STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2024AP79-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

-vs.-

WALTER L. JOHNSON,
Defendant-Respondent-Petitioner.

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

PETITION FOR REVIEW

Respectfully submitted:
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One: Statutory interpretation

A bit of background

Walter Johnson was involved in a fatal car accident that killed his daughter and seriously injured the other vehicle's driver. Subsequent testing established that Johnson's blood contained methamphetamine. Our Motor Vehicle Code lists methamphetamine as a restricted controlled substance, and the State charged Johnson with having caused injury and death while driving with a detectable amount of a restricted controlled substance in his blood.

Recognizing that one isomer of methamphetamine—L-meth—exists in readily available over-the-counter nasal spray that he used, Johnson argued that it would be absurd and unreasonable to read the Motor Vehicle Code to criminalize driving with that substance in one's system. He averred that a proper reading of the relevant statutes would limit the restricted type of methamphetamine to a different isomer—

D-meth (the type found in the street drug)—than the L-meth that is readily available in over-the-counter nasal sprays.[1]

The circuit court agreed with Johnson. But that decision had adverse consequences for the State: it had destroyed Johnson's blood sample without testing to differentiate between L-meth and D-meth. Thus, if the State was required to prove that Johnson had D-meth and not L-meth in his blood, it couldn't. The State sought permission to appeal, which the court of appeals granted.

The court of appeals reversed, holding that "methamphetamine" as used in the restricted controlled substance statute is inclusive of both L-meth (nasal sprays) and D-meth (the street drug).

Issue presented

Whether the circuit court rightly determined that the Legislature did not intend the Motor Vehicle Code's use of "methamphetamine" to include L-meth when the contrary interpretation would make it unlawful to drive with a widely-available, over-the-counter nasal spray in your system?

This Court should grant review and reinstate the lower court's ruling.

Two: A matter of appellate court jurisdiction

A bit of background

As noted above, the State commenced the current proceedings by filing a petition for permissive appeal, asking the court of appeals to review the statutory interpretation issue that led the circuit court to its ruling. The court of appeals granted that petition.

In the circuit court, Johnson had presented a constitutional claim as an alternative to his statutory interpretation claim. But the circuit court's written order from which the State sought to appeal expressly did not decide that constitutional question. Instead, the circuit court concluded that its decision on the statutory

[1] Throughout these proceedings, the abbreviations of those isomers have been stylized differently. Sometimes, they were written as *l*-methamphetamine and *d*-methamphetamine; other times, as L-meth and D-meth. Johnson will herein follow the convention used in the court of appeals' decision.

interpretation question rendered any decision on the constitutional question unnecessary.

The State did not include that constitutional issue in its petition for leave to appeal. Nonetheless, the State raised it for the first time in briefing, and the court of appeals decided it.

Issue presented

In a permissive appeal, does the court of appeals have jurisdiction to decide for the first time an issue that was not decided by the lower court, expressly excluded from the court's written order, and not part of the petition for leave to appeal?

This Court should grant review and hold that the appellate court's jurisdiction in a permissive appeal is limited to issues decided below and to those issues presented in the petition for leave to appeal.

Statement of Criteria for Review

Whether the Motor Vehicle Code should be interpreted to criminalize driving with a detectable amount of a widely-available, over-the-counter nasal spray in your system is a novel question with statewide impact. Wis. Stat. § (Rule) 809.62(1r)(c)2. The court of appeals' decision in Johnson's case is the only appellate decision to have addressed that issue, and it reversed the lower court's statutory interpretation. The divergence of opinion between those two courts signals that reasonable jurists can disagree as to how the relevant statues should be interpreted.

And yet, this Court, not the court of appeals, is responsible for "law defining and law development," tasks that are "designated [to it] by the constitution and the legislature." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (quotation omitted). As the final voice in deciding how Wisconsin's statutes are to be properly interpreted and in consideration of the disagreement between the circuit court and the court of appeals, this Court's review of Johnson's case is needed. The Court's review will define and develop the law of this state by answering the novel statutory interpretation question that Johnson's case presents, constituting a ground for granting this petition. Wis. Stat. § (Rule) 809.62(1r)(c).

