STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2024AP2291-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN TYRONE RICKETTS, JR.,

Defendant-Respondent.

APPEAL OF AN ORDER STRIKING THE DOMESTIC ABUSE REPEATER PENALTY ENHANCEMENT, ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ZAKOWSKI, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

This Court should reverse the circuit court's order because Ricketts qualifies for the domestic abuse repeater enhancement under proper application of the plain-meaning rule.

A. This Court should engage in the analytical process contemplated by the plain-meaning rule to derive the fair meaning from the text of the domestic abuse repeater statute.

The plain-meaning rule employs an analytical process to derive the fair meaning of a statute from its text. *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1. It's a "methodology that relies primarily on intrinsic sources of statutory meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 43, 271 Wis. 2d 633, 681 N.W.2d 110. Such intrinsic sources include statutory scope, context, and purpose. *In re Commitment of Lombard*, 2004 WI 95, ¶ 19, 273 Wis. 2d 538, 684 N.W.2d 103. It's an approach that examines structure and the language of closely-related and surrounding statutes. *Kalal*, 271 Wis. 2d 633, ¶ 46. It includes analyzing changes made over the years to statutes. *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571.

Plain-meaning interpretation is not a literalistic approach. *Brey*, 400 Wis. 2d 417, ¶ 11 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 355 (2012)). "Strict constructionism, as opposed to fair-reading textualism, is not a doctrine to be taken seriously." Scalia & Garner, *supra*, 356. The plain-meaning rule centers on ascertaining meaning; it rejects hyper-literalism. *Brey*, 400 Wis. 2d 417, ¶ 13.

In *Kalal*, the court fairly interpreted a statute; the court was not literalistic in its approach. *Kalal* interpreted when a district attorney "refuses" to issue a complaint in a statute

that read: "If a district attorney *refuses* or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint." Wis. Stat. § 968.02(3) (2001–02), *quoted in Kalal*, 271 Wis. 2d 633, ¶ 18. The court accepted that "refuses" had a common and accepted meaning: "To refuse is '[t]o indicate unwillingness to do, accept, give, or allow.'" *Kalal*, 271 Wis. 2d 633, ¶ 54 (quoting The American Heritage Dictionary of the English Language, 1519 (3d ed. 1992)). But the court found that the statute did not require any express indication of unwillingness. *Id*. ¶ 56. The court concluded that a refusal "can be indirect and inferred, as in a long silence or period of inaction that, under the totality of circumstances, gives rise to a reasonable inference that the district attorney intends not to act." *Id*. ¶ 55.

Ricketts correctly identifies *Kalal* as a "landmark decision in . . . the preferred method of statutory construction." (Ricketts' Br. 12.) But he doesn't engage in its approach and methodology. Ricketts dedicates two paragraphs to his plain text argument, citing only the domestic abuse repeater statute. (Ricketts' Br. 9–10 (citing Wis. Stat. § 939.621(1)(b)).) He doesn't consider the statute's scope, context, purpose, and structure. (Ricketts' Br. 9–10.) Ricketts doesn't analyze intrinsic sources; he doesn't look to surrounding or closely-related statutes. (Ricketts' Br. 9–10.) He summarily dismisses the habitual criminality statute without analysis, as "a distinct enhancer scheme." (Ricketts' Br. 10.) He declares "no authority has ever held that *this* [domestic abuse repeater statute] evinces the same meaning [as the habitual criminality statute]." (Ricketts' Br. 10.) Notably absent from Ricketts' discussion is any citation to *State v. Hill*, 2016 WI App 29, 368 Wis. 2d 243, 878 N.W.2d 709. This Court explained in *Hill* that "cases interpreting the ordinary [habitual criminality] repeater statute are instructive" to interpret when a defendant qualifies as a domestic abuse repeater. *Id*. ¶ 12.

Ricketts takes a literalistic approach to strictly construe the domestic abuse repeater statute. He makes a conclusory statement that "two convictions that occur as part of the same occasion fail this plain text requirement," while offering no authority or analysis in support. (Ricketts' Br. 9.)

This Court should engage in the analytical process contemplated by the plain-meaning rule to derive the fair meaning of the domestic abuse repeater statute. (State's Br. 12–14.) This Court should reject a hyper-literalistic approach; it should reject Ricketts' strict constructionism.

B. This Court should employ canons of statutory construction derived from case law that conform to the principles of plain-meaning interpretation.

"[C]anons serve as 'helpful, neutral guides' and are 'grounded in experience developed by reason and tend to a better administration of justice than leaving interpretation in each case to feelings of policy on the part of the tribunal.'" *James v. Heinrich*, 2021 WI 58, ¶ 23 n.12, 397 Wis. 2d 517, 960 N.W.2d 350 (quoting Scalia & Garner, *supra*, at 61 (quoting 3 Roscoe Pound, *Jurisprudence*, 506 (1959))).

