STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 24AP79-CRLV

STATE OF WISCONSIN,

Plaintiff-Petitioner,

v.

WALTER L. JOHNSON,

Defendant-Respondent.

AMENDED RESPONSE TO PETITION FOR LEAVE TO APPEAL A NONFINAL ORDER OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

ARGUMENT

The State's petition has no reasonable likelihood of success on the merits because the State improperly attempts to raise new arguments that it failed to raise before the circuit court, fails meaningfully to engage with the substance of the circuit court's opinion, and ignores the constitutional flaws that would otherwise prove fatal to its analysis.[1]

The State's petition boldly asserts that in interpreting

[1] Respondent recognizes that this matter involves an issue of statewide importance and assumes that the remaining criteria favor review. This memorandum focuses entirely on why the State's petition demonstrates that it has no reasonable likelihood of success on the merits.

the statutory definition of "restricted controlled substance," "the circuit court created ambiguity where none exists." (Pet. 10.) The State then proceeds to ignore virtually all of the circuit court's extensive, painstaking analysis demonstrating why the State is wrong. This alone constitutes a basis for dismissal of the petition. However, by attempting to inject improper arguments it had not raised before, and by flatly ignoring the constitutional implications of its statutory argument, the State's petition should leave no doubt that dismissal is appropriate.

1. The State improperly presents arguments that it failed to assert in the circuit court.

As support for its flawed analysis, the State advances for the first time in its petition arguments that it failed to assert in the circuit court, flying in the face of long-settled case law establishing that an appellant may not raise novel arguments for the first time on appeal.[2] In fact, the State's circuit court brief all but ignored the statutory interpretation question, asserting that the issue was somehow "not ripe to be decided" despite extensive defense briefing on the subject:

> As to the defendant's "statutory misinterpretation" motion, it too

[2] *See*, *e.g.*, *State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 ("a party seeking reversal may not advance arguments on appeal which were not presented to the trial court.").

> is not ripe to be decided. The State is unsure what "misinterpretation" the defense is challenging. In his brief, the defendant references that the "State asserted" the restricted controlled substances law regulates both D and L meth. The defendant further references the "State's preferred reading" of the statute. It is the State's opinion that the State's opinion doesn't matter in this case. It is the Court's decisions that matter.
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> So far the only decision the Court has made regarding the statutory interpretation of Wis. Stat. 340.01(50m) is its denial of the defendant's Franks/Mann motion. (Doc. 55). The Court has not engaged in any interpretation (mis or not) since. The defense motion regarding statutory interpretation seems better suited for a Motion for Reconsideration of the Court's prior decision. That is not how it was pled in the defendant's motion and I am not going to respond to a hypothetical motion. Perhaps the defendant is asking for a jury instruction, however, I cannot tell. This motion regarding statutory interpretation is very unclear and the State is unable to tell what it is the defendant wants the Court to do.

(Pet.-App. 64-65.) Evidently the State saw no need to address the statutory interpretation question in the circuit court because it believed it had no obligation to do so.

The State's petition also attempts to develop its statutory interpretation argument based on a case—*State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 267 N.W. 2d 285 (1978)—that it never cited or discussed in the circuit court proceedings. (*See* Pet. 12-14; Pet.-App. 54-65.) The State had every opportunity to discuss *Huser* in its trial brief, yet it failed even to mention the case. (*See*, *generally*, Pet.-App. 54-65.) The Court should reject the State's attempt to use this petition to assert arguments that it failed to make to the circuit court.

Appellate courts strive to avoid reversals that

"blindside" trial courts based on theories or arguments that did not originate in their forum. *State v. Roger*s, 196 Wis. 2d 817, 821, 539 N.W.2d 897, 898 (Ct. App. 1995). Appellate courts "will typically reject arguments raised [by appellants] for the first time on appeal." *Id*. The forfeiture rule is "not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *State v. Huebner*, 2000 WI 59, ¶ 11, 235 Wis. 2d 486, 611 N.W.2d 727. The rule promotes both efficiency and fairness, and "goes to the heart of the common law tradition and the adversary system." *Id*. "By forcing parties to make all of their arguments to the trial court, it prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal (or on remand) should their original idea not win favor." *Rogers*, 196 Wis. 2d at 821.

The forfeiture rule focuses on whether specific arguments have been preserved, not on whether general issues were raised before the circuit court. An appellant "must articulate each of its theories to the trial court to preserve its right to appeal." *Id*. at 829. *Rogers* makes clear that the forfeiture rule requires that, to preserve its right to appeal, an

appellant must "make all of its arguments to the trial court." *See id*. at 827 (emphasis added).

