14-20).

After briefing from both sides, the circuit court denied Mr. McAdory's motion for postconviction relief. (279; App. 42-55). The court held that double jeopardy principles were not offended by reinstating a previously-dismissed count in order to convict Mr. McAdory of that count. (279:7; App. 48). The court further held that, although the text of § 346.63(1)(c) does not grant it the explicit authority to reinstate a previously-dismissed count, "[t]here is no language in ch.346, Stat. prohibiting reinstatement of a dismissed or vacated conviction." (279:8; App. 49). Finally, the circuit court held that although "[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," it had the inherent authority to do so. (279:9-11; App. 50-52).

Mr. McAdory appealed. (280).

McAdory II

In his second appeal, Mr. McAdory argued that the circuit court did not have the post-remittitur authority to reopen the previously-dismissed offense. *McAdory II*, 412 Wis. 2d 29, ¶ 13 (App. 61). The court of appeals held that, although "[t]he somewhat sparse language of the single-conviction provision does not explicitly" provide the circuit court with the authority to resurrect a previously-dismissed count, §

346.63(1)(c) "implicitly authorizes" a circuit court to reopen a previously-dismissed count and convict the defendant of the same after appeal and remittitur. *Id.* at ¶¶ 15, 18 (App. 62, 64). The court of appeals also held that although it reversed the OWI conviction and remanded for a new trial in *McAdory I*, a new trial was not required by the court of appeals' decision or by Wis. Stat. § 808.08. *Id.* at ¶¶24-25 (App. 67-68); *but see McAdory I*, 400 Wis. 2d 215, ¶ 71 ("Accordingly, we remand for a *new trial* on the § 346.63(1)(a) charge.") (emphasis added) (App. 40).

Mr. McAdory additionally argued that the State forfeited its ability to raise the previously-dismissed offense as an alternative basis on which to sustain the judgment of conviction by failing to take a protective appeal or by raising it in briefing in *McAdory I*. *McAdory II*, 412 Wis. 2d 29, ¶ 32 (App. 71). The court of appeals held that it would be nonsensical to require the State to take a protective appeal on the dismissed count because "the State had no interest in modification of any judgment or order." *Id.* at ¶ 36 (App. 73).

Finally, Mr. McAdory argued that the circuit court's swapping of offenses violated his constitutional protection against double jeopardy. *Id.* at ¶ 38 (App. 74). In holding that the circuit court's actions did not violate double jeopardy protections, the court of appeals reasoned that "McAdory essentially seeks to benefit from the due process violation on the OWI count at his trial by arguing that the single conviction must remain the OWI count even though the

reinstatement of the RCS count does not subject him to a new trial." *Id.* at ¶ 42 (App. 75). The court of appeals also attempted to distinguish between "reinstating" a dismissed-with-prejudice charge and refiling a charge. *Id.* at ¶ 45 (App. 76-77). The court of appeals appeared to suggest that the State attempting to initiate a new criminal case based solely on the previously-dismissed charge would violate double jeopardy, while simply "reinstating" the previously-dismissed charge would not. *See id.* The court of appeals affirmed the circuit court. *Id.* at ¶ 47 (App. 77).

Mr. McAdory filed his petition for review with this Court on June 3, 2024, raising three issues: (1) whether the circuit court had the authority to reinstate a previously-dismissed offense and convict the defendant thereof; (2) whether the State forfeited the argument of the alternative basis on which to sustain the judgment of conviction when it failed to raise the matter in *McAdory I*; and (3) whether reinstating an offense that had been dismissed after the attachment of jeopardy is consistent with double jeopardy principles. This Court granted review.

ARGUMENT

I. Neither Wis. Stat. § 346.63(1)(c) nor any other source provide the circuit court with authority to reinstate a previously-dismissed count and enter a judgment of conviction.

Wisconsin courts derive their power from three sources: (1) the Wisconsin constitution, (2) the statutes passed by the legislature, and (3) the courts' inherent powers. *See Eberhardy v. Circuit Court for Wood Cty*, 102 Wis. 2d 539, 549-50, 307 N.W.2d 881 (1981); *Breier v. E.C.*, 130 Wis. 2d 376, 381, 387 N.W.2d 72 (1986). The Wisconsin constitution provides that "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may prescribe by law. The circuit court may issue all writs necessary in aid of its jurisdiction." Wis. Const. Art. VII, § 8.

The circuit courts source their power from the statutes, generally, in two places: Chapter 753 and Chapter 757. Chapter 753 specifically regulates the circuit courts. *See generally* Wis. Stat. Ch. 753. It provides to circuit courts "all the powers, according to the usages of the courts of law and equity necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations, subject to review by the court of appeals or the supreme court as provided by

law." Wis. Stat. § 753.03. As relevant, Chapter 757 provides that the courts of Wisconsin have the power to (1) issue subpoenas, (2) administer oaths to witnesses, (3) "devise and make such writs and proceedings as may be necessary to carry into effect the powers and jurisdiction" of the court, and (4) exercise the powers of a court commissioner. Wis. Stat. §§ 757.01(1)-(4).

Finally, courts retain "inherent authority." *State v. Schwind*, 2019 WI 48, ¶¶ 12-13, 386 Wis. 2d 526, 926 N.W.2d 742. Inherent authority, however, only extends to those actions necessary for the court to function as a court. *Id.* at ¶ 15.

A. Standard of review.

The interpretation and application of a statute is a question of law that this Court reviews de novo. *State v. Ziegler*, 2012 WI 73, ¶ 37, 342 Wis. 2d 256, 816 N.W.2d 238; *State v. Henley*, 2010 WI 97, ¶ 29, 328 Wis. 2d 544, 787 N.W.2d 350.

Similarly, "[t]he issue of judicial authority is a question of law that this [C]ourt reviews de novo." *Henley*, 328 Wis. 2d 544, ¶ 29.

B. The plain text of § 346.63(1)(c) does not provide the circuit court with the authority to reopen and reinstate a previously-dismissed count and enter a judgment of conviction.

