STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE KARL HANSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A jury found Carl Lee McAdory guilty of operating while intoxicated and operating with a restricted controlled substance in his blood at his one and only trial. By statute, a defendant may be charged with both offenses arising from the same incident with the important caveat that a person found guilty of both offenses at trial may only be convicted and sentenced for one. In accordance with appellate authority interpreting that statute, the State moved to dismiss one of McAdory's charges after trial but sought to reinstate that charge and the jury's guilty verdict after the court of appeals reversed his conviction for his companion charge.

1. Could the circuit court reinstate that dismissed charge and order judgment on the jury's guilty verdict?

The circuit court answered yes.

The court of appeals answered yes.

This Court should answer yes.

2. Did the State forfeit its post-remittitur request to enter judgment on McAdory's previously dismissed charge?

The circuit court did not answer that question because McAdory never raised it.

The court of appeals answered no.

This Court should answer no and hold that McAdory forfeited his circuit court competency argument by omitting it from his petition for review.

3. Did the reinstatement of McAdory's previously dismissed charge subject him to double jeopardy or violate the doctrine of claim preclusion?

The circuit court answered no.

The court of appeals answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has signified that oral argument and publication are warranted.

STATEMENT OF THE CASE

A. The jury found McAdory guilty of operating while intoxicated and operating with a restricted controlled substance in his blood.

Rejecting his arguments that he had fallen victim to a disorganized laboratory that confused his blood sample with another motorist's, the jury ultimately found McAdory guilty of operating a motor vehicle while intoxicated, operating a motor vehicle with a restricted controlled substance in his blood, and obstructing an officer.[1] (R. 182:218–19.)

Supporting those verdicts, the jury heard testimony from Officer Jason Bier, who arrested McAdory one morning after he showed signs of impairment during a traffic stop, lied about his name, and then fled on foot. (R. 182:108–09.) And the jury also heard testimony from the hospital phlebotomist who drew McAdory's blood after his arrest, as well as the laboratory chemist who discovered cocaine and marijuana metabolites in his blood sample, including two restricted controlled substances. (R. 182:127–30, 140–43.)

At McAdory's ensuing sentencing hearing, the State moved to dismiss McAdory's RCS charge as "duplicative" of the OWI charge for which the jury also found him guilty. (R. 152:4.) Noting that the issue was also "on [its] radar," the court granted the State's request and imposed sentence on McAdory's remaining convictions. (R. 148; 152:5, 35–38.)

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[1] For ease of reading, the State shall refer to both driving charges by their respective "OWI" and "RCS" initialisms.

B. In *McAdory I*, the court of appeals reversed McAdory's OWI conviction and granted him a new trial.

McAdory pursued a direct appeal of his convictions, and the court of appeals reversed his OWI conviction and granted him a new trial. *State v. McAdory*, 2021 WI App 89, ¶¶ 2, 71, 400 Wis. 2d 215, 968 N.W.2d 770; (Pet-App. 3–40). While it concluded that the State had presented sufficient evidence to sustain the jury's verdict on that particular charge, the court nevertheless held that certain statements by the prosecutor at trial, viewed in conjunction with a modified pattern jury instruction, resulted in the jury being misled about the State's burden on the OWI charge. (Pet-App. 4, 20–22, 34–38, 40.)

While the court addressed McAdory's two arguments in its opinion, it did not address an important third issue, which it raised sua sponte, that became the primary focus of the parties' oral arguments. Specifically, if McAdory were granted a new trial for his OWI charge, what should happen to the jury's guilty verdict on the RCS charge—which was dismissed before sentencing—and what were the double jeopardy ramifications of reinstating that charge and the jury's guilty verdict upon remand? (R. 270:2–6, 16–20.)

C. The circuit court reinstated the jury's guilty verdict on the RCS charge and sentenced McAdory for that conviction.

Upon remand, the State moved the circuit court to reinstate what it errantly referred to as McAdory's "conviction" for the RCS charge. (R. 203:1.) Supporting its request, the State cited federal authority recognizing a district court's power to reinstate certain vacated convictions without requiring a new trial or plea. (R. 203:2.) Additionally, the State argued, with supporting authority, that reinstatement of McAdory's RCS charge verdict would not run afoul of the Double Jeopardy Clause while also pointing out

that the court of appeals' decision said nothing barring the State's request. (R. 203:2.)

The circuit court granted the State's motion over McAdory's objection. (R. 210; 219.) Though it acknowledged a lack of authority explicitly authorizing the reinstatement of a dismissed charge, it deemed the State's cited Seventh Circuit precedent persuasive. (R. 219:3.) It also observed that Wis. Stat. § 346.63(1)(c) does not mandate dismissal of charges for which a jury has returned a guilty verdict but that do not result in a judgment of conviction. (R. 219:3–4.) It also noted that McAdory's "RCS conviction" was neither dismissed and read in as part of a plea agreement nor dismissed due to the State's failure to meet its burden at trial. (R. 219:4.)

Following sentencing for his new conviction, McAdory moved for postconviction relief, renewing his argument that Wis. Stat. § 346.63(1)(c) barred his RCS conviction, that the circuit court lacked authority to reinstate that charge after its dismissal, and that doing so violated his constitutional right against double jeopardy. (R. 259; 267.)

The circuit court issued a decision denying McAdory's postconviction motion. (R. 279.) Addressing his constitutional claims, the court found no double jeopardy violation because McAdory had neither suffered successive prosecutions for the same offense following conviction or acquittal, nor did he receive multiple punishments. (R. 279:4–5.) The court further acknowledged Seventh Circuit and Supreme Court authority recognizing that "[t]he [D]ouble [J]eopardy [C]lause 'does not bar reinstatement of a conviction on a charge for which a jury returned a guilty verdict.'" (R. 279:6.)

Turning to McAdory's statutory argument, the court observed "no statutory bar" that "prohibit[ed] reinstatement of a dismissed or vacated conviction." (R. 279:8–9.) The court also found persuasive the "doctrine of merger," adopted by the Kansas Supreme Court in comparable cases in which multiple

charges that could statutorily result in only one conviction would be deemed "merged" for disposition. (R. 279:13.)

D. In *McAdory II*, the court of appeals affirmed the order both reinstating and imposing judgment on the jury's RCS charge verdict.

