STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP002291-CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN TYRONE RICKETTS, JR.,

Defendant-Respondent.

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On Appeal from an Order Striking the Domestic Abuse Repeater Enhancer Entered in the Brown County Circuit Court, the Honorable John P. Zakowski, Presiding.

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# BRIEF OF DEFENDANT-RESPONDENT

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## ISSUE PRESENTED

> Under Wisconsin law, some persons charged with crimes of domestic abuse are eligible for an enhanced sentence when, among other factors, they have been "convicted on 2 or more separate occasions of a felony or a misdemeanor" for which a domestic abuse surcharge under Wis. Stat. § 973.055(1) applies.

Does the plain language of the statute require the qualifying convictions to occur on separate occasions?

The circuit court answered yes. This Court should answer yes.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. Mr. Ricketts agrees with and joins the State's request for publication.

## STATEMENT OF THE CASE AND FACTS

Mr. Ricketts was arrested and charged with two misdemeanor offenses following an alleged argument with his ex-girlfriend at a casino. (2:1-3). Relying on Wis. Stat. § 939.621 (hereinafter, "DV repeater"), the State alleged that these two misdemeanor offenses should be prosecuted as felonies given Mr. Ricketts's

prior record. (2:1-2). In support, the State relied on a single underlying incident which resulted in two convictions, entered as part of the same court appearance, for which a domestic abuse surcharge was applied. (2:1-2).

Mr. Ricketts filed a motion to strike the DV repeater. (15). Relying on the plain text of the statute, Mr. Ricketts argued that he needed to have been convicted on "2 or more separate occasions." (15:1). Because both of his convictions were from a single transaction and entered simultaneously as part of the same court proceeding, he argued this requirement had not been satisfied. (15:1).

The circuit court agreed with Mr. Ricketts's reading of the statutory language and granted the defense motion. (23:8). The State petitioned for leave to appeal. (29).

## ARGUMENT

### I. The plain text of the statute requires more than the bare counting of convictions and insists that those convictions arise from "separate occasions."

#### A. This Court is guided by the plain text of the statute, with no need to resort to complex canons of construction.

##### 1. Canons are irrelevant when faced with unambiguous plain text.

For the most part, the State's brief relies on the force of interpretative canons to compel this Court's agreement that two cases discussing an entirely different enhancer scheme—the habitual criminality repeater—should control the outcome of this case.

As Justice Rebecca Dallet recognized in her dissent in *James v. Heinrich*, 2021 WI 58, ¶ 63, 397 Wis. 2d 517, 960 N.W.2d 350, canons should not be used to obscure plain text meaning derivable from "a common sense understanding of the English language."

In fact, there are several problems presented when canons of construction take the place of simple and straightforward textual analysis. First, many of the so-called "rules" of construction are derivable not from precedent but from an extrinsic source—a single work of academic analysis. *Id.*, ¶ 76. Second, some of the "rules" set down in that catalog of potential canons

are, on closer inspection, incompatible with Wisconsin precedent. *Id*. And, while these tools *may* be helpful in some cases, such tools have no role when the text itself resolves the interpretative question at issue. *Id*., ¶ 77.

Even when relevant to textual analysis, such rules are not "gospel." *Id*., ¶ 78. Canons, in large part, can be a legal fiction that lawmakers themselves are wholly unaware of when making law. *Id*. As a result, the post-hoc application of such tools derived from academic sources can be flexibly used to distort or obscure the "real" meaning of a statute. *Id*., ¶ 79.

Accordingly, when faced with clear text evincing a commonsense reading, canons have no place and the text itself is the only relevant guide toward a definitive meaning.

2. The plain text requires separate occasions of conviction.

Here, the statutory text is plain. In order for a person to be a DV repeater, they must have been convicted on "2 or more separate occasions." Wis. Stat. § 939.621(1)(b). If the legislature wanted the person to merely have two convictions, period, it could have said so directly. Instead, the legislature imposed an additional requirement—that those convictions occur on "separate occasions." Thus, two convictions that occur as part of the same occasion fail this plain text requirement.

To get around this commonsense reading of the words in the text, the State relies on canons of

construction and authorities discussing and interpreting a distinct enhancer scheme. However, given the plainness of the text, there is no need to resort to canons. And, to the extent that the cases cited by the State interpret a different legislative enactment and no authority has ever held that *this* statute evinces the same meaning, this Court should abide by the plain text of the statute and affirm.

B. To the extent this Court feels bound by *State v. Wittrock* and *State v. Hopkins*, recent developments in the Wisconsin and United States Supreme Courts undermine the precedential force of those authorities.

1. If the Court feels bound by these authorities, it must recognize that *Wittrock* and *Hopkins* were incorrectly decided and should be overturned.