1. Wisconsin impaired driving law generally.

Wisconsin impaired driving law criminalizes a "single evil,"—the conduct of operating a motor vehicle while impaired by alcohol or a controlled substance—but grants prosecutors multiple theories of liability to prove the "evil." *See State v. Bohacheff*, 114 Wis. 2d 402, 414-16, 338 N.W.2d 466 (1983); Assembl. 66, 1981 Leg. § 2051(13) (Wis. 1981). There are three theories of liability under which the State may proceed against a driver alleged to be impaired. *See* Wis. Stat. § 346.63(1) (a)-(b).

The first theory of liability is operating a motor vehicle while "[u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance, or a controlled substance analog. . .." Wis. Stat. § 346.63(1)(a). For ease of reading, this theory of liability will be referred to as Operating While Intoxicated or OWI. The second theory of liability of impaired driving is driving while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." Wis. Stat. § 346.63(1)(am). This category of liability will be referred to as Restricted Controlled Substance or RCS. The third theory of

liability is operating a motor vehicle while "[t]he person has a prohibited alcohol concentration." Wis. Stat. § 346.63(1)(b). This theory of liability will be referred to as Prohibited Alcohol Concentration or PAC.

The impaired driving law allows the prosecution to charge any combination of OWI, RCS, or PAC as may be applicable for a single incident. Wis. Stat. § 346.63(1)(c). The law also provides that "[i]f a person is found guilty of any combination of [the OWI, RCS, or PAC charges] 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. . .." *Id.*

This dual-prosecution/single-conviction scheme was adopted in 1981. Assembl. 66, § 1598t, 1981 Leg. (Wis. 1981). At that time, Wisconsin criminalized driving while "[u]nder the influence of an intoxicant or controlled substance or a combination" and while "[t]he person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood. . .." *Id.*; Wis. Stat. § 346.63(1) (1981-82). Additionally, the statutes only recognized OWI and PAC theories of liability. *See id.* The legislature allowed "a prosecutor [to] proceed upon a complaint based upon a violation of [the OWI or PAC sections] or both for acts arising out of the same incident or occurrence," but allowed only "a single conviction. . .." Wis. Stat. § 346.63(1)(c) (1981-82).

The dual-prosecution/single-conviction scheme appears throughout the impaired driving statutes. Similar provisions exist for impaired driving causing injury to another, Wis. Stat. § 346.63(2)(am); impaired operation of a commercial motor vehicle, Wis. Stat. § 346.63(5)(b); impaired driving causing injury to another while operating a commercial motor vehicle, Wis. Stat. § 346.63(6)(b); possessing or consuming an intoxicating beverage while on duty with respect to a commercial motor vehicle, Wis. Stat. § 346.63(7)(b); and impaired driving causing death, Wis. Stat. § 940.09(1m).

This Court had occasion to review an identical dual-prosecution/single-conviction provision in the context of impaired driving causing injury shortly after the legislature adopted the dual-prosecution/single-conviction scheme for all impaired driving offenses that persists today.[1] *State v.*

[1] The statute at issue in *Bohacheff* was Wis. Stat. § 940.25(1)(c) (1981-82). *Bohacheff*, 114 Wis. 2d 402, 408. The text of that statute read:

> A person may be charged with and a prosecution may proceed upon an information based upon a violation of par. (a) [OWI causing great bodily harm] or (b) [PAC causing great bodily harm] or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b) in the information, the crimes shall be joined under s. 971.12. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for

Bohacheff, 114 Wis. 2d 402, 338 N.W.2d 466 (1983). In *Bohacheff*, the defendant was dually charged with OWI causing great bodily harm and PAC causing great bodily harm. *Id.* at 405. The circuit court dismissed the complaint pre-trial after the defendant complained that it violated his right to be free from multiple punishment for the same offense. *Id.* at 404-05. The State argued that the single conviction provision allowed the court to enter a judgment of conviction on only one of the impaired driving offenses. *Id.* at 408. The defendant, however, argued that the single conviction provision only required one conviction for sentencing and counting prior offenses for penalty enhancement, but not for other purposes, namely the opprobrium that accompanies each offense on which a judgment of conviction is entered. *Id*. This Court reversed, however, holding that because "the legislature mandated only one conviction *for all purposes* and therefore one punishment," the dual-prosecution/single-conviction scheme did not violate

---

> purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction that the other does not require.

Wis. Stat. § 940.25(1)(c) (1981-82).

At that time, the legislature had not yet codified a separate offense for RCS. *See* Wis. Stat. § 346.63(1)(a)-(b) (1981-82). A separate offense for RCS was codified in 2003. 2003 WI Act 97, § 47; Wis. Stat. § 346.63(1)(am) (2003-04).

the constitutional guarantee against double jeopardy. *Id.* at 418.

2. Section 346.63(1)(c) does not provide the circuit court with the authority to "swap" charges after conviction and appeal.

Although it has undergone some changes, Wis. Stat. § 346.63(1)(c) remains largely identical as it did when first enacted in 1981. *Compare* Wis. Stat. § 346.63(1)(c) (1981-82) *with* Wis. Stat. § 346.63(1)(c) (2021-22). It provides:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a) [OWI], (am) [RCS], or (b) [PAC] 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.

Wis. Stat. § 346.63(1)(c) (emphasis added).

"[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cty*, 2004 WI 58, ¶ 45,

271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is given its ordinary meaning, except for words that are technically or specially defined, which receive their technical or special meaning. *Id.* Context is also important to divining statutory meaning. *Id.* at ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* Where the statute is unambiguous, resort to extrinsic sources is unnecessary. *Id.*

"Under the omitted-case canon of statutory interpretation, '[n]othing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est).[2] That is, a matter not covered is to be treated as not covered." *State ex rel. Lopez-Quintero v. Dittman*, 2019 WI 58, ¶ 18, 387 Wis. 2d 50, 928 N.W.2d 480 (alteration in original, footnote added). A bedrock "principle of statutory construction is that courts should not add words to a statute to give it a certain meaning." *Id.* (quoting *Fond du Lac Cty v. Town of Rosendal*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989)). This Court does "not read words into a statute regardless of how persuasive the source

[2] *Casus omissus pro omisso habendus est* is a statutory canon of interpretation that a matter not covered by a statute should be treated as intentionally omitted. Statutory Interpretation: Theories, tools, and trends, Congressional Research Service, R45153, 54 (updated Apr. 5, 2018) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 93 (2012)).

may be; rather [it] interpret[s] the words the legislature actually enacted into law." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165.