McAdory appealed his judgment of conviction for his RCS charge and the order denying postconviction relief. (R. 280.) There, he argued that the circuit court exceeded its post-remittitur authority by imposing judgment and sentence on the jury's RCS verdict instead of holding a new trial on his OWI charge, that Wis. Stat. § 346.63(1)(c) prohibited his conviction for the RCS charge, that the circuit court improperly circumvented the rules of postconviction and appellate procedure, that the State forfeited its request to have him convicted of the RCS charge by not cross-appealing in *McAdory I* to seek that relief, and that reinstatement of his RCS charge violated his right to be free from double jeopardy. (McAdory's Ct. App. Br. 25–47.)

The court of appeals rejected his various arguments and affirmed. *State v. McAdory*, 2024 WI App 29, 412 Wis. 2d 112, 8 N.W.3d 101; (Pet-App. 56–77.) Supporting its decision, the court held that Wis. Stat. § 346.63(1)(c) implicitly authorized the circuit court to act to achieve the legislature's goal of ensuring that a defendant is convicted and sentenced for only one drunk or drugged driving offense regardless of the number of charges brought stemming from the same incident. (Pet-App. 62–66.) The court separately concluded that the circuit court's actions did not subject McAdory to double jeopardy. (Pet-App. 74–77.)

McAdory appeals. (R. 280.)

ARGUMENT

I. The circuit court possessed the inherent power to reinstate and impose judgment upon the verdict finding McAdory guilty of the RCS offense.

McAdory argues that the circuit court lacked authority to reinstate and enter judgment on his RCS charge after it was dismissed following his trial. (McAdory's Br. 26–38.) Above all, this Court should overturn a portion of a 31-year-old court of appeals opinion that invited the peculiar procedural history underlying this appeal, which is destined to cause problems in other cases if not corrected. This Court should also reject McAdory's arguments and affirm his judgment of conviction and the order denying postconviction relief because the circuit court maintained the inherent power to reinstate his RCS charge and the jury's accompanying verdict after the court of appeals reversed his OWI conviction in *McAdory I*.[2]

A. Standards of review

The case calls upon this Court to assess whether circuit courts maintain authority to take certain actions after a defendant is found guilty of multiple drunk-driving related

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[2] The State argued in the court of appeals that the circuit court maintained the inherent power to reinstate the jury's guilty verdict on McAdory's RCS charge following *McAdory I*. The court of appeals assumed without deciding that the circuit court lacked that inherent power, instead holding that Wis. Stat. § 346.63(1)(c) implicitly authorized the circuit court's actions. (Pet-App. 61–66.) Although the State originally defended the court's reasoning in its response to McAdory's petition for review, upon closer examination, the State agrees with McAdory's position that the statute is merely silent to the procedure that must follow if the conviction for an impaired driving offense is overturned and a new trial is ordered on appeal. (McAdory's Br. 33.)

offenses at trial, a judgment and sentence are imposed upon only one of those verdicts as state law commands, and the defendant's conviction and sentence is later disturbed on appeal. (McAdory's Br. 24–38.) This presents questions of judicial authority and statutory interpretation, both of which this Court reviews independently. *State v. Henley*, 2010 WI 97, ¶ 29, 328 Wis. 2d 544, 787 N.W.2d 350.

B. A defendant found guilty of multiple drunk or drugged driving offenses arising from the same incident may only be convicted of one.

"Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. North Dakota*, 579 U.S. 438, 443 (2016). To help avoid those disastrous results, Wisconsin has enacted a series of statutes that prohibit individuals from driving upon the state's highways with impairing or illegal substances in their blood. Wis. Stat. § 346.63(1)(a)–(c).

Those subsections define three separate subsets of unlawful vehicle operation. The first, commonly referred to as an "OWI" offense, forbids driving "[u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog, or any combination" of those substances "to a degree which renders him or her incapable of safely driving." Wis. Stat. § 346.63(1)(a). The second, often branded an "RCS" offense, forbids driving with "a detectable amount of a restricted controlled substance in his or her blood," even when those ingested substances caused no level of impairment. Wis. Stat. § 346.63(1)(am); *State v. VanderGalien*, 2024 WI App 4, ¶ 23, 410 Wis. 2d 517, 2 N.W.3d 774. And the third, referred to as a "PAC offense," forbids driving with "a prohibited alcohol concentration" in one's blood. Wis. Stat. § 346.63(1)(b).

Though related in some respects—a motorist is virtually certain to exhibit notable impairment after drinking

enough cocktails to reach an unlawful blood alcohol concentration or ingesting drugs like cocaine or methamphetamine—the State may charge a motorist with, and proceed to trial on, any combination of OWI, PAC, and RCS offenses arising from the same incident with one caveat: if a defendant is found guilty of multiple charges "for acts arising out of the same incident or occurrence," then "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions" under Wisconsin's graduated penalty scheme. Wis. Stat. § 346.63(1)(c).

Thus, while Wis. Stat. § 972.13(1) mandates that a court enter a judgment of conviction when a jury returns a verdict finding a person guilty of a crime, the more specific provision of Wis. Stat. § 346.63(1)(c) prevents a court from imposing judgment or a sentence when a defendant is found guilty of a combination of OWI, PAC, or RCS offenses. *Waity v. LeMahieu*, 2022 WI 6, ¶ 38, 400 Wis. 2d 356, 969 N.W.2d 263 ("[W]here two conflicting statutes apply to the same subject, the more specific statute controls."); *State v. Bohacheff*, 114 Wis. 2d 402, 417, 338 N.W.2d 466 (1983) ("[W]e conclude that the legislature did not intend to require two convictions, even if there were two guilty verdicts, or to impose multiple punishments.").

Given that caveat, the legislature's overarching intent is clear from the text of the statute: while the State may prosecute motorists with multiple forms of drunk or drugged driving without choosing just one theory of prosecution, a person found guilty of more than one offense arising from the same incident should not suffer multiple punishments. *See Bohacheff*, 114 Wis. 2d at 413. Yet while the legislature's ultimate objective may be clear from the text of the statute, the text stops short of explaining how circuit courts must achieve that goal of one conviction and sentence.

That did not stop the court of appeals from trying to set a procedure over three decades ago in *Town of Menasha v.*

Bastian, 178 Wis. 2d 191, 503 N.W.2d 382 (Ct. App. 1993). There, the court endorsed one—and only one—option for a circuit court to dispose of those companion charges for which a defendant is found guilty but do not result in judgment and sentence: dismissal. But *Bastian* did not say why dismissal was either the correct or only option to honor the legislature's goal of one conviction and sentence. Rather, the court simply determined, without further explanation, "In other words, the defendant is to be sentenced on one of the charges, *and the other charge is to be dismissed*." *Id.* at 195 (emphasis added).

C. This Court should overturn *Bastian* and adopt a procedure that promotes—rather than undermines—the legislature's intent.