As noted, the State argues that reversal is warranted given the decisions of the Wisconsin Supreme Court in two cases interpreting the habitual criminality enhancer, which uses similar language: *State v. Wittrock*, 119 Wis. 2d 664, 350 N.W.2d 647 (1984) and *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992).

However, even if this Court accepts the State's proposition that these cases "bind" the Court—an outcome that Mr. Ricketts does not believe to be preordained—these cases are poorly reasoned and ripe for re-evaluation and reversal by the Wisconsin

Supreme Court. Accordingly, if this Court does feel bound by those authorities, it must certify the case for resolution of this important legal question.

In *Wittrock*, the Court was asked to analyze the language of Wis. Stat. § 939.62, which required the person to be convicted "on 3 separate occasions" in order to qualify as a repeater. *Wittrock*, 119 Wis. 2d 664, 667, 350 N.W.2d 647 (1984). Although the statute plainly refers to the timing of the conviction(s) ("convicted […] on 3 separate occasions"), the Court nevertheless found the statute ambiguous. In its view, it was unclear whether the legislature was referring to "the time of conviction or time of the crime's commission" in identifying qualifying prior convictions. *Id*. at 670.

Accordingly, the Court quickly abandoned any efforts at plain text analysis and instead proceeded to resolve the matter with the aid of extrinsic evidence, most notably a 1950 law review article. *Id*. at 672. The Court concluded the drafters intended to focus on "the quantity of crimes rather than with the time of conviction." *Id*. at 674. As a result, Wittrock was a "repeater" even though two of his convictions were entered simultaneously as part of a criminal case involving one underlying incident. *Id*.

In 1992, the Court confronted the same legal issue a second time in *Hopkins* and echoed its comments about the meaning derived in *Wittrock*. In addition, the Court concluded that a contrary

interpretation would be disallowed for public policy reasons. *Hopkins,* 168 Wis. 2d at 810-812.

Notably, both *Wittrock* and *Hopkins* were released prior to the Court's landmark decision in *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. As a result, those cases do not utilize the preferred method of statutory construction subsequently articulated by the Wisconsin Supreme Court in *Kalal*. Instead, *Wittrock* relies heavily on the opinion of a single legislative drafter as expressed in a law review article; *Hopkins* resorts to public policy justifications.

Most problematically, neither case acknowledges the most commonsense reading of the statute—that by requiring a person to be convicted on a specified "number of occasions," the legislature used language that necessarily focuses on the timing of the convictions, not just their overall number. *Wittrock* conjures ambiguity where none exists and then uses that asserted ambiguity to make the statute say something other than what the plain text signals. *Hopkins* ratifies and entrenches that error. As the Wisconsin Supreme Court has made clear, precedent based on erroneous legal analysis is not accorded deference under the principle of *stare decisis*. *State v. Johnson*, 2023 WI 39, ¶ 25, 407 Wis. 2d 195, 990 N.W.2d 174.

Accordingly, because *Hopkins* and *Wittrock* are poorly reasoned, fail to respect contemporary statutory construction rules, and reach an outcome

which contradicts the plain meaning of the statute, they should be overruled. If this Court feels duty-bound to apply those holdings, then its recourse is to certify the matter to the Wisconsin Supreme Court for resolution.

2. In addition, and in the alternative, recent legal developments have undermined the force of these opinions and this Court should acknowledge those changes in deciding this case.

While this Court is of course bound to apply prior precedent—and must therefore certify the matter if it believes that the erroneously decided *Wittrock* and *Hopkins* cases govern—this Court's published jurisprudence also shows that it can reach the merits when subsequent legal developments lessen the precedential force of ostensibly "binding" authority.

For example, in *State v. Seaton*, 2024 WI App 68, ¶ 22, 414 Wis. 2d 415, 16 N.W.3d 20, this Court was asked to determine, in part, whether "in a case involving a sexual assault by sexual intercourse, where the only issue is consent, an unrelated act of nonconsensual sexual intercourse with a different person is not relevant[…]." At first blush, this was an easy question for the Court to answer. The Wisconsin Supreme Court confronted this same issue in *State v. Alsteen*, 108 Wis. 2d 723, 324 N.W.2d 426 (1982) and unambiguously answered "yes."

While this Court is not free to disagree with published decisions of the Wisconsin Supreme Court, *Livesey v. Copps Corp.,* 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979), there is no invocation of this rule in the Court's decision. Instead, after confronting the changes in our law in the intervening 40 years, the Court concluded the precedential force of that decision had been called into question. *Id*., ¶¶ 25-28. Accordingly, it was not required to apply the *Alsteen* rule. *Id*.

Similarly, the law regarding separate "occasions" has undergone substantial changes in the intervening decades.