"[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Kalal*, 271 Wis. 2d 633, ¶ 47. The test is not whether there is a disagreement about statutory meaning, but whether the statute reasonably gives rise to different meanings. *Id.* "Where there is a doubt as to the statutory scheme, penal statutes should be strictly construed in favor of the accused." *State v. Wilson*, 77 Wis. 2d 15, 28, 252 N.W.2d 64 (1977). The rule of lenity, however, is only invoked when there is a "grievous ambiguity" remaining after the court has considered "statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 867 N.W.2d 400.

Section 346.63(1)(c) and its analogs in other impaired driving statutory provisions address what occurs after a finding of guilt on more than one impaired driving offense for the same conduct. The statute provides that "there shall be a single conviction" if an individual is found guilty on more than one impaired driving offense. Wis. Stat. § 346.63(1)(c). When interpreting the same language in the context of impaired driving causing great bodily harm, this Court found that when the statute "is read with an understanding of the nature of the proscribed

conduct, it is evident that the legislature intended a prosecution [for impaired driving] to terminate with one conviction for all purposes." *Bohacheff*, 114 Wis. 2d 402, 413; *see also State v. Theriault*, 187 Wis. 2d 125, 134, 522 N.W.2d 254 (1994) ("[I]t is elementary that each case must have documentation addressing the disposition of every charge pending against the defendant in that case. It must be apparent from the record that all counts are resolved in some fashion—whether by conviction, acquittal, or dismissal.").

The statute does not, however, address what occurs if the conviction for an impaired driving offense is overturned and a new trial is ordered on appeal. *See McAdory II*, 412 Wis. 2d 29, ¶ 15 (noting that "[t]he somewhat sparse language of the single-conviction provision does not expressly address the procedures to be used to accomplish the result of a single conviction, either generally or in the specific circumstances here.") (App. 62). The statute certainly does not provide for "resurrection" of a dismissed charge in order to swap that offense in for an offense on which the court of appeals ordered a new trial. This Court should reject any invitation to read additional language into the statute that does not exist.

If, however, this Court concludes that § 346.63(1)(c) is not entirely silent regarding what is to occur after an impaired driving conviction has been reversed on appeal, it should hold that the statute is ambiguous. Additionally, because the statute is bereft of any mention of what is to occur after reversal and remand, this Court should hold that the statute is

grievously ambiguous such that the Court would simply have to guess at its meaning and resolve the ambiguity in Mr. McAdory's favor.

When a statute is ambiguous, courts turn to the legislative history to determine the statutory meaning. Relating to operating while impaired offenses, the legislature made four findings consistent with its adoption of the dual-prosecution/single-conviction scheme. Assembl. 66, 1981 Leg. § 2051(13) (Wis. 1981). The findings of the legislature dealt with the general dangerousness of impaired driving and noted that penalties are an important deterrent for impaired driving. *Id.*

Similarly, the legislature provided its explicit intention in adopting the dual-prosecution/single-conviction scheme. *Id.* As relevant, the legislature intended "[t]o encourage the vigorous prosecution of persons who operate motor vehicles while intoxicated." *Id.* This Court previously found that the legislature "apparently intended to make it easier for the state to convict a defendant for drinking and driving by broadening the bases for liability." *Bohacheff*, 114 Wis. 2d 402, 414. "[T]he legislature intended not to authorize two convictions but to ensure that the prosecutor would not be forced to elect the charge or mode of proof *before* trial and risk a variance between the evidence and the charge." *Id.* at 416 (emphasis added).

It is clear then, from the explicit legislative intent and this Court's previous findings on legislative

intent, that the legislature intended to make *trying* impaired driving offenses easier by allowing the State to put forth several different theories of liability for the same course of conduct rather than selecting one before trial. The dual-prosecution/single-conviction scheme makes it easier for the prosecutor to secure a conviction by not requiring the prosecutor to choose *one* theory of liability on which to proceed *before the trial begins*. However, once the trial has concluded and verdicts are returned, the dual-prosecution/single-conviction scheme requires the State to elect a theory of liability to proceed on "for all purposes." *See Bohacheff*, 114 Wis. 2d 402, 418.

C. Circuit courts do not have the inherent authority to reopen and reinstate a previously-dismissed count, and convict the defendant of that count.

Just as § 346.63(1)(c) does not allow the court to "swap" offenses, the circuit court does not have the inherent authority to do so. Circuit courts have those "inherent, implied, and incidental powers" that "are necessary to enable [them] to accomplish their constitutionally and legislatively mandated functions." *Henley*, 328 Wis. 2d 544, ¶ 73. The inherent authority of circuit courts has generally been recognized in three areas: "(1) to guard against actions that would impair the powers or efficacy of the courts or the judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice." *Schwind*, 386 Wis. 2d 526, ¶ 16 (quoting

Henley, 328 Wis. 2d 544, ¶ 73). Because inherent powers are powers that courts were understood to possess at common law, courts "generally consider historical practices when determining whether a certain power is inherent in the judiciary." *Id.* at ¶ 13.

The first area of inherent power is generally considered to involve the "internal operations of a court." *Id.* at ¶ 17. As the circuit court's actions in this case do not involve the internal operations of the court, this could not have been the source of the circuit court's power.

"The second area, regulating the bench and bar, includes the inherent authority to discipline members of the bar, . . . and to resolve disputes regarding representation of a client." *Id.* at ¶ 18 (internal citations omitted). Because the disputed court action did not involve regulation of the bench or bar, this area of inherent power is also inapplicable.