Ricketts' is dismissive on the use of canons to interpret the domestic abuse repeater enhancement. (Ricketts' Br. 8–9.) He makes three mistakes in rejecting canons: (1) relying only on a dissenting opinion; (2) ignoring the applicable canons derived from precedent; and (3) failing to address canons that align with plain-meaning methodology.

First, Ricketts relies entirely on five paragraphs from a dissenting opinion to make his case against canons. (Ricketts' Br. 8–9 (citing *James*, 397 Wis. 2d 517, ¶¶ 63, 76–79 (Dallet, J., dissenting).) A dissent necessarily is not the majority opinion of the court; it is not counted toward a majority consensus. *State v. Griep*, 2015 WI 40, ¶ 37 n.16, 361 Wis. 2d 657, 863 N.W.2d 567. Absent from Ricketts' discussion is the

majority opinion that embraced canons, having "been previously adopted and applied not only by this court, but both federal and state courts—for centuries." *James*, 397 Wis. 2d 517, ¶ 23 n.12.

Second, Ricketts argues canons may be "incompatible with Wisconsin precedent" and many "are derivable not from precedent but from an extrinsic source—a single work of academic analysis." (Ricketts' Br. 8, 9.) The flaw in Ricketts' argument is that he discusses canons generally without addressing the three canons relevant here. Each of the three canons relied upon by the State *are* derived from precedent. (State's Br. 14–19.) So a general statement that some canons may be incompatible with or not derived from precedent is superfluous.

Third, the three relevant canons here conform to the statutory interpretation principles articulated in *Kalal*. In *James*, the court applied the related-statutes canon in alignment with *Kalal's* instruction to interpret language in relation to surrounding and closely-related statutes. 397 Wis. 2d 517, ¶¶ 19–20. *Rector* similarly identified that the prior-construction canon aligns with *Kalal* because a prior interpretation of a closely-related statute may help in the plain-meaning analysis. *State v. Rector*, 2023 WI 41, ¶ 25, 407 Wis. 2d 321, 990 N.W.2d 213. The harmonious-reading canon also is grounded in precedent, *In re T.L.E.-C.*, 2021 WI 56, ¶ 30, 397 Wis. 2d 462, 960 N.W.2d 391; harmonization avoids absurd results, *State v. Hemp*, 2014 WI 129, ¶ 29, 359 Wis. 2d 320, 856 N.W.2d 811.

Ricketts asserts the statutory text is "clear" and "unambiguous" (Ricketts' Br. 8–9), but he fails to understand that the domestic abuse repeater statute has such a clear and unambiguous meaning because of canons of statutory interpretation. "Separate" and "occasion" have multiple common, ordinary, and accepted meanings, some definitions have a temporal component and others do not. (State's Br. 23–

24 (citing *State v. Wittrock*, 119 Wis. 2d 664, 350 N.W.2d 647 (1984)).) The phrase "separate occasions" in the habitual criminality statute only became clear once construed in *Hopkins*. (State's Br. 24–25 (citing *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992)).)

This Court should employ canons of statutory construction derived from precedent that conform to plain-meaning principles. This Court should reject Ricketts' assertion that the canons are "irrelevant" and "have no place" interpreting the domestic abuse repeater statute.

C. The domestic abuse repeater statute should have a construction in harmony with *Wittrock* and *Hopkins* that construed the closely-related habitual criminality statute.

Ricketts dedicates most of his argument to advocate for overturning or, alternatively, undermining *Wittrock* and *Hopkins*. (Ricketts' Br. 10–17.) There is an internal inconsistency to such an argument. Ricketts seeks to overturn *Wittrock* and *Hopkins* because they are highly relevant and necessary to fully analyze the statutory construction issue presented. But if they may be sufficiently undermined, they would be inconsequential. *Wittrock* and *Hopkins* cannot be both critical and inconsequential. Neither approach by Ricketts adheres to stare decisis and statutory construction doctrine.

1. This Court should decline Ricketts' invitation to revisit *Wittrock* and *Hopkins*.

"Stare decisis is fundamental to the rule of law." *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 66, 389 Wis. 2d 669, 937 N.W.2d 37; *see Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("Respecting *stare decisis* means sticking to some wrong decisions."), *quoted in State v. Denny*, 2017 WI 17, ¶ 70 n.16, 373 Wis. 2d 390, 891 N.W.2d 144. "Stare decisis has

greater significance when [the] prior decisions involve the interpretation of statutes" because a critic of the statutory construction "can take their objections across the street, and [the legislature] can correct any mistake it sees." *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶ 36 n.9, 400 Wis. 2d 50, 968 N.W.2d 684 (quoting *Kimble*, 576 U.S. at 456).

Ricketts' invitation to reject stare decisis and certify this matter to the Wisconsin Supreme Court to overturn *Wittrock* and *Hopkins* presents three problems: (1) construction of the habitual criminality statute is not before this Court; (2) The judicial branch settled construction of that statute; and (3) the legislative branch has demonstrated that the court correctly decided *Wittrock* and *Hopkins*.

First, Ricketts fails to appreciate that this appeal addresses the construction of the domestic abuse repeater statute, not the habitual criminality statute. In *Rector*, the court explained "this case is not about whether to overrule *Wittrock* and *Hopkins* but whether we should extend those cases' interpretation . . . to a different statute." *Rector*, 407 Wis. 2d 321, ¶ 25 n.7. Here the same rationale applies; this appeal is the wrong forum to revisit *Wittrock's* and *Hopkins'* construction of the habitual criminality statute.

Second, the construction of the habitual criminality statute became part of the statute, so the judicial branch is constrained not to alter the prior construction. (State's Br. 16–18.) When the court was previously asked to change its interpretation of a statutory phrase that had stood for decades, it reminded: "This court has long been committed to the principle that a construction given to a statute by the court becomes a part thereof, unless the legislature subsequently amends the statute to effect a change." *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 52, 281 Wis. 2d 300, 697 N.W.2d 417 (quoting *City of Sun Prairie v. PSC*, 37 Wis. 2d 96, 100, 154 N.W.2d 360 (1967). *Rector* similarly acknowledged that "operation of the [habitual

criminality] statute appears to be settled." 407 Wis. 2d 321, ¶ 25.

Third, statutory history demonstrates that the court correctly decided *Wittrock* and *Hopkins*. (State's Br. 25–26.) The legislative branch acquiesced to the unanimous court opinions in *Wittrock* and *Hopkins*. (State's Br. 25–26.) This statutory history indicates that the legislative branch agrees with the *Wittrock-Hopkins* construction. (State's Br. 25–26.)

Any certification under Wis. Stat. § (Rule) 809.61 should not be based on revisiting *Wittrock* and *Hopkins*.

2. This Court should rebuke Ricketts' claim that the precedential force of *Wittrock* and *Hopkins* has lessened.

By all accounts, *Wittrock* and *Hopkins* appear to be settled precedent. *Rector*, 407 Wis. 2d 321, ¶ 25. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

Ricketts suggests that *Wittrock* and *Hopkins* have been lessened in "precedential force." (Ricketts' Br. 13.) He offers no citation for his claim that precedent may "lessen" over time. (Ricketts' Br. 13.) Rather, Ricketts attempts to degrade *Wittrock* and *Hopkins*, relying on three cases. (Ricketts' Br. 13–17 (citing *Wooden v. United States*, 595 U.S. 360 (2022), *Rector*, 407 Wis. 2d 321, and *State v. Seaton*, 2024 WI App 68, 414 Wis. 2d 415, 16 N.W.3d 20).)

Ricketts begins with a flawed comparison to *Seaton*, to argue "precedential force" of an earlier opinion can be "called into question." (Ricketts' Br. 14 (citing *Seaton*, 414 Wis. 2d 415, ¶¶ 25–28).) But he leaves out a critical component of statutory history: *Seaton* interpreted the other acts evidence statute after a significant legislative amendment codified and expanded the greater latitude rule that postdated the earlier

precedent. *See* 2013 Wis. Act 362, §§ 20–22, 38 (amending Wis. Stat. § 904.04). When a statute is amended, it is presumed the Legislature intended to change existing law, otherwise an amendment would have been unnecessary. *Banuelos v. Univ. of Wisconsin Hosps. & Clinics Auth.*, 2021 WI App 70, ¶ 26, 399 Wis. 2d 568, 966 N.W.2d 78, *aff'd*, 2023 WI 25, ¶ 26, 406 Wis. 2d 439, 988 N.W.2d 627. *Seaton* doesn't stand for the proposition Ricketts' suggests; it concerned the admission of other acts evidence after a significant statutory amendment, *Seaton*, 414 Wis. 2d 415, ¶ 25. *Seaton* is inapposite here.

Next, Ricketts relies heavily on *Rector* to suggest that *Wittrock* and *Hopkins* are under threat. (Ricketts' Br. 14–16.) Ricketts makes multiple missteps when relying on *Rector*. He incorrectly states the sex offender registration statute and penalty enhancement statutes utilize identical language. And he largely ignores the subsequent and significant statutory amendment to the sex offender registration statute.