1. *Bastian* misinterpreted Wis. Stat. § 346.63(1)(c) as establishing a mandate that the legislature did not impose.

Bastian incorrectly holds that any charge not resulting in conviction and sentence under Wis. Stat. § 346.63(1)(c) must be dismissed after trial. That holding—which is largely responsible for the issues arising in McAdory's case—should be overturned. As pointed out above, Wis. Stat. § 346.63(1)(c) contains no language mandating dismissal of charges not resulting in conviction and sentence, yet *Bastian* read that requirement into the statute without explanation.

While this Court has consistently required a compelling reason to overturn its own precedent, it has "never required a special justification to overturn a decision of the court of appeals." *State v. Johnson*, 2023 WI 39, ¶¶ 19–20, 407 Wis. 2d 195, 990 N.W.2d 174; *accord Evers v. Marklein*, 2024 WI 31, ¶ 25, 412 Wis. 2d 525, 8 N.W.3d 395. This Court should take McAdory's case as the opportunity overturn *Bastian*'s errant holding to prevent similarly problematic procedural postures from recurring in the future.

Although not necessary for this Court to overturn any part of *Bastian* because it is a court of appeals decision, when assessing whether to overturn its own precedent, this Court generally considers whether the decision is either "unsound in principle" or "unworkable in practice." *Johnson*, 407 Wis. 2d 195, ¶ 20 (quoting *State v. Young*, 2006 WI 98, ¶ 51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729). The State maintains that *Bastian*'s assertion that those charges not resulting in conviction under Wis. Stat. § 346.63(1)(c) must be dismissed fits that mold.

For starters, *Bastian*'s rule enjoys no support under Wisconsin law. The text of Wis. Stat. § 346.63(1)(c) does not mandate that charges not resulting in conviction must be dismissed; it prescribes only that there shall be one conviction and sentence if a defendant is found guilty of multiple drunk or drugged driving charges arising from the same incident. Wis. Stat. § 346.63(1)(c). And while the general rule is that a circuit court must enter a judgment of conviction based on the jury's guilty verdict(s), Wis. Stat. § 972.13(1), that statute says nothing about what a court must do for those guilty verdicts which it is statutorily barred from entering a judgment of conviction on.

Even more problematic, *Bastian*'s holding requiring dismissal of charges not resulting in conviction is unworkable in practice as it creates a conflict between two statutes and undermines the legislature's unequivocal commitment for the "vigorous prosecution" of drunk and drugged driving offenses. Wis. Stat. § 967.055(1)(a). To that end, the legislature made clear by enacting Wis. Stat. § 967.055(2)(a) that no drunk or drugged driving prosecution should be dismissed by the State unless the prosecutor applies to the court and convinces it its request is "consistent with the public's interest in deterring" drunk or drugged driving. Wis. Stat. § 967.055(2)(a).

McAdory's case reveals how *Bastian*'s interpretation of Wis. Stat. § 346.63(1)(c) defies the legislature's mandate while

actually preventing the "vigorous prosecution" of drunk or drugged driving. Indeed, the State did exactly what Wis. Stat. § 967.055(1)(a) demands by zealously prosecuting a perennial drunk driver for what was his eighth offense of driving while under the influence of an intoxicant. (R. 19:3.) And the State succeeded in that endeavor, convincing a panel of jurors that McAdory was guilty of not only driving while impaired but also with restricted controlled substances in his blood.

Because of *Bastian*, however, the State had no choice but to dismiss one of McAdory's charges even though the jury found him guilty of all of them. Even worse, depending on how this appeal is ultimately decided, that dismissal may bar the State from fulfilling the legislature's stated goal of keeping drunk and drugged drivers off Wisconsin's streets. Given the double jeopardy protections implicated in this case, the State has no avenue to retry McAdory for the RCS offense if this Court holds that the circuit court lacked the authority to reinstate the jury's verdict from his earlier trial, and the blame for that falls squarely on *Bastian*.

This Court should overturn *Bastian* to prevent its holding from frustrating the legislature's intent and causing the same problem in future drunk and drugged driving prosecutions. Given his position that this Court must not read words into statutes that the legislature did not include, (McAdory's Br. 31–32), McAdory should agree that *Bastian*'s holding requiring dismissal of charges should be overturned.

2. The circuit court was permitted to vacate its prior order premised upon *Bastian*'s incorrect holding.

It is well-settled that a circuit court possesses authority to vacate a void order or judgment that it lacked the authority to issue in the first place. *See City of Sun Prairie v. Davis,* 226 Wis. 2d 738, 750, 595 N.W.2d 635 (1999); *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 98, 516 N.W.2d 4 (Ct. App. 1994). This

holds true even where there is no explicit statutory authority permitting the court's action. *Jensen*, 184 Wis. 2d at 98.

In this case, the State moved to dismiss McAdory's RCS charge, and the circuit court granted that request, based upon *Bastian*'s holding that any charge brought under Wis. Stat. § 346.63(1)(c) that does not result in conviction and sentence must be dismissed. But if *Bastian*'s holding was incorrect, and if McAdory's RCS charge could not be dismissed unless and until the State complied with Wis. Stat. § 967.055(2)(a), then the circuit court should not have dismissed McAdory's RCS charge following his trial.

In other words, if the circuit court dismissed McAdory's RCS charge notwithstanding noncompliance with Wis. Stat. § 967.055(2)(a), and if the only basis for the court's decision was *Bastian*'s flawed holding that dismissal was not just possible but required, then it naturally follows that the circuit court had the authority to vacate its prior order dismissing McAdory's RCS charge that it lacked the authority to issue in the first place. *Davis,* 226 Wis. 2d at 750; *Jensen*, 184 Wis. 2d at 98.

While that may not have been the circuit court's stated rationale for reviving McAdory's dismissed charge, this Court should nevertheless affirm because the circuit court reached the right conclusion, even if for the wrong reason. *State v. Amrine*, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990) ("If a trial court reaches the correct result for the wrong reason, it will be affirmed."); *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) ("If a trial court reaches the proper result for the wrong reason it will be affirmed.").

3. This Court should exercise its superintending authority to adopt a substitute procedure that advances the legislature's intent.

"Pursuant to Article VII, Section 3 of the Wisconsin Constitution, this [C]ourt has superintending authority 'that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice.'" *State v. Scott*, 2018 WI 74, ¶ 43, 382 Wis. 2d 476, 914 N.W.2d 141 (citation omitted). In other words, whether this Court chooses to exercise its supervisory authority is a matter of judicial policy rather than one relating to the power of the Court. *See Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878.