Finally, courts have inherent authority to ensure "that the court functions efficiently and effectively to provide the fair administration of justice." *Id.* at ¶ 19 (quoting *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999)). This Court has found inherent authority in this area to (1) hold an individual in contempt for failing to appear, *Smith v. Burns*, 65 Wis. 2d 638, 645, 223 N.W.2d 562 (1974); (2) to appoint counsel for indigent parents in a CHIPS proceeding, *Joni B. v. State*, 202 Wis. 2d 1, 10, 549 N.W.2d 411 (1996); and (3) to correct clerical errors in judgments of conviction,

State v. Prihoda, 2000 WI 123, ¶ 17, 239 Wis. 2d 244, 618 N.W.2d 857. Clerical errors are contrasted with "judicial error[s]," which are errors flowing from a court's "deliberate," yet erroneous resolution of an issue. *Prihoda*, 239 Wis. 2d 244, ¶ 15 n. 6 (citation omitted). "Without the ability to exercise inherent authority in this area, courts would not perform their constitutionally mandated functions." *Schwind*, 386 Wis. 2d 526, ¶ 19.

Here, the circuit court was not sanctioning contemptuous conduct, appointing counsel, or correcting a clerical error when it re-opened the previously-dismissed RCS offense and entered a judgment of conviction against Mr. McAdory. The circuit court resurrected a previously-dismissed charge to convict Mr. McAdory rather than provide him with a new trial as required by the court of appeals' decision. *See McAdory I*, 400 Wis. 2d 215, ¶ 71 (App. 40). In holding that circuit courts do not have inherent power to resurrect previously-dismissed charges after appeal, this Court would not remove circuit courts' ability to perform their constitutionally or statutorily mandated duties. Simply put, "[t]here is no case law, statutory authority, or basis in the constitution to show that without [this power], the court will cease to exist or it will not be able to exercise its jurisdiction in an orderly and efficient manner." *See Davis*, 226 Wis. 2d at 754.

Further, the dual-prosecution/single-conviction scheme that Wisconsin employs for impaired driving prosecutions is a legislative creation. *See Schwind*,

386 Wis. 2d 526, ¶ 28 (holding that because probation is a legislative creation, circuit courts do not have inherent authority to shorten a term of probation except as authorized by statute). The dual-prosecution/single-conviction scheme was utterly unknown to Wisconsin law prior to the enactment of the precursor to the modern scheme in 1981. Assembl. 66, 1981 Leg. § 1598t (Wis. 1981). Dual-prosecution/single-conviction "offense swapping" postconviction and after appeal, as occurred here, therefore "could not have been incorporated into the Wisconsin Constitution as a power that 'from time immemorial has been conceded to courts because they are courts,' and not necessary for courts to perform their constitutionally mandated functions." *See Schwind*, 386 Wis. 2d 526, ¶ 28.

II. The State forfeited the alternative ground on which the judgment of conviction could be sustained by failing to raise it in McAdory I.

A. Standard of review.

The question of whether the State forfeited its argument that the RCS guilty verdict was an alternative ground on which the judgment of conviction could be sustained is a "question of law that [this Court] review[s] independently of the determinations rendered by the circuit court and court of appeals." *State v. Counihan*, 2020 WI 12, ¶ 23, 390 Wis. 2d 172, 938 N.W.2d 530; *City of Eau Claire v.*

Booth, 2016 WI 65, ¶ 6, 370 Wis. 2d 595, 882 N.W.2d 738.

Additionally, this Court "independently review[s] questions of subject matter jurisdiction and competency." *Booth*, 370 Wis. 2d 595, ¶ 6.

B. The State forfeited the argument that there was an alternative ground to sustain Mr. McAdory's conviction by failing to raise it in the initial appeal.

When the State of Wisconsin, as a party to litigation, is aggrieved by a decision of the circuit court, it may appeal. *See* Wis. Stats. §§ 974.05, 808.03(1). The State is expressly permitted to appeal from any "[f]inal order or judgment adverse to the state, whether following a trial or plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy." Wis. Stat. § 974.05(1)(a). Additionally, "[i]f the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, as provided by s. 809.10(2)(b)." Wis. Stat. § 974.05(2). Section 809.10(2)(b) governs cross-appeals and grants to cross-appellants "the same rights and obligations as an appellant" under Chapter 809. Wis. Stat. § 809.10(2)(b). The entry of a judgment of conviction disposing of the charges in a criminal case is a final judgment or order. *State v. Lagundoye*, 2004 WI 4, ¶ 20, 268 Wis. 2d 77, 674 N.W.2d 526.

Section 809.10(2)(b) "requires that a respondent who seeks modification of an order entered in a

proceeding from which the appellant appealed must file a notice of cross-appeal within thirty days after filing of a notice of appeal." *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507, 515, 331 N.W.2d 325 (1983). However, where a party "rais[es] . . . an error which, if corrected, would sustain the judgment," it need not file a cross-appeal. *State v. Alles*, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (1982). Although § 809.10(4) purports to limit appellate review to "orders and rulings adverse to the appellant and favorable to the respondent," this Court has acknowledged that "where the party is joined in the appeal, all intermediate orders may be reviewed." *Id.* at 392 n. 7.

In *Alles*, this Court reviewed the propriety of the State filing a notice of cross-appeal that sought review of the circuit court's jury instructions. *Id.* at 383. The defendant appealed after being convicted of one offense after a jury trial and alleged that there had been insufficient evidence on which the jury could convict him. *Id.* The State cross-appealed a ruling of the circuit court on the matter of the jury instructions. *Id.* at 374-75. The State argued that, had the circuit court correctly instructed the jury, there was sufficient evidence to convict under the State's preferred jury instructions. *Id.* This Court held that, although the State did not need to file a cross-appeal, it was not inappropriate for the State to do so. *Id.* at 392. "Although the notice of cross-appeal was an acceptable way to bring the erroneous instruction before the [appellate] court, a notice raising the issue in the briefs would have been sufficient." *Id.* at 393.

There is a strong presumption against multiple, successive appeals taken from the same case. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); *Alles*, 106 Wis. 2d at 394 (noting that Wisconsin Chapters 808 and 809 are based on the American Bar Association Standards Relating to Appellate Courts and that the ABA standards make clear that its purpose "is to avoid piecemeal appeals which delay and interfere with trial court proceedings and destroy the integrity of trial court judgments."); *State v. Beals*, 52 Wis. 2d 599, 605-06, 191 N.W.2d 221 (1971); *Crossman v. Gipp*, 17 Wis. 2d 54, 61, 115 N.W.2d 547 (1962); *State ex rel. Roberts Co. v. Breidenbach*, 222 Wis. 136, 266 N.W. 909, 910-11 (1936). It is for that reason that "those portions of the judgment below not appealed from bec[o]me final and cut off as effectively as any other method of limitation could cut off the right of review." *Breidenbach*, 266 N.W. at 910.