The Wisconsin Supreme Court has clearly set forth the importance of applying the forfeiture rule in promoting efficient and fair litigation:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612 (citations omitted). There is no reason to dismiss these factors in this case.

The reasons for the forfeiture rule outlined by the supreme court in *Ndina* all apply with full force here: 1) the State's failure to make all of its material arguments to the circuit court deprived both the circuit court and the defense of a fair opportunity to address them, 2) a diligent attorney would have litigated the statutory interpretation argument in the circuit court, and ordering reversal based on arguments developed first on appeal would undermine judicial efficiency and sanction the State's failures, and 3) allowing the State to

develop its statutory interpretation argument for the first time on appeal would sandbag the defense and blindside the circuit court by advocating for reversal based on an argument that the State for whatever reason failed to when it should have.

Allowing the State to litigate issues that it did not raise earlier would be fundamentally unfair to the circuit court and to the defense, and it would sanction the State's failure to raise the issue when it clearly should have as it martialed its best evidence and arguments in litigating the circuit court motion. Reversing the circuit court's order would give an aggrieved party a right to relitigate a decision simply by injecting a new argument into the case that the party should have made prior to the adverse decision.

2. The State's argument fails to engage meaningfully with the circuit court's exhaustive opinion demonstrating why the statutory definitions at issue are ambiguous.

The State attempts to overturn the circuit court's carefully reasoned decision and replace it with a simplistic gloss, devoid of context, which it did not even bother to present to the circuit court when it had that opportunity. Beyond that, the State's petition fails almost entirely to grapple with the complicated set of factors set forth in the circuit court's opinion

that show that the definition of a "restricted controlled substance" does not—and indeed cannot—include *l*-methamphetamine, a lawful product available without a prescription to the public. Having failed to address the merits of the circuit court's opinion, the petition provides no reasonable basis for reversal.

The State's petition fails to rebut any of the circuit court's detailed, exhaustive analysis showing that the term "restricted controlled substance" within the meaning of sections 940.09(1)(am) (Count 1) and 346.63(2)(a)3 (Count 3) is ambiguous when read in connection with closely related statutes. (Pet.-App. 26.) In fact, the State's entire legal argument cites the circuit court's 22-page opinion only once, when making a passing reference to the undisputed fact that the controlled substances board has no authority to regulate *l*-methamphetamine. (Pet. 11.) The petition otherwise fails to address the many ways in which the circuit court might have responded to the arguments the State now attempts to raise. The State's failure to address the circuit court's opinion in any meaningful way clearly shows that the State has a substantial likelihood of failure on the merits, and this Court should dismiss its petition.

As a threshold matter, accepting the State's claim that the definition of "restricted controlled substance" unambiguously includes lawful *l*-methamphetamine would require this Court to conclude that the circuit court's conclusion—that another reasonable interpretation exists—is itself unreasonable. Ambiguity requires that a given term be susceptible to two or more reasonable interpretations by "well-informed" persons. (Pet.-App. 23.) The circuit court found this to be the case—that a well-informed reader could reasonably conclude that the statutory definition of "restricted controlled substance" at once either includes or excludes *l*-methamphetamine. (Pet.-App. 26.) The circuit court's opinion thoroughly addresses why it believes that both interpretations are reasonable. (*See* Pet.-App. 21-27.) Presumably the State does not contend that the circuit court is poorly informed. The question for this Court must therefore be, "is this well-informed court's belief unreasonable?" Clearly it is not.

The State's petition asserts that "methamphetamine is not further defined in Wis. Stat. §§ 340.01(50m) or 967.005(1m)(b)."[3] (Pet. 10.) It then looks to the definition of

[3] The State's petition cites section 967.005(1m)(b), which neither of the parties raised in their briefs, nor did the circuit court address it because it

methamphetamine found in section 961.16(5)(a)-(b), which defines methamphetamine to include any of its isomers. What the State fails to mention, and which the circuit court explained in its opinion, is that section 340.01(9m) of the Motor Vehicle Code obviously complicates this analysis. (Pet.-App. 23.) That provision, which applies to offenses under chapter 346, states that a "controlled substance" has the same meaning as that term is used in section 961.01(4). Wis. Stat. § 340.01(9m). Section 961.01(4) in turn hinges on whether the substance is included in schedules I to V of subchapter II. (Pet.-App. 24.) Put another way, the definition of "controlled substance" depends on

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is largely irrelevant here. Section 967.055 is a procedural statute that places unique restrictions on the disposition of alcohol and drug related motor vehicle operating offenses. However, taking a closer look at this statute reveals that it too is ambiguous. According to the State, under the blanket definition of "methamphetamine" in section 967.005(1m)(b), *l*-methamphetamine is a "restricted controlled substance." This claim, however, does not end the inquiry.