First, in *State v. Rector*, 2023 WI 41, ¶ 25, 407 Wis. 2d 321, 990 N.W.2d 213, the Wisconsin Supreme Court raised substantial questions about the validity of *Wittrock* and *Hopkins* while also definitively holding that the phrase "separate occasion" is not a "term of art" which must have a consistent judicial interpretation throughout our statutes.

Rector challenged another statute related to sentencing: the sex offender registration requirements under Wis. Stat. § 301.45. Notably, that statute (since amended) used language identical to that under review here, and required the person to have been "convicted" on "2 or more separate occasions" to qualify for lifetime registration. *Rector*, 2023 WI 41, ¶ 11. The issue presented for the Court's review also mirrors this appeal, with both parties taking familiar positions:

The State averred "that a person meets the criteria of being convicted 'on 2 or more separate occasions' when that person has been convicted of two or more offenses." *Id.*

In contrast, Rector argued "that a person fails to meet the criteria of being convicted 'on 2 or more separate occasions' when that person is convicted based on charges filed in a single case, and the convictions occur during the same hearing." *Id.* "According to Rector, the State's interpretation of the statute reads out the phrase 'separate occasions' altogether." *Id.*

Notably, the Court then conducted the plain text analysis called-for in this case and agreed with Rector. In the Court's view, "a separate occasion is an incident or time at which an event occurred, which is set apart from another incident or time at which a different event occurred." *Id.*, ¶ 12. Because "separate occasions" clearly modifies the statute's use of "conviction," then it logically follows that the sex offender registration requirements are activated "if the event of conviction occurred at two or more separate (set apart) times." *Id.* Thus, convictions stemming from the same court hearing cannot be counted together to constitute qualifying prior offenses: "Convictions that are filed in a single case and pronounced within the same hearing are not significantly 'set apart' or 'disunited,' and so are not 'separate occasions.'" *Id.*, ¶ 17.

While the Court did not overrule *Wittrock* or *Hopkins*, it nevertheless qualified their precedential force by observing that "the operation of the criminal repeater statute *appears* to be settled[..]." *Id.*, ¶ 25 (emphasis added). Moreover, the Court's plain text analysis cannot help but reveal the obvious inconsistencies in those prior decisions. *See id.* n. 7. At the same time, *Rector* emphasizes that the decisions in those cases were driven by questions of legislative intent, without application of the obvious plain text analysis used to resolve Rector's appeal.

Simply put, the language is identical. The textual analysis should therefore be the same. Thus, while *Rector* tried to distinguish its holding by focusing on the unique nature of the sex offender registration statute as compared to the habitual criminality enhancer,[1] these attempts cannot obscure the Court's fundamental and obvious disagreement with its prior interpretation of identical language in *Wittrock* and *Hopkins*.

[1] Careful research into the legislative archives shows that there is no substantive legislative history to the DV Repeater statute version under which the defendant here is charged, which was created by 2011 Wisconsin Act 277. In contrast with the regular repeater, for the DV Repeater there is no law review article or committee comment; nor are there legislative advisory committee notes. There is no clear indication of legislative intent to focus on the quantity of crimes rather than the time of conviction.

The second development, discussed in *Rector*, is the United States Supreme Court's jurisprudence calling into question the problematic reading of *Wittrock* and *Hopkins*. Thus, in *Wooden v. United States*, 595 U.S. 360, 369 (2022), the Court was called upon to interpret the concept of an "occasion." It held that, in order to find whether criminal conduct was part of the same occasion, it was necessary to consider the temporal and spatial proximity of the controverted events. This tracks the commonsense reading of separate occasions and, as a result, was a source of persuasive authority for the Court in *Rector*. *Rector*, 2023 WI 41, ¶ 16. More recently, the United States Supreme Court referenced the *Wooden* test in context of a federal sentencing statute. *Erlinger v. United States*, 602 U.S. 821, 834 (2024).

Taken together, then, the emerging legal consensus is one that rejects the strained reading of *Wittrock* and *Hopkins* and instead restores commonsense meaning to plain text. As a result, the precedential force of these authorities is lessened.

Because this Court is interpreting a different statute than *Wittrock* and *Hopkins*, it should follow the lead of the Wisconsin Supreme Court, distinguish the two statutes, give effect to the plain meaning of this text, and avoid perpetuating the errors of those unpersuasive precedents.

## CONCLUSION

For the reasons set forth herein, Mr. Ricketts asks this Court to affirm the circuit court.

Dated this 11th day of March, 2025.

Respectfully submitted,

*Electronically signed by Christopher P. August*
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**CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,416 words.

Dated this 11th day of March, 2025.

Signed:

*Electronically signed by*
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