Taking the *Alles* holding that the State may either file a cross-appeal or raise a matter that would otherwise sustain the judgment of conviction in briefing with the presumption against successive appeals, this Court should hold that the State forfeited its ability to raise the RCS guilty finding as an alternative ground on which the court could sustain the circuit court's judgment. This holding would further the legislative purpose of "prevent[ing] the evils arising from successive appeals," *Crossman*, 17 Wis. 2d at 61, by allowing the appellate courts to consider *all* bases on which to sustain a judgment of conviction in one appeal rather than in piecemeal

litigation. This would be further consistent with the goal of finality in litigation and criminal cases in particular. *See State v. Mikulance*, 2006 WI App 69, ¶ 12, 291 Wis. 2d 494, 713 N.W.2d 160; *Escalona-Naranjo*, 185 Wis. 2d at 185; *Breidenbach*, 266 N.W. at 911.

Here, the State failed to raise the possibility that the RCS guilty verdict could be an alternative ground on which to sustain the judgment of conviction in Mr. McAdory's initial appeal. The State was on notice that Mr. McAdory was seeking to invalidate the OWI conviction and the grounds on which he sought to do so from his opening brief. The State's response brief in *McAdory I* is entirely bereft of any mention of the RCS guilty verdict as a means to sustain the judgment of conviction. Additionally, the State did not have a reason for not doing so in its briefing. The court of appeals held oral arguments in *McAdory I* and pressed the State on why it had not put forth the RCS verdict as an alternative means that it could use to sustain the conviction. The State admitted at oral argument that there was no strategic or other reasoning for its failure. (270:16).

Although strategy was not an explicit consideration of the State in this case, permitting the State's tactic in this case could result in the State choosing to raise some defenses to the judgment of conviction on appeal, strategically not raising others, and, if the conviction is overturned on appeal, the State could then raise the defenses to the judgment of conviction that it withheld from the appellate court on

remand. *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727. (noting that the forfeiture rule "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming the error is grounds for reversal."). This Court should hold that failure to raise a defense to the judgment of conviction before the appellate courts forfeits the use of that defense of the judgment on remand. *See State v. Counihan*, 2020 WI 12, ¶ 32, 390 Wis. 2d 172, 938 N.W.2d 530 (noting that "the stated purpose[] of the forfeiture rule [is] maximizing the efficiency of the judicial process.").

Additionally, if the State is permitted to swap the basis of a conviction after appeal, it will necessarily lead to additional, piecemeal appeals. Imagine a typical impaired driving prosecution and postconviction procedures that would occur if this Court permitted the State to swap a PAC or RCS conviction for an OWI conviction that was overturned on appeal. Taking a "typical" OWI case, a defendant is usually pulled over and arrested on suspicion of operating while impaired. The State could then charge the defendant with OWI while awaiting the blood results from the lab. Assuming the lab results indicate a higher-than-allowed blood alcohol content, the State could then move to amend the complaint or information to add a PAC charge. After that amendment is made, the defendant proceeds to a jury trial and the jury returns a verdict of guilty on both the OWI and the PAC charge. Prior to sentencing, the State will typically move to dismiss the PAC offense,

leaving the OWI on which to enter a judgment of conviction.

The defendant is sentenced and then appeals the OWI. He cannot appeal the dismissal of the PAC offense because he was not aggrieved by that order. *See Estreen v. Bluhm*, 79 Wis. 2d 142, 255 N.W.2d 473 (1977) (noting that a party who has received the benefit of a judgment waives the right to an appeal which would involve the reversal of the part of the judgment under which the benefit was received). The OWI is reversed on appeal. On remand, the State requests and the circuit court grants a motion to reinstate the previously-dismissed PAC charge. The defendant is resentenced on the PAC offense. The defendant now has the right to postconviction review of the PAC conviction. While the issues that made the OWI conviction infirm may also impact the PAC offense, there could also be issues that only infect the PAC offense that are entitled to appellate review.

For example, take a case wherein the OWI is reversed for sufficiency of the evidence because there was no testimony as to the defendant's impairment or ability to safely operate the vehicle. Those same sufficiency concerns would not necessarily infect the PAC offense. However, the PAC offense may have its own infirmities; for example, if the State had a substitute lab analyst testify to the blood alcohol results, *see e.g. Smith v. Arizona*, 602 U.S. 779, 798 (2024) (holding that expert witness testimony restating an absent lab analyst's factual assertions to support his or her own opinion is hearsay), or if the

jury was incorrectly instructed only on the PAC offense. Those issues would need to be addressed in separate post-conviction proceedings.

As Mr. McAdory's case demonstrates, allowing the State to swap bases for conviction after the defendant's direct appeal and remittitur prolongs postconviction litigation and indefinitely postpones the finality of the case. Mr. McAdory's case has been pending since January 5, 2016. (186). He was found guilty by a jury on August 19, 2019. (182:218-19). Mr. McAdory's notice of intent to pursue postconviction relief was filed on November 19, 2019. (151). This means that his case has been in postconviction litigation for nearly five years. Had the circuit court placed the matter on its trial calendar as ordered by the court of appeals, the trial likely could have concluded by early 2020 and the post-conviction litigation could have been finally concluded by the end of 2021. Allowing the State to swap the basis for a conviction after appeal and remittitur does not maximize judicial efficiency nor does it preserve the integrity of circuit court judgments. *See Gertz v. Milwaukee Electric Ry. & Light Co.*, 153 Wis. 475, 140 N.W. 312, 313 (1913) ("To allow [several successive appeals from the same judgment] would sanction an abuse of the jurisdiction [in the appellate courts] or confess an infirmity of judicial power to prevent it, which the founders of our system, nor the Legislature in regulating it, did not contemplate.")