Under Wis. Stat. § 967.005(1m)(a), which the State fails to mention, *l*-methamphetamine would also constitute a "drug" (i.e. not a "restricted controlled substance"). That paragraph hinges the definition of "drug" on section 450.01(10), which would include *l*-methamphetamine. As discussed in greater detail below, the circuit court's opinion notes that under 450.01(10), *l*-methamphetamine constitutes a "drug, a non-prescription drug product that is not a controlled substance that is regulated under the Motor Vehicle Code when it renders a person incapable of safely driving." (Pet.-App. 25.)

Under the State's erroneous reading of this specific statute, *l*-methamphetamine would therefore fall under two mutually exclusive definitions. It would at once be both a restricted controlled substance and a nonrestricted, over-the-counter "drug." In citing this statute, the State's petition paints a picture of definitional clarity when barely scratching the surface reveals that no such clarity can be found.

whether the substance is in fact a scheduled substance.

Because *l*-methamphetamine is not a scheduled substance under federal law, it cannot be scheduled under Wisconsin law. (Pet.-App. 24-25.) Therefore, even if Wisconsin's definition under Schedule II purports to include any methamphetamine isomer, *l*-methamphetamine is not and cannot be included in Schedule II because federal law preempts Wisconsin law to the extent that the federal government has de-scheduled *l*-methamphetamine. (*Id*.) Not only does the Supremacy Clause demand this result,[4] but the same conclusion also follows directly from a plain reading of section 961.11(6)(a), which necessarily yields to the federal government when it de-schedules any substance. (*Id*.) The circuit court's opinion discusses these points in detail. (*Id*.) The State's circuit court brief and petition ignore them.

This set of unique and complex circumstances also

[4] For example, the Federal Controlled Substances Act provides in part:

> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." 21 USC sec 903 (emphasis added).

shows why the State is incorrect when it improperly attempts to cite *Huser* in support of its argument. (Pet. 12.) In this case, by contrast, *l*-methamphetamine was at one point scheduled but evidently was later de-scheduled by the federal government. It therefore is now excluded from Schedule II by operation of subsequent developments in federal law and by section 961.11(6)(a). (*See* Pet.-App. 23-25.) These circumstances render any vestigial language purporting to include a federally de-scheduled substance null and void. Wisconsin simply has no authority to include within its Schedule II definitions any substance that has been de-scheduled federally. This remains true regardless of whether the Wisconsin Legislature or the controlled substances board have codified this compulsory exclusion.

Beyond these considerations, the circuit court correctly observed that reading other closely related provisions consistent with the State's interpretation would lead to absurd results. For example, such a reading would grant an affirmative defense to motorists alleged to have methamphetamine in their blood, but only to those who had a prescription. Motorists having a detectible amount of methamphetamine derived instead from non-prescription, over the counter products,

which are categorically less susceptible to abuse, would inexplicably be left without recourse:

> Other statutory context adds to the lack of clarity. Specifically, § 346.63(1)(d) provides an affirmative defense to an allegation of having a detectable amount of methamphetamine in the blood. This defense renders a defendant not guilty if they prove by a preponderance of the evidence that at the time of the incident, they had a valid prescription for methamphetamine or one of its metabolic precursors. If the purpose of the prohibition is to prohibit driving with any detectable amount of any form of methamphetamine irrespective of its legality, permitting a defense for a legal prescription but not for a legal, over the counter, substance is not logical.

(Pet.-App. 25.) The State has given no reason to believe the circuit court's conclusion here is unreasonable. The circuit court's clear, logical analysis demonstrates that the State's position would lead to absurd results, but the State's petition flatly ignores these inconvenient contradictions.

Finally, as the circuit court has demonstrated, there is a plain reading of these interrelated statutes that would expressly exclude *l*-methamphetamine from the definition of "methamphetamine":

> The Motor Vehicle Code prohibits operating under the influence of any drug to a degree which renders a person incapable of safely driving. Wis. Stat. § 346.63(a). The Motor Vehicle Code defines "drug" in § 340.01(15mm) as having the meaning specified in § 450.01(10)(b). That statute defines a "drug" as "Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or other animals." *L*-methamphetamine would therefore be categorized as a non-prescription drug product under § 450.01(13m) which provides that a "'Nonprescription drug product' means any nonnarcotic drug product which may be sold without a prescription order and which is prepackaged for use by consumers and labeled in accordance with the requirements of state and

> federal law." Thus, *l*-methamphetamine is a drug, a non-prescription drug product that is not a controlled substance that is regulated under the Motor Vehicle Code when it renders a person incapable of safely driving.
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> Looking at plain-reading another way, the common name of *l*-methamphetamine was changed in the United States at some unknown time, seemingly to avoid confusion in its kinship to illegal methamphetamine. The common name of *l*-methamphetamine is "levmetamfetamine" as identified in 21 CFR § 1308.22. On a very plain-reading, perhaps *l*-methamphetamine is unambiguously not methamphetamine as the word is spelled and used in ch. 340.

(Pet.-App. 26.) Thus, as the circuit court explains, a plain reading of different but related statutes finds *l*-methamphetamine instead to be a "drug," which categorically excludes it as a "restricted controlled substance." (Pet.-App. 25-26.) As the circuit court reasonably concluded, it cannot be both. (Pet.-App. 25.) It would be helpful to know why the State asserts that the circuit court's analysis somehow unreasonable,[5] but the petition scarcely discusses the merits of the circuit court's opinion. Speculation cannot serve as a substitute for the circuit court's well-developed, reasoned analysis.

3. Setting aside the State's failure to address the circuit court's statutory interpretation analysis, the State also fails to explain why its interpretation would somehow survive a constitutional challenge, as the defense argued in

[5] Setting aside the State's superficial and undeveloped argument regarding policy considerations, which the circuit court implicitly addressed in its analysis despite the State's failure to raise it below. (*See* Pet. 14; Pet.-App. 25.)

its circuit court briefing.

Although the circuit court properly declined to reach the constitutional questions raised by the State's incorrect reading of the statutes, having concluded the language is ambiguous, the State's failure to address them here or in the circuit court leaves these dispositive arguments unchallenged. (See Pet.-App. 49-52.) Mr. Johnson's principal trial brief articulated in detail significant constitutional problems with the State's proposed interpretation, which violates both substantive due process and equal protection rights guaranteed by the United States and Wisconsin constitutions. (*Id*.) The State has not attempted to address these constitutional problems.

As argued in greater detail in the principal defense brief, there is no rational basis for imposing criminal liability for operating a motor vehicle with a detectable amount of a perfectly legal and non-impairing substance such as *l*-methamphetamine but failing to do so with respect to many other over the counter substances. (Pet.-App. 50.) It would be fundamentally unfair for the government to allow the sale, purchase and use of *l*-methamphetamine without a prescription, but then punish that conduct if it is combined with driving regardless of impairment. (*Id*.) None of the typical

considerations that might justify a zero-tolerance approach to restricted controlled substances apply to *l*-methamphetamine. (*Id*.) By failing to challenge these arguments in the circuit court, the State has no basis to refute them now.

As to its equal protection challenge, the defense brief argued that the State's statutory interpretation fails the test for equal protection because it punishes non-abusive use of one lawful and non-impairing substance and then driving, and yet does not punish non-abusive use of another lawful, non-impairing (unless abused) substance and then driving. There is no conceivable basis to believe the State's purported distinction between motorists who use, for example, lawful products containing dextromethorphan (indisputably not a "restricted controlled substance" but which can cause impairment when misused) on the one hand, and those who use *l*-methamphetamine products on the other, is rationally related to the legislative purpose of more efficiently detecting and removing impaired drivers from the road to improve public safety. *See, e.g., State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977). As with the due process challenge, the State has made no attempt to contest these equal protection arguments.

CONCLUSION

One can see how the complex interplay of these statutes by their express terms, and by operation of federal law, at the very least renders the word "methamphetamine" ambiguous when it comes to *l*-methamphetamine. That is what the circuit court also concluded, after an extensive discussion of these various considerations. The State's failure to raise its arguments before the circuit court, to address the substance of the circuit court's decision, or to grapple with the constitutional infirmities implicated by the State's interpretation, shows that the State has no substantial likelihood of success on the merits. Accordingly, the Court should dismiss the petition.

Respectfully submitted on March 13, 2024.

Electronically signed by:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ (Rule) 809.50(2) and (4) for a response to a petition with a proportional serif font. The length of this brief is 3,466 words.

Dated March 13, 2024.

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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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated March 13, 2024.

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