While this Court does not invoke its superintending authority lightly, *id.* ¶ 12, this is a suitable case to do so. By enacting Wis. Stat. § 346.63(1)(c), the legislature expressed its intent for a specific result—that a defendant suffer only one conviction and one sentence regardless of the number of charges for which he is found guilty—without identifying the means to achieve that result, whether that is charge dismissal as contemplated by *Bastian* or another procedure not codified within the statute.

While the parties disagree in many respects, the State and McAdory are (or at least were) of one mind when it comes to a proposed solution. As McAdory observed in his petition for review, "[a] better solution is available." (McAdory's Pet. 21.) The State submits that this solution is straightforward: in the event that the State elects to charge a defendant with multiple offenses as permitted by Wis. Stat. § 346.63(1)(c) and the defendant is found guilty of more than one of those charges, a circuit court should accept the jury's verdicts, enter judgment and sentence on only one of the jury's verdicts, but decline to dismiss those interrelated charges not resulting in conviction and sentence.

Thereafter, the defendant should be entitled to seek postconviction and appellate relief from his conviction and sentence, where he can argue not only why he is entitled to a new trial or sentence on the charge resulting in his conviction but why reversible error should prevent the circuit court from imposing judgment and sentence on the jury's remaining verdicts for which judgment and sentence were not initially imposed. This process would promote the interest of Wis. Stat. § (Rule) 809.10(4), which brings before the appellate court those orders and adverse rulings made preceding the final judgment subject to appeal. And if a defendant's conviction is vacated due to trial errors affecting only one (but not all) of the jury's verdicts, the circuit court may impose judgment and sentence on another charge without expending additional time and resources to hold a second trial.

This solution serves three goals. First and foremost, it furthers judicial efficiency. To be clear, the State shares McAdory's frustration about the path his case has taken since he was initially charged nearly nine years ago. (McAdory's Br. 45–46.) The history of this case is not ideal for either party, but it is bound to happen in future cases unless this Court establishes a procedure to effectuate the outcome commanded by Wis. Stat. § 346.63(1)(c). Moreover, establishing the State's proposed solution will further cut down on unnecessary trials by allowing for circuit courts to impose judgment on a guilty verdict unaffected by alleged error.

Second, this solution furthers the finality of judgments. As McAdory aptly points out, defendants, victims, and their respective families may be forced to wait years for a case to reach its end resolution unless a better procedure is adopted. (McAdory's Br. 46.) The State agrees that is an undesirable process. The proposed procedure would alleviate those issues by allowing a circuit court to accept the jury's several verdicts, enter judgment and sentence on only one without dismissing any accompanying charges, and allow a single appeal where

the parties can argue why alleged errors may have affected any or all of the jury's verdicts. Rather than requiring several postconviction hearings and appeals, the defendant would have his opportunity to show that one or more errors affected the jury's verdicts, and if he is unsuccessful in showing that each verdict is affected, the circuit court could simply enter judgment on one of the jury's verdicts on a companion charge.

Third, this solution furthers the legislature's intent of zealously prosecuting drunk and drugged drivers by ensuring that none escape accountability simply because the State or circuit court, possibly unaware of which postconviction claims may be lurking in the future, would choose to have judgment and sentence imposed for one jury verdict over another. Indeed, McAdory criticizes the State for that reason, insisting that the prosecutor could have just opted to dismiss his OWI charge at sentencing, rather than his RCS charge, given that the State "was fully apprised of all of the facts and the law" at that point, including his challenge to jury instructions used at his trial. (McAdory's Br. 46.)

McAdory's criticism is unfounded. While it may be easy now to second-guess the prosecutor's reasoning for selecting one charge to dismiss over another, that will not always be the case. Potential postconviction claims are not necessarily obvious during a jury trial, and the State is often put in the position to simply guess at which charge will be least vulnerable to postconviction relief. While his complaint about jury instructions may have only involved his OWI charge, he could have also possibly mounted a separate challenge to his counsel's effectiveness relating to his RCS charge. And there may be times where an obvious trial error claim might prove weaker than a hidden claim that only comes to light during postconviction proceedings.

The State simply should not be forced to speculate as to which charge is more likely to survive a later postconviction challenge, lest it be barred from pursuing a conviction on that

charge in the future, and McAdory's suggestion that the State may resort to sandbagging to drag matters out is baseless. (McAdory's Br. 42–43.) Certainly, the State, too, has a vested interest in finality in a defendant's conviction, and the State's proposed solution as an alternative to *Bastian*'s endorsed rule would serve that goal for both the State and the defendant.

In the end, assuming this Court agrees that *Bastian* wrongly proclaimed that any charges brought as authorized by Wis. Stat. § 346.63(1)(c) must be dismissed if a judgment and sentence is not imposed for that charge, circuit courts will need guidance as to the proper treatment for those charges if not dismissal. This Court should exercise its superintending authority to provide that guidance.

D. The circuit court had the inherent power to revive McAdory's RCS charge and enter judgment on the jury's guilty verdict.

"The Wisconsin Constitution created a court system and expressly granted certain powers to Wisconsin's courts," including inherent authority or "[t]hose powers . . . necessary to enable courts to accomplish their constitutionally and legislatively mandated functions." *State v. Schwind*, 2019 WI 48, ¶ 12, 386 Wis. 2d 526, 926 N.W.2d 742; *Henley*, 328 Wis. 2d 544, ¶ 73. Circuit courts generally exercise inherent authority to serve three goals: "(1) to guard against actions that would impair the powers or efficacy of the courts or 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." *Henley*, 328 Wis. 2d 544, ¶ 73.

While not explicitly attributed to any specific goal, one cannot dispute that both this Court and the court of appeals have sanctioned the reinstatement of criminal charges after their dismissal, even absent constitutional or statutory authorization. *See, e.g.*, *State v. Davis*, 2023 WI App 25, ¶ 19, 407 Wis. 2d 783, 991 N.W.2d 491 (allowing for reinstatement

of charges dismissed minutes earlier in oral ruling); *State v. Deilke*, 2004 WI 104, ¶ 25, 274 Wis. 2d 595, 682 N.W.2d 945 (allowing for reinstatement of charges dismissed pursuant to plea agreement that is later breached); *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977) (allowing for reinstatement of charges dismissed before circuit court discovered that newly elected district attorney received campaign contributions from defendant's family).