While the impacts of this extended litigation may only be felt by Mr. McAdory in this case, such

would not be true in impaired driving cases involving victims. The dual-prosecution/single-conviction provision exists not just in the "simple" impaired driving context, but also in the context of impaired driving causing injury and impaired driving causing death. *See* Wis. Stats. §§ 346.63(2)(am), 940.09(1m). The dual-prosecution/single-conviction language in those sections is identical (other than to the references to the particular impaired driving subsection) to the language of Wis. Stat. § 346.63(1)(c). The result would be that, if the Court permitted the swapping of impaired driving offenses after appeal, not only would the defendant be forced to wait years for the final outcome of his case, but victims or their families would also be required to wait years for finality. *Contra* WI Const. Art. I, § 9m(2)(c)-(d) (providing victims of crimes the rights to "proceedings free from unreasonable delay" and to the "timely disposition of the case, free from unreasonable delay.").

The dismissal of the RCS offense was a decision that the State made when it was fully apprised of all of the facts and the law. The State was present during the entirety of the jury trial. It was aware of the challenges that Mr. McAdory made to the jury instructions on the OWI offense when it moved to dismiss the RCS count. The State should not get to hold its cards close to its chest, and—only after it loses and is faced with the prospect of re-trying the defendant—play the trump card to avoid the consequences of its litigation strategy. *See State v. Myers*, 158 Wis. 2d 356, 367, 461 N.W.2d 777 (1990) (refusing to "rescue [the State] from a trial strategy

that went awry."); *Sutter v. State, Dep't of Nat. Res.*, 69 Wis. 2d 709, 718-19, 233 N.W.2d 391 (1975) ("All questions of law and fact were available to the plaintiffs. No inadvertent mistake was made, but a deliberate choice of strategy taken. Justice does not require that plaintiffs be twice afforded their day in court."); *Crossman*, 17 Wis. 2d 54, 60 ("Respondent Barbara chose the reduced award. . . . she is precluded from now contesting the reduction.") (internal citation omitted); *Breidenbach*, 266 N.W. at 909 ("If an appeal is not taken when the situation requires it, in order to challenge a judgment or order, the right will be deemed to have been waived.").

Just as this Court does not allow criminal defendants to raise additional challenges to the judgment of conviction after remand from an appellate court, this Court should decline to allow the State to raise additional grounds on which the judgment of conviction could be sustained after remand from an appellate court. This Court does not allow criminal defendants to raise issues on appeal that have not been preserved in the circuit court; this Court should similarly prevent the State from raising issues on remand to sustain a conviction that it failed to raise in the appellate court. "We require accuseds to abide by the decisions they made at trial. We should not alter the rules under which the trial was conducted after the trial is completed or allow the state to modify its trial position on appeal." *Myers*, 158 Wis. 2d at 369.

C. When the State failed to appeal the dismissal of the RCS charge or otherwise raise it as an alternative means to sustain the conviction, the dismissal became final.

"[T]hose portions of the judgment below not appealed from bec[o]me final and cut off as effectively as any other method of limitation could cut off the right of review." *Breidenbach*, 266 N.W. at 910. While "a circuit court has inherent authority to reconsider its own rulings during ongoing proceedings," *State v. Davis*, 2023 WI App 25, ¶ 20, 407 Wis. 2d 783, 991 N.W.2d 491, once an appeal is taken, the circuit court does not have the authority to reconsider its own rulings after those rulings have been affirmed on appeal, *Crowns v. Forest Land Co.*, 100 Wis. 554, 613, 76 N.W. 613 (1898) ("[A] judgment of the trial court, when affirmed on appeal, becomes the judgment of this court, and the trial court has no jurisdiction whatever thereafter to open it, set it aside, or modify it, or do anything in regard thereto except to enforce it.").

In *McAdory I*, Mr. McAdory only challenged his conviction on the OWI offense. Brief of Defendant-Appellant at 14-33, *McAdory I*, 2021 WI App 89, No. 2020AP2001-CR. He did not challenge any aspect of the RCS dismissal. *See id.* Nor did the State challenge any aspect of the RCS dismissal. Brief of Plaintiff-Respondent at 5-26, *McAdory I*, 2021 WI App 89, No. 2020AP2001-CR. The court of appeals then reversed Mr. McAdory's conviction on the OWI offense. *McAdory I*, 400 Wis. 2d 215, ¶ 71 (App. 40). The court

of appeals, therefore, affirmed the rest of the judgment of conviction. *See* Wis. Stat. § 808.09 ("Upon an appeal from a judgment or order an appellate court may reverse, affirm or modify the judgment or order as to any or all of the parties; may order a new trial; and, if the appeal is from a part of the judgment or order, may reverse, affirm or modify as to the part appealed from."). Because the dismissal of the RCS offense had been affirmed by the court of appeals, the circuit court did not have the authority to re-open the order dismissing the RCS offense, set it aside, or modify it, or do anything except to enforce the order of the court of appeals to provide Mr. McAdory with a new trial on the OWI offense.

D. The circuit court lacked the competency to reinstate the dismissed RCS charge following remittitur, as the court of appeals had ordered a new trial.

"The circuit courts have the general jurisdiction prescribed for them in article VII of the constitution and have power to issue all writs, process and commissions provided in article VII of the constitution or by the statutes, or which may be necessary to the due execution of the powers vested in them." Wis. Stat. § 753.03. While the circuit courts of Wisconsin never lack *jurisdiction* to hear and adjudicate causes of action, they may lack *competency* to exercise their power. *Schoenwald v. M.C.*, 146 Wis. 2d 377, 390, 432 N.W.2d 588 (1988). Jurisdiction refers to the power of the court to act, while competency describes "a court's power to render a valid judgment." *Id.* at 391.

Noncompliance with statutory requirements that pertain to the invocation of the court's jurisdiction may cause the court to lose competency to proceed. *Booth*, 370 Wis. 2d 595, ¶ 7. When a failure to abide by statutory mandates that are "central to the statutory scheme" occurs, the circuit court loses competency. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 10, 273 Wis. 2d 76, 681 N.W.2d 190.

