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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2024AP79-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

-vs.-

WALTER L. JOHNSON,
Defendant-Respondent.

**ON APPEAL FROM A PRETRIAL ORDER ENTERED IN DANE COUNTY CIRCUIT
COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING.
DANE COUNTY CASE NO. 2021CF1178**

DEFENDANTS-RESPONDENT’S BRIEF

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Statement of the Issue

Background

The circuit court found that the form of methamphetamine contained in over-the-counter Vicks Vapo inhalers was not a restricted controlled substance under Wis. Stat. § 340.01(50m)(d). This State's appeal would ask this Court to reverse and find the use of nasal spray combined with driving to be illegal under Wisconsin law. Doing so is not only contrary to the legislature's intent in drafting the restricted controlled substance act, it would render the law nonsensical and lead to unconstitutional results.

Issue presented

Did the circuit court rightly determine that § 340.01(50m)(d) does not restrict the presence of l-methamphetamine in blood while operating a motor vehicle in Wisconsin?

Statement on Oral Argument and Publication

Johnson does not request oral argument or publication. This case involves the application of well-settled law to the facts, which the briefs will adequately address.

Statement of the Case

On a Friday afternoon in September of 2020 Johnson was taking his daughter to the East Towne Mall. (R.2:4.) The complaint relates that Johnson recalled to officers a BMW pulling up next to his car at a stop light and a person in the BMW brandishing a gun. (*Id.*) Johnson attempted to get away from the BMW and had to swerve to avoid a motorcycle. (*Id.*) In the process, Johnson was involved in a horrible crash that tragically took the life of his daughter. (*Id.*)

The State charged Johnson, among other things, with homicide by vehicle – use of a restricted controlled substance, and operating with a restricted controlled substance in blood causing injury. (*Id.* at 1.) The alleged restricted controlled

substance was based off a report from the Wisconsin State Laboratory of Hygiene that found the presence of “Methamphetamine” and its metabolite, “Amphetamine,” in a sample of Johnson’s blood that was drawn on the day of the crash. (R.13, 61.)

The Defense made a number of challenges to the counts containing the “restricted controlled substance” modifier. (See R.41, 47, 89, 101, 110.) In the first motion Johnson asserted “that he has from time to time used numerous products for relief from sinus difficulties, including [. . .] Vicks© Vapoinhalers, and the generic equivalents thereof, and that on or around September 4, 2020, he was using one or more of those products.” (R.41:5.) In response, the State amended the charges to include First Degree Reckless Homicide. (R.35.)

Three evidentiary hearings were held by the circuit court in which representatives of the Wisconsin State Laboratory of Hygiene testified as well as an expert on forensic toxicology and drug identification. (R.78, 88, 100.) At those hearings all experts agreed that methamphetamine has two “stereoisomers” that have a similar chemical structure but are arranged differently and have very different effects on people when ingested. (R.78:27-28, 62; R.88:22.) The two forms are referred to as *d*-methamphetamine and *l*-methamphetamine (“*d*-meth” and “*l*-meth” are used below), the “*d*-” form existing in the illicit drug commonly referred to as “meth,” and “*l*-” form existing in legal, over the counter nasal spray. (R.78:28-30, 75-76; R.88:22.) *L*-meth has been detected in blood in the clinical setting for individuals who used the nasal spray in a case report from 2005 as well as studies from 2008 and 2015. (R.63, 65, 69.) Testimony confirmed that there are at least two methods for differentiating the type of methamphetamine found in a blood sample to determine if it is *d*-, the illicit form, or *l*-meth, the legal form. (R.78:33-34, 63-64, 127; R.88:30-33, see also R.68.) The Wisconsin State Laboratory of Hygiene does not employ any method to determine if the methamphetamine found in a sample is the *d*- form or *l*- form. (R.78:34; R.88:39-41.)

After additional briefing, the circuit court issued a ruling denying the defense’s motion to dismiss counts one and three. (R.111:1.) In the decision the court found that Johnson had failed to establish that the State acted in bad faith or in an attempt to suppress exculpatory evidence when it destroyed his blood sample before it could be tested for whether the methamphetamine was of the *d*- or *l*- variety. (*Id.* at 6-12.) However the court also found that *l*-meth was not a restricted controlled substance under Wis. Stat. § 340.01(50m)(d) and so the State would have the burden of

proving at trial that the methamphetamine present in Johnson's blood at the time at issue was in fact d-meth and *not* l-meth. (R.111:12-22.)