This Court should also grant review of Johnson's case to consider the limits of appellate jurisdiction in a permissive appeal. The court of appeals' choice to decide the undecided constitutional issue in Johnson's case conflicts with established rules of appellate procedure and the court of appeals' own prior cases. First, it is well established that appellate jurisdiction requires a written order from which an appeal may be taken. *State v. Powell*, 70 Wis. 2d 220, 222, 234 N.W.2d 345 (1975). But in Johnson's case, there is no written order deciding the constitutional question (in fact, the written order from which the State appealed expressly did not decide it). The court of appeals should not have had jurisdiction over that issue, and yet it decided the claim anyway. Second, the State did not include the constitutional issue in its petition for leave to appeal. The court of appeals has before limited the issues that may be considered in permissive appeals to those set forth in the petition. *State v. Aufderhaar*, 2004 WI App 208, ¶ 1, 277 Wis. 2d 173, 689 N.W.2d 674. The court of appeals' choice to decide the constitutional issue in Johnson's case despite its non-inclusion in the State's petition is thus contrary to its own prior decisions. Review is appropriate to address the conflict between the court of appeals' decision in this case and extant controlling authority. Wis. Stat. § (Rule) 809.62(1r)(d).

Statement of the Case

In the fall of 2020, Walter Johnson was involved in a car accident. (R.2:2.)[2] Tragically, that accident killed his daughter and injured the other car's driver. (*Id.*:3-4.)

Wisconsin's Motor Vehicle Code lists "methamphetamine" as a restricted controlled substance, and it prohibits driving with a detectible amount of that substance in one's blood. Wis. Stat. §§ 340.01(50m), 346.01(1), 346.63(1)(am). After the State Crime Lab reported that Johnson's blood had tested positive for methamphetamine, the State charged him with multiple felonies. (*See* R.2:1-2, 5.)

In pretrial proceedings, Johnson sought to dismiss the State's case because the Crime Lab had destroyed his blood sample. (R.41.) Johnson made two arguments for dismissal, but only one is relevant to the present appeal: that destruction of his

[2] Johnson's case is before this Court on permissive appeal from a pretrial ruling. As such, there's not yet been an adjudication or finding of Johnson's guilt; he thus maintains the presumption of innocence to which our laws entitle him.

blood sample rendered the State unable to prove his guilt. (*Id.*:1-2.) In support of that claim, Johnson averred that there are two isomers of methamphetamine—L-meth and D-meth—and it is unlawful to drive with only one—D-meth—in your system. (*Id.*:3.) As Johnson's reasoning went, proving that he'd driven with D-meth in his system was necessary to prove him criminally liable because, if it was L-meth, he'd committed no crime. (*Id.*:3-6.) But the State had destroyed Johnson's blood without testing to identify the specific isomer that it contained. (*Id.*) And thus, argued Johnson, the State's case should be dismissed because it could not prove that he drove with the illegal form of methamphetamine in his system. (*Id.*)

The circuit court conducted a statutory interpretation analysis and concluded that Johnson was correct: to secure a guilty verdict, the State would have to prove that he'd driven with D-meth in his system, not L-meth. (R.111:12-21; P-Ap 41-50.) The circuit court reached that conclusion by wading through a morass of interrelated statutes and regulatory provisions that the court decided had to be read together. (*Id.*) Finding ambiguity in those statutes, the circuit court turned to the legislative history behind enactment of the restricted controlled substances law. (*Id.*:18-20; P-Ap 47-49.) That legislative history convinced the circuit court that L-meth cannot be a restricted controlled substance under the Motor Vehicle Code because it is available in over-the-counter medications that can be lawfully possessed. (*Id.*:18-21; P-Ap 47-50.) Surely, reasoned the court, the Legislature did not mean to criminalize one's driving with a detectable amount of a legally-procured, over-the-counter medication in one's system. (*Id.*) Thus, concluded the court, proper interpretation of the operative statutes meant that Johnson could be guilty of a crime only if the State could prove that the methamphetamine in his system was D-meth. (*Id.*)