When an appeal from a judgment of the circuit court is taken, the circuit court has limited authority to act on the matter. *See* Wis. Stats. §§ 808.07, 808.075, 808.08, and 808.09. In a criminal case, for example, a circuit court may act as it relates to bond, imposition of sentence after revocation of probation, determination of sentence credit, modification of probation, modification of sentence, and conditional release while an appeal is pending. Wis. Stat. § 808.075(4)(g)1.-7. The legislature has specifically provided that once the circuit court receives the remittitur, it may take one of three actions. Wis. Stat. § 808.08. After the circuit court receives the record and remittitur,

> (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. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

Id. (emphasis added). Further, once the appellate court "remits its judgment or decision to the court below[,] . . . the court below *shall* proceed in accordance with the judgment or decision." Wis. Stat. § 808.09 (emphasis added).

While circuit courts retain "some discretion on remand to resolve matters not addressed by a mandate in a manner consistent with that mandate," *State ex rel. J.H. Findorff & Sons, Inc. v. Circuit Court for Milwaukee Cty*, 2000 WI 30, ¶ 25, 233 Wis. 2d 428, 608 N.W.2d 679, when an appellate court remands for a new trial, § 808.08 requires that a new trial occur. *See State v. Thiel*, 2004 WI App 140, ¶ 27, 275 Wis. 2d 421, 685 N.W.2d 890, *petition for rev. denied*, 2004 WI 138, 276 Wis. 2d 29, 689 N.W.2d 57 ("Subsections (1) and (2) by stating, 'the judge shall' and 'the trial court . . . shall' respectively, clearly place the duty on the trial court to initiate the action ordered on remand."). A circuit court has the authority 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 appellate court*." *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 32, 303 Wis. 2d 94, 735 N.W.2d 418 (emphasis added).

The circuit court is not permitted to take actions "that conflict with the expressed or implied mandate of the appellate court." *Id.* Generally, the word "shall" in a statute "is construed as mandatory unless a different construction is required by the statute in order to carry out the clear intention of the legislature." *Walworth Cty v. Spalding*, 111 Wis. 2d 19, 24, 329 N.W.2d 925 (1983). It is further presumed "that the legislature chose its terms carefully and precisely to express its meaning." *Ball v. District No. 4, Area Bd. Of Vocational, Tech. and Adult Educ.*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984).

Section 808.08 is central to the statutory scheme for appeals and, after remittitur, restores the circuit court's jurisdiction over a case. The circuit court was *required* to place the matter on its trial calendar by virtue of the court of appeals' mandate and § 808.08(2). By failing to comply with the statutory scheme, the circuit court lost competency to act on the court of appeals' mandate. Without the competency to act, the circuit court was without the power to issue a valid order. *See Schoenwald*, 146 Wis. 2d at 391.

Further, when the circuit court re-opened the RCS charge, convicted Mr. McAdory of the RCS charge, and dismissed the OWI offense, the circuit court turned *McAdory I* "into little more than an advisory opinion." *See Tietsworth*, 303 Wis. 2d 94, ¶ 40. If the State was confused about the mandate of the court of appeals, it should have filed a motion under Wis. Stat. § (Rule) 809.14 to clarify the effect of the mandate or under Wis. Stat. § (Rule) 809.24 to seek

reconsideration. *See Tietsworth*, 303 Wis. 2d 94, ¶ 48 (citing *Johann v. Milwaukee Elec. Tool Corp.*, 270 Wis. 2d 573, 579, 72 N.W.2d 401 (1955)).

If the court of appeals believed this offense swapping was an appropriate or permissible approach to reversing the OWI conviction, it could have remanded the case with an order for further proceedings not inconsistent with the opinion under Wis. Stat. § 808.08(3). The court of appeals, however, vacated the OWI conviction and remanded it for a new trial.

III. Double jeopardy principles prohibit the circuit court from reinstating a count on which a defendant was found guilty but the State chose to dismiss after jeopardy attached.

A. Standard of review.

"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. Similarly, matters of statutory interpretation are reviewed de novo "while benefitting from the analyses of the court of appeals and circuit court. *Id.* at ¶ 17.

B. Double Jeopardy principles.

Both the U.S. and Wisconsin constitutions contain protections against double jeopardy. The U.S. Constitution prohibits "any person be subject[ed] for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Wisconsin constitution similarly protects against a person "for the same offense . . . be put twice in jeopardy of punishment." Wis. const. Art. I, § 8(1). The Wisconsin constitutional provision protecting against double jeopardy is "identical in scope and purpose" to the U.S. Double Jeopardy Clause. *State v. Schultz*, 2020 WI 24, ¶ 18, 390 Wis. 2d 570, 939 N.W.2d 519.

The Supreme Court has identified three categories of protection derived from the Double Jeopardy Clause. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). "The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *Pearce*, 395 U.S. 711, 717). Essentially, the Double Jeopardy Clause protects against a subsequent prosecution for "the same offense." *Schultz*, 390 Wis. 2d 570, ¶ 20. Offenses are "the same offense" for purposes of double jeopardy when they "are 'identical in the law and in fact.'" *Id.* at ¶ 22 (quoting *State v. Van Meter*, 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976)). "Offenses are not

identical in law if each requires proof of an element that the other does not." *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

"Jeopardy attaches . . . [i]n a jury trial when the selection of the jury has been completed and the jury is sworn." Wis. Stat. § 972.07(2); *see also Martinez v. Illinois*, 572 U.S. 833, 839 (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).

In order to determine if double jeopardy principles prohibit a second prosecution or punishment, first courts must determine the scope of the jeopardy that previously attached. *State v. Killian*, 2023 WI 52, ¶ 24, 408 Wis. 2d 92, 991 N.W.2d 387. "Regardless of whether the first prosecution results in an acquittal or a conviction, it is the record in its entirety that reveals the scope of jeopardy and protects a defendant against a subsequent prosecution for the same crime." *Schultz*, 390 Wis. 2d 570, ¶ 32. The defendant must be "subjected to the risk of conviction" for an offense to have been placed in jeopardy on that offense. *Killian*, 408 Wis. 2d 92, ¶ 25. "[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.* at ¶ 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 guilt or innocence of the accused.'").

C. Allowing for the possibility of a retrial on the OWI offense after the circuit court entered a judgment of conviction on the RCS offense violated the right to be free from two prosecutions for the same offense.

There can be no good-faith argument that Mr. McAdory was not placed in jeopardy on the RCS charge during the 2019 jury trial. The jury was selected and sworn on August 19, 2019. (182:88). The court instructed the jury on and submitted to the jury the RCS charge. (182:201). Clearly the RCS charge was within the scope of Mr. McAdory's jeopardy for the 2019 jury trial.

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) (internal citations omitted). "[T]he dispositive issue in determining whether a court may impose multiple punishments on a defendant in a single trial for violating two statutory provisions (regardless of whether they constitute the same offense) is whether the legislature authorized multiple punishments." *Bohacheff*, 114 Wis. 2d at 409 (citing *Missouri v. Hunter*, 459 U.S. 359, 368 (1983)).

In designing the dual-prosecution/single-conviction impaired driving statutory scheme, the legislature clearly did not intend to authorize multiple

punishments. The legislature intended to punish "[t]he single evil" of impaired driving. *Id.* at 414. By providing for only "one conviction," Wis. Stat. § 346.63(1)(c), "the legislature intended a prosecution under [the dual-prosecution/single-conviction scheme] to terminate with one conviction *for all purposes*." *Id.* at 413 (emphasis added).

In the present case, Mr. McAdory was indeed placed in jeopardy twice for the same offense. The circuit court issued its decision purporting to "reinstate" Mr. McAdory's "conviction" for the RCS offense on February 8, 2022. (219). *After* the circuit court "reinstated" the guilty verdict on the RCS charge, it instructed "the clerk to update the court file to show that Count 1, the OWI eighth, that the disposition after remittitur from the [c]ourt of [a]ppeals should indicate that the defendant has entered a not guilty plea and that matter is to be scheduled for trial still." (237:3). The court then asked the State whether it intended to retry Mr. McAdory for the OWI offense. (237:3-4). While the State elected not to retry Mr. McAdory for the OWI count and to dismiss that count voluntarily, that cannot change the fact that the circuit court was apparently willing to retry the OWI count even after it convicted Mr. McAdory of the RCS count.

D. "Swapping" bases of conviction after appeal is inconsistent with double jeopardy principles.

Finally, by dismissing the RCS count after jeopardy attached and after the verdicts had been received, the State induced Mr. McAdory to expect that he would not be further prosecuted or punished for the RCS 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) (internal quotation marks, citation omitted).

The circuit court would have allowed the State to make repeated attempts to convict Mr. McAdory of *both* the OWI and RCS offenses. This is impermissible under the constitutional requirement of finality in criminal litigation imposed by the Double Jeopardy Clause.

E. The State should be prohibited from resurrecting the RCS offense because it was dismissed after jeopardy attached, a decision on the merits had been made, and the State would have been barred from refiling the RCS charge.

Ordinarily, the State's prosecutorial discretion to terminate pending prosecutions is subject only to the circuit court's authority to determine whether dismissal is in the public interest. *State v. Braunsdorf*, 98 Wis. 2d 569, 574, 297 N.W.2d 808 (1980). This Court in *Braunsdorf* noted that only § 976.05(1)—related to interstate detainers—gave circuit courts the authority to dismiss a case in which jeopardy had not yet attached with prejudice. *Id.* The Court also held that circuit courts do not have the inherent authority to dismiss a case with prejudice because it "conclude[d] 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. . .." *Id.* at 585. Throughout the decision, the *Braunsdorf* court emphasized that dismissals "before the attachment of jeopardy" are without prejudice. *Id.* at 575, 578, 585, 586. This emphasis suggests that dismissals that occur *after* jeopardy has attached are *with* prejudice.

"Long operative in civil litigation, . . . claim preclusion is also essential to the Constitution's prohibition against successive criminal prosecutions." *Bravo-Fernandez v. United States*, 580 U.S. 5, 9 (2016). Claim preclusion "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 action; (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." *State v. Miller*, 2004 WI App 117, ¶ 25, 274 Wis. 2d 471, 683 N.W.2d 485 (citing *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995); *De Pratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983)). In a criminal case, the "causes of action" are the allegations that the defendant violated a specific criminal statutory provision. *See Miller* at ¶ 26.

Braunsdorf and *Miller* support the conclusion that the RCS offense's dismissal was with prejudice and its later resurrection was barred by the Double Jeopardy Clause and by claim preclusion. In *Braunsdorf*, this Court placed particular emphasis on the attachment of jeopardy as the demarcation point between dismissals with prejudice and dismissals without prejudice. In Mr. McAdory's case, the RCS offense was dismissed *after* jeopardy attached. Following *Braunsdorf* to its logical conclusion, that dismissal was *with prejudice* because the State would not have been free to recharge the RCS offense in a new criminal complaint.

Similarly, claim preclusion would operate to bar the State from recharging the RCS offense in a new criminal complaint. First, the identity of parties is the same: the State of Wisconsin and Carl Lee McAdory.

Second, the causes of action are identical—at its core, the cause of action against Mr. McAdory is that he violated Wis. Stat. § 346.63(1) on or about January 5, 2016. (35:1-2). Finally, a judgment on the merits had been previously reached in a court of competent jurisdiction: the jury rendered its verdict after deliberating and the court directed an entry of judgment on that verdict. Regardless of what the final judgment on the merits was, the State cannot argue that a final judgment on the merits was not reached. *See Miller*, 274 Wis. 2d 471, ¶ 27 (noting that the judgment in that case was not a final judgment on the merits because "the State was . . . free to refile the same charges and to obtain a judgment on the merits."). Mr. McAdory's cause meets all three elements of claim preclusion and the State, therefore, should be barred from relitigating those claims.

CONCLUSION

For the foregoing reasons, Mr. McAdory respectfully requests that the Court reverse the court of appeals, hold that conviction swapping is not authorized under Wis. Stat. § 346.63(1)(c), any argument that it would be permissible in this case has been forfeited, and in violation of double jeopardy principles. Mr. McAdory respectfully requests that this Court vacate the amended judgment of conviction on the RCS offense and remand the matter for a new trial on the OWI offense consistent with *McAdory I*.

Dated this 6th day of November, 2024.

Respectfully submitted,

Electronically signed by Olivia Garman

OLIVIA GARMAN
Assistant State Public Defender
State Bar No. 1105954

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
garmano@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 11,035 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 6th day of November, 2024.

Signed:

Electronically signed by
Olivia Garman
OLIVIA GARMAN
Assistant State Public Defender