Ricketts misstates that the sex offender registration statutory language is "identical" to the penalty enhancement statutes, repeating the statement three times in his brief. (Ricketts' Br. 14, 16 ("language identical," "language is identical," "interpretation of identical language").) *Rector* stated quite the opposite, explaining that the "sex offender registration statute and the criminal repeater statute[ ] [e]ach use[ ] the phrase 'separate occasions,' but the surrounding structure and language of each statute is *far from identical*." *Rector*, 407 Wis. 2d 321, ¶ 38 (emphasis added). Ricketts position is in direct conflict with the very case he relies upon. A comparison to this unrelated statute is unpersuasive and unhelpful. *State v. Williams*, 2014 WI 64, ¶ 39 n.18, 355 Wis. 2d 581, 852 N.W.2d 467.

Ricketts largely ignores the Legislature's significant amendment to the sex offender registration statute, aside from a single cursory reference that the statute has been

"since amended." (Ricketts' Br. 14.) The Legislature clearly and unequivocally rejected *Rector's* construction; the statutory amendment made clear that, since September 2, 2017, the phrase "separate occasions" meant "2 or more times" and included "convictions that were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint." *Compare* 2023 Wis. Act 254, § 1 (amending Wis. Stat. § 301.45(5)(b)1.), *with id.* § 5 (retroactive initial applicability to September 2, 2017) *and* Wis. Op. Att'y Gen. OAG-02-17 (Sept. 1, 2017). This statutory history is an appropriate part of the plain-meaning analysis; it shouldn't be ignored. *Cnty. of Dane v. LIRC*, 315 Wis. 2d 293, ¶ 27. The prior construction in *Rector* didn't become part of the statute because the Legislature amended the statute in response to the judicial construction. *Progressive N. Ins. Co.*, 281 Wis. 2d 300, ¶ 52.

Finally, Ricketts directs this Court to the unrelated federal Armed Career Criminal Act (ACCA) interpreted in *Wooden*, 595 U.S. 360. (Ricketts' Br. 17.) But, as *Rector* explained, the United States Supreme Court's analysis interpreting this federal code "is, of course, not binding on this court in matters of state statutory interpretation." *Rector*, 407 Wis. 2d 321, ¶ 16 (citing *Wooden*, 595 U.S. 360). This federal act is not *in pari materia* to a state statute; the federal code and state statute are not closely-related, *see Int. of A.A.*, 2020 WI App 11, ¶ 25 n.10, 391 Wis. 2d 416, 941 N.W.2d 260 (articulating when statutes aren't closely related). Comparison to an unrelated statute is unpersuasive and unhelpful. *Williams*, 355 Wis. 2d 581, ¶ 39 n.18.

The history of the federal ACCA contrasts sharply from the state statutory history applicable here. The ACCA originally designated a defendant as a career criminal when the defendant had "three previous convictions." Pub. L. No. 99–308, § 104, 100 Stat. 449, 458 (1986) (codified in 18 U.S.C. § 924(e)(1)). Congress later amended the ACCA to make clear

that a career criminal under the act had to have "three previous convictions . . . committed on occasions different from one another." 18 U.S.C. § 924(e)(1) (*see* Pub. L. No. 100–690, § 7056, 102 Stat. 4181, 4402 (1988) (amending 18 U.S.C. § 924(e)(1))). "Congress added the occasions clause only after a court applied ACCA to an offender . . . convicted of multiple counts of robbery arising from a single criminal episode." *Wooden*, 595 U.S. at 371. Congress made a deliberate choice—after a court interpretation—to amend the ACCA to *narrow* its application. *Id*. at 373. In contrast, the state statutory history shows a *broad* application with the Legislature acquiescing to the *Wittrock–Hopkins* construction and affirmatively rejecting the *Rector* construction. (State's Br. 30–32.)

This Court should disapprove of Ricketts' suggestion that *Wittrock* and *Hopkins* have been lessened in "precedential force." (Ricketts' Br. 13.) The three cases Ricketts' relies upon don't help his cause; they interpreted unrelated statutes with distinct statutory histories. "Separate occasions" in the domestic abuse repeater statute should have a meaning in harmony with the prior *Wittrock-Hopkins* construction that interpreted the closely-related habitual criminality statute. (State's Br. 19–27.)

CONCLUSION

This Court should reverse the circuit court's order because Ricketts qualifies as a domestic abuse repeater under proper application of the plain meaning rule.

Dated this 16th day of April 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,974 words.

Dated this 16th day of April 2025.

Electronically signed by:

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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.

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