Together, the above-cited authority reveals that circuit courts are entitled to exercise their inherent authority when taking actions that "are necessary to enable [them] to accomplish their constitutionally and legislatively mandated functions," *Henley*, 328 Wis. 2d 544, ¶ 73, particularly where that action is performed to correct an error in an ongoing proceeding, *see Davis*, 226 Wis. 2d at 750. In McAdory's case, the circuit court wielded that inherent authority to accomplish its judicial functions and legislative mandate by ensuring that a defendant found guilty of an RCS offense did not escape the consequences of his actions simply due to an errant, decades-old appellate decision that incorrectly interpreted Wis. Stat. § 346.63(1)(c) to require dismissal of charges where the legislature not only did not command as much but where dismissal would actually undermine the legislature's intent.

In the same vein, entering judgment on the jury's guilty verdict on McAdory's previously dismissed RCS charge rather than holding a new trial on his OWI charge as contemplated by *McAdory I* helped to ensure the "efficient and effective functioning of the court" and effectuate the "fair[ ] administer[ation of] justice." *Henley*, 328 Wis. 2d 544, ¶ 73. Again, the errors that resulted in the court of appeals reversing McAdory's OWI conviction in *McAdory I* had no impact on the jury's guilty verdict for his RCS offense. The State presented compelling evidence that convinced the jury, beyond a reasonable doubt, that McAdory's blood contained at

least one—if not two—restricted controlled substances. To hold another jury trial on McAdory's OWI charge when the jury already found him guilty of the RCS charge would waste judicial resources, which could be avoided by reinstating McAdory's RCS charge and entering judgment on it.

In sum, the circuit court exercised its inherent power to both reinstate McAdory's dismissed RCS charge and enter judgment on it after he disturbed his original OWI conviction in *McAdory I*.

E. McAdory's counterarguments should not persuade.

McAdory disputes that the circuit court had the inherent authority to reinstate his RCS charge and enter judgment on it. (McAdory's Br. 26–38.) In support, he contends that the court's actions are not of the type previously deemed to fall within its inherent authority and that the court's actions were not necessary to perform its mandated functions. (McAdory's Br. 30–38.)

Neither of his arguments should persuade. Again, the circuit court's actions fell within its inherent authority to fairly administer justice and promote efficient, effective functioning of the court. *Henley*, 328 Wis. 2d 544, ¶ 73. Still, McAdory seems to imply that this power is exercised only when a court holds a person in contempt, appoints counsel for indigent parties, or corrects clerical errors, but none of his cited authority sets such limits. (McAdory's Br. 36–37.) And that is for good reason: if inherent authority were limited to those tasks, those restrictions would counterintuitively serve to hamper, rather than assist, a court from performing its necessary judicial functions.

This reasoning holds true notwithstanding the fact that Wis. Stat. § 346.63(1)(c) is a "legislative creation." (McAdory's Br. 37–38.) Again, the legislature did not explicitly advise how a court must effectuate its goal of having one conviction and

one sentence. McAdory's argument might hold weight had the statute explicitly required that a circuit court take one action, only for the court in his case to take another. To hold that the circuit court were barred from abiding by the statute unless it specifically directs how to do so would prevent the court from doing anything at all because any act—be it dismissal as required by *Bastian* or simply accepting the jury's verdicts without dismissing any charges as proposed by the State and McAdory's petition for review—is not defined by the statute.

Finally, even if it concludes that the text of Wis. Stat. § 346.63(1)(c) is ambiguous and not simply silent as to preferred procedure, neither the legislative history cited by McAdory nor the "rule of lenity" should lead this Court to hold that the circuit court lacked the authority it exercised in this case. Indeed, the legislative history McAdory cites in his brief does not help him. (McAdory's Br. 34.) If the legislature intended to hold drunk and drugged drivers accountable and ensure they faced consequences for their dangerous conduct, it is hard to believe that the legislature envisioned Wis. Stat. § 346.63(1)(c), as enacted, would enable a perennial drunk driver found guilty of operating with restricted controlled substances in his blood to face no consequences just because he successfully appealed a conviction for a companion charge.

In short, the circuit court possessed the inherent power to revive McAdory's RCS charge and the jury's verdict, and McAdory's arguments to the contrary should not convince this Court otherwise.

II. Only McAdory forfeited a claim before this Court, and this Court should decline to review it.

McAdory argues that the State forfeited what he labels "an alternative ground to sustain [his] conviction by failing to raise it" in *McAdory I*. (McAdory's Br. 39–53.) His argument is misguided and fails to recognize that it is he who forfeited one of his current claims by omitting it from his petition for

review. This Court should reject McAdory's assertion that the State forfeited its argument and decline to review his court competency claim that he omitted from his petition for review.

A. Standard of review

"Whether a claim is forfeited or adequately preserved for appeal is a question of law this court reviews de novo." *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

B. The State's failure to raise a meritless if not frivolous argument in *McAdory I* did not result in forfeiture of its later request to have McAdory convicted of his RCS charge.

McAdory contends that "[t]he State forfeited the argument that there was an alternative ground to sustain [his] conviction by failing to raise it in the initial appeal." (McAdory's Br. 39.) To that end, he appears to argue that the State, put on notice that he was trying to invalidate his OWI conviction as soon as he filed his appellate brief in *McAdory I*, was obligated to file a notice of cross-appeal or, at the very least, argue in its response brief that the jury's guilty verdict on McAdory's RCS charge was an alternative basis for which the court of appeals could affirm his judgment on his OWI charge. (McAdory's Br. 39–47.)

McAdory's argument falters from the very start. While OWI, RCS, and PAC convictions may count equally for the purpose of elevating penalties for future offenses, Wis. Stat. § 343.307(1), they are still different charges with different elements, *see supra* p. 16. A guilty verdict on an RCS charge does not support an OWI conviction any more than it would support a disorderly conduct conviction. Simply stated, the jury's verdict finding McAdory guilty of his RCS charge was not "an alternative ground" by which the circuit court or the

court of appeals could have sustained McAdory's OWI conviction even if the State had so argued in *McAdory I*.

McAdory's argument that the State needed to pursue a cross-appeal is likewise flawed. A respondent on appeal need only file a cross-appeal when seeking modification of an order entered in a proceeding from which the appellant appealed. Wis. Stat. § (Rule) 809.10(2)(b). But the State did not seek modification of an order in *McAdory I*. As the court of appeals correctly observed, "[I]n the first appeal the State had no interest in modification of any judgment or order. The State's position was that the proceedings to date had been error-free." (Pet-App. 73.) Simply put, the State did not seek any modified order or judgment in *McAdory I*, but even if it had, any argument that McAdory's OWI conviction could be sustained on "alternative grounds" would have been meritless at best and frivolous at worst.