The State said it best when, before the defense's motion hearing, it commented: "I'm not sure if the issues in this case are that complex that it is going to take that long for this to be decided at this point. [. . .] I can't imagine it will result in any interlocutory relief for the defense or the State." (R.78:9.) And yet the State appealed the nonfinal order of the circuit court and now seeks review of the decision clarifying l-meth as not a restricted controlled substance under § 340.01(50m)(d). (R.116.)

The issue before this Court is straightforward, the circuit court got it right with its decision, and this Court should affirm.

Summary of the Argument

The trial court was right: l-meth, a compound found in legal, over the counter medication, that does not impair driving unless ingested in enormous quantities, and that is specifically delineated in Federal law as *not* a scheduled, controlled substance, is not a restricted controlled substance under Wis. Stat. § 340.01(50m)(d).

Well-established law combined with the briefs and evidence adduced at the hearings correctly establish that Wis. Stat. § 340.01(50m)(d) was never meant to include l-meth as a restricted controlled substance. This Court should reach the same conclusion here and affirm.

But the court's decision is the right result for another reason, too. In addition to not appropriately fitting as a controlled substance under Wisconsin law, if l-meth were to be included in § 340.01(50m)(d) the result would be unconstitutional as applied to Johnson. Under that unconstitutional as applied theory, the trial court could also have come to the conclusion that the State's argument fails, offering this Court an alternate path to affirmance. Though the constitutional issue cannot be a basis for reversal, since it was not decided by the circuit court, it could be the basis for affirmance.

Either way, this Court should affirm the circuit court's order.

Argument

I. The State ‘s arguments are weakened by their declining to make them before the circuit court.

The State here saw no need to address the statutory interpretation question in the circuit court. (*See* R.109:11.) When given the opportunity to argue that l-meth was included in Wis. Stat. § 340.01(50m)(d), the State refused to do so. (*See id.*) claiming “it too is not ripe.” *See also* R.78:9 (“There is really one novel issue before the Court and it is not even that novel. It is a spoliation issue.”); R.88:8-10, 14-16.) The State should not be allowed to change its mind now that it is unhappy with a decision on an issue it failed to argue. The majority of the State’s brief makes arguments that were not made below.

“A party seeking reversal may not advance arguments on appeal which were not presented to the trial court.” *State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Wis. App. 1995). Appellate courts strive to avoid reversals that “blindsides” trial courts based on theories or arguments that did not originate in their forum. *State v. Rogers* at 828. 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 828.

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).

The reasons for the forfeiture rule outlined by the supreme court in *Ndina* all apply with full force here to the State’s attempt at interpreting Wis. Stat. § 340.01(50m)(d) : 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 sandbags the defense and blindsides the circuit court by advocating for reversal based on an argument that the State 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 in litigating the circuit court motions. 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.

II. L-methamphetamine is not a restricted controlled substance under the Motor Vehicle Code.

In order to ascertain the meaning of Wisconsin’s restricted controlled substance law we must consider the context of its statutory provisions and definitions. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶48, 271 Wis. 2d 633, 681 N.W.2d 110 (Wis. 2004). This ends up being a circuitous process, which requires

following statutory references from the Motor Vehicle Code to the Criminal Uniform Controlled Substances Act and ultimately to the Federal Code. It is a confusing path beset with sometimes poor drafting, and any confusion that emerges below is a valid response. Indeed that should be the take away of this analysis: The laws surrounding restricted controlled substances are not as straightforward or simple as the State suggests.

Let us begin with Wis. Stat. § 346.63(1)(a) and (am) which sets forth that:

(1) No person may drive or operate a motor vehicle while: (a) [. . .] under the influence of any other drug to a degree which renders him or her incapable of safely driving [. . .]; or (am) The person has a detectable amount of a restricted controlled substance in his or her blood.

The Motor Vehicle Code appears to identify methamphetamine as a restricted controlled substance under the definitions of Wis. Stat. § 340.01(50m)(d). But evidence elicited at the hearings before the circuit court established that there are at least two different forms of methamphetamine: here referred to as *l-meth* and *d-meth* for short. (R.78:28-30, 75-76; R.88:22.)

A. The plain meaning of § 340(50m)(d) manifests ambiguity.

As mentioned above, “scope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶48, 271 Wis. 2d 633, 681 N.W.2d 110 (Wis. 2004). As stated in *Kalal*:

Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. 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. at 46 citing *State v. Delaney*, 2003 WI 9, ¶ 13, 259 Wis. 2d 77, 658 N.W.2d 416; *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 16, 245 Wis. 2d 1, 628 N.W.2d 893; *Seider v. O’Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659.

Therefore the definition contained in Wis. Stat. § 340.01(50m)(d) cannot be read in isolation, but must be considered within the context of the Wisconsin Statutes to which it relates.

First looking directly above (50m)(d) to another, related definition is Wis. Stat. § 340.01(9m) which defines “controlled substance” as having the meaning given in § 961.01(4). § 961.01(4) states “a drug, substance or immediate precursor included in schedules I to V of subch. II.” Moving then to Chapter 961 is the Uniform Controlled Substances Act and under its provisions “Methamphetamine” is listed under sub (5) Stimulants, of Schedule II. Wis. Stat. § 961.16(5)(b).

However, again looking to the context of the plain language of now the 961 statute, the prefatory language to § 961.16 states: “Unless specifically excepted by state or federal law or regulation [. . .] the following controlled substances are listed in schedule II.” Wis. Stat. § 961.16. And under the “Authority to control” section: “The controlled substances board shall not have authority to control a nonnarcotic substance if the substance may, under the federal food, drug and cosmetic act and the laws of this state, be lawfully sold over the counter without a prescription.” Wis. Stat. § 961.11(6)(a). As the circuit court decision highlighted: “Wisconsin regulation of controlled substances explicitly yields to federal regulation.” (R.111:15.)

The code of Federal Regulation explicitly excludes the relevant form of l-meth at issue in this case. *See* 21 CFR § 1308.22:

The following nonnarcotic substances which may, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301), be lawfully sold over the counter without a prescription, are excluded from all schedules pursuant to § 201(g)(1) of the Act (21 U.S.C. § 811(g)(1)):

Company - Aphenia Pharma Solutions – New York, LLC
Trade name - Nasal Decongestant Inhaler/Vapor Inhaler
Form - IN
Controlled Substance - *Levmetamfetamine* (1-Desoxyephedrine)
(mg or mg/ml) – 50.00

[. . .]

Company – Procter & Gamble Co., The
Trade name – Vicks VapoInhaler
NDC code – 37000-686-01
Form – IN

Controlled substance - *Levmetamfetamine* (1-Desoxyephedrine)
(mg or mg/ml) – 50.00

(*Emphasis added.*) As such, L-meth is not a controlled substance under the Federal Drug Regulations. Therefore, the Wisconsin Uniform Controlled Substances Act, ch. 961, cannot prohibit its possession and the Wisconsin Controlled Substances Board may not regulate it. Tellingly, the substance is legally available over the counter in Wisconsin.

Moving back to the restricted controlled substances laws, Wis. Stat. § 346.63(1)(d) provides an affirmative defense to operating under the influence of a controlled substance if a defendant “proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors.” As the circuit court noted, “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.” (R.111:16.)

If the State is arguing that only the presence of l-meth in a driver’s blood to a degree that it causes impairment is prohibited, then such a prosecution would be actionable under Wis. Stat. § 346.63(a), which prohibits operating under the influence of any drug to a degree which renders a person incapable of safely driving. L-meth would fall under the relevant definition of a nonprescription drug found at § 450.01(13m). (“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.” *Id.*)

A plain language reading of these statutes, taken together, leads to a very ambiguous conclusion: l-meth cannot be a controlled substance, since it cannot be regulated by the Wisconsin Controlled Substances Board, but the use of “methamphetamine” does not specify the different isomers when discussing restricted controlled substances. L-meth is a non-prescription drug product, but classifying it as a “restricted controlled substance” under § 340.01(50m)(d) would contravene the contextually manifest purpose of controlled substance regulation

and highway safety regulation by totally prohibiting the presence of one lawful substance in the absence of impairment.

Put simply, the State's position that l-meth is at once a "restricted controlled substance" without being a "controlled substance" is, at best, simply illogical, confusing, presenting the "absurd or unreasonable results" *Kalal* at ¶48 warns against with plain language statutory readings.

In light of the ambiguity of § 340.01(50m)(d), analysis of legislative history is needed to clarify the meaning of the statute.

B. Legislative history makes clear § 340.01(50m)(d) was not intended to include non-restricted, non-controlled substances.

2003 Wis. Act 97 established the restricted controlled substance prohibition in the Wisconsin Motor Vehicle Code. The Wisconsin Legislative Reference Bureau possess much material on the creation and adoption of the act in the form of pdf drafting files and communications. (Available at https://docs.legis.wisconsin.gov/2003/related/drafting_files/wisconsin_acts/2003_act_097_ab_458 last accessed 9-4-2024.)

As pointed out by the circuit court in its decision (R.111:18-20), the drafting file for 2003 Wis. Act 97 reflects that from the outset, the drafters of the legislation were thinking about "controlled substances" with reference to § 961. The drafting file repeatedly references the Uniform Controlled Substance Schedules used in § 961 and federal law. There is no indication of any intent to define methamphetamine differently in the Motor Vehicle Code than it is defined in the Uniform Controlled Substances Act.

In an early email from the Acts author, Representative Mark Gundrum, tells the reference bureau "I am looking to declare that operating the vehicle with any amount of illegal substance in a person's system is per se negligent" and "I just want to address the controlled substance issue." See *drafting file* (#02) AB458 sub folder, 03-0465df_pt01.pdf, at 19.

An article about the origins of the legislation underscore that it was an attempt to address a situation where death resulted from a driver with "illegal drugs" in blood. *Id.* at 21-24. Under a section discussing the support of area prosecutors

Gundrum is quoted as saying “Why in God’s name would we let someone drive a motor vehicle after ingesting any *illegal* drugs?” *Id.* at 23 (emphasis added).

The drafting file contains notes from participants at a meeting between Gundrum and representatives of the Wisconsin Laboratory of Hygiene. It appears Representative Gundrum was seeking guidance from toxicology experts to properly capture his intent in the legislation. In notes from an unknown author relating to a meeting with Representative Gundrum on March 18, 2003, the author and Representative Gundrum talked with a “Ron” from the toxicology lab. *See drafting file (#02) AB458 sub folder, 03-0465df_pt04.pdf*, at 15. The notes reflect a discussion about three types of drugs: illegal drugs, prescription drugs, and over the counter drugs. *Id.* The note defines an illegal drug as a schedule I drug or any prescription drug for which a person does not have a prescription. *Id.* The conclusory note states, “SO: IF Rx or OTC, keep current law.” *Id.* This suggests a conclusion of the conversation to not include prescription or over the counter drugs in the new legislation. Another note appears to memorialize the same conversation as “don’t cover cases in which you have a prescription but don’t follow prescription. Same w/ over the counter.” *Id.* at 17.

A meeting was later apparently held between Representative Gundrum and Tom Neuser and Laura Liddicoat from the State Lab of Hygiene. The notes from an unknown author, possibly Representative Gundrum, contain a list of restricted controlled substances. Among other named substances is a note, “methamphetamine (unless prescription for it or its precursors).” *Id.* at 40. Mr. Neuser sent an email that appears to follow up on the April 22 meeting. In pertinent part, the email reads:

Representative Gundrum will contact some prosecutors to determine if methamphetamine will yet be included in the legislation (methamphetamine is problematic because of legitimate prescription usage and the complications that entails).

To recap, new legislation is meant to address those cases where illicit drugs are found in drivers. It will not be necessary to show impairment from these drugs – the presence of the drug while driving is prohibited. All the provisions of current law will remain in effect.

Id. at 41.

Perhaps most damning to the State’s attempt to construe the statute otherwise, in an email addressing comments regarding the definition of “intoxicant,” Senior Legislative Attorney Timothy Fast notes: “OK since all restricted controlled

substances are controlled substances.” *Id.* at 43. Fast clearly identified that there is no such thing in Wisconsin Statutes as a restricted controlled substance separate and distinct from a controlled substance. And so here, as *l*-meth is not a controlled substance, it cannot be a restricted controlled substance.

The last information in the drafting file reflects that methamphetamine was to be included as a restricted controlled substance unless there was a prescription. The final version does not distinguish prescription from illicit methamphetamine, but provides the affirmative defense in the case of a prescription. Wis. Stat. § 346.63(1)(d).

The circuit court in Johnson’s case considered these materials and concluded that the Motor Vehicle Code definition of methamphetamine for purposes of driving with a detectable amount of a restricted controlled substance does not include *l*-meth as a restricted controlled substance. (R.111:19.) *L*-meth is legal without a prescription. Nothing about the scope, context, or purpose of the statute suggests that it restricts legal substances. The Motor Vehicle Code does not completely restrict any other legal substance in the absence of impairment. The fact that *l*-meth can result in impairment makes it no different from any other legal substance if it is misused. To the contrary, the contexts lead to the conclusion that *l*-meth be regarded the same in the Motor Vehicle Code as in the Uniform Controlled Substances Act. A meaning, as contemplated by § 340.01, is expressly provided via § 961.

Finally, the circuit court found that the legislative history of 2003 Wis. Act 97 does not reflect any purpose to regulate legal substances. (R.111:20.) No evidence supports that the legislature or drafters took any notice of the issue with *l*- versus *d*-methamphetamine. By any route of statutory interpretation, *l*-meth is not a restricted controlled substance in the Wisconsin Motor Vehicle Code.

This Court should affirm the determination of the circuit court.

III. This Court cannot reverse on the basis of the constitutional challenge, but may affirm on those grounds.

If the Court agrees with the State and interprets § 340.01(50m)(d) to include *l*-meth as a restricted controlled substance, it would lead to unconstitutional results. However, since the constitutional question was not developed or decided below, if

this Court agrees with the State on the interpretation of § 340.01(50m)(d), it should remand the matter back to the circuit court for review of the constitutionality challenges. Alternatively, this Court may affirm the circuit court's decision on the basis of the constitutional arguments presented.

A. The circuit court did not decide the constitutional issue, so this Court cannot reverse on that basis. Nonetheless, it is a viable basis for affirmance, and this Court can affirm even if the circuit court was right but for the wrong reason.

This Court cannot use the constitutionality issue as a basis for reversal for several reasons:

The constitutionality question is not ripe. The majority of the circuit court litigation in this matter had to do with spoliation of evidence and delineating the different detectable isomers of methamphetamine. Though the defense below presented some abbreviated constitutional challenges, there has not been sufficient fact finding to properly address the challenges presented. This is not a fact finding Court. Therefore, should this Court reach the substantive issue of constitutionality, the matter should be remanded to the circuit court for development.

The circuit court did not decide the constitutionality issue. The circuit court decision below specifically indicated that “Since this Court has determined that *l*-methamphetamine is not a restricted controlled substance for purposes of the Motor Vehicle Code, this Court need not address the issue of Wis. Stat. § 340.01(50m)(d)'s constitutionality.” (R.111:20.) Since the circuit court specifically did not reach the constitutional question in its decision, it would not be proper to do so at this time on appeal.

The State did not petition this court to decide the constitutionality question. This matter is before the Court on a permissive appeal in which the State asked to be heard on “the circuit court's order requiring the State to prove Johnson's blood contained the specific isomer D-meth.” (State's Petition at 2.) The State did not petition this court to review the constitutionality question and indeed does not address the unconstitutional as applied issue anywhere in the petition. Indeed there is no adverse circuit court decision on unconstitutionality from which to appeal. There would be no jurisdiction in this Court for reaching this question, since there is no final order from which the State is appealing constitutionality.

This Court did not grant the State leave to address the constitutionality issue. The order granting interlocutory appeal states that “appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice.” (April 19, 2024 Court Order.) The order does not permit the State to appeal an issue not decided by the circuit court. As noted above, there is a procedural bar from attempting to reverse on it now.

For all these reasons, if this Court agrees with the State on the statutory interpretation question and wants to properly engage the constitutional question, the matter should be sent back down to the circuit court to address the constitutionality question in the proper forum there first.

However, even though the circuit court did not find that interpreting § 340.01(50m)(d) to include l-meth was unconstitutional as applied to Johnson in this case, that is no impediment to this Court affirming the finding of the circuit court on those grounds. *See State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984). It has long been the rule that “[a] respondent may advance on appeal, and [this Court] may consider, any basis for sustaining the trial court’s order or judgment.” *Doe v. Gen. Motors Acceptance Corp.*, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7. That rule is broad, allowing this Court to affirm even “on a theory or on reasoning not presented to the lower court.” *Liberty Trucking Co. v. Dep’t Indus., Labor & Hum. Relations*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). Johnson doesn’t ask this Court to go that far; the constitutional claim was presented below. (R.89:5-8; R.101:18-21.) In fact, Johnson raised it in the very same motion that adduced the statutory interpretation, spoliation, and dismissal claims. (*Id.*) The circuit court never reached the constitutionality claim, instead deciding to interpret § 340.01(50m)(d) to find that it did not include l-meth as a restricted controlled substance.

However, the remedy for the unconstitutionality issue could be the same as for a the statutory interpretation: applying § 340.01(50m)(d) to avoid the unconstitutional result of l-meth prosecution. And thus, the constitutional issue is an alternate basis for affirmance. *State v. Alles*, 106 Wis. 2d 368, 392, 316 N.W.2d 378 (1982). After all, “a respondent may advance for the first time on appeal any argument that will sustain the trial court’s ruling.” *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). And, even “[i]f a trial court reaches the

proper result for the wrong reason[,] it will be affirmed.” *King*, 120 Wis. 2d at 292, 354 N.W.2d 742.

As detailed below, if applying Wis. Stat. § 346.63(1)(am) to Johnson would be unconstitutional, then the Court can set aside that interpretation of the law to avoid the unconstitutional result. In other words, require the State to prove that the form of methamphetamine allegedly in Johnson’s system was an illicit form in order to restore constitutionality to the law at issue. Johnson asks the Court to affirm on those grounds if not otherwise convinced to affirm on the basis of the statute’s interpretation.

B. The State’s suggested reading of § 340.01(50m)(d) leads to unconstitutional results.

The State alleges that Johnson did not argue with enough specificity before the circuit court to satisfy a constitutional challenge. (State’s Brief at 22-23.) The State appears to have missed that Johnson asserted that he is a user of Vicks VapoInhalers of the sort demonstrated to contain l-meth. (R.41:5. “Mr. Johnson asserts that he has from time to time used numerous products for relief from sinus difficulties, including [...] Vicks© Vapoinhalers, and the generic equivalents thereof, and that on or around September 4, 2020, he was using one or more of those products.”) Therefore since Johnson has used the legal, over the counter pharmaceutical and the State now insists on criminally prosecuting an allegation of him driving with potentially such chemicals in his blood in violation of the State’s interpretation of § 340.01(50m)(d), the law would be unconstitutional as applied to him. The State has chosen to exercise its power by applying the law in a specific way to a specific situation. That is where this analysis must begin.

1. Criminalization of l-meth would violate Johnson’s substantive due process.

Legislative exercise of the police power must have a reasonable relation to the protection of the public health, safety, and general welfare. *State v. Smet*, 2005 WI App 2005, ¶7, 288 Wis. 2d 525, 709 N.W.2d 474 (Wis. App. 2005) (citing *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989)). Due process requires the means chosen to have a reasonable and rational relationship to the purpose or object of the enactment. *Id.* (citing *Kahn v. McCormack*, 99 Wis. 2d 382, 385, 299 N.W.2d 279 (Ct. App. 1980)).

In the case of l-meth, there is no reasonable need to protect the public or general welfare from individuals driving after taking nasal spray or their Parkinson's medication. As such, there is no means that would be reasonable or rational to meet any such purpose.

There is no rational basis for imposing criminal liability for operating a motor vehicle with a detectable but not impairing amount of a perfectly legal substance such as l-meth but failing to do so with respect to many other over the counter substances. It would be fundamentally unfair for the government to allow the sale, purchase and use of l-meth without a prescription, but then punish that conduct if it is combined with driving, regardless of impairment.

None of the typical considerations that might justify a zero-tolerance approach to restricted controlled substances apply to l-meth. For example, l-meth is not a proscribed substance. It does not "range widely in purity and potency" and is therefore quite predictable in its duration and effect. See *State v. Luedtke*, 2015 WI 42, ¶77, 362 Wis. 2d 1, 45, 863 N.W.2d 592 (Wis. 2015). L-meth has no impairing effect unless consumed in quantities well beyond the intended dosage and method of consumption. (R.63:1 "Inhaled 1-methamphetamine delivered from a non-prescription product produced minimal effects but may be a cardiodepressant.")

There is no reasonable basis to conclude that a strict liability approach is a rational means to combat the nonexistent "problem" of driving while impaired by l-meth. Therefore, it would violate substantive due process to categorize lawfully obtained l-meth as a "restricted controlled substance" due simply to its presence in one's blood while driving.

Reading § 340.01(50m)(d) to include l-meth would violate the substantive component of the due process clauses of the United States and Wisconsin constitutions, rendering § 340.01(50m)(d) in combination with § 940.09(1)(am) and § 346.63(2)(a)3 unconstitutional as applied to Mr. Johnson.

2. Criminalization of l-meth would violate Johnson's equal protection guarantees.

Equal protection requires that the subject classification rests on grounds that are relevant to the achievement of the state's objective. *State v. Hirsch*, 2014 WI App 39, ¶6, 353 Wis. 2d 453, 847 N.W.2d 192. Reading § 340.01(50m)(d) to include l-meth

would also violate the equal protection guarantees of the United States and Wisconsin constitutions, rendering § 340.01(50m)(d) in combination with § 940.09(1)(am) and § 346.63(2)(a)3 unconstitutional as applied to Mr. Johnson.

The test for whether a classification is reasonable requires that:

1. All classifications must be based upon substantial distinctions which made one class really different from another;
2. The classification must be germane to the purpose of the law;
3. The classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within the class;
4. The prohibition must apply equally to each member of the class; and
5. The court should consider whether the characteristics of each class could be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

See *Hirsch*, ¶7 n.3 (quoting *Harris v. Kelley*, 70 Wis. 2d 242, 252, 234 N.W.2d 628 (1975)).

A *per se* ban on driving with l-meth in one's blood fails this test. Let us start by considering dextromethorphan ("DXM"). DXM, like l-meth, is present in legal, over the counter medication and may, when taken to intoxication, cause impairment and negative effects in driving users.¹ DXM is not listed as a restricted controlled substance under Wis. Stat. § 340.01(50m)(d).

¹ See Jarrett M Burns & Edward W Boyer, *Antitussives and substance abuse*, Subst Abuse Rehabil. 2013; 4: 75–82 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3931656/> (last accessed September 18, 2024), "The clinical presentation of dextromethorphan intoxication therefore depends on the ingested dose. Minimally intoxicated persons may develop tachycardia, hypertension, vomiting, mydriasis, diaphoresis, nystagmus, euphoria, loss of motor coordination, and giggling or laughing. In addition to the above findings, persons with moderate intoxication may demonstrate hallucinations and a distinctive, plodding ataxic gait that has been compared with "zombie-like" walking. Severely intoxicated individuals in a dissociated state may be agitated or somnolent. Extremely agitated patients may develop hyperthermia and metabolic

The Wisconsin law then, under the State's preferred reading, treats two classes of citizens very differently: the group of people who have sinus decongestion (and so are in a position to utilize over the counter l-meth medication and drive) and the group of people who have a cough (and so are in a position to utilize over the counter DXM medication and drive). When articulated in this way it becomes clear that there can be no reasonable grounds for the police power to interfere with the rights of one group over the other, and that such interference would operate to the peculiar disadvantage of one group.

There is already a law in Wisconsin that restricts driving after ingesting any chemical to the point of intoxication: Wis. Stat. § 346.63(a) Operating under influence of intoxicant or other drug. Though l-meth does have the capacity to create impairment when taken in quantities substantially exceeding the recommended dose, as noted by the State (State's Brief at 25) and the circuit court below (R.111:16), such conduct is adequately otherwise regulated in the Motor Vehicle Code under this chapter. 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 statute at issue here, again, as discussed above, was meant to prosecute the presence of an *illicit* substance in a driver after an accident. Punishment of the presence of one over the counter substance in the blood but not another would not reasonably serve the public good.

Under the State's preferred reading, Wis. Stat. § 340.01(50m)(d) punishes non-abusive use of one lawful and nonimpairing (unless abused) substance and then driving on a public highway with initially civil and increasingly more serious criminal sanctions, and yet leaves any other nonabusive use of another lawful, non-

acidosis." *citing to* White W. DXM FAQ. 1995. [Accessed June 19, 2013]. Available at: <http://www.erowid.org/chemicals/dxm/faq/>; Boyer EW. Dextromethorphan Abuse. *Pediatr Emerg Care*. 2004;20(12):858-863; Graudins A, Ferm R. Acute dystonia in a child associated with therapeutic ingestion of a dextromethorphan-containing cough and cold syrup. *J Toxicol Clin Toxicol*. 1996;34:351-352; Banerji S, Anderson I. Abuse of Coricidin HBP cough and cold tablets: episodes recorded by a poison center. *Am J Health Syst Pharm*. 2001;58:1811-1814; Kirages T, Sule H, Mycyk M. Severe manifestations of coricidin intoxication. *Am J Emerg Med*; Boyer EW. Dextromethorphan Abuse. *Pediatr Emerg Care*. 2004;20(12):858-863.

impairing (unless abused²) substance and then driving on a public highway until it rises to the reasonable level of impairment required by Wis. Stat. § 346.63(a).

When combined with data that points to different prevalence of sinus congestion and coughing symptoms along racial lines,³ the State's reading of § 340.01(50m)(d) does not pass constitutional muster. That is to say, members of suspect classes appear to be more disposed to ailments that can entail certain over the counter medication that, when combined with driving, are treated different under the law and for no apparent reason. In fact, Johnson here is African American. (R.122:1.) The alleviation of symptoms that Johnson's race makes him more prone to, and the State's resultant attempt to prosecute him at a more severe level than other racially implied medications, renders the restricted controlled substance law unconstitutional as applied to Johnson.

Accordingly, even if it is determined that § 340.01(50m)(d) does not violate substantive due process, it violates Mr. Johnson's right to equal protection of the law, and as such, is unconstitutional.

Conclusion

The State's asks this court to reverse the trial court's rational and well reasoned decision in order to adopt an absurd, contradictory interpretation that would lead to an unconstitutional application of the statute. The State should not be rewarded for avoiding the statutory interpretation arguments below only to flesh them out now after losing below. Instead, this Court should agree with the circuit court and hold that § 340.01(50m)(d) must not include the legally available, over the counter

² See, e.g., "Dextromethorphan," TOXNET entry, National Library of Medicine, National Institutes of Health available at <https://toxnet.nlm.nih.gov/cgi-bin/sis/search/a?dbs+hsdb:@term+@DOCNO+3056> (stating that a one-time therapeutic dose of 120mg of dextromethorphan was found not to impair driving or result in failed standardized field sobriety tests, but also noting that "the administration of suprathreshold doses of DXM resulted in acute cognitive impairments on all tasks that were examined.").

³ See, e.g., Zachary M. Soler, et al., *Chronic rhinosinusitis, race, and ethnicity*, *Am J Rhinol Allergy*. 2012 Mar-Apr; 26(2): 110–116, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3345896/> (last accessed September 19, 2024), "Significant differences may exist across racial and ethnic categories with regard to CRS health status and health care use."; also, as to DXM, A. James Mamary, et al., *Race and Gender Disparities are Evident in COPD Underdiagnoses Across all Severities of Measured Airflow Obstruction*, *Chronic Obstr Pulm Dis*. 2018; 5(3): 177–184, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6296789/> (last accessed September 19, 2024), "Race and gender are associated with significant disparities in COPD diagnosis."

isomer of l-meth, either because the ambiguity in the statute is resolved through examination of the legislative history or because doing otherwise would lead to unconstitutional results in this and other cases.

Dated this 30 day of September, 2024.

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Rule 809.19(8g)(a) Certifications

I certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,104 words, as counted by the commercially available word processor Microsoft Word.

Dated this 30 day of September, 2024.

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