In addition to his statutory interpretation argument, Johnson also made an alternative constitutional claim. (R.89:1.) Namely, he argued that if L-meth was criminalized along with D-meth, the relevant statutory scheme would violate his substantive due process and equal protection rights, as applied. (*Id.*) But in its order, the circuit court expressly withheld judgment on Johnson's constitutional claim: "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 . . . constitutionality." (R.111:20; P-Ap 49.)

Ultimately, the circuit court refused to dismiss the case against Johnson because it found that the State could still convict him if it could figure out some way to prove which of the isomers was in his system. (*Id.*:20-21; P-Ap 49-50.) If the State could prove that it was D-meth, it could convict Johnson; if not, he'd be acquitted. (*Id.*) And thus, the case would proceed to trial. (*Id.*:21-22; P-Ap 50-51.) But the case would also move forward because Johnson was charged with other serious felonies—including an alternate homicide charge—the proof of which did not depend on what methamphetamine was in his system. (*See* R.44 (amended information).)

So, while the State beat back the bulk of defense's motion to dismiss, the circuit court's requirement that the State prove that Johnson had D-meth in his system caused it some trouble. (*See* R.116:3.) Namely, the State was never going to be able to prove that Johnson's methamphetamine was D-meth because the Crime Lab had destroyed his blood sample. (*See id.*) Without that sample, the State could not test it to discern which of the two isomers was present and, relatedly, could not prove at trial that it was the illegal one. (*See id.*)

The State asked the court of appeals for permission to appeal from the nonfinal order on Johnson's motion to dismiss. (*Id.*:1-3.) It wanted the court of appeals to weigh in on whether the circuit court had rightly interpreted the operative statutes such that the State would be required to prove that Johnson drove with D-meth in his system. (*Id.*:1-3.) The State's petition did not ask the court of appeals to review the constitutional question.

But by the time it filed its opening brief in the court of appeals, the State expanded the issues that it wanted reviewed beyond what it had put in its petition. *See* App.'s Br., 2024AP79-CR at 7 (filed Aug. 7, 2024). In its brief, the State asked the court of appeals to also decide whether "the classification of L-meth as a restricted controlled substance [is] unconstitutional as applied to Johnson under either the due process clause or the equal protection clause?" *Id.* The State's brief rightly noted that "[t]he circuit court did not reach this question," but nonetheless asked the court of appeals to decide it anyway. *Id.*

In his response brief, Johnson argued that the court of appeals should not decide the constitutional issue because it was not properly before the court. Resp.'s Br., 2024AP79-CR at 16-18 (filed Sept. 30, 2024). Johnson contended that the

constitutional issue was out of bounds because it was not part of the State's petition for permissive appeal and had not been decided by the lower court. *Id.* at 16-18.

The court of appeals decided both issues. *State v. Johnson*, No. 2024AP79-CR, slip op., ¶¶2-3 (Wis. Ct. App. Feb. 13, 2025); (P-Ap 4-5). It concluded that the circuit court had erred in its interpretation of the operative statutes, and thus that the State would not be required to prove which isomer was in Johnson's system. *Id.* ¶ 3; (P-Ap 5.) Unlike the circuit court, the court of appeals could find no ambiguity in the law, and thus did consider the legislative history behind it. *Id.* ¶ 38; (P-Ap 23). According to the court of appeals, Johnson would be guilty regardless of whether he was driving with L-meth or D-meth in his system. *Id.* ¶ 54; (P-Ap 29). The lower court's order would thus be reversed. *Id.* As for the constitutional issue, the court of appeals decided it adversely to Johnson. *Id.* ¶ 53; (P-Ap 29).