McAdory's policy arguments should not convince this Court otherwise. Although the State agrees that multiple, successive appeals should be avoided and are burdensome on the judicial system, that still doesn't mean that the court of appeals in *McAdory I* could have affirmed his OWI conviction just because the jury also found him guilty of his RCS charge. Had the State advanced the arguments McAdory envisions, they not only would have failed, they also would not have prevented this successive appeal.

As far as avoiding piecemeal appeals, the State submits that its proposed procedure for replacing *Bastian* serves that very goal. *See supra* pp. 22–25. By allowing a circuit court to accept a jury's multiple verdicts and enter judgment and sentence on one but not dismiss others while a defendant exhausts his appellate rights, the State, defendant, and any victims can reach case finality much more quickly than by advancing as McAdory's case has up to this point.

In sum, while the State shares McAdory's frustration with the path his case has taken, that the State did not file an unnecessary cross-appeal or raise meritless, if not frivolous, arguments in *McAdory I* did not result in the forfeiture of its ability to seek judgment and sentence on the jury's verdict finding McAdory guilty of his RCS charge.

C. McAdory raises and argues an issue not presented in his petition for review; it is not preserved for review and should not be addressed.

As the appellant and petitioner, McAdory was required to properly preserve his claims for review and is accordingly limited to the claims he both preserved below and raised in his petition for review. *State v Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); *Emer's Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶ 44, 391 Wis. 2d 674, 943 N.W.2d 513 (holding that a petitioner cannot raise alternative legal theories to support their claims for relief that were not raised in the petition for review to this Court).

In his petition for review, McAdory requested that this Court assume jurisdiction for three reasons: (1) to interpret Wis. Stat. § 346.63(1)(c) and guide lower courts on the proper process when a jury returns guilty verdicts on more than one OWI, PAC, or RCS charge; (2) to address the double jeopardy ramifications of dismissing and reviving a charge for which a jury has returned a guilty verdict but that is dismissed as required by *Bastian*; and (3) to address whether the State was obligated to cross-appeal or argue during *McAdory I* that his judgment could be sustained on alternative grounds, namely the jury's verdict on the RCS charge. (McAdory's Pet. 7–9.)

Conversely, McAdory argues in his brief that the circuit court lacked competency to reinstate the dismissed RCS charge following *McAdory I* as the court of appeals had ordered a new trial. (McAdory's Br. 49–53.) In support, he

cites both state statutes and several of this Court's opinions concerning the circuit court's competency to take certain actions once it receives remittitur following an appeal. (McAdory's Br. 49–53.) And he concludes by arguing that "[b]y failing to comply with the statutory scheme, the circuit court lost competency to act on the court of appeals' mandate" and was therefore "without the power to issue a valid order." (McAdory's Br. 52.)

That is a different claim and argument than that which McAdory asserted in his petition. Arguing that a statute did not empower the circuit court to take the actions that it did is not the same as arguing that a court lacked competency to take actions that it eventually took. This Court's order granting McAdory's petition made clear that, pursuant to Wis. Stat. § (Rule) 809.62(6) that he could not raise or argue issues not set forth in the petition for review unless otherwise ordered by this Court. This Court has not authorized him to deviate from those claims raised in his petition, McAdory's competency argument is not preserved, and this Court must decline to review it.

III. Neither the Double Jeopardy Clause nor the doctrine of claim preclusion barred the circuit court from reinstating McAdory's RCS offense and the jury's guilty verdict.

Lastly, McAdory argues that reinstatement of his RCS charge after dismissal violated his right to be free from double jeopardy and was otherwise prohibited by the doctrine of claim preclusion. (McAdory's Br. 56–61.) His arguments lack merit. His successive prosecution double jeopardy challenge fails as it ignores Supreme Court precedent recognizing that reinstatement of a criminal charge for which a jury found a defendant guilty does not constitute an improper successive prosecution. His multiplicity double jeopardy challenge fares no better as he was never punished twice for the same offense or for two separate offenses contrary to the legislature's

intent. And his claim preclusion challenge fails because he was never subject to a second action which the doctrine could serve to prohibit.

A. Standards of review

This Court reviews de novo whether a defendant's conviction violates the Double Jeopardy Clause's prohibition against successive prosecutions, whether a defendant was subjected to multiplicitous punishments, and whether an action is barred by the doctrine of claim preclusion. *State v. Schultz*, 2020 WI 24, ¶ 16, 390 Wis. 2d 570, 939 N.W.2d 519 (successive prosecutions); *State v. Patterson*, 2010 WI 130, ¶ 12, 329 Wis. 2d 599, 790 N.W.2d 909 (multiplicity); *State v. Parrish*, 2002 WI App 263, ¶ 14, 258 Wis. 2d 521, 654 N.W.2d 273 (claim preclusion).

B. McAdory was not subject to successive prosecutions for the same offense following conviction or acquittal.

1. The Double Jeopardy Clause bars retrial for the same offense after an acquittal or conviction; it does not bar reinstatement of a jury's guilty verdict from an earlier trial.

"The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution guarantee the right to be free from double jeopardy." *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis. 2d 712, 896 N.W.2d 700 (footnotes omitted). This Court "view[s] these provisions as 'identical in scope and purpose' and therefore accept[s] the 'decisions of the United States Supreme Court as controlling interpretations of the double jeopardy provisions of both constitutions.'" *State v. Kelty*, 2006 WI 101, ¶ 15, 294 Wis. 2d 62, 716 N.W.2d 886 (quoting *State v. Davison*, 2003 WI 89, ¶ 18, 263 Wis. 2d 145, 666 N.W.2d 1).

One of those "controlling interpretations" came in *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989), where the Supreme Court identified three protections afforded by the Double Jeopardy Clause: "protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992) (citing *Pearce*, 395 U.S. at 717).

Another of those "controlling interpretations," which was announced almost a half-century ago and reaffirmed just earlier this year, observed that the "controlling constitutional principle" of the Double Jeopardy Clause "focuses on prohibitions against multiple trials." *McElrath v. Georgia*, 601 U.S. 87, 93 (2024) (citation omitted); *United States v. Wilson*, 420 U.S. 332, 346 (1975), *overruled on other grounds by United States v. Scott*, 437 U.S. 82, 94–101 (1978). To that end, the Supreme Court has explained, "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by *being again tried or sentenced for the same offense*." *Wilson*, 420 U.S. at 343 (emphasis added).

Conversely, where there is no risk of successive trials for the same offense, *Wilson* teaches that the reinstatement of a jury's guilty verdict from an earlier trial—or at least an appeal by the State seeking the reinstatement of a guilty verdict dismissed by court following trial—does not violate a defendant's right to be free from double jeopardy as doing so would not subject him to a second trial for the same offense. *Id.* at 353. Courts across the country have echoed the same, often after a jury returns a guilty verdict that is set aside by the court after the verdict was received. *See, e.g.*, *Maupin v. Commonwealth*, 542 S.W.3d 926, 931 (Ky. 2018); *State v.*

Rincon, 700 So. 2d 412, 414 (Fla. Dist. Ct. App. 1997); *State v. Schaub*, 832 S.W.2d 843, 846 (Ark. 1992).

2. McAdory's successive prosecution claim fails as he was not tried a second time for the same offense.

Assuming this Court stays true to its own established practice of accepting "decisions of the United States Supreme Court as controlling interpretations of the double jeopardy provisions of both constitutions," *Kelty*, 294 Wis. 2d 62, ¶ 15, it should hold McAdory's right to be free from double jeopardy was not violated by reinstatement of the RCS verdict because it did not subject him to any risk of a second trial for that same offense. *Wilson*, 420 U.S. at 353.

To begin, the parties agree that "[t]here can be no good-faith argument that Mr. McAdory was not placed in jeopardy on the RCS charge during the 2019 jury trial." (McAdory's Br. 56.) The State never disputed that point, (R. 268:8–9; State's Ct. App. Br. 21), nor could it. "[J]eopardy attaches when 'an accused has been subjected to the risk of conviction'" for an offense, *State v. Killian*, 2023 WI 52, ¶ 25, 408 Wis. 2d 92, 991 N.W.2d 387 (citation omitted), and McAdory was clearly "subjected to the risk of conviction" of his RCS offense at the trial where the jury found him guilty of that charge.

Nevertheless, to succeed on his double jeopardy claim, McAdory also had to show that he was placed in jeopardy a second time for that RCS offense, which he failed to do. Again, the "controlling constitutional principle" at play is preventing "multiple trials." *McElrath*, 601 U.S. at 93 (citation omitted). McAdory was not subject to multiple trials. The jury found McAdory guilty of the RCS offense at his only trial, and entering judgment on the jury's verdict did not constitute another "trial" supporting a double jeopardy claim. *Wilson*, 420 U.S. at 353.

Admittedly, things would be very different if McAdory's trial had ended prematurely before the jury could deliberate. For example, had both parties rested their cases at the end of trial, only for the circuit court to order a directed verdict for McAdory's RCS charge, the State would get no second chance to present additional evidence and shore up its case. *Smith v. Massachusetts*, 543 U.S. 462, 473–74 (2005). But that is not what happened; the jury deliberated, it found McAdory guilty of his RCS charge, and neither the court nor the jury found that the State failed to meet it burden on the RCS charge.

Simply put, McAdory received that which the Double Jeopardy Clause guaranteed to him: the "valued right to have his trial completed by a particular tribunal." *State v. Seefeldt*, 2003 WI 47, ¶ 16, 261 Wis. 2d 383, 661 N.W.2d 882 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Since he was never subject to a second trial for the same offense following a conviction or acquittal, his successive-prosecution claim fails.

McAdory disagrees, but his counterarguments should not persuade. First, he insists that he "was indeed placed in jeopardy twice for the same offense" because the circuit court, having already entered judgment and sentence on his RCS charge, expressed its intent to schedule his OWI charge for trial as ordered in *McAdory I*. (McAdory's Br. 56–57.)

There are two obvious problems with that argument. First and foremost, as just explained, McAdory only had one trial in this case, so he could not prove that he was tried a second time for the same offense after conviction or acquittal. *See supra* pp. 35–36. Secondly, even if the State proceeded to trial a second time on the OWI charge, that still would not have violated McAdory's right to be free from successive prosecutions because he asked for a new trial on the OWI charge in *McAdory I*. *State v. Detco, Inc.*, 66 Wis. 2d 95, 104, 223 N.W.2d 859 (1974) ("Where a defendant asks for and receives a new trial, he cannot argue that the [D]ouble [J]eopardy [C]lause bars the second trial."). In short, McAdory

had only one trial, and nothing about the circuit court's calendaring changes that.

Next, McAdory insists that reviving his RCS charge and the jury's verdict following *McAdory I*—what he describes as "'[s]wapping' bases of conviction after appeal"—improperly "induced" him to believe he would face no further prosecution or penalty for the RCS offense and undermined the Double Jeopardy Clause's "guarantee[ ] 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." (McAdory's Br. 58 (quoting *Blueford v. Arkansas*, 566 U.S. 599, 605 (2012)).)

The problem with that argument is that it confuses the actual protections guaranteed by the Double Jeopardy Clause with the interests they are meant to serve. Just because a criminal defendant might believe that the State intended to permanently dismiss his case does not mean an unanticipated future prosecution will violate his rights under the Double Jeopardy Clause. Indeed, neither this Court nor the Supreme Court has proclaimed that a criminal defendant holds a right to be free from the embarrassment, expense, and insecurity that comes with a prosecution he did not expect but that did not subject him to unlawful successive prosecutions. At the end of the day, McAdory offers no authority recognizing a double jeopardy protection from stress and anxiety brought on by criminal prosecution for charges that did not result in a conviction or acquittal at a prior trial.

McAdory's policy arguments should not lead this Court to doubt that conclusion. He complains as though it were unpredictable that the State, compelled by binding precedent to dismiss either his OWI or RCS charge despite convincing a jury that he was guilty of both offenses, would someday seek to reinstate the dismissed RCS charge and guilty verdict if he successfully disrupted his OWI conviction during his direct

appeal. (McAdory's Br. 58.) Not only does the record fail to substantiate that self-serving claim, but it simply defies logic.

McAdory did not testify or present any evidence signifying his belief that he would never face any future consequences of the jury's RCS charge verdict if he successfully appealed his OWI conviction. Even if he had, his testimony would have been incredible. Just as a defendant who successfully moves to withdraw his guilty plea cannot pretend to be blindsided when his request results in revival of charges dismissed pursuant to plea agreement, McAdory cannot now feign surprise that the State, compelled to dismiss one of his driving charges despite convincing the jury that he was guilty of both, would seek to have judgment entered on the jury's verdict for his RCS charge if he were to disturb his OWI conviction during his direct appeal.