Johnson now petitions for this Court's review.

Argument

I. This Court should grant review to consider a matter of first impression: whether the Legislature intended the Motor Vehicle Code's use of "methamphetamine" to criminalize driving with a detectable amount of a widely-available, over-the-counter nasal spray in your system?

The fundamental question in this case is what the word "methamphetamine" means as it occurs in the Motor Vehicle Code's definition of a "restricted controlled substance." Wis. Stat. § 340.01(50m). If the Legislature intended that term to be inclusive of both L-meth and D-meth, then the Motor Vehicle Code criminalizes driving with a detectible amount of over-the-counter nasal spray in your blood. On the other hand, if the Legislature intended "methamphetamine" to mean only D-meth, then operating a car after using over-the-counter nasal spray is not a crime but driving after using the street drug is.

The circuit court considered the Motor Vehicle Code, the Controlled Substances Code, and affiliated federal rules and regulations in concert to conclude that the Legislature could not possibly have intended to criminalize L-meth when it used the term "methamphetamine." (R.111:12-20; P-Ap 41-49.) The court of appeals, on the other hand, considered those same authorities and reached the opposite result: the

Legislature must have intended to include both L-meth and D-meth when it wrote "methamphetamine." *Johnson*, 2024AP79, ¶¶ 24-38; (P-Ap 15-23). And thus, according to the court of appeals' interpretation, a person who drives after using an over-the-counter nasal spray containing L-meth is just as criminally liable as a person who drives after using the street drug containing D-meth. *See id.*

It is worth noting that the nasal spray that the court of appeals' statutory interpretation will criminalize is sold at multiple big-box pharmacies under their house label.[3] And it is remarkably affordable, costing less than $5.00 per container.[4] Given the easy access to those medications and their affordability, it is highly likely that countless individuals are driving on Wisconsin roads with L-meth in their system every day. Just to display for this Court the scale of possibility, Johnson will note that there were 4.4 million licensed drivers in Wisconsin in 2024. Wis. DMV, *DMV 2023 Facts & Figures*, 42 (available at https://bit.ly/3XG9yUo) (last visited Mar. 11, 2025). In Madison and on Highway 51 near where Johnson's accident occurred, daily traffic totals show the route is traveled by approximately 45,000 cars a day. Wis. DOT, *WisDOT Traffic Counts*, Site 130266, https://bit.ly/3DmOGuL (last accessed Mar. 11, 2025). That number increases nearly fourfold to 174,000 cars per day when one looks at daily traffic navigating the Marquette Interchange in Milwaukee. *Id.* at Site 400016. In short, there are hundreds of thousands—if not millions—of people driving cars on Wisconsin roadways every day. And before setting out, any number of those people could have used the L-meth nasal spray that they'd bought over-the-counter at their neighborhood pharmacy.

But how many of those drivers would realize that they were breaking the law simply because they were driving after having used a medication that they bought over the counter? *See* Wis. Stat. § 346.63(1)(am) (unlawful to drive with restricted controlled substance in blood). It is worth highlighting that the unlawfulness of those drivers' actions has nothing to do with any intoxicating effect caused by the inhaler. *Compare id. with* Wis. Stat. § 346.63(1)(a). Instead, an otherwise completely sober driver could break the law solely by virtue of having a detectable amount of L-meth in their blood, Wis. Stat. § 346.63(1)(am), which is known to be "an inert form

[3] *See, e.g.,* Walgreens, *Walgreens Vapor Inhaler 0.01oz x 3 pack*, https://bit.ly/walgreensvapoinhale (last accessed Mar. 11, 2025), Meijer, *Meijer Decongestant Vapor Inhaler*, .007 oz, https://bit.ly/meijervapoinhale (last accessed Mar. 11, 2025), Dollar General, *DG Health Vapor Inhaler, 1 ct*, https://bit.ly/dollargenvapoinhale (last accessed Mar. 11, 2025).
[4] *Id.*

[of methamphetamine] with little or no physiological effects" while D-meth "has the active physiological effects characteristic of [methamphetamine]," *United States v. Carroll*, 6 F.3d 735, 743 (11th Cir. 1993).

This Court should take Johnson's case to assess whether the Legislature intended such absurd results when it listed "methamphetamine" as a restricted controlled substance in the Motor Vehicle Code. That analysis will be novel, clarify the law of this state, and have statewide impact. Whichever interpretation this Court accepts, its review will shine a light on the issue.

If the Court agrees with the circuit court, then Wisconsinites can drive on the roadways after using nasal spray without fear of criminal consequences. On the other hand, if this Court agrees with the court of appeals, then at least the Court's consideration of the issue will more widely inform Wisconsinites of the perils of driving after using nasal spray. After all, more attention is paid to this Court's decisions than those of the court of appeals. And on that point, if this Court believes that the law is poorly written to include nasal spray as a restricted controlled substance but feels constrained by the rules of statutory interpretation to reach that conclusion, the Court can nonetheless use its decision to highlight any absurdities and call for the Legislature to address them.

This Court should grant review.

II. This Court should grant review because the court of appeals lacked jurisdiction in this permissive appeal to decide an issue that was expressly not decided by the lower court and not included in the State's petition for leave to appeal.

A. The court of appeals decision is contrary to well-established law that says an appellate court lacks jurisdiction when there is not a written order deciding an issue.

The court of appeals' jurisdiction is statutorily conferred. Wis. Const. Art. 7 § 5 ("The appeals court shall have such appellate jurisdiction . . . as the legislature may provide by law . . .."); *see also* Wis. Stat. § 752.01(1) ("The court of appeals has appellate jurisdiction as provided by law."). It may, by granting leave to appeal, exercise its jurisdiction over nonfinal orders in what are known as permissive or interlocutory appeals. Wis. Stat. § 808.03(2). Permissive appeals allow the appellate court to review a nonfinal order "in advance of a final judgment or order." *Id.*

To appeal a nonfinal order by permissive appeal, a party must "seek leave of the court to appeal . . . by filing . . . within 14 days after the entry of the judgment or order a petition and supporting memorandum, if any." Wis. Stat. § (Rule) 809.50(1). "An order is 'entered' when it is filed [with] the clerk of the circuit court." *State v. Wolverton*, 193 Wis. 2d 234, 259, 533 N.W.2d 167 (1995), abrogated on other grounds by *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582; *see also* Wis. Stat. § 807.11(2).

It has long been the rule that "[t]he appellate court is without jurisdiction until an order is entered in writing." *State v. Powell*, 70 Wis. 2d 220, 222, 234 N.W.2d 345 (1975). Accordingly, "if a party seeks to invoke the jurisdiction of the appellate court, the order [to be appealed] must be in writing." *Id.* Thus, to trigger the court of appeals' jurisdiction to review a nonfinal order in a permissive appeal, there must be a written order. "[P]arties cannot, either by failure to raise the question or by consent, confer jurisdiction upon an appellate court to review an order which is not appealable." *Id.* at 221.

But in Johnson's case, there is no written order deciding the constitutional issue that the State presented in its brief. (R.111:20; P-Ap 49.) In fact, quite to the contrary, the circuit court's written order expressly refused to decide that issue. (*Id.*) Thus, contrary to the aforementioned authority, the court of appeals in Johnson's case exceeded its jurisdiction by considering—in a published decision—an issue that was undecided by the circuit court in the written order from which the State appealed. *See Johnson*, 2024AP79, ¶¶ 39-53; (P-Ap 23-29).

This Court should grant review because the court of appeals' decision is in conflict with controlling law. Wis. Stat. § (Rule) 809.62(1r)(d).

B. The court of appeals decision is contrary to established law because it decided an issue that the State did not raise in its petition for leave to appeal.

The court of appeals has before expressly addressed whether it will consider issues that the appellant did not raise in their petition for leave to appeal: "The major holding here is that when [the court of appeals] accepts an interlocutory appeal, the appellant is limited to briefing only those issues presented in the petition for leave to appeal and may not raise additional issues without the prior consent of

the court." *State v. Aufderhaar*, 2004 WI App 208, ¶ 1, 277 Wis. 2d 173, 689 N.W.2d 674.

In *Aufderhaar*, it was the State that was arguing against consideration of issues not before raised in a petition for leave to appeal. The court of appeals agreed with the State, recognizing that "interlocutory appeals are not appeals of right and one must obtain permission to pursue such an appeal by filing a petition." *Id.* ¶ 12. The court of appeals explained that "the logical conclusion" to be reached from the "very narrowly construed" right to permissive appeal "is that a person who is granted leave to appeal a nonfinal order is limited solely to those issues outlined in the petition to the court of appeals." *Id.* And thus, the court of appeals will not allow an appellant in a permissive appeal to expand the issues beyond those that had been included in the petition. *Id.* ¶ 17. The court of appeals explained: "For a party to add issues after a petition is granted where we have not had the opportunity to assess the likelihood of success of that issue is counterproductive to the process and undermines the rationale for our approach to nonfinal orders." *Id.* ¶ 16.

But that is precisely what occurred in Johnson's case. The State did not assert the constitutional question in its petition as an issue to be considered on appeal. (R.116:1-3.) Nor did it seek the court's prior consent to expand the issues prior to filing its opening brief.

And yet, the court of appeals nonetheless reached and decided the constitutional question anyway, deciding it adversely to Johnson. *See Johnson*, 2024AP79, ¶¶ 39-53; (P-Ap 23-29). As such, the court of appeals decision in Johnson's case—which is recommended for publication—conflicts with the rule espoused in *Aufderhaar*. The court of appeals is not at liberty to "overrule, modify or withdraw language from [one of its] published opinion[s]." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Only this Court may do that. *Id.* This Court should review Johnson's case to resolve the conflict between *Aufderhaar* and his own, ultimately deciding whether a petitioner in an interlocutory appeal may raise issues during briefing that were not included in the original petition. Wis. Stat. § (Rule) 809.62(1r)(d).

Conclusion

Johnson's case comes to this Court while still in pretrial proceedings. He is not presently convicted of any crime, and the issues presented for this Court's review do not ask the Court to overturn any conviction or modify any sentence.

Instead, the first issue that Johnson presents for this Court's review asks it only to interpret the Wisconsin statutes and discern whether the Legislature meant to criminalize driving after using over-the-counter nasal spray in the same way that it criminalizes driving after using street meth. That novel question of statutory interpretation is one that warrants this Court's attention. The second issue that Johnson asks this Court to consider is not a matter of criminal law but rather is a matter of appellate procedure generally applicable to civil and criminal cases alike. Given the conflict between Johnson's case and extant authority on the subject, this Court's voice is warranted to describe the limits of appellate jurisdiction in a permissive appeal.

Johnson thus asks this Court to grant review.

Dated this 13th day of March, 2025.

PINIX LAW, LLC
Attorneys for Petitioner Walter L. Johnson

Electronically signed by Matthew S. Pinix
Matthew S. Pinix, SBN 1064368

Rule 809.19(8g) Certifications

I hereby certify that this petition for review conforms to the rules contained in s. 809.19 (8) (b) and (bm) and s. 809.62(4). The length of this petition is 4,024 words, as counted by the commercially available word processor Microsoft Word.

I hereby certify that filed with this petition is an appendix that complies with s. 809.62 (2) (f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals the findings; (3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (4) any

other portions of the record necessary for an understanding of the petition; and (5) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 13th day of March, 2025.

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