Finally, McAdory appears to argue that his right to be free from double jeopardy was violated because the dismissal of his RCS charge at his initial sentencing hearing occurred after his trial and was, therefore, with prejudice. (McAdory's Br. 59.) The court of appeals made short shrift of that claim and for good reason: while a dismissal with prejudice may have prevented refiling charges against him, that did not happen here. *McAdory*, 412 Wis. 2d 112, ¶ 45. McAdory fails to develop his argument any more now than he did below, instead deflecting to a claim preclusion argument which, as the State explains below, is meritless. *See infra* pp. 41–42. This Court should reject his dismissal-with-prejudice claim as undeveloped. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

In sum, under prevailing United States Supreme Court precedent, reinstatement of McAdory's RCS charge and the jury's guilty verdict did not subject him to improper successive prosecutions for the same offense after conviction or acquittal, and his double jeopardy claim therefore fails.

C. McAdory was not subject to multiplicitous punishments.

1. Multiplicity arises when a defendant receives multiple punishments either for offenses that are identical in law and fact or for distinct offenses if the legislature did not intend for cumulative punishments.

Again, besides the protection against successive trials for the same offense, a criminal defendant is also protected from multiple punishments for the same offense. *Pearce*, 395 U.S. at 717; *Sauceda*, 168 Wis. 2d at 492. That protection is often characterized as one against multiplicity, which arises when a defendant is convicted and punished in more than one count for offenses that the Legislature did not intend cumulative punishments. *Davison*, 263 Wis. 2d 145, ¶¶ 34–46.

However, this Court already decided that the statutory structure of Wis. Stat. § 940.25(1)(c) (1982), which largely mirrored the current language of Wis. Stat. § 346.63(1)(c), obviates multiplicity concerns because the statute permits just one conviction and sentence regardless of the charges brought by the State. *Bohacheff*, 114 Wis. 2d at 405. This is consistent with the Supreme Court's recognition that the Constitution does not bar *trying* a defendant for potentially multiplicitous offenses: "[w]hile the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent[s] for such multiple offenses in a single prosecution." *Ohio v. Johnson*, 467 U.S. 493, 500 (1984).

2. McAdory's multiplicity claim is both undeveloped and meritless as he never suffered cumulative punishments.

It is unclear whether McAdory means to challenge the post-*McAdory I* reinstatement of his RCS charge and jury's guilty verdict on multiplicity grounds. Although he cites *State v. Lechner*, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), to define multiplicity and *Bohacheff* for this Court's recognition that the legislature did not intend for a motorist to suffer multiple punishments if found guilty of more than one OWI, RCS, or PAC charge arising from the same incident, he does not argue that he ever suffered multiple punishments contrary to the legislature's intent. (McAdory's Br. 56–57.)

Instead of developing his multiplicity claim, McAdory pivots to a distinct successive-prosecution double jeopardy claim concerning the circuit court's willingness to place his OWI charge on the trial calendar after it had reinstated his RCS charge. (McAdory's Br. 57.) But those are two different claims, and McAdory does not try to show how, under the facts of his case, entering judgment and imposing sentence upon his RCS charge after his OWI conviction and sentence were vacated resulted in multiplicative punishments. To the extent McAdory means to pursue a standalone multiplicity claim, this Court should reject it as undeveloped. *Pettit*, 171 Wis. 2d at 646–47.

Even on its merits, McAdory's undeveloped multiplicity claim otherwise fails. Again, the prohibition at issue is one of multiplicitous *punishments*, not charges. *Johnson*, 467 U.S. at 500. While the State concedes that Wis. Stat. § 346.63(1)(c) reveals the legislature's wish for a motorist to suffer only one conviction and punishment regardless of whether he or she was found guilty of both an OWI and RCS offense at trial, at no time was McAdory punished for both his OWI and RCS offenses. His OWI conviction and sentence were vacated in *McAdory I*, and that charge remained dismissed once he was

convicted of the RCS charge thereafter. Simply put, to the extent that McAdory intends to bring a multiplicity challenge, it is meritless, and this Court should reject it.

D. The doctrine of claim preclusion did not bar reinstatement of McAdory's RCS charge and the jury's guilty verdict.

1. The doctrine of claim preclusion bars subsequent actions premised upon matters that were previously litigated or that could have been litigated in an earlier action.

"Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties or their privies involving all matters litigated, and all matters that could have been litigated, in the proceeding leading to the judgment." *Parrish*, 258 Wis. 2d 521, ¶ 14. In other words, the doctrine provides that "a final judgment bars the *relitigation* of a factual or legal issue that actually was litigated and decided in the earlier action." *Id.* (emphasis added). However, the doctrine applies only when three requirements are met: "(1) both the prior action and the challenged action have the same parties; (2) both the prior action and the challenged action have the same causes of action; and (3) the prior action resulted in a final judgment on the merits in a court of competent jurisdiction." *Id*. ¶ 15.

2. Claim preclusion has no application in McAdory's case.

McAdory's invocation of the doctrine of claim preclusion is confusing. While he correctly identifies the prerequisites of the doctrine—namely an identity between parties, an identity between causes of action in two suits, and a final judgment on the merits in a court of competent jurisdiction, (McAdory's Br. 59–60)—he seemingly overlooks what the doctrine prevents: "subsequent actions" based on matters that were already

litigated or that could have been litigated in the prior proceeding. *Parrish*, 258 Wis. 2d 521, ¶ 14.

McAdory had only one action underlying this appeal. He was prosecuted for those crimes he committed in the early morning hours of January 5, 2016, including operating a motor vehicle while intoxicated and operating a motor vehicle with a restricted controlled substance in his blood. (R. 19:1.) Unlike *State v. Miller*, 2004 WI App 117, 274 Wis. 2d 471, 683 N.W.2d 485, where the State filed a criminal complaint, later dismissed the case, and then filed a new criminal complaint against the same defendant to initiate a second "action," there were no subsequent actions or cases filed in McAdory's case.

In short, to the extent that McAdory could have invoked the claim preclusion doctrine to prevent the State from bringing a successive action against him in a later proceeding, there was no successive action for the doctrine to prevent. He faced a single prosecution in this case, and the State never pursued a second action against him. The doctrine of claim preclusion has no bearing on McAdory's case, and this Court should reject his argument as meritless.

CONCLUSION

This Court should overturn *Bastian*'s limited holding mandating dismissal of any charge brought under Wis. Stat. § 346.63(1)(c) that does not result in conviction and sentence, exercise its superintending authority to adopt the proposed alternative procedure, and affirm McAdory's judgment of conviction and the order denying postconviction relief.

Dated this 20th day of December 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,720 words.

Dated this 20th day of December 2024.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of December 2024.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS